Court File No. CV-21-00661458-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

ONTARIO SECURITIES COMMISSION

Applicant

- and -

BRIDGING FINANCE INC., BRIDGING INCOME FUND LP, BRIDGING MID-MARKET DEBT FUND LP, SB FUND GP INC., BRIDGING FINANCE GP INC., BRIDGING INCOME RSP FUND, BRIDGING MID-MARKET DEBT RSP FUND, BRIDGING PRIVATE DEBT INSTITUTIONAL LP, BRIDGING REAL ESTATE LENDING FUND LP, BRIDGING SMA 1 LP, BRIDGING INFRASTRUCTURE FUND LP, BRIDGING MJ GP INC., BRIDGING INDIGENOUS IMPACT FUND, BRIDGING FERN ALTERNATIVE CREDIT FUND, BRIDGING SMA 2 LP, BRIDGING SMA 2 GP INC., and BRIDGING PRIVATE DEBT INSTITUTIONAL RSP FUND

Respondents

IN THE MATTER OF AN APPLICATION UNDER SECTION 129 OF THE SECURITIES ACT (ONTARIO), R.S.O. 1990, c. S. 5, AS AMENDED

BOOK OF AUTHORITIES OF THE MISREPRESENTATION CLAIMANTS
(Re: Unitholder Priority Motion returnable November 16 & 17, 2022)

November 3, 2022

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Representative Counsel for Misrepresentation Claimants for the Unitholder Priority Motion

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20.	*Canada v. Canada North Group Inc*. 2021 SCC 30 (SCC), per Côté J.
21.	*Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43 (SCC), per Karakatsanis J.
22.	*Re London and Leeds Bank; ex p Carling* (1887) 56 LT (NS) 115 (UK Chan. Div.), per Sterling J.
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26.	*Nelson Financial Group Ltd*., 2010 ONSC 6229 (Ont. Sup. Ct. [C.L.]) per Pepall J.
27.	*BMP Global Distribution Inc v Bank of Nova Scotia*, 2009 SCC 15 (SCC) per Deschamps J.
28.	*Carter v. Golland* [1937] O.R. 881 (Ont. C.A.) per Middleton J.A.
29.	*Knight v. Imperial Tobacco Canada Ltd*., 2011 SCC 42 (SCC) per McLachlin C.J.
30.	*Spasic Estate v. Imperial Tobacco Ltd*., [2000] 188 D.L.R. (4th) 577 (Ont. Sup. Ct.), per Borins J.A.
31.	*Watkins v. Olafson*, [1989] 2 SCR 750 (SCC), per McLachlin J.
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34.	*Tucci v. Peoples Trust Company*, 2017 BCSC 1525 (B.C. Sup. Ct.) per Masuhara J.
35.	*Frame v. Smith*, [1987] 2 SCR 99 (SCC), per La Forest J.
36.	*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 (SCC), per Iacobucci J.
37.	*R. v Stevenson*, 2017 ABCA 420 (Alt. C.A.), *per curiam.*
38.	*Ontario Securities Commission v. Buckingham Securities Corporation*, [2002] OJ No 4036 (Ont. Sup. Ct. [C.L.]), per Ground J.

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39.	*Nortel Networks Corp, Re*, 2015 ONCA 681 (Ont. C.A.), per Rouleau J.A.
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41.	*Stelco Inc, Re*, [2004] OJ No 1257 (Ont. Sup. Ct. [C.L.]) per Farley J.
42.	*Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 (SCC), per Deschamps J.
43.	Endorsement and Order of Justice Hainey dated November 23, 2020 in *Hi-Rise Capital Ltd. and Adelaide Street Lofts Inc. (Re)* (CV-19-616261-CL)
Secondary Sources	
44.	John D. McCamus, *Law of Contracts*, (Toronto: Irwin Law, 2005) at 402.
45.	Peter D Maddaugh & John D McCamus, *The Law of Restitution*, Looseleaf Edition (United States: Thomson Reuters, 2022) at § 5:18.
46.	Mark R Gillen, *Securities Regulation in Canada*, 4th ed (Toronto: Thomson Reuters, 2019) at 150.
47.	Kimber, J.R., *Report of the Attorney General's Committee on Securities Legislation in Ontario* (Toronto: Queen's Printer, March 1965), at p. 47-48.
48.	Kimber, J.R., Report of the Attorney General's Committee on Securities Legislation in Ontario (Toronto: Queen's Printer, March 1965), *Supplementary Notes to Explanatory Notes*, at p. 5-6.
49.	G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011) at pp. 762-63.
50.	John McGhee & Steven Elliott, *Snell's Equity*, 34th ed (London, England: Thomson Reuters, 2020) at 458, 460.

Tab 1

2011 ONSC 6692
Ontario Superior Court of Justice

Richardson v. Great Gulfcan Energy Inc.

2011 CarswellOnt 14655, 2011 ONSC 6692

James Armstrong Richardson, Plaintiff v. Great Gulfcan Energy Inc., Defendant

H.J. Wilton-Siegel J.

Heard: November 10, 2011
Judgment: December 14, 2011
Docket: CV-11-9335-CL

Counsel: Matthew J. Latella, for Plaintiff
Peter R. Green, Kyle J. Peterson, for Defendant

Subject: Civil Practice and Procedure; Corporate and Commercial; Securities
Related Abridgment Classifications
Civil practice and procedure
X Pleadings
X.4 Statement of defence
X.4.b Reasonable defence to be disclosed
Securities
III Trading in securities
III.4 Prospectus
III.4.c Misrepresentation
Headnote
Civil practice and procedure --- Pleadings — Statement of defence — Reasonable defence to be disclosed
Plaintiff purchased units under subscription agreement entered into by parties — Plaintiff claimed there were misrepresentations in offering memorandum — Plaintiff sought declaration that subscription agreement between parties was rescinded and plaintiff was entitled to return of subscription proceeds — Defendant argued it was statutorily prohibited from paying money to plaintiff in implementation of any order for rescission or damages — Plaintiff brought motion to strike out statement of defence and for summary judgment — Statement of defence failed to assert reasonable defence and was struck out — Pleading raised issues of law and contained only bald denial of factual pleadings in statement of claim without asserting facts to support defence to claim for rescission — There was no answer to claim for rescission that defendant would be

subject to other provisions that would prevent payment — There was no merit in defendant's argument that plaintiff's motion was attempt to jump queue of other shareholder claimants — Motion for summary judgment was allowed — Evidence established existence of one or more misrepresentations in offering memorandum — Plaintiff was entitled to declaration subscription agreement was rescinded and plaintiff was entitled to return of subscription proceeds paid to defendant.

Securities --- Trading in securities — Prospectus — Misrepresentation

Plaintiff purchased units under subscription agreement entered into by parties — Plaintiff claimed there were misrepresentations in offering memorandum — Plaintiff sought declaration that subscription agreement between parties was rescinded and plaintiff was entitled to return of subscription proceeds — Defendant argued it was statutorily prohibited from paying money to plaintiff in implementation of any order for rescission or damages — Plaintiff brought motion to strike out statement of defence and for summary judgment — Statement of defence failed to assert reasonable defence and was struck out — Pleading raised issues of law and contained only bald denial of factual pleadings in statement of claim without asserting facts to support defence to claim for rescission — There was no answer to claim for rescission that defendant would be subject to other provisions that would prevent payment — There was no merit in defendant's argument that plaintiff's motion was attempt to jump queue of other shareholder claimants — Motion for summary judgment was allowed — Evidence established existence of one or more misrepresentations in offering memorandum — Plaintiff was entitled to declaration subscription agreement was rescinded and plaintiff was entitled to return of subscription proceeds paid to defendant.

***H.J. Wilton-Siegel J.*:**

1 The plaintiff, James Richardson (the "plaintiff") seeks an order striking the defendant's statement of defence under rule 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 and granting summary judgment in his favour pursuant to rule 20.04.

Background

2 In his statement of claim, the plaintiff seeks a declaration that a subscription agreement (the "Subscription Agreement") dated February 10, 2011 between the plaintiff and the defendant is rescinded pursuant to s. 141.1 of *The Securities Act*, C.C.S.M. c. S50 (the "Manitoba Act") and/or s. 130.1 of the *Securities Act*, R.S.O. 1990, c. S-5 (the "Ontario Act"), and that he is entitled to a return of the subscription proceeds. Under the Subscription Agreement, the plaintiff purchased 500,000 units, each comprising one common share in the defendant and one-half common share purchase warrant, for an aggregate subscription price of $250,000.

3 The statement of claim describes in general terms three misrepresentations in the offering memorandum by which the securities were offered in a private placement in or about February

2010 (the "Offering Memorandum"). It also states that the defendant alerted the plaintiff to the misrepresentations approximately six months after the closing of the transaction.

4 In its statement of defence, without admitting or even addressing the alleged misrepresentations, the defendant asserts reliance on the provisions of ss. 34-40 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "CBCA") and of the provisions of ss. 3 and 4 of the *Assignments and Preferences Act*, R.S.O. 1990, c. A.33 (the "APA").

5 With respect to the CBCA provisions, the defendant says that, in view of companion actions for rescission commenced by most, if not all, of the other purchasers of securities in the private placement, it is statutorily prohibited from paying any money to the plaintiff in implementation of any order for rescission or damages. With respect to the APA provisions, it pleads that any transfer of monies in the present circumstances would contravene the provisions of the statute and would be highly prejudicial to the defendant's other creditors, in particular the other private placement purchasers. In summary, the shareholder claims exceed the defendant's assets so any payment to the plaintiff will contravene one or both statutes.

6 Based on these assertions, the defendant asserts the rather remarkable conclusion that the plaintiff's rescission claim is "unenforceable and contrary to the law and, as such, the plaintiff has no right or cause of action to proceed with a claim for rescission or damages" under the Manitoba Act or the Ontario Act, whichever is applicable.

Issues on this Motion

7 There are two issues on this motion:

1. should the statement of defence be struck?

2. if so, should summary judgment be granted in favour of the plaintiff?

I will address each in turn.

Should the Statement of Defence be Struck?

8 The defendant's statement of defence fails to assert a reasonable defence and, as such, it should be struck pursuant to rule 21.01(1)(b). Apart from raising the issues of law pertaining to the CBCA and the APA, the pleading contains only a bald denial of the factual pleadings in the statement of claim without asserting any facts to support a defence to the plaintiff's claim for recission. The defendant's defence based on the operation of the CBCA and the APA fails to distinguish between enforceability, as a legal matter, and enforceability or ability to pay, as a practical matter.

9 It is no answer to a claim for rescission that, if ordered, the defendant will be subject to other provisions that will prevent payment. The provisions of the CBCA and the APA may well be

applicable to any payment to be made to the plaintiff. In that event, the defendant, and its directors, will have two broad choices: to find additional sources of finance to recapitalize the defendant or to resort to insolvency and/or bankruptcy legislation. That is, however, for another day.

10 There is nothing in the provisions of the CBCA or the APA upon which the defendant relies that relieves a company of a legal obligation to pay monies, much less prevents judgment from being rendered against a corporate defendant. Instead, these provisions specify consequences for transactions that occur in the circumstances described therein, i.e., those that contravene the particular statute. If the defendant finds itself in circumstances where those consequences will arise on a payment, the defendant and its directors must consider the appropriate action required to comply with these statutes.

11 Nor is there any merit in the defendant's argument that the plaintiff's motion is an attempt to jump the queue and put himself in a preferential position vis-à-vis the other shareholder claimants. As and when there is a judgment in favour of one or more shareholders in this action, the defendant, and its directors, will have to decide upon a course of action consistent with their legal obligations, which include, among other matters, compliance with fraudulent preference legislation. It is more accurate to say that, by its defence, the defendant seeks a stay of proceedings that is only available under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA").

12 The defendant's argument also fails for a more technical reason. The defendant relies upon the provisions of ss. 34(2), 35(2), 36(2) and 40(2) of the CBCA. However, these provisions apply only if a corporation is purchasing its own shares. The defendant argues that the right of rescission is a term of the Subscription Agreement — that is, that the Subscription Agreement contains a provision that the defendant will repurchase the plaintiff's shares if there is a misrepresentation in the Offering Memorandum.

13 However, in the particular circumstances, the plaintiff is exercising a statutory right of rescission pursuant to either s. 130.1 of the Ontario Act or s. 141.1 of the Manitoba Act (it is not necessary to address the jurisdictional issue on this motion). He is not relying on a contractual right of rescission located in the Subscription Agreement. The Ontario Act and the Manitoba Act provide for a right of rescission, i.e., invalidity *ab initio* of the Subscription Agreement by operation of a statutory right, rather than by way of a contractual repurchase of the shares pursuant to the Subscription Agreement. I would add that ss. 40(2) of the CBCA also addresses a different issue — the inability to elevate an obligation to repurchase equity into a debt obligation in circumstances of insolvency — rather than the legal enforceability of a purchase obligation.

14 Accordingly, the statement of defence is struck pursuant to rule 20.01(1)(b) for failing to assert a reasonable defence. The defendant does not seek leave to file an amended defence nor does it assert any facts that would warrant such an order.

Should Summary Judgment be Granted?

15 In these circumstances, the plaintiff also seeks summary judgment in his favour.

16 Rule 20.04(2)(a) provides that the court shall grant summary judgment if it is satisfied that there is no genuine issue requiring a trial with respect to a claim. Rule 20.04(2.1) provides, among other things, that in making such a determination, the court shall consider the evidence submitted by the parties and may, for such purpose, weigh the evidence unless it is in the interest of justice that such power be exercised only at trial. In *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764 (Ont. C.A.) at para. 50, the Court of Appeal recently addressed the operation of the new Rule and articulated the "full appreciation test" as follows to be applied by a court in determining whether summary judgment can be granted: 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? *Flesch* confirms that, among other things, on a summary judgment motion, the court continues to be entitled to assume that the record contains all of the evidence that the parties would present if there were a trial.

17 The unique feature of this case is that the defendant has not asserted any facts that raise a genuine issue for trial. Nevertheless, the plaintiff must still establish the elements of a statutory claim for recission to succeed on a summary judgment motion. Further, given the nature of the defence as well as the plaintiff's relationship to the defendant as a shareholder not holding any position as an officer or director, there is no evidence that a trial judge would have any other facts before the court than the facts presented on this motion. On this basis, I conclude that the present circumstances satisfy the "full appreciation test".

Issue for the Court

18 As mentioned, the plaintiff asserts a claim for rescission under the statutory provisions referred to above. These provisions, which are identical in language, provide for a right of rescission if, among other requirements, an offering memorandum contains a "misrepresentation". For this purpose, a "misrepresentation" is defined to be an untrue statement of a material fact or an omission to state a material fact that is necessary to make a statement not misleading in the light of the circumstances in which it was made. In turn, a "material fact" is defined to be a fact that would reasonably be expected to have a significant effect on the market price or value of the securities issued or proposed to be issued.

19 It is also important to note that a "misrepresentation" arises in respect of a statement in an offering memorandum as of the date of the document. While there may be some issue as to undiscoverable facts, it is clear that a misrepresentation can arise in respect of a statement that is untrue as of such date even if the falsity of such statement is only discovered at a later date, provided that the falsity of the statement could reasonably have been discovered at the time of the offering memorandum.

20 Accordingly, the issue for the court on this summary judgment motion is whether the plaintiff has established, on a balance of probabilities, that the Offering Memorandum contained an untrue statement of a material fact as of the date it was issued that would reasonably be expected to have a material effect on the value of the defendant's shares (there being no evidence before the court of any market or market price for the shares). I note that the defendant does not deny that the other requirements of the statutory right of rescission are satisfied in the present circumstances.

Evidence Before the Court

21 The evidence before the court consists principally of an affidavit of the plaintiff setting out, among other things, five statements in the Offering Memorandum and five statements in a letter of the defendant dated August 2, 2011, that are referred to by the defendant as "misrepresentations". There are also three statements in a further document of the defendant entitled "Great Gulfcan Shareholder Update" dated August 2011 (the letter and the further document being collectively referred to as the "August documentation").

22 The circumstances giving rise to the present position of the defendant according to the August documentation are threefold: (1) an apparent defect in title to certain of the principal assets of the defendant; (2) the underperformance of the producing assets of the defendant in respect of production rates and reserves; and (3) as a result of the foregoing, significantly higher capital expenditures to rehabilitate the drilling assets of the defendant than the forecast amounts in the Offering Memorandum, which was arguably made worse by the former chief operating officer of the defendant concealing the level of capital expenditures.

23 As a result of these three factors, the defendant had approximately $11 million of unpaid trade payables that it was unable to pay as of August 2011. This has prompted restructuring negotiations with the principal trade creditors with a view to compromising the trade payables in return for an arrangement that would apportion most of the current production revenue to the creditors in the form of participation rights, leaving the defendant with only a modest amount of cash flow to fund its overhead expenses. The August documentation also contemplated that, among other things, the creditors would receive 10% of the equity in the defendant, apparently to be balanced by a return of such amount of equity to the defendant by certain of the founding shareholders. The August documentation further contemplated certain preferential rights and a royalty in favour of the trade creditors in respect of future drilling programmes, although the defendant would retain its existing assets. There is no evidence before the court regarding the status of these negotiations as of the date of this motion.

24 There can be no doubt that these circumstances constitute a material adverse change in the affairs of the defendant that has occurred since the private placement. However, that does not constitute a "misrepresentation" which, as mentioned above, must relate to a material misstatement in the Offering Memorandum at the time of the private placement.

25 The plaintiff has not, however, provided any specific cross-reference of the statements in the August documentation to specific statements in the Offering Memorandum in order to establish the existence of misrepresentations for the purposes of the applicable securities legislation, apart from the above. More significantly, he has not provided any specific information regarding the assets and liabilities, revenues, expenses and profit of the defendant to demonstrate that the statements relied upon relate to material facts, and therefore constitute "misrepresentations" for the purposes of the applicable statutory rescission right. In part, this is due to the absence of financial statements, or *pro forma* financial statements, in the Offering Memorandum, which contained very modest financial information regarding the defendant.

26 Insofar as the plaintiff addresses the issue of misrepresentations in the Offering memorandum, he relies upon defendant's failure to deny that there are misrepresentations in the Offering Memorandum and on the plaintiff's more general belief that the defendant accepts that the Offering Memorandum contained "misrepresentations", as defined for purposes of the applicable securities legislation, entitling him to rescission under these provisions.

27 The only other evidence before the Court are the pleadings in a companion action which are appended to the plaintiff's affidavit without any statement regarding the particular paragraphs upon which the plaintiff relies. The extent to which these pleadings can be used to establish a "misrepresentation" is addressed below.

28 In most circumstances, such evidence is insufficient to establish the requirements of a claim for recission without a trial. To obtain judgment in his favour, the plaintiff must still prove that the statements in the August documentation establish the existence of one or more misrepresentations, as defined for purposes of securities legislation, in the Offering Memorandum.

Analysis and Conclusions

29 I have, however, examined the Offering Memorandum and the statements in the August documentation to determine whether the evidence before the court establishes the existence of one or more misrepresentations on a more specific basis than that offered by the plaintiff.

30 I would note at the outset that the information before the court, while certainly suggestive, does not suffice to establish the materiality of the misrepresentations regarding the title to the two drilling platforms or the gathering system. The information in the August documentation regarding the two drilling leases and the gathering system in para. 7 of the plaintiff's affidavit is terse at best. It may be clear to the plaintiff and his counsel, but they have not provided the court with sufficient information to establish that the particular defects identified in the August documentation are material to the defendant's business and assets and therefore that the statements respecting ownership of these assets in the Offering Memorandum constituted a misrepresentation. There is no explicit statement of the exact defects and their impact on the operations of the defendant. The

plaintiff points to statements in a chart in the August documentation that indicate the H155 N/2 lease expired in 2011 and the H155 S/2 lease was fraudulently conveyed. How these defects relate to the H155 wells and the significance of these title defects is not, however, explained. The impact of the defect in the title to the gathering system is also not explained.

31 For the same reason, the court cannot establish that the statements in the Offering Memorandum respecting the production rates and reserves were materially incorrect. The impact of these inaccuracies has not been reflected in revised estimates or production data that demonstrate the materiality of the reduction in the reserves. The court cannot draw any conclusions on its own comparing the proved reserves summary in the August documentation with the estimated reserves in the Offering Memorandum.

32 However, for the reasons set out below, I have concluded that the evidence before the court does establish the existence of one or more misrepresentations in the Offering Memorandum and that, accordingly, the plaintiff is entitled to summary judgment in his favour.

33 First, whether or not the misrepresentations regarding the assets and productive capacity/reserves are actually material for the purposes of applicable securities legislation, the defendant acknowledged that the former chief operating officer participated in a scheme with associates to deliver false and/or misleading title opinions and geological and engineering reserve reports to the defendant in connection with the transaction by which the defendant acquired its principal assets from him in 2010 prior to the private placement.

34 On this basis, the plaintiff can rightfully assert that the Offering Memorandum contained a misrepresentation regarding the character of the former chief operating officer. If the true character of the former chief operating officer had been disclosed in the Offering Memorandum, that disclosure would have affected the value of the defendant's shares. The market for shares of a company whose chief operating officer has fraudulently sold assets to the company would be significantly limited and the offering price of such shares would be correspondingly reduced.

35 Second, while there is limited financial information contained in the Offering Memorandum, the court can conclude on the evidence before it that the statements regarding the remaining capital expenditures for the phase 1 development and the phase 2 development programme, totalling approximately $8,420,000, were materially misleading.

36 By the admission of the defendant, the combined effect of the state of the defendant's title in its principal assets and the quality of the productive assets is that the actual capital expenditures required to rehabilitate the drilling wells were materially greater than the capital expenditures that the Offering Memorandum stated were required. The August documentation succinctly states that "the corporation's capital budget has been significantly overspent". While several hundred thousand dollars were directly misappropriated by the former chief operating officer, the court should infer that the remainder of the overspend is attributable to *bona fide* capital expenditures

necessary to rehabilitate the drilling wells, as they represent services that are not being questioned by the defendant in its restructuring negotiations with its trade creditors. This is a result of a misrepresentation at the time of the Offering Memorandum, not a development after the private placement.

37 Put another way, I think it is a necessary inference from the August documentation that, if the state of the title and the quality of the drilling assets had been known at the time of the private placement, the disclosure of the necessary capital expenditures required to rehabilitate those assets would have been materially different. While it may also be a necessary inference from the level of capital expenditures that the defects in title and the state of the reserves were misrepresented in the Offering Memorandum, this is more difficult to establish for the reasons set out above and, as it is unnecessary to address this issue, I have not based my decision on any such conclusion.

38 Third, while not dispositive, the conclusion that these statements constitute misrepresentations for securities law purposes is reinforced by the defendant's own actions in this proceeding. As mentioned, the statement of defence in this proceeding contains no pleadings that, in any way, assert that the three misrepresentations that are described in the statement of claim are not "misrepresentations" for purposes of the plaintiff's entitlement to a statutory rescission right. The statement of defence was silent on this issue. Similarly, the defendant's factum was silent on the issue. In oral argument, apart from general statements regarding the need for the plaintiff to establish his case, the defendant also offered no substantive defence.

39 More importantly, while the defendant avoids expressly stating that the claims for rescission of the other shareholders who purchased in the private placement are valid, that is the only way that its defence can be understood. In asserting that it is statutorily prohibited from paying the plaintiff, it is acknowledging that the circumstances contemplated by the statutes upon which it relies apply to the defendant — that is, that it is insolvent. This is made clear in the defendant's factum. At para. 24, the defendant acknowledges that it is insolvent and does not have the ability to pay all of the shareholders who have similar claims. This statement must be read as an admission that the shareholders who purchased in the private placement, including the plaintiff, have an enforceable statutory right of rescission.

40 Lastly, while not determinative, the court is also entitled to have regard to the defendant's position in companion actions arising out of the same factual matrix. In this regard, the defendant's pleadings in an action against its professional advisors in the private placement set out further evidence in support of the conclusion that the Offering Memorandum contains a misrepresentation for securities law purposes in respect of the statements regarding the value of the drilling assets as well as the capital expenditures required to rehabilitate the drilling assets. In para. 25 of its statement of claim in that action, the plaintiff pleads that the full value of the assets, which it estimated at $75 million less the anticipated capital expenditures of $8,420,000, has been eliminated as a result of the state of title, and the quality, of the drilling assets.

Conclusion

41 Based on the foregoing, the plaintiff is entitled to a declaration that the Subscription Agreement is rescinded and the plaintiff is entitled to the return of the subscription proceeds paid to the defendant thereunder.

Costs

42 The plaintiff seeks costs of $65,160.78 on a substantial indemnity basis or $44,042.55 on a partial indemnity basis. Of these amounts, disbursements total $1,646.53 inclusive of GST. The defendant's costs outline reflects costs of approximately $7,300 on a partial indemnity basis. It suggests that costs of $10,000 would be appropriate.

43 In regards to the scale of costs, the August documentation upon which the plaintiff relies does not establish involvement on the part of the officers and directors of the defendant, other than the former chief operating officer, in the misrepresentations. That is the subject of a companion action. However, the defendant has not offered any substantive defence to the plaintiff's claim for rescission. Moreover, the defence that it has asserted is totally without merit, not merely novel. It was also based on a factual error (the statutory rather than contractual nature of the plaintiff's right of rescission) that could have been identified and a statutory interpretation (of s. 40(2) of the CBCA) that is incorrect.

44 I am satisfied that the defendant did not expect to succeed in its defence. Its real purpose in defending the action was to delay in order to seek a negotiated settlement with the private placement purchasers or, if unsuccessful, to prepare its own filing under applicable insolvency legislation. In my view, this conduct should attract costs on a substantial indemnity basis.

45 However, there is no justification for a costs award of the magnitude sought by the plaintiff. The statement of claim is terse and general in nature. The motion itself was straightforward with very limited materials, an absence of cross-examinations by the parties, and a short hearing. The legal issues raised by the defendant were hardly complex and did not require any significant amount of research. The plaintiff suggested additional costs were attributable to a threatened cross-motion that was not raised. However, the issue on the proposed cross-motion, as described by the plaintiff, was also straightforward. Although there is no evidence for the defendant's assertion that the plaintiff has included costs incurred in his companion action against the directors, I am inclined to think this must be the explanation for the level of the costs. Further, there is obvious duplication arising from the involvement of two law firms.

46 Based on the foregoing, I think the costs reasonably attributable to this action in its entirety on a substantial indemnity basis are $20,000. Costs in such amount are payable forthwith by the defendant to the plaintiff.

2011 ONSC 6692, 2011 CarswellOnt 14655

End of Document

Tab 2

2011 SCC 26, 2011 CSC 26
Supreme Court of Canada

Bank of Montreal v. i Trade Finance Inc.

2011 CarswellOnt 3306, 2011 CarswellOnt 3307, 2011 SCC 26, 2011 CSC 26, [2011] 2 S.C.R. 360, 108 O.R. (3d) 80 (note), 17 P.P.S.A.C. (3d) 250, 201 A.C.W.S. (3d) 823, 276 O.A.C. 141, 332 D.L.R. (4th) 193, 416 N.R. 166, 77 C.B.R. (5th) 231, J.E. 2011-880

i Trade Finance Inc. (Appellant) and Bank of Montreal (Respondent)

Binnie, LeBel, Deschamps, Fish, Charron, Rothstein, Cromwell JJ.

Heard: November 4, 2010
Judgment: May 20, 2011
Docket: 33394

Proceedings: affirming *Bank of Montreal v. i Trade Finance Inc.* (2009), 2009 ONCA 615, 310 D.L.R. (4th) 315, 56 C.B.R. (5th) 161, 2009 CarswellOnt 4782, 15 P.P.S.A.C. (3d) 188, 96 O.R. (3d) 561, *(*sub nom. *i Trade Finance Inc. v. Webworx Inc.)* 252 O.A.C. 291 (Ont. C.A.)

Counsel: Benjamin Salsberg, Fay Zalcberg for Appellant
Joshua J. Siegel, Michael Collis for Respondent

Subject: Restitution; Estates and Trusts; Corporate and Commercial; Insolvency; Contracts
Related Abridgment Classifications
Estates and trusts
III Trustees
III.3 Breach of trust
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Headnote

Restitution and unjust enrichment --- Benefits conferred under mistake — Mistake of fact — Miscellaneous

I Inc. was induced to advance substantial sum of money to W Inc. — Advances were made in context of fraudulent scheme perpetrated by W Inc.'s president, A, and others — A and his spouse pledged certain shares credited to investment account, which were purchased by A with funds coming from monies advanced to W Inc. by I Inc., to bank for extension by bank of credit limit on credit card account — After fraud was discovered, I Inc. obtained judgment imposing constructive trust over all assets held by W Inc. and A that were purchased with funds fraudulently obtained from I Inc., and granting tracing order allowing tracing of those funds into hands of parties other than bona fide purchasers for value without notice — I Inc. brought successful motion for declaration that it was entitled to proceeds of sale of shares credited to investment account to exclusion of bank — Bank's appeal was allowed — I Inc. appealed — Appeal dismissed — I Inc.'s argument that it had prima facie right to recover monies paid under mistake of fact could not succeed — Principles respecting recovery of mistaken payments applied as between payor and payee — Bank was not payee, so those principles were inapplicable here.

Estates and trusts --- Trustees — Breach of trust — Remedies — Against third parties — Tracing — Property bought with trust funds

I Inc. was induced to advance substantial sum of money to W Inc. — Advances were made in context of fraudulent scheme perpetrated by W Inc.'s president, A, and others — A and his spouse pledged certain shares credited to investment account, which were purchased by A with funds coming from monies advanced to W Inc. by I Inc., to bank for extension by bank of credit limit on credit card account — After fraud was discovered, I Inc. obtained judgment imposing constructive trust over all assets held by W Inc. and A that were purchased with funds fraudulently obtained from I Inc., and granting tracing order allowing tracing of those funds into hands of parties other than bona fide purchasers for value without notice — I Inc. brought successful motion for declaration that it was entitled to proceeds of sale of shares credited to investment account to exclusion of bank — Bank's appeal was allowed — I Inc. appealed — Appeal dismissed — I Inc.'s claim to disputed funds arose from judgment giving it equitable proprietary interest by virtue of constructive trust or equitable lien — This interest was not governed by Personal Property Security Act (PPSA) — Bank's receipt of pledge gave it enforceable PPSA security interest — Pledge made bank "purchaser" within meaning of words "bona fide purchaser for value without notice" — There was no dispute that bank's purchase was bona fide and was made for value and without notice — I Inc.'s right to recover disputed funds instead of bank was limited by tracing order, and did not overcome fact that bank was bona fide purchaser for value without notice.

Personal property security --- Attachment of security interest — Elements — Debtor's interest

I Inc. was induced to advance substantial sum of money to W Inc. in context of fraudulent scheme perpetrated by W Inc.'s president, A, and others — A and spouse, R, pledged shares credited to

investment account, which were purchased by A with funds from monies advanced to W Inc. by I Inc., to bank for extension of credit limit on credit card account — After fraud was discovered, I Inc. obtained judgment imposing constructive trust over all assets held by W Inc. and A that were purchased with funds fraudulently obtained from I Inc., and allowing tracing of those funds into hands of parties other than bona fide purchasers for value without notice — I Inc. brought successful motion for declaration that it was entitled to proceeds of sale of shares credited to investment account to exclusion of bank — Bank's appeal was allowed — I Inc. appealed — Appeal dismissed — I Inc.'s claim to disputed funds arose from judgment giving it equitable proprietary interest, interest not governed by Personal Property Security Act (PPSA) — Bank's receipt of pledge gave it enforceable PPSA security interest — Requirements for attachment under PPSA were met, including that A and R had "rights" in shares when they pledged them — A's acquisition of shares with funds he knew were obtained fraudulently under agreements between I Inc. and W Inc. did not preclude A and R from acquiring "rights" in shares — Fraud made agreement voidable, not void — Before I Inc.'s consent under agreements for W Inc. to use money advanced by I Inc. had been revoked, W Inc. was able to pass its interest in funds to A, and I Inc. had to bear risk of loss — I Inc.'s right to recover disputed funds instead of bank was limited by tracing order, and did not overcome fact that bank was bona fide purchaser for value without notice.

Personal property security --- Scope of legislation — Miscellaneous

Restitution et enrichissement injustifié --- Avantages conférés à cause d'une erreur — Erreur de fait — Divers

I Inc. a été amenée à avancer une importante somme d'argent à W Inc. — Fonds ont été avancés dans le contexte d'un stratagème frauduleux établi par le président de W Inc., A, et d'autres personnes — Afin de faire augmenter la limite de crédit d'un compte de carte de crédit, A et sa conjointe ont donné en gage, auprès d'une banque, certaines actions inscrites à un compte de placement, lesquelles avaient été achetées par A à l'aide des fonds que I Inc. avait avancés à W Inc. — Après la découverte de la fraude, un jugement a été rendu en faveur de I Inc. en vertu duquel le tribunal a ordonné la création d'une fiducie par interprétation portant sur tous les actifs détenus par W Inc. et A et ayant été achetés à l'aide des fonds frauduleusement obtenus de I Inc., et a accordé un droit de suite permettant de retracer des fonds détenus par un acquéreur autre qu'un acquéreur ayant acquis les fonds de bonne foi, à titre onéreux et sans connaissance préalable de la fraude — I Inc. a demandé à faire déclarer qu'elle avait droit au produit de la vente des actions inscrites au compte d'investissement, et non la banque, avec succès — Appel interjeté par la banque a été accueilli — I Inc. a formé un pourvoi — Pourvoi rejeté — Argument de I Inc. selon lequel elle avait, à première vue, le droit de recouvrer les fonds avancés à la suite d'une erreur de fait ne pouvait pas être retenu — Principes applicables en matière de recouvrement des paiements effectués par erreur s'appliquaient au rapport qui existe entre la personne qui fait le paiement et celle qui le reçoit — Comme la banque n'avait pas reçu de paiement, ces principes ne trouvaient pas application en l'espèce.

Successions et fiducies --- Fiduciaires — Abus de confiance — Réparations — À l'encontre de tierces parties — Droit de suite — Biens achetés avec les fonds de la fiducie

I Inc. a été amenée à avancer une importante somme d'argent à W Inc. — Fonds ont été avancés dans le contexte d'un stratagème frauduleux établi par le président de W Inc., A, et d'autres personnes — Afin de faire augmenter la limite de crédit d'un compte de carte de crédit, A et sa conjointe ont donné en gage, auprès d'une banque, certaines actions inscrites à un compte de placement, lesquelles avaient été achetées par A à l'aide des fonds que I Inc. avait avancés à W Inc. — Après la découverte de la fraude, un jugement a été rendu en faveur de I Inc. en vertu duquel le tribunal a ordonné la création d'une fiducie par interprétation portant sur tous les actifs détenus par W Inc. et A et ayant été achetés à l'aide des fonds frauduleusement obtenus de I Inc., et a accordé un droit de suite permettant de retracer des fonds détenus par un acquéreur autre qu'un acquéreur ayant acquis les fonds de bonne foi, à titre onéreux et sans connaissance préalable de la fraude — I Inc. a demandé à faire déclarer qu'elle avait droit au produit de la vente des actions inscrites au compte d'investissement, et non la banque, avec succès — Appel interjeté par la banque a été accueilli — I Inc. a formé un pourvoi — Pourvoi rejeté — Réclamation de I Inc. à l'égard de la somme en litige était fondée sur le jugement lui conférant un intérêt propriétal en equity par le biais d'une fiducie par interprétation ou d'un privilège en equity — Cet intérêt n'était pas régi par la Loi sur les sûretés mobilières (LSM) — Réception du gage par la banque lui a conféré une sûreté opposable au sens de la LSM — Gage a conféré à la banque la qualité d'« acquéreur de bonne foi, à titre onéreux et sans connaissance préalable » — Il ne faisait aucun doute que la banque avait la qualité d'acquéreur de bonne foi et qu'elle avait acquis les biens en cause à titre onéreux et sans connaissance préalable — Droit de I Inc. de recouvrer la somme en litige, à l'exclusion de la banque, était restreint par l'ordonnance lui accordant un droit de suite, et ne l'emportait pas sur le fait que la banque avait la qualité d'acquéreur de bonne foi, à titre onéreux et sans connaissance préalable.

Sûretés mobilières --- Charge effective de la sûreté — Éléments — Intérêt du débiteur

I Inc. a été amenée à avancer une importante somme d'argent à W Inc. dans le contexte d'un stratagème frauduleux établi par le président de W Inc., A, et d'autres personnes — Afin de faire augmenter la limite de crédit d'un compte de carte de crédit, A et sa conjointe, R, ont donné en gage, auprès d'une banque, des actions inscrites à un compte de placement, lesquelles avaient été achetées par A à l'aide des fonds que I Inc. avait avancés à W Inc. — Après la découverte de la fraude, un jugement a été rendu en faveur de I Inc. en vertu duquel le tribunal a ordonné la création d'une fiducie par interprétation portant sur tous les actifs détenus par W Inc. et A et ayant été achetés à l'aide des fonds frauduleusement obtenus de I Inc., et a accordé un droit de suite permettant de retracer des fonds détenus par un acquéreur autre qu'un acquéreur ayant acquis les fonds de bonne foi, à titre onéreux et sans connaissance préalable de la fraude — I Inc. a demandé à faire déclarer qu'elle avait droit au produit de la vente des actions inscrites au compte d'investissement, et non la banque, avec succès — Appel interjeté par la banque a été accueilli — I Inc. a formé un pourvoi — Pourvoi rejeté — Réclamation de I Inc. à l'égard de la somme en litige était fondée sur le jugement lui conférant un intérêt propriétal en equity, un intérêt qui n'était pas régi par la Loi sur les sûretés mobilières (LSM) — Réception du gage par la banque lui a conféré une sûreté opposable au sens de la LSM — Conditions pour la création d'un intérêt fondé

sur la LSM étaient remplies, y compris le fait que A et R avaient des « droits » sur les actions au moment où ils les ont données en gage — Acquisition par A des actions tout en sachant que les fonds utilisés à cette fin avaient été frauduleusement obtenus à la suite d'ententes entre I Inc. et W Inc. ne les empêchait pas, lui et R, d'acquérir des « droits » à l'égard des actions — Fraude rendait une entente annulable, mais pas forcément nulle — Avant que I Inc. ne révoque son consentement aux termes des ententes permettant à W Inc. d'utiliser les fonds avancés par I Inc., W Inc. a été en mesure de transmettre à A son intérêt dans les fonds, et I Inc. devait assumer un risque de perte — Droit de I Inc. de recouvrer la somme en litige, à l'exclusion de la banque, était restreint par l'ordonnance lui accordant un droit de suite, et ne l'emportait pas sur le fait que la banque avait la qualité d'acquéreur de bonne foi, à titre onéreux et sans connaissance préalable.

Sûretés mobilières --- Portée de la législation — Divers

I Inc. was induced to advance a substantial sum of money to W Inc. The advances were made in the context of a fraudulent scheme perpetrated by W Inc.'s president, A, and others. A and his spouse, R, pledged certain shares credited to an investment account, which were purchased by A with funds coming from monies advanced to W Inc. by I Inc., to the bank for an extension by the bank of the credit limit on a credit card account. At the time it received the pledge, the bank provided value and had no knowledge of the fraudulent scheme or the fact that the funds used to purchase the shares had originated from that scheme.

After the fraud was discovered, I Inc. obtained a judgment which imposed a constructive trust over all assets held by W Inc. and A that were purchased with funds fraudulently obtained from I Inc., and which granted a tracing order allowing tracing of those funds into the hands of parties other than bona fide purchasers for value without notice. On a motion by I Inc. for a declaration that it was entitled to the proceeds of the sale of the shares credited to the investment account to the exclusion of the bank, the motion judge determined that I Inc. was entitled to the funds. The motion judge held that the bank had not acquired an enforceable security interest under the Personal Property Security Act (PPSA) in the shares. The motion judge held that the investment account was impressed with a constructive trust in I Inc.'s favour. The motion judge held that the bona fide purchaser for value without notice defence did not preclude recovery by I Inc. because the bank had purchased its interest from A and R, not from W Inc.

The bank appealed to the Court of Appeal, which allowed the appeal and attributed the disputed funds to the bank, disagreeing with each of the motion judge's conclusions. I Inc. appealed.

Held: The appeal was dismissed.

Per Deschamps J. (Binnie, LeBel, Fish, Charron, Rothstein, Cromwell JJ. concurring): As the bank was not a payee, the principles respecting the recovery of monies paid under mistake of fact were inapplicable. I Inc.'s claim to the disputed funds arose from the judgment giving it an equitable proprietary interest by virtue of a constructive trust or equitable lien. This interest was not governed by the PPSA.

The bank's receipt of the pledge gave it an enforceable PPSA security interest. The requirements for attachment under the PPSA were met. First, A and R signed a security agreement that identified the collateral as the shares credited to the investment account. Second, the bank gave value to

A and R by extending further credit on the credit card account of A and R. Third, A and R had "rights" in the shares when they pledged them. A's acquisition of the shares with funds he knew to have been obtained fraudulently under the agreements between I Inc. and W Inc. did not preclude him and R from acquiring "rights" in the shares. Fraud made an agreement voidable, not void. Before I Inc. revoked its consent under the agreements for W Inc. to use the money advanced by I Inc., W Inc. was able to pass its interest in the funds to A, and I Inc. had to bear a risk of loss.
The pledge made the bank a "purchaser" within the meaning of the words "bona fide purchaser for value without notice". There was no dispute that the bank's purchase was bona fide and was made for value and without notice. I Inc.'s right to recover the disputed funds instead of the bank was limited by the tracing order, and did not overcome the fact that the bank was a bona fide purchaser for value without notice.
I Inc. a été amenée à avancer une importante somme d'argent à W Inc. Les fonds ont été avancés dans le contexte d'un stratagème frauduleux établi par le président de W Inc., A, et d'autres personnes. Afin de faire augmenter la limite de crédit d'un compte de carte de crédit, A et sa conjointe, R, ont donné en gage, auprès d'une banque, certaines actions inscrites à un compte de placement, lesquelles avaient été achetées par A à l'aide des fonds que I Inc. avait avancés à W Inc. Au moment où elle a obtenu le gage, la banque a fourni une contrepartie et ignorait tout du stratagème frauduleux ou du fait que les fonds utilisés pour acheter les actions provenaient de ce stratagème.
Après la découverte de la fraude, un jugement a été rendu en faveur de I Inc. en vertu duquel le tribunal a ordonné la création d'une fiducie par interprétation portant sur tous les actifs détenus par W Inc. et A et ayant été achetés à l'aide des fonds frauduleusement obtenus de I Inc., et a accordé un droit de suite permettant de retracer des fonds détenus par un acquéreur autre qu'un acquéreur ayant acquis les fonds de bonne foi, à titre onéreux et sans connaissance préalable de la fraude. Saisi d'une demande de I Inc. visant à faire déclarer qu'elle avait droit au produit de la vente des actions inscrites au compte d'investissement, et non la banque, la juge des requêtes a conclu que I Inc. avait effectivement droit aux fonds. La juge des requêtes a estimé que la banque n'avait pas acquis de sûreté opposable, au sens de la Loi sur les sûretés mobilières (LSM), grevant les actions. La juge des requêtes a conclu que le compte d'investissement faisait l'objet d'une fiducie par interprétation en faveur de I Inc. La juge des requêtes a estimé que la défense de l'acquéreur de bonne foi, à titre onéreux et sans connaissance préalable, n'empêchait pas I Inc. de procéder au recouvrement parce que la banque avait acquis son intérêt de A et R, et non de W Inc.
La banque a interjeté appel auprès de la Cour d'appel, laquelle a accueilli l'appel et a jugé que la somme en litige appartenait à la banque, rejetant chacune des conclusions de la juge des requêtes. I Inc. a formé un pourvoi.
Arrêt: Le pourvoi a été rejeté.
Deschamps, J. (Binnie, LeBel, Fish, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) :
Puisque la banque n'a pas été payée, les principes applicables en matière de recouvrement des paiements effectués par erreur ne s'appliquaient pas. La réclamation de I Inc. à l'égard de la somme

en litige était fondée sur le jugement lui conférant un intérêt propriétal en equity par le biais d'une fiducie par interprétation ou d'un privilège en equity. Cet intérêt n'était pas régi par la LSM.
La réception du gage par la banque lui a conféré une sûreté opposable au sens de la LSM. Les conditions pour la création d'un intérêt fondé sur la LSM étaient remplies. D'abord, A et R ont signé un contrat de sûreté décrivant les actions inscrites au compte d'investissement comme biens grevés. Ensuite, la banque a fourni une contrepartie à A et R en augmentant le crédit disponible à partir du compte de leur carte de crédit. Enfin, A et R avaient des « droits » sur les actions au moment où ils les ont données en gage. L'acquisition par A des actions tout en sachant que les fonds utilisés à cette fin avaient été frauduleusement obtenus à la suite d'ententes entre I Inc. et W Inc. ne les empêchait pas, lui et R, d'acquérir des « droits » à l'égard des actions. La fraude rendait une entente annulable, mais pas forcément nulle. Avant que I Inc. ne révoque son consentement aux termes des ententes permettant à W Inc. d'utiliser les fonds avancés par I Inc., W Inc. a été en mesure de transmettre à A son intérêt dans les fonds, et I Inc. devait assumer un risque de perte.
Le gage a conféré à la banque la qualité d'« acquéreur de bonne foi, à titre onéreux et sans connaissance préalable ». Il ne faisait aucun doute que la banque avait la qualité d'acquéreur de bonne foi et qu'elle avait acquis les biens en cause à titre onéreux et sans connaissance préalable. Le droit de I Inc. de recouvrer la somme en litige, à l'exclusion de la banque, était restreint par l'ordonnance lui accordant un droit de suite, et ne l'emportait pas sur le fait que la banque avait la qualité d'acquéreur de bonne foi, à titre onéreux et sans connaissance préalable.

APPEAL from judgment reported at *Bank of Montreal v. i Trade Finance Inc.* (2009), 2009 ONCA 615, 310 D.L.R. (4th) 315, 56 C.B.R. (5th) 161, 2009 CarswellOnt 4782, 15 P.P.S.A.C. (3d) 188, 96 O.R. (3d) 561, *(*sub nom. *i Trade Finance Inc. v. Webworx Inc.)* 252 O.A.C. 291 (Ont. C.A.), determining that bank, rather than appellant, was entitled to certain money resulting from sale of assets traceable to fraudulently obtained funds.

POURVOI à l'encontre d'un jugement publié à *Bank of Montreal v. i Trade Finance Inc.* (2009), 2009 ONCA 615, 310 D.L.R. (4th) 315, 56 C.B.R. (5th) 161, 2009 CarswellOnt 4782, 15 P.P.S.A.C. (3d) 188, 96 O.R. (3d) 561, *(*sub nom. *i Trade Finance Inc. v. Webworx Inc.)* 252 O.A.C. 291 (Ont. C.A.), dont la conclusion était que la banque, et non l'appelante, avait droit à certaines sommes d'argent découlant de la vente d'actifs reliés à des fonds obtenus frauduleusement.

***Deschamps J.*:**

1 This appeal requires the Court to determine which of two innocent creditors is entitled to a limited pool of money resulting from the sale of assets traceable to fraudulently obtained funds. On one side is a creditor that advanced funds to the fraudster's corporation and that subsequently obtained an order authorizing it to trace those funds into the hands of persons other than *bona fide* purchasers for value without notice. On the other side is a creditor having no knowledge of the fraud, to which the fraudster and his spouse pledged securities acquired with the same funds in exchange for valuable consideration. To resolve this question, the Court must determine the nature

of the interests held by these two parties and clarify the role that Ontario's *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*"), plays in this determination.

I. Facts

2 The material facts in this appeal are not in dispute. Between 2002 and 2003, the appellant, i Trade Finance Inc. ("i Trade"), was induced to advance a substantial sum of money to a corporation named Webworx Inc. ("Webworx"). The advances were made in the context of a fraudulent scheme perpetrated by Webworx's President, Rohit Ablacksingh, and others, all of whom have since been convicted of criminal conspiracy in relation to the fraud. As a result of the scheme, i Trade extended financing to Webworx on the basis of representations that Webworx had substantial contracts for computer services with a large U.S. corporation, when in fact it did not.

3 The evidence indicates that Mr. Ablacksingh received both paycheques and corporate loans from Webworx that were financed by the advances made by i Trade to Webworx. This enabled him to purchase shares that were credited to an investment account with BMO Nesbitt Burns ("Nesbitt Burns") that was held jointly in the names of Mr. Ablacksingh and his spouse, Cindy Ramsackal.

4 Mr. Ablacksingh and Ms. Ramsackal were also joint cardholders of a MasterCard account with the respondent, the Bank of Montreal ("BMO"). The initial credit limit extended on this account was $10,000, but it was subsequently increased to $75,000. The basis for BMO's further extension of credit was a request by the cardholders and an agreement executed by Mr. Ablacksingh and Ms. Ramsackal pledging the shares credited to the investment account to BMO. At the time of the hearing in the Court of Appeal, the outstanding balance on the MasterCard account was $138,747.66.

5 BMO does not dispute i Trade's evidence that the shares credited to the investment account were purchased by Mr. Ablacksingh with funds coming from the monies advanced to Webworx by i Trade, and that Ms. Ramsackal herself gave no consideration for the purchase of these shares. The parties also agree that at the time it received the pledge, BMO provided value (the extension of additional credit to Mr. Ablacksingh and Ms. Ramsackal) and had no knowledge of the fraudulent scheme or of the fact that the funds used to purchase the shares had originated from that scheme. Thus, BMO could not have any knowledge of any equitable interest of i Trade attributable to these funds.

6 On February 23, 2004 — after the fraud was discovered — MacDonald J. ordered, on consent of all parties, that the shares credited to the investment account be sold and that, after certain commissions and expenses were paid, the remaining proceeds be held in trust pending further order of the court. It is these monies ($130,117.11 plus interest accrued since March 19, 2004) that are claimed by each of the parties to this appeal.

7 Civil proceedings were commenced by i Trade. On September 5, 2006, Belobaba J. ordered Webworx and Mr. Ablacksingh to pay US$5,193,457.30 in damages — plus aggravated, exemplary and punitive damages, interest and costs — for conspiracy, deceit and fraudulent misrepresentation, and for knowing assistance in a breach of trust (unreported judgment dated September 5, 2006, at paras. 2, 4 and 16). He also declared that Webworx and Mr. Ablacksingh held "any real or personal property or any other assets that they purchased with funds provided by [i Trade] to Webworx as constructive trustee for the benefit [of] i Trade" (para. 5). In addition, Belobaba J. granted i Trade a tracing order, which excluded assets in the hands of *bona fide* purchasers for value without notice (para. 7). Upon execution of the tracing order, i Trade could elect in whole or in part between (1) imposing a constructive trust and/or an equitable lien; and (2) seeking a personal remedy against any party liable (para. 12).

II. Decisions of the Courts Below

A. Ontario Superior Court of Justice (No. 03-CV-246248CM4, October 14, 2008, Unreported)

8 Kiteley J. heard a motion by i Trade for a declaration that it was entitled to the disputed funds to the exclusion of BMO. She determined that i Trade was entitled to the funds on the basis of her resolution of three issues.

9 First, she found that BMO had not acquired an enforceable *PPSA* security interest in the shares credited to the investment account, because neither Mr. Ablacksingh nor Ms. Ramsackal had any "rights in the collateral" to pledge to BMO (para. 24). Ms. Ramsackal had not given any consideration for the shares and Mr. Ablacksingh "could not acquire an interest in the collateral that he knew was obtained through his fraud" (para. 25). For this reason, no security interest had attached within the meaning of s. 11 of the *PPSA*, which meant that none was enforceable against third parties.

10 Second, Kiteley J. considered whether i Trade could follow the funds it had advanced to Webworx and trace them into the shares in the investment account, which she understood to require a determination of whether the investment account was impressed with a constructive trust in i Trade's favour. She thus considered whether Webworx had been unjustly enriched, since the imposition of a constructive trust and tracing were, in her view, remedies that flowed from that cause of action. Kiteley J. found that Webworx had been unjustly enriched. However, because BMO had not acquired an enforceable security interest under the *PPSA*, the purported pledge by Mr. Ablacksingh and Ms. Ramsackal was "not a juristic reason that would preclude recovery by i Trade" (para. 30). Consequently, she held that the investment account was impressed with a constructive trust in i Trade's favour.

11 Finally, Kiteley J. considered whether the exercise of i Trade's right to follow the funds it had advanced to Webworx and trace them into the shares credited to the investment account was

precluded on the basis that BMO was a *bona fide* purchaser for value without notice. Though she found that BMO met the requirements for establishing this defence, Kiteley J. held that this did not preclude recovery by i Trade, because BMO had *purchased* its interest from Mr. Ablacksingh and Ms. Ramsackal, not from Webworx (paras. 33-34).

B. Ontario Court of Appeal (2009 ONCA 615, 96 O.R. (3d) 561 (Ont. C.A.))

12 The Court of Appeal unanimously allowed the appeal and attributed the disputed funds to BMO. Blair J.A. (Simmons and Epstein JJ.A. concurring) disagreed with each of Kiteley J.'s conclusions.

13 Blair J.A. held that BMO had obtained, by virtue of the pledge, a security interest in the shares credited to the investment account that had attached and had been perfected under the *PPSA*. In particular, he disagreed with Kiteley J. on whether Mr. Ablacksingh had sufficient rights in the collateral to ground BMO's acquisition of an enforceable security interest in the pledged shares from him and his spouse. In Blair J.A.'s view, when i Trade loaned money to Webworx with the intention of transferring the ownership interest in it, the transfer was sufficient, even though it had been induced by fraud unbeknownst to i Trade, to create a voidable interest that could form the basis for a security interest (para. 20). Moreover, the fact that i Trade had loaned the funds to Webworx — the corporate vehicle used by Mr. Ablacksingh to commit the fraud — and not to Mr. Ablacksingh (or his spouse) personally was "quite immaterial" to the question of whether Mr. Ablacksingh had acquired a sufficient property interest from Webworx in the funds that were used to purchase the shares that Mr. Ablacksingh and Ms. Ramsackal later pledged to BMO (paras. 24-25). The key, in Blair J.A.'s opinion, was that i Trade had originally advanced the funds with an intention to pass title.

14 In any event, Blair J.A. found that BMO's *PPSA* security interest in the pledged shares made little difference to the result, since this was not a priority contest between i Trade and BMO under the *PPSA*. Further, i Trade's interest in the disputed funds by way of a constructive trust or an equitable lien was arguably excluded from the purview of the *PPSA*. Most importantly, if BMO was a *bona fide* purchaser for value without notice, any ability i Trade may have had pursuant to the order issued by Belobaba J. to recover the money it had advanced would have been lost.

15 Thus, Blair J.A. proceeded to consider whether the pledge granted to BMO had made it a *bona fide* purchaser for value without notice. He found that it had and that i Trade consequently lost its ability to trace funds into the shares that were pledged to BMO. He rejected Kiteley J.'s conclusion to the contrary, the basis for which was that BMO was a "purchaser" from Mr. Ablacksingh and Ms. Ramsackal rather than from Webworx, as follows (at para. 29):

> Respectfully, that distinction is equally immaterial for these purposes. The fact that [BMO] purchased directly from the fraudster [Mr. Ablacksingh] rather than from the corporate vehicle used by the fraudster to perpetrate the fraud [Webworx] is of no moment.

16 Finally, Blair J.A. considered "whether [i Trade was] entitled to recover the [disputed funds] based on principles of unjust enrichment standing alone" (para. 30). He concluded that it was not, and that Kiteley J. had erred in focussing her unjust enrichment inquiry on Webworx and in finding that the pledge agreement with BMO was not a "juristic reason" for any enrichment that may have occurred. In Blair J.A.'s view, the unjust enrichment analysis had to be undertaken as between i Trade and BMO. Although he questioned whether BMO had in fact been "enriched" in the circumstances, he found it unnecessary to decide this question, because if BMO had been enriched there were a number of juristic reasons for that enrichment, namely (i) that the shares had been pledged in a valid contract between Mr. Ablacksingh, Ms. Ramsackal and BMO; (ii) that, in law, the debtors had sufficient rights in the collateral to create a pledge; and (iii) that BMO was a *bona fide* purchaser for value without notice (para. 36).

III. Issue in This Court

17 In his judgment, Belobaba J. imposed a constructive trust over all assets held by Webworx and Mr. Ablacksingh that were purchased with the funds fraudulently obtained from i Trade. Moreover, the tracing order authorized i Trade to follow the funds it had advanced to Webworx and identify assets that could be traced to these funds in the hands of parties other than *bona fide* purchasers for value without notice.

18 At the hearing of this appeal, counsel for i Trade was asked whether i Trade had asserted a direct remedy for unjust enrichment against BMO. Counsel confirmed that no such claim had been made and that, although the Court of Appeal's reasons suggested that a direct claim for unjust enrichment was available against BMO, that was not a position i Trade had advocated.

19 Simply put, i Trade's ability to recover the disputed funds is circumscribed by the tracing order issued by Belobaba J., which incorporates an exception recognized in equity: it excludes assets in the hands of "*bona fide* purchasers for value without notice". If BMO is such a purchaser, i Trade's claim to the disputed funds cannot succeed. Consequently, this appeal ultimately turns on a single issue: Is BMO a *bona fide* purchaser for value without notice?

20 Straightforward as this issue may sound, it requires consideration of a number of interrelated matters to determine what rules will apply to resolve the competing claims. The first is the nature of i Trade's interest in the disputed funds. The second is the nature of BMO's interest in them. It is on consideration of BMO's interest that the *PPSA* is engaged. The *PPSA*'s application to BMO's interest leads us to consider whether the debtors — here the pledgors Ablacksingh and Ramsackal — had a right in the shares sufficient to support granting the pledgee, BMO, a security interest. It is worth noting that the legislation in force at the relevant time has since been changed: see *Securities Transfer Act, 2006*, S.O. 2006, c. 8. However, had that legislation applied, the outcome of this appeal would not have been different.

IV. Positions of the Parties

21 The argument of i Trade is that it advanced the funds to Webworx under a mistake of fact and accordingly has a *prima facie* right to recover them on the basis of the principles set out in *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, 2009 SCC 15, [2009] 1 S.C.R. 504 (S.C.C.), and *Barclays Bank Ltd. v. W.J. Simms Son & Cooke (Southern) Ltd.*, [1979] 3 All E.R. 522 (Eng. Q.B.).

22 Moreover, i Trade submits that BMO's claim to the disputed funds based on the pledge is a security interest governed by the *PPSA* and that BMO could acquire an enforceable security interest only if the pledgors themselves had rights in the collateral to pledge to BMO. This argument is based on the maxim *nemo dat quod non habet* (no one can give what he or she does not have). According to i Trade, the pledgors had acquired no interest in the shares: Ms. Ramsackal had no interest because she had given no consideration upon the purchase of the shares, and Mr. Ablacksingh could not have acquired an interest in the funds used to purchase the shares because he knew that they were attributable to the advances made by i Trade to Webworx, which he and others had procured by fraud.

23 BMO responds that the principles from *B.M.P.* and *Simms* with respect to the recovery of mistaken payments are inapplicable here because they concern the rights and obligations of payors and payees of such monies. BMO is not a payee. Even if the cases in question were applicable, this would not defeat BMO's position as a *bona fide* purchaser for value without notice, since i Trade's rights as against BMO are derived from the order, which contains an exception for such a purchaser.

24 Moreover, BMO agrees with Blair J.A. that the fact that i Trade was fraudulently induced to advance money to Webworx, and not directly to Mr. Ablacksingh or Ms. Ramsackal, is immaterial to the question of whether BMO is a *bona fide* purchaser for value without notice. BMO submits that its status in this regard is not affected by any latent defect in title. BMO also agrees with the Court of Appeal that the important point is that when i Trade lent the money to Webworx, i Trade intended to pass title in the money to Webworx, regardless of the fact that it was induced to do so by fraudulent misrepresentations.

25 Finally, BMO asserts that the resolution of the dispute between the parties is not governed by the *PPSA*, even though it had a valid *PPSA* security interest. It argues that the pledge agreement establishes that it is a *bona fide* purchaser for value without notice and that, as a result of the order issued by Belobaba J., this shields it from i Trade's claim to the disputed funds.

V. Analysis

26 In Ontario, when a party claims a security interest in personal property to satisfy payment or performance of an obligation, the court must ask whether the *PPSA* applies: subject to limited

exceptions, the application of that Act is pervasive. In *Innovation Credit Union v. Bank of Montreal*, 2010 SCC 47, [2010] 3 S.C.R. 3 (S.C.C.), this Court noted that the provisions of Saskatchewan's *Personal Property Security Act, 1993*, S.S. 1993, c. P-6.2, extend "to almost anything which serves the function of a security interest" (para. 18). The same is true in Ontario. Section 2 of the *PPSA* reads in part as follows:

> **2.** Subject to subsection 4(1), this Act applies to,
>
> (a) every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest including, without limiting the foregoing,
>
> (i) a chattel mortgage, conditional sale, equipment trust, debenture, floating charge, pledge, trust indenture or trust receipt ...

27 A "security interest" is defined broadly as "an interest in personal property that secures payment or performance of an obligation", and the definition of "personal property" that applied at the relevant time included "intangibles" and "securities" (*PPSA*, s. 1(1)). The *PPSA* employs "a functional approach to determining what security interests are covered by its provisions" (*Bank of Montreal*, at para. 18). When it applies, it renders irrelevant the distinctions between the wide variety of instruments which existed at common law and in equity for taking a security interest in another person's property.

28 With this in mind, I will now consider the nature of the interests of the parties to this appeal in the disputed funds.

A. Interest of i Trade in the Disputed Funds

29 In i Trade's opinion, it has a *prima facie* right, as set out in *B.M.P.*, *Simms* and other cases, to recover monies paid under a mistake of fact. This argument cannot succeed. The principles respecting the recovery of mistaken payments apply as between payor and payee. BMO is not a payee, so those principles are inapplicable here. Rather, the source of i Trade's claim to the disputed funds lies in Belobaba J.'s judgment, and more specifically in the order in which he authorized i Trade to follow and trace the assets acquired with funds it had advanced to Webworx. What i Trade now seeks to do is to recover the proceeds of sale of the shares credited to the investment account on the basis that they were impressed with a constructive trust or were subject to an equitable lien.

30 Regardless of whether i Trade elects to take the constructive trust or the equitable lien route to assert its interest, the *PPSA* does not apply to those rights. This is because i Trade acquired them as a result of Belobaba J.'s judgment granting a constructive trust or an equitable lien. The rights thus resulted from a court order, not from a "transaction ... that in substance creates a security interest" (*PPSA*, s. 2). In addition, the creation of the rights was not consensual: R. H. McLaren,

Secured Transactions in Personal Property in Canada (2nd ed. loose-leaf), at § 1.02; F. Bennett, *Bennett on the PPSA (Ontario)* (3rd ed. 2006), at p. 15; R. C. C. Cuming, C. Walsh and R. J. Wood, *Personal Property Security Law* (2005), at pp. 85 and 96-97; J. S. Ziegel and D. L. Denomme, *The Ontario Personal Property Security Act: Commentary and Analysis* (2nd ed. 2000), at pp. 71-72.

31 Since i Trade's interest in the disputed funds is not subject to the *PPSA*, it arises in equity. The important point to bear in mind is that regardless of whether i Trade's interest resulting from Belobaba J.'s judgment was acquired by virtue of a constructive trust or an equitable lien, it is an equitable proprietary interest because it flows from one of those two equitable proprietary remedies: P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (loose-leaf), at pp. 5-4 and 5-39; A. H. Oosterhoff et al., *Oosterhoff on Trusts: Text, Commentary and Materials* (7th ed. 2009), at pp. 735-36. For the purpose of this appeal, the distinction between the constructive trust and the equitable lien is irrelevant because, if i Trade's interest prevails over that of BMO, the asset will consist of the disputed funds held in trust in lieu of the shares themselves.

32 In sum, i Trade's claim to the disputed funds arises from the judgment of Belobaba J., giving it an equitable proprietary interest in the shares credited to the investment account. This interest is not governed by the *PPSA*. The next question is whether BMO's interest prevails over i Trade's interest. This inquiry requires an examination of the consensual transaction on which BMO's interest in the disputed funds is based: the pledge by Mr. Ablacksingh and Ms. Ramsackal to BMO.

B. Interest of BMO in the Disputed Funds

33 The source of BMO's claim to the disputed funds — and of its assertion that it is a "purchaser" — is the interest it acquired when Mr. Ablacksingh and Ms. Ramsackal pledged the shares credited to the investment account. To characterize the nature of this interest, it will be necessary to review the circumstances of the pledge.

34 The documentary evidence indicates that between August and October 2002, Mr. Ablacksingh and Ms. Ramsackal requested that the credit extended on their MasterCard account with BMO be increased, first on a temporary basis and eventually on a permanent basis, from $10,000 to $60,000, and then to $75,000.

35 On August 14, 2002, Mr. Ablacksingh and Ms. Ramsackal executed a "Collateral Agency Agreement" as pledgors (or "the Pledgor"). The agreement read in part as follows:

> **WHEREAS** the Pledgor is, and has agreed with each of the Agent [Nesbitt Burns] and the Lender [BMO] that the Pledgor will at all times be, the beneficial owner of:
>
> (a) the securities ... delivered to or held by the Agent herewith and credited by the Agent to the account of the Pledgor held at the Agent (the "Account") ...

. . . . .

2. AGENT APPOINTMENT

The Lender hereby appoints the Agent to hold the Collateral on the Lender's behalf under the Pledge Agreement, and the Agent accepts such appointment subject to the terms and conditions hereof. All Collateral shall be held by the Agent under and pursuant to this Agreement as the agent of the Lender under the Pledge Agreement.

36 Two days later, on August 16, 2002, Mr. Ablacksingh and Ms. Ramsackal executed Schedule "A" to the Collateral Agency Agreement, which designated the investment account with Nesbitt Burns as the account to which the shares being pledged were credited.

37 On February 21, 2003, the pledgors signed a "Notice and Direction" in which they expressly acknowledged that they had granted a security interest in the shares credited to the investment account to BMO. This document read in part as follows:

Until revocation and termination of this Notice and Direction under paragraph 4, below [which required BMO's written consent], ... Nesbitt Burns shall retain possession of and control over property in the Account for the benefit of [BMO] and not as agent for [Mr. Ablacksingh and Ms. Ramsackal].

38 Nesbitt Burns confirmed receipt of this Notice and Direction to BMO on March 7, 2003, and subsequent monthly statements for the investment account that were sent to BMO referred to that account as the "pledge account".

39 Professor MacDougall defines a pledge as follows:

A pledge is the creation of a possessory interest in a situation where a debtor — called the pledgor — transfers possession of property — called (like the transaction itself) the pledge — to a creditor — called a pledgee. It is a consensual transaction ... and it is a type of bailment. The peculiarity of the pledge is the ability of the pledgee to sell the pledged goods without recourse to a court of law....

. . . . .

The pledgee acquires a special property interest in the property held.

(B. MacDougall, *Personal Property Security Law in British Columbia* (2009), at p. 35 (footnotes omitted))

40 Given the *PPSA*'s functional approach to determining which security interests it covers, regard must be had to the substance of the transaction between Mr. Ablacksingh, Ms. Ramsackal and BMO, not to its form.

41 In this case, it is clear from the evidence that the transaction was in substance intended to create a security interest: the purpose of that interest was to secure payment or performance of the obligations of Mr. Ablacksingh and Ms. Ramsackal in relation to the increased credit limit for the MasterCard account. Moreover, the examples listed in s. 2(a)(i) of the *PPSA* of transactions to which the Act applies include "pledge", and none of the exceptions to the application of the Act are relevant here. In sum, the *PPSA* applies to BMO's interest in the shares credited to the investment account.

42 Since the *PPSA* applies, BMO's interest has to be shown to comply with its provisions. The interest could be enforced only as of the moment of "attachment" (*Bank of Montreal*, at para. 20). Attachment is a statutory condition that must be met for a security interest to be enforceable against third parties. The requirements for attachment are set out in s. 11 of the *PPSA*. When Mr. Ablacksingh and Ms. Ramsackal signed the Collateral Agency Agreement, Schedule "A" to that agreement and the Notice and Direction relating to the shares credited to the investment account, that section read as follows:

> 11. — (1) A security interest is not enforceable against a third party unless it has attached.
>
> (2) A security interest, including a security interest in the nature of a floating charge, attaches when,
>
> (a) the secured party or a person on behalf of the secured party other than the debtor or the debtor's agent obtains possession of the collateral or when the debtor signs a security agreement that contains a description of the collateral sufficient to enable it to be identified;
>
> (b) value is given; and
>
> (c) the debtor has rights in the collateral ...

43 The first two requirements for attachment of a *PPSA* interest are easily met. First, as was set out above, the debtors Mr. Ablacksingh and Ms. Ramsackal signed a security agreement that identified the collateral as the shares credited to the investment account. Second, it is clear that BMO gave value to the debtors by extending further credit on the MasterCard account of Mr. Ablacksingh and Ms. Ramsackal.

44 The real question is whether Mr. Ablacksingh and Ms. Ramsackal had rights in the shares when they pledged them to BMO. What is considered as "rights" in the collateral encompasses a range of interests beyond legal and equitable title (see McLaren, at § 2.01[2]). If Mr. Ablacksingh and Ms. Ramsackal did not have any rights in the collateral, then by operation of the *nemo dat* rule, BMO could not have acquired a statutory security interest that would be enforceable against third parties. It is not disputed that Mr. Ablacksingh purchased the shares with funds attributable

to the fraud. Thus, the focus of the inquiry must be on whether Mr. Ablacksingh's acquisition of the shares with funds he knew to have been obtained fraudulently under the agreements between i Trade and Webworx precluded him and his spouse from acquiring "rights" in the shares, which they later pledged to BMO as collateral.

45 Fraud makes an agreement voidable, not void: A. Swan, *Canadian Contract Law* (2nd ed. 2009), at p. 656; G. H. L. Fridman, *The Law of Contract in Canada* (5th ed. 2006), at p. 293; *434438 B.C. Ltd. v. R.S. & D. Contracting Ltd.*, 2002 BCCA 423, 171 B.C.A.C. 111 (B.C. C.A.), at para. 34. This long-standing proposition is exemplified by *Bawlf Grain Co. v. Ross* (1917), 55 S.C.R. 232 (S.C.C.), in which Fitzpatrick C.J. wrote, at p. 233:

> What is only voidable and not void cannot be held as invalid until it has been rescinded. It is not enough to avoid the contract, that nothing is done to affirm it, it must be disaffirmed. In *Deposit Life Assurance Co. v. Ayscough* [6 E. & B. 761], the defence was that the contract was induced by fraud and Lord Campbell C.J. said: —
>
> It is now well settled that a contract tainted by fraud is not void, but only voidable at the election of the party defrauded.

See also *Adams v. Alcroft* (1907), 38 S.C.R. 365 (S.C.C.), at pp. 375-76, *per* Idington J.; *Bertrand v. Racicot* (1978), [1979] 1 S.C.R. 441 (S.C.C.), at p. 453, citing *United Shoe Machinery Co. of Canada v. Brunet*, [1909] A.C. 330 (Quebec P.C.), at p. 339.

46 When an agreement is induced by fraud, it is the innocent party's consent to the agreement that has been fraudulently obtained. As Professor Fridman says, "[a] contract resulting from a fraudulent misrepresentation may be avoided by the victim of the fraud. In such instances the apparent consent by the innocent party to the contract and its terms, is not a real consent [and it] may be revoked at his option" (p. 286 (footnotes omitted)). However, since the decision to revoke the consent and avoid the contract falls to the innocent party, that party may elect to waive the fraud and not to avoid the contract (Swan, at p. 657).

47 The initial relationship between i Trade and Webworx was that of creditor and debtor. When it advanced funds to Webworx under the agreements, i Trade, as creditor, acquired a chose in action in the form of the debt obligation (*Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805 (S.C.C.), at para. 29). Concurrently, also pursuant to the agreements, it passed title to the funds to Webworx. There is no doubt that when it did so, i Trade consented to Webworx having use of the funds. For this reason, Webworx acquired an interest that entitled it to use the funds, subject only to i Trade revoking its consent to the agreements. The following comments from *Goode on Commercial Law* are helpful in describing the concepts of personal property law that are relevant here:

> Interest is to be distinguished from title. A person's interest in an asset denotes the quantum of rights over it which he enjoys against other persons, though not necessarily against *all* other persons. His title measures the strength of the interest he enjoys in relation to others....
>
> Title to an absolute interest may be defeasible either because it is the second-best title, ... or because, though constituting the best title so long as it continues, it is subject to divestment, as where ... the contract under which the title was acquired was a voidable title which has been avoided by the exercise of a right of rescission.
>
> (E. McKendrick, ed. (4th ed. 2009), at pp. 34-35 (emphasis in original; footnotes omitted))

48 In *R. v. Canadian Imperial Bank of Commerce* (2000), 51 O.R. (3d) 257 (Ont. C.A.), the Ontario Court of Appeal was confronted with a telemarketing scheme in which the fraudster, Mr. Obront, had induced victims in the United States to purchase gemstones at inflated prices from his corporation, Royal International Collectibles ("R.I.C."). The trial judge had ordered the forfeiture to the Crown of the proceeds of the fraudulent sales held in a U.S. dollar account in R.I.C.'s name at the Canadian Imperial Bank of Commerce, but the bank claimed to have a valid *PPSA* security interest in the funds in the account. In discussing whether R.I.C. had acquired rights in those funds that could ground the bank's acquisition of a security interest, the Court of Appeal wrote (at p. 260):

> In this case, the victims of the gem scam did not know they were victims and intended to forward their funds to R.I.C. in exchange for the gemstones which they received. The interest of R.I.C. in the funds was voidable but not void *ab initio*. The security interest of the bank was therefore able to attach to the funds deposited into the account.

49 *Canadian Imperial Bank of Commerce* illustrates that when an innocent party consensually advances funds to another under an agreement, it voluntarily parts with those funds, and this divestiture conveys the right to use them. This right is subject to the innocent party avoiding the agreement by revoking their consent to it. Until that time, the agreement is effective by its terms.

50 Consequently, when i Trade discovered the fraud, it was entitled to revoke its consent to its agreements with Webworx, avoid any further obligations it may have had to Webworx under the agreements, and seek remedies. However, it was not required to do so, since it could have sought other forms of recourse. At the time of the agreements, i Trade had voluntarily passed title to the monies, and it had to bear a risk of loss under the agreements. As Angela Swan notes, at p. 656:

> [i]f the contract is held to be voidable only, the risk of loss remains with the [initial] owner, for the contract with the rogue will not be rescinded in this situation and, as a result, title will have passed through the rogue and any subsequent *bona fide* purchaser will not be liable in conversion to the [initial] owner. It is far preferable that the loss remain with the [initial]

> owner, for that person had the better (and far cheaper) opportunity to avoid the risk entirely by requiring cash or some other secure form of payment.

51 The evidence before the Court indicates that the fraud perpetrated by Mr. Ablacksingh and others became clear to i Trade on March 23, 2003. A Mareva injunction freezing the assets of Webworx, Mr. Ablacksingh and others was obtained by i Trade on March 28, 2003. That order was continued by a further order dated April 7, 2003. Meanwhile, i Trade had filed a statement of claim on April 4, 2003, and this ultimately led to Belobaba J.'s judgment of September 5, 2006. That judgment ordered rescission of the agreements between i Trade and Webworx.

52 However, the evidence also indicates that before the foregoing chain of events transpired, Mr. Ablacksingh had received both paycheques and corporate loans from Webworx that were funded by the advances i Trade had made to Webworx, and that those amounts had enabled him to purchase the shares that were credited to the investment account.

53 The consequence of this chronology is that before i Trade discovered the fraud and initiated civil proceedings, Webworx had i Trade's consent under the agreements to use the money advanced by i Trade. Since Webworx was the vehicle used by Mr. Ablacksingh to perpetrate the fraud, that company was itself a party to the fraud, but this does not mean that Webworx was not entitled to use the funds. At the time Webworx was issuing paycheques and corporate loans to Mr. Ablacksingh, i Trade's consent had not been revoked and the agreements remained effective. Webworx was therefore able to pass its interest in the funds to Mr. Ablacksingh, and i Trade had to bear a risk of loss.

54 I cannot agree with the distinction drawn by i Trade on the basis of the fact that Webworx, rather than Mr. Ablacksingh, was the party to which i Trade advanced the funds. Nor can I accede to the corollary argument that Mr. Ablacksingh was unable to use the funds to acquire an interest in the shares credited, in his name and that of his spouse, to the investment account. The key is that at the time Webworx acquired the funds, it had i Trade's *consent* to their use, which brings into play the principle that a contract tainted by fraud is not void, but voidable. Webworx was entitled to use the funds. In turn, Mr. Ablacksingh was able to acquire the same interest in the funds as Webworx, and the funds were used to purchase the shares.

55 According to i Trade, to countenance this outcome would amount either to inappropriately lifting Webworx's corporate veil so as to favour Mr. Ablacksingh, or to sanctioning criminal activity. I do not accept these characterizations. Mr. Ablacksingh received no greater interest in the funds from Webworx than Webworx had received from i Trade. Because Webworx was entitled to use the funds, Mr. Ablacksingh and Ms. Ramsackal were able to acquire "rights" in the shares using the proceeds of the paycheques and of the corporate loans. As a result, they had "rights" in the collateral that were sufficient for them to pledge the shares to BMO and thereby create a security interest: see, e.g., Cuming, Walsh and Wood, who give the example (at p. 422) of a trustee

who grants a security interest in the property held in trust and who, even though this was done in breach of the trust, holds sufficient title in that property for the interest to attach to the property.

56 The documents related to the pledge of the shares credited to the investment account were executed in August 2002, and Mr. Ablacksingh and Ms. Ramsackal signed the Notice and Direction on February 21, 2003, that is, before the orders rescinding the agreements with i Trade and authorizing that company to trace the funds into the hands of persons other than "*bona fide* purchasers for value without notice". BMO's interest in the shares credited to the investment account could therefore attach, giving it an enforceable *PPSA* security interest.

57 I will now consider whether BMO's receipt of the pledge, which gave it an enforceable *PPSA* security interest, also made it a "purchaser" and thereby qualified it for the *bona fide* purchaser for value without notice exception set out in Belobaba J.'s order.

C. Resolution of the Competing Claims of i Trade and BMO to the Disputed Funds

58 The *PPSA*'s priority rules do not apply here. Although BMO's interest is covered by the *PPSA*, i Trade's interest is not. As pervasive as it may be, the *PPSA* provides that, insofar as the principles of law and equity are not inconsistent with its express provisions, they supplement it and continue to apply. Section 72 reads:

> **72.** Except in so far as they are inconsistent with the express provisions of this Act, the principles of law and equity, including the law merchant, the law relating to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake and other validating or invalidating rules of law, shall supplement this Act and shall continue to apply.

59 Recourse to the principles of law and equity does not render the *PPSA* meaningless. That Act continues to apply to BMO's statutory security interest. I find the following comment of the Court in *Bank of Montreal* (at para. 30) regarding the Saskatchewan *PPSA* illustrative of this point:

> It is true that the internal priority rules of the *PPSA* cannot be invoked to resolve the dispute. However, it does not follow that the provincial security interest created under the *PPSA* does not exist outside these priority rules.

60 Traditionally, the fact that a party is a *bona fide* purchaser for value without notice has been an equitable defence. Professor Smith describes this defence as follows:

> The full name of the equitable defence is 'bona fide purchase of a legal interest for value without notice of a pre-existing equitable interest'. The effect of the defence is to allow the defendant to hold its legal proprietary rights unencumbered by the pre-existing equitable proprietary rights. In other terms, where the defence operates, the pre-existing equitable

> proprietary rights are stripped away and lost in the transaction by which the defendant acquires its legal proprietary rights.
>
> (L. Smith, *The Law of Tracing* (1997), at p. 386 (footnotes omitted))

61 In the case at bar, the transaction by which BMO acquired its rights was the pledge. The enforceable interest acquired by BMO in this transaction is a security interest that was created by statute and is recognized at law (*Bank of Montreal*, at para. 42). As I explained above, the statutory security interest replaced the common law pledge. If BMO is found to be a *bona fide* purchaser for value without notice, therefore, i Trade's equitable proprietary right will be defeated by the transaction in which BMO acquired its statutory security interest.

62 There is no dispute that if BMO is a "purchaser", its purchase was *bona fide* and was made for value (the increased credit extended on the MasterCard account) and without notice. It remains to be determined whether BMO is in fact a purchaser.

63 The *PPSA* expressly defines "purchase" and "purchaser":

> **1.** — (1) In this Act,
>
> . . . . .
>
> "purchase" includes taking by sale, lease, negotiation, mortgage, pledge, lien, gift or any other consensual transaction creating an interest in personal property;
>
> . . . . .
>
> "purchaser" means a person who takes by purchase;

64 In addition, a purchaser, as understood in equity, is "a person who acquires *any* interest in property, whatever its quantum and whether absolutely or by way of security" (Ziegel and Denomme, at p. 26 (emphasis in original)).

65 Thus, BMO fits both the definition of "purchaser" in the *PPSA* and the meaning of that term as understood in equity, because it acquired a pledge of — that is, an interest in — the shares credited to the investment account.

66 I therefore conclude that the transaction by which BMO acquired its enforceable *PPSA* security interest made it a "purchaser" within the meaning of the words "*bona fide* purchasers for value without notice". BMO falls within the exception to the tracing order issued by Belobaba J. Consequently, any interest asserted against BMO by i Trade on the basis of Belobaba J.'s judgment will fail by virtue of the very terms of the order.

67 Since i Trade's interest in the disputed funds has been defeated by the transaction in which BMO acquired an enforceable security interest under the *PPSA*, i Trade cannot succeed in this appeal. Its right to recover the disputed funds instead of BMO is limited by the tracing order and does not overcome the fact that BMO is a *bona fide* purchaser for value without notice.

VI. Disposition

68 For these reasons, I would dismiss the appeal, with costs.

Appeal dismissed.

Pourvoi rejeté.

Tab 3

2022 ONCA 589
Ontario Court of Appeal

Urban Mechanical Contracting Ltd. v. Zurich Insurance Company Ltd.

2022 CarswellOnt 11581, 2022 ONCA 589

Urban Mechanical Contracting Ltd., OZZ Electric Inc., Oakdale Drywall & Acoustics Ltd., NORR Limited, WSP Canada Group Limited, Noram Building Systems Inc. and Safway Services Canada, Inc. (Applicants / Appellants) and Zurich Insurance Company Ltd. (Respondent / Respondent)

Urban Mechanical Contracting Ltd., OZZ Electric Inc., Oakdale Drywall & Acoustics Ltd., NORR Limited, WSP Canada Group Limited, Noram Building Systems Inc. and Safway Services Canada, Inc. (Applicants / Appellant) and Zurich Insurance Company Ltd (Respondent /Respondent)

Bank of Montreal, as Administrative Agent (Applicant / Appellant) and Zurich Insurance Company Ltd. (Respondent / Respondent)

Fairburn A.C.J.O., J.A. Thorburn J.A., and L. Favreau J.A.

Heard: March 1, 2022; March 2, 2022
Judgment: August 17, 2022
Docket: CA C69416, C69440, C69448

Proceedings: Affirmed, 2021 CarswellOnt 5043, 2021 ONSC 2535, 332 A.C.W.S. (3d) 260 (Ont. S.C.J.)

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Subject: Contracts; Corporate and Commercial; Insolvency
Headnote
Bankruptcy and insolvency
Construction law
Contracts

***J.A. Thorburn J.A.*:**

OVERVIEW

1 The appellants brought two applications seeking a determination of whether, as a matter of law, a bond issuer can rescind a bond agreement on the basis of fraudulent misrepresentations and collusion when doing so would affect the rights of innocent third parties.

2 The application judge determined that, as a matter of law, rescission may be possible even when it would affect the rights of innocent third parties. She therefore held that the issue of whether the respondent Zurich was entitled to rescind its bonds on the basis of fraudulent misrepresentation should be determined at trial on a full factual record and not disposed of summarily by way of application.

3 The appellants appeal the application judge's order and submit that, as a matter of law, rescission is not available where there are innocent third parties.

4 I would dismiss the appeal.

5 Prejudice to the rights of third parties may be, but is not always, a bar to rescission. This is particularly true in the case of fraudulent misrepresentation and in cases where it is possible to provide restitution in other ways.

6 As the application judge made no error of law, deference is owed to her conclusion that the issue of rescission should proceed to trial on a full factual record so that the court may consider all the circumstances and equities of the case. This determination accords with the principles of rescission as an equitable remedy and the high degree of flexibility courts exercise in rescinding contracts in cases of fraud.

HOW THE APPLICATIONS TO DETERMINE THE RIGHT TO RESCISSION AROSE

7 In 2011, St. Michael's Hospital (the "Hospital") entered into a public-private redevelopment project with Infrastructure Ontario to build a new 17-storey patient care tower (the "Project"). Construction was to be financed and carried out by the private sector. The Construction Contract was to be awarded to a bidder chosen through Infrastructure Ontario's procurement process, which was subject to rules that were designed to ensure a fair, open and transparent process.

8 The Construction Contract was ultimately awarded to 2442931 Ontario Inc., a.k.a. "ProjectCo", a wholly owned single-purpose subsidiary of Bondfield Construction Company Limited. ProjectCo was responsible for designing, constructing and financing the Project for the sum of $301,189,863. Bondfield was made the general construction contractor.

9 A syndicate of lenders financed the Project by way of a $230 million loan to ProjectCo as memorialized in the Credit Agreement. The Credit Agreement named the appellant Bank of Montreal ("BMO") administrative agent for the Lenders.

10 Both the Construction Contract and Credit Agreement required ProjectCo to obtain and maintain surety bonds: a Performance Bond for the construction and design contract, and a Labour and Material Payment Bond ("Payment Bond") for labour, services and materials (collectively, the "Bonds").

11 Surety bonds, such as the ones in this case, are financial instruments which transfer project risk to a third party insurer, thereby providing assurance to purchasers, lenders, subcontractors and suppliers.

12 A performance bond is issued by an insurance company and guarantees completion of the project in respect of which the bond is issued in the event the contractor (in the language of the bond, the "principal") defaults on its obligations: Truro (Town) v. Toronto General Insurance Co., [1974] S.C.R. 1129. A payment bond protects those supplying services and materials to the general contractor from the risk of non-payment should, for instance, the general contractor become insolvent. In Ontario, such bonds are required to secure a minimum of 50% of the contract price for public contracts exceeding $500,000: Construction Act, R.S.O. 1990, c. C.30, s. 85.1 and O. Reg. 304/18, s. 12.

13 Surety bonds of both kinds are common in public infrastructure projects. There are at least three parties to a surety bond: (1) the surety (typically the insurance company) that acts as a guarantor and issues the bond; (2) the principal (typically the general contractor) whose contractual obligations are guaranteed by the surety; and (3) the obligee who requires the bond as a condition of its contract with the principal/general contractor and who can make a claim on the bond in the event of default by the principal. A payment bond also contemplates other claimants such as the suppliers of labour and materials to a construction project pursuant to agreements with the bond's principal.

14 On January 27, 2015, Zurich issued the Performance Bond in the amount of approximately $156 million, or half the contract price; and the Payment Bond in the amount of approximately $142 million. The Bonds name Zurich as surety, Bondfield as principal, and ProjectCo, BMO, and the Hospital as obligees.

15 The Performance Bond provides that if the principal defaults on its obligations under the Construction Contract, any one of the obligees may declare it to be in default. The declaration triggers an election by the surety to remedy the default, complete the contract, arrange for bids to complete, or pay the obligee the lesser of the remaining balance of the Bond Amount or the obligee's reasonable estimate of the cost to complete the contract.

16 The Payment Bond sets up an express trust with the obligee ProjectCo as trustee. The trustee holds the right to claim on the Payment Bond in trust for the appellant subcontractors, Urban Mechanical Contracting Ltd., OZZ Electric Inc., Oakdale Drywall and Acoustics Ltd., NORR Limited, WSP Canada Group Limited, Norman Building Systems Inc. and Safway Services Canada, Inc. (collectively, the "Trades").

17 Bondfield struggled to meet the payment deadlines as early as 2017. Zurich paid the subcontractors and suppliers to keep the Project going. It also signed Ratification Agreements with some Trades to ensure that they would keep working on the Project.

18 The Ratification Agreements set out that payment was being made with respect to that Trade's claim under the Payment Bond. They also confirm the statement of account owing; provide that the Trades will recommence work; require the Trades to discharge their lien rights; and perhaps most importantly, provide that the Trades agree to be bound by the subcontract to Zurich to the same extent as if it they had entered into the subcontract with Zurich or a successor contractor.

19 Bondfield continued experiencing difficulties meeting deadlines through 2017 and 2018. On November 2, 2018, the Hospital issued a Notice of Default under the Project Agreement, which had been entered into by the Hospital and ProjectCo in January 2015 to provide for services, labour and materials in relation to the construction and financing of the Project. On November 16, BMO, as the obligee, informed Zurich that Bondfield was in default and demanded payment of the Performance Bond.

20 After a dispute over whether BMO could demand payment without exercising step-in rights under the Construction Contract, BMO obtained a court order appointing a receiver to make a call on the Performance Bond, which Zurich did not dispute. The receivership order did not modify Zurich's liability under the Bonds.

21 Zurich elected to pay the lesser of the remaining balance of the Bond Amount or the obligee's reasonable estimate of the cost to complete the contract. Zurich requested an adjournment until April 2020 to file materials, but before it could do so, it discovered the events which led to this appeal.

22 In March 2020, five years after Zurich entered into the agreements to provide bonds, one of its consultants uncovered numerous email communications between Bondfield and Hospital

representatives disclosing allegedly fraudulent misrepresentations and collusion which appeared to have enabled Bondfield to secure the contract for the Project. The evidence spans many years and includes communications among many people.

23 In April 2020, Zurich ceased paying the Trades and started an action (the "Zurich action") seeking a declaration that both Bonds be rescinded due to fraud in the construction procurement process. Zurich claims the fraud occurred prior to the issuance of its Bonds and that, by virtue of the fraudulent misrepresentations, it was induced to issue the Bonds. It seeks to recover the money paid out under the Bonds prior to rescission from the alleged principal fraudsters.

24 Zurich takes the position that, had it known about the fraud, it would never have issued the Bonds.

25 The appellant Trades have unpaid claims under the Payment Bond. The appellant BMO represents the syndicate of lenders who were given payment and performance guarantees provided by the Performance Bond which, they claim, induced them to lend funds to the Project. None of these funds have been repaid.

THE APPLICATIONS TO DENY RESCISSION

26 Examinations for discovery were commenced but not concluded in the Zurich rescission action.

27 The appellants then brought two applications seeking declarations that, as a matter of law, Zurich may not rescind the Bonds because, *inter alia*, doing so would affect their rights as innocent third parties. [1] In the first application, the Trades sought a declaration that Zurich cannot rescind the Payment Bond. In the second application, BMO sought a declaration that Zurich cannot rescind the Performance Bond.

28 The case management judge allowed the applications to proceed, reasoning as follows:

> I see no reason why the non-party lenders and subtrades should not be entitled to seek this court's determination of whether, as a matter of law, rescission is or is not an available remedy where (as they claim) the rights of innocent third parties are at stake.

29 In a later endorsement, another case management judge explained, "In my view, [the applications] involve *a discrete legal issue* that can be decided on an application" (emphasis added).

30 It was on this basis that the applications were permitted to proceed. The applications were argued on a paper record only.

31 The application judge began her reasons by noting that, "In the two Applications before the Court, the question that must be answered is whether rescission is available as a matter of law on a construction bond where there has been fraud and collusion in the procurement process." She noted that Zurich defended both applications on the basis that the appellants "are seeking to have the Court pre-emptively decide Zurich's Rescission Action and that the legal propositions on which both Applicants rely are wrong." She went on to say that:

> [T]he Legislature [in enacting the Construction Lien Act] cannot have intended that the liability of a surety be absolute. That is, common law and equitable remedies are still available; otherwise, the section would stipulate that the Surety's liability arose upon execution rather than when the Bond is "in effect."
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> . . .
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> [S]ection [69] of the *Construction Act* also makes clear that the right of action by the claimant must be in accordance with the terms of the Bond. This means that the express trust created in the Payment Bond imposes limits on any statutory rights acquired by the Trades under the *Construction Act*. As such, the Trades' rights as Claimants are subject to the provisions under the Payment Bond and through their Trustees ProjectCo and SMH. As ProjectCo and SMH are alleged to have engaged in fraudulent conduct, claims by the Trades are subject to Zurich's equitable defences.

32 She concluded her reasons dismissing both applications with the following:

> Equitable remedies are not determined in a vacuum and must be decided on a factual record. Without a complete record, including all of the allegations related to the fraud implicating the various parties, the Court is unable to determine at this stage whether or not the remedy is available to Zurich. Certainly it has not been shown that rescission is unavailable as a matter of law.

THE LAW OF RESCISSION AND THIRD-PARTY RIGHTS

33 The central issue on this appeal is whether, as a matter of law, an order for rescission can ever be made where an innocent party was induced to enter a contract by virtue of fraudulent misrepresentation and there are third parties who assert their rights. This is a question of law for which the standard of review is correctness.

34 In order to answer the question of law for the purposes of this appeal, I must assume that the Trades and the Lenders are "innocent third parties". Accordingly, I will not address whether the appellants' rights are derivative or whether the appellants are beneficiaries or assignees. This is in part a factual determination that will have to be made by the trial judge. To this end, this matter was before the application judge strictly as a question of law. Accordingly, to the extent that the

application judge engaged in findings of fact unnecessary to determining the narrow application that was before her, those findings of fact are not binding of the trial judge.

What is Rescission?

35 Rescission is an equitable remedy that is meant to put the contracting parties back in the positions they were in before entering into the contract (*restitutio in integrum*): Guarantee Co. of North America v. Gordon Capital Corp., [1999] 3 S.C.R. 423, at para. 39; Place Concorde East Ltd. Partnership v. Shelter Corp. of Canada Ltd.(2006), 270 D.L.R. (4th) 181 (Ont. C.A.); and Gerald H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011), at p. 762.

36 Rescission is available to a party that has been improperly induced to enter into a contract, for instance, by a fraudulent misrepresentation: *Guarantee Co.* , at para. 39; Deschenes v. Lalonde, 2020 ONCA 304, 447 D.L.R. (4th) 132, at para. 29, leave to appeal to S.C.C. refused, 39288 (February 11, 2021); and Kingu v. Walmer Ventures Ltd. (1986), 10 B.C.L.R. (2d) 15 (C.A.), at pp. 6–8. Indeed, as Lord Wright noted in Spence v. Crawford, [1939] 3 All E.R. 271, the court will be more willing to order rescission when the plaintiff was induced to enter the contract by fraud:

> [T]he court will be more drastic in exercising its discretionary powers in a case of fraud than in a case of innocent misrepresentation. . . . There is no doubt good reason for the distinction. A case of innocent misrepresentation may be regarded rather as one of misfortune than as one of moral obliquity. There is no deceit or intention to defraud. The court will be less ready to pull a transaction to pieces where the defendant is innocent, whereas in the case of fraud the court will exercise its jurisdiction to the full in order, if possible, to prevent the defendant from enjoying the benefit of his fraud at the expense of the innocent plaintiff.

37 Rescission requires proof that the misrepresentation was material and was relied on by the party seeking to rescind the contract: *Deschenes* , at para. 29; Barclays Bank v. Metcalfe & Mansfield, 2011 ONSC 5008, 82 C.B.R. (5th) 159, at paras. , aff'd 2013 ONCA 494, 365 D.L.R. (4th) 15, leave to appeal refused, [2013] S.C.C.A. No. 374.

38 A "material misrepresentation" is one that a reasonable person would consider to be relevant to the decision to enter the agreement, though it need not be the only reason to enter into the agreement: York University v. Markicevic and Brown, , aff'd 2018 ONCA 893, 51 C.C.E.L. (4th) 30, leave to appeal refused, [2019] S.C.C.A. No. 134.

39 Whether a contracting party relied on the misrepresentation, at least in part, to enter into the agreement is a "question of fact to be inferred from all the circumstances of the case and evidence at trial": *Barclays Bank* , at para. *159*.

Can Rescission Co–Exist with the Construction Lien Act?

40 The appellant Trades argue that s. 69 of the Construction Lien Act, R.S.O. 1990, c. C.30, [2] prevents Zurich from rescinding the Payment Bond as they have valid claims against Zurich pursuant to the Bond. They claim that equitable remedies such as rescission cannot undermine their statutory right and that, if Zurich's rescission action is sustained, their right to claim on the Payment Bond pursuant to s. 69, would be improperly extinguished.

41 Zurich claims that the rights of the Trades are tainted by the fraud allegations and that some of the Trades were party to the alleged fraud.

42 Sections 69(1) and (3) of the Construction Lien Act create a right of action on the part of subcontractors to recover from the surety in accordance with the terms of the Payment Bond, and subrogation of the rights of the surety to the subcontractor. Section 69 provides that:

> (1) Where a labour and material payment bond is in effect in respect of an improvement, any person whose payment is guaranteed by that bond has a right of action to recover the amount of the person's claim, in accordance with the terms and conditions of the bond, against the surety on the bond, where the principal on the bond defaults in making the payment guaranteed by the bond.
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> . . .
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> (3) The surety, upon satisfaction of its obligation to any person whose payment is guaranteed by the bond, shall be subrogated to all the rights of that person.

43 Legislation supersedes a common law remedy, including equity where it has done so clearly and unambiguously: Ruth Sullivan, *The Construction of Statutes*, 7th ed. (Markham: LexisNexis Canada Inc., 2022), at pp. 530-32.

44 As such, a statutory scheme may oust equitable rights that would otherwise be available but only where the legislature expressed its intention to do so with "irresistible clearness": Moore v. Sweet, 2018 SCC 52, [2018] 3 S.C.R. 303, at para. 70; KBA Canada, Inc. v. Supreme Graphics Limited, 2014 BCCA 117, 59 B.C.L.R. (5th) 273; Zaidan Group Ltd. v. London (City)(1990), 71 O.R. (2d) 65 (C.A.), at para. 11, aff'd [1991] 3 S.C.R. 593; and Neles Controls Ltd. v. Canada, 2002 FCA 107, 222 F.T.R. 319, at para. 15.

45 In order to decide whether legislation ousts a common law remedy, the court must begin by "analysing, identifying and setting out the applicable common law, after which the statute law's effect on the common law must be specified by determining what common law rule the statute law codifies, replaces or repeals, whether the statute law leaves gaps that the common law must fill and whether the statute law is a complete code that excludes or supplants all of the common

law in the specific area of law involved": 2747–3174 Québec Inc. v. Québec (Régie des permis d'alcool), [1996] 3 S.C.R. 919, at para. 97, *per* L'Heureux-Dubé J.

46 The *Construction Lien Act* clearly ousts certain equitable rights. For instance, it precludes a subcontractor who was entitled to, but did not register a construction lien for unpaid work as provided by the *Construction Lien Act*, from claiming the amount of the lien in unjust enrichment. This is the "precise sort of situation that the *Construction Lien Act* was designed to address and augmenting the scope of claims available would undercut the balance established by the Act": Tremblar Building Supplies Ltd. v. 1839563 Ontario Limited, 2020 ONSC 6302, 454 D.L.R. (4th) 546, at para. 18.

47 In deciding whether the legislative scheme in s. 69 ousts rescission, it is necessary to look at the situation s. 69 was designed to address.[3] At common law, tradespeople could not sue upon a payment bond because they were not parties to the bond, and had no privity of contract with the surety. To avoid this problem, modern payment bonds used trust language: Valard ConstructionLtd. v. Bird Construction Co2018 SCC 8, [2018] 1 S.C.R. 224, at para. 53, *per* Karakatsanis J. Additionally, at common law, a bond was "effective" when it was signed, sealed and delivered: Paul D'Aoust Construction Ltd. v. Markel Insurance Co. of Canada(1999), 120 O.A.C. 243 (C.A.), aff'd 2001 SCC 84, [2001] 3 S.C.R. 744.

48 Section 69 was designed to replace the common law actions based on trust bonds with a direct statutory action between the surety and the trades. This served to resolve any potential problem arising from the lack of privity of contract between them. As explained in a report prepared by the Advisory Committee on the draft *Construction Lien Act*, in 1982:

> While the purpose of the bond is to protect the suppliers of services or materials, those suppliers cannot sue upon it, at common law, because they have no contractual relationship with the bonding company. To remedy this problem a trust form of bond has recently become common. There may still be some doubt as to the effectiveness of this bond form. Section [69] removes all doubt and permits suppliers of services or materials to sue upon a labour and materials bond. [Emphasis added.]

49 More recently, at Chapter 10 of their report to the Ministry of Attorney General of Ontario, Striking the Balance: Expert Review of Ontario's Construction Lien Act (delivered April 30, 2016), Bruce Reynolds and Sharon Vogel note that:

> Surety bonds guarantee, among other things, payment of either fifty percent or one hundred percent of the amounts owed by general contractors to the suppliers of labour and materials, and guarantee the owner that, in the event of the insolvency of the general contractor, construction will be completed. [Emphasis added.]

50 However, the *Construction Lien Act* does not explicitly address the trades' right of action on the payment bond when the bond agreement was founded on fraud. Nor is there anything in the legislative record to show whether the legislature specifically intended s. 69 to sustain the bond even in the face of fraud. And finally, the parties have adduced no cases that specifically address the issue of fraud in the issuance of the bond. As such, it is not appropriate to foreclose this argument at this stage of the proceeding without hearing full submissions on this issue.

51 In any event, Zurich has alleged that certain of the Trades have participated in the fraud. Discoveries are not complete and as such, the argument has not been fully developed. If it is established that the Trades were party to the fraud, it would be difficult to envisage that the legislature intended with "irresistible clearness" to protect the Trades who participated in fraud.

52 The determination of this issue should therefore be left to the trial judge and decided on a complete record and full submissions to see what, if any, equitable claims may arise.

May Rescission be Granted where there are Innocent Third Parties?

53 The appellants argue that rescission is unavailable as a matter of law whenever the rights of innocent third parties are engaged.

54 The appellants note that in *The Law of Contract in Canada*, at pp. 762-63, Professor Fridman states that "[r]escission is only possible where to grant such remedy would not operate to the prejudice of a third-party, who was not implicated in the original contract . . . [I]f granting rescission would have such an effect, a court of equity will refuse that remedy".

55 The appellants also cite British authorities which have held that "the option to void the contract is barred where innocent third parties have, in reliance on the fraudulent contract, acquired rights which would be defeated by its rescission": *Tennent v. The City of Glasgow Bank (1879), 4 App. Cas. 615 (U.K.)*, at p. 621; Clough v. London and Northwestern Railway Company (1871), L.R. 7 Exch. 26 (U.K.). The court in Society of Lloyd's v. Leighs, [1997] E.W.C.A. Civ. 2283 (U.K.), concluded that rescission would invalidate contracts with third parties, which could not be "accommodated within established legal principles" noting that *restitutio in integrum* was impossible because the court could not sever the contracts that had resulted from the original contract if the original contract were rescinded.

56 The appellants note that in Foy v. Royal Bank (1995), 37 C.P.C. (3d) 262 (Ont. Gen. Div.), at p. 12, an Ontario court refused to order rescission of an agreement of purchase and sale where a *bona fide* mortgagee for value without notice would be prejudiced "in a manner which could not be compensated for by costs or by an adjournment."

57 The jurisprudence and academic literature reflect two concerns about the rights of third parties in rescission cases: first, the impossibility of achieving *restitutio in integrum* when third parties have acquired an interest in property subject to the contract; and second, unavoidable prejudice to, or adverse effect on, third parties. However, as further discussed below, neither concern presents an absolute bar to rescission.

1. Where third-party rights render restitutio in integrum impossible

58 The first concern arises when some of the property subject to the contract has ended up in the hands of a third party, and the third party's interest in it is superior to the original owner's interest.

59 As will be seen below, this scenario tends to arise when the third party has purchased and been conveyed the contract property. It is well established that when property is purchased by an innocent third party for value without notice, the pre-existing equitable interests of other parties are extinguished: *i* Trade Finance Inc. v. Bank of Montreal, 2011 SCC 26, [2011] 2 S.C.R. 360, at para. 60.[4] The property cannot be wrested from a party with a superior interest and restored to the original owner. As a result, the original owner cannot be restored to the pre-contracting position, and *restitutio in integrum* is technically impossible.

60 However, this kind of technical impossibility does not pose an absolute bar to rescission. When the court cannot return specific property to its original owner (*restitutio in specie*) because a third party has acquired a superior interest in it, the court may award the original owner alternate relief aimed at restoring its pre-contractual position. As the Supreme Court wrote in Nesbitt v. Redican, [1924] S.C.R. 135, at p. 153:

> [T]he practice has always been for a Court of Equity to give relief by way of rescission whenever by the exercise of its powers it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract. [Emphasis added.]

61 Even when the parties cannot be restored precisely to the state they were in before the contract was signed, courts may still grant and tailor rescission remedy because rescission is an equitable remedy focused on practical justice, not rigid technicalities: Fridman, *The Law of Contract in Canada*, at p. 761; *Spence v. Crawford, [1939] 3 All E.R. 271, at pp. 280–88*; Kiani v. Abdullah(1989), 70 O.R. (2d) 697 (C.A.); Carter v. Golland, [1937] O.R. 881 (C.A.), at para. 10; and Brown & Root v. Aerotech Herman Nelson Inc. et al., 2004 MBCA 63, 184 Man. R. (2d) 188, leave to appeal refused, [2004] S.C.C.A. No. 344.

62 Rescission operates to relieve and prevent unconscionability and unfairness, such as fraud: Canada (Attorney General) v. Collins Family Trust, 2022 SCC 26, at paras. 9–11. The court may therefore order rescission so long as it avoids injustice between the parties, for instance by

unjustifiably making the respondent worse off: Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Markham: LexisNexis Canada, 2014), at p. 1433.

63 Being focused on practical justice between the parties, the availability and form rescission may take will vary depending on the facts of the case. As noted, the court is more willing to exercise its discretionary power in cases of fraud than in cases of innocent misrepresentation: Spence,at p. 288.

64 The principle of practical justice was at issue in *Brown & Root.* That case *involved* a claim for fraudulent misrepresentation in respect of heaters that had already been transferred to a third party and could not be returned. The Manitoba Court of Appeal, at paras. 57-60, concluded that the inability of the defrauded party to restore the heaters that had been sold and/or the inability to perfectly restore the parties to their original position did not bar rescission. The court rejected the view that "absolute *restitutio* is required in every case": at para. 52. Instead, it took a flexible approach to determining whether *restitutio in integrum* could be achieved by considering what was "practically just": at para. 66.

65 This flexible approach fits with the Supreme Court of Canada's approach to equitable compensation, endorsed in Rick v. Brandsema, 2009 SCC 10, [2009] 1 S.C.R. 295, at para. 66:

> [W]hen rescission is unavailable because restitution, as a practical matter, cannot be made, damages in the form of "equitable compensation" are imposed to provide relief to the wronged party. This is because, as the British Columbia Court of Appeal said in *Dusik v. Newton* (1985), 62 B.C.L.R. 1: "Where rescission is impossible or inappropriate, it would be inequitable for the defendant to retain the benefits of the unconscionable bargain" (p. 47).

66 Canadian courts have achieved practical justice between the parties when *restitutio in specie* is not possible by awarding monetary compensation approximating the value of that property to the contracting party owed the property: Peter D. Maddaugh and John D. McCamus, *The Law of Restitution* (Toronto: Thomson Reuters, 2021) (loose-leaf, release 2), at]§5:18.

67 Such relief was also ordered in Kupchak v. Dayson Holdings Ltd.(1965), 53 D.L.R. (2d) 482 (B.C.C.A.), at paras. 13-15. The Kupchaks were induced by fraud to transfer two properties to the defendant for shares and give mortgages to secure the difference in value between the two properties. By the time of trial, the defendant had already sold a half interest in one of the properties to an innocent third party without notice of the fraud and made substantial changes to that property. *Restitutio in specie* was therefore impossible. However, the court found that it could grant rescission by ordering the defendant to pay the Kupchaks the value of the properties. Davey J.A. for the majority held:

> [E]quity has the same power, operating on the conscience of the parties, to order one to pay compensation to the other in order to effect substantial restitution under a decree for

> rescission, as it has to order one party to pay money on account, or by way of indemnity. The jurisdiction to order compensation is, I think, inherent in the decree for rescission and incidental to it.

68 Similarly, in McCarthy v. Kenny, [1939] 3 D.L.R. 556 (Ont. S.C.), at p. 563, an Ontario court held that if fraud was found, "relief may be given to the plaintiff by the rescission of the transaction and compensation for loss in the event of her securities not being returned to her by the defendant".

69 In Trans–Canada Trading Co. v. M. Loeb Ltd., [1947] 2 D.L.R. 849 (Ont. H.C.J.), rescission was sought based on a fraudulent misrepresentation made at the time the agreement was entered into that the plaintiff would be the exclusive outlet for lighters for a defined district. This misrepresentation induced the plaintiff to enter into the contract. *Restitutio in specie* was no longer possible as some lighters had been sold to third parties before the discovery of the misrepresentation. Nevertheless, the court ordered rescission as it held that monetary compensation could cover the cost of lighters already sold.

70 This reasoning was also followed in Stewart v. Complex 329 Ltd.(1990), 109 N.B.R. (2d) 115 (Q.B.), *at p. 20*. The plaintiff sought rescission of a contract due to fraudulent misrepresentation, but assets originally owned by the plaintiff had already been transferred to a third party. Notwithstanding that the assets were unrecoverable by their original owner, rescission was allowed as the court held:

> [T]he *bona fide* interests of third parties in the assets can be protected . . . and the contract founded on fraudulent misrepresentation be deemed as existing, for third parties with an interest were also put at risk by the misrepresentations of the Defendants and the breaches of the covenants set out in the Agreement.
>
> The results of an order of rescission can be held by him for the benefit of himself and all those who are creditors or who held a beneficial interest in the assets . . . .
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> Accordingly, I have decided that the fact that third parties had acquired for value an interest in the assets he had purchased prior to the time he elected to rescind the Agreement should not be seen as a bar to rescission in the circumstances of this case. [Emphasis added.]

71 In short, where a third party is entitled to keep the property originally owned by one of the contracting parties, the court may still exercise its equitable power to do what is practically just and order a remedy that makes the original owner whole.

72 "The court must fix its eyes on the goal of doing 'what is practically just.' How that goal may be reached must depend on the circumstances of the case": Spence, at pp. 280–88; *The Canadian Law of Unjust Enrichment and Restitution*, Ch. 34, III.E. To achieve this goal, the court will typically need a full factual record before it.

73 It is not possible to say, at this stage of the litigation and in the absence of a full factual record, whether rescission could be crafted to achieve practical justice for the appellants and respondents.

74 I take no view on whether, in the event that rescission is ordered, the appellants have acquired interests under the Bond that they might be entitled to retain by virtue of being purchasers for value or because they acquired a beneficial interest in the Bond Amount. Nor do I take a view on whether the Trades acquired a statutory cause of action that was fully accrued before Zurich asserted its claim for rescission. If they have acquired and are entitled to retain such interests, a constellation of facts will need to be considered to determine how the contracting parties, deprived of the value of these interests, should be made whole. Finally, I also take no view on whether rescission would be able to achieve practical justice between the parties in the circumstances. These are fact-laden questions that are more appropriate for trial than an application.

75 The question referred by the case management judge on this application was simply whether rescission is ever available as a matter of law when the rights of innocent third parties intervene and *restitutio in integrum* is impossible. For the reasons set out above, the answer is yes.

2. Where innocent third parties may suffer prejudice because of the rescission

76 The appellants submit that rescission is not permitted where it causes unavoidable prejudice to innocent third parties. The appellant OZZ Electric argues that rescission must also be refused where it would adversely affect or prejudice an innocent third party such as itself. The appellants Urban Mechanical Contracting et al. and BMO add that the principle of *restitutio in integrum* requires the court to return third parties affected by the contract, such as themselves, to the positions they occupied prior to the contract, in effect protecting them from being adversely affected by the rescission.

77 They also argue that the Credit and Ratification Agreements are interrelated such that the Bonds alone cannot be rescinded on their own as partial rescission is not permitted: *Kingu* . They note that, should a court conclude that the Credit Agreement or the Ratification Agreements are inseparably related to the Bonds, *restitutio in integrum* as between Zurich and the principal fraudsters may amount to impermissible partial rescission.

78 Turning first to the appellants' "prejudice to innocent third parties" argument, Urban Mechanical Contracting et al. and BMO misconstrue the effect of the principle of *restitutio in integrum* on third parties. Rescission unwinds the contractual relationship between the contracting parties: Spence, at p. 289. It does not unwind the contractual relationship with third parties. If it were otherwise, rescission would require a third party that purchased contract property to return it to its original owner in order to restore the third party's pre-contract position. As demonstrated in the line of cases considered above, rescission does not require that outcome.

79 All of the appellants point to the language in Professor Fridman's *The Law of Contract in Canada*, at pp. 762-63, for the proposition that unavoidable adverse effect or prejudice to third parties poses an absolute bar to rescission:

> Rescission is only possible where to grant such remedy would not operate to the prejudice of a third and innocent party, who was not implicated in the original contract and so ought not to be affected adversely by the subsequent, later avoidance of that transaction. If granting rescission would have such an effect, a court of equity will refuse that remedy, leaving the plaintiff to his common-law remedy, that is, damages if it is available in the circumstances. [Emphasis added.]

80 The quoted passage cites cases that articulate the principle in *Clough*, at p. 35, that if "an innocent third party has acquired an interest in the property . . . it will preclude [the innocent contracting party] from exercising his right to rescind."

81 However, it is clear from the discussion of the Canadian cases above that rescission may sometimes be available even if a third party acquires an interest in the contract property which renders *restitutio in specie* impossible. Indeed, Professor Fridman recognized the limitation in the general proposition in his quoted passage. The third case cited by Professor Fridman, at p. 763, n. 185, is Stewart v. Complex 329 Ltd As noted above, this case concerns a third party acquiring an interest in the contract property, which rendered *restitutio in specie* impossible, but rescission was nevertheless ordered.

82 As Professor Stephen M. Waddams points out in *The Law of Contracts*, 7th ed. (Toronto: Thomson Reuters, 2017), at para. 422, while rescission "may be refused" if third party rights are significantly adversely affected, the bars to rescission are "flexible criteria". In any event, a full factual record would be required to determine whether prejudice to the appellants would be unavoidable.

83 I disagree with the appellant's submission that Singh v. Trump,2016 ONCA 747*, leave to appeal refused, [2016] S.C.C.A. No. 548*, stands for the proposition that once third-party rights intervene, the court must dismiss the claim for rescission. The court explained the following, at paras. 157- 58:

> Absent a finding of fraud, in the context of real estate transactions induced by misrepresentation, execution of the agreement has *typically been held* to constitute a barrier to rescission. The appellants have referred the court to more recent judicial support for the view that execution is *a relevant but not decisive factor* in determining whether rescission is available, at least in some limited contexts.

> Even assuming without deciding that rescission could be a remedy available to Mrs. Lee after having executed her transaction, I would nevertheless not grant rescission in the circumstances of this case. It is not apparent from the record what effect rescission would have on innocent third parties such as Mrs. Lee's mortgagor, who was not made a party to these proceedings. Further, the claim was issued more than two years after she closed the transaction. In these circumstances I view the award of damages as constituting the appropriate remedy for Mrs. Lee. [Emphasis added, citations omitted.]

84 Before a court can determine what the rescission remedy would unwind, the possible interconnections among the various agreements must be explored. This is an issue of mixed fact and law that can only be determined by a trial judge upon consideration of the factual matrix and the parties' intentions: De Molestina & Ors v Ponton & Ors, [2001] E.W.H.C. 521 (Comm) (U.K.).

85 For these reasons, I disagree that rescission may never be ordered where it would adversely affect third parties and I disagree that this issue can be determined without consideration of the full factual record in this case.

CONCLUSION

86 In sum, the application judge correctly concluded that, as a matter of law, the rights of innocent third parties are not an absolute bar to rescission in all cases where there is an allegation of fraudulent misrepresentation. The applications were permitted to be brought in the midst of an ongoing action only to determine this narrow issue of law.

87 With the benefit of hindsight, it is unfortunate that this issue was addressed without a full record at trial as the full factual context is necessary to enable the court to make a final determination as to whether rescission is possible.

88 Courts exercise flexibility in determining whether rescission can and should be ordered where it is alleged that fraudulent misrepresentation induced the innocent contracting party to enter into an agreement. In making this determination, courts take into account all the facts and circumstances of the particular case in order to do practical justice between the parties.

89 The parties here have not completed examinations for discovery and there is therefore no full factual record available.

90 The facts and circumstances of the case may determine important issues such as: (a) when Zurich knew or ought to have known of the fraud; (b) whether the Ratification Agreements with the Trades, the Credit Agreement, and the Bonds are inseparably related agreements; (c) if the Ratification Agreements are not inseparably connected to the Payment Bond, whether the Ratification Agreements are void for mutual mistake on the mistaken assumption the Payment Bond was in force and not void for fraud; (d) what knowledge, if any, the appellants had of the

fraud; (e) whether some or all of the appellants are indeed third parties, beneficiaries or assignees and if so, whether they are innocent third parties; (f) whether any of the Trades participated in the alleged fraud; (g) whether any of the claims are derivative of the Obligee ProjectCo; and (h) whether the remedy of rescission is practical and just in cases such as this.

91 Because there is no complete factual record, the application judge's findings of fact are not binding on the trial judge.

92 The narrow question of whether, as a matter of law, rescission may be available where an innocent party was induced to enter a contract by virtue of fraudulent misrepresentation and there are innocent third parties who assert their rights is answered in the affirmative.

93 The appeals are therefore dismissed.

94 On the agreement of the parties, costs of the Bank of Montreal's appeal (C69448) are payable to Zurich in the all-inclusive amount of $50,000and costs of the Trades' appeals (C69440 & C69416) are payable to Zurich in the all-inclusive amount of $60,000.

***Fairburn A.C.J.O.*:**

I agree.

Footnotes

1 Numerous directions were made at various case conferences including allowing BMO and all but one of the Trades to intervene, plead, seek relief in the Rescission Action, and participate in examinations for discovery.

2 Now repealed but continues to apply by virtue of s. 87.3(1) of the Construction Act.

3 For instance, in KBA Canada Inc. v. 3S Printers Inc., 2014 BCCA 117, 59 B.C.L.R. (5th) 273, the legislature implemented a hierarchy of priorities between different securities interests. Equity would have prescribed a different hierarchy between the same security interests. The court held that the scheme ousted equity because the legislature, by establishing the statutory hierarchy for security interests, had intended that hierarchy to apply when those security interests were at issue. The purpose of the statute was to provide commercial certainty and predictability to personal property financing, and "[t]he statutory purpose of replacing those complex and convoluted principles with simple rules that provide certainty and predictability would be undermined": *KBA Canada Inc.*, at para. 24.

4 It is conceivable that a third party which has acquired other interests, including equitable interests, could also have a superior claim: Mitchell McInnes, The Canadian Law of Unjust Enrichment and Restitution, (LexisNexis Canada, 2014), Ch. 34, II.B.2

Tab 4

2010 ONSC 2759
Ontario Superior Court of Justice

Grant v. Saks

2010 CarswellOnt 3431, 2010 ONSC 2759, [2010] O.J. No. 2110, 188 A.C.W.S. (3d) 666

Gary Grant (Plaintiff) and Uri Saks (Defendant)

S.E. Healey J.

Heard: April 23, 2010
Judgment: May 11, 2010
Docket: 08-1218, 09-0891

Proceedings: additional reasons to *Grant v. Saks* (2010), 2010 CarswellOnt 3714, 2010 ONSC 3115 (Ont. S.C.J.)

Counsel: Gary Grant, Plaintiff for himself
M. Farace for Defendant

Subject: Contracts; Civil Practice and Procedure; Public; Torts; Property; Corporate and Commercial

Related Abridgment Classifications

Business associations
V Legal proceedings involving business associations
V.3 Practice and procedure in proceedings involving corporations
V.3.j Transfer to Commercial List
Civil practice and procedure
XXIV Costs
XXIV.8 Scale and quantum of costs
XXIV.8.h Interest
Contracts
XIV Remedies for breach
XIV.5 Damages
XIV.5.d Partnership or joint venture
Professions and occupations
VIII Lawyers
VIII.5 Fees
VIII.5.d Accounting and refunding by lawyer
VIII.5.d.v Miscellaneous

Real property
VII Mortgages
VII.18 Renewal
Remedies
I Damages
I.11 Damages in contract
I.11.d Partnership or joint venture

Headnote

Contracts --- Remedies for breach — Damages — Partnership or joint venture
Parties entered into joint venture with respect to commercial property — Eventually disagreements arose and conflict developed between them — In effort to settle disputes they had settlement meeting with counsel on January 21, 2009, on which date they made written settlement agreement — Plaintiff brought motion for several forms of relief including order enforcing certain terms and conditions contained in settlement agreement that were inserted for his benefit — Motion dismissed — Given potential for rescission, and keeping in mind that this was plaintiff's foremost claim for relief, it would be counterproductive to enforce agreement at this point in time.
Remedies --- Damages — Damages in contract — Partnership or joint venture
Parties entered into joint venture with respect to commercial property — Eventually disagreements arose and conflict developed between them — In effort to settle disputes they had settlement meeting with counsel on January 21, 2009, on which date they made written settlement agreement — Plaintiff brought motion for several forms of relief, including damages for breach of settlement agreement — Motion dismissed — Absent motion for summary judgment, plaintiff can only be awarded damages sought after there had been finding by trial judge that he was so entitled after he or she heard all of evidence in proceeding — Without hearing all of evidence it would not be fair or just for court to make finding that there had been breach of settlement agreement, nor to decide what offended party's damages were and whether remedy should be imposed — The same could be said for plaintiff's request for damages for breach of fiduciary duty and aggravated and punitive damages.
Professions and occupations --- Barristers and solicitors — Fees — Accounting and refunding by solicitor — General principles
Parties entered into joint venture with respect to commercial property — Eventually disagreements arose and conflict developed between them — In effort to settle disputes they had settlement meeting with counsel on January 21, 2009, on which date they made written settlement agreement — Plaintiff brought motion for several forms of relief including accounting of funds held in solicitor's trust account — Motion granted — Plaintiff's current request for accounting was reasonable and was information that would ultimately be required by trial judge.
Real property --- Mortgages — Renewal
Parties entered into joint venture with respect to commercial property — Eventually disagreements arose and conflict developed between them — In effort to settle disputes they had settlement meeting with counsel on January 21, 2009, on which date they made written settlement agreement

— Plaintiff brought motion for several forms of relief including order compelling defendant to renew existing first mortgage — Motion dismissed — No orders should be made that would extend relationship between parties and make their disentanglement that much more difficult in event that rescission was ordered — In event this action was not settled or tried before March 2011, and in event that parties were unable to agree upon and negotiate short extension of mortgage, motion could be brought at that time in order to have issue resolved by motions judge.

Business associations --- Legal proceedings involving business associations — Practice and procedure in proceedings involving corporations — Transfer to Commercial List

Parties entered into joint venture with respect to commercial property — Eventually disagreements arose and conflict developed between them — In effort to settle disputes they had settlement meeting with counsel on January 21, 2009, on which date they made written settlement agreement — Plaintiff brought motion for several forms of relief including order restraining defendant from taking unilateral steps with respect to property — Motion granted — Plaintiff was definitely party to joint venture and so had right to be part of all decisions made with respect to property — Accordingly it was ordered that defendant shall not enter into any commercial transactions or have other dealings with property without written consent of plaintiff, which consent shall not be unreasonably withheld — It was further ordered that in event of deadlock either party may bring motion, on short notice if necessary, for resolution of narrow issue in dispute.

Civil practice and procedure --- Costs — Scale and quantum of costs — Interest

MOTION by plaintiff for enforcement of certain terms of settlement agreement, damages for breach of agreement, accounting of funds in solicitor's trust account, order compelling defendant to renew existing first mortgage, order restraining defendant from taking unilateral steps with respect to property, and interest on award of damages.

***S.E. Healey J.*:**

Nature of the Motions

1 This is a motion by the plaintiff for: 1) an order enforcing certain terms and conditions contained in a settlement agreement that were inserted for his benefit; 2) an order against the defendant for damages for breach of the settlement agreement, breach of fiduciary duty and aggravated and punitive damages; 3) an order for, essentially, an accounting of funds held in a solicitor's trust account; 4) an order compelling the defendant to renew an existing first mortgage on certain terms listed by the plaintiff; 5) an order essentially restraining the defendant from taking any unilateral steps with respect to certain property without the plaintiff's agreement; 6) interest on any award of damages and 7) costs of the motion on a substantial indemnity basis.

2 By cross-motion the defendant seeks an order prohibiting the plaintiff from bringing any further motions in any proceedings before the court without prior leave of the court.

3 I will deal with each of these requests individually.

Enforcement of terms of the settlement agreement

4 The parties entered into a joint venture with respect to a commercial property located at 466 Hume Street in Collingwood ("the property"); eventually disagreements arose and conflict developed between them. In an effort to settle their disputes they had a settlement meeting with counsel on January 21, 2009, on which date they made a written settlement agreement. Significant performance of some of its terms occurred thereafter, as follows:

> (i) a corporation was created to be the venture corporation with the parties as shareholders, which took title to the property in question;
>
> (ii) Laurentian Bank was given a first mortgage registered against the property for an advance of $2,300,000;
>
> (iii) rents were assigned to Laurentian Bank;
>
> (iv) a second mortgage was given to a corporation owned by the defendant;
>
> (v) the plaintiff pledged as security his shares in the venture corporation for promissory notes and related advances by the defendant in the sum of $103,000.

5 The settlement agreement contained additional terms that were carried out, which I will not list here for sake of brevity.

6 Despite these steps having been taken by the parties in accordance with the terms of the agreement, on July 7, 2009 the plaintiff commenced an application by which he sought to set aside or rescind the settlement agreement, or alternatively to have the court insert altered and additional terms into that agreement. By order of Eberhard J. the proceeding has been converted to an action. On April 1, 2010 Howden J. granted leave to the plaintiff to amend his statement of claim, with an order that he serve and file his amended claim within a set time limit. The plaintiff has now done so and I have reviewed that pleading, which is 97 paragraphs in length. The plaintiff is self-represented in this proceeding, and his claim includes a multiplicity of pleas for relief but all related to the following request:

> An order to change the Settlement Agreement to incorporate the relief requested below or to rescind the agreement and make a new "Settlement Agreement" one incorporating the relief requested, as well as changes to any documents that flowed from the Settlement Agreement and that were subsequently signed by the plaintiff.

7 In his amended claim the plaintiff raises factual allegations constituting fraudulent misrepresentation, undue influence and unconscionability, but the primary allegation underpinning the plaintiff's claim is set out on page 9 of his claim as follows:

The Defendant Saks gave false statements at the Settlement Agreement (S.A.) meeting on crucial matters relating to the Laurentian Bank financing commitment that was eventually obtained for the venture to use to close on the property.

8 In essence the plaintiff alleges that at the settlement meeting the defendant deliberately misled him as to the existence and amount of a mortgage commitment from the Laurentian Bank, such that the plaintiff was placed at a disadvantage in the negotiations by not knowing how much surplus funding might be available after the purchase price of $1.8M was paid. The mortgage funding was ultimately for $2.3M, a fact discovered by the plaintiff two days after the settlement meeting but which he alleges was known to the defendant at the meeting. Interestingly, in December 2008 Laurentian Bank had delivered a previous commitment for $2.2M but there is a disagreement about whether the plaintiff was made aware of that potential mortgage as well. On February 2, 2009, which was the closing date for the various transactions, the plaintiff indisputably knew the amount of the funding and signed those documents necessary to give effect to the terms of the settlement agreement reached 13 days earlier.

9 Fraudulent misrepresentation, as defined by G.H.L. Fridman in *The Law of Contract* in Canada, 5th ed., (Toronto: Carswell, 2006) at 287, consists of a representation of fact made without any belief in its truth, with intent that the person to whom it is made shall act upon it and actually causing that person to act upon it. A contract induced by fraud is voidable at the election of the defrauded party. It is not void *ab initio* (from the start). As a result, the court may grant the defrauded party a rescission: See *Morin v. Anger*, [1931] 1 D.L.R. 827 (Ont. C.A.); *McCarthy v. Kenny*, [1939] O.J. No. 257, 3 D.L.R. 556 (Ont. H.C.); *Clark v. Coopers & Lybrand Consulting Group* [1999 CarswellOnt 3723 (Ont. S.C.J.)], *supra*; G.H.L. Fridman, *supra*, 293 -294. Likewise, a contract made under undue influence: *IMG Canada Ltd. v. Melitta Canada Inc.*, [2001] O.J. No. 2331, 18 B.L.R. (3d) 78 (Ont. S.C.J.); John D. McCamus, *Law of Contracts*, (Toronto: Irwin Law, 2005) at 402, or a contract that is unconscionable is voidable and can be remedied by rescission: John D. McCamus, *supra*, at 418.

10 The plaintiff argues that until the settlement agreement is either "changed" or rescinded, it is an enforceable agreement to which the parties should be held, and therefore the relief that he seeks on this motion should be granted. Specifically, the plaintiff requests that this Court order that money held in trust be split equally between the parties, that the defendant pay unpaid accounts on the project, that the defendant pay him a final loan payment in the amount of $7,000 and that the defendant pay him the sum of $35,600 to reimburse him for legal fees that the plaintiff has paid on behalf of the venture.

11 The plaintiff is correct that the settlement agreement is currently an enforceable contract. However, the discretion as to whether its terms should be enforced remains with the court in the face of a request to "unwind" or rescind the terms of that agreement.

12 As McCamus states at 337 - 338, discussing rescission:

> In essence the remedy of rescission involves an unwinding or setting aside of the contractual relationship between the parties. Upon rescission, the as yet unperformed obligations of the party become unenforceable. With respect to obligations that have been performed, an agreement that is subject to the remedy of rescission is voidable rather than void *ab initio*, with the consequence that the agreement is considered to be an enforceable one until a rescission of the agreement is achieved. Upon rescission, however, the parties are to be restored to their initial pre-contractual position by requiring the restoration of benefits transferred under the agreement. In this sense, then, the rescission of the contract in question has a retrospective or *ab initio* effect.

See also: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.); *Barton v. Toronto Argonaut Football Club Ltd.*, [1982] 1 S.C.R. 666 (S.C.C.).

13 There is the further problem that the plaintiff knew of the alleged misrepresentation at the time that he consented to all of the transactions set out above following the signing of the settlement agreement. Just as a party may elect to rescind a agreement on the basis of a misrepresentation, they may elect to affirm the transaction, which may be irrevocable: *Kupchak v. Dayson Holdings Ltd.*, [1965] B.C.J. No. 153, 53 D.L.R. (2d) 482 (B.C. C.A.); *Guarantee Co. of North America v. Gordon Capital Corp.supra*. In *Country Stop Donuts Ltd. v. Great West Life Assurance*, [1996] O.J. No. 3521, 15 O.T.C. 172 (Ont. Gen. Div.), the Court refused to grant the plaintiff a rescission of a lease where the plaintiff previously did not take the step of repudiating the lease when the breach was taking place, but opted to try to enforce it, thereby affirming the contract. In the case at hand, there has been part performance and given that this part performance took place after the plaintiff became aware of the alleged misrepresentations, the plaintiff may very well be held to the contract. Further, and more importantly, by seeking to enforce the contract the plaintiff may be taken as electing to affirm the transaction, therefore barring rescission as found in *Country Stop Donuts Ltd. v. Great West Life Assurance*, *supra*.

14 Furthermore, where the conduct of the injured party deprives him or her of the right of rescission of a contract induced by fraud, or where restitution is found impracticable, he or she may still be entitled to recover damages: *McCarthy v. Kenny*, *supra*.

15 It only stands to reason that if this court grants the relief requested by the plaintiff, and the trial judge orders rescission of the agreement, there will be that many more transactions occurring under the agreement for the court to have to unwind in order to put the parties back to their pre-agreement position. If rescission is granted by the courts the plaintiff may have to return any benefit that he received under the motion. Alternatively, the court may rule in favour of the agreement's validity and find no reason to do anything other than enforce it, or may find that the plaintiff by his conduct has affirmed the agreement. But these decisions can only be made on a full record created

by the trial judge hearing and assessing all of the evidence. Given the potential for rescission, and keeping in mind that this is the plaintiff's foremost claim for relief, it would be counterproductive to enforce the agreement at this point in time and I decline to do so.

16 Having made the above decision it is not necessary for me to deal with the defendant's main argument on the motion, which was that all of the relief requested as set out in paragraph 10 above, with the exception of the request for payment of $7,000, was already ruled upon by Eberhard, J. on October 15, 2009. It is true that a comparison of the notice of motion and supplementary notice of motion that were before Eberhard, J., together with the motion before this court, indicates that the same or virtually the same relief was requested. Eberhard J. determined that the plaintiff's motion could not succeed because the allegation that the contract was invalid could not be determined without an assessment of credibility in relation to the conflicting evidence on the point in question, and she ordered a trial of the issue. The plaintiff argues that there is no duplicity of proceedings between motions because the request to Eberhard J. was to set aside the settlement agreement, whereas the request on his current motion is to seek compliance with the terms of the agreement. This is a false distinction. The issue in this proceeding is whether the agreement stands or falls based upon the findings made by a trial judge on disputed facts and his or her application of the relevant law discussed above. Justice Eberhard decided, for good reasons, that that central issue should run the course of an action. To decide otherwise would be to overturn her ruling, which this court has no jurisdiction to do.

17 It is ordered that paragraph 1 of his motion is dismissed.

Order for damages

18 To request this relief on an interim motion is akin to bringing a motion for summary judgment and asking the motions judge to make a determination that there is no genuine issue for trial. This is problematic for two reasons: this is not a motion for summary judgment, and further the plaintiff would have no ability to bring such a motion under the *Rules of Civil Procedure* given that no statement of defence had been delivered at the time that this motion was argued.

19 Absent a motion for summary judgment, the plaintiff can only be awarded the damages sought after there has been a finding by a trial judge that he is so entitled after he or she hears all of the evidence in the proceeding. Without hearing all of the evidence it would not be fair or just for this court to make a finding that there has been breach of the settlement agreement, nor to decide what the offended party's damages are and whether a remedy should be imposed. The same can be said for the plaintiff's request for damages for breach of fiduciary duty and aggravated and punitive damages. The cases referred to by the plaintiff in argument were trial decisions. It is ordered that paragraph 6 of his motion is dismissed.

Accounting of funds in solicitor's trust account

20 Again the defendant asserts that this same request was made in the supplementary notice of motion at paragraph 15 that was before Eberhard J. What the plaintiff seeks now is an order requiring disclosure and full details of the present status of the $80,000 of the venture's money that is held in the trust account of the defendant's lawyer Martin Houser, and an order releasing the balance equally to the two parties. This is a different request than that made in the motion returnable before Eberhard, J., which was that the sum of $80,000 be transferred from one lawyer's trust account to that of another.

21 The plaintiff's current request for an accounting is reasonable and is information that will ultimately be required by the trial judge. I hereby order that the defendant sign any direction or authorization that may be required by Martin Houser in order to immediately provide to the plaintiff an accounting of all funds received and disbursed from that trust account since its inception, to be updated once every three months thereafter pending trial. The plaintiff is to provide a copy of this endorsement to Mr. Houser together with a request that he provide the accounting directly to the plaintiff, together with a copy to the defendant or his counsel as the defendant may direct.

22 The plaintiff's request for disbursement of those proceeds suffers from the same problems with the requests made in paragraph 1 of his notice of motion and detailed in paragraph 15 above. It is ordered that the second clause in paragraph 7 of his motion is dismissed.

Renewal of first mortgage

23 The parties to this mortgage are Laurentian Bank of Canada as charge and 466 Hume Street Inc. (the venture corporation) as chargor. The mortgage is for a term of 24 months, the last payment date being March 1, 2011. The plaintiff seeks an order that this mortgage be renewed on the same terms, conditions and guarantees as are on the existing mortgage but with as long an amortization period as possible and for a term of no less than 5 years.

24 For the same reasons set out in paragraph 15 above no orders should be made that would extend the relationship between the parties and make their disentanglement that much more difficult in the event that rescission is ordered. In the event this action is not settled or tried before March 2011, and in the event that the parties are unable to agree upon and negotiate a short extension of this mortgage, a motion could be brought at that time in order to have the issue resolved by a motions judge. It is ordered that paragraph 8 of his motion is dismissed.

No unilateral steps in relation to the property

25 Under this heading the plaintiff requests that an order be made that the defendant treat the plaintiff in a respectful manner and recognize the plaintiff's rights as a 50% owner of the project. First, the parties' respective ownership interest in the venture is a disputed issue in this litigation. Second, this court has no jurisdiction to dictate the tone of interpersonal relationships except where

an individual's behaviour contravenes limits prescribed by statute or common law, which has not yet been proven in this case. It is ordered that the first sentence in paragraph 9 of his motion is dismissed.

26 It appears on the record that the defendant has been making decisions related to insurance and roof repairs without the consent of the plaintiff given the lack of constructive communication between them. While the decisions made seem to have protected rather than jeopardized the plaintiff's interests, he is definitely a party to the joint venture and so has a right to be part of all decisions made with respect to the property. Accordingly it is ordered that the defendant shall not enter into any commercial transactions or have other dealings with the property without the written consent of the plaintiff, which consent shall not be unreasonably withheld. It is further ordered that in the event of a deadlock either party may bring a motion, on short notice if necessary, for a resolution of the narrow issue in dispute.

Interest on damages

27 As no damages can be awarded at this stage, neither can interest. It is ordered that paragraph 11 of the plaintiff's motion is dismissed.

All other aspects of the plaintiff's motion dismissed

28 The plaintiff from the outset advised that he was not proceeding with argument on paragraphs 2, 3 and 5 of his notice of motion, and that he might argue for the relief requested in paragraph 4, which he did not do. The issues raised in paragraphs 3 and 5 have been previously decided by Howden J. in his endorsement released April 1, 2010. Paragraphs 2 and 4 are dismissed, but paragraph 4 is dismissed without prejudice to the plaintiff's right to seek an order for discovery of a non-party, if necessary in the future.

Defendant's cross-motion

29 The defendant moves for an order pursuant to Rule 37.16 to prohibit the plaintiff from making further motions in the proceeding without leave of the court. In order to make such an order the rule provides that the judge or master must be satisfied that the other party is attempting to delay or add to the costs of the proceeding or otherwise abuse the process of the court by a multiplicity of frivolous or vexatious motions.

30 This is not yet a case in which the plaintiff has brought a myriad of interlocutory motions. Although his present motion, as well as the one before Eberhard J., were ill-conceived in that the chances of success were not strong given the *Rules of Civil Procedure* and the state of the law, I appreciate that the plaintiff is self-represented and is attempting to navigate his way through a lawsuit on his own due to his inability to afford legal counsel. I note that he did successfully bring a motion, which was heard by Howden, J. to amend his pleading and add a party. In such

circumstances it is both premature and ill-advised to restrict the plaintiff's right to seek assistance from the court *where the situation entitles him to possible relief.* In this endorsement I have, for example, referred twice to circumstances in which the plaintiff may need to avail himself of the court's assistance to resolve disputes while awaiting trial. Accordingly I am not satisfied that the plaintiff's behaviour in the litigation is such that it should invoke Rule 37.16 and accordingly it is ordered that the defendant's motion is dismissed.

31 However, the plaintiff is not immune to an order that he pay the defendant's costs where he brings unsuccessful motions, as has overwhelmingly been the case with respect to the present motion. This is not a case of divided success; the plaintiff's motion took the majority of the day to be argued and was certainly the greatest focus of the material filed, whereas the defendant's response and cross-motion, argued at the same time, were considerably more concise.

Costs

32 Failing an agreement on costs with respect to these motions, the parties may make written submissions no longer than 2 pages in length with cost outlines attached, to be delivered to me at my chambers in Barrie. The plaintiff's submissions are due 7 days, and the defendant's 14 days, from the release of this endorsement.

Order accordingly.

End of Document

Tab 5

2018 ONSC 1563
Ontario Superior Court of Justice

846-6718 Canada Inc. v. 1779042 Interior Ltd

2018 CarswellOnt 3599, 2018 ONSC 1563, 295 A.C.W.S. (3d) 211

846-6718 Canada Inc. (Plaintiff) and 1779042 Interior Ltd, 1447735 Interior Inc. and John Ackerman (Defendants)

P. Kane J.

Heard: March 21, 2017; March 22, 2017; March 23, 2017; March 24, 2017; March 27, 2017; March 28, 2017; March 29, 2017; March 30, 2017; March 31, 2017; April 18, 2017; April 20, 2017
Judgment: March 7, 2018
Docket: Ottawa 14-60497

Counsel: H. Witteveen, for Plaintiff
J.W.K. Griffiths, for Defendants

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Property; Torts
Related Abridgment Classifications
Business associations
I Nature of business associations
I.3 Nature of corporation
I.3.b Distinct existence
I.3.b.i From owner
I.3.b.i.B Lifting the corporate veil
I.3.b.i.B.1 Fraud or improper conduct
Real property
V Landlord and tenant
V.4 Premises
V.4.f Damage to premises
V.4.f.i Negligence
Torts
VIII Fraud, deceit, and misrepresentation
VIII.1 Fraudulent misrepresentation [civil fraud, deceit]
VIII.1.c Particular relationships
VIII.1.c.ii Sale of business
Torts

VIII Fraud, deceit, and misrepresentation
VIII.3 Negligent misrepresentation [Hedley Byrne principle]
VIII.3.c Particular relationships
VIII.3.c.ii Sale of business

Headnote

Torts --- Fraud and misrepresentation — Fraudulent misrepresentation — Particular relationships — Sale of business — Inducement

Plaintiff entered into asset purchase (APA) and lease of bar and restaurant business from two corporate defendants — Defendants knew that requirement that plaintiff, as condition for purchase of assets was to sign five year lease of premises would rely upon representation premises and fixtures were in good state of repair — Plaintiff sought rescission of asset purchase, return of purchase price, termination of lease, damages and judgment for $275,000 together with interest since issuance of claim — Action granted — Plaintiff, relying upon above representation, entered into APA and lease — Misrepresentation as to repair was fraudulent — Defendant did not limit its undertaking to ensure premises and fixtures were in good repair to date of closing, as it did with equipment sold, indicating those categories of premises assets to be treated differently — Once vendor breaks its silence in stating status of an element, doctrine of caveat emptor not available as defence.

Torts --- Fraud and misrepresentation — Negligent misrepresentation (Hedley Byrne principle) — Particular relationships — Sale of business

Plaintiff entered into asset purchase (APA) and lease of bar and restaurant business from two corporate defendants — Defendants knew that requirement that plaintiff, as condition for purchase of assets was to sign five year lease of premises would rely upon representation premises and fixtures were in good state of repair — Plaintiff sought rescission of asset purchase, return of purchase price, termination of lease, damages and judgment for $275,000 together with interest since issuance of claim — Action granted — "Special relationship" existed as defendants knew or should have known that plaintiff would foreseeably rely upon its representation as to good state of repair of premises and fixtures — Failure to divulge highly relevant information can be pertinent consideration in determining whether particular misrepresentation negligent — Omission can be considered negligent when considered in context of other express positive misrepresentations - in contrast with situations where no representations made at all — Defendant did not limit its undertaking to ensure premises and fixtures were in good repair to date of closing, as it did with equipment sold, indicating those categories of premises assets to be treated differently — Once vendor breaks its silence in stating status of an element, doctrine of caveat emptor not available as defence.

Business associations --- Nature of business associations — Nature of corporation — Distinct existence — From owner — Lifting the corporate veil — Fraud or improper conduct

Plaintiff entered into asset purchase (APA) and lease of bar and restaurant business from two corporate defendants owned by A — Plaintiff sought rescission of asset purchase and judgment for $275,000 against A personally together with interest since issuance of claim on grounds of

fraudulent and negligent misrepresentation — Action granted only against corporate defendants — no evidence that A acted beyond his capacity as officer of defendant corporations or that he personally misrepresented state of repair of premises and fixtures.
Real property --- Landlord and tenant — Premises — Damage to premises — Negligence
Plaintiff entered into asset purchase (APA) and lease of bar and restaurant business from two corporate defendants owned by A — Plaintiff sought rescission of asset purchase and judgment for $275,000 against A personally together with interest since issuance of claim on grounds of fraudulent and negligent misrepresentation — Defendant landlord corporation counterclaimed for $123,955 damages for repairs to plumbing — Counterclaim dismissed — Amount claimed was simply total of two estimates with no proof work done — Estimates duplicated much of same plumbing work and fixtures in counterclaim — Landlord failed to establish damages it alleged were caused by plaintiff's breach of lease to properly heat premises.

APPLICATION for rescission of agreement for asset purchase on for breach of contract or fraudulent and negligent misrepresentation.

***P. Kane J.*:**

1 This trial involves the plaintiff's purchase of the assets of a bar and restaurant business, certain problems as to that asset purchase and numerous problems involving the premises where the business continued to be operated. The plaintiff seeks rescission of the asset purchase, return of that purchase price, termination of the lease, damages and judgment for $275,000 together with interest since issuance of this claim.

2 The defendant 1447735 Ontario Inc. (the "Vendor") owned and operated a restaurant and bar business under the name and style of "Buds On The Bay" (hereinafter referred to as "BOTB" and the "Business") in a Premises located at 17 Broad St., Brockville Ontario (the "Premises").

3 The Premises was owned by the defendant 1779042 Interior Ltd. (the "Landlord").

4 The plaintiff purchased the physical assets of the Business and the right to carry on that commercial activity under its operating name, BOTB, (the "Assets"), pursuant to an asset purchase agreement (the "APA") from the Vendor.

5 Mr. Ackerman is the directing mind of both defendant corporations. He made the Vendor's Asset sale in the APA conditional upon the plaintiff lease of the Premises from the Landlord. The terms of the lease restricted the use of the Premises to a restaurant, which was its then existing use.

6 The plaintiff:

(a) purchased the Assets for $359,000 from the Vendor pursuant to the APA under which it paid $15,000 as a deposit, $200,000 on closing and $6,000 per month towards the remaining $144,000 balance;

(b) leased the Premises from the Landlord in order to carry on the Business pursuant to which it paid the Landlord monthly rent, HST and realty taxes which combined totalled $10,101 per month; and

(c) operated the Business in the Premises from mid-May 2013 until early April 2014 and then ceased operating the Business due to concerns as to the structural integrity, safety and state of disrepair of the Premises which included repeated instances of waste water backing up inside the Premises and water infiltration into the Premises.

7 The plaintiff made all Asset purchase and lease payments from May 2013 to March 2014 and then announced it would pay no more until the Premise issues were remedied, failing which it cease operating the business and seek relief in this proceeding.

8 The defendants in response took possession of the Assets, the Premises and continued thereafter to operate the Business in the Premises.

9 The pleadings are broader however the parties at the conclusion of trial essentially seek determination of the following issues:

(a) whether the plaintiff is entitled to rescission of APA and recover damages in the amount of $275,000, being the amount it had paid under the APA by March 31, 2014 towards the purchase price of the Assets;

(b) whether the plaintiff is entitled to rescission or termination of the Lease;

(c) whether the plaintiff is entitled to $275,000 damages against the Landlord and Mr. Ackerman; and

(d) whether the Landlord by counterclaim is entitled to damages against the plaintiff in the amount of $123,955, being its estimated cost to repair and replace bathroom fixtures and water pipes allegedly damaged due to the lack of heating by the plaintiff during its possession of the Premises during the winter of 2013/2014.

STATEMENT OF CLAIM

10 The plaintiff in its Statement of Claim issued on April 2, 2014, in anticipation of the defendants refusal to remedy the issues as to the equipment and Premise, sues the defendants in tort and contract. The plaintiff alleges the defendants are liable based upon:

(a) breach of contract;

(b) breach of an express or implied warranty;

(c) deceit;

(d) negligence;

(e) fraudulent misrepresentation; and

(f) negligent misrepresentation.

11 In the claim, the plaintiff seeks:

(a) interim injunctive relief to prevent the Landlord and Vendor enforcing their rights under the Lease and APA respectively prior to the trial decision. This interim relief was not pursued before trial;

(b) in the alternative, an order directing the Landlord and/or the Vendor to carry out such repairs as are necessary to restore the plaintiff to safe occupation of the Premises leased within a reasonable period of time and relieving the plaintiff of any obligation to pay rent or instalments on the promissory note pending completion of this work. This head of relief was not pursued at trial; and

(c) a declaration that Mr. Ackerman is the directing mind of the Landlord and the Vendor and is personally responsible for the above defaults of each.

12 The claim alleges that the Vendor:

(a) breached the express terms of the APA that the Premises and fixtures at the date of closing of the transaction were in a good state of repair, which was not the case as:

i. the condition of the Premises as reflected in the WESA and Belec Reports, were in a state of disrepair which had existed long before and on closing; and

ii. the plaintiff was required to carry out multiple repairs and replacement of equipment following closing.

(b) in addition or in the alternative, there was an implied warranty that the Premises and equipment leased and sold were fit to operate the normal business of BOTB, which implied they breached the warranty;

(c) in addition or in the alternative, the Vendor was or should have been aware of the seriously deteriorated but non-apparent state of the equipment, fixtures and the premises which would

not be known to or discovered by the plaintiff. The Vendor accordingly had a duty to warn the plaintiff, failed to do so and is guilty of deceit; and

(d) in addition or in the alternative, the Vendor represented that the equipment, fixtures and the Premises were in a good state of repair when it knew or should have known this was not true and that the plaintiff might rely on and did rely these representations to its detriment. The vendor knew the representations were untrue, or was reckless as to their truth and is therefore liable for fraudulent or negligent.

13 The plaintiff at trial submitted that:

(a) the Landlord had breached its covenant to provide the plaintiff with quiet enjoyment of the Premises;

(b) the Landlord had breached section 9 of the Lease requiring that the Premises and fixtures upon commencement of the Lease be in good working order;

(c) the Premises and fixtures in fact required extensive repairs and/or replacement before they could be safely used for their intended purposes;

(d) the Landlord breached its obligation to provide the plaintiff with quiet enjoyment and failed to rectify the problems arising from water infiltration and the failure of various mechanical systems in the Premises thereby materially impairing the plaintiff's ability to operate the Business in the Premises; and

(e) the Vendor breached its contractual obligation in the APA by failing to:

i. transfer ownership of the Assets to the plaintiff;

ii. ensure that the Assets including equipment was in good working order; and

iii. ensure that the Premises and its fixtures were in a good state of repair.

14 The plaintiff alleges that Mr. Ackerman:

(a) is the governing mind of the Landlord and as such, the Landlord is fixed with the same knowledge and the liability flowing from such knowledge as the Vendor;

(b) as the directing mind of the defendants' corporations, authored all of the breaches by the Vendor and the Landlord;

(c) the corporate veil of those corporations should therefore be pierced; and

(d) Mr. Ackerman should be held personally liable for the misconduct by those corporations against the plaintiff.

15 The plaintiff in seeking rescission of the APA, the Lease and damages equivalent to the $275,000 it paid under the APA alleges that:

(a) the defendants were negligent in not disclosing known issues as to the Assets and the Premises; and

(b) made dishonest, negligent, misleading misrepresentations and withheld known information as to the Assets and the Premises which were relied upon by the plaintiff to its detriment but for which, the plaintiff would never have entered into the AGA and Lease contracts.

16 The plaintiff in seeking "rescission" of the Lease does not seek return of the 11 months of rent it paid thereunder which totalled $111,111.

17 The plaintiff at the start of trial withdrew its claims for lost Business income and expenses caused by the defendants and its alternative remedy to oblige the Landlord and/or the Vendor to repair and restore the Premises to permit the plaintiff's safe occupation.

Statement of Defence

18 The defendants in their defence and at trial allege and submit:

(a) the Vendor fulfilled its obligation in the APA to ensure the Assets were in good working order on the date of closing and that obligation was a condition precedent to closing which merged on and did not extend beyond closing;

(b) the Premises was leased on an "as is" condition with no promise, representation or undertaking as to equipment and fixtures binding on the Landlord;

(c) the plaintiff breached the Lease by failing to heat and prevent damage to the Premises and is responsible for any complaints it had as to the Premises;

(e) the plaintiff during the trial acknowledged its principle complaints were as to the Premises and not the Assets purchased. The plaintiff accordingly is limited to claims against the Landlord, which does not extend to the APA or liability against the Vendor; and

(d) there is no basis to pierce the corporate veil of either defendant corporation and determine liability against Mr. Ackerman.

Counterclaim

19 In argument at the conclusion of trial, the only counterclaim sought by the Landlord was $123,955 in damages, being the estimated cost to repair plumbing and bathroom fixtures allegedly

damaged by the plaintiff's failure to properly winterize those pipes and fixtures for the winter of 2013/2014.

Background

20 The evidence is clear that Mr. Ackerman is the directing mind of the defendant corporations. He, in addition, is:

(a) the President of both defendant corporations;

(b) the only Director and shareholder of the Vendor; and

(c) is a Director of the Landlord Corporation. He stated his wife may be a second Director of the Landlord. The shares of the Landlord are owned equally by Mr. and Mrs. Ackerman.

21 There are many troubling aspects and events regarding the parties, the Assets sold, the Premises leased and the testimony of several witnesses as to this conflict in this small Ontario community.

22 Mr. Ackerman had worked in the Business since the early 1990s. He incorporated the Vendor and caused it to buy the Business in 2001 which it operated in the Premises until the plaintiff's involvement in 2013. Mr. Ackerman in 2013 had full knowledge as to the state of the Business, its assets and the state of the Premises.

23 Mr. Ackerman caused the Landlord Corporation to buy the Premises in 2008. In order to do that, he caused the Vendor, as owner of the Assets and the Business, to finance that purchase of the Premises for the Landlord/owner, namely the Vendor borrowed the $793,000 purchase price from its institutional lenders which was then advanced to the Landlord to pay its purchase price which it then owed to the Vendor as reflected in the Vendor's 2010 financial statements.

24 Mr. Ackerman testified that the Vendor then rented the Premises from the Landlord.

25 The resulting long term debt thereby incurred for the Landlord's purchase of the Premises consisted of a mortgage and three promissory notes from the Vendor to institutional lenders. The total monthly payments under those four loans by the Vendor was $7,500. That is the same base monthly rent later charged by the Landlord to the plaintiff under the Lease.

26 There is nothing improper as to the above structuring of debt. This structure of the Vendor borrowing from its lenders for the Landlord's purchase and the Vendor then continuing to finance that debt is unusual however as:

(a) the Landlord benefited in becoming owner of the Premises for consideration that was paid by Vendor, a separate corporation;

(b) the Vendor borrowed and became indebted for that purchase price and was liable for the $793,000 paid and was liable to pay those loans in the amount of $7,500 monthly to its lenders;

(c) Mr. Ackerman testified the Vendor for its occupancy of the Premises was obligated for approximately $26,000 annual rent to the Landlord, which was the amount of the annual decrease in the Landlord's indebtedness to the Vendor. He stated, however, that such rent was not paid directly by the Vendor to the Landlord but was instead off-set by the reduction in the same amount ($26,000) of the Landlord's indebtedness owed to the Vendor;

(d) the Vendor, under the heading "Investing Activities", in its financial statements shows the $793,00 as owing to it by the Landlord and decreasing (paid down) annually starting in 2010 by some $26,000;

(e) the $26,000 annual decrease of the Landlord's opening $793,000 liability owed to the Vendor is well below the $90,000 ($7,500 X 12) annual payments the Vendor was paying to its lenders and despite that, the Landlord's liability owed to the Vendor decreases annually; and

(f) the Vendor accordingly had rented occupation of the Premises but continued by making higher monthly loan payments to subsidize the Vendor's purchase and ownership of the Premises.

27 The point is that Mr. Ackerman was directing the Vendor and non-owner of the Premises to finance that purchase and pay the ongoing borrowing costs, which exceeded the rent charged, as if the Vendor was a beneficial or joint owner of the property.

28 The court acknowledges these corporate defendants are separate legal entities, as relied upon by the defendants in their defence of this proceeding. They were not on the above facts, however acting as such, and in fact were acting as if joint partners as to the Premises, as evidenced by the Vendor's $90,000 annual loan payments which were well in excess of the $26,000 annual rent. There joint relationship as to the Premises is further evidenced in other ways relevant to the issues in this proceeding.

29 Mr. Ackerman in approximately 2012 decided he no longer wished to operate the Business. He accordingly marketed the sale of the Business on behalf of the Vendor via Internet. Mr. Ackerman's posted the Vendor's business as: "Successful Waterfront Restaurant And Bar In Brockville For Sale".

30 The plaintiff responded to that representation and entered into negotiations with Mr. Ackerman.

31 Although not determinative of the issues in this trial, Mr. Ackerman knowingly misrepresented the financial viability of the Vendor's Business. The Vendor had been operating

at a loss for several years, despite his personal infusion of capital as a shareholder to continue its operation.

32 The Vendor's 2009 to 2012 annual financial statements contradict Mr. Ackerman's representation to the plaintiff that the Vendor in 2013 was selling a "Successful" business. Those annual statements record the following annual net losses and slight profit in 2012:

	Net (Loss)/Profit	Deficit End of Year
2009	($22,806)	($107,085)
2010	($88,788)	($129,891)
2011	($61,508)	($323,187)
2012	$14,791	$323,178

33 Those statements record the Vendor's long-term debt, excluding current liabilities, owed to its lenders and the indebtedness owed to Mr. Ackerman as its sole shareholder as follows:

	Long Term Debt	Amount Owed To Mr. Ackerman
2009	$724,520	$152,717
2010	$703,246	$152,717
2011	$657,414	$196,776
2012	$617,016	$196,776

34 Mr. Ackerman in testifying acknowledged the Business was operating at a loss. He testified that the financial health of the Business in 2012 was not good, was struggling, necessitated that he delay cashing his paycheque on occasion and limited the increase in his salary to $100 over 20 plus years.

35 Mr. Ackerman testified that several parties before the plaintiff responded to his Vendor sale posting, however, their initial interest ended upon disclosure of the Vendor's financial performance statements.

36 Ms. Frenette as part of the initial negotiations requested Mr. Ackerman to provide the Vendor's financial records.

37 The plaintiff sent a letter of intent to Mr. Ackerman on February 11, 2013 offering to buy the Assets of the Vendor and lease the Premises from the Landlord for stated amounts with the terms thereof to be incorporated into a final agreement of purchase and sale. The plaintiff undertook, in the event the acquisition was not completed, to keep confidential the financial disclosure requested as to the Vendor's Business.

38 Mr. Ackerman, knowing that financial disclosure by the Vendor had terminated the interest of other prospective purchasers, refused the plaintiff's financial disclosure request. He responded

that there would be no disclosure of the Vendor's financial records until all essential elements of the APA and the Lease had been agreed upon and the plaintiff had submitted a signed offer with a deposit. The plaintiff proposed a $5,000 APA deposit. Mr. Ackerman insisted upon a $15,000 deposit before providing financial disclosure by the Vendor. That $15,000 is recorded as a deposit in the APA, with the associated law which normally results in its forfeiture in the event the purchase does not proceed.

39 The operating loss position of the Vendor and its financial viability was likely to worsen with Mr. Ackerman's total rent requirement of the Landlord of $10,101 per month.

40 The Vendor did not pay but recorded the following annual rent for its lease of the Premises to the Landlord:

2009	$64,832 (rent and undefined occupancy costs)
2010	$27,600
2011	$26,600
2012	$26,300

41 The annual rental cost of $121,212 negotiated with the plaintiff occurred prior to disclosure of the Vendor's 2009 to 2012 financial statements demonstrating the above annual "cost" of some $26,000, despite Mr. Ackerman knowing that the Vendor, under his management, was operating with an annual deficit. That was an increase in the Business';

(a) annual rent by some $95,000 ($121,000 - $26,000); and

(b) annual operating expenses of some 31,000 ($121,000 - $90,000 being the Vendor's prior monthly borrowing costs of the Landlord's purchase price).

42 It was almost as if Mr. Ackerman was structuring the lease costs, for the Business already operated at a loss, as if to ensure its financial failure.

43 In response to the argument that no Vendor and Lessor would so financially risk default in payment of the balance of the Asset purchase price and likely default under the Lease, the Landlord, the Vendor and Mr. Ackerman bore little if any risk as:

(a) the Vendor by closing of the APA had received $215,000 thereby improving its financial position considerably;

(b) the Vendor, pursuant to the APA, received a General Security Agreement charging the Assets for the two year term of the promissory note until payment of the $144,000 balance of the purchase price was received; and

(c) the Landlord in the interim was receiving the greatly escalated monthly rent on the five year Lease and could retake possession of the Premises upon default in payment, seize the Assets sold and put the plaintiff out of business.

44 There likely, in addition, would be other unsuspecting subsequent purchasers like the plaintiff when and if the Landlord and the Vendor took possession of the Premises and the Assets in the event of default by the plaintiff.

45 The plaintiff however made all payments to the Landlord and Vendor until April, 2014.

46 The court recognizes the legal principle of *caveat emptor* and the plaintiff's resulting obligation to perform due diligence, which in this case required it obtain and examine the Vendor's financial statements which reveal Mr. Ackerman's intentional misrepresentation as to the "successful" business for sale.

47 The plaintiff's obligation in the APA to proceed and close its purchase of the Assets was not made conditional upon its receipt and consideration of the Vendor's financial statements regarding the Business.

48 The intentional misrepresentation by Mr. Ackerman as to the financial "success" of the business being sold is relevant in considering his credibility and the many contradictions between his and the plaintiff's testimony during this trial.

49 The plaintiff asked for the last five years of financial statements. Upon completion of negotiations as to the terms of purchase and sale, the APA and the Lease, Mr. Ackerman on April 12, 2013 provided the plaintiff with the Vendor's annual financial statements for the years 2009 to 2012, but not for the year ending March 31, 2013, as requested. Mr. Ackerman replied the 2013 financial statements were not yet completed. Instead of providing the Vendor's internal 2013 financial records of sales and expenses, Mr. Ackerman instead offered to provide the Vendor's 2008 financial statements, reflecting six-year-old financial activity. Ms. Frenette was then out of the country for several weeks and Mr. Ackerman was dealing with her daughter in the interim.

50 Mr. Ackerman was not going to risk again losing this purchaser by disclosure of the Vendor's available financial records for the period of April 2012 to March 2013 in advance of closing.

51 Ms. Frenette on behalf of the plaintiff visited the Business in the Premises. Her initial visit was short. She attended several times later on, often unannounced and simply as a customer to observe. She spoke to Mr. Ackerman on some of these occasions. Her daughter who has business experience and works with her mother attended on behalf of the plaintiff before closing to review the list of Assets attached as Schedule A to the APA as Ms. Frenette was out of the country at the time.

52 The APA and the Lease transactions closed on May 18, 2014. The plaintiff continued to carry on the Business under the name BOTB in the Premises until early April, 2014.

Vendor's Breach of APA

53 The APA states that the assets sold or assigned include:

> (a) all assets used by the Vendor in its operation of the Business carried on under the name of Buds on the Bay ("BOTB");
>
> (b) all equipment chattels and software owned or leased by the Vendor for the Business including all restaurant equipment located in the Premises, including but not limited to the property listed as Schedule A;
>
> (c) all inventories including food and beverage supplies;
>
> (d) all rights of the Vendor in all contracts dealing with the Business; and
>
> (e) all intellectual property owned or used by the Vendor in connection with the Business, including logos, trademarks, trade names, such as BOTB, software and goodwill (the "Assets").

54 The Vendor through Mr. Ackerman breached the above provisions in failing to transfer or assign assets used in the Business. The assets used in the Business included an ATM machine which Mr. Ackerman continued to operate in the Premises after closing and earned an income from instead of the plaintiff. The assets used in the Business also involved a jukebox in the restaurant. The APA contained a list of assets excluded from those sold ("Excluded Assets"). The ATM machine and the jukebox are not in the Excluded Asset list.

55 The APA required the Vendor to use its best efforts to obtain the assignment of any assets used in the Business but not owned by the Vendor. Mr. Ackerman testified that obligation as to these two pieces of equipment was inapplicable, as the Vendor had purchased but not paid for the ATM machine which it therefore did not own, but continued to operate for a profit post-closing and then unilaterally removed from the Premises. He testified the Vendor did not own the jukebox, which ignores its obligation to arrange for its assignment to the plaintiff on closing.

56 The APA:

> (a) states the Vendor will provide the plaintiff with access to its books and records after the signing of the APA;
>
> (b) states the Vendor will be liable for all pre-closing expenses and liabilities associated with the running of the Business including and all monies due under contract, for two years; and

(c) warrants there are no Vendor liabilities of any kind, whether or not accrued or determinable, for which the plaintiff may become liable on or after closing.

57 Mr. Ackerman was aware of the Vendor's liability under its gift card and locality card credit programs, one of which totalled some $17,000 in November 2013. He failed to disclose those credit program liabilities, of which the Vendor had already received payment for the gift card purchases. He then on behalf of the Vendor avoided honouring that obligation after closing.

58 The plaintiff complained to Mr. Ackerman about the failure to disclose and failure to assume liability for these programs. Mr. Ackerman responded that the plaintiff should simply not honour the customers' gift and loyalty card credits, despite knowing that would impair the reputation of the Business purchased and its new owner.

59 In response to continuing complaints by the plaintiff and from its lawyer, Mr. Ackerman ultimately paid $3,000 towards the gift card program and stated the Vendor would limit its remaining liability to demonstrated subsequent purchases, but only for two years.

60 The Vendor on Mr. Ackerman's direction breached the above covenant in the APA to be solely responsible for all pre-closing liabilities of the Business.

61 After closing, Mr. Ackerman, without authority or permission, issued a $500 gift card from BOTB to his friend Mr. Harkness, thereby incurring liability against the plaintiff. Mr. Harkness had been engaged for years as a handyman by Mr. Ackerman for his home and for the Premises. Each testified they were friends and had played hockey together.

62 The conditions precedent to closing stated in the APA include:

(a) the plaintiff's execution of the five year lease with the Landlord, a non-party to that APA contract, for a monthly rent of $7,500 plus municipal taxes payable by the Landlord plus utilities;

(b) the Vendor ensuring that all equipment was in good working order on the date of closing; and

(c) the Vendor ensuring that the leased premises and fixtures were in a state of good repair.

63 The Vendor's requirement that a condition of the sale of the Assets was the plaintiff's requirement to sign a five year lease of the Premises with the Landlord and the Vendor's assumption of an obligation to ensure the Premises and fixtures were in a good state of repair demonstrate the co-partnership of the corporate defendants as to the Premises. Nothing on the evidence prevented the Vendor's sale of the Assets independent of the purchaser leasing the Premises owned by

the Landlord. The Vendor undoubtedly inserted that requirement for the mutual benefit of both corporate defendants.

64 This Vendor's obligation in paragraph 6(d) of the APA to ensure the "state of good repair" of the Premises/leased premises and fixtures, does not contain the "on the day of closing" qualifier contained in the Vendor's obligation therein to ensure the "good working order" of the equipment or the similar time qualifier as to the Landlord's obligation in the Lease as to the Premises. The absence of that qualifying phrase as to the ensuring that the Premises and fixtures in the APA were in a good state of repair must be presumed to have been an intended difference.

65 The point is the Vendor was undertaking to ensure the state of repair of the Premises it did not own and accepted that obligation without limiting it by similar wording to the date of closing in a contract as to the terms and conditions of its sale of equipment it owned and was selling.

66 Independent of the linkage to the Premises, the Vendor's assumption of that Premises' obligation signals an intent of the parties in the APA, independent of the Landlord, to ensure the Premises' good state of repair.

67 That assumed responsibility by the Vendor to ensure the state of repair of the Premises is not contained in the representations and warranty provisions in section 9 of the APA, which like the other provisions of the APA, address the sale of the equipment and good will.

68 The Vendor's obligation to ensure the premises and fixtures are in a in a state of good repair accordingly appears to be an independent undertaking and obligation of the Vendor separate from the sale of Assets.

69 Independent of the above, courts commonly imply a term that the goods sold will perform in accordance with their intended purpose. This court implies such a term to the APA, which at the election of the Vendor and the evidence of joint partnering as to the Premises, extends to and includes the Premises and its fixtures.

Equipment

70 Mr. Ackerman acknowledges that the Vendor breached the above APA obligation to ensure all equipment was in good working order on the date of closing. The alcohol dispensing "guns" in the bar were broken on closing, had not been repaired and had to be replaced by the plaintiff at its costs.

71 The plaintiff engaged Mr. Harkness to repair the Premise's faulty air-conditioning equipment immediately after the May 18, 2013 closing, as indicated on his invoices:

(a) 02 bar air conditioner repair work — May 22, 2013 repairs;

(b) 02 bar air conditioning repair work — June 5, 2013; and

(c) repair to the air-conditioning — June 2 and 15, 2013.

72 Mr. Harkness was unable to repair the air conditioning equipment. The plaintiff was required to:

(a) purchase and replace the furnace motor and its computer board related to the Premise's air-conditioning on June 21, 2013 at a cost of some $1,200; and

(b) replace and install new air-conditioning equipment on July 3, 2013 at a cost of $4,943.

73 The court is being asked to accept that the defendants on closing were unaware of the deteriorated condition of this equipment requiring repair, including replacement of the faulty furnace motor and computer board within 5 days of closing. Given the numerous deteriorated conditions in the Premises, I do not accept this to be the case.

74 The plaintiff's electrical contractor as part of the renovations conducted reported numerous overcharged electrical circuits which required repair. The extent of those overcharged electrical circuits indicate that some or all of them existed and were not repaired on closing as the Vendor had covenanted would occur.

Plaintiff's Continuing Commitment To The Business

75 There are numerous invoices paid by the plaintiff in the fall of 2013 and the spring of 2014 during its 11 month occupancy to electrical and equipment contractors such as McCann, Bryant, Upper Canada Electrical, Service in Motion, Copper Age and Van Dusen to repair and replace faulty Premises elements, restaurant and bar equipment, at a cost exceeding $10,000 during this 11 month occupancy.

76 The plaintiff purchased and installed food preparation tables on September 4, 2013 at a cost of $2,757 and installed three ovens in the kitchen in February 2014 at an unknown cost.

77 The plaintiff does not rely upon these repairs and replacements costs in support of the relief sought in this action, but points to those expenditures and upgrades as evidence of its continuing commitment to continue operating the Business.

78 The plaintiff borrowed money to carry out several renovation projects to the Premises including conversion of the disco bar. Those bar renovations were underway in January 2014.

79 The defendants' argument given the above ongoing investments by the plaintiff is contradicted and illogical that the plaintiff's motivation since January 2014, when the WESA Report is dated, was to unwind the Asset purchase and the Lease. The plaintiff continued to invest in repairing and

replacing deteriorated and broken equipment and elements in the Premises and investing in new Premise projects throughout the spring of 2014.

80 The ongoing expenditures and investments in the Business by the plaintiff evidences it remained committed to operating the Business on an ongoing basis and contradicts the defendants' allegations that the plaintiff simply obtained the WESA and Belec reports as an excuse to abandon the Lease, the Assets and the Business because it had failed financially to operate successfully and wanted the return of the Asset purchase price paid.

Premises And Fixtures Elements Not Repaired

81 Mr. Ackerman, and therefore the Vendor and the Landlord knew during negotiations at closing and thereafter that the Premises had several serious elements requiring repair and a history of operating issues which negatively impacted the operation of the Business which they did not disclose before or after closing and did not repair. Despite that knowledge, Mr. Ackerman and the Vendor made the Asset sale conditional upon the plaintiff signing the five year Premises lease (the "Lease") in which the Business was to be operated.

82 For the reasons hereafter stated, the Vendor at the direction of Mr. Ackerman breached its obligation to ensure that the leased premises and fixtures were in a state of good repair.

83 The plaintiff encountered multiple instances of waste water discharge out of the second floor kitchen floor drain onto that floor which then escaped and dripped down into the restaurant dining room below on the first floor. The same result occurred with any larger quantities of water spilt onto the upper kitchen floor, which the court presumes is not an unusual event in a busy restaurant kitchen. That resulted in interruption in the use of that lower dining room and then having to clean up that discharge and its released into the dining room.

84 The second floor kitchen waste water drain pipe under that kitchen floor was too narrow to accommodate waste water discharge simultaneously from more than one of that kitchen's dishwasher and its four sinks. Simultaneous discharge by two or more of those elements would result in fountaining of waste water out of that waste water pipe through a floor drain onto the kitchen floor. The improper or inadequate slant of that kitchen floor directed that discharged water to the wall which would then drain down into the dining room below interrupting the operation and business of that facility.

85 Such discharges onto that kitchen floor with the resulting draining down into the dining room below also occurred when the kitchen dishwasher backed up and discharged waste water onto that kitchen floor and when that under floor drain pipe became blocked with grease which would fountain discharged waste water onto the kitchen floor. Mr. Ackerman acknowledged that the dishwasher and/or the sinks in that kitchen lacked "catchers" used in other commercial kitchens to prevent grease and food particle release into the floor drain pipe. Some of Mr. Harkness' prior

invoices include work to unblock the second floor kitchen waste water drain pipe. This was a known issue requiring repair on closing, which the Vendor and Landlord did not disclose leaving the plaintiff to discover.

86 The engineers for each party agree that the kitchen floor, at a minimum, lacked the appropriate slant towards the floor drain thereby directing discharged "fountained" water to the wall and then down into the dining room.

87 These floor slant and floor drain fountaining conditions were known to the defendants prior to closing as such fountaining of waste water and its draining down into the dining room had occurred on numerous occasions before closing. The engineers both reported that the older wooden floor above the beam support in the ceiling of the dining room and below the upper concrete kitchen floor showed extensive water damage.

88 The inadequate size of the waste water drain pipe below the kitchen floor, the lack of food and grease catchers and the lack of or inadequate slant of the kitchen floor towards the kitchen drain required repair and were not repaired.

89 Mr. Ackerman made the above inadequacies and resulting interruptions to the plaintiffs dining room business worse by not advising the plaintiff of these inadequate conditions requiring repair. The plaintiff instead was forced to learn of these inadequacies through waste water spillages into the lower dining room. The plaintiff repeatedly reported and questioned Mr. Ackerman as to what was causing these water spillages into the dining room. She believed and told him the kitchen floor drain pipe must be leaking. Rather than divulging the above deficiencies which he was aware of, Mr. Ackerman had Mr. Harkness pour several pails of water down through the kitchen floor drain and then showed the plaintiff that none of that water poured into the pipe was leaking into the dining room, thus avoiding disclosure and discussion as to the above deficiencies which were causing the waste water discharges into the dining room.

Wood Facings And Eves

90 The outside wooden facing or planks immediately below the third floor shingled roof and S-shaped wooden struts supporting the roof overhanging the exterior brick walls had not been painted and maintained for years resulting in water penetrating and rotting those wood elements.

91 Exterior pictures of the Premises in April 2014 show sections of fallen eaves troughs at the front and the back of the Premises. Mr. Easterbrook, surprisingly, testified eaves troughs falling off this three-storey Premises was not unusual given the harsh winter conditions that year. With respect, eaves troughs properly attached to solid exterior surfaces of the three-storey Building do not fall off during winter due to heavy snow. Eaves troughs commonly fall off due to deteriorated, non-maintained wood surfaces to which they are attached, like those of this Premises which the Vendor had engaged to ensure would be in a good state of repair.

Windowsill

92 Mr. Belec and Mr. Easterbrook reported a missing concrete windowsill on the third floor which was permitting water to penetrate behind the brick exterior. That condition pre-dated the APA and was not repaired.

Exterior Brick Load Bearing Wall

93 The third floor east exterior brick wall was damaged and required repairs according to Mr. Belec and Mr. Easterbrook. The brick on this wall showed multiple locations of spalling which Mr. Easterbrook reported had occurred on prior occasions as a result of water penetrating into the brick wall, which then froze thereby popping off or spalling the brick face.

94 A section of this same east brick wall had bowed or shifted outwards and had a lengthy diagonal crack in the brick face.

95 Mr. Easterbrook opined that this load bearing brick wall had some years before shifted downwards causing other observed damage, required maintenance repairs but did not in his opinion need to be replaced as Mr. Belec reported. This brick wall as a result of it shifting down and outwards reduced its load bearing capacity and required repair.

96 The brick wall deterioration was a long-standing condition and was not in a state of good repair as the Vendor had covenanted to ensure would occur in the APA.

97 The defendants were aware of these deteriorated conditions requiring repair. Despite the specific or implicit contractual requirement to ensure the state of good repair to ensure their performance, the Vendor failed as to that obligation and withheld this information and issues from the plaintiff.

January 6, 2014

98 Water infiltration into the Premises dramatically worsened on January 6, 2014 from several locations. That escalated the plaintiff's existing concerns and resulted in its engagement of an engineer, Mr. Belec, to identify the causes and engagement of an air quality specialist, WESA, to identify whether mould was developing due to the continuing water discharges in the Premises.

99 On January 6, 2014:

> (a) the roof membrane above the second storey kitchen broke open which led to water entering in through that ceiling on to the kitchen floor which then drained, not through the floor drain, but down the wall into the first floor dining room/pub area and into the basement;

(b) a basement sewage pipe from the upstairs washrooms began leaking waste water into the basement;

(c) water pipes in the ceiling of the disco bar washrooms broke and discharged water into the disco bar which was then being renovated; and

(d) the main Premises sewage discharge pipe froze outside at its connection to the City's sewer line which caused ongoing sewage discharge into the disco bar.

Basement And Main Sewage Pipes

100 Mr. Ackerman did not fault the plaintiff for the basement sewage pipe break or the freezing of the sewage pipe adjacent to the City manhole. Mr. Harkness entered that outside City manhole and chipped away the accumulated ice and thawed the pipe to permit the Premise's sewage pipe to discharge waste water into the City sewage system.

101 Considerable time was expended during the trial as to whether the plaintiff was responsible for the broken roof membrane and the broken disco washroom water pipe. That issue is less important in this trial than the state of the Premises revealed during the subsequent examination by the each party's engineer, by WESA and the City's initial closure of the Premises.

Roof Membrane Tear Above Kitchen

102 Mr. Ackerman acknowledged that the water entering through the roof had damaged ceiling tiles in the front pub and drywall in the kitchen. He ignored the inability of the second floor kitchen floor due to the slant of the floor, to collect and discharge the incoming water appropriately which then drained to lower areas in the Premises. He blamed the plaintiff for the membrane break in alleging it had failed to plug in the outside second storey roof edge electrical heating coils.

103 Mr. Ackerman had not informed the plaintiff as to the presence and use of the rooftop heating coils to prevent ice accumulation on the membrane roof. The court takes judicial notice of the fact that two-storey buildings with slanted roofs in Canada do not normally have exterior roof heating coils.

104 The Lease is silent as to the presence or requirement to use roof top heat coils.

105 Section 10(3) of the Lease required the plaintiff to "heat the Premises to a sufficient temperature at all times so that the Premises or any part thereof will not be damaged by frost or cold".

106 There is no evidence beyond the speculation of Mr. Ackerman and Harkness that this separation in the roof membrane was caused by the accumulated ice they observed on that day. The evidence further indicates that roof snow melting was caused by interior heat loss from the

Premises into the roof cavity due to the lack of a vapour barrier, inadequate roof cavity insulation and the absence of roof cavity ventilation which would have allowed for the escape of leaked heat into that cavity.

107 The lack of adequate insulation, vapour barriers and roof cavity venting was recorded by Mr. Belec. Ms. Frenette observed Mr. Harkness' removal of wet attic paper insulation on one occasion and its replacement with customary fiberglass insulation.

108 The inadequacy of the above attic insulation also relates to the freezing of the water pipe in the ceiling of the disco bar washroom.

109 Mr. Harkness testified he advised the husband of Ms. Frennette on two occasion of the need to plug in the coils during the winter, that he on his own plugged them in on one occasion during the 2013/2014 winter and that the roof coil was not plugged in on January 6, 2014. Such advice to the husband was not notice to the plaintiff.

110 Mr. Harkness throughout his testimony was an advocate of the defendants and generally lacks credibility. His testimony on occasion was contradicted by the testimony of Ms. Frenette, her husband and on occasion by Mr. Ackerman.

111 Mr. Harkness testified this roof membrane was relatively new and implied that only the ice he observed on that roof membrane on January 6, 2014 caused this membrane separation. He omitted the evidence of the two engineers who each observed multiple and therefore prior patch repairs of this roof membrane prior to the plaintiff's occupancy of the Premises.

112 Ms. Frenette denies:

(a) she was advised as to the need to plug in the roof coils. She denies ever unplugging the roof coils; and

(b) denies she ever instructed staff to unplug the roof coil.

113 Mr. Harter was asked in cross-examination why he never plugged in the roof coil upon observing it unplugged during the 2013/2014 winter. He responded Ms. Frenette had advised staff not to plug it in. It escapes me why this cook would be concerned about snow accumulation on this particular roof at the back of the Premises, would be aware of the coil on this particular roof and its need to prevent ice accumulation in order to prevent damage to the roof membrane, other than the fact that Ms. Frennette had demoted him from his previous position as kitchen/restaurant manager.

114 Mr. Harkness and Mr. Harter's alleged concern about the unplugged roof coil and the alleged risk that represented did not lead either of them to notify Mr. Ackerman of the fact, as testified by Mr. Ackerman. That suggests the requirement to use the coil and the risk its non-use represented did not appear to be as apparent as their testimony suggested.

115 There were underlying unresolved deficiencies causing the ongoing breaks in this roof membrane

116 As to the January 6 frozen/burst water pipe in the disco bar washroom ceiling, Mr. Ackerman wrote on or about January 9, 2014 that that broken pipe was caused by:

(a) the extreme weather temperature swings then occurring;

(b) the plaintiff's plumber's inadequate winterizing of that pipe;

(c) the plaintiff's failure to adequately heat the disco room; and

(d) the plaintiff's failure to leave the disco washroom doors open to allow the dance floor heat to circulate in that washroom.

117 There is no evidence Mr. Ackerman had advised the plaintiff of a requirement that the washroom doors must be left open in winter to prevent freezing of the pipes in the washroom. Mr. Ackerman in this response:

(a) acknowledges that the dance bar washrooms were inadequately heated to prevent freezing of the pipe in the washroom ceilings;

(b) ignores the evidence, including that of Mr. Harkness, that the thermostat in that bar had historically been problematic; and

(c) ignores invoices from Mr. Harkness prior to the plaintiff's Asset purchase and the Lease which included charges for water pipe issues including some he attributed to winter freezing.

118 The Landlord pursues this argument in its counterclaim in alleging the plaintiff's plumber failed to properly winterize the water pipes above the bar washroom ceiling which resulted in broken pipes and bathroom fixtures.

119 The plaintiff filed its plumber's invoice for such winterizing work and a written statement from that plumber to Mr. Ackerman denying that he had winterized incorrectly. Mr. Harkness testified his winterizing methodology would have prevented the pipe and fixture damages now sought in the counterclaim. His above prior invoices contradict his and the defendants' allegation that the plaintiff's plumber in October 2013 negligently winterized the Premises. Mr. Harkness acknowledged he did not observe or work on the piping and fixtures now claimed until after the defendants took over possession of the premises in April 2014. His testimony therefore that it was the plaintiff that caused this alleged damage on January 6, 2014 is post factum speculation.

120 The evidence indicates that the 02 washroom ceiling lacked sufficient heating and/or insulation which caused the freezing of this pipe on January 6, 2014, just as had previously occurred before the plaintiff took possession.

121 Ms. Frenette was concerned and obtained a quotation from D.D.D.G. Engineering to identify what was causing the ongoing water infiltrations in the Premises. Mr. De Groot's inspected the Premises on February 20, 2014 and observed water damage to the ceilings in the kitchen, dining room, bar, washrooms and third floor offices. Mr. Easterbrook in his report states that the third floor office ceilings were damaged but not as a result of water infiltration.

122 The photographs of water-stained ceiling tiles and large buckets in numerous locations to catch dripping water together with Mr. De Groot's above quotation statements contradict Mr. Ackeman's letter and testimony and corroborates Ms. Frenette's evidence as to the extent of water infiltration from the ceilings and waste water back flows on January 6, 2014 and the resulting damages. That infiltration and waste water backups caused material damage to Premises elements and some business interruption.

123 Ms. Frenette was concerned about the state of the Premises, what was the cause of the four prior incidents of internal waste water discharges and pipe blockages, the numerous water entries and sewage discharges on January 6, 2014, the impact of those events in public areas of the Premises and what risk that might represent. She accordingly sought advice from WESA in January, 2014 initially, D.D.D.G. Engineering in February 2014 and then from Mr. Belec in March, 2014.

124 Given his personal relationship with Mr. Ackerman and his subsequent assistance of the defendants despite another engineer from his office being engaged by the defendants, it is fortunate the plaintiff did not accept Mr. De Groot's offer to have someone from his office provide an opinion as to the cause of the water infiltration and sewage back-ups in the Premises. Mr. De Groot and Mr. Ackerman were friends and played hockey together.

Evidence Of Prior Water And Drainage Issues

125 Mr. Ackerman at trial admitted there had been a problem and prior incidents of waste water back flows from the second storey kitchen floor pipes and that water then dripping down into the dining room below. He admitted that he did not advise the plaintiff of this condition. He stated that January 6, 2014 was the first occasion of water infiltrating through the roof into the Premises, but failed to address the numerous membrane patches on the roof observed by the two engineers.

126 Invoices from Mr. Harkness and one from Houle Plumbing prior to the May 10, 2013 possession by the plaintiff, records the following ongoing water leakage, water pipes freezing, breaking and blockages, second storey floor drain backing up repairs over a lengthy period of time

and obviously not repaired as required before closing. Those deficiencies continued during the plaintiff's occupancy of the premises including winter related repairs:

(1) deck roof repairs in the winter prior to March 31, 2010;

(2) replacing pipes and leaking upstairs toilets — April 2010;

(3) repairs to broken pipes in the 02 bar and repairing leaking toilets — May 9, 2010;

(4) floor and drain repairs, brickwork repairs, and plumbing repairs — August 19, 2011;

(5) unplugging second floor kitchen floor drain and fixture and plumbing issues in the summer terrace washrooms and the 02 bar at the end of winter — March 17, 2012;

(6) floor drain backing up (Houle Plumbing) — March 22, 2012;

(7) repairs to upstairs plumbing caused by freezing — May 24, 2012;

(8) washroom leaks, plumbing repairs in the basement and men's washrooms — June 18, 2012;

(9) plumbing repairs and plugged floor drains — July 13, 2012;

(10) plumbing repairs in basement — October 12, 2012;

(11) repairs to leaking beer fridge main floor — May 12, 2013; and

(12) repairing leaks inside upstairs women's washroom above dining room — May 15, 2013.

127 Wastewater backflow had long been an issue on the floor of the second storey kitchen.

WESA Report

128 WESA was engaged by the plaintiff to conduct an occupational hygiene and safety analysis of the premises on January 16, 2014. WESA inspected the Premises on January 17, 2014 and identified in its January 22, 2014 report evidence of multiple incidents of water infiltration in the Premises.

129 WESA concluded that air sample results for fungal spores did not identify elevated concentrations or abnormal fungal spores in areas where water intrusion was identified. The front dining area however had higher concentrations of fungal spores including Aspergillus/Penicillium-like ("A/P") spores and Stachybotrys ("S") spores. The spore trap count in that area was elevated at 3,800.

130 The A/P spores in this front dining area were not considered "normal" and were reported as indicating a source of active mould/fungal spore growth. The S spores are hydrophilic and

indicative of water intrusion, and in this instance, indicated a source of active mould/fungal spore growth. If there was no water penetration in this area since May 2013, present spore count suggested a source of active mould growth that should be further investigated and remediated.

131 WESA identified the following obvious areas of water penetration inside the Premises, which corroborates the observations of Mr. Belec on March 5, 2014 prior to the April 16, 2014 inspection of Mr. Easterbrook and recommended the following repairs:

1st Floor

(1) Mens and womens disco w/c damage was 1) tiles of the dropped ceiling were damaged and removed, 2) 14X10 ft and 18X10 ft portions of drywall ceiling and 3) the shared wall between them, each side, from ceiling then down 2 feet. Replace drywall ceiling and wall portions and any affected fiberglass.

(2) In the disco bar 1) damaged dropped ceiling tiles 2) 10X30 ft of drywall above the dropped ceiling tiles. Replace drywall ceiling and wall portions and any affected fiberglass. Investigate for water penetration and replace any damaged drywall behind the wall to the bar.

(3) Water damaged areas tween disco and 1st floor kitchen — 1) drywall walls water damage ceiling to 2.5 feet down 2) 10X8 ft portion of drywall ceiling above drop ceiling 3) no vapor barrier tween fiberglass insulation and upper drywall ceiling. Replace damaged drywall ceiling, walls and any damaged fiberglass.

(4) 1st floor kitchen and fridge room — 1) water penetration along drywall ceiling patch 2) 3X5 ft drywall ceiling water damage 3) water penetration along drywall patch area. Replace water penetrated drywall areas and any affected fiberglass.

3rd Floor

(1) Office ceiling — past water damage — 3X12 ft along joint tween wall and ceiling and 2) 2X6 ft along angles of vaulted ceiling. No evidence current water penetration. No repairs required.

(2) Storage room — ceiling has 1) a crack 2) evidence of past water damage, 5X2 ft of joint between the wall and ceiling and 3) water damage below and along window well. Replace drywall below the window wells and any affected insulation.

2nd Floor

(1) Kitchen Prep Room — evidence of 1) drywall crack and water damage along seam down middle of the length of room being a 3X16Ft area 2) 8X8 ft area of the wall.

> Replaced the patched area with larger 7X6ft patch and any affected insulation. Replace drywall ceiling and wall areas with 3X17 and 9X9 areas and fiberglass insulation if damaged.
>
> (2) Dining Room to left of bar — 1) water damage to wood beams above drop ceiling over a 8X10 ft area.

Basement

(1) Water leaked 1) under the stairs and 2) into far corner and penetrated the wood beam.

132 Items 1 to 3 appear to relate to the January 6, 2014 broken water pipe in the disco washroom. Items 4, 7, 8 and 9 may be water entry on January 6 and/or prior thereto. Items 5 and 6 are prior to January 6, 2014.

Belec Engineering Report

133 Mr. Belec after an examination of the Premises in March 2014 provided his engineering report and opinion that the Premises had multiple long standing deficiencies requiring examination and repair and that some of those were structural deficiencies which represented a risk to Premises occupants. The Premises Division of the City of Brockville on April 15, 2014 read Mr. Belec's report, conducted its own inspection and then issued an order closing the Premises and requiring repairs identified as needed.

134 The court qualified Mr. Belec to provide engineering opinion evidence as to the issues regarding the Premises. I found his testimony credible, fair and balanced.

135 Mr. Belec inspected the Premises at the request of the plaintiff on March 5, 2014. His report is dated March 15, 2014. He admitted his review and recommendations must be considered in light of his limited ability to inspect without removal of building elements to confirm his observations and opinions.

136 The Belec Report states:

> (a) extended structural and architectural damages was observed;
>
> (b) recurrent water infiltrations and repairs were clearly visible mostly on the roofs and ceilings located directly below the roofs in an attempt to fix wafer infiltrations;
>
> (c) the upper roof facia and roof gutter have fallen off due to the rotten wood structure;
>
> (d) eighty percent (80%) of all the observed infiltration problems inside this Premises are directly linked to the total absence of ventilation. The absence of ventilation creates condensation in insulation and ceilings below as well as humid structural members which

will decay rapidly leading to ceiling falls, mould formation, airborne spores and important structural failures;

(e) condensation from attic runoffs has infiltrated behind the original brick wall which is leaning dangerously toward the lower roof with significant cracks;

(f) the hipped roofs lack proper ventilation as there are no air stream exits provided against the brick wall. The absence of weep holes under the first row of bricks prevents ventilation behind the brick wall. Deflection of the roof and the caving of the wall indicates the advanced decayed condition of the wooden wall frame;

(g) the hipped roof lacks soffit ventilation, contains rotten wood and is caving in. Its continuous deflection is associated with the redundant cracks on ceilings in the second floor kitchen and dishwashing area;

(h) the wooden structure inside the attic is falling apart because of extensive damages due to moisture. Nails are no longer holding due to the structure softness;

(i) the old roof structural members and its old ceilings have suffered extensive deterioration and decay with a risk of caving in unless immediate conservation and replacement measures are undertaken;

(j) replacement of the upper roof structure and back portion of the exterior wall with proper ventilation is the best solution to repair the extended damaged structure;

(k) the deflection of and the cracks in the exterior brick wall could cause it to become very unstable and collapse under its own weight;

(l) the interior reappearing cracks in the third floor office ceiling indicate the caving of the roof structure due to extended moisture damage;

(m) reoccurring water infiltration is occurring due to condensation and the absence of the roof cavity ventilation in the second floor dishwashing and upper kitchen areas;

(n) the floor drain in the upper kitchen is not functional due to the reverse slope of the floor away from the drain which leads water on the floor draining down to the ground floor dining room. The reverse slope of the kitchen floor is caused by deflection of an undersized beam beneath the kitchen floor which is clearly visible from the dining lounge. The beam deflection can accentuate with time. The undersized beam should be replaced or reinforced. The kitchen floor should be re-done;

(o) the roof cavity above the extended first floor dining area is not ventilated. The absence of such ventilation will eventually lead to moisture damage to that roof structure as well as the brick wall above it as weeping holes are no longer effective;

(p) the absence of vents in the roof of the night club is responsible for water infiltration and condensation as well as the interior ceiling tiles which have fallen off due to dampness and high humidity;

(q) the terrace washroom floors are not insulated. Ceiling tiles below that terrace floor are falling off because of dampness, water infiltration and cons condensation; and

(r) sustained growth of microbial contamination and airborne spores is considered to be directly associated with water infiltration problems and Premises material decay under moisture conditions.

137 The Belloc Report in conclusion states:

(a) the situation inside different parts of the Premises is now critical because of airborne fungal spores and mould growth, the heightened risk of structural failures and health hazards. These problems cannot be associated with business operations since observed details related to structural and architectural conditions confirm that water infiltrations due to condensation and lack of proper ventilation have been ongoing for a number of years; and

(b) clean and healthy environment inside several parts of the complex cannot be achieved without extensive repairs and replacements which will disturb the normal business operation.

138 The Belec Report states immediate interventions required include:

(a) replacement of the hipped roof structure;

(b) replacement and/or restoration of the third floor ceilings with proper vapour barrier, insulation and attic ventilation;

(c) installation of new ventilated soffits to hipped and flat roofs;

(d) replacement of the second floor wall of the main Premises and restoration of brick walls;

(e) replacement of the second floor hipped roof structure above the second floor kitchen and replacement or restoration of the second floor ceilings with new vapour barrier, insulation and proper attic ventilation;

(f) replacement or reinforcement of the undersized beam above the main floor dining lounge;

(g) replace the floor tiles and redirect drainage towards the floor drain in the second story kitchen;

(h) repair plumbing system downstream from the second floor kitchen;

(i) disconnect improper plumbing connections to basement;

(j) provide airstream ventilation to flat roof cavities and cathedral ceilings;

(k) insulated floor and cavities under terrace washroom above the night club area; and

(l) isolate and seal ceilings and floor cavities contaminated with mould growth.

139 The cost estimate obtained by the plaintiff to repair the Belec-identified deficiencies from Hunt Construction Co. Limited on March 21, 2014 is $320,000.

Easterbrook Engineering Report

140 Mr. Easterbrook begins his report by stating his engagement and mandate as follows:

> D.D.D.G. Engineering Services have been asked . . . .to review and counter claims made in . . . the Belec Report. (emphasis added).

141 The stated purpose of his report was not to evaluate and provide an objective engineering opinion. The mandate as stated was to provide a contradictory opinion.

142 This articulated objective seriously undermines Mr. Easterbrooks professional objectivity and credibility.

143 Mr. Easterbrook focussed on the structural integrity of elements addressed by Mr. Belec and did not address numerous other elements in the WESA and Belec reports which are relevant in this trial as to whether the premises and fixtures were in a state requiring repair on March 18, 2013. Mr. Easterbrook limited his responding report to structural elements because Mr. Caskenette in his April 16, 2014 email to Mr. De Groot stated it was structural issues that prompted the City's unsafe and closure order.

144 Mr. Easterbrook stated it was difficult to determine exactly what Mr. Belec's concerns were or the location thereof. That is incorrect as the Belec Report is clear as to both aspects.

145 Mr. Easterbrook acknowledged that the inspections of the Premises by himself and Mr. Belec were limited as each of them could not damage the Premises which therefore required some speculation supported by logical, historical information or evidence.

146 As to the reported reoccurring water infiltrations and visible repairs, Mr. Easterbrook stated the ceilings in the washroom had no sign of leakage or prior water damage.

147 Mr. Easterbrook recorded:

(a) there was some damage to eaves troughs which did not surprise them given the winter that year. He failed to address the reported deteriorated wood facings which caused the eaves troughs to fall off and the repairs required; and

(b) no signs of condensation, but inspected the Premises on April 16, 2014, beyond the winter conditions which Mr. Belec observed and reported is when condensation forms.

148 Mr. Easterbrook does not address Mr. Belec's opinion as to the lack of roof cavity air vents and the resulting condensation as a result of water penetration into that cavity as evidenced by the multiple roof membrane repairs and the impact of that trapped condensation on internal roof structures, beyond his statement that he saw no evidence of such impact during his limited inspection.

149 Mr. Easterbrook stated that there was some insulation in the ceiling of the dance bar washrooms and under the floor of the terrace washrooms he inspected. This statement:

(a) does not speak to the adequacy of insulation in this cavity, which Mr. Belec reported was insufficient and needed repair; and

(b) does not address Mr. Belec's finding that the pipes in this area lacked insulation which would cause condensation in the cavity.

150 The alleged winter freezing of these uninsulated pipes in this area is the basis of the Landlord's counterclaim for damages.

151 Mr. Easterbrook states that he did not see evidence of rotted roof rafters, condensation leaking out of cavities, damp or soft drywall in Mr. Belec's pictures. The issue was what he observed, not his interpretation of copies of small pictures in the Belec report.

152 He states he found no instances of falling drywall but admits that the third floor staff office ceiling, although renovated earlier, is drooping because the ceiling drywall thickness was inadequate and was insufficiently attached to the frame above it. The issue was the dropping drywall ceiling and repeated repairs and well as the reported lack of ventilation above that ceiling leading to condensation originated damages, including whether there was a risk of the ceiling and roof collapse and the need to have repaired those conditions prior to May 18, 2013.

153 He acknowledged finding one spot in the interior third floor ceiling that evidenced water infiltration but stated the surrounding ceiling drywall on his inspection was firm, dry and showed no sign of mould. This confirms the plaintiff's allegations of water penetration on the third floor.

154 Mr. Easterbrook stated that the roof was sound and there was no basis in support of Mr. Belec's recommendation that the hipped roof structure be replaced or that the roof structure membrane is rotten and giving way.

155 Mr. Easterbrook acknowledged that the exterior brick wall on the second storey was spalled, had diagonal cracks and the outward deflection of that wall. He speculated that the diagonal cracks indicate the brick wall had previously lost support and therefore sagged and caused the brick to crack but states this diagonal crack was repaired. By repair, he is referring to adding mortar to fill the diagonal crack cavity. The diagonal crack is very apparent in the photographs.

156 Mr. Easterbrook in response to the alleged absence of weep holes to drain moisture from inside the brick wall cavity states it was common in a Premises of this age to not have weep holes. Common or not, Mr. Belec was of the opinion that the absence of that draining mechanism was a contributing cause of the deteriorated condition of this wall and interior roof cavity which required repair.

157 He agreed that the roof in this area of deteriorated brick had dropped because of the drop of the brick wall below it. He states, however, that those facts do not mean the above roof will fall down.

158 Mr. Easterbrook indicated that there may be several reasons for the outward deflection of the exterior brick wall, including a previous fire in the Premises which could have cracked the brick mortar and caused the brick wall and roof above it to drop. He attached pictures which show two burnt interior roof heavy timber beams which no longer support the brick wall. Mr. Belec strongly disputes this statement and states every structural engineer would recommend replacement or repair of the two burnt beams. The extent of the fire damage to the wood beams apparent in the photographs and Mr. Easterbrook's acknowledgment that this fire damage reduced the support level of the bricks above these damaged beams, coupled with the lack of cavity ventilation and resulting condensation and wood deterioration, supports Mr. Belec's recommended repairs required of these elements. Given the estimated age of the fire damage, this was another area which needed repair on May 18, 2013.

159 The same fire according to Mr. Easterbrook burnt or charred the first two roof rafters or joists above the second storey dishwashing area. The function of the rafters is to support the roof. He stated the extent of damage in that area was unknown without removal of the drywall under that roof but stated this was immaterial because he speculated the fire repairs would have been "under the watch of the Premises Department" of the City. The evidence is that there remained two charred roof joints which do not fully support their function of supporting the above roof at this location which Mr. Belec reasonably included in the areas needing repair.

160 Mr. Easterbrook concluded that the reported need to replace this exterior brick wall was unnecessary as it remained stable, however "it could use some maintenance to deal with the current spalling by replacing the concrete windowsill and redoing the caulking", as the wall despite its defects had withstood reported seismic events in the area in 2010 and 2013. Mr. Belec replied that this stability despite seismic events is misleading and incorrect. He states:

> (a) the 5.0 magnitude of these earthquakes are important but not destructive; and
>
> (b) the center of the 2010 quake was in a town in Quebec, north of Ottawa and several hours drive from Brockville.

161 This spalled, outward deflected brick wall which lacked weeping holes and the absence of a window sill which was allowing water entry into the wall cavity was a long standing prior May 2013 deteriorated condition which had not been repaired by closing.

162 As to the dining room ceiling beam being undersized as reported by Mr. Belec, Mr. Easterbrook relied upon the statement of Mr. Harkness that engineers were involved in placement of this beam. Mr. Easterbrook further stated that all such beams deflect and a summer inspection of it absent the weight of winter snow may show that the bulkhead is straight. This is unsupported speculation as the reverse was equally possible and lends support to Mr. Belec's recommendation that additional support of the beam at a minimum was required. Mr. Belec explanation appears more reasonable. He points to the location of this beam or girder as being directly below the upper kitchen concrete floor which does not slant or slants insufficiently towards the floor drain. Mr. Belec states that this beam has excessive deflection due to improper design or inadequate support, which caused the inadequately supported concrete floor above it to loose slope towards the floor drain.

163 Mr. Easterbrook confirms that the floor of the kitchen on the second story is insufficiently sloped towards the floor drain and that water on the floor could drain at the edge of the wall down into the dining room, as Ms. Frennette testified happened on five occasions.

164 Mr. Harkness told Mr. Easterbrook his practice had been to clean this wastewater pipeline monthly in order to dislodge the accumulated food particles and grease waste build-up. The court doubts this testimony as Mr. Harkness did not so report such monthly clearing of this floor pipe on his invoices dating back to 2010.

165 Pursuant to his opening stated objective of providing an opinion to contradict Mr. Belec's report, Mr. Easterbrook concludes his "engineering" report in stating:

> "The original Premises is 138 years old and has multiple changes in use, additions, renovations, changes in businesses, repairs and maintenance by multiple owners . . . residents

and patrons." . . . "You would expect a Premises of this age to have a few 'wrinkles', but wrinkles are skin deep."

166 This is not a fair or accurate description of the areas of this Premises requiring repair.

167 Mr. Easterbrook in summary states:

(a) the structural integrity of the Premises does not require immediate intervention;

(b) the roof structural members are not rotten and do not need to be replaced and therefore the new roof ventilation design is not required as the current ventilation of the roof has proven sufficient;

(c) the second floor exterior brick wall has been maintained;

(d) the beam in the ceiling of the dining room has been engineered and appears sound;

(e) the floor and its drain in the second storey kitchen are a maintenance and not a structural issue;

(f) the Premises in his opinion is sound and does not require structural remediation; and

(g) there are some maintenance issues that he was sure the owners would take care of in a timely, responsible manner.

168 The above subparagraph (a) as worded suggests structural integrity intervention is required, just not immediately. This admission supports Mr. Belec's opinion that his identified structural issues required repair.

169 Mr. Easterbrook's report fails to address historical areas of repair required including:

(a) insulation of water pipes in the ceiling above the dance bar;

(b) sufficient insulation in the dance bar ceiling cavity; and

(c) the rotten wood eaves' rim joist casing the eves troughs to fall.

170 The 2014 practice and need to vent roof cavities contradicts subparagraph (b). Roof venting should have been previously installed to provide air passage, to prevent condensation build up during winter and its deterioration of adjoining elements.

171 The second storey east brick wall clearly is in a deteriorated condition. It should have been repaired.

172 The acknowledged insufficient slope of the upper kitchen floor supports Mr. Belec's interpretation that the condition of the supporting beam under that floor shows excessive deflection and requires additional support or replacement.

173 Common logic and the Belec Report support the determination that continued waste water spillage and overflow events in that kitchen leaking down into the main floor dining area will with time deteriorate and damage the interior of those walls, are inappropriate in a public dinning lounge and can encourage the development of bacteria, mould and spores. The lack of food and grease catchers, the insufficient slope of the kitchen floor and the apparent excessive deflection of the beam under that floor should have been repaired.

174 Overall, the court prefers the more balanced opinions of Mr. Belec over the contradictory opinions of Mr. Easterbrook.

175 The premises and fixtures on May 10, 2013:

(a) were not "in a state of good repair" which the Vendor undertook to ensure pursuant to paragraph 6(d) of the APA;

(b) were not then and continued to not be in " in good working order" in accordance with that obligation of the Landlord pursuant to paragraph 9 of the Lease; and

(c) deprived the plaintiff of its right to quiet enjoyment of the premises.

176 The extent of important deficiencies requiring repair, the estimated cost of such repairs and the repetitive interruption in the business operations of the plaintiff support Ms. Frenette's testimony that she would not have purchased the Assets and entered into the Lease knowing the state of disrepair and the breach of the Vendor and Landlord to or ensure the repair of.

177 A number of those elements requiring repair would not have been detectable by the plaintiff in a typical, as in non-destructive, inspection of the Premises pre-closing.

The Lease

178 The Lease limited the use of the premises to the operation of a restaurant business only and solely by the plaintiff. That restricted use to the plaintiff links the Lease to the plaintiff's purchase of the Assets.

179 The condition of the Premises is addressed in s. 9 in which the plaintiff acknowledges it is renting the premises on an "as is" basis and that there are no promises, representations or undertakings binding on the Landlord with respect to any repair, alteration, remodelling or

decorating of or installation of equipment or fixtures on or in the premises. That "as is" limitation is then qualified.

180 S. 9 then states that the Landlord agrees, however, to provide the premises and fixtures on the commencement date in good working order and that the premises is not in violation of Premises or fire code and is not subject to any work orders. The Landlord's obligation to provide the premises in "good working order on the commencement date" as stated is more restrictive than the Vendor's obligation in the APA to ensure "that the lease premises and fixtures are in a state of good repair".

181 The Lease obliged the plaintiff:

(a) to keep the Premises in good order and condition;

(b) to keep the equipment and fixtures in good working order and to replace such items if damaged during the term;

(c) to heat the premises to a sufficient temperature at all times so that it will not be damaged by frost or cold;

(d) to repair any damage caused to the premises by the wilful or negligent conduct of the plaintiff or anyone permitted on the premises by the tenant;

(e) to give prompt notice to the Landlord of any accident or defect in the water pipes, heating apparatus, wiring or to any other part of the premises;

(f) to pay the cost for any damage caused to the water, drainage or heating pipes; and

(g) to shut off and drain any outside water outlet to prevent it from freezing and causing damage to any pipes and connections and pay the cost to repair the same.

182 The equipment in the premises belonged to the Vendor and then the plaintiff after closing. The above obligation to keep equipment in good working order is another example of each defendant corporation contracting as to assets owned by the other defendant corporation.

183 Events of default defined in the Lease include:

(a) non-payment of rent after three days' notice from the Landlord;

(b) the plaintiff's failure upon notice to remedy the breach of its obligations in the Lease; and

(c) abandonment of the premises by the tenant or the premises becoming vacant for a period of five consecutive days or the movement by the plaintiff of its trade fixtures, chattels or equipment out of the premises.

184 Upon any such default, the Landlord had the right to terminate the Lease by notice or to re-enter and repossess the premises and remove and store any property therein or sell such property.

185 Unlike the APA, the Lease contains an "entire agreement" provision by which the terms of the Lease supersede any previous agreements or representations.

186 The premises and fixtures on May 10 to, 2013 were operational but contained numerous latent defects known to the defendants as evidenced in the Belec and Easterbrook Reports and not known ot the plaintiff until those latent defects demonstrated themselves or were identified by the two engineers.

Chronology of Events

187 The plaintiff obtained a written estimate from a construction company on March 21, 2014 which states the cost to repair the issues identified in the Belec Report is approximately $320,000.

188 The plaintiff sent the WESA and Belec Reports and to the defendants on March 26, 2014 and indicated that:

> (a) the continued operation of the Business was impossible without significant repairs to the Premises due to water infiltration and concern that the premises were no longer safe for the continued operation of the Business;
>
> (b) the Premises' problems complained of and their ineffective repair had existed prior to the commencement of the Lease which were not discoverable upon reasonable inspection by the plaintiff;
>
> (c) the Landlord was obliged to disclose such issues to the plaintiff prior to entering into the Lease and failed to do so;
>
> (d) the Vendor had falsely represented in the APA that the Premises and fixtures were in a good state of repair despite knowing that the water infiltration problems and their ineffectual repair predate the sale of Assets;
>
> (e) the plaintiff was deprived of its entitlement to quiet enjoyment of the Premises which could no longer be safely occupied unless immediate steps were taken to remedy the issues at identified in the enclosed reports;
>
> (f) in the absence of the defendants' proposal to remedy the issues identified, the plaintiff would not continue to pay rent effective April 1, 2014; and
>
> (g) the defendants misrepresentation regarding the Business, the Assets and the Premises had caused the plaintiff damages including the loss of its investment, loss of revenue, the cost

of repairs not properly its responsibility, the cost of replacement equipment and the cost of honouring coupons issued and not disclosed by the Vendor prior to the purchase of Assets. The plaintiff accordingly on April 15, 2014 would cease making monthly payments under the promissory note as to the balance of the purchase price of the Assets.

189 This was not a notice repudiating the Asset purchase or the Lease.

190 The defendants failed to respond to the plaintiff's above March 26, 2014 letter or the enclosed engineering and air analysis reports.

191 The plaintiff by letter dated April 2, 2014 advised the three defendants that:

(a) their silence indicated refusal to the plaintiff's March 26, 2014 request to conduct the repairs required to correct the unsafe conditions;

(b) continued operation of the Business was unsafe and could not continue without such repairs;

(c) the Business accordingly would be closed on April 6, 2014 due to the unsafe conditions, unless it received a comprehensive plan to address the identified issue; and

(d) the plaintiff intended to send its reports to Health authorities.

192 This notice indicates the plaintiff's wish to continue operating the Business pursuant to the Lease. The plaintiff was not thereby repudiating the Asset purchase contract or the Lease.

193 Mr. Ackerman and the defendant corporations again refused to respond.

194 It would have been irresponsible and negligent for the plaintiff to have continued operation of the Business in the Premises in the face of the health and safety risks reported by its experts. The defendants knew or should have known that, but remained determined in their attempt to force the plaintiff to do exactly that.

195 On April 7, 2014, two weeks after having received them, Mr. Ackerman sent the plaintiff's WESA and Belec Reports to Mr. De Groot, a friend of his, who is an engineer and asked him to read them. He was seeking an engineering report to contradict the WESA Report and the Belec Report in particular. Mr. Ackerman did not address the issues raised with the plaintiff nor inform the plaintiff he was retaining an engineer.

196 The plaintiff on April 8, 2014 forwarded the Belec and WESA Reports and a complaint to the premises division of the City of Brockville (the "Premises Division").

197 Mr. Ackerman on April 9, 2014 told Mr. De Groot that he needed a report to contradict the WESA and Belec Reports. Mr. Ackerman engaged Mr. De Groot's firm, D.D.D.G. Engineering, for that purpose.

198 On April 15, 2014 the Premises Division's inspectors, Messrs. Scott and Turner, conducted a scheduled property standards inspection of the Premises in response to structural concerns highlighted in the Development Report. Miss Frenette was present in the parking lot. The inspectors were provided access into the Premises by the wife of Mr. Ackerman, Mr. Harkness, Mr. Harper who had been the restaurant manager until demoted by Ms. Frenette and Ms. Ackerman's father.

199 Following this inspection, Messrs. Scott and Turner reported their observations to Mr. Caskenette, head of the Premises Division, who then consulted with the City's solicitor and was advised that he should follow standard procedure with regards to a report from an engineer identifying structural deficiencies and potential imminent failure. Mr. Caskenette thereupon directed his staff to issue and post an unsafe Premises order and restrict Premises occupancy at that time. That order declared the Premises unsafe, its closure and directed the Landlord to undertake repairs to comply with the structural deficiencies as identified by the plaintiff's March 15, 2014.

200 Mr. Ackerman immediately notified Mr. De Groot of the unsafe and closure order by the Premises Division. Mr. De Groot wrote to Mr. Caskenette in the Premises Division and stated that his firm, subject to its inspection of the Premises, may choose to refute the Belec Report. He asked:

> (a) the Premises Division to identify what issues in the Belec Report caused issuance of the closure order;
>
> (b) what would occur if his firm refutes the Belec Report, how does the Premises Division determine which conflicting report/opinion to rely upon; and
>
> (c) what information and details would help the Premises Division in this determination.

201 On April 17, 2014, Mr. Caskenette replied and stated:

> (a) the principle concerns of the Premises Division were the structural issues in the Belec Report which resulted in the closure order which needed to be addressed;
>
> (b) the Premises Division could request a third party engineer peer review in the case of two conflicting engineering reports; and
>
> (c) the D.D.D.G. engineering report should not simply state it refuted the Belec report but should give reasons for any disagreement.

202 Mr. De Groot enlisted Mr. Easterbrook, another engineer in the D.D.D.G. firm, to respond to the Belec Report due to his personal relationship with Mr. Ackerman. Mr. Easterbrook inspected the Premises on April 16, 2014, together with Mr. Ackerman and Mr. Harkness, without notice to the plaintiff or Mr. Belec.

203 Mr. Ackerman in an email to Mr. De Groot on April 19, 2014 asked about Mr. Easterbrook's progress with producing a report as he needed to re-open the Business by the following weekend. Mr. Ackerman by then had not communicated any response to the plaintiff for almost one month. He did not want the plaintiff to continue with the Business in the Premises and made no effort to pursue that result. He and the defendants had decided to retake the Assets, re-open and operate the Business in the Premises and retain the $275,000 of the Asset purchase price paid and the elevated rent paid since May 2013.

204 Mr. Easterbrook sent his draft report to Messrs. De Groot and Ackerman on April 20, 2014. Mr. De Groot edited the draft report. He put aside his previous recognition that his personal relationship prohibited his involvement. The Easterbrook Report was then finalized and issued on April 21, 2014.

205 The Easterbrook Report disagreed with the findings, analysis and repair recommendations in the Belec Report.

206 Mr. De Groot sent the Easterbrook Report to Mr. Caskenette on April 21, 2014 but did not send it to the plaintiff or Mr. Belec.

Withholding Of The Easterbrook Report

207 The Easterbrook Report disagrees with the risk assessment and many of the observations in the Belec Report. Considerable trial time involved these experts debating the validity of their opinions. That interesting debate ignores, however, the events and opinions as they occurred.

208 One would have thought that the defendants now having an engineering opinion to counter the Belec Report would send it to the plaintiff in support of a request that the APA and Lease obligations be met. The defendants instead kept and communicated nothing about the Easterbrook Report to the plaintiff then, after the City lifted the closure order and somehow continued to refuse to produce that report until shortly before trial. The Premises Division subsequently refused to disclose the Easterbrook Report.

209 The defendants' denial of this relevant information at the critical time in April 2014 prevented the plaintiff and its experts the opportunity to consider and respond to the Easterbrook Report's opinions and conclusions.

210 The defendants thereby forced the plaintiff at the time to decide whether to continue operating the Business in the Premises and expose its employees and the public to the risks identified in the Belec and WESA Reports, being the only expert opinions available to it. The plaintiff would have been negligent to ignore and simply carry on the Business based on the findings in the reports of its experts.

211 So why deny the plaintiff this relevant available information in April 2014? The answer to that question includes at least the following factors.

212 The Vendor having by then received $275,000 of the Asset purchase price, with the resulting reduction of Mr. Ackerman's potential liability as guarantor of the Vendor's debts and the Landlord's receipt of 11 months of the much higher increased rent, were each in a much better financial position in April 2014 compared to 11 months earlier. The Vendor had a general security agreement over the Assets and the Lease entitled the Landlord to possession in the event of default.

213 Mr. Ackerman previously expressed frustration due to the frequent complaints and calls for assistance by Ms. Frenette.

214 These are at least some of the reasons why the defendants refused to disclose the Easterbrook Report to the plaintiff in April, 2014. These same reasons are why Mr. Ackerman did not reply upon being provided with the WESA and Belec Reports and why the defendants never offered to do any remedial repairs.

215 The defendants also knew that fixtures attached to the reality, including those purchased and installed by the plaintiff such as furnace motors, air conditioning equipment and food preparation cabinetry could not legally be removed for use elsewhere. Brockville is an extremely small community with an even smaller commercial area.

216 The defendants were quite happy if the plaintiff without disclosure of the Easterbrook Report departed out of frustration and silence by Mr. Ackerman, even after the City lifted the safety closure order. There undoubtedly were other future purchasers and tenants who might, yet again, financially benefit the defendants.

Second Inspection by City's Premises Division

217 Mr. De Groot emailed Mr. Caskenette on April 23, 2014 stating he had learned the Premises Division intended to inspect the Premises on April 24 and stated he would arrange for Mr. Easterbrook to be present. Mr. Caskenette replied requesting Mr. Easterbrook not be present to avoid it being "construed by either party that there has been any undue influence by said parties" and should the Premises Division "have any questions or concerns regarding either report, we will contact" the engineer(s).

218 Mr. Caskenette and three Premises inspectors, one of whom was an engineer, inspected the Premises on April 24, 2014 as to its structural integrity as Mr. Caskenette had previously indicated, including:

(a) the structural integrity of the purported undersized beam above the dining room ceiling; and

(b) the purported imminent collapse of the roof structure.

219 The Belec and WESA reports identified these two but also numerous other issues.

220 The Premises Division examiners inspected the Premises in the presence and with the participation of Mr. Ackerman, his wife, Mr. Harkness, the long term handyman used for the Premises, Mr. Harper, who had been demoted by the plaintiff as manager of the restaurant and bar and Mr. Shields. The plaintiff and Ms. Frenette were not present or aware of this inspection. Mr. Caskenette's April 23 stated goal of avoiding any appearance of influence as between the plaintiff and the defendants no longer seemed relevant as to Mr. Ackerman and three other property and Business representatives participating during the inspection, notwithstanding that the plaintiff was unaware of that inspection, unaware of the Easterbrook report and was not present at this inspection.

221 Mr. Caskenette, Mr. Wood and Mr. Scott each prepared a File Note dated April 24, 2014 as to their observations during their 55 minute inspection of the Premises. Combined, those notes state:

(a) no critical roof issues were noted that would confirm collapse regarding the flat membrane portions, the gable and the hip style portions of the roof. Seasonal weathering of the roof was noted. Roof areas did not indicate evidence of weak points. No noted roof deflection was apparent. Shingled areas were weathered and in fair condition. The two fire charred structural roof members as reported by the engineers were noted as to the support of the second floor roof structure. The other structural roof members at that location were as originally constructed. The membrane roof appeared intact, but showed evidence of various previous repairs;

(b) the wooden eves, soffits and fascia areas evidenced lack of maintenance, painting with some evidence of water penetration into the wood, were deteriorated but generally in reasonable condition;

(c) the contractor (Mr. Harkness) removed portions of the interior third floor ceiling drywall to permit interior inspection of that portion of the third floor hip roof. No critical issues were found. Little or no previous attempt had been made to access the interior of the hipped roof structure. The hip roof portions examined were dry, firm and did not indicate water

damage. Junction points between adjoining hip structure members were even with no signs of deflection;

(d) the purported undersized beam above the dining room ceiling was inspected as to its structural sufficiency. No deflection of this ceiling beam was noted. It was consistent with standard construction and installation practices. No water staining on the girded truss or any structural components associated with its installation were noted;

(e) the floor system or original wooden floor above that dining room truss beam showed significant water damage. Maintenance staff (Mr. Harkness) indicated that the dishwashing equipment in the kitchen above the dining room truss had been leaking and was a source of moisture in this area; and

(f) the East third floor exterior brick wall has cracks, spalling and has shifted however the crack has been sealed, the brick appears to be solid but requires maintenance to prevent further deterioration.

222 The Premises Division withdrew its Premises closure order on April 25, 2014 without:

(a) engagement of a third party engineer to review the two opposite opinions of Messrs. Belec and Easterbrook as to what level of risk if any the Premises posed and what level of repairs were required to remedy those deficiencies; and

(b) without obtaining a review and critique of the Easterbrook Report by Mr. Belec, similar to the one Mr. Easterbrook had performed.

223 The plaintiff upon learning the closure order had been withdrawn asked the City to see the documentation relied upon in support of that decision. Mr. Caskenette responded that the plaintiff would have to file an access to information request, which the plaintiff filed.

224 Mr. Caskenette or one of his inspectors notified Mr. Easterbrook that the plaintiff was requesting production of documentation including his report related to its withdrawal of the closure and repair order. Mr. De Groot was alerted and stated his belief that they could advise the Premises Division that it could justifiably refuse to release the Easterbrook Report. Mr. De Groot contacted Mr. Ackerman who emailed in response, in capital letters, that no information should be released to the plaintiff.

225 Mr. Ackerman had no wish for the plaintiff to resume operation of the Business.

226 Mr. Easterbrook wrote a lengthy email with reasons for opposing production of his report to the plaintiff. He then at trial obtained qualification as an expert to provide fair, objective and non-partisan engineering opinion evidence. In retrospect, Mr. Easterbrook should not have been qualified as an expert.

227 Messrs. De Groot and Easterbrook were advocates for Mr. Ackerman and the corporate defendants.

Analysis

Failure to Convey All Assets Used In Business

228 The Vendor's failure to convey title or assign its rights as to the ATM machine and the jukebox to the plaintiff breached its obligation in paragraph 1 of the APA.

229 These two pieces of equipment are not included amongst the list and categories of assets excluded in paragraph 2 of the APA.

230 These two pieces of equipment are relatively minor in the context of the quantity and value of the assets sold. The Vendor's breach of contract as to this equipment does not therefore go to the heart of the agreement. The appropriate remedy for this breach is damages, which are not claimed in the alternative.

231 This breach in isolation does not entitle the plaintiff to rescind the APA.

Nature and Extent of Obligation to Ensure Equipment's and the Premises' Good State of Repair

232 Paragraph 6(d) of the APA provides the Vendor shall ensure that:

> (a) all equipment is in good working order on the day of closing; and
>
> (b) that the lease premises and fixtures are in a state of good repair.

233 Paragraph 6 of the APA is entitled "Conditions Precedent to Closing" and begins with the phrase that the "closing of this transaction is subject to the following conditions precedent".

234 The defendants without legal authority submit that in proceeding to close the APA transaction, the plaintiff thereby acknowledged that the paragraph 6(d) conditions were satisfied and paragraph 6 did not create an ongoing warranty with respect to the equipment or the premises. This is an oversimplification of the nature and extent of paragraph 6 and is legally inaccurate.

235 The court agrees that the Vendor's obligation that the equipment be in good working order on the date of closing and that the premises and fixtures are in a good state of repair was not a continuing obligation in the sense of equipment breaking or newly developed elements of the premises requiring repair which developed after May 10, 2013. The issue is the status of the equipment and elements as of May 10, 2013.

236 The court in *Gladu v. Robineau Estate*, 2017 ONSC 37 (Ont. S.C.J.), paras. 272 to 274:

(a) cites the obligation on contractual parties as determined by the Supreme Court in *Bhasin v. Hrynew*, [2014] 3 S.C.R. 494, para 86, to act honestly in relation to the performance of the contract;

(b) cites the duty of a vendor to act in good faith and to take all reasonable steps to complete the sale transaction, pursuant to *Dynamic Transport Ltd.* v. *O.K. Detail Ltd.*, [1978] S.C.R. 1072, at p. 1084; and

(c) concludes that vendors are under a positive duty to not lie and to not conceal (para 274).

237 The party who is reasonable for satisfying a contractual term including a condition has a duty to act in good faith by taking all reasonable steps to complete the transaction as contracted for and exercise any discretion it has in good faith (*Marshall v. Bernard Place Corp.* (2002), 58 O.R. (3d) 97 (Ont. C.A.), at para. 26).

238 The Vendor ignores:

(a) its failure to ensure that the air-conditioning system in the Premises was in a state of good repair on May 10, 2013;

(b) its failure to ensure the state of good repair of the sewer drain pipe below the floor in the second storey kitchen, the incorrectly slanted kitchen floor, the spalled and extruding portion of the exterior brick wall on the second storey, the overcharged electrical circuit board in the basement, the absence of ventilation of the roof cavities and its impact as to condensation during the winter, the absence of vapour barriers, the inadequate insulation including that of water pipes, a malfunctioning thermostat in the disco bar and the charred roof support membranes on May 10, 2013 (the "Unrepaired Elements");

(c) the fact that by paragraph 6(d), it contractually incorporated and undertook to ensure the state of good repair of the premises and fixtures as a condition into the APA contract of the sale of business chattels and business name;

(d) paragraph 6(c) required the plaintiff to lease the Premises, which contained the chattels to be sold in the APA; and

(e) the requirement of the associated Landlord in the Lease that the premises be used for the same and continuing purpose for which the chattels were located in the Premises.

239 The APA, in requiring a five year lease with the Landlord and obligating the Vendor to ensure the state of good repair of the Premises and fixtures, was not simply a contract of sale of chattels.

240 The defendants rely upon the different remedies available in tort versus for breach of contract. They submit that the plaintiff's cause of action at its best alleges breach of the APA contract for which rescission is not an available remedy. The court for the reasons indicated below disagrees with this submission as to the availability of rescission in the case of breach of contract.

241 The defendants are correct in their general categorization that:

(a) terms of a contract are different than representations;

(b) terms are contractual. Breach of a promise contained in a term gives rise to an action for breach of contract;

(c) representations are non-contractual and consist of a statement or assertion made by one party to the other before or at any time of the contract of some matter or circumstances relating to it;

(d) representations may become terms of the contract, in which event they will have effect as such;

(e) damages for breach of contract are compensatory and based on the value of the contractual right requiring the party breaching the contract to compensate for the loss caused by the breach which is measured by the value of the performance promised (see S.M. Waddams, *The Law of Damages*, loose-leaf (consulted on 8 December 2016), (Toronto: Canada Law Book, 2015), at p. 5-1; and *Simpson v. Hatzipetrakos*, [2009] O.J. No. 3728 (Ont. S.C.J.), at para. 24);

(f) this differs from damages for the tort of fraudulent misrepresentation, which seek to put the plaintiff in the position it would have been in had the misrepresentation not been made (see Waddams, at p. 5-19); and

(g) if a representation is untrue, the appropriate remedy is not an action for breach of contract, but the avoidance or rescission of the contract entered into in consequence of the representation, and, possibly, a tort action for damages (*Gladu* paras 294-298).

242 A plaintiff in a successful action for breach of contract is entitled to compensation for the pecuniary loss flowing from the breach: Fridman, p. 730.

243 The complexity in this case is the condition requiring the lease of the Premises and the insertion and interplay of the Vendor's obligation to ensure the state of good repair of the Premises and fixtures in the APA contract.

244 The above general legal principles do not include consideration of the difference between condition and warranty contractual provisions.

Contractual Conditions and Warranties

245 G. Fridman states:

> The term "condition" in the past and currently referred to requirements that had to be satisfied in order to produce a binding contract. The expression "root of the contract" with generally accepted as the distinction between conditions and the lesser terms such as warranties. Courts determined whether a clause went to the root of the contract in the light of whether it's non-compliance would entitle a party to repudiate or an action for damages by the aggrieved party (Fridman p. 479).
>
> Older English cases differentiated between conditions precedent and other conditions, namely conditions were terms of the contract or as conditions precedent was something to be satisfied before the contract comes into operation or something basic to its continuing operation (Fridman p. 480).
>
> Warranty refers to determine the contract which is not the root of the agreement and expresses some lesser obligation, the failure to perform of which can give rise to an action for damages but never to the right to repudiate the contract. Conditions and warranties have different meanings according to the context in which they are used (Fridman p. 486).

246 A condition precedent is a contract term that the parties intended to be fundamental to its performance, meaning that its non-performance can be construed as a substantial failure to perform the contract at all. This can be contrasted with a mere warranty, which is a less important term that often relates to the quality of the subject. A breach of warranty survives closing and entitles the purchaser to damages: *Springhill Gardens Developments Inc. v. Kent*, [2004] O.T.C. 8 (Ont. S.C.J.), at paras. 9-11. The Vendor's obligation in paragraph 6(d) accordingly was fundamental to performance of the APA of a level of importance which exceeded the warranties in paragraph 9.

247 A distinction exists between a true condition precedent and other types of conditions. A "true" condition precedent arises where the rights and obligations of the parties depend on a future uncertain event beyond the parties' control and dependant entirely on the will of a third party. However, if the condition's fulfilment only depends on the actions of one or both of the parties, it is not a true condition precedent. Failure to satisfy a condition that is not a true condition precedent does not automatically render the contract void (*Coghlan v. Unique Real Estate Holdings Inc.*, 2016 ONSC 6420 (Ont. S.C.J.), at paras. 33-37, 48).

248 The effect of closing on the condition depends on the facts and the parties' intentions. The manner in which the parties have labelled a particular provision is not necessarily determinative. Rather, the court should look to the essential nature of the contractual provision on the facts of each case (*Gelakis v. Giouroukos* (1991), 18 R.P.R. (2d) 161 (Ont. Gen. Div.) pg. 49).

249 The Vendor's direct engagement for itself to ensure:

(a) the good working order of the equipment; and

(b) the state of good repair of the Premises and fixtures.

250 Traditionally, a condition in a contract of sale of goods was a term which was so important that the failure to perform it entitled the other party to treat the contract as at an end and pursue whatever remedies became available, whereas breach of a warranty was considered less important entitling the injured party to sue for damages however the parties remained bound to perform obligations under the contract. The traditional distinction between condition and warranty involved determining whether the provision that went to the root of the contract were conditions therefore and not true conditions precedent.

251 That a condition in some cases can mean that it's a non-fulfilment goes to the very existence or life of the contract, namely a condition precedent, being a term in the contract, yet outside of it in relating to the life or existence of the contract (Fridman, p. 478 and 479).

252 While the simple distinction between a condition and a warranty in many cases is sufficient to determine the respective obligations and consequences of a breach, that distinction in other situations is insufficient to permit a court to arrive at a proper and just conclusion in order to prevent injustice to one of the parties (Fridman p. 487 to 489).

253 The paragraph 6(d) obligation to ensure the state of good repair of the premises and fixtures is a condition of and related to the core of the APA.

254 Paragraph 6(d) of the APA creates two things, namely:

(a) it establishes the Vendor's obligation to ensure the good working order of the equipment on the date of closing and to ensure the good state of repair of the premises and fixtures; and

(b) it grants a right to the plaintiff to not close the transaction upon knowledge that the Vendor has failed to fulfil its above obligations.

255 It is illogical and an inappropriate interpretation of paragraph 6(d) to hold that a court will relieve a vendor from its obligation to ensure the repair of non-apparent latent Premises elements known to it, because the plaintiff failed to observe the same and proceeded to close the transaction.

256 It is not contradictory and the logical interpretation of paragraph 6(d) is that the plaintiff's right thereunder to refuse to close expired on closing, however the Vendor's breach to ensure the repair of existing latent defective premises' and fixture elements remained actionable upon their subsequent disclosure. A contrary interpretation encourages default by a party which contracted to

ensure the repair of known defects and then ignored that obligation in order to gain the immediate financial gain of closing.

257 The plaintiff was entitled to assume that the Vendor would take all reasonable measures to comply with its obligations as to the state of the equipment and the premises pursuant to paragraph 6(d) of the APA.

258 The court in *Gladu* as to patent versus latent defects stated:

> 292. The distinction between patent and latent defects is described in *Halsbury's Laws of England*, at para. 51:
>
> > Defects of quality may be either patent or latent. Patent defects are such as are discoverable by inspection and ordinary vigilance on the part of a purchaser, and latent defects are such as would not be revealed by any inquiry which a purchaser is in a position to make before entering into the contract for purchase.
>
> 293. A home inspection is not intended to find latent defects.

259 The fact the plaintiff did not have a Premises inspection conducted prior to closing must also be considered in light of the fact it was leasing and not buying the premises, which is when an inspection of the Premises would normally be conducted.

260 The APA does not state that the obligations of the Vendor such as those in paragraph 6(d) do not survive closing.

261 Paragraph 9 of the APA lists numerous representations and warranties by the Vendor.

262 Subparagraph 9(1)(e) addresses the enforceability of obligations and states that "this Agreement constitutes a valid and binding obligation of the Vendor or enforceable against it in accordance with its terms". The enforceability of the Vendor's obligations are not thereby limited to the representations and warranties in paragraph 9 and extend beyond that paragraph to the full contract which includes the Vendor's obligations in paragraph 6(d). Paragraph 9(1)(e) accordingly supports the conclusion that the Vendor's paragraph 6(d) obligations survived closing.

263 The Vendor under paragraph 9(e) represents and warrants that its obligations in paragraph 6(d) are valid and binding terms of the contract enforceable against it, thereby identifying that those obligations, as to the state thereof as of May 10, 2013, survived closing and remained enforceable.

264 The court concludes that the Vendor breached its obligations in paragraph 6(d) to ensure that its equipment being sold was in good working order on May 10, 2013 and that the Premises and fixtures were in a state of good repair. That obligation as of May 10, 2013 regarding the state

of non-repair of the Premises and fixtures survived closing and remained actionable thereafter as to the latent elements which the Vendor knew required and were not repaired.

Whether Rescission Is Available For Breach of APA Condition

265 Waddams addresses the conflicting jurisprudence as to the availability of the remedy of rescission in the case of breach of contract, reconciles those authorities and states:

> Some courts have held that rescission in the case of sale of goods is not available if the misrepresentation is a term of the contract (Waddams, paras. 427 and 428).
>
> The obvious remedy, in the face of the conflicting case law, is prevention of enrichment, either by setting aside the transaction or by a monetary adjustment of equivalent economic effect (Waddams, paras. 427 and 428).

266 The author then addresses unjust enrichment in the context of a contract induced by an innocent but false statement, which would include a statement to ensure the state of repair, as follows:

> Innocent misrepresentation is a sufficient reason to deny the enrichment, namely the benefit of a contract induced by a false statement (Waddam, paras. 428 and 429).

267 The above goal of preventing enrichment to a contractual party knowingly breaching its undertaking to ensure the repairs were carried out, combined with the equitable jurisdiction of this court, constitutes jurisdiction in contract to set aside the APA by way of rescission or to grant judgment in the amount of the purchase price paid thereunder.

268 The Vendor's representation in the APA to ensure the premises and fixtures owned by the Landlord were in a state of good repair goes to the heart of the APA sale contract which required the plaintiff to agree to a five year lease with the Landlord of the premises in which the Assets were to be used in the Business to therein be carried on.

Party's Unilateral Mistake

269 A party induced to enter into a contract by reason of fraud or essential error of a material kind is entitled to seek rescission of the contract and restoring the parties to their original position (*Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.), para 39 and *Abram Steamship Co. v. Westville Shipping Co.*, [1923] A.C. 773 (U.K. H.L.), p. 781).

270 The inability to conduct business within the premises in utilizing the Assets purchased was the reasonable and probable consequence of the Vendor's breach of its contractual obligation in the APA to ensure the good state of repair of the Premises, resulted in the plaintiff's loss as

in the case of *Eastwalsh Homes Ltd. v. Anatal Development Ltd.* (1993), 12 O.R. (3d) 675 (Ont. C.A.), at p. 687.

271 The Supreme Court in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.) addresses a party's decision to rescind a contract and determined the availability of rescission as a remedy in contract.

272 The Supreme Court in *Guarantee* stated:

> 39. A fundamental confusion seems to exist over the meaning of the terms "rescission" and "repudiation". This confusion is not a new one, as it has plagued common law jurisdictions for years. [page440] Rescission is a remedy available to the representee, inter alia, when the other party has made a false or misleading representation. A useful definition of rescission comes from Lord Atkinson in Abram Steamship Co. v. Westville Shipping Co., [1923] A.C. 773 (H.L.), at p. 781:
>
> > Where one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it, and refuses to be bound by it, the expression of his election, if justified by the facts, terminates the contract, puts the parties in status quo ante and restores things, as between them, to the position in which they stood before the contract was entered into.
>
> See similarly G. H. L. Fridman, *The Law of Contract in Canada* (3rd ed. 1994), at p. 807.
>
> 42. However, merely clarifying the distinction between rescission and an accepted repudiation does not end the discussion. Since "rescission" has frequently been used to describe an accepted repudiation, courts must be sensitive to the potential for misuse. To that end, courts must analyse the entire context of the contract and give effect, where possible, to the intent of the parties. If they intended "rescission" to mean "an accepted repudiation", then the contract should be interpreted as such. For example, in *Mills v. S.I.M.U. Mutual Insurance Association*, [1970] N.Z.L.R. 602 (C.A.), the court held that a clause stating that in the event of false statements the policy "shall be void", was in fact a repudiation clause. Crucial to the court's reasoning in that case was the fact that the clause in question provided for forfeiture of premiums. Turner J. therefore concluded, at p. 609, that
>
> > the policy does not provide that the consequences of an untrue statement shall be that the policy shall be deemed void *ab initio*, as if it had never come into existence, for the premium is to be forfeited . . . . I therefore construe the clause to mean that an untrue statement shall entitle the respondent to repudiate liability under the policy, while keeping the premium.

> Of course, contrary to the facts in this appeal, the actual term "rescission" was not used in *Mills*. Nonetheless, we must always examine whether the use of the word rescission is indeed consistent with the parties' intent.

43. Before turning to the issue of intent, however, one must determine whether rescission is even available. As Treitel notes regarding the law in England, *supra*, at p. 347:

> Before the *Misrepresentation Act* it was clear that a person could rescind a contract for a misrepresentation which did not form part of the contract; but it was doubtful whether this right to rescind survived where the misrepresentation was later incorporated into the contract as one of its terms. [Emphasis in original.]
>
> However, the *Misrepresentation Act* 1967 (U.K.), 1967, c. 7, s. 1, cleared up that question in England, providing that "a person shall be entitled to rescind notwithstanding that the misrepresentation has become a term of the contract" (Treitel, *supra*, at p. 347).

44. In Canada, the issue is somewhat less clear. The state of the law is best summarized by Waddams, *supra*, at para. 427:

> If the [misrepresentation] is a term of the contract . . . the mistaken party is entitled to damages as for breach of contract. Whether the party is further entitled to set aside the transaction and demand restitution of the contractual benefits transferred will depend upon ... whether the breach is "substantial" or "goes to the root of" the contract.

> A breach that is "substantial" or "goes to the root of" the contract is often also described as a material breach; see, for example, Fridman, *supra*, at p. 293: "A misrepresentation is a misstatement of some fact which is material to the making or inducement of a contract" . . . .
>
> The question, in light of the law as stated in Waddams, *supra*, and Fridman, *supra*, is whether the misrepresentation is "substantial", "material", or "goes to the root of" the contract. This brings us back to the issue of the parties' intent, for whether the rescission is warranted is at least in part a question of intent.

47. In summary, a misrepresentation, even one that was incorporated into the contract, gives the innocent party the option of rescinding the contract, i.e. to have

it declared void ab initio.

273 In summary, rescission is an equitable remedy available to the court in an action for breach of contract where the representation is incorporated in the contract, as contained in paragraph 6(d) of the APA in this case.

274 On the facts of this case, rescission of the APA is the appropriate and fair remedy with an accounting by the Master as to the use of the chattels and name during the 10 to 11 month period of their use.

Deposit

275 Rescission of the APA results placing the parties back to their position immediately prior to that transaction including repayment of the purchase price paid for the Assets subject to an accounting for the value of the use thereof.

276 The $15,000 deposit paid pursuant to the APA requires consideration. The plaintiff paid that money upon submission of its offer to purchase pursuant to the APA.

277 The APA provides that the plaintiff shall pay the sum of $15,000 "as a deposit to be credited towards the purchase price on closing." The clause then continues in stating that if the plaintiff "fails to complete this transaction for any reason other than the non-fulfillment by the Vendor of any of the conditions set forth in Section 6, the Vendor shall be entitled to retain the deposit as liquidated damages".

278 Money paid as a deposit must be paid on some terms implied or expressed. Relevant to that issue is whether the word deposit is used in the contract. If money is paid as a deposit, it is not recoverable if the payor abandoned the contract (*De Palma v. Runnymede Iron & Steel Co.* (1949), [1950] O.R. 1 (Ont. C.A.)).

279 If a deposit has been paid under contract which does not provide for its return to the purchaser and the contract has gone off by default of the purchaser, the Vendor is entitled to retain the deposit (*Thagard v. Edmiston*, [1925] M.J. No. 25 (Man. C.A.), p. 3).

280 On the basis that the plaintiff:

(a) did not fail to close the transaction; and

(b) did not abandon or repudiate the APA and the Lease nor cause those contracts to not proceed for the reasons stated above and for the reasons set forth below;

there is no basis to consider or treat the deposit differently from the other $260,000 of the purchase price paid by the plaintiff under the APA.

Quiet Enjoyment

281 Whether there has been a breach of the covenant of quiet enjoyment is a question of fact. The nature and extent of the right to quiet enjoyment will depend on the purposes for which the premises are being used (*Watchcraft Shop Ltd. v. L & A Development (Canada) Ltd.* (1996), 8 O.T.C. 4 (Ont. Gen. Div.), at para. 29).

282 The covenant for quiet enjoyment includes any act that is a substantial, non-trifling interference with the tenant's ability to use the premises for the intended purpose, in this case as a public restaurant and bar (*Watchcraft*, at paras. 30-31).

283 Ongoing roof leaks or fire damage, which have a significant impact on the tenant's ability to carry on its business, can constitute a breach of the covenant of quiet enjoyment: *DMX Plastics Ltd. v. Misco Holdings Inc.* (2008), 76 R.P.R. (4th) 300 (Ont. S.C.J.), at para. 75 and *Bassiouny v. Lo* (2008), 79 R.P.R. (4th) 179 (Ont. S.C.J.).

284 Several of the Premises elements requiring repair such as the inadequate kitchen floor pipes, the inadequate kitchen floor slant to the floor drain, the lack of adequate insulation of pipes in the ceiling of the disco bar, the lack of proper heating of the disco washrooms, the defective thermostat in the disco bar, the need of support of the disco ceiling support beam and the risk of collapse of the exterior brick wall were latent in nature, not apparent to the plaintiff, rendered the premises unfit for the business purpose intended, posed risk of harm to occupants and fundamentally denied the plaintiff's right to quiet enjoyment.

Lease and Availability of Rescission

285 The Lease provides that the Landlord shall provide the premises and fixtures on the commencement date in good working order. This contractual provision is not identified as a condition or as a representation or warranty. That, however, is not determinative of the issue.

286 Unlike the APA, the Lease contains no clause identified as representations or warranties by the Landlord.

287 The Lease contains a covenant by the Landlord to provide the plaintiff with quiet enjoyment.

288 Given that entering into the Lease was a condition as to the APA purchase of the Assets and not the reverse and that the purpose of the plaintiff's purchase of the Assets was to carry on the business of BOTB in the Premises and given the identical level of knowledge by the Landlord and the Vendor regarding the elements in the Premises requiring repair, this contractual condition in the Lease constituted a condition and not a warranty.

289 The action and inaction by the two corporate defendants is identical.

290 A tenant will not be able to treat the lease as terminated unless the breach is a fundamental breach, in which the tenant is deprived of substantially the whole benefit of the lease: *Chevalier Automobiles Inc. v. Francis* (1996), 1 O.T.C. 368 (Ont. Gen. Div.), at para. 68; see also *1723718 Ontario Corp. v. MacLeod*, 2010 ONSC 6665 (Ont. S.C.J.), at paras. 86-97.

291 "Constructive eviction" is another scenario in which the tenant may walk away from the agreement. Constructive eviction occurs where:

(a) the breach is intentional or the probable consequence of intentional conduct;

(b) the interference has the character of permanence or wrongfulness; and

(c) the inference is so substantial or intolerable as to make it reasonable for the tenant to vacate: *Arangio v. Patterson*, [1993] O.J. No. 448 (Ont. Gen. Div.), at para. 23.

Where there is constructive eviction, the tenant is entitled to vacate the premises, no longer pay rent, receive damages for consequential loss (such as loss of profit, moving expenses, or damages to growth of business), and potentially receive punitive or exemplary damages (*Arangio*, at paras. 24-31).

292 The case of *Shun Cheong Holdings B.C. Ltd. v. Gold Ocean City Supermarket Ltd.*, 2000 BCSC 574 (B.C. S.C.), aff'd 2002 BCCA 451 (B.C. C.A.), cited with approval in Ontario in *MacLeod* and *Bassiouny v. Lo* (2008), 79 R.P.R. (4th) 179 (Ont. S.C.J.), involved an alleged fundamental breach of the covenant of quiet enjoyment and the remedies available for that.

293 The trial judge in *Shun Cheong* found that the covenant for quiet enjoyment had been fundamentally breached when the tenant grocery store suffered repeated leaks of noxious water given that the business was one in which health and safety standards were important (para. 78). The Court found that the breach arose when the landlord failed to repair the leaks, the landlord was notified by the tenant that he considered this a fundamental breach, and the landlord, by re-entering for distraint, foreclosed any negotiation for damages with the tenant and crystalizing into fundamental breach (paras. 78, 91).

294 The Court found that the landlord was therefore responsible for all proven damages flowing from the fundamental breach of quiet enjoyment (para. 92). The tenant sought return of the entire purchase price of the grocery store business. The court appeared willing to entertain that remedy but held the tenant had failed to prove any particular quantum of damages or provide evidence that he had lost the whole of the investment or income. The Court terminated the lease and ordered return of the tenant's security deposit but held that further damages lacked a proper evidentiary foundation (paras. 93-99).

295 Rescission of the Lease and requiring repayment of the rent is not an appropriate remedy in the present case. The plaintiff is not claiming repayment of the rent paid.

296 The plaintiff occupied the Premises until April 6, 2014 and would be accountable for rent for that period of time. It would be inappropriate to now conduct a hearing before the Master as to the appropriate level of rent when the parties negotiated and agreed upon that as contained in the Lease.

297 The appropriate remedy given the impact of the latent elements not repaired which materially impaired the operation of the Business is termination of the Lease effective April 6, 2014.

Alternative — Implied Term

298 In the alternative, if the above interpretation as to the nature of paragraph 6(d) and its enforceability after closing as to the state of the Premises and fixtures as of May 10, 2013 is incorrect, the court in the alternative would imply the same paragraph 6(d) obligation of the Vendor as a condition into the APA contract which remained enforceable as to the latent Unrepaired Elements of the Premises upon discovery by the plaintiff.

299 A court may imply a term to a contract if the parties intended it, for example for the purposes of business efficacy. A term may not be implied simply on the ground of fairness. The court may determine that everything that was agreed to between the parties is not contained in the written contract and that it is justifiable to imply an additional term to establish the scope of the contractual obligations binding the respective parties. Instances for implying a term include where it is reasonably necessary having regard to the surrounding circumstances (Fridman pages 463 and 464).

300 Given the nature of the latent Unrepaired Elements in the premises, including their impact on operation of the Business and their potential risk, combined with the Vendor's undertaking to ensure those elements were repaired, leads to the inescapable conclusion that the plaintiff as testified would not have proceeded with the purchase of the Assets which required it to the lease and carry on business in the premises had it known the state of disrepair and the Vendor's failure to ensure the state of good repair on May 10, 2013. This provision is reasonably necessary having regard to the surrounding circumstances.

301 The court would grant rescission of the APA based upon this implied condition for the same reasons as stated above.

Repudiation

302 The defendants submit the plaintiff repudiated the APA which the Vendor in response accepted with the result of then terminating the APA and the Lease which results in the Vendor's entitlement to retention of the Assets and the portion of the Asset purchase price paid.

303 A purchaser's repudiation or abandonment of the contract thereby terminates and does not rescind such contract. Repudiation or abandonment prevents the purchaser from claiming recovery of the money paid (*Rudd v. Balaz*, [1940] M.J. No. 27 (Man. K.B.)) at para 22).

304 The Supreme Court in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.) at 445 stated the following as to repudiation:

> 40. Repudiation, by contrast, occurs "by words or conduct evincing an intention not to be bound by the contract. It was held by the Privy Council in *Clausen v. Canada Timber & Lands, Ltd.*, [1923] 4 D.R.L. 751], that such an intention may be evinced by a refusal to perform, even though the party refusing mistakenly thinks that he is exercising a contractual right" (S. M. Waddams, *The Law of Contracts* (4th ed. 1999), at para. 620). Contrary to rescission, which allows the rescinding party to treat the contract as if it were void *ab initio*, the effect of a repudiation depends on the election made by the non-repudiating party. If that party treats the contract as still being in full force and effect, the contract "remains in being for the future on both sides. Each (party) has a right to sue for damages *for past or future breaches*" (emphasis in original): *Cheshire, Fifoot and Furmston's Law of Contract* (12th ed. 1991), by M. P. Furmston, at p. 541. If, however, the non-repudiating party accepts the repudiation, the contract is terminated, and the parties are discharged from future obligations. Rights and obligations that have already matured are not extinguished. Furmston, *supra*, at pp. 543-44.
>
> 41. So much is relatively clear. Problems have arisen, however, from misuse of the word "rescission" to describe an accepted repudiation. In *Keneric Tractor Sales Ltd. v. Langille*, [1987] 2 S.C.R. 440, at p. 455, Wilson J., writing for the Court, addressed the distinction as follows:
>
> > The modern view is that when one party repudiates the contract and the other party accepts the repudiation the contract is at this point terminated or brought to an end. The contract is not, however, rescinded in the true legal sense, i.e., in the sense of being voided *ab initio* by some vitiating element. The parties are discharged of their prospective obligations under the contract as from the date of termination but the prospective obligations embodied in the contract are relevant to the assessment of damages: see *Johnson v. Agnew*, [1980] A.C. 367, [1979] 1 All E.R. 883 (H.L.),

> and *Moschi v. Lep Air Services Ltd.*, [1973] A.C. 331, [1972] 2 All E.R. 393 (H.L.). [Emphasis added.]
>
> 47 . . . Repudiation, by contrast, occurs when one party indicates its intention not to fulfill any future obligations under the contract. If the other pa y accepts the repudiation, the contract is terminated, not rescinded. To use "rescission" and "accepted repudiation" synonymously can lead only to confusion and should be avoided. Where there is some doubt as to whether repudiation or rescission is intended, courts should look to such factors as the context of the contract, particularly the intent of the parties. For sophisticated parties, it will take strong evidence to displace the meaning suggested by the parties' choice of language in the contract itself. In this case, because both parties agreed to the word "rescission".

305 If the innocent party to a repudiated breach or an anticipatory repudiation wishes to be discharged from the contract, its election to disaffirm the contract must be clearly and unequivocally communicated to the repudiating party within a reasonable time. Actual notice of acceptance or adoption of the repudiation is not necessary. Adoption or rejection of the repudiation may be reasonably inferred from all the circumstances (*Brown v. Belleville (City)*, 2013 ONCA 148 (Ont. C.A.), para 42 to 457).

306 The defendants allege that the plaintiff repudiated these two contracts because of the decreased profitability of the Business during the winter of 2013/2014. The evidence indicates revenue materially decreased during the winter season which had also been the case during the Vendor's prior operation of the Business which included Mr. Ackerman's closure of the disco bar for months which only opened two weeks prior to May 18, 2013, just as occurred during the plaintiff's operation. The plaintiff was aware on April 6, 2014 that the Business and its revenue stream were about to dramatically increase in approximately one month. The lower winter revenue levels were not a motivation to repudiate these contracts.

307 Correspondence from the plaintiff's lawyer dated March 26 and April 2, 2014 seek action by the corporate defendants to remedy the Unrepaired Elements to permit the plaintiff's continued ownership and operation of the Business.

308 These letters make it clear that the plaintiff was not repudiating or abandoning the purchase and lease contracts. The defendants refused to respond then and subsequently, even after the Premises Division's temporary closure of the premises and later when that closure order was lifted.

309 Faced with this continuing refusal to communicate, counsel for the plaintiff accordingly caused issuance of the claim in this proceeding on April 3, 2014 in which the plaintiff seeks rescission of the APA.

310 The plaintiff did not repudiate the APA or the Lease.

Failure to Mitigate

311 The defendants submit that the plaintiff failed in its duty to mitigate its damages which thereby prevents the recovery thereof. The defendants point to the APA chattels purchased which the plaintiff left in place but could have removed and used elsewhere or sold.

312 The duty to mitigate prevents a plaintiff from recovering compensation that could have been avoided or lessened by taking reasonable steps: *Gladu*, para 389, relying upon *Toronto Industrial Leaseholds Ltd. v. Posesorski* (1994), 21 O.R. (3d) 1 (Ont. C.A.), at p.10.

313 A plaintiff in an action for breach of contract has a duty to take all reasonable steps to mitigate the loss occasioned by the breach and prevents recovery in respect of any part of the damages caused by the plaintiff's failure to take such steps (Fridman, p. 730).

314 The defendant has a heavy onus to prove that the plaintiff has failed to mitigate. The plaintiff will be relieved of its duty to mitigate if it was unreasonable for it to do anything or if what the defendant alleges it ought to have done was totally unreasonable (Fridman, p. 731).

315 Removal of the chattels purchased would contradict the plaintiff's original call that the defendants remedy the elements of the Premises requiring repair to allow it to continue the Business. It in addition would defeat the plaintiff's claim for rescission of the APA. The duty to mitigate does not supersede or obligate a party to abandon a legal remedy and did not require the plaintiff to relocate or sell the chattels which had not become fixtures.

Alternative Claims for Fraudulent and Negligent Misrepresentation

316 Having determined the plaintiff's entitlement under contract to rescission of the APA, it is not therefore necessary to determine its alternative cause of action in tort for fraudulent misrepresentation. For the benefit of another court's review, this Court will proceed to determine this claim for fraudulent misrepresentation.

317 A party may sue in tort when the relationship between the parties was governed by a contract: *Canadian Pacific Hotels Ltd. v. Bank of Montreal* (1987), 40 D.L.R. (4th) 385 (S.C.C.) at p. 455.

318 This court, in the alternative to its determinations of rescission in contract, notes that although incorporated as a term in the APA, paragraph 6(d) therein arises as a result of a representation to that effect by the Vendor thereby entitling the plaintiff to sue in tort for fraudulent misrepresentation. This contractual provision requiring the Vendor to ensure the state of good repair of the premises and fixtures based on logic did not come into existence out of the air. Although there is no evidence on the point, either the plaintiff asked for and the plaintiff agreed, or the Vendor proposed and the plaintiff agreed that the Vendor or would ensure the good state

of repair of the premises and fixtures as then incorporated and reflected in the wording of the subparagraph.

Representation as to Future Conduct

319 A false representation as to future conduct can be treated as a misrepresentation. Waddams states:

> Similarly, although a promise as to the future conduct of the promisor or a third party is not a misrepresentation, it has been held that such a promise implies a statement that the present intention of the promisor is to carry out the promise, or that the promisor's belief is that the third party will act as stated, and this statement of fact, if false, can be treated as a misrepresentation (Waddams para 421).

Fraudulent Misrepresentation and Rescission

320 A fraudulent misrepresentation is a statement known to be false or made not caring whether it is true or false. A person is induced to enter into a contract by such a statement is entitled, prima facie, to damages for fraud . . . and to rescission (Waddams para 419).

321 A fraudulent misrepresentation consists of a representation of fact made without any belief in its truth, with intent that the person to whom it is made shall act upon it and actually causing that person to act upon it (Fridman page 285).

322 The elements to be established in a case of fraudulent misrepresentation are:

> (1) that the representations were made by the defendant and were false;
>
> (2) that the wrongdoer either knew that the statements were false or made them recklessly without knowing whether they were false or true;
>
> (3) that the victim was thereby induced to enter into the contract; and
>
> (4) the plaintiff's actions resulted in a loss: *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.), para 87 and Fridman p. 285.

323 The above four elements are proven in this case.

324 The Vendor had knowledge of the Unrepaired Elements prior to entering into the APA. The Vendor represented it would ensure the good state of repair of the premises and fixtures.

325 The Vendor on the evidence had no intention of repairing but represented it would ensure the repair of the Premises which includes the Unrepaired Elements. The Vendor accordingly falsely made this representation.

326 The Vendor knew that its requirement that the plaintiff, as a condition for the purchase of the Assets, was to sign a five year lease of the Premises in which the Business was to be carried on, would rely upon its representation to ensure the Premises and fixtures were in a good state of repair.

327 The plaintiff, relying upon the Vendor's above representation, entered into the APA and the Lease.

328 Rescission is an equitable remedy available to a representee when the other party has made a false or misleading representation. Where rescission is based on misrepresentation, it must be "material", "substantial", or "go to the root of" the contract (*Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.), at paras. 39, 47).

329 Waddams states a false promise to take future action may treated as a misrepresentation: para 421:

> Where fraud is discovered after the closing of a transaction, the purchaser can elect to sue for rescission or damages (*Halsbury's Laws of Canada* (online), *Real Property*, "Sale of Land: Physical and Title Defects: Representations: Fraudulent Misrepresentation" at HRP-183 "Rescission").

330 Fridman as to equitable rescission states the following principles relevant to the facts in this case:

> In contrast with the common law idea of rescission, it is sometimes possible for a party to seek the equitable remedy of rescission, by applying to the court for relief from a transaction in respect of which it would be inequitable to hold the applicant bound. Rescission is a remedy, not a cause of action. It is sometimes possible for a party to seek the equitable remedy of rescission by applying for relief from a transaction in respect of which it would be inequitable to hold that the applicant bound (p.761).
>
> The court's jurisdiction to grant rescission on economic grounds extends beyond the common law circumstances which permitted a party acting unilaterally to treat the contract as a legal nullity (p. 761).
>
> Although there is a degree of overlap between the common law right to rescind for fraud and the equitable jurisdiction of the court to grant rescission of a contract which has been entered into as a consequence of a false representation or some other fraud, the equitable power to order rescission is wider in scope. Indeed, the limits of this jurisdiction have not been fixed (p. 761).

> Wherever a court considers, on general equitable grounds, that a contract should not be allowed to stand and that the plaintiff's request that it be annulled should be granted, the Court has power to do so. A Court of equity can do what is "practically just" (p. 761).
>
> Rescission may be granted even where the contract is not susceptible of attack at common law. Rescission may be granted despite title having passed . . . . (based upon) the inequitable conduct of the other party (p. 762).
>
> Most frequently the jurisdiction to rescind a contract on equitable grounds is invoked in three main instances. The first is where the contract resulted from some fraud which induced a mistake on the part of the defrauded party. The second is where the mistaken question was the result of innocent non-fraudulent misrepresentation. The third is where the contract was procured without fraud but as a consequence of what in equity is regarded as fraud, namely by the use of undue influence or some unconscionable conduct which renders the bargain questionable on equitable grounds, even though it may be perfectly valid at common law (p.762).
>
> Rescission may be invoked where the contract was brought about by undue influence or unconscionable conduct (p.766).
>
> . . . The court can rescind an agreement because of the unilateral mistake of one party if the mistake is brought about by the inequitable conduct or equitable fraud on the part of the other party (p.767).
>
> The equitable power (to rescind) is to give relief in cases involving unconscionable transactions . . . (p.767).

331 Damages in a tort action for misrepresentation is the amount of money required to put the plaintiff in the position if the statement had not been made. It's an action for a wrong done in which the plaintiff was tricked out of its. In that case, the highest limit of the plaintiff's damages was determined to be the full extent of loss which is measured by the money that was in its pocket and is now in the possession of the defendant. That level of out-of-pocket loss is the measure of damages in tort action for fraud and for negligent misrepresentation (*Sethi v. Dawnne*, 2002 ABQB 736 (Alta. Q.B.), para. 66).

332 The Vendor, with knowledge, falsely deceived the plaintiff into believing by its misrepresentation to ensure the state of good repair of the Premises and fixtures and then requiring and contracting for the lease of the Premises in which the purchased Assets to be used in the operation of the Business.

333 The plaintiff has established fraudulent misrepresentation by the Vendor. The appropriate remedy for that fraudulent misrepresentation is the equitable remedy of rescission of the APA for all of the reasons previously stated above.

Negligent Misrepresentation

334 *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.), at p. 110 lays out the 5-step test for negligent misrepresentation established in *Hedley Byrne & Co. v. Heller & Partners Ltd.* (1963), [1964] A.C. 465 (U.K. H.L.):

> (1) there must be a duty of care based on a "special relationship" between the representor and the representee;
>
> (2) the representation in question must be untrue, inaccurate, or misleading;
>
> (3) the representor must have acted negligently in making said misrepresentation;
>
> (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
>
> (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

335 A "special relationship" existed in the present case as the Vendor knew or should have known that the plaintiff would foreseeably rely upon its representation to ensure the good state of repair of the premises and fixtures. The Vendor through Mr. Ackerman knew from experience as to the foreseeability of damage to the Premises, the plaintiff's likely reliance upon the representation to ensure the state of repair. Given the Vendor's knowledge of the latent nature of the repairs required and the representation to ensure repair of any such elements, a proximate relationship existed (*Cognos*, para 46).

336 The evidence establishes the other four elements.

337 A failure to divulge highly relevant information can be a pertinent consideration in determining whether a particular misrepresentation was negligent (*Cognos*, at pp. 123-24). An omission can be considered negligent when considered in the context of other express positive misrepresentations — in contrast with situations where no representations have been made at all (*Lysko v. Braley* (2006), 79 O.R. (3d) 721 (Ont. C.A.), at para. 45.)

Rescission and Accounting

338 Fridman in the Law of Contract as to rescission and accounting states:

> Rescission may be granted even where the contract is not susceptible of attack at common law. When it is, the purpose of the court is to produce *restitutio in integrum*. This has two major consequences. . . . . Second, there may have to be, and the court is the power to order adjustments, perhaps involving monetary payments by way of compensation for use of property, or reimbursement of expenses so as to ensure that, so far as it is within the capability of the court, the parties are restored to their original situations before the contract was ever concluded between them (p. 762).

Piercing Corporate Veil and Personal Liability

339 The plaintiff seeks personal judgement against Mr. Ackerman for the $275,000 claimed by recession.

340 The court in *Singh v. Trump*, 2015 ONSC 4461 (Ont. S.C.J.) as to this issue stated:

> 38. At common law, the owners and management of a corporation are not liable for what they do within their authority and on behalf of their corporation, but they are liable if there is some conduct on their part that is either tortious in itself or is independent misconduct from that of the corporation. Corporate actors can be separately liable if they have engaged in their own tortious conduct for their own purposes independent of the purposes of the corporation: *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (C.A.); *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.* (1995), 26 O.R. (3d) 481 (C.A.). leave to appeal to S.C.C. ref'd, [1996] S.C.C.A. No. 40; *Schembri v. Way*, 2012 ONCA 620; *Hogarth v. Rocky Mountain Slate Inc.*, 2013 ABCA 57.
>
> 39. In the case at bar, in my opinion, there was no conduct on the part of Messrs. Shnaider or Levitan that was independent from that of the corporation and there is no basis for personal liability.

341 The court in *Wandinger v. Lake* (1977), 16 O.R. (2d) 362 (Ont. H.C.) on this issue stated:

> I have no difficulty in finding that the defendants, Donald and Audrey Lake, deliberately and knowingly concocted and falsified the financial statements in ex. 1 covering the fiscal year ended October 31, 1974, and the period from November 1, 1974, to March 31, 1975. This was done with the intention to mislead a prospective purchaser and eventually to mislead the plaintiff and her husband, i.e., to represent that the Lakefern Motel and Restaurant business was a profitable, thriving business. On the contrary, to the knowledge of the defendants, Donald and Audrey Lake, it had been in operation 17 months prior to the plaintiff's purchase. These defendants were also well aware that the plaintiff and her husband were relying on these financial statements and Donald Lake's false representations when they purchased this restaurant and motel business.

> In any event I find that they (personal defendants who were officers of defendant corp) were the agents of the corporate defendant. (p.3)
>
> An agent is personally liable in tort for his own fraudulent misrepresentations: 26 Hals., 3rd ed., p. 867, para. *1610; Eaglesfield v. Marquis of Londonderry* (1878), 26 W.R. 540 at p. 541 (H.L.). In *Goldrei, Foucard & Son v. Sinclair et al.*, [1918] 1 K.B. 180 (C.A.), the plaintiffs alleged that they were induced by false and fraudulent misrepresentations made to them by the personal defendant, acting as the agent of the corporate defendant, to enter into an agreement. They claimed damages for fraud against both defendants and for rescission against the corporate defendant and for damages. It was held that they were entitled to recover as there were two causes of action, one against the company for rescission and repayment of their payments on the agreement and, secondly, against the personal defendant for damages for fraud.
>
> In *Yost v. Int'l Securities Co. Ltd. et al.* (1918), 42 O.L.R. 572 at p. 585, 43 D.L.R. 28 at p. 40 (C.A.), the personal defendant, with the intention of inducing the plaintiff to purchase lots so that he might earn a commission, recklessly and without knowing whether they were true or false, made statements upon which the plaintiff acted. As the statements turned out to be false, the agent was responsible to the same extent as if he had asserted what he knew to be untrue. (p. 6)
>
> In the result, the plaintiff is entitled, as against the defendant Lakefern, to rescission and to recover the moneys that she paid pursuant to the agreement of purchase and sale: *Clough v. London & North Western R. Co.* (1871), L.R. 7 Ex. 26at p. 34. She is also entitled to recover moneys subsequently expended as consequential damages for the defendants' deceit. As stated in *Clark et al. v. Urquhart*, [1930] A.C. 28 at p. 68, the measure of damages should be "based" on the actual damage directly flowing from the fraudulent inducement. The plaintiff is to return the goods and chattels obtained pursuant to that agreement and the value of those not returned.
>
> Turning to the defendants, Donald and Audrey Lake, their personal liability rests on the premise that they were the persons who committed fraud against the plaintiff for their own benefit by means of the corporation which they controlled: *Parna et al. v. G. & S. Properties Ltd. et al.*, [1968] 1 O.R. 626, 67 D.L.R. (2d) 279 (Ont. H. C.); affirmed [1969] 2 O.R. 346, 5 D.L.R. (3d) 315 (C.A.) [affirmed [1971] S.C.R. 306, 15 D.L.R. (3d) 336]. The plaintiff is therefore entitled to recover damages against them for the tort of deceit. (p. 8)

342 There is no evidence that Mr. Ackerman as to the conduct under review acted beyond his capacity as an officer of the two defendant corporations or that he personally misrepresented the state of repair of the premises and fixtures. Based on the above authorities, there is accordingly no basis to find him personally liable.

Caveat Emptor

343 The defendants allege this action should be denied on the basis of *caveat emptor*.

344 The court in *Gladu v. Robineau Estate*, 2017 ONSC 37 (Ont. S.C.J.) as to *caveat emptor* stated:

> 269. The doctrine of *caveat emptor* will not be displaced by silence about defects, unless the silence relates to some material fact, which there is a duty on the silent party to disclose to the other. Put another way, mere silence, without more, on the part of a vendor regarding a defect subsequently discovered by a purchaser, will not normally found a cause of action for misrepresentation or for fraud: see *Alevizos v. Nirula*, 2003 MBCA 148 (CanLII), 180 Man. R. (2d) 186, at para. 19.

345 The court in *McGrath v. MacLean* (1979), 22 O.R. (2d) 784 (Ont. C.A.) stated: "where the action sounds in fraud or misrepresentation, the defence of *caveat emptor* will be of no avail".

346 The court in *Swayze v. Robertson*, [2001] O.T.C. 186 (Ont. S.C.J.) para 39, held the vendor lost the protection of *caveat emptor* upon determination of its negligence or fraudulent misrepresentation.

347 Once the vendor breaks its silence in stating the status of an element, the doctrine of *caveat emptor* is not available as a defence: *Krawchuk v. Scherbak*, 2011 ONCA 352 (Ont. C.A.), para. 77.

348 The Vendor's obligation in the APA to ensure the state of good repair survived closing. The Vendor thereupon was bound by the principles in *Bhasin v. Hrynew* [2014 CarswellAlta 2046 (S.C.C.)], namely the imposition under common law to perform their contractual obligations honestly and in good faith, paras 65 and 86. The Vendor failed to act accordingly before or after closing regarding its obligation to ensure the good state of repair of the premises and fixtures.

349 *Caveat emptor* is denied as a defence on the facts in this case.

350 The Vendor and Landlord in this case were not silent. The Landlord covenanted to provide the premises and fixtures in good working order on the commencement date. The Vendor contracted to ensure that the leased premises and fixtures are in a state of good repair, in the case of the Vendor.

351 The Vendor in paragraph 6(d) of the APA did not limit its undertaking to ensure the premises and fixtures were in a state of good repair to the date of closing, as it did regarding the equipment sold, thus indicating those categories of Premises assets were to be treated differently.

352 The Vendor in paragraph 6 of the APA obliged the plaintiff to enter into a five year lease of the Premises and made that a condition to the Asset sale and the plaintiff's operation of the Business. The Vendor knew or should have known that the plaintiff would not have agreed to lease the Premises in order to purchase the Assets for $359,000 to be used in operating the Business under the name of BOTB had it known the Vendor would not honour its representation and undertaking to ensure the Premises was in a state of good repair.

353 The Vendor on the evidence knowingly failed to ensure those premise and fixture repairs were done.

Counterclaim

354 The Landlord seeks judgment of $123,955 to repair damage to the Premises allegedly caused by the plaintiff. Those claimed damages are the total of two estimates and not evidence as repair work performed.

355 The first estimate is undated from Mr. Harkness in the amount of $90,500. The second is a July 1, 2015 estimate from Houle Plumbing in the amount of $33,955.

356 To succeed, evidence is required as to:

(a) which of the Premises elements were damaged, including where they are located;

(b) the nature and extent of that damage;

(c) when the damage occurred and the cause thereof;

(d) the plaintiff's action or inaction caused the damage; and

(e) the cost to repair the damage caused by the plaintiff.

357 The evidence as to this claim is limited to the two estimates and the testimony of Messrs. Ackerman and Harkness.

358 Mr. Ackerman testified the plaintiff failed to properly winterize the outside patio washrooms which caused those toilets to shatter. The evidence does not indicate whether all those toilets were shattered or how many were shattered. This repair work has not been conducted during the subsequent 3 years and winters. He estimates the cost to repair the same will likely cost between $20,000 and $30,000. This testimony is not proof of damages.

359 Mr. Ackerman testified that repairs were conducted in 2014 to repair hairline cracks to water pipes in the ceiling of the washrooms in the disco bar however those pipes subsequently

continued to develop further hair line cracks. Despite his re-possession of the Premises and the use of Mr. Harkness, those pipes continued over time to develop new leaks.

360 As a result of the reoccurring new leaks in these water pipes, Mr. Ackerman decided to stop doing repairs. He instead had Mr. Harkness in 2016 replace and install new pipes in this area. He testified that work cost between $70,000 and $80,000. He also testified, however, that that he converted the disco bar into a pizza restaurant between January and April 2016 and converted everything in doing so.

361 There is no evidence as to what was causing the reoccurring new leaks in this area of pipes in 2014 and 2015, namely after the plaintiff ceased operating on April 6, 2014. It also is unclear if this 2016 pipe replacement was part of the total conversion of "everything" in 2016 on transition to a pizza restaurant.

362 No one from Houle Plumbing testified. The Houle estimate is to redo the "south washrooms" which was part of the conversion to a pizza restaurant and "on the patio" which is work that has not been carried out. The description of work includes redoing all drains, vents, replacing all water pipes and to "insulate water lines as required" and provide and install a new gas fired water heater. It is unclear how any of this work is related to the plaintiff. The insulation of the water pipes is what was noted as missing in January, 2014.

363 The Houle estimate includes supplying and installing 8 toilets, 7 basins, 2 floor drains and 2 urinals. It is unclear why the plaintiff would be responsible for the cost of new floor drains, urinals and basins. The estimate provides a total price with no break down between the different elements.

364 Mr. Ackerma testified the total conversion of the disco bar space to the pizza restaurant occurred in the spring of 2016. The undated estimate from Mr. Harkness is work he testified he did in the spring of 2015. There would be no need for the July 2015 Houle estimate, if Mr. Harkness as he testified did the work in the spring of 2015.

365 Mr. Harkness admitted he never issued an invoice for the work identified in his estimate so there is no invoice evidence as to what was done and charged.

366 The Harkness' $90,500 estimate consists of two categories of work, plumbing and fixtures for $37,500 as well as $53,000 of Premises repairs with no breakdown as to individual items in those categories.

367 The Harkness plumbing estimate, like the $33,955 Houle plumbing estimate, includes the supply and installation of 7 toilets, 3 urinals, 4 vanities and basins, replacing new floor drains and 7 sets of faucets and taps. His testimony that he did this work in the spring on 2015 is contradicted by the Landlord obtaining the July 2015 Houle estimate for essentially the same plumbing work.

These two plumbing estimates duplicate much of the same plumbing work and fixtures in this counterclaim.

368 The Harkness estimate of $53,000 is for unspecified work identified as "structural, electrical drywall, tile insulation, vapor barrier, painting, flooring". There is no cost breakdown per element and appears unrelated in any event to the conduct of the plaintiff.

369 These two duplicate estimates are not evidence of what work was done, by whom and whether the plaintiff is liable for such work.

370 The Landlord has failed to establish the damages it alleges were caused by the plaintiff's breach of the Lease to properly heat the Premises. This counterclaim has not been proven and is dismissed.

Conclusion

371 The plaintiff is granted judgment against the Vendor:

(a) for rescission of the APA on the basis of breach of contract or alternatively based on fraudulent and negligent misrepresentation; and

(b) judgment against the Vendor in the amount of $275,000 constituting return by rescission and payment of the purchase price, plus prejudgment interest after May 1, 2014, less any deduction as determined by the Master on the accounting as provided below.

372 The plaintiff is granted a declaration terminating the Lease effective April 6, 2014.

373 A reference in the form of an accounting is ordered to proceed before the Master in Ottawa to determine the following:

(a) the amount paid by the plaintiff for the repair and replacement of the air conditioning equipment in the capital Premises, which shall constitute a credit in favour of the plaintiff; and

(b) the monetary market value of the plaintiff's use of the Assets between May 18, 2013 and April 6, 2014, with consideration as to the level of profitability of the Business before and during that period of time.

374 The Master shall offset the amount determined under (a) against (b). The residual balance if any, together with prejudgment interest, shall be deducted from the judgment by rescission of the $275,000, thereby resulting in the adjusted judgment amount granted against the Vendor in favour of the plaintiff.

375 The action against Mr. Ackerman is dismissed.

376 The Landlord's counterclaim against the plaintiff is dismissed.

Costs

377 Any party seeking costs is to provide the court with written submissions, including a summary of the services, dates thereof, rates and time expended, within 30 days from the date of this decision.

378 Any reply to the cost requested by party shall be submitted in writing within the following 30 days.

Application granted.

Tab 6

2021 ONSC 8513
Ontario Superior Court of Justice [Commercial List]

Johanns v. Fulford

2021 CarswellOnt 19825, 2021 ONSC 8513, 340 A.C.W.S. (3d) 174, 95 C.B.R. (6th) 52

IN THE MATTER OF the bankruptcy of CORNELL DAVID MARIA JOHANNS, of the City of Toronto, in the Province of Ontario

CORNELL DAVID MARIA JOHANNS AND SUSAN FULFORD

Vermette J.

Heard: August 6, 2021
Judgment: December 29, 2021
Docket: BK-14-01585400-0031

Counsel: Adam J. Wygodny, for Bankrupt, Cornell David Maria Johanns
Robert A. Klotz, for Estate Trustee of the Estate of Susan Fulford, deceased
Justin Heimpel, for Martin Johanns and Delcour Martin Ltd.
Mark Morgan — Trustee in Bankruptcy for Cornell David Maria Johanns (for David Sklar & Associates Inc.)

Subject: Civil Practice and Procedure; Insolvency; Public
Related Abridgment Classifications
Bankruptcy and insolvency
XVI Effect of bankruptcy on other proceedings
XVI.3 Miscellaneous
Civil practice and procedure
III Parties
III.4 Standing
Civil practice and procedure
XXIV Costs
XXIV.19 Set-off of costs
Professions and occupations
VIII Lawyers
VIII.8 Lawyer's or solicitor's lien
VIII.8.b Statutory charging order
VIII.8.b.i Entitlement

Headnote

Civil practice and procedure --- Costs — Set-off of costs

Bankrupt individual was in relationship with woman, between 2004 and 2005 — Parties never cohabited or married, but woman became pregnant with individual's son — Mother had sole custody of son, with individual having access rights — Parties were involved in family litigation, with several costs awards being made against individual — Individual was successful in family law action against mother, with award of $150,000 made in individual's favour — Individual made assignment in bankruptcy — Mother brought civil action against individual, which had not proceeded to trial — Mother passed away in 2021 — Father of individual asserted claim, over balance of costs award payable to individual — Father's basis for claim was his payment of individual's legal fees, in family law action — Estate of mother requested stay of enforcement of balance owing, on above costs award — Individual and father requested that action brought by mother be stayed or dismissed — Parties moved for above-noted relief — Costs awards were set-off against each other — Balance of costs award was payable to trustee in bankruptcy — Motion to dismiss civil action was dismissed, without prejudice — Parties agreed case was appropriate one for set-off — Net difference between parties was made up of property acquired by bankrupt — This difference was part of bankrupt's property, which was divisible among his creditors — Effective date of set-off was date that costs award was made.

Professions and occupations --- Lawyers — Lawyer's or solicitor's lien — Statutory charging order — Entitlement

Bankrupt individual was in relationship with woman, between 2004 and 2005 — Parties never cohabited or married, but woman became pregnant with individual's son — Mother had sole custody of son, with individual having access rights — Parties were involved in family litigation, with several costs awards being made against individual — Individual was successful in family law action against mother, with award of $150,000 made in individual's favour — Individual made assignment in bankruptcy — Mother brought civil action against individual, which had not proceeded to trial — Mother passed away in 2021 — Father of individual asserted claim, over balance of costs award payable to individual — Father's basis for claim was his payment of individual's legal fees, in family law action — Estate of mother requested stay of enforcement of balance owing, on above costs award — Individual and father requested that action brought by mother be stayed or dismissed — Parties moved for above-noted relief — Costs awards were set-off against each other — Balance of costs award was payable to trustee in bankruptcy — Motion to dismiss civil action was dismissed, without prejudice — There was no legal basis for father having charge over balance — At most, father and his company were unsecured creditors — Balance properly accrued to trustee in bankruptcy, as it was property acquired by bankrupt after bankruptcy — Father could make claim for balance through bankruptcy court.

Bankruptcy and insolvency --- Effect of bankruptcy on other proceedings — Miscellaneous

Bankrupt individual was in relationship with woman, between 2004 and 2005 — Parties never cohabited or married, but woman became pregnant with individual's son — Mother had sole custody of son, with individual having access rights — Parties were involved in family litigation,

with several costs awards being made against individual — Individual was successful in family law action against mother, with award of $150,000 made in individual's favour — Individual made assignment in bankruptcy — Mother brought civil action against individual, which had not proceeded to trial — Mother passed away in 2021 — Father of individual asserted claim, over balance of costs award payable to individual — Father's basis for claim was his payment of individual's legal fees, in family law action — Estate of mother requested stay of enforcement of balance owing, on above costs award — Individual and father requested that action brought by mother be stayed or dismissed — Parties moved for above-noted relief — Costs awards were set-off against each other — Balance of costs award was payable to trustee in bankruptcy — Motion to dismiss civil action was dismissed, without prejudice — As action was stayed by death of mother, father and individual had no standing to move for dismissal of civil action — Father and individual could move within civil action, for relief sought on present motion.

Civil practice and procedure --- Parties — Standing

Bankrupt individual was in relationship with woman, between 2004 and 2005 — Parties never cohabited or married, but woman became pregnant with individual's son — Mother had sole custody of son, with individual having access rights — Parties were involved in family litigation, with several costs awards being made against individual — Individual was successful in family law action against mother, with award of $150,000 made in individual's favour — Individual made assignment in bankruptcy — Mother brought civil action against individual, which had not proceeded to trial — Mother passed away in 2021 — Father of individual asserted claim, over balance of costs award payable to individual — Father's basis for claim was his payment of individual's legal fees, in family law action — Estate of mother requested stay of enforcement of balance owing, on above costs award — Individual and father requested that action brought by mother be stayed or dismissed — Parties moved for above-noted relief — Costs awards were set-off against each other — Balance of costs award was payable to trustee in bankruptcy — Motion to dismiss civil action was dismissed, without prejudice — Estate had no standing to seek child support, or security for future child support.

MOTION by father of bankrupt individual, for balance of costs award after set-off; MOTION by father and individual to dismiss civil action brought by mother; MOTION by estate of mother for stay of enforcement of costs award.

***Vermette J.*:**

1 There are three related and overlapping motions before me: one by the bankrupt, Cornell David Maria Johanns ("*D. Johanns*"); one by Martin Johanns (D. Johanns' father) ("*M. Johanns*") and Delcour Martin Ltd. ("*Delcour*"); and one originally brought by Susan Fulford ("*Ms. Fulford*"), who passed away on April 22, 2021. Susan Fulford's counsel now represents Dava Fulford, the Estate Trustee of the Estate of Susan Fulford ("*Estate Trustee*"). Except when specific reference to the Estate is required to deal with a particular issue, these reasons refer to Ms. Fulford or her Estate as "Ms. Fulford".

2 Most of the relief sought in the motions relates to a number of costs awards made against D. Johanns and Ms. Fulford, the set-off of these costs awards against each other and the consequences of the set-off.

Factual background

a. The Family Proceeding

3 In 2004 and 2005, D. Johanns was in an intimate relationship with Ms. Fulford. However, they neither cohabited nor married. In November 2005, shortly after their relationship ended, Ms. Fulford advised D. Johanns that she was pregnant. On [date omitted] Ms. Fulford gave birth to Harrison, who is D. Johanns' son. While she was alive, Ms. Fulford had sole custody of Harrison and was his primary caregiver. D. Johanns had access rights.

4 D. Johanns and Ms. Fulford were in litigation in relation to Harrison for many years ("*Family Proceeding*"). Over the course of the Family Proceeding, numerous costs awards were made against D. Johanns (together, the "*Fulford Family Costs Awards*"):

Costs Order	*Date*	*Amount*	*Interest*
Order of E.B. Murray J.	November 2, 2010	$32,500.00	2.0 percent per annum calculated from December 14, 2009
Order of Aston J.	October 26, 2011	$ 4,000.00	3.0 percent per annum
Order of Mesbur J.	February 2, 2012	$ 1,500.00	3.0 percent per annum
Order of Jones J.	February 29, 2012	$ 4,000.00	3.0 percent per annum
Order of Allen J.	May 3, 2013	$12,919.00	3.0 percent per annum
Order of Cohen J.	June 13, 2016	$25,000.00	2.0 percent per annum

5 The affidavits filed by the parties stated that the Fulford Family Costs Awards remained unpaid. However, at the hearing of the motions, the Trustee advised that some of the costs awards above, or a portion thereof, may have already been paid to the Family Responsibility Office ("*FRO*") if they related to support orders. The Trustee also raised the issue of interest stopping to accrue as of the date of bankruptcy with respect to pre-bankruptcy debts (i.e. the Costs Orders of E.B. Murray and Aston JJ.). After discussion, counsel agreed that, working with the Trustee, they would figure out the correct amount owing with respect to the Fulford Family Costs Awards after my decision is released.

6 Starting in 2016, D. Johanns was represented by Lawrence Liquornik in the Family Proceeding. Because D. Johanns did not have sufficient resources at the time, M. Johanns acted as a guarantor of the retainer and was required to advance funds to Mr. Liquornik from time to time in order to continue the retainer and ensure the representation of D. Johanns. M. Johanns' evidence is that, through Delcour, a corporation of which he is the principal, he advanced $84,000 to Mr. Liquornik

to pay for legal fees incurred in his representation of D. Johanns in the Family Proceeding. The following payments were made: (1) $70,000 paid by certified cheque dated May 11, 2016; (2) $6,500 paid by cheque dated June 13, 2016; and (3) $7,500 paid by cheque dated September 1, 2016.

7 On December 22, 2017, Justice S. O'Connell released her judgment with respect to a motion brought by Ms. Fulford to change the custody and access provisions of a final order made in December 2009. Ms. Fulford's motion was heard over a 15-day trial in 2016 and 2017. On September 28, 2018, Justice O'Connell ordered Ms. Fulford to pay to D. Johanns his costs of the trial in the amount of $150,000.00, with interest accruing at the rate of 3.0 percent per annum ("*Johanns Costs Award*").

b. D. Johanns' assignment in bankruptcy

8 On January 30, 2012, D. Johanns made an assignment in bankruptcy, and David Sklar & Associates Inc, was appointed as Trustee. The Statement of Affairs dated January 27, 2012 identified Ms. Fulford as a creditor of D. Johanns' estate with unsecured liabilities totaling $69,000.00. This amount represented approximately one third of D. Johanns' total unsecured liabilities identified in the Statement of Affairs.

9 On July 17, 2014, D. Johanns' application for a discharge was heard by Master Wiebe. Ms. Fulford was the only creditor who opposed granting D. Johanns a discharge. Master Wiebe adjourned the hearing of the discharge application *sine die* "to allow the full administration of the estate to unfold with proper, full and thorough disclosure of all assets". Master Wiebe expressed concerns regarding the ownership of the Property (defined below) and stated that it should be investigated by the Trustee. He ordered that D. Johanns pay costs to Ms. Fulford in the amount of $10,000.00 within 30 days and, in any event, before the return of the discharge application, with interest accruing at the rate of 3.0 percent per annum ("*Fulford Bankruptcy Costs Award*" and, together with the Fulford Family Costs Awards, the "*Fulford Costs Awards*").

c. The Civil Action

10 On November 2, 2012, Ms. Fulford commenced an action against D. Johanns, M. Johanns, Maddy Johanns (D. Johanns' mother and M. Johanns' wife) and Simpson Screen Print & Lithograph Ltd. ("*Simpson*"), a company controlled by M. Johanns ("*Civil Action*"). The evidence before me is that Maddy Johanns suffers from dementia and other cognitive issues.

11 Ms. Fulford seeks the following relief in the Civil Action:

a. A declaration that M. Johanns and Maddy Johanns hold a certain property in Toronto ("*Property*") in trust for their son, D. Johanns;

b. A declaration that Ms. Fulford is entitled to effect a Sheriff's sale of the Property pursuant to her writ of seizure and sale issued against D. Johanns;

c. Judgment against the Defendants in the amount of $65,000, plus post-judgment interest thereon and all enforcement costs on a full indemnity basis, for fraudulent misrepresentation concerning D. Johanns' income from Simpson, in connection with garnishment proceedings to date against Simpson as garnishee;

d. Damages of $500,000 against all the Defendants for conspiracy to defeat Ms. Fulford's right to enforce her money claims against D. Johanns, including her claims arising out of present and future judgments and orders in her favour in her matrimonial litigation against D. Johanns;

e. Punitive damages in the amount of $50,000;

f. An interlocutory and permanent Order securing D. Johanns' interest in the Property in the amount of $300,000, as security for Ms. Fulford's existing and future rights as D. Johanns' judgment creditor;

g. A Certificate of Pending Litigation against the Property;

h. Pre-judgment interest; and

i. Her costs on a full indemnity basis.

12 Ms. Fulford alleges in her Statement of Claim that D. Johanns is the beneficial owner of the Property, and that title to the Property is nominally in the name of D. Johanns' parents who hold it in trust for him. She states that the purpose of the trust arrangement is to protect the Property from D. Johanns' creditors, and more particularly from Ms. Fulford. Ms. Fulford further alleges that D. Johanns works for Simpson pursuant to an arrangement that he be paid a nominal salary so as to divert or hide most of D. Johanns' real income that might otherwise be subject to enforcement by garnishment. The Statement of Claim also includes allegations regarding a family trust of which D. Johanns is a beneficiary and his parents are the trustees.

13 The Statement of Claim includes the following allegations regarding conspiracy and damages:

15. The Defendants have together conspired to foil Susan's ability, as David's judgment creditor, to enforce her entitlement to child support, both past and future. The object of their conduct is to protect David's real assets and income from judgment enforcement, to preserve his present and future standard of living from the burden of his court-ordered support obligations for his child, and to impoverish Susan so that she will be unable to enforce her

> and Harrison's right to child support. The acts done in furtherance of this conspiracy are those set out in paragraphs 8 through 15 hereof.
>
> [...]
>
> 17. As a result of the Defendants' actions, Susan has been put to substantial additional expense to enforce her rights. In addition, her collection of child support has been flouted. Her damages are equivalent to her current support arrears, her costs, the present value of her future child support, and the reduction, over the next 12 years, of the quantum of child support to which she would otherwise have been entitled had David's income not been concealed and diverted.

14 In their Statement of Defence, the Defendants deny that D. Johanns is the beneficial owner of the Property. They also deny that he works for Simpson. They plead that Ms. Fulford is attempting to enforce family law orders outside the scope of the family courts and that she does not have the authority to enforce them as they have been assigned to the FRO.

15 On August 18, 2015, Ms. Fulford obtained an order from Master Mills under section 38 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (“BIA”) authorizing her to prosecute the Civil Action in her own name and at her own expense ("*Section 38 Order*"). The Section 38 Order provides that all benefits to be derived from the Civil Action, together with the costs thereof, shall belong exclusively to Ms. Fulford and such other creditor who may agree to contribute pro rata to the expense and risk of the proceeding. However, no other creditor agreed to contribute. The Section 38 Order also provides the following:

> 5. **THIS COURT ORDERS** that any recovery shall be applied first to pay the legal costs of Susan Fulford and such other contributing creditors, and the balance shall be divided between the moving creditor and any other contributing creditors pro rata according to the respective non-preferred amounts of their claims.
>
> 6. **THIS COURT ORDERS** that any surplus after payment of such costs, claims and interest thereon, be paid to the Trustee in Bankruptcy.
>
> [...]
>
> 9. **THIS COURT ORDERS** that the full indemnity cots [sic] of this motion be added to the provable claim of Susan Fulford for the purposes of this Order.

16 The Civil Action was dismissed for delay on December 6, 2017. The dismissal was set aside by Order dated April 18, 2018. The Defendants consented to Ms. Fulford's motion to reinstate the Civil Action. The April 18, 2018 Order required that the Civil Action be set down for trial by April 22, 2019. This did not happen. Ms. Fulford subsequently brought a motion for an order amending the timetable. The Defendants agreed not to oppose the motion provided that the order be made without prejudice to any motions that they may bring. On August 30, 2019, Master McAfee granted

the requested order, which provides, among other things, that the examinations for discovery be completed by November 30, 2019 and that the action be set down for trial by September 30, 2020. This did not happen.

17 As stated above, Ms. Fulford passed away in May 2021. Her lawyer has advised the other counsel that he has instructions from the Estate Trustee, who is Ms. Fulford's sister, to obtain an order to continue and to continue to prosecute the Civil Action. However, the necessary motion had not been brought at the time of the hearing of the motions before me. While I was advised that Ms. Fulford's sister had assumed Ms. Fulford's parental role with respect to Harrison, there is no evidence before me of any custody order or of anything that happened after Ms. Fulford's death. All the affidavits filed on the motions precede Ms. Fulford's death.

18 As at March 10, 2020 (i.e. when this motion was originally brought), the net difference between the Johanns Costs Award and the Fulford Costs Awards was $51,410.34 in favour of D. Johanns. [1]

Discussion

19 I discuss the following issues below:

a. the set-off of the costs awards, including the effective date of the set-off;

b. M. Johanns' claim over the balance of the Johanns Costs Award;

c. Ms. Fulford's request for a stay of enforcement of the balance owing under the Johanns Costs Award; and

d. D. Johanns' and M. Johanns' request that the Civil Action be dismissed or stayed.

a. Set-off of costs awards

20 Section 97(3) of the BIA provides that the law of set-off applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be.

21 There are two kinds of set-off: legal set-off and equitable set-off. Legal set-off requires the fulfilment of two conditions: (1) both obligations must be debts; and (2) both debts must be mutual cross obligations: see Holt v. Telford, [1987] 2 S.C.R. 193 at para. 25 (“Holt ”). Section 111 of the Courts of Justice Act, R.S.O. 1990, c. C.43 provides that mutual debts may be set off against each other even if they are of a different nature.

22 In order for legal set-off to operate in the bankruptcy context, the relevant debts must exist before the date of bankruptcy: see King Insurance Finance (Wines) Inc. v. 1557359 Ontario Inc. (Willowdale Autobody Inc.), 2012 ONSC 4263 at paras. 11-12 ("King Insurance "). Given that most of the costs awards in issue in this case were made after the date of bankruptcy, legal set-off does not apply.

23 Equitable set-off, in contrast, does not require a liquidated claim or mutual debts: Holt at para. 27. It is available, among other things, where the defendant claims a money sum arising out of the same contract or series of events that gave rise to the plaintiff's claim, or is closely connected with that contract or series of events: Canaccord Genuity Corp. v. Pilot, 2015 ONCA 716 at para. 57. Equitable set-off arises where there is such a relationship between the claims of the parties that it would be unconscionable or inequitable not to permit a set-off: see *King Insurance* at para. 15. The following general principles are relevant to equitable set-off (see Holt at para. 34):

a. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands.

b. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed.

c. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim.

d. The plaintiff's claim and the cross-claim need not arise out of the same contract.

e. Unliquidated claims are on the same footing as liquidated claims.

24 Here, all parties agree that this is an appropriate case for set-off. I agree as well. The Fulford Costs Awards and the Johanns Cost Award, with one exception, were made in the same legal proceeding, i.e. the Family Proceeding. The exception is the Fulford Bankruptcy Costs Award, but this costs award is also related to the Family Proceeding in that Ms. Fulford's status as a creditor and her claim in the bankruptcy proceeding are derived from the Family Proceeding. Further, it is my view that it would be manifestly unjust to allow either party to enforce payment of the costs awards without taking into consideration the costs awards made in favour of the other party.

25 In the bankruptcy context, the issue of whether the requested set-off would amount to an unfair preference is often considered: see *King Insurance* at paras. 15, 20-21. In this case, given the close connections between the costs awards and the fact that the set-off operates in favour of D. Johanns, I find no unfairness. The net difference, which arises out of the Johanns Costs Award, constitutes property acquired by the bankrupt after the date of the bankruptcy but before his discharge and,

consequently, is part of the bankrupt's property that is divisible among his remaining creditors: see subsection 67(1)(c) of the BIA and *King Insurance* at para. 21.

26 The parties disagree as to the effective date of set-off. D. Johanns argues that the date of set-off should be the date of the decision allowing set-off, while Ms. Fulford submits that the date of set-off should be the date of the Johanns Costs Award, i.e. September 28, 2018, since equitable set-off was available as of that date. The date of set-off is important for calculating the parties' respective entitlements to interest on their costs awards.

27 No case directly on point was brought to my attention on this issue. D. Johanns relied on two cases decided by assessment officers. One of them, *Ontex Resources Ltd. v. Metalore Resources Ltd.*,, [1997] O.J. No. 770 (Gen. Div.), expressly states that *Holt* and the principles of legal or equitable set-off do not apply to set-off in an assessment under Rule 58 of the Rules of Civil Procedure: see para. 26. In my view, the cases referred to by D. Johanns do not have general application outside of the assessment context, especially in the circumstances of this case where more than three years have elapsed since the last costs award was ordered.

28 I also note that *Holt* does not support the proposition that interest should run until the date on which set-off is ordered by the court. In *Holt* , the Telfords tendered payment to discharge a mortgage and took the position that the payment tendered was sufficient as a result of an alleged set-off. The Telfords were unsuccessful at trial and before the Alberta Court of Appeal, but they were successful in establishing equitable set-off before the Supreme Court of Canada. The Supreme Court held that the balance due on the mortgage was the amount that was first tendered, and did not impose any additional interest, even though the equitable set-off was not declared or ordered until many years after payment was tendered.

29 In some cases, it may be appropriate to find that the effective date of set-off is the date of the decision allowing set-off because equitable set-off is not "automatic". However, in the particular circumstances of this case, I am of the view that the appropriate date of set-off is September 28, 2018. The right to set-off was never really disputed by D. Johanns and Ms. Fulford, but each attempted to tie it to other factors or desired outcomes. Given this, I do not think that it would be fair or appropriate to allow interest to continue to accrue on the Fulford Costs Awards until the date of this decision. See *Re Essar Steel Algoma Inc.*, 2017 ONSC 3930 at footnote 3. This is especially the case since Ms. Fulford cannot be blamed for the delay in having this motion heard.

30 While the date of set-off is September 28, 2018, Ms. Fulford is still liable to pay interest from that date on the balance owing under the Johanns Costs Award.

31 As a result of the set-off, Ms. Fulford is no longer a creditor of D. Johanns' estate in bankruptcy and, therefore, has no standing to oppose D. Johanns' discharge: see Bankruptcy of Thomas Pirner, 2014 ONSC 172 at para. 28. This is conceded by Ms. Fulford.

32 I note that the Section 38 Order provides that the full indemnity costs of the motion to obtain the Section 38 Order are to "be added to the provable claim of Susan Fulford for the purposes of this Order". In my view, the words "for the purposes of this Order" mean that the costs of the motion will be added to the provable claim of Ms. Fulford for the purpose of the distribution of any proceeds of the litigation under the Section 38 Order. The Section 38 Order does not have the effect of adding these costs to the actual claim of Ms. Fulford in the bankruptcy. If that were the intention, the words "for the purposes of this Order" would not have been added. Thus, as stated above, Ms. Fulford is no longer a creditor of D. Johanns' estate in bankruptcy.

b. M. Johanns' claim over the balance of the Johanns Costs Award

33 M. Johanns and Delcour argue that they are entitled to a charge upon the balance of the Johanns Costs Award based on the $84,000 that was paid to Mr. Liquornik on account of D. Johanns' legal fees. They rely on the case law regarding solicitors' liens and charging orders with respect to the proceeds of litigation, and submit that they stand in the place of Mr. Liquornik by virtue of the payments made on account of the retainer.

34 The issue of whether M. Johanns/Delcour is a creditor of D. Johanns' estate in bankruptcy with respect to the $84,000 paid to Mr. Liquornik for the legal fees incurred by D. Johanns in the Family Proceeding is in dispute. Ms. Fulford relies on the objective factors considered by the courts when deciding whether an advancement by a parent is a gift or a loan (see Locke v. Locke, 2000 BCSC 1300 at para. 23) to support her position that the funds paid to Mr. Liquornik were paid by M. Johanns on D. Johanns' behalf as a gift. It does not appear that M. Johanns or Delcour has filed a proof of claim in the bankruptcy with respect to the $84,000 payment to Mr. Liquornik.

35 Ultimately, I do not need to determine whether M. Johanns or Delcour is a creditor on this motion because I reject the submission that M. Johanns or Delcour has a charge over the Johanns Costs Award. M. Johanns/Delcour did not cite any authority supporting the proposition that a solicitor's lien or charging order could extend to a non-lawyer funding the litigation. In my view, the test applicable to obtain a charging order or a solicitor's lien [2] shows that it only applies to lawyers. In order to obtain a charging order, a lawyer must demonstrate that:

a. the fund, or property, is in existence at the time the order is granted;

b. the property was "recovered or preserved" through the instrumentality of the solicitor;

c. there must be some evidence that the client cannot or will not pay the lawyer's fees.

See Weig v. Weig, 2014 ONSC 643 at para. 26.

36 The test is clearly focused on the lawyer. Further, if someone other than the client funds the litigation, then the third prong of the test cannot be met. Here, Mr. Liquornik would not have

been able to establish a right to a charging order or a solicitor's lien as his fees were paid and, consequently, the third prong of the test was not met. Therefore, M. Johanns/Delcour cannot "stand in his place" and claim a charge.

37 The third prong of the test reflects the fact that part of the rationale supporting solicitors' liens and charging orders is to encourage lawyers to represent clients who are unable to pay as their cases progress, despite the risks involved: see Taylor v. Taylor(2002), 60 O.R. (3d) 138, 2002 CanLII 4498 at para. 29 (C.A.). In this case, Mr. Liquornik took no such risks as his fees were being paid. There is no valid policy reason to apply the principles underlying the solicitor's lien/charging order to this case.

38 At most, M. Johanns or Delcour is an unsecured creditor of D. Johanns with respect to the $84,000. They have no priority right over the balance of the Johanns Costs Award.

39 Therefore, the net difference between the Johanns Costs Award and the Fulford Costs Awards should be paid to the Trustee. As stated above, it constitutes property acquired by the bankrupt after the date of the bankruptcy but before his discharge and, consequently, is part of the bankrupt's property that is divisible among his remaining creditors: see subsection 67(1)(c) of the BIA.

40 As discussed at the hearing, if M. Johanns or Delcour wants to make a claim for the $84,000, they should follow the normal bankruptcy process and the claim will be considered by the Trustee in due course.

c. Ms. Fulford's request for stay of enforcement of the balance owing under the Johanns Costs Award

41 Ms. Fulford requests a stay of enforcement of the balance owing under the Johanns Costs Award following set-off pending the disposition of a motion in Family Court for security against D. Johanns in respect of future child support. There is no evidence before me that any motion for security has been brought in Family Court.

42 While the evidence shows that there have been issues over the years with respect to payment of child support by D. Johanns, the Trustee advised at the hearing of this motion that there has been no balance due to the FRO as of February 4, 2019.

43 There are many reasons to decline to grant the relief sought by Ms. Fulford, but the most basic one is that Ms. Fulford's Estate has no standing to seek child support or security for future child support. As stated above, while I was advised that Ms. Fulford's sister had assumed Ms. Fulford's parental role with respect to Harrison, there is no evidence before me of any custody or child support order made following Ms. Fulford's death.

44 The same reasoning applies to Ms. Fulford's request for a stay with respect to the payment of any surplus funds that may otherwise be payable to D. Johanns under section 144 of the BIA following disposition of the Civil Action. Further, given the status of the Civil Action, there is ample time for a motion to be brought in Family Court for security, if necessary. There is no need for a stay.

d. D. Johanns' and M. Johanns' request that the Civil Action be dismissed or stayed

45 D. Johanns and M. Johanns ask that the Civil Action be dismissed or stayed for delay. In their respective Notices of Motion, they also sought an order rescinding the Section 38 Order, but this was not pursued in any detail in their Facta. They also each refer to mootness in one paragraph of their respective Facta.

46 I note that since no order to continue has been obtained, the Civil Action has been stayed since the death of Ms. Fulford pursuant to Rule 11.01 of the Rules of Civil Procedure.

47 Less than a week after the hearing of these motions, the Court of Appeal released its reasons in McEwen (Re) 2021 ONCA 566 (“McEwen”). In that case, the appellant appealed from an order dismissing its motion to set aside an order made under section 38 of the BIA. The Court of Appeal found that the appellant had no standing to challenge the order made under section 38 and dismissed the appeal.

48 As a result of the decision in *McEwen*, I received additional written submissions from the parties regarding its applicability to this case.

49 In my view, D. Johanns and M. Johanns, as Defendants to the Civil Action, have no standing to challenge the Section 38 Order and no right to review or appeal it: see *McEwen* at para. 28. None of the exceptions identified by the Court of Appeal in *McEwen* at paragraphs 29 and 33-35 apply to this case.

50 While D. Johanns and M. Johanns may not be able to rescind the Section 38 Order at this stage, they can raise delay and other issues (including mootness) within the Civil Action and seek its dismissal on substantive and/or procedural grounds: see *McEwen* at para. 35. However, the present motion was brought within the bankruptcy proceeding, not the Civil Action.

51 At this time, I decline to dismiss the Civil Action, but this is without prejudice to the Defendants' right to bring another motion within the Civil Action for the same relief at a later time.

52 In my view, the record and argument before me with respect to the issues of delay and mootness were insufficiently detailed. While it appears that Ms. Fulford has failed to pursue the Civil Action with diligence and to comply with court-ordered timetables, it also appears that the failure to comply with the most recent timetable (and the obligation to set down the action for trial

by September 30, 2020) was due, at least in part, to D. Johanns' motion - which was originally brought in March 2020 - and the delay in having it heard.

53 More importantly, it is my view that the Estate Trustee should be given an opportunity to seek an order to continue - if the Estate wishes to pursue the Civil Action - and file evidence in response to any motion to dismiss or stay the Civil Action for delay or mootness. [3] In making its decision, the Estate Trustee should consider the standing issues discussed above with respect to child support and the fact that Ms. Fulford is no longer a creditor of D. Johanns' estate in bankruptcy. The fact that Ms. Fulford may have a claim for costs is not a sufficient reason to continue the Civil Action. Costs issues are resolved at the end of a proceeding; they do not keep a proceeding alive forever.

54 With respect to the issue of mootness, the Defendants argue that the Civil Action has been rendered moot as a result of the set-off. While I express no views on the merits of the claims asserted in the Civil Action, I note that Ms. Fulford has pleaded that she has suffered damages that go beyond the "debts" owed to her by D. Johanns, and these damages are based on allegations of torts against the Defendants (including conspiracy and fraudulent misrepresentation). The satisfaction of the Fulford Costs Award through set-off do not address the tort allegations and the allegations of additional damages. However, I also note that the Section 38 Order provides that any surplus after paying Ms. Fulford's legal costs would be payable to the Trustee (since Ms. Fulford no longer has a claim in the bankruptcy), not to Ms. Fulford. These points and issues need to be addressed in any motion to dismiss based on mootness, and one paragraph in the Defendants' Facta does not do so in a satisfactory fashion.

Conclusion

55 In light of the foregoing, I order that the Fulford Costs Awards and the Johanns Costs Award be set-off as of September 28, 2018. Counsel and the Trustee should work together to determine the exact amount of the net difference arising out of the Johanns Costs Award as of that date. If agreement cannot be reached, counsel should write to my assistant to schedule a case conference with me.

56 The balance of the Johanns Costs Award is payable to the Trustee. M. Johanns/Delcour's claim for a charge or lien over the balance is dismissed. Ms. Fulford's request for a stay of enforcement of the balance is also dismissed, as is her request for a stay with respect to the payment of any surplus funds.

57 Finally, I dismiss D. Johanns' and M. Johanns' motion to dismiss the Civil Action without prejudice to their right to bring another motion within the Civil Action for the same relief at a later time.

58 With respect to costs, my initial view is not to order costs as between Ms. Fulford and D. Johanns in light of the overall conduct of the parties (including delay on the part of both sides

and the various positions taken by the parties over the relevant period) and the fact that success was divided. While M. Johanns and Delcour were unsuccessful with respect to their claim for a charge or lien, I am not satisfied that they should be ordered to pay costs to Ms. Fulford since I have found that the balance of the Johanns Costs Award was payable to the Trustee, which does not benefit Ms. Fulford. If, despite the foregoing, the parties wish to seek costs, they shall deliver submissions of not more than three pages (double-spaced), excluding the costs outline, within 14 days of the date of this endorsement. The submissions should be sent to my assistant by e-mail and uploaded onto CaseLines.

Motions dismssed.

Footnotes

1 This is subject to adjustments after review of the outstanding Fulford Family Costs Awards by counsel with the Trustee, as stated above.

2 The test is the same for both: see Weenen v. Biadi, 2018 ONCA 288 at paras. 16-17.

3 These comments are without prejudice to any positions that the Defendants may wish to take in the Civil Action, and any relief that they may want to seek in the event an order to continue is not sought in a timely manner.

Tab 7

1987 CarswellAlta 188
Supreme Court of Canada

Telford v. Holt

1987 CarswellAlta 188, 1987 CarswellAlta 583, [1987] 2 S.C.R. 193, [1987] 6 W.W.R. 385, [1987] S.C.J. No. 53, 21 C.P.C. (2d) 1, 37 B.L.R. 241, 41 D.L.R. (4th) 385, 46 R.P.R. 234, 54 Alta. L.R. (2d) 193, 6 A.C.W.S. (3d) 168, 78 N.R. 321, 81 A.R. 385, J.E. 87-1005, EYB 1987-66910

TELFORD and TELFORD v. HOLT and HOLT

Dickson C.J.C., Estey, McIntyre, Wilson and Le Dain JJ.

Heard: February 27 and March 2, 1987
Judgment: September 17, 1987
Docket: No. 19175

Counsel: *D.E. Jermyn*, for appellants.
J.P. Low, for respondents.

Subject: Insolvency; Civil Practice and Procedure; Property; Corporate and Commercial
Related Abridgment Classifications
Civil practice and procedure
X Pleadings
X.6 Counterclaim, crossclaim and set-off
X.6.b Set-off
Personal property
III Choses in action
III.8 Equities to which assignments subject
III.8.a Right of set-off
Headnote
Bankruptcy
Choses in Action --- Equities to which assignments subject — Right of set-off
Practice --- Pleadings — Counterclaim, crossclaim and set-off — Set-off
Creditors and debtors — Set-off — Set-off in equity — Equitable set-off available for money sum whether liquidated or unliquidated and mutuality of debts not required — Assignment not barring right to equitable set-off — Set-off available where sum due prior to notice of assignment being given or where sum due arising out of or closely connected to same contract or series of events — Debt to be set off must be enforceable — Reciprocal mortgages subject to equitable set-off despite

unenforceability of personal covenant in one mortgage — Foreclosure available and equitable set-off not requiring symmetry of remedies or amounts.

Creditors and debtors — Set-off — Set-off at law — Set-off available for debts being mutual cross obligations — Assignment of debt destroying mutuality — Set-off at law not available.

Mortgages — Action on covenant to pay — Personal judgment — Availability — Statutory restrictions — Section 41 of Law of Property Act barring action on personal covenant but not creating unenforceable debt as mortgagee still able to pursue foreclosure remedy.

Mortgages — Payment of mortgage — Set-off — Defendant and third party swapping land and exchanging mortgages — Third party assigning mortgage to plaintiff — Plaintiff seeking judgment on mortgage when defendant willing to make payment equalizing balances owing on mortgages and discharge mortgages — Defendant entitled to set-off in equity in foreclosure action — Defendant to make payment and mortgages to be discharged.

C. Ltd and the appellants traded properties, with each receiving cash and a mortgage back from the other. The appellants gave a mortgage for $150,000 and received a mortgage for $100,000. The mortgage given by the appellants was repayable in three equal instalments of $50,000, the last two of which coincided in time and amount with the two payments to be made by C. Ltd. under its mortgage. The mortgages were separate agreements, neither of which referred directly to the other. Prior to the execution of the mortgages C. Ltd assigned its interest in the appellants' mortgage to the respondents. The appellants were not given notice of this assignment. Prior to the date the appellants were to make their first payment they tendered $50,000 plus accrued interest to C. Ltd. on condition that there be a mutual discharge of the mortgages (as upon payment each party then owed the other $100,000). The appellants were then orally advised of the assignment. Negotiations followed and after the due date for the appellants' first payment passed the respondents brought an action on the mortgage for the full $150,000 owed by the appellants. At trial the court held that the appellants did not have right of set-off at the time the proceedings were commenced and the mortgage contracts did not provide for a set-off by agreement. Furthermore, as the covenant to pay in the mortgage could not be enforced against the appellants, because they were individuals, an enforceable debt did not exist which could be set off in law. Therefore the respondents were entitled to succeed in their action on the appellants' mortgage. The majority of the Court of Appeal adopted this opinion, concluding that for set-off to be available both debts must be enforceable by action at the time set-off is directed. The debt owed by the appellant, arising from a covenant to pay on a mortgage given by an individual, was held to be an unenforceable debt. The appellants further appealed.

Held:

Appeal allowed.

In the absence of an agreement for set-off it may be established that there is a right to set-off at law or in equity. Set-off at law requires that the obligations be debts and the debts be mutual cross obligations. Any assignment will destroy the necessary mutuality. Set-off at law was therefore not available because of the assignment by C. Ltd. to the respondents. Set-off in equity is available where there is a claim for a money sum, liquidated or unliquidated, even if there has been an

assignment. No mutuality is required. The courts of equity have held that set-off may be claimed against an assignee in respect of a money sum which has accrued and become due prior to notice of the assignment, or in respect of a money sum which arose out of the same contract or series of events which gave rise to the assigned money sum or was closely connected with that contract or series of events. In addition, both debts must be enforceable. The appellants received written notice of the assignment, as required by s. 150 of the Land Titles Act, prior to the time the debt sought to be set off had accrued due, as that debt was the $100,000 remaining owing on the mortgage which had not yet accrued due. Therefore, they could not succeed on the first branch of the test for availability of an equitable set-off. However, the two mortgages were part of a single land exchange deal, each being part of the consideration for the reciprocal transfers. They were closely connected and therefore met the second criterion for the availability of equitable set-off. The mortgages were made with reference to one another and it would be unfair to enforce only the one side of the land exchange agreement. The appellants and C. Ltd. (and the respondent assignees) did have mutually enforceable debts, as s. 41 of the Law of Property Act does not create an unenforceable debt. It does not extinguish or satisfy the debt, it merely precludes a remedy by way of judgment on the covenant. It does not matter that one debt is enforceable only by way of foreclosure, as the availability of equitable set-off does not require symmetry of remedies or amount.

Appeal from judgment, 37 Alta. L.R. (2d) 399, [1985] 4 W.W.R. 573, dismissing appeal from judgment of Foisy J.

The judgment of the court was delivered by *Wilson J.*:

1. The Facts

1 This appeal concerns a series of transactions entered into by three parties, the Telfords, the Holts and Canadian Stanley Development Ltd., involving contracts for the sale of land and mortgages. The appeal arises out of an action commenced by the Holts alleging default of payment on a mortgage made by the Telfords to Canadian Stanley ("the Telford mortgage"). The Holts had been assigned the Telford mortgage by Canadian Stanley to secure the balance of the purchase price of a piece of land the Holts had sold to Canadian Stanley.

2 The Telford mortgage arose out of a real estate trade between the Telfords and Canadian Stanley. The Telfords sold their land (a domestic residence plus 40 acres) to Canadian Stanley. Canadian Stanley sold a parcel of land to the Telfords. The purchase price for the parcel of land sold by the Telfords to Canadian Stanley was $265,000. The purchase price for the piece of land sold by Canadian Stanley to the Telfords was also $265,000.

3 The transaction between the Telfords and Canadian Stanley required Canadian Stanley to pay the Telfords $165,000 for the Telford land and give a second mortgage back to the Telfords for $100,000 ("the Canadian Stanley mortgage"). The Telfords were to pay Canadian Stanley $115,000 for its parcel of land and give a first mortgage to Canadian Stanley for $150,000. The net effect of

the combined transaction was that on closing Canadian Stanley would pay the Telfords $50,000 which the Telfords would use for the purpose of financing the construction of a residence on their new land. The closing date was 1st October 1980.

4 The transaction between the Telfords and Canadian Stanley was closed effective 1st October 1980 by payment by Canadian Stanley to the Telfords of $47,885.93 and the execution and delivery of the Telford mortgage and the Canadian Stanley mortgage. The payment of $47,885.93 by Canadian Stanley was arrived at by subtracting the down payment owed by the Telfords ($115,000) from the down payment owed by Canadian Stanley ($165,000) plus adjustments.

5 The interest rate on both mortgages was the same, i.e., 14.75 per cent. The last two payments on each mortgage were also the same both as to amount and time of payment. Each mortgagor had to pay $50,000 plus accrued interest on 31st July 1981 and $50,000 plus accrued interest on 31st January 1982. The only difference was that the Telfords also had to pay $50,000 plus interest on 31st January 1981.

6 On 26th September 1980 Canadian Stanley assigned the Telford mortgage to the Holts. The Telfords were not notified of this assign ment. On 5th November 1980 the Telfords met with Mr. Outhwaite, the principal officer and manager of Canadian Stanley. No mention was made of the assignment of the Telford mortgage. Mr. Outhwaite persuaded the Telfords to agree to a postponement of the Canadian Stanley mortgage. The postponement did not affect the date of payment. It did change the order of priority. The effect of the postponement was that the Canadian Stanley mortgage moved from a second position to a third position on the title to the Telford land.

7 On 13th November 1980 the Telfords tendered the first payment of $50,886.60 on the Telford mortgage. As is apparent, this tendering occurred well before the agreed 31st January 1981 due date for the first payment. The payment of $50,886.60 was forwarded to Canadian Stanley's solicitor, Beaumont Proctor, along with a letter which stated:

> I am enclosing herewith my cheque in the amount of $50,886.60 being the amount required to payout and discharge your clients mortgage on the property. The balance of the $150,000 is being offset by the amount owing on your clients mortgage to my client.
>
> The monies are sent in trust that you forward to my office a registerable discharge of mortgage and the duplicate registered mortgage for which I will in turn forward to you a discharge of mortgage for my clients mortgage on your clients property.

8 On 1st December 1980 Beaumont Proctor returned the $50,886.60 to the Telfords' solicitor informing him that they were no longer acting for Canadian Stanley. The firm of Eden and Pirie was now acting for Canadian Stanley. The Telfords' solicitor forwarded the $50,886.60 to Eden and Pirie with the same trust conditions attached as previously.

9 In a letter dated 16th December 1980 Eden and Pirie informed the Telfords' solicitor that the Telford mortgage had been assigned to the Holts. Various negotiations ensued. On 29th January 1981 the Telfords' solicitor indicated that if the matter was not resolved by 6th February 1981 he would proceed with a court application for a discharge of the mortgage. On 2nd February 1981 the Telfords, for the first time, heard from the representatives of the Holts. The Holts' solicitor demanded the payment of the $50,000 plus accrued interest. The Telfords' solicitor asked Eden and Pirie to return the $50,886.60. The funds were refunded on or about 19th February 1981.

10 The Holts filed a statement of claim against the Telfords on 13th March 1981 for $150,000 plus interest. Their claim for the entire amount was based on cl. 3 of the Telford mortgage which provided that upon default of any payment of the principal the whole principal would become payable as if the time frame stipulated for the payment of such principal had expired.

11 After the Telfords received notice of the Holts' statement of claim they paid the $50,886.60 into court.

2. The Courts Below

12

(1) The trial

13 The Holts in their statement of claim asked for the total amount due under the assigned mortgage — $157,375. The Telfords' counterclaim stated that, having paid the $50,000 plus interest into court, they were entitled to a discharge of the mortgage. The trial judge decided that the Telfords owed the Holts $150,000 plus interest. He made an order for sale with a redemption period of one year.

14 The trial judge held that no notice of the transfer of mortgage was given to the Telfords as required by s. 150(2) of the Land Titles Act, R.S.A. 1980, c. L-5, until the statement of claim was served in the action in March 1981 and that the Holts therefore took the mortgage subject to the state of accounts existing between the Telfords and Canadian Stanley as of the date of service of the notice. He then considered whether there was a right of set-off in existence at that time. First, he concluded that there was no agreement to set-off between the Telfords and Canadian Stanley. In reaching this conclusion he considered the oral evidence of the events leading up to the execution of the mortgage and subsequent documentation. He found that the Telfords believed that, after payment of the sum of $50,000 plus interest due on 31st January 1981, the remaining payments due on the Telford and Canadian Stanley mortgages would set each other off. However, the documents in the two transactions were not drafted so as to provide for a set-off. Each mortgage provided for two payments subsequent to the 31st January 1981 payment. A right of set-off does not arise

until the debt or payment on each mortgage becomes due and payable. It follows that there was no enforceable agreement to set-off between the parties.

15 Further, the Telford mortgage was made by the Telfords in their personal capacity as mortgagors and, pursuant to the Law of Property Act, R.S.A. 1980, c. L-8, s. 41(1), the personal covenant is not enforceable as a debt against them. The Canadian Stanley mortgage on the other hand is a mortgage made by a corporation and the personal covenant is enforceable as a debt against the corporation when such debt becomes due and payable under s. 43(1) of the Law of Property Act. The fact that there never was any enforceable debt against the Telfords would, in the trial judge's view, preclude any right of set-off in law.

16 The trial judge found the Holts' claim for $150,000 plus interest well-founded. Clause 3 of the Telford mortgage provided that on default of payment of the principal or interest or any money thereby secured, the whole principal should become payable as if the time frame stipulated for the payment of such principal had expired. The Telfords made a conditional payment in advance of the due date for such payment. The condition attached was that a registrable discharge of the mortgage would be forwarded to the Telfords. Since this condition was never met, payment was not made and the Holts were free to accelerate payment of the entire mortgage.

(2) The Alberta Court of Appeal

Lieberman J.A. (for the majority)

17 The majority stated that the issue on the appeal was not whether there was an agreement for a set-off but whether in the circumstances of this case there could be a set-off between the mortgages in question. This issue was governed by the earlier decision of the Alberta Court of Appeal in *Renner v. Racz*, [1972] 1 W.W.R. 109, 22 D.L.R. (3d) 443. For a court to direct the set-off of one debt against another both debts must be enforceable by action at the time the set-off is directed.

18 The debt owed by the Telfords under the agreement for sale fell into the category of an unenforceable debt. This was how a mortgage debt was characterized by the Supreme Court of Canada in *Edmonton Airport Hotel Co. v. Credit Foncier Franco-Can.*, [1965] S.C.R. 441, 51 W.W.R. 431, 50 D.L.R. (2d) 510. Therefore, the Telfords' claim for set-off could not succeed.

Kerans J.A. (dissenting)

19 Kerans J.A. followed the dissenting judgment in *Renner*. He agreed that a debtor cannot set off an unenforceable debt of his creditor against a debt of his to the creditor which the creditor can enforce. This would be to permit the debtor to, in effect, enforce his unenforceable debt. But Kerans J.A. held that the converse was not true. A creditor who could enforce his debt should be allowed to set it off against a debt owing by him which he could not be forced to pay by personal action. Kerans J.A. found that that was the situation here.

3. The Issue

20 It is not disputed that under the provisions of the Telford mortgage the Telfords owe the Holts $150,000 plus interest. The Tel fords submit, however, that they have the right to set off the debt owed to them by Canadian Stanley against the Holts' claim. Their first argument is that the parties agreed to create a right of set-off. Agreement, express or implied, may confer such a right: see *Freeman v. Lomas* (1851), 9 Hare 109, 68 E.R. 435, at p. 114. Whether there is agreement or not is, however, a matter of evidence. The trial judge concluded that there was no such agreement in this case. He said:

> What then was the state of accounts as it existed as at the date of the service of the statement of claim? Was there in fact a right of set-off in existence as at that time? Assuming that the oral evidence adduced as to what transpired prior to the execution of Ex. 18 [the agreement of sale of the Telford land] and subsequent documentation, does not offend the parol evidence rule, a point which was not brought up nor argued, I am of the view that there was not such a right of set-off and that the plaintiffs should succeed.
>
> There is no doubt that the defendants believed that after payment of the sum of $50,000 plus interest due on 31st January 1981 the remaining payments due under Exs. 7 [Telford mortgage] and 17 [Canadian Stanley mortgage] would set each other off. This result they felt would be a logical consequence of the two transactions in question.
>
> However, the documents on the two transactions were drafted in such a way that it was never certain that a right or [sic] set-off would or could arise. A number of contingencies could possibly arise before the right of set-off if any ever existed could be triggered. Firstly, the right of set-off does not arise until the debt or payment on each mortgage becomes due and payable. This was not to occur until firstly the $50,000 payment plus interest due on Ex. 7 on 31st January 1981 had been paid and secondly, until each of the payments for $50,000 plus interest on each mortgage due 31st July 1981 and 31st January 1982 had become due, and this is assuming no intervening factors such as an assignment of either Ex. 7 or Ex. 17 with proper notice or seizure under a writ or other such type of event would occur.

21 The Alberta Court of Appeal stated that whether there was an agreement to set-off was not at issue on the appeal. The Telfords testified that on an occasion prior to the execution of the documents and an occasion subsequent to the execution of the documents Canadian Stanley orally agreed that upon the payment by the Telfords of $50,000 the mortgages would be off-set. This testimony was extremely sketchy. The written agreement, on the other hand, is clear. The parties did not prepare a simple straightforward mortgage from the Telfords to Canadian Stanley for $50,000. Instead, they prepared two separate mortgage documents each of which provided for payments subsequent to the Telfords' payment of $50,000. In these circumstances I think the trial judge was correct in finding that there was no agreement to set-off.

22 In the absence of such an agreement the Telfords must demonstrate that they have a right of set-off at law or a right of set-off in equity.

(1) Set-off at law

23 Set-off at law originally arose from two statutes: the Insolvent Debtors Relief Act, 1728 U.K. (2 Geo. 2, c. 22), and the Set-off Act, 1734 U.K. (8 Geo. 2, c. 24). These statutes were repealed but their effect was preserved in subsequent legislation. In the rules promulgated under the Supreme Court of Judicature Act, 1873 U.K. (36 & 37 Vict., c. 66), the following was included:

> 199.3 A defendant in an action may set-off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim. But the Court or a Judge may, on the application of the plaintiff before trial, if in the opinion of the Court or Judge such set-off or counterclaim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof.

24 In Alberta the relevant provisions are found in the Alberta Rules of Court. Rule 93 of the Alberta Rules of Court reads as follows:

> 93(1) A defendant may by way of counterclaim against the plaintiff's claim or cause of action set up any claim or cause of action by the defendant either against the plaintiff alone or one or more of several plaintiffs or against the plaintiff and another person whether a party to the action or not.
>
> (2) All matters which might be pleaded by way of set-off shall if it is desired to set the same up in the action, be pleaded by way of counterclaim.
>
> (3) A counterclaim has the same effect as a cross-action so as to enable the court to pronounce a final judgment in the same action both on the original and on the counterclaim.
>
> (4) The counterclaim shall be conjoined and pleaded with the statement of defence.
>
> (5) A defence to counterclaim shall be conjoined and pleaded with the reply.

The Alberta Court of Appeal discussed the relevant Alberta legislation in *Atlantic Accept. Corp. v. Burns & Dutton Const. (1962) Ltd.*, [1971] 1 W.W.R. 84, 14 D.L.R. (3d) 175. At p. 90 Allen J.A. stated:

> Rule 95 contains provision enabling the court to direct a counterclaim to be excluded or tried separately if it cannot be conveniently disposed of in the same action. Thus it would appear

that there are no essential differences in principle between the English R. 199.3 quoted above and our Rules dealing with the same subject matter.

It would therefore seem that decisions of English courts on the question of enforceability of claims sought to be set off by a defendant against a claim of a plaintiff may still be helpful in resolving the problems faced in this case and in dealing with the first question propounded above we find some assistance from certain cases to which I will now refer.

25 The English common law interpretation of the statutory right of set-off is neatly summarized in Halsbury's Laws of England, 4th ed., vol. 42, para. 421:

> 421. Nature of the right. The right conferred by the Statutes of Set-Off was a right to set off mutual debts arising from transactions of a different nature which could be ascertained with certainty at the time of pleading. Thus, no legal set-off could exist against a claim which sounded in damages, nor could a claim which sounded in damages be set off at law against a plaintiff's claim. The fact that a claim was framed in damages precluded the raising of a set-off at law, notwithstanding that the claim might have been differently framed in a way which would have permitted such a set-off. Where a claim for a liquidated debt was joined by a plaintiff with a claim for damages, set-off at law might only be pleaded in defence to the former claim. Set-off at law operates as a defence.

Thus, as was stated by the British Columbia Court of Appeal in *C.I.B.C. v. Tuckerr Indust. Inc.*, [1983] 5 W.W.R. 602 at 604, 46 B.C.L.R. 8, 48 C.B.R. (N.S.) 1, 149 D.L.R. (3d) 172, statutory set-off (or set-off at law) "requires the fulfilment of two conditions. The first is that both obligations must be debts. The second is that both debts must be mutual cross obligations". The claim in this case is a debt. The major hurdle the appellant faces is the requirement of "mutuality".

26 How has this mutuality requirement been interpreted by the courts? In *Royal Trust Co. v. Holden* (1915), 21 B.C.R. 185, 8 W.W.R. 500, 22 D.L.R. 660 (C.A.), the British Columbia Court of Appeal discussed the meaning of the phrase "mutual debts" at pp. 662-63:

> The expression "mutual debts" is somewhat hard to understand according to the old cases, but when we see in the ancient and approved form of plea given in *Bullen v. Leake*, 3rd ed. 682, viz.: —
>
> > That the plaintiff, at the commencement of the suit was and still is indebted to the defendant in an amount equal to the plaintiff's claim ...
>
> we are relieved to find that "mutual debts" mean practically debts due from either party to the other for liquidated sums, or money demands which can be ascertained with certainty at the time of pleading — *per* Kennedy, L.J., in *Bennett v. White*, [1910] 2 K.B. at 648, 79 L.J.K.B. 1133.

It seems that under this definition any assignment would destroy mutuality and hence destroy the possibility of set-off at law. This was the view taken by the British Columbia Court of Appeal in *Coba In dust. Ltd. v. Millie's Hldgs. (Can.) Ltd.*, [1985] 6 W.W.R. 14, 65 B.C.L.R. 31, 36 R.P.R. 259 , at pp. 28-29:

> None of the authorities cited by the appellant is applicable to the case before us and none of them detracts in any way from the authority of the *Nfld.* case. Each of them is an example of a set-off at law. In such cases the assignment of a debt prevents fulfilment of the requirement that the debts sought to be set off against each other must be mutual. Once a debt is assigned, it is owed to a third party and the debts are no longer mutual cross-claims: see *C.I.B.C. v. Tuckerr Indust. Inc.*, 46 B.C.L.R. 8, [1983] 5 W.W.R. 602 at 605, 48 C.B.R. (N.S.) 1, 149 D.L.R. (3d) 172 (C.A.).

Since there was an assignment in this case, it appears that a set-off at law is not available to the Telfords. It is necessary, therefore, to decide whether a set-off is available in equity.

(2) Set-off in equity

27 The distinction between set-off at law and set-off in equity was canvassed by the British Columbia Court of Appeal in *C.I.B.C. v. Tuckerr Indust. Inc.*, supra, at p. 605:

> Such a set-off has its origin in equity and does not rest on the statute of 1728. It can apply where mutuality is lost or never existed. It can apply where the cross obligations are not debts.

Equitable set-off is available where there is a claim for a money sum whether liquidated or unliquidated: see *Aboussafy v. Abacus Cities Ltd.*, [1981] 4 W.W.R. 660, 39 C.B.R. (N.S.) 1, 124 D.L.R. (3d) 150, 29 A.R. 607 (C.A.), at p. 666. More importantly in the context of this case, it is available where there has been an assignment. There is no requirement of mutuality. The authorities to be reviewed indicate that courts of equity had two rules regarding the effect of a notice of assignment on the right to set-off. First, an individual may set off against the assignee a money sum which accrued and became due prior to the notice of assignment. And second, an individual may set off against the assignee a money sum which arose out of the same contract or series of events which gave rise to the assigned money sum or was closely connected with that contract or series of events.

28 The first case to consider is *Watson v. Mid Wales Ry. Co.* (1867), L.R. 2 C.P. 593. In that case the assignees of a Lloyd's bond sued the makers of the bond in the name of the original bondholder. The makers sought to set off arrears of rent due from the original bondholder which had accrued due since the notice of the assignment under a lease entered into prior to the notice of assignment. The question was whether a debtor had, in equity, a right to set off against the assignee of his debt a debt to him from his original creditor which has accrued due subsequent to the notice to him of

the assignment. The three judges, in separate reasons, answered that a debtor had no right to set-off in such a case. Montague Smith J. said at pp. 600-601:

> If the debt sought to be set off in an action brought on behalf of the assignee of a debt had existed at the time of the transfer, equity would not interfere to restrain the legal set-off which the parties had. But here, at the time of transfer and notice, no debt existed to be set off. It is said that if debts are accruing mutually under independent contracts, neither of which is due at the time of the transfer, the right of set-off exists, if at the time of action brought upon one of them the liability of the other has ripened into a debt actually due. But the time to be looked at is, not the time of action brought, but the time when the transfer was made and notice given, and the rights of parties must be determined by the state of things then existing.

However, each judge made it clear that the answer would be different in a case where "the two transactions were in some way connected together, so as to lead the Court to the conclusion that they were made with reference to one another" (p. 598). For example, Bovill C.J., referring to *Smith v. Parkes* (1852), 16 Beav. 115, 51 E.R. 720, expressed the view at p. 598 that:

> ... the decision went on the footing that both debts arose out of the same partnership dealings and transactions, and were inseparably connected together. That case, therefore, is not applicable to the one before us, where the transactions appear entirely separate, and where we have no allegation or statement from which we can infer any connection to have existed.

29 *Nfld. Govt. v. Nfld. Ry. Co.* (1888), 13 App. Cas. 199 (P.C.), is the seminal case on the right to set off debts arising under the same or interrelated contracts. The court construed the contract before it in that case and concluded that (1) each claim by the railway to a grant of land from the Newfoundland government was complete at the time the construction of the railway section which was the quid pro quo for the grant was completed and (2) upon the completion of construction of each section a proportionate part of the government subsidy became payable for the specified term subject to the condition of continuous efficient operation. On 15th July 1882 the railway assigned the southern division of the railway to another company. On 20th April 1886 the railway, according to the contract, should have been completed. It was not completed. The government, therefore, ceased making the requisite payments. The assignee made a claim for these payments. The government of Newfoundland counterclaimed for unliquidated damages against the assignees of the railway company. Their Lordships stated at pp. 212-13:

> The present case is entirely different from any of those cited by the plaintiffs' counsel. The two claims under consideration have their origin in the same portion of the same contract, where the obligations which gave rise to them are intertwined in the closest manner. The claim of the Government does not arise from any fresh transaction freely entered into by it after notice of assignment by the company. It was utterly powerless to prevent the company from inflicting injury on it by breaking the contract. It would be a lamentable thing if it were

> found to be the law that a party to a contract may assign a portion of it, perhaps a beneficial portion, so that the assignee shall take the benefit, wholly discharged of any counter-claim by the other party in respect of the rest of the contract, which may be burdensome. There is no universal rule that claims arising out of the same contract may be set against one another in all circumstances. But their Lordships have no hesitation in saying that in this contract the claims for subsidy and for non-construction ought to be set against one another.
>
> It is hardly necessary to cite authorities for a conclusion resting on such well-known principles. Their Lordships will only refer to *Smith v. Parkes* [16 Beav. 115], not so much on account of the decision as for the sake of quoting a concise statement by Lord Romilly of the principle which governed it. He says, "All the debts sought to be set off against the defendant Parkes are debts either actually due from him at the time of the execution of the deed" (this was the deed by which the third party who resisted the set-off was brought in) "or flowing out of and inseparably connected with his previous dealings and transactions with the firm." That was a case of equitable set-off, and was decided in 1852, when unliquidated damages could not by law be the subject of set-off. That law was not found conducive to justice, and has been altered. Unliquidated damages may now be set off as between the original parties, and also against an assignee if flowing out of and inseparably connected with the dealings and transactions which also give rise to the subject of the assignment.

30 The court found that the government was entitled to set off their counterclaim against the assignees' claim since the claim and counterclaim had their origin in the same portion of the same contract and the obligations which gave rise to them were closely intertwined.

31 In *Re Pinto Leite & Nephews; Ex parte Des Olivaes*, [1929] 1 Ch. 221, the question was whether a trustee was entitled to set off the debt of £15,000 which became due after receipt of the notice of assignment. The court held that although the liability existed at or before the date of the notice of assignment, yet as that debt had not then accrued due, it was not debitum in praesenti and therefore was not a debt which the trustee was entitled to set off. Clauson J. stated at p. 233:

> It is, of course, well settled that the assignee of a chose in action ... takes subject to all rights of set-off which were available against the assignor, subject only to the exception that, after notice of an equitable assignment of a chose in action, a debtor cannot set off against the assignee a debt which accrues due subsequently to the date of notice, even though that debt may arise out of a liability which existed at or before the date of the notice; but the debtor may set off as against the assignee a debt which accrues due before notice of the assignment, although it is not payable until after that date.

And at p. 236 he further stated:

> ... when the debt assigned is at the date of notice of the assignment payable in futuro, the debtor can set off against the assignee a debt which becomes payable by the assignor to the

> debtor after notice of assignment, but before the assigned debt becomes payable, if, but only if, the debt so to be set off was debitum in praesenti at the date of notice of assignment.

Clauson J. then went on to add at p. 236:

> In order to prevent any misunderstanding I ought to make it clear that it is not suggested that the debt assigned, and the liabilities sought to be set off against it, are so connected as to bring the case within the authorities of which the case of *Government of Newfoundland v. Newfoundland Ry. Co.* is typical.

32 In *Business Computers Ltd. v. Anglo-African Leasing Ltd.*, [1977] 1 W.L.R. 578, [1977] 2 All E.R. 741 (Ch. D.), the defendant owed the plaintiff £10,587 in respect of two transactions for computers bought by the defendant and sold on hire purchase to third parties. Under a third transaction the plaintiff manufactured a computer for its own use, sold it to the defendant, and by a hire purchase agreement leased it back. The plaintiff became insolvent and a receiver was appointed on 17th June 1974. By 17th June the defendant was entitled under a condition of the hire purchase agreement to terminate that agreement. It did not do so. On 31st July the receiver repudiated the agreement. On 8th August the defendant accepted the repudiation. It sold the computer and claimed a sum in excess of £32,000 as damages under another condition of the hire purchase agreement. Templeman J. reviewed the relevant authorities and concluded at p. 585:

> The result of the relevant authorities is that a debt which accrues due before notice of an assignment is received, whether or not it is payable before that date, or a debt which arises out of the same contract as that which gives rise to the assigned debt, or is closely connected with that contract, may be set off against the assignee. But a debt which is neither accrued nor connected may not be set off even though it arises from a contract made before the assignment.

He found that in this case the debt was neither accrued nor connected. There was, accordingly, no right of set-off.

33 In *Can. Admiral Corp. v. L.F. Dommerich & Co.*, [1964] S.C.R. 238, 6 C.B.R. (N.S.) 64, 43 D.L.R. (2d) 1 [Ont.], this court affirmed the rule that a debt which has accrued due before a notice of assignment is received may be set off against the assignee. In that case an assignee sought to claim money from a corporation. The corporation sought to set off a debt owed to it by the assignor. This debt had accrued due prior to the notice of assignment. The court allowed the set-off stating at p. 240: "There is no doubt as to the general rule. The debtor has as against the assignee the same right of set-off as he would have had against the assignor at the time at which he receives notice of the assignment".

34 Thus, cases involving debts that arise from the same contract or closely interrelated contracts form an exception to the general rule. In these cases a debt arising out of the contract or closely interrelated contracts may be set off against the assignee even if the debt accrues due after the

notice of the assignment. The issue in our case therefore turns on whether the debt assigned and the liability sought to be set off against it were so connected as to fall within the principle of the *Nfld. Ry.* case.

35 I have found no judgment of this court in which an equitable set-off was permitted on the *Nfld. Ry.* principle. Nor was any cited to us. However, in *Coba Indust.*, supra, the British Columbia Court of Appeal applied the *Nfld. Ry.* case to the following transaction. The respondents bought a commercial property from one Polacco. The interim agreement provided for a second mortgage to be given to Polacco and for Polacco to lease the premises from the respondents for a period of three years. During the lease the respondents were to make second mortgage payments of approximately $5,000 to Polacco and Polacco was to make monthly payments of approximately $10,000 to the respondents. Post-dated cheques were exchanged. Polacco almost immediately assigned his second mortgage to the petitioner and endorsed over all of the respondents' cheques. Shortly thereafter Polacco defaulted on his lease payments. The mortgage went into default and the petitioner commenced foreclosure proceedings. The respondents successfully applied for a declaration that they were entitled to an equitable set-off against amounts owing under the mortgage to the petitioner. The petitioner's appeal was dismissed. Macfarlane J.A. reviewed the English authorities and drew from them the following principles at p. 22:

> 1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands: *Rawson v. Samuel* (1841), Cr. & Ph. 161, 41 E.R. 451 (L.C.).
>
> 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed: [*Br. Anzani (Felixstowe) Ltd. v. Int. Marine Mgmt. (U.K.) Ltd.*, [1980] Q.B. 137, [1979] 3 W.L.R. 451, [1979] 2 All E.R. 1063].
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> 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim: [*Fed. Commerce and Navigation Co. v. Molena Alpha Inc.*, [1978] Q.B. 927, [1978] 3 W.L.R. 309, [1978] 3 All E.R. 1066].
>
> 4. The plaintiff's claim and the cross-claim need not arise out of the same contract: *Bankes v. Jarvis*, [1903] 1 K.B. 549 (Div. Ct.);*Br Anzani*.
>
> 5. Unliquidated claims are on the same footing as liquidated claims: [*Nfld. v. Nfld. Ry. Co.* (1888), 13 App. Cas. 199 (P.C.)].

36 Macfarlane J.A. found that although the mortgage and lease were separate documents evidencing two different legal relationships and did not refer to one another, and although the amounts payable and the payment dates were totally different in each document, the evidence disclosed that the lease payments were intended by the parties to be the source of the funds required to satisfy the mortgage payments. This was why the term of the lease exceeded the term of the mortgage and the amounts payable under the lease exceeded the amounts falling due on

the mortgage. In view of the connection between them the differences in the two documents were immaterial.

37 The English Court of Appeal decision in *Hanak v. Green*, [1958] 2 Q.B. 9, [1958] 2 W.L.R. 755, [1958] 2 All E.R. 141, on which Macfarlane J.A. placed substantial reliance for the interrelated obligations principle, involved an action by the plaintiff against the builder for failure to complete the construction of a house. The builder counterclaimed or claimed by way of set-off on a quantum meruit for extras outside the purview of the contract. The Court of Appeal held that the defendant had an equitable set-off which totally defeated the plaintiff's claim. Because of the close relationship between the dealings which gave rise to the respective claims, equity would not permit one of them to be insisted upon without taking the other into account. The *Nfld. Ry.* case was followed.

38 Macfarlane J.A. relied also on the English Court of Appeal decision in the *Fed. Commerce* case, supra, where charterers of a vessel were held entitled to deduct from hire by way of equitable set-off claims which they had against the shipowners. The case is interesting because Lord Denning indicates in the course of his reasons that it is no longer necessary since the merger of law and equity to probe the technicalities of the common law of set-off. He said ([1978] 3 All E.R. 1066) at p. 1078:

> Over 100 years have passed since the Supreme Court of Judicature Act 1873. During that time the streams of common law and equity have flown together and combined so as to be indistinguishable the one from the other. We have no longer to ask ourselves: what would the courts of common law or the courts of equity have done before the Supreme Court of Judicature Act 1873? We have to ask ourselves: what should we do now so as to ensure fair dealing between the parties? (see *United Scientific Holdings Ltd v. Burnley Borough Council* [[1977] 2 All E.R. 62 at 68, [1977] 2 W.L.R. 806 at 811-12] per Lord Diplock). This question must be asked in each case as it arises for decision; and then, from case to case, we shall build up a series of precedents to guide those who come after us. But one thing is quite clear: it is not every cross-claim which can be deducted. It is only cross-claims that arise out of the same transaction or are closely connected with it. And it is only cross-claims which go directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim.

The court held that it would be unfair for the creditor to be paid his claim without allowing the debtor to raise an equity against the creditor in the form of his own claim to the extent it had been held to be well-founded.

39 I return now to the facts of this case in order to determine the effect of the notice of assignment on the Telfords' claim for set-off. Section 150 of the Land Titles Act, R.S.A. 1980, c. L-5, identifies the prerequisites for an effective assignment of a mortgage. Section 150 states:

> 150(1) Any contract in writing for the sale and purchase of any land, mortgage or encumbrance is assignable notwithstanding anything to the contrary therein contained, and any assignment of any such contract operates according to its terms to transfer to the assignee therein mentioned all the right, title and interest of the assignor both at law and in equity, subject to the conditions and stipulations contained in the assignment.
>
> (2) Nothing in this section shall be deemed to affect any rights at law or in equity of the original vendor or owner of the land, mortgage or encumbrance, until notice in writing of the assignment has been either sent to him by registered mail or served on him in the way process is usually served, and the notice mentioned in section 134 shall be deemed to be such notice.

The Telfords did not receive any notice of assignment in compliance with the provisions of this statute until the Holts filed their notice of statement of claim. The date of notice of assignment was accordingly 13th March 1981. Under the original schedule of payments the only debt which accrued due prior to 13th March 1981 was the 31st January 1981 payment of $50,000 from the Telfords to Canadian Stanley. The debts which the Telfords are seeking to set off did not accrue due before the date of the notice of assignment. Thus, the debts can be set off only if the Telfords can demonstrate that they arise out of the same contract or closely interrelated contracts. In my view, the Telfords have succeeded in demonstrating this. In essence, what happened here was that the Telfords and Canadian Stanley "swapped" parcels of land. The Telfords bought land from Canadian Stanley and gave a mortgage to Canadian Stanley but they also sold land to, and received a mortgage from, Canadian Stanley. The mortgages were entered into on the same date. The purchase price for both parcels was the same, namely, $265,000. Except for the 31st January 1981 payment the payments under the two mortgages were on the same dates and for the same amounts. It is these two latter payments under the Canadian Stanley mortgage and the Telford mortgage that the Telfords seek to set off against each other. Because the Telford mortgage and the Canadian Stanley mortgage are part of the land exchange deal, being part of the consideration for the reciprocal transfers, they are, in my view, closely connected and meet the requirements for an equitable set-off. They were made with reference to one another. It would be unfair to enforce only one side of the land exchange agreement.

40 However, the Telfords have one more obstacle to overcome, namely, the view expressed by the Alberta Court of Appeal that their debt was unenforceable and could not be set off for that reason. In reaching this conclusion the majority of the Court of Appeal followed their own earlier precedent in *Renner v. Racz*, supra. In *Renner* the court considered the Alberta Law of Property Act, R.S.A. 1980, c. L-8. Section 41(1) of that Act states:

> 41(1) In an action brought on a mortgage of land, whether legal or equitable, or on an agreement for the sale of land, the right of the mortgagee or vendor is restricted to the land to which the mortgage or agreement relates and to foreclosure of the mortgage or cancellation of the agreement for sale, as the case may be, and no action lies
>
> (*a*) on a covenant for payment contained in the mortgage or agreement for sale,
>
> (*b*) on any covenant, whether express or implied, by or on the part of a person to whom the land comprised in the mortgage or agreement for sale has been transferred or assigned subject to the mortgage or agreement for the payment of the principal money or purchase money payable under the mortgage or agreement or part thereof, as the case may be, or
>
> (*c*) for damages based on the sale or forfeiture for taxes of land included in the mortgage or agreement for sale, whether or not the sale or forfeiture was due to, or the result of, the default of the mortgagor or purchaser of the land or of the transferee or assignee from the mortgagor or purchaser.

Section 43(1) states:

> 43(1) Sections 41 and 42 do not apply to a proceeding for the enforcement of any provision
>
> (*a*) of any agreement for sale of land to a corporation, or
>
> (*b*) of a mortgage given by a corporation.

41 The Court of Appeal, in interpreting these sections, made reference to this court's judgment in *Edmonton Airport Hotel Co. v. Credit Foncier Franco-Can.*, supra, and, in particular, to the court's observation that the predecessor section to s. 41 created "an unenforceable debt". The Alberta Court of Appeal concluded therefore that in a case where the debt was a mortgage debt and where, because of the statute, an action on the personal covenant was not available, the court could not order set-off. It could not order set-off because there was no enforceable debt.

42 With respect, I must disagree with this interpretation of the *Edmonton Airport Hotel* case. This court's comment in that case must be viewed in context. In *Edmonton Airport Hotel* a guarantor had given a personal guarantee in respect of a mortgagor's indebtedness. The guarantor argued that any guarantee of any mortgage indebtedness is void under the terms of the statute as an indirect method of attempting to impose personal liability under the mortgage. The court disagreed since the guarantor was not (and could not be) the mortgagor. In the course of its reasoning the court said at pp. 444-45:

> As to the guarantee, Superstein submitted that he was under no liability as guarantor since there was no debt owing by the principal debtor. He said that the effect of s. 34(17)(*a*) was to render it impossible that there should be any debt owing by the hotel company. The simple

> answer is that the hotel borrowed money from Credit Foncier on the security of land and chattels. This borrowing was neither illegal nor *ultra vires* and gave rise to a debt. *Swan v. Bank of Scotland* [(1836), 10 Bli. N.S. 627] does not apply. It was a case of illegality. But here, s. 34(17) is a procedural limitation. There was a borrowing and there was an unenforceable debt which will not disappear by the terms of s. 34(18) until a vesting order is made.

In my view, the court was emphasizing that enforcing the guarantee was not equivalent to enforcing a mortgagor's personal covenant. The reference to the unenforceable debt was simply a reference to the fact that a mortgagor's personal covenant for payment is unenforceable under the terms of the statute. Section 41 does not create an unenforceable debt. Section 41 does not extinguish or satisfy the debt. It merely precludes the remedy by way of a personal judgment against the mortgagor on the covenant. The mortgagee may still pursue the remedy of foreclosure. Therefore, both the Telfords and Canadian Stanley have enforceable debts. It is true that pursuant to the statute a different range of remedies is available to an individual from that available to a corporation. Set-off does not however require either symmetry of remedies or of amounts.

4. Conclusion

43 In summary, the Telfords are not entitled to legal set-off because the debts are not mutual. The Telfords are entitled to equitable set-off because they are entitled to set off against the assignee, the Holts, a money sum which arises out of the same contract or interrelated contracts which gave rise to the assigned money sum. The provisions of the Alberta Law of Property Act do not preclude this result.

44 The appeal is allowed. The balance due on the Telford mortgage is the sum of $50,886.60 and, upon the payment of that amount by the Telfords to the Holts, the order for foreclosure should be vacated or set aside and the mortgage expunged from the title. The appellants should have their costs both here and in the courts below to be withheld from the said sum of $50,886.60.

Appeal allowed.

Tab 8

2008 CarswellOnt 6166
Ontario Superior Court of Justice

1261468 Ontario Ltd. v. Huigenbos

2008 CarswellOnt 6166, 171 A.C.W.S. (3d) 962

1261468 Ontario Ltd. and 1261469 Ontario Inc. (Plaintiffs) and John Huigenbos (Defendant)

B.H. Matheson J.

Heard: August 25-29, 2008
Judgment: October 14, 2008
Docket: Brantford CV-06-527

Counsel: Paul D. Amey for Plaintiffs
James G. Ion for Defendant

Subject: Evidence; Contracts; Property; Torts; Corporate and Commercial

Related Abridgment Classifications

Contracts
V Mistake
V.6 As grounds of rescission
Evidence
VI Witnesses
VI.4 Credibility
VI.4.a Duty of judge in assessing
Real property
III Sale of land
III.1 Agreement of purchase and sale
III.1.b Interpretation of contract
III.1.b.iii Conditions
III.1.b.iii.A Conditions precedent
III.1.b.iii.A.3 Miscellaneous
Torts
VIII Fraud, deceit, and misrepresentation
VIII.6 Remedies
VIII.6.a Rescission
VIII.6.a.i Availability of remedy

Headnote

Evidence --- Witnesses — Cogency — Credibility — Duty of judge in assessing

On March 30, 2006, purchaser executed agreement of purchase and sale for lands upon which flea market was being operated; closing date was June 30, 2006 — Agreement contained condition that vendors fully cooperate with purchaser, and provide all information regarding property and business of which they had knowledge — Vendor D met with purchaser and his son P to discuss financial matters relating to flea market — D testified that she answered purchaser and P's questions to best of her ability, then gave them name of bookkeeper W to contact for further information — P wrote name "W" on notes of meeting, but both purchaser and P later claimed that D had refused to provide name of accountant — In letter dated April 23, 2006, purchaser thanked vendors for their cooperation and help — Purchaser signed termination of agreement on April 25, 2006 — Vendors brought action for damages for breach of agreement — Purchaser brought counterclaim for declaration that agreement was legally terminated since conditions were not complied with — Action allowed; counterclaim dismissed — Condition that vendors fully cooperate with purchaser had been satisfied — Evidence of D, when it was in conflict with that of purchaser and P, was to be preferred — D gave her testimony in fair and unequivocal manner — D had answered purchaser and P's questions to best of her ability, and it was clear from looking at P's notes that name of W had come up.

Real property --- Sale of land — Agreement of purchase and sale — Interpretation of contract — Conditions — Conditions precedent — Miscellaneous

On March 30, 2006, purchaser executed agreement of purchase and sale for lands upon which flea market was being operated; closing date was June 30, 2006 — Agreement contained condition that vendors fully cooperate with purchaser, and provide all information regarding property and business of which they had knowledge — Agreement contained further condition that purchaser make satisfactory arrangements to hire manager to run flea market — Vendor D met with purchaser and his son P to discuss financial matters relating to flea market — D testified that she answered purchaser and P's questions to best of her ability, then gave them name of bookkeeper W to contact for further information — P wrote name "W" on notes of meeting, but both purchaser and P later claimed that D had refused to provide name of accountant — H, who was part-time manager of flea market for vendors, was only person interviewed by purchaser for manager position — H indicated that he would be prepared to increase his hours at flea market and would stay in same salary range, and that he was not thinking of retiring — Purchaser and P testified that H was not suitable manager, and that since they intended to expand operation, manager's salary was not financially viable — Purchaser signed termination of agreement on April 25, 2006 — Vendors brought action for damages for breach of agreement — Purchaser brought counterclaim for declaration that agreement was legally terminated since conditions were not complied with — Action allowed; counterclaim dismissed — Condition that vendors fully cooperate with purchaser had been met, as D had answered questions to best of her ability and it was clear that W's name had come up — Neither purchaser nor P had provided satisfactory reasons for not hiring H or for not looking for another manager.

Torts --- Fraud and misrepresentation — Remedies — Rescission — Availability of remedy — Entitlement

On March 30, 2006, purchaser executed agreement of purchase and sale for lands upon which flea market was being operated; closing date was June 30, 2006 — Agreement contained condition that vendors fully cooperate with purchaser, and provide all information regarding property and business of which they had knowledge — After going over financial information provided by vendors, purchaser discovered miscalculations in statement of expenses and statement of income (vendors' documents) — Purchaser made lower offer to vendors (second offer), which vendors did not accept — Purchaser signed termination of agreement on April 25, 2006 — Vendors brought action for damages for breach of agreement — Purchaser brought counterclaim, in part seeking recission of agreement due to material misrepresentation in vendors' documents — Action allowed; counterclaim dismissed — Purchaser was not induced into entering agreement by vendors' documents — Purchaser had been involved in other major purchases, and was assisted in present case by his son, who was accountant with major company — One would have expected that purchaser would have asked for all financial information before signing agreement with vendors — Purchaser likely put more restrictive interpretation on these financial figures to arrive at second offer price — Although there may have been slight miscalculations in vendors' documents, these were not sufficient for finding that recission was in order.

ACTION by vendor for damages for breach of agreement of purchase and sale; COUNTERCLAIM by purchaser for declaration that agreement was legally terminated or for recission of agreement.

***B.H. Matheson J.*:**

1 This is a breach of contract case.

2 At trial the Defendant asked for an amendment to his counterclaim by adding to paragraph 38 the following:

> ii) Rescission of the Agreement of Purchase and Sale made March 31, 2006, (the Agreement).

3 This amendment was done on consent of the Plaintiffs, on the understanding that there were no fraudulent inducements or statements made by the Plaintiffs.

Issues Not in Dispute

4 The facts that are not in dispute are as follows:

> a) 1261468 Ontario Ltd. owned vacant land adjacent to 1261469 Ontario Inc., which has the flea market on it.

b) John Huigenbos viewed the property with his real estate agent, Bob Boswell, before signing purchase documents.

c) John Huigenbos "in trust" executed Agreement of Purchase and Sale for the lands, buildings, chattels, and fixtures as set out in document at Exhibit 1, tab 12. Huigenbos signed this on March 30, 2006.

d) John Huigenbos's real estate agent. Bob Boswell, prepared the Agreement of Purchase and Sale.

e) The closing date was to be June 30, 2006.

f) There were six conditions set out in the Agreement of Purchase and Sale. They were:

1) The purchaser, at his own expense, obtaining a satisfactory building inspection report. Huigenbos waived that condition by signing a Notice of Fulfillment of Condition on 10th April 2006. See tab 13 of Exhibit 1.

2) Huigenbos to make satisfactory arrangements to hire a manager to run the business o/a Crossroads Flea Market.

3) Seller to provide to the buyer all details regarding the environmental condition of the property including but not limited to any and all environmental reports in their possession.

4) Seller to provide the buyer all financial details related to the business and the real property.

5) Seller to provide "detailed list" of all inclusions, exclusions and rental fixtures relative to the property and business.

6) Buyer may inspect the property three times prior to completion of the transaction. The seller agrees to cooperate fully with the buyer and provide whatever details and information regarding the property and business of which they have knowledge. Huigenbos was on the property at least twice after signing of the agreement.

5 One Ralph Haines, who was the part-time manager for the vendors, was the only person interviewed by Huigenbos. All parties agree that John Huigenbos and Ralph Haines met and discussed duties of manager. There is some dispute as to when the meeting took place.

6 Huigenbos did not ask to speak to the Plaintiffs' bookkeeper or ask for further information. Huigenbos, in letter of April 23, 2006 addressed to the McColemans, stated, "We wish to thank you for the cooperation and help that you have given us in doing the evaluation of this property and (sic) business." (See tab 16, Exhibit 1)

7 He had his agent Bob Boswell prepare a Termination of Agreement by Buyer dated April 25, 2006. (See tab 17, Exhibit 1.) There was a meeting at Boswell's office on May 2, 2006. Huigenbos was aware at this time that there was a possibility of a lawsuit. Bob Boswell, Norm Moore (Plaintiffs' agent), the McColemans, and John Huigenbos were present. It ended on an unpleasant note, and Bob Boswell apologized for his client's remarks.

Issues in Dispute

8 One of the main issues in dispute is whether the condition dealing with the hiring of a manger for the flea market was complied with. The Plaintiffs take the position that there was a suitable manager in Roger Haines. The Defendant's position is that that condition had not be complied with and, therefore, he could terminate the contract on that ground alone.

9 The other issue in dispute is that the figures given by the Plaintiffs as to the financial situation of the flea market were deficient. He also states that, after having his son Paul review the figures, he concluded that the amount offered for the purchase of $849,000.00 was much too much for the purchase. He then wrote a letter to the McColemans dated April 23, 2006 offering a new figure to purchase the flea market and land at $670,000.00. (See tab 16, Exhibit 1.)

10 Those were the main issues in dispute. Huigenbos did state in his evidence that some of the other conditions had not been met. I will deal with them briefly, later.

Credibility of the Witnesses

11 In determining the two main issues in dispute, I will have to look at the credibility of the witnesses. There are major differences in the evidence of the parties.

12 The Plaintiffs called Darlene and Bert McColeman, Norm Moore, and Ralph Haines. I find that they answered the questions, both in examination in-chief and cross-examination, in a straightforward manner. None of them had their credibility challenged.

13 Darlene, who was the major operative of the flea market, gave her testimony in a fair and unequivocal manner. She stated that she was relying on the bookkeeper Miriam Woodley for the financial advice. In her meeting with John and Paul Huigenbos, she answered the financial questions to the best of her ability. She stated that when she did not have the answers they should get in touch with Miriam.

14 One is able to see, by looking at the notes made at the time of the meeting of the John and Paul Huigenbos and Darlene, that the name of Miriam came up. This is confirmed by the note that Paul made on his paper where he placed an arrow with the name Miriam being at the tip.

15 John Huigenbos in cross-examination could not recall if Darlene said to talk to Miriam Woodley. Yet, in his examination for discovery on the 10th of July 2007, he said the following:

> 296 Q. And she didn't volunteer that you should speak with Miriam Woodley, her bookkeeper?
>
> A. No.
>
> 297 Q. Did either of you ask to do so?
>
> A. No.

16 In response to a number of undertakings given at the discovery, a letter was prepared by the solicitor for the Defendant dated November 26, 2007. At numbered paragraph 7 it states:

> ... At the meeting, Darlene McColeman would not provide the name of the accountant nor would she agree to meet with the accountant, or allow Mr. Huigenbos to meet with the accountant in order to have their numerous questions fully answered and explained.

17 Paul Huigenbos, who is a certified accountant, helped his father in dealing with this matter. He attended the meeting with Darlene. Even though he wrote the name Miriam on his notes, he stated that she refused to give the name of the accountant.

18 It is quite clear that in the Agreement the seller "agrees to fully cooperate with Buyer and provide whatever details and information regarding the property & business of which they have knowledge."

19 Darlene has stated that she gave the name of Miriam Woodley and said that the Huigenboses should contact her for further information. She had provided financial statements with the name "Padgett Business Services" name on the documents. (See tabs 8 and 10, Exhibit 1)

20 In his letter of April 23, 2006, he thanks the McColemans for their "cooperation and help that you have given us ..."

21 I find that the evidence as given by Darlene, when it is in conflict with both Paul and John Huigenbos, is to be accepted over that of the Huigenboses.

22 There was a meeting with Ralph Haines and John and Paul Huigenbos. This had to do with the interview dealing with his being the manager.

23 There was some dispute as to when the meeting took place. In the examination of John Huigenbos July 10th, the following question and answer were given:

> 172 Q. And do we know this document has a date on it on April 2nd, 2006. Do you know when, in fact, you met with Mr. Hanes?
>
> A. No.

24 There were further questions and answers dealing with the time of the meeting, but nothing more concrete was obtained.

25 In the examination at trial, Huigenbos gave a specific date of April 14th. Mr Amey made an objection that in light of Q. 172, the Defendant should have complied with Rule 31.09. That rule calls for the party to correct any misinformation given at discovery as soon as possible. This was not done here.

26 The timing may have had an impact on the examination in-chief of Mr. Ralph Haines. It does indicate a pattern as to how John Huigenbos approaches this trial and his dealing with the McColemans.

27 He would have the court believe the following:

> 1. That he did not contact his lawyer before signing the agreement. He had is real estate agent Bob Boswell draft the agreement — he did not call Boswell as a witness. Doing so could have cleared up some issues.
>
> 2. That he did not read the document before signing it.
>
> 3. That he did not read the transcript of his examination for discovery or Darlene's before the start of the trial. He was provided copies well before the trial.
>
> 4. That he erased, from his computer, documents pertaining to this action, notwithstanding that he was aware as early as the meeting on May 1, 2006 that there might be a trial. He was put on notice formally by letter to his counsel dated June 2, 2006.
>
> 5. That he relied on the two pages of income and expenses prepared by Darlene (Exhibit 1, tabs 1 & 2) when he signed the Agreement — notwithstanding that the price was $849,000.00. He stated that he believed he could renegotiate the price. That was his belief. No evidence was called on this issue, including his agent who drafted the Agreement.

28 Huigenbos stated that his letter of April 18, 2006 was e-mailed. See his examination for discovery:

> 309 Q. And do you know what form it was delivered in? Was it delivered personally, through your agent or by e-mail?

A. I advised them by e-mail.

29 In a letter from Huigenbos's lawyer dated November 26, 2007 (see Exhibit 3, paragraph 9), he now would have one believe that he delivered the letter personally.

30 Darlene McColeman stated that it was by e-mail. For reasons already given, I accept Darlene's evidence on this point.

31 It would appear that John Huigenbos instructed his agent Boswell to prepare and serve the Termination of Agreement by Buyer document. It was dated April 25, 2006 and signed by John Huigenbos.

32 In the document, the reasons given by the Defendant is, "The Buyer interviewing candidates and make satisfactory arrangements to hire a manager and all other conditions." (See tab 17, Exhibit 1.)

Interview of Candidates for Manager Position

33 It is acknowledged that only Ralph Haines was interviewed. Both Paul and John Huigenbos interviewed Mr. Haines.

34 Ralph Haines had started at the flea market as a vendor. He was asked to be a part-time manager a few years later. That meant opening the market, looking after the other vendors, and operating the front counter. He would run the operation when the McColemans were away. He had a job as a starter at a golf course each Tuesday and Thursday.

35 He prepared a *curriculum vitae* for the interview with the Huigenboses. Paul Huigenbos prepared an agenda for this interview, which is dated April 2, 2006 (See Exhibit 2, tab 8). He states that they did not keep to the script, but he answered all their questions. Paul took notes. Those notes were not available.

36 Haines indicated that he would be prepared to increase his hours at the flea market. He would stay in the same salary range. He was not thinking of retiring. According to Haines the meeting went well and he believed that he had the job.

37 The Huigenboses both stated that he was not a suitable person to be the manager. They both indicated that they intended to expand the operation, that the new manger would have to be paid about $1,000.00 a week, and this would not make it financially viable.

38 Mr. Haines had a very different take on the meeting. He stated that John Huigenbos stated that "it would be interesting working with him." Haines expected to be hired and indicated that

John Huigenbos stated that he would call back in four or five days. Haines called when he had not heard from them.

39 Haines is now working as a manager at the flea market with owners other than the McColemans.

40 As stated, John Huigenbos did not interview any other candidate for the job.

41 Paul Huigenbos did take notes of the meeting, but they are not available. No valid reason was given for not producing them, other than they were lost.

42 I find that the Defendant did not adequately pursue the search for a manager.

43 I found that Ralph Haines presented his evidence in an acceptable manner. He did not embellish it. Unfortunately, I am not able to say the same about the Huigenboses.

44 I question whether the Defendant is trying to state that since he wanted a much larger and grander flea market than the one he agreed to purchase, that he is suggesting that the plans for expansion were reasons for aborting the agreement.

45 From my review of the evidence of Mr. Haines, he was prepared to accept longer hours and, except for one morning, agreed to be on the grounds during operating hours. From his *curriculam vitae*, he had the ability to do the job. In my opinion, neither John Huigenbos nor his son provided any satisfactory reasons for not hiring Haines or for not looking for others. It was the Defendant's responsibility to make arrangements for the hiring of a manager, not that of the Plaintiffs.

Other Conditions

46 As stated previously, there were six conditions to be met. I have dealt with the matter of the hiring of a manager.

47 The next condition was the buyer obtaining, at his own expense, a satisfactory inspection. This condition was removed when the Defendant served the Plaintiffs with a Notice of Fulfillment of Condition dated April 10, 2006. (See Exhibit 1, tab 13). I did not hear any evidence that the Defendant hired a professional to do the inspection. It would appear that he relied on his own intuition.

48 The next condition was that the seller was to provide all financial details related to the business and the real property. As previously stated, the vendors provided the financial and related information that they had in their possession. (See tabs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 22, 23, 24, and 25.)

49 Mr. Norm Moore, agent for the Plaintiffs, stated in evidence that he gave the buyer most of the documents that are referred to in paragraph 48 above.

50 The buyer and his son interviewed Mr. Haines and he gave them all the information that they asked for. In addition, there were walkabouts with the vendor and the purchaser's real estate agent. The Huigenboses interviewed Darlene McColeman and she answered as best she could all the questions asked of her. If she did not know, she told them to ask her accountant Miriam Woodley.

51 As stated before, I do not believe that Darlene did not give the name of Miriam Woodley or prevented the Huigenboses from talking to her about the business.

52 I am satisfied that all the financial and other information was given by the seller to the buyer. Because they elected not to talk with the bookkeeper is their fault. This condition has been satisfied.

53 The next condition is that the seller was to provide to the buyer all details regarding the environmental condition of the property, including all environmental reports in their possession. (See paragraph 48 above.)

54 The Defendant did not give much evidence about not receiving all the environmental documents in the possession of the Plaintiffs. He also had the right to have to have an inspection of the property; he elected not to do so. I find that this condition has been satisfied.

55 The next condition is that the seller is to provide 'detailed list' of all inclusions, exclusions and rental fixtures relative to the property and business. I find that this condition was met when then sellers provided the buyer with exhibits at tabs 23, 24, and 25 in Exhibit 1.

56 The next condition is that the seller agrees to cooperate fully with buyer and will provide whatever details and information regarding the property and business of which they have knowledge. For reasons previously stated, I find that the Plaintiffs cooperated fully with the Defendant and provided him with all the documents and information that they had. Because the Defendant did not more actively pursue the issue is not the Plaintiffs' fault.

57 Therefore, I find that all the conditions have been met. The Defendant, after going over the financial information that had been provided, made another offer to the Plaintiffs. This was the letter dated April 23, 2006 and is found at tab 16 of Exhibit 1.

58 They are trying to state that the figures provided do not show a profit. One would have expected that before an offer was made that they would have asked for all the financial information. From this letter one could conclude that the buyer accepted the financial figures provided, but put a restrictive interpretation on them to arrive at the second offer price. There was an error of some $2,000.00 between the Statement of Income and the Financial Statement. The Defendant did admit that this difference was not material.

59 The Defendant is asking this court to rescind the contract because of a material misrepresentation. It is to be noted that the Defendant was allowed to amend his pleadings at trial to read as follows:

> 38 ...
>
> ii) Rescission of the Agreement of Purchase and Sale made March 31, 2006 (the 'Agreement')

60 Counsel for the Defendant stated that the Defendant was not saying that any misrepresentation was false.

61 The Plaintiff is relying, in part, on paragraph 25 of the Agreement, found at tab 26 of Exhibit 1, which reads as follows:

> **AGREEMENT IN WRITING**: If there is a conflict or discrepancy between any provision added to this Agreement (including any Schedule attached hereto) and any provision in the standard pre-set portion hereof, the added provision shall supersede the standard pre-set provision to the extent of such conflict or discrepancy. This Agreement including any Schedule attached hereto, shall constitute the entire Agreement between Buyer and Seller. There is no representation, warranty, collateral agreement or condition, which affects this Agreement other than as expressed herein. For the purposes of this Agreement, Seller means vender and Buyer means purchaser. This Agreement shall be read with all changes of gender or number required by the context.

62 The Defendant is relying on rescission of the contract because of a material misrepresentation.

The Law Dealing with Recission

63 Anne Warner La Forest writing in Anger & Honsberger's Law of Real Property (3d), stated at 23-65 the following:

> Rescission, used in its proper sense, has both legal and equitable elements. At law, in certain situations, an innocent party has the right to treat the contract as void *ab initio* at their option. Examples include fraud and contracts made by infants. Also, contracts may be void at law for duress, fraudulent misrepresentation, mistake, error in *substantialibus* and *non est factum*. In equity, contracts may be rescinded for innocent misrepresentation, mistake, unconscionability, undue influence and breach of fiduciary duty....

Later at 23-66:

> As noted in the previous section, the various substantive grounds for rescission include fraud, duress, misrepresentation, mistake, error *in substantialibus, non est factum*, unconscionability, undue influence and breach of fiduciary duty....
>
> . . . . .
>
> A material misrepresentation that has induced the entering of an unexecuted contract gives rise to a right to rescind whether the misrepresentation was fraudeulent, negligent or innocent....

64 The Defendant states that there was a material misrepresentation found in the Statement of Expenses and Statement of Income. The material misrepresentation would not allow for a fulltime manager. These documents were prepared by the vendors from figures that they obtained from the financial statements.

65 The purchaser claims that he has been involved in other major purchases. He also had the benefit of his son, who is an accountant with a major Canadian company. One would have expected that before signing the Agreement the Defendant would want to look at the books prepared by the Plaintiff's bookkeeper.

66 The Statement of Expenses does not contain any information as to wages. Would one not expect to have some information as to wages? Mr. Moore, the agent for the vendor, stated that once he was confident that a purchaser was serious and had the finances, he would release all the financial documents.

67 I find that the Purchaser was not induced by those two documents. There may have been slight miscalculations made by the vendor, but not sufficient to allow the court to find that rescission was in order.

68 I find that the parties have met all the conditions, and that there are not grounds to rescind the contract.

69 There will be judgment for the Plaintiff, in the amount of $99,000 plus post-judgment interest at rate of 5%. The counterclaim is dismissed.

70 There will be costs to the Plaintiff. If the parties are not able to come to a resolution as to costs, counsel make written submissions.

Action allowed; counterclaim dismissed.

Tab 9

2004 SCC 9, 2004 CSC 9
Supreme Court of Canada

Hamilton v. Open Window Bakery Ltd.

2003 CarswellOnt 5591, 2003 CarswellOnt 5592, 2004 SCC 9, 2004 CSC 9, [2003] S.C.J. No. 72, [2004] 1 S.C.R. 303, 128 A.C.W.S. (3d) 1111, 184 O.A.C. 209, 2004 C.L.L.C. 210-025, 235 D.L.R. (4th) 193, 316 N.R. 265, 40 B.L.R. (3d) 1, 70 O.R. (3d) 255 (note), 70 O.R. (3d) 255, J.E. 2004-470, REJB 2004-54076

Jane Hamilton (Appellant) and Open Window Bakery Limited (Respondent)

McLachlin C.J.C., Major, Bastarache, Binnie, Arbour, LeBel, Deschamps JJ.

Heard: November 13, 2003
Judgment: November 13, 2003
Written reasons: February 19, 2004
Docket: 29225

Proceedings: affirming *Hamilton v. Open Window Bakery Ltd.* (2002), 2002 CarswellOnt 964, 211 D.L.R. (4th) 443, 157 O.A.C. 222, 58 O.R. (3d) 767 (Ont. C.A.); varying *Hamilton v. Open Window Bakery Ltd.* (2000), 2000 CarswellOnt 5038 (Ont. S.C.J.)

Counsel: Susan J. Heakes, Tiffany Little for Appellant
Paul Gemmink for Respondent

Subject: Civil Practice and Procedure; Contracts; Torts; Public; Employment; Family
Related Abridgment Classifications
Civil practice and procedure
XXIV Costs
XXIV.7 Particular orders as to costs
XXIV.7.e Costs on solicitor and client basis
XXIV.7.e.ii Grounds for awarding
XXIV.7.e.ii.A Unfounded allegations
Commercial law
I Agency
I.7 Relationship between principal and third person
I.7.d Fraud and misrepresentation by agent
I.7.d.iii Rights of principal
Commercial law

I Agency
I.10 Termination of agency
I.10.c Notice of termination
I.10.c.ii What constituting reasonable notice
Contracts
XIV Remedies for breach
XIV.5 Damages
XIV.5.i Contract of employment
Labour and employment law
II Employment law
II.1 Nature of employment relationship
II.1.b Relationships distinct from employment relationship
II.1.b.i Independent contractor
Remedies
I Damages
I.11 Damages in contract
I.11.i Contract of employment

Headnote

Damages --- Damages in contract — General principles

Under general principle applicable where defendant wrongfully repudiated contract and defendant had alternative modes of performing contract, it is not necessary that non-breaching party be restored to position it would likely have been in but for repudiation — Plaintiff was entitled to damages in accordance with early termination clause of three months' notice, not damages extending for 36-month term of contract.

Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and client basis — Grounds for awarding — Unfounded allegations

In breach of contract action, unsuccessful defendant was ordered to pay costs on solicitor and client basis after certain date because action was defended on unsubstantiated basis that plaintiff was dishonest.

Dommages-intérêts --- Dommages-intérêts contractuels — Principes généraux

Vu le principe général applicable lorsqu'un défendeur, qui a procédé à la résiliation fautive d'un contrat, disposait de différents modes d'exécution du contrat, il n'est pas nécessaire de replacer la partie innocente dans la situation où elle se serait trouvée n'eût été la résiliation — Demanderesse avait droit à des dommages-intérêts correspondant aux trois mois de préavis prévus par la clause autorisant la résiliation anticipée, et non à des dommages correspondant aux versements qui auraient été effectués jusqu'à la fin du contrat de 36 mois.

Procédure civile --- Frais — Ordonnances particulières en matière de frais — Frais sur une base avocat-client — Motifs justifiant de les accorder — Allégations non fondées

Dans le cadre d'une action pour inexécution de contrat, la partie perdante, le défendeur, s'est vu ordonner de payer les frais sur une base avocat-client, à partir d'une date en particulier, parce que la défense reposait sur une allégation non fondée que la demanderesse avait agit de façon malhonnête.

H entered into a contract with bakery O Ltd. for a term of 36 months. H was to be an exclusive agent for the marketing and sale of O Ltd.'s baked goods in Japan. The contract provided that O Ltd. could terminate the agreement in several ways. First, O Ltd. could terminate the contract "without notice or other act if . . . the Agent acts in a manner which is detrimental to the reputation and well being" of O Ltd. Second, the contract granted O Ltd. the unconditional right to terminate the contract "with notice to the Agent effective after the commencement of the 19th month of the term herein, on three (3) months notice".

Approximately 16 months later, O Ltd. repudiated the contract. In a letter of termination addressed to H, O Ltd. made two allegations in support of the termination. The first allegation was that H behaved in a manner "detrimental to the reputation and well being" of O Ltd. by deliberately falsifying ingredient lists in omitting sugar on shipments of bagels to Japan. The second allegation was that H disclosed pricing and other confidential information to an employee of one of Japan's largest food retailers in violation of the contract's confidentiality clause. The letter stated that H's termination was "effective immediately."

H brought an action against O Ltd. for wrongful dismissal. The matter proceeded as an action for general damages in breach of contract against O Ltd. The trial judge held that O Ltd. wrongfully repudiated the contract and awarded damages reflecting the payments that would have been made under the full 36-month term of the contract, less an allowance of 25 per cent.

The trial judge ordered O Ltd. to pay H's costs on a party-and-party scale up to October 30, 2000, and from that date forward on a solicitor-and-client scale. The trial judge held that costs on a solicitor-and-client scale were appropriate because O Ltd. defended the action on the "most serious" and "narrow" basis that H had behaved dishonestly. O Ltd. failed to demonstrate on a balance of probabilities that H had in fact been dishonest. O Ltd. persisted in its allegations of dishonesty even after October 30, 2000, at which time pre-trial production and discovery had been completed. The trial judge held that by that date O Ltd. had access to information sufficient to conclude that H had not behaved dishonestly or fraudulently.

O Ltd. appealed. The majority of the Court of Appeal held that the early termination clause with three months' notice constituted the minimum guaranteed benefits under the contract. As such, it also constituted O Ltd.'s maximum exposure for damages. The damages award was reduced accordingly. The costs order was reduced to party-and-party scale after October 30, 2000.

H appealed the damages and costs awards.

Held: The appeal was allowed with respect to the costs award.

Under the general principle applicable in breach of contract with alternative performance, it is not necessary that the non-breaching party be restored to the position it 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 it would have been in had the contract been performed.

H advocated another approach involving an inquiry into how the defendant would likely have performed its obligations under the contract, hypothetically, but for its repudiation. This tort-like analysis proposed by H is not an established part of Canadian law. 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.

In this case, the relevant contractual duties had been expressly set out by the parties in the agreement. H was entitled to O Ltd.'s performance of these voluntarily assumed duties. H had 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.

The trial judge erred in engaging in a tort-like inquiry as to what would have happened if O Ltd. had not breached its contractual obligations to H, and in concluding that O Ltd. would not have terminated at the earliest opportunity. The assessment of damages required only a determination of the minimum performance to which the plaintiff was entitled under the contract. The analytical approach adopted by the majority of the Court of Appeal regarding the appropriate quantum of damages was one that comported with the long-standing and widely accepted general principle, was sound in policy, and led to predictable and justifiable results.

In ruling on costs, the trial judge assessed the tenability of the allegations of dishonesty and fraud, assisted by his observation of the demeanour of all the witnesses. He concluded that, while the allegations had, perhaps, some circumstantial plausibility, O Ltd. relied only upon the narrow issue of dishonesty and persisted unduly in these allegations. A court should set aside a costs award on appeal only if the trial judge has made an error in principle or if the costs award is plainly wrong. In light of the privileged position of the trial judge to assess first-hand the credibility of witnesses, and given the highly fact-driven nature of the analysis that was required in this case, the costs order made by the trial judge must be restored.

H a conclu un contrat d'une durée de 36 mois avec la boulangerie O ltée. H devait être l'agente exclusive de commercialisation et de vente au Japon des produits de O ltée. Le contrat prévoyait que O ltée pouvait le résilier de plusieurs façons. Premièrement, O ltée pouvait le résilier « sans donner de préavis ni prendre aucune autre mesure si [...] l'agent agi[ssait] d'une manière dommageable pour la réputation et la prospérité » d'O ltée. Deuxièmement, le contrat accordait à O ltée un droit absolu de le résilier « en donnant à l'agent un préavis de trois (3) mois, à compter du 19e mois de la durée prévue du contrat ».

O ltée a résilié le contrat environ 16 mois plus tard. Dans la lettre de résiliation envoyée à H, O ltée a prétendu avoir deux raisons justifiant la résiliation. Elle a d'abord allégué que H avait eu un comportement « dommageable pour [s]a réputation et [s]a prospérité », en falsifiant délibérément les listes d'ingrédients en omettant d'y inscrire le sucre contenu dans les bagels expédiés au Japon. Elle a ensuite allégué que H avait contrevenu à la clause de confidentialité du contrat en divulguant les prix et d'autres renseignements confidentiels à un employé de l'une des plus grandes chaînes

de magasins d'alimentation du Japon. La lettre indiquait que la résiliation du contrat de H était « immédiate ».

H a intenté contre O ltée une action pour congédiement injustifié. L'affaire a été instruite comme une action en dommages-intérêts pour inexécution de contrat. Le juge de première instance a conclu à la résiliation fautive du contrat par O ltée et a accordé des dommages-intérêts correspondant aux versements qui auraient été effectués pendant toute la durée de 36 mois du contrat, moins une réduction de 25 pour 100.

Le premier juge a ordonné à O ltée de payer à H des frais sur une base de partie à partie jusqu'au 30 octobre 2000 et, après cette date, des frais sur une base avocat-client. Selon lui, il convenait d'ordonner le paiement de frais sur une base avocat-client étant donné que la défense de O ltée reposait uniquement sur l'allégation « très grave » et « limitée » que H s'était comportée malhonnêtement. O ltée n'a pas réussi à démontrer, selon la prépondérance des probabilités, que H avait effectivement agi malhonnêtement. Elle a continué d'alléguer la malhonnêteté de H même après le 30 octobre 2000, c'est-à-dire au moment où la production de documents et les interrogatoires préalables au procès étaient terminés. Le premier juge a conclu, qu'à cette date, O ltée disposait de suffisamment d'informations pour conclure que H n'avait pas agi de façon malhonnête ou frauduleuse.

O ltée a interjeté appel. Les juges majoritaires de la Cour d'appel ont conclu que la clause autorisant la résiliation anticipée, moyennant un préavis de trois mois, constituait l'avantage minimum garanti par le contrat. À ce titre, il s'agissait également du montant maximal de dommages pouvant être accordé en vertu du contrat. Les dommages accordés ont donc été réduits en conséquence. Les dépens ont été ramenés à des dépens sur une base de partie à partie pour la période suivant le 30 octobre 2000.

H a interjeté appel des dommages-intérêts et des dépens accordés.

Arrêt: Le pourvoi a été accueilli en ce qui a trait aux dépens accordés.

Selon le principe général applicable à l'inexécution de contrats qui disposent d'autres moyens d'exécution, il n'était pas nécessaire de replacer la partie innocente dans la situation où elle se serait trouvée dans les faits n'eût été la résiliation du contrat. La partie innocente a plutôt droit d'être replacée dans la situation où elle aurait été si le contrat avait été exécuté.

H préconisait une autre approche, laquelle consistait à se demander comment, en théorie, la défenderesse aurait vraisemblablement exécuté ses obligations contractuelles si elle n'avait pas résilié le contrat. Cette analyse proposée par H, qui s'apparente à celle faite en matière de responsabilité délictuelle, n'est pas implantée en droit canadien. Les obligations contractuelles sont des obligations que les parties assument de plein gré et auxquelles les tribunaux donnent effet. Le manquement, en droit des contrats, à une obligation contractuelle positive découlant de l'engagement des parties est un concept différent du manquement, en matière de responsabilité délictuelle, à l'obligation, négative cette fois et ne découlant pas d'un engagement, de ne causer aucun préjudice à autrui.

En l'espèce, les obligations contractuelles pertinentes des parties ont été expressément énoncées dans le contrat qu'elles avaient signé. H avait droit à l'exécution des obligations que O ltée

avait assumées de plein gré. H ne possédait aucun droit donnant ouverture à l'indemnisation des avantages qu'elle aurait pu s'attendre à tirer d'un mode particulier d'exécution du contrat, étant donné que le contrat lui-même donnait à la défenderesse le choix de différents modes d'exécution. Le premier juge a commis une erreur en procédant à une analyse semblable à celle effectuée en matière de responsabilité délictuelle, c'est-à-dire en se demandant quelle aurait été la situation si O ltée n'avait pas manqué à ses obligations contractuelles envers H, et en concluant qu'O ltée n'aurait pas résilié le contrat à la première occasion. Pour évaluer les dommages, il fallait seulement déterminer quelle était l'exécution minimale à laquelle la demanderesse avait droit en vertu du contrat. La méthode analytique utilisée par les juges majoritaires de la Cour d'appel, relativement au montant approprié de dommages-intérêts, était conforme au principe général existant de longue date et généralement accepté, était valable sur le plan de la politique générale et menait à des résultats prévisibles et justifiables.

Quant au dépens, le juge de première instance a évalué la solidité des allégations de malhonnêteté et de fraude en observant le comportement de tous les témoins. Il a conclu que même si les allégations avaient une certaine vraisemblance dans les circonstances, O ltée avait seulement soulevé la question limitée de la malhonnêteté et avait maintenu indûment ces allégations. Un tribunal siégeant en appel ne devrait annuler une ordonnance relative aux dépens que si le juge de première instance a commis une erreur de principe ou si l'ordonnance de dépens est manifestement erronée. Vu la position privilégiée dans laquelle le juge de première instance se trouvait pour apprécier directement la crédibilité des témoins, et compte tenu de la nature éminemment factuelle de l'analyse requise en l'espèce, l'ordonnance du premier juge relative aux dépens devait être rétablie.

APPEAL by plaintiff of judgment reported at (2002), 2002 CarswellOnt 964, 211 D.L.R. (4th) 443, 157 O.A.C. 222, 58 O.R. (3d) 767 (Ont. C.A.) with respect to damages and costs.

POURVOI de la demanderesse en ce qui concerne les dommages-intérêts et les dépens accordés par l'arrêt publié à (2002), 2002 CarswellOnt 964, 211 D.L.R. (4th) 443, 157 O.A.C. 222, 58 O.R. (3d) 767 (Ont. C.A.).

***Arbour J.*:**

I. Facts and Overview

1 This case requires us to determine the appropriate approach to assessing damages for the breach of a contract with alternative modes of performance.

2 The appellant, Jane Hamilton, entered into a contract with Open Window Bakery Limited ("OWB") for a term of 36 months. By its terms, Hamilton was to be an exclusive agent for the marketing and sale of OWB's baked goods in Japan.

3 The contract provided that OWB could terminate the agreement in several ways, two of which are apposite to this appeal. First, OWB could terminate the contract "without notice or other act if ... the Agent acts in a manner which is detrimental to the reputation and well being" of OWB. Second, the contract granted OWB the unconditional right to terminate the contract "with notice to the Agent effective after the commencement of the 19th month of the term herein, on three (3) months notice".

4 Approximately 16 months later, OWB repudiated the contract. In a letter of termination addressed to Hamilton, dated May 19, 1998, OWB made two allegations in support of the termination. The first allegation was that Hamilton behaved in a manner "detrimental to the reputation and well being" of OWB by deliberately falsifying ingredient lists in omitting sugar on shipments of bagels to Japan (sugar content was an important factor in the assessment of Japanese import tariffs). The second allegation was that Hamilton disclosed pricing and other confidential information to an employee of one of Japan's largest food retailers (who also was an employee of the Japanese External Trade Organization) in violation of the contract's confidentiality clause. The letter stated that Hamilton's termination was "effective immediately".

5 In the letter, OWB claimed entitlement to a return of all commission advances paid (but not yet earned) and denied any further obligation to pay commissions or to reimburse Hamilton for expenses. The letter stated that OWB would not pursue the return of commission advances already paid if Hamilton did not legally challenge her termination.

6 OWB sent a subsequent letter of termination dated August 5, 1998. This letter was motivated by OWB's desire to rely upon the clause in the agreement which provided for early termination with notice in the event its earlier termination was successfully challenged by Hamilton.

7 Hamilton subsequently commenced an action against OWB and its chief executive officer, Gail Agasi, in the Ontario Superior Court of Justice. OWB counterclaimed against Hamilton. At the outset of the trial the action against Agasi was dismissed on consent, as was the counterclaim. The matter proceeded as an action for general damages in breach of contract against OWB. The trial judge, Wilkins J., held that OWB wrongfully repudiated the contract and awarded damages reflecting the payments that would have been made under the full 36-month term of the contract, less an allowance of 25 percent: [2000] O.J. No. 5004 (Ont. S.C.J.). The discount reflected the possibility that OWB might at some later point have validly exercised its right to terminate the contract with notice.

8 In addition to the damages award, Wilkins J. ordered OWB to pay Hamilton's costs on a party-and-party scale up to October 30, 2000 and from that date forward on a solicitor-and-client scale. Wilkins J. held that costs on a solicitor-and-client scale were appropriate for several reasons. OWB defended the action on the "most serious" and "narrow" basis that Hamilton had behaved dishonestly. OWB failed to demonstrate on a balance of probabilities that Hamilton had in fact been

dishonest. OWB persisted in its allegations of dishonesty even after October 30, 2000, at which time pre-trial production and discovery had been completed. By that date, Wilkins J. held that OWB had access to information sufficient to conclude that Hamilton had not behaved dishonestly or fraudulently. OWB appealed.

9 Simmons J.A. for the majority at the Court of Appeal for Ontario (2002), 58 O.R. (3d) 767 (Ont. C.A.), (Goudge J.A. dissenting) held that the early termination clause with three months' notice constituted the minimum guaranteed benefits under the contract. As such, in the court's opinion, it also constituted OWB's maximum exposure for damages. The damages award was reduced accordingly. Simmons J.A. also varied the costs order of Wilkins J., reducing the award of costs on a solicitor-and-client scale after October 30, 2000, to costs on a party-and-party scale.

10 Hamilton appealed to this Court with respect to both damages and costs. From the bench, this Court dismissed the appeal with respect to the damages, but allowed the appeal with respect to costs.

II. Analysis

A. Damages

11 There is a general principle regarding damages awarded in cases where a defendant who wrongfully repudiated a contract had alternative modes of performing the contract. This general principle traces its roots at least as far back as the case of *Cockburn v. Alexander* (1948), 6 C.B. 791. In that case, Maule J. articulated the general principle, at p. 814, as follows:

> Generally speaking, where there are several ways in which the contract might be performed, that mode is adopted which is the least profitable to the plaintiff, and the least burthensome to the defendant.

This general principle has been adopted by decisions in Canada (see *Park v. Parsons Brown & Co.* (1989), 39 B.C.L.R. (2d) 107 (B.C. C.A.); *Aldo Ippolito & Co. v. Canada Packers Inc.* (1986), 57 O.R. (2d) 65 (Ont. C.A.); and, more generally, S.M. Waddams, *The Law of Damages* (loose-leaf ed.), at pp. 13-19 to 13-21), and has been confirmed in the United Kingdom (see *Lavarack v. Woods of Colchester Ltd.* (1966), [1967] 1 Q.B. 278 (Eng. C.A.); and *Kurt A Becher GmbH v. Roplak Enterprises SA*, [1991] 2 Lloyd's Rep. 23 (Eng. C.A.)).

12 This approach is also the one that is generally applicable in the United States (see, for example, *Restatement* (*Second*) *of Contracts* § 344 (1981); Williston on Contracts (3rd ed. 1968) § 1407; *Western Oil & Fuel Co. v. Kemp*, 245 F.2d 633 (U.S. C.A. 8th Cir. 1957), at p. 640; *Stewart v. Cran-Vela Rental Co.*, 510 F.2d 982 (U.S. C.A. 5th Cir. 1975), at p. 986; and 22 Am. Jur. 2d Damages § 126 (1988)).

13 The general principle was explained by Scrutton L.J. in *Withers v. General Theatre Corp.*, [1933] 2 K.B. 536 (Eng. C.A.), at pp. 548-49:

> Now where a defendant has alternative ways of performing a contract at his option, there is a well settled rule as to how the damages for breach of such a contract are to be assessed . . . A very common instance explaining how that works is this: A. undertakes to sell to B. 800 to 1200 tons of a certain commodity; he does not supply B. with any commodity. On what basis are the damages to be fixed? They are fixed in this way. A. would perform his contract if he supplied 800 tons, and the damages must therefore be assessed on the basis that he has not supplied 800 tons, and not on the basis that he has not supplied 1200 tons, not on the basis that he has not supplied the average, 1000 tons, and not on the basis that he might reasonably be expected, whatever the contract was, to supply more than 800 tons. The damages are assessed . . . on the basis that the defendant will perform the contract in the way most beneficial to himself and not in the way that is most beneficial to the plaintiff.

If one substitutes duration in time for quantity of goods into Scrutton L.J.'s statement, then it directly addresses the case at bar. Indeed, the application of this general principle to a breach of a contract with various possible durations is addressed immediately following the above example by Scrutton L.J., at pp. 549-50:

> [Consider] a lease for seven, fourteen or twenty-one years which is wrongfully determined at the end of five years by the landlord. On what basis are damages to be assessed? Answer: On the basis that the landlord can determine the lease in seven years, and therefore the plaintiff can only recover damages on the assumption that he had only two more years of the lease to run.

This passage speaks directly to our case, and is persuasive in its application.

14 Notwithstanding the broad acceptance of the general principle, the appellant in this case advocates another approach — the one employed by Wilkins J. at trial. This approach involves an inquiry into how the defendant would likely have performed his or her obligations under the contract, hypothetically, but for his or her repudiation. This, the appellant argues, is the true test of the position the plaintiff would have been in had the contract not been repudiated.

15 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.

16 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 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.

17 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.

18 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.

19 The trial judge erred in this case in engaging in a tort-like inquiry as to what would have happened if OWB had not breached its contractual obligations to Hamilton, and in concluding that OWB would not have terminated at the earliest opportunity.

20 The assessment of damages required only a determination of the minimum performance the plaintiff was entitled to under the contract, *i.e.*, the performance which was least burdensome for the defendant. The plaintiff agreed at the outset that she was entitled to no more by contracting for a contractual term that could be truncated with notice entirely at the discretion of the defendant.

21 This is not to say that the general principle will never require a factual inquiry. The method of performance that is most advantageous or least costly for the defendant may not always be clear at the outset from the contract's terms. A court may have to consider evidence to determine an estimated cost of the various means of performance. In some cases it will only be after this factual investigation that a court can confidently conclude that a certain mode of performance would have been the least burdensome for the defendant. That this factual investigation might need to be conducted in some instances does not undermine the general principle.

22 A factual investigation of this type is not necessary on the facts of this case. The case at bar raises only a question of the extent of time the contract will be performed which, with three months' notice given after the expiration of the 18th month, is entirely at the election of the defendant.

23 The analytical approach adopted by Simmons J.A. at the Court of Appeal in this case regarding the appropriate quantum of damages is one that comports with the long-standing and widely accepted general principle, is sound in policy, and is one that leads to predictable and justifiable results. For the foregoing reasons, the appeal with regard to damages is dismissed.

B. Costs

24 In overturning the costs award ordered by Wilkins J. at trial, Simmons J.A. for the majority of the Court of Appeal, at para. 57, stated:

> The trial judge found that the appellant had not met the high standard of proof required to sustain allegations of fraud or dishonesty. He did not find the pleading to be without foundation. In these circumstances and in light of my disposition of the main ground of appeal, I would set aside the order for solicitor and client costs and substitute an award on the partial indemnity scale.

25 In this case, Wilkins J. assessed the tenability of the allegations of dishonesty and fraud, assisted by his observation of the demeanour of all the witnesses. He concluded that, while the allegations had, perhaps, some circumstantial plausibility, OWB relied only upon the narrow issue of dishonesty and persisted unduly in these allegations.

26 In *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.), at p. 134, McLachlin J. (as she then was) for a majority of this Court held that solicitor-and-client costs "are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties". An unsuccessful attempt to prove fraud or dishonesty on a balance of probabilities does not lead inexorably to the conclusion that the unsuccessful party should be held liable for solicitor-and-client costs, since not all such attempts will be correctly considered to amount to "reprehensible, scandalous or outrageous conduct". However, allegations of fraud and dishonesty are serious and potentially very damaging to those accused of deception. When, as here, a party makes such allegations unsuccessfully at trial and with access to information sufficient to conclude that the other party was merely negligent and neither dishonest nor fraudulent (as Wilkins J. found), costs on a solicitor-and-client scale are appropriate: see, generally, M.M. Orkin, *The Law of Costs*, (2nd ed. (loose-leaf)), at para. 219.

27 A court should set aside a costs award on appeal only if the trial judge has made an error in principle or if the costs award is plainly wrong (*Duong v. NN Life Insurance Co. of Canada* (2001), 141 O.A.C. 307 (Ont. C.A.), at para. 14). In Wilkins J.'s costs order I find no such error

of principle, nor can I conclude that the award is plainly wrong. In light of the privileged position of the trial judge to assess first-hand the credibility of witnesses, and given the highly fact-driven nature of the analysis that was required here, the costs order made by Wilkins J. must be restored.

III. Conclusion

28 For the foregoing reasons, the appeal was dismissed from the bench with regard to damages and allowed only on the issue of costs. The trial judge's award of solicitor-client costs at trial is restored. Each party is to bear its own costs in the Court of Appeal for Ontario and in this Court.

Appeal allowed in part.

Pourvoi accueilli en partie.

Tab 10

2011 ONCA 460
Ontario Court of Appeal

Agribrands Purina Canada Inc. v. Kasamekas

2011 CarswellOnt 5034, 2011 ONCA 460, [2011] O.J. No. 2786,
106 O.R. (3d) 427, 203 A.C.W.S. (3d) 753, 278 O.A.C. 363,
334 D.L.R. (4th) 714, 86 C.C.L.T. (3d) 179, 87 B.L.R. (4th) 1

Agribrands Purina Canada Inc. (Plaintiff / Appellant) and Walter Kasamekas and Sherry Kasamekas, Raymond Joseph Jackson and Savitri Jackson (Defendants / Respondents)

Walter Kasamekas and Sherry Kasamekas, Raymond Joseph Jackson and Raywalt Feed Sales (Plaintiffs by Counterclaim / Respondents) and Agribrands Purina Canada Inc., Ren's Feed and Supplies Limited, Walter Rendell Job, McGrath Farms Inc., Edward James McGrath Farms Ltd., E.J.M. Farms Ltd. and The Estate of Edward James McGrath (Defendants by Counterclaim / Appellants)

S.T. Goudge, E.E Gillese, R.G. Juriansz JJ.A.

Heard: February 14, 2011
Judgment: June 20, 2011 *
Docket: CA C51618, C51637

Proceedings: varying *Agribrands Purina Canada Inc. v. Kasamekas* (2010), 2010 CarswellOnt 98, 2010 ONSC 166 (Ont. S.C.J.)

Counsel: Kirk F. Stevens, Gerard V. Thompson, for Appellants
W. Graydon Sheppard, Marc Munro, for Respondents

Subject: Torts; Contracts; Civil Practice and Procedure; Corporate and Commercial; Estates and Trusts
Related Abridgment Classifications
Civil practice and procedure
XXII Judgments and orders
XXII.22 Interest on judgments
XXII.22.a Prejudgment interest
XXII.22.a.ii Rate of
Contracts
XIV Remedies for breach

XIV.5 Damages
XIV.5.a General principles
Contracts
XIV Remedies for breach
XIV.5 Damages
XIV.5.p Punitive or exemplary damages
Remedies
I Damages
I.11 Damages in contract
I.11.l Loss of profits consequent to breach
I.11.l.ii Sale of goods
Torts
III Conspiracy
III.1 Elements
III.1.b Conduct
Torts
III Conspiracy
III.2 Remedies
III.2.a Damages
Torts
XI Interference with economic relations
XI.2 Miscellaneous

Headnote

Torts --- Conspiracy — Nature and elements of tort — General principles

Unlawful conduct conspiracy — R Ltd. was dealer of Purina livestock feed — Purina terminated R Ltd.'s dealership — K and his brother set up RFS as dealership to take over R Ltd.'s territory — Under dealership agreement, Purina agreed not to appoint any other dealer in RFS's territory — Purina continued to supply feed to R Ltd. and then provided M with feed for resale by R Ltd. at dealer prices — As result of R Ltd. continuing to sell Purina feed in RFS's territory, RFS ceased business within year — RFS and its principals ("plaintiffs") counterclaimed against Purina, R Ltd., and M's estate ("defendants") — Trial judge found defendants liable for tort of unlawful conduct conspiracy, and found Purina in breach of its contract with RFS — Defendants appealed finding of unlawful conduct conspiracy — Appeal allowed — Trial judge based his finding that defendants' conduct was unlawful on cases dealing with tort of intentional interference with economic relations — That approach was too broad — To meet "unlawful conduct" element of conspiracy tort, defendants must engage, in concert, in acts that are wrong in law, whether or not actionable at private law — R Ltd. was free to purchase Purina feed from M at best price it could obtain and sell it wherever it could — R Ltd.'s conduct in doing so breached no contract and was not otherwise wrong in law — Trial judge characterized M's conduct as violation of Purina's standard operating procedures, not breach of his contract with Purina — M's actions did

not amount to unlawful conduct — Only Purina engaged in any unlawful conduct — Finding of unlawful conduct conspiracy set aside — Claim based on civil conspiracy dismissed.

Torts --- Conspiracy — Remedies — Damages

Unlawful conduct conspiracy — R Ltd. was dealer of Purina livestock feed — Purina terminated R Ltd.'s dealership — K and his brother set up RFS as dealership to take over R Ltd.'s territory — Under dealership agreement, Purina agreed not to appoint any other dealer in RFS's territory — Purina continued to supply feed to R Ltd. and then provided M with feed for resale by R Ltd. at dealer prices — As result of R Ltd. continuing to sell Purina feed in RFS's territory, RFS ceased business within year — Purina brought action — RFS and its principals ("plaintiffs") counterclaimed against Purina, R Ltd., and M's estate ("defendants") — Trial judge found defendants liable for tort of unlawful conduct conspiracy, and found Purina in breach of its contract with RFS — Plaintiffs recovered $2,096,406 in general damages and prejudgment interest — Defendants appealed trial judge's calculation of damages in tort — Appeal allowed in part on other grounds — Trial judge concluded that damages should reflect going concern value of RFS at time it was harmed, which he calculated by assessing what its net profit would have been in its second year of operation and then applying three times earnings multiple — Result was damage award of $954,213 for conspiracy and breach of contract — Finding of unlawful conduct conspiracy and damages flowing from it were set aside, but calculation of RFS's net profits for second year was used to calculate contractual damages — Trial judge did not make any errors resulting in overvaluation of contribution that additional pet food sales would have made — He did not err in discount he applied to calculate what RFS would have earned but for harm inflicted on it — There was no basis to interfere with his calculation of value of R Ltd.'s feed sales that RFS would have taken over but for conspiracy — Trial judge's assessment of administrative expenses that RFS would have incurred in its second year was well-founded on evidence.

Contracts --- Remedies for breach — Damages — General principles

R Ltd. was dealer of Purina livestock feed — Purina terminated R Ltd.'s dealership — K and his brother set up RFS as dealership to take over R Ltd.'s territory — Under dealership agreement, Purina agreed not to appoint any other dealer in RFS's territory — Purina continued to supply feed to R Ltd. and then provided M with feed for resale by R Ltd. at dealer prices — As result of R Ltd. continuing to sell Purina feed in RFS's territory, RFS ceased business within year — Purina brought action — RFS and its principals ("plaintiffs") counterclaimed against Purina, R Ltd., and M's estate ("defendants") — Trial judge found defendants liable for tort of unlawful conduct conspiracy, and found Purina in breach of its contract with RFS — Plaintiffs recovered $2,096,406 in general damages and prejudgment interest — Purina appealed trial judge's calculation of damages for breach of contract — Appeal allowed — Trial judge based his quantification of damages for breach of contract on premise that Purina's contract with RFS would have continued indefinitely — He embarked on hypothetical inquiry into how Purina would likely have performed its contractual obligations had it not breached contract — That is sort of inquiry that Supreme Court of Canada says should not be done in approaching breach of contract damages where there are alternate modes of performing contract — Contract gave Purina unconditional right to cancel contract on 60

days' notice — That was least burdensome mode of performance for Purina and thus constituted its maximum exposure for damages for breach of contract — There was no basis for interfering with trial judge's calculation of $145,654 as first year profits lost to RFS due to Purina's breach of contract — Based on his calculation of net profits that RFS would have achieved in its second year of operation had defendants acted lawfully, profits lost to RFS during 60 days' notice period were $53,011.83 — RFS was entitled to $198,665.83 in damages for breach of contract.

Remedies --- Damages — Valuation of damages — General principles

R Ltd. was dealer of Purina livestock feed — Purina terminated R Ltd.'s dealership — K and his brother set up RFS as dealership to take over R Ltd.'s territory — Under dealership agreement, Purina agreed not to appoint any other dealer in RFS's territory — Purina continued to supply feed to R Ltd. and then provided M with feed for resale by R Ltd. at dealer prices — As result of R Ltd. continuing to sell Purina feed in RFS's territory, RFS ceased business within year — Purina brought action — RFS and its principals ("plaintiffs") counterclaimed against Purina, R Ltd., and M's estate ("defendants") — Trial judge found defendants liable for tort of unlawful conduct conspiracy, and found Purina in breach of its contract with RFS — Plaintiffs recovered $2,096,406 in general damages and prejudgment interest — Purina appealed trial judge's calculation of damages for breach of contract — Appeal allowed — Trial judge based his quantification of damages for breach of contract on premise that Purina's contract with RFS would have continued indefinitely — He embarked on hypothetical inquiry into how Purina would likely have performed its contractual obligations had it not breached contract — That is sort of inquiry that Supreme Court of Canada says should not be done in approaching breach of contract damages where there are alternate modes of performing contract — Contract gave Purina unconditional right to cancel contract on 60 days' notice — That was least burdensome mode of performance for Purina and thus constituted its maximum exposure for damages for breach of contract — There was no basis for interfering with trial judge's calculation of $145,654 as first year profits lost to RFS due to Purina's breach of contract — Based on his calculation of net profits that RFS would have achieved in its second year of operation had defendants acted lawfully, profits lost to RFS during 60 days' notice period were $53,011.83 — RFS was entitled to $198,665.83 in damages for breach of contract.

Contracts --- Remedies for breach — Damages — Punitive or exemplary damages

R Ltd. was dealer of Purina livestock feed — Purina terminated R Ltd.'s dealership — K and his brother set up RFS as dealership to take over R Ltd.'s territory — Under dealership agreement, Purina agreed not to appoint any other dealer in RFS's territory — Purina continued to supply feed to R Ltd. and then provided M with feed for resale by R Ltd. at dealer prices — As result of R Ltd. continuing to sell Purina feed in RFS's territory, RFS ceased business within year — Purina brought action — RFS and its principals ("plaintiffs") counterclaimed against Purina, R Ltd., and M's estate ("defendants") — Trial judge found defendants liable for tort of unlawful conduct conspiracy, and found Purina in breach of its contract with RFS — Plaintiffs recovered punitive damages of $30,000 against Purina — Purina appealed award of punitive damages — Appeal allowed in part on other grounds — Trial judge that found that if Purina's participation in conspiracy tort was not enough to justify imposition of punitive damages, breach of its implied

duty of good faith to RFS constituted second actionable wrong, and held Purina's conduct to be "very antithesis of acting in good faith" — Breach of implied duty of good faith is not per se enough to justify punitive damages — Purina's conduct constituted such marked departure from ordinary standards of decency that it warranted censure through imposition of award of punitive damages — Exclusive right to market and sell Purina feed products within defined geographical territory was, to Purina's knowledge, crucial to RFS — Purina was aware of financial risks and vulnerability of K and his brother — Purina did precisely what it told RFS it would not do, repeatedly and with complete disregard for consequences to RFS — Purina's actions in supplying M so that he could supply R Ltd. were deceitful — As such, they were reprehensible and deserving of sanction — Damages award did not otherwise punish this behaviour, and was insufficient to accomplish objectives of denunciation and deterrence — Amount set by trial judge was sufficient to do so.
Civil practice and procedure --- Judgments and orders — Interest on judgments — Prejudgment interest — Rate of
R Ltd. was dealer of Purina livestock feed — Purina terminated R Ltd.'s dealership — K and his brother set up RFS as dealership to take over R Ltd.'s territory — Under dealership agreement, Purina agreed not to appoint any other dealer in RFS's territory — Purina continued to supply feed to R Ltd. and then provided M with feed for resale by R Ltd. at dealer prices — As result of R Ltd. continuing to sell Purina feed in RFS's territory, RFS ceased business within year — Purina brought action — RFS and its principals ("plaintiffs") counterclaimed against Purina, R Ltd., and M's estate ("defendants") — Trial judge found defendants liable for tort of unlawful conduct conspiracy, and found Purina in breach of its contract with RFS — Plaintiffs recovered $2,096,406 in general damages and prejudgment interest — Defendants appealed on basis that trial judge erred in rate he applied for prejudgment interest, which amounted to $1,142,193 — Appeal allowed — Trial judge applied prejudgment interest rate of 6.65 percent to his damage award of $954,213 — Following release of his reasons, trial judge agreed to receive written submissions on issue, but he declined to change rate — Prejudgment rate specified in Rules of Civil Procedure pursuant to Courts of Justice Act for proceedings commenced in last quarter of 1992, when claim was commenced, was 5.1 percent — Trial judge erred by taking as his starting point average prejudgment interest rate for 1992, year in which cause of action arose, rather than starting point as specified under Act — He offered no special circumstances for exercising his discretion to deviate from applicable rate specified by Act — Proper applicable rate was 5.1 percent.

APPEAL by defendants by counterclaim from judgment reported at *Agribrands Purina Canada Inc. v. Kasamekas* (2010), 2010 CarswellOnt 98, 2010 ONSC 166 (Ont. S.C.J.), finding them liable for tort of unlawful conduct conspiracy and breach of contract, and awarding plaintiff general and punitive damages plus prejudgment interest.

***S.T. Goudge J.A.*:**

Introduction

1 After an eleven 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 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 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 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 cancelation. 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.* (2003), [2004] 1 S.C.R. 303 (S.C.C.). 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 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 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 Assn. of Canada* (2003), 65 O.R. (3d) 30 (Ont. C.A.) [hereinafter *Reach*], 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.

17 His assessment of the appellants' conduct against this standard was as follows at paras. 132-134:

> 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 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% to this amount. Because eighteen 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, the trial judge noted 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%, which was the bank rate 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 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.

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 (S.C.C.). Speaking for the court, Estey J. described at p. 471 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.

25 This case deals with the second category, namely unlawful conduct conspiracy. The first does not apply because 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), 3 B.C.L.R. (5th) 39 (B.C. 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.

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.

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. v. Cousins* (1968), [1969] 2 Ch. 106 (Eng. 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 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 (Ont. 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* (2008), 91 O.R. (3d) 353 (Ont. C.A.), this court approved of Lord Hoffman's majority reasons in *OBG Ltd. v. Allan* (2007), [2008] 1 A.C. 1 (U.K. H.L.), in which he required unlawful conduct 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 ONCA 557 (Ont. C.A.), 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 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 *Total Network SL v. Revenue & Customs*, [2008] 2 W.L.R. 711 (U.K. 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 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*. 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* (Markham: LexisNexis, 2009), the authors say this at p. 167-168:

> 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, 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) 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 tort, namely that Ren's caused Purina to breach its contract with Raywalt or induced McGrath 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 McGraths' 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 the nineteenth month of the contract. In the sixteenth 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 the nineteen 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* (1948), 6 C.B. 791 (Eng. C.P.) 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:

> 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 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*, finding that it applied only where the parties acted honestly and in good faith, and that Purina had not done so, having "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 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 sixty 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 (Ont. C.A.), at para. 53 this court made clear that Canadian courts have not accorded this power to an implied duty of good faith.

52 The trial judge also suggested that it would be unconscionable in these circumstances to allow Purina to rely on a 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 sixty 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.

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 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 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 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 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 — Pre-Judgment Interest

70 In his original reasons for judgment, the trial judge applied a pre-judgment interest rate of 6.65% 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:

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

> 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*. 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.

74 I agree. The pre-judgment rate specified in the *Rules of Civil Procedure* 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%. 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 pre-judgment 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% as the applicable rate. The proper applicable rate to be used is 5.1%.

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 (S.C.C.) ("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 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 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 (S.C.C.), 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 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

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

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 Kasemekas and Jackson. As part of the start up financing, Kasemekas gave Purina a mortgage against his home and the company's credit line was secured by personal guarantees by Kasemekas, 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. 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 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 pre-judgment interest rate of 5.1%. 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 10 pages on both of these questions within 30 days of the release of these reasons.

***E.E Gillese J.A.*:**

I agree.

***R.G. Juriansz J.A.*:**

I agree.

Appeal allowed in part.

Footnotes

∗ Additional reasons at *Agribrands Purina Canada Inc. v. Kasamekas* (2011), 2011 ONCA 581, 2011 CarswellOnt 9210, 86 C.C.L.T. (3d) 206 (Ont. C.A.).

Tab 11

2003 SKQB 453
Saskatchewan Court of Queen's Bench

Fitzpatrick v. Estevan Credit Union

2003 CarswellSask 741, 2003 SKQB 453, [2003] S.J. No. 711, [2005] 1 W.W.R. 306, 127 A.C.W.S. (3d) 246, 15 R.P.R. (4th) 275, 243 Sask. R. 54

MELVIN FITZPATRICK (PLAINTIFF) and ESTEVAN CREDIT UNION (DEFENDANT)

Dawson J.

Judgment: October 30, 2003
Docket: Estevan Q.B. 38/01

Counsel: P. Elash for Plaintiff
R.M. Baumgartner for Defendant

Subject: Contracts; Corporate and Commercial; Torts
Related Abridgment Classifications
Contracts
IX Performance or breach
IX.4 Obligation to perform
IX.4.a General principles
Contracts
X Discharge
X.5 Right to rescind after repudiation
X.5.a General principles
Financial institutions
XIV Institutions with banking functions
XIV.2 Credit unions
XIV.2.b Miscellaneous
Torts
VIII Fraud, deceit, and misrepresentation
VIII.2 Innocent misrepresentation
VIII.2.b Miscellaneous
Headnote
Contracts --- Performance or breach — Obligation to perform — General principles
Plaintiff farmer agreed to purchase three parcels of land from his brother at price of $39,600 per parcel — Both farmer and brother were customers of defendant credit union — Sale of first two

parcels of land proceeded but sale of third parcel was delayed — Brother requested interim loan from credit union for venture and farmer agreed to co-sign loan based on assurances of credit union that proceeds from sale of third parcel of land would be applied to loan once sale was completed — After receiving interim loan of $39,600 from credit union, brother required more cash and farmer agreed to personally loan brother $20,000 on understanding that sum would be advanced towards purchase price of third parcel — Once sale was completed, farmer's lawyer sent letter to credit union authorizing it to transfer proceeds of $19,063.31 from farmer's account to brother's account — Instead of using proceeds towards interim loan, credit union deposited sum directly into brother's account — Brother used deposited proceeds to pay another credit union, he defaulted on interim loan, and bank recovered full loan amount from farmer — On farmer's action against credit union for breach of contract, issue arose as to whether credit union was obliged by terms of contract to apply proceeds of sale against interim loan — Credit union obligated to apply proceeds against loan — No ambiguity existed in loan documents which referred throughout to sale monies being used to pay interim loan — Instruction by farmer's lawyer was in accordance with arrangements made between parties and contemplated by credit union.

Banking and banks --- Institutions with banking functions — Credit unions

Plaintiff farmer agreed to purchase three parcels of land from his brother at price of $39,600 per parcel — Both farmer and brother were customers of defendant credit union — Sale of first two parcels of land proceeded but sale of third parcel was delayed — Brother requested interim loan from credit union for venture and farmer agreed to co-sign loan based on assurances of credit union that proceeds from sale of third parcel of land would be applied to loan once sale was completed — After receiving interim loan of $39,600 from credit union, brother required more cash and farmer agreed to personally loan brother $20,000 on understanding that sum would be advanced towards purchase price of third parcel — Once sale was completed, farmer's lawyer sent letter to credit union authorizing it to transfer proceeds of $19,063.31 from farmer's account to brother's account — Instead of using proceeds towards interim loan, credit union deposited sum directly into brother's account — Brother used deposited proceeds to pay another credit union, he defaulted on interim loan, and bank recovered full loan amount from farmer — On farmer's action against credit union for breach of contract, issue arose as to whether credit union was obliged by terms of contract to apply proceeds of sale against interim loan — Credit union obligated to apply proceeds against loan — No ambiguity existed in loan documents which referred throughout to sale monies being used to pay interim loan — Instruction by farmer's lawyer was in accordance with arrangements made between parties and contemplated by credit union.

Contracts --- Discharge — Right to rescind after repudiation — General principles

Plaintiff farmer agreed to purchase three parcels of land from his brother at price of $39,600 per parcel — Both farmer and brother were customers of defendant credit union — Sale of first two parcels of land proceeded but sale of third parcel was delayed — Brother requested interim loan from credit union for venture and farmer agreed to co-sign loan based on assurances of credit union that proceeds from sale of third parcel of land would be applied to loan once sale was completed — After receiving interim loan of $39,600 from credit union, brother required more cash and

farmer agreed to personally loan brother $20,000 on understanding that sum would be advanced towards purchase price of third parcel — Once sale was completed, farmer's lawyer sent letter to credit union authorizing it to transfer proceeds of $19,063.31 from farmer's account to brother's account — Instead of using proceeds towards interim loan, credit union deposited sum directly into brother's account — Brother used deposited proceeds to pay another credit union, he defaulted on interim loan, and bank recovered full loan amount from farmer — On farmer's action against credit union for breach of contract, issue arose as to whether farmer breached loan agreement by failing to pay full amount of loan, thereby absolving credit union of its obligation to use sale proceeds against interim loan — Farmer not in breach of loan agreement — Contract did not stipulate that full amount had to be paid out all at once, and when farmer authorized transfer of $19,063.31, default date of loan had not yet passed.

Fraud and misrepresentation --- Innocent misrepresentation — General

Plaintiff farmer agreed to purchase three parcels of land from his brother at price of $39,600 per parcel — Both farmer and brother were customers of defendant credit union — Sale of first two parcels of land proceeded but sale of third parcel was delayed — Brother requested interim loan from credit union for venture and farmer agreed to co-sign loan based on assurances of credit union that proceeds from sale of third parcel of land would be applied to loan once sale was completed — After receiving interim loan of $39,600 from credit union, brother required more cash and farmer agreed to personally loan brother $20,000 on understanding that sum would be advanced towards purchase price of third parcel — Once sale was completed, farmer's lawyer sent letter to credit union authorizing it to transfer proceeds of $19,063.31 from farmer's account to brother's account — Instead of using proceeds towards interim loan, credit union deposited sum directly into brother's account — Brother used deposited proceeds to pay another credit union, he defaulted on interim loan, and bank recovered full loan amount from farmer — On farmer's action against credit union for breach of contract, issue arose as to whether credit union was induced to enter loan agreement through misrepresentation and was entitled to rescind agreement — Credit union not entitled to rescind agreement and obligated to fulfil term of contract that sale proceeds be applied to loan — Even if farmer innocently misrepresented to credit union that lawyer would send instruction for payment of $39,227.98 to be made, credit union did not get something "totally different" from that which it bargained for.

ACTION by debtor against defendant credit union for breach of loan contract.

***Dawson J.*:**

1 This is an action for breach of contract brought by the plaintiff, Melvin Fitzpatrick ("Melvin"), against the defendant, Estevan Credit Union.

2 Melvin Fitzpatrick is a farmer who has had a longstanding business relationship with the defendant Estevan Credit Union. Melvin held several accounts at the Estevan Credit Union.

3 In 1999 Melvin decided to purchase three quarter sections of land from his brother Clifford Fitzpatrick ("Clifford"). Clifford also was a customer of the Estevan Credit Union. The price agreed to between the brothers was $39,600.00 for each quarter of land. Melvin had the cash to purchase the land. Melvin's cash for the purchase was on deposit in his account at the Estevan Credit Union.

4 The purchase of two of the three quarters was able to proceed. However, the sale for the third quarter was unable to proceed immediately as the actual Certificate of Title to the quarter of land was in the safety deposit box of Melvin and Clifford's father and he was out of the country. Melvin and Clifford arranged for a lawyer, Kim Thorson, to represent both of them on each sale transaction. The arrangements made for the payment of the purchase proceeds on each sale was as follows: Mr. Thorson would confirm with the Estevan Credit Union that Melvin had sufficient funds in his account at the Estevan Credit Union to cover the purchase price. Mr. Thorson would then submit the transfer of land from Clifford to Melvin to the land titles office. Once the title had transferred free and clear into Melvin's name, Mr. Thorson would send a letter to the Estevan Credit Union authorizing them to transfer the necessary monies for the purchase from Melvin's account to Clifford's account at the Estevan Credit Union.

5 As stated, the sale for the first two quarter sections proceeded. On February 18, 1999 Mr. Thorson faxed a letter to the Estevan Credit Union advising it that the title to two quarters had been registered in Melvin Fitzpatrick's name and asking the Estevan Credit Union to transfer the purchase proceeds from Melvin's account at the Estevan Credit Union to Clifford's account. On February 19, 1999 the Estevan Credit Union withdrew the necessary amount of funds from Melvin's account and deposited the funds in Clifford's account.

6 As stated, the sale of the third quarter was delayed until the return of Melvin and Clifford's father. All parties were aware of the delay. However, Clifford needed funds as soon as possible, as he needed cash to finance a venture he was undertaking. Clifford asked the Estevan Credit Union for interim financing. Clifford asked the Estevan Credit Union to lend him an amount equivalent to the sale proceeds of the third quarter of land, on the basis that the loan would be paid out in full from the proceeds of the sale of the land to Melvin, once the land sale was completed. The Estevan Credit Union was not prepared to provide the financing to the Clifford but would provide it if Melvin co-signed the loan. The Estevan Credit Union wanted this additional security for the loan to Clifford. The Estevan Credit Union did not view Clifford as a good security risk, whereas it considered Melvin a very good customer.

7 Clifford asked Melvin if he would co-sign the loan. Melvin met on two occasions with a representative of the Estevan Credit Union, namely Gail Goertz, respecting this loan. Melvin wanted to confirm, before he agreed to co-sign the loan, that the loan would be paid from the proceeds of the land sale. Ms. Goertz had known Melvin as a customer of the Estevan Credit Union for many years. She and the Estevan Credit Union considered Melvin a "good credit risk". Melvin

asked Ms. Goertz to confirm that the interim loan would be paid by the proceeds of the purchase of the property. Melvin advised Ms. Goertz that he was not prepared to co-sign the loan unless he was assured that the loan would be paid from the sale proceeds. Ms. Goertz confirmed that the proceeds from the sale of the third quarter would be applied to the loan upon receipt of the proceeds. Melvin agreed to co-sign for the interim loan based on Ms. Goertz' assurances.

8 On February 26, 1999, Melvin attended to the Estevan Credit Union and executed the loan documents prepared by the Estevan Credit Union. The loan documents included an Application for Loan, a Cost of Borrowing Summary, a Promissory Note and the Estevan Credit Union Specific Security Agreement.

9 The Application for Loan contained the following references:

PURPOSE OF LOAN

Interim Financing until proceeds from land sale clears

SECURITY

Specific Security Agreement on Letter of Direction from Land Purchase

SECURITY FOR LOANS BEING APPLIED FOR:

Proceeds from the Sale of NW 29-1-32 WPM being transferred to Cliff Fitzpatrick (vendor) from Mel Fitzpatrick (purchaser)

MANAGEMENT COMMENTS and RECOMMENDATIONS:

100% secured by funds being forwarded through Law Firm of Thorson & Horner, 203 -1st St. N.E., Weyburn, Sk.

. . .

Term and Amor. Prd.

Demand — 2 months

Payment Amt. and Freq.

Lump sum due May 1/99

Security

P/N; S/A on Letter of Direction from Law Firm

10 The Promissory Note indicated that the principal sum and interest was due:

> On Demand Due in Full May 1, 1999.

11 The Specific Security Agreement described the collateral as:

> Letter of Direction From Thorson & Horner Law Firm advising that proceeds from land sale will be sent directly to CW Fitzpatrick for Full Payout.
>
> Melvin was satisfied that the loan documents reflected the parties agreement that the land sale proceeds would be used to pay the loan and he executed the Estevan Credit Union's loan documentation in the form described above.

12 The Estevan Credit Union did not register any of the security.

13 Around the time that Melvin was discussing the loan with the Estevan Credit Union, Clifford began pressuring Melvin to loan him money immediately as he (Clifford) was afraid he would lose the deal on his new business venture. Melvin gave Clifford the sum of $20,000.00 on February 23, 1999. Clifford promised Melvin that he would repay the $20,000.00 in two weeks time. Melvin said that while he and Clifford agreed that the $20,000.00 would be an advance towards the purchase price of the land, it was agreed that Clifford would repay the $20,000.00 to him within two weeks, which was well before the land transfer would be completed. Melvin had Clifford sign a receipt for the $20,000.00. The receipt signed by Clifford read:

> Down payment received on NW 29-1-32 W twenty thousand.

Melvin, Clifford and the Estevan Credit Union thought that the land transaction on the third quarter would be completed sometime around the end of April, 1999. Melvin said that Clifford promised that the $20,000.00 would be repaid long before the land sale was completed.

14 By April, 1999 Clifford still had not repaid Melvin the $20,000.00. At that time Melvin contacted Mr. Thorson and advised him to take the $20,000.00 he had already loaned to Clifford into account when paying the proceeds of the purchase price to Clifford. Melvin acknowledged that he understood he would be responsible to the Credit Union for this $20,000.00 in the event that Clifford did not repay him this sum, as he had co-signed the loan. Melvin expected that the balance of the purchase price for the land would be applied to the interim loan in accordance with the loan arrangements.

15 On April 16, 1999 the land transfer was completed and title registered in Melvin's name. Mr. Thorson sent a letter to the Estevan Credit Union, to the attention of Gail Goertz, by telephone Facsimile (Fax). The letter stated:

> Title to the land Melvin is purchasing from Clifford has now registered in his name. Please pay from Melvin's account the total of $19, 849.45 as follows:

> To Clifford Fitzpatrick's account: $19,063.31 [and] send to Thorson & Horner: 786.14 . . .

16 Unfortunately, Gail Goertz was not around when Mr. Thorson's letter addressed to her came in by Fax. A customer service representative, Gaylene Stovin, took the letter and processed the transaction. Ms. Stovin took the sum of $19,849.45 out of Melvin's account and deposited the sum of $19,063.31 into Clifford's account and paid the $786.14 to Mr. Thorson for his fees. The Estevan Credit Union entry made by Ms. Stovin on the withdrawal said:

> 16 APR 99 Debit to CLIFF'S ACCT RE: SALE

and the entry for the deposit read:

> 16 APR 99 Credit FR: MEL'S ACCT RE: SALE

The sum of $19,063.31 was deposited directly into Clifford's account and was not used to pay the interim loan.

17 Ms. Stovin was not aware prior to receiving Mr. Thorson's letter of the land sale transaction. She was not aware of the financing arrangements or of the Estevan Credit Union's security on the sale proceeds. She knew nothing about any of these arrangements. Ms. Stovin did not ask anyone about the letter nor did she obtain any clarification from any person. She simply transferred the money to Clifford's account in accordance with the letter. She did not check with Melvin or anyone at the Estevan Credit Union to see if in fact Melvin had authorized the money to be transferred from his account. She proceeded only on the basis of Mr. Thorson's letter. Ms. Stovin testified that the reason she deposited the money directly to Clifford's account was based solely on the letter from Mr. Thorson. Ms. Stovin acknowledged that the amount of money referred to in Mr. Thorson's letter had nothing to do with her decision to deposit the money directly into Clifford's account, instead of paying the interim loan.

18 Next, on April 27, 1999 Clifford wrote a cheque on his Estevan Credit Union account for $17,000.00 and presented it to another credit union. The Estevan Credit Union was contacted by the other credit union to confirm that $17,000.00 was available in Clifford's account to cover the cheque he had written. The Estevan Credit Union confirmed to this other credit union that this sum was available in Clifford's account to cover the cheque. The only reason that there were sufficient funds to cover this cheque was because of the deposit of the $19,063.31. However, after this, on April 29, 1999, the Estevan Credit Union returned the $17,000.00 cheque as being "non-sufficient funds".

19 The interim loan was due and payable in full on May 1, 1999.

20 After that, on May 4, 1999, the Estevan Credit Union reversed the non-sufficient fund designation and honoured the $17,000.00 cheque. The Estevan Credit Union sent the $17,000.00 to the other credit union. The Estevan Credit Union said that it sent the funds because it had given verbal authorization to this other credit union that the cheque would be good. The Estevan Credit Union by honouring this cheque after first dis-honouring it, lost the ability to apply the sale proceeds to the interim loan.

21 Melvin did not know that the sale proceeds had been deposited into Clifford's account as opposed to being used to pay the loan. Nor did he know that the Estevan Credit Union made a decision to allow the funds which were subject to their security to be released to the other credit union.

22 Around May 1999, Clifford advised Melvin he could not repay him the $20,000.00. Approximately one week after this Melvin contacted Gail Goertz at the Estevan Credit Union to tell her that Clifford was not going to pay him the $20,000.00. Melvin testified that he realized he would be responsible to pay to the Estevan Credit Union the $20,000.00. It was at this point that Gail Goertz informed Melvin that the $19,063.31 had been delivered to Clifford and had not been applied against the loan. Melvin asked Gail Goertz how this could have happened. Ms. Goertz explained that she was not in the office on the day that the proceeds became available and that Ms. Stovin had handled the transaction. Ms. Goertz told Melvin that Clifford withdrew the funds shortly after they were placed in his account. Needless to say, Melvin was very upset.

23 Thereafter, Melvin and Ms. Goertz agreed to try to work together to try to collect the $19,063.31 from Clifford. Melvin told Ms. Goertz that he accepted responsibility to pay the Estevan Credit Union the $20,000.00 he had advanced to Clifford. Over the next several months Ms. Goertz attempted to collect the $19,063.31 directly from Clifford to no avail. Melvin also contacted Clifford. Melvin did obtain from Clifford a cheque in the amount of $1,484.00 which he brought into the Estevan Credit Union on September 7, 1999. Melvin told the Estevan Credit Union to apply this cheque to the interim loan. However, the Estevan Credit Union applied the $1,484.00 to Clifford's mortgage payment which was due. In November, 1999 Melvin brought a cheque from Clifford into the Estevan Credit Union in the amount of $7,000.00 and told the Estevan Credit Union to apply that amount to the interim loan. The Estevan Credit Union did apply that amount to the loan.

24 In March, 2000 Melvin was advised by Clifford that Clifford had a Registered Retirement Savings Plan (RRSP) with the Estevan Credit Union which could be used to apply to the interim loan. Melvin contacted the Estevan Credit Union to advise them that they could apply Clifford's RRSP's proceeds to the loan. The Estevan Credit Union did not apply the RRSP's to the interim loan because they had prior security over the RRSP's. The Estevan Credit Union withdrew the RRSP's and applied the proceeds to Clifford's house mortgage. Clifford had at the time of investing the

RRSP signed a loan and withdrawal of the RRSP. After Melvin's advice respecting the RRSP, the Estevan Credit Union cashed the RRSP's and applied the proceeds to Clifford's house mortgage.

25 No further funds were forthcoming from Clifford.

26 In July 2000 the interim loan still had not been paid in full and the Estevan Credit Union declared it to be in a "delinquent position". The Estevan Credit Union decided put a "hold" or a "freeze" on Melvin's chequing account to secure repayment of the entire loan. On July 28, 2000 Gail Goertz met with Melvin and advised him that he would have to pay out the loan in full. Ms. Goertz told Melvin that the Estevan Credit Union would grant him a formal extension of the loan if he signed a General Security Agreement. After signing the loan extension documents and General Security Agreement, the Estevan Credit Union released the "hold" or "freeze" on Melvin's account.

27 On September 21, 2001 the Estevan Credit Union made a formal demand for payment of the loan. On October 2, 2001 the Estevan Credit Union withdrew from Melvin's chequing account, the amount of $42,436.37 representing $35,312.23 in principal and $7,124.03 in interest, to pay out the loan. The Estevan Credit Union asserted that it had exercised its right of setoff and applied the funds in Melvin's account against the outstanding amount owing under the loan.

28 Melvin then commenced this action for breach of contract and damages, alleging that the Estevan Credit Union breached the loan agreement when it failed to apply the $19,063.31 proceeds from the sale of the land to the loan. Melvin also alleges that the Estevan Credit Union misappropriated the $1,484.00 funds and Clifford's RRSP's when it applied those funds to Clifford's other loans.

29 Melvin also sought a rescission of the security agreement executed by him at the time that his bank account was frozen, but he abandoned this and the other claims related to that at the trial.

30 The defendant, Estevan Credit Union, defended the action on the basis that it was excused from performing the obligation to use the sale proceeds to pay the loan because of Melvin's unilateral alteration or breach of the original loan agreement and/or because Melvin misrepresented the facts to the Estevan Credit Union when applying for the loan. The Estevan Credit Union asserted that it was not required to act on its security and use the sale proceeds to pay out the loan and is therefore not liable to Melvin.

ISSUES

1. Was the Estevan Credit Union obligated by the terms of the contract to apply the proceeds of sale against the interim loan?

2. Did Melvin Fitzpatrick unilaterally alter or breach the original loan agreement? If so, what is the effect of this breach?

3. Did Melvin Fitzpatrick induce the Estevan Credit Union into entering the loan agreement through misrepresentation? If so, what is the effect of misrepresentation?

4. What are Melvin Fitzpatrick's damages, if any?

(4a) Did the Estevan Credit Union improperly fail to apply the $1,484.00 and the RRSP proceeds received against the interim loan?

(4b) Calculation of damages.

DISCUSSION

1. Was the Estevan Credit Union obligated by the terms of the contract to apply the proceeds of sale against the interim loan?

31 The Estevan Credit Union acknowledged at the trial that it *was* a term of the interim loan agreement that the proceeds of the sale of the land would be used to pay the loan. However, it also argued that Mr. Thorson's instruction to pay the sale monies to Clifford superseded the terms of the agreement.

32 The fundamental rule of interpretation of contract is to interpret the meaning of the contract in accordance with the intention of the parties. The rule is succinctly stated by Estey J. in *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.* (1979), [1980] 1 S.C.R. 888 (S.C.C.) at pages 899-900, quoting from *Pense v. Northern Life Assurance Co.* (1907), 15 O.L.R. 131 (Ont. C.A.) at p. 137:

> In such a contract, just as in all other contracts, effect must be given to the intention of the parties, to be gathered from the words they have used. A plaintiff must make out from the terms of the contract a right to recover; a defendant must likewise make out any defence based upon the agreement. The onus of proof, if I may use such a term in reference to the interpretation of a writing, is, upon each party respectively, precisely the same. . . .
>
> Such a proposition may be referred to as Step one in the interpretative process. Step two is the application, when ambiguity is found, of the *contra proferentem* doctrine . . .

33 As stated, the application of the *contra proferentum* rule arises only when ambiguity is found. The same is true for extrinsic evidence to aid in contractual interpretation. Extrinsic evidence should only be used if the words do not lead to a "plain meaning", or if strict construction would lead to an absurd result. Provided that it does not contradict the written terms, parol evidence may be used to aid in the interpretation. However, as stated the use of parole evidence is governed by the same rules. In *Murray v. Boyle* (1991), 93 Sask. R. 165 (Sask. C.A.), Madam Justice Gerwing stated at para. 12:

> [12] Parol evidence is not admissible if the agreement is both clear and unambiguous. Other evidence should not be admitted to alter or vary the written words . . .

34 The analysis here, as mandated by the authorities listed above, begins with an examination of the written terms of the contract. In the original loan application the contract states that the loan is payable "on demand" and is due within two months, due May 1, 1999. Further, the Estevan Credit Union indicated that security for the loan was the proceeds from the sale of land. The purpose of the loan was to provide "interim financing until the sale of land clears". The promissory note contains similar wording, and indicates in clause (e) that the loan is "on demand due in full May 1, 1999". Finally, the security agreement indicates in clause 33(g) that the Estevan Credit Union acknowledges that the collateral will be handled as follows:

> Letter of Direction From Thorson & Horner Law Firm advising that proceeds from land sale will be sent directly to CW Fitzpatrick for Full Payout.

35 The loan documents refer throughout to the sale monies being used to pay the interim loan. There is no ambiguity. It is clear it was a term of the loan agreement (as admitted by the defendant) that the sale proceeds would be used to pay the loan.

36 However, even if the contract could be said to be ambiguous, any ambiguity is to be construed against the Estevan Credit Union. Further, only if there is ambiguity may parole evidence be used to aid in interpretation. Here, the parole evidence confirms the same interpretation of the contract. Melvin was careful to communicate to the Estevan Credit Union that he was not prepared to oblige himself for the loan unless it was a term of the agreement that the sale proceeds would be used to pay the interim loan. The Estevan Credit Union was aware that Melvin wanted confirmation that the proceeds would be used to pay the loan. Gail Goertz acknowledged that she recalled discussing with Melvin that the loan would be paid from the proceeds of the sale of the land from Clifford. It is clear from the contract that it was a term of the loan that the proceeds of the sale of the third quarter were to be used to pay the interim loan.

37 The Estevan Credit Union argues further that Mr. Thorson's instruction to them in his faxed letter of April 16, 1999, to pay the money to Clifford, superseded their agreement with Melvin that the sale proceeds would be used to pay the interim loan. This argument is not sustainable on the facts. The Estevan Credit Union cannot suggest that it escapes responsibility because of the nature of the direction of Mr. Thorson. It is evident that Mr. Thorson's letter of instruction of April 16, 1999 was perfectly in accordance with the previous business practices of the parties and was fully contemplated by the Estevan Credit Union. In fact, the instruction from Mr. Thorson perfectly mirrored the instruction the Estevan Credit Union expected to receive as recited in the Security Agreement, which stated:

> Letter of Direction from Thorson & Horner Law Firm advising that **proceeds from land sale will be sent directly to CW Fitzpatrick for full payout**. [Emphasis added]

This instruction is the instruction contemplated by the Estevan Credit Union. It was only because the Estevan Credit Union's employee, Gaylene Stovin had no knowledge of the security arrangements that the monies were not paid on the interim loan. Ms. Stovin acknowledged that the amount referred to in Thorson's Fax had nothing to do with her decision to pay the funds to Clifford as opposed to paying the funds on the interim loan. Thorson's instruction was in accordance with the arrangements made between the parties and contemplated by the Estevan Credit Union.

38 I am satisfied that it was a term of the loan contract that the proceeds of the sale of the land would be used to pay the interim loan.

2. Did Melvin Fitzpatrick unilaterally alter or breach the original loan agreement? If so, what is the effect of this breach?

39 The Estevan Credit Union argues that even if it was a term of the loan agreement that the sale proceeds would be used to pay the interim loan, Melvin breached the loan agreement or unilaterally altered the loan agreement when he paid over only $19,063.31 of the sale proceeds on April 16, 1999, thereby absolving the Estevan Credit Union of its obligation to use the proceeds against the interim loan. The Estevan Credit Union provided no authority for this position nor did they refer me to any cases to support this position.

40 The first question is whether Melvin's action constitutes a breach?

41 The loan contract required Melvin to pay the interim loan "on demand due in full May 1, 1999". It is well established that a debt that is "payable on demand" is construed to mean that the debtor must pay after a reasonable time period. The purpose of the "reasonable time period" is to allow the debtor to arrange his/her finances. In *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726 (S.C.C.), Estey J. stated at p. 746:

> The rule has long been that enunciated in *Massey v. Sladen* (1868), L.R. 4 Ex. 13 at p. 19: the debtor must be given "some notice on which he might reasonably expect to be able to act". The application of this simple proposition will depend upon all the facts and circumstances in each case. Failure to give such reasonable notice places the debtor under economic, but nonetheless real duress, often as real as physical duress to the person, and no doubt explains the eagerness of the courts to construe debt-evidencing or creating documents as including in all cases the requirement of reasonable notice for payment.
>
> This authority (*Massey*) relates back to the *dictum* of Cockburn C.J. in *Toms v. Wilson and Another* (1863), 4 B. & S. 442, 122 E.R. 524, at p. 529. Blackburn J., in concurring, put the matter directly:

> But, when, by the express terms of the instrument creating the debt, payment is to be made "immediately upon demand in writing," it must be construed to mean within a reasonable time.

Baron Pigget, in *Massey, supra*, stated (at p. 19):

> It is not necessary to define what time ought to elapse between the notice and the seizure. It must be a question of the circumstances and relations of the parties, and would be difficult, perhaps impossible, to lay down any rule of law on the subject, except that the interval must be a reasonable one. But it is quite clear that the plaintiff did not intend to stipulate for a merely illusory notice, but for some notice on which he might reasonably expect to be able to act.

While the issue of "reasonable time" does not arise here, the cases are helpful in that they illustrate the courts' treatment of these types of provisions. At its heart, the purpose is to try to create a reasonable balance for both the creditor and debtor.

42 Here, the Estevan Credit Union has admitted that applying the proceeds of the land transaction to the loan was a term of the contract. The terms of the contract do not support the Estevan Credit Union's suggestion that Melvin, by only paying $19,063.31 over instead of the full amount, was in breach of the loan agreement. The stipulation in the agreement was that Melvin and Clifford were required to pay the full loan amount by May 1, 1999. The contract did not stipulate that the full amount had to be paid out all at once. Had an amount been paid in April and the balance May 1, 1999 Melvin would not have been in default. To interpret the contract in such a way to suggest that Melvin was in default on April 16, 1999 by paying $19,063.31 on that date would be contrary to the express provisions of the contract. On April 16, 1999 Melvin was not in default of the loan agreement. I am not convinced that Melvin was in breach of the contract or had unilaterally altered the contract on April 16, 1999 when the sum of $19,063.31 was delivered.

43 That having been said, if I am wrong to suggest that Melvin was not in breach on April 16, 1999, what would be the effect of such a breach? The proper remedy to be granted to an innocent party that is faced with a breach of contract depends on the nature of the breach. In *Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha Ltd.* (1961), [1962] 1 All E.R. 474 (Eng. C.A.) Lord Diplock made this often quoted remarks at p. 485:

> Every synallagmatic contract contains in it the seeds of the problem: in what event will a party be relieved of his undertaking to do that which he has agreed to do but has not yet done? The contract may itself expressly define some of these events, as in the cancellation clause in a charter party, but, human prescience being limited, it seldom does so exhaustively and often fails to do so at all . . . where an event occurs the occurrence of which neither the parties nor Parliament have expressly stated will discharge one of the parties from further performance

> of his undertakings, it is for the court to determine whether the event has this effect or not. The test whether an event has this effect or not has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings. . . .

44 Lord Diplock revisited this issue again in 1980, as a member of the House of Lords. His judgment in *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827 (U.K. H.L.) was cited with approval by Justice Wilson in *Syncrude Canada Ltd. v. Hunter Engineering Co.* (1989), 57 D.L.R. (4th) 321 (S.C.C.), at 369:

> The formulation that I prefer is that given by Lord Diplock in *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827 (H.L.). A fundamental breach occurs "Where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract" (p.849). This is a restrictive definition and rightly so, I believe. As Lord Diplock points out, the usual remedy for breach of a "primary" contractual obligation (the thing bargained for) is a concomitant "secondary" obligation to pay damages. The other primary obligations for both parties yet unperformed remain in place. Fundamental breach represents an exception to this rule for it gives to the innocent party an additional remedy, an election to "put an end to all primary obligations of both parties remaining unperformed" (p. 849). It seems to me that this exceptional remedy should be available only in circumstances where the foundation of the contract has been undermined, where the very thing bargained for has not been provided.

45 Fridman in *The Law of Contract in Canada*, 3rd ed. (Scarborough: Thomson, 1994) at pp. 566-567 says the following about fundamental breach:

> . . . One point is clear. Whether a fundamental breach does not appear to depend upon any express terms of the contract. The determination of a fundamental breach is a teleological question not one that involves construction of the contract in the narrow, literal sense. The concept of fundamental breach seems to transcend the normal issues of contractual interpretation. It involves investigation of the underlying nature and purpose of the contract into which the parties have entered, and the respective benefits designed to be obtained or ensured by the agreement.

This reasoning has been adopted in Saskatchewan in *Lilly Agencies Ltd. v. Concorde Investment Corp.* (1985), 43 Sask. R. 284 (Sask. Q.B.) and *Xerox of Canada Inc. v. D & L Management Inc.* (1985), 41 Sask. R. 68 (Sask. Q.B.).

46 The question then is whether Melvin, by making the $19,063.31 payment on April 16, 1999, set in motion events that substantially deprived the Estevan Credit Union of the entire benefit that the parties intended it to receive, thus releasing Estevan Credit Union from its duty to allocate the proceeds of the sale of the interim loan? The answer is clearly no. Melvin was still obligated under the terms of the loan agreement to pay the balance of the loan (something which he acknowledged from the outset). The Estevan Credit Union had not lost its benefit under the contract, which was to be repaid the entire loan with interest. This breach (if there was one) did not "go to the root" of the original contract. The Estevan Credit Union would be entitled to damages only and not repudiation of the entire contact. As such, the Estevan Credit Union continued to be obligated to fulfill the term of the contract to apply the sale proceeds to the loan.

3. Did Melvin Fitzpatrick induce the Estevan Credit Union into entering the loan agreement through misrepresentation? If so, what is the effect of misrepresentation?

47 The Estevan Credit Union also argues that Melvin induced it to enter into the loan agreement through misrepresentation and as such they were not obliged to fulfill the term of the contract to apply the sale proceeds to the interim loan. The Estevan Credit Union provided no authority for the assertion that Melvin's action amounted to misrepresenation nor did they refer me to any cases in this regard.

48 A "representation", as stated in Cheshire, Fifoot & Furmston's *Law of Contract*, 14th ed (England: Butterworths, 2001) at p. 293 is:

> . . . a statement of fact made by one party to the contract (the representor) to the other (the representee) which, while not forming a term of the contract, is yet one of the reasons that induces the representee to enter into the contract. A misrepresentation is simply a representation that is untrue . . .
>
> It has already been observed that while terms of a contract may be of a promissory nature, the concept of a representation is limited to statements of facts . . .

49 A representation is, as stated, a statement of fact, not of intention. It contains no element of futurity. Generally mere silence is not misrepresentation, unless the silence distorts a positive assertion. As stated at p. 297 of Cheshire, *supra*:

> . . . A party to a contract may be legally justified in remaining silent about some material fact, but if he ventures to make a representation upon the matter it must be a full and frank statement, and not such a partial and fragmentary account that what is withheld makes that which is said absolutely false. A half truth may be in fact false because of what it leaves unsaid, and, although what a man actually says may be true in every detail, he is guilty of misrepresentation unless he tells the whole truth . . .

50 A misrepresentation does not render a contract voidable unless it was intended to cause and has in fact caused the representee to make the contract. Cheshire, *supra*, stated at p. 298:

> . . . It must have produced a misunderstanding in his mind, and that misunderstanding must have been one of the 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.
>
> It follows from this that a misrepresentation is legally harmless if the plaintiff:
>
> (a) never knew of its existence; or
>
> (b) did not allow it to affect his judgement; or
>
> (c) was aware of its untruth.

51 The remedy available to the Estevan Credit Union in the event of misrepresentation will depend on the nature of the misrepresentation. If Melvin induced the Estevan Credit Union to grant the loan through fraud, the Estevan Credit Union will likely be entitled to void the contract. Fridman, *supra* at p. 295 defines 'fraudulent misrepresentation':

> A fraudulent misrepresentation consists of a representation of fact made without any belief in its truth, with intent that the person to whom it is made shall act upon it and actually causing that persons to act upon it . . .

And at p. 294 of Fridman, *supra*:

> A distinction must be made between misrepresentations which are fraudulent and those which are not. A fraudulent misrepresentation is one which is made with knowledge that it is untrue and with the intent to deceive. It may even constitute a term of the contract. Whether it does or not is immaterial, since fraud gives rise to effects in the law of contract and the law of tort. A contract resulting from a fraudulent misrepresentation may be avoided by the victim of the fraud . . .

A person induced to enter into a contract by a fraudulent misrepresentation is entitled, *prima facie* to damages for fraud and to rescission. Rescission has important restitutionary implications, because it entitles the innocent party to restitution of the benefits conferred on the other party to the contract and may have the effect of putting the innocent party in a better position than would an award of damages. Rescission may be refused if the innocent party is unable to restore benefits received under the contract and if third party rights are affected or on account of affirmation or lapse of times.

52 An innocent misrepresentation differs from fraud in that there is no intent to deceive on the part of the wrongdoer. In a passage in the House of Lords' case of 1939, *Spence v. Crawford*,

[1939] 3 All E.R. 271 (U.K. H.L.)) later approved by the British Columbia Court of Appeal in 1965 in *Kupchak v. Dayson Holdings Ltd.* (1965), 53 D.L.R. (2d) 482 (B.C. C.A.), at 485, Lord Wright said at p. 288:

> . . . A case of innocent misrepresentation may be regarded rather as one of misfortune than as one of moral obliquity. There is no deceit or intention to defraud. The court will be less ready to pull a transaction to pieces where the defendant is innocent, whereas in the case of fraud the court will exercise its jurisdiction to the full in order, if possible, to prevent the defendant from enjoying the benefit of his fraud at the expense of the innocent plaintiff.

And as stated at p. 303 of Fridman:

> . . . there is a clear distinction between statements which are intended to be, and are regarded as being terms of the contract, and statements which are not terms but merely inducements to the making of the contract. Second, there is a difference between the approach at common law and the attitude of equity towards innocent misrepresentation.
>
> At common law an innocent, non-negligent misrepresentation would not, and still does not entitle the victim to any relief unless the statement concerned can be regarded as constituting a term of the contract. If the statement can be regarded as more than an assertion but as a definite part of the bargain, that is, as one of the promises made by one party to get the consent of the other, then it will be a term. Its exact status is another matter, and one upon which the nature of the victim's remedy will depend. In such instances the contract is perfectly valid, though there may have been a breach which justified some sort of remedial action. The injured party may be able to repudiate the contract and claim damages for breach, or he may be restricted to a claim for damages, or to the return of his money on the basis of failure of consideration. . . .

And at page 305:

> For innocent misrepresentation to be operative in this way, as was explained in *Alberta North West Lumber Co.v. Lewis*, [[1917] 3 W.W.R. 1007 (B.C.C.A.)] . . . there must be, generally speaking, a substantial difference between what the victim bargained for and what he obtained, such as to constitute failure of consideration . . .

53 Non-fraudulent misrepresentations have a different effect. At common law only fraud entitles an innocent party to upset his apparent consent and avoid a contract which originally was validly created. At common law an innocent misrepresentation, that is, where the party making it was unaware that what he was stating was untrue, could not render the resulting contract either void or voidable unless the effect of such misrepresentation was to produce an operative mistake.

54 The question here is whether Melvin misrepresented a fact to the Estevan Credit Union, whether the Estevan Credit Union relied on such fact to induce it to loan the funds and, if there was a misrepresentation, what is the nature of the misrepresentation.

55 In this case, the evidence indicates that after Clifford had received the sale proceeds for the first two quarters of land, he approached the Estevan Credit Union for interim financing pending completion of the third quarter land sale. The Branch Manager refused Clifford's request for a loan but advised Clifford that the Estevan Credit Union would make financing available to his brother Melvin, because in their opinion Melvin was a good credit risk and Clifford was not a good credit risk. Melvin advised Ms. Goertz that he would not obligate himself for the loan unless the sale proceeds from the land sale would be used to pay the interim loan. He was assured by Ms. Goertz that they would be. Ms. Goertz then prepared the loan documentation and Melvin signed the papers on February 26, 1999. Ms. Goertz obtained confirmation from Mr. Thorson that the approximate sum of $39,227.00 would be available from the land sale to apply against the loan. Melvin was not aware that Mr. Thorson had given Ms. Goertz this information at the time he signed the loan documents. At no time did Melvin himself advise the Estevan Credit Union as to the amount of the sale proceeds, although the loan documents refers to an amount of $39,600.00 being available from the sale and Melvin signed those documents. At around the same time, on February 23, 1999 Melvin lent the sum of $20,000.00 to Clifford.

56 The Estevan Credit Union must show, to prove fraudulent misrepresentation, that Melvin made representations of fact which he knew were false (or made them recklessly) and that the representations induced the Estevan Credit Union to enter into the loan agreement. I am not satisfied that Melvin made any such fraudulent representation. I am satisfied that Melvin believed at the time that he lent the $20,000.00 to Clifford that Clifford would repay the sum well before the closing date of the land sale. I find there was no frauluent misrepresentation.

57 I must turn my mind to whether there was an innocent misrepresentation.

58 In this case it may be said that Melvin innocently misrepresented to the Estevan Credit Union that $39,227.98 would be paid from Mr. Thorson. However, even finding such innocent misrepresentation, it cannot be said that there was a substantial difference between what the Estevan Credit Union bargained for and what it obtained, so as to constitute failure of consideration which entitles the Estevan Credit Union to rescission. As stated by the Saskatchewan Court of Queen's Bench in *Komarniski v. Marien*, [1979] 4 W.W.R. 267 (Sask. Q.B.) at p. 271:

> It is a well-settled law that a plaintiff is not entitled to rescission of an executed contract because of an innocent misrepresentation.
>
> *Short v. MacLennan*, [1959] S.C.R. 3 . . . *Redican v. Nesbitt*, [1924] S.C.R. 135 . . . There is no question that the contract between the plaintiffs and the defendant Marien was fully

executed. In addition, it should be noted that it is probably not possible to put the parties back to the same position they were before the agreement was finalized, particularly with regard to the defendant Marien's mortgage on the property which he subsequently discharged.

The plaintiffs urged the court to follow *Ruscheinsky v. A. Spencer Co.*, (1948) 2 W.W.R. 392 (B.C.), which held that the general principle governing the right to rescission of an executed contract is subject to the exception that results from the purchaser receiving under the contract something "totally different in substance from what he bargained for". However, in my opinion, that is not the case here. The only difference in this case relates to the actual as opposed to the represented size of the "acreage". The evidence seems to indicate that no one, i.e. Marien, the trust company officials, or the plaintiffs, was able to discern that the 4.8 acres, as represented, was obviously something smaller. This case does not fall within the class of contract where the subject matter of the sale was "totally different" from what the plaintiff bargained for. So, the plea of rescission fails.

59 Here, the Estevan Credit Union did not get something "totally different" from that which they bargained for. While they did not receive the total proceeds from the sale of the land, the Estevan Credit Union still received what it bargained for: the right to be repaid the principle sum plus interest. Melvin has always acknowledged his obligation to repay the amount of the loan. The innocent misrepresentation here did not render what the Estevan Credit Union obtained under the contract substantially different in nature from what it believed it was going to obtain. The Estevan Credit Union was not entitled to recission such that it was not obligated to fulfill the term of the contract that the sale proceeds be applied to the loan.

60 The Estevan Credit Union also asserted at trial that Melvin had an obligation to pursue Clifford for the overpayment before he was entitled to damages from it. Once again the Estevan Credit Union provided no authority for this proposition. There is no factual basis to support this position. Here, Melvin had a contract with the Estevan Credit Union that he would be obligated to them for a principle sum plus interest. It was a term of the contract that the Estevan Credit Union apply the proceeds of the sale of the farm land to the loan. The Estevan Credit Union failed to do so.

4. What are Melvin Fitzpatrick's damages, if any?

61 The Estevan Credit Union failed to apply the sum of $19,063.31 against the interim loan, thereby increasing Melvin's obligation to the Estevan Credit Union. Ultimately the Estevan Credit Union took from Melvin's account an amount which it calculated as the balance owing under the loan. Melvin's damages amount to the difference between the amount taken by the Estevan Credit Union and that which should have been owing by him had the $19,063.31 been applied to the amount outstanding. Melvin also argues that the Estevan Credit Union failed to apply the $1,484.00 and Clifford's RRSP proceeds to the loan. I will deal with the issue of the appropriation of the funds first before calculating the damages.

4a. Did the Estevan Credit Union improperly fail to apply the $1,484.00 and the RRSP proceeds received against the interim loan?

62 It is well settled that a debtor who owes to a creditor different and distinct accounts may direct his payments to be applied as he directs. It is also settled that in the absence of any appropriation made by the debtor the creditor may apply the money as he thinks fit. *Nash-Simington Co. v. Caldwell* (1930), [1931] 1 W.W.R. 183 (Sask. C.A.) stated at p.186:

> A debtor has the right to apply a payment in any way he thinks fit, and if there are several debts he has a right to say to which of the debts the payment shall be applied . . . When there is no appropriation by the debtor, the creditor has the right to appropriate, and it seems that he may appropriate a payment to an unguaranteed debt (*Leake on Contracts*, 7th ed, p. 687) . . . If neither the debtor nor the creditor makes any appropriation, the law appropriates the payment upon equitable principles, and *prima facie* to the earliest debt . . .

63 Recently, in *Malva Enterprises Inc. v. Rosgate Holdings Ltd.* (1993), 14 O.R. (3d) 481 (Ont. C.A.)the Ontario Court of Appeal confirmed this at pp. 491-492:

> The law bearing on this question appears, as one would expect, to be the same in the law of landlord and tenant as it is for the law of creditor and debtor generally. With respect to the latter, Dunlop, *Creditor-Debtor Law in Canada* (1981), at p. 24 quotes from *Cory Brothers & Co. v. "The Mecca"*, [1897] A.C. 286 at p. 293, [1895-9] All E.R. Rep. 933 (H.L.), as follows:
>
> > When a debtor is making a payment to his creditor he may appropriate the money as he pleases, and the creditor must apply it accordingly. If the debtor does not make any appropriation at the time when he makes the payment the right of application devolves on the creditor.

64 In this case, Melvin obtained a payment from Clifford in the sum of $1,484.00 and brought that sum to the Estevan Credit Union and instructed the Estevan Credit Union on Clifford's and his own behalf that the sum was to be applied to the interim loan. The law is clear that this amount should have been used in accordance with Clifford and Melvin's instruction and applied to the interim loan.

65 The RRSP funds, however, are somewhat different. The RRSP's were subject to a prior instruction by Clifford that any withdrawal therefrom should be used against the house mortgage. The Estevan Credit Union was entitled to make the appropriation it did with respect to the RRSP.

4b. Calculation of Damages.

66 The calculation of damages therefore is as follows:

Loan advanced by the Estevan Credit Union - Feb 26/99		$39,227.98
Plus interest accrued to April 16/99 (49 days @ 10.75%)		566.12
Less proceeds of sale received from Thorson		$19,063.31
	Sub-total owing at April 16, 1999	$20,730.79
Plus interest from April 16 to September 7/99 on balance before the misapplied $1,484.00 (144 days @ 10.50%)		858.77
Less payment not applied Sept 7/99		1,484.00
	Sub-total owing Sept 7/99	$20,105.56
Plus interest from Sept 7 to Nov 26/99 (80 days @ 10.50%)		462.70
	Sub-total owing Nov 26/99	$20,568.26
Less payment made Nov 26/99		7,000.00
	Sub-total owing after Nov 26/99 payment	$13,568.26
Plus interest @ 11% to Oct 3/2001 date Estevan Credit Union withdrew funds from Melvin's account (676 days)		2,764.21
	Balance owing on loan at Oct. 31/2001	$16,332.47

67 The amount that the Estevan Credit Union took from Melvin's account on October 3, 2001, was $42,436.37. On that date Melvin owed the Estevan Credit Union $16,332.47. As such, Melvin is entitled to the difference, which is $26,103.90.

68 The plaintiff shall have judgment against the defendant for $26,103.90 plus pre-judgment interest from October 3, 2001. The plaintiff is entitled to his costs.

Action allowed.

Tab 12

1991 CarswellOnt 534
Ontario Court of Justice (General Division) (In Bankruptcy)

Sharby v. N.R.S. Elgin Realty Ltd. (Trustee of)

1991 CarswellOnt 534, [1991] O.J. No. 669, 26 A.C.W.S. (3d) 923, 35 C.C.E.L. 305, 3 O.R. (3d) 129, 41 E.T.R. 193

RE N.R.S. ELGIN REALTY LTD.; SHARBY et al. v. DELOITTE & TOUCHE INC., (Trustee in Bankruptcy of N.R.S. Elgin Realty Ltd.)

Killeen J.

Heard: March 22, 1991
Judgment: April 4, 1991
Docket: Doc. 35034825

Counsel: *Frank Highley*, for claimants John Sharby and Donnalda Ferreira.
H. Van Klink, for respondent Deloitte & Touche Inc., the trustee of the estate of N.R.S. Elgin Realty Ltd., a bankrupt.

Subject: Corporate and Commercial; Estates and Trusts; Employment; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
VIII Property of bankrupt
VIII.8 Property in hands of bankrupt agent or broker
VIII.8.c Real estate agents

Headnote

Bankruptcy --- Property of bankrupt — Property in hands of bankrupt agent or broker — Real estate agents

Real estate agents — Real estate salespersons employed as independent contractors by bankrupt real estate brokerage firm under agreements which provided that upon closing of real estate transactions brokerage firm held commissions as stakeholder for salesperson — Salespersons not traditional employees of brokerage firm — Brokerage firm never at any time becoming owner of commissions — Commissions received after bankruptcy not property of brokerage firm.

Constructive trusts — Real estate salespersons employed as independent contractors by bankrupt real estate brokerage firm under agreements which provided that upon closing of real estate transactions brokerage firm held commissions as stakeholder for salespersons — Commissions received after bankruptcy of brokerage firm impressed with constructive trust in favour of salespersons.

The claimants were registered real estate salespersons employed as "independent contractors" with the bankrupt real estate brokerage firm. When the firm went bankrupt, there were a number of uncompleted sales transactions on its books. Commissions from those transactions eventually came into the hands of the trustee. The claimants filed proofs of claim with respect to those commissions. The trustee disallowed their claims, and the claimants appealed.

Held:

The appeal was allowed.

The agreements which the claimants entered into with the bankrupt made it clear that they were independent contractors and not employees of the bankrupt in the classic master-servant sense. Before the transactions closed, the bankrupt held the commissions in trust for the purchase and vendor; thereafter, according to the agreements, the bankrupt became a stakeholder, holding the commissions for the independent contractors. In other words, the earned commissions never became the property of the bankrupt. The agreements made this case an exception to the rule that, after the bankruptcy of a real estate brokerage firm, agents who had commission entitlements can not assert a property interest against commission or deposit moneys falling into the hands of the trustee.

The claimants were not estopped from asserting their rights by the fact that they had participated in the bankruptcy proceedings.

In the alternative, the moneys in question were impressed with a constructive trust on behalf of the claimants.

APPEAL from decision of trustee in bankruptcy disallowing claims under s. 81(2) of *Bankruptcy Act*.

***Killeen J.*:**

1 This is an appeal against a decision of the trustee of the estate of N.R.S. Elgin Realty Ltd. disallowing claims under s. 81(2) of the *Bankruptcy Act*, R.S.C. 1985, c. B-3.

2 Section 81(2) reads as follows:

> (2) The trustee with whom a proof of claim is filed under subsection (1) shall within fifteen days thereafter or within fifteen 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 give notice in writing to the claimant that the claim is disputed with his reasons therefor, and, unless the claimant appeals therefrom to the court within fifteen days after the mailing of the notice of dispute, he shall be deemed to have abandoned or relinquished all his right to or interest in the property to the trustee who thereupon may sell or dispose of the property free of any lien, right, title or interest of the claimant.

3 The claimants are both registered real estate salespersons and, at material times, were employed as "independent contractor" salespersons with the now bankrupt real estate brokerage firm, N.R.S.

4 When N.R.S. went bankrupt on July 17, 1990, there were a number of uncompleted sale transactions on its books under which commissions might become payable at future dates. These transactions covered sales in respect of which N.R.S. was either a listing broker, a selling broker, or, in some cases, both the listing and selling broker.

5 Of these sale transactions, eight involved the claimants as either the salesperson who obtained the listing, sold the property, or, in certain cases, both listed and sold the property.

6 Deloitte now holds, in its capacity as trustee, the commissions relating to the sale of five of such transactions completed after the bankruptcy. The total amount of these latter commissions is $20,365. The admitted quantum of the claims of the claimants exceeds that amount.

The Legal Issues

7 There is a long line of cases which has followed the rule that, after the bankruptcy of a real estate brokerage firm, the agents who had commission entitlements could not assert a property interest against commission or deposit moneys falling into the hands of the trustee: see, for example, *Re Century 21 Brenmore Real Estate Ltd.* (1979), 6 E.T.R. 1, 24 O.R. (2d) 783, 30 C.B.R. (N.S.) 71, 100 D.L.R. (3d) 150 (S.C.), aff'd (1980), 6 E.T.R. 205, 28 O.R. (2d) 653, 33 C.B.R. (N.S.) 170, 111 D.L.R. (3d) 280 (C.A.); *Re Ridout Real Estate Ltd.* (1957), 36 C.B.R. 111 (Ont. S.C.); *Price Waterhouse Ltd. v. Vic MacLeod Real Estate Ltd.* (1983), 48 C.B.R. (N.S.) 191 (Ont. Co. Ct.); and *Re Allan Realty of Guelph Ltd.* (1979), 6 E.T.R. 50, 24 O.R. (2d) 21, 29 C.B.R. (N.S.) 229, 97 D.L.R. (3d) 95 (S.C.).

8 Mr. Highley, for the claimants, argues that this case is different. He submits two points which, he says, take a fresh tack and should lead to a different result: first, he submits that the contracts of employment of both claimants, which legally characterized them as independent contractor salespersons, impresses these commissions with a special ownership interest in favour of them; second, he submits, alternatively, the principle of unjust enrichment would also avail to prevent these commissions from entirely falling into the maw of the bankrupt estate.

The Independent Contractor Argument

9 The claimants' argument under this head starts with the contract of employment between each claimant and N.R.S.: Tab. H, motions record of the claimants.

10 It is clear that this contract form, prepared in standardized form by N.R.S., made independent contractors of both claimants and not servants in the classical master-servant sense. For example, the contract form is headed with the bold print phrase "Independent Contractor Agreement". It then goes on to expressly disavow an employer-employee relationship in article 2.01. Article 2.02 provides that the salesperson-contractor has no authority to sign any contracts or other documents

on behalf of N.R.S. Article 3 makes it clear that the salesperson may conduct his or her work in a wholly discretionary way and may even hire staff to assist him or her, subject, of course, to absorbing the cost of that staff expense personally.

11 Articles IV through VIII then go on to deal with such subjects as "Listings and Deposits" (article IV), "Commissions" (article V), "Administrative Services and Administration Fees" (article VI), "Expenses Payable by Salesperson" (article VII), and "Financial Arrangements" (article VIII).

12 For ease of reference, I reproduce in full certain of the critically relevant portions of Articles V, VI, and VIII:

> **5.01 General**
>
> When the Broker receives any real estate commission because a property has been sold or leased as a result of the Salesperson's negotiations, the Broker shall divide such commission between listing and selling brokers or salespersons or otherwise in accordance with the custom of the trade at the applicable time. Subject to the provisions of Article VIII of this agreement, the Broker shall pay the portion of the commission remaining after such division to the Salesperson. The commissions payable to the Salesperson before deducting any amounts pursuant to Article VIII of this agreement shall be referred to as the 'Base Commissions'. The provisions of this agreement are applicable to all commissions paid or payable by the Broker to the Salesperson on or after the Effective Date regardless of whether such commissions were earned prior to the Effective Date.
>
> . . . . .
>
> **6.01 Provision of Facilities**
>
> The Broker shall provide the Salesperson with suitable work space in the Premises, secretarial services during normal business hours, telephone, reception areas and such other facilities and services which may be made generally available from time to time to its independent Salespersons. The Salesperson is hereby given the non-exclusive right to use all such facilities as are maintained from time to time by the Broker in common with the other independent Salespersons and Employed Salespersons of the Broker working in the Premises.
>
> . . . . .
>
> **6.03 Variable Fees**
>
> In addition to the Administration Fee, described in section 6.02, the Salesperson shall also pay a fee (the 'Variable Fee') to the Broker each and every time the Salesperson earns commission forthwith upon receipt by the Salesperson of his or her commission from the Broker. In each financial year (which, for the purposes of this section, means a period of one year commencing on September 1 of each year) the Variable Fee payable by the Salesperson shall be thirty-five — per cent (35%) of the Base Commissions of the Salesperson until the Salesperson has

> received Base Commissions aggregating to $60,000.00 in that financial year. Thereafter, the Variable Fee payable by the Salesperson in that financial year shall be — Five — per cent (5%) of the Base Commissions of the Salesperson ...
>
> . . . . .
>
> **8.01 Indebtedness**
>
> Before remitting any amount which may be due and owing by the Broker to the Salesperson, the Broker may deduct any amount which the Salesperson is liable to pay to the Broker pursuant to the provisions of this agreement or otherwise. Without limiting the generality of the foregoing, the Broker may deduct the amount of any fees described in section 6.03 or in section 9.07 from the commissions which give rise to such fees.
>
> **8.02 Collecting Commissions**
>
> Commissions are due and payable by the Broker to the Salesperson only when they are collected by the Broker. The Collection of commission is as much the responsibility of the Salesperson as of the Broker. The Broker may withhold the Salesperson's entire commission on a partially paid transaction until full payment of the gross commission is received.

13 At this point, it should be indicated that certain provisions of the*Real Estate and Business Brokers Act*, R.S.O. 1980, c. 431, must be brought into the picture.

14 Both brokers, such as N.R.S., and salespersons, like the applicants, are, of course, "registered" to do business under the Act: see s. 3 of the Act.

15 While the Act does not specifically address the status of independent contractor salespersons, the recent case of *Re/Max Ontario-Atlantic Canada Inc. v. Ontario (Registrar of Real Estate & Business Brokers)* (1986), 57 O.R. (2d) 354, 43 R.P.R. 287, 33 D.L.R. (4th) 125 (H.C.), aff'd (1988), 66 O.R. (2d) 255, 55 D.L.R. (4th) 320 (C.A.), has held that Ontario brokers can, in fact, engage salespersons as independent contractors and not just as employees in the traditional sense. Sections 19-36 deal broadly with the regulation of trading by brokers. For example, s. 19(1) requires the broker to keep a detailed "trade record sheet" and proper books and accounts with respect to each trade. Under ss. 19-20, the broker is called upon to maintain a trust account in a bank or other defined financial institution into which all trust funds, including deposit moneys on real estate transactions, must go. Section 20(1) says that the broker shall "disburse such moneys only in accordance with the terms of the trust."

16 These statutory provisions, then, give express recognition to the established practice in Ontario that the broker receives the deposit under the agreement of purchase and sale in trust, that such money must be kept separate and apart from the broker's other funds in a designated trust account, and, finally, that such impressed funds may only be disbursed according to the trust.

17 The only method of finding out how the trust is to be executed upon is by going back to the listing agreement entered into between the broker and the vendor of the given property. While I do not have the specific listings or sale agreements for the properties which generated the commissions in issue, I took it from counsel's arguments that such listings and sale agreements were of the usual standard-form variety. Thus, the listings would have provided that the broker received either an exclusive or multiple listing in return for a specified commission, calculated as a percentage of the sale price. And the commission would be payable on the date of completion, with a proviso permitting the broker to deduct his commission from the deposit after closing or to apply such deposit, as the case might be, to his commission entitlement. The responding affidavit of Brian McLay, a vice-president of the trustee, in fact, discloses that, as the sale transactions in issue were closed out after the bankruptcy, the deposits were routinely transferred from the trust account of N.R.S. to the general operating account in accordance with the usual practice.

18 Serious contest could, of course, arise over the ownership or payment out of these deposit trust funds in a given case, where, for example, the transaction did not close, either by reason of failure of conditions, devious secret arrangements between vendor and purchaser, and so on. In these situations, resort would have to be had to the sale agreement and the related listing agreement to identify who had a legal claim upon the deposit amongst the competing parties, namely, the vendor, purchaser, or broker.

The Ownership Issue

19 Mr. Highley points to the terms of the independent contractor agreement. This document must control the ownership issue as between the trustee and the claimants because it specifically deals with what is to happen to the deposit and commission in the event of a completed sale. He argues that article IV shows the contracting parties — N.R.S. and the salesperson — agree that the deposit is held in trust; that is what article 4.02 says explicitly.

20 Then, he submits that article V goes on to make the broker a mere stakeholder, clearing house, or collection agent for these claimants because it is couched in language which directs N.R.S., when the transaction is successfully closed out, to pay out the commission to the entitled brokers or agents, subject only to its right to deduct or withhold its own "variable fee" entitlement under article 6.03. Mr. Highley concedes that, without this special contract with N.R.S., neither claimant could be classed as anything but an ordinary creditor so far as commission entitlement was concerned. However, here, N.R.S. has changed the ground rules under which it receives the deposit or other commission funds, and these ground rules involve a clear-cut contract which provides a precise code for how, and to whom, the trust funds are to be disbursed after the given sales trans action has been completed.

21 I am persuaded that the claimants' position must prevail in light of the unique provisions of the independent contractor agreement in existence in their favour.

22 Without this agreement, and its special features, the position would be as set out in the well-known judgment of Smily J. in *Re Ridout Real Estate Ltd.* (1957), 36 C.B.R. 111 (Ont. S.C.). There, at pp. 116-117, Smily J. laid down the principles or rules which have stood the test of time with respect to (a) the status of deposits in the hands of a bankrupt broker and (b) claims by the salesperson against such bankrupt broker for commission entitlement:

> Having regard to the provisions of *The Real Estate and Business Brokers Act* above referred to, including the form of the sales record sheet prescribed by the Superintendent under subs. 1 of s. 34 (and I think it should be presumed that moneys deposited by the bankrupt in the trust account were intended to be so deposited in compliance with the said statutory provisions), I am of the opinion that the money received by the bankrupt as a deposit from prospective purchasers of real estate (subject to what I shall say later with respect to listing cooperative brokers) are trust moneys and held in trust for the vendor or the purchaser, whichever one is eventually entitled to receive or be paid it, that is, either by its return to the purchaser in the event the purchaser's purchase is not completed or becomes null and void in accordance with the terms of the agreement of purchase and sale, or by payment over to the vendor, less, of course, in the latter case the commission earned by the bankrupt which, under the terms of the said agreement, it is entitled to deduct from the deposit. This would seem to be in accordance with the interpretation placed by the Court of Appeal on these statutory provisions in the case of *Isbister v. Riordan*, [1957] O.W.N. 436. While under the terms of the agreement of purchase and sale the agent may be entitled to his commission upon the acceptance of the offer to purchase, that is, upon the completion of the agreement itself, I think the said statutory provisions contemplate that the deposit of the purchaser shall remain in the trust account of the agent until the transaction has been completed. In any case, so long as the money is in the trust account of the agent it is trust money for the purchaser or vendor, whichever becomes entitled, and this would be the case even if the agent had the right to take his commission out of it as against the vendor. To hold otherwise would, in my opinion, defeat the purpose of the said statutory provisions. It may be noted that among the terms of the purchase and sale agreement used by the bankrupt it provides for repayment of the deposit to the purchaser under certain circumstances. Apart from the statute, there is of course a fiduciary relationship between the bankrupt and the vendor, so that, subject to the right of the purchaser to the return of the deposit, any part of the deposit above the commission would be held in trust for the vendor.
>
> As to the salesmen, any money to which the salesman became entitled was only a debt to him. The salesman was an employee and his interest in the commission was only as an employee and was in the nature of remuneration for his services to the bankrupt, the amount of which remuneration was fixed on a percentage basis. It was a debt by the bankrupt to its employee. The remuneration being on a percentage basis did not alter its character as a debt. No trust was created. It would, of course, follow that there would be no difference whether the transaction

> was closed either before or after the bankruptcy. The salesman's service was rendered to the bankrupt and it would not make any difference when the salesman's remuneration became payable. If it became payable after the bankruptcy, the trustee in bankruptcy would stand in the same position as the bankrupt.

23 The question in this case is, of course, whether the independent contractor agreement makes a difference and takes the claimants' claim outside the rules laid down in the *Ridout* case.

24 It is, as I have said, my view that this agreement does make a dramatic legal difference.

25 I first note that Smily J. was dealing only with the claim of the traditional real estate salesman working as an "employee" within the employer-employee rubric. There was no evidence in*Ridout*, or any of the cases following it, that the broker had made any special contractual arrangement with the salesperson-employee either with respect to the deposit moneys or the employee's claim upon it after closing for commission services rendered. In these circumstances, it is hardly surprising that Smily J. concluded that the salesperson's claim was, in essence, for services rendered to the broker and was a "debt" owed by the bankrupt broker to the salesperson, nothing more and nothing less.

26 In the instant case, however, different considerations are brought into play, and those considerations arise because of actions by the broker. Here the broker has voluntarily elected to hire the two claimants, and presumably others, as independent-contractor salespersons and not as simple "master-servant" employees.

27 The independent contractor form here is a printed near adhesion-type of contract form and was, of course, prepared by the broker. As such, it must be construed against the broker in the event of ambiguity under the contra proferentem rule. It must be assumed, also, that, in choosing to use this type of contract form, the broker was acting in its own best economic interests.

28 In essence, an interpretation of this contract form must answer the question whether the salespersons, notwithstanding their characterization as independent contractors, still remained in a mere creditor-debtor relationship with N.R.S. or, alternatively, whether this contract somehow transmuted the relationship beyond a bare employee-employer level and, at the same time, changed the status or character of the deposit moneys, along with other commission payments, so that it could be said that the broker was no longer a full owner of such funds.

29 Clearly, the whole framework of the contract form reflects a serious and deliberate attempt to deal with the status of the salesperson in a fresh way and, at the same time, to effect some substantial changes with respect to the character of the deposit moneys.

30 Article 2.01 reflects the broker's broad attempt to freeze the character of the salesperson outside the typical employer-employee relationship:

> **2.01 Independent Contractors**
>
> The Salesperson is an independent contractor. This agreement does not create a joint venture, partnership, employer/employee relationship or any other relationship between the Salesperson and the Broker except that of two independent contracting parties.

31 While article 4 makes it clear that the salesperson's duty is to obtain listings "in the name of the Broker" and obliges the salesperson to turn over all deposits and other cash to the broker — traditional responsibilities for any kind of salesperson — articles V, VI, and VIII all contain provisions which, as it seems to me, are entirely inconsistent with the perpetuation of a creditor-debtor relationship and consistent with something new and different.

32 Article V starts off by saying that when the broker "receives" the commission because the property has been sold, it "shall divide" this commission between brokers or salespersons in accordance with the custom of the trade at the applicable time. In context, this rather loose language can only mean something along the following lines:

> (1) Under Article IV, combined with ss. 19-20 of the Act, the broker has received the deposit moneys in trust for the vendor and purchaser as their interests may unfold: see *Ridout*, supra, at pp. 116-117.
>
> (2) If the transaction closes successfully and properly, the broker then "receives" the trust deposit moneys as on account of real estate commission but, under article V, does not become a vested owner of such commission; rather, article V *directs* the broker to "divide" or pay such commission funds amongst other brokers or its independent contractor salesperson as their interests appear.
>
> (3) It is only *after* the broker has complied with the division direction of article V that the broker itself has any authority to receive on its own account the 35 per cent "variable fee" called for under article 6.03:
>
> ... the Salesperson shall also pay a fee (the 'Variable Fee') to the Broker each and every time the Salesperson earns commission forthwith upon receipt by the Salesperson of his or her commission from the Broker. In each financial year (which, for the purposes of this section, means a period of one year commencing on September 1 of each year) the Variable Fee payable by the Salesperson shall be thirty-five — per cent (35%) of the Base Commissions of the Salesperson until the Salesperson has received Base Commissions aggregating to $60,000.00 in that financial year.

In other words, the earned commission *never*, under these unusual provisions of the independent contractor agreement, becomes the property of N.R.S. *per se*. It is already in the hands of N.R.S. in trust for the vendor and purchaser up to the time of closing. Thereafter, the trust changes and N.R.S.

becomes a stakeholder or agent holding the trust funds for interested listing or selling brokers and the independent contractor salesperson. Under article V, N.R.S. is obliged to pay out the now commission moneys direct to other entitled brokers or salespersons who participated in the sale and then pay the denied net "base commission" to the independent contractor salesperson, less a "variable fee" of 35 per cent which, under articles 6.03 and 8.01, it is entitled to withhold for itself. Note that the 35 per cent of the base commission which N.R.S. may withhold for itself is described as a "fee" and not a commission entitlement, and comes out of the base commission to which its own independent contractor salesperson becomes entitled under article V.

33 Mr. Van Klink, for the trustee, in his attempt to keep this case within the line of cases exemplified by *Ridout*, has pointed to the language of article VIII, entitled "Financial Arrangements", which, he submits, tends to show that the parties intended to continue the traditional creditor-debtor relationship so far as commission entitlement was concerned. It is accurate to say that such words or phrases as "indebtedness" and "due and payable" are contained in article VIII, but a careful reading of article VIII merely reinforces the view I have taken of articles V and VI. Article 8.01 is the specific provision in the contract which authorizes N.R.S. to deduct its variable fee entitlement from the base commission to which the independent-contractor salesperson is entitled under article V. Somewhat ironically, article V makes the salesperson a debtor of N.R.S. to the amount of the defined variable fee and, without article 8.01, N.S.R. would have no specific right to deduct it from the base commission. In this context, article 8.01 can hardly be said to make a creditor of the salesperson vis-à-vis N.R.S.

34 Article 8.01, it seems to me, is more in the nature of a direction or authorization to deduct rather than anything else. Article 8.02 is instructive here. This provision makes it clear that the commission is only payable by N.R.S. to the salesperson if the deposit or other moneys is already in hand to pay it. It also contains a clause which says that the collection of commissions is as much an obligation of the salesperson as of the broker. Such language can only be consistent with an attempt to make it clear that N.R.S. was a mere *conduit* for the transfer of commission moneys and not a true owner of them.

35 Article 8.04 is also consistent with this approach:

> **8.04 Withholding**
>
> The Broker may withhold from all amounts in its possession that would otherwise be payable to the Salesperson, an amount sufficient to fully pay its reasonable estimate of any amount described in section 2.03 of this agreement which the Broker may incur.

One may note that article 8.04 permits the broker to withhold from "amounts in its possession" a reasonably estimated sum to cover possible indemnity claims under article 2.03. The use of the phrase "amounts in its possession" is hardly consistent with ownership on the part of the broker.

36 At the root of this case and, indeed, the *Ridout* line of cases is the issue of whether the claim of the salesperson was a debt owing, in the sense of a money claim for services rendered. In *Ridout*, Smily J. had no difficulty in finding that the salespersons in that case were ordinary creditors because a bare employer-employee relationship was shown and there was nothing to indicate that the parties made any special arrangements as to how deposit moneys were to be dealt with after the sales transaction was closed. In this case, the bare and simple employer-employee relationship has been replaced by an independent contractor relationship and the parties have elected, as they have a right to do, to provide an entirely different regime for the further retention and disposition of deposit moneys, and other commission payments, after the transaction has closed. I read the independent contractor form as creating a special financial arrangement under which the tables are turned somewhat, with the broker becoming a mere conduit for the transfer of deposit moneys after closing, in accordance with a defined formula set out centrally in article V of the contract form. It is true that the formula also calls for a permitted deduction of 35 per cent for the broker's own variable fee, but at no time, under this contract, does N.R.S. become the owner of the totality of the funds and it is not unfair to say that N.R.S., at best, became *a creditor*, not a debtor, of the salespersons, under the contract formula.

37 Mr. Van Klink also argued that, regardless of the potential merits of the claimants' first point, they must lose because they have waived their rights, or are estopped, because they participated in the bankruptcy proceedings and have received and accepted interim dividends.

38 The materials before me show that the claimant Sharby filed a proof of loss on August 16, 1990, but that the other claimant, Ferreira, did not. Later, on or about September 27, 1990, the trustee sent out $475 interim dividend cheques to each of the claimants and these were cashed.

39 The two cases relied upon by Mr. Van Klink for this position are *Pelyea v. Canada Packers Employees' Credit Union Ltd.* (1969), [1970] 2 O.R. 384, 13 C.B.R. (N.S.) 284, 11 D.L.R. (3d) 35 (C.A.); and *Re Robitaille* (sub nom. *Holy Rosary Parish (Thorold) Credit Union Ltd. v. Premier Trust Co.*), [1965] S.C.R. 503, *(*sub nom. *Re Robitaille)* 7 C.B.R. (N.S.) 169, *(*sub nom. *Holy Parish (Thorold) Credit Union Ltd. v. Premier Trust Co.))* 51 D.L.R. (2d) 591. On careful examination, both of these cases involved "secured creditors" and not third parties who were asserting ownership or trust claims. In *Robitaille*, Spence J. made an obiter statement, about an earlier English decision, which had suggested that a party, by proving in the bankruptcy for the full amount of its secured claim, might, by that election, have lost its right to enforce its security. In the later case of *Pelyea*, the Court of Appeal said this, at [C.B.R. p. 290]:

> Under our Act there is no corresponding provision to that contained in the latter part of para. 10 of Sched. 1 of the English Act, but having regard to the provisions of the Act in respect of secured creditors, if in the unlikely event that a secured creditor failed to disclose a security held by him, voted in respect of his whole claim and received a dividend in respect of his

> whole claim, equitable principles would require that the creditor turn the security, as an asset of the debtor, over to the trustee for the benefit of all the creditors and the secured creditor would be estopped by his conduct from disputing a clam by the trustee to the security.

40 On the facts before me, I cannot conclude that the acts of either claimant constituted an unequivocal waiver of rights or raised an estoppel. Both claimants asserted their ownership and trust claims to the trustee in a matter of a few weeks after the assignment in bankruptcy, and the trustee was under no misapprehension as to their position throughout. The trustee disallowed their claims under s. 81 on September 7, 1990, and shortly thereafter, on September 20, the claimants brought these proceedings, seeking a vindication of their positions. In these circumstances, no estoppel or waiver can arise against them.

The Unjust Enrichment Argument

41 Under this second branch of his argument, Mr. Highley points to the fact that, under the independent contractor agreements, N.R.S. bargained for a limited entitlement of 35 per cent by way of its "variable fee" arrangement with the salespersons. It would be a patently unjust enrichment, he says, to allow the trustee to retain the entire commissions, and equity must intervene to require the trustee to disgorge 65 per cent out to the salespersons.

42 This alternative argument implicates s. 67(*a*) of the*Bankruptcy Act* and the principle of unjust enrichment as explicated in such cases as *Becker v. Pettkus*, [1980] 2 S.C.R. 834, 8 E.T.R. 143, 19 R.F.L. (2d) 165, 117 D.L.R. (3d) 257, 34 N.R. 384; and *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38, 23 E.T.R. 143, 2 R.F.L. (3d) 225, [1986] 5 W.W.R. 289, 46 Alta. L.R. (2d) 97, 29 D.L.R. (4th) 1, 69 N.R. 81, 74 A.R. 67, [1986] R.D.I. 448, [1986] R.D.F. 501. Section 67(*a*) reads as follows:

> 67. The property of a bankrupt divisible among his creditors shall not comprise
>
> (*a*) property held by the bankrupt in trust for any other person.

43 The Supreme Court has recently considered the meaning of s. 67(*a*) in*British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, 34 E.T.R. 1, 75 C.B.R. (N.S.) 1, [1989] 5 W.W.R. 577, 38 B.C.L.R. (2d) 145, 59 D.L.R. (4th) 726, 97 N.R. 61, 2 T.C.T. 4263, [1989] 1 T.S.T. 2164. In that case, the Court held s. 67(*a*) embraced the concept of trust as developed in the common law sense. As McLachlin J. said at p. 31 [S.C.R.]:

> The intention of Parliament in enacting s. 47(*a*) [now s. 67(*a*)], then, was to permit removal of property which can be specifically identified as not belonging to the bankrupt under general principles of trust law from the distribution scheme established by the *Bankruptcy Act*.

It is beyond controversy, of course, that the principle of unjust enrichment and its remedial mechanism, the constructive trust, are both creatures of the general law of trusts. As was said by Dickson C.J.C. in *Becker v. Pettkus*, supra, at pp. 847-848 [S.C.R.]:

> The principle of unjust enrichment lies at the heart of the constructive trust. 'Unjust enrichment' has played a role in Anglo-American legal writing for centuries. Lord Mansfield, in the case of *Moses v. Macferlan* (1760), 2 Burr. 1005, put the matter in these words: '... the gist of this kind of action is, that the defendant, upon the circumstances of the case, is *obliged by the ties of natural justice and equity to refund* the money'. It would be undesirable, and indeed impossible, to attempt to define all the circumstances in which an unjust enrichment might arise. (See A.W. Scott, 'Constructive Trusts' (1955), 71 L.Q.R. 39; Leonard Pollock, 'Matrimonial Property and Trusts: The Situation from Murdoch to Rathwell', (1978), 16 Alberta Law Review 357). The great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice.

[Emphasis added by Dickson J., as he then was.]

44 In the later case of *Sorochan*, supra, the former Chief Justice said, at p. 44 [S.C.R.], that there were three basic requirements for the establishment of an unjust enrichment, namely, (a) an enrichment, (b) a corresponding deprivation, and (c) the absence of any juristic reason for the enrichment. Here, clearly, there was an enrichment because N.R.S. bargained for a limited fee equal to 35 per cent of the base commission and now wishes to take all. The salespersons have been deprived because, in the bankruptcy, they would get virtually nothing if they are pushed into the category of unsecured creditors. Finally, there is no legitimate juristic reason for the enrichment: the very contract under which the moneys in question have been taken states that N.R.S. is only to have 35 per cent and not 100 per cent.

45 Should a constructive trust be imposed in this case to remedy the obvious unjust enrichment? In *Sorochan*, Dickson C.J.C. was at pains to consider two factors which should be considered — the causal connection factor and the reasonable expectations' factor.

46 Here there was an obvious link between the claimants' depriva tion and the actual acquisition of the property. To adopt the language of Dickson C.J.C. at p. 48 [S.C.R.], the claimants' contributions were "sufficiently substantial and direct" to entitle the claimants to an interest in the property in question.

47 As to the reasonable expectations' factor, the following is said by the Chief Justice, at pp. 52-53 [S.C.R.]:

> In addition to the causal connection requirement, it is often suggested that the reasonable expectation of the claimant in obtaining an actual interest in the property as opposed to monetary relief, constitutes another important consideration in determining if the constructive trust remedy is appropriate: see, for example, *Wilson v. Munro* (1983), 32 R.F.L. (2d) 235 (B.C. S.C.), McClean, supra, at p. 171. A reasonable expectation of benefit is part and

> parcel of the third pre-condition of unjust enrichment (the absence of a juristic reason for the enrichment). At this point, however, in assessing whether a constructive trust remedy is appropriate, we must direct our minds to the specific question of whether the claimant reasonably expected to receive an actual interest in property and whether the respondent was or reasonably ought to have been cognizant of that expectation.

48 In the framework of the instant case, the claimants did have a reasonable expectation that they would obtain an interest in the moneys in question, and it cannot be doubted that N.R.S. was aware of this expectation. The trustee is, of course, bound by this awareness because, legally, it stands in the shoes of the bankrupt.

49 If I am wrong in adopting the first position of the claimants, I conclude that their second position should prevail.

50 In the result, I conclude that the appeal must be allowed. Orders will go as follows:

> (1) An order will go declaring that the sum of $20,365, now held by the trustee in respect of sales transactions involving the claimants, is not the bankrupt's property.
>
> (2) A further order will go directing that the trustee pay to the claimants the sum of $13,237.25, representing 65 per cent of the said $20,365, with the 35 per cent balance, totalling $7,127.75, to remain in the trustee's hands, representing the variable fee entitlement of the bankrupt.

51 During argument, counsel for the claimants argued that the trustee, in its alleged capacity as receiver-manager, had improperly diverted commission funds on some of the sales to the Royal Bank after the bankruptcy occurred.

52 I do not feel I should deal with that issue in the absence of clearer evidence and, more especially, in the absence of representations from the Royal Bank as an interested party. That issue, then, will either have to be decided in separate proceedings or by compromise.

53 The claimants will have their costs of this proceeding after assessment but subject to an earlier order on costs which, I understand, was made in favour of the trustee.

Appeal allowed.

End of Document

Tab 13

1989 CarswellBC 351
Supreme Court of Canada

British Columbia v. Henfrey Samson Belair Ltd.

1989 CarswellBC 351, 1989 CarswellBC 711, [1989] 1 T.S.T. 2164, [1989] 2 S.C.R. 24, [1989] 5 W.W.R. 577, [1989] B.C.W.L.D. 2137, [1989] C.L.D. 1119, [1989] S.C.J. No. 78, 2 T.C.T. 4263, 34 E.T.R. 1, 38 B.C.L.R. (2d) 145, 59 D.L.R. (4th) 726, 75 C.B.R. (N.S.) 1, 97 N.R. 61, J.E. 89-1098, EYB 1989-66987

R. IN RIGHT OF BRITISH COLUMBIA v. HENFREY SAMSON BELAIR LTD. et al.

Lamer, Wilson, La Forest, L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ.

Heard: April 21, 1989
Judgment: July 13, 1989
Docket: No. 20515

Counsel: *W.A. Pearce* and *J.G. Pottinger*, for appellant.
W.G. Baker, Q.C., and *G.E. Parson*, for respondent.
J.M. Mabbutt, Q.C., for intervener Attorney General of Canada.
J.E. Minor and *T. Macklem*, for intervener Attorney General for Ontario.
Y. de Montigny and *M. Aubé*, for intervener Attorney General of Quebec.
R.M. Endres, for intervener Attorney General of Nova Scotia.
R. Burns, for intervener Attorney General for New Brunswick.
W.G. McFetridge and *D.D. Blevins*, for intervener Attorney General of Manitoba.
R.C. Maybank, for intervener Attorney General for Alberta.
W.G. Burke-Robertson, Q.C., for intervener Attorney General of Newfoundland.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts; Provincial Tax

Headnote

Taxation --- Provincial and territorial taxes — General taxation principles — Priority of tax claims in bankruptcy proceedings

Bankruptcy --- Priorities of claims — Claims of Crown — Provincial — General

Secured creditors — Priorities — Debentures — Statutory trust for provincial sales tax — Bankrupt commingling sales tax collected with own assets — Receiver applying all assets to debenture holder's indebtedness — Province claiming statutory trust under Social Service Tax Act having priority under Bankruptcy Act — Statutory trust not conforming to principles of general trust law after property converted — Province only having claim secured by statutory charge or lien — Claim falling within s. 107(1)(j) of Bankruptcy Act.

Property of bankrupt — Trust property — Definition of "trust" to be applied for purposes of exemption under Bankruptcy Act being within sole legislative competence of federal government. T. collected provincial sales tax in the course of its business operations as required by the British Columbia Social Service Tax Act. T. failed to remit the tax collected and mingled it with its other assets. A secured creditor placed T. into receivership pursuant to its debenture and T. subsequently made an assignment in bankruptcy. The receiver sold T.'s assets and applied the full proceeds to reducing the secured creditor's indebtedness. The province claimed s. 18 of the Act created a statutory trust over the assets of T. equal to the amount of the sales tax collected but not remitted and that it had priority over the secured creditor and all other creditors. The chambers judge held the Act did not create a trust and the province did not have priority. The Court of Appeal held the Act did create a statutory trust, but that the province did not have priority as the Bankruptcy Act did not confer priority on such a trust. The province appealed. At issue was whether the statutorily created trust was a trust within s. 47 of the Bankruptcy Act or merely a Crown claim under s. 107(1)(*j*) of the Bankruptcy Act.

Held:

Appeal dismissed.

Per MCLACHLIN J. (LAMER, WILSON, LA FOREST, L'HEUREUX-DUBÉ JJ. concurring): The words of s. 47(*a*) of the Bankruptcy Act in their ordinary sense evidence the intention to permit removal from the distribution scheme established by the Bankruptcy Act of property which can be specifically identified, under general principles of trust law, as not belonging to the bankrupt. Section 107(1)(*j*) deals with claims, such as tax claims, not established under general principles of law but secured by the Crown's personal preference through legislation. This interpretation of s. 47(*a*) and s. 107(1)(*j*) avoids any conflict between the sections and conforms to the principle that provinces cannot create priorities under the Bankruptcy Act by their own legislation. Practical policy considerations also support this interpretation of the Bankruptcy Act.

Section 18 of the Social Service Tax Act deems a statutory trust at the moment the tax is collected. At that moment the trust property is identifiable, the trust meets the requirements for a trust under general principles of law and the money is exempt from distribution to creditors under s. 47(*a*). However, the identifiability is soon lost as the tax money becomes mingled with other money and is converted to other property so that it is no longer traceable and there is no longer a trust under general principles of law. Although s. 18(1)(*b*) of the Social Service Tax Act deems all tax collected to be held separate from the collector's other money, assets or estate, in reality the statutory trust bears little resemblance to a true trust after conversion of the property. It is for this reason that s. 18(2) provides for the unpaid tax to form a lien and charge on the entire assets of the collector.

Whether the province's interest under s. 18 is a trust within the meaning of s. 47(*a*) or a claim of the Crown under s. 107(1)(*j*) depends on the facts of a particular case. Here, no specific property impressed with a trust could be identified; accordingly, the province's claim could not fall under s. 47(*a*). As the province had a claim secured only by a charge or lien, s. 107(1)(*j*) would apply.

Further, although provinces could define "trust" for matters within their own legislative competence, the definition of trust which is operative for purposes of exemption under the Bankruptcy Act, must be that of the federal Parliament.

Per CORY J. (dissenting): The sales tax money collected by a vendor never belongs to the vendor. The vendor is simply the conduit for payment of the sales tax to the province and, in every sense of the word, the vendor is a trustee of the money collected. The statutory requirements concerning the keeping of records and accounts by the vendor emphasize the trust nature of the arrangement between the vendor as tax collector and the province. While the provinces cannot create priorities under the Bankruptcy Act by their own legislation, the Bankruptcy Act does not prohibit a province from creating a deemed trust or lien. Section 18 does not create a priority, but protects those funds which at the moment they were paid were truly trust funds. It is also not certain that the validity of a trust must be determined exclusively on the basis of common law.

The statutory trust created by s. 18 is validly constituted as it conforms to the three certainties required of a trust in equity: that is, certainty of intention, certainty of subject matter and certainty of object. The statute establishes certainty of intention and object, and provides a clear formula for establishing the trust property. The traceability of the property is a separate issue and the statute provides for a deemed tracing remedy. This has the advantage over a privately constituted trust of recognizing the existence of the trust in property held by the trustee without requiring the beneficiary to undertake the often inordinately expensive action of tracing commingled funds. This advantage does not negate the trust or take it outside policies previously enunciated by the Supreme Court of Canada.

Since the sales tax collected never at any time became the property of the bankrupt, it fell within s. 47(*a*) and was not subject to distribution under s. 107(1). As there is no conflict between ss. 18, 47(*a*) and 107(1)(*j*), the doctrine of federal paramountcy of legislation does not apply and s. 18 prevails. The appeal should therefore be allowed.

Annotation

The question whether a "deemed" trust created by the provincial legislature is a trust within the meaning of s. 67 of the Bankruptcy Act, R.S.C. 1985, c. B-3, or is entitled to priority only under the provisions of s. 136 of the Bankruptcy Act has been a matter of controversy between several provincial appellate courts. For instance, the courts in Nova Scotia (*Dir. of Lab. Standards (N.S.) v. Trustee in Bankruptcy* (1981), 38 C.B.R. (N.S.) 253, 126 D.L.R. (3d) 417, 47 N.S.R. (2d) 446, 90 A.P.R. 446 (C.A.)) and the appellate courts in British Columbia (*R. v. C.I.B.C.* (1983), 50 C.B.R. (N.S.) 116; *A.G. Can. v. Samson Belair Ltd.*, 55 C.B.R. (N.S.) 114, [1985] 3 W.W.R. 651, 61 B.C.L.R. 24, 17 D.L.R. (4th) 544, leave to appeal to S.C.C. refused 55 C.B.R. (N.S.) xxvii, 62 B.C.L.R. xli, 17 D.L.R. (4th) 544n, 61 N.R. 78) held that provincial "deemed" trusts fell within the provisions of s. 136 of the Bankruptcy Act, while the courts in Ontario, culminating with the case of *Re Phoenix Paper Prod. Ltd.* (1983), 44 O.R. (2d) 225, 48 C.B.R. (N.S.) 113, 1 O.A.C. 215, 3 D.L.R. (4th) 617 (C.A.), held the opposite, namely, that a "deemed" statutory trust created by the province falls within s. 67 of the Bankruptcy Act and therefore has priority over other preferred

creditors such as the trustee. The judgment of the Supreme Court of Canada in the case of *R. v. Henfrey Samson Belair Ltd.* now settles this question in an authoritative manner.

The law is now quite clear: the provisions of s. 67 of the Bankruptcy Act should be confined to trusts arising under general principles of law (namely, that the res must be identifiable or traceable) while s. 136 applies to claims not established by general law but secured "by Her Majesty's personal preference" through legislation. As the court stated, this conclusion is supported by the wording of ss. 67 and 136 of the Bankruptcy Act, by the jurisprudence of the Supreme Court of Canada, and by policy considerations.

However, the court made it clear that at some stage the "deemed" trust may still meet the requirements for a trust under the principles of trust law because, at some point, the trust property may still be identifiable or traceable. But once the trust property is mingled with other funds and converted to other property, it can no longer be traced and at this point there is no longer a trust under general principles of law. In the latter case, s. 67 of the Bankruptcy Act no longer applies.

It is interesting that the court considered practical policy considerations when it stated at p. 19 as follows:

"The difficulties of extending [s. 67] to cases where no specific property impressed with a trust can be identified are formidable and defy fairness and common sense. For example, if the claim for taxes equalled or exceeded the funds in the hands of the trustee in bankruptcy, the trustee would not recover the costs incurred to realize the funds. Indeed, the trustee might be in breach of the Act by expending funds to realize the bankrupt's assets. Other difficulties would arise in the case of more than one claimant to the trust property. The spectre is raised of a person who has a valid trust claim under the general principles of trust law to a specific piece of property, finding himself in competition with the Crown claiming a statutory trust in that and all the other property. Could the Crown's general claim pre-empt the property interest of the claimant under trust law? Or would the claimant under trust law prevail? To admit of such a possibility would be to run counter to the clear intention of Parliament in enacting the Bankruptcy Act of setting up a clear and orderly scheme for the distribution of the bankrupt's assets".

C.H. Morawetz, Q.C.

Appeal from judgment of B.C.C.A., 65 C.B.R. (N.S.) 24, [1987] 4 W.W.R. 673, 13 B.C.L.R. (2d) 346, 40 D.L.R. (4th) 78, dismissing appeal from judgment of Meredith J., 61 C.B.R. (N.S.) 59, 5 B.C.L.R. (2d) 212, denying province's claimed priority over secured creditor in bankruptcy proceedings.

***Cory J.* (dissenting):**

1 I have read with great interest the compelling reasons of my colleague Justice McLachlin. Unfortunately I cannot agree that s. 47(*a*) [now s. 67(*a*)] of the Bankruptcy Act, R.S.C. 1970, c. B-3 [now R.S.C. 1985, c. B-3], does not apply in this case [appeal from 65 C.B.R. (N.S.) 24, [1987] 4 W.W.R. 673, 13 B.C.L.R. (2d) 346, 40 D.L.R. (4th) 728]. If s. 18 of the British Columbia Social Service Tax Act, R.S.B.C. 1979, c. 388, creates a valid trust, then s. 47(*a*) of the Bankruptcy Act must apply. In order to determine the effect of s. 18 it may be helpful to consider the Social Service Tax Act as a whole.

Scheme of the British Columbia Social Service Tax Act

2 Registration under this Act is a condition precedent to carrying on a retail sales business in the province of British Columbia. Subject to certain irrelevant and minor exceptions, the Act provides that no one may sell "tangible personal property" in the province at a retail sale without being registered with the "commissioner", the provincial official appointed to administer the Act. It is sufficient to note that the term "tangible personal property" is given a very broad definition. With the approval of the minister, the commissioner may cancel or suspend the certificate of anyone found guilty of an offence under the Act, thus terminating the retail business. This is the ultimate form of control that the province exercises over those who collect the taxes assessed under the Act. In addition, the regulations passed pursuant to the Act provide for close scrutiny of the use of the registration certificates issued to vendors.

3 Pursuant to s. 5 of the Act, retail vendors are deemed to be agents of the minister for the purposes of levying and collecting sales tax. Section 6 provides that these agents are deemed to be tax collectors for the purposes of the Revenue Act, R.S.B.C. 1979, c. 367, and are made subject to the provisions of ss. 22 to 28 of that Act. Sections 22 to 28 prescribe the penalties for tax collectors who fail to render their accounts as required by the statute. Pursuant to s. 27, where a collector has received money belonging to the Crown in the right of the province and has failed to pay it to the province, the defaulting collector's property may be seized. As a quid pro quo s. 8 of the Social Service Tax Act provides that vendors are to receive remuneration for the service they provide to the government by collecting the tax.

4 Under ss. 9 and 10 of the Act every vendor is required to make returns and keep tax records in the form prescribed by the regulations and must keep a record of all purchases and sales. Division 5 of the Social Service Tax Act Regulations, B.C. Reg. 84/58, makes detailed provision for these returns and records. The regulations make clear that there is to be continuous supervision of sales tax collection. Separate monthly returns must be made for each place of business and the returns must be made no later than 15 days after the last day of each monthly period. The regulations provide in detail for the means of calculating upon each return the commission for each vendor on the collection of sales tax.

5 The requirements concerning the keeping of records and accounts emphasize the trust nature of the arrangement. They provide that books of accounts must contain distinct records of all (1) sales, (2) purchases, (3) non-taxable sales, (4) taxable sales, (5) amounts of tax collected, and (6) disposal of tax including commission taken. The records further stress that "all entries concerning the tax and such books of account, records and documents shall be kept *separate and distinguishable* from other entries made therein" (emphasis added). As well the tax must be shown as a separate item on all receipts given to purchases. Section 27 of the Act provides wide powers for the inspection of these records.

6 It is against this background that s. 18 of the Social Service Tax Act must be considered. That section provides:

> 18. (1) Where a person collects an amount of tax under this Act
>
> (*a*) he shall be deemed to hold it in trust for Her Majesty in right of the Province for the payment over of that amount to Her Majesty in the manner and at the time required under this Act and regulations, and
>
> (*b*) the tax collected shall be deemed to be held separate from and form no part of the person's money, assets or estate, whether or not the amount of the tax has in fact been kept separate and apart from either the person's own money or the assets of the estate of the person who collected the amount of the tax under this Act.
>
> (2) The amount of taxes that, under this Act,
>
> (*a*) is collected and held in trust in accordance with subsection (1); or
>
> (*b*) is required to be collected and remitted by a vendor or lessor
>
> forms a lien and charge on the entire assets of
>
> (*c*) the estate of the trustee under paragraph (*a*);
>
> (*d*) the person required to collect or remit the tax under paragraph (*b*); or
>
> (*e*) the estate of the person required to collect or remit the tax under paragraph (*d*).

7 It can be seen that the moneys collected by a vendor such as Tops Pontiac Buick Ltd. ("Tops") as the tax collector of the sales tax never belongs to the vendor. The sales tax is payable by the purchaser who owes that sum to the province. The vendor never has any interest in those funds and is in every sense of the word a trustee of the funds collected for the sales tax. The vendor is simply the conduit for payment of the sales tax to the province. The province has not relied upon a requirement that separate bank accounts be kept by a vendor to protect its trust property. Rather, it has put into place a system of registration of all retail sales business and provided for a regulated

means of record keeping and inspection. The system permits the government to specify precisely what money is due to it and to ascertain what is happening to its money on a monthly basis.

8 If the tax is not paid to the province then a vendor such as Tops must have stolen the funds, converted them to its own use or most charitably lost the funds for which it was responsible and for which it was accountable to the province.

9 From the point of view of fairness, there would seem to be no objection to the provincial government creating a lien or charge on the assets of the vendor for the amount of the sales tax (the trust funds) which the vendor was responsible for collecting and remitting to the province.

Does s. 18 create a valid trust?

10 The question may be phrased more precisely by asking: If, as the chambers judge found [61 C.B.R. (N.S.) 59 at 60, 5 B.C.L.R. (2d) 212], sales tax money "was misappropriated by Tops and mingled with its assets", does that put an end to the trust? It is said that the trust, although validly existing at the moment the funds were paid by the purchaser, ceases to exist or have any validity once the funds were mingled so that they could not be traced readily. To begin with, and somewhat simplistically, there is no prohibition in the Bankruptcy Act against the province creating a deemed trust or lien against the retail vendor's property for the extent of the sales tax, nor is there a conflict between s. 18 of the Social Service Tax Act and s. 47(*a*) and s. 107 [now s. 136] of the Bankruptcy Act. This is not a statutory ruse to evade the provisions of the Bankruptcy Act. It is simply an attempt to protect trust funds which are earmarked to be used for the public benefit and public use. Rather than insist that on each sale there be a separate payment to the province, the Act created a system which was in the best interest of retail purchases, retail vendors, the business community and the province as a whole. The Act does no more than protect funds which at the moment they were paid were truly trust funds. Nor am I sure that the validity of a trust must be determined exclusively on the basis of common law. It has been held by this court that the civil law of trust is not the same as that of common law: see *Royal Trust Co. v. Tucker*, [1982] 1 S.C.R. 250 at 261, 12 E.T.R. 257, 40 N.R. 361 [Que.].

11 There are a number of provincial statutory provisions which create trusts. This type of legislation is common to a wide range of statutes that may benefit employees, purchasers of insurance, payers of health and insurance and many others who lack the organization or bargaining power to establish a trust for themselves. See for example, Pension Benefits Act, S.O. 1987, c. 35, s. 58; Insurance Act, R.S.O. 1980, c. 218, s. 359; Health Insurance Act, R.S.O. 1980, c. 197, s. 18; Builders' Lien Act, R.S.A. 1980, c. B-12, s. 16.1; Construction Lien Act, S.O. 1983, c. 6, s. 7; Business Corporations Act, S.A. 1981, c. B-15, s. 191(1); Employment Standards Act, S.A. 1988, c. E-10.2, s. 113; Insurance Act, R.S.A. 1980, c. I-5, s. 124(1); Real Estate Agents' Licensing Act, R.S.A. 1980, c. R-5, s. 14; and Health Insurance Premiums Regulation, Alta. Reg. 217/81.

12 This court has held that a province may, to further and protect a principle of social policy, create a statutory trust. In *John M.M. Troup Ltd. v. Royal Bank*, [1962] S.C.R. 487 at 494, 3 C.B.R. (N.S.) 224, 34 D.L.R. (2d) 556 [Ont.], the trust provisions of the Mechanics' Lien Act, R.S.O. 1950, c. 227 (now the Construction Lien Act), were found to be validly enacted. The statutory trusts referred to above provide needed protection for their beneficiaries and forward salutary social objectives which the provinces have jurisdiction to pursue.

13 Section 23(4) of the Canada Pension Plan, R.S.C. 1985, c. C-8, creates a statutory trust using language almost identical to s. 18 of the Social Service Tax Act. In *Re Deslauriers Const. Prod. Ltd.*, [1970] 3 O.R. 599, *(*sub nom. *A.G. Can. v. Perlmutter)* 14 C.B.R. (N.S.) 197, 13 D.L.R. (3d) 551 (C.A.), Gale C.J.O., for a unanimous court, noted that the Act deemed pension plan moneys to be kept separate and apart from the estate of the employer "whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate", and commented at p. 601:

> ... [these words] were inserted in the Act specifically for the purpose of taking the moneys equivalent to the deductions out of the estate of the bankrupt by the creation of a trust and making those moneys the property of the Minister.

From this he drew the following conclusion at pp. 602-603:

> In the *Canada Pension Plan* the fund is deemed to be property which does not comprise part of the bankruptcy at all, so that the Crown under that act is not a creditor, but is deemed to hold property which is not the property of the bankrupt.

Gale C.J.O.'s judgment was cited with approval by Pigeon J. writing for the majority in this court in *Dauphin Plains Credit Union Ltd. v. Xyloid Indust. Ltd.*, [1980] 1 S.C.R. 1182 at 1198, [1980] 3 W.W.R. 513, 33 C.B.R. (N.S.) 107, [1980] C.T.C. 247, *(*sub nom. *Dauphin Plains Credit Union Ltd. v. R.)* 80 D.T.C. 6123, 108 D.L.R. (3d) 257, 3 Man. R. (2d) 283, 31 N.R. 301, who stated: "I find the reasoning in *Deslauriers* wholly persuasive."

14 The provisions of s. 18 then should prevail unless they are in conflict with the provisions of the Bankruptcy Act. Sections 47 and 107 of the Act provide:

> 47. The property of a bankrupt divisible among his creditors shall not comprise
>
> (*a*) property held by the bankrupt in trust for any other person.
>
> 107.(1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

(*j*) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, *pari passu* notwithstanding any statutory preference to the contrary.

15 The doctrine of federal paramountcy of legislation can only apply if there is actual conflict in the operation of the provincial and federal statutes. The principle was set forth in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 at 191, 18 B.L.R. 138, 138 D.L.R. (3d) 1, 44 N.R. 181 [Ont.], by Dickson J., as he then was, in these words:

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other.

16 In this case there is no conflict as the property which was subject to s. 18 of the Social Service Tax Act never at any time became the property of the bankrupt and is therefore not subject to distribution as the property of the bankrupt pursuant to s. 107 of the Bankruptcy Act. On a plain reading of s. 47 of the Bankruptcy Act there is no conflict created by the two statutes.

17 It is true that this court has in *Deloitte Haskins & Sells Ltd. v. W.C.B.*, [1985] 1 S.C.R. 785, 55 C.B.R. (N.S.) 241, [1985] 4 W.W.R. 481, 38 Alta. L.R. (2d) 169, 19 D.L.R. (4th) 577, 63 A.R. 321, 60 N.R. 81, recognized and emphasized that provinces cannot, by means of their own legislation, create priorities under the Bankruptcy Act. However, s. 18 has not created a priority. It did no more than give statutory recognition to a valid trust. It then eliminated the necessity of setting up a separate bank account for sales tax moneys and substituted a system of registration and record-keeping to control these funds which never at any time belonged to the vendor trustee. That latter step did not alter the existence of the valid trust of the funds collected from the purchases for payment to the province. I do not think that the decision in *Deloitte Haskins & Sells v. W.C.B.* can be taken to have altered the meaning of the words "property of the bankrupt" contained in s. 47 of the Bankruptcy Act.

18 This appears to be the opinion expressed by Anne E. Hardy, the author of Crown Priority in Insolvency (1986). She concedes that in the interest of consistency with *Deloitte Haskins & Sells v. W.C.B.*, the lien portion of the deemed trust section should probably be held to be ineffective on the bankruptcy of the trustee. Nonetheless at pp. 107-108 she sets out her position in this way:

> Thus, as a matter of interpretation, it is questionable to limit the scope of section 47(*a*) of the Bankruptcy Act to trusts which either exist in fact or do not benefit the Crown or a creditor whose claim is referred to in subsection 107(1) of the Act. Until the Act is amended to permit the courts to construe section 47 in this manner, they are probably not justified in taking this approach. The *Coopers & Lybrand* case therefore appears to be incorrectly decided. The

> judgments in most cases which have upheld statutory deemed trusts in bankruptcy and refused to rank the claims covered by them under subsection 107(1) of the Act are preferable.
>
> As argued above, trusts should generally be upheld on the bankruptcy of the trustee regardless of the manner in which they arise. It is possible, however, that certain types of deemed trust provisions should be held to be ineffective and that a valid trust would therefore not come into existence. Most of the trust cases decided since *Re Bourgault* have distinguished that case because it did not discuss trust provisions or the relationship between the trusts covered by section 47(*a*) and subsection 107(1) of the Bankruptcy Act. Some of these decisions dealt with trust provisions under which an amount deemed to be held in trust had been made a lien and charge on the assets of the trustee.

That view should, I think, prevail.

19 Furthermore, it seems that the trust although imposed by statute contains all the essential characteristics required of a trust. In order for a trust to be recognized in equity, there had to be three fundamental aspects complied with, that is to say, there had to be certainty of intention, certainty of subject matter and certainty of object. It is conceded that the statute establishes certainty of intention and of object. The respondent argues that there cannot be certainty of subject matter because the trust property cannot be identified and that, thus, trust in the traditional sense has not come into existence. However, here the subject matter was clearly identified at the moment of the sales by the vendor (Tops). The only issue that remained was whether or not the trust property could be identified so that such a trust could succeed in a tracing action. This subject matter was addressed by Professor Waters in the Law of Trusts in Canada, 2nd ed. (1984), at pp. 119-22.

> When the courts say that there must be certainty of subject-matter, they mean that the property must either be described in the trust instrument, or there must be "a formula or method given for identifying it" ...
>
> In determining certainty, what the courts are looking for is the certainty of concept rather than whether it is too difficult to ascertain the subject-matter.

He distinguishes this question from the tracing issue:

> Initial ascertainability does not exist, so far as case law is concerned, unless specific property is earmarked as *the* trust property. Once this has occurred, and the trust has come into effect, the trust beneficiary can trace that property, whether it is converted into other forms, or, if money, it is mixed with other funds. [emphasis in original]

20 There can be no doubt that the statute provides a clear formula for establishing the trust property, that is to say, the sales tax, and therefore certainty of subject matter does indeed exist. The three certainties of intention, object and subject matter are thus established by statute. It could

not be said that funds which were collected by Tops for sales tax became the property of Tops on the ground that the certainties required of a trust by equity do not exist as the statute has validly created them.

21 Neither could it be said that the statutory trust funds (the sales tax collected) became the property of the bankrupt Tops by reason of the fact that Tops improperly mingled those funds with its own property. In equity, funds mingled in this way remained impressed with their trust obligations. This left the beneficiary with two possible recourses against the trustee for its wrongful conduct. The beneficiary might either seek to recover the trust property by itself through the remedy of tracing or might choose instead to seek compensation for the loss by means of an action against the trustee.

22 Although there is some dispute as to whether at common law funds can be "followed" once they have been mixed with the defendant's own funds, in equity those moneys can be traced "either as a separate fund or as part of a mixed fund or as latent in property acquired by means of such a fund": *Re Diplock's Estate; Diplock v. Wintle*, [1948] Ch. 465 at 521, [1948] 2 All E.R. 318 at 347, per Lord Green M.R.; affirmed *(*sub nom. *Min. of Health v. Simpson)* [1951] A.C. 251, [1950] 2 All E.R. 1137 (H.L.). The limits to a tracing action are largely fixed by the difficulties and ultimately the prohibitive excuse of providing the necessary accounts: see D.W.M. Waters at p. 1037 ff. There is no reason why a statutorily constituted trust cannot provide an advantage over a privately constituted trust by recognizing the existence of the trust in property held by the trustee without requiring the beneficiary to undertake the often inordinately expensive action of tracing commingled funds. This advantage should not deprive the statutory trust property of its trust character or take it outside the policies articulated in *Dep. Min. of Revenue (Que.) v. Rainville*, [1980] 1 S.C.R. 35, *(*sub nom. *Re Bourgault; Dep. Min. of Revenue of Que. v. Rainville)* 33 C.B.R. (N.S.) 301, 105 D.L.R. (3d) 270, *(*sub nom. *Bourgault's Estate v. Dep. Min. of Revenue of Que.)* 30 N.R. 24; *Deloitte Haskins & Sells v. W.C.B.*, supra; and *F.B.D.B. v. Que. (Comm. de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061, 68 C.B.R. (N.S.) 209, 50 D.L.R. (4th) 577, 14 Q.A.C. 140, 84 N.R. 308. It would thus seem that the statutory trust complies with the requirements of a valid trust that would be recognized in equity.

23 If as stated in *Dep. Min. of Revenue (Que.) v. Rainville* mechanics' liens or construction liens may be recognized, although it would be impossible to trace the funds of the subcontractors in the commingled accounts of the general contractor, so too should the statutory trust pertaining to sales tax be recognized.

24 Nor will such a conclusion create practical problems. If the proposed trustee in bankruptcy is faced with the question as to whether or not the assets are subject to a trust, an application may be made to the court to determine that issue at the outset of the proceedings. Further, if there is a dispute between those claiming a trust interest it can be determined on the basis of priority predicated upon the date on which the trust arose.

Disposition

25 I conclude therefore that the trust described in s. 18 of the British Columbia Social Service Tax Act is not in any sense a claim against the property of the bankrupt so as to conflict with the policy underlying s. 107(1) of the Bankruptcy Act as that policy has been expounded in *Dep. Min. v. Rainville, Deloitte Haskins & Sells v. W.C.B.*, and *F.B.D.B. v. Que. (Comm. de la santé et de la sécuritié du travail)*, for the following reasons:

(a) The sums constituting the trust were never the property of the bankrupt, but were transferred from purchases of vehicles to the provincial Crown, for whom Tops acted as trustee, in satisfaction of an obligation incurred by those purchases;

(b) The trust was validly constituted in that it complied with the three certainties required of trusts by the law of equity: s. 18 of the Social Service Tax Act does not dispense with those certainties, but conforms to them, in the same way that a contractual trust instrument must;

(c) The only relevant distinction between this statutory trust and a contractual express trust lies in the deemed tracing remedy provided by the statute. The existence of this remedy:

(i) does not negate the trusts;

(ii) is largely facilitative and thus does not take the trust out of the policy enunciated in *Re Bourgault, Deloitte Haskins & Sells* and *F.B.D.B.*;

(d) The trust therefore properly falls within s. 47(*a*) of the Bankruptcy Act and outside the property of the bankrupt, as that term is to be understood in light of the policy underlying s. 107(1) of the Act.

26 I would therefore answer the constitutional question as follows:

Are the provisions of s. 18(1) of the *Social Service Tax Act*, R.S.B.C. 1979, c. 388, as amended, inoperative by reason of being in conflict with s. 107(1)(*j*) of the *Bankruptcy Act*, R.S.C. 1970, c. B-3?

Answer: No.

27 I would allow the appeal, set aside the decision of the Court of Appeal and that of the chambers judge and direct that the special case be answered "the defendant was not correct in granting the Canadian Imperial Bank of Commerce priority over the statutory trust of the plaintiff."

***McLachlin J. (Lamer, Wilson, La Forest, L'Heureux-Dubé* and *Gonthier JJ.* concurring)::**

28 The issue on this appeal [from 65 C.B.R. (N.S.) 24, [1987] 4 W.W.R. 673, 13 B.C.L.R. (2d) 346, 40 D.L.R. (4th) 728] is whether the statutory trust created by s. 18 of the British Columbia Social Service Tax Act, R.S.B.C. 1979, c. 388, gives the province priority over other creditors under the Bankruptcy Act, R.S.C. 1970, c. B-3 [now R.S.C. 1985, c. B-3].

29 Tops Pontiac Buick Ltd. ("Tops") collected sales tax for the provincial government in the course of its business operations, as it was required to do by the Social Service Tax Act. Tops mingled the tax collected with its other assets. When the Canadian Imperial Bank of Commerce placed Tops in receivership pursuant to its debenture and Tops made an assignment in bankruptcy, the receiver sold the assets of Tops and applied the full proceeds in reduction of the indebtedness of the bank.

30 The province contends that the Social Service Tax Act creates statutory trust over the assets of Tops equal to the amount of the sales tax collected but not remitted ($58,763.23), and that it has priority over the bank and all other creditors for this amount.

31 The chambers judge held that the Social Service Tax Act did not create a trust and that the province did not have priority. On appeal the receiver conceded that the legislation created a statutory trust, but contended that the chambers judge was correct in ruling that the province did not have priority because the Bankruptcy Act did not confer priority on such a trust. The British Columbia Court of Appeal accepted this submission. The province now appeals to this court.

32 The section of the Social Service Tax Act which the province contends gives it priority provides:

> 18. (1) Where a person collects an amount of tax under this Act
>
> (*a*) he shall be deemed to hold it in trust for Her Majesty in right of the Province for the payment over of that amount to Her Majesty in the manner and at the time required under this Act and regulations, and
>
> (*b*) the tax collected shall be deemed to be held separate from and form no part of the person's money, assets or estate, whether or not the amount of the tax has in fact been kept separate and apart from either the person's own money or the assets of the estate of the person who collected the amount of the tax under this Act.
>
> (2) The amount of taxes that, under this Act,
>
> (*a*) is collected and held in trust in accordance with subsection (1); or
>
> (*b*) is required to be collected and remitted by a vendor or lessor
>
> forms a lien and charge on the entire assets of

(*c*) the estate of the trustee under paragraph (*a*);

(*d*) the person required to collect or remit the tax under paragraph (*b*); or

(*e*) the estate of the person required to collect or remit the tax under paragraph (*d*).

33 The province argues that s. 18(1) creates a trust within s. 47(*a*) [now s. 67(*a*)] of the Bankruptcy Act, which provides:

47. The property of a bankrupt divisible among his creditors shall not comprise

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

34 The respondents, on the other hand, submit that the deemed statutory trust created by s. 18 of the Social Service Tax Act is not a trust within s. 47 of the Bankruptcy Act, in that it does not possess the attributes of a true trust. They submit that the province's claim to the tax money is in fact a debt falling under s. 107(1)(*j*) [now s. 136(1)(*j*)] of the Bankruptcy Act, the priority to which falls to be determined according to the priorities established by s. 107.

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

(*j*) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, *pari passu* notwithstanding any statutory preference to the contrary.

Discussion

35 The issue may be characterized as follows. Section 47(*a*) of the Bankruptcy Act exempts trust property in the hands of the bankrupt from distribution to creditors, giving trust claimants absolute priority. Section 107(1) establishes priorities between creditors on distribution; s. 107(1)(*j*) ranks Crown claims last. Section 18 of the Social Service Tax Act creates a statutory trust which lacks the essential characteristics of a trust, namely, that the property impressed with the trust be identifiable or traceable. The question is whether the statutory trust created by the provincial legislation is a trust within s. 47(*a*) of the Bankruptcy Act or a mere Crown claim under s. 107(1)(*j*).

36 In my opinion, the answer to this question lies in the construction of the relevant provisions of the Bankruptcy Act and the Social Service Tax Act.

37 In approaching this task, I take as my guide the following passage from Driedger, Construction of Statutes, 2nd ed. (1983), at p. 105:

The decisions ... indicate that the provisions of an enactment relevant to a particular case are to be read in the following way:

> 1. The Act as a whole is to be read in its entire context so as to ascertain the intention of Parliament (the law as expressly or impliedly enacted by the words), the object of the Act (the ends sought to be achieved), and the scheme of the Act (the relation between the individual provisions of the Act).
>
> 2. The words of the individual provisions to be applied to the particular case under consideration are then to be read in their grammatical and ordinary sense in the light of the intention of Parliament embodied in the Act as a whole, the object of the Act and the scheme of the Act, and if they are clear and unambiguous and in harmony with that intention, object and scheme and with the general body of the law, that is the end.

38 With these principles in mind, I turn to the construction of ss. 47(*a*) and 107(1)(*j*) of the Bankruptcy Act. The question which arises under s. 47(*a*) of the Act concerns the meaning of the phrase "property held by the bankrupt in trust for any other person". Taking the words in their ordinary sense, they connote a situation where there is property which can be identified as being held in trust. That property is to be removed from other assets in the hands of the bankrupt before distribution under the Bankruptcy Act because, in equity, it belongs to another person. The intention of Parliament in enacting s. 47(*a*), then, was to permit removal of property which can be specifically identified as not belonging to the bankrupt under general principles of trust law from the distribution scheme established by the Bankruptcy Act.

39 Section 107(1)(*j*), on the other hand, has been held to deal not with rights conferred by general law, but with the statutorily created claims of federal and provincial tax collectors. The purpose of s. 107(1)(*j*) was discussed by this court in *Dep. Min. of Revenue (Que.) v. Rainville*, [1980] 1 S.C.R. 35, *(*sub nom. *Re Bourgault; Dep. Min. of Revenue of Que. v. Rainville)* 33 C.B.R. (N.S.) 301, 105 D.L.R. (3d) 270, *(*sub nom. *Bourgault's Estate v. Dep. Min. of Revenue of Que.)* 30 N.R. 24. Pigeon J., speaking for the majority, stated at p. 45:

> There is no need to consider the scope of the expression "claims of the Crown". It is quite clear that this applies to claims of provincial governments for taxes and I think it is obvious that it does not include claims not secured by Her Majesty's personal preference, but by a privilege which may be obtained by anyone under general rules of law, such as a vendor's or a builder's privilege.

40 If s. 47(*a*) and s. 107(1)(*j*) are read in this way, no conflict arises between them. If a trust claim is established under general principles of law, then the property subject to the trust is removed from the general distribution by reason of s. 47(*a*). Following the reasoning of Pigeon J. in *Rainville*, such a claim would not fall under s. 107(1)(*j*) because it is valid under general principles of law and is not a claim secured by the Crown's personal preference.

41 This construction of ss. 47(*a*) and 107(1)(*j*) of the Bankruptcy Act conforms with the principle that provinces cannot create priorities under the Bankruptcy Act by their own legislation, a principle affirmed by this court in *Deloitte, Haskins & Sells Ltd. v. W.C.B.*, [1985] 1 S.C.R. 785, 55 C.B.R. (N.S.) 241, [1985] 4 W.W.R. 481, 38 Alta. L.R. (2d) 169, 19 D.L.R. (4th) 577, 63 A.R. 321, 60 N.R. 81. As Wilson J. stated at p. 806:

> ... the issue in *Re Bourgault* and *Re Black Forest Restaurant Ltd.* was not whether a proprietary interest has been created under the relevant provincial legislation. It was whether provincial legislation, even if it did create a proprietary interest, could defeat the scheme of distribution under s. 107(1) of the *Bankruptcy Act*. These cases held that it could not, that while the provincial legislation could validly secure debts on the property of the debtor in a non-bankruptcy situation, once bankruptcy occurred s. 107(1) determined the status and priority of the claims specifically dealt with in the section. It was not open to the claimant in bankruptcy to say: By virtue of the applicable provincial legislation I am a secured creditor within the meaning of the opening words of s. 107(1) of the *Bankruptcy Act* and therefore the priority accorded my claim under the relevant paragraph of s. 107(1) does not apply to me. In effect, this is the position adopted by the Court of Appeal and advanced before us by the respondent. It cannot be supported as a matter of statutory interpretation of s. 107(1) since, if the section were to be read in this way, it would have effect of permitting the provinces to determine priorities on a bankruptcy, a matter within exclusive federal jurisdiction.

While *Deloitte, Haskins & Sells Ltd. v. W.C.B.* was concerned with provincial legislation purporting to give the province the status of a secured creditor for purposes of the Bankruptcy Act, the same reasoning applies in the case at bar.

42 To interpret s. 47(*a*) as applying not only to trusts as defined by the general law, but to statutory trusts created by the provinces lacking the common law attributes of trusts, would be to permit the provinces to create their own priorities under the Bankruptcy Act and to invite a differential scheme of distribution on bankruptcy from province to province.

43 Practical policy considerations also recommended this interpretation of the Bankruptcy Act. The difficulties of extending s. 47(*a*) to cases where no specific property impressed with a trust can be identified are formidable and defy fairness and common sense. For example, if the claim for taxes equalled or exceeded the funds in the hands of the trustee in bankruptcy, the trustee would not recover the costs incurred to realize the funds. Indeed, the trustee might be in breach of the Act by expending funds to realize the bankrupt's assets. Other difficulties would arise in the case of more than one claimant to the trust property. The spectre is raised of a person who has a valid trust claim under the general principles of trust law to a specific piece of property, finding himself in competition with the Crown claiming a statutory trust in that and all the other property. Could the Crown's general claim pre-empt the property interest of the claimant under trust law? Or would

the claimant under trust law prevail? To admit of such a possibility would be to run counter to the clear intention of Parliament in enacting the Bankruptcy Act of setting up a clear and orderly scheme for the distribution of the bankrupt's assets.

44 In summary, I am of the view that s. 47(*a*) should be confined to trusts arising under general principles of law, while s. 107(1)(*j*) should be confined to claims such as tax claims not established by general law but secured "by Her Majesty's personal preference" through legislation. This conclusion, in my opinion, is supported by the wording of the sections in question, by the jurisprudence of this court and by the policy considerations to which I have alluded.

45 I turn next to s. 18 of the Social Service Tax Act and the nature of the legal interests created by it. At the moment of collection of the tax, there is a deemed statutory trust. At that moment the trust property is identifiable and the trust meets the requirements for a trust under the principles of trust law. The difficulty in this, as in most cases, is that the trust property soon ceases to be identifiable. The tax money is mingled with other money in the hands of the merchant and converted to other property so that it cannot be traced. At this point it is no longer a trust under general principles of law. In an attempt to meet this problem, s. 18(1)(*b*) states that tax collected shall be deemed to be held separate from and form no part of the collector's money, assets or estate. But, as the presence of the deeming provision tacitly acknowledges, the reality is that after conversion the statutory trust bears little resemblance to a true trust. There is no property which can be regarded as being impressed with a trust. Because of this, s. 18(2) goes on to provide that the unpaid tax forms a lien and charge on the entire assets of the collector, an interest in the nature of a secured debt.

46 Applying these observations on s. 18 of the Social Service Tax Act to the construction of ss. 47(*a*) and 107(1)(*j*) of the Bankruptcy Act which I have earlier adopted, the answer to the question of whether the province's interest under s. 18 is a "trust" under s. 47(*a*) or a "claim of the Crown" under s. 107(1)(*j*) depends on the facts of the particular case. If the money collected for tax is identifiable or traceable, then the true state of affairs conforms with the ordinary meaning of "trust" and the money is exempt from distribution to creditors by reason of 47(*a*). If, on the other hand, the money has been converted to other property and cannot be traced, there is no "property held ... in trust" under s. 47(*a*). The province has a claim secured only by a charge or lien, and s. 107(1)(*j*) applies.

47 In the case at bar, no specific property impressed with a trust can be identified. It follows that s. 47(*a*) of the Bankruptcy Act should not be construed as extending to the province's claim in this case.

48 The province, however, argues that it is open to it to define "trust" however it pleases, property and civil rights being matters within provincial competence. The short answer to this submission is that the definition of trust which is operative for purposes of exemption under the Bankruptcy Act must be that of the federal Parliament, not the provincial legislatures. The provinces may define

"trust" as they choose for matters within their own legislative competence, but they cannot dictate to Parliament how it should be defined for purposes of the Bankruptcy Act: *Deloitte, Haskins & Sells Ltd. v. W.C.B.*

49 Nor does the argument that the tax money remains the property of the Crown throughout withstand scrutiny. If that were the case, there would be no need for the lien and charge in the Crown's favour created by s. 18(2) of the Social Service Tax Act. The province has a trust inter est and hence property in the tax funds so long as they can be identified or traced. But once they lose that character, any common law or equitable property interest disappears. The province is left with a statutory deemed trust which does not give it the same property interest a common law trust would, supplemented by a lien and charge over all the bankrupt's property under s. 18(2).

50 The province relies on *Re Phoenix Paper Prod. Ltd.* (1983), 44 O.R. (2d) 225, 48 C.B.R. (N.S.) 113, 3 D.L.R. (4th) 617, 1 O.A.C. 215, where the Ontario Court of Appeal held that accrued vacation pay mixed with other assets of a bankrupt constituted a trust under s. 47(*a*) of the Bankruptcy Act. As the Court of Appeal in this case pointed out, the Ontario Court of Appeal in *Re Phoenix Paper Prod. Ltd.*, in considering the two divergent lines of authority presented to it, did not have the advantage of considering what was said in *Deloitte, Haskins & Sells v. W.C.B.*, and the affirmation in that case of the line of authority which the Ontario Court of Appeal rejected.

51 The appellant raised a second question in the alternative, namely:

> If the Province is divested of its trust property by reason of s. 18(1) being in conflict with s. 107(1)(*j*) of the *Bankruptcy Act*, does [that] property devolve to the secured creditor [the Bank] or is it distributed to unsecured creditors pursuant to s. 107 of the *Bankruptcy Act*?

This question was not raised in the courts below, nor on the application for leave to appeal. It concerns parties who were not present on the appeal. For these reasons, I would decline to consider it.

Conclusion

52 For the reasons stated, I conclude that s. 47(*a*) of the Bankruptcy Act does not apply in this case and the priority of the province's claim is governed by s. 107(1)(*j*) of the Act. I would decline to answer the alternative question posed by the appellants.

53 I would dismiss the appeal, with costs.

Appeal dismissed.

Tab 14

2013 BCCA 313
British Columbia Court of Appeal

Suen v. Suen

2013 CarswellBC 1957, 2013 BCCA 313, [2013] 10 W.W.R. 311, [2013] B.C.W.L.D. 5367, 230 A.C.W.S. (3d) 299, 340 B.C.A.C. 176, 46 B.C.L.R. (5th) 248, 579 W.A.C. 176, 88 E.T.R. (3d) 179

Yuk Chun Suen, Appellant (Plaintiff) and Hung Shun Suen, Respondent (Defendant)

Prowse, D. Smith, Neilson JJ.A.

Heard: April 16, 2013
Judgment: June 28, 2013
Docket: Vancouver CA039734

Proceedings: reversing *Suen v. Suen* (2012), 2012 BCSC 153, 2012 CarswellBC 294 (B.C. S.C.)

Counsel: D. Lunny, D.L. Cayley, for Appellant
R.D. Lee, for Respondent

Subject: Estates and Trusts; Property
Related Abridgment Classifications
Estates and trusts
II Trusts
II.4 Resulting trust
II.4.a Creation
II.4.a.i Relationship of parties
Headnote
Estates and trusts --- Trusts — Resulting trust — Creation — Relationship of parties
Father allegedly offered defendant son interest in first home in exchange for his contribution to family expenses — First home was sold and proceeds were used to buy new home — New home was jointly registered to father and son — Father brought unsuccessful action for declaration that son held his half interest in new home in trust for father — Trial judge found that father held his half interest in new home on resulting trust for son — Father appealed — Appeal allowed — Trial judge erred in law and in fact in finding that parties entered into binding and enforceable agreement or express trust with regard to first home — Absent finding of contract or express trust in regard to net sale proceeds of first home, trial judge's finding that resulting trust existed with respect to son's half interest in new home could not stand — Moreover, this finding did not displace onus

on son to demonstrate that registration of joint ownership in new home was gratuitous transfer to father — Further, additional factors demonstrated prima facie intention by son to share ownership of new home with father.

APPEAL by father from judgment reported at *Suen v. Suen* (2012), 2012 BCSC 153, 2012 CarswellBC 294 (B.C. S.C.), dismissing father's action for declaration that son held his half interest in home in trust for father.

***D. Smith J.A.*:**

I. Overview

1 The plaintiff-appellant, Yuk Chun Suen ("Albert"), and his adult son the defendant-respondent, Hung Shun Suen ("Andy"), jointly own a home on Capstan Way ("Capstan Way") in Richmond, B.C. I shall refer to the parties by their anglicized first names to avoid any potential confusion, but intend no disrespect in so doing.

2 The underlying action involves a dispute over the beneficial ownership of each party's undivided $^{1}/_{2}$ interest in Capstan Way. Albert sued Andy for an order that Andy holds his $^{1}/_{2}$ interest in trust for Albert. In his statement of claim, Albert alleged that Andy did not contribute any monies to the acquisition of Capstan Way, or to Albert's previously owned Vancouver residence on Pender Street ("Pender") of which the net sale proceeds were invested into Capstan Way. Therefore, Albert alleged that Andy received his $^{1}/_{2}$ interest in Capstan Way gratuitously from Albert giving rise to a presumption of resulting trust.

3 Albert further pleaded that the legal title to Capstan Way was registered in the parties' joint names because: (i) Albert had little income and did not qualify for a mortgage on his own; (ii) Andy had agreed to "deal" with the property (i.e., pay the expenses associated with it, including the mortgage, in lieu of rent for him and his wife); and (iii) on Albert's death the property would pass to Andy without probate fee liability.

4 Andy filed a defence and counterclaim to the action. In his defence, he pleaded that he had made significant direct and indirect contributions to Pender, which were acknowledged by Albert agreeing to give him a beneficial $^{1}/_{2}$ interest in Pender. He claimed that the parties had jointly purchased Capstan Way with the net sale proceeds from Pender, his RRSP proceeds, and mortgage proceeds, and that he (Andy) had paid all the expenses associated with Capstan Way since its purchase.

5 Andy further pleaded that the legal title to Capstan Way was registered in the parties' joint names to reflect their respective ownership interests. He sought an order dismissing the action.

6 In his counterclaim, Andy reiterated the pleadings from his statement of defence and sought a declaration that Albert held his undivided $^1/_2$ interest in Capstan Way in trust for Andy pursuant to an express trust, or in the alternative a resulting trust, or in the further alternative a constructive trust. Andy did not plead that he held his beneficial interest in Pender pursuant to a contract or a trust, but claimed that his direct and indirect contributions to Pender entitled him (in an unjust enrichment claim) to a constructive trust in regard to Albert's $^1/_2$ interest in Capstan Way.

7 The parties' positions, as outlined in their pleadings, evolved during the course of the trial.

8 At the conclusion of the evidence, Albert conceded that Andy's contributions to Pender and thereafter Capstan Way entitled Andy to his undivided $^1/_2$ interest in Capstan Way. Albert sought an order that, upon the sale of Capstan Way, he (Albert) would receive the first $260,199 (the net proceeds of sale from Pender) with the balance of the net sale proceeds to be divided equally between the parties.

9 At trial, Andy submitted that Albert held his undivided $^1/_2$ interest in Capstan Way in trust for Andy as a result of a 2002 agreement between the parties (before the sale of Pender) in which Albert agreed to give him the legal title to Pender, if Andy returned to live with him at Pender, and managed his deteriorating financial affairs (the "2002 Agreement").

10 As to Capstan Way, Andy claimed at trial that the purchase price for that property came solely from his financial contributions, which included his $10,000 RRSP proceeds, the net sale proceeds of Pender (which he said were beneficially owned by him based on the alleged oral agreement), and mortgage proceeds. Andy contended that legal title to Capstan Way was registered in the parties' joint names for the sole purpose of encouraging Albert to reform his spending habits, which Albert failed to do. Andy also said that, after a few months, Albert ceased making any financial contribution to the monthly expenses of Capstan Way and therefore Albert's undivided $^1/_2$ interest in Capstan Way was gratuitously transferred to him. This gave rise to a presumption of resulting trust over Albert's $^1/_2$ interest.

11 The trial judge found that Andy and Albert had reached an agreement in 2002. Based on that agreement, the trial judge found that Andy held the beneficial interest in the net sale proceeds of Pender, even though the agreement was never formalized by the transfer of the legal title in Pender to Andy. He also found that because Andy owned the net proceeds of sale from Pender, which were invested in Capstan Way, only Andy financially contributed to the acquisition of Capstan Way. He therefore reasoned that registration of an undivided $^1/_2$ interest in Capstan Way to Albert amounted to a gratuitous transfer by Andy to Albert and triggered the presumption of resulting trust over Albert's $^1/_2$ interest in Capstan Way. See paras. 52-54.

12 As a result of this finding, the trial judge found it unnecessary to undertake an analysis of Andy's claim for unjust enrichment and his application for a remedial constructive trust in regard to Albert's interest in Capstan Way.

13 The central issue on appeal is whether the trial judge erred in finding that the alleged agreement between the parties created an express, resulting or constructive trust over Albert's $^{1}/_{2}$ interest in Capstan Way thereby displacing the statutory presumption of indefeasible title in s. 23(2) of the *Land Title Act*, R.S.B.C. 1996, c. 250 in regard to the jointly held legal title to Capstan Way. Subsection 23(2) provides that "[a]n indefeasible title ... is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title ...".

II. Background

14 In 1990, Albert moved to Vancouver, British Columbia, from Honk Kong with his wife, two daughters (Erica and Vivian), and Andy. He brought with him the equivalent of $105,000 CDN from the sale of his house in Hong Kong and purchased a home with his wife on Fleming Street ("Fleming"). Two years later, they sold Fleming and with the proceeds of sale of about $105,000 and mortgage proceeds of about $125,000, jointly purchased Pender for $225,000.

15 In the fall of 1998, Andy graduated from university and obtained employment with a bank. At that time, he began contributing $1,000 per month toward the family's expenses. His contributions covered the monthly mortgage payment on Pender. Albert contended that Andy's monthly financial contribution was merely a rental payment.

16 In 2000, Andy's girlfriend Angela, now his wife, moved into Pender. Angela assumed the household responsibilities and assisted in the care of Andy's terminally ill mother.

17 In 2001, Albert's wife passed away and her joint interest in Pender passed to Albert by right of survivorship.

18 In 2002, Albert refinanced Pender increasing the mortgage from $115,000 to $135,000. He used the $20,000 mortgage proceeds to pay off his significant credit card debts, to reimburse $7,000 he had borrowed from Erica, and to repay a loan he had obtained in 1997.

19 The refinancing of Pender triggered an argument between Albert and his three children over Albert's spending habits. Thereafter, all three children and Angela moved out of Pender.

20 About a month later, Andy was persuaded by other family members to move back into Pender in order to help Albert manage his finances and to assist in his care. Before moving back

into Pender, Andy met with Albert to discuss some conditions for his return (the "2002 Meeting"). Present at the 2002 Meeting were Albert, Andy, and Vivian.

21 Albert's account of what transpired at the 2002 Meeting differed from Andy's. The trial judge summarized the evidence of the 2002 Meeting as follows:

> [22] According to Andy and Vivian, upon returning to Pender Street, Andy told his father that he would live there and that he would agree to pay the mortgage and other household expenses on the condition that Albert controlled his spending such that he would not fall into debt again. Albert agreed to that condition. Andy also told Albert that he would manage Albert's finances. This included arranging to pay off Albert's remaining debts and cancelling or reducing the borrowing limits on Albert's credit cards. Albert agreed to those conditions as well. As to ownership of the Pender Street house, Andy and Vivian testified that Albert told them that he had taken out of the house all of the money he was entitled to and that in light of Andy having paid the mortgage for years and undertaking to continue to pay it along with the household expenses, Albert would transfer his interest in the Pender Street house to Andy. From that point forward, then, according to Andy and Vivian's evidence, the agreement was that Andy would own the Pender Street house and would pay all the expenses related to it.
>
> [23] Albert, on the other hand, testified that he agreed to Andy managing all of the finances of the house (including Albert's own spending) and to Andy paying the mortgage and household expenses, but that he never agreed to transfer his interest in the Pender Street property to Andy. Albert testified that he felt that eventually the Pender Street house would go to Andy, but only after Albert's death by way of his estate.

22 The trial judge accepted Andy's (and Vivian's) evidence in regard to the alleged 2002 Agreement and found:

> [50] When Erica, Andy and Vivian moved out of Pender Street in 2002, Albert's financial circumstances were grim. He was $20,000 to $30,000 in debt. He was unable to earn enough money to support him much less pay his debts. More particularly, Albert could not have kept the mortgage payments on Pender Street current. Albert knew that he was in serious jeopardy of having no place to live if the Pender Street property was lost to the bank. Albert also knew that he was unable to support himself; that is to say, he knew that he was in jeopardy of falling into poverty. I find that when Albert's children moved out of the house, Albert found himself in a place where he had to do something to entice Andy, at least, to continue to supply him with a place to live and food to eat.
>
> [51] The only thing that Albert had to bargain with was his interest in the Pender Street house. I find that ownership of the house was the only inducement that Albert could offer to Andy and that during the meeting between Andy, Vivian and Albert in 2002, Albert in fact put his ownership of the Pender Street house on the table. During that meeting, Albert said to Andy

words to the effect of "the house is yours if you agree to come back to live here, pay my debts and provide me with a place to live and food to eat". I find that Andy agreed to that proposition.

[52] The deal that Albert and Andy made in 2002 was entirely congruent with the facts and the parties' history. Andy had been paying the mortgage since 1998 and had been paying most if not all of the household expenses since 2000. It was entirely reasonable for him to believe that he had already acquired an interest in the house. It was not unreasonable for him to have believed that whatever interest his father had in the house had been seriously eroded thereby. It was equally reasonable for Albert to have believed that without Andy's help, he would lose the house through foreclosure. Albert therefore had little to lose and much to gain if he traded his interest in the house for Andy's commitment to support him. The bargain that the parties reached during their meeting in 2002 was, therefore, reasonable and fair.

[53] I find that Andy lived up to his end of the bargain. He paid Albert's debts, he paid all of the household expenses, and he paid the mortgage. It follows that from 2002 on, Andy was entitled to the legal and beneficial title to the Pender Street property and that from that point forward, Albert held title to the house in trust for Andy.

23 Legal title to Pender was never transferred into Andy's name. The trial judge found that, in order to pay off Albert's creditors, Andy increased his personal debt by borrowing on his own credit cards and bank facilities (para. 24). Andy testified that he did not press Albert to transfer the legal title to Pender into his name, as a developer had expressed an interest in buying Pender, and he did not want to incur the expenses associated with such a transfer, if Pender was to be sold in short order (para. 25).

24 It was not until late 2003 that an agreement was reached with the developer for the sale of Pender. The sale completed in January 2004 for $412,000, resulting in net proceeds of sale of $260,199.

25 The plan was that Albert would continue to live with Andy and Angela, and make a monthly financial contribution of $500 to the expenses of their new home. In January 2004, all three settled on the purchase of Capstan Way for $433,000. The purchase price was paid from Andy's RRSP proceeds of $10,000, the $260,199 net sale proceeds of Pender, and mortgage proceeds of $190,000. Andy had assumed that he would not qualify for a mortgage because of the personal debt he had incurred to pay off Albert's creditors. He therefore borrowed $30,000 from Vivian, which he used to pay off his debts and then applied for the mortgage (paras. 28 and 29). Both Albert and Andy signed the mortgage agreement, although Albert acknowledged that he alone would never have qualified for the mortgage. Albert made a few monthly payments toward the household expenses, but then ceased all payments.

26 Upon completion of the purchase of Capstan Way, there was a surplus of funds in the amount of $19,956. The trial judge found that these funds were used for renovations, furnishings, and electronics for the new house (para. 32). Andy also obtained a $90,000 line of credit that was secured against the title to Capstan Way and drew down about $60,000 to repay various monies he had borrowed from Vivian to repay Albert's debts (para. 36).

27 In May 2008, Andy refinanced Capstan Way in order to pay an income tax debt and to make investments (para. 37). He obtained additional mortgage funds and a line of credit totalling $500,000, which was secured by a mortgage of $710,000 against the legal title to Capstan Way. Albert and Andy both signed the refinancing documents. Albert denied that he consented to or in fact understood the refinancing documents he signed. However, between June 2008 and June 2009, Albert drew down $4,000 on the line of credit (para. 37).

28 The parties' evidence at trial differed on the rationale for registering the legal title to Capstan Way in their joint names. The trial judge summarized their evidence as follows:

> [30] ... Albert maintains that he arranged for Andy to be a joint owner so that when Albert passed away, Andy would automatically receive the house outside of his estate. That is how Albert's wife's interest in the Pender Street house passed to him when she died; Albert says that he wanted ownership of the Capstan Way house to pass to Andy in the same way. Albert testified that so long as he was alive, however, the house was his to do with as he wished. Albert testified that Andy was to pay the mortgage in return for being allowed to live there and because doing so was part of a son's duty to provide for his elderly parent.
>
> [31] Andy, on the other hand, testified that so far as he was concerned the equity in the Pender Street was actually his money; i.e., according to the 2002 agreement, Albert had transferred his interest in Pender Street to Andy and so, when Pender Street sold, the net proceeds of that sale belonged to Andy, not Albert. According to Andy, then, 100 percent of the money that went into Capstan Way was his money: i.e., the down payment from Pender Street and the mortgage payments that he has made since. As for putting Albert on title as a joint tenant, Andy testified that he did so for two reasons: first, to encourage his father to take some responsibility for his own finances; and second, because he wanted his father to feel that he was part of the Suen family. Andy testified that he did not have any thoughts about the consequences, legal, equitable or otherwise, of registering his father as a joint tenant in the new house. He said that he continued to trust that his father would act in accordance with the agreement that they had made in 2002.

29 The trial judge accepted Andy's explanation for the manner in which the legal title to Capstan Way was registered, finding:

> [60] ... Neither of the parties anticipated or expected that Albert would actually participate in paying for Capstan Way; the burden of the mortgage and all property related costs were mutually agreed to be on Andy's account alone.
>
> [61] Given these facts, I find that Albert did not contribute to the purchase of Capstan Way. Andy's decision to have Albert registered as a joint owner was, therefore, gratuitous. According to *Pecore* [*Pecore v. Pecore*, 2007 SCC 17], the presumption of advancement does not apply to gratuitous transfers between independent adult family members. The principle of resulting trust does apply. I am therefore driven to conclude that resulting trust arose between Andy and Albert, such that Andy retains the beneficial ownership of Capstan Way and Albert holds his interest to the property for Andy pursuant to a resulting trust. The relationship between Albert and Andy has broken down - it follows that Albert ought not to continue in his position as trustee of Andy's beneficial interest. An order must therefore go vesting legal and beneficial ownership of Capstan Way in Andy's name alone. A corollary order must go requiring Andy to indemnify Albert for any liability that may be imposed upon Albert with respect to charges [i.e. the line of credit] registered against the titled to Capstan Way.
>
> [62] In August 2009, Albert drew $4,000 out of the line of credit that is secured against title to Capstan Way. Albert had no entitlement to those funds. Andy is entitled to a judgment against Albert for $4,000, plus whatever interest has accrued on that sum since Albert obtained it. In the event that the parties cannot agree upon the amount of interest that has accrued, that issue will be referred to a registrar of the court for an assessment and certification of findings.

30 In sum, the trial judge concluded that Andy became the beneficial owner of Pender as a result of the 2002 Agreement. Andy, as the beneficial owner of the net sale proceeds of Pender, was found to have contributed all of the monies for the purchase of Capstan Way and all of the expenses relating to the property. Thus, the trial judge found that when Andy registered the legal title to Capstan Way in the joint names of him and Albert, he made a gratuitous transfer to Albert of an undivided $^{1}/_{2}$ interest in that property. Upon the breakdown of their relationship, and the ensuing action over Capstan Way, this gratuitous transfer triggered a rebuttable presumption of resulting trust over Albert's $^{1}/_{2}$ interest, a presumption that Albert did not rebut.

31 In the result, the trial judge ordered Albert to transfer his $^{1}/_{2}$ interest to Andy and to repay Andy the $4,000 that he (Albert) had drawn down on the line of credit.

32 As a result of finding a resulting trust to Andy in regard to Albert's $^{1}/_{2}$ interest in Capstan Way, the trial judge found it unnecessary to decide Andy's alternative claim of unjust enrichment and request for a remedial constructive trust over Albert's $^{1}/_{2}$ interest in Capstan Way.

III. Issues on Appeal

33 The appellant submits that the trial judge erred in four respects:

(a) By ignoring the pleadings in making findings of fact and law;

(b) In his assessment of the credibility of the witnesses;

(c) In finding that Albert and Andy, in 2002, entered into a binding agreement in which Albert settled an express trust upon Andy that made him the sole beneficial owner of Pender; and

(d) In finding that Albert held his interest in Capstan Way on a resulting trust in favour of Andy.

IV. Discussion of Legal Principles

34 The central issue to be determined by the trial judge was whether the statutory presumption of indefeasible title as to the joint ownership of Capstan Way was rebutted by either of the parties. This Court has endorsed three considerations for determining this issue:

(i) the operation of a resulting trust which may be inferred where no value is given for a legal interest;

(ii) the operation of an agreement between the parties that is contrary to the registered legal title; or

(iii) taking into account the underlying equitable interests between the parties (e.g., considerations that arise in claims for unjust enrichment).

See *Bajwa v. Pannu*, 2007 BCCA 260 (B.C. C.A.), paras. 12-14, 18, and 23; and *Aujla v. Kaila*, 2010 BCSC 1739 (B.C. S.C.), paras. 31-36.

(i) The presumption of resulting trust

35 The presumption of resulting trust is engaged where an owner of property has gratuitously transferred title to the property to another. In *Pecore v. Pecore* [2007 CarswellOnt 2752 (S.C.C.)], Mr. Justice Rothstein, writing for the Court, explained the concept of a resulting trust at para. 20:

> A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner: see D.W.M. Waters, M.R. Gillen and L.D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 362. While the trustee almost always has the legal title, in exceptional circumstances it is also possible that the trustee has equitable title: see *Waters' Law of Trusts*, at p. 365, noting the case of *Carter v. Carter* (1969), 70 W.W.R. 237 (B.C.S.C.).

36 A gratuitous transfer of property from one party to another is fundamental to the presumption of a resulting trust. In *Kerr v. Baranow*, 2011 SCC 10 (S.C.C.), Mr. Justice Cromwell, for the Court, wrote:

> [17] Resulting trusts arising from gratuitous transfers are the ones relevant to domestic situations. The traditional view was they arose in two types of situations: the gratuitous transfer of property from one partner to the other, and the joint contribution by two partners to the acquisition of property, title to which is in the name of only one of them. In either case, the transfer is gratuitous, in the first case because there was no consideration for the transfer of the property, and in the second case because there was no consideration for the contribution to the acquisition of the property.
>
> [18] The Court's most recent decision in relation to resulting trusts is consistent with the view that, in these gratuitous transfer situations, the actual intention of the grantor is the governing consideration: *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795, at paras. 43-44. As Rothstein J. noted at para. 44 of *Pecore*, where a gratuitous transfer is being challenged, "[t]he trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the *transferor's actual intention*" (emphasis added [by Cromwell J.]).
>
> [19] As noted by Rothstein J. in this passage, presumptions may come into play when dealing with gratuitous transfers. The law generally presumes that the grantor intended to create a trust, rather than to make a gift, and so the presumption of resulting trust will often operate. As Rothstein J. explained, a presumption of a resulting trust is the general rule that applies to gratuitous transfers. When such a transfer is made, the onus will be on the person receiving the transfer to demonstrate that a gift was intended. Otherwise, the transferee holds the property in trust for the transferor. This presumption rests on the principle that equity presumes bargains and not gifts (*Pecore*, at para. 24).

37 The imposition of a resulting trust does not require proof of intention, but rather it is a legal doctrine that is imposed, "'to return property to the person who gave it and is entitled to it beneficially, from someone else who has title to it. Thus, the beneficial interest 'results' (jumps back) to the true owner': Oosterhoff, [*Oosterhoff on Trusts: Text, Commentary and Materials*, 7th ed. (Toronto, Carswell, 2009)] at p. 25" (*Kerr* at para. 16). It may also arise where a claimant seeks, "the recognition of his or her proportionate interest in the asset which the other has acquired with [his or her] property" (para. 25).

38 The onus of proof is on the party seeking to rebut the presumption of resulting trust, i.e., the transferee. In *Pecore*, the Supreme Court of Canada confirmed that when a transfer is challenged (as having been made for no consideration), "the onus is placed on the transferee to demonstrate that a gift was intended: see Waters, Gillen and Smith, *Waters' Law of Trusts* at p. 375, [*Waters*]

and E.E. Gillese and M. Milczynski, *The Law of Trusts* (2nd ed. 2005), at p. 110. This is so because equity presumes bargains, not gifts" (para 24).

(ii) An agreement between the parties contrary to the registered title

39 The trial judge relied on a finding of an agreement (in contract or by express trust) in which Albert transferred his beneficial interest in Pender to Andy. This finding, in turn, formed the basis for his finding that Albert acquired his interest in Capstan Way as a gratuitous transfer from Andy thereby giving rise to a resulting trust over Albert's $^{1}/_{2}$ interest.

1. An agreement in contract

40 A contract is promissory in nature, that is, it is an undertaking by the promisor to do something for the promisee in exchange for something. The exchange of promises is enforceable only if there is an agreement or consensus on the "existence, nature and scope of their [respective] rights and duties" (G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Ontario: Carswell, 2011) at 6).

41 Professor Fridman discusses the development of the doctrine of consideration, or the concept of a bargain, as an essential feature of the common law of contract at 8:

> ... what is an essential ingredient of a valid, enforceable, legally acceptable contract, is an agreement that can be called "serious," that is, made with the kind of serious, binding intent that demarcates the casual promise, undeserving of legal recognition, from a promise which should be effective in law and should be obligatory on the future action, as well as the conscience of the promisor.

42 The common law of contract is distinguishable from equitable or promissory estoppel where, absent consideration, reliance on a promise that is not fulfilled and gives rise to injury or damage, may be actionable. Consequently, if a promise is supported only by "moral consideration", it is generally not enforceable at common law:

> The idea that moral justification could be the basis of a contract, for example, where a promise was made because of the familial relation of the parties, or out of "natural love and affection," has long since been rejected by the common law (Fridman at 9).

43 Communications in the family context are often no more than statements of intent or wishes. For a promise, in that context, to rise to the level of a binding enforceable contract there must be strict proof of the terms of the bargain including: the parties, the property, and the consideration. See *McKenzie v. Walsh* (1920), 61 S.C.R. 312 (S.C.C.), and *Ross v. Ross* (1957), [1958] O.R. 49, 11 D.L.R. (2d) 561 (Ont. C.A.).

44 Agreements involving real property are also subject to s. 59(3) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253. That section provides, in part, that:

> A contract respecting land or a disposition of land is not enforceable unless
>
> (a) there is, in a writing signed by the party to be charged ... both an indication that it has been made and a reasonable indication of the subject matter ...

2. An express trust

45 An express trust is created when the requirements of certainty of intention, subject, and objects of the transfer have been established and the trust property has been vested in the trustee: *Waters* at 132 and 167. Where the trust property has not been vested in the trustee, and there is no way of compelling the settlor to do so, this "incompletely constituted trust" or "shell of a trust" does not operate as a trust and has no legal significance: *Waters* at 167. *Waters* describes the "one golden rule" for the creation of a trust (at 168):

> Unless the trustees or the trust beneficiaries give value in the sense of valuable consideration for the creation of the trust, the act creating the trust and the vesting of the property in the trustee or trustees should occur at the same time. The distinction between voluntary promises to settle property on trust in exchange for valuable consideration is thus an important distinction to begin with ...

46 Citing *Currie v. Misa* (1875), L.R. 10 Exch. 153 (Eng. Exch.), affirmed (1876), (1875-76) L.R. 1 App. Cas. 554 (U.K. H.L.), *Waters* describes valuable consideration as including, "the promise to provide services or to deliver any of the various forms of property such as money, land, chattels, and choses in action, or a promise to forebear from pursuing some particular course of action" (169).

(iii) The equitable interests between the parties

47 The law of unjust enrichment in support of a remedial constructive trust (or monetary award) was also extensively reviewed in *Kerr*. There, Cromwell J. set out the legal framework for the analysis at para. 31:

> [31] At the heart of the doctrine of unjust enrichment lies the notion of restoring a benefit which justice does not permit one to retain: *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 788. For recovery, something must have been given by the plaintiff and received and retained by the defendant without juristic reason. ...
>
> [32] Canadian law ... permits recovery whenever the plaintiff can establish three elements: an enrichment of or benefit to the defendant, a corresponding deprivation of the plaintiff and the

absence of a juristic reason for the enrichment: *Pettkus* [*Pettkus v. Becker*, [1980] 2 S.C.R. 834]; *Peel*, at p. 784.

48 In *Kerr*, the application of unjust enrichment principles was considered in the context of a domestic claim between common law spouses. However, the Court observed that, "the test for juristic reason is flexible, and the relevant factors to consider will depend on the situation before the court (*Peter* [*Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.)], at p. 990)" (para. 44).

V. Application of Legal Principles

49 I turn now to an examination of the specific grounds of appeal in the context of the aforementioned legal principles.

(a) The trial judge's findings of fact and law

50 Albert submits that the trial judge erred in law and fact in awarding Andy sole legal title to Capstan Way by finding that: (i) "Andy's pleadings were consistent with his position at the end of the trial" (para. 43); (ii) Albert's financial circumstances were "grim" and that he had only his interest in Pender to entice and bargain with Andy "to supply him with a place to live and food to eat" (paras. 16-17, 50-51); (iii) the parties reached an agreement in 2002 in which Albert promised to give Andy legal title to Pender if he agreed to return to live in Pender and manage Albert's financial affairs (paras. 50-52); and (iv) this agreement (to transfer Albert's interest in Pender to Andy) meant that Albert held the legal title to Pender in trust for Andy as no transfer was ever completed (para. 53).

(i) Are the pleadings consistent with the parties' positions at trial?

51 In my view, the pleadings are not consistent with the parties' positions at trial. First, the trial judge found that at the 2002 Meeting, Albert agreed to transfer his interest in Pender to Andy. However, Andy pleaded that his contributions to Pender entitled him to a $^{1}/_{2}$ interest (not the whole interest) in Pender. Nor did Andy plead an alleged contract or express trust between the parties as to the title in Pender, although the trial judge found just that. Second, the trial judge found that Albert held his $^{1}/_{2}$ interest in Capstan Way on a resulting trust for Andy, although Andy pleaded in his statement of defence and counterclaim that the jointly held title reflected the parties' joint ownership interests in Capstan Way. Third, the trial judge found that Andy had used the surplus mortgage funds of $19,956 on renovations, furnishings, and electronics, when Andy pleaded that he received those funds in partial repayment of a debt Albert owed him. Last, the trial judge found that the 2002 Agreement gave Andy the beneficial interest in Pender, when Andy pleaded in his counterclaim that Albert held his interest in Capstan Way (not Pender for which no trust claim was pleaded) in trust for Andy.

52 Neither party appears to have adhered to the position taken in their respective pleadings at trial. Nor, however, did either party appear to object to the evolving nature of each other's position at trial. Each party led evidence on the issue of the alleged 2002 Agreement and its effect on that party's respective legal interest in Capstan Way. Each party also changed his position in regard to the extent of his legal interest in Capstan Way.

53 In my view, the decisions relied upon by the appellant to support his submission on this issue, (*Xeni Gwet'in First Nations v. British Columbia*, 2007 BCSC 1700 (B.C. S.C.) at paras. 992-93; *Caviglia v. Tenorio* (1992), 71 B.C.L.R. (2d) 255 (B.C. S.C.), at 10; *Wakabayashi v. Partel Towing and Recovery Ltd.* [1990 CarswellBC 3083 (B.C. S.C.)], 1990 CanLII 1798 at 6; and *Pepper's Produce Ltd. v. Medallion Realty Ltd.*, 2012 BCCA 247 (B.C. C.A.) at para. 28), are readily distinguished, particularly in the absence of any demonstrated prejudice to either party at trial.

54 Accordingly, while the manner in which the issues were advanced for the trial judge's determination was somewhat unusual, as both sides appeared to acquiesce in that procedure, I would not accede to this submission.

(ii) The findings in regard to Albert's financial circumstances

55 Albert submits there was no evidentiary basis for the trial judge's findings that Albert's financial circumstances were "grim" and that he was unable to support himself without Andy's assistance (at para. 50). These findings, he submits, led the trial judge to a further erroneous finding that, "the only thing that Albert had to bargain with was his interest in [Pender]" (para. 51).

56 However, there is no dispute that in 2002, Albert had credit card debts of $20,000 — $30,000, had insufficient income to pay those debts or the mortgage, and was in jeopardy of losing the house either through foreclosure or a forced sale. Although Albert denied this state of affairs, he did agree that he promised Andy that he would stop gambling (a major source of his financial problems), lower the limits on his credit cards, and have Andy control certain aspects of the household finances.

57 Andy, on the other hand, testified that in 2002, Albert's debts were significant, he was again "maxed out" on his credit cards (about $20,000), what limited income he earned he immediately spent, he had no ability to borrow any more monies from the bank, and he could not afford to maintain the mortgage. Andy also testified that he had been paying the household expenses (including the mortgage) at an amount of about $1,000 per month since 1998.

58 The standard of appellate review from findings and inferences of fact is highly deferential. Provided there is some evidence upon which the trial judge's findings or inferences of fact could have been made, there is no basis for appellate intervention: *Housen v. Nikolaisen*, 2002 SCC

33, [2002] 2 S.C.R. 235 (S.C.C.). In my view, there was an evidentiary basis for the trial judge's findings as to Albert's financial circumstances at the time of the 2002 Meeting. Consequently, I would not accede to this submission.

(iii) The finding of a 2002 Agreement regarding Pender

59 Albert submits there was no evidentiary basis for the trial judge's finding that at the 2002 Meeting he agreed that, "'the house is yours [Andy's] if you agree to come back to live here, pay my debts and provide me with a place to live and food to eat'" (para. 51). While Albert may not have used these exact words, as I read the trial judge's reasons, this was merely an attempt to summarize the effect of the evidence on the issue of the alleged 2002 Agreement. I am satisfied that an evidentiary basis existed from Andy's evidence for the trial judge's finding that Albert agreed to give Pender to Andy, if Andy returned to live there and manage Albert's financial affairs, which included paying off Albert's debts. It is the characterization and effect of this agreement that in my view raises the more difficult issues.

(iv) The finding that the agreement meant that Albert held his legal and beneficial interest in Pender in trust for Andy (para. 53)

60 Albert submits that the trial judge's finding that Albert held his legal and beneficial interest in Pender in trust for Andy is inconsistent with Andy's pleadings. In particular, in his pleadings, Andy alleged that his contributions entitled him to a $^{1}/_{2}$ interest in Pender. The issue of the characterization and legal effect of the 2002 Agreement raises a question of law, which I prefer to address under the third ground of appeal below.

(b) The trial judge's assessment of the credibility of the witnesses

61 The trial judge summarized his findings on the credibility and reliability of the witnesses as follows:

> [44] The credibility of the witnesses and the reliability of their testimony will heavily influence the outcome of this litigation. More specifically, determining who said what during, firstly, the family meeting in 2002 and, secondly, when Capstan Way was registered to the parties is crucial to deciding on what legal and equitable basis the parties moved forward after those discussions.
>
> [45] I find that I can rely on the evidence of Andy, his wife Angela, his sisters Vivian and Erica, their aunt Ko Fung Luen, and Ms. Wong of the RBC. The evidence they gave was logical, internally consistent and reasonably congruent with the documentary evidence. None of these witnesses were significantly shaken on cross-examination; neither was their evidence impaired by earlier inconsistent statements.

> [46] I regret to say that Albert's evidence was not of the same calibre as the other witnesses. At times, Albert's evidence was internally inconsistent, as for example when he denied having seen or been aware of the Capstan Way refinancing documents before his examination for discovery, but then acknowledged that he had signed the documents and even remembered having put his signature in the wrong place. At times, Albert's evidence was contrary to the story told by certain documents, the authenticity and accuracy of which Albert could not deny. So, for example, Albert testified with great certainty that never after moving into the Capstan Way house did he run his credit cards up to their maximum limits. Unfortunately for Albert, his credit card invoices clearly show that during that time, he consistently borrowed the maximum on his cards. At times, Albert's evidence was simply unbelievable, as for example when he testified that he would put up to $1,000 in $100 bills in a drawer and that the Suen children were welcome to help themselves to that money whenever they wished. Given Albert's spending habits, his poor record of income earnings in Canada, and his inability to manage his finances, it is simply unbelievable that at any time while they were in Canada Albert would have that much cash on hand or that he would have a relaxed attitude toward the children helping themselves to it.
>
> [47] In the end, I find that I can give little weight to Albert's testimony. Where his testimony conflicts with the testimony of other witnesses, I prefer the latter over the former.

62 Albert alleges that the trial judge misapprehended his evidence regarding the financing of Capstan Way and that resulted in the trial judge committing palpable and overriding errors of fact. He also submits that the trial judge made other erroneous findings of fact because he failed to address the inconsistencies in Andy's and Vivian's testimony between their examination in chief and their cross-examination.

63 The trial of this action was dominated by the oral evidence of a number of witnesses over a period of seven days. The documentary evidence was limited and non-existent on the key issues of the alleged 2002 Agreement and the reasons for registering the title to Capstan Way in the parties' joint names. The trial judge carefully reviewed each witness's evidence and summarized his findings as to the credibility and reliability of their evidence as noted in para. 61 above.

64 It is not uncommon in a trial of this nature for the judge to make some minor errors of fact. However, it is apparent from the trial judge's reasons that his assessment of the credibility and reliability of the witnesses was based on an extensive and careful examination of their evidence. I am mindful of the following words of Mr. Justice Low in *Bradshaw v. Stenner*, 2012 BCCA 296 (B.C. C.A.), and would adopt them as apposite to this submission:

> [22] This trial did not involve an inordinate number of documentary exhibits, but there was extensive oral evidence and the credibility of the four main witnesses and several other witnesses was in issue. The trial judge was obviously in the best position to assess the

> reliability of each witness and to assess each portion of the evidence. We have to look at the factual conclusion of the judge as a whole and determine whether the appellant has identified a palpable and overriding error. In a case with as much oral evidence as was before the court in this case, it would be unusual if the trier of fact did not make an error or two with respect to discrete factual matters. Such error, individually or cumulatively, would have to significantly undermine critical findings of fact (including credibility) before palpable and overriding error could be found and appellate interference justified.

65 I find no palpable and overriding error in the trial judge's findings of fact based on his assessment of the credibility and reliability of the witnesses' testimony.

(c) Did the 2002 Agreement create a binding agreement in which Albert settled an express trust upon Andy that made him the sole beneficial owner of Pender?

66 Albert submits that the 2002 Agreement (which he denies he made) was, at its best, a promise by Albert to transfer legal title in Pender to Andy in return for Andy returning to live at Pender, pay his debts and all the expenses associated with Pender, and manage Albert's financial affairs. In effect, he submits, the promise was an agreement to agree, which at its highest might support a claim for specific performance or promissory estoppel, but not a binding and enforceable contract or an express trust. Furthermore, he submits, such an agreement would not be enforceable as it had no certainty of terms and failed to comply with s. 59(3)(a) of the *Law and Equity Act*. This section requires that a contract respecting the disposition of land must be in writing in order to be enforceable.

67 Andy argues that this submission should not be entertained by the Court as it was not raised in the pleadings or at trial. The circumstances in which a new issue may be raised on appeal were addressed in *Athey v. Leonati*, [1996] 3 S.C.R. 458 (S.C.C.). There, the Supreme Court of Canada found that this Court erred in refusing to consider certain of the appellant's arguments on the grounds that they were not raised at trial. The Supreme Court set out a two-fold test to be met for an appellate court to entertain a new argument on appeal (at paras. 51 and 52): (i) all the relevant evidence to the submission must be found in the record (para. 51), and (ii) the respondent must not suffer prejudice by the failure of the appellant to raise the new argument at trial (para. 52).

68 Having reviewed the record, I am satisfied that all the relevant evidence to determine this issue may be found in the record and that no prejudice will be suffered by Andy, if Albert is permitted to argue this point on appeal. Each party led evidence in support of, and made extensive submissions in regard to, the other's trust claims over the title to Capstan Way. It was the trial judge who decided to limit his analysis to the issues of whether the parties had made a contract or express trust in regard to Pender and as a result of that finding whether the parties' respective interests in the title to Pender gave rise to a resulting trust in regard to the title to Capstan Way.

69 With respect, in my view, there are a number of deficiencies in the trial judge's analysis that resulted in a finding that the 2002 Agreement was binding and enforceable based on the principles of contract or express trust, which I discussed above at paras. 41 to 46. This finding was critical to his subsequent finding in regard to the parties' ownership interests in Capstan Way. At the very least, the 2002 Agreement does not appear to meet the requirement for certainty of objects. There was no consensus between the parties on the specific terms of the agreement or trust. For example, there was no specified duration for the services that Andy had to provide in return for the legal title to Pender, or the exact nature and value of the services he had to provide (e.g., did it extend to future debts and expenses of Albert's at any limit), or whether Albert had any obligation to stay out of debt for a specified period, to earn any income to support himself, or, in the absence of an actual transfer, whether the agreement extended to the replacement property of Capstan Way. Furthermore, it remains unclear why, if Andy received the whole beneficial interest in Pender pursuant to this agreement, he registered the legal title to Capstan Way in their joint names.

70 In *Ratner v. L.H. Ratner Construction Ltd.*, 2010 BCCA 593 (B.C. C.A.), the Court declined to find that a gratuitous transfer of shares of a company, which was revoked before it was completed, resulted in a trust or transfer of beneficial ownership in the shares. On that point, Madam Justice Newbury, writing for the Court at para. 24, relied on the following comments of Turner L.J. in *Milroy v. Lord* (1862), 45 E.R. 1185 (Eng. Ch. Div.):

> I take the law of this Court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; ... but in order to render the settlement binding, one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift. The cases I think go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. ...
>
> [Emphasis added by Newbury J.A.]

71 There is no evidence that either party took any steps to perfect the 2002 Agreement. Their respective reasons for not transferring the legal title to Andy are unclear especially in light of the title to Capstan Way being registered in their joint names. If there was a time to give effect to the 2002 Agreement, surely it would have been upon the sale of Pender by registering the subsequent purchase of Capstan Way in the sole name of Andy.

72 I am not satisfied that the 2002 Agreement to give Andy title to Pender rose to the level of a binding and enforceable contract or express trust, for the reasons I have given. At its best, it was a promise that included no certainty of terms. Nor did it comply with s. 59(3) of the *Law and Equity Act*. In my view, the trial judge erred in law and in fact in finding that the parties entered into a binding and enforceable agreement or express trust at the 2002 Meeting.

(d) Did Albert hold his interest in Capstan Way on a resulting trust in favour of Andy?

73 Andy submits that Albert holds his interest in Capstan Way on a resulting trust for Andy, as Albert made no financial contribution to the acquisition of the property and, therefore, received his interest from Andy as a gratuitous transfer.

74 In order to reach the determination that a resulting trust existed with respect to Albert's $^{1}/_{2}$ interest in Capstan way, the trial judge relied in large part on his finding that, "Andy owned all of the proceeds of sale of Pender". However, absent a finding of a contract or express trust in regard to the net sale proceeds of Pender, this finding cannot stand. Moreover, this finding did not displace the onus on Andy to demonstrate that the registration of joint ownership in Capstan Way was a gratuitous transfer to Albert. In my view, that onus could not be met if the net sale proceeds of Pender were owned by Albert, in whole or in part.

75 Further, a number of additional factors demonstrated a *prima facie* intention by Andy to share ownership of Capstan Way with Albert including: (i) registration of the legal title jointly with Albert; (ii) Albert being made a joint principal on the mortgage and line of credit; and (iii) Andy's request that Albert make monthly contributions to the expenses of the property (which Albert ceased altogether after a few months). In sum, I am of the view that the trial judge erred in law and fact in finding that the statutory presumption of indefeasible title in Capstan Way was displaced by evidence at trial.

VI. The Unjust Enrichment Claim

76 This leads me to the final issue that the trial judge did not address, namely whether Andy's significant contributions, both direct and indirect, to the preservation and maintenance of Pender, and the acquisition, preservation, and maintenance of Capstan Way, established his claim of unjust enrichment thereby entitling him to a monetary sum or constructive trust over all, or part of, Albert's interest in Capstan Way. Regrettably, this Court is unable to determine this issue as it would require us to weigh the evidence and make findings of fact, which is beyond our appellate review jurisdiction. The parties each led evidence and made full submissions before the trial judge on this claim, and, in my view, it is appropriate that this issue is remitted to the trial judge for determination on the record.

VII. Disposition

77 In the result, I would allow the appeal and remit the issue of Andy's claim of unjust enrichment to the trial judge for determination.

***Prowse J.A.*:**

I AGREE:

***Neilson J.A.*:**

I AGREE:

Appeal allowed.

Tab 15

1997 CarswellOnt 1489
Supreme Court of Canada

Soulos v. Korkontzilas

1997 CarswellOnt 1489, 1997 CarswellOnt 1490, [1997] 2 S.C.R. 217, [1997] S.C.J. No. 52, 100 O.A.C. 241, 146 D.L.R. (4th) 214, 17 E.T.R. (2d) 89, 212 N.R. 1, 32 O.R. (3d) 716 (note), 46 C.B.R. (3d) 1, 71 A.C.W.S. (3d) 194, 9 R.P.R. (3d) 1, J.E. 97-1111

Fotios Korkontzilas, Panagiota Korkontzilas and Olympia Town Real Estate Limited, Appellants v. Nick Soulos, Respondent

La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: February 8, 1997
Judgment: May 22, 1997
Docket: 24949

Proceedings: affirming (1995), 84 O.A.C 390 (Ont. C.A..); reversing (1991), 4 O.R. (3d) 51 (Ont. Gen. Div.); additional reasons at (1991), 4 O.R. (3d) 51 at 71 (Ont. Gen. Div.)

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Subject: Torts; Contracts; Estates and Trusts; Insolvency; Property
Related Abridgment Classifications
Commercial law
I Agency
I.6 Relationship between principal and agent
I.6.b Agent's duties to principal
I.6.b.ii Fiduciary duty
I.6.b.ii.C Duty to disclose
Estates and trusts
II Trusts
II.3 Constructive trust
II.3.b Gains by fiduciaries
Real property
IV Real estate agents
IV.10 Agent's duties to principal
IV.10.b Duty to make full disclosure to principal
IV.10.b.v Miscellaneous

Headnote

Trusts and Trustees --- Constructive trust — Gains by fiduciaries
Appeal dismissed.
Agency --- Relationship between principal and agent — Agent's duties to principal — Fiduciary duty — Duty to disclose
Appeal dismissed.
Fiducies et fiduciaires --- Fiducie par interprétation — Avantages tirés par le fiduciaire
Pourvoi a été rejeté.
Mandat --- Relation entre le mandant et le mandataire — Obligations du mandataire envers le mandant — Obligation fiduciaire — Obligation d'informer — Courtier en immeuble n'a pas informé son client que le vendeur avait accepté son offre pour une propriété
Pourvoi a été rejeté.
A real estate broker failed to advise his client that the seller of a commercial property had accepted the client's counter-offer and arranged for his wife to purchase the property. Title was then transferred to the broker and his wife as joint tenants. When the client discovered what had happened, he commenced an action against the broker for breach of fiduciary duty and sought to have the property conveyed to him on the basis of constructive trust. The client had not suffered any monetary loss as a result of the broker's conduct because of a subsequent decrease in the market value of the property. However, the client still wanted the property because of the prestige associated with the ownership of it.
At trial, the broker was found to have been in breach of fiduciary duty, but the judge refused to grant the constructive trust remedy because the broker had not been enriched by his purchase of the property, in that its value had decreased. The decision was reversed on appeal, with the Court of Appeal holding the the moral quality of the broker's conduct allowed the court to grant the constructive trust remedy. It stated that the remedy was necessary in order to act as deterrent to activity in the real estate business that would undermine bonds of trust that enabled that industry to function. The broker appealed to the Supreme Court of Canada
Held: The appeal was dismissed
Per McLachlin J. (La Forest, Gonthier, Cory and Major JJ. concurring): Constructive trusts are not limited exclusively to cases involving unjust enrichment. Wrongful conduct by itself can give rise to the remedy if the following criteria are met: the defendant must have been under an equitable obligation, the defendant must have derived the assets from agency activities in breach of his equitable obligation to the plaintiff, the plaintiff must show a legitimate reason for seeking the remedy, either persona or related to the need to ensure that others like the defendant remain faithful to their duties, and there must be no factors (such as the rights of third parties) which would render imposition of a constructive trust unjust in all the circumstances of the case. In this case, the broker obtained the property as a result of a breach of his obligation to the client and as a direct result of his agency activities with respect to the client. As well, the client still had a desire to own the property and the remedy was necessary to ensure that real estate agents and others in positions of trust remain faithful to their duty of loyalty to their clients. To allow the broker to

keep the property in these circumstances would have undermined the trust and confidence which underpins the institution of real estate brokerage. Finally, there were no factors which would make the imposition of a constructive trust unjust.

Per Sopinka J. (dissenting) (Iacobucci J. concurring): The granting of a constructive trust is a discretionary remedy and, as such, a decision of a trial judge on this issue can be overturned only if it can be shown that the judge made an error in principle. In this case, the trial judge did not commit any error in principle in rendering his decision

Recent case law had made it very clear that a constructive trust can be granted only in cases of unjust enrichment, which must be pecuniary in nature. In this case, there was no such enrichment.

. . . . .

Un courtier en immeuble a volontairement omis d'informer son client que le vendeur d'un immeuble commercial avait accepté sa contre-offre et s'est arrangé pour que son épouse en fasse l'acquisition. Le titre a ensuite été transféré au courtier et à son épouse en tant que cotitulaires. Lorsque le client a eu vent de la manoeuvre, il a entrepris une action contre le courtier pour manquement à son obligation de fiduciaire, avec des conclusions translatives de propriété en vertu de la doctrine de la fiducie par interprétation. Le client n'avait pas subi de dommages pécuniaires par suite des agissements du courtier, car l'immeuble avait subséquemment subi une dévaluation. Cependant, le client désirait toujours acquérir l'immeuble à cause du prestige lié à cette propriété. Au procès, le juge du procès a estimé que le courtier avait manqué à son obligation de fiduciaire, mais a refusé d'accorder le redressement en vertu de la fiducie par interprétation puisque le courtier ne s'était pas enrichi par suite de l'acquisition de l'immeuble, celui-ci s'étant dévalué. Le jugement a été annulé par la Cour d'appel, qui a statué que la turpitude du courtier l'autorisait à accueillir le recours fondé sur la fiducie par interprétation. La Cour a conclu que ce redressement s'avérait nécessaire afin de dissuader les agissements dans le domaine du courtage immobilier qui nuiraient au lien de confiance, élément essentiel dans ce secteur d'activité. Le courtier a formé un pourvoi à la Cour suprême du Canada.

Arrêt: Le pourvoi a été rejeté.

McLachlin, J. (La Forest, Gonthier, Cory et Major, JJ., souscrivant) : Les fiducies par interprétation ne se limitent pas seulement aux cas d'enrichissement sans cause. En soi, l'inconduite peut donner ouverture à ce recours si les critères suivants sont rencontrés : le défendeur doit assumer une obligation équitable, le défendeur doit avoir distrait les biens objets de son mandat en violation de son obligation équitable envers le demandeur, le demandeur doit avoir une raison légitime d'entreprendre un tel recours, soit personnelle ou liée au besoin de s'assurer que d'autres dans la position du défendeur respectent leurs obligations et il ne doit pas exister d'autres facteurs (tels les droits des tiers) qui, dans les circonstances du litige, rendraient injuste l'imposition d'une fiducie par interprétation. En l'espèce, le courtier a obtenu l'immeuble à la suite d'une violation de son obligation envers son client et à la suitede ses activités en tant que mandataire pour le compte du client. En outre, le client désirait toujours acquérir l'immeuble et le recours s'avérait nécessaire pour s'assurer que les courtiers en immeuble, de même que d'autres personnes en situation de confiance, respectent leur obligation de loyauté envers leurs clients. En l'occurrence, permettre au

courtier de conserver l'immeuble compromettrait le lien de confiance qui sous-tend l'institution du courtage immobilier. En terminant, il n'y avait aucun facteur qui rendait injuste l'imposition d'une fiducie par interprétation.

Sopinka, J. (dissident) (Iacobucci, J., souscrivant) : Accorder une fiducie par interprétation est un redressement discrétionnaire et, comme telle, la décision du juge du procès ne peut être annulée que s'il est démontré une erreur de principe de sa part. En l'espèce, le juge du procès n'a pas commis d'erreur de principe.

La jurisprudence récente a établi très clairement qu'une fiducie par interprétation ne peut être accordée que dans des cas d'enrichissement sans cause, de nature pécuniaire. Il n'existait pas de tel enrichissement dans ce dossier.

APPEAL from judgment reported at [1995] 84 O.A.C. 390 , allowing appeal from (1991), 4 O.R. (3d) 51 (Gen. Div.) , additional reasons at (1991), 4 O.R. (3d) 51 at 71 (Gen. Div.) which refused to grant remedy of constructive trust for breach of fiduciary duty when no resulting unjust enrichment.

POURVOI à l'encontre d'un arrêt publié à [1995] 84 O.A.C. 390 , accueillant le pourvoi à l'encontre de (1991), 4 O.R. (3d) 51 (Gen. Div.) , motifs additionnels publié à (1991), 4 O.R. (3d) 51 à 71 (Div. Gén.), refusant le redressement en vertu de la fiducie par interprétation résultant de la violation de l'obligation fiduciaire lorsque aucun enrichissement sans cause n'en résulte.

McLachlin J. **(La Forest, Gonthier, Cory and Major JJ. concurring):**

I

1 This appeal requires this Court to determine whether a real estate agent who buys for himself property for which he has been negotiating on behalf of a client, may be required to return the property to his client despite the fact that the client can show no loss. This raises the legal issue of whether a constructive trust over property may be imposed in the absence of enrichment of the defendant and corresponding deprivation of the plaintiff. In my view, this question should be answered in the affirmative.

II

2 The appellant Mr. Korkontzilas is a real estate broker. The respondent, Mr. Soulos, was his client. In 1984, Mr. Korkontzilas found a commercial building which he thought might interest Mr. Soulos. Mr. Soulos was interested in purchasing the building. Mr. Korkontzilas entered into negotiations on behalf of Mr. Soulos. He offered $250,000. The vendor, Dominion Life, rejected the offer and tendered a counter-offer of $275,000. Mr. Soulos rejected the counter-offer but "signed it back" at $260,000 or $265,000. Dominion Life advised Mr. Korkontzilas that it would accept $265,000. Instead of conveying this information to Mr. Soulos as he should have, Mr. Korkontzilas arranged for his wife, Panagiota Goutsoulas, to purchase the property using the name Panagiot Goutsoulas. Panagiot Goutsoulas then transferred the property to Panagiota and

Fotios Korkontzilas as joint tenants. Mr. Soulos asked what had happened to the property. Mr. Korkontzilas told him to "forget about it"; the vendor no longer wanted to sell it and he would find him a better property. Mr. Soulos asked Mr. Korkontzilas whether he had had anything to do with the vendor's change of heart. Mr. Korkontzilas said he had not.

3 In 1987 Mr. Soulos learned that Mr. Korkontzilas had purchased the property for himself. He brought an action against Mr. Korkontzilas to have the property conveyed to him, alleging breach of fiduciary duty giving rise to a constructive trust. He asserted that the property held special value to him because its tenant was his banker, and being one's banker's landlord was a source of prestige in the Greek community of which he was a member. However, Mr. Soulos abandoned his claim for damages because the market value of the property had, in fact, decreased from the time of the Korkontzilas purchase.

4 The trial judge found that Mr. Korkontzilas had breached a duty of loyalty to Mr. Soulos, but held that a constructive trust was not an appropriate remedy because Mr. Korkontzilas had purchased the property at market value and hence had not been "enriched": (1991), 4 O.R. (3d) 51, 19 R.P.R. (2d) 205 (Ont. Gen. Div.) (hereinafter cited to O.R.). The decision was reversed on appeal, Labrosse J.A. dissenting: (1995), 25 O.R. (3d) 257, 126 D.L.R. (4th) 637, 84 O.A.C. 390, 47 R.P.R. (2d) 221 (Ont. C.A.) (hereinafter cited to O.R.).

5 For the reasons that follow, I would dismiss the appeal. In my view, the doctrine of constructive trust applies and requires that Mr. Korkontzilas convey the property he wrongly acquired to Mr. Soulos.

III

6 The first question is what duties Mr. Korkontzilas owed to Mr. Soulos in relation to the property. This question returns us to the findings of the trial judge. The trial judge rejected the submission of Mr. Soulos that an agreement existed requiring Mr. Korkontzilas to present all properties in the Danforth area to him exclusively before other purchasers. He found, however, that Mr. Korkontzilas became the agent for Mr. Soulos when he prepared the offer which Mr. Soulos signed with respect to the property at issue. He further found that this agency relationship extended to reporting the vendor's response to Mr. Soulos. This relationship of agency was not terminated when the vendor made its counter-offer. The trial judge therefore concluded that Mr. Korkontzilas was acting as Mr. Soulos' agent at all material times.

7 The trial judge went on to state that the relationship of agent and principal is fiduciary in nature. He concluded that as agent to Mr. Soulos, Mr. Korkontzilas owed Mr. Soulos a "duty of loyalty". He found that Mr. Korkontzilas breached this duty of loyalty when he failed to refer the vendor's counter-offer to Mr. Soulos.

8 The Court of Appeal did not take issue with these conclusions. The majority did, however, differ from the trial judge on what consequences flowed from Mr. Korkontzilas' breach of the duty of loyalty.

IV

9 This brings us to the main issue on this appeal: what remedy, if any, does the law afford Mr. Soulos for Mr. Korkontzilas' breach of the duty of loyalty in acquiring the property in question for himself rather than passing the vendor's statement of the price it would accept on to his principal, Mr. Soulos?

10 At trial Mr. Soulos' only claim was that the property be transferred to him for the price paid by Mr. Korkontzilas, subject to adjustments for changes in value and losses incurred on the property since purchase. He abandoned his claim for damages at an early stage of the proceedings. This is not surprising, since Mr. Korkontzilas had paid market value for the property and had, in fact, lost money on it during the period he had held it. Still, Mr. Soulos maintained his desire to own the property.

11 Mr. Soulos argued that the property should be returned to him under the equitable doctrine of constructive trust. The trial judge rejected this claim, on the ground that constructive trust arises only where the defendant has been unjustly enriched by his wrongful act. The fact that damages offered Mr. Soulos no compensation was of no moment: "It would be anomalous to declare a constructive trust, in effect, because a remedy in damages is unsatisfactory, the plaintiff having suffered none" (p. 69). Furthermore, "it seems simply disproportionate and inappropriate to utilize the drastic remedy of a constructive trust where the plaintiff has suffered no damage" (p. 69). The trial judge added that nominal damages were inappropriate, damages having been waived, and that Mr. Soulos had mitigated his loss by buying other properties.

12 The majority of the Court of Appeal took a different view. Carthy J.A. held that the award of an equitable remedy is discretionary and dependent on all the facts before the court. In his view, however, the trial judge had exercised his discretion on a wrong principle. Carthy J.A. asserted that the moral quality of the defendant's act may dictate the court's intervention. Most real estate transactions involve one person acting gratuitously for the purchaser, while seeking commission from the vendor. The fiduciary duties of the agent would be meaningless if the agent could simply acquire the property at market value, and then deny that he or she is a constructive trustee because no damages are suffered. In such circumstances, equity will "intervene with a proprietary remedy to sustain the integrity of the laws which it supervises" (p. 261). Carthy J.A. conceded that Mr. Soulos' reason for desiring the property may seem "whimsical". But viewed against the broad context of real estate transactions, he found that the remedy of constructive trust in these circumstances serves a "salutary purpose". It enables the court to ensure that immoral conduct is not repeated,

undermining the bond of trust that enables the industry to function. The majority accordingly ordered conveyance of the property subject to appropriate adjustments.

13 The difference between the trial judge and the majority in the Court of Appeal may be summarized as follows. The trial judge took the view that in the absence of established loss, Mr. Soulos had no action. To grant the remedy of constructive trust in the absence of loss would be "simply disproportionate and inappropriate", in his view. The majority in the Court of Appeal, by contrast, took a broader view of when a constructive trust could apply. It held that a constructive trust requiring reconveyance of the property could arise in the absence of an established loss in order to condemn the agent's improper act and maintain the bond of trust underlying the real estate industry and hence the "integrity of the laws" which a court of equity supervises.

14 The appeal thus presents two different views of the function and ambit of the constructive trust. One view sees the constructive trust exclusively as a remedy for clearly established loss. On this view, a constructive trust can arise only where there has been "enrichment" of the defendant and corresponding "deprivation" of the plaintiff. The other view, while not denying that the constructive trust may appropriately apply to prevent unjust enrichment, does not confine it to that role. On this view, the constructive trust may apply absent an established loss to condemn a wrongful act and maintain the integrity of the relationships of trust which underlie many of our industries and institutions.

15 It is my view that the second, broader approach to constructive trust should prevail. This approach best accords with the history of the doctrine of constructive trust, the theory underlying the constructive trust, and the purposes which the constructive trust serves in our legal system.

V

16 The appellants argue that this Court has adopted a view of constructive trust based exclusively on unjust enrichment in cases such as *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.) . Therefore, they argue, a constructive trust cannot be imposed in cases like this where the plaintiff can demonstrate no deprivation and corresponding enrichment of the defendant.

17 The history of the law of constructive trust does not support this view. Rather, it suggests that the constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in "good conscience" they should not be permitted to retain. This served the end, not only of doing justice in the case before the court, but of protecting relationships of trust and the institutions that depend on these relationships. These goals were accomplished by treating the person holding the property as a trustee of it for the wronged person's benefit, even though there was no true trust created by intention. In England, the trust thus created was thought of as a real or "institutional" trust. In the United States and recently in Canada,

jurisprudence speaks of the availability of the constructive trust as a remedy; hence the remedial constructive trust.

18 While specific situations attracting a constructive trust have been identified, the older English jurisprudence offers no satisfactory limiting or unifying conceptual theory for the constructive trust. As D. W. M. Waters, *The Constructive Trust* (1964), at p. 39, puts it, the constructive trust "was never any more than a convenient and available language medium through which ... the obligations of parties might be expressed or determined". The constructive trust was used in English law "to link together a number of disparate situations ... on the basis that the obligations imposed by law in these situations might in some way be likened to the obligations which were imposed upon an express trustee": J. L. Dewar, "The Development of the Remedial Constructive Trust" (1981), 6 *Est. & Tr. Q.* 312, at p. 317, citing Waters, *supra* .

19 The situations in which a constructive trust was recognized in England include constructive trusts arising on breach of a fiduciary relationship, as well as trusts imposed to prevent the absence of writing from depriving a person of proprietary rights, to prevent a purchaser with notice from fraudulently retaining trust properties, and to enforce secret trusts and mutual wills. See Dewar, *supra* , at p. 334. The fiduciary relationship underlies much of the English law of constructive trust. As Waters, *supra* , at p. 33, writes: "the fiduciary relationship is clearly wed to the constructive trust over the whole, or little short of the whole, of the trust's operation". At the same time, not all breaches of fiduciary relationships give rise to a constructive trust. As L. S. Sealy, "Fiduciary Relationships", [1962] *Camb. L.J.* 69, at p. 73, states:

> The word "fiduciary," we find, is *not* definitive of a single class of relationships to which a fixed set of rules and principles apply. Each equitable remedy is available only in a limited number of fiduciary situations; and the mere statement that John is in a fiduciary relationship towards me means no more than that in some respects his position is trustee-like; it does not warrant the inference that any particular fiduciary principle or remedy can be applied. [Emphasis in original.]

Nor does the absence of a classic fiduciary relationship necessarily preclude a finding of a constructive trust; the wrongful nature of an act may be sufficient to constitute breach of a trust-like duty: see Dewar, *supra* , at pp. 322-23.

20 Canadian courts have never abandoned the principles of constructive trust developed in England. They have, however, modified them. Most notably, Canadian courts in recent decades have developed the constructive trust as a remedy for unjust enrichment. It is now established that a constructive trust may be imposed in the absence of wrongful conduct like breach of fiduciary duty, where three elements are present: (1) the enrichment of the defendant; (2) the corresponding deprivation of the plaintiff; and (3) the absence of a juristic reason for the enrichment: *Becker v. Pettkus, supra* .

21 This Court's assertion that a remedial constructive trust lies to prevent unjust enrichment in cases such as *Becker v. Pettkus* should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized. The language used makes no such claim. A. J. McClean, "Constructive and Resulting Trusts — Unjust Enrichment in a Common Law Relationship — *Pettkus v. Becker* " (1982), 16 *U.B.C.L. Rev.* 156 at p. 170, describes the ratio of *Becker v. Pettkus* as "a modest enough proposition". He goes on: "It would be wrong ... to read it as one would read the language of a statute and limit further development of the law".

22 Other scholars agree that the constructive trust as a remedy for unjust enrichment does not negate a finding of a constructive trust in other situations. D. M. Paciocco, "The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors, (1989), 68 *Can. Bar Rev.* 315, at p. 318, states: "the constructive trust that is used to remedy unjust enrichment must be distinguished from the other types of constructive trusts known to Canadian law prior to 1980". Paciocco asserts that unjust enrichment is not a necessary condition of a constructive trust (at p. 320):

> ... in the largest traditional category, the fiduciary constructive trust, there need be no deprivation experienced by the particular plaintiff. The constructive trust is imposed to raise the morality of the marketplace generally, with the beneficiaries of some of these trusts receiving what can only be described as a windfall.

23 Dewar, *supra* , holds a similar view (at p. 332):

> While it is unlikely that Canadian courts will abandon the learning and the classifications which have grown up in connection with the English constructive trust, it is submitted that the adoption of the American style constructive trust by the Supreme Court of Canada in *Pettkus v. Becker* will profoundly influence the future development of Canadian trust law.

Dewar, *supra* , at pp. 332-33, goes on to state: "In English and Canadian law there is no general agreement as to precisely which situations give rise to a constructive trust, although there are certain general categories of cases in which it is agreed that a constructive trust does arise". One of these is to correct fraudulent or disloyal conduct.

24 M. M. Litman, "The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust", (1988), 26 *Alta. L. Rev.* 407, at p. 414, sees unjust enrichment as a useful tool in rationalizing the traditional categories of constructive trust. Nevertheless he opines that it would be a "significant error" to simply ignore the traditional principles of constructive trust. He cites a number of Canadian cases subsequent to *Becker v. Pettkus, supra* , which impose constructive trusts for wrongful acquisition of property, even in the absence of unjust enrichment and correlative deprivation, and concludes that the constructive trust "cannot always be explained by the unjust

enrichment model of constructive trust" (p. 416). In sum, the old English law remains part of contemporary Canadian law and guides its development. As La Forest J.A. (as he then was) states in *White v. Central Trust Co.* (1984), 17 E.T.R. 78 (N.B. C.A.) , at p. 90, cited by Litman, *supra* , the courts "will not venture far onto an uncharted sea when they can administer justice from a safe berth".

25 I conclude that the law of constructive trust in the common law provinces of Canada embraces the situations in which English courts of equity traditionally found a constructive trust as well as the situations of unjust enrichment recognized in recent Canadian jurisprudence.

VI

26 Various principles have been proposed to unify the situations in which the English law found constructive trust. R. Goff and G. Jones, *The Law of Restitution* (3rd ed. 1986), at p. 61, suggest that unjust enrichment is such a theme. However, unless "enrichment" is interpreted very broadly to extend beyond pecuniary claims, it does not explain all situations in which the constructive trust has been applied. As McClean, *supra* , at p. 168, states: "however satisfactory [the unjust enrichment theory] may be for other aspects of the law of restitution, it may not be wide enough to cover all types of constructive trust." McClean goes on to note the situation raised by this appeal: "In some cases, where such a trust is imposed the trustee may not have obtained any benefit at all; this could be the case, for example, when a person is held to be a trustee *de son tort* . A plaintiff may not always have suffered a loss." McClean concludes (at pp. 168-69): "Unjust enrichment may not, therefore, satisfactorily explain all types of restitutionary claims".

27 McClean, among others, regards the most satisfactory underpinning for unjust enrichment to be the concept of "good conscience" which lies at "the very foundation of equitable jurisdiction" (p. 169):

> "Safe conscience" and "natural justice and equity" were two of the criteria referred to by Lord Mansfield in *Moses v. MacFerlan* (1760), 2 Burr. 1005, 97 E.R. 676 (K.B.) in dealing with an action for money had and received, the prototype of a common law restitutionary claim. "Good conscience" has a sound basis in equity, some basis in common law, and is wide enough to encompass constructive trusts where the defendant has not obtained a benefit or where the plaintiff has not suffered a loss. It is, therefore, as good as, or perhaps a better, foundation for the law of restitution than is unjust enrichment.

28 Other scholars agree with McClean that good conscience may provide a useful way of unifying the different forms of constructive trust. Litman, *supra* , adverts to the "natural justice and equity" or "good conscience" trust "which operates as a remedy for wrongs which are broader in concept than unjust enrichment" and goes on to state that this may be viewed as the underpinning of the various institutional trusts as well as the unjust enrichment restitutionary constructive trust (at pp. 415-16).

29 Good conscience as the unifying concept underlying constructive trust has attracted the support of many jurists. Edmund Davies L.J. suggested that the concept of a "want of probity" in the person upon whom the constructive trust is imposed provides "a useful touchstone in considering circumstances said to give rise to constructive trusts": *Carl-Zeiss-Stiftung v. Herbert Smith & Co. (No. 2)*, [1968] 2 Ch. 276 (Eng. C.A.) . Cardozo J. similarly endorsed the unifying theme of good conscience in *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378 (U.S. 1919), at p. 380:

> A constructive trust is the formula through which the conscience of equity finds expression. *When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee* . [Emphasis added.]

30 Lord Denning M.R. expressed similar views in a series of cases applying the constructive trust as a remedy for wrong-doing: see *Neale v. Willis* (1968), 112 Sol. Jo. 521 (Eng. C.A.) ; *Binions v. Evans*, [1972] Ch. 359 (Eng. C.A.) ; *Hussey v. Palmer*, [1972] 1 W.L.R. 1286 (Eng. C.A.) . In *Binions* , referring to the statement by Cardozo J., *supra* , Denning M.R. stated that the court would impose a constructive trust "for the simple reason that it would be utterly inequitable for the plaintiffs to turn the defendant out contrary to the stipulation subject to which they took the premises" (p. 368). In *Hussey* , he said the following of the constructive trust (at pp. 1289-90): "By whatever name it is described, it is a trust imposed by law whenever justice and good conscience require it".

31 Many English scholars have questioned Lord Denning's expansive statements on constructive trust. Nevertheless, he is not alone: Bingham J. similarly referred to good conscience as the basis for equitable intervention in *Neste Oy v. Lloyd's Bank Ltd.*, [1983] 2 Lloyd's Rep. 658 (Eng. C.A.) .

32 The New Zealand Court of Appeal also appears to have accepted good conscience as the basis for imposing a constructive trust in *Elders Pastoral Ltd. v. Bank of New Zealand* (1989), 2 N.Z.L.R. 180 . Cooke P., at pp. 185-86, cited the following passage from Bingham J.'s reasons in *Neste Oy, supra* , at p. 666:

> Given the situation of [the defendants] when the last payment was received, any reasonable and honest directors of that company (or the actual directors had they known of it) would, I feel sure, have arranged for the repayment of that sum to the plaintiffs without hesitation or delay. It would have seemed little short of sharp practice for [the defendants] to take any benefit from the payment, and it would have seemed contrary to any ordinary notion of fairness that the general body of creditors should profit from the accident of a payment made at a time when there was bound to be a total failure of consideration. Of course it is true that insolvency always causes loss and perfect fairness is unattainable. The bank, and other creditors, have their legitimate claims. *It nonetheless seems to me that at the time of its receipt*

> *[the defendants] could not in good conscience retain this payment and that accordingly a constructive trust is to be inferred* . [Emphasis added.]

Cooke P. concluded simply (at p. 186): "I do not think that in conscience the stock agents can retain this money." *Elders* has been taken to stand for the proposition that even in the absence of a fiduciary relationship or unjust enrichment, conduct contrary to good conscience may give rise to a remedial constructive trust: see *Mogal Corp. v. Australasia Investment Co. (In Liquidation)* (1990), 3 N.Z.B.L.C. 101 , 783; J. Dixon, "The Remedial Constructive Trust Based on Unconscionability in the New Zealand Commercial Environment" (1995), 7 *Auck. U. L. Rev.* 147, at pp. 157-58. Although the Judicial Committee of the Privy Council rejected the creation of a constructive trust on grounds of good conscience in *Goldcorp Exchange Ltd., Re*, [1994] 2 All E.R. 806 (New Zealand P.C.) , the fact remains that good conscience is a theme underlying constructive trust from its earliest times.

33 Good conscience addresses not only fairness between the parties before the court, but the larger public concern of the courts to maintain the integrity of institutions like fiduciary relationships which the courts of equity supervised. As La Forest J. states in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.) , at p. 453:

> The law of fiduciary duties has always contained within it an element of deterrence. This can be seen as early as *Keech* in the passage cited *supra* ; see also *Canadian Aero, supra* , at pp. 607 and 610; *Canson, supra* , at p. 547, *per* McLachlin J. In this way the law is able to monitor a given relationship society views as socially useful while avoiding the necessity of formal regulation that may tend to hamper its social utility.

The constructive trust imposed for breach of fiduciary relationship thus serves not only to do the justice between the parties that good conscience requires, but to hold fiduciaries and people in positions of trust to the high standards of trust and probity that commercial and other social institutions require if they are to function effectively.

34 It thus emerges that a constructive trust may be imposed where good conscience so requires. The inquiry into good conscience is informed by the situations where constructive trusts have been recognized in the past. It is also informed by the dual reasons for which constructive trusts have traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships. Finally, it is informed by the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case.

35 Good conscience as a common concept unifying the various instances in which a constructive trust may be found has the disadvantage of being very general. But any concept capable of embracing the diverse circumstances in which a constructive trust may be imposed must, of

necessity, be general. Particularity is found in the situations in which judges in the past have found constructive trusts. A judge faced with a claim for a constructive trust will have regard not merely to what might seem "fair" in a general sense, but to other situations where courts have found a constructive trust. The goal is but a reasoned, incremental development of the law on a case-by-case basis.

36 The situations which the judge may consider in deciding whether good conscience requires imposition of a constructive trust may be seen as falling into two general categories. The first category concerns property obtained by a wrongful act of the defendant, notably breach of fiduciary obligation or breach of duty of loyalty. The traditional English institutional trusts largely fall under but may not exhaust (at least in Canada) this category. The second category concerns situations where the defendant has not acted wrongfully in obtaining the property, but where he would be unjustly enriched to the plaintiff's detriment by being permitted to keep the property for himself. The two categories are not mutually exclusive. Often wrongful acquisition of property will be associated with unjust enrichment, and vice versa. However, either situation alone may be sufficient to justify imposition of a constructive trust.

37 In England the law has yet to formally recognize the remedial constructive trust for unjust enrichment, although many of Lord Denning's pronouncements pointed in this direction. The courts do, however, find constructive trusts in circumstances similar to those at bar. Equity traditionally recognized the appropriateness of a constructive trust for breach of duty of loyalty simpliciter. The English law is summarized by Goff and Jones, *The Law of Restitution, supra* , at p. 643:

> A fiduciary may abuse his position of trust by diverting a contract, purchase or other opportunity from his beneficiary to himself. If he does so, he is deemed to hold that contract, purchase, or opportunity on trust for the beneficiary.

P. Birks, *An Introduction to the Law of Restitution* (1985) (at pp. 330; 338-43) agrees. He suggests that cases of conflict of interest not infrequently may give rise to constructive trust, absent unjust enrichment. Birks distinguishes between anti-enrichment wrongs and anti-harm wrongs (at p. 340). A fiduciary acting in conflict of interest represents a risk of actual or potential harm, even though his misconduct may not always enrich him. A constructive trust may accordingly be ordered.

38 Both categories of constructive trust are recognized in the United States; although unjust enrichment is sometimes cited as the rationale for the constructive trust in the U.S., in fact its courts recognize the availability of constructive trust to require the return of property acquired by wrongful act absent unjust enrichment of the defendant and reciprocal deprivation of the plaintiff. Thus the authors of *Scott on Trusts* (3rd ed. 1967), vol. V, at p. 3410, state that the constructive trust "is available where property is obtained by mistake or by fraud or by other wrong". Or as Cardozo C.J. put it, "[a] constructive trust is, then, the remedial device through which preference of self is

made subordinate to loyalty to others": *Meinhard v. Salmon* (1928), 164 N.E. 545 (U.S. 1928), at p. 548, cited in *Scott on Trusts, supra* , at p. 3412. *Scott on Trusts, supra* , at p. 3418, states that there are cases "in which a constructive trust is enforced against a defendant, although the loss to the plaintiff is less than the gain to the defendant or, indeed, where there is no loss to the plaintiff".

39 Canadian courts also recognize the availability of constructive trusts for both wrongful acquisition of property and unjust enrichment. Applying the English law, they have long found constructive trusts as a consequence of wrongful acquisition of property, for example by fraud or breach of fiduciary duty. More recently, Canadian courts have recognized the availability of the American-style remedial constructive trust in cases of unjust enrichment: *Becker v. Pettkus, supra* . However, since *Becker v. Pettkus* Canadian courts have continued to find constructive trusts where property has been wrongfully acquired, even in the absence of unjust enrichment. While such cases appear infrequently since few choose to litigate absent pecuniary loss, they are not rare.

40 Litman, *supra* , at p. 416, notes that in "the post-*Pettkus v. Becker* era there are numerous cases where courts have used the institutional constructive trust without adverting to or relying on unjust enrichment". The imposition of a constructive trust in these cases is justified not on grounds of unjust enrichment, but on the ground that the defendant's wrongful act requires him to restore the property thus obtained to the plaintiff.

41 Thus in *Ontario (Wheat Producers' Marketing Board) v. Royal Bank* (1984), 9 D.L.R. (4th) 729 (Ont. C.A.) , a constructive trust was imposed on a bank which received money with actual knowledge that it belonged to someone other than the depositor.

42 Again, in *MacMillan Bloedel Ltd. v. Binstead* (1983), 14 E.T.R. 269 (B.C. S.C.) , a constructive trust was imposed on individuals who knowingly participated in a breach of fiduciary duty despite a finding that unjust enrichment would not warrant the imposition of a trust because the plaintiff company could not be said to have suffered a loss or deprivation since its own policy precluded it from receiving the profits. Dohm J. (as he then was) stated that the constructive trust was required "not to balance the equities but to ensure that trustees and fiduciaries remain faithful and that those who assist them in the breaches of their duty are called to account" (p. 302).

43 I conclude that in Canada, under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, as well as to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground: where there is a wrongful act but no unjust enrichment and corresponding deprivation; or where there is an unconscionable unjust enrichment in the absence of a wrongful act, as in *Becker v. Pettkus, supra* . Within these two broad categories, there is room for the law of constructive trust to develop and for greater precision to be attained, as time and experience may dictate.

44 The process suggested is aptly summarized by McClean, *supra* , at pp. 167-70:

> The law [of constructive trust] may now be at a stage where it can distill from the specific examples a few general principles, and then, by analogy to the specific examples and within the ambit of the general principle, create new heads of liability. That, it is suggested, is not asking the courts to embark on too dangerous a task, or indeed on a novel task. In large measure it is the way that the common law has always developed.

VII

45 In *Becker v. Pettkus, supra* , this Court explored the prerequisites for a constructive trust based on unjust enrichment. This case requires us to explore the prerequisites for a constructive trust based on wrongful conduct. Extrapolating from the cases where courts of equity have imposed constructive trusts for wrongful conduct, and from a discussion of the criteria considered in an essay by Roy Goode, "Property and Unjust Enrichment", in Andrew Burrows ed., *Essays on the Law of Restitution* (1991), I would identify four conditions which generally should be satisfied:

> (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
>
> (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
>
> (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
>
> (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

VIII

46 Applying this test to the case before us, I conclude that Mr. Korkontzilas' breach of his duty of loyalty sufficed to engage the conscience of the court and support a finding of constructive trust for the following reasons.

47 First, Mr. Korkontzilas was under an equitable obligation in relation to the property at issue. His failure to pass on to his client the information he obtained on his client's behalf as to the price the vendor would accept on the property and his use of that information to purchase the property instead for himself constituted breach of his equitable duty of loyalty. He allowed his own interests to conflict with those of his client. He acquired the property wrongfully, in flagrant and inexcusable

breach of his duty of loyalty to Mr. Soulos. This is the sort of situation which courts of equity, in Canada and elsewhere, have traditionally treated as involving an equitable duty, breach of which may give rise to a constructive trust, even in the absence of unjust enrichment.

48 Second, the assets in the hands of Mr. Korkontzilas resulted from his agency activities in breach of his equitable obligation to the plaintiff. His acquisition of the property was a direct result of his breach of his duty of loyalty to his client, Mr. Soulos.

49 Third, while Mr. Korkontzilas was not monetarily enriched by his wrongful acquisition of the property, ample reasons exist for equity to impose a constructive trust. Mr. Soulos argues that a constructive trust is required to remedy the deprivation he suffered because of his continuing desire, albeit for non-monetary reasons, to own the particular property in question. No less is required, he asserts, to return the parties to the position they would have been in had the breach not occurred. That alone, in my opinion, would be sufficient to persuade a court of equity that the proper remedy for Mr. Korkontzilas' wrongful acquisition of the property is an order that he is bound as a constructive trustee to convey the property to Mr. Soulos.

50 But there is more. I agree with the Court of Appeal that a constructive trust is required in cases such as this to ensure that agents and others in positions of trust remain faithful to their duty of loyalty: see *Hodgkinson v. Simms, supra, per* La Forest J. If real estate agents are permitted to retain properties which they acquire for themselves in breach of a duty of loyalty to their clients provided they pay market value, the trust and confidence which underpins the institution of real estate brokerage will be undermined. The message will be clear: real estate agents may breach their duties to their clients and the courts will do nothing about it, unless the client can show that the real estate agent made a profit. This will not do. Courts of equity have always been concerned to keep the person who acts on behalf of others to his ethical mark; this Court should continue in the same path.

51 I come finally to the question of whether there are factors which would make imposition of a constructive trust unjust in this case. In my view, there are none. No third parties would suffer from an order requiring Mr. Korkontzilas to convey the property to Mr. Soulos. Nor would Mr. Korkontzilas be treated unfairly. Mr. Soulos is content to make all necessary financial adjustments, including indemnification for the loss Mr. Korkontszilas has sustained during the years he has held the property.

52 I conclude that a constructive trust should be imposed. I would dismiss the appeal and confirm the order of the Court of Appeal that the appellants convey the property to the respondent, subject to appropriate adjustments. The respondent is entitled to costs throughout.

Sopinka J. **(dissenting) (Iacobucci J. concurring):**

53 I have read the reasons of my colleague McLachlin J. While I agree with her conclusion that a breach of a fiduciary duty was made out herein, I disagree with her analysis concerning the appropriate remedy. In my view, she errs in upholding the decision of the majority of the Court of Appeal to overturn the trial judge and impose a constructive trust over the property in question. There are two broad reasons for my conclusion. First, the order of a constructive trust is a discretionary matter and, as such, is entitled to appellate deference. Given that the trial judge did not err in principle in declining to make such an order, appellate courts should not interfere with the exercise of his discretion. Second, even if appellate review were appropriate in the present case, a constructive trust as a remedy is not available where there has been no unjust enrichment. The main source of my disagreement with McLachlin J. arises in consideration of the second point, but in order to address the reasons of the majority in the court below as well, I will consider both of these issues in turn.

Standard of Review and the Exercise of Discretion

54 It is a matter of settled law that appellate courts should generally not interfere with orders exercised within a trial judge's discretion. Only if the discretion has been exercised on the basis of an erroneous principle should the order be overturned on appeal: see *Donkin v. Bugoy*, [1985] 2 S.C.R. 85 (S.C.C.) . As acknowledged by the majority in the Court of Appeal ((1995), 25 O.R. (3d) 257 (Ont. C.A.) , at p. 259), the decision to order a constructive trust is a matter of discretion. In *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.) , the majority held that the order of a constructive trust in response to a breach of a fiduciary duty would depend on all the circumstances. La Forest J. stated at p. 674:

> In the case at hand, the restitutionary claim has been made out. The Court can award either a proprietary remedy, namely that Lac hand over the Williams property, or award a personal remedy, namely a monetary award. ... [A constructive trust] is but one remedy, and will only be imposed in appropriate circumstances.

The discretionary approach to constructive trusts is also consistent with the approach to equitable remedies generally: see *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 (S.C.C.) , at p. 585.

55 Given that ordering a constructive trust is a discretionary matter, it is necessary to show an error in principle on the part of the trial judge in order to overturn the judge's decision not to order such a remedy. In my view, the trial judge committed no such error.

56 The majority of the Court of Appeal apparently found that the trial judge erred in failing to consider the moral blameworthiness of the appellants' actions. Similarly, McLachlin J. would hold that a constructive trust was appropriate in the present case simply because of considerations of "good conscience". In my view, the trial judge considered the moral quality of the appellants'

actions and thus there is no room for appellate intervention on this ground. He stated ((1991), 4 O.R. (3d) 51 (Ont. Gen. Div.) , at p. 69) that, while "[n]o doubt the maintenance of commercial morality is an element of public policy and a legitimate concern of the court", morality should generally not invite the intervention of the court, except where it is required in aid of enforcing some legal right. Put another way, in my view the trial judge was of the opinion that where there is otherwise no justification for ordering a constructive trust or any other remedy, the morality of the act will not alone justify such an order, which statement of the law is in my view correct.

57 The majority of the Court of Appeal stated (at pp. 259-60) that the principles set out by the trial judge may be applicable where there are alternative remedies, but are questionable where only one remedy is available, as in the present case. I do not accept this contention. If a constructive trust is held to be inappropriate where there are a variety of remedies available, I cannot understand the principle behind the conclusion that such a remedy may be appropriate where it is the only remedy available. The trial judge has a discretion to order a constructive trust, or not to order one, and this discretion should not be affected by the number of available remedies. In the present case, the plaintiff withdrew his claim for damages. While compensatory damages were unavailable since the plaintiff suffered no pecuniary loss (which I will discuss further below in assessing whether a constructive trust could have been ordered), the plaintiff could have sought exemplary damages — his decision not to do so should not bind the trial judge's discretion with respect to the order of a constructive trust.

58 The trial judge put significant emphasis on the absence of pecuniary gains in concluding that he would not order a constructive trust. For the reasons which I set out in detail below, I am of the opinion that the trial judge was correct in this regard. On the other hand, the majority of the Court of Appeal and McLachlin J. hold that the trial judge erred in improperly appreciating the deterrence role of a constructive trust in the present case. In my view, consideration of deterrence fails to disclose any error in principle on the part of the trial judge. Deterrence, like the morality of the acts in question, may be relevant to the exercise of discretion with respect to the remedy for a breach of a fiduciary duty (see, e.g., *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.) , at pp. 421 and 453), but the trial judge in the present case did not fail to consider deterrence in deciding whether to order a constructive trust. As noted above, he stated that while "maintenance of commercial morality is ... a legitimate concern of the court" (p. 69), it would not alone justify ordering a remedy in the present case. In my view, his mention of the "maintenance of commercial morality" indicates that the judge considered deterrence, but held that it alone could not justify a remedy in the present case. Thus, even if failure to consider deterrence could be considered an error in principle, the trial judge in the present case did not so err.

59 In my view, the trial judge committed no error in principle which could justify a decision to set aside his judgment and order a constructive trust. Even if the trial judge did commit some error in principle, however, in my view the remedy of a constructive trust was not available on the facts of the present case. That is, even if no deference is owed to the trial judge, the majority

below erred in ordering a constructive trust and the appeal should be allowed. The following are my reasons for this conclusion.

Unjust Enrichment and the Availability of a Constructive Trust

60 McLachlin J. would hold that there are two general circumstances in which a constructive trust may be ordered: where there has been unjust enrichment and where there has been an absence of "good conscience". While unjust enrichment and the absence of "good conscience" may both be present in a particular case, McLachlin J. is of the view that either element individually is sufficient to order a constructive trust. By failing to consider the "good conscience" ground on its own, McLachlin J. finds that the trial judge erred. I respectfully disagree with this finding. In my view, recent case law in this Court is very clear that a constructive trust may *only* be ordered where there has been an unjust enrichment. For example, passages in *LAC Minerals, supra* , set out the circumstances in which an order of a constructive trust might be appropriate. In my opinion, it is clear from that decision that a constructive trust is not available as a remedy unless there has been an unjust enrichment. La Forest J. stated at pp. 673-74:

> This Court has recently had occasion to address the circumstances in which a constructive trust will be imposed in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 . There, the Chief Justice discussed the development of the constructive trust over 200 years from its original use in the context of fiduciary relationships, through to *Pettkus v. Becker* , [[1980] 2 S.C.R. 834], where the Court moved to the modern approach with the constructive trust as a remedy for unjust enrichment. He identified that *Pettkus v. Becker, supra* , set out a two-step approach. *First, the Court determines whether a claim for unjust enrichment is established, and then, secondly, examines whether in the circumstances a constructive trust is the appropriate remedy to redress that unjust enrichment* . In *Hunter Engineering Co. v. Syncrude Canada Ltd.* , a constructive trust was refused, not on the basis that it would not have been available between the parties (though in my view it may not have been appropriate), but rather on the basis that the claim for unjust enrichment had not been made out, so no remedial question arose.
>
> In the case at hand, the restitutionary claim has been made out. The Court can award either a proprietary remedy, namely that Lac hand over the Williams property, or award a personal remedy, namely a monetary award. While, as the Chief Justice observed, "*The principle of unjust enrichment lies at the heart of the constructive trust* ": see *Pettkus v. Becker* , at p. 847, the converse is not true. The constructive trust does not lie at the heart of the law of restitution. [Emphasis added.]

La Forest J. added at p. 678:

> *Much of the difficulty disappears if it is recognized that in this context the issue of the appropriate remedy only arises once a valid restitutionary claim has been made out* . The

> constructive trust awards a right in property, but that right can only arise once a right to relief has been established. [Emphasis added.]

61 In *Brissette v. Westbury Life Insurance Co.*, [1992] 3 S.C.R. 87 (S.C.C.) , the majority cited some of the passages above from *Lac* with approval and held at p. 96 that, "[t]he requirement of unjust enrichment is fundamental to the use of a constructive trust."

62 Citing only *Pettkus, supra* , specifically, McLachlin J. states at para. 21 that it and other cases should not be taken to expunge from Canadian law the constructive trust in circumstances where there has not been unjust enrichment. With respect, I do not see how statements such as "The requirement of unjust enrichment is fundamental to the use of a constructive trust" could do anything but expunge from Canadian law the use of constructive trusts where there has been no enrichment. Unjust enrichment has been repeatedly stated to be a *requirement* for a constructive trust; thus to order one where there has been no unjust enrichment would clearly depart from settled law.

63 Even aside from the case law, in my view, the unavailability of a constructive trust in the absence of unjust enrichment is consistent with the constructive trust's remedial role. The respondent submitted that if no remedy is available in the present case, there would inappropriately be a right without a remedy. I disagree. Clearly, the beneficiary has a right to have the fiduciary adhere to its duty, and *if damages are suffered* , the beneficiary has a right to a remedy. In my view, this is analogous to remedial principles found elsewhere in the private law. Even if a duty is owed and breached in other legal contexts, there is no remedy unless a loss has been suffered. I may owe a duty to my neighbour to shovel snow off my walk, and I may breach that duty, but if my neighbour does not suffer any loss because of the breached duty, there is no tort and no remedy. Similarly, I may have a contractual duty to supply goods at a specific date for a specific price, but if I do not and the other party is able to purchase the same goods at the contract price at the same time and place, the party has not suffered damage and no remedy is available. It is entirely consistent with these rules to state that even if a fiduciary breaches a duty, if the fiduciary is not unjustly enriched by the breach, there is no remedy.

64 Remedial principles generally thus support the rule against a constructive trust where there has been no unjust enrichment. The rule is also supported, in my view, by specific consideration of the principles governing constructive trusts set out in *LAC Minerals* . In *LAC Minerals* , La Forest J. stated that, even where there has been unjust enrichment, the constructive trust will be an exceptional remedy; the usual approach would be to award damages. He stated at p. 678:

> In the vast majority of cases a constructive trust will not be the appropriate remedy. Thus, in *Hunter Engineering Co. v. Syncrude Canada Ltd., supra* , had the restitutionary claim been made out, there would have been no reason to award a constructive trust, as the plaintiff's claim could have been satisfied simply by a personal monetary award; *a constructive trust*

> *should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property* . [Emphasis added.]

65 La Forest J. thus held that generally an aggrieved beneficiary will only be entitled to damages, not to the property itself. This implies that the beneficiary does not generally have a right to the property in question, but rather has a right to receive the value of the gains resulting from the acquisition of the property. Following this reasoning, if the value of the gains is zero, that is, there is no unjust enrichment, the beneficiary will not have a right to a remedy. Consequently, where there has been no unjust enrichment, there is no right to a constructive trust or any other remedy.

66 While, in my view, recent decisions of this Court and the principles underlying them settle the matter, McLachlin J. cites other Canadian case law in concluding that constructive trusts may be ordered even where there has not been unjust enrichment. She cites three lower court decisions which she claims involved the award of a constructive trust absent unjust enrichment. With respect, I do not read any one of these cases as supporting her claim. An unjust enrichment exists where there has been an enrichment of the defendant, a corresponding deprivation experienced by the plaintiff and the absence of any juristic reason for the enrichment: *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.) ; *Syncrude Canada Ltd. v. Hunter Engineering Co.*, [1989] 1 S.C.R. 426 (S.C.C.) . McLachlin J. fails to cite a case where a remedial constructive trust was ordered absent such an enrichment.

67 In *Ontario (Wheat Producers' Marketing Board) v. Royal Bank* (1984), 9 D.L.R. (4th) 729 (Ont. C.A.) , a constructive trust was imposed on a bank which received money with actual knowledge that it belonged to someone other than the depositor. The bank was a secured creditor of the depositor, which depositor was in financial difficulty at the time of the deposits. Clearly, this case involved an unjust enrichment: the bank benefitted by gaining rights over the deposited money, as well as by increasing the likelihood of repayment of the depositor's credit; the plaintiff (a corporation whose agent, the depositor, breached his fiduciary obligations) was deprived of its right to its money; and there was no juristic reason for the enrichment. Thus, the order of a constructive trust responded to an unjust enrichment, whether or not the court adverted to such doctrine.

68 *MacMillan Bloedel Ltd. v. Binstead* (1983), 14 E.T.R. 269 (B.C. S.C.) is also, in my view, a case of unjust enrichment. In this case, a fiduciary to a corporation breached his duty by engaging in self-dealing without disclosing his interest. A constructive trust was imposed over the secret profits even though the plaintiff organization, because of its internal policy, could not have realized the profits itself. While the fiduciary was plainly enriched, the trial judge and McLachlin J. conclude that since the plaintiff could not have realized the profits, there was no "corresponding deprivation" and therefore no unjust enrichment.

69 I disagree with McLachlin J. that there was no unjust enrichment in *MacMillan Bloedel Ltd.* First of all, courts have consistently treated fiduciaries' profits explicitly as unjust enrichment, whether or not the beneficiary could have earned the profits itself. For example, in *Reading v. R.*, [1948] 2 All E.R. 27 (Eng. K.B.) , aff'd [1949] 2 All E.R. 68 (Eng. C.A.) , aff'd [1951] 1 All E.R. 617 (Eng. H.L.) , Denning J. stated at p. 28:

> It matters not that the master has not lost any profit, nor suffered any damage, nor does it matter that the master could not have done the act himself. If the servant has *unjustly enriched himself* by virtue of his service without his master's sanction, the law says that he ought not to be allowed to keep the money. ... [Emphasis added.]

In *Canadian Aero Service Ltd. v. O'Malley* (1973), [1974] S.C.R. 592 (S.C.C.) , at pp. 621-22, Laskin J., as he then was, stated:

> Liability of O'Malley and Zarzycki for breach of fiduciary duty *does not depend upon proof by Canaero that, but for their intervention, it would have obtained the Guyana contract* ; nor is it a condition of recovery of damages that Canaero establish what its profit would have been or what it has lost by failing to realize the corporate opportunity in question. It is entitled to compel the faithless fiduciaries to answer for their default according to their gain. Whether the damages awarded here be viewed as an accounting of profits or, what amounts to the same thing, *as based on unjust enrichment* , I would not interfere with the quantum. [Emphasis added.]

Reading and *Canadian Aero Service Ltd.* are clear: the characterization of the profits earned by a fiduciary in breach of duty is one of unjust enrichment, whether or not the corporation could have earned the profits itself. Thus, *MacMillan Bloedel Ltd.* involved unjust enrichment, contrary to McLachlin J.'s assertion.

70 I wish to add that the treatment of the profits as unjust enrichment in *Reading, O'Malley* , and *MacMillan Bloedel Ltd.* is not inconsistent with the general rules governing unjust enrichment. The plaintiff in each case had a right to have the fiduciary adhere to his duty. When the defendant breached that duty, the profits earned as a result of that breach are essentially treated in equity as belonging to the corporation, whether or not the corporation could have earned those profits in the absence of the breach. As an example of the proprietary analogy, Denning M.R. stated at p. 856 in *Phipps v. Boardman*, [1965] 1 All E.R. 849 (Eng. C.A.) , aff'd [1966] 3 All E.R. 721 (U.K. H.L.) , that:

> [W]ith *information or knowledge* which he has been employed by his principal to collect or discover, *or which he has otherwise acquired* , for the use of his principal, then again if he turns it to his own use, so as to make a profit by means of it for himself, *he is accountable ... for*

> *such information or knowledge is the property of his principal, just as much as an invention is* . ... [Italics in original; underlining added.]

71 Thus, in *MacMillan Bloedel Ltd.* , the retention of the profits by the fiduciary would have deprived the corporation of its right to the profits. The deprivation is represented by the monies obtained by the fiduciary as a result of infringing the rights of the plaintiff. In order for there not to have been deprivation and unjust enrichment in circumstances otherwise similar to *MacMillan Bloedel Ltd.* , the self-dealing could not have resulted in any secret profits — if a remedy were awarded in a case without profit, thus no enrichment nor deprivation, McLachlin J. could well point to the case for support. Given that there *was* profit in *MacMillan Bloedel Ltd.* , however, there was unjust enrichment which justified the order of a constructive trust, whether or not the court explicitly relied upon unjust enrichment.

72 In summary, McLachlin J. fails to refer to a single Canadian case where a constructive trust was ordered despite the absence of unjust enrichment. Given this conclusion and given that recent cases of this Court unambiguously foreclose the possibility of ordering a constructive trust in the absence of unjust enrichment, in my view McLachlin J. is in error in concluding that a constructive trust may be ordered in the absence of unjust enrichment.

73 Aside from Canadian case law, McLachlin J. attempts to rely on various scholars and foreign case law as providing support for her conclusion. Because of the clear statement of the law recently set out by this Court, in my view the scholarly writings and foreign cases are only useful insofar as the policy they set out suggests that the law in Canada should be modified. I will therefore simply address the policy upon which McLachlin J. relies, rather than each case and each article she cites.

74 Simply put, McLachlin J., reasoning similarly to the majority below, concludes that to fail to permit the order of a constructive trust where there has been a breach of a fiduciary duty, but no unjust enrichment, would inadequately safeguard the integrity of fiduciary relationships. She says at para. 33 that ordering a constructive trust simply on the basis of "good conscience",

> addresses not only fairness between the parties before the court, but the larger public concern of the courts to maintain the integrity of institutions like fiduciary relationships which the courts of equity supervised. ... The constructive trust imposed for breach of fiduciary relationship, thus serves not only to do the justice between the parties that good conscience requires, but to hold fiduciaries and people in positions of trust to the high standards of trust and probity that commercial and other social institutions require if they are to function effectively.

According to McLachlin J., then, deterrence of faithless fiduciaries requires the availability of constructive trust as a remedy even where there has been no unjust enrichment.

75 In my view, deterrence is not a factor which suggests modifying the law of Canada and permitting the order of a constructive trust even where there has been no unjust enrichment. As noted above, despite considerations of deterrence, it is true throughout the private law that remedies are typically unavailable in the absence of a loss. Courts have not, because of concern about protecting the integrity of these duties, held it to be necessary where a tort duty, or a contractual duty, has been breached to order remedies even where no loss resulted. I fail to see what distinguishes the role of fiduciary duties from the very important societal roles played by other legal duties which would justify their exceptional treatment with respect to remedy.

76 In any event, the unavailability of a constructive trust in cases where there is no unjust enrichment does not, in my opinion, have any significant effect on deterring unfaithful fiduciaries and protecting the integrity of fiduciary relationships. First, if deterrence were deemed to be particularly important in a case, the plaintiff may seek and the trial judge may award exemplary damages; a constructive trust is not necessary to preserve the integrity of the relationship, even if this integrity were of particular concern in a given case. The fact that exemplary damages were not sought in the present case should not compel this Court to order a constructive trust in their place. Second, even if a remedy were unavailable in the absence of unjust enrichment, which is not true given exemplary damages, deterrence is not precluded. Taking a case similar to the present appeal, while an unscrupulous fiduciary would know that he or she would not be compelled to give up the surreptitiously obtained property if there were no gains in value to the property, he or she must also reckon with the possibility that if there *were* gains in value, and therefore unjust enrichment, he or she *would* be compelled to pay damages or possibly give up the property. Thus, if the fiduciary were motivated to breach his or her duty because of the prospect of pecuniary gains, which would, I imagine, be the typical, if not the exclusive, motive for such a breach, not ordering a constructive trust where there have been no pecuniary gains does not affect deterrence. I therefore disagree with McLachlin J. that deterrence suggests that a constructive trust should be available even where there is no unjust enrichment.

77 As is clear, I cannot agree with McLachlin J. that a constructive trust could be ordered, and indeed should have been ordered, in the present case even if there was no unjust enrichment. In order to decide whether such a remedy could be ordered, in my view, it must be decided whether there was unjust enrichment in the present case.

Was There Unjust Enrichment?

78 In my opinion, there was no enrichment and therefore no unjust enrichment in the present case. It is first of all plain that there were no pecuniary advantages accruing to the appellants from the purchase of the property. The trial judge stated (at p. 68):

> I now consider the facts of the case at bar. The nature of the duty and of the breach have already been discussed. At an interlocutory stage, the plaintiff abandoned any claim for damages. *This step involved no sacrifice because the plaintiff could not have proved any* . [Emphasis added.]

Any enrichment from the purchase of the property was not pecuniary, which would suggest that there has in fact been no enrichment and therefore no unjust enrichment.

79 It could, perhaps, be argued that if the property were unique or otherwise difficult to value, the defendant's pecuniary gains may not represent the enrichment of the defendant or the deprivation of the plaintiff. Analogizing to the award of specific performance in contract, where property that is the subject of a contract is unique or otherwise difficult to value, and the contract is breached, it may be held that monetary damages are inadequate and thus a remedy of specific performance must be ordered to compensate the plaintiff adequately. In such cases, pecuniary damages may not represent the loss to the plaintiff or the gain to the defendant from the breach. Thus, perhaps, an enrichment could be found in the absence of a change in market price if the property were unique or otherwise difficult to value.

80 Whether or not such considerations could be relevant to a finding of an enrichment, the property in question was not found to be unique or otherwise difficult to value in a manner relevant to the remedy. The trial judge noted that the respondent had asserted that the property in question had special value to him given its tenant, a bank, and the significance of being a landlord to a bank in the Greek community. The trial judge (at p. 69) held that such a factor should not be taken into account any more than personal attachment in an eminent domain case. In other words, while there may have been personal motivation for the purchase, this was not relevant to an assessment of the value of the property. This indicates, in my view, that the trial judge did not view the property to be unique in a manner meaningful to the remedial analysis. Such a conclusion is plain in the trial judge's analysis of *Lee v. Chow* (1990), 12 R.P.R. (2d) 217 (Ont. H.C.) . In *Lee* , a constructive trust was declared in a property that had been purchased surreptitiously by an agent in a situation similar to the present case. The trial judge in the instant appeal distinguished *Lee* in the following way (at p. 70):

> [The circumstances in *Lee*] included the following: a degree of dependence by the plaintiff which, in my view, is lacking in the case at bar; that it was a residential property meeting the specific requirements of the plaintiff, *rather than a commercial property having value only as an investment* ; and that it appeared probable that the acquisition price represented a bargain, while the property at issue in the case at bar did not. [Emphasis added.]

In *Lee* there were pecuniary gains, thus an enrichment, and the property had unique qualities which helped justify a constructive trust. In the present case there were no pecuniary gains, and the trial judge did not find any meaningful non-pecuniary advantages associated with the property — the property had value "only as an investment". In my view, given the absence of both pecuniary and

non-pecuniary advantages from the property, there was no enrichment and therefore no unjust enrichment.

81 In the absence of unjust enrichment, in my view the trial judge was correct not to order the remedy sought, a constructive trust. The trial judge stated (at p. 69):

> A constructive trust was deemed appropriate in *Lac Minerals, supra* , because damages were deemed to be unsatisfactory. It would be anomalous to declare a constructive trust, in effect, because a remedy in damages is unsatisfactory, the plaintiff having suffered none.

The trial judge, in the absence of pecuniary damages which might have indicated unjust enrichment, declined to order a constructive trust. Neither the majority of the Court of Appeal nor McLachlin J. raise an error in principle in the trial judge's reasons; indeed, in my view they err in concluding that a constructive trust is available in the present case. Even if the trial judge ignored factors such as the moral quality of the defendants' acts and deterrence, which he did not, and even if this could be construed as an error in principle, the factors to be considered in ordering a constructive trust only become relevant at the second stage of the inquiry when it is decided what remedy is appropriate. Unless unjust enrichment is made out at the first stage of the inquiry, there is no need to consider the factors relevant to ordering a constructive trust. The majority of the Court of Appeal erred in interfering with the trial judge's discretion and in deciding that a constructive trust may be ordered in the absence of unjust enrichment.

Conclusion

82 Since the trial judge did not err in not ordering a constructive trust, but rather the majority of the Court of Appeal did in ordering one, I would allow the appeal, set aside the judgment of the Court of Appeal and reinstate the judgment of the trial judge. In the circumstances, I would not award costs to the appellants either here or in the Court of Appeal.

Appeal dismissed.

Pourvoi rejeté.

Tab 16

2011 SCC 10
Supreme Court of Canada

Kerr v. Baranow

2011 CarswellBC 240, 2011 CarswellBC 241, 2011 SCC 10, [2011] 1 S.C.R. 269, [2011] 3 W.W.R. 575, [2011] B.C.W.L.D. 2245, [2011] B.C.W.L.D. 2316, [2011] B.C.W.L.D. 2321, [2011] B.C.W.L.D. 2322, [2011] B.C.W.L.D. 2346, [2011] B.C.W.L.D. 2347, [2011] B.C.W.L.D. 2440, [2011] B.C.W.L.D. 2441, [2011] W.D.F.L. 1631, [2011] W.D.F.L. 1646, [2011] W.D.F.L. 1647, [2011] W.D.F.L. 1648, [2011] W.D.F.L. 1649, [2011] W.D.F.L. 1651, [2011] W.D.F.L. 1657, [2011] W.D.F.L. 1660, [2011] W.D.F.L. 1668, [2011] W.D.F.L. 1680, [2011] W.D.F.L. 1685, [2011] W.D.F.L. 1690, [2011] W.D.F.L. 1700, [2011] W.D.F.L. 1701, [2011] W.D.F.L. 1702, [2011] W.D.F.L. 1706, [2011] W.D.F.L. 1714, [2011] W.D.F.L. 1715, [2011] A.C.S. No. 10, [2011] S.C.J. No. 10, 108 O.R. (3d) 399, 14 B.C.L.R. (5th) 203, 199 A.C.W.S. (3d) 1214, 274 O.A.C. 1, 300 B.C.A.C. 1, 328 D.L.R. (4th) 577, 411 N.R. 200, 509 W.A.C. 1, 64 E.T.R. (3d) 1, 93 R.F.L. (6th) 1, J.E. 2011-333

Margaret Patricia Kerr (Appellant) and Nelson Dennis Baranow (Respondent)

Michele Vanasse (Appellant) and David Seguin (Respondent)

McLachlin C.J.C., Binnie, LeBel, Abella, Charron, Rothstein, Cromwell JJ.

Heard: April 21, 2010
Judgment: February 18, 2011
Docket: 33157, 33358

Proceedings: reversing in part *Kerr v. Baranow* (2009), 2009 CarswellBC 642, 2009 BCCA 111, 266 B.C.A.C. 298, 449 W.A.C. 298, [2009] 9 W.W.R. 285, 93 B.C.L.R. (4th) 201, 66 R.F.L. (6th) 1 (B.C. C.A.); additional reasons at *Kerr v. Baranow* (2010), [2010] 4 W.W.R. 465, 2 B.C.L.R. (5th) 197, 2010 CarswellBC 108, 2010 BCCA 32, 78 R.F.L. (6th) 305 (B.C. C.A.); reversing in part *Kerr v. Baranow* (2007), 2007 CarswellBC 3047, 2007 BCSC 1863, 47 R.F.L. (6th) 103 (B.C. S.C.); and reversing *Vanasse v. Seguin* (2009), 2009 ONCA 595, 2009 CarswellOnt 4407, 77 R.F.L. (6th) 118, 96 O.R. (3d) 321, 252 O.A.C. 218 (Ont. C.A.); reversing *Vanasse v. Seguin* (2008), 2008 CarswellOnt 4265 (Ont. S.C.J.); additional reasons at *Vanasse v. Seguin* (2009), 2009 CarswellOnt 606, 77 R.F.L. (6th) 109 (Ont. S.C.J.)

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Subject: Restitution; Family; Property; Estates and Trusts

Related Abridgment Classifications

Family law
VII Division of property
VII.2 Determination of ownership of property
VII.2.a Application of trust principles
VII.2.a.i Resulting and constructive trusts
VII.2.a.i.A Resulting trusts generally
Family law
VIII Support
VIII.3 Spousal support
VIII.3.d Retroactive award
VIII.3.d.ii Determination of commencement date
Family law
VIII Support
VIII.3 Spousal support
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Restitution and unjust enrichment
V Benefits conferred in anticipation of reward
V.4 Family
V.4.b Common law spouses
Restitution and unjust enrichment
V Benefits conferred in anticipation of reward
V.4 Family
V.4.c Miscellaneous

Headnote

Restitution and unjust enrichment --- Benefits conferred in anticipation of reward — Family — Common law spouses

V and S lived together in common law relationship from 1993 until March 2005 — In 2000, S sold company for approximately $11 million — Parties separated almost 5 years later — V brought proceedings claiming unjust enrichment — Trial judge concluded that relationship of parties could be divided into three distinct periods and that S had been unjustly enriched by V in second period — Trial judge determined that V was entitled to one-half interest in prorated increase of S's net worth during period of unjust enrichment — S appealed, conceding unjust enrichment during period — Court of Appeal directed that proper approach to valuation was to place monetary value on services provided by V to family taking due account of S's own contributions — V appealed — Appeal allowed — Monetary award for unjust enrichment need not, as matter of principle, always be calculated on fee-for-service basis — Trial judge had concluded that V was at least equal contributor to family enterprise throughout relationship and that during period of unjust enrichment

her contributions had significantly benefitted S — There were several factors which suggested that throughout relationship S and V were working collaboratively toward common goals — There were number of findings of fact that indicated that V and S considered their relationship to be joint family venture — There was strong inference from factual findings that, to S's knowledge, V relied on relationship to her detriment — Not only were V and S engaged in joint family venture but there was clear link between V's contribution to it and accumulation of wealth — Trial judge's approach to calculation was reasonable in circumstances.

Family law --- Division of family property — Determination of ownership of property — Application of trust principles — Resulting and constructive trusts — Resulting trusts generally

K and B began living together in common law relationship in 1981 — In 1991, K suffered massive stroke and cardiac arrest, leaving her paralyzed on her left side and unable to return to work — In 2002, B took early retirement — In 2006, K was transferred to extended care facility — K brought claim for unjust enrichment, resulting trust and spousal support — B brought counterclaim for unjust enrichment — Trial judge allowed K's claim both by way of resulting trust and by way of remedial constructive trust as remedy for her successful claim in unjust enrichment and rejected B's counterclaim — B successfully appealed — Court of Appeal concluded that K's claims for resulting trust and in unjust enrichment should be dismissed and that B's claim for unjust enrichment should be remitted to trial court for determination — K appealed — Appeal allowed in part — Court of Appeal was right to set aside trial judge's findings of resulting trust and unjust enrichment and did not err in directing that B's counterclaim be returned to court for hearing — Court of Appeal was correct to intervene and conclude that transfer was not gratuitous — Common intention resulting trust has no further role to play in resolution of disputes such as this one — Resulting trust should not have been imposed on property on basis of finding of common intention between parties.

Restitution and unjust enrichment --- Benefits conferred in anticipation of reward — Family — Miscellaneous

K and B began living together in common law relationship in 1981 — In 1991, K suffered massive stroke and cardiac arrest, leaving her paralyzed on her left side and unable to return to work — In 2002, B took early retirement — In 2006, K was transferred to extended care facility — K brought claim for unjust enrichment, resulting trust and spousal support — B brought counterclaim for unjust enrichment — Trial judge allowed K's claim both by way of resulting trust and by way of remedial constructive trust as remedy for her successful claim in unjust enrichment and rejected B's counterclaim — B successfully appealed — Court of Appeal concluded that K's claims for resulting trust and in unjust enrichment should be dismissed and that B's claim for unjust enrichment should be remitted to trial court for determination — K appealed — Appeal allowed in part — Court of Appeal was right to set aside trial judge's findings of resulting trust and unjust enrichment and did not err in directing that B's counterclaim be returned to court for hearing — K's unjust enrichment claims should not have been dismissed but rather new trial ordered — Court of Appeal erred in assessing B's contributions as part of juristic reason analysis — Trying counterclaim separated from K's claim would be artificial and potentially unfair way of proceeding

— K's claim was not presented, defended or considered by courts pursuant to joint family venture analysis — Even assuming K made out her claim in unjust enrichment, it was not possible to fairly apply joint family venture approach using record available.

Family law --- Support — Spousal support under Divorce Act and provincial statutes — Retroactivity of order

K and B began living together in common law relationship in 1981 — In 1991, K suffered massive stroke and cardiac arrest — In 2002, B took early retirement — In 2006, K was transferred to extended care facility — K brought claim for unjust enrichment, resulting trust and spousal support — K was awarded $1,739 per month in spousal support effective date she commenced proceedings — B successfully appealed — Court of Appeal concluded that order for support should be effective as of first day of trial — K appealed — Appeal allowed in part — Court of Appeal's order with respect to commencement date of spousal support order was set aside and order of trial judge restored — There was little concern about certainty of B's obligations and there was little need to provide further incentives for K or others in her position to proceed with more diligence — It was unreasonable for Court of Appeal to attach such serious consequences to fact that interim application was not pursued — There was virtually no delay in applying for support nor was there any inordinate delay between date of application and date of trial — K was in need throughout relevant period, suffered from serious physical disability and her standard of living was markedly lower than it was while she lived with B — B had means to provide her support, had prompt notice of her claim and there was no indication in Court of Appeal's reasons that it considered judge's award imposed on him hardship so as to make award inappropriate.

Family law --- Support — Spousal support under Divorce Act and provincial statutes — Miscellaneous

K and B began living together in common law relationship in 1981 — In 1991, K suffered massive stroke and cardiac arrest — In 2002, B took early retirement — In 2006, K was transferred to extended care facility — K brought claim for unjust enrichment, resulting trust and spousal support — K was awarded $1,739 per month in spousal support effective date she commenced proceedings — B successfully appealed — Court of Appeal concluded that order for support should be effective as of first day of trial — K appealed — Appeal allowed in part — Court of Appeal's order with respect to commencement date of spousal support order was set aside and order of trial judge restored — There was little concern about certainty of B's obligations and there was little need to provide further incentives for K or others in her position to proceed with more diligence — It was unreasonable for Court of Appeal to attach such serious consequences to fact that interim application was not pursued — There was virtually no delay in applying for support nor was there any inordinate delay between date of application and date of trial — K was in need throughout relevant period, suffered from serious physical disability and her standard of living was markedly lower than it was while she lived with B — B had means to provide her support, had prompt notice of her claim and there was no indication in Court of Appeal's reasons that it considered judge's award imposed on him hardship so as to make award inappropriate.

Restitution et enrichissement injustifié --- Avantages conférés dans l'attente d'un retour — Famille — Conjoints de fait

V et S ont fait vie commune entre 1993 et mars 2005 — En 2000, S a vendu son entreprise pour la somme d'environ 11 millions $ — Parties se sont séparées pratiquement 5 années plus tard — V a entamé des procédures, invoquant l'enrichissement injustifié — Juge de première instance a conclu que la relation des parties pouvait se diviser en trois périodes distinctes et que S s'était injustement enrichi grâce à V au cours de la deuxième période — Juge de première instance a déterminé que V avait droit à la moitié de l'augmentation proportionnelle de l'avoir net de S pendant la période de l'enrichissement injustifié — S a interjeté appel, admettant l'enrichissement injustifié au cours de la deuxième période — Cour d'appel a statué que la meilleure façon de procéder à l'évaluation était de calculer la valeur monétaire des services fournis par V à la famille en considérant de façon adéquate la contribution de S — V a formé un pourvoi — Pourvoi accueilli — Il n'est pas toujours nécessaire, en principe, de calculer une indemnité pécuniaire pour enrichissement injustifié en fonction de la rémunération des services rendus — Juge de première instance a conclu que V avait contribué au moins autant pendant la relation à la coentreprise familiale et que, pendant la période de l'enrichissement injustifié, ses contributions avaient grandement avantagé S — Plusieurs facteurs donnaient à penser que, pendant toute la durée de leur relation, V et S collaboraient en vue d'atteindre des buts communs — Certain nombre de conclusions de fait indiquaient que V et S considéraient leur relation comme une coentreprise familiale — Il y avait de fortes raisons d'inférer des conclusions de fait que, à la connaissance de S, V se fiait sur la relation à son détriment — Non seulement V et S étaient engagés dans une coentreprise familiale, mais il y avait aussi un lien clair entre la contribution de V à celle-ci et l'accumulation de la richesse — Approche adoptée par la juge de première instance au sujet du calcul était raisonnable dans les circonstances.

Droit de la famille --- Partage du patrimoine familial — Détermination de la propriété des biens — Application des principes de fiducie — Fiducie résultoire et fiducie constructoire — Fiducies résultoires en général

K et B ont commencé à faire vie commune en 1981 — En 1991, K a été victime d'un grave accident vasculaire cérébral et d'un arrêt cardiaque qui l'ont laissée paralysée du côté gauche et qui l'ont rendue inapte au travail — B a pris une retraite anticipée en 2002 — En 2006, K a été transférée dans un établissement de soins prolongés — K a présenté une réclamation fondée sur la fiducie résultoire, l'enrichissement injustifié et le droit à une pension alimentaire — B a présenté une demande reconventionnelle fondée sur l'enrichissement injustifié — Juge de première instance a accueilli la réclamation de K sur le fondement de la fiducie résultoire et de la fiducie constructoire de nature réparatoire comme réparation pour enrichissement injustifié et a rejeté la demande reconventionnelle de B — B a interjeté appel avec succès — Cour d'appel a conclu que la réclamation de K, fondée sur la fiducie résultoire et l'enrichissement injustifié, devrait être rejetée et que la réclamation de B, fondée sur l'enrichissement injustifié, devrait être renvoyée au tribunal de première instance pour réexamen — K a formé un pourvoi — Pourvoi accueilli en partie — Cour d'appel a eu raison d'écarter les conclusions du juge de première instance en ce qui concernait

la fiducie résultoire et l'enrichissement injustifié et n'a pas commis d'erreur en ordonnant le renvoi de la demande reconventionnelle de B au tribunal — Cour d'appel a eu raison d'intervenir et de conclure que le transfert n'a pas été fait à titre gratuit — Fiducie résultoire fondée sur l'intention commune n'avait plus aucun rôle à jouer dans le règlement d'un litige tel que celui-ci — Fiducie résultoire n'aurait pas dû être imposée à l'égard de la propriété sur la base de l'intention commune des parties.

Restitution et enrichissement injustifié --- Avantages conférés dans l'attente d'un retour — Famille — Divers

K et B ont commencé à faire vie commune en 1981 — En 1991, K a été victime d'un grave accident vasculaire cérébral et d'un arrêt cardiaque qui l'ont laissée paralysée du côté gauche et qui l'ont rendue inapte au travail — B a pris une retraite anticipée en 2002 — En 2006, K a été transférée dans un établissement de soins prolongés — K a présenté une réclamation fondée sur la fiducie résultoire, l'enrichissement injustifié et le droit à une pension alimentaire — B a présenté une demande reconventionnelle fondée sur l'enrichissement injustifié — Juge de première instance a accueilli la réclamation de K sur le fondement de la fiducie résultoire et de la fiducie constructoire de nature réparatoire comme réparation pour enrichissement injustifié et a rejeté la demande reconventionnelle de B — B a interjeté appel avec succès — Cour d'appel a conclu que la réclamation de K, fondée sur la fiducie résultoire et l'enrichissement injustifié, devrait être rejetée et que la réclamation de B, fondée sur l'enrichissement injustifié, devrait être renvoyée au tribunal de première instance pour réexamen — K a formé un pourvoi — Pourvoi accueilli en partie — Cour d'appel a eu raison d'écarter les conclusions du juge de première instance en ce qui concernait la fiducie résultoire et l'enrichissement injustifié et n'a pas commis d'erreur en ordonnant le renvoi de la demande reconventionnelle de B au tribunal — Réclamations de K fondées sur l'enrichissement injustifié n'auraient pas dû être rejetées mais une nouvelle audition de ces demandes aurait dû être ordonnée — Cour d'appel a commis une erreur en évaluant les contributions de B dans le cadre de l'analyse du motif juridique — Il serait artificiel et potentiellement injuste d'entendre la demande reconventionnelle séparément de celle de K — Demande de K n'a pas été présentée, défendue ni examinée par les tribunaux suivant la méthode d'analyse de la coentreprise familiale — Même à supposer que K avait réussi à établir ses prétentions au sujet de l'enrichissement injustifié, il n'était pas possible d'appliquer équitablement la méthode d'analyse de la coentreprise familiale sur la base du dossier.

Droit de la famille --- Aliments — Pensions alimentaires pour époux en vertu de la Loi sur le divorce ou des lois provinciales — Application rétroactive de l'ordonnance

K et B ont commencé à faire vie commune en 1981 — En 1991, K a été victime d'un grave accident vasculaire cérébral et d'un arrêt cardiaque — B a pris une retraite anticipée en 2002 — En 2006, K a été transférée dans un établissement de soins prolongés — K a présenté une réclamation fondée sur la fiducie résultoire, l'enrichissement injustifié et le droit à une pension alimentaire — K a obtenu une pension alimentaire mensuelle de 1 739 $ payable à la date où elle a entamé les procédures — B a interjeté appel avec succès — Cour d'appel a conclu que l'ordonnance de pension alimentaire devrait être applicable à compter du premier jour de l'audition — K a formé

un pourvoi — Pourvoi accueilli en partie — Conclusion de la Cour d'appel au sujet de la date d'exécution de l'ordonnance alimentaire devrait être annulée et l'ordonnance de première instance rétablie — Il n'y avait pas vraiment lieu de s'interroger sur la certitude des obligations de B et il n'était pas vraiment nécessaire de mettre en place d'autres mesures propres à inciter K, ou d'autres personnes dans sa situation, à procéder de façon plus diligente — Il était déraisonnable pour la Cour d'appel d'attribuer des conséquences aussi graves au fait qu'une demande provisoire n'avait pas été présentée — K n'a pas tardé à déposer sa demande de pension alimentaire et il n'y a pas eu de retard excessif entre la date de la demande et le début de l'audition — K avait besoin de soutien pendant toute la période pertinente; elle souffrait d'une grave invalidité physique et son niveau de vie était nettement inférieur à celui qu'elle avait lorsqu'elle habitait avec B — B avait les moyens de lui verser une pension, il avait reçu sans délai un avis de sa réclamation, et rien dans les motifs de la Cour d'appel n'indiquait qu'elle considérait que la pension alimentaire imposée par le juge lui créait une situation financière difficile, au point de rendre l'ordonnance inappropriée.

Droit de la famille --- Aliments — Pensions alimentaires pour époux en vertu de la Loi sur le divorce ou des lois provinciales — Divers

K et B ont commencé à faire vie commune en 1981 — En 1991, K a été victime d'un grave accident vasculaire cérébral et d'un arrêt cardiaque — B a pris une retraite anticipée en 2002 — En 2006, K a été transférée dans un établissement de soins prolongés — K a présenté une réclamation fondée sur la fiducie résultoire, l'enrichissement injustifié et le droit à une pension alimentaire — K a obtenu une pension alimentaire mensuelle de 1 739 $ payable à la date où elle a entamé les procédures — B a interjeté appel avec succès — Cour d'appel a conclu que l'ordonnance de pension alimentaire devrait être applicable à compter du premier jour de l'audition — K a formé un pourvoi — Pourvoi accueilli en partie — Conclusion de la Cour d'appel au sujet de la date d'exécution de l'ordonnance alimentaire devrait être annulée et l'ordonnance de première instance rétablie — Il n'y avait pas vraiment lieu de s'interroger sur la certitude des obligations de B et il n'était pas vraiment nécessaire de mettre en place d'autres mesures propres à inciter K, ou d'autres personnes dans sa situation, à procéder de façon plus diligente — Il était déraisonnable pour la Cour d'appel d'attribuer des conséquences aussi graves au fait qu'une demande provisoire n'avait pas été présentée — K n'a pas tardé à déposer sa demande de pension alimentaire et il n'y a pas eu de retard excessif entre la date de la demande et le début de l'audition — K avait besoin de soutien pendant toute la période pertinente; elle souffrait d'une grave invalidité physique et son niveau de vie était nettement inférieur à celui qu'elle avait lorsqu'elle habitait avec B — B avait les moyens de lui verser une pension, il avait reçu sans délai un avis de sa réclamation, et rien dans les motifs de la Cour d'appel n'indiquait qu'elle considérait que la pension alimentaire imposée par le juge lui créait une situation financière difficile, au point de rendre l'ordonnance inappropriée.

B and K separated after a common law relationship of more than 25 years. In 1991, K suffered a massive stroke and cardiac arrest leaving her unable to return to work. B took early retirement in 2002. After surgery in 2005, K was transferred to an extended care facility. K claimed support and a one-third share of the property held in her partner's name based on resulting trust and unjust enrichment principles. B brought a counterclaim that K had been unjustly enriched at his expense.

The trial judge awarded K one-third of the value of the couple's residence, grounded in both resulting trust and unjust enrichment claims. The trial judge did not address B's counterclaim. The trial judge also awarded substantial monthly support for K effective as of the date she applied to the court for relief. B appealed. The Court of Appeal allowed the appeal, concluding that K's claim for resulting trust and in unjust enrichment should be dismissed, that B's claim for unjust enrichment should be remitted to the trial court for determination and that the order for spousal support should be effective as of the first day of trial, not as of the date proceedings were commenced.

V and S lived together in a common law relationship for approximately 12 years. During the first four years the couple diligently pursued their respective careers. In 1997, V took a leave of absence. During the next three and one-half years, the couple had two children and V took care of the domestic labour while S devoted himself to developing his business. In 2000, S's business was sold after which V continued to assume most of the domestic responsibilities. V and S separated in 2005. At the time of separation, V's net worth was about $332,000 and S's net worth was about $8,450,000. V brought an action for spousal support and child custody, and claimed unjust enrichment. The trial judge concluded that the relationship could be divided into three distinct periods and that S had been unjustly enriched by V during the second period. The trial judge concluded that throughout the relationship V had been at least an equal contributor to the family enterprise and that V's efforts during this second period were directly linked to S's business success. The trial judge concluded that a monetary award was appropriate and determined that V was entitled to a one-half interest in the prorated increase in S's net worth during the period of unjust enrichment. The trial judge awarded just under $1 million. S appealed, conceding unjust enrichment during the second period. The Court of Appeal set aside the trial judge's finding and held that V should be treated as an unpaid employee, not a co-venturer. Both K and V appealed.

Held: The appeal by V was allowed and the appeal by K was allowed in part.

Per Cromwell J. (McLachlin C.J.C., Binnie, LeBel, Abella, Charron, Rothstein JJ. concurring): The time had come to acknowledge that there was no continuing role for the "common intention" resulting trust. First, the "common intention" resulting trust was doctrinally unsound. It was inconsistent with the underlying principles of resulting trust law. Second, the notion of common intention may be highly artificial, particularly in domestic cases. Third, the "common intention" resulting trust in Canada evolved from a misreading of some imprecise language in early authorities from the House of Lords. Finally, the principles of unjust enrichment, coupled with the possible remedy of a constructive trust, provided a much less artificial, more comprehensive and more principled basis to address the wide variety of circumstances that lead to claims arising out of domestic partnerships.

The law of unjust enrichment had been the primary vehicle to address claims of inequitable distribution of assets on the breakdown of a domestic relationship. A critical early question — whether the provision of domestic services could support a claim for unjust enrichment — was conclusively resolved in a 1993 decision. Remedies for unjust enrichment were restitutionary in nature. The first remedy was always a monetary award. Restricting the money remedy to a fee-for-services calculation was inappropriate for four reasons. First, it failed to reflect the reality of

the lives of many domestic partners. Second, it was inconsistent with the inherent flexibility of unjust enrichment. Third, it ignored the historical basis of quantum meruit claims. Finally, it was not mandated by the Court's judgment in the 1993 case. Where the unjust enrichment was best characterized as an unjust retention of a disproportionate share of assets accumulated during the course of a "joint family venture" to which both partners had contributed, the monetary remedy should reflect that fact. When the parties had been engaged in a joint family venture, and the claimant's contributions to it were linked to the generation of wealth, a monetary award for unjust enrichment should be calculated according to the share of the accumulated wealth proportionate to the claimant's contributions. To be entitled to a monetary remedy of that nature, the claimant must show both that there was in fact a joint family venture and that there was a link between his or her contributions to it and the accumulation of assets and/or wealth. Whether there was a joint family venture was a question of fact and may be assessed by having regard to all the relevant circumstances, including factors relating to mutual effort, economic integration, actual intent and priority of the family.

Unjust enrichment analysis in domestic situations was often complicated by the fact that there had been a mutual conferral of benefits. Mutual enrichments should mainly be considered at the defence and remedy stages but they may be considered at the juristic reason stage to the extent that the provision of reciprocal benefits constituted relevant evidence of the existence of juristic reason for the enrichment. The parties' reasonable or legitimate expectations had little role to play in deciding whether the services were provided for a juristic reason within the existing categories. In some cases, the facts that mutual benefits were conferred or that the benefits were provided pursuant to the parties' reasonable expectations may be relevant evidence of whether one of the existing categories of juristic reasons was present. The parties' reasonable or legitimate expectations had a role to play at the second step of the juristic reason analysis.

In the V appeal, the trial judge's order should be restored. The money compensation for unjust enrichment need not always be calculated on a quantum meruit basis. The trial judge's findings of fact and analysis indicated that the unjust enrichment of S at the expense of V ought to be characterized as retention by S of a disproportionate share of the wealth generated from a joint family venture. There were several factors which suggested that throughout their relationship the parties were working collaboratively towards common goals. There was a pooling of resources. There were a number of findings of fact that indicated that the parties considered their relationship to be joint family venture. Not only were the parties engaged in a joint family venture but that there was a clear link between V's contribution to it and the accumulation of wealth. The trial judge's approach was reasonable in the circumstances. The trial judge took a realistic and practical view of the evidence before her and gave sufficient consideration to S's contribution.

In the K appeal, the Court of Appeal was right to set aside the trial judge's findings of resulting trust and unjust enrichment. It also did not err in directing that B's counterclaim be returned to the Supreme Court of British Columbia for hearing. The Court of Appeal was correct to conclude that the transfer was not gratuitous. The trial judge apparently based his conclusions about the resulting trust on his finding of a common intention on the part of K and B to share in the property.

The common intention resulting trust had no further role to play in the resolution of such disputes. K's claim for unjust enrichment should be returned for a new trial. The first consideration in support of a new trial was that the Court of Appeal directed a hearing of B's counterclaim. Trying the counterclaim separated from K's claim would be an artificial and potentially unfair way of proceeding. More fundamentally, K's claim was not presented, defended or considered by the courts below pursuant to the joint family venture analysis that had been set out. Attempting to resolve K's unjust enrichment claim on its merits, using the record before this Court, involved too much uncertainty and risked injustice. With respect to the date of the spousal support order, the order of the trial judge should be restored. The Court of Appeal made two main errors. First, it erred in finding that the circumstances of K were such that there was no need prior to the trial. Second, the Court of Appeal was wrong to fault K for not bringing an interim application. There was virtually no delay in applying for maintenance nor was there any inordinate delay between the date of application and the date of trial. B had the means to provide support, had prompt notice of K's claim and there was no indication in the Court of Appeal's reasons that indicated that it had considered the trial judge's award a hardship so as to make that award inappropriate.

K et B se sont séparés après plus de 25 ans de vie commune. En 1991, K a été victime d'un grave accident vasculaire cérébral et d'un arrêt cardiaque qui l'ont rendue inapte au travail. B a pris une retraite anticipée en 2002. À la suite d'une intervention chirurgicale, en 2005, K a été transférée dans un établissement de soins prolongés. Sur le fondement de la fiducie résultoire et de l'enrichissement injustifié, K a réclamé une pension alimentaire et un tiers des biens détenus au nom de son conjoint. Par demande reconventionnelle, B a cherché à faire reconnaître que K s'était injustement enrichie à ses dépens. Le juge de première instance a accordé à K un tiers de la valeur de la maison du couple, sur le fondement de la fiducie résultoire et de l'enrichissement injustifié. Le juge de première instance ne s'est pas prononcé au sujet de la demande reconventionelle de B. Le juge de première instance a également accordé à K une pension alimentaire mensuelle importante, rétroactive à la date d'introduction de l'instance. B a interjeté appel. La Cour d'appel a accueilli l'appel, concluant que la réclamation de K, fondée sur la fiducie résultoire et l'enrichissement injustifié, devrait être rejetée, que la réclamation de B, fondée sur l'enrichissement injustifié, devrait être renvoyée au tribunal de première instance pour réexamen et que l'ordonnance concernant la pension alimentaire devrait être rétroactive à la date du début de l'audition et non à la date d'introduction de l'instance.

V et S ont fait vie commune pendant environ 12 ans. Au cours des quatre premières années, les parties ont diligemment continué leur carrière respective. En 1997, V a pris un congé. Au cours des trois années et demie qui ont suivi, les parties ont eu deux enfants et V s'est occupée des travaux domestiques pendant que S se consacrait à la croissance de son entreprise. En 2000, l'entreprise de S a été vendue et V a continué de s'acquitter de la plupart des obligations familiales. V et S se sont séparés en 2005. Au moment de la séparation, l'avoir net de V était d'environ 332 000 $ tandis que l'avoir net de S était d'environ 8 450 000 $. V a déposé une action visant à obtenir une pension alimentaire et la garde des enfants et a invoqué l'enrichissement injustifié. La juge de première instance a conclu que la relation pouvait se diviser en trois périodes distinctes et que S

s'était injustement enrichi grâce à V au cours de la deuxième période. La juge de première instance a conclu que tout le long de la relation, V avait contribué au moins autant à la coentreprise familiale et que les efforts déployés par V pendant cette deuxième période étaient directement liés au succès professionnel de S. La juge de première instance a conclu qu'une indemnité pécuniaire était appropriée et a déterminé que V avait droit à la moitié de l'augmentation proportionnelle de l'avoir net de S pendant la période de l'enrichissement injustifié. La juge de première instance a accordé un montant d'un peu moins d'un million de dollars. S a interjeté appel, admettant l'enrichissement injustifié au cours de la deuxième période. La Cour d'appel a annulé la conclusion de la juge de première instance et a conclu que V devait être considérée comme une employée non rémunérée, et non comme une co-entrepreneure. K et V ont toutes les deux formé un pourvoi.

Arrêt: Le pourvoi formé par V a été accueilli et le pourvoi formé par K a été accueilli en partie.

Cromwell, J. (McLachlin, J.C.C., Binnie, LeBel, Abella, Charron, Rothstein, JJ., souscrivant à son opinion) : Il était temps de reconnaître que la fiducie résultoire fondée sur l'« intention commune » avait perdu sa raison d'être. Premièrement, la fiducie résultoire basée sur l'« intention commune » était mal fondée sur le plan théorique. Elle était incompatible avec les principes sous-jacents du droit des fiducies résultoires. Deuxièmement, la notion d'intention commune peut être extrêmement artificielle, surtout en matière familiale. Troisièmement, la fiducie résultoire fondée sur « l'intention commune » au Canada tirait son origine d'une interprétation erronée de quelques formulations imprécises dans l'ancienne jurisprudence de la Chambre des lords. Finalement, les principes de l'enrichissement injustifié, conjugués au recours possible à la fiducie constructoire, fournissaient un fondement beaucoup moins artificiel, plus complet et plus rationnel pour traiter de la grande variété des circonstances donnant lieu à des réclamations découlant d'unions conjugales. Les règles relatives à l'enrichissement injustifié ont été le principal moyen utilisé pour régler les réclamations pour partage inéquitable des biens après la rupture d'une relation conjugale. Une question cruciale qui consistait au début à savoir si la prestation de services domestiques pouvait appuyer une action pour enrichissement injustifié a été définitivement réglée dans un arrêt de 1993. Les moyens utilisés pour corriger l'enrichissement injustifié étaient de nature réparatoire. La réparation pécuniaire était toujours considérée en premier. Il était inapproprié de calculer la réparation pécuniaire en fonction de la rémunération des services rendus, et ce, pour quatre raisons. Premièrement, ce type de calcul ne reflétait pas la réalité de nombreux conjoints vivant en union libre. Deuxièmement, il était incompatible avec la souplesse inhérente à l'enrichissement injustifié. Troisièmement, il ne tenait pas compte de l'historique des réclamations fondées sur le quantum meruit. Enfin, l'arrêt de la Cour de 1993 ne l'imposait pas. Dans les cas où la meilleure façon de qualifier l'enrichissement injustifié était de le considérer comme une rétention injuste d'une part disproportionnée des biens accumulés dans le cadre d'une « coentreprise familiale » à laquelle les deux conjoints avaient contribué, la réparation pécuniaire devrait refléter ce fait. Quand les parties ont été engagées dans une coentreprise familiale, et que les contributions du demandeur sont liées à l'accumulation de la richesse, il convenait de calculer une indemnité pécuniaire pour enrichissement injustifié en fonction de la part proportionnelle de la contribution du demandeur à cette accumulation de la richesse. Pour avoir droit à une réparation pécuniaire de cette nature, le

demandeur doit prouver qu'une coentreprise familiale existait effectivement et qu'il existait un lien entre ses contributions à la coentreprise et l'accumulation de l'avoir ou de la richesse. La question de savoir s'il existait une coentreprise familiale était une question de fait et on pouvait l'apprécier en prenant en considération toutes les circonstances pertinentes, y compris les facteurs relatifs à l'effort commun, à l'intégration économique, à l'intention réelle et à la priorité accordée à la famille. L'analyse de l'enrichissement injustifié en matière familiale se compliquait souvent du fait qu'il y avait eu des avantages réciproques. Les enrichissements mutuels devraient être examinés principalement au stade de la défense ou à celui de la réparation, mais il était aussi possible de le faire au stade de l'analyse du motif juridique dans la mesure où l'octroi d'avantages réciproques constituait une preuve pertinente de l'existence d'un motif juridique justifiant l'enrichissement. Les attentes raisonnables ou légitimes des parties jouaient un rôle négligeable au moment de décider si les services ont été fournis pour un motif juridique appartenant à une catégorie établie. Dans certains cas, le fait que des avantages réciproques aient été conférés ou le fait que les avantages aient été fournis conformément aux attentes raisonnables des parties pouvait constituer une preuve pertinente pour déterminer si l'une des catégories établies de motifs juridiques s'appliquait. Les attentes raisonnables ou légitimes des parties jouaient un rôle à la deuxième étape de l'analyse du motif juridique.

Dans le pourvoi de V, l'ordonnance de la juge de première instance devrait être rétablie. Il n'est pas toujours nécessaire de calculer une indemnité pécuniaire pour enrichissement injustifié en fonction du quantum meruit. Selon les conclusions de fait et l'analyse de la juge de première instance, l'enrichissement injustifié de S au détriment de V tenait à la conservation, par S, d'une part disproportionnée de la richesse générée par la coentreprise familiale. Plusieurs facteurs donnaient à penser que, pendant toute la durée de leur relation, les parties collaboraient en vue d'atteindre des buts communs. Il y avait une mise en commun des ressources. Un certain nombre de conclusions de fait indiquaient que les parties considéraient leur relation comme une coentreprise familiale. Non seulement les parties étaient engagées dans une coentreprise familiale, mais il y avait aussi un lien clair entre la contribution de V et l'accumulation de la richesse. L'approche adoptée par la juge de première instance était raisonnable dans les circonstances. La juge de première instance s'est prononcée de manière réaliste et pratique quant à la preuve dont elle disposait et a suffisamment tenu compte des contributions de S.

Dans le pourvoi de K, la Cour d'appel a eu raison d'écarter les conclusions de première instance en ce qui concernait la fiducie résultoire et l'enrichissement injustifié. Elle n'a pas non plus commis d'erreur en ordonnant le renvoi de la demande reconventionnelle de B à la Cour suprême de la Colombie-Britannique. La Cour d'appel a eu raison de conclure que le transfert n'avait pas été fait à titre gratuit. Le juge de première instance semblait avoir fondé ses conclusions relatives à la fiducie résultoire sur l'existence d'une intention commune, de la part de K et de B, de partager la propriété. La fiducie résultoire fondée sur l'intention commune n'avait plus aucun rôle à jouer dans le règlement d'un litige tel que celui-ci. Il convenait de renvoyer la demande de K fondée sur l'enrichissement injustifié pour qu'elle fasse l'objet d'une nouvelle audition. La première considération à l'appui d'une nouvelle audition était que la Cour d'appel avait ordonné l'audition

de la demande reconventionnelle de B. Il serait artificiel et potentiellement injuste d'entendre la demande reconventionnelle séparément de celle de K. Fondamentalement, la demande de K n'a pas été présentée, défendue ni examinée par les tribunaux d'instance inférieure suivant la méthode d'analyse de la coentreprise familiale qui a été exposée. Tenter de trancher sur le fond la demande de K fondée sur l'enrichissement injustifié, sur la base du dossier soumis à la Cour, présentait trop d'aléas et des risques d'injustice. En ce qui concernait la date d'exécution de l'ordonnance alimentaire, l'ordonnance de première instance devrait être rétablie. La Cour d'appel a commis deux erreurs principales. Premièrement, elle a commis une erreur en concluant que la situation de K était telle qu'elle n'avait pas besoin de soutien avant l'audition. Deuxièmement, la Cour d'appel a eu tort de reprocher à K de ne pas avoir présenté une demande provisoire. K n'a pas tardé à déposer sa demande de pension alimentaire et il n'y a pas eu de retard excessif entre la date de la demande et le début de l'audition. B avait les moyens de lui verser une pension, il avait reçu sans délai un avis de sa réclamation, et rien dans les motifs de la Cour d'appel n'indiquait qu'elle considérait que la pension alimentaire imposée par le juge créait une situation financière difficile, au point de rendre l'ordonnance inappropriée.

APPEALS from judgments reported at *Kerr v. Baranow* (2009), 2009 CarswellBC 642, 2009 BCCA 111, 266 B.C.A.C. 298, 449 W.A.C. 298, [2009] 9 W.W.R. 285, 93 B.C.L.R. (4th) 201, 66 R.F.L. (6th) 1 (B.C. C.A.) and *Vanasse v. Seguin* (2009), 2009 ONCA 595, 2009 CarswellOnt 4407, 77 R.F.L. (6th) 118, 96 O.R. (3d) 321, 252 O.A.C. 218 (Ont. C.A.).

POURVOIS à l'encontre des jugements publiés à *Kerr v. Baranow* (2009), 2009 CarswellBC 642, 2009 BCCA 111, 266 B.C.A.C. 298, 449 W.A.C. 298, [2009] 9 W.W.R. 285, 93 B.C.L.R. (4th) 201, 66 R.F.L. (6th) 1 (B.C. C.A.) et à *Vanasse v. Seguin* (2009), 2009 ONCA 595, 2009 CarswellOnt 4407, 77 R.F.L. (6th) 118, 96 O.R. (3d) 321, 252 O.A.C. 218 (Ont. C.A.).

***Cromwell J.*:**

I. Introduction

1 In a series of cases spanning 30 years, the Court has wrestled with the financial and property rights of parties on the breakdown of a marriage or domestic relationship. Now, for married spouses, comprehensive matrimonial property statutes enacted in the late 1970s and 1980s provide the applicable legal framework. But for unmarried persons in domestic relationships in most common law provinces, judge-made law was and remains the only option. The main legal mechanisms available to parties and courts have been the resulting trust and the action in unjust enrichment.

2 In the early cases of the 1970s, the parties and the courts turned to the resulting trust. The underlying legal principle was that contributions to the acquisition of a property, which were not reflected in the legal title, could nonetheless give rise to a property interest. Added to this underlying notion was the idea that a resulting trust could arise based on the "common intention"

of the parties that the non-owner partner was intended to have an interest. The resulting trust soon proved to be an unsatisfactory legal solution for many domestic property disputes, but claims continue to be advanced and decided on that basis.

3 As the doctrinal problems and practical limitations of the resulting trust became clearer, parties and courts turned increasingly to the emerging law of unjust enrichment. As the law developed, unjust enrichment carried with it the possibility of a remedial constructive trust. In order to successfully prove a claim for unjust enrichment, the claimant must show that the defendant has been enriched, the claimant suffered a corresponding detriment, and there is no "juristic reason" for the enrichment. This claim has become the pre-eminent vehicle for addressing the financial consequences of the breakdown of domestic relationships. However, various issues continue to create controversy, and these two appeals, argued consecutively, provide the Court with the opportunity to address them.

4 In the *Kerr* appeal, a couple in their late-sixties separated after a common law relationship of more than 25 years. Both had worked through much of that time and each had contributed in various ways to their mutual welfare. Ms. Kerr claimed support and a share of property held in her partner's name based on resulting trust and unjust enrichment principles. The trial judge awarded her one-third of the value of the couple's residence, grounded in both resulting trust and unjust enrichment claims (2007 BCSC 1863, 47 R.F.L. (6th) 103 (B.C. S.C.)). He did not address, other than in passing, Mr. Baranow's counterclaim that Ms. Kerr had been unjustly enriched at his expense. The judge also ordered substantial monthly support for Ms. Kerr pursuant to statute, effective as of the date she applied to the court for relief. However, the resulting trust and unjust enrichment conclusions of the trial judge were set aside by the British Columbia Court of Appeal (2009 BCCA 111, 93 B.C.L.R. (4th) 201 (B.C. C.A.)). Both lower courts addressed the role of the parties' common intention and reasonable expectations. The appeal to this Court raises the questions of the role of resulting trust law in these types of disputes, as well as how an unjust enrichment analysis should take account of the mutual conferral of benefits and what role the parties' intentions and expectations play in that analysis. This Court is also called upon to decide whether the award of spousal support should be effective as of the date of application, as found by the trial judge, the date the trial began, as ordered by the Court of Appeal, or some other date.

5 In the *Vanasse* appeal, the central problem is how to quantify a monetary award for unjust enrichment. It is agreed that Mr. Seguin was unjustly enriched by the contributions of his partner, Ms. Vanasse; the two lived in a common law relationship for about 12 years and had two children together during this time. The trial judge valued the extent of the enrichment by determining what proportion of Mr. Seguin's increased wealth was due to Ms. Vanasse's efforts as an equal contributor to the family venture (2008 CanLII 35922). The Court of Appeal set aside this finding and, while ordering a new trial, directed that the proper approach to valuation was to place a monetary value on the services provided by Ms. Vanasse to the family, taking due account of Mr. Seguin's own contributions by way of set-off (2009 ONCA 595, 252 O.A.C. 218 (Ont. C.A.)). In

short, the Court of Appeal held that Ms. Vanasse should be treated as an unpaid employee, not a co-venturer. The appeal to this Court challenges this conclusion.

6 These appeals require us to resolve five main issues. The first concerns the role of the "common intention" resulting trust in claims by domestic partners. In my view, it is time to recognize that the "common intention" approach to resulting trust has no further role to play in the resolution of property claims by domestic partners on the breakdown of their relationship.

7 The second issue concerns the nature of the money remedy for a successful unjust enrichment claim. Some courts take the view that if the claimant's contribution cannot be linked to specific property, a money remedy must always be assessed on a fee-for-services basis. Other courts have taken a more flexible approach. In my view, where both parties have worked together for the common good, with each making extensive, but different, contributions to the welfare of the other and, as a result, have accumulated assets, the money remedy for unjust enrichment should reflect that reality. The money remedy in those circumstances should not be based on a minute totting up of the give and take of daily domestic life, but rather should treat the claimant as a co-venturer, not as the hired help.

8 The third area requiring clarification relates to mutual benefit conferral. Many domestic relationships involve the mutual conferral of benefits, in the sense that each contributes in various ways to the welfare of the other. The question is how and at what point in the unjust enrichment analysis should this mutual conferral of benefits be taken into account? For reasons I will develop below, this issue should, with a small exception, be addressed at the defence and remedy stage.

9 Fourth, there is the question of what role the parties' reasonable or legitimate expectations play in the unjust enrichment analysis. My view is that they have a limited role, and must be considered in relation to whether there is a juristic reason for the enrichment.

10 Finally, there is the issue of the appropriate date for the commencement of spousal support. In my respectful view, the Court of Appeal erred in setting aside the trial judge's selection of the date of application in the circumstances of the *Kerr* appeal.

11 I will first address the law of resulting trusts as it applies to the breakdown of a marriage-like relationship. Next, I will turn to the law of unjust enrichment in this context. Finally, I will address the specific issues raised in the two appeals.

II. Resulting Trusts

12 The resulting trust played an important role in the early years of the Court's jurisprudence relating to property rights following the breakdown of intimate personal relationships. This is not surprising; it had been settled law since at least 1788 in England (and likely long before) that the trust of a legal estate, whether in the names of the purchaser or others, "results" to the person who

advances the purchase money: *Dyer v. Dyer* (1788), 2 Cox Eq. Cas. 92, at p. 93, 30 E.R. 42 (Eng. Ch. Div.). The resulting trust, therefore, seemed a promising vehicle to address claims that one party's contribution to the acquisition of property was not reflected in the legal title.

13 The resulting trust jurisprudence in domestic property cases developed into what has been called "a purely Canadian invention", the "common intention" resulting trust: A H. Oosterhoff, et al., *Oosterhoff on Trusts: Text, Commentary and Materials* (7th ed. 2009) at p. 642. While this vehicle has largely been eclipsed by the law of unjust enrichment since the decision of the Court in *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.), claims based on the "common intention" resulting trust continue to be advanced. In the *Kerr* appeal, for example, the trial judge justified the imposition of a resulting trust, in part, on the basis that the parties had a common intention that Mr. Baranow would hold title to the property by way of a resulting trust for Ms. Kerr. The Court of Appeal, while reversing the trial judge's finding of fact on this point, implicitly accepted the ongoing vitality of the common intention resulting trust.

14 However promising this common intention resulting trust approach looked at the beginning, doctrinal and practical problems soon became apparent and have been the subject of comment by the Court and scholars: see, e.g., *Pettkus*, at pp. 842-43; Oosterhoff, at pp. 641-47; D.W.M. Waters, M.R. Gillen and L.D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005) ("*Waters*") at pp. 430-35; J. Mee, *The Property Rights of Cohabitees*: *An Analysis of Equity's Response in Five Common Law Jurisdictions* (1999), at pp. 39-43; T. G. Youdan, "Resulting and Constructive Trusts" in *Special Lectures of the Law Society of Upper Canada* 1993 - *Family Law: Roles, Fairness and Equality* (1994), 169 at pp. 172-74.

15 In this Court, since *Pettkus*, the common intention resulting trust remains intact but unused. While traditional resulting trust principles may well have a role to play in the resolution of property disputes between unmarried domestic partners, the time has come to acknowledge that there is no continuing role for the common intention resulting trust. To explain why, I must first put the question in the context of some basic principles about resulting trusts.

16 That task is not as easy as it should be; there is not much one can say about resulting trusts without a well-grounded fear of contradiction. There is debate about how they should be classified and how they arise, let alone about many of the finer points: see, for example, *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 (S.C.C.), at pp. 449-50; *Waters'*, at pp. 19-22; P. H. Pettit, *Equity and the Law of Trusts* (11th ed. 2009), at p. 67. However, it is widely accepted that the underlying notion of the resulting trust is that it is imposed "to return property to the person who gave it and is entitled to it beneficially, from someone else who has title to it. Thus, the beneficial interest 'results' (jumps back) to the true owner": Oosterhoff, at p. 25. There is also widespread agreement that, traditionally, resulting trusts arose where there had been a gratuitous transfer or where the purposes set out by an express or implied trust failed to exhaust the trust property: *Waters'*, at p. 21.

17 Resulting trusts arising from gratuitous transfers are the ones relevant to domestic situations. The traditional view was they arose in two types of situations: the gratuitous transfer of property from one partner to the other, and the joint contribution by two partners to the acquisition of property, title to which is in the name of only one of them. In either case, the transfer is gratuitous, in the first case because there was no consideration for the transfer of the property, and in the second case because there was no consideration for the contribution to the acquisition of the property.

18 The Court's most recent decision in relation to resulting trusts is consistent with the view that, in these gratuitous transfer situations, the actual intention of the grantor is the governing consideration: *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795 (S.C.C.), at paras. 43-44. As Rothstein J. noted at para. 44 of *Pecore*, where a gratuitous transfer is being challenged, "[t]he trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the *transferor's actual intention*" (emphasis added).

19 As noted by Rothstein J. in this passage, presumptions may come into play when dealing with gratuitous transfers. The law generally presumes that the grantor intended to create a trust, rather than to make a gift, and so the presumption of resulting trust will often operate. As Rothstein J. explained, a presumption of a resulting trust is the general rule that applies to gratuitous transfers. When such a transfer is made, the onus will be on the person receiving the transfer to demonstrate that a gift was intended. Otherwise, the transferee holds that property in trust for the transferor. This presumption rests on the principle that equity presumes bargains and not gifts (*Pecore*, at para. 24).

20 The presumption of resulting trust, however, is neither universal nor irrebuttable. So, for example, in the case of transfers between persons in certain relationships (such as from a parent to a minor child), a presumption of advancement — that is, a presumption that the grantor intended to make a gift — rather than a presumption of resulting trust applies: see *Pecore*, at paras. 27-41. The presumption of advancement traditionally applied to grants from husband to wife, but the presumption of resulting trust traditionally applied to grants from wife to husband. Whether the application of the presumption of advancement applies to unmarried couples may be more controversial: Oosterhoff, at pp. 681-82. Although the trial judge in *Kerr* touched on this issue, neither party relies on the presumption of advancement and I need say nothing further about it.

21 That brings me to the "common intention" resulting trust. It figured prominently in the majority judgment in *Murdoch v. Murdoch* (1973), [1975] 1 S.C.R. 423 (S.C.C.). Quoting from Lord Diplock's speech in *Gissing v. Gissing*, [1970] 2 All E.R. 780 (U.K. H.L.), at pp. 789 and 793, Martland J. held for the majority that, absent a financial contribution to the acquisition of the contested property, a resulting trust could only arise "where the court is satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not

to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or other": *Murdoch*, at p. 438.

22 This approach was repeated and followed by a majority of the Court three years later in *Rathwell*, at pp. 451-53, although the Court also unanimously found there had been a direct financial contribution by the claimant. In *Rathwell*, there is, as well, some blurring of the notions of contribution and common intention; there are references to the fact that a presumption of resulting trust is sometimes explained by saying that the fact of contribution evidences the common intention to share ownership: see p. 452, *per* Dickson J. (as he then was); p. 474, *per* Ritchie J. This blurring is also evident in the reasons of the Court of Appeal in *Kerr*, where the court said, at para. 42, that "a resulting trust is an equitable doctrine that, by operation of law, imposes a trust on a party who holds legal title to property that was gratuitously transferred to that party by another *and where there is evidence of a common intention that the property was to be shared by both parties*" (emphasis added).

23 The Court's development of the common intention resulting trust ended with *Pettkus*, in which Dickson J. (as he then was) noted the "many difficulties, chronicled in the cases and in the legal literature" as well as the "artificiality of the common intention approach" to resulting trusts: at pp. 842-3. He also clearly rejected the notion that the requisite common intention could be attributed to the parties where such an intention was negated by the evidence: p. 847. The import of *Pettkus* was that the law of unjust enrichment, coupled with the remedial constructive trust, became the more flexible and appropriate lens through which to view property and financial disputes in domestic situations. As Ms. Kerr stated in her factum, the "approach enunciated in *Becker v. Pettkus* has become the dominant legal paradigm for the resolution of property disputes between common law spouses" (para. 100).

24 This, in my view, is as it should be, and the time has come to say that the common intention resulting trust has no further role to play in the resolution of domestic cases. I say this for four reasons.

25 First, as the abundant scholarly criticism demonstrates, the common intention resulting trust is doctrinally unsound. It is inconsistent with the underlying principles of resulting trust law. Where the issue of intention is relevant to the finding of resulting trust, it is the intention of the grantor or contributor alone that counts. As Professor Waters puts it, "In imposing a resulting trust upon the recipient, Equity is never concerned with [common] intention (*Waters'*, at p. 431)." The underlying principles of resulting trust law also make it hard to accommodate situations in which the contribution made by the claimant was not in the form of property or closely linked to its acquisition. The point of the resulting trust is that the claimant is asking for his or her own property back, or for the recognition of his or her proportionate interest in the asset which the other has acquired with that property. This thinking extends artificially to claims that are based on contributions that are not clearly associated with the acquisition of an interest in property; in

such cases there is not, in any meaningful sense, a "resulting" back of the transferred property: *Waters'*, at p. 432. It follows that a resulting trust based solely on intention without a transfer of property is, as Oosterhoff puts it, a doctrinal impossibility: "... a resulting trust can arise only when one person has transferred assets to, or purchased assets for, another person and did not intend to make a gift of the property": p. 642. The final doctrinal problem is that the relevant time for ascertaining intention is the time of acquisition of the property. As a result, it is hard to see how a resulting trust can arise from contributions made over time to the improvement of an existing asset, or contributions in kind over time for its maintenance. As Oosterhoff succinctly puts it at p. 652, a resulting trust is inappropriate in these circumstances because its imposition, in effect, forces one party to give up beneficial ownership which he or she enjoyed before the improvement or maintenance occurred.

26 There are problems beyond these doctrinal issues. A second difficulty with the common intention resulting trust is that the notion of common intention may be highly artificial, particularly in domestic cases. The search for common intention may easily become "a mere vehicle or formula" for giving a share of an asset, divorced from any realistic assessment of the actual intention of the parties. Dickson J. in *Pettkus* noted the artificiality and undue malleability of the common intention approach: at pp. 843-44.

27 Third, the "common intention" resulting trust in Canada evolved from a misreading of some imprecise language in early authorities from the House of Lords. While much has been written on this topic, it is sufficient for my purposes to note, as did Dickson J. in *Pettkus*, at p. 842, that the principles upon which the common intention resulting trust jurisprudence developed are found in the House of Lords decisions in *Pettitt v. Pettitt* (1969), [1970] A.C. 777 (U.K. H.L.), and *Gissing*. However, no clear majority opinion emerged in those cases and four of the five Law Lords in *Gissing* spoke of "resulting, implied or constructive trusts" without distinction. The passages that have been most influential in Canada on this point, those authored by Lord Diplock, in fact relate to constructive rather than resulting trusts: see, e.g., *Waters'*, at pp. 430-35; Oosterhoff, at pp. 642-43. I find persuasive Professor Waters' comments, specifically approved by Dickson J. in *Pettkus*, that where the search for common intention becomes simply a vehicle for reaching what the court perceives to be a just result, "[i]t is in fact a constructive trust approach masquerading as a resulting trust approach": D. Waters, Comment (1975), 53 *Can. Bar Rev.* 366, at p. 368.

28 Finally, as the development of the law since *Pettkus* has shown, the principles of unjust enrichment, coupled with the possible remedy of a constructive trust, provide a much less artificial, more comprehensive and more principled basis to address the wide variety of circumstances that lead to claims arising out of domestic partnerships. There is no need for any artificial inquiry into common intent. Claims for compensation as well as for property interests may be addressed. Contributions of all kinds and made at all times may be justly considered. The equities of the particular case are considered transparently and according to principle, rather than masquerading

behind often artificial attempts to find common intent to support what the court thinks for unstated reasons is a just result.

29 I would hold that the resulting trust arising solely from the common intention of the parties, as described by the Court in *Murdoch* and *Rathwell*, no longer has a useful role to play in resolving property and financial disputes in domestic cases. I emphasize that I am speaking here only of the common intention resulting trust. I am not addressing other aspects of the law relating to resulting trusts, nor am I suggesting that a resulting trust that would otherwise validly arise is defeated by the existence in fact of common intention.

III. Unjust Enrichment

A. Introduction

30 The law of unjust enrichment has been the primary vehicle to address claims of inequitable distribution of assets on the breakdown of a domestic relationship. In a series of decisions, the Court has developed a sturdy framework within which to address these claims. However, a number of doctrinal and practical issues require further attention. I will first briefly set out the existing framework, then articulate the issues that in my view require further attention, and finally propose the ways in which they should be addressed.

B. The Legal Framework for Unjust Enrichment Claims

31 At the heart of the doctrine of unjust enrichment lies the notion of restoring a benefit which justice does not permit one to retain: *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 (S.C.C.), at p. 788. For recovery, something must have been given by the plaintiff and received and retained by the defendant without juristic reason. A series of categories developed in which retention of a conferred benefit was considered unjust. These included, for example: benefits conferred under mistakes of fact or law; under compulsion; out of necessity; as a result of ineffective transactions; or at the defendant's request: see *Peel*, at p. 789; see generally, G. H. L. Fridman, *Restitution* (2nd ed. 1992), c. 3-5, 7, 8 and 10; and Lord Goff of Chieveley and G. Jones, *The Law of Restitution* (7th ed., 2007), c. 4-11, 17 and 19-26).

32 Canadian law, however, does not limit unjust enrichment claims to these categories. It permits recovery whenever the plaintiff can establish three elements: an enrichment of or benefit to the defendant, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment: *Pettkus*; *Peel*, at p. 784. By retaining the existing categories, while recognizing other claims that fall within the principles underlying unjust enrichment, the law is able "to develop in a flexible way as required to meet changing perceptions of justice": *Peel*, at p. 788.

33 The application of unjust enrichment principles to claims by domestic partners was resisted until the Court's 1980 decision in *Pettkus*. In applying unjust enrichment principles to domestic

claims, however, the Court has been clear that there is and should be no separate line of authority for "family" cases developed within the law of unjust enrichment. Rather, concern for clarity and doctrinal integrity mandate that "the basic principles governing the rights and remedies for unjust enrichment remain the same for all cases" (*Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), at p. 997).

34 Although the legal principles remain constant across subject areas, they must be applied in the particular factual and social context out of which the claim arises. The Court in *Peter* was unanimously of the view that the courts "should exercise flexibility and common sense when applying equitable principles to family law issues with due sensitivity to the special circumstances that can arise in such cases" (p. 997, *per* McLachlin J. (as she then was); see also p. 1023, *per* Cory J.). Thus, while the underlying legal principles of the law of unjust enrichment are the same for all cases, the courts must apply those common principles in ways that respond to the particular context in which they are to operate.

35 It will be helpful to review, briefly, the current state of the law with respect to each of the elements of an unjust enrichment claim and note the particular issues in relation to each that arise in claims by domestic partners.

C. The Elements of an Unjust Enrichment Claim

(1) Enrichment and Corresponding Deprivation

36 The first and second steps in the unjust enrichment analysis concern first, whether the defendant has been enriched by the plaintiff and second, whether the plaintiff has suffered a corresponding deprivation.

37 The Court has taken a straightforward economic approach to the first two elements — enrichment and corresponding deprivation. Accordingly, other considerations, such as moral and policy questions, are appropriately dealt with at the juristic reason stage of the analysis: see *Peter*, at p. 990, referring to *Pettkus*, *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 (S.C.C.), and *Peel*, affirmed in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.), at para. 31.

38 For the first requirement — enrichment — the plaintiff must show that he or she gave something to the defendant which the defendant received and retained. The benefit need not be retained permanently, but there must be a benefit which has enriched the defendant and which can be restored to the plaintiff *in specie* or by money. Moreover, the benefit must be tangible. It may be positive or negative, the latter in the sense that the benefit conferred on the defendant spares him or her an expense he or she would have had to undertake (*Peel*, at pp. 788 and 790; *Garland*, at paras. 31 and 37).

39 Turning to the second element — a *corresponding* deprivation — the plaintiff's loss is material only if the defendant has gained a benefit or been enriched (*Peel*, at pp. 789-90). That is why the second requirement obligates the plaintiff to establish not simply that the defendant has been enriched, but also that the enrichment corresponds to a deprivation which the plaintiff has suffered (*Pettkus*, at p. 852; *Rathwell*, at p. 455).

(2) Absence of Juristic Reason

40 The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason. To put it simply, this means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case: see *Pettkus*, at p. 848; *Rathwell*, at p. 456; *Sorochan*, at p. 44; *Peter*, at p. 987; *Peel*, at pp. 784 and 788; *Garland*, at para. 30.

41 Juristic reasons to deny recovery may be the intention to make a gift (referred to as a "donative intent"), a contract, or a disposition of law (*Peter*, at pp.990-91; *Garland*, at para. 44; *Rathwell*, at p. 455). The latter category generally includes circumstances where the enrichment of the defendant at the plaintiff's expense is required by law, such as where a valid statute denies recovery (P.D. Maddaugh, and J. D. McCamus, *The Law of Restitution* (1990), at p. 46; *Reference re Excise Tax Act (Canada)*, [1992] 2 S.C.R. 445 (S.C.C.); *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737 (Ont. C.A.)). However, just as the Court has resisted a purely categorical approach to unjust enrichment claims, it has also refused to limit juristic reasons to a closed list. This third stage of the unjust enrichment analysis provides for due consideration of the autonomy of the parties, including factors such as "the legitimate expectation of the parties, the right of parties to order their affairs by contract (*Peel*, at p. 803).

42 A critical early question in domestic claims was whether the provision of domestic services could support a claim for unjust enrichment. After some doubts, the matter was conclusively resolved in *Peter*, where the Court held that they could. A spouse or domestic partner generally has no duty, at common law, equity, or by statute, to perform work or services for the other. It follows, on a straightforward economic approach, that there is no reason to distinguish domestic services from other contributions (*Peter*, at pp. 991 and 993; *Sorochan*, at p. 46). They constitute an enrichment because such services are of great value to the family and to the other spouse; any other conclusion devalues contributions, mostly by women, to the family economy (*Peter*, at p. 993). The unpaid provision of services (including domestic services) or labour may also constitute a deprivation because the full-time devotion of one's labour and earnings without compensation may readily be viewed as such. The Court rejected the view that such services could not found an unjust enrichment claim because they are performed out of "natural love and affection". (*Peter*, at pp. 989-95, *per* McLachlin J., and pp. 1012-16, *per* Cory J.).

43 In *Garland*, the Court set out a two-step analysis for the absence of juristic reason. It is important to remember that what prompted this development was to ensure that the juristic reason analysis was not "purely subjective", thereby building into the unjust enrichment analysis an unacceptable "immeasureable judicial discretion" that would permit "case by case 'palm tree' justice": *Garland*, at para. 40. The first step of the juristic reason analysis applies the established categories of juristic reasons; in their absence, the second step permits consideration of the reasonable expectations of the parties and public policy considerations to assess whether recovery should be denied:

> First, the plaintiff must show that no juristic reason from an established category exists to deny recovery [...] The established categories that can constitute juristic reasons include a contract (*Pettkus*, *supra)*, a disposition of law (*Pettkus*, *supra*), a donative intent (*Peter*, *supra*), and other valid common law, equitable or statutory obligations (*Peter*, *supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.
>
> The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.
>
> As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. [paras. 44-46]

44 Thus, at the juristic reason stage of the analysis, if the case falls outside the existing categories, the court may take into account the legitimate expectations of the parties (*Pettkus*, at p. 849) and moral and policy-based arguments about whether particular enrichments are unjust (*Peter*, at p. 990). For example, in *Peter*, it was at this stage that the Court considered and rejected the argument that the provision of domestic and childcare services should not give rise to equitable claims against the other spouse in a marital or quasi-marital relationship (pp. 993-95). Overall, the test for juristic reason is flexible, and the relevant factors to consider will depend on the situation before the court (*Peter*, at p. 990).

45 Policy arguments concerning individual autonomy may arise under the second branch of the juristic reason analysis. In the context of claims for unjust enrichment, this has led to questions regarding how (and when) factors relating to the manner in which the parties organized their relationship should be taken into account. It has been argued, for example, that the legislative decision to exclude unmarried couples from property division legislation indicates the court should not use the equitable doctrine of unjust enrichment to address their property and asset disputes.

However, the court in *Peter* rejected this argument, noting that it misapprehended the role of equity. As McLachlin J. put it at p. 994, "It is precisely where an injustice arises without a legal remedy that equity finds a role." (See also *Walsh v. Bona*, 2002 SCC 83, [2002] 4 S.C.R. 325 (S.C.C.), at para. 61.)

(3) Remedy

46 Remedies for unjust enrichment are restitutionary in nature; that is, the object of the remedy is to require the defendant to repay or reverse the unjustified enrichment. A successful claim for unjust enrichment may attract either a "personal restitutionary award" or a "restitutionary proprietary award". In other words, the plaintiff may be entitled to a monetary or a proprietary remedy (*International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.), at p. 669, *per* La Forest J.).

(a) Monetary Award

47 The first remedy to consider is always a monetary award (*Peter*, at pp. 987 and 999). In most cases, it will be sufficient to remedy the unjust enrichment. However, calculation of such an award is far from straightforward. Two issues have given rise to disagreement and difficulty in domestic unjust enrichment claims.

48 First, the fact that many domestic claims of unjust enrichment arise out of relationships in which there has been a mutual conferral of benefits gives rise to difficulties in determining what will constitute adequate compensation. While the value of domestic services is not questioned (*Peter*; *Sorochan*), it is unjust to pay attention only to the contributions of one party in assessing an appropriate remedy. This is not only an important issue of principle; in practice, it is enormously difficult for the parties and the court to "create, retroactively, a notional ledger to record and value every service rendered by each party to the other" (R. E. Scane, "Relationships 'Tantamount to Spousal', Unjust Enrichment, and Constructive Trusts" (1991), 70 *Can. Bar Rev.* 260, at p. 281). This gives rise to the practical problem that one scholar has aptly referred to as "duelling *quantum meruits*" (J. D. McCamus, "Restitution on Dissolution of Marital and Other Intimate Relationships: Constructive Trust or Quantum Meruit?", in J.W. Neyers, M. McInnes and S.G.A. Pitel, eds., *Understanding Unjust Enrichment* (2004), 359, at p. 376). McLachlin J. also alluded to this practical problem in *Peter*, at p. 999.

49 A second difficulty arises from the fact that some courts and commentators have read *Peter* as holding that when a monetary award is appropriate, it must invariably be calculated on the basis of the monetary value of the unpaid services. This is often referred to as the *quantum meruit*, or "value received" or "fee-for-services" approach. This was followed in *Bell v. Bailey* (2001), 203 D.L.R. (4th) 589 (Ont. C.A.). Other appellate courts have held that monetary relief may be assessed more flexibly — in effect, on a value survived basis — by reference, for example, to the overall increase in the couple's wealth during the relationship: *Wilson v. Fotsch*, 2010 BCCA 226, 319

D.L.R. (4th) 26 (B.C. C.A.), at para. 50; *Pickelein v. Gillmore* (1997), 30 B.C.L.R. (3d) 44 (B.C. C.A.); *Harrison v. Kalinocha* (1994), 90 B.C.L.R. (2d) 273 (B.C. C.A.); *MacFarlane v. Smith*, 2003 NBCA 6, 256 N.B.R. (2d) 108 (N.B. C.A.), at paras. 31-34 and 41-43; *Shannon v. Gidden*, 1999 BCCA 539, 71 B.C.L.R. (3d) 40 (B.C. C.A.), at para. 37. With respect to inconsistencies in how *in personam* relief for unjust enrichment may be quantified, see also: *Matrimonial Property Law in Canada*, vol 1, by J.G. McLeod and A.A. Mamo, eds.(loose-leaf), at pp. 40.78-40.79.

(b) Proprietary Award

50 The Court has recognized that, in some cases, when a monetary award is inappropriate or insufficient, a proprietary remedy may be required. *Pettkus* is responsible for an important remedial feature of the Canadian law of unjust enrichment: the development of the remedial constructive trust. Imposed without reference to intention to create a trust, the constructive trust is a broad and flexible equitable tool used to determine beneficial entitlement to property (*Pettkus*, at pp. 843-44 and 847-48). Where the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour (*Pettkus*, at pp. 852-53; *Sorochan*, at p. 50). *Pettkus* made clear that these principles apply equally to unmarried cohabitants, since "[t]he equitable principle on which the remedy of constructive trusts rests is broad and general; its purpose is to prevent unjust enrichment in whatever circumstances it occurs" (pp. 850-51).

51 As to the nature of the link required between the contribution and the property, the Court has consistently held that the plaintiff must demonstrate a "sufficiently substantial and direct" link, a "causal connection" or a "nexus" between the plaintiff's contributions and the property which is the subject matter of the trust (*Peter*, at pp. 988, 997 and 999; *Pettkus* at p. 852; *Sorochan*, at pp. 47-50; *Rathwell*, at p. 454). A minor or indirect contribution will not suffice (*Peter*, at p. 997). As Dickson C.J. put it in *Sorochan*, the primary focus is on whether the contributions have a "clear proprietary relationship" (p. 50, citing Professor McLeod's annotation of *Herman v. Smith* (1984), 42 R.F.L. (2d) 154 (Alta. Q.B.), at p. 156). Indirect contributions of money and direct contributions of labour may suffice, provided that a connection is established between the plaintiff's deprivation and the acquisition, preservation, maintenance, or improvement of the property (*Sorochan*, at p. 50; *Pettkus*, at p. 852).

52 The plaintiff must also establish that a monetary award would be insufficient in the circumstances (*Peter*, at p. 999). In this regard, the court may take into account the probability of recovery, as well as whether there is a reason to grant the plaintiff the additional rights that flow from recognition of property rights (*Lac Minerals*, at p. 678, *per* La Forest J.).

53 The extent of the constructive trust interest should be proportionate to the claimant's contributions. Where the contributions are unequal, the shares will be unequal (*Pettkus*, at pp.

852-53; *Rathwell*, at p. 448; *Peter*, at pp. 998-99). As Dickson J. put it in *Rathwell*, "The court will assess the contributions made by each spouse and make a fair, equitable distribution having regard to the respective contributions" (p. 454).

D. Areas Needing Clarification

54 While the law of unjust enrichment sets out a sturdy legal framework within which to address claims by domestic partners, three areas continue to generate controversy and require clarification. As mentioned earlier, these are as follows: the approach to the assessment of a monetary award for a successful unjust enrichment claim, how and where to address the mutual benefit problem, and the role of the parties' reasonable or legitimate expectations. I will address these in turn.

E. Is a Monetary Award Restricted to Quantum Meruit?

(1) Introduction

55 As noted earlier, remedies for unjust enrichment may either be proprietary (normally a remedial constructive trust) or personal (normally a money remedy). Once the choice has been made to award a monetary rather than a proprietary remedy, the question of how to quantify that monetary remedy arises. Some courts have held that monetary relief must always be calculated based on a value received or *quantum meruit* basis (*Bell*), while others have held that monetary relief may also be based on a value survived (i.e. by reference to the value of property) approach (*Wilson*; *Pickelein*; *Harrison*; *MacFarlane; Shannon*). If, as some courts have held, a monetary remedy must invariably be quantified on a *quantum meruit* basis, the remedial choice in unjust enrichment cases becomes whether to impose a constructive trust or order a monetary remedy calculated on a *quantum meruit* basis. One scholar has referred to this approach as the false dichotomy between constructive trust and *quantum meruit* (McCamus, at pp. 375-76). Scholars have also noted this area of uncertainty in the case law, and have suggested that an *in personam* remedy using the value survived measure is a plausible alternative to the constructive trust (McCamus, at p. 377; P. Birks, *An Introduction to the Law of Restitution* (1985), at pp. 394-95). As I will explain below, *Peter* is said to have established this dichotomy of remedial choice. However, in my view, the focus in *Peter* was on the availability of the constructive trust remedy, and that case should not be taken as limiting the calculation of monetary relief for unjust enrichment to a *quantum meruit* basis. In appropriate circumstances, monetary relief may be assessed on a value survived basis.

56 I will first briefly describe the genesis of the purported limitation on the monetary remedy. Then I will explain why, in my view, it should be rejected. Finally, I will set out my views on how money remedies for unjust enrichment claims in domestic situations should be approached.

(2) The Remedial Dichotomy

57 As noted, there is a widespread, although not unanimous, view that there are only two choices of remedy for an unjust enrichment: a monetary award, assessed on a fee-for-services basis; or a proprietary one (generally taking the form of a remedial constructive trust), where the claimant can show that the benefit conferred contributed to the acquisition, preservation, maintenance, or improvement of specific property. Some brief comments in *Peter* seem to have spawned this idea, which is reflected in a number of appellate authorities. For instance, in the *Vanasse* appeal, the Ontario Court of Appeal reasoned that since Ms. Vanasse could not show that her contributions were linked to specific property, her claim had to be quantified on a fee-for-services basis. I respectfully do not agree that monetary awards for unjust enrichment must always be calculated in this way.

(3) Why the Remedial Dichotomy Should Be Rejected

58 In my view, restricting the money remedy to a fee-for-services calculation is inappropriate for four reasons. First, it fails to reflect the reality of the lives of many domestic partners. Second, it is inconsistent with the inherent flexibility of unjust enrichment. Third, it ignores the historical basis of *quantum meruit* claims. Finally, it is not mandated by the Court's judgment in *Peter*. For those reasons, this remedial dichotomy should be rejected. The discussion which follows is concerned only with the quantification of a monetary remedy for unjust enrichment; the law relating to when a proprietary remedy should be granted is well established and remains unchanged.

(a) Life Experience

59 The remedial dichotomy would be appropriate if, in fact, the bases of all domestic unjust enrichment claims fit into only two categories — those where the enrichment consists of the provision of unpaid services, and those where it consists of an unrecognized contribution to the acquisition, improvement, maintenance or preservation of specific property. To be sure, those two bases for unjust enrichment claims exist. However, all unjust enrichment cases cannot be neatly divided into these two categories.

60 At least one other basis for an unjust enrichment claim is easy to identify. It consists of cases in which the contributions of both parties over time have resulted in an accumulation of wealth. The unjust enrichment occurs following the breakdown of their relationship when one party retains a disproportionate share of the assets which are the product of their joint efforts. The required link between the contributions and a specific property may not exist, making it inappropriate to confer a proprietary remedy. However, there may clearly be a link between the joint efforts of the parties and the accumulation of wealth; in other words, a link between the "value received" and the "value surviving", as McLachlin J. put it in *Peter*, at pp. 1000-1001. Thus, where there is a relationship that can be described as a "joint family venture", and the joint efforts of the parties are linked to the accumulation of wealth, the unjust enrichment should be thought of as leaving one party with a disproportionate share of the jointly earned assets.

61 There is nothing new about the notion of a joint family venture in which both parties contribute to their overall accumulation of wealth. It was recognition of this reality that contributed to comprehensive matrimonial property legislative reform in the late 1970s and early 1980s. As the Court put it in *Clarke v. Clarke*, [1990] 2 S.C.R. 795 (S.C.C.), at p. 807 (in relation to Nova Scotia's *Matrimonial Property Act*), "... the Act supports the equality of both parties to a marriage and *recognized the joint contribution of the spouses, be it financial or otherwise, to that enterprise*. ... The Act is accordingly remedial in nature. It was designed to alleviate the inequities of the past when the contribution made by women to the economic survival and growth of the family was not recognized" (emphasis added).

62 Unlike much matrimonial property legislation, the law of unjust enrichment does not mandate a presumption of equal sharing. However, the law of unjust enrichment can and should respond to the social reality identified by the legislature that many domestic relationships are more realistically viewed as a joint venture to which the parties jointly contribute.

63 This reality has also been recognized many times and in many contexts by the Court. For instance, in *Murdoch*, Laskin J. (as he then was), in dissent, would have imposed constructive trust relief, on the basis that the facts were "consistent with a pooling of effort by the spouses" to establish themselves in a ranch operation (p. 457), and that the spouses had worked together for fifteen years to improve "their lot in life through progressively larger acquisitions of ranch property" (p. 446). Similarly, in *Rathwell*, a majority of the judges agreed that Mr. and Mrs. Rathwell had pooled their efforts to accumulate wealth as a team. Dickson J. emphasized that the parties had together "decided to make farming their way of life" (p. 444), and that the acquisition of property in Mr. Rathwell's name was only made possible through their "joint effort" and "team work" (p. 461).

64 A similar recognition is evident in *Pettkus* and *Peter*.

65 In *Pettkus*, the parties developed a successful beekeeping business, the profits from which they used to acquire real property. Dickson J., writing for the majority of the Court, emphasized facts suggestive of a domestic and financial partnership. He observed that "each started with nothing; each worked continuously, unremittingly and sedulously in the joint effort" (p. 853); that each contributed to the "good fortune of the common enterprise" (p. 838); that Wilson J.A. (as she then was) at the Court of Appeal had found the wealth they accumulated was through "joint effort" and "teamwork" (p. 849); and finally, that "[t]heir lives and their economic well-being were fully integrated" (p. 850).

66 I agree with Professor McCamus that the Court in *Pettkus* was "satisfied that the parties were engaged in a common venture in which they expected to share the benefits flowing from the wealth that they jointly created" (p. 367). Put another way, Mr. Pettkus was not unjustly enriched

because Ms. Becker had a precise expectation of obtaining a legal interest in certain properties, but rather because they were in reality partners in a common venture.

67 The significance of the fact that wealth had been acquired through joint effort was again at the forefront of the analysis in *Peter* where the parties lived together for 12 years in a common law relationship. While Mr. Beblow generated most of the family income and also contributed to the maintenance of the property, Ms. Peter did all of the domestic work (including raising the six children of their blended family), helped with property maintenance, and was solely responsible for the property when Mr. Beblow was away. The reality of their joint venture was acknowledged when McLachlin J. wrote that the "joint family venture, in effect, was no different from the farm which was the subject of the trust in *Becker v. Pettkus*" (p. 1001).

68 The Court's recognition of the joint family venture is evident in three other places in *Peter*. First, in reference to the appropriateness of the "value survived" measure of relief, McLachlin J. observed, "[I]t is more likely that a couple expects to share in the wealth generated from their partnership, rather than to receive compensation for the services performed during the relationship" (p. 999). Second, and also related to valuing the extent of the unjust enrichment, McLachlin J. noted that, in a case where both parties had contributed to the "family venture", it was appropriate to look to all of the family assets, rather than simply one of them, to approximate the value of the claimant's contributions to that family venture (p. 1001). Third, the Court's justification for affirming the value of domestic services was, in part, based on reasoning that such services are often proffered in the context of a common venture (p. 993).

69 Relationships of this nature are common in our life experience. For many domestic relationships, the couple's venture may only sensibly be viewed as a joint one, making it highly artificial in theory and extremely difficult in practice to do a detailed accounting of the contributions made and benefits received on a fee-for-services basis. Of course, this is a relationship-specific issue; there can be no presumption one way or the other. However, the legal consequences of the breakdown of a domestic relationship should reflect realistically the way people live their lives. It should not impose on them the need to engage in an artificial balance sheet approach which does not reflect the true nature of their relationship.

(b) Flexibility

70 Maintaining a strict remedial dichotomy is inconsistent with the Court's approach to equitable remedies in general, and to its development of remedies for unjust enrichment in particular.

71 The Court has often emphasized the flexibility of equitable remedies and the need to fashion remedies that respond to various situations in principled and realistic ways. So, for example, when speaking of equitable compensation for breach of confidence, Binnie J. affirmed that "the Court has ample jurisdiction to fashion appropriate relief out of the full gamut of available remedies, including appropriate financial compensation": *Cadbury Schweppes Inc. v. FBI Foods*

Ltd., [1999] 1 S.C.R. 142 (S.C.C.), at para. 61. At para. 24, he noted the broad approach to equitable remedies for breach of confidence taken by the Court in *Lac Minerals*. In doing so, he cited this statement with approval: "... the remedy that follows [once liability is established] should be the one that is most appropriate on the facts of the case rather than one derived from history or over-categorization" (from J. D. Davies, "Duties of Confidence and Loyalty", [1990] *Lloyds' Mar. & Com. L.Q.* 4, at p. 5). Similarly, in the context of the constructive trust, McLachlin J. (as she then was) noted that "[e]quitable remedies are flexible; their award is based on what is just in all the circumstances of the case": *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.), at para. 34.

72 Turning specifically to remedies for unjust enrichment, I refer to Binnie J.'s comments in *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575 (S.C.C.) at para. 13. He noted that the doctrine of unjust enrichment, while predicated on clearly defined principles, "retains a large measure of remedial flexibility to deal with different circumstances according to principles rooted in fairness and good conscience". Moreover, the Court has recognized that, given the wide variety of circumstances addressed by the traditional categories of unjust enrichment, as well as the flexibility of the broader, principled approach, its development has been characterized by, and indeed requires, recourse to a number of different sorts of remedies depending on the circumstances: see *Peter*, at p. 987; *Sorochan*, at p. 47.

73 Thus, the remedy should mirror the flexibility inherent in the unjust enrichment principle itself, so as to allow the court to respond appropriately to the substance of the problem put before it. This means that a monetary remedy must match, as best it can, the extent of the enrichment unjustly retained by the defendant. There is no reason to think that the wide range of circumstances that may give rise to unjust enrichment claims will necessarily fall into one or other of the two remedial options into which some have tried to force them.

(c) History

74 Imposing a strict remedial dichotomy is also inconsistent with the historical development of the unjust enrichment principle. Unjust enrichment developed through several particular categories of cases. *Quantum meruit*, the origin of the fee-for-services award, was only one of them. *Quantum meruit* originated as a common law claim for compensation for benefits conferred under an agreement which, while apparently binding, was rendered ineffective for a reason recognized at common law. The scope of the claim was expanded over time, and the measure of a *quantum meruit* award was flexible. It might be assessed, for example, by the cost to the plaintiff of providing the service, the market value of the benefit, or even the value placed on the benefit by the recipient: P.D. Maddaugh and J.D. McCamus, *The Law of Restitution* (loose-leaf), vol. 1 at § 4:200.30. The important point, however, is that *quantum meruit* is simply one of the established categories of unjust enrichment claims. There is no reason in principle why one of the traditional categories of unjust enrichment should be used to force the monetary remedy for all present domestic unjust enrichment cases into a remedial straitjacket.

(d) Peter v. Beblow

75 *Peter* does not mandate strict adherence to a *quantum meruit* approach to money remedies for unjust enrichment. One must remember that the focus of *Peter* was on whether the plaintiff's contributions entitled her to a constructive trust over the former family home. While it was assumed by both McLachlin J. and Cory J., who wrote concurring reasons in the case, that a money award would be fashioned on the basis of *quantum meruit*, that was not an issue, let alone a holding, in the case.

76 There are, in fact, only two sentences in the judgments that could be taken as supporting the view that this rule should always apply. At p. 995, McLachlin J. said, "Two remedies are possible: an award of money on the basis of the value of the services rendered, i.e. *quantum meruit*; and the one the trial judge awarded, title to the house based on a constructive trust"; at p. 999, she wrote that "[f]or a monetary award, the 'value received' approach is appropriate". Given that the focus of the case was deciding whether a proprietary remedy was appropriate, I would not read these two brief passages as laying down the sweeping rule that a monetary award must always be calculated on a fee-for-services basis.

77 Moreover, McLachlin J. noted that the doctrine of unjust enrichment applies to a variety of situations, and that successful claims have been addressed through a number of remedies, depending on the circumstances. Only one of these remedies is a payment for services rendered on the basis of *quantum meruit*: p. 987. There is nothing in this observation to suggest that the Court decided to opt for a one-size-fits-all monetary remedy, especially when such an approach would be contrary to the very flexibility that the Court has repeatedly affirmed with regards to the law of unjust enrichment and corresponding remedies.

78 This restrictive reading of *Peter* is not consistent with the underlying nature of the claim founded on the principles set out in *Pettkus*. As Professor McCamus has suggested, cases like *Pettkus* rest on a claimant's right to share surplus wealth created by joint effort and teamwork. It follows that a remedy based on notional fees for services is not responsive to the underlying nature of that claim: McCamus, at pp. 376-77. In my view, this reasoning is persuasive whether the joint effort has led to the accumulation of specific property, in which case a remedial constructive trust may be appropriate according to the well-settled principles in that area of trust law, or where the joint effort has led to an accumulation of assets generally. In the latter instance, when appropriate, there is no reason in principle why a monetary remedy cannot be fashioned to reflect this basis of the enrichment and corresponding deprivation. What is essential, in my view, is that, in either type of case, there must be a link between the contribution and the accumulation of wealth, or to use the words of McLachlin J. in *Peter*, between the "value received" and the "value surviving". Where that link exists, and a proprietary remedy is either inappropriate or unnecessary, the monetary award should be fashioned to reflect the true nature of the enrichment and the corresponding deprivation.

79 Professor McCamus has suggested that the equitable remedy of an accounting of profits could be an appropriate remedial tool: p. 377. While I would not discount that as a possibility, I doubt that the complexity and technicality of that remedy would be well-suited to domestic situations, which are more often than not rather straightforward. The unjust enrichment principle is inherently flexible and, in my view, the calculation of a monetary award for a successful unjust enrichment claim should be equally flexible. This is necessary to respond, to the extent money can, to the particular enrichment being addressed. To my way of thinking, Professor Fridman was right to say that "where a claim for unjust enrichment has been made out by the plaintiff, the court may award whatever form of relief is most appropriate so as to ensure that the plaintiff obtains that to which he or she is entitled, regardless of whether the situation would have been governed by common law or equitable doctrines or whether the case would formerly have been considered one for a personal or a proprietary remedy" (p. 398).

(4) The Approach to the Monetary Remedy

80 The next step in the legal development of this area should be to move away from the false remedial dichotomy between *quantum meruit* and constructive trust, and to return to the underlying principles governing the law of unjust enrichment. These underlying principles focus on properly characterizing the nature of the unjust enrichment giving rise to the claim. As I have mentioned above, not all unjust enrichments arising between domestic partners fit comfortably into either a "fee-for-services" or "a share of specific property" mold. Where the unjust enrichment is best characterized as an unjust retention of a disproportionate share of assets accumulated during the course of what McLachlin J. referred to in *Peter* (at p. 1001) as a "joint family venture" to which both partners have contributed, the monetary remedy should reflect that fact.

81 In such cases, the basis of the unjust enrichment is the retention of an inappropriately disproportionate amount of wealth by one party when the parties have been engaged in a joint family venture and there is a clear link between the claimant's contributions to the joint venture and the accumulation of wealth. Irrespective of the status of legal title to particular assets, the parties in those circumstances are realistically viewed as "creating wealth in a common enterprise that will assist in sustaining their relationship, their well-being and their family life" (McCamus, at p. 366). The wealth created during the period of cohabitation will be treated as the fruit of their domestic and financial relationship, though not necessarily by the parties in equal measure. Since the spouses are domestic and financial partners, there is no need for "duelling *quantum meruits*". In such cases, the unjust enrichment is understood to arise because the party who leaves the relationship with a disproportionate share of the wealth is denying to the claimant a reasonable share of the wealth accumulated in the course of the relationship through their joint efforts. The monetary award for unjust enrichment should be assessed by determining the proportionate contribution of the claimant to the accumulation of the wealth.

82 This flexible approach to the money remedy in unjust enrichment cases is fully consistent with *Walsh*. While that case was focused on constitutional issues that are not before us in this case, the majority judgment was clearly not intended to freeze the law of unjust enrichment in domestic cases; the judgment indicates that the law of unjust enrichment, including the remedial constructive trust, is the preferable method of responding to the inequities brought about by the breakdown of a common law relationship, since the remedies for unjust enrichment "are tailored to the parties' specific situation and grievances" (para. 61). In short, while emphasizing respect for autonomy as an important value, the Court at the same time approved of the continued development of the law of unjust enrichment in order to respond to the plethora of forms and functions of common law relationships.

83 A similar approach was taken in *Peter*. Mr. Beblow argued that the law of unjust enrichment should not provide a share of property to unmarried partners because the legislature had chosen to exclude them from the rights accorded to married spouses under matrimonial property legislation. This argument was succinctly — and flatly — rejected with the remark that it is "precisely where an injustice arises without a legal remedy that equity finds a role": p. 994.

84 It is not the purpose of the law of unjust enrichment to replicate for unmarried partners the legislative presumption that married partners are engaged in a joint family venture. However, there is no reason in principle why remedies for unjust enrichment should fail to reflect that reality in the lives and relationships of unmarried partners.

85 I conclude, therefore, that the common law of unjust enrichment should recognize and respond to the reality that there are unmarried domestic arrangements that are partnerships; the remedy in such cases should address the disproportionate retention of assets acquired through joint efforts with another person. This sort of sharing, of course, should not be presumed, nor will it be presumed that wealth acquired by mutual effort will be shared equally. Cohabitation does not, in itself, under the common law of unjust enrichment, entitle one party to a share of the other's property or any other relief. However, where wealth is accumulated as a result of joint effort, as evidenced by the nature of the parties' relationship and their dealings with each other, the law of unjust enrichment should reflect that reality.

86 Thus the rejection of the remedial dichotomy leads us to consider in what circumstances an unjust enrichment may be appropriately characterized as a failure to share equitably assets acquired through the parties' joint efforts. While this approach will need further refinement in future cases, I offer the following as a broad outline of when this characterization of an unjust enrichment will be appropriate.

(5) Identifying Unjust Enrichment Arising From a Joint Family Venture

87 My view is that when the parties have been engaged in a joint family venture, and the claimant's contributions to it are linked to the generation of wealth, a monetary award for unjust enrichment should be calculated according to the share of the accumulated wealth proportionate to the claimant's contributions. In order to apply this approach, it is first necessary to identify whether the parties have, in fact, been engaged in a joint family venture. In the preceding section, I reviewed the many occasions on which the existence of a joint family venture has been recognized. From this rich set of factual circumstances, what emerge as the hallmarks of such a relationship?

88 It is critical to note that cohabiting couples are not a homogeneous group. It follows that the analysis must take into account the particular circumstances of each particular relationship. Furthermore, as previously stated, there can be no presumption of a joint family venture. The goal is for the law of unjust enrichment to attach just consequences to the way the parties have lived their lives, not to treat them as if they ought to have lived some other way or conducted their relationship on some different basis. A joint family venture can only be identified by the court when its existence, in fact, is well-grounded in the evidence. The emphasis should be on how the parties actually lived their lives, not on their *ex post facto* assertions or the court's view of how they ought to have done so.

89 In undertaking this analysis, it may be helpful to consider the evidence under four main headings: mutual effort, economic integration, actual intent and priority of the family. There is, of course, overlap among factors that may be relevant under these headings and there is no closed list of relevant factors. What follows is not a checklist of conditions for finding (or not finding) that the parties were engaged in a joint family venture. These headings, and the factors grouped under them, simply provide a useful way to approach a global analysis of the evidence and some examples of the relevant factors that may be taken into account in deciding whether or not the parties were engaged in a joint family venture. The absence of the factors I have set out, and many other relevant considerations, may well negate that conclusion.

(a) Mutual Effort

90 One set of factors concerns whether the parties worked collaboratively towards common goals. Indicators such as the pooling of effort and team work, the decision to have and raise children together, and the length of the relationship may all point towards the extent, if any, to which the parties have formed a true partnership and jointly worked towards important mutual goals.

91 Joint contributions, or contributions to a common pool, may provide evidence of joint effort. For instance, in *Murdoch*, central to Laskin J.'s constructive trust analysis was that the parties had pooled their efforts to establish themselves in a ranch operation. Joint contributions were also an important aspect of the Court's analyses in *Peter*, *Sorochan*, and *Pettkus*. Pooling of efforts and resources, whether capital or income, has also been noted in the appellate case law (see, for example, *Birmingham v. Ferguson* [2004 CarswellOnt 3119 (Ont. C.A.)], 2004 CanLII

4764; *McDougall v. Gesell Estate*, 2001 MBCA 3, 153 Man. R. (2d) 54 (Man. C.A.), at para. 14). The use of parties' funds entirely for family purposes may be indicative of the pooling of resources: *McDougall*. The parties may also be said to be pooling their resources where one spouse takes on all, or a greater proportion, of the domestic labour, freeing the other spouse from those responsibilities, and enabling him or her to pursue activities in the paid workforce (see *Nasser v. Mayer-Nasser* (2000), 5 R.F.L. (5th) 100 (Ont. C.A.) and *Panara v. Di Ascenzo*, 2005 ABCA 47, 361 A.R. 382 (Alta. C.A.), at para. 27).

(b) Economic Integration

92 Another group of factors, related to those in the first group, concerns the degree of economic interdependence and integration that characterized the parties' relationship (*Birmingham*; *Pettkus*; *Nasser*). The more extensive the integration of the couple's finances, economic interests and economic well-being, the more likely it is that they should be considered as having been engaged in a joint family venture. For example, the existence of a joint bank account that was used as a "common purse", as well as the fact that the family farm was operated by the family unit, were key factors in Dickson J.'s analysis in *Rathwell*. The sharing of expenses and the amassing of a common pool of savings may also be relevant considerations (see *Wilson; Panara*).

93 The parties' conduct may further indicate a sense of collectivity, mutuality, and prioritization of the overall welfare of the family unit over the individual interests of the individual members (McCamus, at p. 366). These and other factors may indicate that the economic well-being and lives of the parties are largely integrated (see, for example, *Pettkus*, at p. 850).

(c) Actual Intent

94 Underpinning the law of unjust enrichment is an appropriate concern for the autonomy of the parties, and this is a particularly important consideration in relation to domestic partnerships. While domestic partners might not marry for a host of reasons, one of them may be the deliberate choice not to have their lives economically intertwined. Thus, in considering whether there is a joint family venture, the actual intentions of the parties must be given considerable weight. Those intentions may have been expressed by the parties or may be inferred from their conduct. The important point, however, is that the quest is for their actual intent as expressed or inferred, not for what in the court's view "reasonable" parties *ought* to have intended in the same circumstances. Courts must be vigilant not to impose their own views, under the guise of inferred intent, in order to reach a certain result.

95 Courts may infer from the parties' conduct that they intended to share in the wealth they jointly created (P. Parkinson, "Beyond *Becker v. Pettkus*: Quantifying Relief for Unjust Enrichment" (1993), 43 U.T.L.J. 217, at p. 245). The conduct of the parties may show that they intended the domestic and professional spheres of their lives to be part of a larger, common venture (*Pettkus*; *Peter*; *Sorochan*). In some cases, courts have explicitly labelled the relationship as a

"partnership" in the social and economic sense (*Panara*, at para. 71; *McDougall*, at para. 14). Similarly, the intention to engage in a joint family venture may be inferred where the parties accepted that their relationship was "equivalent to marriage" (*Birmingham*, at para. 1), or where the parties held themselves out to the public as married (*Sorochan*). The stability of the relationship may be a relevant factor as may the length of cohabitation (*Nasser*; *Sorochan*; *Birmingham*). When parties have lived together in a stable relationship for a lengthy period, it may be nearly impossible to engage in a precise weighing of the benefits conferred within the relationship (*McDougall*; *Nasser*).

96 The title to property may also reflect an intent to share wealth, or some portion of it, equitably. This may be the case where the parties are joint tenants of property. Even where title is registered to one of the parties, acceptance of the view that wealth will be shared may be evident from other aspects of the parties' conduct. For example, there may have been little concern with the details of title and accounting of monies spent for household expenses, renovations, taxes, insurance, and so on. Plans for property distribution on death, whether in a will or a verbal discussion, may also indicate that the parties saw one another as domestic and economic partners.

97 The parties' actual intent may also negate the existence of a joint family venture, or support the conclusion that particular assets were to be held independently. Once again, it is the parties' actual intent, express or inferred from the evidence, that is the relevant consideration.

(d) Priority of the Family

98 A final category of factors to consider in determining whether the parties were in fact engaged in a joint family venture is whether and to what extent they have given priority to the family in their decision making. A relevant question is whether there has been in some sense detrimental reliance on the relationship, by one or both of the parties, for the sake of the family. As Professor McCamus puts it, the question is whether the parties have been "[p]roceeding on the basis of understandings or assumptions about a shared future which may or may not be articulated" (p. 365). The focus is on contributions to the domestic and financial partnership, and particularly financial sacrifices made by the parties for the welfare of the collective or family unit. Whether the roles of the parties fall into the traditional wage earner/homemaker division, or whether both parties are employed and share domestic responsibilities, it is frequently the case that one party relies on the success and stability of the relationship for future economic security, to his or her own economic detriment (Parkinson, at p. 243). This may occur in a number of ways including: leaving the workforce for a period of time to raise children; relocating for the benefit of the other party's career (and giving up employment and employment-related networks as a result); foregoing career or educational advancement for the benefit of the family or relationship; and accepting underemployment in order to balance the financial and domestic needs of the family unit.

99 As I see it, giving priority to the family is not associated exclusively with the actions of the more financially dependent spouse. The spouse with the higher income may also make financial sacrifices (for example, foregoing a promotion for the benefit of family life), which may be indicative that the parties saw the relationship as a domestic and financial partnership. As Professor Parkinson puts it, the joint family venture may be identified where

> [o]ne party has encouraged the other to rely to her detriment by leaving the workforce or forgoing other career opportunities for the sake of the relationship, and the breakdown of the relationship leaves her in a worse position than she would otherwise have been had she not acted in this way to her economic detriment. [p. 256].

(6) Summary of Quantum Meruit Versus Constructive Trust

100 I conclude:

> 1. The monetary remedy for unjust enrichment is not restricted to an award based on a fee-for-services approach.
>
> 2. Where the unjust enrichment is most realistically characterized as one party retaining a disproportionate share of assets resulting from a joint family venture, and a monetary award is appropriate, it should be calculated on the basis of the share of those assets proportionate to the claimant's contributions.
>
> 3. To be entitled to a monetary remedy of this nature, the claimant must show both (a) that there was, in fact, a joint family venture, and (b) that there is a link between his or her contributions to it and the accumulation of assets and/or wealth.
>
> 4. Whether there was a joint family venture is a question of fact and may be assessed by having regard to all of the relevant circumstances, including factors relating to (a) mutual effort, (b) economic integration, (c) actual intent and (d) priority of the family.

F. Mutual Benefit Conferral

(1) Introduction

101 As discussed earlier, the unjust enrichment analysis in domestic situations is often complicated by the fact that there has been a mutual conferral of benefits; each party in almost all cases confers benefits on the other: Parkinson, at p. 222. Of course, a claimant cannot expect both to get back something given to the defendant and retain something received from him or her: Birks, at p. 415. The unjust enrichment analysis must take account of this common sense proposition. How and where in the analysis should this be done?

102 The answer is fairly straightforward when the essence of the unjust enrichment claim is that one party has emerged from the relationship with a disproportionate share of assets accumulated through their joint efforts. These are the cases of a joint family venture in which the mutual efforts of the parties have resulted in an accumulation of wealth. The remedy is a share of that wealth proportionate to the claimant's contributions. Once the claimant has established his or her contribution to a joint family venture, and a link between that contribution and the accumulation of wealth, the respective contributions of the parties are taken into account in determining the claimant's proportionate share. While determining the proportionate contributions of the parties is not an exact science, it generally does not call for a minute examination of the give and take of daily life. It calls, rather, for the reasoned exercise of judgment in light of all of the evidence.

103 Mutual benefit conferral, however, gives rise to more practical problems in an unjust enrichment claim where the appropriate remedy is a money award based on a fee-for-services-provided approach. The fact that the defendant has also provided services to the claimant may be seen as a factor relevant at all stages of the unjust enrichment analysis. Some courts have considered benefits received by the claimant as part of the benefit/detriment analysis (for example, at the Court of Appeal in *Peter v. Beblow* (1990), 50 B.C.L.R. (2d) 266 (B.C. C.A.)). Others have looked at mutual benefits as an aspect of the juristic reason inquiry (for example, *Ford v. Werden* (1996), 27 B.C.L.R. (3d) 169 (B.C. C.A.), and the Court of Appeal judgment in *Kerr*). Still others have looked at mutual benefits in relation to both juristic reason and at the remedy stage (for example, as proposed in *Wilson*). It is apparent that some clarity and consistency is necessary with respect to this issue.

104 In my view, there is much to be said about the approach to the mutual benefit analysis mapped out by Huddart J.A. in *Wilson*. Specifically, I would adopt her conclusions that mutual enrichments should mainly be considered at the defence and remedy stages, but that they may be considered at the juristic reason stage to the extent that the provision of reciprocal benefits constitutes relevant evidence of the existence (or non-existence) of juristic reason for the enrichment (para. 9). This approach is consistent with the authorities from this Court, and provides a straightforward and just method of ensuring that mutual benefit conferral is fully taken into account without short-circuiting the proper unjust enrichment analysis. I will briefly set out why, in my view, this approach is sound.

105 At the outset, however, I should say that this Court's decision in *Peter* does not mandate consideration of mutual benefits at the juristic reason stage of the analysis: see, e.g., *Ford*, at para. 14; *Thomas v. Fenton*, 2006 BCCA 299, 269 D.L.R. (4th) 376 (B.C. C.A.), at para. 18. Rather, *Peter* made clear that mutual benefit conferral should generally not be considered at the benefit and detriment stages; the Court also approved the trial judge's decision to take mutual benefits into account at the remedy stage of the unjust enrichment analysis.

106 In *Peter*, the trial judge found that all three elements of unjust enrichment had been established. Before Ms. Peter and Mr. Beblow started living together, he had a housekeeper whom he paid $350 per month. When Ms. Peter moved in with her children and assumed the housekeeping and child-care responsibilities, the housekeeper was no longer required. The trial judge valued Ms. Peter's contribution by starting with the amount Mr. Beblow had paid his housekeeper, but then discounting this figure by one half to reflect the benefits Ms. Peter received in return. The trial judge then used that discounted figure to value Ms. Peter's services over the 12 years of the relationship: (B.C. S.C.).

107 The Court of Appeal, at (1990), 50 B.C.L.R. (2d) 266 (B.C. C.A.), set aside the judge's finding on the basis that Ms. Peter had failed to establish that she had suffered a deprivation corresponding to the benefits she had conferred on Mr. Beblow. The court reasoned that, although she had performed the services of a housekeeper and homemaker, she had received compensation because she and her children lived in Mr. Beblow's home rent free and he contributed more for groceries than she had.

108 This Court reversed the Court of Appeal and restored the trial judge's award. The Court was unanimous that Ms. Peter had established all of the elements of unjust enrichment, including deprivation. Cory J. (with whom McLachlin J. agreed on this point) made short work of Mr. Beblow's submission that Ms. Peter had not shown deprivation. He observed, "As a general rule, if it is found that the defendant has been enriched by the efforts of the plaintiff there will, almost as a matter of course be deprivation suffered by the plaintiff": at p. 1013. The Court also unanimously upheld the trial judge's approach of taking account of the benefits Ms. Peter had received at the remedy stage of his decision. As noted, the trial judge had reduced the monthly amount used to calculate Ms. Peter's award by 50 percent to reflect benefits she had received from Mr. Beblow. McLachlin J. did not disagree with this approach, holding at p. 1003 that the figure arrived at by the judge fairly reflected the value of Ms. Peter's contribution to the family assets. Cory J., at p. 1025, referred to the trial judge's approach as "a fair means of calculating the amount due to the appellant". Thus, the Court approved the approach of taking the mutual benefit issue into account at the remedy stage of the analysis. *Peter* therefore does not support the view that mutual benefits should be considered at the benefit/detriment or juristic reason stages of the analysis.

(2) The Correct Approach

109 As I noted earlier, my view is that mutual benefit conferral can be taken into account at the juristic reason stage of the analysis, but only to the extent that it provides relevant evidence of the existence of a juristic reason for the enrichment. Otherwise, the mutual exchange of benefits should be taken into account at the defence and/or remedy stage. It is important to note that this can, and should, take place whether or not the defendant has made a formal counterclaim or pleaded set-off.

110 I turn first to why mutual benefits should not be addressed at the benefit/detriment stage of the analysis. In my view, refusing to address mutual benefits at that point is consistent with the *quantum meruit* origins of the fee-for-services approach and, as well, with the straightforward economic approach to the benefit/detriment analysis which has been consistently followed by this Court.

111 An unjust enrichment claim based on a fee-for-services approach is analogous to the traditional claim for *quantum meruit*. In *quantum meruit* claims, the fact that some benefit had flowed from the defendant to the claimant is taken into account by reducing the claimant's recovery by the amount of the countervailing benefit provided. For example, in a *quantum meruit* claim where the plaintiff is seeking to recover money paid pursuant to an unenforceable contract, but received some benefit from the defendant already, the claim will succeed but the award will be reduced by an amount corresponding to the value of that benefit: Maddaugh and McCamus (loose-leaf), vol. 2, at § 13:200. The authors offer as an example *Giles v. McEwan* (1896), 11 Man. R. 150 (Man. C.A.). In that case, two employees recovered in *quantum meruit* for services provided to the defendant under an unenforceable agreement, but the amount of the award was reduced to reflect the value of benefits the defendant had provided to them. Thus, taking the benefits conferred by the defendant into account at the remedy stage is consistent with general principles of *quantum meruit* claims. Of course, if the defendant has pleaded a counterclaim or set-off, the mutual benefit issue must be resolved in the course of considering that defence or claim.

112 Refusing to take mutual benefits into account at the benefit/detriment stage is also supported by a straightforward economic approach to the benefit/detriment analysis which the Court has consistently followed. *Garland* is a good example. The class action plaintiffs claimed in unjust enrichment to seek restitution for late payment penalties that had been imposed but that this Court (in an earlier decision) found had been charged at a criminal rate of interest: see *Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112 (S.C.C.). The company argued that it had not been enriched because its rates were set by a regulatory mechanism out of its control, and that the rates charged would have been even higher had the company not received the late payment penalties as part of its revenues. That argument was accepted by the Court of Appeal, but rejected on the further appeal to this Court. Iacobucci J., for the Court, held that the payment of money, under the "straightforward economic approach" adopted in *Peter*, was a benefit: para. 32. He stated at para. 36: "There simply is no doubt that Consumers' Gas received the monies represented by the [late payment penalties] and had that money available for use in the carrying on of its business. ...We are not, at this stage, concerned with what happened to this benefit in the ongoing operation of the regulatory scheme." The Court held that the company was in fact asserting the "change of position" defence (that is, the defence that is available when "an innocent defendant demonstrates that it has materially changed its position as a result of an enrichment such that it would be inequitable to require the benefit to be returned": para. 63). This defence is considered only after the three elements of an unjust enrichment claim have been established: para. 37. Thus the Court declined

to get into a detailed consideration at the benefit/detriment stage of the defendant's submissions that it had not benefitted because of the regulatory scheme.

113 While *Garland* dealt with the payment of money, my view is that the same approach should be applied where the alleged enrichment consists of services. Provided that they confer a tangible benefit on the defendant, the services will generally constitute an enrichment and a corresponding deprivation. Whether the deprivation was counterbalanced by benefits flowing to the claimant from the defendant should not be addressed at the first two steps of the analysis. I turn now to the limited role that mutual benefit conferral may have at the juristic reason stage of the analysis.

114 As previously set out, juristic reason is the third of three parts to the unjust enrichment analysis. As McLachlin J. put it in *Peter*, at p. 990, "It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are 'unjust'." The juristic reason analysis is intended to reveal whether there is a reason for the defendant to retain the enrichment, not to determine its value or whether the enrichment should be set off against reciprocal benefits: *Wilson*, at para. 30. *Garland* established that claimants must show that there is no juristic reason falling within any of the established categories, such as whether the benefit was a gift or pursuant to a legal obligation. If that is established, it is open to the defendant to show that a different juristic reason for the enrichment should be recognized, having regard to the parties' reasonable expectations and public policy considerations.

115 The fact that the parties have conferred benefits on each other may provide relevant evidence of their reasonable expectations, a subject that may become germane when the defendant attempts to show that those expectations support the existence of a juristic reason outside the settled categories. However, given that the purpose of the juristic reason step in the analysis is to determine whether the enrichment was just, not its extent, mutual benefit conferral should only be considered at the juristic reason stage for that limited purpose.

(3) Summary

116 I conclude that mutual benefits may be considered at the juristic reason stage, but only to the extent that they provide evidence relevant to the parties' reasonable expectations. Otherwise, mutual benefit conferrals are to be considered at the defence and/or remedy stage. I will have more to say in the next section about how mutual benefit conferral and the parties' reasonable expectations may come into play in the juristic reason analysis.

G. Reasonable or Legitimate Expectations

117 The final point that requires some clarification relates to the role of the parties' reasonable expectations in the domestic context. My conclusion is that, while in the early domestic unjust enrichment cases the parties' reasonable expectations played an important role in the juristic reason

analysis, the development of the law, and particularly the Court's judgment in *Garland*, has led to a more limited and clearly circumscribed role for those expectations.

118 In the early cases of domestic unjust enrichment claims, the reasonable expectations of the claimant and the defendant's knowledge of those expectations were central to the juristic reason analysis. For example, in *Pettkus*, when Dickson J. came to the juristic reason step in the analysis, he said that "where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it" (p. 849). Similarly, in *Sorochan*, at p. 46, precisely the same reasoning was invoked to show that there was no juristic reason for the enrichment.

119 In these cases, central to the Court's concern was whether it was just to require the defendant to pay — in fact to surrender an interest in property — for services not expressly requested. The Court's answer was that it would indeed be unjust for the defendant to retain the benefits, given that he had continued to accept the services when he knew or ought to have known that the claimant was providing them with the reasonable expectation of reward.

120 The Court's resort to reasonable expectations and the defendant's knowledge of them in these cases is analogous to the "free acceptance" principle. The notion of free acceptance has been invoked to extend restitutionary recovery beyond the traditional sorts of *quantum meruit* claims in which services had either been requested or provided under an unenforceable agreement. The law's traditional reluctance to provide a remedy for claims where no request was made was based on the tenet that a person should generally not be required, in effect, to pay for services that he or she did not request, and perhaps did not want. However, this concern carries much less weight when the person receiving the services knew that they were being provided, had no reasonable belief that they were a gift, and yet continued to freely accept them: see P. Birks, *Unjust Enrichment* (2nd ed. 2005), at pp. 56-57.

121 The need to engage in this analysis of the claimant's reasonable expectations and the defendant's knowledge thereof with respect to domestic services has, in my view, now been overtaken by developments in the law. *Garland*, as noted, mandated a two-step approach to the juristic reason analysis. The first step requires the claimant to show that the benefit was not conferred for any existing category of juristic reasons. Significantly, the fact that the defendant also provided services to the claimant is not one of the existing categories. Nor is the fact that the services were provided pursuant to the parties' reasonable expectations. However, the fact that the parties reasonably expected the services to be provided might afford relevant evidence in relation to whether the case falls within one of the traditional categories, for example a contract or gift. Other than in that way, mutual benefit conferral and the parties' reasonable expectations have a very limited role to play at the first step in the juristic reason analysis set out in *Garland*.

122 However, different considerations arise at the second step. Following *Peter* and *Garland*, the parties' reasonable or legitimate expectations have a critical role to play when the defendant seeks to establish a new juristic reason, whether case-specific or categorical. As Iacobucci J. put it in *Garland*, this introduces a category of residual situations in which "courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery" (para. 45). Specifically, it is here that the court should consider the parties' reasonable expectations and questions of policy.

123 It will be helpful in understanding how *Peter* and *Garland* fit together to apply the *Garland* approach to an issue touched on, but not resolved, in *Peter*. In *Peter*, an issue was whether a claim based on the provision of domestic services could be defeated on the basis that the services had been provided as part of the bargain between the parties in deciding to live together. While the Court concluded that the claim failed on the facts, it did not hold that such a claim would inevitably fail in all circumstances: p. 991. It seems to me that, in light of *Garland*, where a "bargain" which does not constitute a binding contract is alleged, the issue will be considered at the stage when the defendant seeks to show that there is a juristic reason for the enrichment that does not fall within any of the existing categories; the claim is that the "bargain" represents the parties' reasonable expectations, and evidence about their reasonable expectations would be relevant evidence of the existence (or not) of such a bargain.

124 To summarize:

> 1. The parties' reasonable or legitimate expectations have little role to play in deciding whether the services were provided for a juristic reason within the existing categories.
>
> 2. In some cases, the facts that mutual benefits were conferred or that the benefits were provided pursuant to the parties' reasonable expectations may be relevant evidence of whether one of the existing categories of juristic reasons is present. An example might be whether there was a contract for the provision of the benefits. However, generally the existence of mutual benefits flowing from the defendant to the claimant will not be considered at the juristic reason stage of the analysis.
>
> 3. The parties' reasonable or legitimate expectations have a role to play at the second step of the juristic reason analysis, that is, where the defendant bears the burden of establishing that there is a juristic reason for retaining the benefit which does not fall within the existing categories. It is the mutual or legitimate expectations of both parties that must be considered, and not simply the expectations of either the claimant or the defendant. The question is whether the parties' expectations show that retention of the benefits is just.

125 I will now turn to the two cases at bar.

IV. The *Vanasse* Appeal

A. Introduction

126 In the Vanasse appeal, the main issue is how to quantify a monetary award for unjust enrichment. The trial judge awarded a share of the net increase in the family's wealth during the period of unjust enrichment. The Court of Appeal held that this was the wrong approach, finding that the trial judge ought to have performed a *quantum meruit* calculation in which the value that each party received from the other was assessed and set off. This required an evaluation of the defendant Mr. Seguin's non-financial contributions to the relationship which, in the view of the Court of Appeal, the trial judge failed to perform. As the record did not permit the court to apply the correct legal principles to the facts, it ordered a new hearing with respect to compensation and consequential changes to spousal support.

127 In this Court, the appellant Ms. Vanasse raises two issues:

1. Did the Court of Appeal err by insisting on a strict *quantum meruit* (i.e. "value received") approach to quantify the monetary award for unjust enrichment?

2. Did the Court of Appeal err in finding that the trial judge had failed to consider relevant evidence of Mr. Seguin's contributions?

128 In my view, the appeal should be allowed and the trial judge's order restored. For the reasons I have developed above, my view is that money compensation for unjust enrichment need not always, as a matter of principle, be calculated on a *quantum meruit* basis. The trial judge here, although not labelling it as such, found that there was a joint family venture and that there was a link between Ms. Vanasse's contribution to it and the substantial accumulation of wealth which the family achieved. In my view, the trial judge made a reasonable assessment of the monetary award appropriate to reverse this unjust enrichment, taking due account of Mr. Seguin's undoubted and substantial contributions.

B. Brief Overview of the Facts and Proceedings

129 The background facts of this case are largely undisputed. The parties lived together in a common law relationship for approximately 12 years, from 1993 until March 2005. Together, they had two children who were aged 8 and 10 at the time of trial.

130 During approximately the first four years of their relationship (1993 to 1997), the parties diligently pursued their respective careers, Ms. Vanasse with the Canadian Security Intelligence Service ("CSIS") and Mr. Seguin with Fastlane Technologies Inc., marketing a network operating system he had developed.

131 In March of 1997, Ms. Vanasse took a leave of absence to move with Mr. Seguin to Halifax, where Fastlane had relocated for important business reasons. During the next three and one-half years, the parties had two children; Ms. Vanasse took care of the domestic labour, while Mr. Seguin devoted himself to developing Fastlane. The family moved back to Ottawa in 1998, where Mr. Seguin purchased a home and registered it in the names of both parties as joint tenants. In September 2000, Fastlane was sold and Mr. Seguin netted approximately $11 million. He placed the funds in a holding company, with which he continued to develop business and investment opportunities.

132 After the sale of Fastlane, Ms. Vanasse continued to assume most of the domestic responsibilities, although Mr. Seguin was more available to assist. He continued to manage the finances.

133 The parties separated on March 27, 2005. At that time, they were in starkly contrasting financial positions: Ms. Vanasse's net worth had gone from about $40,000 at the time she and Mr. Seguin started living together, to about $332,000 at the time of separation; Mr. Seguin had come into the relationship with about $94,000, and his net worth at the time of separation was about $8,450,000.

134 Ms. Vanasse brought proceedings in the Superior Court of Justice. In addition to seeking orders with respect to spousal support and child custody, Ms. Vanasse claimed unjust enrichment. She argued that Mr. Seguin had been unjustly enriched because he retained virtually all of the funds from the sale of Fastlane, even though she had contributed to their acquisition through benefits she conferred in the form of domestic and childcare services. She alleged her contributions allowed Mr. Seguin to dedicate most of his time and energy to Fastlane. She sought relief by way of constructive trust in Mr. Seguin's remaining one half interest in the family home, and a one-half interest in the investment assets held by Mr. Seguin's holding company.

135 Mr. Seguin contested the unjust enrichment claim. While conceding he had been enriched during the roughly three-year period where he was working outside the home full time and Ms. Vanasse was working at home full time (May 1997 to September 2000), he argued there was no corresponding deprivation because he had given her a one-half interest in the family home and approximately $44,000 in Registered Retirement Saving Plans ("RRSPs"). In the alternative, Mr. Seguin submitted that a constructive trust remedy was inappropriate because there was no link between Ms. Vanasse's contributions and the property of Fastlane.

136 The trial judge, Blishen J., concluded that the relationship of the parties could be divided into three distinct periods: (1) From the commencement of cohabitation in 1993 until March 1997 when Ms. Vanasse left her job at CSIS; (2) From March 1997 to September 2000, during which both children were born and Fastlane was sold; and (3) From September 2000 to the separation of the parties in March 2005. She concluded that neither party had been unjustly enriched in the

first or third periods; she held that their contributions to the relationship during these periods had been proportionate. In the first period, there were no children of the relationship and both parties were focused on their careers; in the third period, both parents were home and their contributions had been proportional.

137 In the second period, however, the trial judge concluded that Mr. Seguin had been unjustly enriched by Ms. Vanasse. Ms. Vanasse had been in charge of the domestic side of the household, including caring for their two children. She had not been a "nanny/housekeeper" and, as the trial judge held, throughout the relationship she had been at least "an equal contributor to the family enterprise". The trial judge concluded that Ms. Vanasse's contributions during this second period "significantly benefited Mr. Seguin and were not proportional" (para. 139).

138 The trial judge found as fact that Ms. Vanasse's efforts during this second period were directly linked to Mr. Seguin's business success. She stated, at para. 91, that

> Mr. Seguin was enriched by Ms. Vanasse's running of the household, providing child care for two young children and looking after all the necessary appointments and needs of the children. Mr. Seguin could not have made the efforts he did to build up the company but for Ms. Vanasse's assumption of these responsibilities. Mr. Seguin reaped the benefits of Ms. Vanasse's efforts by being able to focus his time, energy and efforts on Fastlane.
>
> [Emphasis added.]

Again at para. 137, the trial judge found that

> Mr. Seguin was unjustly enriched and Ms. Vanasse deprived for three and one-half years of their relationship, during which time Mr. Seguin often worked day and night and traveled frequently while in Halifax. Mr. Seguin could not have succeeded, as he did, and built up the company, as he did, without Ms. Vanasse assuming the vast majority of childcare and household responsibilities. Mr. Seguin could not have devoted his time to Fastlane but for Ms. Vanasse's assumption of those responsibilities. ... Mr. Seguin reaped the benefit of Ms. Vanasse's efforts by being able to focus all of his considerable energies and talents on making Fastlane a success.
>
> [Emphasis added.]

139 The trial judge concluded that a monetary award in this case was appropriate, given Mr. Seguin's ability to pay, and lack of a sufficiently direct and substantial link between Ms. Vanasse's contributions and Fastlane or Mr. Seguin's holding company, as required to impose a remedial constructive trust.

140 With respect to quantification, Blishen J. noted that Ms. Vanasse had received a one-half interest in the family home, but concluded that this was not adequate compensation for her

contributions. The trial judge compared the net worths of the parties and determined that Ms. Vanasse was entitled to a one-half interest in the prorated increase in Mr. Seguin's net worth during the period of the unjust enrichment. She reasoned that his net worth had increased by about $8.4 million dollars over the 12 years of the relationship. Although she noted that the most significant increase took place when Fastlane was sold towards the end of the period of unjust enrichment, she nonetheless prorated the increase over the full 12 years of the relationship, yielding a figure of about $700,000 per year. Starting with the $2.45 million increase attributable to the three and one-half years of unjust enrichment, the trial judge awarded Ms. Vanasse 50 percent of that amount, less the value of her interest in the family home and her RRSPs. This produced an award of just under $1 million.

141 Mr. Seguin did not appeal Blishen J.'s unjust enrichment finding, and conceded unjust enrichment between 1997 and 2000 on appeal. Therefore, the trial judge's findings that there had been an unjust enrichment during that period and that there was no unjust enrichment during the other periods are not in issue. The sole issue for determination in this Court is the propriety of the trial judge's monetary award for the unjust enrichment which she found to have occurred.

C. Analysis

(1) Was the Trial Judge Required to Use a Quantum Meruit Approach to Calculate the Monetary Award?

142 I agree with the appellant that a monetary award for unjust enrichment need not, as a matter of principle, always be calculated on a fee-for-services basis. As I have set out earlier, an unjust enrichment is best characterized as one party leaving the relationship with a disproportionate share of wealth that accumulated as a result of the parties' joint efforts. This will be so when the parties were engaged in a joint family venture and where there is a link between the contributions of the claimant and the accumulation of wealth. When this is the case, the amount of the enrichment should be assessed by determining the claimant's proportionate contribution to that accumulated wealth. As the trial judge saw it, this was exactly the situation of Ms. Vanasse and Mr. Seguin.

(2) Existence of a Joint Family Venture

143 The trial judge, after a six-day trial, concluded that "Ms. Vanasse was not a nanny/housekeeper". She found that Ms. Vanasse had been at least "an equal contributor to the family enterprise" throughout the relationship and that, during the period of unjust enrichment, her contributions "significantly benefited Mr. Seguin" (para. 139).

144 The trial judge, of course, did not review the evidence under the headings that I have suggested will be helpful in identifying a joint family venture, namely "mutual effort", "economic integration", "actual intent" and "priority of the family". However, her findings of fact and analysis indicate that the unjust enrichment of Mr. Seguin at the expense of Ms. Vanasse ought to be

characterized as the retention by Mr. Seguin of a disproportionate share of the wealth generated from a joint family venture. The judge's findings fit conveniently under the headings I have suggested.

(a) Mutual Effort

145 There are several factors in this case which suggest that, throughout their relationship, the parties were working collaboratively towards common goals. First, as previously mentioned, the trial judge found that Ms. Vanasse's role was not as a "nanny/housekeeper" but rather as at least an equal contributor throughout the relationship. The parties made important decisions keeping the overall welfare of the family at the forefront: the decision to move to Halifax, the decision to move back to Ottawa, and the decision that Ms. Vanasse would not return to work after the sale of Fastlane are all clear examples. The parties pooled their efforts for the benefit of their family unit. As the trial judge found, during the second stage of their relationship from March 1997 to September 2000, the division of labour was such that Ms. Vanasse was almost entirely responsible for running the home and caring for the children, while Mr. Seguin worked long hours and managed the family finances. The trial judge found that it was through their joint efforts that they were able to raise a young family and acquire wealth. As she put it, "Mr. Seguin could not have made the efforts he did to build up the company but for Ms. Vanasse's assumption of these responsibilities" (para. 91). While Mr. Seguin's long hours and extensive travel reduced somewhat in September 1998 when the parties returned to Ottawa, the basic division of labour remained the same.

146 Notably, the period of unjust enrichment corresponds to the time during which the parties had two children together (in 1997 and 1999), a further indicator that they were working together to achieve common goals. The length of the relationship is also relevant, and their 12-year cohabitation is a significant period of time. Finally, the trial judge described the arrangement between the parties as a "family enterprise", to which Ms. Vanasse was "at least, an equal contributor" (paras. 138-39).

(b) Economic Integration

147 The trial judge found that "[t]his was not a situation of economic interdependence" (para. 105). That said, there was a pooling of resources. Ms. Vanasse was not employed and did not contribute financially to the family after the children were born, and thus was financially dependent on Mr. Seguin. The family home was registered jointly, and the parties had a joint chequing account. As the trial judge put it, "She was 'the C.E.O. of the kids' and he was 'the C.E.O. of the finances'" (para. 105).

(c) Actual Intent

148 The actual intent of the parties in a domestic relationship, as expressed by the parties or inferred from their conduct, must be given considerable weight in determining whether there was a joint family venture. There are a number of findings of fact that indicate these parties considered their relationship to be a joint family venture.

149 While a promise to marry or the discussion of legal marriage is by no means a prerequisite for the identification of a joint family venture, in this case the parties' intentions with respect to marriage strongly suggest that they viewed themselves as the equivalent of a married couple. Mr. Seguin proposed to Ms. Vanasse in July 1996 and they exchanged rings. While they were "devoted to one another and still in love", a wedding date was never set (para. 14). Mr. Seguin raised the topic of marriage again when Ms. Vanasse found out she was pregnant with their first child. Although they never married, the trial judge found that there had been "mutual expectations [of marriage] during the first few years of their 12 year relationship" (para. 64). Mr. Seguin continued to address Ms. Vanasse as "my future wife", and she was viewed by the outside world as such (para. 33).

150 The trial judge also referred to statements made by Mr. Seguin that were strongly indicative of his view that there was a joint family venture. As the trial judge put it, at para. 28, upon the sale of Fastlane

> Mr. Seguin became a wealthy man. He told Ms. Vanasse that they would never have to worry about finances as their parents did; their children could go to the best schools and they could live a good life without financial concerns.

Again, at para. 98:

> After the sale of the company, Mr. Seguin indicated they could retire, the children could go to the best schools and the family would be well cared for. The family took travel vacations, enjoyed luxury cars, bought a large cabin cruiser which they used for summer vacations and purchased condominiums at Mont-Tremblant.

151 While the trial judge viewed Mr. Seguin's promises and reassurances as contributing to a reasonable expectation on the part of Ms. Vanasse that she was to share in the increase of his net worth during the period of unjust enrichment, in my view these comments are more appropriately characterized as a reflection of the reality that there was a joint family venture, to which the couple jointly contributed for their mutual benefit and the benefit of their children.

(d) Priority of the Family

152 There is a strong inference from the factual findings that, to Mr. Seguin's knowledge, Ms. Vanasse relied on the relationship to her detriment. As the trial judge found, in 1997 Ms. Vanasse gave up a lucrative and exciting career with CSIS, where she was training to be an intelligence

officer, to move to Halifax with Mr. Seguin. In many ways this was a sacrifice on her part; she left her career, gave up her own income, and moved away from her family and friends. Mr. Seguin had moved to Halifax in order to relocate Fastlane for business reasons. Ms. Vanasse then stayed home and cared for their two small children. As I have already explained, during the period of the unjust enrichment, Ms. Vanasse was responsible for a disproportionate share of the domestic labour. It was these domestic contributions that, in part, permitted Mr. Seguin to focus on his work with Fastlane. Later, in 2003, the "family's decision" was for Ms. Vanasse to remain home after her leave from CSIS had expired (para. 198). Ms. Vanasse's financial position at the breakdown of the relationship indicates she relied on the relationship to her economic detriment. This is all evidence supporting the conclusion that the parties were, in fact, operating as a joint family venture.

153 As a final point, I would refer to the arguments made by Mr. Seguin, which were accepted by the Court of Appeal, that the trial judge failed to give adequate weight to sacrifices Mr. Seguin made for the benefit of the relationship. Later in my reasons, I will address the question of whether the trial judge actually failed in this regard. However, the points raised by Mr. Seguin to support this argument actually serve to reinforce the conclusion that there was a joint family venture. Mr. Seguin specifically notes a number of factors, including: agreeing to step down as CEO of Fastlane in September 1997 to make himself more available to Ms. Vanasse, causing friction with his co-workers and partners, and reducing his remuneration; agreeing to relocate to Ottawa at Ms. Vanasse's request in 1998; and making increased efforts to work at home more and travel less after moving back to Ottawa. These facts are indicative of the sense of mutuality in the parties' social and financial relationship. In short, they support the identification of a joint family venture.

(e) Conclusion on Identification of the Joint Family Venture

154 In my view, the trial judge's findings of fact clearly show that Ms. Vanasse and Mr. Seguin engaged in a joint family venture. The remaining question is whether there was a link between Ms. Vanasse's contributions to it and the accumulation of wealth.

(3) Link to Accumulation of Wealth

155 The trial judge made a clear finding that there was a link between Ms. Vanasse's contributions and the family's accumulation of wealth.

156 I have referred earlier, in some detail, to the trial judge's findings in this regard. However, to repeat, her conclusion is expressed particularly clearly at para. 91 of her reasons:

> Mr. Seguin could not have made the efforts he did to build up the company but for Ms. Vanasse's assumption of these [household and child-rearing] responsibilities. Mr. Seguin reaped the benefits of Ms. Vanasse's efforts by being able to focus his time, energy and efforts on Fastlane.

157 Given that and similar findings, I conclude that not only were these parties engaged in a joint family venture, but that there was a clear link between Ms. Vanasse's contribution to it and the accumulation of wealth. The unjust enrichment is thus best viewed as Mr. Seguin leaving the relationship with a disproportionate share of the wealth accumulated as a result of their joint efforts.

(4) Calculation of the Award

158 The main focus of the appeal was on whether the award ought to have been calculated on a *quantum meruit* basis. Very little was argued before this Court regarding the way the trial judge approached her calculation of a proportionate share of the parties' accumulated wealth. I conclude that the trial judge's approach was reasonable in the circumstances, but I stress that I do not hold out her approach as necessarily being a template for future cases. Within the legal principles I have outlined, there may be many ways in which an award may be quantified reasonably. I prefer not to make any more general statements about the quantification process in the context of this appeal, except this. Provided that the correct legal principles are applied, and the findings of fact are not tainted by clear and determinative error, a trial judge's assessment of damages is treated with considerable deference on appeal: see, e.g., *Nance v. British Columbia Electric Railway*, [1951] A.C. 601 (British Columbia P.C.). A reasoned and careful exercise of judgment by the trial judge as to the appropriate monetary award to remedy an unjust enrichment should be treated with the same deference. There are two final specific points that I must address.

159 Mr. Seguin submits, very briefly, that a proper application of the "value survived" approach in this case would require a careful determination of the contributions by third parties to the growth of Fastlane during the period his own contributions were diminished, as a result of what counsel characterizes as Ms. Vanasse's "demands" that he reduce his hours and move back to Ottawa. This argument is premised on the notion that the money he received from the sale was not justly his to share with Ms. Vanasse. I cannot accept this premise. Unexplained is why he received more than his share when the company was sold or why, having received more than he was due, Ms. Vanasse is still not entitled to an equitable share of what he actually received.

160 Second, there is the finding of the Court of Appeal that the trial judge failed to take into account evidence of Mr. Seguin's numerous and significant non-financial contributions to the family. I respectfully cannot accept this view. The trial judge specifically alluded to these contributions in her reasons. Moreover, by confining the period of unjust enrichment to the three and one-half year period, the trial judge took into account the periods during which Ms. Vanasse's contributions were not disproportionate to Mr. Seguin's. In my view, the trial judge took a realistic and practical view of the evidence before her and gave sufficient consideration to Mr. Seguin's contributions.

D. Disposition

161 I would allow the appeal, set aside the order of the Court of Appeal, and restore the order of the trial judge. The appellant should have her costs throughout.

V. The *Kerr* Appeal

A. Introduction

162 When their common law relationship of more than 25 years ended, Ms. Kerr sued her former partner, Mr. Baranow, advancing claims for unjust enrichment, resulting trust, and spousal support. Mr. Baranow counterclaimed that Ms. Kerr had been unjustly enriched by his housekeeping services provided between 1991 and 2006, and by his early retirement in order to provide her personal assistance. The trial judge awarded Ms. Kerr $315,000, holding that she was entitled to this amount both by way of resulting trust (to reflect her contribution to the acquisition of property) and by way of remedial constructive trust (as a remedy for her successful claim in unjust enrichment). He also awarded Ms. Kerr $1,739 per month in spousal support effective the date she commenced proceedings. Although the trial judge rejected Mr. Baranow's assertion that Ms. Kerr had been unjustly enriched at his expense, the reasons for judgment and the order after trial do not otherwise address Mr. Baranow's counterclaim.

163 Mr. Baranow appealed. The Court of Appeal allowed the appeal, concluding that Ms. Kerr's claims for a resulting trust and in unjust enrichment should be dismissed, that Mr. Baranow's claim for unjust enrichment should be remitted to the trial court for determination, and that the order for spousal support should be effective as of the first day of the trial, not as of the date proceedings were commenced.

164 Ms. Kerr appeals, submitting that the Court of Appeal erred by setting aside the trial judge's findings that:

(1) a resulting trust arose in her favour;

(2) she had unjustly enriched Mr. Baranow; and

(3) spousal support should begin as of the date she instituted proceedings.

165 In my view, the Court of Appeal was right to set aside the trial judge's findings of resulting trust and unjust enrichment. It also did not err in directing that Mr. Baranow's counterclaim be returned to the Supreme Court of British Columbia for hearing. However, my view is that Ms. Kerr's unjust enrichment claim should not have been dismissed, but rather a new trial ordered. While the trial judge's errors certainly were not harmless, it is not possible to say on this record, which includes findings of fact tainted by clear error, that her unjust enrichment claim would inevitably fail if analyzed using the clarified legal framework set out above. With respect to the

commencement date of the spousal support order, I would set aside the order of the Court of Appeal and restore the trial judge's order.

B. Overview of the Facts

166 The trial judge's disposition of both the resulting trust and unjust enrichment claims turned on his conclusion that Ms. Kerr had provided $60,000 worth of equity and assets at the beginning of the relationship. This fact, in the trial judge's view, supported awarding her one-third of the value of the home she shared with Mr. Baranow at the time of separation. According to the trial judge, this $60,000 of equity and assets consisted of three elements: her $37,000 of equity in the Coleman Street home she had shared with her former husband; the value of an automobile; and the value of furniture which she brought into her relationship with Mr. Baranow. The trial judge did not make specific findings of fact about the value of either Ms. Kerr's or Mr. Baranow's non-monetary contributions to the relationship. As previously noted, while the judge rejected in a single sentence Mr. Baranow's contention that Ms. Kerr had been unjustly enriched at his expense, the judge did not explain the basis of that conclusion. Mr. Baranow's counterclaim was not otherwise addressed.

167 The trial judge's findings of fact, of course, must be accepted unless tainted with clear and determinative error. In this case, however, the Court of Appeal's intervention on some of the judge's key findings was justified, because those findings simply were not supported by the record. I will have to delve into the facts, more than might otherwise be required, to explain why.

168 The parties began to live together in Mr. Baranow's home on Wall Street in Vancouver in May 1981. Shortly afterward, they moved into Ms. Kerr's former matrimonial home on Coleman Street. They had met at their mutual place of work, the Port of Vancouver, where she worked as a secretary and he as a longshoreman. Ms. Kerr was in midst of a divorce. Through her separation agreement, Ms. Kerr received her husband's interest in their former matrimonial home on Coleman Street in North Vancouver, all of the furniture in the house, and a 1979 Cadillac Eldorado. However, Ms. Kerr's ex-husband owed more than $400,000 and Ms. Kerr was guarantor of some of that debt.

169 In the summer of 1981, the Coleman Street property was the subject of foreclosure proceedings and, according to the evidence, was about to be foreclosed on July 29, 1981. Ms. Kerr testified at trial that, at the time, she had two teenage children, was earning under $30,000 a year, and had no money to save the house.

170 Ms. Kerr instructed her lawyer to place the titles to the Coleman Street property and the vehicle into Mr. Baranow's name. Mr. Baranow paid $33,000 in cash to secure the property against outstanding debts, and guaranteed a $100,000 mortgage at a rate of 22 percent. He then began to make the mortgage payments and eventually refinanced the mortgage, together with that on his Wall Street property, and assumed that new mortgage himself.

171 The couple lived together for the next 25 years, first in the Wall Street property, then at Coleman Street, then in a temporary apartment, and finally in their "dream home" which they constructed on Mr. Baranow's Wall Street property.

172 While the parties lived together in the Coleman Street property (from September 1981 to December 1985), Mr. Baranow retained the $450 per month he received by renting out his Wall Street property. The trial judge found that, although the parties kept their financial affairs separate, there was an arrangement by which Mr. Baranow would pay the property taxes and mortgage payments on both the Coleman Street and the Wall Street properties. The mortgage on both properties was paid off before July 1985. However, Mr. Baranow took out a $32,000 mortgage on the Wall Street property in July 1985, which was paid in full by August 1988.

173 The Coleman Street property was sold in August 1985 for $138,000. This sale was at a considerable loss, taking into account the real estate commission, the $33,000 in cash Mr. Baranow had contributed at the time of the transfer to him, and the mortgage payments he alone had made between the transfer in the summer of 1981 and the sale in the summer of 1985.

174 The parties moved into an apartment (from August 1985 until October 1986) while they constructed their "dream home" at the Wall Street location. The existing dwelling was torn down and replaced. Mr. Baranow spent somewhere between $97,000 and $105,000 on its construction, with additional amounts spent for materials, labour and permits. Ms. Kerr, the trial judge found, was involved with the planning, interior decorating and cleaning. She also planted sod, tended the flower garden, and paid for some wood paneling in the downstairs bedroom. In addition, she made contributions towards the purchase of furniture, appliances, and other chattels for the Wall Street property. Her son paid $350 per month in rent, which Mr. Baranow retained. At one point in his reasons, the trial judge stated that Ms. Kerr paid "all of the household expenses and the insurance on the new house ... even after the $32,000.00 mortgage was paid off by [Mr. Baranow] in August 1988" (para. 24). However, at another point, the judge noted that Ms. Kerr paid the utilities and insurance and bought "some groceries" (para. 36). Mr. Baranow, he found, paid the property-related expenses, consisting of property taxes (less the disability benefit attributable to Ms. Kerr) and upkeep (which was minimal in the new house). The trial judge found that the current value of the Wall Street property was $942,500, compared with $205,000 in October of 1986. He then concluded that, given there were no mortgage payments after 1988, Ms. Kerr's share of the expenses "was probably higher" than Mr. Baranow's for approximately 18 years before they stopped living together.

175 In 1991, Ms. Kerr suffered a massive stroke and cardiac arrest, leaving her paralyzed on her left side and unable to return to work. Her health steadily deteriorated, and relations between the couple became increasingly strained. Mr. Baranow took an early retirement in 2002. The trial judge acknowledged that Mr. Baranow claimed to have done this to care for Ms. Kerr, but noted

that early retirement was also favourable to him. The trial judge found that Mr. Baranow started to experience "caregiver fatigue" and began exploring institutional care alternatives in June 2005. The next summer, in August 2006, Ms. Kerr had to undergo surgery on her knee. After the surgery, Mr. Baranow made it clear to the hospital staff that he was not prepared to have her return home. Ms. Kerr was transferred to an extended care facility where she remained at the time of trial. The trial judge found that, in the last 18 months Ms. Kerr resided at the Wall Street property, Mr. Baranow did most of the housework and helped her with her bodily functions.

C. Analysis

(1) The Resulting Trust Issue

176 The trial judge found that Mr. Baranow held a one-third interest in the Wall Street property by way of resulting trust for Ms. Kerr, on three bases. The Court of Appeal found that each of these holdings was erroneous. I respectfully agree.

(a) Gratuitous Transfer

177 The trial judge found that the transfer of the Coleman Street property to Mr. Baranow was gratuitous, therefore raising the presumption of a resulting trust in Ms. Kerr's favour. At the time of transfer to Mr. Baranow, roughly $133,000 was required to save the property (it was subject to a first mortgage of just under $80,000, a second mortgage of just under $35,000, a judgment in favour of the Bank of Montreal of just under $12,000, and other miscellaneous debts and charges, adding up to roughly $133,000). There was also a $26,500 judgment in favour of CIBC, which was of concern to Ms. Kerr, although it is not listed in the payouts required to close the transfer. We know that Ms. Kerr had guaranteed some of her former husband's debts, and that she declared bankruptcy in 1983 in relation to $15,000 of debt for which she had co-signed with her former husband.

178 The Court of Appeal reversed the trial judge's resulting trust finding, holding that the transfer was not gratuitous. The court pointed to the contributions and liabilities undertaken by Mr. Baranow to make the transfer possible, and concluded that the trial judge's finding in this regard constituted a palpable and overriding error.

179 On this point, I respectfully agree with the Court of Appeal. There is no dispute that Mr. Baranow injected roughly $33,000 in cash, and guaranteed a $100,000 mortgage, so that the property would not be lost to the bank in the foreclosure proceedings. This constituted consideration, and the transfer therefore cannot reasonably be labelled gratuitous. The respondent would have us hold otherwise on the basis of technical arguments about the lack of a precise coincidence between the time of the transfer and payments, and the lack of payment directly to Ms. Kerr because Mr. Baranow's payments were made to her creditors. These arguments have no merit. An important element of the trial judge's finding of a resulting trust was his conclusion

that there was "no evidence" that Mr. Baranow's payment of $33,000 in cash and his guarantee of the $100,000 mortgage "were in connection with the transfer or part of an agreement between the parties so as to constitute consideration for the transfer" (para. 76). Putting to one side for the moment whether this finding reflects a correct understanding of a gratuitous transfer, the judge clearly erred in making this statement; there was in fact much evidence to that precise effect. Mr. Baranow testified that Ms. Kerr had "tearfully asked" Mr. Baranow for help to save the property from the creditors. Ms. Kerr's solicitor recorded in his reporting letter that Ms. Kerr felt she had little choice but to convey the property to Mr. Baranow "faced with the large outstanding debts of [her] husband which include[d] a Judgment taken by C.I.B.C. for a debt outstanding in the amount of $26,500.00". At trial, Ms. Kerr was asked whether she had requested Mr. Baranow to save the house; she responded, "I guess so". Thus, contrary to the judge's finding, there was in fact considerable evidence that Mr. Baranow's paying off of the debts and guaranteeing the mortgage were in connection with the transfer of the property to him. This evidence shows that he accepted the transfer and assumed the financial obligations at Ms. Kerr's request, and in order to further her purpose of preventing the creditors from foreclosing on the property.

180 The Court of Appeal was correct to intervene on this point and conclude that the transfer was not gratuitous. The trial judge's imposition of a resulting trust on one-third of the Wall Street property on this basis accordingly cannot be sustained.

(b) Ms. Kerr's Contributions

181 The trial judge also based his finding of resulting trust on Ms. Kerr's financial and other contributions to the acquisition of the new home on the Wall Street property. He found Ms. Kerr had contributed a total of $60,000: $37,000 in equity from the transfer of the Coleman Street property to Mr. Baranow; $20,000 for the value of the Cadillac also transferred to Mr. Baranow; and $3,000 for the furniture in the Coleman Street property. In addition, the trial judge noted that, in obtaining the legal title of Coleman, Mr. Baranow was able to "re-mortgage both properties for $116,000.00 and apply the $16,000.00 toward the acquisition of the Wall Street Property" (para. 82). Furthermore, Mr. Baranow would not have been able to pay off the mortgages with the same efficiency but for Ms. Kerr's contributions to household expenses. However, the trial judge did not attach any value to these last two matters in his determination of the extent of the resulting trust which he imposed on the Wall Street property.

182 The Court of Appeal reversed this finding as not being supported by the record. The court noted that Ms. Kerr did not have $37,000 in equity in the Coleman Street property when Mr. Baranow took title, Mr. Baranow did not receive any beneficial interest in the vehicle, and there was no evidence of the value of the furnishings.

183 I agree with the Court of Appeal's disposition of this issue. As it pointed out, the evidence showed that, in addition to Mr. Baranow paying cash and guaranteeing a mortgage, he paid the

monthly mortgage payments, taxes and upkeep expenses on the Coleman property until it was sold in 1985 for $138,000 (less real estate commission). Mr. Baranow received no beneficial interest in the vehicle and the judge made no finding about the value of the furnishings. There was not, in any meaningful sense of the word, any equity in the Coleman property for Ms. Kerr to contribute to the acquisition or improvement of the Wall Street property. I would affirm the conclusion of the Court of Appeal on this point.

(c) Common Intention Resulting Trust

184 The trial judge also appears to have based his conclusions about the resulting trust on his finding of a common intention on the part of Ms. Kerr and Mr. Baranow to share in the Wall Street property. For the reasons I have given earlier, the "common intention" resulting trust has no further role to play in the resolution of disputes such as this one. I would hold that a resulting trust should not have been imposed on the Wall Street property on the basis of a finding of common intention between these parties.

(d) Conclusion With Respect to Resulting Trust

185 In my view the Court of Appeal was correct to set aside the trial judge's conclusions with respect to the resulting trust issues.

(2) Unjust Enrichment

186 The trial judge also found that Mr. Baranow had been unjustly enriched by Ms. Kerr to the extent of $315,000, the value of the one-third interest in the Wall Street property determined during the resulting trust analysis. The judge found that Ms. Kerr had provided the following benefits to Mr. Baranow:

a. $37,000 equity in the Coleman Street property

b. the automobile

c. the furnishings

d. $16,000 in refinancing permitted by the Coleman transfer and applied to the Wall Street property

e. $22,000 gained on the resale of the Coleman Street property

f. household expenses and insurance paid on both properties

g. spousal services such as housework, entertaining guests and preparing meals until Ms. Kerr's disability made it impossible to continue

h. assistance with planning and decoration of the Wall Street house

i. financial contributions towards the purchase of chattels for the new home

j. a disability tax exemption

k. approximately five years' worth of rental income from Ms. Kerr's son

187 Turning to the element of corresponding deprivation, the trial judge noted that it was "unlikely" that Ms. Kerr had given up any career or educational opportunities over the course of the relationship. Furthermore, her income remained unchanged, even following her stroke, due to her receipt of disability pensions and other benefits. The judge found that she had lived rent-free for the entire relationship. He concluded, however, that she had suffered a deprivation because, had she not contributed her equity in the Coleman Street property, it was "reasonable to infer that she would have used it to purchase an asset in her own name, invest for her own benefit, use it for some personal interest, or otherwise avail herself of beneficial financial opportunity": para. 92. He also concluded, without elaboration, that the benefits that she received from the relationship did not overtake her contributions.

188 The Court of Appeal set aside the trial judge's finding of unjust enrichment. It found that Mr. Baranow's direct and indirect contributions, by which Ms. Kerr was enriched and for which he was not compensated, constituted a juristic reason for any enrichment which he experienced at her expense. The court found that, for reasons mentioned earlier, there was no $60,000 contribution by Ms. Kerr and therefore her claim rested on her indirect contributions. The court also concluded that the trial judge's analysis failed to assess the extent of Mr. Baranow's direct and indirect contributions to Ms. Kerr, including: his payment of accommodation expenses for the duration of the relationship; his contribution to the purchase price of the van which Ms. Kerr still possesses; her receipt of almost half of his lifetime amount of union medical benefits, used to pay for her health care expenses; his taking early retirement with a reduced monthly pension to care for Ms. Kerr; and his provision of extensive personal caregiver and domestic services without compensation. Moreover, in the Court of Appeal's view, the trial judge had failed to note that Mr. Baranow's payment of her living expenses permitted her to save about $272,000 over the course of the relationship.

189 The appellant challenges the Court of Appeal's decision on two bases. First, she argues that the court improperly interfered with the trial judge's finding of fact with respect to Ms. Kerr's $60,000 contribution to the relationship. Second, she submits that the court improperly considered the question of mutual benefits through the lens of juristic reason, and that this resulted in the court failing to consider globally who had been enriched and who deprived. Ms. Kerr's submission on this latter point is that consideration of mutual benefit conferral should occur during the first two steps of the unjust enrichment analysis: enrichment and corresponding deprivation. Once that has been established, she argues that the legitimate expectations of the parties may be considered as part of the analysis of whether there was a juristic reason for the enrichment. The main point

is that, in the appellant's submission, it was open to the trial judge to conclude that the parties' legitimate expectation was that they would accumulate wealth in proportion to their respective incomes; without a share of the value of the real property acquired during the relationship, that reasonable expectation cannot be realized.

190 More fundamentally, the appellant urges the Court to adopt what she calls the "family property approach" to unjust enrichment. In essence, the appellant submits that her contributions gave rise to a reasonable expectation that she would have an equitable share of the assets acquired during the relationship.

191 I will deal with these submissions in turn.

(a) Findings of Fact Regarding the $60,000 Contribution

192 As noted earlier, the Court of Appeal was right to set aside the trial judge's conclusion that the appellant had contributed $60,000 to the couple's assets. There was, in no realistic sense of the word, any "equity" to contribute from the Coleman Street property to acquisition of the new Wall Street "dream home". Furthermore, the appellant retained the beneficial use of the motor vehicle, and there was no satisfactory evidence of the value of the furniture. The judge's findings on this point were the product of clear and determinative error.

(b) Analysis of Offsetting Enrichments

193 On this issue, I cannot accept the conclusions of either the trial judge or the Court of Appeal. As noted, in his determination of the extent of Ms. Kerr's unjust enrichment, the trial judge largely ignored Mr. Baranow's contributions. However, for the reasons I have developed earlier, the Court of Appeal erred in assessing Mr. Baranow's contributions as part of the juristic reason analysis; this analysis prematurely truncated Ms. Kerr's *prima facie* case of unjust enrichment. I have set out the correct approach to this issue earlier in my reasons. As, in my view, there must be a new trial of both Ms. Kerr's unjust enrichment claim and Mr. Baranow's counterclaim, it is not necessary to say anything further. The principles set out above must accordingly be applied at the new trial of these issues.

(c) The "Family Property Approach"

194 I turn finally to Ms. Kerr's more general point that her claim should be assessed using a "family property approach". As set out earlier in my reasons, for Ms. Kerr to show an entitlement to a proportionate share of the wealth accumulated during the relationship, she must establish that Mr. Baranow has been unjustly enriched at her expense, that their relationship constituted a joint family venture, and that her contributions are linked to the generation of wealth during the relationship. She would then have to show what proportion of the jointly accumulated wealth reflects her contributions. Of course, this clarified template was not available to the trial judge or

to the Court of Appeal. However, these requirements are quite different than those advanced by the appellant and accordingly her "family property approach" must be rejected.

(d) Disposition of the Unjust Enrichment Appeal

195 I conclude that the findings of the trial judge in relation to unjust enrichment cannot stand. The next question is whether, as the Court of Appeal decided, Ms. Kerr's claim for unjust enrichment should be dismissed or whether it ought to be returned for a new trial. With reluctance, I have concluded the latter course is the more just one in all of the circumstances.

196 The first consideration in support of a new trial is that the Court of Appeal directed a hearing of Mr. Baranow's counterclaim. Given that the trial judge unfortunately did not address that claim in any meaningful way, the Court of Appeal's order that it be heard and decided is unimpeachable. There was evidence that Mr. Baranow made very significant contributions to Ms. Kerr's welfare such that his counterclaim cannot simply be dismissed. As I noted earlier, the trial judge also referred to various other monetary and non-monetary contributions which Ms. Kerr made to the couple's welfare and comfort, but he did not evaluate them, let alone compare them with the contributions made by Mr. Baranow. In these circumstances, trying the counterclaim separated from Ms. Kerr's claim would be an artificial and potentially unfair way of proceeding.

197 More fundamentally, Ms. Kerr's claim was not presented, defended or considered by the courts below pursuant to the joint family venture analysis that I have set out. Even assuming that Ms. Kerr made out her claim in unjust enrichment, it is not possible to fairly apply the joint family venture approach to this case on appeal, using the record available to this Court. There are few findings of fact relevant to the key question of whether the parties' relationship constituted a joint family venture. Moreover, even if one were persuaded that the evidence permitted resolution of the joint family venture issue, the record is unsatisfactory for deciding whether Ms. Kerr's contributions to a joint family venture were linked to the accumulation of wealth and, if so, in what proportion. The trial judge found that her payment of household expenses and insurance payments, along with the "proceeds" from the Coleman Street property, allowed Mr. Baranow to pay off the $116,000 mortgage on both properties before July 1985. There is, thus, a finding that her contributions were linked to the accumulation of wealth, given that the Wall Street property was valued at $942,500 at the time of trial. However, as the judge's findings with respect to Ms. Kerr's equity in the Coleman Street property cannot stand, this conclusion is considerably undermined. For much the same reason, there is no possibility on this record of evaluating the proportionate contributions to a joint family venture. In short, to attempt to resolve Ms. Kerr's unjust enrichment claim on its merits, using the record before this Court, involves too much uncertainty and risks injustice.

198 In this respect, the *Kerr* appeal is in marked contrast to the *Vanasse* appeal. There, an unjust enrichment was conceded and the trial judge's findings of fact closely correspond to the

analytical approach I have proposed. In the present appeal, while the findings made do not appear to demonstrate a joint family venture or a concomitant link to accumulated wealth, it would be unfair to reach that conclusion without giving an opportunity to the parties to present their evidence and arguments in light of the approach set out in these reasons.

199 Reluctantly, therefore, I would order a new trial of Ms. Kerr's unjust enrichment claim, as well as affirm the Court of Appeal's order for a hearing of Mr. Baranow's counterclaim.

(3) Effective Date of Spousal Support

200 The final issue is whether, as the Court of Appeal held, the trial judge erred in making his order for spousal support in favour of Ms. Kerr effective on the date she had commenced proceedings rather than on the first day of trial. In my respectful view, the Court of Appeal erred in its application of the relevant factors and ought not to have set aside the trial judge's order.

201 The trial judge found that the appellant's income in 2006 was $28,787 and the respondent's income was $70,520, on the basis of their respective income tax returns. He then applied the Spousal Support Advisory Guidelines ("SSAG") to arrive at a range of $1,304 to $1,739 per month. He settled on an amount at the higher end of that range in order to assist Ms. Kerr in pursuing a private bed while waiting for a subsidized bed in a suitable facility closer to her family.

202 The Court of Appeal agreed with the trial judge that Ms. Kerr was entitled to an award of spousal support given the length of the parties' relationship, her age, her fixed and limited income and her significant disability; she was entitled to a spousal support award that would permit her to live at a lifestyle that is closer to that which the parties enjoyed when they were together; and that the judge had properly determined the quantum of support. The Court of Appeal concluded, however, that the trial judge had erred in ordering support effective the date Ms. Kerr had commenced proceedings. It faulted the judge in several respects: for apparently having made the order as a matter of course rather than applying the relevant legal principles; for failing to consider that, during the interim period, Ms. Kerr had no financial needs beyond her means because she had been residing in a government-subsidized care facility and had not had to encroach on her capital; for failing to take account of the fact she had made no demand of Mr. Baranow to contribute to her interim support and had provided no explanation for not having done so; and for ordering retroactive support where, in light of the absence of an interim application, there was no blameworthy conduct on Mr. Baranow's part.

203 The appellant submits that the decision to equate the principles pertaining to retroactive spousal support with those of retroactive child support has been done without any discussion or legal analysis. Furthermore, she argues that the Court of Appeal's reasoning places an untoward and inappropriate burden on applicants, essentially mandating that they apply for interim spousal support or lose their entitlement. Lastly, she argues that there is a legal distinction between

retroactive support before and after the application is filed, and that in the latter circumstance there is less need for judicial restraint. I agree with the second and third of these submissions.

204 There is no doubt that the trial judge had the discretion to award support effective the date proceedings had been commenced. This is clear from the British Columbia *Family Relations Act*, R.S.B.C. 1996, c. 128 ("*FRA*"), s. 93(5)(d):

> (5) An order under this section may also provide for one or more of the following:
>
> . . . . .
>
> (d) payment of support in respect of any period before the order is made;

205 The appellant requested support effective the date her writ of summons and statement of claim were issued and served. She was and is not seeking support for the period before she commenced her proceedings, or for any period during which another court order for support was in effect. I note that she was obliged by statute to seek support within a year of the end of cohabitation: s. 1(1), definition of "spouse" para. (b), of the *FRA*. Ms. Kerr made her application just over a month after the parties ceased living together.

206 I will not venture into the semantics of the word "retroactive": see *S. (D.B.) v. G. (S.R.)*, 2006 SCC 37, [2006] 2 S.C.R. 231 (S.C.C.), at paras. 2 and 69-70; *S. (L.) v. P. (E.)* (1999), 67 B.C.L.R. (3d) 254 (B.C. C.A.), at paras. 55-57. Rather, I prefer to follow the example of Bastarache J. in *S. (D.B.)* and consider the relevant factors that come into play where support is sought in relation to a period predating the order.

207 While *S. (D.B.)* was concerned with child as opposed to spousal support, I agree with the Court of Appeal that similar considerations to those set out in the context of child support are also relevant to deciding the suitability of a "retroactive" award of spousal support. Specifically, these factors are the needs of the recipient, the conduct of the payor, the reason for the delay in seeking support and any hardship the retroactive award may occasion on the payor spouse. However, in spousal support cases, these factors must be considered and weighed in light of the different legal principles and objectives that underpin spousal as compared with child support. I will mention some of those differences briefly, although certainly not exhaustively.

208 Spousal support has a different legal foundation than child support. A parent-child relationship is a fiduciary relationship of presumed dependency and the obligation of both parents to support the child arises at birth. It that sense, the entitlement to child support is "automatic" and both parents must put their child's interests ahead of their own in negotiating and litigating child support. Child support is the right of the child, not of the parent seeking support on the child's behalf, and the basic amount of child support under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), (as well as many provincial child support statutes) now depends on the income of the payor and not on a highly discretionary balancing of means and needs. These aspects of child support reduce somewhat the strength of concerns about lack of notice and lack of diligence in seeking

child support. With respect to notice, the payor parent is or should be aware of the obligation to provide support commensurate with his or her income. As for delay, the right to support is the child's and therefore it is the child's, not the other parent's position that is prejudiced by lack of diligence on the part of the parent seeking child support: see *S. (D.B.)*, at paras. 36-39, 47-48, 59, 80 and 100-104. In contrast, there is no presumptive entitlement to spousal support and, unlike child support, the spouse is in general not under any legal obligation to look out for the separated spouse's legal interests. Thus, concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support: see, for example, M.L. Gordon, "Blame Over: Retroactive Child and Spousal Support in the Post-Guideline Era" (2004-2005), 23 C.F.L.Q. 243, at pp. 281 and 291-92.

209 Where, as here, the payor's complaint is that support could have been sought earlier, but was not, there are two underlying interests at stake. The first relates to the certainty of the payor's legal obligations; the possibility of an order that reaches back into the past makes it more difficult to plan one's affairs and a sizeable "retroactive" award for which the payor did not plan may impose financial hardship. The second concerns placing proper incentives on the applicant to proceed with his or her claims promptly (see *S. (D.B.)*, at paras. 100-103).

210 Neither of these concerns carries much weight in this case. The order was made effective the date on which the proceedings seeking relief had been commenced, and there was no interim order for some different amount. Commencement of proceedings provided clear notice to the payor that support was being claimed and permitted some planning for the eventuality that it was ordered. There is thus little concern about certainty of the payor's obligations. Ms. Kerr diligently pursued her claim to trial and that being the case, there is little need to provide further incentives for her or others in her position to proceed with more diligence.

211 In *S. (D.B.)*, Bastarache, J. referred to the date of effective notice as the "general rule" and "default option" for the choice of effective date of the order (paras. 118 and 121; see also para. 125). The date of the initiation of proceedings for spousal support has been described by the Ontario Court of Appeal as the "usual commencement date", absent a reason not to make the order effective as of that date: *MacKinnon v. MacKinnon* (2005), 75 O.R. (3d) 175 (Ont. C.A.), at para. 24. While in my view, the decision to order support for a period before the date of the order should be the product of the exercise of judicial discretion in light of the particular circumstances, the fact that the order is sought effective from the commencement of proceedings will often be a significant factor in how the relevant considerations are weighed. It is important to note that, in *S. (D.B.)*, all four litigants were requesting that child support payments reach back to a period in time preceding their respective applications; such is not the case here.

212 Other relevant considerations noted in *S. (D.B.)* include the conduct of the payor, the circumstances of the child (or in the case of spousal support, the spouse seeking support), and any hardship occasioned by the award. The focus of concern about conduct must be on conduct broadly

relevant to the support obligation, for example concealing assets or failing to make appropriate disclosure: *S. (D.B.)*, at para. 106. Consideration of the circumstances of the spouse seeking support, by analogy to the *S. (D.B.)* analysis, will relate to the needs of the spouse both at the time the support should have been paid and at present. The comments of Bastarache J. at para. 113 of *S. (D.B.)* may be easily adapted to the situation of the spouse seeking support: "A [spouse] who underwent hardship in the past may be compensated for this unfortunate circumstance through a retroactive award. On the other hand, the argument for retroactive [spousal] support will be less convincing where the [spouse] already enjoyed all the advantages (s)he would have received [from that support]". As for hardship, there is the risk that a retroactive award will not be fashioned having regard to what the payor can currently afford and may disrupt the payor's ability to manage his or her finances. However, it is also critical to note that this Court in *S. (D.B.)* emphasized the need for flexibility and a holistic view of each matter on its own merits; the same flexibility is appropriate when dealing with "retroactive" spousal support.

213 In light of these principles, my view is that the Court of Appeal made two main errors.

214 First, it erred by finding that the circumstances of the appellant were such that there was no need prior to the trial. The trial judge found, and the Court of Appeal did not dispute, that the appellant was entitled to non-compensatory spousal support, at the high end of the range suggested by the SSAG, for an indefinite duration. Entitlement, quantum, and the indefinite duration of the order were not appealed before this Court. It is clear that Ms. Kerr was in need of support from the respondent at the date she started her proceedings and remained so at the time of trial. The Court of Appeal rightly noted the relevant factors, such as her age, disability, and fixed income. However, the Court of Appeal did not describe how Ms. Kerr's circumstances had changed between the commencement of proceedings and the date of trial, nor is any such change apparent in the trial judge's findings of fact. As I understand the record, one of the objectives of the support order was to permit Ms. Kerr to have access to a private pay bed while waiting for her name to come up for a subsidized bed in a suitable facility closer to her son's residence. From the date she commenced her proceedings until the date of trial, she resided in the Brock Fahrni Pavilion in a government-funded extended care bed in a room with three other people. In my respectful view, her need was constant throughout the period. If the Court of Appeal's rationale was that Ms. Kerr's need would only arise once she actually had secured the private pay bed, its decision to make the order effective the first day of trial seems inconsistent with that approach. The Court of Appeal did not suggest that her need was any different on that day than on the day she had commenced her proceedings. Nor did the court point to any financial hardship that the trial judge's award would have on Mr. Baranow.

215 Respectfully, the Court of Appeal erred in principle in setting aside the judge's order effective as of the date of commencement of proceedings on the ground that Ms. Kerr had no need during that period, while upholding the judge's findings of need in circumstances that were no different from those existing at the time proceedings were commenced.

216 Second, the Court of Appeal in my respectful view was wrong to fault Ms. Kerr for not bringing an interim application, in effect attributing to her unreasonable delay in seeking support for the period in question. Ms. Kerr commenced her proceedings promptly after separation and, in light of the fact that the trial occurred only about thirteen months afterward, she apparently pursued those proceedings to trial with diligence. There was thus clear notice to Mr. Baranow that support was being sought and he could readily take advice on the likely extent of his liability. Given the high financial, physical, and emotional costs of interlocutory applications, especially for a party with limited means and a significant disability such as Ms. Kerr, it was in my respectful view unreasonable for the Court of Appeal to attach such serious consequences to the fact that an interim application was not pursued. The position taken by the Court of Appeal to my way of thinking undermines the incentives which should exist on parties to seek financial disclosure, pursue their claims with due diligence, and keep interlocutory proceedings to a minimum. Requiring interim applications risks prolonging rather than expediting proceedings. The respondent's argument based on the fact that a different legal test would have applied at the interim support stage is unconvincing. After a full trial on the merits, the trial judge made clear and now unchallenged findings of need on the basis of circumstances that had not changed between commencement of proceedings and trial.

217 In short, there was virtually no delay in applying for maintenance, nor was there any inordinate delay between the date of application and the date of trial. Ms. Kerr was in need throughout the relevant period, she suffered from a serious physical disability, and her standard of living was markedly lower than it was while she lived with the respondent. Mr. Baranow had the means to provide support, had prompt notice of her claim, and there was no indication in the Court of Appeal's reasons that it considered the judge's award imposed on him a hardship so as to make that award inappropriate.

218 While it is regrettable that the judge did not elaborate on his reasons for making the order effective as of the date proceedings had been commenced, the relevant legal principles applied to the facts as he found them support the making of that order and the Court of Appeal erred in holding otherwise.

219 In summary, I conclude that the Court of Appeal erred in setting aside the portion of the judge's order for support between the commencement of proceedings and the beginning of trial. I would restore the order of the trial judge making spousal support effective September 14, 2006.

D. Disposition

220 I would allow the appeal in part. Specifically, I would:

a. allow the appeal on the spousal support issue and restore the order of the trial judge with respect to support;

Tab 17

b. allow the appeal with respect to the Court of Appeal's decision to dismiss Ms. Kerr's unjust enrichment claim and order a new trial of that claim;

c. dismiss the appeal in relation to Ms. Kerr's claim of resulting trust and the ordering of a new hearing of Mr. Baranow's counterclaim and affirm the order of the Court of Appeal in relation to those issues.

221 As Ms. Kerr has been substantially successful, I would award her costs throughout.

Appeal by V allowed; appeal by K allowed in part.

Pourvoi de V accueilli; pourvoi de K accueilli en partie.

2017 SKCA 40
Saskatchewan Court of Appeal

Dunnison Estate v. Dunnison

2017 CarswellSask 251, 2017 SKCA 40, [2017] 8 W.W.R. 18, [2017] S.J. No. 205, 26 E.T.R. (4th) 167, 279 A.C.W.S. (3d) 671, 78 R.P.R. (5th) 194

Douglas Dennison, Executor of the Estate of Marilyn Lucille Dunnison (Appellant /Applicant) And Raymond Dunnison (Respondent / Respondent)

Jackson, Caldwell, Ryan-Froslie JJ.A.

Judgment: May 31, 2017 *
Docket: CACV2679

Counsel: Kevin Miller, for Appellant
Robert MacKay, for Respondent

Subject: Civil Practice and Procedure; Estates and Trusts; Property; Torts
Related Abridgment Classifications
Estates and trusts
II Trusts
II.4 Resulting trust
II.4.b Rebuttal of presumption of resulting trust
II.4.b.i Relationship of parties
Headnote
Estates and trusts --- Trusts — Resulting trust — Rebuttal of presumption of resulting trust — Relationship of parties
MD, prior to her death, transferred family cottage into joint names of herself and two sons - appellant, DD, and respondent, RD - with right of survivorship — Upon MD's death, issue arose as to what interest DD and RD had in cottage — DD, as executor of mother's estate, brought seeking opinion as to whether resulting trust or gift had been created by transfer — Chambers judge who heard application found that no resulting trust had been created when deceased transferred title to property into joint tenancy with sons — DD appealed — Appeal dismissed — Based on evidence, Chambers judge's conclusion that no resulting trust arose on facts of this case was unassailable — Even if presumption of resulting trust applied, it would be easily rebutted — MD transferred land to herself and two sons to be held as joint tenants with right of survivorship — She had legal advice when she did so — She chose type of instrument that made clear statement of intention to grant gift - a transfer creating joint tenancy with right of survivorship — Evidence did not show

that when she executed transfer she did not intend to benefit herself and two sons equally — She did not treat sons differently in transfer document.

APPEAL by son DD from decision of chambers judge, which found that no resulting trust had been created when deceased transferred title to property into joint tenancy with sons.

***Per curiam*:**

I. INTRODUCTION

1 At the heart of this appeal are the important questions of whether voluntary transfer resulting trusts and the presumption that accompanies such trusts can exist with respect to land in this Province, given our land titles legislation and the Torrens system of landholding it creates. In light of such authorities as *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795 (S.C.C.) [*Pecore*], voluntary transfer resulting trusts can exist with respect to land in this Province. Having said that, the presumption that accompanies such trusts is incompatible with the concept of absolute transfer of land and the fact a certificate of title is conclusive evidence of ownership, as set out in ss. 90(1) and 213(1) of *The Land Titles Act*, RSS 1978, c L-5 [*The Land Titles Act, 1978*], as repealed by *The Land Titles Act, 2000*, SS 2000, c L-5.1 [*2000 Act*].

2 In the present case, Ms. Dunnison, prior to her death, transferred the family cottage into the joint names of herself and her two sons — the appellant, Douglas Dennison, and the respondent, Raymond Dunnison — with a right of survivorship. Upon Ms. Dunnison's death, an issue arose as to what interest Douglas and Raymond had in the cottage. Douglas, as executor of his mother's estate, brought an application in the Court of Queen's Bench seeking an opinion as to whether a resulting trust or gift had been created by the transfer.

3 The Chambers judge who heard the application found that no resulting trust had been created "when the deceased transferred title to the property into a joint tenancy with her sons."

4 Douglas now appeals that decision. For the reasons set out herein, we would dismiss the appeal.

II. BACKGROUND

5 Ms. Dunnison and her husband had two sons, Douglas and Raymond. During their marriage, the Dunnisons acquired a cottage that the family shared and enjoyed. When her husband passed away in 1995, Ms. Dunnison received the cottage as the surviving joint tenant. Her husband's will had provided that if she predeceased him, the cottage would go to Douglas and Raymond in equal shares. Shortly after her husband's death, Ms. Dunnison transferred the cottage into the names of herself and her two sons as "joint tenants."

6 Discord arose between Douglas and Raymond and, on August 20, 2010, Raymond wrote Douglas seeking to sell his interest in the cottage to him. That was followed by a second letter in

October 2010, this time from Raymond's lawyer, who indicated a court order for partition and sale of the cottage would be sought if an agreement could not be reached.

7 Douglas told his mother about the letters. She was very upset with Raymond and instructed her lawyer to write Raymond's legal counsel, which he did on October 29, 2010. That letter stated, among other things, that Ms. Dunnison had transferred the cottage into her and her sons' names "for estate simplification purposes and for no consideration and that it was not her intention that any beneficial interest in the cottage would be disposed of to Douglas or Raymond." It indicated Ms. Dunnison had not reported any disposition of the cottage for tax purposes and she had always paid the municipal taxes, insurance and utilities with respect to the cottage. The letter requested Raymond transfer his interest in the property back to his mother.

8 When Raymond failed to transfer his interest in the cottage as requested, Ms. Dunnison changed her will to exclude Raymond as a beneficiary of her estate. The will was signed on March 22, 2011. Clauses III N and VI of the will relate to the cottage and Raymond and provide as follows:

> N. all of my interest in my cottage property (including contents) at 150 Sunset Drive in the Resort Village of Island View, Saskatchewan, shall be given, assigned, transferred and conveyed to DOUGLAS if he survives me, for his own use and benefit entirely;
>
> . . .
>
> **VI. NO GIFT TO MY SON, RAYMOND DALE DUNNISON:**
>
> I have not left any of my property to my son, RAYMOND DALE DUNNISON (hereinafter called "RAYMOND") because he takes the position that he owns an interest in my cottage property at 150 Sunset Drive in the Resort Village of Island View, Saskatchewan, despite my having told him and his lawyer that when I transferred the title of that property into the joint names of DOUGLAS, RAYMOND and me in 1996, that was done for estate simplification purposes only, and that it has never at any time been my intention that anyone owns any interest in that property other than me. RAYMOND does not own any beneficial interest in my cottage property and the bare legal interest he obtained when I added his name and DOUGLAS's name to my title is held by him for my estate.

9 Between 1996 and 2013, Ms. Dunnison, Douglas and Raymond all used the cottage. Douglas paid some expenses including water, sewer and "TV." He also maintained the cottage and made improvements to it.

10 Ms. Dunnison passed away on January 2, 2013.

III. THE CHAMBERS JUDGE'S DECISION

11 Douglas's application was dealt with in Queen's Bench Chambers on the basis of affidavit evidence. The Chambers judge found there was "little conflict" in that evidence: Douglas and Raymond both understood they would receive the cottage on their mother's death and not before. The Chambers judge determined, however, there was no "signed agreement, memorandum or note in writing" establishing a trust and, thus, based on her interpretation of the law as set out in *Mergel v. Thomson* (1998), 21 E.T.R. (2d) 86 (Sask. Q.B.), and *Semchyshen v. Semchyshen*, 2013 SKQB 206, 421 Sask. R. 271 (Sask. Q.B.) [*Semchyshen QB*], aff'd 2016 SKCA 108, 402 D.L.R. (4th) 623 (Sask. C.A.) — both of which dealt with the application of the *Statute of Frauds*, 1677, 29 Car. 2, c 3 — she concluded that "in Saskatchewan a transferor cannot regain his or her beneficial interest in land without a written agreement."

12 Further — relying on a series of cases beginning with *Podboy v. Bale*, 2001 SKQB 28, 201 Sask. R. 306 (Sask. Q.B.) [*Podboy*], followed by *Winisky v. Krivuzoff*, 2003 SKQB 345, [2004] 1 W.W.R. 639 (Sask. Q.B.) [*Winisky*]; *Semchyshen QB*; and *Thorsteinson v. Olson*, 2014 SKQB 237, [2014] 10 W.W.R. 768 (Sask. Q.B.) [*Thorsteinson QB*], aff'd 2016 SKCA 134, 404 D.L.R. (4th) 453 (Sask. C.A.) — she found that a resulting trust "is not available in the absence of a written agreement."

IV. ANALYSIS

13 The appeal raises the following issues:

(a) can the presumption of resulting trust and voluntary transfer resulting trusts exist with respect to land in Saskatchewan;

(b) does the *Statute of Frauds* apply to resulting trusts; and

(c) if voluntary transfer resulting trusts can exist with respect to land in Saskatchewan, did such a trust arise in this case?

A. Can the presumption of resulting trust and voluntary transfer resulting trusts exist with respect to land in Saskatchewan?

1. Resulting trusts

14 A basic understanding of resulting trusts is important to the resolution of this appeal.

15 A trust is a fiduciary relationship, which exists between a trustee and a beneficiary (or beneficiaries), whereby the trustee holds title to property and manages it for the benefit of the beneficiary who has exclusive enjoyment of it (see: Donovan W.M. Waters, ed, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Carswell, 2012) at 9 [*Waters' on Trusts*]).

16 A trust can come into existence in one of two ways — it can be intentionally created or it can be imposed by operation of law. A resulting trust is said to arise by operation of law.

17 The origin and history of resulting trusts is canvassed in every text on trusts or equity. We have consulted some of these texts in the preparation of these reasons: *Waters' on Trusts*; A.H. Oosterhoff, Robert Chambers and Mitchell McInnes, *Oosterhoff on Trusts: Text, Commentary and Materials*, 8th ed (Toronto: Carswell, 2014) [*Oosterhoff*]; John Mowbray et al, *Lewin on Trusts*, 18th ed (London, UK: Sweet & Maxwell, 2008) [*Lewin*]; and Hanbury & Martin, *Modern Equity*, 18th ed (London, UK: Sweet & Maxwell, 2009).

18 Resulting trusts had their origin in medieval England. *Oosterhoff* succinctly describes their development at 586-587:

> ... Before the *Statute of Uses*, uses had become a popular way for landowners to devise land by will and avoid the feudal incidents that became due when land descended to an heir. At that time, real property could not be given away by will, and on the owner's death, it would pass to the owner's heir-at-law (usually the eldest son). This created a problem for landowners who wanted to provide for other members of the family. Also, the descent to the heir was costly, since the landlord was entitled to receive certain feudal incidents (such as a year's income from the land) in exchange for recognizing the heir's right to inherit the land.
>
> A landowner could avoid both those problems by conveying his land to trusted friends to hold it as joint tenants to the use of the landowner for life, and then to the use of whomever the landowner might direct. At that time, a conveyance of land was by *feoffment*, so the landowner (who we would call the settlor today) was the *feoffor que use*, the trusted friends were the *feoffees que use*, and the beneficiaries of the use were the *cestuis que use*. If any of the feoffees (trustees) died, the other feoffees would acquire the deceased feoffee's interest automatically as surviving joint tenants. Deceased feoffees could be replaced by further feoffments. This ensured that all of the legal owners never died so that the land never descended to an heir. The instructions given by the feoffor que use were binding on the consciences of the feoffees and operated essentially as a will directing the disposition of the feoffor's land.
>
> The popularity of this device had two lasting consequences. The first, discussed in the first chapter, was the *Statute of Uses*. The loss of revenue to the Crown (then Henry VIII) from feudal incidents was so great that the *Statute of Uses* was passed to execute the use and transfer legal ownership to the cestuis que use. Secondly, whenever land was conveyed for no consideration, if no uses were declared, it was assumed that the feoffment was made for the purpose of creating a use for the feoffor. This became known as the *resulting use*.
>
> . . .

> In the 17th century, when the Court of Chancery began to enforce the use upon a use and the modern trust was born ... the court also began to enforce the resulting trust by analogy to the resulting use. ...
>
> [Footnote omitted; emphasis in original]

Resulting trusts and the presumption that accompanies them thus developed in a system of landholding very different than the Torrens system that currently exists in this Province.

19 Most authors and editors agree that resulting trusts arise in three situations where property is gratuitously transferred:

> (a) where an express trust fails or fails to dispose of the entire beneficial ownership of the trust property;
>
> (b) where "A" purchases property that is registered in the name of "B" (a purchase money resulting trust); and
>
> (c) where property is voluntarily transferred to another (a voluntary transfer resulting trust).

(See: *Waters' on Trusts* at 397, *Lewin* at 232 and *Oosterhoff* at 588.) In this appeal, we are only concerned with the last category, namely, the voluntary transfer resulting trust as it relates to land.

20 There is consistency among the authors of various textbooks about many matters, but there are also some surprising doctrinal differences. One such difference exists with respect to what actually happens when a resulting trust arises. At one time, it was believed that the beneficial interest "resulted" back to the transferor. In the context of this Province's land titles system, every transfer is in essence a re-grant from the Crown thus making problematic the notion of a resulting trust where ownership of property "results" back to the transferor immediately upon registration of the transfer.

21 The modern view, which we favour, is that a resulting trust arises because the transferor "lacked donative intent and therefore the title holder has an equitable obligation to hold the property for the benefit of the transferor" (*Oosterhoff* at 594). This view of the voluntary transfer resulting trust is more consistent with the way in which the land titles system considers how land is transferred and held. The registered owner of land in a Torrens system does not have two titles, one legal and one equitable. If a trust exists, the registered owner of land holds the land in fee simple in trust for the transferor claiming under a resulting trust. The modern view of what happens when a resulting trust arises does, however, highlight this question: on what basis can the voluntary transfer resulting trust stand with a land titles system where the transferor is compelled to say he or she has transferred all right, title and interest?

22 Since 2007, the Supreme Court of Canada has endorsed, either unanimously or by strong majorities, the presumption of resulting trust in four cases: *Pecore*; *Saylor v. Madsen Estate*, 2007 SCC 18, [2007] 1 S.C.R. 838 (S.C.C.) [*Madsen*]; *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269 (S.C.C.) [*Kerr*]; and *Rascal Trucking Ltd. v. Nishi*, 2013 SCC 33, [2013] 2 S.C.R. 438 (S.C.C.) [*Nishi*].

23 In *Pecore*, Rothstein J. concluded that the presumption of resulting trust continues to apply to gratuitous transfers:

> [23] For the reasons discussed below, I think the long-standing common law presumptions continue to have a role to play in disputes over gratuitous transfers. **The presumptions provide a guide for courts in resolving disputes over transfers where evidence as to the transferor's intent in making the transfer is unavailable or unpersuasive**. This may be especially true when the transferor is deceased and thus is unable to tell the court his or her intention in effecting the transfer. In addition, as noted by Feldman J.A. in the Ontario Court of Appeal in *Saylor v. Madsen Estate* (2005), 261 D.L.R. (4th) 597, the advantage of maintaining the presumption of advancement and the presumption of a resulting trust is that they provide a measure of certainty and predictability for individuals who put property in joint accounts or make other gratuitous transfers.
>
> **1. The Presumption of Resulting Trust**
>
> [24] The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. **When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended**: see *Waters' Law of Trusts*, at p. 375, and E. E. Gillese and M. Milczynski, *The Law of Trusts* (2nd ed. 2005), at p. 110. This is so because equity presumes bargains, not gifts.
>
> [25] The presumption of resulting trust therefore alters the general practice that a plaintiff (who would be the party challenging the transfer in these cases) bears the legal burden in a civil case. Rather, the onus is on the transferee to rebut the presumption of a resulting trust.
>
> [26] In cases where the transferor is deceased and the dispute is between the transferee and a third party, the presumption of resulting trust has an additional justification. In such cases, it is the transferee who is better placed to bring evidence about the circumstances of the transfer.
>
> [Emphasis added]

24 *Pecore* and its companion case, *Madsen*, both dealt with situations where fathers had transferred bank accounts or investments into the joint names of themselves and an adult child with a right of survivorship. In *Pecore*, the majority found the father intended to retain exclusive

control of his bank accounts and investments during his life but that, upon his death, his adult child would take the balance in those accounts and investments through the right of survivorship. In *Madsen*, the Supreme Court of Canada determined the presumption of resulting trust applied and was not rebutted by evidence of a gift. Accordingly, the bank account and investment became part of the father's estate.

25 Justice Rothstein, at para 48 of *Pecore*, found the "rights of survivorship, both legal and equitable, vest when a joint account is opened and the gift of those rights is therefore *inter vivos* in nature." He concluded by stating that the presumption of resulting trust means the surviving joint account holder must prove the transferor intended to gift the right of survivorship. Otherwise, the assets would form part of the transferor's estate and be distributed according to his or her will (*Pecore* at para 53).

26 In *Kerr*, the Supreme Court of Canada considered the role of resulting trusts in property disputes arising out of the breakdown of common-law relationships. Justice Cromwell, writing for a unanimous Court (at paras 16-20), restated the law with respect to resulting trusts as set out by Rothstein J. in *Pecore*. He went on to note that resulting trust jurisprudence in domestic property cases had developed into a "purely Canadian invention" — "the common intention resulting trust" — whereby a resulting trust would be imposed on property owned by one spouse where the court was satisfied by the words or conduct of the parties that it was their common intention that beneficial interest to the property would be shared. Justice Cromwell indicated the Courts' development of the common intention resulting trust ended with the Supreme Court of Canada's decision in *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.). He observed that "[t]he import of *Pettkus* was that the law of unjust enrichment, coupled with the remedial constructive trust, became the more flexible and appropriate lens through which to view property and financial disputes in domestic situations" (at para 23).

27 Justice Cromwell confirmed that the *common intention* resulting trust had no further role to play in the resolution of domestic cases while, at the same time, emphasizing that "traditional resulting trust principles may well have a role to play" in such disputes (*Kerr* at paras 15 and 29). We note *The Family Property Act*, SS 1997, c F-6.3, applies to common law relationships. Accordingly, the role of resulting or constructive trusts in domestic cases in this Province is very limited.

28 Finally, in *Nishi*, the Supreme Court of Canada dealt with a *purchase money* resulting trust pertaining to land in British Columbia. In that case, money had been advanced by one person to purchase property that was placed in the name of another. Justice Rothstein, writing for a unanimous Court, described a purchase money resulting trust in the following terms:

> [21] The purchase money resulting trust is a species of gratuitous transfer resulting trust, where a person advances a contribution to the purchase price of property without taking legal

> title. Gratuitous transfer resulting trusts presumptively arise any time a person voluntarily transfers property to another unrelated person or purchases property in another person's name: (D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (4th ed. 2012), at p. 397).

29 Mr. Nishi had argued that purchase money resulting trusts should be abandoned because of overlap with the doctrine of unjust enrichment. [1]

30 The Supreme Court of Canada rejected Mr. Nishi's arguments. In doing so, Rothstein J. stated:

> [24] In this case, Mr. Nishi is asking this Court to depart from both *Kerr* and *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795, two recent appeals decided unanimously or by firm majorities. These decisions represent just the most recent endorsements of long-standing doctrine. There is no concrete evidence that the purchase money resulting trust is unworkable or has led to untenable results (*Fraser*, at para. 83). Nor has Mr. Nishi shown that the purchase money resulting trust has been "attenuated or undermined by other decisions of this or other appellate courts" (*R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, at p. 778).
>
> . . .
>
> [28] ... Absent strong dissenting opinions in this Court, contrary decisions in provincial appellate courts or significant negative academic commentary that would justify disturbing such a settled area of the law, there is no reason to abandon the purchase money resulting trust.

He added that the "purchase money resulting trust has been a feature of the common law since at least 1788 and provides certainty and predictability in situations where a person has made a gratuitous advance" (at para 26).

31 In summary, the Supreme Court of Canada in *Pecore*, *Madsen*, *Kerr* and *Nishi* has endorsed the application of both resulting trusts and the presumption of resulting trust to the gratuitous transfer of property, both real and personal. That Court has not, however, considered whether those concepts are compatible with land titles legislation such as exists in this Province. The state of the jurisprudence on that issue can best be described as unsettled.

2. The jurisprudence

32 The Court of Queen's Bench of this Province in a series of strong decisions beginning with *Podboy* has found that voluntary transfer resulting trusts cannot be imposed on land in Saskatchewan. In the case under consideration here, the Chambers judge considered herself bound by those decisions, which include *Lafaver v. Lafaver*, 2003 SKQB 73, [2003] 6 W.W.R. 698 (Sask. Q.B.); *Winisky*; *Semchyshen QB* and *Thorsteinson QB*.

33 Douglas contends those cases were wrongly decided. He points to a second line of cases in this Province emanating from decisions made pursuant to *The Family Property Act*: *Johnson v. Johnson*, 2012 SKCA 87, 356 D.L.R. (4th) 500 (Sask. C.A.); *Rausch v. Rausch*, 2004 SKQB 81, 248 Sask. R. 85 (Sask. Q.B.); *Dwinnell v. Dwinnell*, 2008 SKQB 506, 328 Sask. R. 256 (Sask. Q.B.); and *Raabel v. Raabel*, 2014 SKQB 129, 444 Sask. R. 150 (Sask. Q.B.). In each of those family law cases, the Court found real property was not subject to division under *The Family Property Act* because a spouse held it pursuant to a resulting trust.

34 The cases cited by Douglas are of little assistance to this Court as none address the question of whether a resulting trust can exist with respect to land in Saskatchewan in light of our land titles legislation. However, the cases do underscore the importance and far-reaching effect the determination of that issue will have on a number of areas of law, including commercial transactions, estate planning and the division of family property.

35 In *Podboy*, the trial judge found a voluntary transfer resulting trust could not exist in the face of ss. 90 and 213(1) of *The Land Titles Act, 1978*, which made a registered owner's title to land "indefeasible." He based his conclusion on this Court's decision in *Canada (Attorney General) v. Saskatchewan (Attorney General)* (1987), [1988] 5 W.W.R. 706 (Sask. C.A.), and, in particular, the following passage found at para 13 (CanLII) of that decision:

> [13] It is fundamental to the operation of the Torrens system that the certificate of title (in the words of s. 213) is "conclusive evidence ... that the person named therein" owns the "estate or interest therein specified". ... I am precluded from questioning the correctness of title 227N56 since, "To hold otherwise would be contrary to the intent and purpose of the Act and would destroy the conclusive nature of the records of and in the land titles office" ... .

36 In *Winisky*, the transferor and transferee had been long-time business associates. The transferor had legal advice when he transferred the land into his name and that of the transferee as joint tenants with right of survivorship. Six years later, after a falling out, the transferor demanded the land back. Justice Foley wrote:

> [29] ... **The cases referred to by counsel** [*Kaup and Kaup v Imperial Oil Ltd.*, [1962] SCR 170 and *Bensette v Reece* (1969), 70 WWR 705 (Sask QB)] **are not inconsistent with the view that a common law resulting trust is inconsistent with a Torrens system transfer. In this case the transfer recited as it must under *The Land Titles Act* that Winisky transferred his entire interest i.e. both legal and beneficial title. The resulting trust principle would oblige one to reach a contrary conclusion in that only legal title passed and that the beneficial interest remained with the transferor. In effect the common law would amend the Act**. The cases referred to by Winisky affirm that an interest arising from unregistered equitable interest (or registrar mistake) is defeated by subsequent acquisition by one who purchases the estate for value without notice. This principle is well accepted. Here

there is no intervening or affected third party nor does this case engage classic indefeasibility principles consequently those cases are inapplicable. I therefore reject Winisky's submission on this point.

[30] **In my opinion the presumption of intention to exclude beneficial interest imposed by operation of law in the circumstances of gratuitous transfers is not only inconsistent with the principle of conclusiveness of title as found in *Podboy*** [*Podboy v Bale*, 2001 SKQB 28, 201 Sask R 306 and *Lafaver v Lafaver*, 2003 SKQB 73, [2003] 6 WWR 698] **but preserves a principle of equity which no longer serves a useful purpose and is inconsistent with the modern trend to search for true intent**.

[Emphasis added]

37 In an equally strong decision, Schwann J. in *Thorsteinson QB* reached the same conclusion. After analysing the governing authorities, including *Hermanson v. Martin* (1986), 33 D.L.R. (4th) 12 (Sask. C.A.) [*Hermanson*], and ss. 68, 69, 73, 90 and 213 of *The Land Titles Act, 1978*, Schwann J. concluded:

[103] Therefore, based on the statutory provisions referred to above and established jurisprudence, **it can be stated with confidence that the doctrine of resulting trust is inapplicable where the impugned transfer of land has been registered in Saskatchewan's land titles system**. As Marjorie's claim requires this Court to look beyond the certificate of title and give effect to an equitable doctrine in which she claims to have retained a "beneficial interest" in the land following transfer, it is at clear odds with statute. As aptly put in *Winisky*, *supra*, this approach "is not only inconsistent with the principle of conclusiveness of title as found in *Podboy* and *Lafaver*, *supra*, but preserves a principle of equity which no longer serves a useful purpose and is inconsistent with the modern trend to search for true intent". (para. 30)

[Emphasis added]

Other decisions on point include *Semchyshen QB*; *Cosmopolitan Clothing Bank Inc. v. Archiepiscopal Corp. of Regina*, 2016 SKQB 284 (Sask. Q.B.); and *MNP Ltd. v. Denis*, 2016 SKQB 159 (Sask. Q.B.).

38 The origin of all land titles Acts is *The Real Property Act* 1858, which was presented to the House of Assembly of South Australia by Sir Robert Torrens. Notwithstanding the common origin of the land titles Acts in Canada, each province developed its own Act responding to local exigencies. Some of the provincial Acts depart from the original legislation more than others. See, generally: Victor DiCastri, *Thom's Canadian Torrens System*, 2d ed (Calgary: Burroughs & Company Limited, 1962);[2] and Kim Korven, *The Emperor's New Clothes: The Myth of Indefeasibility of Title in Saskatchewan* (LLM Thesis, University of Saskatchewan, 2012).

39 Saskatchewan's legislation is more like Alberta's and Manitoba's than, say, for example, the legislation of British Columbia, but there are also differences among the three prairie provinces. For example, Alberta permits title to be acquired by adverse possession, which is not a feature of Saskatchewan law (*Olney Estate v. Great-West Life Assurance Co.*, 2014 SKCA 47 (Sask. C.A.) at paras 30-31, [2014] 8 W.W.R. 293 (Sask. C.A.) [*Olney*]).

40 With respect to differences between Saskatchewan and British Columbia, there are several. For example, it has always been possible to acquire land and hold it as a trustee in British Columbia. Saskatchewan has taken a different route. Section 73 of *The Land Titles Act, 1978* provided:

> **No trusts registered**
>
> **73**(1) No memorandum or entry shall be made upon a certificate of title, or upon the duplicate thereof, of any notice of trusts whether express, implied or constructive.
>
> (2) The registrar shall treat any instrument containing any such notice as if there was no trust, and the trustees therein named shall be deemed to be the absolute and beneficial owners of the land for the purposes of this Act.

Pursuant to s. 73, the registrar was to treat any instrument containing notice of a trust as if no trust existed. The trustee named therein was deemed to be the absolute and beneficial owner of the land for the purposes of the Act. Section 73 did not do away with trusts. It merely provided direction to the registrar as to how trusts were to be recorded. As a result of that section, in Saskatchewan the existence of a trust is not readily apparent when examining a certificate of title.

41 The courts of British Columbia, Alberta and Manitoba have all had opportunities to consider the indefeasibility and conclusiveness of title provisions in their respective legislation and the application of those provisions to registered owners and volunteers claiming through them.

42 Douglas urged us to follow the Alberta Court of Appeal's decision in *Passburg Petroleums Ltd. v. Landstrom Developments Ltd.* (1984), 8 D.L.R. (4th) 363 (Alta. C.A.) [*Passburg*], leave refused [1984] 2 S.C.R. viii (note) (S.C.C.), and the Alberta Court of Queen's Bench's decision in *Bezuko v. Supruniuk*, 2007 ABQB 204, [2007] 12 W.W.R. 557 (Alta. Q.B.) [*Bezuko*], which held indefeasibility and conclusiveness of title are for the benefit of those who acquire an interest in land *bona fide*, for value and in reliance on the register.

43 Raymond, on the other hand, advocated in favour of this Court viewing the Manitoba Court of Appeal's decision in *Fort Garry Care Centre Ltd. v. Hospitality Corp. of Manitoba Inc.* (1997), [1998] 4 W.W.R. 688 (Man. C.A.) [*Fort Garry*], in combination with that Court's decision in *Ehrmantraut v. Ehrmantraut (Trustee of)*, 2008 MBCA 127, [2008] 12 W.W.R. 100 (Man. C.A.) [*Ehrmantraut*], as standing for the proposition that voluntary transfer resulting trusts are incompatible with the principles of indefeasibility and conclusiveness of title.

44 We are not convinced that Raymond's interpretation of the Manitoba Court of Appeal's position is a correct one. In our view, the status of voluntary transfer resulting trusts has not yet been determined by that Court.

45 In *Fort Garry*, the Manitoba Court of Appeal dealt with a situation where a private nursing home had applied to have rights-of-way removed from the titles of two parcels of land — one registered in the nursing home's name and the other registered in the name of a motor inn. The rights-of-way extended six feet onto each parcel of land and were noted on the certificates of title. The motor inn wanted to enlarge its beverage room. The effect of the expansion, which was consented to by the nursing home, was an almost total encroachment upon the six foot right-of-way enjoyed by the nursing home. What remained of the rights-of-way served only the motor inn's purposes.

46 The trial judge concluded, on the basis of what was fair and reasonable, that the rights-of-way should be excised from the certificates of title. On appeal, counsel for the owner of the motor inn contended it was unreasonable and unfair to extinguish those rights and that s. 176(1) of Manitoba's *Real Property Act*, RSM 1988, c R30, did not confer jurisdiction upon the trial judge to make the order he did. The Manitoba Court of Appeal agreed with both those propositions. At para 31 of *Fort Garry*, Huband J.A. concluded:

> [31] Even if the wording of s. 176(1) is given a broader interpretation, it must be readily apparent that it does not contemplate what occurred in the present case, where, absent fraud or a mistake, the court is simply asked to readjust the interests shown in the respective certificates of title. Section 176(1) does not itself create a cause of action. Short of mistake or fraud, it does not authorize the court to conclude that a right of way for all purposes should now have limited purposes or, indeed, should not exist at all.

47 The case did not address the question of whether unregistered equitable interests and, in particular, voluntary transfer resulting trusts can exist and be enforced with respect to land under Manitoba's Torrens system.

48 The Manitoba Court of Appeal in *Ehrmantraut* did not address that question either. It merely determined that the appellant had not demonstrated a palpable or overriding error with respect to the motion judge's conclusion that a resulting trust had not been created. Justice MacInnes, writing for the Court in *Ehrmantraut*, stated:

> [4] As we are deciding the appeal on this issue alone, it is not necessary for us to deal with the issue of indefeasibility of title under s. 59 of *The Real Property Act*, C.C.S.M., c. R30, a matter best left for another day.

49 That the law remains unsettled in Manitoba is clear from the recent case of *Hyczkewycz v. Hupe*, 2016 MBCA 23, [2016] 4 W.W.R. 213 (Man. C.A.), wherein the Manitoba Court of Appeal, in overturning a Chambers judge's decision to strike a statement of claim, stated:

> [3] ... there are triable issues as to the proper interpretation of section 59, given the approaches in other provinces and the case law in Manitoba ... .

See also: *Indefeasibility of Title and Resulting and Constructive Trusts*, Issue Paper #3 (Winnipeg: Manitoba Law Reform Commission, 2016).

50 The place of voluntary transfer resulting trusts and the presumption associated therewith in the context of Alberta's land titles legislation also remains unsettled.

51 In *Passburg*, the Alberta Court of Appeal had occasion to consider the effect of indefeasibility and conclusiveness of title within the context of Alberta's land titles legislation. In that case, the registered owner of land had granted a 25-year surface lease to Quasar Petroleum, which then registered a caveat against the land to protect its interests under the lease. The land was subsequently sold to the respondent, who took title subject to Quasar's caveat. Quasar then assigned its lease to Passburg. Passburg did not file a caveat, choosing instead to rely on Quasar's caveat. For some unknown reason, Quasar discharged its caveat. When Passburg learned of the discharge, it filed its own caveat. The respondent brought an action seeking, amongst other things, a declaration that Passburg's surface lease was no longer in force. That declaration was granted by the judge at first instance. In allowing the appeal, Moir J.A., writing for the Court, determined, on the basis of the Supreme Court of Canada's decision in *Church, Re*, [1923] S.C.R. 642 (S.C.C.) [*Church*], that an "unregistered interest may exist independent of the register," that such interests may be enforced, and that the principle of indefeasibility applies only to situations in which there is a need to rely on the certificate of title. At para 15 of *Passburg*, Moir J.A. quoted the Privy Council in *Loke Yew v. Port Swettenham Rubber Co.*, [1913] A.C. 491 (Selangor P.C.), as setting out an example of such interests, namely, where an agent purchases land on behalf of his principal but takes the conveyance in his own name. That, of course, is a classic example of a purchase money resulting trust.

52 In *Passburg*, Moir J.A. went on to distinguish between situations that involve "immediate parties" or volunteers from those involving third parties who *bona fide*, for value and in reliance on the register acquire an interest in land. He stated:

> [16] **This situation involves immediate parties. Both the Supreme Court of Canada and the Judicial Committee of the Privy Council have apparently held that an immediate party or a volunteer from him stands in a less advantageous position than that of a third party. The reason for this is that the immediate party or volunteer claiming through him does not rely on the register**. If "A" mortgages his land to "B", "A" does not need to

> look at the register to see if "B" has an interest in the land. "A" knows of "B's" interest. Even with the passage of time "A" looks only to the register to find clear title, but he knows of "B's" interest. No doubt "A" is entitled to rely upon the register in respect of any other alleged interest which he has not created but he has no need of the register to determine "B's" interest. A third party dealing with "A", on the other hand, must rely on the register and once he has taken "A's" interest he continues to rely on the register as it appeared when he purchased the land. That is the way the system is designed. It must work in this manner to facilitate dealing with land. If a third party has heard rumours of "B's" interest he would be forced to investigate the history of "A's" title unless he can rely upon the register. The entire system for ease of dealing says that the purchaser for value may rely upon the register.
>
> [17] The same is true of the volunteer. He does not rely on the register. The volunteer does not look to the register to decide whether or not he will accept a gift. He gives no valuable consideration. He is happy to receive whatever interest the registered owner has to give. The volunteer is in the same position as the registered owner who may have created and sold numerous unregistered interests. **Accordingly, the volunteer cannot use the Act to better his position. It is designed to protect third party purchasers for value**.
>
> [Emphasis added]

53 Justice Moir also quoted with approval this Court's decision in *Bensette v. Reece*, [1973] 2 W.W.R. 497 (Sask. C.A.) [*Bensette*], in which an unregistered interest was recognized.

54 Justice Moir, writing for the majority in *Passburg*, did not, however, address the issue that this appeal presents, namely, whether the presumption of resulting trust and voluntary transfer resulting trusts can exist with respect to land in a Torrens system. Rather, *Passburg* and the cases relied on by Moir J.A. — *Church*; *Kaup v. Imperial Oil Ltd.*, [1962] S.C.R. 170 (S.C.C.) [*Kaup*]; and *Bensette* — stand for two propositions: (a) that indefeasibility and conclusiveness of title are intended to protect persons who acquire an interest in land *bona fide*, for value and in reliance on the register; and (b) that equitable interests will be protected where land titles legislation allows.

55 In the more recent case of *Bezuko*, a judge of the Alberta Court of Queen's Bench held — following the Supreme Court of Canada's decision in *Kaup* and the Alberta Court of Appeal's decision in *Passburg* — that indefeasibility and conclusiveness of title protect only *bona fide* purchasers for value who have relied on the register and that unregistered interests may exist with respect to land between immediate parties or volunteers claiming through such immediate parties. On that basis, she found resulting trusts can arise with respect to land in Alberta. In arriving at her decision, the judge declined to follow the *Podboy* line of cases emanating from this Province, stating:

> [30] ... In my view, the Saskatchewan decisions are inconsistent with the holding in *Kaup v. Imperial Oil Ltd.*, [1962] S.C.R. 170, at 182-83, that the indefeasibility provisions of the *Land*

> *Titles Act* protect only *bona fide* purchasers for valuable consideration, who have relied on the register. The Alberta Court of Appeal elaborated on this concept in *Passburg Petroleums Ltd. v. Landstrom Developments Ltd.* (1984), 8 D.L.R. (4th) 363, at 367, observing that decisions of the Supreme Court of Canada make it "abundantly clear that interest in land under the *Land Titles Act of Alberta* may be created and may exist independent of the register between the 'immediate parties' or volunteers claiming through the immediate parties."

56 We note the judge in *Bezuko* did not address what role the presumption of resulting trust, as distinct from resulting trust themselves, would play given Alberta's land titles legislation. That is an issue this Court must resolve.

57 The courts in British Columbia have adopted a different approach than that taken in Saskatchewan, Manitoba and Alberta.

58 While the British Columbia Court of Appeal in *Fuller v. Fuller Estate*, 2010 BCCA 421, 292 B.C.A.C. 182 (B.C. C.A.) [*Fuller*], did not determine whether the presumption of resulting trust applies to real property in that province, Smith J.A., writing for a unanimous court, suggested that was the situation:

> [43] While academics have posited that it remains unsettled as to whether the presumption of a resulting trust for gratuitous transfers applies to real property (see A. Warner La Forest, ed., *Anger & Honsberger: Law of Real Property*, 3d ed., loose-leaf (consulted on 13 September 2010), (Aurora: Canada Law Book, 2008), vol. 1, ch. 11 at 36), for the purpose of this appeal the parties have assumed that the presumption does apply. There is also authority from this Court that would appear to support that view: *Bajwa v. Pannu*, 2007 BCCA 260.

59 In a series of cases decided both before and after *Fuller*, the British Columbia Court of Appeal has determined resulting trusts are compatible with British Columbia's land titles legislation. See: *Bajwa v. Pannu*, 2007 BCCA 260, 66 B.C.L.R. (4th) 192 (B.C. C.A.); *Aujla v. Kaila*, 2013 BCCA 158, 336 B.C.A.C. 184 (B.C. C.A.); and *Suen v. Suen*, 2016 BCCA 107, 85 B.C.L.R. (5th) 294 (B.C. C.A.) [*Suen*]. The British Columbia Court of Appeal did so on the basis the legislation creates a rebuttable statutory presumption that registered owners hold absolute title to the land in their names. In *Suen*, Groberman J.A. set out the law in British Columbia as follows:

> [39] Underlying the judge's analysis were certain legal principles stated in this Court's decision on the earlier appeal in this case:
>
> > [34] The central issue to be determined by the trial judge was whether the statutory presumption of indefeasible title as to the joint ownership of [the Richmond home] was rebutted by either of the parties. This Court has endorsed three considerations for determining this issue:

(i) the operation of a resulting trust which may be inferred where no value is given for a legal interest;

(ii) the operation of an agreement between the parties that is contrary to the registered legal title; or

(iii) taking into account the underlying equitable interests between the parties (e.g., considerations that arise in claims for unjust enrichment).

See *Bajwa v. Pannu*, 2007 BCCA 260, paras. 12-14, 18 and 23; and *Aujla v. Kaila*, 2010 BCSC 1739, paras. 31-36 [appeal dismissed 2013 BCCA 158]

See also: *Dhaliwal v. Olleck*, 2012 BCCA 86, 28 B.C.L.R. (5th) 57 (B.C. C.A.); *Kirk v. Dawe*, 2011 BCCA 406, 311 B.C.A.C. 266 (B.C. C.A.); *Skender v. Skender*, 2006 BCCA 162, 52 B.C.L.R. (4th) 6 (B.C. C.A.); and *Ng v. Ng*, 2012 BCCA 195, 32 B.C.L.R. (5th) 334 (B.C. C.A.).

60 Saskatchewan has taken an entirely different approach to the role of the certificate of title. In our view, it runs counter to the central tenets of *The Land Titles Act, 1978* to speak of a "presumption of indefeasible title," which is capable of being rebutted as if it were an evidentiary rule. While more will be said of this later, s. 213 declares that the title is conclusive and admits of only listed exceptions. Further, in *Hermanson* (at para 56), Bayda C.J.S. concluded our legislation gives effect to the "immediate indefeasibility theory" of title, which is a legal principle rather than an evidentiary one.

61 The uncertainty emanating from Manitoba and Alberta on the issues before this Court, as well as the differences in legislative provisions among the prairie provinces, renders the extra-provincial jurisprudence cited by Douglas and Raymond of limited assistance. Having said that, this Court has on a number of occasions found, as the Alberta Court of Appeal did in *Passburg*, that, as against persons creating them, equitable and unregistered interests are valid and enforceable under a Torrens system (see: *Bensette*; *Fleck v. Davidson Estate* (1996), [1997] 2 W.W.R. 60 (Sask. C.A.) at para 1; and *Olney* at para 66).

62 The fact unregistered equitable interests can exist and be enforced against an owner does not, however, answer the question whether voluntary transfer resulting trusts or the presumption associated therewith can exist given our land titles legislation. To answer that question requires an examination of the applicable provisions of *The Land Titles Act, 1978* itself.

3. The legislation

a. History

63 In order to deal properly with the question posed, a brief overview of the history of the Torrens system and land titles legislation in Saskatchewan is required.

64 To fully understand the Torrens system of land registration, one needs a basic understanding of the system it replaced — the deeds system. The deeds system was inherited in Saskatchewan from the English common law. Under that system, land was sold by deed — a solemn contract entered into between a seller and a buyer — but the deed was not valid unless the seller had the right to sell the land. Such a right could only be established by searching back through all the transactions dealing with the land until one reached either the first sale of the land by the Crown or until the longest period under the *Statute of Limitations* had been exhausted.

65 Under the deeds system, an individual's title to land depended on the validity of the title of all prior owners. The process of establishing "change of title" was expensive and fraught with difficulties, not the least of which was that flaws in earlier titles were carried on down the line, even if later purchasers knew nothing of them. Moreover, because the historical documents supporting transfers were in private hands, there was significant potential for forgery and fraud. The system was further complicated by the courts' development of the equitable doctrine of notice, which bound landholders to claims such as mortgages, trusts and leases that were not noted on the deed but nevertheless were held to affect a new owner's title whether he or she knew or ought to have known of them.

66 The Torrens system of land registration was conceived by Sir Robert Torrens and originated in South Australia. It transformed the way people bought, sold and mortgaged land. The new method of recording ownership of land left behind the strictures and the expense of a system mired in complexity and steeped in secrecy. It allowed one to trade on the faith of the register unaffected by the secret or hidden interests of others. Under a Torrens system, the register is everything.

67 The Torrens system of land registration made its debut in Canada in 1861 when it was adopted by Vancouver Island. In 1886, it took effect in what is now Saskatchewan and Alberta through the passage of *The Territories Real Property Act*, RSC 1886, c 51. After Saskatchewan became a province in 1905, the Torrens system of land registration continued with the first land titles Act being enacted in 1906. Since then, land titles legislation in this Province has undergone numerous revisions leading to the current Act — the *2000 Act*, which provided for the electronicization of the land titles system and, in doing so, created Information Services Corporation (ISC) to administer that system.

b. The Land Titles Act, 1978

68 Counsel argued this appeal on the basis of the *2000 Act*, which came into effect on June 25, 2001. That legislation was operative at the time of Ms. Dunnison's death and at the time of the court hearing. We note, however, that Ms. Dunnison transferred the cottage into the joint names of herself and her two sons in 1996 under the former Act, being *The Land Titles Act, 1978*. It is that statute as it existed at the time of transfer that governs this appeal. However, the legal principles set out herein are generally equally applicable to the *2000 Act*.

69 The sections raised in argument by counsel with respect to the *2000 Act* were: ss. 13(1), 23(1) and (2), 35 and 47(1). Those sections are not readily traceable to the provisions of *The Land Titles Act, 1978*, largely because the *2000 Act* consolidated and reorganized the provisions. It is clear, however, that the important provisions for the purpose of this appeal are those dealing with indefeasibility and conclusiveness of title, being: ss. 67, 68, 90(1), 213 and 237 of *The Land Titles Act, 1978*.

70 Key to a determination of whether voluntary transfer resulting trusts and the presumption associated therewith can exist with respect to land under our land titles system is the interpretation of the relevant provisions in the context of *The Land Titles Act, 1978* as a whole.

71 The leading case with respect to statutory interpretation is the Supreme Court of Canada's decision in *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), where (at para 21) Iacobucci J. adopted the approach set out by Elmer A. Driedger, *Construction of Statutes*, 2d ed (Butterworths: Toronto, 1983) at 87:

> Today there is only one principle or approach [to statutory interpretation], 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.

72 The earliest expression of the purpose of our land titles legislation is found in *Gibbs v. Messer*, [1891] A.C. 248 (Australia P.C.) at 254, where Lord Watson observed:

> ... The main object of the Act, and the legislative scheme for the attainment of that object, appear to them [their Lordships] to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that every one who purchases, in bonâ fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.

73 This statement was echoed in *Turta v. Canadian Pacific Railway*, [1954] S.C.R. 427 (S.C.C.) at 452, by Rand J. (in concurring reasons) who described the purpose of Alberta's land titles legislation as follows:

> The general and primary conception underlying the statute, as it is of all legislation establishing what is known as the Torrens system of land titles, is that the existing certificate, bearing the name of a real person, is conclusive evidence of his title in favour of any person dealing with him in good faith and for valuable consideration: *Gibbs v. Messer*. The preamble

to *The Territories Real Property Act*, 1886 (Can.), c. 26 which introduced the Torrens system to the western provinces indicates its objects: —

> Whereas it is expedient to give certainty to the title to estates in land in the Territories and to facilitate the proof thereof, and also to render dealings with land more simple and less expensive:

This general principle is subject, of course, to certain qualifications declared in the statute but that it expresses the broad purpose of the system is unquestionable.

[Footnote omitted]

74 Finally, Justice Lamont, writing for a majority of this Court in *Reeves v. Konschur* (1909), 10 W.L.R. 680 (Sask. C.A.) at para 27, described the purpose of *The Land Titles Act*, SS 1906, c 24, as follows:

> [27] In determining the meaning of these provisions, we must keep in view the object and scope of the Land Titles Act. The main object of the Act was "to save persons dealing with land from the trouble and expense of going behind the register to investigate the history of their authors' title and to satisfy themselves of its validity. That end is accomplished by providing that every one who bona fide purchases from a registered owner and enters his transfer or mortgage in the register shall thereby acquire an indefeasible title." [3]
>
> [Footnote added]

75 In summary, the purpose of our land titles legislation is to provide certainty of title and to protect persons who acquire an interest in land *bona fide*, for value and in reliance on the register from unregistered or hidden claims. In our view, however, that is not its only purpose. The legislation also establishes a predictable method of registering interests in land within an established framework. A series of legislative and regulatory provisions create a system upon which persons rely daily to search the registry and make personal and business decisions.

76 Having said that, the land titles Acts of this Province have always recognized to a certain extent unregistered interests "as against the person making the same." Subsection 67(1) of *The Land Titles Act, 1978* makes that clear:

> **Unregistered instrument ineffectual transfer**
>
> **67**(1) **After a certificate of title has been granted no instrument shall until registered pass any estate or interest in the land therein comprised**, except a leasehold interest not exceeding three years where there is actual occupation of the land under the same, or render the land liable as security for the payment of money **except as against the person making the same**.

[Emphasis added]

77 The equivalent of s. 67(1) was interpreted in *Church* where a testator had made a devise of his land in his will but subsequently disposed of it pursuant to an agreement for sale. Justice Anglin held that equitable interests will be recognized and protected (at 644):

> The result of decisions of this court in *Jellett v. Wilkie*, *Williams v. Box*, *Smith v. National Trust Co.*, *Yockney v. Thomson*, *Grace v. Kuebler*, and other cases, is that, notwithstanding such provisions as s. 41 of ch. 24 of the Alberta statutes of 1906, **equitable doctrines and jurisdiction apply to lands under the Land Titles or Torrens system of registration and equitable interests in such lands may be created and will be recognized and protected.**
>
> [Emphasis added; footnotes omitted]

(See also: *T. M. Ball Lumber Co. v. Zirtz*, [1961] S.C.R. 310 (S.C.C.).)

78 The Supreme Court in *Balzer v. Saskatchewan (Registrar, Moosomin Land Titles Office)* (1954), [1955] S.C.R. 82 (S.C.C.) at 91, also considered the closing words "except as against the person making the same" as found in s. 65 of *The Land Titles Act*, RSS 1953, c 108. Justice Estey held that "these [words] have no reference to the effect of an instrument when registered but rather to its effect as against a party making same quite apart from registration."

79 Voluntary transfer resulting trusts fall into a different category than other unregistered interests because neither the transferor nor the transferee — to use the wording of s. 67(1) — "make" the trust; it is imposed by operation of law. The transferor "makes" an instrument (i.e., the transfer) but the transfer is silent as to any limitations and there is no documentation of the trust. Since the voluntary transfer resulting trust does not depend on an instrument or even the knowledge of the transferor or transferee — its existence lies only in the lack of donative intent of the transferor — its secret nature is a particular problem for the land titles system.

80 Having said that, the same rationale for recognizing and enforcing unregistered instruments against the person making the same can be applied to obligations imposed on a registered owner by operation of law. Those obligations arise *inter se* between the transferor and the transferee. In the case of voluntary transfer resulting trusts, the obligation is imposed because of the circumstances under which the registered owner took title. Recognizing and enforcing such obligations does not directly interfere with the operation of *The Land Titles Act, 1978*, nor does it directly impact the protection afforded *bona fide* third parties who acquire an interest in land for value and in reliance on the register.

81 Moreover, as we have indicated, the Supreme Court of Canada has sustained the existence of resulting trusts without distinction among the various types of resulting trusts. Thus, the voluntary transfer resulting trust can arise with respect to land in this jurisdiction. We also agree with the

Alberta Court of Appeal in *Passburg* that "the concept of indefeasibility applies only to situations in which there is a need to rely upon the certificate of title." *Passburg* cited *Church*, *Kaup* and *Bensette*. In *Kaup*, Martland J., writing for the Court, said at 182-183:

> When regard is had to these sections it appears that the conclusiveness referred to in s. 44 is for the benefit of the *bona fide* purchaser for valuable consideration only. This view was stated in this Court by Crocket J. in *Minchau v. Busse*, where he says, referring to the opinion of the dissenting judges in the Court below:
>
> > I agree with the view expressed by Mr. Justice Clarke and Mr. Justice Ford in the reasons for their dissenting opinion, as delivered by the latter, that **the sections of the *Land Titles Act* as to the conclusiveness of the certificate of title are for the benefit of those who *bona fide* acquire title on the faith of the register** and that in the present instance Busse did not so acquire his title.
>
> [Emphasis added; footnote omitted]

See also: *Olney* where Caldwell J.A., writing for the majority, held "the title of a volunteer is defeasible at the behest of the rightful owner of the land" (at para 66).

82 The same rationale, however, cannot be said to apply to the presumption of resulting trust as distinct from voluntary transfer resulting trusts themselves.

83 That the presumption of resulting trust poses a problem in the context of Saskatchewan's land titles system is evident from cases such as *Winisky* and the other Saskatchewan authorities referred to herein. In *Winisky* (at para 30), Foley J. expressed the opinion that "the presumption of intention to exclude beneficial interest imposed by operation of law in the circumstances of gratuitous transfers is not only inconsistent with the principle of conclusiveness of title as found in *Podboy* ... but preserves a principle of equity which no longer serves a useful purpose and is inconsistent with the modern trend to search for true intent."

84 The problem identified in *Winisky* has become more acute because the presumption of advancement is no longer recognized when parents gratuitously transfer property to their independent adult children (*Pecore* at para 40). The presumption also poses problems with respect to creditors. It is true that creditors, as a matter of law, are not presumed to rely on the register, but practically speaking they do. This point was made in *Ehrmantraut* where the transferor asserted a resulting trust to prevent the land from forming part of the transferee's estate in bankruptcy.

85 In England and Wales, the presumption of resulting trust as it applies to a voluntary conveyance of land has been considered as having been abolished by s. 60(3) of the *Law of Property Act 1925* (see: *Ali v. Khan*, [2002] EWCA Civ 974 (Eng. C.A.) (BAILII) [*Khan*], as cited in *Oosterhoff* at 650). [4] In the United States, it is almost universally accepted that the presumption

of resulting trust does not arise on a gratuitous transfer of either real or personal property. In that country, there is a presumption of *gift*, which may be rebutted (see: *Oosterhoff* at 651).

86 The Supreme Court of Canada in *Pecore* described the presumption of resulting trust as allocating the burden of proof. Viewed from this perspective, the presumption serves two main purposes. First, it shifts the evidentiary burden to the transferee to establish on a balance of probabilities that the transferor intended a gift. Second, if a judge cannot determine a transferor's true intent after weighing all the evidence, then the presumption would come into play to tip the balance in favour of a resulting trust. As Rothstein J. stated in *Pecore*:

> [24] The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended: see *Waters' Law of Trusts*, at p. 375, and E. E. Gillese and M. Milczynski, *The Law of Trusts* (2nd ed. 2005), at p. 110. This is so because equity presumes bargains, not gifts.
>
> . . .
>
> [44] As in other civil cases, regardless of the legal burden, both sides to the dispute will normally bring evidence to support their position. The trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor's actual intention. Thus, as discussed by Sopinka et al. in *The Law of Evidence in Canada*, at p. 116, the presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities.

87 In our view, the presumption of resulting trust as described in *Pecore* runs counter to s. 90(1) of *The Land Titles Act, 1978*.

88 Subsection 90(1) provides as follows:

> **Effect of transfer**
>
> **90**(1) **No words of limitation are necessary in a transfer of land in order to transfer all or any title therein**, but every instrument transferring land shall operate as an absolute transfer of all such right and title as the transferor has in the land at the time of its execution, unless a contrary intention is expressed in the transfer.
>
> [Emphasis added; footnote added]

89 A transfer under our land titles legislation is a statement of the transferor's intention to divest himself or herself of the land. Users of the system are entitled to rely on s. 90(1) which states

"[n]o words of limitation are necessary in a transfer of land in order to transfer all or any title ... ." Unless the transfer contains words of limitation, every instrument transferring land operates as an *absolute transfer* of all such right and title as the transferor has in the land. In other words, only a fee simple estate is acceptable for registration. [5]

90 This is reinforced by ss. 118, 243 and 244 of *The Land Titles Act, 1978*. Section 118 provides that if one wants to create a life interest, the registered owner must execute a lease in Form M:

> **Form and registration**
>
> **118**(1) When land for which a certificate of title has been granted is intended to be leased or demised for a life or lives or for a term of more than three years, the owner shall execute a lease (form M) and such instrument shall for description of the land refer to the certificate of title or give such other description as will identify it.
>
> . . .

Sections 243 and 244 do away with limited fees and fee tails.

91 The ultimate effect of ss. 118, 243 and 244 in combination with s. 90(1) is that transfers of land are transfers of the complete fee simple estate. The presumption of resulting trust is incompatible with those sections because a transfer cannot be viewed as "absolute" and at the same time be "presumed" to create a trust. This conclusion is not inconsistent with the Supreme Court of Canada's decisions in *Pecore*, *Madsen*, *Kerr* and *Nishi* as none of those cases considered whether there were legislative provisions that might affect the presumption of resulting trust. The law may still impose a resulting trust in situations where such trusts traditionally would have arisen but, based on s. 90(1), the burden of proof will be on the person challenging the title to establish on a balance of probabilities that the transferor lacked donative intent and, thus, the title does not accurately reflect legal ownership of the land.

92 We are also of the view that the evidentiary role played by the presumption of resulting trust as described in *Pecore* is incompatible with s. 213(1) of *The Land Titles Act, 1978*. That subsection provides:

> **Certificate of title conclusive evidence of right to land, exceptions**
>
> **213**(1) Every certificate of title and duplicate certificate granted under this Act shall, except:
>
> (a) in case of fraud wherein the owner has participated or colluded; and
>
> (b) as against any person claiming under a prior certificate of title granted under this Act in respect to the same land; and

> (c) so far as regards any portion of the land by wrong description of boundaries or parcels included in the certificate of title;
>
> be conclusive evidence, so long as the same remains in force and uncancelled, in all courts, as against Her Majesty and all persons whomsoever, that the person named therein is entitled to the land included in the same for the estate or interest therein specified, subject to the exceptions and reservations implied under this Act.

93 Subsection 213(1) states a certificate of title is conclusive evidence of ownership subject to the exceptions and reservations implied by the *Act*. Subsection 213(1) clearly places the burden of attacking a certificate of title on the person(s) challenging the same. On the other hand, the presumption of resulting trust reverses that statutory evidentiary burden, requiring the registered owner to establish the validity of his title.

94 In summary, in light of *Pecore*, a voluntary transfer resulting trust can exist with respect to land in Saskatchewan. However, the presumption that accompanies such trusts is incompatible with ss. 90(1) and 213(1) of *The Land Titles Act, 1978*. Those sections provide different evidentiary assumptions than the presumption of resulting trust, namely, that absent limitations set out in a transfer, the transfer is taken as conveying absolute title (a fee simple estate) to the transferee and that a certificate of title is conclusive evidence the person named is entitled to the interest in land described therein.

95 Abolishing the presumption of resulting trust with respect to land does not solve all of the problems associated with such interests, but without the presumption the probable effect will be to diminish resort to such trusts.

c. Of judicial concern

96 To be clear, as a matter of judge-made law, voluntary transfer resulting trusts can exist with respect to land in this Province. Having said that, we have concerns about whether such trusts truly fit with our land titles system.

97 Much of this has been canvassed previously in these reasons. Speaking briefly, there are three main reasons for our concern.

98 First, voluntary transfer resulting trusts arise against a backdrop of significant controversy. To show how unsettled the English law has been, it is useful to compare earlier English texts with the present ones. [6] In that regard, reference can be made to the first Canadian case analyzing the effect of resulting trust law on voluntary transfers of land within a land titles system: *Neazor v. Hoyle* (1962), 32 D.L.R. (2d) 131 (Alta. C.A.) [*Neazor*] (cited and analyzed by Professor Waters in *Waters' on Trusts* at 407-408).

99 In *Neazor*, the Court held that the presumption of resulting trust had been rebutted on the facts such that it chose not to decide whether a voluntary transfer resulting trust was compatible with the land titles Act. The Court in *Neazor*, however, reviewed the earlier editions of the trusts texts that we have consulted (apart from *Waters' on Trusts*, which was first released in 1974). It is clear that when one reviews the various textbooks, disagreement exists on the fundamental question of the effect of a voluntary transfer of land to a stranger.

100 The decision of Justice MacDonald, writing for the Court in *Neazor* (at 140), referred to Ronald Cozens-Hardy Horne, *Lewin's Practical Treatise on The Law of Trusts*, 15th ed (London: Sweet & Maxwell, 1950):

> In *Lewin on Trusts*, 15th ed., p. 131, the following statement appears:
>
> > If an estate be granted either without consideration or for merely a nominal one, and no trust is declared of *any part*, then if the conveyance be simply to a *stranger and no intention appear of conferring the beneficial interest*, as the law will not suppose a person to part with property without some inducement thereto, a trust of the *whole estate* — as in the analogous case of uses before the statute of Henry VIII — will result to the settlor.
>
> But in the note at the bottom of p. 131, the following is found:
>
> > **The effect of a voluntary conveyance of land or transfer of personalty to a stranger is a question upon which the opinions of both Judges and text-book writers have differed.**
>
> [Emphasis added]

101 Not everyone shared that view at the time or shares a common view of the law today. We appreciate English case law currently recognizes a resulting trust can arise with respect to a voluntary transfer of land (see: *Khan* at para 24), but we also note *Halsbury's Laws of England*, vol 98, 5th ed (London: LexisNexis, 2013) states:

> **145. Voluntary conveyance**. Formerly, if a conveyance of real property contained no apparent consideration and no declaration to whose use it was made, the use and with it the land conveyed resulted to the transferor. However, the Statute of Uses (1535) was repealed by the Law of Property Act 1925, and in a voluntary conveyance made after 31 December 1925 a resulting trust for the grantor is not to be implied merely by reason that the property is not expressed to be conveyed for the use or benefit of the grantee. **The probable effect of this provision is that there will be no resulting trust on a voluntary conveyance unless it has been expressly conveyed upon trusts which fail to dispose of the entire equitable interest**.
>
> [Emphasis added; footnotes omitted]

102 The continued existence of a voluntary transfer resulting trust within the land titles system rests upon this complex and unsettled state of the law.

103 The second reason for our concern, which has been canvassed more fully in the body of these reasons, relates to the nature of voluntary transfer resulting trusts. Such trusts do not depend on the intention of either the transferor or the transferee and the transferor's lack of donative intent is never documented, giving the appearance of secrecy. Yet, by their very nature, immediately upon transfer of the land, it "results" back to the transferor, awaiting only a court order to give effect to the resulting trust.

104 The third reason, which has also been discussed earlier, relates to the wording of the land titles Acts themselves. On the face of the Acts, it is difficult to determine the place of such trusts within the regimes the Acts create. In short, the issue is more subtle than simply asking the question of whether the interests of a *bona fide* purchaser for value are affected.

105 In a system where the registration of instruments is the basis of certainty of title, it should not be too much to expect, if a transferor wants to reclaim land he or she voluntarily transferred to another, that an express trust be created at the time of transfer. This would lead to the development of a clearer demarcation between express trusts, resulting trusts and constructive trusts as they pertain to land.

106 It may be time to reconsider the role of voluntary transfer resulting trusts within a Torrens system. A one-size-fits-all solution may not be appropriate given the significant differences in provincial land titles legislation. In light of the Supreme Court of Canada's decisions in *Pecore*, *Madsen*, *Kerr* and *Nishi*, it may be that the legislatures of the provinces will have to address this issue.

107 Our comments are not intended to address the place of purchase money resulting trusts and resulting trusts that arise when the objects of an express trust fail within a Torrens land titles system.

B. Does the Statute of Frauds apply to resulting trusts?

108 The application of the *Statute of Frauds* to resulting trusts may be answered simply by reference to the *Statute*.

109 The *Statute of Frauds* was received in Canada as part of the English law as of July 15, 1870, and remains the law in Saskatchewan. For the purpose of this appeal, the relevant portions of the *Statute* are as follows:

> **7** [A]ll declarations or creations of trusts or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is

> by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.
>
> **8** Provided always, that where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of like force and effect as the same would have been if this statute had not been made; anything herein before contained to the contrary notwithstanding.

110 It is obvious, pursuant to s. 8, that the *Statute of Frauds* does not apply to resulting trusts.

C. Did a resulting trust arise in this case?

111 As indicated earlier in these reasons, the presumption of resulting trust is incompatible with ss. 90(1) and 213(1) of *The Land Titles Act, 1978*. Thus, the onus fell on Douglas to establish on a balance of probabilities that his mother did not intend a gift when she transferred the cottage into his, her and Raymond's joint names with a right of survivorship. The issue is Ms. Dunnison's intent at the time the transfer was made.

112 In *Pecore*, Rothstein J. dealt with the question of what evidence a court may consider in determining a transferor's intent. He held evidence that arises subsequent to the transfer can be relevant to the transferor's intention at the time the transfer occurred and is, thus, admissible. It is up to the trial judge to assess its reliability and what weight it should be given "guarding against evidence that is self-serving or that tends to reflect a change in intention" (*Pecore* at para 59). This view was reasserted by the Supreme Court of Canada in *Nishi*:

> [41] Evidence that arises subsequent to a gratuitous transfer can be admissible to show the true intention of the transferor (*Pecore*, at para. 59). However, it is the intention of the transferor *at the time of transfer* that is determinative. The difficulty with subsequent evidence is that it may well be self-serving or the product of a change in intention on the part of the transferor (*Pecore*, at para. 59).

113 The types of evidence relevant to establish a transferor's intent will depend on the facts of each case (*Pecore* at para 55).

114 In this case, Ms. Dunnison's intention at the time of the transfer was not expressed in writing. As a general comment, clients would be well served if their lawyers ensured gratuitous transfers were memorialized by a deed of gift or a declaration of trust. A declaration of trust would allow a transferor to assert a trust in ways that do not compromise the essential tenets of our land titles legislation:

(a) a transferor could transfer land to two or more persons with *no right of survivorship*, which indicates a type of trust that is expressly permitted by s. 238 of *The Land Titles Act, 1978* (see: ss. 34(3.1) and 36 of the *2000 Act*);

(b) a transferor who wished to be able to assert a life interest could claim a lease for life under s. 118 of *The Land Titles Act, 1978* by registering the instrument contemplated by that section (a life interest would be a registerable interest under s. 50 of the *2000 Act*); or

(c) a transferor could file a caveat evincing an intention to create a trust pursuant to s. 150 of *The Land Titles Act, 1978* (see: s. 50 of the *2000 Act*).

115 In Ms. Dunnison's case, since no documentation existed, the Chambers judge had to look to other evidence to determine her true intent. The Chambers judge's findings, with respect to Ms. Dunnison's intentions in 1996, are found at page 11 of her decision:

> Very little evidence is provided with respect to the deceased's intention in 1996 when she transferred the cottage from her name solely into a joint tenancy with right of survivorship with her two sons. In 2010, she indicated through her lawyer that the transfer of title "was done for estate simplification purposes and for no consideration and it was not her intention that any beneficial interest in the cottage be disposed of to Douglas or to Raymond." (Exhibit D of Affidavit of Douglas Dennison sworn June 6, 2014). In her will, executed a few months later, the deceased made essentially the same remarks.
>
> Between 1996 and 2010, the evidence suggests that the deceased, Douglas and Raymond used the cottage extensively and that the deceased and Douglas paid the taxes and utilities. Douglas deposed "despite the significant amount of improvements, maintenance and financial resources I put into the cottage, I never expected that I was gaining me [sic] an ownership ..." (*ibid*, at para. 11). Raymond does not contradict Douglas's contention. Indeed, he acknowledges that the transfer was effected to allow him and Douglas to share the cottage equally on the death of his mother. In the meantime, "everyone would use and enjoy it." (Affidavit of Raymond Dunnison, sworn October 6, 2014 at para. 16). **There is little conflict in the evidence, therefore, that Raymond and Douglas understood they were receiving the cottage on their mother's death and not before. Only Raymond's request to be bought out in 2010 shows a different understanding**.
>
> [Emphasis added]

116 The majority of the evidence relating to Ms. Dunnison's intention arose subsequent to the transfer. That evidence included the October 29, 2010, letter from Ms. Dunnison's lawyer to Raymond and her will as altered in 2011. Such evidence must be viewed with caution as it came into existence during a period when Ms. Dunnison was "displeased with Raymond's position regarding the cottage." Nevertheless, that evidence, insofar as it indicates the transfer was done

for "estate simplification purposes," should be given some weight. Douglas attested his mother told him in 1996 that she had been "updating her own will and doing some estate planning." Ms. Dunnison told Douglas that her lawyer recommended putting Douglas's and Raymond's "names on the title to the cottage so that it would be easier to deal with after she was gone." Raymond attested the transfer was done "to give effect to dad's wishes that in the event of mom's death that Doug and I would share the Cottage equally."

117 When a transferor conveys land for estate simplification purposes, the estate is only simplified if effect is given to the right of survivorship. Once gifted, the right of survivorship cannot be reclaimed. Thus, the evidence in this case supports a finding Ms. Dunnison had donative intent.

118 Moreover, Ms. Dunnison effected the transfer to herself and her sons with right of survivorship within a year of her husband's death. As she herself had just received the cottage through a right of survivorship, she can be presumed to have understood its effect. As well, Ms. Dunnison's husband had indicated in his will that Douglas and Raymond were meant to share the cottage if he and Ms. Dunnison both died. These are circumstances that add credence to the conclusion Ms. Dunnison intended a gift when she transferred the cottage.

119 On the other hand, the fact Ms. Dunnison did not declare the transfer on her 1996 tax return in accordance with s. 73 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp), is evidence that she did not intend to dispose of all her interest in the cottage.

120 The evidence relating to control and use of the cottage is inconclusive. After the transfer, Ms. Dunnison and her sons continued to use the cottage as they had prior to 1996. Such use does not assist in determining Ms. Dunnison's intention at the time of the transfer. Ms. Dunnison continued to pay the taxes, insurance and power for the cottage, while other expenses including water, sewer, "TV" and maintenance were paid by Douglas. In addition, Douglas made numerous improvements to the cottage such as insulating the attic, installing a TV antenna and satellite dish, replacing wood in the steps and landing, replacing the front door and frame, installing new carpet and linoleum, and so forth. Douglas built a deck and, with Raymond's assistance, the cottage was reshingled. It is unknown whether Ms. Dunnison played any role in the improvements done by Douglas.

121 Based on the evidence, the Chambers judge's conclusion that no resulting trust arose on the facts of this case is unassailable.

122 Even if the presumption of resulting trust applied, it would be easily rebutted in this case. Ms. Dunnison transferred land to herself and her two sons to be held as joint tenants with right of survivorship. She had legal advice when she did so. She chose a type of instrument that makes a clear statement of intention to grant a gift — a transfer creating a joint tenancy with right of survivorship. The evidence does not show that when she executed the transfer she did not intend to benefit herself and her two sons equally. She did not treat her sons differently in the transfer document.

V. SUMMARY

123 In summary, the law in Saskatchewan may be expressed as follows:

(a) voluntary transfer resulting trusts will be recognized with respect to land but not the presumption that land is held in trust when it is transferred gratuitously;

(b) proving the existence of a resulting trust is a matter of proving the transferor's lack of donative intent;

(c) the relevant time for proving intention is the time of transfer — subsequent evidence is relevant but it must relate to the transferor's intent at the time of transfer and cannot be self-serving; and

(d) the *Statute of Frauds* does not apply to resulting trusts.

VI. CONCLUSION

124 The application in the Court of Queen's Bench was made pursuant to Rule 1-4(b) of *The Queen's Bench Rules* for an opinion as to whether a resulting trust or a gift had been created by the transfer of the cottage. The answer to that question is that Ms. Dunnison intended a gift.

125 The appeal is dismissed. Given the uncertainty surrounding the law, no costs shall be ordered.

Appeal dismissed.

Footnotes

∗ A corrigendum issued by the court on June 27, 2017 has been incorporated herein.

1 Mr. Nishi's argument extended to gratuitous transfer resulting trusts generally, but the Court's decision pertained only to purchase money resulting trusts.

2 Victor DiCastri, *Registration of Title to Land*, loose-leaf (2007-Rel 9) vol 1 (Toronto: Thomson Carswell, 1987), is a successor to *Thom's Canadian Torrens System*, but we have referred to the latter text as covering in greater detail the prairie Torrens systems in general and Saskatchewan's system in particular.

3 Justice Lamont does not indicate where the quote comes from, although it appears to be a paraphrase of what Lord Watson said in *Gibbs v. Messer*.

4 Subsection 60(3) of the *Law of Property Act 1925* reads as follows:
In a voluntary conveyance a resulting trust for the grantor shall not be implied merely by reason that the property is not expressed to be conveyed for the use or benefit of the grantee.

5 This Province abolished life estates as a separate estate in land capable of supporting a certificate of title in 1949 (see: SS 1949, c 34, ss. 7 and 12 and *Manual of Law and Procedures, Saskatchewan Land Titles Offices* (Regina: Saskatchewan Justice, 1988) (www.publications.gov.sk.ca) at 127).

6 See also the contrasting opinions on the effect of a voluntary conveyance of land in the first edition of *Halsbury's Laws of England*, vol 28 (London: Butterworths & Co, 1914) at 57, para 108 and footnote (i).

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Tab 18

2022 SKCA 32
Saskatchewan Court of Appeal

Rankin v. Rankin

2022 CarswellSask 117, 2022 SKCA 32, [2022] 6 W.W.R. 19, 2022 A.C.W.S. 439, 67 C.C.P.B. (2nd) 169

Anne Marie Rankin (Appellant / Petitioner) And Howard Irvine Rankin (Respondent / Respondent)

Ottenbreit, Whitmore, Tholl JJ.A.

Heard: October 5, 2021
Judgment: March 10, 2022
Docket: CACV3756

Proceedings: affirming *Rankin v. Rankin* (2020), 59 C.C.P.B. (2nd) 52, 2020 CarswellSask 6422020 SKQB 317, F.N. Turcotte J. (Sask. Q.B.)

Counsel: Sean Sinclair, Siobhan Morgan, for Appellant
Deryk Kendall, for Respondent

Subject: Estates and Trusts; Family; Property
Related Abridgment Classifications
Estates and trusts
II Trusts
II.2 Express trust
II.2.a Creation
II.2.a.ii Three certainties
II.2.a.ii.E Miscellaneous
Family law
VII Division of property
VII.4 Valuation
VII.4.g Farming assets
Family law
VII Division of property
VII.6 Equal or unequal division
VII.6.j Miscellaneous
Headnote
Family law --- Division of property — Equal or unequal division — Miscellaneous

Parties separated in 2008 after 29 years of marriage, and while they lived together, they farmed and conducted their farming business through farming corporation (RF Ltd.) that owned farm equipment and machinery and parcels of land — In January 2010 (application date), applicant wife commenced proceeding under Family Property Act to divide family property — After application date, parties caused RF Ltd. to transfer legal title to three quarters of farmland, including family home, into name of wife, and thereafter, parties continued to farm together using land, machinery and equipment each had received as result of Transfer of Assets Agreement — Chambers judge found that family home and quarter section on which it was located, all of which had been transferred to wife pursuant to Transfer of Assets Agreement, was family property and was to be valued as at present day — Wife appealed — Appeal dismissed — Chambers judge made several errors in course of coming to his valuation, however, substance of valuation of RF Ltd. and farmland could have been sustained — Chambers judge made errors in determining that farmland was family property and in concluding that Act allowed tracing in circumstances of this case — Pathway existed within parameters of Act and parties' application to ensure that value of what was after acquired property was shared equitably — Here, using s. 21(3)(q) of Act, Court may consider post-application date distribution of property and value held by RF Ltd. to parties pursuant to Transfer of Assets Agreement — In reference to s. 21(3)(c) of Act, it was also significant that parties had been separated for 11 years without finalization of any division of family property — Value as calculated would have been divided unequally in any final property division between parties to account for appreciation of value in farmland, including quarter section designated as family home The Family Property Act, S.S. 1997, c. F-6.3, s 23; The Family Property Act, S.S. 1997, c. F-6.3, s 43.

Estates and trusts --- Trusts — Express trust — Creation — Three certainties — Miscellaneous

Parties separated in 2008 after 29 years of marriage, and while they lived together, they farmed and conducted their farming business through farming corporation (RF Ltd.) that owned farm equipment and machinery and parcels of land — In January 2010 (application date), applicant wife commenced proceeding under Family Property Act to divide family property — After application date, parties caused RF Ltd. to transfer legal title to three quarters of farmland, including family home, into name of wife, and thereafter, parties continued to farm together using land, machinery and equipment each had received as result of Transfer of Assets Agreement — Chambers judge found that Transfer of Assets Agreement created express trust as declaration of parties' intention to each retain equal interest in assets transferred to them notwithstanding subsequent transfers to each of them of title to farmland — Wife appealed — Appeal dismissed — Chambers judge made no error in applying trust analysis — Parties had specifically asked Chambers judge to determine value of RF Ltd. and farmland — In answering that question, it was open to Chambers judge, as part of his inherent jurisdiction, to determine if circumstances of case were amenable to trust analysis in addition to merely analysis under Act — Chambers judge found there was, on evidence, express trust regarding farmland that it would have been held equally — Transfer of Assets Agreement created express trust as declaration of parties' intention to retain equal interest

in farmland transferred to them, notwithstanding subsequent title transfers The Family Property Act, S.S. 1997, c. F-6.3, s 50.
Family law --- Division of property — Valuation — Farming assets

APPEAL by wife from judgment reported at *Rankin v. Rankin* (2020), 2020 SKQB 317, 2020 CarswellSask 642, 59 C.C.P.B. (2nd) 52 (Sask. Q.B.), regarding equal division of family home and unequal family property.

***Ottenbreit J.A.*:**

I. INTRODUCTION

1 Anne Marie Rankin appeals the decision of a Court of Queen's Bench judge determining certain discrete issues related to a division of family property between her and Howard Irvin Rankin: *Rankin v Rankin*, 2020 SKQB 317, 59 CCPB (2d) 52 [*Decision*].

2 This appeal concerns how property owned by the parties at the application date of their family property proceedings, but converted by them into other property thereafter, should be characterized and valued for the purposes of a division of family property.

3 For the reasons set forth herein, I would vary the *Decision* as described below and dismiss the appeal.

II. FACTS AND BACKGROUND

4 The parties separated in 2008 after 29 years of marriage. While they lived together, they farmed and conducted their farming business through Rankin Farms Ltd. [corporation]. The corporation owned farm equipment and machinery and 16 parcels of land, consisting of roughly 2,560 acres in total.

5 On January 29, 2010 [application date], Ms. Rankin commenced a proceeding under *The* Family Property Act, SS 1997, c F-6.3 [FPA], to divide family property. At the application date, the parties were the sole shareholders of the corporation.

6 After the application date, the parties entered into two significant transactions in relation to the corporation. Both transactions had an effective date of September 30, 2010. The first is set out in an Assumption of Liabilities and Transfer of Assets Agreement [Transfer of Assets Agreement]. Pursuant to the terms of the Transfer of Assets Agreement, the corporation effectively transferred and assigned four quarters of farmland at issue in this matter and certain other farming assets to the parties equally, and the parties assumed certain of the corporation's liabilities equally. Thereafter, the parties caused the corporation to transfer legal title to three quarters of the farmland, including the family home, into the name of Ms. Rankin. She also kept possession of certain farm equipment transferred to her. They caused the corporation to transfer legal title to one quarter of the farmland

into the name of or kept in the possession of Mr. Rankin. The details of this are particularized in the Agreed Statement of Facts [ASF] filed by the parties at the Chambers hearing.

7 In the second transaction, the parties sold all their shares in the corporation to an arm's-length third party pursuant to a Share Sale Agreement. The corporation had, at this point, divested itself of the assets transferred to the parties mentioned above. The sale price of the shares was approximately $1.3 million. The parties divided the proceeds of the sale equally between themselves.

8 Thereafter, the parties continued to farm together using the land, machinery and equipment each had received as a result of the Transfer of Assets Agreement, as well as four additional quarters of rented land they had acquired. They shared income and expenses equally in relation to those farming activities from 2010 until the spring of 2017 when Ms. Rankin unilaterally purported to terminate the farming relationship. Subsequently, Ms. Rankin has claimed a 70-30 income split in her favour of the income and expenses of the farming operation.

9 The parties acknowledge there has never been an equalization or final division of their family property or its value. The parties do not agree on the valuation of the farmland each presently owns. They do agree that, in any final division of family property, each will keep, subject to accounting for the value of such, the quarters of farmland each owns.

III. THE CHAMBERS JUDGE'S DECISION

10 By agreement, the parties applied to have the Chambers judge determine, by way of the summary judgment procedure, four discrete issues to assist them in negotiating a future settlement of their family property. For the purposes of this appeal, only three of those issues are germane:

(a) How to value the corporation and the assets retained and transferred by it to the parties;

(b) Whether the income and expenses from the farming operations earned in 2017, 2018 and 2019 should be equalized; and

(c) Whether the expenses relating to the farmland and buildings since 2010 should be equalized.

11 On the application, the parties' evidence consisted of the ASF, as well as affidavits not inconsistent with it. The ASF set out the values of the farmland and other assets received pursuant to the Transfer of Assets Agreement as at the application date and the present day value of the farmland and buildings. It did not set out present-day values for the depreciable and non-farmland assets.

12 The ASF acknowledged that the farmland and other assets were not owned personally by the parties on the application date but, rather, were owned by the corporation. The ASF further

acknowledged that, effectively, those assets as valued, along with the proceeds of the sale of the Rankins' shares in the corporation to the third party, represented the value of the assets within the corporation as at the application date.

13 The first issue raised by the parties before the Chambers judge regarding valuation reduced itself to the question of whether the farmland should be valued as at the application date or at present day. There appeared to be no dispute about the values of the other assets transferred pursuant to the Transfer of Assets Agreement, many of which were depreciable assets.

14 The Chambers judge began by reviewing the evidence. He then outlined the position of the parties. The elements of Ms. Rankin's position were contradictory. She argued that only the shares of the corporation held at the application date constituted family property and that the farmland she and Mr. Rankin own in their names is not family property because it was acquired after the application date. She submitted it is therefore not subject to division under the *FPA*. Notwithstanding that submission, she acknowledged that the farmland and other property held by her and Mr. Rankin should be retained by them as part of their share of family property and be included in the calculation of the value of family property for division purposes, but only at the application date values set out in the ASF. She submitted that the only way that the court could consider a present-day value for the farmland would be to divide the family property unequally and that was not requested by the parties.

15 Ms. Rankin submitted as well that the income and expenses from the farming operation for the 2017 to 2019 farming years should be split on a 70-30 per cent basis in her favour. She argued, in that event, not all of the expenses she had itemized in her affidavit in relation to maintenance, repair and improvements to the farm buildings and former family home should be credited to her.

16 Mr. Rankin submitted that regardless of the names in which the farmland and assets received pursuant to the Transfer of Assets Agreement are now legally owned, the clear intention as set out in that agreement was that each party was, with certain noted exceptions, *equally* entitled to those assets.

17 Mr. Rankin argued that the value of the farmland received pursuant to the Transfer of Assets Agreement had tripled since 2010 and that such increased value should be divisible in any final division of family property. He submitted that until the parties finalized the division of their family property or its value, neither party should be able to obtain an advantage or suffer a disadvantage due to changes to the value of the farmland arising from pure market forces. He submitted it should therefore be valued at present-day values. With respect to the income and expenses from farming for the 2017 to 2019 farming years, Mr. Rankin argued the same should be divided equally between them as they had done prior to 2017, on the basis that the parties had received the farmland and assets from the corporation on an equal basis and had in fact, conducted their farming operation on that basis as well.

18 The Chambers judge noted that the parties had acknowledged that the transfer of farmland and other assets received pursuant to the Transfer of Assets Agreement was not intended as an interim or final division of family property. He also noted that it was understood that each party wanted to keep the farmland and other assets that each had received pursuant to the Transfer of Assets Agreement in any eventual final division of property, and that there was no objection by either party to that.

19 The Chambers judge then turned to his analysis of how to value the corporation and the farmland. He first reviewed the definition of family property, family home and value in s. 2(1) of the FPA as well as the case law touching on those definitions.

20 With respect to the family home, the Chambers judge determined:

> [43] As I will outline more fully below, considering the parties' 29-year marriage, the steps they took through the Assumption and Transfer Agreement and the Share Sale Agreement to deal with their shareholder interest in Rankin Farms and the 12 years that it has taken for the parties to address the division of their family property or its value, there are no extraordinary circumstances here to support an unequal division of the parties' family home, its value, or any increase in the value of the family home since the date of application (*FPA*, s 22, and [*Williams v Williams*, 2011 SKCA 84, 343 DLR (4th) 720]). The value of the family home, the appurtenant 65 hectares and farm buildings situated thereon should be determined as at the fair market value effective September 6, 2019 and be included in the parties' family property interest in Rankin Farms.

21 The Chambers judge found, based on the reasoning set out later in the *Decision*, that the family home and quarter section on which it is located - all of which had been transferred to Ms. Rankin pursuant to the Transfer of Assets Agreement - was family property and was to be valued as at present day.

22 The Chambers judge then considered the nature of the parties' family property interest in the corporation. Citing Grosse v Grosse 2015 SKCA 68, 387 DLR (4th) 473 [Grosse], he concluded that the term *property*, within the meaning of *family property* in the *FPA*, was to be interpreted broadly, keeping in mind the purpose and scheme of the *FPA*.

23 Relying on *Grosse*, he reasoned that a legal artifice should not be construed in a fashion that would thwart the clear purpose and intention of the scheme of division of family property under the *FPA*. Accordingly, quoting from paragraph 28 of *Grosse*, the Chambers judge found that a court could pierce the veil of "whatever legal entity or device" the spouses' interest in family property is held and determine the fair market value of that property, either as at the date of application or adjudication.

24 The Chambers judge concluded that the Transfer of Assets Agreement and the Share Sale Agreement were legal devices utilized by the parties to transfer to themselves part of the assets and the value of those assets in which they held a family property interest as sole shareholders of the corporation. He found:

> [50] ... Thus, pending a division of their family property estate, or its value, the parties have a continuing family property interest in the assets previously held by Rankin Farms and assigned to them equally under the Assumption and Transfer Agreement, and in the cash they received for their shares under the Share Sale Agreement.

25 He also determined that a court could, under the *FPA*, trace a spouse's interest in property that existed as at the date of application and continued to exist as at the date of adjudication, including where the nature of the spouse's equitable or legal interest in that property as at the date of adjudication had changed since the date of application. In support of that determination, he cited the expansive definition of *family property* and the definition of *value* in the *FPA*, as well as dicta *Good v Good*, (1998), 167 Sask R 196 (QB) [*Good*].

The Chambers judge also referred to Thomas v Thomas 2016 SKCA 53, 476 Sask R 288 [Thomas], in support of the proposition that a court may trace a spouse's interest in the property that exists as at the date of application into property existing at the date of adjudication, where the nature of the spouse's equitable or legal interest has changed through a party's dealing with that property since the date of application.

26 The Chambers judge noted that the concept of tracing is not foreign to the *FPA* and that tracing is allowed under s. 23 with respect to certain categories of property that may be found exempt from distribution. He also noted that ss. 43 and 50 of the FPA contemplate spouses generally being able to deal with their family property, either before or after an application is commenced, whether with third parties or as between the spouses, and that these sections imply an ability to trace property dealt with by a spouse.

27 The Chambers judge determined:

> [58] Here, the value of the parties' interest in Rankin Farms and the assets retained and transferred from the corporation to the parties is in the assets equally assigned to them under the Assumption and Transfer Agreement and the cash proceeds received under the Share Sale Agreement. The parties' interest in the four quarters of land, including the family home and farm buildings situated on the home quarter, farm equipment and machinery, Co-op Equities and Viterra shares, and the cash proceeds from the sale of their shares in Rankin Farms is directly traceable to the interest they held in the property of Rankin Farms as its sole shareholders on the date of application.

. . .

> [61] ... [U]ntil such time as the family property or its value, including the assets equally assigned to them by Rankin Farms, has been divided between the parties in a fair and equitable manner in accordance with the scheme of the *FPA*, they should share in any increase or decrease in the value of such property due to market forces and remain accountable to the other for their continuing use of such property in the interim. This proposition flows as much as from the sections of the *FPA* discussed above, as from the continuing relationship of the parties as Assignees under the Assumption and Transfer Agreement and the definition of "value" under the *FPA*.

28 With respect to the intention of the parties as set out in the Transfer of Assets Agreement, the Chambers judge found:

> [63] ... Under the Assumption and Transfer Agreement, they indicated their clear intention to be equally entitled to the assets assigned thereunder to them with the exception only of the Co-op Equities and Viterra Shares. Their subsequent dealings with those assets was never intended by them to be a division of their family property. To date, their family property estate has not been distributed between them. Having regard for s. 40 of the *FPA* and the Assumption and Transfer Agreement, the parties should share equally in any increase or decrease in the value of the assets of Rankin Farms transferred to them and remain accountable to each other for their use of the same until such time as they have completed the division of their family property or otherwise agreed to a different arrangement.

29 The Chambers judge then considered the effect of the Transfer of Assets Agreement and Share Sale Agreement and the parties' intentions stated therein through the lens of trust law.

30 He found that the Transfer of Assets Agreement created an express trust as a declaration of the parties' intention to each retain an equal interest in the assets transferred to them notwithstanding the subsequent transfers to each of them of title to the farmland. He determined the three certainties of intention, subject matter and objects necessary for a trust found clear expression in the terms of the Transfer of Assets Agreement and that it met the requirement of s. 7 of the Statute of Frauds, 1677, 29 Cha II, c 3, which provides that express trusts dealing with land must be in writing.

31 The Chambers judge alternatively found that the assets received by the parties pursuant to the Transfer of Assets Agreement were impressed with either a constructive trust or a resulting trust.

32 With respect to his findings regarding trusts, the Chambers judge concluded:

> [78] ... In the circumstances, the parties hold the assets, including the titles to the four quarters of land, transferred to them by Rankin Farms equally in trust for both of them as family

> property until those assets or their value is distributed between the parties as part of a final division of their family property.

33 The Chambers judge then turned to determine the value of the parties' family property in question. He prefaced his finding of value by noting that several factors provided a basis to value assets that had changed between the date of application and adjudication: the provisions of ss. 43 and 50 of the FPA; the broad interpretation given to the term *property* within the meaning of family property; and the discretion afforded to the court to determine value under the *FPA*.

34 The Chambers judge acknowledged that, as at the application date, the parties' family property interest in the corporation was held through its shares. He noted that but for the two transactions which occurred on September 30, 2010, those shares would have been valued based on the corporation's value as either a going-concern or on a liquidation basis. He observed that the parties took a different route by jointly selling some of the assets in the corporation to themselves pursuant to the Transfer of Assets Agreement and selling what remained of the corporation pursuant to the Share Sale Agreement for cash.

35 He stated:

> [84] But that cash was not fully representative of the entire value of their interest in Rankin Farms as at the date of application. The evidence before me unequivocally establishes that fact. The balance of the value of their interest in Rankin Farms was in the value of the assets less liabilities and debts assigned and assumed by them equally under the Assumption and Transfer Agreement. Under that agreement, they acquired an equal interest in all the remaining assets of Rankin Farms, including the four quarters of land, the family home, farm buildings and granaries, farm equipment and machinery, but excluding the Co-op Equities and Viterra shares, assigned to them. Although by agreement of the parties the titles to the land were subsequently transferred into their separate names, none of the assets, including that land, nor their value have been formally divided between the parties for the purposes of these proceedings.
>
> [85] In all the circumstances, valuing the assets assigned to them by Rankin Farms under the Assumption and Transfer Agreement as at the date of adjudication is the most fair and equitable approach, particularly where those assets consist of modest farm equipment and machinery and farmland including the former family home situated on the home quarter. A date of adjudication value results in the parties sharing in any increase or decrease in the market value of those assets occurring since 2010. This is eminently fair in these circumstances given the parties' respective delay in prosecuting their claims for division of family property, while bearing in mind the initial delay was at the request of the petitioner who did not want to proceed with concluding the parties' divorce in 2011.
>
> . . .

> [87] Accordingly, in answer to the first question posed, Rankin Farms shall be valued based on the sum of the net proceeds payable to the parties from the sale of their shares in Rankin Farms to the Hutterian Brethren on September 30, 2010, plus the fair market value as at September 6, 2019, of the assets transferred, assigned, conveyed and delivered under the Assumption and Transfer Agreement to the parties by Rankin Farms on September 30, 2010, less the amount of any debts or liabilities of Rankin Farms assumed by the parties on September 30, 2010, and subject to an adjustment to equalize any income tax paid by the parties on the 2010 transactions.

36 The Chambers judge then turned to the issue of how farm income and expenses should be shared, concluding:

> [96] I find that under the Assumption and Transfer Agreement, the parties agreed they had an equal entitlement to the assets of Rankin Farms transferred, assigned, conveyed and delivered to them. After 2010, they continued to farm the four quarters of land and another four quarters of rented farmland in a custom-farming arrangement with third parties. Up to 2017, they shared the income and expenses from this farming activity equally. Other than the petitioner's unilateral decision purporting to terminate this arrangement, there was no evidence of any change in the land base or custom-farming arrangement through which this farming activity was carried on by the parties. Until they completed the division of their family property, there was no basis for the petitioner to unilaterally terminate the equal sharing of farm income and expenses arising out of the custom-farming activity over the land to which both parties continued to have an equal beneficial interest as Assignees under the Assumption and Transfer Agreement.

37 Accordingly, the Chambers judge determined that farm income and expenses after the spring of 2017 would be shared equally between the parties.

IV. ISSUES

38 Ms. Rankin raises the following issues:

> (a) Did the Chambers judge err in determining that the assets acquired after the application date are family property to be valued at the date of adjudication?
>
> (b) Did the Chambers judge err in finding the farmland is subject to a trust and should be shared equally?
>
> (c) Did the Chambers judge err in determining income and expenses from the farmland for and after 2017 should be shared equally?

V. ANALYSIS

39 I preface my analysis with the observation that the Chambers judge had to determine two broad issues raised by the parties. The first was what to make of the parties' dealings with their family property pursuant to the Transfer of Assets Agreement and Share Sale Agreement and the transfers of title to the farmland after the application date. The second was how to value the farmland in the context of those dealings. I mention this because Ms. Rankin argues generally that the Chambers judge was not tasked with dividing family property and could not on the application divide and value the farmland insofar as it is not technically family property.

40 The Chambers judge observed, and it was acknowledged by the parties, that any eventual division of their family property must achieve a fair and equitable distribution of the same or its value: *Grosse*, Riley v Riley 2011 SKCA 5, 366 Sask R 110 [Riley], and *Russell v Russell*, (1999), 180 Sask R 196 (CA) [*Russell*]. This acknowledgment by the parties was an admission that the principles inherent in the *FPA* were at play in the application and that it was open to the Chambers judge, in the resolution of the questions put before him, to apply those principles and make determinations that would affect any eventual division of family property between the parties.

41 Moreover, despite the wording of the discrete questions put before him, the Chambers judge had jurisdiction to entertain an unequal division of property as a remedy to the valuation conundrum created by the parties. Rule 1-4(2) of The Queen's Bench Rules reads as follows:

> **General authority of the Court to provide remedies**
>
> **1-4**(1) The Court may do either or both of the following:
>
> (a) give any relief or remedy described or referred to in *The Queen's Bench Act, 1998*;
>
> (b) give any relief or remedy described or referred to in or under these rules or any enactment.
>
> (2) The Court may grant a remedy whether or not it is claimed or sought in an action on providing the parties with:
>
> (a) a notice of its intention to grant a remedy; and
>
> (b) an opportunity to respond.
>
> (3) Nothing in these rules prevents or is to be interpreted as preventing the Court, as a superior court, from exercising its inherent jurisdiction.

42 The Chambers judge clearly raised with the parties the issue of the impact of the various components of s. 21(3) of the FPA dealing with unequal division, thereby giving notice of the

possibility of a resolution of the questions put to him that incorporated such a remedy. The parties were provided with an opportunity to respond. They did so in the form of supplemental briefs.

43 Additionally, the Chambers judge had inherent jurisdiction to deal with the questions put before him. This jurisdiction was explained by this Court in *Zipchen v Bainbridge*, 2008 SKCA 87, 311 Sask R 90, as follows:

> [70] Inherent jurisdiction is the reserve or fund of powers which the Court may draw upon as necessary whenever it is just or equitable to do so. It is not an unlimited jurisdiction and, of course, it cannot be exercised in contravention of any statutory provision. Except where provided specifically to the contrary, the Court's jurisdiction is unlimited and unrestricted in substantive law in civil matters: *Glover v. Glover et al. (No. 1)* [(1980), 113 DLR (3d) 161 (Ont CA), aff'd [1981] 2 SCR 561].

44 Admittedly, the inherent jurisdiction of the court is to be used sparingly. However, the unusual constellation of circumstances that underpinned the parties' request that the Court resolve the family property issues between them demanded that this jurisdiction be exercised in response. Such exercise was necessary to arrive at a just and equitable solution for the parties.

45 I turn now to the discrete issues raised on this appeal.

A. Did the Chambers judge err in determining that the assets acquired after the application date are family property to be valued as of the date of adjudication?

46 At paragraph 50 of the *Decision*, the Chambers judge concluded that the parties have a continuing family property interest in the assets received by them pursuant to the Transfer of Assets Agreement and in the cash they obtained from the Share Sale Agreement. This is a clear statement that the farmland and the cash were considered by the Chambers judge to be family property.

47 Ms. Rankin challenges that finding, although she accepts that the cash should be treated as family property in any event since it has been divided equally. Thus, the challenge to the Chambers judge's *valuation* of the farmland is the primary thrust of her appeal. She argues that, at the application date, the family property to be valued consisted of the shares of the corporation. Ms. Rankin submits that the individual assets of the corporation each of the parties now owns never were family property and cannot now be defined as family property as the Chambers judge did. Interestingly, she had listed both the farmland and the shares of the corporation as family property in her Property Statement filed in 2017, suggesting that, at that time, at least in her mind, there was some conceptual fluidity with respect to the matter.

48 She also argues that the Chambers judge erred in finding an ability under the *FPA* to trace assets or value that exist at the application date and are disposed of thereafter, into assets that exist at the adjudication date.

49 I turn now to the provisions of the *FPA* germane to my analysis. They are:

Interpretation

2(1) In this Act:

. . .

"family property" means any real or personal property, regardless of its source, kind or nature, that, at the time an application is made pursuant to this Act, is owned, or in which an interest is held, by one or both spouses, or by one or both spouses and a third person, and, without limiting the generality of the foregoing, includes the following:

(a) a security, share or other interest in a corporation or an interest in a trust, partnership, association, organization, society or other joint venture;

(b) property over which a spouse has, either alone or in conjunction with another person, a power of appointment exercisable in favour of the spouse;

(c) property disposed of by a spouse but over which the spouse has, either alone or in conjunction with another person, a power to consume, invoke or dispose of the property;

(d) property mentioned in section 28; ...

. . .

"value" means:

(a) the fair market value at the time an application is made pursuant to this Act, or at the time of adjudication, whichever the court thinks fit; or

(b) if a fair market value cannot be determined, any value at the time an application is made pursuant to this Act, or at the time of adjudication, that the court considers reasonable. ...

. . .

Purpose

20 The purpose of this Act, and in particular of this Part, is to recognize that child care, household management and financial provision are the joint and mutual responsibilities of spouses, and that inherent in the spousal relationship there is joint contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities that entitles

each spouse to an equal distribution of the family property, subject to the exceptions, exemptions and equitable considerations mentioned in this Act.

Distribution of family property

21(1) On application by a spouse for the distribution of family property, the court shall, subject to any exceptions, exemptions and equitable considerations mentioned in this Act, order that the family property or its value be distributed equally between the spouses.

(2) Subject to section 22, where, having regard to the matters mentioned in subsection (3), the court is satisfied that it would be unfair and inequitable to make an equal distribution of family property or its value, the court may:

(a) refuse to order any distribution;

(b) order that all the family property or its value be vested in one spouse; or

(c) make any other order that it considers fair and equitable.

(3) For the purposes of subsection (2), the court shall have regard to the following:

(a) any written agreement between the spouses or between one or both spouses and a third party;

. . .

(c) the duration of the period during which the spouses have lived separate and apart;

. . .

(q) any other relevant fact or circumstance.

Distribution of family home

22(1) Where a family home is the subject of an application for an order pursuant to subsection 21(1), the court, having regard to any tax liability, encumbrance or other debt or liability pertaining to the family home, shall distribute the family home or its value equally between the spouses, except where the court is satisfied that it would be:

(a) unfair and inequitable to do so, having regard only to any extraordinary circumstance; or

(b) unfair and inequitable to the spouse who has custody of the children.

(2) Where clause (1)(a) or (b) applies, the court may:

(a) refuse to order any distribution;

(b) order that the entire family home or its value be vested in one spouse; or

(c) order any distribution that the court considers fair and equitable.

. . .

Agreements between spouses

40 The court may, in any proceeding pursuant to this Act, take into consideration any agreement, verbal or otherwise, between spouses that is not an interspousal contract and may give that agreement whatever weight it considers reasonable.

50 The law governing how family property is to be identified and determined is not in dispute. It is the property that *exists at the date of application.* This is clear from the definition of family property in s. 2(1) of the FPA set out above, as well as a long line of case law confirming the same (see, for example, Benson v Benson(1994), 120 Sask R 17 (CA) at para 32 [Benson], and cases following). The upshot of this is that property acquired by a party after the application date [after acquired property] does not fit into the definition of family property in the *FPA* and therefore cannot be identified and valued as such.

51 It is also not in dispute that the definition of family property in the *FPA* is expansive and non-exhaustive, and captures any kind of property interest the parties may have regardless of the entity or device used to hold the property: *Grosse* at paras 23 and 28. Where family property includes a corporation or a partnership, it is well established that a party's interest in those entities is valued and not the entity's individual assets: Ackerman v Ackerman,2014 SKCA 137 at para 39, 451 Sask R 132 [Ackerman].

52 Despite the expansive definition of family property, the identification of property as such in any case is constrained by the requirement in s. 2(1) of the FPA that the property must be in existence at the date of application. It is well established that after acquired property is not family property.

53 For example, in Qually v Qually (No. 5) (1987), 61 Sask R 178 (QB), the Court held that crops grown after the date of application are not family property. In Homenuk v Homenuk, 2002 SKQB 335 at paras 28 and 38 [Homenuk], the Court specifically excluded from division property (namely, an auger, an engine and livestock) that was acquired after the date of application. In Pinder v Pinder, 2002 SKQB 246 at para 61, 221 Sask R 8, the Court excluded a baler that was purchased after the date of application.

54 In Francis v Cook, 2007 SKQB 136 at paras 14 and 42, 295 Sask R 36, the Court adjusted the value of RRSP funds held by the petitioner at the date of application to account for a contribution made to the account after that date, and adjusted the value of the respondent's

pension for contributions made post-application. Both of these adjustments reflect the fact that assets acquired after the date of application do not constitute family property.

55 Even though the identification of family property is restricted to that in existence on the date of application, there is no temporal restriction on its valuation. The definition of value in the *FPA* gives a court substantial discretion in establishing a fair market value. The principles governing valuation are well known and are summarized in *Ackerman* (at para 37). I need not repeat them except to note that the application date is the date traditionally used to value the family property, although there is discretion to choose the adjudication date in the proper circumstances, as well as any other date if fair market value cannot be determined.

56 Despite the requirement that the family property must be in existence at the date of application, the courts have recognized that a determination of the fair market value of family property can be informed by reference to transactions related to that property after that date. Put differently, after acquired property related to the family property can be relevant to the process of valuation of family property.

57 For example, in Griffiths v Griffiths 2010 SKQB 152, 356 Sask R 91 [Griffiths], the parties owned a vehicle at the date of application that was subsequently traded in for $1,500. However, it was not the $1,500 that constituted family property, but the vehicle itself. The trade-in proceeds were used to value the vehicle as it existed at the date of application. The respondent also owned shares in a corporation at the date of application that he continued to own at the date of adjudication. After the date of application, the respondent liquidated some corporate assets and drew out corporate funds. Those transactions were mathematically "reversed" to arrive at the value of the corporation at the date of application. The disposition of corporate assets liquidated and withdrawn was relevant to determining the proper value of the corporation that existed both at the date of application and the date of adjudication.

58 In the case of *Woodward v Woodward*, 2016 SKQB 301, 86 RFL (7th) 357, the date of application was in 2011. The proceeds from grain or feed grown in 2011 and sold in 2012 was determined to be family property but, since "[t]he 2012 crop would not have been a standing crop as at the date of application", the Court noted that it could not be considered family property (at para 57).

59 Another example of how transactions related to family property after the date of application can inform the fair market value is set out in Carruthers v Carruthers, 2021 SKCA 52 (Sask. C.A.) , 56 RFL (8th) 110, leave to appeal to SCC refused, 2022 CanLII 5852 [Carruthers]. At the date of application, the parties held 55 per cent of the shares in a farming corporation, while the husband's parents owned the remaining 45 per cent. The trial judge found that the parties had an interest in the parents' shares, either by way of an oral contract or unjust enrichment, and thus declared all

of the shares to be family property held at the date of application. Post-application date, but pre-trial, the wife purchased the shares formerly held by the parents.

60 The Court began by noting that the issue for the trial judge was whether the parties had an interest in the parents' shares *at the date of application*, underlining again that it is the date of application that is crucial for the identification of family property. This Court determined that the trial judge erred in finding that the parties had an interest in the parents' shares at the date of application based on an oral contract, but sustained the trial judge's conclusion that the parties had a chose in action respecting the shares based on unjust enrichment that was crystallized when the wife purchased the shares. This Court thereby implicitly affirmed that the subsequent transaction of acquiring the actual shares could be used to value the chose in action in existence at the date of application.

61 In the case at hand, Ms. Rankin had urged the Chambers judge to refer to the transaction that occurred after the application date, i.e., the transfers of the farmland into the parties' respective names, as a way to value the corporation - but only if the application date values of the farmland in the ASF were used. As noted above, there is some justification for using such a methodology. However, Ms. Rankin submits that the Chambers judge went too far and that such an approach cannot be used to value the farmland at the present-day value as a way to value the corporation. As will be seen, I agree with the submission of Ms. Rankin respecting the error in the methodology, but that is as far as it goes.

62 To explain why, I turn to the reasoning of the Chambers judge. He appears to have been riding two different horses to arrive at the valuation of the corporation and of the farmland. He acknowledged that family property must be identified as at the application date. He also accepted the principle that it is the shares of a corporation and not the underlying assets that must be valued. He accepted that the shares of the corporation were to be valued as family property. However, he then went on to determine that the parties also had a family property interest in the cash from the sale of the corporation and the farmland. As a result, he valued the corporation on the basis of the present-day value of the farmland and the cash received from the share sale.

63 The Chambers judge made several errors in the course of coming to his valuation. However, although I disagree with his reasoning in that regard, I do not disagree with the ultimate result of his valuation. I find the substance of the valuation of the corporation and the farmland can be sustained. I will explain.

64 The Chambers judge made errors in determining that the farmland was family property and in concluding that the *FPA* allowed tracing in the circumstances of this case.

65 The Chambers judge canvassed at length the ambit of the terms *property* and *family property*, concluding, in accordance with the jurisprudence noted above, that the concepts are expansive. He

also correctly acknowledged that it is the property determined as of the date of application and the fair market value thereof that must be distributed.

66 Thereafter error crept into his reasoning. The first such error concerns his understanding and application of the definition of *family property*. The Chambers judge made two conflicting statements in that regard. At paragraph 46, he appears to conclude or imply that this was a case where property in existence at the application date continued to exist at the date of adjudication, although the equitable or legal interest of the parties in the property had *changed*. He erred in making such a determination.

67 This was not a case where the legal or equitable interest of the parties in the family property had changed. Based on the definition of family property, and the jurisprudence related thereto, the shares had ceased to exist at the date of adjudication. The property the parties owned or possessed as at the date of adjudication was the farmland and the cash in their possession. The farmland could not technically be defined as *family property* because it had been acquired after the application date. It was different property - not the same property in changed form.

68 The Chambers judge then stated that where the parties have the *same* legal or equitable interest in property at the application date and the date of adjudication, the court can trace that interest and consider its value from the application date to the date of adjudication. For the purposes of his tracing analysis, he considered the parties to have had the same legal or equitable interest throughout. This was again an error. The legal or equitable interest in shares is different than the legal or equitable interest in cash and farmland.

69 The above errors arose because the Chambers judge concluded that the expansive view of the term *family property* includes property that was exchanged for or acquired from the proceeds of property in existence at the application date. He also conflated the continued existence of value in the hands of the parties as at the adjudication date with the identification and existence of family property as at the application date. Such an error is understandable. The parties had, through the Transfer of Assets Agreement and Share Transfer Agreement, preserved and retained in their hands the value that they had in the family property that was locked in the shares at the application date.

70 Unfortunately, the definition of family property, although expansive, is not such that it can bridge the gap between family property of a certain kind and nature owned at the date of application and property of a completely different kind and nature acquired thereafter that, for want of a better term, emanates from that family property.

71 The Chambers judge's conception of family property bends the statutory definition of family property beyond the breaking point. It is incompatible with family property defined as that in existence as at the date of application, whatever the form of that property may be.

72 The Chambers judge also erred by concluding that there was an ability to trace the value of the farmland back to the shares. The concept of tracing is not foreign to the FPA. Section 23 incorporates that concept but restricts it to cases where an exemption from division is claimed for certain types of family property acquired before the commencement of a spousal relationship. This process of tracing is well established in the jurisprudence and is explained in *Ruskin v Dewar*, 2005 SKCA 89, 269 Sask R 80:

> [49] Subsection 23(2) serves to extend the reach of the exemption provided for by subsection 23(1)(a). It does so by allowing the value of property brought into a spousal relationship, though that property no longer exists, to be traced to property acquired during the relationship, provided the latter is in existence on the date of application under the *Act*: *Deyell v. Deyell* (1990), 90 Sask. R. 81(Sask. C.A.). (See, too, *Mitchell v. Mitchell* [(1992), 41 RFL (3d) 220 (Sask CA)], and *Vilcu v. Grams* (1999), 172 Sask. R. 201(Sask. C.A.)).

73 Apart from s. 23, there is simply no mention in the *FPA* about a general power to trace value. The Legislature could have enacted a general power of tracing but did not do so. There is nothing in the *FPA* as a whole from which such a power can be inferred and, as will be seen, the legislative record clearly suggests that the Legislature eschewed such a power.

74 The Chambers judge's justification for finding there is such a general power was, again, the expansive definition of family property and the related jurisprudence. However, there is nothing in the definition of family property nor in the jurisprudence that would justify the implication of a general power to trace the value of family property into after acquired property. The portions of *Good* and *Grosse* cited by the Chambers judge in support of such a power provide no basis for a general power to trace.

75 The Chambers judge also found support for tracing in *Thomas*. It is, however, inapplicable to the facts at hand. In *Thomas*, the value of investment accounts *in existence both at the date of application and at the date of adjudication* had changed dramatically through market forces and substantial withdrawals that had been made. This Court explained that, where neither the date of application nor the date of adjudication results in a fair valuation of the asset, the proper *valuation* of such accounts can attempt to eliminate the effect of market forces and calculate the benefit derived from such accounts by adding back to the value of such accounts the withdrawals made by the parties. *Thomas* provides no support for the existence of a general power to trace value. This Court did not trace property that was no longer in existence; it merely fashioned a practical method of valuing such accounts that fit within the scheme of the *FPA*. Unlike *Thomas*, in the present case, the family property in existence at the application date no longer exists.

76 A review of the legislative record concerning the *FPA* and its predecessor suggests as well that there is no general power to trace contained within the statute. I say this because such a power was proposed but the Legislature chose not to implement it.

77 In the Law Reform Commission of Saskatchewan's [Commission] Report to the Minister (June 1996), titled *The* Matrimonial Property Act: Selected Topics, 1996 CanLIIDocs 135, the Commission first noted that the definition of family property was "unambiguous", and that property acquired after the date of application is not considered family property (at 7). The Commission then explained the distinction between *identification* and *valuation* of family property and the close relationship between the two concepts. The Commission referred to property acquired after the date of application from the proceeds of family property and the concept of tracing and noted (at 9):

> The ambiguity in the way in which the *Act* handles identification and valuation may hide another problem. An asset acquired after date of application is not, by definition, matrimonial property. It may, however, have been acquired from the proceeds of matrimonial property or by use of matrimonial property. It is possible that a court, confronted with appropriate evidence, would trace proceeds of matrimonial property into newly acquired property. There is no clear mandate in the *Act* for such a course of action, however, and no reported decision in which it has been done.

78 While the Commission noted that this approach could be avoided through the use of a constructive trust, the Commission instead proposed a flexible identification date for family property similar to the flexibility provided to a court to establish the date of valuation. At page 16, it stated:

> ... The date of application is no more or less appropriate as an identification date than as a valuation date. For example, if income earned from matrimonial property is used to purchase new assets after the date of application, the new property is as much a product of the marital relationship as a post-application appreciation in the value of existing matrimonial property. Recourse to constructive trust would likely be necessary to achieve an equitable result in such a case.

79 The Commission, at pages 13-14, noted that in an ideal world, a distribution of such assets would occur immediately upon termination of the relationship or bringing an application for division of family property. However, it recognized that the practical realities of our adjudicative system mean that spouses are locked in the marital relationships for at least certain purposes until a distribution is actually ordered. Thus, the Commission submitted that changes in the nature and value of property between the application date and the adjudication date ought to be considered.

80 On this basis, the Commission recommended a change to the definition of family property as follows (at 17):

> "matrimonial property" means any real or personal property whatsoever, regardless of its source, kind or nature, owned, or in which an interest is held, by one or both spouses

(a) on the date of application under this Act, or

(b) between the date of application and the date of adjudication, to the extent that the property was acquired with proceeds, income or profits from other matrimonial property.

81 The Commission submitted that this definition would maintain the crystallization of family property rights as of the date of application, with the addition of a limited form of tracing where property is acquired with the direct proceeds, income or profits of family property that existed at the date of application.

82 This proposed amendment was never incorporated in the *FPA*. The *FPA*, as noted by the Hon. Mr. John Nilson, was essentially identical to the Act that it was replacing, namely *The* Matrimonial Property Act, SS 1979, c M-6.1 [MPA]. The purpose behind the *FPA* was to keep the law the same as the outgoing *MPA*, and to make some technical drafting changes to facilitate translating the Act into French: Saskatchewan, Legislative Assembly, *Debates and Proceedings (Hansard)* 23rd Leg, 2d Sess (12 May 1997) at 1543 (Hon. Mr. Nilson). It may therefore be inferred that the Legislature was not inclined to incorporate a general concept of tracing to deal with property that is acquired from the proceeds of family property that existed at the date of application.

83 Given the foregoing, I agree with Ms. Rankin that the Chambers judge erred by finding that the *FPA* permits a general concept of tracing to be employed and by using that concept as he did.

84 All that said, the Chambers judge was asked approximately 11 years after the application date to determine the legal effect of the parties' decision reflected in the Transfer of Assets Agreement. That decision converted part of the value of the shares as discrete family property into value in discrete real property that is different in nature and kind, as well as in legal and equitable interest than the shares. The value of that property has risen while the parties have delayed finalizing the division of their family property. Ms. Rankin argues that the Chambers judge was, and this Court is, compelled by the strictures of the *FPA* to use the application date value and not the present-day value of that property for the purposes of assisting Mr. Rankin and her in moving that finalization forward. She argues there are no tools under the *FPA* for the Court to use in these circumstances to consider the proper allocation of the increase in the value of the farmland. I disagree.

85 Despite having concluded that the Chambers judge erred in finding the farmland to be family property and by using a tracing concept to establish value, that does not end the matter. A pathway exists within the parameters of the *FPA* and the parties' application to ensure that the value of what is now after acquired property is shared equitably.

86 To demonstrate this, I will start with s. 43 of the FPA. This section allows parties to deal with family property as if it is their own property prior to a final division thereof. It reads:

Property remains separate

> **43**(1) No provision of this Act vests any title to or interest in any family property of one spouse in the other spouse.
>
> (2) Subject to subsection 18(2) and sections 28 and 50, any interspousal contract and any order of a court made pursuant to this Act, the spouse who owns the family property may sell, lease, mortgage, hypothecate, repair, improve, demolish, spend or otherwise deal with or dispose of the property as if this Act had not been passed.

87 This provision very clearly allows parties to deal with family property after the date of application and prior to any court order. Such dealing would include outright selling of family property. It is expansive and, for example, even covers the situation where the property is demolished and its value is thereby extinguished. The ambit of this provision is, in my view, wide enough by virtue of the words "or otherwise deal with or dispose of" to cover almost any dealing with family property, including converting it into other property that would then become after acquired property. Section 43 is therefore an implicit direction to a court to use the provisions of the *FPA* to fashion a fair and equitable distribution of family property, even in situations where the parties have rearranged the ownership of that property or otherwise dealt with its value.

88 It would be strange indeed if a party who had disposed of family property after the application date could come to the court as does Ms. Rankin and argue that the court has no tools at its disposal under the *FPA* to deal with such a situation.

89 The touchstone of any analysis is that an eventual division of family property must achieve a fair and equitable distribution of the same or its value. The issues the parties placed before the Chambers judge engage those principles. The determination of those issues must be capable of being integrated into an eventual division of the parties' family property based on those principles. Indeed, the parties have, by this application, requested the assistance of the court in that regard.

90 This allows the court to consider the nature of the parties' dealings with the family property after the application date or the acquisition of property after the application date as a factor bearing on both the equal or unequal division of that family property and the determination and division of its value.

91 There is jurisprudential support for this approach. This Court in *Deyell v Deyell*, (1991), 90 Sask R 81 (CA) [*Deyell*], suggested as much. Justice Wakeling, in concurring reasons, held that farming operations (and the related income and expenses) subsequent to the date of application are, at best, factors that "may indirectly bear on the desirability of equal division" (at para 68). I take this comment to be a reference to the balancing of factors that would go into an unequal division pursuant to s. 21(2) of the FPA. This Court therefore contemplated the possibility of subsequent non-family property transactions being relevant to an unequal division in the proper circumstances.

92 To similar effect is this Court's decision in *Russell*. The date of application in that case was in 1992, but the trial judgment was not delivered until May 15, 1997. One of the issues at trial, and on appeal, was how to properly deal with the crops and farming income enjoyed by the husband during the five years between the date of application and the date of the trial. The trial judge had determined that the farming operations after the date of application could be considered in her overall conclusion. This Court, at paragraph 13, reiterated that the property available for distribution is that which is in existence at the date of application but approved of her approach saying, that "[a]t several points in the judgment [the trial judge] spoke in terms of making an equitable adjustment as opposed to dividing matrimonial property" (at para 88). It further held that "[t]he legislature permits a court to consider an unequal division of matrimonial property having regard for post-application income generated by matrimonial assets" (at para 94).

93 All of this is to say that in furthering a fair and equitable distribution of the value of the shares of the corporation, the Chambers judge could take into consideration, 11 years post-application, the parties' dealings with it or its shares pursuant to the Transfer of Assets Agreement and Share Sale Agreement. As noted above, assets acquired between the date of application and the date of adjudication that are derived from the proceeds of family property, although not family property within the meaning of the *FPA*, can be considered and appropriately valued in arriving at an equitable distribution of family property. The nature of such acquired assets and other circumstances relevant to their acquisition may be germane. Each case will depend on its circumstances.

94 The effluxion of 11 years between the application date and the date of adjudication in this case has complicated the fair market valuation of the corporation as at the application date and the division of that value when viewed in the context of the principles of a fair and equitable distribution. The parties have removed substantial value from the family property estate. Had the parties merely caused the corporation to sell farmland to the third parties and kept the shares of the corporation which retained the farmland at issue, those shares would likely have been valued as at the date of adjudication to account for the appreciation of the farmland in the corporation. This would have been so because the parties had not finally divided their family property. Any valuation of the corporation and the farmland as requested by the parties in this matter, notwithstanding their creation of after acquired property, must therefore be seen in the context of their attempt to resolve issues that touch on any final division.

95 A key factor that affects the valuation in any division of the corporation is the Transfer of Assets Agreement. It is consistent with the parties' acknowledgment that they have not finally divided their family property. It provides that all assets from the corporation are assigned equally to the parties with the exception of Co-op Equities shares and Viterra shares, which were to belong solely to Mr. Rankin. Although the legal title to the farmland assigned was subsequently transferred into the parties' individual names as described above, it is clear that such transfers are not provided

for in the Transfer of Assets Agreement. I agree with the Chambers judge's conclusion that the parties intended, by the Transfer of Assets Agreement, to assign the assets received from the corporation to themselves equally. I will comment on the Transfer of Assets Agreement further in due course.

96 As indicated earlier, the circumstances before this Court allows it to consider s. 21(2) and (3) of the FPA, dealing with unequal division of family property or its value. To be clear, the gist of this provision does not concern the definition of family property -that definition is assumed - but, rather, it concerns the obligation of the court to achieve a fair and equitable distribution of family property or its value between the spouses and stay true to the foundational principle of the *FPA*, i.e., that there is joint contribution to the building up of financial assets. This allows a court to make adjustments in the division of family property or its value to comport with that principle.

97 As alluded to above, Ms. Rankin says that the parties have not asked for an unequal division of family property and there is no basis to invoke s. 21 of the FPA. I disagree.

98 The pleadings before the Chambers judge showed that both parties had claimed an unequal division, but each for different reasons. Admittedly, their claims were not because of the valuation issue they eventually put before the Chambers judge. That said, the issue of how, 11 years later, to value the shares as they were as at the application date must involve how that value will be equitably distributed. That engages s. 21(2) and (3).

99 Moreover, the Chambers judge had jurisdiction to entertain an unequal division of property as a remedy to the valuation conundrum created by the parties both under Rule 1-4(2) and pursuant to his inherent jurisdiction as noted above. This Court, in the determining this appeal, has the same jurisdiction.

100 I now turn to determine how s. 21(2) and (3) apply in this case.

101 Subsections 21(3)(a), (c) and (q) are germane. Pursuant to s. 21(3)(a), the court can consider any written agreement between the spouses or between one or both spouses. In this case, it is the Transfer of Assets Agreement.

102 Under s. 21(3)(c), it can also consider the duration of the period during which the spouses have lived separate and apart.

103 Section 21(3)(q) empowers the Court to consider "*any other relevant fact or circumstance*" (emphasis added), in determining whether to make an unequal distribution of family property or its value. This provision allows the court to consider dealings with property (not necessarily only family property) that occur before or after the date of application, as suggested in *Deyell* and *Russell*. In this case, using s. 21(3)(q), the Court may consider the post-application date

distribution of property and value held by the corporation to the parties pursuant to the Transfer of Assets Agreement.

104 The Transfer of Assets Agreement must be given great weight. It falls to be considered not only under s. 21(3)(a) and (q), but also under s. 40 of the FPA in determining whether to order an unequal division of family property. The principles enshrined in s. 20 are relevant to the operation of s. 40: Anderson v Anderson, 2021 SKCA 117 at para 33 [Anderson]. Section 40 is repeated here for ease of reference:

> **Agreements between spouses**
>
> **40** The court may, in any proceeding pursuant to this Act, take into consideration any agreement, verbal or otherwise, between spouses that is not an interspousal contract and may give that agreement whatever weight it considers reasonable.

105 The approach to be taken in determining whether to give effect to an agreement between the spouses consists of four analytical steps and is outlined in *Anderson*. For the purpose of this case, the two steps in the following excerpt are relevant and at issue:

> [58] Having regard to the case law and the Supreme Court jurisprudence in this area generally, the approach a court should take when dealing with an interspousal agreement under s. 40 of the FPA should involve the following sequential steps:
>
> . . .
>
> (c) Step three - if no issues arise with respect to the negotiation or execution of the agreement, a court must go on to examine the substance of the agreement to determine if its terms are fair and reasonable in the sense that they are in substantial compliance with the general objectives of the *FPA*. ...
>
> (d) Step four - where the agreement is found to be in substantial compliance with the general objectives of the *FPA* at the time it was prepared, great weight should be given to it, unless a new or a changed circumstance has arisen such that its terms "no longer reflect the parties' intentions at the time of execution" or are no longer in substantial compliance with the general objectives of the *FPA* ([*Miglin v Miglin*, 2003 SCC 24, [2003] 1 SCR 303] at para 88). ...

106 With respect to the third step identified above, the Court can accordingly consider the nature of the Transfer of Assets Agreement, the purpose of it, whether there were any values set out for the property (there were none) and its effect on the fair distribution of family property. I conclude that the terms of that agreement are fair and reasonable in the sense that they are in substantial compliance with the general objectives of the *FPA*.

107 The Transfer of Assets Agreement clearly moves value from the corporation into the names of the parties in equal shares. This fact is significant because the parties, by their joint consent, converted approximately $955,000 of corporate family property value into assets that were technically not family property. This circumstance must be given significant weight because it ostensibly removes property that had been acquired by the parties' joint efforts from consideration as family property in circumstances where the parties have not yet concluded a final division of family property.

108 It is uncontroverted that the value of the shares of the corporation as at the application date was underlaid by a substantial portfolio of corporate farmland that was capable of appreciating in value. It is significant that a significant portion of that value, plus appreciation, still exists in the hands of the parties, although not as family property.

109 In reference to s. 21(3)(c), it is also significant that the parties have been separated for 11 years without the finalization of any division of family property. This provision has been historically used by our courts in the consideration of an unequal division in respect of changes in property holdings between the date of separation and the date of application (see: Sergent v Borisko, 2016 SKQB 355 at para 84 and a summary of such cases in H. (D.) v H. (J.E.), 2001 SKQB 534 at paras 79-84, 214 Sask R 39). However, there is no textual constraint to such a purpose only. I find this provision is amenable to be used in the circumstance so this case when looking at the increase in value resulting form the fact that the parties have not finalized their property division.

110 Given the foregoing, it would be unfair and inequitable in light of the parties' dealings with the corporation and each other to fail to take into account the appreciation in the value of the farmland in any division of family property.

111 I pause to note that the family home and the quarter on which it sits was included in the Transfer of Assets Agreement. Section 22(1)(a) requires an equal distribution thereof except where it is unfair and inequitable to do so, having regard only to any extraordinary circumstances. My analysis set forth above applies with equal force to the family home. I would find that the constellation of circumstances in this case are extraordinary and to fail to take the appreciation of the family home into account would be unfair and inequitable.

112 The parties have conveniently provided both the application date value and the adjudication date value of the farmland in paragraphs 13, 14 and 21 of the ASF.

113 Given the constraints of the definition of family property, the shares of the corporation will be valued as at the application date at the values set forth in paragraphs 13 and 14 of the ASF, plus the amount of $1,313,244, being the proceeds from the share sale as indicated in paragraph 17 thereof. This is essentially what Ms. Rankin has submitted should be the value. Ms. Rankin

agrees that on the basis of *these* values, Mr. Rankin is owed an equalization for the value of the corporation.

114 However, the value as calculated in the previous paragraph will be divided unequally in any final property division between the parties to account for the appreciation of value in the farmland, including the quarter section designated as the family home, using the figures in paragraph 21 of the ASF. The mathematical mechanics of how that will be accomplished will be left to the parties, failing which they may apply to the Chambers judge for a determination. Any such calculation shall take into account the property already in each party's possession or name, any payments or credits referable to the division of the value of the corporation as outlined in the ASF and, if appropriate, any further adjustments for debts and liabilities assumed and tax outlined by the Chambers judge in paragraph 87 of the *Decision*.

115 In the end, therefore, I come to the same bottom line as did the Chambers judge, albeit by a different route. I would dismiss the appeal on that basis.

B. Did the Chambers judge err in finding the farmland is subject to a trust and should be shared equally?

116 In answering the valuation questions put to him, the Chambers judge also considered the parties dealings with the corporation through the lens of trust law. Ms. Rankin argues, as she did in the court below, that trust principles had no application and, moreover, neither party submitted there should be a resulting trust and that the Chambers judge erred in conducting a trust analysis. I again disagree.

117 As previously noted, the Chambers judge raised with the parties at the hearing a number of issues, including resulting trust and s. 50 of the FPA. As I indicated above, Rule 1-4(2) applied. The parties had filed supplementary briefs addressing the issues raised. The Chambers judge therefore had the jurisdiction and power to address the issue.

118 Moreover, the parties had specifically asked the Chambers judge to determine the value of the corporation and the farmland. In answering that question, it was open to the Chambers judge, as part of his inherent jurisdiction, to determine if the circumstances of the case were amenable to a trust analysis in addition to merely an analysis under the *FPA*. A flexible approach to a novel circumstance is sometimes necessary.

119 For example, in *Carruthers*, this Court acknowledged that a family home held by a corporation was indeed a family home for the purposes of the *FPA*, although its value was determined by valuing the shares of the corporation and dividing the shares equally (see paras 50-54). This is an example of the flexible approach that is open to the court in resolving difficult issues of division or valuation. As noted above, the parties have taken significant value out of the

family property pool. Accordingly, the Chambers judge was entitled to consider all the tools at his disposal, including the trust alternative regarding how those assets might be valued.

120 Additionally, s. 52 of the FPA provides that "[t]he rights conferred pursuant to this Act are *in addition to and not in substitution for rights under equity or any other law*" (emphasis added). For example, unjust enrichment can be claimed in the context of a family property dispute (see Carruthers at para 87). Likewise, a constructive trust may also be imposed: *O.O.E. v A.O.E.*, 2019 SKQB 48.

121 I conclude that the Chambers judge made no error in applying a trust analysis to the case.

122 The Chambers judge found there was, on the evidence, an express trust regarding the farmland that it would be held equally. I agree with the Chambers judge's reasoning and conclusion that the Transfer of Assets Agreement created an express trust as a declaration of the parties' intention to retain an equal interest in the farmland transferred to them, notwithstanding the subsequent title transfers.

123 Alternatively, the Chambers judge found a resulting trust. A resulting trust can arise where there has been: (a) a failure of an express trust; (b) a gratuitous transfer of property between partners (voluntary transfer trust); or (c) joint contribution by two partners to the acquisition of property, title to which is in the name of only one of them (purchase money trust): Dunnison Estate v Dunnison, 2017 SKCA 40 at para 19, [2017] 8 WWR 18. The resulting trust allows a claimant to seek, "the recognition of his or her proportionate interest in the asset which the other has acquired with [his or her] property" (Kerr v Baranow, 2011 SCC 10 at para 25, [2011] 1 SCR 269).

124 Section 50 of the FPA is relevant to the question of whether there is a resulting trust arising out of the transfer of corporate assets to the parties. It provides:

> **Presumption of advancement abolished**
>
> **50**(1) The rule of law applying a presumption of advancement in questions dealing with the ownership of property as between spouses who are legally married is abolished, and in its place the rule of law applying a presumption of a resulting trust shall be applied in the same manner as if the spouses were not married.
>
> (2) Notwithstanding subsection (1):
>
> > (a) the fact that property is placed or taken in the name of both spouses as joint owners or tenants is proof, in the absence of evidence to the contrary, that each spouse is intended to have, on a severance of the joint ownership or tenancy, a one-half beneficial interest in the property; and

> (b) money that is deposited with a financial institution in the name of both spouses is deemed to be in the name of the spouses as joint owners for the purposes of clause (a).
>
> . . .

125 This section abolishes the presumption of advancement between spouses that are legally married and creates a resulting trust. Ms. Rankin argues that s. 50 only contemplates instances involving a transfer of property between the spouses and because the property transferred was from the corporation, s. 50 does not apply.

126 I disagree. While the classic circumstance caught by s. 50 is such a transfer, the subject matter of the section is *questions in dealing with the ownership* of *property* as *between spouses who are legally married.* It is not restricted to family property, nor is it restricted to transfers between the parties.

127 The limits on the application of s. 50 suggested by Ms. Rankin would prevent a court from dealing with the situation in this case where the spouses caused value in corpo rate family property to be taken out of the pool of property they have accumulated over the years and to be transferred to them personally for no consideration passing between themselves. Such circumstances raise a question dealing with *the ownership of property as between spouses who are legally married* at the relevant time. The terms of the resulting trust are those set out in the Transfer of Assets Agreement.

128 The circumstances can also be dealt with as a constructive trust. I agree with the Chambers judge's reasoning respecting a constructive trust set out in paragraph 73 of the *Decision*. The three criteria for finding a constructive trust are an enrichment, a corresponding deprivation and the absence of any juristic reason for the enrichment (such as a contract or disposition of law): *Pettkus v Becker*, [1980] 2 SCR 834 at 844 and 848, quoting *Rathwell v Rathwell*, [1978] 2 SCR 436 at 455.

129 Part of the basis for the Chambers judge's consideration of a constructive trust was that he found the parties interest in the farmland constituted family property. As I have indicated, he erred in so finding. However, this finding is not necessary to ground the use of a constructive trust in the circumstances of this case.

130 If Ms. Rankin were to keep the appreciation of the farmland in her name as her family property, she would be enriched because, based on the legal ownership of the farmland, the parties do not have farmland of equal value. Such a division would not reflect the equal assignment of the assets to them set forth in the Transfer of Assets Agreement. As a result, Mr. Rankin would have suffered a deprivation. There is no juristic reason for the enrichment, i.e., the unequal transfer of value. Indeed, the parties acknowledged that the Transfer of Assets Agreement and the land transfers were not a final settlement of their family property, so the distribution of its value is in play.

131 Based on the foregoing I agree with the Chambers judge's finding that the parties hold the assets, including the titles to the four quarters of land, transferred to them by the corporation equally in trust for both of them until those assets or their value is distributed between the parties as part of a final division of their family property. On this basis, both parties are entitled to share equally in the value of those assets as at the present date. Insofar as the share proceeds are concerned, there is no dispute regarding their division and I need not comment further.

C. Did the Chambers judge err in determining income and expenses from the farmland for and after 2017 should be shared equally?

132 Ms. Rankin submits that even if the Chambers judge found that the Transfer of Assets Agreement evinced an intention to an equal entitlement of the assets transferred thereunder, he did not cite any jurisprudence to support his finding that the income and expenses are to be shared equally. She argues that because the assets are not family property, the Chambers judge had no authority to divide the income and expenses. There is no merit to this argument.

133 When the Chambers judge determined that the parties held the beneficial interest in the farmland equally, notwithstanding the legal interest, the corollary of this was that the income and expenses were to be divided equally. The fact that the proceeds from the farmland post-application date are not family property did not prevent him from answering the question put to him in this regard. I agree with his reasoning on this issue.

134 I see no error in the decision of the Chambers judge in respect of this issue.

VI. CONCLUSION

135 The appeal of Ms. Rankin is dismissed with costs to Mr. Rankin in the usual way.

***Whitmore J.A.*:**

I concur.

***Tholl J.A.*:**

I concur.

Appeal dismissed.

Tab 19

1999 CarswellOnt 3042
Ontario Superior Court of Justice

Mongillo v. Mongillo

1999 CarswellOnt 3042, 103 O.T.C. 252, 91 A.C.W.S. (3d) 391

Vittoria Mongillo, Plaintiff and Luigi Mongillo, Defendant

Shaughnessy J.

Heard: May 18, 1999
Heard: May 19, 1999
Heard: May 20, 1999
Heard: May 21, 1999
Heard: May 25, 1999
Judgment: September 24, 1999
Docket: 38050/95

Proceedings: additional reasons at (October 12, 1999), Doc. 38050/95 (Ont. S.C.J.)

Counsel: *Colin Still*, for Plaintiff.
Joseph C. Vieni, for Defendant.

Subject: Torts; Contracts; Corporate and Commercial; Civil Practice and Procedure; Estates and Trusts

Related Abridgment Classifications

Civil practice and procedure
XXIV Costs
XXIV.7 Particular orders as to costs
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Headnote

Fraud and misrepresentation --- Fraudulent misrepresentation — Particular relationships — Sale of land — Known falsity

Plaintiff wife was divorced by defendant's son — Separation agreement gave wife exclusive possession of matrimonial home owned by father-in-law — Father-in-law convinced wife to move to smaller, less expensive home, promising to give her $100,000 of proceeds of sale of larger home toward purchase of smaller home — Father-in-law bought smaller home and told wife she was 50 per cent owner — Father-in-law had wife sign trust agreement and power of attorney in his favour — Wife applied for declaration that trust agreement and power of attorney were void — Declaration granted — Father-in-law transferred title into his own name exclusively — Father-in-law knew his representation to wife that she was 50 per cent owner was false and made it to induce her to move from larger house — Wife acted in reliance on representation to her detriment in not requesting $100,000 in cash instead of 50 per cent interest in house — Trust agreement and power of attorney void ab initio by reason of fraudulent misrepresentation.

Contracts --- Mistake — Mistake as to nature of agreement (Non est factum) — General

Application for declaration that trust agreement and power of attorney were void — Plaintiff wife was divorced by defendant's son — Separation agreement gave wife exclusive possession of matrimonial home owned by father-in-law — Father-in-law convinced wife to move to smaller, less expensive home, promising to give her $100,000 of proceeds of sale of larger home toward purchase of smaller home — Father-in-law bought smaller home and told wife she was 50 per cent owner — Father-in-law had wife sign trust agreement and power of attorney in his favour — Father-in-law transferred title into his own name exclusively — Wife applied for declaration that trust agreement and power of attorney were void — Declaration granted on other grounds — Although wife mistaken as to nature and content of document, she was careless in not reading trust agreement and power of attorney — Wife had grade 12 education, was fully conversant in English and under no undue pressure — Non est factum not available.

Fraud and misrepresentation --- Fraudulent misrepresentation — Non est factum

Application for declaration that trust agreement and power of attorney were void — Plaintiff wife was divorced by defendant's son — Separation agreement gave wife exclusive possession of

matrimonial home owned by father-in-law — Father-in-law convinced wife to move to smaller, less expensive home, promising to give her $100,000 of proceeds of sale of larger home toward purchase of smaller home — Father-in-law bought smaller home and told wife she was 50 per cent owner — Father-in-law had wife sign trust agreement and power of attorney in his favour — Father-in-law transferred title into his own name exclusively — Wife applied for declaration that trust agreement and power of attorney were void — Declration granted on other grounds — Although wife mistaken as to nature and content of document, she was careless in not reading trust agreement and power of attorney — Wife had grade 12 education, was fully conversant in English and under no undue pressure — Non est factum not available.

Barristers and solicitors --- Relationship with others — Relationship with opposite party — Fiduciary duty — Duty to suggest independent advice

Application for declaration that trust agreement and power of attorney were void — Plaintiff divorced defendant's son — Separation agreement gave plaintiff exclusive possession of matrimonial home owned by father-in-law — Father-in-law convinced plaintiff to move to smaller, less expensive home, promising to give her $100,000 of proceeds of sale of larger home toward purchase of smaller home — Father-in-law bought smaller home and told plaintiff she was 50 per cent owner — Father-in-law had plaintiff sign trust agreement and power of attorney in his favour — Father-in-law transferred title into his own name exclusively — Wife applied for declaration that trust agreement and power of attorney were void — Declaration granted — Solicitor acting on transaction did not explain trust agreement or power of attorney to plaintiff — Solicitor had acted for plaintiff in previous real estate transaction but took position he acted solely for father-in-law in this transaction — Plaintiff said she trusted father-in-law and solicitor — Solicitor did not suggest independent legal advice — Trust agreement and power of attorney void ab initio for lack of independent legal advice.

APPLICATION by wife for declaration that trust agreement and power of attorney were void by reason of fraudulent misrepresentation, non est factum and failure to provide independent legal advice.

***Shaughnessy, J.*:**

1 The plaintiff, Vittoria Mongillo married Nick Mongillo on July 10, 1982, and they were divorced in 1993. The defendant, Luigi Mongillo, the father of Nick Mongillo, was distressed by the marital discord, and as the self-professed patriarch of the family, he made arrangements for his daughter-in-law to move out of the matrimonial home, which he owned, and into a smaller home. The plaintiff was told that she was an equal owner of the smaller home. This fact was true. However, the plaintiff also executed a Trust Agreement and Power of Attorney, which enabled the defendant to transfer title into his name exclusively. After the relationship of the plaintiff and the defendant was no longer amicable, the defendant, without notice, transferred title to the home into his name in September, 1995.

2 The issues in this proceeding relate to whether the Trust Agreement and Power of Attorney can be set aside by the plaintiff by reason of:

(a) A fraudulent misrepresentation made by the defendant to the plaintiff which induced her to sign the documents.

(b) The principle of non est factum.

(c) The failure of the defendant through his representative to provide independent legal advice to the plaintiff.

3 Plaintiff's counsel raised several other issues relating to the principles of estoppel, however it is not necessary in the determination of this matter to deal with these further issues of law.

Background Information

4 After their marriage, the plaintiff and Nick Mongillo lived with the defendant's family for six years at 29 Lee Avenue in Markham, Ontario. It was a tradition in the Mongillo family that the married children would live at home for several years in order that they could save money to purchase their own home.

5 In 1988, the plaintiff and her husband moved to 14 Kevlin Avenue in the Markham area. The defendant was a subdivider/contractor with extensive experience in new home construction. He arranged for the plaintiff and her husband to move into one of his newly constructed homes at 14 Kevlin Avenue in Markham. This was a 3,800 square foot home on a large lot. At the time they moved into 14 Kevlin Avenue, Nick Mongillo was employed on a full time basis with Bell Canada. Occasionally, Nick Mongillo would assist his father at his various construction sites. The plaintiff would also occasionally assist with the clean up of homes prior to the closings.

6 The evidence establishes that 14 Kevlin Avenue was worth approximately $600,000 at the time that the plaintiff separated from her husband. The plaintiff and her husband paid the household accounts for 14 Kevlin Avenue including the gas, electrical, phone and house insurance. They also installed some landscaping and fixtures to the home. There was no rent paid. While there may have been some general discussions prior to the marital separation that 14 Kevlin Avenue might one day be transferred to Vittoria and Nick Mongillo, nevertheless, the evidence establishes that this was not going to occur within any short period of time. Indeed when Nick Mongillo approached his father about conveying title to 14 Kevlin Avenue to him and Vittoria, the defendant indicated that the home had a value of $600,000 and he would hold a mortgage for that amount. He also expected monthly payments. The transaction was never completed.

7 The marital discord of the plaintiff and Nick Mongillo commenced in 1988, with the husband leaving and returning to the home on several occasions in the years 1988-1990. The final separation

occurred in 1991. Throughout this period of time, the plaintiff was not employed outside the home. She did receive child support payments for the children, ranging from $1,000 to $1,150 per month. Otherwise, she was dependent on the defendant, Luigi Mongillo, for financial and emotional support.

8 Vittoria and Nick Mongillo executed a separation agreement dated May 29, 1992. The provisions of the separation agreement that are relevant to this proceeding are paragraphs 15(a) and 30(d). These paragraphs state that "the spouses acknowledge that the matrimonial home (14 Kevlin Avenue) is owned by the husband's father, and that neither of them has any proprietary claim or interest therein." The agreement further stipulates that Vittoria Mongillo was to continue to have exclusive possession of the matrimonial home. The parties further agreed that the separation agreement constituted the entire agreement, and that there were no representations, warranties, collateral agreements or conditions affecting their agreement.

9 In April, 1993, the defendant met with the plaintiff and told her that the matrimonial home at 14 Kevlin Avenue was too big a home for her to maintain. The defendant also testified that there were arrears of property taxes in excess of $18,000 at that time. The plaintiff's evidence is that at the meeting in April, 1993, the defendant indicated that he wanted to purchase a smaller home for her and the children. The plaintiff testified that the defendant told her that he wanted to sell 14 Kevlin Avenue and give $100,000 to Vittoria Mongillo. Later, he suggested that she use the $100,000 as her contribution to the purchase price of a smaller home. It is the plaintiffs evidence that the defendant, in April of 1993, indicated that he intended to set aside a further $100,000 to be given to his son at some future time, and the remainder of the proceeds of sale from 14 Kevlin Avenue was to be placed in trust for the two grandchildren.

10 The defendants evidence is that he never made any promise to give the plaintiff $100,000 to be used as her contribution to the purchase price of a smaller home, or to put money in trust for the grandchildren. He did testify however, that he told Vittoria Mongillo that he would purchase a smaller home, not too far away from 14 Kevlin Avenue, and allow the plaintiff to live there until "the children got bigger."

11 The plaintiff agreed to move out of 14 Kevlin Avenue. She acknowledged that a smaller home was a reasonable consideration. She accompanied the defendant in the house search. Eventually, the defendant located a home at 52 Southdale Drive, Markham, Ontario, and he invited the plaintiff to inspect it. The parties agreed that the home would be adequate for the plaintiff and her children. While the closing of the transaction took place on January 7, 1994, the plaintiff and her children did not take possession until February 25, 1994.

12 The defendant personally and through subcontractors, had extensive renovations made to 52 Southdale Drive in the months of January and February, 1994. The plaintiff's evidence is that she contributed $5,000 for kitchen cabinets. The defendant states that he borrowed $5,000 from

the plaintiff to pay the subtrades in cash. His evidence was that since the plaintiff had not made a demand, he has not repaid the loan.

13 The plaintiff also testified, and she filed as exhibits, receipts substantiating the purchase and installation of kitchen appliances, light fixtures, drapes and blinds at 52 Southdale Drive. She also produced documents indicating that she paid the taxes and utilities for the first year that she resided at 52 Southdale Drive.

14 The plaintiff's evidence is that on more than one occasion, before and after the closing of 52 Southdale Drive, Luigi Mongillo told her that she owned one-half of the home. There was never any discussion about any restrictions or limitations on her interest in the home.

15 The close relationship between the plaintiff and the defendant dramatically changed in August, 1995, when Luigi Mongillo became aware that the plaintiff was having a male friend visiting the home. In a heated confrontation, the defendant told the plaintiff that she was not permitted to have male acquaintances visiting at the home. The defendant also told the plaintiff that 52 Southdale Drive was not her home. The plaintiff testified that the reference to the home not being hers, caused her sufficient concern that she retrieved a manila envelope which contained the lawyer's reporting letter and documents relating to the purchase of 52 Southdale Drive. It is the plaintiff's evidence that she had not previously read the reporting letter or reviewed the documents. She took note of a Trust Agreement and Power of Attorney given to Luigi Mongillo in relation to 52 Southdale Drive and retained a lawyer to investigate the title. This litigation was then commenced.

Facts Surrounding the Purchase of 52 Southdale Drive

16 Mr. Klemens Fass had been the defendant's lawyer for over 20 years, and had acted on his behalf in at least 20 real estate transactions. On January 6, 1994, a meeting was arranged at Mr. Fass's office to execute closing documents for the purchase of 52 Southdale Drive.

17 The plaintiff's evidence is that the defendant requested that she attend with him at the lawyer's office to sign the closing documents. She testified that on previous occasions, and again on the morning of January 6th before attending Mr. Fass's office, the defendant told her that she was to be a one-half owner of 52 Southdale Drive.

18 Present at the meeting of January 6, 1994, were Mr. Klemens Fass, Luigi Mongillo and Vittoria Mongillo. There is some dispute in the evidence as to whether Mr. Fass's secretary was momentarily in attendance in the private office of Mr. Fass.

19 The plaintiff's evidence is that the attendance in Mr. Fass's office lasted no more than 15 minutes. She stated that Mr. Fass explained that they had to sign closing documents for the purchase of 52 Southdale Drive. The plaintiff testified that she observed on the desk in front of her a number of papers and documents. It is her evidence that the first document on top was a "transfer of deed".

She stated that she looked at the document, and she noted that it indicated that she was a one-half owner with Luigi Mongillo as a tenant in common. Her evidence is that she was satisfied that all was in order as her name was being put on title. She testified that based on her experience and trust in other dealings with Luigi Mongillo, she proceeded to sign all the other closing documents without reading them. The evidence of the plaintiff is that Mr. Fass did not provide any explanation of the documents she was signing. She admits that she did not seek an explanation of what she was signing. She recalls stating at the meeting that she trusted Luigi and Mr. Fass.

20 The plaintiff's evidence is that Mr. Fass did not suggest or even mention to her that she might wish to retain her own lawyer before signing the documents. The plaintiff states that she did not have any particular concerns, and she proceeded to sign the numerous documents, and Luigi Mongillo signed the documents after her. It is the plaintiff's recollection that Luigi Mongillo did not speak at all in Mr. Fass's office, nor does she recall Mr. Fass speaking directly to him.

21 The plaintiff's evidence, which is corroborated by Mr. Fass and the defendant, is that no copies of the documents being signed were given to either party on January 6, 1994. Indeed, it was not until March, 1994, that the defendant handed to the plaintiff a brown manila envelope which he told her contained a letter from the lawyer and copies of the title documents. It is the plaintiff's evidence that she never opened the envelope and reviewed the contents until August, 1995, after a bitter confrontation with the defendant.

22 Mr. Luigi Mongillo's evidence was that after he executed the agreement of purchase and sale for 52 Southdale Drive, he had a discussion with the plaintiff wherein she expressed a concern that if the defendant and his wife died, then the other adult children of Luigi Mongillo would force her out of the home. Mr. Mongillo testified that he shared these concerns, and therefore, when he delivered a copy of the Agreement of Purchase and Sale to Mr. Fass in November, 1993, he advised that he wanted Vittoria Mongillo's name on the deed.

23 Mr. Mongillo testified that it was not his intention to transfer property to any of his children (including Vittoria Mongillo) while he was alive, but rather they would inherit on his death. In the meantime, he instructed his lawyer, Mr. Fass, to "protect the property".

24 Mr. Mongillo recalls attending Mr. Fass's office the morning of January 6, 1994. He denies having any discussion with the plaintiff concerning title to the home, prior to attending the lawyer's office. His evidence is that Mr. Fass explained each document to Vittoria Mongillo as she signed them. He recalls Vittoria stating in the course of the meeting, that she trusted Mr. Fass and Luigi. However, the defendant maintains that he does not know what Vittoria signed in Mr. Fass's office, other than that they were closing documents required to purchase 52 Southdale Drive.

25 The defendant testified that he did not read the contents of the documents he was asked to sign. His evidence is that Mr. Fass did not explain the documents to him, and he did not request an explanation. He estimates that he was in Mr. Fass's office for approximately 20 minutes.

26 Mr. Mongillo recalls that Mr. Fass told Vittoria, as they were about to leave the office, that he acted only for Luigi Mongillo and not her; that Mr. Mongillo bought the house and she had not contributed to the purchase price; that Luigi Mongillo could do anything he wanted with the home, including sell it or put a mortgage on it. The defendant testified that Vittoria Mongillo's response was that she was aware of this, but she trusted Luigi.

27 Mr. Mongillo testified that sometime after the real estate transaction closed, he received a telephone call from Mr. Fass's office to come in and pick-up the reporting letter and copies of the documents. He states that he delivered a copy of the letter and documents to Vittoria Mongillo a few weeks after he received them.

28 Mr. Klemens Fass was called to the Bar of Ontario in 1972, and his practice consists of primarily solicitor's work in the areas of real estate, estates, and corporate law. He was called as a witness by the defendant. He testified that Luigi Mongillo came to his office on or about November 17, 1993, to discuss the purpose of buying 52 Southdale Drive, and how title to the property was to be registered. Mr. Fass had no notes of the conversation, but his recollection is that he was informed that Vittoria Mongillo was moving from Kevlin Avenue to Southdale Drive as the Kevlin Avenue home was too large for her to maintain. Mr. Fass testified that the discussions concerning how title was to be registered essentially involved estate planning considerations. Mr. Fass testified that Luigi Mongillo wanted control of the property, and at some future time he would give the property to Vittoria. Accordingly, Mr. Fass decided that the estate planning objective could be achieved by registering title in the names of Luigi and Vittoria Mongillo, while control of the property could be exercised by Luigi Mongillo through a Trust Agreement executed by the parties and a Power of Attorney executed by Vittoria Mongillo in favour of Luigi Mongillo. Mr. Fass assumed that the gift to Vittoria Mongillo would take effect on Luigi Mongillos' death. However, he testified that he had never seen Mr. Mongillo's will, and he had no notes in his file to this effect.

29 In cross-examination, Mr. Fass acknowledged that the Agreement of Purchase and Sale entered into by Luigi Mongillo for the purchase of 52 Southdale Drive, was executed only by the defendant. The plaintiff's name was not shown as a purchaser on the Agreement. A direction as to title was prepared on November 17, 1993, on Mr. Mongillo's instruction that title be registered in the names of Luigi Mongillo and Vittoria Mongillo each as to a one-half interest as tenants in common. Mr. Fass stated in his evidence, that Luigi Mongillo had given him specific instructions to put Vittoria Mongillo on title as an owner. However, he also testified that "I had the feeling that after Luigi's death, the property was to go to her". He then testified that what was being arranged was a method to save Luigi Mongillo's estate from paying "probate fees".

30 Mr. Fass has no notes of the meeting at his office with the Mongillo's on January 6, 1994, yet he maintains that he has an independent recollection of the event. He testified that he spoke to Vittoria and Luigi together, and he did not specifically discuss matters solely with Vittoria.

He stated that it is his usual custom to discuss the monetary aspects of the transaction and then to proceed to discuss each document that has to be signed. It was also his custom to review his correspondence braid to determine if there were any outstanding problems in relation to the transaction.

31 Mr. Fass acknowledged that a draft of the transfer of title and the direction as to title, would have been produced and shown to Vittoria Mongillo at the January 6, 1994 meeting. Indeed, Vittoria Mongillo was told to sign the direction as to title, even though only the signature of Luigi Mongillo was required on the document. Both the draft transfer of title and the direction indicated that Luigi Mongillo and Vittoria Mongillo each held a one-half interest as tenants in common of the subject property.

32 Mr. Fass testified that he explained the Trust Agreement to the parties, however, he also stated that he did not have a proper recollection of what he told the parties. He states that he has a clear recollection that Vittoria Mongillo raised concerns that if the property was subsequently conveyed away, that she wanted to be protected. Mr. Fass's evidence is that upon Vittoria making this statement he immediately summoned his secretary into his office and gave her instructions to prepare an Indemnification Agreement. He testified that the Indemnification Agreement was prepared to protect Vittoria from any costs or claims that may arise in holding the property in trust for Luigi Mongillo. The Indemnification Agreement was executed in the presence of Mr. Fass by Luigi Mongillo. Mr. Mongillo also gave evidence that he recalls the secretary coming into the office and that Mr. Fass dictated to the secretary. The plaintiff denies that the secretary ever attended in the office while she was present. The secretary was not called as a witness at trial.

33 Mr. Fass has a recollection, which he recounted several times in his evidence, that Vittoria Mongillo stated that she trusted Mr. Fass and the defendant. He recalls vaguely telling the plaintiff that the defendant was still the beneficial owner of the property, and nothing had changed from 14 Kevlin Avenue.

34 Mr. Fass's evidence is that in the course of the meeting of January 6, 1994, he did *not* make it clear that he was acting only for Luigi Mongillo. He has no recollection of stating who his client was. However, Mr. Fass maintained at trial that Vittoria Mongillo was not his client. He further stated that he did not feel it was necessary to send her away for independent legal advice, as there had been no change in the equity from Kevlin Avenue, and in his opinion, there was no interest of Vittoria Mongillo to protect.

35 While he has no specific recollection of what he said to Vittoria Mongillo and Luigi Mongillo concerning the Trust Agreement and the Power of Attorney, he believes he would have discussed the documents for no more than a couple of minutes and he would have provided a capsulized explanation of the importance of the document before it was executed.

36 Mr. Fass testified that his next contact with Luigi Mongillo was in September, 1995. Again, Mr. Fass had no notes of this conversation, but it is his recollection that Mr. Mongillo told Mr. Fass that he wanted to transfer the property into his name solely in order to "make sure the grandchildren were living in a proper environment and to make sure his grandchildren were looked after." Mr. Fass recollects that Luigi Mongillo discussed his concerns that 52 Southdale Drive might become a matrimonial home as a result of a possible marriage or co-habitation of Vittoria with another person, in which case his grandchildren would not benefit. Mr. Fass testified that he advised Luigi Mongillo that he had control over the property, and he recommended that title be transferred into the sole name of the defendant. However, Mr. Mongillo told Mr. Fass that he did *not* want to change the existing living arrangements. Therefore, acting on instructions Mr. Fass transferred title into the sole name of Luigi Mongillo on September 11, 1995. Vittoria Mongillo was not advised by Mr. Fass of this transfer of title.

37 It is the submission of counsel for the plaintiff that the credibility of Mr. Fass is in issue. In his evidence, Mr. Fass stated that the Power of Attorney and the Trust Agreement were prepared by his office in advance of the January 6, 1994 meeting. He also stated that the Indemnity Agreement was dictated and prepared in his office while Vittoria and Luigi Mongillo were present. However, in an examination under oath held in March, 1996, (page 18 Q. 63 & 64), Mr. Fass stated that the Indemnity Agreement, the Power of Attorney and the Trust Agreement were all prepared "concurrently". It is Vittoria Mongillo's evidence that the Indemnity Agreement was never dictated or prepared in her presence. It is further her evidence that she never asked any questions that related to her ongoing personal liability for costs and expenses, by reason of holding the land in trust for Luigi Mongillo. Indeed her evidence is that she did not read the Trust Agreement or the Power of Attorney or the Indemnity Agreement, and that these documents were never explained to her by Mr. Fass.

38 I find that Mr. Fass's recollection of what was said at the meeting of January 6, 1994, is, by his own admission, vague and uncertain. I formed the impression that he was attempting to reconstruct events to provide answers and explain his actions and the extent of his participation in this transaction. I find that he has no independent recollection of what he told Vittoria Mongillo, if anything, concerning the Trust Agreement, the Power of Attorney and the Indemnity Agreement. Mr. Fass was a very busy real estate practitioner, who was being asked to recollect events 5 years previous, without the benefit of notes. Further, he appeared to be under considerable stress while testifying. It was disclosed during his evidence, that while he was not a named defendant, nevertheless, the Lawyer's Professional Indemnity Company had been consulted in this matter. Accordingly, it was apparent from his manner of testifying that Mr. Fass was concerned about his personal liability, and in the circumstances, this coloured his evidence to some considerable extent.

39 I find that I accept the evidence of Vittoria Mongillo, that she attended in Mr. Fass's office for approximately 15 minutes and signed the documents presented to her for closing, without receiving

or requesting an adequate explanation of the documents. I find that Mr. Fass did not explain the importance or significance of the Trust Agreement and the Power of Attorney to the plaintiff. It was Mr. Fass's belief that Luigi Mongillo was his client, and Vittoria Mongillo had no interest to protect. In his testimony, he acknowledged that with the benefit of hindsight, he ought to have sent Vittoria Mongillo off for independent legal advice in order to stave off any criticism concerning the events which transpired in his office.

Previous Investment in Real Estate by the Mongillo Family

40 When Vittoria and Nick Mongillo were married, they were given a significant amount of cash as wedding gifts. They gave this money to Luigi Mongillo to invest on their behalf. He used the funds to purchase an investment referred to as the Kennedy Road property. Following the separation of Vittoria and Nick Mongillo, and pursuant to the terms of their separation agreement, the defendant arranged for the Kennedy Road property to be sold and for Vittoria Mongillo to receive her share of the proceeds, which amounted to $50,000. The purchase and sale of the Kennedy Road property was handled by Luigi Mongillo. Mr. Fass was their solicitor in the transaction. In the course of dealing with the Kennedy Road property, Vittoria Mongillo executed a Power of Attorney in favour of Luigi Mongillo. However, there was no Trust Agreement prepared or executed in relation to this transaction.

The Position of the Parties

41 The plaintiff's position is that when Vittoria Mongillo attended the law office of Mr. Klemens Fass on January 6, 1994, she was lead to believe that she was executing documents in order to be registered as a one-half owner of 52 Southdale Drive. It is the plaintiff's position that Luigi Mongillo deliberately misrepresented to her the nature and restrictions to her title on the property. The plaintiff submits that the Trust Agreement and the Power of Attorney are void ab initio on the basis of non est factum, the doctrine of unconscionability, estoppel, fraud and lack of independent legal advice.

42 The defendant's position is that Vittoria Mongillo obtained only an undivided one-half interest as a tenant in common of 52 Southdale Drive, and which interest she held in trust for the beneficial owner, Luigi Mongillo. It is submitted that the legal issues of non est factum and fraudulent misrepresentation, only become relevant to the courts consideration if it is accepted that there was a common intention between the parties that Vittoria Mongillo had both a legal and a beneficial interest in 52 Southdale Drive, unfettered by a trust in favour of the defendant. The defendant maintains that the plaintiff's interest in the Southdale property was no more or less than as disclosed in the Trust Agreement.

Analysis

43 There was considerable evidence adduced at trial concerning the contributions that may have been made by Nick and Vittoria to the Mongillo household while living at the Lee Avenue and Kevlin Avenue properties. However, I find that this evidence does not assist the plaintiff in this proceeding. While assistance may have been rendered from time to time by the plaintiff to Luigi Mongillo and his family, nevertheless there was no expectation that she would as a result be compensated for her contributions. Indeed the evidence establishes that the plaintiff equally obtained a benefit by living at the Lee and Kevlin residences rent free. Further, the separation agreement entered into between Nick and Vittoria Mongillo confirms that Vittoria did not have a proprietary or equity interest in 14 Kevlin Avenue. Therefore, the analysis of the parties' positions commences with the acquisition of 52 Southdale Drive.

44 The pivotal question that must be answered is, why did Luigi Mongillo direct that title to 52 Southdale Drive be registered in Vittoria Mongillo's name and his name each as to a one-half interest as tenants in common?

45 I find that the only plausible and reasonable explanation is provided in the evidence of Vittoria Mongillo. I accept her evidence that Luigi Mongillo approached her in April, 1993, and suggested to her that she should move out of 14 Kevlin Avenue. I accept the evidence of the plaintiff that the defendant told her that out of the proceeds of the sale of 14 Kevlin Avenue he would give her $100,000 for the purchase of another smaller home; and that he would at some unspecified time in the future, give his son Nick $100,000 and the balance of the proceeds of sale would be placed in trust for the two grandchildren. I further accept the plaintiff's evidence that the defendant specifically told her, on more than one occasion, that title to 52 Southdale Drive was to be registered in both of their names. It is not in dispute that the defendant had the plaintiff accompany him in the house search, and he sought her approval before signing the offer of purchase on the property. I further find that the plaintiff paid $5,000 for the kitchen cabinet renovations, and that she paid the taxes on the home in the first year. All of these actions were consistent with home ownership.

46 I find that Luigi Mongillo never advised the plaintiff that he intended to maintain control over 52 Southdale Drive through a Trust Agreement and Power of Attorney. There is no credible or reliable evidence to suggest that Vittoria Mongillo was aware that she was taking title to the property in trust for Luigi Mongillo. Her evidence, which I accept, is that Luigi Mongillo told her, as well as family members and friends, that he was purchasing a home for her and the children, and her name was to be registered on title as to a one-half interest. When the plaintiff attended at the lawyer's office on January 6, 1994, she observed her name on the draft transfer and the direction as to title, which she executed. There was no reference in the transfer or the direction as to title that she was holding the property in trust. The defendant and Mr. Fass both acknowledged that they recalled Vittoria stating that she trusted them as she proceeded to execute the documents. I have no doubt that she believed that the promise made to her by Luigi Mongillo in April, 1993, was being fulfilled.

47 The evidence of Mr. Fass that the transaction involving 52 Southdale Drive was structured to effect an estate planning purpose while maintaining control of the property in the hands of Luigi Mongillo, does not appear plausible. If Mr. Mongillo wanted to maintain absolute control of the property, one would have thought that his lawyer would register a notice of the Trust Agreement on title. The fact that the transfer of title made no reference to the property being held in trust, meant that it was open to Vittoria Mongillo to mortgage or otherwise dispose of her interest in the property. This, of course, would be inconsistent with Luigi Mongillo's desire to exercise control over the land. In relation to estate planning, and the suggestion that Luigi Mongillo would give the property to Vittoria on his death, the evidence does not support such a contention. At trial it was acknowledged that Mr. Fass had never examined Mr. Mongillo's will, and the defendant acknowledged that he had not directed in his will that 52 Southdale Drive be left to either the plaintiff or his two grandchildren.

48 It is difficult to ascertain the motivation of the defendant in having title to the home registered in his name as well as the plaintiffs. His suggestion that this was done to protect the plaintiff and her children from being "thrown out of the home" by other family members, does not appear to be supported by the facts. Since his will made no provision for 52 Southdale Drive to be transferred to the plaintiff and/or her children, then on his death the representatives of his estate could exercise their rights under the Trust Agreement and take control of the asset and sell it. Accordingly, the suggestion that the Trust Agreement and Power of Attorney were created for estate planning purposes and for the benefit of the plaintiff and her children is not credible.

49 I find that Mr. Mongillo, for the first few years following the separation, was bitterly disappointed in his son who he perceived as abandoning his wife and children. Accordingly, the defendant felt an obligation to support them. He maintained the plaintiff and the children at 14 Kevlin Avenue with the hope that his son would reconcile with the plaintiff. Once the son divorced the plaintiff and remarried, it was apparent to the defendant that there was to be no reconciliation and he then proposed that Kevlin Avenue be sold. Whether the defendant was concerned about the provisions in the separation agreement, which gave the plaintiff exclusive possession of 14 Kevlin Avenue (but which would have no legal effect on the defendant's rights), or he was concerned that he would encounter significant difficulties in gaining the co-operation of the plaintiff to move out of Kevlin Avenue with her children is unknown. It is not in dispute that the defendant wished to maintain control over members of his extended family. Regardless of what motivated Mr. Mongillo, I find that he induced the plaintiff to move out of 14 Kevlin Avenue with the false representation that he was providing her with $100,000 of the sale proceeds to purchase a smaller home, and that she would have an equal one-half interest in the home. I find that he never disclosed to her that she would be holding the property in trust for him, and that therefore, her personal interest in the property was nonexistent. Without advising the plaintiff, he surreptitiously arranged for a Trust Agreement and Power of Attorney to be created, which would leave him in control of the property.

50 The fact that the plaintiff was not contacted by Mr. Fass before January 6, 1994 to determine if she understood and was willing to execute a Trust Agreement as well as a Power of Attorney in favour of the defendant, leads me to the further conclusion that Mr. Mongillo did not want the plaintiff to be alerted to his scheme. I accept the plaintiff's evidence that as late as the morning of January 6, 1994, before attending the lawyer's office to sign the closing documents the defendant represented to her that she would be receiving an equal one-half interest in the property. I further find that Mr. Mongillo knew that this representation was false, and he made it to deliberately mislead the plaintiff.

The Law

Fraudulent Misrepresentation

51 Professor Waddams in the *Law of Contracts* (1984) Toronto Canada Law Book at page 222 states the legal principle that "if B fraudulently misrepresents the nature of the document or induces the signature by some other fraudulent trick, there can be no doubt that relief will be available to A against B". Where the party to the contract induces the signer to execute the document by making a fraudulent misrepresentation, then the transaction will be voidable for fraud whether or not the signer is "negligent", and whether or not the mistake is "fundamental".

52 In *Francis v. Dingman* (1983), 43 O.R. (2d) 641 (Ont. C.A.), the Ontario Court of Appeal determined that in order for a representation to be fraudulent, it must be one:

(1) which is untrue in fact

(2) which the defendant knows to be untrue or is indifferent to its truth

(3) which was intended or calculated to induce the plaintiff to act upon it

(4) which the plaintiff acts upon and suffers damage

53 Applying these principles to the evidence, I find that Luigi Mongillo made a representation to the plaintiff that upon vacating the residence at 14 Kevlin Avenue in order that it could be sold, a replacement residence would be purchased. Out of the proceeds of the sale of 14 Kevlin Avenue, $100,000 was to be given to Vittoria Mongillo. Subsequently, it was agreed that this sum would be directed into the purchase price of 52 Southdale Drive. Vittoria Mongillo relied on the representation of the defendant and vacated 14 Kevlin Avenue. At no time was it ever disclosed to the plaintiff that her interest in 52 Southdale Drive was nothing more than a trustee on behalf of Luigi Mongillo.

54 The next consideration is whether Luigi Mongillo knew that his representations were untrue. The evidence at trial establishes that Luigi Mongillo contacted Mr. Fass in November, 1993, and

he told him that he wanted to keep control over the property. Vittoria Mongillo was never told that the defendant was contacting his lawyer and arranging for limitations to be put in place with respect to her interest in the property. I find that there can be no other reasonable conclusion other than that Luigi Mongillo knew that he was misrepresenting to the plaintiff the nature of her interest in the Southdale property.

55 The defendant's suggestion that he wanted to protect the plaintiff and the children by registering the title in the name of Vittoria Mongillo as to an equal one-half interest, but subject to a Trust Agreement and Power of Attorney, is untenable. This arrangement did not afford any protection to the plaintiff and her children.

56 The court does not have to make a determination as to the motive of the defendant in making a fraudulent misrepresentation. What is relevant is that the defendant made a representation to Vittoria Mongillo regarding the nature of her title that was untrue, and which he knew was untrue. He made the representation to the plaintiff to induce her to move from Kevlin Avenue to Southdale Drive, and Vittoria Mongillo acted upon the representation to her detriment. It remained open to the plaintiff to request $100,000 cash upon the sale of Kevlin Avenue, and not invest it in Southdale Drive. Therefore, it would be unconscionable for the defendant in the circumstances to rely on the Power of Attorney and the Trust Agreement, which were the instruments by which he was able to deceive the plaintiff. Carelessness on the part of the plaintiff to read the documents is not a defense when fraud and unconscionability is proven.

57 The plaintiff's claim will then succeed, based on the finding of a fraudulent misrepresentation having been made by the defendant inducing the plaintiff to act to her detriment.

Non Est Factum

58 In the particular facts of this case, I find that the legal principle of non est factum is not available to the plaintiff. The doctrine of non est factum was recently considered in *Royal Bank v. Hussain* (1997), 37 O.R. (3d) 85 (Ont. Gen. Div.). There is a two-step test that is applied to the principle of non est factum. First, the individual signing a contractual document must be mistaken as to the nature and content of the document. However, once it has been determined that the signer was mistaken as to the nature of the document, the court must determine the second part of the test, namely, whether the individual was careless when signing the document.

59 Based on the facts in this case, I find that Vittoria Mongillo did *not* know or appreciate the nature and significance of the Trust Agreement and Power of Attorney. However, I also find that she was careless in not reading the documents. The plaintiff was born in Canada and attained a Grade 12 education. Following graduation, she was employed in a secretarial capacity by I.B.M. She was fully conversant in the English language. There was no undue pressure or duress as in a family situation, where a spouse or parent is pressured to sign a guarantee on behalf of another family member.

60 Therefore, based on the second part of the test as it relates to the principle of non est factum, the plaintiff's claim to set aside the Trust Agreement and Power of Attorney fails.

Independent Legal Advice

61 The lack of independent legal advice for the plaintiff in this transaction would not in itself set aside the Power of Attorney and the Trust Agreement. However, as was stated in *Bank of Montreal v. Featherstone* (1989), 68 O.R. (2d) 541 (Ont. C.A.) at page 547 when there is evidence of fraud or misrepresentation, then lack of independent legal advice makes it unconscionable to allow the contract to stand.

62 In considering the issue of independent legal advice, it is necessary to establish whether a fiduciary relationship existed as between the plaintiff and Mr. Fass. The test to determine a fiduciary relationship has been stated by the Supreme Court of Canada (*International Corona Resources Ltd. v. Lac Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.) and *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.)) as follows:

> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interest.
>
> (2) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

63 In cross-examination, Mr. Fass admitted that he probably did not mention to the plaintiff that he was acting only for Luigi Mongillo. Both Mr. Fass and the defendant acknowledged that the plaintiff stated at the January 6, 1994 meeting, that she trusted them. It is reasonable to infer that based on that statement she was relying on Mr. Fass to guide her through the transaction. It is also a significant fact that Mr. Fass had previously acted on behalf of the plaintiff in the sale of the Kennedy Road property. Accordingly, it would not be unreasonable for her to expect that she could rely on Mr. Fass for advice and direction. The plaintiff was not sophisticated in real estate transactions, and therefore she was particularly vulnerable to the advice and direction, or lack thereof, that she would receive from Mr. Fass. The fact that the plaintiff had not personally retained or paid Mr. Fass for his services does not preclude the finding that a fiduciary relationship existed, (*McKenzie v. Bank of Montreal* (1975), 7 O.R. (2d) 521 (Ont. H.C.); affirmed (1976), 12 O.R. (2d) 719 (Ont. C.A.).

64 Mr. Fass testified that he did not refer Vittoria Mongillo for independent legal advice because, in his opinion, she had no equity position that had to be protected. However, Mr. Fass has no recollection of making any inquiry to the plaintiff to ascertain why she was entering into the transaction and Trust Agreement. I find it difficult to accept Mr. Fass's explanation. It would

be reasonable to expect a solicitor to make sufficient inquiries of both parties to determine what agreements or arrangements they had entered into, and their expectations. The fact that Mr. Fass was never instructed by the plaintiff to prepare a Trust Agreement or Power of Attorney on her behalf, should have alerted him to consider whether independent legal advice was required. If sufficient inquiries had been made concerning the Trust Agreement, the solicitor would have been aware of the potential for misrepresentation/or fraud.

65 I find that the plaintiff should have been sent for independent legal advice with respect to the Trust Agreement and the Power of Attorney, prior to executing these documents. I find that a fiduciary relationship existed between the plaintiff and Mr. Fass, and he did not disclose to the plaintiff that he was declining to act on her behalf. I find that Mr. Fass was the solicitor acting on behalf of the defendant. Accordingly, his actions as agent are binding on the defendant. I also find that based on a prior dealing, and the statement made by the plaintiff that she trusted the defendant and Mr. Fass, that it was apparent that the plaintiff was relying on the solicitor for legal advice and direction in the transaction. Therefore the fiduciary, Mr. Fass, had scope for the exercise of some discretion or power on behalf of the plaintiff and he exercised that discretion or power to unilaterally affect the plaintiff's legal or practical interest. In the circumstances of this case, this plaintiff was particularly vulnerable to the fiduciary. Therefore, I find that the Power of Attorney and the Trust Agreement should be set aside by reason of the lack of independent advice to the plaintiff.

Conclusion

66 In the result, the plaintiff will have judgment based on the finding of fraudulent misrepresentation and lack of independent legal advice. The Power of Attorney and Trust Agreement both dated January 6, 1994, are declared as void ab initio. It is further ordered that the Registrar of Land Titles at the Newmarket Registry Office, shall strike out instrument number 0664763 being a transfer of land registered September 11, 1995 from Vittoria Mongillo (by her attorney Luigi Mongillo as to her undivided one-half interest) to Luigi Mongillo.

67 Counsel may make written submissions concerning costs within 15 days of the release of these Reasons.

Application granted

Tab 20

2021 SCC 30, 2021 CSC 30
Supreme Court of Canada

Canada v. Canada North Group Inc.

2021 CarswellAlta 1780, 2021 CarswellAlta 1781, 2021 SCC 30, 2021 CSC 30, [2021] 10 W.W.R. 1, [2021] 5 C.T.C. 111, [2021] A.W.L.D. 3408, [2021] A.W.L.D. 3521, 19 B.L.R. (6th) 1, 2021 D.T.C. 5080, 2021 D.T.C. 5081, 28 Alta. L.R. (7th) 1, 333 A.C.W.S. (3d) 23, 460 D.L.R. (4th) 309, 91 C.B.R. (6th) 1, EYB 2021-397318

Her Majesty The Queen in Right of Canada (Appellant) and Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd., Ernst & Young Inc. in its capacity as monitor and Business Development Bank of Canada (Respondents) and Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer JJ.

Heard: December 1, 2020
Judgment: July 28, 2021
Docket: 38871

Proceedings: affirming *Canada v. Canada North Group Inc.* (2019), *(*sub nom. *The Queen v. Canada North Group Inc.)* 2019 D.T.C. 5111, 11 P.P.S.A.C. (4th) 157, [2019] 12 W.W.R. 635, 93 Alta. L.R. (6th) 29, 437 D.L.R. (4th) 122, 72 C.B.R. (6th) 161, 2019 ABCA 314, 2019 CarswellAlta 1815, 95 B.L.R. (5th) 222, Frederica Schutz J.A., Patricia Rowbotham J.A., Thomas W. Wakeling J.A. (Alta. C.A.); affirming *Canada North Group Inc (Companies' Creditors Arrangement Act)* (2017), 2017 ABQB 550, 2017 CarswellAlta 1631, [2018] 2 W.W.R. 731, 60 Alta. L.R. (6th) 103, 52 C.B.R. (6th) 308, J.E. Topolniski J. (Alta. Q.B.)

Counsel: Michael Taylor, Louis L'Heureux, for Appellant
Darren R. Bieganek, Q.C., Brad Angove, for Respondents, Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd. and Ernst & Young Inc. in its capacity as Monitor
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Kelly J. Bourassa, for Intervener, Insolvency Institute of Canada
Randal Van de Mosselaer, for Intervener, Canadian Association of Insolvency and Restructuring Professionals

Subject: Civil Practice and Procedure; Estates and Trusts; Income Tax (Federal); Insolvency; Tax — Miscellaneous

Related Abridgment Classifications

Bankruptcy and insolvency
X Priorities of claims
X.5 Claims of Crown
X.5.a Federal
X.5.a.iv Income tax, unemployment insurance, and Canada Pension Plan
X.5.a.iv.B Creation of statutory trust
Tax
II Income tax
II.22 Special rules
II.22.d Bankruptcy
II.22.d.i Corporations

Headnote

Tax --- Income tax — Special rules — Bankruptcy — Corporations

In debtors' restructuring proceedings under Companies' Creditors Arrangement Act (CCAA), court granted "super-priority" or priming charges in favour of interim financier and others — Motion by Canada Revenue Agency (CRA) for order that such court-ordered interests did not take priority over statutory deemed trusts for unremitted source deductions was dismissed on basis that CCAA allowed court to rank priority charges necessary for restructuring ahead of CRA's interest — Crown's appeal was dismissed — Crown appealed — Appeal dismissed — CCAA generally empowers supervising judges to order super-priority charges with priority over all other claims, even those protected by deemed trusts, and financing was critical aspect of CCAA regime premised on restructuring to preserve debtors' greater value as going concerns — Most important feature of CCAA was broad discretionary power vested in supervising court by s. 11 — Preservation by s. 37(2) of CCAA of deemed trusts created by s. 227(4.1) of Income Tax Act (ITA) does not modify their characteristics — Section 227(4.1) of ITA does not establish proprietary interest because Crown's claim does not attach to any specific asset — Deemed removal of property from debtor's estate does not prevent judge from ordering super priority — There was no conflict between CCAA and ITA, as deemed trust created by ITA has priority only over defined set of security interests into which super-priority charge ordered under s. 11 of CCAA does not fall — Section 227(4.1) of ITA does not create true trust because there is no certainty of subject matter, so Crown's beneficial ownership was weaker than under common law and its content could not be inferred solely from ITA — Broad discretionary power under s. 11 of CCAA permits court to rank priming charges ahead of deemed trust for unremitted source deductions, as s. 6(3) of CCAA gives specific effect to Crown's deemed trust for CCAA purposes by requiring plan of compromise to pay Crown in full Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s 11; Income Tax Act, s 227(4.1).

Bankruptcy and insolvency --- Priorities of claims — Claims of Crown — Federal — Income tax, unemployment insurance, and Canada Pension Plan — Creation of statutory trust

Taxation --- Impôt sur le revenu — Règles spéciales — Faillite — Sociétés

Dans le cadre des procédures de restructuration des débitrices en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC), le tribunal a accordé des charges super prioritaires en faveur du prêteur intérimaire et d'autres personnes — Requête de l'Agence du revenu du Canada (ARC) en vue d'une ordonnance déclarant qu'une telle sûreté ou charge super prioritaire accordée par le tribunal n'avait pas priorité sur les fiducies réputées créées par la loi pour les retenues à la source non versées a été rejetée au motif que la LACC permettait aux tribunaux d'accorder aux charges prioritaires nécessaires au processus de restructuration un rang supérieur à la sûreté de l'ARC — Appel interjeté par la Couronne a été rejeté — Couronne a formé un pourvoi — Pourvoi rejeté — LACC habilite de façon générale les juges surveillants à faire passer des charges super prioritaires devant toutes les autres créances, y compris celles qui sont protégées par des fiducies réputées, et l'obtention d'un financement constituait un aspect fondamental de ce régime fondé sur la prémisse qu'une compagnie débitrice est susceptible de posséder une plus grande valeur lorsqu'elle poursuit ses activités — Caractéristique la plus importante de la LACC est le vaste pouvoir discrétionnaire qu'elle confère au tribunal de surveillance par l'art. 11 — Que l'art. 37(2) de la LACC permette aux fiducies réputées créées par l'art. 227(4.1) de la Loi de l'impôt sur le revenu (LIR) de continuer à produire leurs effets ne modifie en rien les caractéristiques de ces fiducies — Article 227(4.1) de la LIR ne crée pas d'intérêt à titre de propriétaire, parce que la créance de Sa Majesté ne se rattache à aucun bien spécifique — Que des biens soient réputés soustraits au patrimoine du débiteur n'empêche pas un juge d'ordonner des charges super prioritaires — Il n'y avait pas de conflit entre la LACC et la LIR, car la fiducie réputée créée en vertu de la LIR n'a priorité que sur un ensemble bien précis de garanties dont la charge super prioritaire constituée en vertu de l'art. 11 de la LACC ne fait partie — Article 227(4.1) de la LIR ne crée pas une fiducie véritable puisqu'il n'existe aucune certitude quant à sa matière, de sorte que le droit de bénéficiaire de la Couronne était plus faible que le sens qui lui est généralement donné en common law, et la teneur du droit de la Couronne dans un contexte d'insolvabilité ne peut être déduite uniquement du texte de la LIR — Vaste pouvoir discrétionnaire conféré par l'art. 11 de la LACC permet au tribunal de faire passer les charges super prioritaires devant la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées, car l'art. 6(3) de la LACC donne explicitement effet à la fiducie réputée de la Couronne pour les fins de l'application de la LACC en exigeant que le plan de transaction prévoit le paiement intégral à la Couronne.

Faillite et insolvabilité --- Priorité des créances — Réclamations de la Couronne — Fédérale — Impôt sur le revenu, assurance-chômage, et Régime de pensions du Canada — Création de fiducies statutaires

In restructuring proceedings under the Companies' Creditors Arrangement Act (CCAA), debtor companies received interim financing and the court granted three super-priority charges in favour of the interim financier and the administrators of the monitor, counsel and restructuring officer for their fees, and the debtors' directors and officers for liabilities incurred after the commencement of the proceedings. The motion by the Canada Revenue Agency (CRA) for an order that such court-ordered super-priority security interests or priming charges did not take priority over the

statutory deemed trusts in favour of the Minister or the CRA for unremitted source deductions was dismissed. The motion judge found that the CCAA gave the court the ability to rank priority charges necessary for the restructuring ahead of the CRA's security interest arising out of the deemed trusts. The Crown's appeal was dismissed by the majority of the Court of Appeal. The Crown appealed.

Held: The appeal was dismissed.

Per Côté J. (Wagner C.J.C., Kasirer J. concurring): As previously held, the CCAA generally empowers supervising judges to order super-priority charges with priority over all other claims, including claims protected by deemed trusts. The view underlying the entire CCAA regime was that debtors would retain more value as going concerns than in liquidation scenarios, and financing was a critical aspect of this system that required the protection of these priming charges. The most important feature of the CCAA, which enabled it to be adapted so readily to each reorganization, is the broad discretionary power vested in the supervising court by s. 11 of the CCAA. The preservation by s. 37(2) of the CCAA of the deemed trusts created by s. 227(4.1) of the Income Tax Act (ITA) does not modify the characteristics of these trusts. Section 227(4.1) of the ITA does not establish a proprietary interest because the Crown's claim does not attach to any specific asset. By choosing not to protect the Crown's claim to any particular asset, Parliament protected the Crown from the risks associated with asset ownership, including damage, depreciation and loss. The statement in s. 227(4.1) of the ITA that property is deemed to be removed from the debtor's estate does not prevent a judge from ordering a super-priority charge over the debtor's property. This interpretation is supported by the existence of s. 227(4.2) of the ITA that specifically anticipates other interests taking priority over the deemed trust, which would be impossible if there was an ownership interest. There was no conflict between the CCAA and the ITA, as the deemed trust created by the ITA has priority only over a defined set of security interests. A super-priority charge ordered under s. 11 of the CCAA does not fall within the definition in s. 224(1.3) of the ITA. As the Crown had been repaid and the case was technically moot, it was not critical to review the basis in this case for subordinating the Crown's claim to the super-priority charges.

Per Karakatsanis J. (concurring) (Martin J. concurring): Defining the Crown's entitlement as a "security" or "propriety" interest did not resolve the issues in the case. The meaning of "beneficially owned" in s. 227(4.1) of the ITA could only be understood in the specific statutory context. Section 227(4.1) of the ITA does not create a true trust because there is no certainty of subject matter, and so the Crown's beneficial ownership was weaker than would be generally understood by that term at common law. Section 227(4.1) of the ITA is structured as a security interest but also uses the mechanism of deemed trust. The content of the Crown's right for the purposes of insolvency could not be inferred solely from the text of the ITA. Interim financing is crucial to the restructuring process under the CCAA. Section 37(2) of the CCAA continues the Crown's statutory deemed trust but does not explain what to do with that right. Section 11 of the CCAA gives the court broad discretion to consider and give effect to the Crown's interest, while s. 6(3) of CCAA gives specific effect to the Crown's right by barring the court from sanctioning a plan of compromise unless it pays the Crown in full for unremitted source deductions within six months of the plan's approval

or the Crown agrees otherwise. The CCAA thus gives the deemed trust concrete meaning for its purposes, namely that a plan of compromise has to pay the Crown in full. The Crown's interest did not fit within the relevant statutory definition of "secured creditor" under the CCCA as required for ss. 11.2, 11.51 and 11.52 of the CCAA, but the broad discretionary power under s. 11 of the CCAA permits the court to rank priming charges ahead of the deemed trust for unremitted source deductions.

Per Brown, Rowe JJ. (dissenting) (Abella J. concurring): The text of the ITA and other fiscal statutes is clear and gives ultimate priority to the deemed trusts for source deductions over all security interests, notwithstanding the CCAA or any other Act. The priming charges are "security interests" within the meaning of s. 224(1.3) of the ITA such that the Crown's interest under the deemed trust enjoys priority over them pursuant to s. 227(4.2) of the ITA. The fiscal statutes operated harmoniously with the CCAA, since s. 37(2) of the CCAA restricted the court's powers under s. 11 of the CCAA. Section 6(3) of the CCAA protects different reasons than those captured by the deemed trusts. Policy reasons did not support a different interpretation where Parliament chose to prioritize the integrity of the tax system over the interests of secured creditors, and the majority's view that interim financing would simply end without priming charges was not supported by evidence.

Per Moldaver J. (dissenting): While the analysis and conclusions of Brown and Rowe JJ. were largely agreed with, it was unnecessary to define the particular nature or operation of the Crown's interest under s. 227(4.1) of the ITA and whether it amounted to an ownership interest. Further, s. 37(2) of the CCAA does not amount to an explicit and unambiguous restriction on s. 11 of the CCAA but merely preserves the Crown's deemed trust under s. 227(4.1) of the ITA. As such, using s. 11 of the CCAA to prioritize the priming charges over the Crown's deemed trust would conflict with s. 227(4.1) of the ITA. Such direct conflict would trigger the "notwithstanding [. . .] any other enactment of Canada" language in s. 227(4.1) of the ITA that imposes an external restriction on the court's power under s. 11 of the CCAA. Section 6(3) of the CCAA does not give effect to the absolute supremacy of the Crown's deemed trust claim over priming charges.

Dans le cadre de procédures de restructuration sous le régime de la Loi sur les arrangements avec les créanciers des compagnies (LACC), les compagnies débitrices ont obtenu du financement intérimaire et le tribunal a accordé trois charges super prioritaires en faveur du prêteur intérimaire et des administrateurs du contrôleur, des avocats et du directeur de la restructuration pour les frais qu'ils ont engagés, et des administrateurs et dirigeants des débitrices pour les dettes accumulées depuis le début des procédures. La requête de l'Agence du revenu du Canada (ARC) en vue d'une ordonnance déclarant qu'une telle sûreté ou charge super prioritaire accordée par le tribunal n'avait pas priorité sur les fiducies réputées créées par la loi en faveur du ministre ou de l'ARC pour les retenues à la source non versées a été rejetée. Le juge des requêtes a conclu que la LACC conférait au tribunal le pouvoir d'accorder aux charges prioritaires nécessaires au processus de restructuration un rang supérieur à la sûreté de l'ARC découlant des fiducies réputées. L'appel interjeté par la Couronne a été rejeté par les juges majoritaires de la Cour d'appel. La Couronne a formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Côté, J. (Wagner, J.C.C., Kasirer, J., souscrivant à son opinion) : Ainsi que la Cour l'a déjà jugé, la LACC habilite de façon générale les juges surveillants à faire passer des charges super prioritaires devant toutes les autres créances, y compris celles qui sont protégées par des fiducies réputées. La vision sous-jacente au régime de la LACC est qu'une compagnie débitrice est susceptible de posséder une plus grande valeur lorsqu'elle poursuit ses activités que lorsqu'elle est liquidée, et l'obtention d'un financement est un aspect fondamental de ce système, ce qui exige que ces charges super prioritaires soient protégées. La caractéristique la plus importante de la LACC, et celle qui la rend assez souple pour s'adapter si aisément à chaque réorganisation, est le vaste pouvoir discrétionnaire qu'elle confère au tribunal de surveillance par l'art. 11 de la LACC. Le fait que l'art. 37(2) de la LACC permet aux fiducies réputées créées par l'art. 227(4.1) de la Loi de l'impôt sur le revenu (LIR) de continuer à produire leurs effets ne modifie en rien les caractéristiques de ces fiducies. L'article 227(4.1) de la LIR ne crée pas d'intérêt à titre de propriétaire, parce que la créance de Sa Majesté ne se rattache à aucun bien spécifique. En décidant de n'associer la créance de Sa Majesté à aucun bien en particulier, le législateur a protégé Sa Majesté des risques que comporte la propriété d'un bien, y compris l'endommagement, la dépréciation et la perte. L'affirmation énoncée à l'art. 227(4.1) de la LIR selon laquelle des biens sont réputés soustraits au patrimoine du débiteur n'empêche pas un juge de grever les biens du débiteur de charges super prioritaires. Cette interprétation est appuyée par l'existence de l'art. 227(4.2) de la LIR, qui prévoit expressément que d'autres intérêts prennent rang devant la fiducie réputée, ce qui serait impossible s'il existait un intérêt à titre de propriétaire. Il n'y a pas de conflit entre la LACC et la LIR, car la fiducie réputée créée en vertu de la LIR n'a priorité que sur un ensemble bien précis de garanties. La charge super prioritaire constituée en vertu de l'art. 11 de la LACC ne répond pas à la définition de l'art. 224(1.3) de la LIR. Puisque Sa Majesté a été payée et que l'affaire est en fait devenue théorique, il n'était pas essentiel d'analyser les fondements permettant, dans la présente affaire, de subordonner la créance de Sa Majesté à des charges super prioritaires.

Karakatsanis, J. (souscrivant à l'opinion des juges majoritaires) (Martin, J., souscrivant à son opinion) : Qualifier le droit de la Couronne de « garantie » ou de « droit propriétal » n'était pas d'une grande utilité dans la présente analyse. Le sens du terme « droit de bénéficiaire » utilisé à l'art. 227(4.1) de la LIR ne peut être saisi que dans le contexte législatif précis et pertinent où il est employé. L'article 227(4.1) de la LIR ne crée pas une fiducie véritable puisqu'il n'existe aucune certitude quant à sa matière, de sorte que le droit de bénéficiaire de la Couronne était plus faible que le sens qui lui est généralement donné en common law. L'article 227(4.1) de la LIR est structuré comme une garantie, mais utilise également le mécanisme d'une fiducie réputée. La teneur du droit de la Couronne dans un contexte d'insolvabilité ne peut être déduite uniquement du texte de la LIR. Le financement temporaire est essentiel au processus de restructuration sous le régime de la LACC. L'article 37(2) de la LACC maintient la fiducie réputée créée par la loi, mais n'explique pas quoi faire de ce droit. L'article 11 de la LACC confère au tribunal un vaste pouvoir discrétionnaire pour examiner l'intérêt reconnu à la Couronne, tandis que l'art. 6(3) de la LACC donne explicitement effet au droit que possède la Couronne en empêchant un tribunal

d'homologuer un plan de transaction qui ne prévoit pas le paiement intégral à la Couronne des retenues à la source non versées dans les six mois suivant l'homologation, à supposer que la Couronne n'en ait pas convenu autrement. La LACC donne ainsi à la fiducie réputée un sens concret qui convient à ses fins, soit qu'un plan de transaction doit prévoir le paiement intégral des sommes dues à la Couronne. L'intérêt de la Couronne n'entre pas dans la définition applicable de « créancier garanti » contenue dans la LACC, selon ce qui est exigé en vertu des art. 11.2, 11.51 et 11.52 de la LACC, mais le vaste pouvoir discrétionnaire conféré par l'art. 11 de la LACC permet au tribunal de faire passer les charges super prioritaires devant la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées.

Brown, Rowe, JJ. (dissidents) (Abella, J., souscrivant à leur opinion) : Le texte de la LIR et d'autres lois fiscales est non équivoque et accorde à la fiducie réputée créée à l'égard des retenues à la source priorité absolue sur toute garantie, nonobstant la LACC ou toute autre loi. Les charges super prioritaires sont des « garanties » au sens de l'art. 224(1.3) de la LIR de telle sorte que le droit conféré à la Couronne par la fiducie réputée a préséance sur ces charges en vertu de l'art. 227(4.2) de la LIR. Les lois fiscales s'appliquent harmonieusement avec la LACC, puisque l'art. 37(2) de la LACC impose une limite au pouvoir que l'art. 11 de la LACC confère au tribunal. L'article 6(3) de la LACC protège des droits différents de ceux visés par la fiducie réputée. Des considérations de politique générale n'appuient pas une interprétation différente dans laquelle le législateur a choisi d'accorder à l'intégrité du régime fiscal la priorité sur les droits des créanciers garantis, et l'opinion des juges majoritaires selon laquelle le financement temporaire prendrait tout simplement fin sans les charges super prioritaires n'était pas étayée par la preuve.

Moldaver, J. (dissident) : Bien que l'on partageât, pour l'essentiel, l'analyse et les conclusions des juges Brown et Rowe, il n'était pas nécessaire de définir la nature ou le fonctionnement particulier du droit que l'art. 227(4.1) de la LIR confère à la Couronne ou de déterminer s'ils peuvent être assimilés à une certaine forme d'intérêt propriétal. De plus, l'art. 37(2) de la LACC ne constitue pas une restriction explicite et non équivoque à l'application de l'art. 11 de la LACC, mais vise simplement à maintenir la fiducie réputée de la Couronne en vertu de l'art. 227(4.1) de la LIR. Dans cet ordre d'idée, recourir à l'art. 11 de la LACC pour faire passer une charge super prioritaire devant la réclamation de la Couronne au titre d'une fiducie réputée entrerait en conflit direct avec l'art. 227(4.1) de la LIR. Ce conflit direct entraînerait l'application du libellé de l'art. 227(4.1) de la LIR, à savoir « [m]algré [. . .] tout autre texte législatif fédéral », lequel impose une limite externe au pouvoir que l'art. 11 de la LACC confère au tribunal. L'article 6(3) de la LACC n'entraîne pas la primauté absolue de la fiducie réputée de la Couronne sur les autres charges super prioritaires.

APPEAL by Crown from judgment reported at *Canada v. Canada North Group Inc.* (2019), 2019 ABCA 314, 2019 CarswellAlta 1815, 72 C.B.R. (6th) 161, 437 D.L.R. (4th) 122, 93 Alta. L.R. (6th) 29, 95 B.L.R. (5th) 222, [2019] 12 W.W.R. 635, 11 P.P.S.A.C. (4th) 157, 2019 D.T.C. 5111 (Alta. C.A.), dismissing its appeal from ruling that court could rank super-priority charges ahead of statutory deemed trusts for unremitted source deductions.

POURVOI formé par la Couronne à l'encontre d'un jugement publié à *Canada v. Canada North Group Inc.* (2019), 2019 ABCA 314, 2019 CarswellAlta 1815, 72 C.B.R. (6th) 161, 437 D.L.R. (4th) 122, 93 Alta. L.R. (6th) 29, 95 B.L.R. (5th) 222, [2019] 12 W.W.R. 635, 11 P.P.S.A.C. (4th) 157, 2019 D.T.C. 5111 (Alta. C.A.), ayant rejeté l'appel que cette dernière a interjeté à l'encontre d'une décision selon laquelle un tribunal avait le pouvoir de faire passer les charges super prioritaires devant les fiducies réputées créées par la loi pour les retenues à la source non versées.

***Côté J.* (Wagner C.J.C., Kasirer J. concurring):**

I. Overview

1 The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (“CCAA”), has a long and storied history. From its origins in the Great Depression to its revival and reinvention during the 1970s and 1980s, the *CCAA* has played an important role in Canada's economy. Today, the *CCAA* provides an opportunity for insolvent companies with more than $5,000,000 in liabilities to restructure their affairs through a plan of arrangement. The goal of the *CCAA* process is to avoid bankruptcy and maximize value for all stakeholders.

2 In order to facilitate the restructuring process, courts supervising *CCAA* restructurings may authorize an insolvent company to incur certain critical costs associated with this process. Supervising courts may also secure payment of these costs by ordering a super-priority charge against the insolvent company's assets. Today, our Court is called upon to determine whether a supervising court may order super-priority charges over assets that are subject to a claim of Her Majesty protected by a deemed trust created by s. 227(4.1) of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) (“ITA”).

3 The Crown raises two arguments as to why a supervising court should be unable to subordinate Her Majesty's interest to super-priority charges. First, the Crown says that s. 227(4.1) creates a proprietary interest in a debtor's assets and a court cannot attach a super-priority charge to assets subject to Her Majesty's interest. Second, the Crown says that even if s. 227(4.1) does not create a proprietary interest, it creates a security interest that has statutory priority over all other security interests, including super-priority charges.

4 Both of these arguments must fail. As this Court has previously held, the *CCAA* generally empowers supervising judges to order super-priority charges that have priority over all other claims, including claims protected by deemed trusts. In all cases where a supervising court is faced with a deemed trust, the court must assess the nature of the interest established by the empowering enactment, and not simply rely on the title of deemed trust. In this case, when the relevant provisions of the *ITA* are examined in their entirety, it is clear that the *ITA* does not establish a proprietary interest because Her Majesty's claim does not attach to any specific asset. Further, there is no conflict between the *CCAA* order and the *ITA*, as the deemed trust created by the *ITA*

has priority only over a defined set of security interests. A super-priority charge ordered under s. 11 of the CCAA does not fall within that definition. For the reasons that follow, I would therefore dismiss the appeal.

II. Background

5 Canada North Group and six related corporations ("Debtors") initiated restructuring proceedings under s. 50.4(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (“BIA”), but soon changed course and sought to restructure under the *CCAA*. In their initial *CCAA* application, they requested a package of relief standard to *CCAA* proceedings, including a thirty-day stay on all proceedings against them, the appointment of a monitor and the creation of three super-priority charges. The first charge they requested was an administration charge of up to $1,000,000 in favour of counsel, a monitor and a chief restructuring officer for the fees they incurred. The second was a $1,000,000 financing charge in favour of an interim lender. The third was a $150,000 directors' charge protecting their directors and officers against liabilities incurred after the commencement of the proceedings. The Debtors included in their initial motion an affidavit from one of their directors attesting to a $1,140,000 debt to Her Majesty The Queen for source deductions and Goods and Services Tax ("GST").

6 Justice Nielsen of the Court of Queen's Bench heard the motion together with a cross-motion by the Debtors' primary lender, Canadian Western Bank, seeking the appointment of a receiver. Justice Nielsen granted an initial order in favour of the Debtors on the terms requested in the initial application, aside from a $500,000 reduction in the administration charge (Alta. Q.B., No. 1703-12327, July 5, 2017 ("Initial Order”)). The terms of that order included the following with regard to priority:

> Each of the Directors' Charge, Administration Charge and the Interim Lender's Charge (all as constituted and defined herein) shall constitute a charge on the Property and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "Encumbrances") in favour of any Person.
>
> [Emphasis deleted; para. 44.]

Justice Nielsen further ordered that these charges "shall not otherwise be limited or impaired in any way by ... (d) the provisions of any federal or provincial statutes" (para. 46).

7 Three weeks after the Initial Order was granted, the Debtors sought supplementary orders extending the stay of proceedings and increasing the interim financing to $2,500,000. Canadian Western Bank again filed a motion to appoint a receiver. At the hearing of the three motions, counsel for Her Majesty appeared in order to advise that Her Majesty would be filing a motion to vary the Initial Order on the ground that the order failed to recognize Her priority interest in

unremitted source deductions (the portion of remuneration that employers are required to withhold from employees and remit directly to the Canada Revenue Agency ("CRA")).

8 The Crown filed the motion soon after. Its argument for variance was grounded in the nature of Her Majesty's interest in the Debtors' property. It argued that the nature of Her Majesty's interest is determined by s. 227(4.1) of the ITA and that that provision creates a proprietary interest:

> **(4)** Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.
>
> **(4.1)** Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed
>
> > (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
> >
> > (b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest
>
> and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

III. Judgments Below

A. Court of Queen's Bench, 2017 ABQB 550, 60 Alta. L.R. (6th) 103

9 Justice Topolniski heard Her Majesty's motion to vary the Initial Order. Despite the delay between the Initial Order and the motion to vary, Topolniski J. found that she had jurisdiction

to hear the motion based on the discretion and flexibility conferred by the *CCAA*. However, she dismissed the motion on the ground that s. 227(4.1) of the ITA creates a security interest that can be subordinated to court-ordered super-priority charges.

10 Justice Topolniski relied upon *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274, and *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, to conclude that the deemed trust created by s. 227(4.1) of the ITA is not a proprietary interest. Rather, the *ITA* creates something similar to a floating charge over all the debtor's assets, which permits the debtor to alienate property subject to the deemed trust. These characteristics are inconsistent with a proprietary interest, and thus s. 227(4.1) does not create such an interest.

11 Justice Topolniski also considered whether s. 227(4.1) creates a security interest that requires Her Majesty's interest to take priority over court-ordered charges. She acknowledged that the *CCAA* preserves the operation of the deemed trust, but she found that it also authorizes the reorganization of priorities by court order. Because each of the charges included in the Initial Order was critical to the restructuring process, they were necessarily required by the *CCAA* regime.

B. Leave to Appeal, 2017 ABCA 363, 54 C.B.R. (6th) 5

12 Following the dismissal of the Crown's motion, the Debtors determined that there were sufficient assets in the estate to satisfy both Her Majesty and the beneficiaries of the three court-ordered super-priority charges in full. However, the Crown sought and obtained leave to appeal in order to seek appellate guidance on the nature of Her Majesty's priority.

C. Court of Appeal of Alberta, 2019 ABCA 314, 93 Alta. L.R. (6th) 29

13 The Court of Appeal dismissed the appeal. It was divided as to whether the super-priority charges had priority over Her Majesty's claim. Justice Rowbotham wrote for the majority and agreed with the motion judge that s. 227(4.1) of the ITA creates a security interest, in accordance with this Court's earlier finding in *First Vancouver* that the deemed trust is like a "floating charge over all of the assets of the tax debtor in the amount of the default" (*First Vancouver*, at para. 40). She found further support for this in the fact that the deemed trust also falls squarely within the *ITA*'s definition of "security interest" in s. 224(1.3).

14 After determining that Her Majesty's interest in the Debtors' property was a security interest, Rowbotham J.A. turned to the question of whether the deemed trust could be subordinated to the court-ordered super-priority charges. She found that "while a conflict may appear to exist at the level of the 'black letter' wording" of the *ITA* and the *CCAA*, "the presumption of statutory coherence require[d] that the provisions be read to work together" (para. 45). A deemed trust that could not be subordinated to super-priority charges would undermine both Acts' objectives because fewer restructurings could succeed and thus less tax revenue could be collected. If the Crown's position prevailed, then absurd consequences could follow. Approximately 75 percent of

restructurings require interim lenders. Without the assurance that they would be repaid in priority, these lenders would not come forward, nor would monitors or directors. The reality is that all of these services are provided in reliance on super priorities. Without these priorities, *CCAA* restructurings may be severely curtailed or at least delayed until Her Majesty's exact claim could be ascertained, by which point the company might have totally collapsed.

15 Justice Wakeling dissented. In his view, none of the arguments raised by the majority could overcome the text of the *ITA*. On his reading, the text of s. 227(4.1) is clear: Her Majesty is the beneficial owner of the amounts deemed to be held separate and apart from the debtor's property, and these amounts must be paid to Her Majesty notwithstanding any type of security interest, including super-priority charges. In his view, nothing in the *CCAA* overrides this proprietary interest. Section 11 of the CCAA cannot permit discretion to be exercised without regard for s. 227(4.1) of the ITA, nor can ss. 11.2, 11.51 and 11.52 of the CCAA be used, as they only allow a court to make orders regarding "all or part of the company's property" (s. 11.2(1)). In conclusion, since no part of the *CCAA* authorizes a court to override s. 227(4.1), a court must give effect to the clear text of s. 227(4.1) and cannot subordinate Her Majesty's claims to super-priority charges.

IV. Issue

16 The central issue in this appeal is whether the *CCAA* authorizes courts to grant super-priority charges with priority over a deemed trust created by s. 227(4.1) of the ITA. In order to answer this question, I proceed in three stages. First, I assess the nature of the *CCAA* regime and the power of supervising courts to order such charges. Given that supervising courts generally have the authority to order super-priority charges with priority over all other claims, I then turn to s. 227(4.1) of the ITA to determine whether it gives Her Majesty an interest that cannot be subordinated to super-priority charges. Here I assess the Crown's two arguments as to why s. 227(4.1) provides for an exception to the general rule, namely that Her Majesty has a proprietary or ownership interest in the insolvent company's assets and that, even if Her Majesty does not have such an interest, s. 227(4.1) provides Her with a security interest that has absolute priority over all claims. I conclude by assessing how courts should exercise their authority to order super-priority charges where Her Majesty has a claim against an insolvent company protected by a s. 227(4.1) deemed trust.

V. Analysis

17 In order to determine whether the *CCAA* empowers a court to order super-priority charges over assets subject to a deemed trust created by s. 227(4.1) of the ITA, we must understand both the *CCAA* regime and the nature of the interest created by s. 227(4.1).

A. CCAA Regime

18 The *CCAA* is part of Canada's system of insolvency law, which also includes the BIA and the Winding-up and Restructuring Act, R.S.C. 1985, c. W-11, s. 6(1), for banks and other

specified institutions. Although both the *CCAA* and the *BIA* create reorganization regimes, what distinguishes the *CCAA* regime is that it is restricted to companies with liabilities of more than $5,000,000 and "offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations" (Century Services Inc. v. Canada (Attorney General), 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 14).

19 The *CCAA* works by creating breathing room for an insolvent debtor to negotiate a way out of insolvency. Upon an initial application, the supervising judge makes an order that ordinarily preserves the status quo by freezing claims against the debtor while allowing it to remain in possession of its assets in order to continue carrying on business. During this time, it is hoped that the debtor will negotiate a plan of arrangement with creditors and other stakeholders. The goal is to enable the parties to reach a compromise that allows the debtor to reorganize and emerge from the *CCAA* process as a going concern (*Century Services*, at para. 18).

20 The view underlying the entire *CCAA* regime is thus that debtor companies retain more value as going concerns than in liquidation scenarios (*Century Services*, at para. 18). The survival of a going-concern business is ordinarily the result with the greatest net benefit. It often enables creditors to maximize returns while simultaneously benefiting shareholders, employees, and other firms that do business with the debtor company (para. 60). Thus, this Court recently held that the *CCAA* embraces "the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress ... and enhancement of the credit system generally" (9354-9186 Québec inc. v. Callidus Capital Corp., 2020 SCC 10, at para. 42, quoting J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at p. 14).

21 The most important feature of the *CCAA* — and the feature that enables it to be adapted so readily to each reorganization — is the broad discretionary power it vests in the supervising court (*Callidus Capital*, at paras. 47-48). Section 11 of the CCAA confers jurisdiction on the supervising court to "make any order that it considers appropriate in the circumstances". This power is vast. As the Chief Justice and Moldaver J. recently observed in their joint reasons, "On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be 'appropriate in the circumstances'" (*Callidus Capital*, at para. 67). Keeping in mind the centrality of judicial discretion in the *CCAA* regime, our jurisprudence has developed baseline requirements of appropriateness, good faith and due diligence in order to exercise this power. The supervising judge must be satisfied that the order is appropriate and that the applicant has acted in good faith and with due diligence (*Century Services*, at para. 69). The judge must also be satisfied as to appropriateness, which is assessed by considering whether the order would advance the policy and remedial objectives of the *CCAA* (para. 70). For instance, given that the purpose of the *CCAA* is to facilitate the survival of going concerns, when crafting an initial order, "[a] court must first of all provide the conditions under which the debtor can attempt to reorganize" (para. 60).

22 On review of a supervising judge's order, an appellate court should be cognizant that supervising judges have been given this broad discretion in order to fulfill their difficult role of continuously balancing conflicting and changing interests. Appellate courts should also recognize that orders are generally temporary or interim in nature and that the restructuring process is constantly evolving. These considerations require not only that supervising judges be endowed with a broad discretion, but that appellate courts exercise particular caution before interfering with orders made in accordance with that discretion (Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368 (C.A.), at paras. 30-31).

23 In addition to s. 11, there are more specific powers in some of the provisions following that section. They include the power to order a super-priority security or charge on all or part of a company's assets in favour of interim financiers (s. 11.2), critical suppliers (s. 11.4), the monitor and financial, legal or other experts (s. 11.52), or indemnification of directors or officers (s. 11.51). Each of these provisions empowers the court to "order that the security or charge rank in priority over the claim of any secured creditor of the company" (ss. 11.2(2), 11.4(4), 11.51(2) and 11.52(2)).

24 As this Court held in Century Services, at para. 70, the general language of s. 11 is not restricted by the availability of these more specific orders. In fact, courts regularly grant super-priority charges in favour of persons not specifically referred to in the aforementioned provisions, including through orders that have priority over orders made under the specific provisions. These include, for example, key employee retention plan charges (Grant Forest Products Inc., Re (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J.); *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169), and bid protection charges (*In the Matter of a Plan of Compromise or Arrangement of Green Growth Brands Inc.*, 2020 ONSC 3565, 84 C.B.R. (6th) 146).

25 In Sun Indalex Finance, LLC v. United Steelworkers, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 60, quoting the amended initial order in that case, this Court confirmed that a court-ordered financing charge with priority over "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise", had priority over a deemed trust established by the Personal Property Security Act, R.S.O. 1990, c. P.10 (“PPSA”), to protect employee pensions. Justice Deschamps wrote for a unanimous Court on this point. She found that the existence of a deemed trust did not preclude orders granting first priority to financiers: "This will be the case only if the provincial priorities provided for in s. 30(7) of the PPSA ensure that the claim of the Salaried Plan's members has priority over the [debtor-in-possession ("DIP")] charge" (para. 48).

26 Justice Deschamps first assessed the supervising judge's order to determine whether it had truly been necessary to give the financing charge priority over the deemed trust. Even though the supervising judge had not specifically considered the deemed trust in the order authorizing a super-priority charge, he had found that there was no alternative but to make the order. Financing secured by a super priority was necessary if the company was to remain a going concern (para.

59). Justice Deschamps rejected the suggestion "that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust", because "[t]he harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries" (para. 59).

27 After determining that the order was necessary, she turned to the statute creating the deemed trust's priority. Section 30(7) of the PPSA provided that the deemed trust would have priority over all security interests. In her view, this created a conflict between the court-ordered super priority and the statutory priority of the claim protected by the deemed trust. The super priority therefore prevailed by virtue of federal paramountcy (para. 60).

28 There are also practical considerations that explain why supervising judges must have the discretion to order other charges with priority over deemed trusts. Restructuring under the *CCAA* often requires the assistance of many professionals. As Wagner C.J. and Moldaver J. recently recognized for a unanimous Court, the role the monitor plays in a *CCAA* proceeding is critical: "The monitor is an independent and impartial expert, acting as 'the eyes and the ears of the court' throughout the proceedings .... The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing" (*Callidus Capital*, at para. 52, quoting Ernst & Young Inc. v. Essar Global Fund Ltd., 2017 ONCA 1014, 139 O.R. (3d) 1, at para. 109). In the words of Morawetz J. (as he then was), "[i]t is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position" (*Timminco*, at para. 66).

29 This Court has similarly found that financing is critical as "case after case has shown that 'the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout'" (*Indalex*, at para. 59, quoting J. P. Sarra, *Rescue! The* Companies' Creditors Arrangement Act (2007), at p. 97). As lower courts have affirmed, "Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges" (First Leaside Wealth Management Inc. (Re), 2012 ONSC 1299, at para. 51 (CanLII)).

30 Super-priority charges in favour of the monitor, financiers and other professionals are required to derive the most value for the stakeholders. They are beneficial to all creditors, including those whose claims are protected by a deemed trust. The fact that they require super priority is just a part of "[t]he harsh reality ... that lending is governed by the commercial imperatives of the lenders" (*Indalex*, at para. 59). It does not make commercial sense to act when there is a high level of risk involved. For a monitor and financiers to put themselves at risk to restructure and develop assets, only to later discover that a deemed trust supersedes all claims, smacks of unfairness. As McLachlin J. (as she then was) said, granting a deemed trust absolute priority where it does not

amount to a trust under general principles of law would "defy fairness and common sense" (*British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, at p. 33).

31 It is therefore clear that, in general, courts supervising a *CCAA* reorganization have the authority to order super-priority charges to facilitate the restructuring process. Similarly, courts have ensured that the *CCAA* is given a liberal construction to fulfill its broad purpose and to prevent this purpose from being neutralized by other statutes: [TRANSLATION] "As the courts have ruled time and again, the purpose of the *CCAA* and orders made under it cannot be affected or neutralized by another [Act], whether of public order or not" (Triton Électronique inc. (Arrangement relatif à), 2009 QCCS 1202, at para. 35 (CanLII)). "This case is not so much about the rights of employees as creditors, but the right of the court under the [*CCAA*] to serve not the special interests of the directors and officers of the company but the broader constituency referred to in Chef Ready Foods Ltd. [v. Hongkong Bank of Can. (1990), 51 B.C.L.R. (2d) 84 (C.A.)] ... Such a decision may inevitably conflict with provincial legislation, but the broad purposes of the [*CCAA*] must be served" (*Pacific National Lease Holding*, at para. 28). Courts have been particularly cautious when interpreting security interests so as to ensure that the *CCAA*'s important purpose can be fulfilled. For instance, in *Chef Ready Foods*, Gibbs J.A. observed that if a bank's rights under the Bank Act, S.C. 1991, c. 46, were to be interpreted as being immune from the provisions of the *CCAA*, then the benefits of *CCAA* proceedings would be "largely illusory" (p. 92). "There will be two classes of debtor companies: those for whom there are prospects for recovery under the [*CCAA*]; and those for whom the [*CCAA*] may be irrelevant dependent upon the whim of the [creditor]" (p. 92). It is important to keep in mind that *CCAA* proceedings operate for the benefit of the creditors as a group and not for the benefit of a single creditor. Without clear and direct instruction from Parliament, we cannot countenance the possibility that it intended to create a security interest that would limit or eliminate the prospect of reorganization and recovery under the *CCAA* for some companies. To do so would turn the *CCAA* into a dead letter. With this in mind, I turn to the specific provision at issue in this appeal.

B. Nature of the Interest Created by Section 227(4.1) of the ITA

32 The Crown argues that, despite the authority a supervising court may have to order super-priority charges, Her Majesty's claim to unremitted source deductions is protected by a deemed trust, and that ordering charges with priority over the deemed trust is contrary to s. 227(4.1) of the ITA. To determine whether this is true, we must begin by understanding how the deemed trust comes about.

33 Section 153(1) of the ITA requires employers to withhold income tax from employees' gross pay and forward the amounts withheld to the CRA. When an employer withholds income tax from its employees in accordance with the *ITA*, it assumes its employees' liability for those amounts (s. 227(9.4)). As a result, Her Majesty cannot have recourse to the employees if the employer fails to remit the withheld amounts. Instead, Her Majesty's interest is protected by a deemed trust. Section

227(4) of the ITA provides that amounts withheld are deemed to be held separate and apart from the employer's assets and in trust for Her Majesty. If an employer fails to remit the amounts withheld in the manner provided by the ITA, s. 227(4.1) extends the trust to all of the employer's assets. In this case, the Debtors failed to remit the amounts withheld to the CRA, bringing s. 227(4.1) into operation.

34 When a company seeks protection under the *CCAA*, s. 37(1) of the CCAA provides that most of Her Majesty's deemed trusts are nullified (unless the property in question would be regarded as held in trust in the absence of the statutory provision creating the deemed trust). However, s. 37(2) of the CCAA exempts the deemed trusts created by s. 227(4) and (4.1) of the ITA from the nullification provided for in s. 37(1). These deemed trusts continue to operate throughout the *CCAA* process (*Century Services*, at para. 45). In my view, this preservation by the *CCAA* of the deemed trusts created by the *ITA* does not modify the characteristics of these trusts. They continue to operate as they would have if the insolvent company had not sought *CCAA* protection. Therefore, the Crown's arguments must be assessed by reviewing the nature of the interest created by s. 227(4.1) of the ITA.

35 Before doing so, and while it is not strictly speaking required of me given the reasons I set out below, I pause here to clarify the role of s. 6(3) of the CCAA, which provides as follows:

> **(3)** Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under
>
> (a) subsection 224(1.2) of the *Income Tax Act* ....

36 Section 6(3) merely grants Her Majesty the right to insist that a compromise or arrangement not be sanctioned by a court unless it provides for payment in full to Her Majesty of certain claims within six months after court sanction. Section 6(3) does not say that it modifies the deemed trust created by s. 227(4.1) of the ITA in any way, and it comes into operation only at the end of the *CCAA* process when parties seek court approval of their arrangement or compromise. Section 6(3) also applies to numerous claims that are not protected by the deemed trust, including penalties, interest, withholdings on non-resident dispositions and certain retirement contributions (see ss. 224(1.2) and 227(10.1) of the ITA, the latter of which refers to amounts payable under ss. 116, 227(9), (9.2), (9.3), (9.4) and (10.2), Part XII.5 and Part XIII). Equating the deemed trust with the right under s. 6(3) renders s. 37(2) of the CCAA and the deemed trust meaningless. I therefore proceed, as this Court did in *Indalex*, by assessing the interest created by s. 227(4.1) of the ITA without regard to the *CCAA* (*Indalex*, at para. 48).

37 Section 227(4.1) provides:

> **(4.1)** Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed
>
> > (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
> >
> > (b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest
>
> and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

(1) Does Section 227(4.1) of the ITA Create a Proprietary or Ownership Interest in the Debtor's Assets?

38 This appeal — like previous appeals to this Court — does not require the Court to exhaustively define the nature and content of the interest created by s. 227(4.1) of the ITA (*Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, and *First Vancouver*). All that is necessary is to determine whether s. 227(4.1) confers upon Her Majesty an interest in the debtor's property that precludes a court from ordering charges with priority over Her Majesty's claim. The Crown argues that s. 227(4.1) does so by giving Her Majesty a proprietary interest in the debtor's assets, which "causes those assets to become the property of the Crown" (A.F., at para. 46). The Crown rests this argument on the wording of the section. First, it says that property equal in value to the amount deemed to be held in trust by a person is deemed to be held "separate and apart from the property of the person". Second, it says that the property deemed to be held in trust is deemed "to form no part of the estate or property of the person". Third, it says that the property deemed to be held in trust "is property beneficially owned by Her Majesty notwithstanding any security interest in such property". The Crown submits that, as a result of Her Majesty's proprietary

interest, amounts subject to the deemed trust cannot be considered assets of the debtor in *CCAA* proceedings.

39 In order to determine whether s. 227(4.1) confers a proprietary or ownership interest upon Her Majesty, we must look at the nature of the rights afforded to Her Majesty by the deemed trust and compare them to the rights ordinarily afforded to an owner. To begin with, it is clear that the statute does not purport to transfer legal title to any property to Her Majesty. Instead, the Crown's argument places considerable weight on the common law meaning of the words "beneficially owned by Her Majesty" and "in trust". Trusts and beneficial ownership are equitable concepts that are part of the common law. As in all cases of statutory interpretation, the meaning of these words is a question of parliamentary intent. In the interpretation of a federal statute that uses concepts of property and civil rights, reference must be had to ss. 8.1 and 8.2 of the Interpretation Act, R.S.C. 1985, c. I-21. These sections provide:

> **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.
>
> **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.

40 In other words, where Parliament uses a private law expression and is silent as to its meaning, courts must refer to the applicable provincial private law. This is known as the principle of complementarity. However, as both these sections also make clear, Parliament is free to derogate from provincial private law and create a uniform rule across all provinces (see R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 158-59).

41 In this case, Parliament has expressly chosen to dissociate itself from provincial private law. Section 227(4.1) says that it operates "*[n]otwithstanding any other provision of this Act*, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), *any other enactment of Canada, any enactment of a province or any other law*". In *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29, [2009] 2 S.C.R. 94, the majority found that, through these words, Parliament has created a standalone scheme of uniform application across all provinces (paras. 11-13). The nature of the deemed trust created by s. 227(4.1) must thus be understood on its own terms.

42 With that said, it is also clear that Parliament has chosen to use terms with established legal meanings in constructing the deemed trust. While the meaning of these terms is not to be based

on their precise meaning under Alberta common law, it is difficult to attempt to understand s. 227(4.1) without any reference to how these concepts generally operate. Despite the protestations of my colleagues Justices Brown and Rowe, I do not see how we could begin to understand the meaning of the words "deemed trust", "held in trust" or "beneficially owned" without reference to the civil law or common law. The law of trusts in both civil law and common law thus provides critical context for understanding Parliament's intent. From a civil law perspective, some courts have found it awkward to apply the idea of beneficial ownership under s. 227(4.1) in Quebec "on the ground that it is a concept that is obviously derived from the common law" (Canada (Attorney General) v. Caisse populaire d'Amos, 2004 FCA 92, 324 N.R. 31, at para. 48). I agree with the following observation by Noël J.A. (as he then was):

> It is not the task of the judiciary to determine whether it is appropriate for Parliament to use common law concepts in Quebec (or to use civil law concepts elsewhere in Canada) for the purpose of giving effect to federal legislation. The task of the courts is limited to discovering Parliament's intention and giving effect to it. [para. 49]

43 Under Quebec civil law, it is clear that s. 227(4.1) does not establish a trust within the meaning of the Civil Code of Québec (“C.C.Q.”). Articles 1260 and 1261 *C.C.Q.* provide the following:

> **1260.** A trust results from an act whereby a person, the settlor, transfers property from his patrimony to another patrimony constituted by him which he appropriates to a particular purpose and which a trustee undertakes, by his acceptance, to hold and administer.
>
> **1261.** The trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right.

As this Court held in *Bank of Nova* Scotia v. Thibault, 2004 SCC 29, [2004] 1 S.C.R. 758, at para. 31, "Three requirements must therefore be met in order for a trust to be constituted [under Quebec civil law]: property must be transferred from an individual's patrimony to another patrimony by appropriation; the property must be appropriated to a particular purpose; and the trustee must accept the property."

44 Under s. 227(4.1) of the ITA, however, no specific property is transferred to a trust patrimony. Indeterminacy remains as to which assets are subject to the deemed trust, *ergo*, as to which assets left the settlor's patrimony and entered the trust's patrimony. Although s. 227(4.1) provides that the assets are deemed to be held "separate and apart from the property of the person" and "to form no part of the estate or property of the person", this is not sufficient to constitute an autonomous patrimony such as the one contemplated by the civilian trust regime. It flows from the autonomous nature of the trust patrimony that assets held in trust must be property in which none of the settlor, trustee or beneficiary has any property right. But this runs afoul of the interest created by s. 227(4.1), because nothing in that provision deprives the person whose assets are subject to a

deemed trust of property rights in these assets. Therefore, the main element of a civilian trust is absent in the deemed trust established by s. 227(4.1): there is no autonomous patrimony to which specific property is transferred.

45 Furthermore, under s. 227(4.1), the person whose assets are subject to the deemed trust would act as trustee. Again, this is inconsistent with the definition of a trustee in civil law. The person whose assets are subject to a deemed trust pursuant to s. 227(4.1) does not "undertak[e], by his acceptance, to hold and administer" a trust patrimony (art. 1260 *C.C.Q.*). But most importantly, the fact that assets subject to the deemed trust are indeterminate makes the trustee's role effectively impossible to play. The *C.C.Q.* provides that the trustee "has the control and the exclusive administration of the trust patrimony" and "acts as the administrator of the property of others charged with full administration" (art. 1278). Thus, the trustee under s. 227(4.1) would be required to administer its own property — or at least an indefinite part of it — in the interest of Her Majesty (art. 1306 *C.C.Q.*). The trustee would be subject to obligations impossible to fulfill, such as the obligation not to mingle the administered property with its own (art. 1313 *C.C.Q.*). Obviously, one cannot act as an administrator of the property of others with respect to one's own property. It is therefore clear that the interest created by s. 227(4.1) has little, if anything, in common with the trust in civil law.

46 In the common law, a trust arises when legal ownership and beneficial ownership of a particular property are separated (see Valard Construction Ltd. v. Bird Construction Co., 2018 SCC 8, [2018] 1 S.C.R. 224, at para. 18). "Because a trust divides legal and beneficial title to property between a trustee and a beneficiary, respectively, the 'hallmark' characteristic of a trust is the fiduciary relationship existing between the trustee and the beneficiary, by which the trustee is to hold the trust property solely for the beneficiary's enjoyment" (para. 17 (footnote omitted)). As Rothstein J. wrote, because of this fiduciary relationship, "[t]he beneficial owner of property has been described as 'the real owner of property even though it is in someone else's name'" (Pecore v. Pecore, 2007 SCC 17, [2007] 1 S.C.R. 795, at para. 4, quoting *Csak v. Aumon*, (1990), 69 D.L.R. (4th) 567 (Ont. H.C.J.), at p. 570).

47 While the precise rights given to a beneficial owner may vary according to the terms of the trust and the principles of equity, I agree with the Crown that, where this type of interest exists, it will generally be inappropriate for the supervising judge to order a super-priority charge over the property subject to the interest, although the broad power conferred on the court by s. 11 of the CCAA would enable it to do so. Property held in trust cannot be said to belong to the trustee because "in equity, it belongs to another person" (*Henfrey*, at p. 31). However, a close examination of the nature of the interest created by s. 227(4.1) of the ITA reveals that it does not create this type of interest because "[t]he employer is not actually required to hold the money separate and apart, the usual fiduciary obligations of a trustee are absent, and the trust exists without a *res*. The law of tracing is similarly corrupted" (R. J. Wood and R. T. G. Reeson, "The Continuing Saga of the Statutory Deemed Trust: Royal Bank v. Tuxedo Transportation Ltd." (2000), 15 B.F.L.R.

515, at p. 532). In other words, the key attributes that allow the common law to refer to beneficial ownership as being a proprietary interest are missing.

48 According to the common law understanding of a trust, the legal owner or trustee owes a fiduciary duty to the equitable owner or beneficiary. The fiduciary relationship impresses the office of trustee with three fundamental duties: the trustee must act honestly and with reasonable skill and prudence, the trustee cannot delegate the office, and the trustee cannot personally profit from its dealings with the trust property or its beneficiaries (see Valard, at para. 17). This severely restricts what the trustee may do with trust property and creates a relationship significantly different from the one between a debtor and a creditor. For instance, while a debtor may attempt to reduce its debt or reach a compromise, a trustee cannot, since it must always act in the best interest of the beneficiary and cannot consider its own interests. Similarly, while a debtor is liable to a creditor until the debt is repaid, a trustee is not liable to a beneficial owner where property is lost, unless it was lost through a breach of the standard of care owed (see E. E. Gillese, *The Law of Trusts* (3rd ed. 2014), at p. 14). In the case of the deemed trust, however, Parliament did not create such a fiduciary relationship. Parliament expressly contemplated a potential compromise between Her Majesty and the debtor in s. 6(3) of the CCAA. In addition, the terms of the *ITA* do not require that the debtor actually keep the property subject to the deemed trust separate and use it solely for the benefit of Her Majesty. In fact, Her Majesty does not enjoy the benefit of Her interest in the property while the property is held by the debtor. Instead, Parliament contemplated that the debtor would continue to use and dispose of the property subject to the trust for its own business purposes (see *First Vancouver*, at paras. 42-46).

49 Another core attribute of beneficial ownership is certainty as to the property that is subject to the trust (see Gillese, at p. 39). Many deemed trusts fail to provide for certainty of subject matter. For instance, in *Henfrey*, the Court considered the deemed trust created by the British Columbia Social Service Tax Act, R.S.B.C. 1979, c. 388. Like s. 227(4.1) of the ITA, the Social Service Tax Act provided that tax collected but not remitted was deemed to be held in trust for Her Majesty. It further provided that unremitted amounts were deemed to be held separate and apart from and form no part of the assets or estate of the tax collector. While McLachlin J. found that the property was identifiable at the time the tax was collected, she noted that "[t]he difficulty in this, as in most cases, is that trust property soon ceases to be identifiable. The tax money is mingled" (p. 34). Therefore, she concluded that there was no trust under general principles of equity. The legislature's attempt to resolve this problem by deeming the amounts to be separate from and form no part of the tax debtor's property was merely a tacit acknowledgment that "the reality is that after conversion the statutory trust bears little resemblance to a true trust. There is no property which can be regarded as being impressed with a trust" (p. 34).

50 In *First Vancouver*, this Court examined the nature of the interest created by s. 227(4.1) of the ITA. Writing for the Court, Iacobucci J. held that this provision creates a charge which "is in principle similar to a floating charge over all the assets of the tax debtor in the amount

of the default" (para. 40). He concluded that Parliament specifically intended to create a charge with fluidity, a charge that could readily float over all of the debtor's assets rather than attach to a particular one (para. 33). Parliament's intention was to capture any property that comes into the possession of the tax debtor whilst simultaneously allowing any asset to be alienated and the proceeds of disposition to be captured (para. 5).

51 This lack of certainty as to the subject matter of the trust is even starker in the present case than in *Henfrey* or in *Sparrow Electric*, where there was certainty as to the assets until they were mingled. Section 227(4.1) purports to bring all assets owned by the debtor within its reach. Despite the wording of the section, this interest — one of the same nature as a "floating charge" — has no particular property to which it attaches. Without certainty of subject matter, equity cannot know which property the debtor has a fiduciary obligation to maintain in the beneficiary's interest and thus "[t]he notion of a trust without a *res* simply cannot be made sensible or coherent" (Wood and Reeson, at pp. 532-33 (footnote omitted); see also Sparrow Electric, at para. 31).

52 Parliament's decision to avoid certainty of subject matter was an intentional modification to the deemed trust following this Court's decision in *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, [1980] 1 S.C.R. 1182. In *Dauphin Plains*, the Court refused to enforce Her Majesty's claim because the Crown had failed to establish that the moneys purported to be deducted actually existed or were kept in such a way as to be traceable (p. 1197). Traceability is another key aspect of a beneficial interest, since it allows the beneficial owner to enjoy the benefits of ownership, such as income from the property. It also ensures that the beneficial owner is responsible for the costs of ownership. By choosing not to attach Her Majesty's claim to any particular asset, Parliament has protected Her Majesty from the risks associated with asset ownership, including damage, depreciation and loss. I agree with Gonthier J., who, speaking of the predecessor to s. 227(4.1) (albeit in dissent), said that "this subsection is antithetical to tracing in the traditional sense, to the extent that it requires no link at all between the subject matter of the trust and the fund or asset which the subject matter is being traced into" (*Sparrow Electric*, at para. 37). Had Parliament wanted to confer a beneficial ownership interest upon Her Majesty, it would have had to impose these associated risks as well.

53 For the same reason as in *Henfrey*, the statement that property is deemed to be removed from the debtor's estate is equally ineffective at preventing a judge from ordering super priorities over the debtor's property. Because the deemed trust does not attach to specific property and the debtor remains free to alienate any of its assets, no property is actually removed from the debtor's estate.

54 This interpretation is supported by the existence of s. 227(4.2) of the ITA, which specifically anticipates other interests taking priority over the deemed trust (something that would be impossible if there were an ownership interest). It states that "[f]or the purposes of subsections 227(4) and 227(4.1), a security interest does not include a prescribed security interest". In the Income Tax Regulations, C.R.C., c. 945, s. 2201(1), the Governor in Council has defined

"prescribed security interest" as a registered mortgage "that encumbers land or a building, where the mortgage is registered ... before the time the amount is deemed to be held in trust by the person". Therefore, in certain situations, mortgage holders take priority over Her Majesty.

55 I reiterate that, without specific property to attach to, there can be no trust. The fact that s. 227(4.1) specifically anticipates that the character of assets will change over time and automatically releases any assets that the debtor chooses to alienate from the deemed trust means that Parliament had in mind something different from beneficial ownership in the common law sense of the word. I tend to agree with Noël J.A.'s assessment of s. 227(4.1): "The deemed trust mechanism, whether applied in Quebec or elsewhere, effectively creates in favour of the Crown a security interest ..." (*Caisse populaire d'Amos*, at para. 46).

56 Other scholars agree that s. 227(4.1) "merely secures payment or performance of an obligation" (R. J. Wood, “Irresistible Force Meets Immovable Object: Canada v. Canada North Group Inc.” (2020), 63 Can. Bus. L.J. 85, at p. 95; see also A. Duggan and J. Ziegel, "Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security” (2007), 57 U.T.L.J. 227, at pp. 245-46). Wood and Reeson reach the particularly damning conclusion that "[t]he concept of a trust is used in the legislation, but in virtually every respect the characteristics of a trust are lacking" and thus "the use of inappropriate legal concepts" has led to the creation of a "statutory provision [that] is deeply flawed" (pp. 531-32). They "suspec[t] that the intention of the drafters was that Revenue Canada should obtain a charge on all the assets of the debtor", and they state that "the statutory deemed trust is nothing more than a legislative mechanism that is intended to create a non-consensual security interest in the assets of the employer" (p. 533).

57 Nonetheless, for our purposes it is not necessary to conclusively determine whether the interest created by s. 227(4.1) should be characterized as a security interest. What is clear is that s. 227(4.1) does not create a beneficial interest that can be considered a proprietary interest. Like the deemed trust at issue in *Henfrey*, it "does not give [the Crown] the same property interest a common law trust would" (p. 35). Without attaching to specific property, creating the usual right to the enjoyment of property or the fiduciary obligations of a trustee, the interest created by s. 227(4.1) lacks the qualities that allow a court to refer to a beneficiary as a beneficial owner. Therefore, I do not accept the Crown's argument that Her Majesty has a proprietary interest in a debtor's property that is adequate to prevent the exercise of a supervising judge's discretion to order super-priority charges under s. 11 of the CCAA or any of the sections that follow it.

(2) Does Section 227(4.1) of the ITA Create a Super Priority That Conflicts With a Court-Ordered Super-Priority Charge?

58 The Crown also refers to the part of s. 227(4.1) which states that the Receiver General shall be paid the proceeds of a debtor's property "in priority to all such security interests", as defined in s. 224(1.3). In the Crown's view, court-ordered super-priority charges under s. 11 of the CCAA

or any of the sections that follow it are security interests within the meaning of s. 224(1.3) and therefore Her Majesty's interest has priority over them.

59 My colleagues Justices Brown and Rowe point to the legislative history of s. 227(4.1) as evidence that Parliament intended Her Majesty's deemed trust to have "absolute priority" over all other security interests (para. 201). In particular, they rely upon Justice Iacobucci's comment in *Sparrow Electric* that "it is open to Parliament to step in and assign absolute priority to the deemed trust" by using the words "shall be paid to the Receiver General in priority to any such security interest" (reasons of Brown and Rowe JJ., at para. 202, citing Sparrow Electric, at para. 112). They further rely upon the press release accompanying the amendments, which stated that the deemed trust was to have absolute priority.

60 With respect, I disagree with this reasoning. *Sparrow Electric* dealt with a type of interest very different from the one before us now. In *Sparrow Electric*, this Court held that a fixed and specific charge over the tax debtor's inventory had priority over Her Majesty's deemed trust created by the *ITA*. Thus the purpose of the amendments was to "clarify that the deemed trusts for unremitted source deductions and GST apply whether or not other security interests have been granted in respect of the inventory or trade receivables of a business" (Department of Finance Canada, *Unremitted Source Deductions and Unpaid GST* (April 7, 1997), at p. 2). If Parliament had intended that the deemed trust have absolute priority, it would not have enacted s. 227(4.2) at the same time. As noted above, s. 227(4.2) provides that "a security interest does not include a prescribed security interest", and thus specifically envisions that the deemed trust will not have absolute priority. In my view, by using the words "in priority to all such security interests" in s. 227(4.1), Parliament intended that the priority be absolute not over all possible interests, but only over security interests as defined in s. 224(1.3). What must therefore be determined is whether a court-ordered super-priority charge under the *CCAA* falls within that definition.

61 Section 224(1.3) reads as follows:

> ***security interest*** means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for ....

62 This definition is expansive. However, the list of illustrative security interests makes it clear that a super-priority charge created under the *CCAA* cannot fall within its meaning. Court-ordered super-priority charges are utterly different from any of the interests listed. These super-priority charges are granted, not for the sole benefit of the holder of the charge, but to facilitate restructuring in furtherance of the interests of all stakeholders. In this way, they benefit the creditors as a group. The fact that Parliament chose to provide a list of examples whose nature is so unlike that of a

court-ordered super-priority charge demonstrates that it must have had a very different type of interest in mind when drafting s. 224(1.3). I could not agree more with Professor Wood about the limited class of interests that Parliament had in mind:

> [Court-ordered super-priority charges] are fundamentally different in nature from security interests that arise by way of agreement between the parties and from non-consensual security interests that arise by operation of law. Court-ordered charges are unlike conventional consensual and non-consensual security interests in that they are integrally connected to insolvency proceedings that operate for the benefit of the creditors as a group. Given the fundamentally different character of court-ordered charges, it would be reasonable to expect that they would be specifically mentioned in the ITA definition of a security interest if they were to be included.
>
> [Emphasis added; p. 98.]

63 My colleagues Brown and Rowe JJ. allege that this interpretation of s. 224(1.3) is contrary to our Court's decision in *Caisse populaire Desjardins de l'Est de Drummond*, where Rothstein J. wrote that the provided examples "do not diminish the broad scope of the words 'any interest in property' (para. 15; see also para. 14). With respect, I disagree with my colleagues. As Justice Rothstein explained at para. 40, his comments were made in response to the argument that the list of examples of security interests was exhaustive. I agree with him that the list of examples provided is not exhaustive. However, the examples remain illustrative of the types of interests that Parliament had in mind and are clearly united by a common theme or class because Parliament employed a compound "means ... and includes" structure to establish its definition: "*security interest means* any interest in, or for civil law any right in, property that secures payment or performance of an obligation *and includes* ...". In my view, this structure evidences Parliament's intent that the list have limiting effect, such that only the instruments enumerated and instruments that are similar in nature fall within the definition. The critical difference between the listed security interests and super-priority charges ordered under s. 11 of the CCAA or any of the sections that follow it explains both why the latter are excluded from the list of specific instruments and why there can be no suggestion that they may be included in the broader term "encumbrance" at the end of that list. The *ejusdem generis* principle supports this position by limiting the generality of the final words on the basis of the narrow enumeration that precedes them (*National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029, at p. 1040). All of the other instruments arise by agreement or by operation of law. Therefore, court-ordered super-priority charges under s. 11 or any of the sections that follow it are different in kind from anything on the list.

64 Using the list of specific examples to ascertain Parliament's intent in this case is also consistent with the presumption against tautology. In *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846, McLachlin C.J. defined this presumption in the following way:

> It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain: Sullivan, at p. 158. Thus, "[e]very word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose" (p. 158). This principle is often invoked by courts to resolve ambiguity or to determine the scope of general words.

(Para. 36, quoting R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 158; see also Placer Dome Canada Ltd. v. Ontario (Minister of Finance), 2006 SCC 20, [2006] 1 S.C.R. 715, at para. 45.)

65 The *ITA* contains two definitions of "security interest", in s. 224(1.3) and s. 18(5). For the purposes of computing taxpayer income, Parliament chose to define "security interest" in s. 18(5) in nearly the same manner as in s. 224(1.3), but without listing the ten specific security instruments: "*security interest*, in respect of a property, means an interest in, or for civil law a right in, the property that secures payment of an obligation". The presumption against tautology means that we must presume that Parliament included the specific additional words in s. 224(1.3) because they "have a specific role to play in advancing the legislative purpose" (*Placer Dome*, at para. 45, quoting R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 159). Applying the presumption against tautology demonstrates that Parliament intended interpretive weight to be placed on the examples.

66 To come back to *Caisse populaire Desjardins de l'Est de Drummond*, I agree with Rothstein J. that the definition of "security interest" in s. 224(1.3) of the ITA is expansive such that it "does not require that the agreement between the creditor and debtor take any particular form" (para. 15). However, I am of the view that there is a key restriction in this expansive definition. The definition focuses on interests created either by consensual agreement or by operation of law, and these types of interests are usually designed to protect the rights of a single creditor, usually to the detriment of other creditors. In that case, the Court was considering whether a right to compensation conferred on a single creditor by a contract entered into between that creditor and the debtor was a security interest within the meaning of s. 224(1.3). The situation at issue in that case was completely different than the one at issue in the present case. Indeed, in the present case, the interest of the participants in the restructuring is created by a court order, not by an agreement or by operation of law. As I have said above, when a judge orders a super-priority charge in *CCAA* proceedings, it is quite a different type of interest as the *CCAA* restructuring process benefits all creditors and not one in particular.

67 Finally, if Parliament had wanted to include court-ordered super-priority charges in the definition of "security interest", it would have said so specifically. Parliament must be taken to have legislated with the operation of the *CCAA* in mind. In the words of Professor Sullivan, "The legislature is presumed to know its own statute book and to draft each new provision with regard

to the structures, conventions, and habits of expression as well as the substantive law embodied in existing legislation" (Sullivan (2014), at p. 422 (footnote omitted)). Given that, in *Indalex*, this Court has already found that granting super-priority charges is critical as "a key aspect of the debtor's ability to attempt a workout", one would expect Parliament to use clearer language where such a definition could jeopardize the operation of another one of its Acts. I am therefore in total disagreement with my colleagues Justices Brown and Rowe that "nothing in the definition of security interest in the *ITA* precludes the inclusion of an interest that is designed to operate to the benefit of all creditors" (para. 210). To the contrary, everything hints at priming charges being excluded from the definition of security interest.

68 In conclusion, a court-ordered super-priority charge under the *CCAA* is not a security interest within the meaning of s. 224(1.3) of the ITA. As a result, there is no conflict between s. 227(4.1) of the ITA and the Initial Order made in this case. I therefore respectfully disagree with my colleague Justice Moldaver's suggestion that there may be a conflict between s. 11 of the CCAA and the *ITA* (para. 258). The Initial Order's super-priority charges prevail over the deemed trust.

C. Was It Necessary for the Initial Order to Subordinate Her Majesty's Claim Protected by a Deemed Trust in This Case?

69 Finally, I must now identify the provision in which the Initial Order here should be grounded. While the initial order under consideration in *Indalex* was based on the court's equitable jurisdiction, in most instances, orders in *CCAA* proceedings should be considered an exercise of statutory power (*Century Services*, at paras. 65-66).

70 As discussed above, a supervising court's authority to order super-priority charges is grounded in its broad discretionary power under s. 11 of the CCAA and also in the more specific grants of authority under ss. 11.2, 11.4, 11.51 and 11.52. Those provisions authorize the court to grant certain priming charges that rank ahead of the claims of "any secured creditor". While I have already concluded that Her Majesty does not have a proprietary interest as a result of Her deemed trust, it is less certain whether Her Majesty is a "secured creditor" under the *CCAA*. Professor Wood is of the view that Her Majesty is not a "secured creditor" under the *CCAA* by virtue of Her deemed trust interest; rather, ss. 37 to 39 of the CCAA create "two distinct approaches — one that applies to a deemed trust, the other that applies when a statute gives the Crown the status of a secured creditor" (p. 96). Therefore, the ranking of a priming charge ahead of the deemed trust would fall outside the scope of the express priming charge provisions. I do not need to definitively determine if Her Majesty falls within the definition of "secured creditor" under the *CCAA* by virtue of Her trust. Instead, I would ground the supervising court's power in s. 11, which "permits courts to create priming charges that are not specifically provided for in the *CCAA*" (p. 98). I respectfully disagree with the suggestion of my colleagues Brown and Rowe JJ. that Professor Wood or any other author has suggested that s. 11 is limited by the specific provisions that follow it (para. 228).

To the contrary, this Court said in *Century Services*, at paras. 68-70, that s. 11 provides a very broad jurisdiction that is not restricted by the availability of more specific orders.

71 My colleagues Brown and Rowe JJ. also argue that "priming charges cannot supersede the Crown's deemed trust claim because they may attach *only* to *the property of the debtor's company*" (para. 223 (emphasis in original)). With respect, this argument cannot stand because, although ss. 11.2, 11.51 and 11.52 of the CCAA contain this restriction, there is no such restriction in s. 11. As Lalonde J. recognized, [TRANSLATION] "In exercising the authority conferred by the *CCAA*, including inherent powers, the courts have not hesitated to use this jurisdiction to intervene in contractual relationships between a debtor and its creditors, even to make orders affecting the rights of third parties" (*Triton Électronique*, at para. 31). There may be circumstances where it is appropriate for a court to attach charges to property that does not belong to the debtor — if, for instance, this deemed trust were to be equivalent to a proprietary interest. However, that circumstance does not arise in this case because the property subject to Her Majesty's deemed trust remains the property of the debtor, as the deemed trust does not create a proprietary interest. My colleagues' reliance on s. 37(2) of the CCAA is similarly ill-founded. As I said earlier, s. 37(2) simply preserves the status quo. It does not alter Her Majesty's interest. It merely continues that interest and excludes it from the operation of s. 37(1), which would otherwise downgrade it to the interest of an ordinary creditor.

72 That said, courts should still recognize the distinct nature of Her Majesty's interest and ensure that they grant a charge with priority over the deemed trust only when necessary. In creating a super-priority charge, a supervising judge must always consider whether the order will achieve the objectives of the *CCAA*. When there is the spectre of a claim by Her Majesty protected by a deemed trust, the judge must also consider whether a super priority is necessary. The record before us contains no reasons for the Initial Order, so this is difficult to determine in this case. Given that Her Majesty has been paid and that the case is in fact moot, it is not critical for us to determine whether the supervising judge believed it was necessary to subordinate Her Majesty's claim to the super-priority charges. Based on Justice Topolniski's reasons for denying the Crown's motion to vary the Initial Order, it is clear that she would have found that the super-priority charges deserved priority over Her Majesty's interest (paras. 100-104). However, I wish to say a few words on when it may be necessary for a supervising judge to subordinate Her Majesty's interest to super-priority charges.

73 It may be necessary to subordinate Her Majesty's deemed trust where the supervising judge believes that, without a super-priority charge, a particular professional or lender would not act. This may often be the case. On the other hand, I agree with Professor Wood that, although subordinating super-priority charges to Her Majesty's claim will often increase the costs and complexity of restructuring, there will be times when it will not. For instance, when Her Majesty's claim is small or known with a high degree of certainty, commercial parties will be able to manage their risks and will not need a super priority. After all, there is an order of priority even amongst super-priority

charges, and therefore it is clear that these parties are willing to have their claims subordinated to some fixed claims. A further example of where different considerations may be in play is in so-called liquidating *CCAA* proceedings. As this Court recently recognized, *CCAA* proceedings whose fundamental objective is to liquidate — rather than to rescue a going concern — have a legitimate place in the *CCAA* regime and have been accepted by Parliament through the enactment of s. 36 (*Callidus Capital*, at paras. 42-45). Liquidating *CCAA* proceedings often aim to maximize returns for creditors, and thus the subordination of Her Majesty's interest has less justification beyond potential unjust enrichment arguments.

VI. Disposition

74 I would dismiss the appeal with costs in this Court in accordance with the tariff of fees and disbursements set out in Schedule B of the Rules of the Supreme Court of Canada, SOR/2002-156.

Karakatsanis J. **(Martin J. concurring):**

I. Overview

75 When a company seeks to restructure its affairs in order to avoid bankruptcy, the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (CCAA), allows the court to order charges in favour of parties that are necessary to the restructuring process: lenders who provide interim financing, the monitor who administers the company's restructuring, and directors and officers who captain the sinking ship (among others). These charges, often referred to as "priming charges", are meant to encourage investment in the company as it undergoes reorganization. A company's reorganization, as an alternative to the devastating effects of bankruptcy, serves the public interest by benefitting creditors, employees, and the health of the economy more generally.

76 In this case, the *CCAA* judge ordered priming charges over the estates of Canada North Group and six related companies (Debtor Companies) in favour of an interim lender, the monitor, and directors. Property of two of the Debtor Companies, however, was also subject to a deemed trust in favour of the Crown, under the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) (ITA), for unremitted source deductions consisting of employees' income tax, Canada Pension Plan contributions, and employment insurance premiums. While this appeal is moot because there are sufficient assets to satisfy both the Crown's deemed trust claim and the priming charges, this Court is asked to determine which has priority in the restructuring: the priming charges under the *CCAA* or the deemed trust under the *ITA*.

77 Section 227(4.1) of the ITA provides that, when an employer fails to remit source deductions to the Crown, a deemed trust attaches to the property of the employer to the extent of the unremitted source deductions. The deemed trust operates "notwithstanding any security interest in such property" and "[n]otwithstanding ... any other enactment of Canada". Sections 11.2, 11.51 and 11.52 of the CCAA give the court authority to order priming charges over a company's property

in favour of interim lenders, directors and officers, and estate administrators. Priming charges can rank ahead of any other secured claim. Read on their own, these provisions appear to give different parties super-priority in an insolvency. This issue of statutory interpretation has been described as the collision of an unstoppable force with an immoveable object (R. J. Wood, "Irresistible Force Meets Immovable Object: Canada v. Canada North Group Inc." (2020), 63 Can. Bus. L.J. 85).

78 The appellant, the Crown, argues that s. 227(4.1) of the ITA creates a proprietary right in the Crown because, through the mechanism of a deemed trust, it gives the Crown beneficial ownership of the amount of the unremitted source deductions. In other words, that *amount* is the Crown's property and a *CCAA* judge cannot, therefore, order a charge over it; it should be taken out of the estate and can play no role in the restructuring process.

79 In contrast, the respondents argue that s. 227(4.1) creates a security interest in the Crown squarely contemplated by ss. 11.2, 11.51 and 11.52 of the CCAA. They further submit that there is no conflict between the relevant provisions because the policies underlying both Acts can be harmonized in favour of giving effect to the *CCAA* provisions.

80 For the reasons below, I conclude that there is no conflict between the *ITA* and *CCAA* provisions. The right that attaches to "beneficial ownership" under s. 227(4.1) of the ITA must be interpreted in the specific statutory context in which it arises. Here, the Crown's right to unremitted source deductions in a *CCAA* restructuring is protected by the requirement that the plan of compromise pay the Crown in full. Because I do not conclude that the Crown's interest fits within the relevant statutory definition of "secured creditor" under the *CCAA*, it is not captured by the court's authority to order priming charges under ss. 11.2, 11.51 and 11.52 of the CCAA. However, in my view, the broad discretionary power under s. 11 of the CCAA permits a court to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions. This conclusion harmonizes the purposes of both federal statutes. I would dismiss the appeal.

II. Facts

81 In July 2017, the Court of Queen's Bench of Alberta issued an order granting the Debtor Companies protection under the CCAA (Alta. Q.B., No. 1703-12327, July 5, 2017 (Initial Order)). The Initial Order provided for priming charges in the following order of priority: (1) an Administration Charge of $500,000 in favour of the court-appointed Monitor, Ernst & Young Inc.; (2) an Interim Lender's Charge of $1,000,000 in favour of the interim lender, Business Development Bank of Canada (BDBC); and (3) a Directors' Charge of $150,000 (together, Priming Charges). The Interim Lender's Charge was later increased to $3,500,000 and the Administration Charge to $950,000.

82 Paragraph 44 of the Initial Order provided that the Priming Charges have priority over the claims of secured creditors:

> Each of the Directors' Charge, Administration Charge and the Interim Lender's Charge ... shall constitute a charge on the Property and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise ... in favour of any Person.

83 Paragraph 46 of the Initial Order provided that the Priming Charges "shall not otherwise be limited or impaired in any way by ... (d) the provisions of any federal or provincial statutes".

84 At the time of the Initial Order, two of the Debtor Companies had failed to remit source deductions and owed the Crown $685,542.93. The Crown applied to vary the Priming Charges in the Initial Order on the basis that paras. 44 and 46(d) failed to recognize the Crown's legislated interest in unremitted source deductions. The Crown argued that s. 227(4.1) of the ITA, s. 23(4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (*CPP*), and s. 86(2.1) of the Employment Insurance Act, S.C. 1996, c. 23 (EIA), require the Crown's claims for unremitted source deductions to have priority over the claims of all other creditors of a debtor, notwithstanding any other federal statute, including the *CCAA*. In these reasons, I will only refer to s. 227(4.1) of the ITA as the relevant *ITA*, *CPP* and *EIA* provisions are identical and the latter two statutes cross-reference the *ITA*.

III. Decisions Below

A. Court of Queen's Bench of Alberta, 2017 ABQB 550, 60 Alta. L.R. (6th) 103 (Topolniski J.)

85 The application judge held that court-ordered priming charges under ss. 11.2, 11.51 and 11.52 of the CCAA have priority over the Crown's deemed trust for unremitted source deductions. First, she concluded that the Crown's deemed trust under s. 227(4.1) of the ITA creates a security interest rather than a proprietary interest because the definition of "security interest" in the *ITA* includes an interest created by a deemed or actual trust, and it would be inconsistent to interpret the Crown's interest under s. 227(4.1) contrary to its enabling statute. She also reasoned that the deemed trust is a security interest because it lacks certainty of subject matter and is therefore not a true trust.

86 Second, the application judge concluded that s. 227(4.1) of the ITA and ss. 11.2, 11.51 and 11.52 of the CCAA are not inconsistent because any conflict can be avoided by interpretation. She reasoned that the policy objectives of both Acts have to be respected because they were enacted by the same government. On the one hand, the collection of source deductions is at the heart of the *ITA*. On the other, the *CCAA* aims to facilitate business survival. The application judge concluded that, without the court's ability to order priming charges, interim lending "would simply end", along with "the hope of positive *CCAA* outcomes" (para. 102). The goals of both Acts can therefore only be achieved if priority is given "to those charges necessary for restructuring", while the deemed trust ranks in priority to all other secured creditors (para. 112).

B. Court of Appeal of Alberta, 2019 ABCA 314, 93 Alta. L.R. (6th) 29 (Rowbotham and Schutz JJ.A., Wakeling J.A. Dissenting)

87 A majority of the Court of Appeal dismissed the Crown's appeal. It agreed with the application judge that the Crown's deemed trust under s. 227(4.1) of the ITA creates a security interest rather than a proprietary interest. It also agreed that the Crown's position failed to reconcile the objectives of the *ITA* and *CCAA*, and given the importance of interim lending, concluded that absurd consequences could follow if the Crown's position prevailed.

88 Wakeling J.A. disagreed. He concluded that s. 227(4.1) of the ITA makes two unequivocal statements: first, that the Crown is the beneficial owner of the debtor's property to the extent of the unremitted source deductions; and second, that this amount must be paid to the Crown notwithstanding the security interests of any other secured creditors, including, in his opinion, the holders of a priming charge. As a result, it was unnecessary to reconcile policy objectives. In his view, the notwithstanding clause in s. 227(4.1) was conclusive because the relevant *CCAA* provisions lacked the same language. As a result, there was "no need to look beyond the four corners of s. 227(4.1) to determine the scope of the unassailable priority it creates" (para. 135). Finally, Wakeling J.A. noted that there is perfect correlation between the purpose of the *ITA* and the plain meaning of s. 227(4.1).

IV. Parties' Submissions

A. The Appellant the Crown

89 The Crown's submissions before this Court echo the dissent at the Court of Appeal: the text of s. 227(4.1) unequivocally states that unremitted source deductions become the property of the Crown. The Crown argues that the plain meaning of s. 227(4.1) aligns with its purpose, which is to protect the largest source of government revenue.

90 The Crown makes two principal submissions. First, it submits that the Crown's interest under s. 227(4.1) of the ITA is a proprietary interest rather than a security interest because the text of s. 227(4.1) causes the unremitted source deductions to become the property of the Crown. There is no need to rely on the "notwithstanding clause" in s. 227(4.1) because the *ITA* and *CCAA* provisions work harmoniously; the priming charges can only attach to a company's property and s. 227(4.1) provides that the unremitted source deductions are beneficially owned by the Crown.

91 Second, the Crown submits in the alternative that, even if its interest is a security interest, it ranks ahead of the priming charges. This is because a priming charge under the *CCAA* is a security interest within the meaning of the *ITA*, and s. 227(4.1) specifically states that the deemed trust ranks ahead of all other security interests.

B. The Respondent Business Development Bank of Canada

92 The respondent BDBC, urges this Court to follow the approach taken by the courts below. It submits that the Crown's interest under the deemed trust is a security interest because (1) the enabling statute, the *ITA*, defines a deemed trust as a security interest; (2) this Court, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, characterized the deemed trust as a "floating charge", which is a security interest; and (3) the opposite conclusion, that it is a proprietary interest, would be at odds with commercial reality. As the definition of "secured creditor" in the *CCAA* includes the holder of a deemed trust, that Act contemplates that a priming charge can rank ahead of the Crown's deemed trust. Thus, ss. 11.2, 11.51 and 11.52 of the CCAA contemplate that a priming charge can rank ahead of the Crown's deemed trust.

C. The Respondent Ernst & Young, in its Capacity as Monitor

93 Both BDBC and Ernst & Young (together, Respondents) submit that the Crown's deemed trust is a security interest and that the statutes can be interpreted harmoniously to avoid a conflict. The Monitor submits that a court-ordered priming charge is not a security interest within the meaning of s. 227(4.1) of the ITA because it is not specifically listed in the definition of security interest under the *ITA*, and as a taxing statute, the *ITA* requires a strict, textual approach to interpretation.

94 The Monitor also highlights that the Crown is a unique creditor because it has immediate information available to it respecting remittance and can certify and pursue amounts owing immediately.

V. Issue

95 The issue on appeal is whether court-ordered priming charges under the *CCAA* can rank ahead of the Crown's deemed trust for unremitted source deductions, as created by s. 227(4.1) of the ITA and related provisions of the *CPP* and *EIA*. It is clear from the wording of s. 227(4.1) of the ITA that, if there is any conflict with a provision from another Act, s. 227(4.1) is to prevail. Accordingly, this appeal turns on whether, and to what extent, the *CCAA* regime conflicts with s. 227(4.1) of the ITA. In answering that question, I proceed in four steps:

1. What rights does s. 227(4.1) of the ITA confer on the Crown in respect of unremitted source deductions?

2. How is the Crown's deemed trust for unremitted source deductions treated in Parliament's insolvency regime?

3. Do ss. 11.2, 11.51 and 11.52 of the CCAA permit the court to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions?

4. If not, does s. 11 of the CCAA allow the court to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions?

VI. Analysis

A. What Rights Does Section 227(4.1) of the ITA Confer on the Crown in Respect of Unremitted Source Deductions?

(1) General Scheme and Background of Sections 227(4) and 227(4.1) of the ITA

96 Section 153(1) of the ITA requires employers to deduct and withhold amounts from their employees' wages (source deductions) and remit those amounts to the Receiver General by a specified due date. When source deductions are made, s. 227(4) deems that they are held separate and apart from the property of the employer and from property held by any secured creditor of the employer, notwithstanding any security interest in that property. Source deductions are deemed to be held in trust for Her Majesty for payment by the specified due date.

97 If source deductions are not paid by the specified due date, s. 227(4.1) extends the trust in s. 227(4). It deems that a trust attaches to the employer's property to the extent of any unremitted source deductions; that the trust existed from the moment the source deductions were made; and that the trust did not form part of the estate or property of the employer from the moment the source deductions were made (all regardless of whether the employer's property is subject to a security interest). It also deems that, to the extent of any unremitted source deductions, the employer's property is property "beneficially owned" by the Crown, notwithstanding any security interest in the employer's property:

> **(4.1)** Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed
>
> (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
>
> (b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and

> apart from the estate or property of the person and whether or not the property is subject to such a security interest
>
> and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

98 The *ITA* defines "security interest" in s. 224(1.3):

> ***security interest*** means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for ....

99 As emphasized by the Crown, ss. 227(4) and 227(4.1) were amended to their current form — excerpted above — to reverse the effect of this Court's decision in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411. The Crown submits that, in explicitly reversing *Sparrow Electric*'s result, Parliament meant to always give the Crown super-priority in an insolvency. I do not agree that such a broad conclusion can be drawn from this legislative history. In *Sparrow Electric*, the issue was who, between a lending bank and the Crown, had priority in the debtor's bankruptcy. The bank had a general security agreement over all of the debtor's property, which it entered into several months before successfully petitioning the debtor into bankruptcy. While the debtor also owed the Crown $625,990.86 in unremitted source deductions at the time of the bankruptcy, the first instance of non-remittance to the Crown was *after* the bank entered its general security agreement.

100 Iacobucci J., writing for a majority of the Court, held in favour of the bank. At that time, the deemed trust was worded differently, triggering only upon an event of "liquidation, assignment, receivership or bankruptcy", and the amount of the unremitted source deductions was only deemed to be held "separate from and form no part of the estate *in liquidation, assignment, receivership or bankruptcy*" (para. 13 (emphasis added)). The majority therefore concluded that the deemed trust did not attach to the debtor's property because, at the relevant time, that property was already "legally the [bank's]" (para. 98). Because the bank had a fixed and specific charge over all of the debtor's property, there was nothing left for the trust to attach to. The trust could not be effective unless there was some unencumbered asset in the bankruptcy out of which the trust could be deemed (para. 99).

101 After *Sparrow Electric*, Parliament amended the deemed trust to ensure that, in a case like *Sparrow Electric*, the deemed trust attached notwithstanding any security interest held in the debtor's property (*First Vancouver*, at para. 27). As Iacobucci J. explained in *First Vancouver*, Parliament intended "to grant priority to the deemed trust in respect of property that is also subject

to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect" (para. 28). [1]

102 In this appeal, the Crown argues that a court-ordered priming charge under the *CCAA* is a security interest for the purposes of the Crown's deemed trust. I agree that the definition of "security interest" in s. 224(1.3) of the ITA is broad, capturing "any interest in ... property that secures payment or performance of an obligation and includes an interest ... created by or arising out of a ... charge ..., *however or whenever arising, created, deemed to arise or otherwise provided for*". However, Wood makes the observation that court-ordered charges are fundamentally different in nature from the security interests that arise by consensual agreement or by operation of law enumerated in s. 224(1.3) because "they are integrally connected to insolvency proceedings that operate for the benefit of the creditors as a group" (Wood (2020), at p. 98). As a result, he reasons that "it would be reasonable to expect that they would be specifically mentioned in the ITA definition of security interest if they were to be included" (p. 98).

103 While s. 227(4.1) undeniably operates notwithstanding any security interest — and priming charge — over the debtor's property, the legislative history post-*Sparrow Electric* says nothing about the Crown's specific right to unremitted source deductions, pursuant to the deemed trust, when a company undergoes restructuring under the *CCAA*. Even if, as the Crown insists, a priming charge under the *CCAA* is a security interest for the purposes of the Crown's deemed trust (and I do not settle that debate in these reasons), that does not define what *rights* the Crown has, in a *CCAA* restructuring, pursuant to its deemed trust. This Court has never considered how s. 227(4.1) of the ITA interacts with the *CCAA* regime in light of the seminal insolvency decisions in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, and *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271. This appeal calls on this Court to do so.

(2) The Right of Beneficial Ownership in Section 227(4.1) of the ITA

104 The Crown argues that s. 227(4.1) creates a proprietary right in the Crown because it gives the Crown beneficial ownership of the amount of the unremitted source deductions. Because this is an *ownership* right, the amount of the unremitted source deductions is taken out of the debtor's estate, effectively giving the Crown super-priority. In other words, the Crown agrees with the dissent in the Court of Appeal: that property is the Crown's property and a *CCAA* judge cannot order a charge over it. The Respondents, in line with the Court of Appeal majority, submit that s. 227(4.1) creates a security interest and can therefore be subordinated to a priming charge under the *CCAA*.

105 These submissions rely heavily on characterizing the Crown's interest as either a "security interest" or as "proprietary" in nature. However, in my view, defining an entitlement as one or the other does not resolve the issues on appeal because neither characterization has essential features in

the abstract. Rather, a statutory entitlement takes its character from the statutory provision. General concepts of "proprietary right" and "security interest" — or of "property," "trust" and "beneficial ownership" — are of limited assistance in this analysis.

106 This Court has noted that property is often understood as a "bundle of rights" and obligations (Saulnier v. Royal Bank of Canada, 2008 SCC 58, [2008] 3 S.C.R. 166, at para. 43). Depending on which rights someone holds, their "bundle of rights" can be viewed as a weak or robust proprietary interest. For this reason, the holder of a security interest has been described as having a proprietary right in its security. In *Sparrow Electric*, for example, both Iacobucci J., writing for the majority, and Gonthier J., writing for the dissent, explained the secured creditor in that case as having a proprietary right in, and effectively owning, the debtor's property that secured its debt (paras. 42 and 98).

107 Similarly, Ronald C. C. Cuming, Catherine Walsh and Roderick J. Wood state that, in the context of personal property security legislation, a secured creditor holds a proprietary right in collateral. This is because, for these authors, "[t]he defining characteristic of a proprietary right ... is that it is ... enforceable against the world", and the right of a secured creditor with a perfected security interest is enforceable against the world (*Personal Property Security Law* (2nd ed. 2012), at p. 613). Without an explanation for what the terms mean in a particular context, it is difficult to draw any conclusion from characterizing something as one or the other. (While there is a clear difference between a right *in rem* (available against the world at large) and a right *in personam* (available against a determinate set of individuals), whether the term "proprietary right" means a "right *in rem*" or the term "security interest" means a "right *in personam*" depends upon the statutory context. In any event, the submissions before this Court were not framed in these terms).

108 This Court explained in *Saulnier* that, when analyzing the definition of property under a statute, there is little use in considering property in the abstract or even under the common law because "Parliament can and does create its own lexicon" for particular purposes (para. 16; see also Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny, 2009 SCC 49, [2009] 3 S.C.R. 286, at paras. 11-12). Indeed, "interests unknown to the common law may be created by statute" (*Wotherspoon v. Canadian Pacific Ltd.*, [1987] 1 S.C.R. 952, at p. 999, citing Ross J. in *Town of Lunenburg v. Municipality of Lunenburg*, [1932] 1 D.L.R. 386 (N.S.S.C.), at p. 390). As a result, caution is required before importing definitions from other contexts, relying on statements or description from cases out of context, and employing general concepts like "proprietary right" and "security interest". It is crucial in this appeal to stay within the bounds of the statutory provisions being interpreted.

109 Section 227(4.1) states that the amount of the unremitted source deductions is "beneficially owned" by the Crown. However, it does not follow that this right of beneficial ownership is absolute or that the term imports specific rights that flow from it. This is not a case where Parliament has used a term with an established legal meaning — leading to an inference that

Parliament has given the term that meaning in the statute in question (R. v. D.L.W., 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 20). The concept of beneficial ownership does not have a precise doctrinal meaning in the common law of Canada, and it does not exist in the civil law of Quebec. It is also not used consistently in the *ITA*. The meaning of "beneficially owned" in s. 227(4.1) can only be understood in the specific, relevant statutory context in which it arises. To that end, while s. 227(4.1) uses the mechanism of a trust and confers some type of beneficial ownership on the Crown, it modifies even those features of beneficial ownership that are widely associated with it under the common law.

110 As a federal statute with national application, the *ITA* rests on the private law of the provinces. This relationship of complementarity is codified in s. 8.1 of the Interpretation Act, R.S.C. 1985, c. I-21. However, the federal statute can derogate and dissociate itself from the private law when it legislates on a matter that falls within its jurisdiction: see M. Lamoureux, "*The Harmonization of Tax Legislation Dissociation: A Mechanism of Exception Part III*" (online). As I shall explain, the trust created by s. 227(4.1) disassociates itself from the requirements of a trust in both the provincial common law and civil law.

111 I proceed as follows: (1) there is no settled doctrinal meaning of the term beneficial ownership; and (2) s. 227(4.1) does not create a true trust because there is no certainty of subject matter. A lack of certainty of subject matters means that the Crown cannot, through tracing, claim appreciation of trust value and the trustee (tax debtor) is free to dispose of trust property. These features render the Crown's beneficial ownership weaker than generally understood at common law. The result is an interest "unknown to the common [or civil] law". We cannot, therefore, look at s. 227(4.1) in isolation to define the way in which the Crown's "beneficially owned" property under s. 227(4.1) should be treated in an insolvency — that clarification must come from, and indeed does come from, Parliament's insolvency legislation.

(i) No Settled Doctrinal Meaning

112 Beneficial ownership is most commonly used in the law of trusts to broadly distinguish between who has legal title to property (the trustee) and who has beneficial enjoyment of that property (the beneficiary). *Black's Law Dictionary* (11th ed. 2019), for example, defines a "beneficial owner" as "[o]ne recognized in equity as the owner of something because use and title belong to that person, even though legal title may belong to someone else, esp. one for whom property is held in trust" (p. 1331).

113 Despite this common usage, there is no clear definition of the rights flowing from the term "beneficial ownership" under the common law (see, e.g., C. Brown, "Beneficial Ownership and the Income Tax Act" (2003), 51 *Can. Tax J.* 401; M. D. Brender, "Beneficial Ownership in Canadian Income Tax Law: Required Reform and Impact on Harmonization of Quebec Civil Law and Federal Legislation" (2003), 51 *Can. Tax J.* 311, at p. 316). As well, the *Civil Code of*

Québec does not have a concept of beneficial ownership (see Canada (Attorney General) v. Caisse populaire d'Amos, 2004 FCA 92, 324 N.R. 31, at paras. 48-49).

114 The term itself is also contentious within the academy, giving rise to a heated debate about whether a trust beneficiary should be thought of as an *owner* at all (see, e.g., D. W. M. Waters, "The Nature of the Trust Beneficiary's Interest" (1967), 45 Can. Bar Rev. 219; L. D. Smith, "Trust and Patrimony" (2008), 38 *R.G.D.* 379; B. McFarlane and R. Stevens, "The nature of equitable property" (2010), 4 J. Eq. 1; J. E. Penner, "The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust" (2014), 27 Can. J.L. & Jur. 473; Brender, at p. 316). The conventional view is that a trust beneficiary only has a right *in personam* against the trustee to enforce the terms of the trust, which is not a proprietary right in the trust property. A different view is that a trust beneficiary has equitable ownership of trust property, despite the existence of an intermediary with legal title (Brown, at pp. 413-14). Some suggest that there is a midway approach in Canada: depending on the context, a beneficiary's right is either a personal right against the trustee or a proprietary right in trust property (Brender, at p. 316).

115 In "Beneficial Ownership and the Income Tax Act", Brown notes the debate in the academy and analyzes how the terms "beneficial ownership", "beneficial owner", and "beneficially owned" are used in the *ITA*. After examining 26 provisions invoking beneficial ownership in the *ITA*, she concludes that its meaning is "no longer obvious" (p. 452).

116 This Court need not resolve the ongoing debate. However, it serves to highlight that "the real question is what is the nature of a beneficiary's interest in a trust when considered in the context of the legislation that is sought to be applied" (Brown, at p. 419). In the *ITA* context, Brown concludes that "the matter of what 'beneficial ownership' means for tax purposes must be settled within the structure of the ITA" (p. 435). Further, whether the beneficiary's rights within the *ITA* are *in rem* or *in personam* will often depend on a combination of factors, like the wording of the deeming provision, private law concepts, case law, and tax policy (see pp. 435-36).

117 In my view, the works cited above belie the notion that s. 227(4.1) of the ITA, and its use of the concept of beneficial ownership, is unequivocal in meaning. Not only is there no settled definition of beneficial ownership under the common law, there also appears to be no consistent meaning of the term in the *ITA*. And the concept does not exist in Quebec civil law. The meaning of beneficial ownership when used in a statute must always be construed within the context of the particular provision in which it occurs. What is necessary is careful scrutiny of s. 227(4.1), and specifically, the right of beneficial ownership it gives the Crown, particularly in the context of a statutory deemed trust with no specific subject matter.

(ii) Section 227(4.1) Does Not Create a "True" Trust

118 A statutory deemed trust is a unique legal vehicle. Unlike an express trust, which can be created by contract, will, or oral and written declarations, and unlike a trust that arises by operation

of law, a statutory deemed trust "is a trust that legislation brings into existence by constituting certain property as trust property and a certain person as the trustee of that property" (Guarantee Company of North America v. Royal Bank of Canada, 2019 ONCA 9, 144 O.R. (3d) 225, at para. 18; see also A. Grenon, "Common Law and Statutory Trusts: In Search of Missing Links" (1995), 15 Est. & Tr. J. 109, at p. 110).

119 Being a creature of statute, a statutory deemed trust does not have to fulfill the ordinary requirements of trust law, namely, certainty of intention, certainty of subject matter, and certainty of object (*British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; see also Friends of Toronto Public Cemeteries Inc. v. Public Guardian and Trustee, 2020 ONCA 282, 59 E.T.R. (4th) 174, at para. 163).

120 Section 227(4.1), for example, does not fulfill the ordinary requirements of the common law of trusts (see R. J. Wood and R. T. G. Reeson, "The Continuing Saga of the Statutory Deemed Trust: Royal Bank v. Tuxedo Transportation Ltd." (2000), 15 B.F.L.R. 515, at pp. 522-24). There is no identifiable trust property and therefore no certainty of subject matter (*Henfrey*, at p. 35). To use the terminology in *Henfrey*, s. 227(4.1) is not a "true" trust (p. 34). Moreover, without specific property being transferred to the trust patrimony, s. 227(4.1) does not satisfy the requirements of an autonomous patrimony contemplated by the *Civil Code of Québec* in arts. 1260, 1261 and 1278: see *Bank of Nova* Scotia v. Thibault, 2004 SCC 29, [2004] 1 S.C.R. 758, at para. 31.

121 This departure from a standard requirement of trust formation — certainty of subject matter — results in at least two features of s. 227(4.1) that are at odds with the operation of ordinary trusts. First, through equitable tracing, the beneficiary of a trust can claim appreciation in trust value, but this advantage is impossible without identifiable trust property (*Rawluk v. Rawluk*, [1990] 1 S.C.R. 70, at pp. 79 and 92-93; *Foskett v. McKeown*, [2001] 1 A.C. 102 (H.L.), at pp. 129-31; L. D. Smith, *The Law of Tracing* (1997), at pp. 347-48). The tracing mechanism in s. 227(4.1) provides that the value of any unremitted source deductions continues to survive in the assets remaining in the tax debtor's hands. Section 227(4.1) traces the *value* of the unremitted source deductions, necessarily capping the Crown's right at that value. In *Sparrow Electric*, Gonthier J. explained that such a tracing mechanism is "antithetical to tracing in the traditional sense, to the extent that it requires no link at all between the subject matter of the trust and the fund or asset which the subject matter is being traced into" (para. 37; see also Wood and Reeson, at p. 518; Smith (1997), at pp. 310-20 and 347-48; R. J. Wood, "The Floating Charge in Canada" (1989), 27 Alta. L. Rev. 191, at p. 221).

122 While s. 227(4.1) gives the Crown beneficial ownership in the value of unremitted source deductions, it does not allow the Crown to claim more than the value of the source deductions. In other words, it gives the Crown the right of beneficial ownership without at least some of the advantages that beneficial ownership often entails.

123 Second, a trustee cannot normally dispose of trust property in the ordinary course of the trustee's business. Section 227(4.1), however, allows the tax debtor to dispose of its property, conveying clear title to property subject to the trust.

124 This was the point made by Iacobucci J. in *First Vancouver* when he likened the deemed trust in s. 227(4.1) to a floating charge. Because a floating charge is a security interest, the Respondents rely on Iacobucci J.'s analogy to argue that s. 227(4.1) only creates a security interest as opposed to a proprietary right. I disagree with the Respondents' submission — the limited analogy to a floating charge in that context cannot be relied on in this case to liken the Crown's interest to a security interest for the purposes of the *CCAA*.

125 One of the issues in *First Vancouver* was whether the deemed trust in s. 227(4.1) continued to attach to property that had been sold by the tax debtor to a third-party purchaser for value. The Court concluded that, in the event of a sale to a third party, "the trust property is replaced by the proceeds of sale of such property" (para. 40). This is because the deemed trust "does not attach specifically to any particular assets of the tax debtor so as to prevent their sale" and the tax debtor is thereby "free to alienate its property in the ordinary course" (para. 40). In this way, "the deemed trust is in principle similar to a floating charge over all the assets of the tax debtor" (para. 40). As a result, the deemed trust in s. 227(4.1) would not override the rights of third-party purchasers for value (para. 44).

126 In short, the deemed trust in s. 227(4.1) clearly "anticipate[s] that the character of the tax debtor's property will change over time" (*First Vancouver*, at para. 41). In making these statements, Iacobucci J. did not, however, equate the deemed trust in s. 227(4.1) to a floating charge for all purposes. Otherwise, the trust would not attach until an event of crystallization, and s. 227(4.1) clearly contemplates that the trust attaches from the moment source deductions are made or withheld (see s. 227(4.1)(a) and (b); see also A. Duggan and J. Ziegel, "Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security" (2007), 57 U.T.L.J. 227, at p. 246; Wood (1989), at p. 195).

127 The Court's limited analogy to a floating charge in *First Vancouver* helps explain why "beneficial ownership" in s. 227(4.1) again means something narrower than it does outside of that statutory context. The Crown's right of beneficial ownership does not prevent the trustee from disposing of trust property until the Canada Revenue Agency (CRA) enforces the deemed trust (Canada Revenue Agency, *Tax collections policies* (online); see also ITA, ss. 222, 223(1) to (3), (5) and (6) and 224(1)). Freely disposing of trust property, including for one's own business purposes, is obviously not something a trustee can do under the common law.

128 The Crown's reliance on s. 227(4.1)(b) of the ITA is misplaced for similar reasons. That clause specifies that the amount of the unremitted source deductions is deemed to "form no part of the estate or property of the person from the time the amount was so deducted or withheld". The

Crown argues that this is further clarification that a *CCAA* judge cannot order a charge over that amount. Again, the deeming words of s. 227(4.1)(b) must be interpreted in the context of a trust without certainty of subject matter. To say that a certain *amount* does not form part of the debtor's estate or property reiterates that the Crown has an interest in that amount; it also clarifies that the debtor's interest in its estate is reduced by that amount. However, it does not change the *makeup* of the estate itself — it does not change the specific property that constitutes the debtor's estate. So long as the thing that is deemed not to form part of the debtor's estate or property is an amount or value of money rather than property with a specific subject matter, the debtor's estate remains unchanged and the debtor continues to have control over it.

129 To conclude, beneficial ownership under s. 227(4.1) is a manipulation of the concept of beneficial ownership under ordinary principles of trust law. The logical incoherence of s. 227(4.1) has prompted some scholars to criticize the provision as using inappropriate legal concepts. For example, Wood and Reeson state:

> ... we believe that the design of [s. 227(4.1) of the *ITA*] is deeply flawed.... In large measure, the difficulties have as their source the use of inappropriate legal concepts. The concept of a trust is used in the legislation, but in virtually every respect the characteristics of a trust are lacking. The employer is not actually required to hold the money separate and apart, the usual fiduciary obligations of a trustee are absent, and the trust exists without a *res*. The law of tracing is similarly corrupted. The tracing exercise does not seek to identify a chain of substitutions, and a proprietary claim is available without the need for a proprietary base.
>
> . . . . .
>
> The misuse of the trust concept and the perversion of conventional tracing principles empty these concepts of meaning and will pose a threat to the rationality of the law. [Footnote omitted; pp. 531-33.]

130 Others have similarly commented that, in substance, s. 227(4.1) only creates a security interest (J. S. Ziegel, "Crown Priorities, Deemed Trusts and Floating Charges: First Vancouver Finance v. Minister of National Revenue" (2004), 45 C.B.R. (4th) 244, at p. 248; Duggan and Ziegel, at pp. 239 and 245-46; M. J. Hanlon, V. Tickle and E. Csiszar, "Conflicting Case Law, Competing Statutes, and the Confounding Priority Battle of the Interim Financing Charge and the Crown's Deemed Trust for Source Deductions", in J. P. Sarra et al., eds., *Annual Review of Insolvency Law 2018* (2019), 897).

131 Similarly, in *Caisse populaire Desjardins de Montmagny*, this Court rejected the Crown's argument that s. 222(3) of the Excise Tax Act, R.S.C. 1985, c. E-15 (ETA), which is nearly identical to s. 227(4.1) of the ITA, created a proprietary right in the Crown (paras. 20-27). In that case, the debtor companies owed goods and services tax (GST) at the time of their respective bankruptcies. As the Crown's GST claims are unsecured in bankruptcy, the tax authorities took the position that amounts owing up to the date of the bankruptcy were the Crown's property. This

Court unanimously disagreed with that position, concluding that the manner and mechanism of collecting GST was not consistent with a proprietary right (paras. 21-23).

132 In any event, treating s. 227(4.1) as only effectively creating a security interest would not resolve the issues in this appeal without reference to how the Crown's interest arises under the *CCAA*. As noted above, broad general characterizations do not help in defining the specific attributes of this deemed trust. This Court must grapple with the fact that s. 227(4.1) is both structured as a security interest, like a charge, but also uses the mechanism of a deemed trust.

133 The takeaway for this appeal is that the structure of s. 227(4.1), on its own, does not shed light on what to do with the Crown's beneficial ownership of unremitted source deductions in the insolvency regimes. Although the provision is clear that the Crown's right operates notwithstanding other security interests, the content of that right for the purposes of insolvency cannot be inferred solely from the text of the *ITA*. The unique statutory device manipulates private law concepts and cannot be carried through to a logical conclusion for the purposes of insolvency. For this reason, it is not surprising that the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (BIA) and the *CCAA* specifically articulate how the deemed trust for unremitted source deductions should be treated.

134 I now turn to that half of the equation: Parliament's insolvency regime.

B. How Is the Crown's Deemed Trust for Unremitted Source Deductions Treated in Parliament's Insolvency Regime?

(1) Parliament's Insolvency Regime

135 There are three main statutes in Parliament's insolvency regime: the *CCAA*, which is at issue in this appeal, the BIA and the Winding-up and Restructuring Act, R.S.C. 1985, c. W-11 (WURA). (The *WURA* covers insolvencies of financial institutions and certain other corporations, like insurance companies, and is not relevant to this appeal (s. 6(1); 9354-9186 Québec inc. v. Callidus Capital Corp., 2020 SCC 10, at para. 39)). In *Century Services*, Deschamps J., writing for the majority, described insolvency as

> the factual situation that arises when a debtor is unable to pay creditors .... Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation. [para. 12]

136 The *BIA* contains both a liquidation regime and a restructuring regime (*Century Services*, at paras. 13 and 78). The liquidation regime provides a detailed statutory scheme of distribution whereby the debtor's assets are liquidated and distributed to creditors. In contrast, the restructuring regime allows debtors to make proposals to their creditors for the adjustment and reorganization of debt. The *BIA* is available to debtors, either natural or legal persons, owing $1000 or more (s. 43(1)).

137 The *CCAA* is predominantly a restructuring statute and access is restricted to companies with liabilities in excess of $5 million (s. 3(1)). As Deschamps J. explained in *Century Services*, the purpose of the *CCAA* is remedial; it provides a means for companies to avoid the devastating social and economic consequences of commercial bankruptcies (paras. 15 and 59, quoting *Elan Corp. v. Comiskey*, (1990), 1 O.R. (3d) 289 (C.A.), at p. 306, per Doherty J.A., dissenting). Liquidations do not only harm creditors, but employees and other stakeholders as well. The *CCAA* permits companies to continue to operate, "preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all" (*Century Services*, at para. 77). In enacting a restructuring statute, Parliament recognized that companies have more value as going concerns, especially since they are "key elements in a complex web of interdependent economic relationships" (para. 18).

138 Due to its remedial nature, the *CCAA* is famously skeletal in nature (*Century Services*, at paras. 57-62). It does not "contain a comprehensive code that lays out all that is permitted or barred" (para. 57, quoting Metcalfe & Mansfield Alternative Investments II Corp. (Re), 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, per Blair J.A.). Under s. 11, for example, the court may make any order that it considers appropriate in the circumstances, subject to the restrictions set out in the Act. Section 11 has been described as "the engine that drives this broad and flexible statutory scheme" (*Stelco Inc. (Re)*, (2005), 75 O.R. (3d) 5 (C.A.), at para. 36; see also *9354-9186 Québec inc.*, at para. 48). Deschamps J. observed in *Century Services* that these discretionary grants of jurisdiction to the courts have been key in allowing the *CCAA* to adapt and evolve to meet contemporary business and social needs. Although judicial discretion must always be exercised in furtherance of the *CCAA*'s remedial purpose, it takes many forms and has proven to be flexible, innovative, and necessary (paras. 58-61; U.S. Steel Canada Inc., Re, 2016 ONCA 662, 402 D.L.R. (4th) 450, at para. 102).

139 This is in contrast to the liquidation regime in the *BIA*, which has slightly different purposes. In *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, Gonthier J. explained that bankruptcy serves two goals: it "ensure[s] the equitable distribution of a bankrupt debtor's assets among the estate's creditors *inter se* [and it ensures] the financial rehabilitation of insolvent individuals" (para. 7; see also *9354-9186 Québec inc.*, at para. 46). Similarly, Sarra and Houlden and Morawetz JJ. describe the purposes of the *BIA* as permitting both "an honest debtor, who has been unfortunate, to secure a discharge so that he or she can make a fresh start

and resume his or her place in the business community" and "the orderly and fair distribution of the property of a bankrupt among his or her creditors on a *pari passu* basis" (The 2020-2021 Annotated Bankruptcy And Insolvency Act (2020), at p. 2).

140 To realize its goals, the *BIA* is strictly rules-based and has a comprehensive scheme for the liquidation process (*Century Services*, at para. 13; *Husky Oil*, at para. 85). It "provide[s] an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules" (*Century Services*, at para. 15). The *BIA*'s comprehensive nature ensures, among other things, that there is a single proceeding in which creditors are placed on an equal footing and know their rights. It also ensures that, post-discharge, the bankrupt will have enough to live on and can have a fresh start (Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Ltd., 2013 ONCA 769, 118 O.R. (3d) 161, at para. 41). While proposals under the *BIA*'s restructuring regime similarly serve a remedial purpose, "this is achieved through a rules-based mechanism that offers less flexibility" (*Century Services*, at para. 15).

141 Importantly, the specific goals of restructuring in the *CCAA*, in contrast to liquidation, result in the introduction of a key player: the interim lender. Interim financing, previously referred to as debtor-in-possession financing, is a judicially-supervised mechanism whereby an insolvent company is loaned funds for use during and for the purposes of the restructuring process. Before the 2009 amendments, there were no statutory provisions on interim financing in the *CCAA*, but the institution was well-established in the jurisprudence (L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. rev. (loose-leaf)), vol. 4, at N§93; see also Century Services, at para. 62). The 2009 amendments codified much of the existing jurisprudence, and I discuss the statutory provisions in detail below.

142 Interim financing is crucial to the restructuring process. It allows the debtor to continue to operate on a day-to-day basis while a workout solution is being arranged. A plan of compromise would be futile if, in the interim six months, the debtor was forced to close its doors. For this reason, Farley J., in Royal Oak Mines Inc., Re (1999), 7 C.B.R. (4th) 293 (Ont. C.J. (Gen. Div.)), at para. 1, quoting Royal Oak Mines Inc., Re (1999), 6 C.B.R. (4th) 314 (Ont. C.J. (Gen. Div.)), at para. 24, observed that interim financing helps "keep the lights ... on". Similarly, in *Indalex*, Deschamps J. explained that giving interim lenders super-priority "is a key aspect of the debtor's ability to attempt a workout" (para. 59, quoting J. P. Sarra, *Rescue! The* Companies' Creditors Arrangement Act (2007), at p. 97). Without interim financing and the ability to prime (i.e., to give it priority) the interim lender's loan, the remedial purposes of the *CCAA* can be frustrated (para. 58).

143 With this background in mind, I turn now to consider the treatment of the Crown's deemed trust for unremitted source deductions in Parliament's insolvency regime.

(2) The Deemed Trust for Unremitted Source Deductions in the BIA and CCAA

144 The statutes in this case are all federal statutes. The *ITA*, *BIA*, and *CCAA* make up a co-existing and harmonious statutory scheme, enacted by one level of government (see, e.g., R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 337, on the presumption of coherence). An example of this co-existence is when, in the insolvency regime, Parliament modifies entitlements that it otherwise grants the Crown outside of insolvency. For example, through s. 222(3) of the ETA, Parliament provides for a statutory deemed trust in favour of the Crown for unremitted GST. Parliament also renders that deemed trust, which is nearly identical in language to s. 227(4.1) of the ITA, ineffective in the *BIA* and *CCAA* (BIA, ss. 67(2) and 86(3); CCAA, s. 37(1); *Century Services*, at paras. 51-56). As I shall explain, Parliament also deals specifically with the deemed trust in s. 227(4.1) of the ITA in the *BIA* and *CCAA*, albeit in different ways.

145 In the *BIA*, the deemed trust for unremitted source deductions appears in s. 67(3). Section 67 is under the heading "Property of the Bankrupt". Section 67(1)(a) excludes property held in trust by the bankrupt from property of the bankrupt that is divisible among creditors. Section 67(2) provides that any provincial or federal deemed trust in favour of the Crown does not qualify as a trust under s. 67(1)(a) unless it would qualify as a trust absent the deeming provision (in other words, unless it would qualify as a common law or true trust) (see *Caisse populaire Desjardins de Montmagny*, at para. 15; Urbancorp Cumberland 2 GP Inc. (Re), 2020 ONCA 197, 444 D.L.R. (4th) 273, at paras. 32-33). Section 67(3) states that s. 67(2) does not apply in respect of the Crown's deemed trust for unremitted source deductions under the *ITA*, *CPP* or *EIA*. Thus, while s. 67(2) provides in general terms an exception to s. 67(1)(a), that exception does not apply to the Crown's deemed trust for unremitted source deductions by virtue of s. 67(3).

146 The result of this scheme is that the debtor's estate — to the extent of the unremitted source deductions — is not "property of a bankrupt divisible among his creditors" (BIA, s. 67(1)). For the purposes of the *BIA*'s liquidation regime, it is effectively the Crown's *property*. Together, ss. 67(1)(a) and 67(3) give content to the Crown's right of beneficial ownership under s. 227(4.1) of the ITA: the amount of the unremitted source deductions is taken out of the pool of money that is distributed to creditors in a *BIA* liquidation.

147 In the *CCAA*, the Crown's deemed trust appears in ss. 37(2) and 6(3), alongside other deemed trusts and devices. Section 37(2) explicitly preserves the operation of s. 227(4.1) in *CCAA* proceedings:

> 37 **(1)** Subject to subsection (2), despite 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 debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

> **(2)** Subsection (1) 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 does it apply 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 if
>
> > (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, despite 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.

148 Due to this language, the Court in *Century Services* variously described the s. 227(4.1) trust as "surviv[ing]", "continu[ing]", and "remain[ing] effective" in the *CCCA* (see paras. 38, 45, 49, 53 and 79). The Crown relies on these observations to argue that the deemed trust remains fully intact in the *CCAA*, conferring a proprietary right on the Crown that cannot be subordinated to any other party.

149 In my view, the Crown's submission overextends the analysis in *Century Services*. The issue in that case was whether the deemed trust under s. 222(3) of the ETA for unremitted GST was effective in the *CCAA*. As mentioned, s. 222(3) is almost identical in wording to s. 227(4.1) of the ITA, providing that the deemed trust extends to property of the tax debtor equal in value to the amount of the unremitted GST and extends to property otherwise held by a secured creditor pursuant to a security interest. Section 222(3) of the ETA also provides that the deemed trust operates despite any other enactment of Canada, except the *BIA*. Thus, under the *BIA*, the Crown priority for unremitted GST is lost. However, under the CCAA, s. 37(1) provides that statutory deemed trusts in favour of the Crown should not be regarded as trusts unless they would qualify as trusts absent the deeming language. The Court in *Century Services* grappled with the apparent conflict between s. 222(3) of the ETA and s. 37(1) (then s. 18.3(1)) of the *CCAA*.

150 A majority of the Court reasoned that, through statutory interpretation, the apparent conflict could be resolved in favour of the *CCAA* (*Century Services*, at para. 44). Parliament had shown a tendency to move away from asserting Crown priority in insolvency. Under both the *BIA* and *CCAA*, it had enacted a general rule that deemed trusts in favour of the Crown are ineffective in insolvency. It had also explicitly carved out an exception to that general rule for unremitted source deductions. The logic of the *CCAA* suggested that only the deemed trust for unremitted source deductions survived (paras. 45-46).

151 Thus, while the Court emphasized that the deemed trust in s. 227(4.1) "survives" in the *CCAA*, it did not comment on *how* it survives. This Court has never considered the scope of the deemed trust under the *CCAA*, especially in light of the purposes of the *CCAA* and the equivocal nature of the beneficial ownership conferred through the deeming provision. For this appeal, it is necessary to probe into ss. 37(2) and 6(3) to determine *how* the *CCAA* construes the Crown's right to unremitted source deductions.

152 To that end, although s. 37(2) of the CCAA is almost identical to s. 67(3) of the BIA, it does not have the same effect because it is not nested under a provision like s. 67(1)(a). Section 37(2) of the CCAA carves out an exception to s. 37(1), which is different from s. 67(1)(a). While s. 67(1)(a) excludes trust property from property of the bankrupt divisible among creditors, s. 37(1) only provides that "property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision". Unlike the *BIA*, the *CCAA* is silent on how trust property should be treated and silent on what constitutes property of the debtor in a restructuring context — indeed, there is no definition of property in the *CCAA* at all. This is in keeping with the *CCAA*'s comparatively skeletal nature.

153 The result is that s. 37(2) provides that the Crown continues to beneficially own the debtor's property equal in value to the unremitted source deductions; the unremitted source deductions "shall ... be regarded as being held in trust for Her Majesty". However, although this signals that, unlike deemed trusts captured by s. 37(1), the Crown's deemed trust continues and confers a stronger right, s. 37(2) does not explain what to do with that right for the purposes of a *CCAA* proceeding. It does not, for example, provide that trust property should be put aside, as it would be in the *BIA* context. In keeping with the *CCAA*'s flexibility, s. 37(2) says little about what the Crown's unique right of beneficial ownership under s. 227(4.1) of the ITA requires. But as I shall explain, s. 11 gives the court broad discretion to consider and give effect to the Crown's interest recognized in s. 37(2).

154 In addition, s. 6(3) of the CCAA gives specific effect to the Crown's right under the deemed trust. Under that provision, the court cannot sanction a plan of compromise unless it pays the Crown in full for unremitted source deductions within six months of the plan's sanction (assuming the Crown does not agree otherwise):

> **(3)** Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under
>
> (a) subsection 224(1.2) of the *Income Tax Act* ....

155 Pursuant to s. 6(3), then, the Crown's right under s. 227(4.1) includes a right *not to have to compromise*. The Crown can demand to be paid in full under the plan "in priority to all ... security interests". The right is therefore different in kind than a security interest. While there may be some risk to the Crown that the plan may fail, and the Crown may not be paid in full if the restructuring dissolves into liquidation and the estate is depleted in the interim, the *CCAA* recognizes that there is societal value in helping a company remain a going concern. This remedial goal is at the forefront of providing flexibility in preserving the Crown's right to unremitted source deductions in s. 37(2), and in giving a concrete effect to that right in s. 6(3) of the CCAA.

156 In my view, the reason for this difference between the *BIA* and *CCAA* is straightforward. The purpose of a *BIA* liquidation is to give the debtor a fresh start and pay out creditors to the extent possible. The debtor's property has to be divided according to the statute's rigid priority scheme. To begin the process of distribution, it is necessary to pool together the debtor's funds and determine what is, and is not, available for creditors. A comprehensive definition of property of the debtor is necessary, and no flexibility is needed in the regime to facilitate the liquidation process. There is also no other overarching goal, like facilitating the debtor's restructuring, that requires an institution like interim financing or requires modifying entitlements.

157 In a restructuring proceeding under the *CCAA*, however, there is no rigid formula for the division of assets. Certain debt might be restructured; other debt might be paid out. When a debtor's restructuring is on the table, the goal pivots, and interim financing is introduced to facilitate the restructuring. Entitlements and priorities shift to accommodate the presence of the interim lender — a new and necessary player who is absent from the liquidation scene.

158 The fact that the Crown's right under s. 227(4.1) of the ITA is treated differently between the two statutes is therefore consistent with the different schemes and purposes of the Acts. This is not a circumstance where Parliament attempted to harmonize entitlements across the regimes (see, e.g., *Indalex*, at para. 51, per Deschamps J.). The *CCAA* gives the deemed trust meaning for its purposes. The concrete meaning given is that a plan of compromise must pay the Crown in full within six months of approval.

C. Do Sections 11.2, 11.51 and 11.52 of the CCAA Permit the Court to Rank Priming Charges Ahead of the Crown's Deemed Trust for Unremitted Source Deductions?

159 In this case, the Initial Order subordinated the Crown's deemed trust to the Priming Charges. The courts below found that this authority is derived from ss. 11.2, 11.51 and 11.52 of the CCAA, which allow the court to order priming charges over a company's property in favour of interim lenders, directors and officers, and estate administrators. Priming charges can rank ahead of any other secured claim. For example, the relevant portions of s. 11.2, which are substantially similar to the relevant portions of ss. 11.51 and 11.52, read as follows:

> **11.2 (1)** On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> **(2)** The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

160 As priming charges can "rank in priority over the claim of any secured creditor", the definition of "secured creditor" in s. 2(1) is key:

> ***secured creditor*** means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds ....

161 The Respondents submit, in line with the courts below, that the Crown is a "secured creditor" under the *CCAA* in respect of its interest in unremitted source deductions because the enabling statute, the *ITA*, itself defines the holder of a deemed trust as holding a "security interest" (see *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274). The Respondents also rely on the analogy in *First Vancouver* likening the Crown's deemed trust to a floating charge (which is a security interest). Accordingly, the Respondents argue that ss. 11.2, 11.51 and 11.52 give the court authority to rank priming charges ahead of the Crown's deemed trust.

162 The Crown, like the dissent at the Court of Appeal, argues that the Crown is not a "secured creditor" because the definition of "secured creditor" in the *CCAA* does not list the holder of a deemed trust and because ss. 37 to 39 of the CCAA clearly draw a distinction between the Crown's deemed trust for unremitted source deductions, on the one hand, and the Crown's secured and unsecured claims on the other. Accordingly, the Crown argues that ss. 11.2, 11.51 and 11.52 do *not* give the court authority to rank priming charges ahead of the Crown's deemed trust.

163 As I shall detail, I conclude that ss. 11.2, 11.51 and 11.52 do not give the court the authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions.

164 First, I agree with the Respondents that the general definition of security interest under the *ITA* includes the holder of a deemed or actual trust (s. 224(1.3)). However the reference to security interest in s. 227(4.1) is not to the Crown's interest but to others' interest in the debtor's property. In my view, any definition of security interest in the *ITA* is not relevant to defining the Crown's interest since it serves an entirely different purpose. What matters is whether the *CCAA* provisions give the court authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions. This is determined by interpreting the words of the *CCAA* and how the *CCAA* defines secured creditor.

165 I also agree with the Crown that the definition of "secured creditor" in the *CCAA* does not specifically list the holder of a deemed or actual trust. In addition, the Crown's interest cannot simply be called a "charge". As explained above, although the Crown's deemed trust has some parallels with a floating charge, the provision also employs some aspects of beneficial ownership. I would also hesitate to draw analogies with any of the other terms listed in the *CCAA* definition. The holders of several of these instruments are often described as having proprietary rights in their security. It was a legislative choice to define them as secured creditors for the purposes of the *CCAA*. It is difficult to shoehorn the Crown's deemed trust into the definition of "secured creditor" in the *CCAA*, particularly as the *CCAA* specifically refers to the deemed trust in s. 37(2).

166 Moreover, I agree with the Crown that ss. 37 to 39 of the CCAA treat the Crown's deemed trust and the Crown's secured claims as distinct interests. After s. 37 of the CCAA, dealing with deemed trusts, s. 38(1) provides a general rule that secured claims of the Crown rank as unsecured claims. Section 38(2) contains an exemption from s. 38(1) for consensual security interests that are granted to the Crown. Section 38(3) contains an exemption for the CRA's enhanced requirement to pay. Finally, s. 39(1) preserves the Crown's secured creditor status if it registers before the commencement of a *CCAA* proceeding, and s. 39(2) subordinates a Crown security or charge to prior perfected security interests.

167 As Wood notes, "These provisions adopt two distinct approaches — one that applies to a deemed trust, the other that applies when a statute gives the Crown the status of a secured creditor" (Wood (2020), at p. 96). If s. 227(4.1) of the ITA gave the Crown the status of a secured

creditor, then the CRA would presumably need to comply with ss. 38 and 39 by registering its security interest. No one suggests that the Crown has to register its claim for unremitted source deductions. In my view, ss. 37 to 39 draw a distinction between deemed trusts on the one hand and secured and unsecured claims on the other, and the Crown is not, therefore, a "secured creditor" under the *CCAA* for its right to unremitted source deductions.

168 This is dispositive for the purposes of ss. 11.2, 11.51 and 11.52 of the CCAA. These sections do not give the court the authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions.

D. Does Section 11 of the CCAA Allow the Court to Rank Priming Charges Ahead of the Crown's Deemed Trust for Unremitted Source Deductions?

169 The remaining issue is whether another provision in the *CCAA*, namely s. 11, confers that jurisdiction. As noted above, s. 11 allows the court to make any order that it considers appropriate in the circumstances, subject to the restrictions set out in the Act:

> **11** Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

170 In *9354-9186 Québec inc.*, this Court explained that the discretionary authority in s. 11 is broad, but not boundless (para. 49). There are three "baseline considerations": (1) the order sought must be appropriate; (2) the applicant must be acting in good faith; and (3) the applicant must demonstrate due diligence (*Century Services*, at para. 70; *9354-9186 Québec inc.*, at para. 49). Appropriateness is assessed by inquiring whether the order sought advances the remedial objectives of the *CCAA*. The general language of s. 11 should not, however, be "restricted by the availability of more specific orders" (*Century Services*, at para. 70).

171 In keeping with its broad language, s. 11 of the CCAA has been used to make a wide array of orders. Most recently, for example, this Court clarified that it can be used to bar a creditor from voting on a plan where the creditor has acted for an improper purpose (*9354-9186 Québec inc.*, at paras. 56 and 66).

172 The issue in this case is whether s. 11 can be used to rank an interim lender's loan, or other priming charge, ahead of the Crown's deemed trust for unremitted source deductions. In my view, it can, for two reasons.

173 First, given my conclusion about the content of the Crown's right under s. 227(4.1) of the ITA for the purposes of the *CCAA* (requiring that it at least be paid in full under a plan of

compromise), ranking a priming charge ahead of the Crown's deemed trust does not conflict with the *ITA* provision. So long as the Crown is paid in full under a plan of compromise, the Crown's right under s. 227(4.1) remains intact "notwithstanding any security interest" in the amount of the unremitted source deductions. For this reason, it is irrelevant whether a priming charge under ss. 11, 11.2, 11.51 or 11.52 of the CCAA is a "security interest" within the meaning of s. 227(4) and (4.1) of the ITA. The analysis above does not depend on finding that a priming charge is not captured within the *ITA* definition.

174 In addition, depending on the circumstances, such an order may further the remedial objectives of the *CCAA*. For example, interim financing is often crucial to the restructuring process. If there is evidence that interim lending cannot be obtained without ranking the interim loan ahead of the Crown's deemed trust, such an order could, again depending on the circumstances, further the remedial objectives of the *CCAA*. In general, the court should have flexibility to order super-priority charges in favour of parties whose function is to facilitate the proposal of a plan of compromise that, in any event, will be required to pay the Crown in full.

175 Second, I do not accept the Crown's argument that s. 11 is unavailable because other *CCAA* provisions, namely ss. 11.2, 11.51 and 11.52, confer more specific jurisdiction (see *9354-9186 Québec inc.*, at paras. 67-68).

176 While I agree that s. 11 is restricted by the provisions set out in the *CCAA* and cannot be used to violate specific provisions in the Act, s. 11 is not "restricted by the availability of more specific orders". The fact that specific provisions of the *CCAA* allow the court to rank priming charges ahead of a secured creditor does not mean that the court can *only* rank priming charges ahead of a secured creditor. Such an interpretation would amount to reading words into ss. 11.2, 11.51 and 11.52 that do not exist. An order that ranks a priming charge ahead of the beneficiary of the deemed trust is different in kind than the orders contemplated by ss. 11.2, 11.51 and 11.52, which contemplate the subordination of secured creditors. There is no provision in the *CCAA* stipulating what the court can do with trust property and no provision in the *CCAA* conferring more specific jurisdiction on whether a priming charge can rank ahead of the beneficiary of a deemed trust. So long as the order does not conflict with other provisions in the Act, namely ss. 37(2) and 6(3), and so long as it fulfills the "baseline considerations" of appropriateness, good faith, and due diligence, an order ranking a priming charge ahead of the Crown's deemed trust would fall under the jurisdiction conferred by s. 11 (*Century Services*, at para. 70; *9354-9186 Québec inc.*, at para. 49). As explained above, there would be no conflict with ss. 37(2) and 6(3) of the CCAA.

177 Both parties invoked policy concerns to assist in the interpretative exercise. I do not find it necessary to resort to such arguments. However, it is far from evident that interim lending would simply end if the Crown's deemed trust had super-priority in an appropriate case. It is also far from evident that the Crown would suffer significantly if the priming charges had super-priority in an appropriate case, given the existence of s. 6(3) of the CCAA requiring full payment, and the

Crown's favourable treatment in the *BIA* liquidation regime in the event the restructuring failed. What is clear is that interim lending is crucial to the restructuring process, and the Crown's deemed trust for unremitted source deductions is crucial to tax collection. It will be up to the *CCAA* judge to weigh and balance the moving pieces.

178 To that end, s. 11 of the CCAA gives the court discretion and flexibility to weigh several considerations in ranking a priming charge ahead of the Crown's deemed trust for unremitted source deductions. It requires the court to take a focused look at the specific facts of a case to determine whether such an order is necessary and appropriate. Where relevant, the court will consider the Crown's interest in the deemed trust as a result of s. 37(2). Courts may no doubt look to the factors already listed in s. 11.2(4) — the likely duration of *CCAA* proceedings, plans for managing the company during those proceedings, views of the company's major creditors and the monitor, and the company's ability to benefit from interim financing, among others — for guidance. Section 11.2(4) of the CCAA states:

> **(4)** In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report referred to in paragraph 23(1)(b), if any.

179 In addition, it seems to me that courts may consider:

- whether the interim lender has indicated, in good faith, that it will not lend to the debtor without ranking ahead of the Crown's deemed trust;

- the relative amounts of the interim loan and the unremitted source deductions (if the amount of the unremitted source deductions is a small fraction of the amount of the interim loan, the interim lender may not be significantly prejudiced without super-priority);

• whether, and for how long, the Crown allowed source deductions to go unremitted without taking action (see, e.g., Hanlon, Tickle and Csiszar); and

• finally, the prospects of success of a restructuring; and whether the *CCAA* is likely to be used to sell the debtor's assets.

180 Finally, different considerations will apply if a court is considering ranking a different party's charge, like the Monitor's or Directors' Charge, ahead of the Crown's deemed trust.

VII. Conclusion

181 I would dismiss the appeal and clarify that the authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions is derived from s. 11 of the CCAA rather than ss. 11.2, 11.51 and 11.52. The Crown's interest under s. 227(4.1) of the ITA is a deemed trust interest, but beneficial ownership of deemed trust property is a manipulation of private law concepts, without settled meaning. Accordingly, the specific nature of beneficial ownership of deemed trust property must be determined in the relevant context in which it is asserted. Here, the Crown's right to unremitted source deductions in a *CCAA* restructuring is protected by both ss. 37(2) and 6(3). The former is flexible, requiring the Crown's deemed trust property to be considered when appropriate under the Act; the latter specifically requires that a plan of compromise provide for payment in full of the Crown's deemed trust claims within six months of the plan's approval. The Crown's right differs under the *BIA*, in keeping with the different goals and schemes of liquidation and restructuring. Given the content of the Crown's right to unremitted source deductions in a *CCAA* restructuring, there is no conflict between s. 227(4.1) of the ITA and s. 11 of the CCAA. The schemes of both federal Acts can be harmonized and the objectives of both statutes furthered.

182 The Respondents will have their costs in accordance with the tariff of fees and disbursements set out in Schedule B of the Rules of the Supreme Court of Canada, SOR/2002-156.

***Brown, Rowe JJ.* (dissenting) (Abella J. concurring):**

I. Overview

183 At issue in this appeal is whether the Crown's deemed trust claim for unremitted source deductions under s. 227(4) and (4.1) of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) ("ITA"), s. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"), and ss. 23(4) and 86(2) and (2.1) of the Employment Insurance Act, S.C. 1996, c. 23 ("EIA") (collectively, the "Fiscal Statutes"), have priority over court-ordered priming charges under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA").

184 The present iteration of the deemed trust provision, s. 227(4.1) of the ITA, was the result of a 1997 amendment enacted by Parliament directly in response to this Court's interpretation of

the provision's predecessor in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (Department of Finance Canada, *Unremitted Source Deductions and Unpaid GST* (April 7, 1997)). That provision was itself the result of several amendments, beginning in 1942, with the amendment introducing the deemed trust in s. 92(6) and (7) of the Income War Tax Act, R.S.C. 1927, c. 97 (previously S.C. 1917, c. 28) (*An Act to amend the* Income War Tax Act, S.C. 1942-43, c. 28, s. 31). The provision and the historical amendments demonstrate Parliament's intention to safeguard its ability to collect employee source deductions under the relevant statutes, in priority to all other claims against a debtor's property.

185 The Crown appeals from the decision of the Court of Appeal of Alberta which, like the chambers judge, held that the *CCAA* court could subordinate the deemed trust claims under the Fiscal Statutes to the priming charges (2019 ABCA 314, 93 Alta. L.R. 29, aff'g 2017 ABQB 550, 60 Alta. L.R. (6th) 103). Having examined the pertinent provisions of the Fiscal Statutes, and for the reasons that follow, we find ourselves in respectful disagreement with that conclusion, and prefer the view of the dissenting judge, Wakeling J.A. The Crown's deemed trust claims under the Fiscal Statutes have ultimate priority and cannot be subordinated by priming charges.

186 In our view, the text of the impugned provisions in the Fiscal Statutes is clear: the Crown's deemed trust operates "[n]otwithstanding ... any other enactment of Canada" (ITA, s. 227(4.1)). [2] Parliament used unequivocal language — indeed, *the very language suggested by this Court* in *Sparrow Electric* — to give ultimate priority to the Crown's claim. Further, and again in clear and unequivocal text, Parliament imposed limits on the broad grant of authority by which a court can prioritize priming charges, thereby making plain the superiority of deemed trust claims. Finally, no provision of the *CCAA* is rendered meaningless by this interpretation. Unlike in other contexts such as the legislative scheme governing the GST/HST, Parliament has left no room for subordinating the deemed trusts under the Fiscal Statutes in pursuit of other legislative objectives. We would, therefore, allow the appeal.

II. Analysis

A. General Comments on the Nature of the Deemed Trusts Under the Fiscal Statutes

187 The deemed trust created by the *ITA* is an essential instrument to collect source deductions (First Vancouver Finance v. M.N.R., 2002 SCC 49, [2002] 2 S.C.R. 720, at para. 22). The *ITA* grants special priority to the Crown to collect unremitted source deductions, reflecting its status as an "involuntary creditor" (*First Vancouver*, at para. 23).

188 Section 227(4) and (4.1) of the ITA reads:

> **(4)** Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person

> and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.
>
> **(4.1)** Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed
>
> > (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
> >
> > (b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest
>
> and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

189 These sections describe two relevant events. First, at the time of the deduction, a trust is deemed in favour of the Crown, binding every person (the "tax debtor") who collects source deductions in the amount withheld until the person remits the source deductions (ITA, s. 227(4)). Section 227(4) deems the tax debtor to hold the source deductions "separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person".

190 The second event occurs where the tax debtor has failed to remit the source deductions in accordance with the manner and time provided by the ITA. Section 227(4.1) extends the deemed trust to all "property of the person and property held by any secured creditor ... equal in value to the amount so deemed to be held in trust". This is achieved by deeming the source deductions to be held "in trust for Her Majesty" from the moment the amount was "deducted or withheld by the person, separate and apart from the property of the person". Parliament further provided that the unremitted source deductions under the Fiscal Statutes "form no part of the estate or property of the person" from the time of deduction or withholding, and is "property beneficially owned by

Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests".

191 This Court has held that the deemed trust is a "creatur[e] of statute" and "is not in truth a real [trust], as the subject matter of the trust cannot be identified from the date of creation of the trust" (*Sparrow Electric*, at para. 31, per Gonthier J., citing D. W. M. Waters, *Law of Trusts in Canada* (2nd ed. 1984), at p. 117, and adopted in First Vancouver, at para. 37). This statement fuelled a debate in this appeal about whether the deemed trust is a security interest or a proprietary interest, with the respondents arguing that the Crown cannot hold a proprietary interest in the debtor's property because there is a lack of certainty in the subject matter.

192 We agree with each of our colleagues Justices Karakatsanis and Côté that the deemed trust is not a "true" trust and that it does not confer an ownership interest or the rights of a beneficiary on the Crown as they are understood at common law or within the meaning of the *Civil Code of Québec* (Karakatsanis J.'s reasons, at paras. 119-20; Côté J.'s reasons, at paras. 43 and 49). Respectfully, however, our colleagues miss the point of the *deemed* quality of the trust. The matters of a property interest, certainty of subject matter and autonomous patrimony that arise from attempts to describe the operation of the deemed trust are entirely irrelevant and do not assist in deciding this appeal, nor in understanding Parliament's intent. The deemed trust is a legal fiction, with *sui generis* characteristics that are described in s. 227(4) and (4.1) of the ITA. As noted in First Vancouver, at para. 34, "it is open to Parliament to characterize the trust in whatever way it chooses; it is not bound by restraints imposed by ordinary principles of trust law". While *First Vancouver* considered the contrast between a statutory trust and a common law trust, the same applies to our colleague Côté J.'s reference to the Civil Code(Canada (Attorney General) v. Caisse populaire d'Amos, 2004 FCA 92, 324 N.R. 31, at para. 49). What matters here is not *the characterization* of the deemed trust that is at issue, but its *operation*. And as we explain, it *operates* to give the Crown a statutory right of access to the debtor's property to the extent of its *corpus* and a right to be paid in priority to all security interests.

193 Further, no concerns regarding certainty of subject matter or autonomous patrimony arise here. It is of course true that, in common law Canada, for a trust to come into existence there must be certainty of intention, certainty of subject matter, and certainty of object (D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (4th ed. 2012), at p. 140; E. E. Gillese, *The Law of Trusts* (3rd ed. 2014), at p. 41). Similarly, under the Quebec civil law, "[t]hree requirements must ... be met in order for a trust to be constituted: property must be transferred from an individual's patrimony to another patrimony by appropriation; the property must be appropriated to a particular purpose; and the trustee must accept the property" (*Bank of Nova* Scotia v. Thibault, 2004 SCC 29, [2004] 1 S.C.R. 758, at para. 31). And, again, it is also true that the subject matter of the deemed trust under s. 227(4.1) cannot be identified from the date of creation of the trust and does not constitute an autonomous patrimony to which specific property is transferred.

194 But again, none of this remotely matters here. Statutory text, not ordinary principles of trust law, determines the nature of, and rights conferred by, deemed trusts (*First Vancouver*, at para. 34). And this Court has recognized that Parliament, through the trust deemed by s. 227(4.1) of the ITA, has "revitaliz[ed] the trust whose subject matter has lost all identity" (*Sparrow Electric*, at para. 31, per Gonthier J., adopted in First Vancouver, at para. 37). This is because the subject matter of the deemed trust is ascertained *ex post facto*, corresponding to the property of the tax debtor and property held by any secured creditor equal in value to the amount deemed to be held in trust by s. 227(4) that, but for the security interest, would be property of the tax debtor. In short, the subject matter is whatever assets the employer then has from which to realize the original trust debt. Hence Iacobucci J.'s description in *First Vancouver* of the operation of s. 227(4.1) as "similar in principle to a floating charge" (para. 4). Parliament also circumvented the traditional requirements of the *Civil Code* for constituting a trust by requiring the amount of the unremitted source deductions to be held "separate and apart from the property of the [debtor]" and to "form no part of the estate [*patrimoine*, in the French version] or property of the [debtor]" (s. 227(4.1)).

195 In short, the requirements of "true" trusts of civil and common law are irrelevant to ascertaining the operation of a statutorily deemed trust. Parliament did not legislate a "true" trust. Instead, it legislated a deeming provision which "artificially imports into a word or an expression an additional meaning which they would not otherwise convey beside the normal meaning which they retain where they are used" (*R. v. Verrette*, [1978] 2 S.C.R. 838, at p. 845).

196 On this point, and contrary to the view of the majority at the Court of Appeal, Iacobucci J. *did not* hold that the deemed trust *is* a floating charge — nor that it was "of the same nature" (Côté J.'s reasons, at para. 51) — but rather that it operated *similarly*, by permitting a debtor in the interim to alienate property in the normal course of business. They are distinct legal concepts; whereas the deemed trust takes "priority over existing and future security interests", a floating charge would be overridden by a subsequent fixed charge (Toronto-Dominion Bank v. Canada, 2020 FCA 80, [2020] 3 F.C.R. 201, at para. 62; see also First Vancouver, at para. 28).

197 Significantly, the s. 227(4.1) deemed trust does not encompass the whole of the tax debtor's interest in property, but only the amount deemed to be held in trust by s. 227(4). But this does not mean the Crown cannot have a property interest in the debtor's property. It merely limits that interest to the extent of the unremitted source deductions. This makes sense. The Crown may collect only what it is owed.

B. The Deemed Trust Under the Fiscal Statutes Have Absolute Priority Over All Other Claims in CCAA Proceedings

198 The text, context, and purpose of s. 227(4.1) of the ITA support the conclusion that s. 227(4.1) of the ITA and the related deemed trust provisions under the Fiscal Statutes bear only one plausible interpretation: the Crown's deemed trust enjoys priority over all other claims, including

priming charges granted under the *CCAA*. Parliament's intention when it amended and expanded s. 227(4) and (4.1) of the ITA was clear and unmistakable.

(1) The Deemed Trusts Apply Notwithstanding the Provisions of the CCAA

(a) Text of the Fiscal Statutes

199 The text of s. 227(4.1) of the ITA is determinative: the Crown's deemed trust claim enjoys superior priority over all "security interests", including priming charges under the *CCAA*. The amount subject to the deemed trusts is deemed "to be held ... separate and apart from the property of the person" and "to form no part of the estate or property of the person". It is "beneficially owned by Her Majesty", and the "proceeds of such property shall be paid ... in priority to all such security interests". The Crown's right pursuant to its deemed trust is clear: it is a right to be paid in priority to all security interests.

200 Parliament granted this unassailable priority by employing the unequivocal language of "[n]otwithstanding any ... enactment of Canada". This is a "blanket paramountcy clause"; it prevails over all other statutes (P. Salembier, *Legal and Legislative Drafting* (2nd ed. 2018), at p. 385). No similar "notwithstanding" provision appears in the *CCAA*, subordinating the claims under the deemed trusts of the Fiscal Statues to priming charges. Indeed, it is quite the opposite: unlike most deemed trusts which are nullified in *CCAA* proceedings by the operation of s. 37(1) of the CCAA, s. 37(2) *preserves* the deemed trusts of the Fiscal Statutes. This distinguishes the deemed trust at issue here from those discussed in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, which were nullified by the operation of what is now s. 37(1). Deschamps J. repeatedly contrasted the different deemed trusts and specified that "the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy" (para. 38). The *ITA* and *CCAA* thus operate without conflict.

(b) Legislative Predecessor Provisions

201 The predecessor provisions of a statutory provision form part of the "entire context" in which it must be interpreted (Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771, 2005 SCC 70, [2005] 3 S.C.R. 425, at para. 28). And here, it confirms that, by enacting s. 227(4.1) of the ITA, Parliament intended for the deemed trusts arising from the Fiscal Statutes to have absolute priority over all secured creditors, as defined in s. 224(1.3) of the ITA.

202 As already noted, Parliament amended s. 227(4.1) of the ITA to its current form in response to this Court's decision in *Sparrow Electric*. In *Sparrow Electric*, both Royal Bank and the Minister claimed priority to the proceeds from the tax debtor's property. This Court held that the Bank had priority since the inventory was subject to the Bank's security before the deemed trust arose. In

reaching this conclusion, Iacobucci J. invited Parliament to grant absolute priority to the Crown, and showed how this could be achieved:

> I wish to emphasize that it is open to Parliament to step in and assign absolute priority to the deemed trust. A clear illustration of how this might be done is afforded by s. 224(1.2) *ITA*, which vests certain moneys in the Crown "notwithstanding any security interest in those moneys" and provides that they "shall be paid to the Receiver General in priority to any such security interest". All that is needed to effect the desired result is clear language of that kind. In the absence of such clear language, judicial innovation is undesirable, both because the issue is policy charged and because a legislative mandate is apt to be clearer than a rule whose precise bounds will become fixed only as a result of expensive and lengthy litigation.
>
> [Emphasis added; para. 112.]

203 Parliament proceeded to do just that. It amended the Fiscal Statutes to reinforce its priority. The press release accompanying the amendments stated that the objective of the amendments was to "assert the *absolute priority* of the Crown's claim [for] unremitted source deductions [and to] ensure that tax revenue losses are minimised and that delinquent taxpayers and their secured creditors do not benefit from failures to remit source deductions and GST at the expense of the Crown" (Department of Finance Canada, at p. 1 (emphasis added)).

204 The purpose of these amendments was described by Iacobucci J. for this Court in *First Vancouver*. It was, he recognized, to grant priority to the deemed trusts and ensure the Crown's claim prevails over secured creditors, irrespective of when the security interest arose (paras. 28-29). "It is evident from these changes" he added, "that Parliament has made a concerted effort to broaden and strengthen the deemed trust in order to facilitate the collection efforts of the Minister" (para. 29). Parliament's intention could not have been clearer.

205 Indeed, our colleagues' view to the contrary leaves us wondering: if the all-encompassing scope of the notwithstanding clause of s. 227(4.1) of the ITA is *insufficient* to prevail over the priming charges, what language would possibly be *sufficient*? Courts must give proper effect to Parliament's plain statutory direction, and not strain to subvert it on the basis that Parliament's categorical language or "basket clause" did not itemize a particular security interest.

(2) The Priming Charges Are "Security Interests" Within the Meaning of the Fiscal Statutes

206 The priming charge provisions in ss. 11.2(1), 11.51(1) and 11.52(1) of the CCAA allow the supervising court to "make an order declaring that all or part of the company's property is subject to a security or charge" ("*charge ou sûreté*" in the French version). This does not, however, prevail over the deemed trust created by s. 227(4.1) of the ITA, which provides that the unpaid amounts of the deemed trust for source deductions have priority over all "security interests". That term is defined by s. 224(1.3) of the ITA as follows:

> ***security interest*** means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for .... *(garantie)*

This makes clear that a "security interest" includes a "charge" (a "*sûreté*" in the French version). Further, ss. 11.2(1), 11.51(1) and 11.52(1) of the CCAA describe the priming charges as a "security or charge". There can be no doubt, therefore, that priming charges under the *CCAA* are security interests under the *ITA*.

207 Even were this insufficient, the definition of "security interest" in s. 224(1.3) of the ITA is sufficiently expansive to capture *CCAA* priming charges. The word "includes", and the categorical language of "encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for" could not be any more expansive. As Professor Sullivan explains, "The purpose of a list of examples following the word 'including' is normally to emphasize the broad range of general language and to ensure that it is not inappropriately read down so as to exclude something that is meant to be included" (*Sullivan on the Construction of Statutes* (6th ed. 2014), at para. 4.39).

208 This Court has already recognized, in *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29, [2009] 2 S.C.R. 94, that Parliament chose "an expansive definition of 'security interest' ... in order to enable maximum recovery by the Crown" (para. 14), such that it captures any interest in the property of the debtor that secures payment or performance of an obligation:

> In order to constitute a security interest for the purposes of s. 227(4.1) *ITA* and s. 86(2.1) *EIA*, the creditor must hold "any interest in property that secures payment or performance of an obligation". The definition of "security interest" in s. 224(1.3) *ITA* does not require that the agreement between the creditor and debtor take any particular form, nor is any particular form expressly excluded. So long as the creditor's interest in the debtor's property secures payment or performance of an obligation, there is a "security interest" within the meaning of this section. While Parliament has provided a list of "included" examples, these examples do not diminish the broad scope of the words "any interest in property" ....
>
> [Emphasis added; para. 15.]

In that case, Rothstein J. held for the Court that a contract providing a right to compensation (or set-off at common law) could constitute a "security interest" under s. 224(1.3) of the ITA, *despite that it was not enumerated in the definition* and that it is *not traditionally understood as such* (paras. 37-40).

209 For all these reasons, the priming charges fall under the definition of "security interest", because they are "interest[s] in the debtor's property [that] secur[e] payment or performance of an obligation", i.e. the payment of the monitor, the interim lender, and directors. Consequently, the Crown's interest under the trust deemed created by s. 227(4.1) of the ITA enjoys priority over the priming charges.

210 Our colleague Côté J., however, sees the matter differently. In our respectful view, she disregards this Court's authoritative statement of the law in *Caisse populaire Desjardins de l'Est de Drummond*. Specifically, she concludes that priming charges are not "security interests" under the *ITA* because "[c]ourt-ordered charges are unlike conventional consensual and non-consensual security interests in that they are integrally connected to insolvency proceedings that operate for the benefit of the creditors as a group" (Côté J.'s reasons, at para. 62 (emphasis deleted), quoting R. J. Wood, "Irresistible Force Meets Immovable Object: Canada v. Canada North Group Inc." (2020), 63 Can. Bus. L.J. 85, at p. 98). With respect, nothing in the definition of security interest in the *ITA* precludes the inclusion of an interest that is designed to operate to the benefit of all creditors.

211 Further, and irrespective of the nature of *CCAA* proceedings, our colleague's conclusion is irreconcilable with this Court's holding in *Caisse populaire Desjardins de l'Est de Drummond* and with the "expansive definition" Parliament adopted to maximize recovery (*Caisse populaire Desjardins de l'Est de Drummond*, at para. 14). The fact that the instrument is court-ordered and is for the presumed benefit of all creditors is irrelevant. It does not affect *the nature* of the priming charges — to secure the payment of an obligation — which is the only relevant criterion (para. 15). As for the express inclusion of "priming charges" in the definition and their creation by court order, we reiterate that "*sûreté*" and "*charge*" are explicitly included "*however* or whenever arising, *created*, deemed to arise or provided for" (ITA, s. 224(1.3)).

212 Nor is Professor Wood's commentary, and by extension, the reasoning in *DaimlerChrysler Financial Services (Debis) Canada Inc. v. Mega Pets Ltd.*, 2002 BCCA 242, 1 B.C.L.R. (4th) 237, and *Minister of National Revenue v. Schwab Construction Ltd.*, 2002 SKCA 6, 213 Sask. R. 278, of any avail to our colleague Karakatsanis J. (para. 102; see also Wood, at p. 98, fns. 51-52). While those judgments held that finance leases and conditional sales agreements did not fall under the definition of s. 224(1.3) of the ITA because they were not specifically listed, that reasoning was later squarely rejected in *Caisse populaire de l'Est de Drummond*. And, were that not enough, *Mega Pets* and *Schwab*, unlike the instant case, dealt with situations where property was not transferred to the debtor, which facts were treated as determinatively supporting the conclusion that the instruments in those cases were not "security interests". For example, under a conditional sales agreement, the seller does not have an interest in the debtor's property because ownership rests with the seller until performance of the obligation (*Mega Pets*, at para. 32). By contrast, the priming charges secure payment out of property that remains the debtor's.

213 Finally, this Court's interpretation of "security interest" in *Caisse populaire de l'Est de Drummond* is confirmed by the French version of the text. "*Sont en particulier des garanties*" is illustrative, not limitative. *Le Robert* (online) defines "*en particulier*" (in particular) as [TRANSLATION] "*particularly, among others*, especially, above all" (emphasis added). Unsurprisingly, the French version of s. 224(1.3) has been described as being [TRANSLATION] "as broadly worded as possible" (R. P. Simard, "Priorités et droits spéciaux de la couronne", in *JurisClasseur Québec — Collection droit civil — Sûretés* (loose-leaf), vol. 1, by P.-C. Lafond, ed., fasc. 4, at para. 20). There is no discordance between both versions of the text. The French version conforms perfectly to the English text's use of the verb "includes", and confirms the plain reading of the English version.

214 Respectfully, our colleagues Côté and Karakatsanis JJ. frustrate the clear will of Parliament. Clear, all-inclusive language should be treated as such, and not circumvented by straining to draw distinctions of no legal significance whatsoever or by searching for what is not specifically mentioned in order to avoid the otherwise inescapable conclusion that Parliament granted absolute priority to the deemed trusts.

(3) Conclusion

215 It is this simple:

1. the Fiscal Statutes give absolute priority to the deemed trusts for source deductions over all security interests notwithstanding the *CCAA*;

2. the priming charges are "security interests" within the meaning of the Fiscal Statutes; and

3. the *CCAA* does not subordinate the claims under the deemed trusts of the Fiscal Statutes to the priming charges.

216 This is sufficient to decide the appeal: the deemed trusts of the Fiscal Statutes have priority over the priming charges. However, in view of the respondents' submissions that such a finding leaves the deemed trust provisions in the Fiscal Statutes in conflict with the *CCAA*, and that recognizing the ultimate priority of the Crown's deemed trust renders certain provisions of the *CCAA* meaningless, we are compelled to explain why this is not so.

C. The CCAA and the Fiscal Statutes Operate Harmoniously

(1) The Broad Grant of Authority Under Section 11 of the CCAA Is Not Unlimited

217 It is not disputed that s. 11 of the CCAA contains a grant of broad supervisory discretion and the power to "make any order that it considers appropriate in the circumstances" to give effect

to that supervisory role (see J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at pp. 18-19). What is in dispute, however, are the limits to this broad power.

218 A supervising judge's authority to grant priming charges was not always contained in the *CCAA*. Prior to the 2009 amendments, it was derived from the courts' inherent jurisdiction (Temple City Housing Inc., Re, 2007 ABQB 786, 42 C.B.R. (5th) 274, at para. 14; Q.B. reasons, at para. 105). While the amendments in some respects represented a codification of the past practice, they clarified how priming charges operated (CCAA, ss. 11.2, 11.51 and 11.52). Despite being "the engine driving the statutory scheme", s. 11's exercise was expressly stated by Parliament to be "*subject to the restrictions set out in this Act*" (see 9354-9186 Québec inc. v. Callidus Capital Corp., 2020 SCC 10, at paras. 48-49, citing *Stelco Inc. (Re)*, (2005), 75 O.R. (3d) 5 (C.A.), at para. 36). Three such restrictions are significant here.

(a) The Continued Operation of the Deemed Trusts for Unremitted Source Deductions (Section 37(2))

219 The first restriction on the authority to grant priming charges is found in s. 37(2) of the CCAA. This provides for the continued operation of the deemed trusts under the Fiscal Statutes in a *CCAA* proceeding — a point this Court *repeatedly* highlighted in *Century Services*, at paras. 78-81. At the hearing of this appeal, the respondents argued that s. 37(1) nullifies the Crown's priority in respect of all deemed trusts under the *CCAA*, and that s. 37(2) acts merely to reincorporate the deemed trusts under the Fiscal Statutes into *CCAA* proceedings without their absolute priority. This tortured interpretation misconceives the effect of s. 37(1).

220 Section 37(1) provides that, despite any deemed trust provision in federal or provincial legislation, "property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision", but it is expressly made "[s]ubject to subsection (2)". Through s. 37(2), Parliament also preserved the operation of the deemed trusts under the Fiscal Statutes within *CCAA* proceedings by providing that "[s]ubsection (1) does not apply in respect of amounts deemed to be held in trust under [the Fiscal Statutes]". In the face of Parliament's clear direction that the deemed trusts operate "notwithstanding" any other enactment, and the express preservation of the deemed trusts in the *CCAA*, there is simply no basis whatsoever for reading s. 37 as invalidating the deemed trust provisions under the Fiscal Statutes only to revive them with a conveniently lesser priority. Such an interpretation finds no support in the text, context, or purpose of the statutory schemes. Rather, all those considerations support the view that the deemed trusts under the Fiscal Statutes are preserved in *CCAA* proceedings in both form and substance, along with their absolute priority.

221 Before turning to the second restriction, we note each of our colleagues Karakatsanis J. and Côté J. fail to give effect to Parliament's decision, expressed in clear statutory text, to "preser[ve] deemed trusts and asser[t] Crown priority only in respect of source deductions" under the *CCAA*

(*Century Services*, at para. 45). For the same reason, the reliance they place on *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, is misconceived. There, the Court held that the deemed trust created by provincial legislation was not a "true trust" so as to fall outside the debtor's property under what is now s. 67(1)(a) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA"). That is not this case. Unlike the deemed trust in *Henfrey*, the deemed trusts of the Fiscal Statutes receive a particular treatment in bankruptcy and insolvency proceeding because they are preserved by s. 37(2) of the CCAA and s. 67(3) of the BIA. Further, while the Court in *Henfrey* concluded that the deemed trust was ineffective in bankruptcy because the commingling of assets rendered the money subject to the deemed trusts untraceable, this rationale has no application to s. 227(4.1). In *First Vancouver*, this Court noted that "by deeming the trust to be effective 'at any time' the debtor is in default, the amendments serve to strengthen the conclusion that the Minister is not required to trace its interest to assets which belonged to the tax debtor at the time the source deductions were made" (para. 37). Again, no conclusions regarding the nature of the deemed trusts flow from the fact that tracing is irrelevant under s. 227(4.1): the deemed trusts are statutory instruments and the question is one of operation, *not* characterization.

(b) Priming Charges Attach Only to the Property of the Debtor Company

222 The second restriction on the *CCAA*'s broad authority to grant priming charges is that the *CCAA* requires priming charges to attach only to "all or part" of the property of the debtor's company (s. 11.2(1); see also ss. 11.51(1) and 11.52(1)). Here, Parliament evinces a clear intent to preserve the ultimate priority it afforded the deemed trusts under the Fiscal Statutes. This is because, by operation of s. 227(4.1) of the ITA and s. 37(2) of the CCAA, the unremitted source deductions are deemed *not* to form part of the property of the debtor's company.

223 Parliament could not have been more explicit: the source deductions are deemed never to form part of the company's property and, if there is a default in remittances, the Crown is deemed to obtain beneficial ownership in the tax debtor's property in the amount of the unremitted source deductions that it can collect "notwithstanding" any other enactment or security interest. Whether this is a true ownership interest is irrelevant to this appeal as the legislation *deems* the Crown to obtain beneficial ownership for these purposes. It follows that the priming charges cannot supersede the Crown's deemed trust claim because they may attach *only* to *the property of the debtor's company*, of which Parliament took great care to ensure the source deductions were deemed to form no part. As Michael J. Hanlon explains:

> While it has been held that an interim financing charge may rank ahead of the deemed trusts existing in favour of the Canada Revenue Agency with respect to amounts owing on account of unremitted source deductions, this appears to be incorrect. Property deemed to be held in trust pursuant to the provisions creating the deemed trust are deemed not to form part of the debtor's estate, and given that those deemed trusts with respect to source deductions, are preserved in a *CCAA* context, the interim financing charge would not attach to those assets.

> [Emphasis added; footnotes omitted.]
>
> (*Halsbury's Laws of Canada — Bankruptcy and Insolvency* (2017 Reissue), at HBI-376)

(c) The Definition of "Secured Creditor" (Section 2)

224 The third restriction on the *CCAA*'s broad authority to grant priming charges is that the court "may order that the security or charge rank in priority over the claim of *any secured creditor* of the company" (ss. 11.2(2), 11.51(2) and 11.52(2)). Also, the definition of "secured creditor" in s. 2(1) of the CCAA makes it manifestly clear that the Crown is not a "secured creditor" in respect of its deemed trust claims under the Fiscal Statutes:

> ***secured creditor*** means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds ....

This definition highlights two relevant considerations. First, the definition should be read as encompassing two classes of creditors. And second, the use of the word "trust" must be given legal significance.

225 As to the first consideration, we accept the Crown's submission that the proper reading of the definition of secured creditor references only two classes of secured creditors: (i) holders of direct security, and (ii) holders of secured bonds. So understood, a secured creditor means either

> a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company,

or

> **a holder of any bond of a debtor company secured by** a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or **a trust in respect of, all or any property of the debtor company** ....

The reference to "trust" appears only in relation to an instrument securing a bond of the debtor company. The definition must be read as "secured creditor means ... a holder of any bond of a

debtor company secured by ... a trust in respect of, all or any property of the debtor company". Accordingly, holders of an interest under a deemed trust are not a third class of creditors (A. Prévost, "Que reste-t-il de la fiducie réputée en matière de régimes de retraite?" (2016), 75 *R. du B.* 23, at p. 58).

226 While finding this interpretation "initially attractive", the majority of the Court of Appeal ultimately rejected this reading. It did so because, irrespective of whether the definition needs a third reference to a "holder of a trust" drafted in parallel to the first two classes of creditors, the Crown's interest could be classified as a "charge" and is therefore captured by the first class of secured creditors (C.A. reasons, at paras. 42-43). Respectfully, this is incorrect. Deemed trusts are not covered by the word "charge". To conclude that the word "charge" encompasses "deemed trusts" under the first class of secured creditors when "charge" and "trust" are listed distinctly under the second class of secured creditors (holders of secured bonds) would be incoherent and run contrary to legislative presumptions in statutory interpretation. Why would Parliament include a specific reference to *trusts* if they are already covered by *charge*? Parliament is presumed to avoid "superfluous or meaningless words, [and] phrases" (Bristol-Myers Squibb Co. v. Canada (Attorney General), 2005 SCC 26, [2005] 1 S.C.R. 533, at para. 178). The deliberate and distinct text of "trust" and "charge" shows that it was not Parliament's intention to have holders of deemed trusts subsumed under "charge" such that the Crown in this circumstance would become a secured creditor.

227 In any case, if there were only one class of creditor, the Crown would not be a secured creditor with respect to the deemed trust claim under the Fiscal Statutes. While Parliament distinguished between "deemed or actual trust[s]" in s. 224(1.3) of the ITA, it made no such distinction in the definition of secured creditor. Parliament is presumed to legislate with intent and chose its words carefully. Our role as a court with respect to legislation is interpretation, not drafting. We must ascribe legal significance to Parliament's choice of text — that is, to the words Parliament chose and *did not* choose.

(d) "Restrictions" Under Section 11 of the CCAA

228 Our colleague Karakatsanis J. agrees with our analysis of the priming charge provisions, but she does not seem to view them as "restrictions" within the meaning of s. 11 because "[t]he general language of s. 11 should not ... be 'restricted by the availability of more specific orders'" (Karakatsanis J.'s reasons, at para. 170, citing Century Services, at para. 70). With respect, as a matter of law and statutory interpretation this view is simply unavailable to our colleague. Neither s. 11 nor the court's inherent jurisdiction can "empower a judge ... to make an order negating the unambiguous expression of the legislative will" (*Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, [1976] 2 S.C.R. 475, at p. 480; see also R. v. Caron, 2011 SCC 5, [2011] 1 S.C.R. 78, at para. 32). Parliament has imposed clear restrictions on the courts' power to give priority to priming charges. It is one thing to rely on s. 11 as a source of general authority even

when other specific orders are available; it is another to misconstrue s. 11 as a source of unfettered authority to circumvent such unambiguous restrictions. While courts may use their general s. 11 power to create priming charges for purposes other than those that are specifically enumerated (see Wood, at pp. 90-91), Parliament has clearly expressed its intention to restrict any such charge in a critical way — it cannot take priority over the Crown's deemed trust.

229 For the same reason, we respectfully find untenable our colleague Justice Moldaver's suggestion that it is unclear whether there are restrictions *internal* to the *CCAA* itself that would prevent a court from using its power under s. 11 to order a priming charge in priority to the Crown's deemed trust claim. This statement does not account for Parliament's clear intention, recorded in s. 37(2), to preserve the Crown's right to be paid in absolute priority over all secured creditors in *CCAA* proceedings. It also renders superfluous the restrictions on the court's authority to prioritize priming charges under ss. 11.2(2), 11.51(2) and 11.52(2) of the CCAA.

230 Further, our colleague Moldaver J. says it is unnecessary to "define the particular nature or operation of the" deemed trust under the *ITA* (para. 255), and relies on the "notwithstanding" language of s. 227(4.1) of the ITA to determine whether the Crown's claim can have priority over priming charges. This interpretation effectively reads in a conflict in the statutory schemes, despite this Court's clear direction that "an interpretation which results in conflict should be eschewed unless it is unavoidable" (*Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, at para. 47). In any event, this is not an *unavoidable* conflict: there is simply *no* conflict. Parliament *avoided* any conflict between the *CCAA* and the *ITA* by imposing restrictions upon the court's authority under s. 11 of the CCAA.

(e) Structure of Crown Claims Under the CCAA

231 Finally, while not a "restrictio[n] set out in [the *CCAA*]", as specified in s. 11, the cogency of the statutory scheme as a whole depends on an interpretation where the Crown cannot be a secured creditor. This is so because classifying the Crown as "secured creditor" would disrupt the structure of Crown claims that the *CCAA* clearly defines at ss. 37 to 39 (Wood, at p. 98). Section 37 applies to deemed trust claims, with s. 37(1) providing that deemed trusts in favour of the Crown are ineffective under the *CCAA*, as a general rule, and s. 37(2) providing an exemption for the deemed trust for source deductions. Section 38(1) sets out the general rule that the Crown's secured claims rank as unsecured claims, with specific exemptions at s. 38(2) and (3). Finally, s. 39(1) preserves the Crown's secured creditor status if it registers before the commencement of the *CCAA* proceedings but, under s. 39(2), that security is subordinate to prior perfected security interests.

232 This leads us to question why Parliament would expressly "preserve" the deemed trusts of the Fiscal Statutes by operation of s. 37(2), only then to rank the Crown as an unsecured creditor by the operation of s. 38(1). Unlike the interpretation that affords the deemed trusts ultimate priority, allowing the Crown to be reduced to an unsecured creditor in respect of its deemed trust claims

would render s. 37(2) almost meaningless. Further, this interpretation would require the Crown to register its claim under s. 39(1) to preserve its status because the deemed trust is not afforded the exemption under s. 38. It would be illogical for Parliament to confer greater protection on secured claims afforded an exemption under s. 38(2) or (3) than it conferred on deemed trusts for source deductions, when the clear objective was to confer "absolute priority" on the latter (*First Vancouver*, at paras. 26-28).

233 We note that Professor Wood is not alone in recognizing that "sections 38 and 39 of the CCAA govern the conditions upon which a Crown claim can be viewed as 'secured' for the purposes of the CCAA" (F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at §79.2). Since the deemed trusts for unremitted source deductions under the Fiscal Statutes do not meet the conditions of these sections, it follows that the Crown's claim is not "secured".

234 In our view, a plain reading of the definition of secured creditor within the context of the broader statutory scheme results in a single inescapable conclusion. That is, there are three classes of Crown claims under the *CCAA*: (1) claims pursuant to deemed trusts continued under the *CCAA*; (2) secured claims; and (3) unsecured claims. The claims for unremitted source deductions fall under the first type: claims pursuant to deemed trusts continued under the *CCAA*.

(2) Recognizing the Ultimate Priority of the Crown's Deemed Trust Does Not Defeat the Purpose of any Provision of the CCAA

235 For two further and related reasons, the majority at the Court of Appeal and the respondents resist the conclusion that the Crown's deemed trust enjoys absolute priority.

(a) Protection of Crown Claims Under Section 6(3)

236 First, the majority held that granting ultimate priority to the deemed trusts would render s. 6(3) of the CCAA meaningless. This provision prohibits the court from sanctioning a compromise or arrangement unless it provides for payment in full to the Crown, within six months of the sanction of the plan, of all amounts due to the Crown. The majority reasoned that if the Crown is always paid first for its deemed trust claims under the Fiscal Statutes, there would be no need to protect the Crown claims under s. 6(3).

237 Respectfully, this conclusion is erroneous. A review of the purpose and scope of s. 6(3) of the CCAA is clear: it operates only where there is an arrangement or compromise put to the court, and it protects the entirety of the Crown claim pursuant to s. 224(1.2) of the ITA and similar provisions of the Fiscal Statutes. This includes claims *not* subject to the deemed trusts under the Fiscal Statutes, such as income tax withholdings, employer contributions to employment insurance and CPP, interest and penalties. In contrast, the deemed trusts arise immediately and operate continuously "from the time the amount was deducted or withheld" from the employee's remuneration, and apply to *only those* deductions. It follows, then, that, without s. 6(3), the Crown

would be guaranteed entitlement only to unremitted source deductions when the court sanctions a compromise or arrangement, and not to its other claims under s. 224(1.2) of the ITA. This is because most of the Crown's claims rank as unsecured under s. 38 of the CCAA.

238 It bears emphasizing that s. 6(3) does *not* apply where no arrangement is proposed or to *CCAA* proceedings which involve the liquidation of the debtor's assets. Such "liquidating CCAAs" are "now commonplace in the *CCAA* landscape" (*Callidus Capital Corp.*, at para. 42). The absolute priority of the deemed trusts under the Fiscal Statutes, continued by s. 37(2) of the CCAA, provides protection to the Crown's claim for unremitted source deductions in liquidating CCAAs. Each of our colleagues Côté and Karakatsanis JJ. deprive the Crown of its guaranteed entitlements in such cases, despite Parliament having unambiguously granted "absolute priority" to claims for unremitted source deductions (Department of Finance Canada).

239 We note that our colleague Karakatsanis J. does not conclude that s. 6(3) is rendered nugatory by our interpretation; rather, she says that, since the term "beneficial ownership" as it is used in the deemed trusts does not have the same meaning at common law, we must look to the *CCAA* to ascertain the Crown's rights. This "manipulation of private law concepts, without settled meaning", she further says, raises the question of *how* the deemed trust survives under the *CCAA* (para. 181). And the answer, she finds, is furnished by s. 6(3).

240 This is wrong for three reasons. First, there is no question as to how the deemed trust survives. Section 37(2) operates to exempt the deemed trusts under the Fiscal Statutes from any change in form or substance under the *CCAA*; this continues the operation of s. 227(4.1), which confers absolute priority on the Crown's claim to the deemed trusts under the Fiscal Statutes. In other words, the deemed trust survives as it was under the Fiscal Statutes. It is unsurprising, therefore, that this Court did not opine on *how* the trust "survives" in *CCAA* proceedings in *Century Services*: it is, with respect, plain and obvious.

241 Secondly, our colleague Karakatsanis J.'s suggestion that the understanding of the rights conferred on the Crown under the deemed trust must arise from reading s. 6(3) of the CCAA entirely bypasses the text of the *ITA* which specifically sets out those rights. After providing that the Crown has "beneficial ownership" of the value of the unremitted source deduction, the *ITA* continues: "the proceeds of such property shall be paid to the Receiver General in priority to all such security interests" (s. 227(4.1)). This is the right of the Crown under the deemed trust, and our colleague fails to give effect to this right.

242 Finally, as we have discussed, s. 6(3) protects different interests than those captured by the deemed trusts. If s. 6(3) were to exhaust the Crown's rights under the *CCAA*, our colleague Karakatsanis J. correctly observes that "there may be some risk to the Crown that the plan [under s. 6(3)] may fail, and the Crown *may not be paid in full* if the restructuring dissolves into liquidation and the estate is depleted in the interim" (para. 155 (emphasis added)). This, however,

only supports our interpretation. The right "not to have to compromise" under s. 6(3) is a right independent of the Crown's right under deemed trusts (para. 155 (emphasis deleted)).

(b) Power to Stay the Crown's Garnishment Right (Section 11.09)

243 Secondly, the majority at the Court of Appeal and the respondents say that giving effect to the clear statutory wording would be contrary to the purpose of s. 11.09 of the CCAA, which grants courts the power to stay the Crown's garnishment right under the *ITA* (C.A. reasons, at para. 54). This demonstrates, the argument goes, Parliament's intent to have the court exercise control over the Crown's interests while monitoring the restructuring proceedings. On this view, granting absolute priority to the deemed trusts under the Fiscal Statutes necessarily implies that s. 11.09 of the CCAA does not apply to the deemed trust claim.

244 Again respectfully, this is not so. A court-ordered stay of garnishments under s. 11.09 of the CCAA *can* apply to the Crown's deemed trust claims under the Fiscal Statutes because the deemed trust provisions and s. 11.09 each serve different purposes: the deemed trusts grant a priority to the Crown, while s. 11.09 imposes conditions on when and how the Crown can enforce its garnishment rights under s. 224(1.2) of the ITA. In other words, s. 11.09 permits the Court to stay the Crown's ability to enforce its claims under the deemed trusts, but it does not remove its priority.

245 The critical point is this: giving effect to Parliament's clear intent to grant absolute priority to the deemed trust does not render s. 6(3) or s. 11.09 meaningless. To the contrary, s. 6(3) and s. 11.09 respect the ultimate priority of the deemed trusts under the Fiscal Statutes by allowing for the ultimate priority of the Crown claim to persist, while not frustrating the remedial purpose of the *CCAA*.

(3) Conclusion

246 As with our discussion of the deemed trust's absolute priority, the harmonious operation of the *CCAA* and the Fiscal Statutes can be summarized as follows:

> 1. the *CCAA* preserves the Crown's right to be paid in priority to all security interests for its claims for source deductions under the Fiscal Statutes;
>
> 2. under the *CCAA*, the Crown is not a "secured creditor" in respect of its deemed trust claims under the Fiscal Statutes;
>
> 3. as priming charges can attach only to the debtor's property, and as Parliament has made it clear that unremitted source deductions form no part of the debtor's property, the Crown's interest under the deemed trust is not subject to the priming charges;

4. section 6(3) of the CCAA, which operates only where there is an arrangement or compromise put to the court, protects the entirety of the Crown claim under s. 224(1.2) of the ITA and similar provisions of the Fiscal Statutes; and

5. the deemed trust's grant of priority to the Crown is unaffected by s. 11.09, which instead imposes conditions on when and how the Crown can enforce its garnishment rights under s. 224(1.2) of the ITA.

D. Policy Reasons Do Not Support a Different Interpretation

247 The majority of the Court of Appeal and the respondents place significant weight on what they view as the potentially "absurd consequences" that would result from concluding that the deemed trusts under the Fiscal Statutes have priority over the priming charges. The same point implicitly underlies our colleague Côté J.'s reasons. Indeed, the majority at the Court of Appeal went as far as to warn that, under this interpretation, interim financing would "simply end", an assertion that "almost certainly goes too far" (C.A. reasons, at para. 50; Wood, at p. 99). It added that it would lead to more business failures and, in turn, undermine tax collection (paras. 48 and 50). We disagree.

248 The "absurd consequences" identified by the majority at the Court of Appeal rest on faulty premises. The conclusion that interim financing would "simply end" was not supported by the record. The majority extrapolated from admittedly incomplete and dated data about interim financing drawn from a textbook which does not indicate the presence of a deemed trust claim. This sweeping statement elides cases where there is no interim lending and cases, such as this one, where the debtor's assets are sufficient to satisfy both the interim lending and the Crown's deemed trust claim. This is an omission that cannot be readily ignored as there are usually enough funds available to satisfy both the Crown claim *and* the court-ordered priming charges (Wood, at p. 100). Equally unfounded is the majority's claim that confirming the priority of the deemed trusts of the Fiscal Statutes would "inject an unacceptable level of uncertainty into the insolvency process" (C.A. reasons, at para. 51). A company applying under the *CCAA* is required to provide its financial statements (s. 10(2)(c)), which include the source deductions owed to the Crown. Interim lenders can rely on this information to evaluate the risk of providing financing.

249 Moreover, the majority at the Court of Appeal did not consider that Parliament can, and did, choose to prioritize the integrity of the tax system over the interests of secured creditors. Indeed, and with respect, the majority's own interpretation arguably itself produces absurd results, whereby employees' gross remuneration are conscripted as a subsidy to secure interim financing and the services of insolvency professionals.

250 We therefore do not remotely see the consequences of our interpretation as rising to the level of absurdity. And Parliament has unambiguously struck the balance it considered appropriate in

pursuit of the dual objectives of collecting unremitted source deductions, which are not the property of the debtor, and avoiding the "devastating social and economic effects of bankruptcy" (*Century Services*, at para. 59, quoting *Elan Corp. v. Comiskey*, (1990), 1 O.R. (3d) 289 (C.A.), at p. 306, per Doherty J.A., dissenting). Whether s. 227(4.1) of the ITA is an effective means to protect the fiscal base or whether "the Crown is biting off the hand that feeds it" are not questions that this Court has the competence or legitimacy to answer (C.A. reasons, at para. 48).

251 In any event, even were there evidence that giving priority to the deemed trusts under the Fiscal Statutes over the priming charges produced absurd results, our conclusion would be no different. The presumption against absurdity is exactly that: a presumption. Nothing more. Illogical consequences flowing from the application of a statute do not give rein to courts to disregard clear legislative intent. As Lamer C.J. noted in R. v. McIntosh, [1995] 1 S.C.R. 686, at para. 41, "Parliament ... has the right to legislate illogically (assuming that this does not raise constitutional concerns). And if Parliament is not satisfied with the judicial application of its illogical enactments, then Parliament may amend them accordingly."

252 Here, Parliament's intention to give absolute priority to the deemed trust of the Fiscal Statutes is unequivocal. Our role is to give effect to this intention.

III. Disposition

253 We would allow the appeal. The respondents should be entitled to costs in accordance with "Schedule B" to the regulations (Rules of the Supreme Court of Canada, SOR/2002-156). There are no exceptional circumstances that would justify enhanced costs. Despite the appeal being moot, it was not improper for the Crown to seek the correct interpretation of the Fiscal Statutes.

***Moldaver J.* (dissenting):**

254 I have had the benefit of reading the reasons of my colleagues, Justice Côté, Justice Karakatsanis, and Justices Brown and Rowe. While I substantially agree with the analysis and conclusions of Brown and Rowe JJ., there are two points that I wish to address.

255 First, unlike Brown and Rowe JJ., I see no reason to define the particular nature or operation of the Crown's interest under s. 227(4.1) of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) (“ITA”), in the context of proceedings under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (“CCAA”). While a future appeal may require this Court to determine exactly how the Crown's interest under s. 227(4.1) "survives", and whether it amounts to some form of ownership interest in the debtor's property, as Brown and Rowe JJ. maintain, some form of security interest in that property, or something else entirely (e.g., a right not to have to compromise, as Karakatsanis J. maintains), such an inquiry is not necessary in this case. Properly interpreted, the relevant provisions of the *CCAA* and *ITA* work in harmony to direct that the Crown's interest

— in whatever form it takes — must be given priority over court-ordered priming charges. This conclusion is sufficient to dispose of the appeal.

256 In my view, to the extent that Brown and Rowe JJ. conclude that the Crown's interest under s. 227(4.1) affords the Crown beneficial ownership over the source deductions such that "the source deductions are deemed never to form part of the company's property", they have effectively decided the appeal by two paths — first, by way of the Crown's absolute priority under s. 227(4.1), and second, by way of the Crown's beneficial ownership over any unremitted source deductions (para. 223). As they note, if the Crown's interest amounts to an ownership interest and unremitted source deductions do not form part of the debtor company's property, priming charges could never attach to those source deductions, whether ordered under the specific priming charge provisions or the court's broad power under s. 11 of the CCAA (paras. 222-23). If this is indeed the case, it is not clear that the issue of competing priority between the Crown's interest and court-ordered priming charges ever arises, as the source deductions would be simply inaccessible to anyone other than the Crown. As I am not necessarily convinced that the Crown's interest under s. 227(4.1) amounts to an ownership interest, and as the Crown's absolute priority does not depend on this conclusion, I would leave the question of the nature of the Crown's interest to another day.

257 Second, while I agree with Brown and Rowe JJ. that s. 37(2) of the CCAA can be interpreted as an internal restriction on s. 11, I hesitate to accept this conclusion, as it strikes me that in order to give proper effect to Parliament's intention for s. 11 to serve as "the engine" that drives the *CCAA* and empowers supervising judges to further its remedial objectives, any restrictions on that discretionary power should be explicit and unambiguous (9354-9186 Québec inc. v. Callidus Capital Corp., 2020 SCC 10, at para. 48, citing *Stelco Inc. (Re)*, (2005), 75 O.R. (3d) 5 (C.A.), at para. 36). With respect, s. 37(2) does not amount to such an explicit and unambiguous restriction. Rather, s. 37(2) is a simple exception to s. 37(1), which serves to nullify the effect of any statutory provision that deems property to be held in favour of the Crown:

> **37(1)** Subject to subsection (2), despite 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 debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> **(2)** Subsection (1) 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* ....

258 In effect, then, the function of s. 37(2) is merely to preserve the Crown's deemed trust under s. 227(4.1) from extinguishment under s. 37(1). In preserving the Crown's interest, however, "s. 37(2) does not explain what to do with that right for the purposes of a *CCAA* proceeding", nor does it say anything that would limit the court's power under s. 11 to order priming charges in priority to the Crown's deemed trust claim (Karakatsanis J.'s reasons, at para. 153). Indeed, as Karakatsanis J. notes, "There is no provision in the *CCAA* stipulating what the court can do with trust property and

no provision in the *CCAA* conferring more specific jurisdiction on whether a priming charge can rank ahead of the beneficiary of a deemed trust" (para. 176). Rather, it is only when one looks to s. 227(4.1) that the absolute priority of the Crown's interest — and the resulting limitations on s. 11 — become apparent. It is thus not entirely clear that interpreting s. 37(2) as an internal restriction accords with the function of s. 37(2) or the leeway that Parliament intended for the scope of powers under s. 11. In other words, the relationship between ss. 11 and 37(2) may not be as clear-cut as my colleagues seem to suggest. Accordingly, while I ultimately agree with Brown and Rowe JJ. that s. 37(2) can be interpreted as an internal restriction so as to avoid a conflict between the *CCAA* and *ITA*, I feel it important to explain that, if this interpretation is mistaken, s. 11 is nonetheless restricted by the external text of s. 227(4.1).

259 If s. 37(2) does not amount to an internal restriction on s. 11, using s. 11 to prioritize priming charges over the Crown's deemed trust claim would put the provision in direct conflict with s. 227(4.1) which, as my colleagues Brown and Rowe JJ. have explained, requires that the Crown's claim be ranked in priority to all security interests, including priming charges. The direct conflict would trigger the "[n]otwithstanding" language in s. 227(4.1), which states that "[n]otwithstanding ... any other enactment of Canada", the Crown's claim is to have priority. This language thus imposes an external restriction on the court's power under s. 11. Indeed, the supremacy of s. 227(4.1) is implicitly acknowledged by the text of s. 11 as, unlike s. 227(4.1), which operates despite "any other enactment of Canada", s. 11 only operates "[d]espite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*", but not despite anything in the *ITA*. Accordingly, while the court's discretionary authority under s. 11 could, in theory, empower a court to subordinate the Crown's interest in unremitted source deductions, that power is ultimately stopped short by the express language of s. 227(4.1).

260 In outlining this position, I consider it important to contextualize this Court's statement in *Callidus* that "the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be 'appropriate in the circumstances'" (para. 67). The focus in *Callidus* was on the discretionary authority of supervising *CCAA* judges within the confines of the *CCAA* itself; it was not on addressing the question of the authority of *CCAA* judges to apply s. 11 in the face of overriding federal legislation. Respectfully, where, as here, Parliament has expressly indicated the supremacy of a statute over the provisions of the *CCAA*, the court's power under s. 11 is correspondingly restricted.

261 The Crown's deemed trust claim must thus take priority over all court-ordered priming charges, whether they arise under the specific priming charge provisions, or under the court's discretionary authority.

262 A necessary consequence of the absolute supremacy of the Crown's deemed trust claim over court-ordered priming charges is that the Crown's interest under s. 227(4.1) cannot be given effect by s. 6(3) of the CCAA. Section 6(3) of the CCAA provides that

> [u]nless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under
>
> (a) subsection 224(1.2) of the *Income Tax Act* ....

263 In my view, there are two reasons why s. 6(3) cannot represent the Crown's interest under s. 227(4.1). First, the focus of s. 6(3) is to establish a timeframe for payment to the Crown of certain outstanding debts in the event that the debtor company succeeds in staying viable as a going concern. By contrast, s. 227(4.1) is focused on ensuring the *priority* of the Crown's claim. The key point of distinction here is that, under s. 6(3), the Crown could be ranked last, so long as it is paid within six months of any arrangement. Such an outcome would be plainly inconsistent with the absolute priority of the Crown's claim, as established by the *CCAA* and *ITA*. Second, as s. 6(3) applies only where a compromise or plan of arrangement is reached, the Crown's deemed trust claim would not operate in the event that a liquidation occurred under the *CCAA*, thereby depriving the Crown of its priority over security interests in such circumstances. Again, this potential consequence would be at odds with the clear intention of the *CCAA* and *ITA*.

264 Before concluding, I would note that it cannot be doubted that Parliament considered the potential consequences of its legislative actions, including any consequences for *CCAA* proceedings. If circumstances do arise in which the priority of the Crown's claim threatens the viability of a particular restructuring, it clearly lies with the Crown to be flexible so as to avoid any consequences that would undermine the remedial purposes of the *CCAA*.

265 I would, therefore, allow the appeal. The respondents are entitled to costs in this Court in accordance with Schedule B of the Rules of the Supreme Court of Canada, SOR/2002-156.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

1 It bears noting, however, that ss. 227(4) and 227(4.1) of the ITA do not give the Crown priority over all creditors. They explicitly carve out an exception for the rights of unpaid suppliers (Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 81.1) and the rights of farmers, fisherman, and aquaculturists (s. 81.2). In addition, s. 227(4.2) of the ITA carves out an exception for a prescribed security interest, defined in the Income Tax Regulations, C.R.C., c. 945, s. 2201. Broadly, a prescribed security interest is a mortgage in land or a building which is registered before the failure to remit the source deductions at issue (Regulatory Impact Analysis Statement, SOR/99-322, *Canada Gazette*, Part II, vol. 133, No. 17, August 18, 1999, at pp. 2041-42).

2 The wording of the deemed trust provisions in the relevant provisions of the Fiscal Statutes is materially identical. This decision focuses on the deemed trusts in s. 227(4) and (4.1) of the ITA. The reasoning herein, however, applies with equal force to each of the other statutes.

Tab 21

Her Majesty The Queen *Appellant*

v.

Criminal Lawyers' Association of Ontario and Lawrence Greenspon *Respondents*

and

Attorney General of Canada, Attorney General of Quebec, Attorney General of Manitoba, Attorney General of British Columbia, British Columbia Civil Liberties Association, Advocates' Society and Mental Health Legal Committee *Interveners*

Sa Majesté la Reine *Appelante*

c.

Criminal Lawyers' Association of Ontario et Lawrence Greenspon *Intimés*

et

Procureur général du Canada, procureur général du Québec, procureur général du Manitoba, procureur général de la Colombie-Britannique, Association des libertés civiles de la Colombie-Britannique, Advocates' Society et Mental Health Legal Committee *Intervenants*

Indexed as: Ontario *v.* Criminal Lawyers' Association of Ontario

2013 SCC 43

File No.: 34317.

2012: December 12; 2013: August 1.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

Répertorié : Ontario *c.* Criminal Lawyers' Association of Ontario

2013 CSC 43

N° du greffe : 34317.

2012 : 12 décembre; 2013 : 1er août.

Présents : La juge en chef McLachlin et les juges LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Courts — Jurisdiction — Appointment of amici curiae — Provincial Attorney General and amici curiae appointed by trial judges in criminal proceedings disagreeing on amici's rate of remuneration — Whether superior and statutory courts have inherent or implied jurisdiction to determine rate of remuneration of amici curiae.

In three cases arising in the context of criminal proceedings in Ontario, trial judges appointed *amici curiae* to assist the accused, who had discharged counsel of their choice. The judges did so in order to maintain the orderly conduct of the trials or to avoid delay in these complex, lengthy proceedings. The cases were not decided under the *Canadian Charter of Rights and Freedoms* and did not proceed on the basis that the

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Tribunaux — Compétence — Nomination d'un amicus curiae — Mésentente entre le procureur général provincial et des amici curiae nommés par des juges présidant des procès criminels au sujet du taux de rémunération des amici — Les cours supérieures et les tribunaux d'origine législative ont-ils une compétence inhérente ou tacite pour fixer le taux de la rémunération des amici curiae?

Dans trois affaires issues de dossiers criminels ontariens, les juges des procès ont nommé des *amici curiae* pour assister les accusés après que ceux-ci eurent révoqué les avocats dont ils avaient retenu les services. Cette mesure visait à assurer le bon déroulement des procès ou à ne pas retarder des instances longues et complexes. Les juges n'ont pas statué sur le fondement de la *Charte canadienne des droits et libertés*, ni estimé

accused could not have fair trials without the assistance of counsel. The Attorney General took the position that here, the *amici* played a role similar to that of defence counsel and should accept legal aid rates. However, the *amici* refused to accept those rates, and the judges fixed rates that exceeded the tariff and ordered the Attorney General to pay. In one case, a judge also appointed a senior lawyer to set a budget for the *amicus* and to review, monitor and assess his accounts on an ongoing basis. The Crown appealed the decisions, on the basis that courts lacked jurisdiction to fix the rates of compensation for *amici curiae*. The Court of Appeal dismissed the appeal, holding that incidental to a superior or statutory court's power to appoint an *amicus* is the power to set the terms and conditions of that appointment, including the rate of compensation and the monitoring of accounts.

Held (LeBel, Fish, Abella and Cromwell JJ. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Rothstein, Moldaver, Karakatsanis and Wagner JJ.: Courts of inherent jurisdiction have the power to appoint *amici curiae* exceptionally, where this is necessary to permit a particular proceeding to be successfully and justly adjudicated. This power is also implied by the ability of statutory courts to function as courts of law. *Amici curiae* have long played a part in our system of justice. However, to the extent that the terms of an *amicus*' appointment mirror the responsibilities of defence counsel, they blur the lines between those two roles. The appointment of an *amicus* for such a purpose can conflict with the accused's constitutional right to represent himself, can defeat previous judicial decisions to refuse to grant state-funded counsel following an application invoking the accused's fair trial rights under the *Charter*, can require the *amicus* to make legal submissions that are not favourable to the accused or are contrary to the accused's wishes, can result in the court's lawyer taking on a role that the court is precluded from taking and can undermine the provincial legal aid scheme. Hence, a lawyer appointed as *amicus* who takes on the role of defence counsel is no longer a friend of the court.

Absent authority flowing from a constitutional challenge or a statutory provision, the jurisdiction to fix

que les procès ne seraient pas équitables si les accusés n'étaient pas représentés. Le procureur général a fait valoir que, dans chacune des instances considérées, l'*amicus* jouait un rôle semblable à celui d'un avocat de la défense et qu'il devait accepter d'être rémunéré au tarif de l'aide juridique. Or, les *amici* ayant refusé ce tarif, les juges des procès ont fixé des taux supérieurs et ordonné au procureur général de rémunérer les *amici* en conséquence. Dans l'une des affaires, la juge du procès a confié à un avocat chevronné la tâche d'établir un budget pour l'*amicus* et de faire droit ou non, après examen, à ses demandes de paiement au fur et à mesure qu'il les présentait. Le ministère public a interjeté appel des décisions et fait valoir que les tribunaux n'avaient pas compétence pour fixer le taux de rémunération des *amici curiae*. La Cour d'appel l'a débouté au motif que le pouvoir d'une cour supérieure ou d'un tribunal d'origine législative de fixer les conditions du mandat de l'*amicus*, y compris sa rémunération et le contrôle des demandes de paiement, était connexe à son pouvoir de nommer l'*amicus*.

Arrêt (les juges LeBel, Fish, Abella et Cromwell sont dissidents) : Le pourvoi est accueilli.

La juge en chef McLachlin et les juges Rothstein, Moldaver, Karakatsanis et Wagner : Une cour dotée d'une compétence inhérente peut, de manière exceptionnelle, nommer un *amicus curiae* si la mesure s'impose afin que justice puisse être rendue dans une instance. Ce pouvoir découle aussi implicitement de la faculté d'un tribunal d'origine législative de constituer une cour de justice. La fonction d'*amicus curiae* existe depuis longtemps dans notre système de justice. Toutefois, lorsque le mandat de l'*amicus* s'apparente à celui d'un avocat de la défense, la ligne de séparation entre ces deux fonctions est brouillée. La nomination peut alors aller à l'encontre du droit constitutionnel de l'accusé d'assurer sa propre défense, ainsi que de la décision antérieure d'un tribunal saisi d'une demande fondée sur le droit constitutionnel de l'accusé à un procès équitable de lui refuser les services d'un avocat rémunéré par l'État; en outre, elle peut obliger l'*amicus* à faire valoir des points de droit qui ne sont pas favorables à l'accusé ou qui sont contraires aux vœux de ce dernier, elle peut faire en sorte que l'avocat retenu exerce une fonction que la cour n'a pas le droit d'exercer et elle peut compromettre le régime provincial d'aide juridique. Une fois nommé *amicus*, l'avocat qui accepte de tenir le rôle d'avocat de la défense n'est donc plus l'ami de la cour.

À défaut d'une habilitation découlant d'une contestation constitutionnelle ou d'une disposition législative,

the compensation of *amici curiae* must be found within the inherent or implied jurisdiction of the courts. The inherent jurisdiction of superior courts permits them to make orders necessary to protect the judicial process and the rule of law and fulfill the judicial function of administering justice in a regular, orderly and effective manner. Similarly, to function as courts of law, statutory courts have implicit powers. However, the doctrine of inherent jurisdiction does not operate without limits. Such inherent and implicit powers are subject to any statutory provisions and must be responsive to the separation of powers that exists among the various players in our constitutional order and the particular institutional capacities that have evolved from that separation. The development of separate executive, legislative and judicial functions has allowed for the evolution of certain core competencies in the various institutions vested with these functions. A court's inherent or implied powers must not trench on the provinces' role in the administration of justice.

While the courts have the jurisdiction to set terms to give effect to their authority to appoint *amici curiae*, the ability to fix rates of compensation for *amici* is not essential to the power to appoint them and its absence does not imperil the judiciary's ability to administer justice according to law in a regular, orderly and effective manner. Furthermore, an order that the Attorney General must provide compensation to an *amicus* at a particular rate is an order directing the Attorney General to pay specific monies out of public funds. While court decisions can have ancillary financial consequences, the allocation of resources between competing priorities remains a policy and economic question; it is a political decision and the legislature and the executive are accountable to the public for it. Making such an order absent authority flowing from a constitutional challenge or a statutory provision does not respect the institutional roles and capacities of the legislature, the executive (including the Attorney General), and the judiciary, or the principle that the legislature and the executive are accountable to the public for the spending of public funds. There is a real risk that such a disregard of the separation of powers and the constitutional role and institutional capacity of the different branches of government could undermine the legal aid system and cause a lack of public confidence in judges and the courts. Accordingly, superior and statutory courts' inherent or implied jurisdiction to appoint *amici*

le pouvoir de fixer la rémunération de l'*amicus curiae* doit s'originer de la compétence inhérente ou tacite de la cour. La compétence inhérente d'une cour supérieure lui permet de rendre les ordonnances nécessaires à la protection du processus judiciaire et de la primauté du droit et de s'acquitter de sa fonction judiciaire qui consiste à administrer la justice d'une manière régulière, ordonnée et efficace. De même, pour constituer une cour de justice, un tribunal d'origine législative possède des pouvoirs tacites. La théorie de la compétence inhérente ne s'applique cependant pas sans réserves. Ces pouvoirs inhérents et tacites existent sous réserve de toute disposition législative, ainsi que du respect de la séparation des pouvoirs entre les différents acteurs de notre ordre constitutionnel et des attributions institutionnelles particulières qui résultent de cette séparation. L'évolution de fonctions exécutive, législative et judiciaire distinctes a permis l'acquisition de certaines compétences essentielles par les diverses institutions appelées à exercer ces fonctions. Le pouvoir inhérent ou tacite d'une cour de justice ne doit pas empiéter sur la fonction provinciale d'administration de la justice.

Bien qu'une cour ait compétence pour fixer les conditions du mandat de l'*amicus curiae* et donner ainsi effet à son pouvoir de le nommer, la faculté de déterminer sa rémunération n'est pas essentielle à l'exercice de ce pouvoir, et son inexistence n'empêche pas la cour de rendre justice dans le respect de la loi, d'une manière régulière, ordonnée et efficace. De plus, l'ordonnance qui lui enjoint de rémunérer l'*amicus* selon un taux précis somme le procureur général de verser une certaine somme par prélèvement sur le trésor. Une décision judiciaire peut accessoirement avoir des conséquences financières, mais l'affectation de ressources en fonction de priorités concurrentes relève de la politique et de l'économie; cette mesure ressortit au législatif et à l'exécutif, qui en sont responsables vis-à-vis de la population. À défaut d'une habilitation découlant d'une contestation constitutionnelle ou d'une disposition législative, une telle ordonnance ne respecte pas les fonctions et les compétences institutionnelles du législatif, de l'exécutif (y compris le procureur général) et du judiciaire, ni le principe voulant que le législateur et l'exécutif soient responsables vis-à-vis des citoyens de l'affectation des fonds publics. Le risque existe bel et bien que le non-respect de la séparation des pouvoirs, ainsi que des attributions constitutionnelles et institutionnelles des différentes branches de l'État, porte atteinte au programme d'aide juridique et sape la

does not extend to setting rates of compensation for *amici* and ordering the provinces to pay.

In those exceptional cases where *Charter* rights are not at stake but the judge must have help to do justice and appoints an *amicus*, the person appointed and the Attorney General should meet to set rates and modes of payment. The judge may be consulted, but should not make orders regarding payment that the Attorney General would have no choice but to obey. If the assistance of an *amicus* is truly essential and the matter cannot be amicably resolved between the *amicus* and the Attorney General, the judge's only recourse may be to exercise his jurisdiction to impose a stay until an *amicus* can be found. If the trial cannot proceed, the court can give reasons for the stay, so that the responsibility for the delay is clear.

Per LeBel, Fish, Abella and Cromwell JJ. (dissenting): Trial judges may appoint an *amicus curiae* to ensure the orderly conduct of proceedings and the availability of relevant submissions. They should not be required to decide contested, uncertain, complex and important points of law or of fact without the benefit of thorough submissions. The power to appoint an *amicus* should be exercised exceptionally and with caution. An *amicus* should not be appointed to impose counsel on an unwilling accused or permit an accused to circumvent the established procedure for obtaining government-funded counsel. Furthering the best interests of the accused may be *an incidental result*, but is not *the purpose*, of an *amicus* appointment.

The jurisdiction to fix the fees of *amici curiae* is necessarily incidental to the power of trial judges to appoint them. Granting the provincial Attorney General the exclusive power to fix an *amicus*'s rate of remuneration would unduly weaken the courts' appointment power and ability to name an *amicus* of their choosing. It would also imperil the integrity of the judicial process, as the ability of courts to ensure fair and orderly process should not depend on a reliance on the continuous and exemplary conduct of the Crown, which is impossible to monitor or control. Finally, the Attorney General's unilateral control over the remuneration of *amici curiae* might create an appearance of bias and place *amici* themselves in an unavoidable conflict of interest. As *amici* often play a role that can be said to be adversarial to the Crown, if the Crown were permitted

confiance du public dans les juges et les tribunaux. Le pouvoir d'une cour supérieure ou d'un tribunal d'origine législative de nommer un *amicus* n'englobe donc pas celui de fixer le taux de sa rémunération et d'ordonner à la province de le rémunérer en conséquence.

Dans les cas exceptionnels où, sans qu'un droit garanti par la *Charte* ne soit en jeu, le juge doit obtenir l'aide d'un *amicus* pour rendre justice, le candidat retenu et le procureur général se rencontrent pour déterminer tarif et modalités de paiement. Ils peuvent consulter le juge, mais ce dernier doit s'abstenir de rendre, relativement à la rémunération, une ordonnance à laquelle le procureur général n'aurait d'autre choix que d'obéir. Lorsque le recours à un *amicus* est vraiment essentiel et que l'avocat pressenti et le procureur général ne parviennent pas à s'entendre, le juge peut n'avoir d'autre recours que l'exercice de sa compétence inhérente et la suspension de l'instance jusqu'à la nomination d'un *amicus*. Si le procès ne peut aller de l'avant, la cour peut motiver la suspension d'instance et préciser la cause du retard.

Les juges LeBel, Fish, Abella et Cromwell (dissidents) : Le juge du procès peut nommer un *amicus curiae* pour assurer le bon déroulement de l'instance et la formulation d'observations pertinentes. Il ne saurait être tenu de trancher une question de droit ou de fait contestée, complexe et importante en l'absence des plaidoiries complètes qui s'imposent. Le pouvoir de nommer un *amicus* doit être exercé de manière exceptionnelle et avec circonspection. Un *amicus* ne doit pas être nommé pour imposer un avocat à l'accusé ou permettre à ce dernier de contourner la procédure établie pour l'obtention des services d'un avocat rémunéré par l'État. Protéger l'intérêt de l'accusé peut constituer *un résultat accessoire* de la nomination de l'*amicus*, mais ne saurait en être *l'objectif*.

Le pouvoir du juge du procès de fixer les honoraires de l'*amicus curiae* est nécessairement accessoire à son pouvoir de le nommer. Accorder au procureur général d'une province le pouvoir exclusif de déterminer le taux de rémunération de l'*amicus* affaiblirait indûment le pouvoir de nomination du tribunal et sa faculté de nommer la personne de son choix. L'intégrité du processus judiciaire serait également compromise, car la faculté du tribunal d'assurer l'équité et le bon déroulement du procès ne devrait pas être fondée sur la confiance à l'égard du comportement exemplaire permanent du ministère public, chose qu'il est impossible de surveiller ou de maîtriser. Enfin, le pouvoir unilatéral du procureur général de déterminer la rémunération de l'*amicus curiae* pourrait créer une apparence de partialité et faire en sorte que l'*amicus* se retrouve inévitablement

to determine unilaterally and exclusively how much an *amicus* is paid, the reasonable person might conclude that the expectation of give and take might lead the *amicus* to discharge his duties so as to curry favour with the Attorney General.

There is no constitutional impediment to vesting in trial judges the authority to fix the fees of *amici curiae* when necessary in the circumstances. The principle that only Parliament can authorize payment out of money from the Consolidated Revenue Fund acts only to constrain the ability of the executive branch of government to spend money in the absence of authorization by the legislature. Here, however, the Attorney General has the authority to disburse public funds to pay *amici curiae* whether or not their rate of remuneration is fixed by the courts, because, with the *Financial Administration Act*, R.S.O. 1990, c. F.12, the Legislative Assembly has pre-approved the disbursement of funds for the purpose of satisfying court orders.

Once a trial judge names and defines the role of an *amicus curiae*, a consensual approach ought to be favoured. The Attorney General and the *amicus* should be invited to agree on both the rate of remuneration and the manner in which the *amicus*'s budget is to be administered. If an agreement cannot be reached, the trial judge should fix the rate. In fixing the rate of remuneration, the judge should consider the importance of the assignment undertaken, the legal complexity of the work, the skill and experience of counsel and his normal rate, and should consider that the *amicus* is performing a public service paid for with public funds. While the legal aid tariff should be taken into account as a guide, it is not determinative. The ultimate choice of whether to proceed with the prosecution in light of the associated costs remains that of the Attorney General, which thus preserves the proper balance between prosecutorial discretion and the jurisdiction of courts.

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en situation de conflit d'intérêts. Puisque l'*amicus* joue souvent un rôle qu'on peut qualifier d'opposé à celui du ministère public, si on conférait à ce dernier le pouvoir unilatéral et exclusif de déterminer la rémunération de l'*amicus*, une personne raisonnable pourrait conclure que l'attente de concessions mutuelles est susceptible d'amener l'*amicus* à s'acquitter de ses fonctions de manière à gagner la faveur du procureur général.

Nulle disposition constitutionnelle ne fait obstacle à l'octroi au juge du procès du pouvoir de déterminer les honoraires de l'*amicus* lorsque la situation l'exige. Le principe selon lequel seul le Parlement peut autoriser un paiement sur le Trésor a seulement pour effet de limiter le pouvoir de l'exécutif de dépenser sans l'autorisation du législateur. En l'espèce, toutefois, le procureur général a le pouvoir de verser des fonds publics pour rémunérer l'*amicus curiae*, que le taux de rémunération de ce dernier soit fixé ou non par le tribunal, car suivant la *Loi sur l'administration financière*, L.R.O. 1990, ch. F.12, l'Assemblée législative autorise au préalable le versement de fonds aux fins d'exécuter les ordonnances judiciaires.

Dès que le juge du procès nomme un *amicus curiae* et définit son mandat, il y a lieu de favoriser une démarche consensuelle. Il faut inviter le procureur général et l'*amicus* à s'entendre sur la rémunération de ce dernier et sur les modalités d'administration de son budget. À défaut d'accord, le juge fixe le taux de rémunération. Il tient alors compte de l'importance du mandat, de la complexité juridique du travail requis, de la compétence et de l'expérience de l'avocat nommé et de son tarif habituel. Il lui faut aussi se souvenir que l'*amicus* exécute un mandat public et qu'il est rémunéré sur les deniers publics. Le tarif de l'aide juridique doit être pris en compte à titre indicatif, mais il n'est pas décisif. La décision finale d'aller ou non de l'avant avec la poursuite à la lumière des frais engagés demeure à bon droit celle du procureur général, ce qui est de nature à préserver le juste équilibre entre le pouvoir discrétionnaire du poursuivant et la compétence du tribunal.

Jurisprudence

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By Fish J. (dissenting)

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à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard, [1997] 3 R.C.S. 3; *Renvoi relatif à certaines modifications à la Residential Tenancies Act (N.-É.)*, [1996] 1 R.C.S. 186; *Société des Acadiens du Nouveau-Brunswick Inc. c. Association of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] 1 R.C.S. 549; *B.C.G.E.U. c. Colombie-Britannique (Procureur général)*, [1988] 2 R.C.S. 214; *R. c. Morales*, [1992] 3 R.C.S. 711; *R. c. Hinse*, [1995] 4 R.C.S. 597; *R. c. Rose*, [1998] 3 R.C.S. 262; *R. c. Cunningham*, 2010 CSC 10, [2010] 1 R.C.S. 331; *R. c. Caron*, 2011 CSC 5, [2011] 1 R.C.S. 78; *Al Rawi c. Security Service*, [2011] UKSC 34, [2012] 1 A.C. 531; *Batistatos c. Roads and Traffic Authority of New South Wales*, [2006] HCA 27, 227 A.L.R. 425; *Fraser c. Commission des relations de travail dans la Fonction publique*, [1985] 2 R.C.S. 455; *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217; *New Brunswick Broadcasting Co. c. Nouvelle-Écosse (Président de l'Assemblée législative)*, [1993] 1 R.C.S. 319; *R. c. Power*, [1994] 1 R.C.S. 601; *Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l'Éducation)*, 2003 CSC 62, [2003] 3 R.C.S. 3; *Terre-Neuve (Conseil du Trésor) c. N.A.P.E.*, 2004 CSC 66, [2004] 3 R.C.S. 381; *Canada (Chambre des communes) c. Vaid*, 2005 CSC 30, [2005] 1 R.C.S. 667; *Canada (Premier ministre) c. Khadr*, 2010 CSC 3, [2010] 1 R.C.S. 44; *Renvoi sur la Loi de 1979 sur la location résidentielle*, [1981] 1 R.C.S. 714; *Di Iorio c. Gardien de la prison de Montréal*, [1978] 1 R.C.S. 152; *In re Criminal Code* (1910), 43 R.C.S. 434; *R. c. Peterman* (2004), 70 O.R. (3d) 481; *R. c. Rowbotham* (1988), 41 C.C.C. (3d) 1; *Boucher c. The Queen*, [1955] R.C.S. 16; *Nelles c. Ontario*, [1989] 2 R.C.S. 170; *Valente c. La Reine*, [1985] 2 R.C.S. 673; *R. c. Swain*, [1991] 1 R.C.S. 933; *R. c. Chan*, 2002 ABCA 299, 317 A.R. 240 (*sub nom. R. c. Cai*); *R. c. Ho*, 2003 BCCA 663, 190 B.C.A.C. 187; *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G. (J.)*, [1999] 3 R.C.S. 46; *R. c. Rockwood* (1989), 91 N.S.R. (2d) 305; *Child and Family Services of Winnipeg c. J. A.*, 2003 MBCA 154, 180 Man. R. (2d) 161; *R. c. Ryan*, 2005 NLCA 44, 199 C.C.C. (3d) 161; *R. c. Gagnon*, 2006 YKCA 12, 230 B.C.A.C. 200; *Grollo c. Palmer* (1995), 184 C.L.R. 348.

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APPEAL from a judgment of the Ontario Court of Appeal (Rosenberg, Goudge and Armstrong JJ.A.), 2011 ONCA 303, 104 O.R. (3d) 721, 277 O.A.C. 264, 270 C.C.C. (3d) 256, 86 C.R. (6th) 407, 234 C.R.R. (2d) 157, [2011] O.J. No. 1792 (QL), 2011 CarswellOnt 2608, affirming orders for the setting of rates of compensation for and the monitoring of accounts of *amici curiae*. Appeal allowed, LeBel, Fish, Abella and Cromwell JJ. dissenting.

Malliha Wilson, *Troy Harrison*, *Kristin Smith* and *Baaba Forson*, for the appellant.

P. Andras Schreck and *Louis P. Strezos*, for the respondent the Criminal Lawyers' Association of Ontario.

No one appeared for the respondent *Lawrence Greenspon*.

Alain Préfontaine, for the intervener the Attorney General of Canada.

Jean-Yves Bernard and *Brigitte Bussières*, for the intervener the Attorney General of Quebec.

Written submissions only by *Deborah Carlson* and *Allison Kindle Pejovic*, for the intervener the Attorney General of Manitoba.

Bryant Alexander Mackey, for the intervener the Attorney General of British Columbia.

Mallette, Jonathan Desjardins. *La constitutionnalisation de la juridiction inhérente au Canada : origines et fondements*. Mémoire de maîtrise non-publié. Faculté de Droit, Université de Montréal, 2007.

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POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges Rosenberg, Goudge et Armstrong), 2011 ONCA 303, 104 O.R. (3d) 721, 277 O.A.C. 264, 270 C.C.C. (3d) 256, 86 C.R. (6th) 407, 234 C.R.R. (2d) 157, [2011] O.J. No. 1792 (QL), 2011 CarswellOnt 2608, qui a confirmé des ordonnances relatives à la fixation du taux de rémunération d'*amici curiae* et au contrôle des réclamations d'un *amicus*. Pourvoi accueilli, les juges LeBel, Fish, Abella et Cromwell sont dissidents.

Malliha Wilson, *Troy Harrison*, *Kristin Smith* et *Baaba Forson*, pour l'appelante.

P. Andras Schreck et *Louis P. Strezos*, pour l'intimée Criminal Lawyers' Association of Ontario.

Personne n'a comparu pour l'intimé *Lawrence Greenspon*.

Alain Préfontaine, pour l'intervenant le procureur général du Canada.

Jean-Yves Bernard et *Brigitte Bussières*, pour l'intervenant le procureur général du Québec.

Argumentation écrite seulement par *Deborah Carlson* et *Allison Kindle Pejovic*, pour l'intervenant le procureur général du Manitoba.

Bryant Alexander Mackey, pour l'intervenant le procureur général de la Colombie-Britannique.

Micah B. Rankin, *Michael Sobkin* and *Elizabeth France*, for the intervener the British Columbia Civil Liberties Association.

John Norris, for the intervener the Advocates' Society.

Anita Szigeti, *Mercedes Perez* and *Marie-France Major*, for the intervener the Mental Health Legal Committee.

The judgment of McLachlin C.J. and Rothstein, Moldaver, Karakatsanis and Wagner JJ. was delivered by

KARAKATSANIS J. —

I. Introduction

[1] This case raises troubling implications that strike to the heart of the constitutional relationship between the judicial and other branches of government in our constitutional democracy.

[2] It is not disputed that a court may appoint a lawyer as "*amicus curiae*", a "friend of the court", to assist the court in exceptional circumstances; or that the Attorney General is obligated to pay *amici curiae* when appointed. What is at issue is whether a court's inherent or implied jurisdiction extends to fixing the rates of compensation for *amici curiae*.

[3] In the four matters under appeal, which all arose in the context of criminal proceedings in Ontario, trial judges appointed *amici curiae*, set higher rates of compensation than those offered by the Attorney General of Ontario and ordered the Attorney General to pay. The Attorney General took the position that, in these cases, the *amici* played a role similar to that of defence counsel and should accept legal aid rates. The Court of Appeal concluded that provincial and superior courts have the jurisdiction to fix the rates of compensation. The Attorney General appeals that decision, although it does not seek the return of any monies paid.

Micah B. Rankin, *Michael Sobkin* et *Elizabeth France*, pour l'intervenante l'Association des libertés civiles de la Colombie-Britannique.

John Norris, pour l'intervenante Advocates' Society.

Anita Szigeti, *Mercedes Perez* et *Marie-France Major*, pour l'intervenant Mental Health Legal Committee.

Version française du jugement de la juge en chef McLachlin et des juges Rothstein, Moldaver, Karakatsanis et Wagner rendu par

LA JUGE KARAKATSANIS —

I. Introduction

[1] L'issue du présent pourvoi pourrait avoir des répercussions déconcertantes qui risquent de rompre l'équilibre entre le pouvoir judiciaire et les autres pouvoirs dans notre démocratie constitutionnelle.

[2] Nul ne conteste qu'une cour de justice peut nommer un avocat « *amicus curiae* » (ou « ami de la cour ») pour l'épauler dans une situation exceptionnelle, ni que le procureur général est alors tenu de le rémunérer. Le présent pourvoi soulève la question de savoir si sa compétence inhérente ou tacite lui confère le pouvoir de fixer le taux de rémunération de l'*amicus curiae*.

[3] Dans chacune des quatre affaires visées par le pourvoi, toutes issues d'instances criminelles ontariennes, le juge du procès a nommé un *amicus*, a établi un taux de rémunération supérieur à celui offert par le procureur général de l'Ontario et a ordonné à ce dernier de verser cette rémunération. Le procureur général a fait valoir que, dans ces affaires, l'*amicus* jouait un rôle semblable à celui d'un avocat de la défense et qu'il devait accepter d'être rémunéré au tarif de l'aide juridique. La Cour d'appel a conclu que les tribunaux provinciaux et supérieurs ont compétence pour fixer le taux de rémunération. Le procureur général se pourvoit contre cette décision, mais ne demande pas le remboursement des sommes versées.

[4] My colleague Fish J. concludes that the jurisdiction to fix the fees of *amici curiae* is necessarily incidental to a court's power to appoint them. He finds no constitutional impediment to this power.

[5] Respectfully, I disagree. Absent statutory authority or a challenge on constitutional grounds, courts do not have the institutional jurisdiction to interfere with the allocation of public funds. While the jurisdiction to control court processes and function as a court of law gives courts the power to appoint *amici curiae*, it does not, in itself, provide the power to determine what the Attorney General must pay them. The scope of a superior court's inherent power, or of powers possessed by statutory courts by necessary implication, must respect the constitutional roles and institutional capacities of the legislature, the executive and the judiciary. As the Chief Law Officers of the Crown, responsible for the administration of justice on behalf of the provinces, the Attorneys General of the provinces, and not the courts, determine the appropriate rate of compensation for *amici curiae*.

[6] For the reasons that follow, I would allow the appeal.

II. Background

[7] These cases were not decided under the *Canadian Charter of Rights and Freedoms*. They did not proceed on the basis that the accused could not have fair trials without the assistance of counsel. Instead, the trial judges appointed counsel to assist the accused, who had in each case discharged counsel of their choice. The judges did so in order to maintain the orderly conduct of the trials or to avoid delay in these complex, lengthy proceedings. However, in each of these cases, the role of the *amici* closely mirrored the role of defence counsel, except that they could not be dismissed by the accused.

[4] Mon collègue le juge Fish estime que le pouvoir d'une cour de justice de fixer les honoraires de l'*amicus curiae* est nécessairement accessoire à son pouvoir de le nommer. Il conclut que nul obstacle constitutionnel n'empêche l'exercice de ce pouvoir.

[5] En toute déférence, je ne suis pas d'accord. En l'absence d'une habilitation découlant d'une disposition législative ou d'une contestation constitutionnelle, une cour de justice n'a pas de compétence institutionnelle pour s'immiscer dans l'affectation de fonds publics. La compétence pour faire respecter sa procédure et constituer une cour de justice confère certes le pouvoir de nommer un *amicus*, mais elle n'accorde pas en soi celui de décider de la rémunération que le procureur général doit verser. La portée de la compétence inhérente d'une cour supérieure ou du pouvoir que possède par inférence nécessaire un tribunal d'origine législative doit respecter les fonctions constitutionnelles et les attributions institutionnelles du législatif, de l'exécutif et du judiciaire. À titre de premiers conseillers juridiques de l'État chargés de l'administration de la justice au nom des provinces, ce sont les procureurs généraux provinciaux, et non les tribunaux, qui déterminent le tarif approprié et rémunèrent les *amici*.

[6] Pour les motifs qui suivent, je suis d'avis d'accueillir le pourvoi.

II. Contexte

[7] Dans les dossiers visés en l'espèce, le tribunal en cause n'a pas statué sur le fondement de la *Charte canadienne des droits et libertés*. Il ne s'agit pas d'affaires où on a estimé que le procès ne serait pas équitable si l'accusé n'était pas représenté par un avocat. Le juge du procès a plutôt nommé un avocat pour aider l'accusé qui, dans chacun des cas, avait mis fin au mandat de l'avocat de son choix. Il l'a fait pour assurer le bon déroulement du procès ou pour ne pas retarder une instance longue et complexe. Toutefois, dans chacun des cas, le rôle de l'*amicus* s'est apparenté à celui d'un avocat de la défense, sauf que l'accusé ne pouvait mettre fin à son mandat.

[8] In *R. v. Imona Russel*, 2009 CarswellOnt 9725 (S.C.J.) ("*Imona Russel #1*"), an *amicus* was appointed, at the request of the Crown, "to ensure the orderly conduct of the trial" (para. 6). The accused had discharged several experienced legal aid counsel and the court had twice refused the accused's request for an order under s. 24(1) of the *Charter* providing state-funded counsel in order to ensure a fair trial. The role of *amicus* was initially expanded so that he would "defend the case as if he had a client who was choosing to remain mute" (para. 13). Subsequently, at the request of the accused, the trial judge told the *amicus* to take instructions from and act on behalf of the accused as he would in a traditional solicitor-client relationship — except he could not be discharged or withdraw due to a breakdown in the relationship with the accused. Later, after the *amicus* applied for permission to withdraw from the case, the trial judge appointed a senior criminal lawyer to set a budget for the *amicus* and to review, monitor and assess his accounts on an ongoing basis (*R. v. Imona Russel*, 2010 CarswellOnt 10747 (S.C.J.) ("*Imona Russel #2*")).

[9] In *R. v. Whalen*, Sept. 18, 2009, No. 2178/1542 (Ont. Ct. J.), a dangerous offender application, the respondent was unrepresented and had a history of discharging lawyers. He had difficulty finding legal aid counsel, due to a boycott of legal aid cases by many members of Ontario's criminal defence bar. The judge appointed an *amicus* to "stabilize the litigation process" (A.R., at p. 26). Although the Attorney General had found other counsel who were available to act at legal aid rates, the respondent had developed a relationship of confidence with a particular lawyer who would not accept the legal aid rate. An *amicus* was appointed to establish a solicitor-client relationship with the respondent, with the ability to override the respondent's instructions in his best interest.

[8] Dans *R. c. Imona Russel*, 2009 CarswellOnt 9725 (C.S.J.) (« *Imona Russel n^o 1* »), un *amicus* a été nommé à la demande du ministère public [TRADUCTION] « pour assurer le bon déroulement du procès » (par. 6). L'accusé avait mis fin aux mandats de plusieurs avocats expérimentés de l'aide juridique, et la cour l'avait débouté deux fois après qu'il eut demandé, sur le fondement du par. 24(1) de la *Charte*, une ordonnance enjoignant à l'État de lui fournir à ses frais les services d'un avocat de sorte qu'il ait droit à un procès équitable. L'*amicus* a d'abord vu son mandat s'accroître pour englober le fait « d'agir dans l'instance comme s'il représentait un client qui choisissait de garder le silence » (par. 13). Puis, à la demande de l'accusé, la juge du procès a invité l'*amicus* à obtenir des instructions de l'accusé et à agir en son nom comme il le ferait dans le cadre d'une relation classique procureur-client, si ce n'est que son mandat ne pouvait être révoqué et qu'il ne pouvait cesser de représenter l'accusé pour cause de mésentente avec lui. Plus tard, après que l'*amicus* eut demandé l'autorisation de cesser d'occuper, la juge du procès a confié à un avocat criminaliste chevronné la tâche d'établir un budget pour l'*amicus* et de faire droit ou non, après examen, à ses demandes de paiement au fur et à mesure qu'il les présentait (*R. c. Imona Russel*, 2010 CarswellOnt 10747 (C.S.J.) (« *Imona Russel n^o 2* »)).

[9] Dans *R. c. Whalen*, 18 sept. 2009, n^o 2178/1542 (C.J. Ont.), où le ministère public demandait que l'intimé soit déclaré délinquant dangereux, ce dernier n'était pas représenté et avait maintes fois révoqué son avocat. Il avait du mal à se trouver un avocat participant à l'aide juridique en raison d'un boycottage des mandats de l'organisme public par de nombreux avocats criminalistes de l'Ontario. Le juge a nommé un *amicus* afin de [TRADUCTION] « stabiliser l'instance » (d.a., p. 26). Même si le procureur général avait trouvé d'autres avocats disposés à le représenter au tarif de l'aide juridique, l'intimé avait établi une relation de confiance avec une avocate qui refusait d'être rémunérée au tarif de l'aide juridique. Cette avocate a été nommée *amicus* afin d'établir une relation procureur-client avec l'intimé. Elle avait le pouvoir de passer outre aux instructions de l'intimé dans son intérêt.

[10] In *R. v. Greenspon*, 2009 CarswellOnt 7359 (S.C.J.), a former counsel, who had been discharged by one of six co-accused, was appointed as *amicus*. This was done to avoid delay, in the event that the accused could not find counsel ready to act in time. Ultimately, the accused found counsel who was able to proceed without delay and the *amicus* was not required.

[11] In each of these cases, the *amicus* refused to accept the legal aid rate offered by the Attorney General. The trial judge fixed a rate that exceeded the tariff, ordering the Attorney General to pay. The Attorney General appealed all four decisions.

III. Decision of the Court of Appeal, 2011 ONCA 303, 104 O.R. (3d) 721

[12] The Court of Appeal considered the four appeals together and affirmed the decisions, as it was of the view that superior and statutory courts have the jurisdiction to appoint *amici* even where s. 24(1) of the *Charter* does not apply and there is no statutory provision for such an appointment. The capacity of a superior court to appoint an *amicus* stems from the court's inherent jurisdiction to act where necessary to ensure that justice can be done. For a statutory court, the capacity stems from the court's power to manage its own process and operate as a court of law, and arises in situations where the court must be able to appoint an *amicus* in order to exercise its statutory jurisdiction.

[13] The Court of Appeal concluded that in order to ensure that serious criminal cases can proceed where difficulty is caused by an unrepresented accused, judges must have the ability to secure the assistance of an *amicus*. To the extent that the ability to fix rates of compensation for *amici* is linked to the capacity to appoint them, it should not be left in the hands of the Attorney General. The court concluded that this authority did not raise any institutional issues or social, economic or political policy concerns.

[10] Dans *R. c. Greenspon*, 2009 CarswellOnt 7359 (C.S.J.), un avocat qui avait déjà occupé dans le dossier, mais dont le mandat avait été révoqué par l'un des six coaccusés, a été nommé *amicus*. Cette nomination a eu lieu afin de ne pas retarder l'instance advenant que l'accusé ne puisse se trouver un avocat disposé à offrir ses services selon le calendrier établi. L'accusé a finalement trouvé un avocat en mesure de le représenter sans délai, si bien que les services de l'*amicus* n'étaient plus nécessaires.

[11] Dans chacun des dossiers, l'*amicus* a refusé l'offre du procureur général de le rémunérer selon le tarif de l'aide juridique. Le juge du procès a fixé un taux supérieur et ordonné au procureur général de rémunérer l'*amicus* en conséquence. Le procureur général a interjeté appel des quatre décisions.

III. L'arrêt de la Cour d'appel, 2011 ONCA 303, 104 O.R. (3d) 721

[12] Après examen des quatre appels sur dossier commun, la Cour d'appel a confirmé les décisions. Elle estimait en effet qu'une cour supérieure ou un tribunal d'origine législative peut nommer un *amicus* même lorsque le par. 24(1) de la *Charte* ne s'applique pas et qu'aucune disposition de la loi ne le prévoit. La faculté qu'a une cour supérieure de nommer un *amicus* découle de sa compétence inhérente pour prendre les mesures nécessaires afin que justice puisse être rendue. Celle d'un tribunal d'origine législative découle de son pouvoir de décider de sa propre procédure et de constituer une cour de justice, et elle naît lorsque le tribunal doit être en mesure de nommer un *amicus* pour exercer la compétence que lui confère la loi.

[13] Selon la Cour d'appel, afin qu'une affaire criminelle grave puisse aller de l'avant malgré la non-représentation de l'accusé, le juge doit pouvoir se faire assister par un *amicus*. Dans la mesure où le pouvoir de fixer la rémunération de l'*amicus* est lié au pouvoir de nommer ce dernier, il ne doit pas relever du procureur général. La Cour d'appel conclut que ce pouvoir ne soulève ni problèmes institutionnels, ni préoccupations sociales, économiques ou politiques.

IV. Analysis

[14] My colleague Fish J. provides three reasons for finding the power to set the rate of compensation to be incidental to a superior court's inherent jurisdiction and a statutory court's power to control its own processes: (1) the inability to set rates of compensation would unduly weaken the court's appointment power and ability to name the *amicus* of its choice (para. 123); (2) the integrity of the judicial process would be imperilled and should not be dependent upon the Crown (para. 124); and (3) unilateral control by the Attorney General over remuneration might create an apprehension of bias and place an *amicus* in a conflict of interest (para. 125). He concludes that there is no constitutional impediment to vesting such a power in trial judges.

[15] I take a different view. The jurisdiction to appoint an *amicus* does not necessarily imply or require the authority to set a specific rate of compensation. The ability to order the government to make payments out of public funds must be grounded in law and a court's inherent or implied jurisdiction is limited by the separate roles established by our constitutional structure. Absent authority flowing from a constitutional challenge or a statutory provision, exercising such power would not respect the institutional roles and capacities of the legislature, the executive (including the Attorney General), and the judiciary, or the principle that the legislature and the executive are accountable to the public for the spending of public funds.

[16] I propose to explain my conclusion by first addressing the constitutional framework that surrounds the exercise of a superior court's inherent jurisdiction. This framework also applies to the exercise of the jurisdiction implied by the ability of statutory courts to function as courts of law. Second, I will apply that constitutional framework to the particular context of *amicus* appointments.

IV. Analyse

[14] Mon collègue le juge Fish estime que le pouvoir de fixer le taux de rémunération est accessoire à la compétence inhérente d'une cour supérieure et au pouvoir d'un tribunal d'origine législative de faire respecter sa propre procédure, et ce, pour trois raisons : (1) l'impossibilité de fixer le taux de rémunération affaiblirait indûment le pouvoir de nomination du tribunal et sa faculté de nommer l'*amicus* de son choix (par. 123); (2) l'intégrité du processus judiciaire, qui ne devrait pas être fondée sur la confiance envers le ministère public, serait compromise (par. 124); (3) le pouvoir unilatéral du procureur général de déterminer la rémunération pourrait créer une apparence de partialité et placer l'*amicus* dans une situation de conflit d'intérêts (par. 125). Il conclut que nulle disposition constitutionnelle ne fait obstacle à l'octroi de ce pouvoir au juge du procès.

[15] Je ne suis pas de cet avis. Le pouvoir de nommer un *amicus* ne suppose pas et n'exige pas nécessairement celui de fixer le taux de sa rémunération. Le pouvoir du tribunal d'ordonner à l'État de payer quelque somme sur les fonds publics doit s'appuyer sur une règle de droit, et la compétence inhérente ou implicite du tribunal est délimitée par les fonctions distinctes qu'établit notre structure constitutionnelle. À défaut d'une habilitation découlant d'une contestation constitutionnelle ou d'une disposition législative, l'exercice d'un tel pouvoir ne respecterait pas les fonctions et les compétences institutionnelles du législatif, de l'exécutif (y compris le procureur général) et du judiciaire, ni le principe voulant que le législateur et l'exécutif soient responsables vis-à-vis des citoyens de l'affectation des fonds publics.

[16] Je me propose d'expliquer ma conclusion en considérant d'abord le cadre constitutionnel dans lequel s'exerce la compétence inhérente d'une cour supérieure, de même que la compétence tacite issue du pouvoir d'un tribunal d'origine législative de constituer une cour de justice. J'appliquerai ensuite ce cadre constitutionnel au contexte particulier de la nomination d'un *amicus*.

A. *The Constitutional Framework*

(1) The Inherent Jurisdiction of Superior Courts

[17] Canada's provincial superior courts are the descendants of the Royal Courts of Justice and inherited the powers and jurisdiction exercised by superior, district or county courts at the time of Confederation (*Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at pp. 326-27, *per* Estey J.). As such, superior courts play a central role in maintaining the rule of law, uniformity in our judicial system and the constitutional balance in our country.

[18] The essential nature and powers of the superior courts are constitutionally protected by s. 96 of the *Constitution Act, 1867*. Accordingly, the "core or inherent jurisdiction which is integral to their operations . . . cannot be removed from the superior courts by either level of government, without amending the Constitution" (*MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at para. 15). The rationale for s. 96 has evolved to ensure "the maintenance of the rule of law through the protection of the judicial role" (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*Provincial Judges Reference*"), at para. 88).

[19] In *MacMillan Bloedel*, a majority of this Court described the powers at the core of a superior court's jurisdiction as comprising "those powers which are essential to the administration of justice and the maintenance of the rule of law" (para. 38), which define the court's "essential character" or "immanent attribute" (para. 30). The core is "a very narrow one which includes only critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and to the preservation of its foundational role within our legal system" (*Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186, at para. 56, *per* Lamer C.J.).

A. *Le cadre constitutionnel*

(1) La compétence inhérente d'une cour supérieure

[17] Au Canada, les cours supérieures des provinces sont les descendantes des cours royales de justice et elles ont hérité des pouvoirs et de la compétence des cours supérieures, de district ou de comté qui existaient au moment de la Confédération (*Procureur général du Canada c. Law Society of British Columbia*, [1982] 2 R.C.S. 307, p. 326-327, le juge Estey). Elles jouent donc un rôle central dans le maintien de la primauté du droit, de l'uniformité du système judiciaire et de l'équilibre constitutionnel canadien.

[18] La nature essentielle et les pouvoirs des cours supérieures sont protégés par l'art. 96 de la *Loi constitutionnelle de 1867*. Par conséquent, « [a]ucun des ordres de gouvernement ne peut retirer à une cour supérieure cette compétence fondamentale [. . .] sans que ne soit modifiée la Constitution » (*MacMillan Bloedel Ltd. c. Simpson*, [1995] 4 R.C.S. 725, par. 15). La raison d'être de l'art. 96 a évolué de manière à garantir « [le] maintien de la primauté du droit par la protection du rôle des tribunaux » (*Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3 (« *Renvoi relatif aux juges de la Cour provinciale* »), par. 88).

[19] Dans l'arrêt *MacMillan Bloedel*, les juges majoritaires de la Cour considèrent que la compétence fondamentale d'une cour supérieure englobe « les pouvoirs qui sont essentiels à l'administration de la justice et au maintien de la primauté du droit » (par. 38), ce qui confère à la cour son « caractère essentiel » ou « attribut immanent » (par. 30). La compétence fondamentale « est très limitée et ne comprend que les pouvoirs qui ont une importance cruciale et qui sont essentiels à l'existence d'une cour supérieure dotée de pouvoirs inhérents et au maintien de son rôle vital au sein de notre système juridique » (*Renvoi relatif à certaines modifications à la Residential Tenancies Act (N.-É)*, [1996] 1 R.C.S. 186, par. 56, le juge en chef Lamer).

[20] In his 1970 article, "The Inherent Jurisdiction of the Court", 23 *Curr. Legal Probs.* 23, which has been cited by this Court on eight separate occasions,[1] I. H. Jacob provided the following definition of inherent jurisdiction:

> . . . the inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. [p. 51]

[21] As noted by this Court in *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78, at para. 24:

> These powers are derived "not from any statute or rule of law, but from the very nature of the court as a superior court of law" (Jacob, at p. 27) to enable "the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner" (p. 28).

[22] In spite of its amorphous nature, providing the foundation for powers as diverse as contempt of court, the stay of proceedings and judicial review,

[20] Dans un article paru en 1970 intitulé « The Inherent Jurisdiction of the Court », 23 *Curr. Legal Probs.* 23, que notre Cour cite dans huit arrêts[1], I. H. Jacob propose de définir comme suit la compétence inhérente :

> [TRADUCTION] . . . la compétence inhérente de la cour peut être définie comme étant la réserve ou le fonds de pouvoirs, une source résiduelle de pouvoirs à laquelle la cour peut puiser au besoin lorsqu'il est juste ou équitable de le faire et, en particulier, pour veiller à l'application régulière de la loi, empêcher les abus, garantir un procès équitable aux parties et rendre justice. [p. 51]

[21] Comme le fait observer la Cour dans *R. c. Caron*, 2011 CSC 5, [2011] 1 R.C.S. 78, par. 24 :

> Ces pouvoirs émanent « non pas d'une loi ou d'une règle de droit, mais de la nature même de la cour en tant que cour supérieure de justice » (Jacob, p. 27) pour permettre « de maintenir, protéger et remplir leur fonction qui est de rendre justice, dans le respect de la loi, d'une manière régulière, ordonnée et efficace » (p. 28).

[22] Malgré ses contours flous, la théorie de la compétence inhérente, qui fonde des pouvoirs aussi divers que la déclaration d'outrage au tribunal,

1 *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] 1 S.C.R. 549, at pp. 591-92, *per* Wilson J. (granting leave to appeal to a non-party); *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at p. 240 (issuing injunction on the court's own motion to guarantee access to court facilities); *R. v. Morales*, [1992] 3 S.C.R. 711, at pp. 754-55, *per* Gonthier J. (discretion regarding bail); *R. v. Hinse*, [1995] 4 S.C.R. 597, at para. 21, *per* Lamer C.J. (stay of criminal proceedings for abuse of process); *MacMillan Bloedel*, at paras. 29-31, *per* Lamer C.J. (punishing for contempt out of court); *R. v. Rose*, [1998] 3 S.C.R. 262, at para. 64, *per* L'Heureux-Dubé J., and at para. 131, *per* Cory, Iacobucci and Bastarache JJ. (discretion to grant a right of reply in a criminal trial); *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 18 (authority to refuse defence counsel's request to withdraw); *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78, at paras. 24-34, *per* Binnie J. (granting interim costs).

1 *Société des Acadiens du Nouveau-Brunswick Inc. c. Association of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] 1 R.C.S. 549, p. 591-592, la juge Wilson (autorisation d'appel accordée à une personne non partie à l'instance); *B.C.G.E.U c. Colombie-Britannique (Procureur général)*, [1988] 2 R.C.S. 214, p. 240 (injonction décernée de la propre initiative de la cour pour garantir l'accès aux palais de justice); *R. c. Morales*, [1992] 3 R.C.S. 711, p. 754-755, le juge Gonthier (pouvoir discrétionnaire en matière de mise en liberté sous caution); *R. c. Hinse*, [1995] 4 R.C.S. 597, par. 21, le juge en chef Lamer (arrêt des procédures criminelles pour cause d'abus de procédures); *MacMillan Bloedel,* par. 29-31, le juge en chef Lamer (condamnation pour outrage au tribunal); *R. c. Rose*, [1998] 3 R.C.S. 262, par. 64, la juge L'Heureux-Dubé, et par. 131, les juges Cory, Iacobucci et Bastarache (pouvoir discrétionnaire d'accorder un droit de réplique dans un procès criminel); *R. c. Cunningham*, 2010 CSC 10, [2010] 1 R.C.S. 331, par. 18 (pouvoir de rejeter la requête pour cesser d'occuper présentée par l'avocat de la défense); *R. c. Caron*, 2011 CSC 5, [2011] 1 R.C.S. 78, par. 24-34, le juge Binnie (octroi d'une provision pour frais).

the doctrine of inherent jurisdiction does not operate without limits.[2]

[23] It has long been settled that the way in which superior courts exercise their powers may be structured by Parliament and the legislatures (see *MacMillan Bloedel*, at para. 78, *per* McLachlin J., dissenting on other grounds). As Jacob notes (at p. 24): ". . . the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision" (emphasis added) (see also *Caron*, at para. 32).

[24] Further, even where there are no legislative limits, the inherent jurisdiction of the court is limited by the institutional roles and capacities that emerge out of our constitutional framework and values (see *Provincial Judges Reference*, at para. 108).

[25] These limits were recognized in a thoughtful thesis on inherent jurisdiction written by Jonathan Desjardins Mallette:

[TRANSLATION] As for the unwritten [constitutional] structural principles, they are particularly relevant to determining the limits of the exercise of the inherent jurisdiction of the courts. They require the courts to take into account the structure of our Constitution, which includes other fundamental principles, such as the rule of law and parliamentary supremacy.

(*La constitutionnalisation de la juridiction inhérente au Canada: origines et fondements*, unpublished LL.M. thesis, Université de Montréal (2007), reproduced in the Attorney General of Quebec's book of authorities, vol. II, at p. 375.)

[26] With the advent of the *Charter*, the superior courts' inherent jurisdiction must also support

2 These limits are a topic that has also been considered by the highest courts in the United Kingdom and Australia, see *Al Rawi v. Security Service*, [2011] UKSC 34, [2012] 1 A.C. 531, at paras. 18-22, *per* Lord Dyson J.S.C.; *Batistatos v. Roads and Traffic Authority of New South Wales*, [2006] HCA 27, 227 A.L.R. 425, at paras. 121-36, *per* Kirby J.

l'arrêt des procédures et le contrôle judiciaire, ne s'applique pas sans réserves[2].

[23] Il est établi depuis longtemps que la manière dont les cours supérieures exercent leurs pouvoirs peut être structurée par le Parlement et les législatures (voir *MacMillan Bloedel*, par. 78, la juge McLachlin, dissidente sur d'autres points). Comme le fait observer Jacob (p. 24), [TRADUCTION] « la cour peut exercer sa compétence inhérente même à l'égard de questions qui sont régies par une loi ou par une règle de la cour, à condition qu'elle puisse le faire sans enfreindre une disposition législative » (je souligne) (voir aussi *Caron*, par. 32).

[24] Qui plus est, même lorsqu'il n'y a pas de restrictions législatives, la compétence inhérente de la cour est limitée par les fonctions et les compétences institutionnelles qui se dégagent du cadre et des valeurs constitutionnels (voir *Renvoi relatif aux juges de la Cour provinciale*, par. 108).

[25] Dans sa thèse réfléchie sur la compétence inhérente, Jonathan Desjardins Mallette reconnaît ces limites :

Pour leur part, les principes structurels non écrits sont particulièrement pertinents pour déterminer les limites de l'exercice de la [compétence] inhérente par les tribunaux. Ils obligent les tribunaux à tenir compte de la structure de notre Constitution qui comprend d'autres principes fondamentaux tels que la primauté du droit et la suprématie parlementaire.

(*La constitutionnalisation de la juridiction inhérente au Canada : origines et fondements*, mémoire de maîtrise non-publié, Université de Montréal (2007), reproduite dans le recueil de sources du procureur général du Québec, vol. II, p. 375.)

[26] Depuis l'adoption de la *Charte*, la compétence inhérente doit aussi permettre à une

2 Ces réserves ont également été examinées par les plus hauts tribunaux du Royaume-Uni et d'Australie : voir *Al Rawi c. Security Service*, [2011] UKSC 34, [2012] 1 A.C. 531, par. 18-22, le lord juge Dyson; *Batistatos c. Roads and Traffic Authority of New South Wales*, [2006] HCA 27, 227 A.L.R. 425, par. 121-136, le juge Kirby.

their independence in safeguarding the values and principles the *Charter* has entrenched in our constitutional order. Thus, the inherent jurisdiction of superior courts provides powers that are essential to the administration of justice and the maintenance of the rule of law and the Constitution. It includes those residual powers required to permit the courts to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner — subject to any statutory provisions. I would add, however, that the powers recognized as part of the courts' inherent jurisdiction are limited by the separation of powers that exists among the various players in our constitutional order and by the particular institutional capacities that have evolved from that separation.

(2) Separation of Powers

[27] This Court has long recognized that our constitutional framework prescribes different roles for the executive, legislative and judicial branches (see *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at pp. 469-70). The content of these various constitutional roles has been shaped by the history and evolution of our constitutional order (see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 49-52).

[28] Over several centuries of transformation and conflict, the English system evolved from one in which power was centralized in the Crown to one in which the powers of the state were exercised by way of distinct organs with separate functions. The development of separate executive, legislative and judicial functions has allowed for the evolution of certain core competencies in the various institutions vested with these functions. The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The judiciary maintains the rule of law, by interpreting and applying these laws through the independent

cour supérieure de préserver avec indépendance les valeurs et les principes consacrés par la *Charte* dans notre régime constitutionnel. Cette compétence confère donc les pouvoirs essentiels à l'administration de la justice et au respect de la primauté du droit et de la Constitution. Elle englobe le pouvoir résiduel dont la cour a besoin pour s'acquitter de sa fonction judiciaire qui consiste à administrer la justice d'une manière régulière, ordonnée et efficace, sous réserve de toute disposition législative. J'ajoute cependant que les pouvoirs dont on reconnaît qu'ils font partie de la compétence inhérente sont balisés par la séparation des pouvoirs entre les différents acteurs dans l'ordre constitutionnel et par les attributions institutionnelles particulières qui ont résulté de cette séparation.

(2) La séparation des pouvoirs

[27] La Cour reconnaît depuis longtemps que notre cadre constitutionnel attribue des fonctions différentes à l'exécutif, au législatif et au judiciaire (voir *Fraser c. Commission des relations de travail dans la Fonction publique*, [1985] 2 R.C.S. 455, p. 469-470). La teneur de ces rôles différents a été façonnée par l'histoire et l'évolution de notre ordre constitutionnel (voir *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217, par. 49-52).

[28] Au fil de plusieurs siècles de transformation et de conflits, le système anglais est passé d'un régime où la Couronne détenait tous les pouvoirs à un régime où des organes indépendants aux fonctions distinctes les exercent. L'évolution de fonctions exécutive, législative et judiciaire distinctes a permis l'acquisition de certaines compétences essentielles par les diverses institutions appelées à exercer ces fonctions. Le pouvoir législatif fait des choix politiques, adopte des lois et tient les cordons de la bourse de l'État, car lui seul peut autoriser l'affectation de fonds publics. L'exécutif met en œuvre et administre ces choix politiques et ces lois par le recours à une fonction publique compétente. Le judiciaire assure la primauté du droit en interprétant et en appliquant ces lois dans le cadre de renvois et de litiges sur lesquels il statue

and impartial adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the *Charter*.

[29] All three branches have distinct institutional capacities and play critical and complementary roles in our constitutional democracy. However, each branch will be unable to fulfill its role if it is unduly interfered with by the others. In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, McLachlin J. affirmed the importance of respecting the separate roles and institutional capacities of Canada's branches of government for our constitutional order, holding that "[i]t is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other" (p. 389).[3]

[30] Accordingly, the limits of the court's inherent jurisdiction must be responsive to the proper function of the separate branches of government, lest it upset the balance of roles, responsibilities and capacities that has evolved in our system of governance over the course of centuries.

[31] Indeed, even where courts have the jurisdiction to address matters that fall within the constitutional role of the other branches of government, they must give sufficient weight to the constitutional responsibilities of the legislative and executive branches, as in certain cases the other branch will be "better placed to make such decisions within a range of constitutional options" (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 37).

3 The normative force of the separation of powers has been recognized by this Court on multiple occasions since *New Brunswick Broadcasting*. See *R. v. Power*, [1994] 1 S.C.R. 601, at pp. 620-21; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at paras. 33-34 and 106-11; *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381, at paras. 104-5; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, at para. 21; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at paras. 39-41.

de manière indépendante et impartiale, et il défend les libertés fondamentales garanties par la *Charte*.

[29] Les trois pouvoirs ont des attributions institutionnelles distinctes et jouent des rôles à la fois cruciaux et complémentaires dans notre démocratie constitutionnelle. Toutefois, un pouvoir ne peut jouer son rôle lorsqu'un autre empiète indûment sur lui. Dans *New Brunswick Broadcasting Co. c. Nouvelle-Écosse (Président de l'Assemblée législative)*, [1993] 1 R.C.S. 319, la juge McLachlin confirme l'importance de respecter les fonctions et les attributions distinctes des pouvoirs de l'État canadien pour ce qui est de notre ordre constitutionnel et elle conclut qu'« il est essentiel que toutes ces composantes jouent le rôle qui leur est propre. Il est également essentiel qu'aucune [. . .] n'outrepasse ses limites et que chacune respecte de façon appropriée le domaine légitime de compétence de l'autre » (p. 389)[3].

[30] Par conséquent, la compétence inhérente de la cour doit être limitée au regard de la fonction propre à chacun des pouvoirs distincts, sous peine de rupture de l'équilibre des fonctions et des attributions issu de l'évolution de notre système de gouvernement au fil des siècles.

[31] En effet, même le tribunal doté du pouvoir de connaître de questions qui relèvent constitutionnellement des autres composantes de l'État doit accorder suffisamment d'importance aux attributions constitutionnelles des pouvoirs législatif et exécutif car, dans certains cas, l'autre pouvoir « est mieux placé pour prendre ces décisions dans le cadre des choix constitutionnels possibles » (*Canada (Premier ministre) c. Khadr*, 2010 CSC 3, [2010] 1 R.C.S. 44, par. 37).

3 Depuis cet arrêt, notre Cour a maintes fois reconnu la force normative de la séparation des pouvoirs. Voir *R. c. Power*, [1994] 1 R.C.S. 601, p. 620-621; *Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l'Éducation)*, 2003 CSC 62, [2003] 3 R.C.S. 3, par. 33-34 et 106-111; *Terre-Neuve (Conseil du Trésor) c. N.A.P.E.*, 2004 CSC 66, [2004] 3 R.C.S. 381, par. 104-105; *Canada (Chambre des communes) c. Vaid*, 2005 CSC 30, [2005] 1 R.C.S 667, par. 21; *Canada (Premier ministre) c. Khadr*, 2010 CSC 3, [2010] 1 R.C.S. 44, par. 39-41.

(3) The Administration of Justice in the Provinces

[32] The framers of our Constitution established a delicate balance between the federal and provincial governments, anchored by s. 96 courts, whose independence and core jurisdiction and powers provide a unified, national judicial presence (see *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714, at p. 728). While the federal government is responsible for the appointment of s. 96 judges, the Constitution has charged the provinces with the responsibility for the administration of justice in the provinces (*Constitution Act, 1867*, s. 92(14)).

[33] Pursuant to this power, the provincial legislatures enact laws and adopt regulations pertaining to courts, rules of court and civil procedure, or delegate this function to another body. They also pass laws to provide the infrastructure and staff necessary to operate the courts and establish schemes to provide legal representation to persons involved in court proceedings. The provincial legislature votes the funds necessary to operate the justice system within the province, and the executive, mainly through the office of the Attorney General, is charged with the responsibility of administering these funds and, more broadly, the administration of justice itself. As Dickson J. stated in *Di Iorio v. Warden of the Montreal Jail*, [1978] 1 S.C.R. 152, at p. 200: "Since Confederation, the provincial departments of the Attorney General have in practice 'administered justice' in the broadest sense, at great expense to the taxpayers . . . ."

(4) Role of the Attorney General in the Administration of Justice on Behalf of the Province

[34] The first reference to the "*attornatus regis*" — the King's Attorney — dates back to the

(3) L'administration de la justice dans les provinces

[32] Les auteurs de la Constitution ont établi entre les gouvernements fédéral et provinciaux un subtil équilibre, fondé sur l'art. 96, une disposition qui vise des cours dont l'indépendance ainsi que la compétence et les pouvoirs fondamentaux garantissent une présence judiciaire nationale unifiée (voir *Renvoi sur la Loi de 1979 sur la location résidentielle*, [1981] 1 R.C.S. 714, p. 728). Bien qu'il revienne au gouvernement fédéral de nommer les juges des cours visées à l'art. 96, la Constitution confie aux provinces l'administration de la justice dans les provinces (*Loi constitutionnelle de 1867*, par. 92(14)).

[33] Dans l'exercice de ce pouvoir, les législatures provinciales édictent des lois et prennent des règlements sur les tribunaux, les règles de procédure et la procédure civile, ou elles délèguent cette fonction à une autre entité. En outre, elles adoptent des lois pour assurer aux tribunaux l'infrastructure et le personnel nécessaires à leur fonctionnement, et elles créent des programmes qui permettent la représentation par avocat d'une partie à une instance judiciaire. La législature provinciale vote les fonds nécessaires au fonctionnement du système de justice dans la province, et l'exécutif, surtout par l'intermédiaire du bureau du procureur général, est chargé de la gestion de ces fonds et, de façon plus générale, de l'administration de la justice elle-même. Comme l'a affirmé le juge Dickson dans *Di Iorio c. Gardien de la prison de Montréal*, [1978] 1 R.C.S. 152, p. 200, « [d]epuis la Confédération, ce sont les procureurs généraux des provinces qui, en pratique, ont vu à "l'administration de la justice" au sens le plus large de l'expression. Ce sont les contribuables provinciaux qui en ont assumé les frais élevés ».

(4) Le rôle du procureur général dans l'administration de la justice au nom de la province

[34] La première mention de l'« *attornatus regis* » — le procureur du Roi — remonte au 13e siècle

13th century (J. L. J. Edwards, *The Law Officers of the Crown* (1964), at p. 16). The role of Attorney General was carried into Canada in the 18th century, with the first Attorney General of Upper Canada being appointed in 1791 (P. Romney, *Mr Attorney: The Attorney General for Ontario in Court, Cabinet, and Legislature 1791-1899* (1986), at pp. 6-7). The role was continued by the *Constitution Act, 1867*, as s. 63 explicitly mentions the Attorney General as one of the officers of the Executive Council of Ontario.

[35] The Attorney General of Ontario, on behalf of the executive, acts pursuant to the province's responsibility under s. 92(14) of the *Constitution Act, 1867* for the administration of justice. As Chief Law Officer of the Crown, the Attorney General has special responsibilities to uphold the administration of justice (see, for example, *Ministry of the Attorney General Act*, R.S.O. 1990, c. M.17, s. 5). Idington J. noted in *In re Criminal Code* (1910), 43 S.C.R. 434, at p. 443, that "custom, tradition and constitutional usage, hav[e] charged [the Attorney General] with the administration of justice within the province as his primary duty".

[36] The Attorney General remunerates various participants in the criminal justice system — including provincial Crown counsel, court reporters, interpreters, registrars and law clerks. The Attorney discharges his obligation to provide counsel for indigent accused through the establishment of legal aid programs (see *R. v. Peterman* (2004), 70 O.R. (3d) 481 (C.A.)). Defence counsel appointed under s. 24(1) of the *Charter* (see, for instance, *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.)) are funded directly by the Attorney General. This does not create an apprehension of bias or a conflict of interest. Instead, this role is consistent with the Attorney's responsibilities and public accountability. Indeed, even provincial court judges are paid by the provincial Attorneys General and are still seen as independent (see *Provincial Judges Reference*).

(J. L. J. Edwards, *The Law Officers of the Crown* (1964), p. 16). La fonction de procureur général a vu le jour au Canada au 18e siècle lors de la nomination du premier procureur général du Haut-Canada en 1791 (P. Romney, *Mr Attorney : The Attorney General for Ontario in Court, Cabinet and Legislature 1791-1899* (1986), p. 6-7). La fonction a été reconduite dans la *Loi constitutionnelle de 1867*, le procureur général faisant partie des officiers du conseil exécutif d'Ontario énumérés à l'art. 63.

[35] Au nom de l'exécutif, le procureur général de l'Ontario exerce sa fonction en application de la compétence reconnue à la province au par. 92(14) de la *Loi constitutionnelle de 1867* en matière d'administration de la justice. En tant que premier conseiller juridique de l'État, il jouit d'attributions particulières pour assurer l'administration de la justice (voir par exemple la *Loi sur le ministère du Procureur général*, L.R.O. 1990, ch. M.17, art. 5). Dans *In re Criminal Code* (1910), 43 R.C.S. 434, p. 443, le juge Idington fait remarquer que [TRADUCTION] « la coutume, la tradition et l'usage constitutionnel [ont] chargé [le procureur général] de l'administration de la justice dans la province, sa fonction principale ».

[36] Le procureur général rémunère les divers participants du système judiciaire pénal, y compris les procureurs de la Couronne provinciale, les sténographes, les interprètes, les greffiers et les auxiliaires juridiques. Il s'acquitte de son obligation constitutionnelle d'assurer la représentation par avocat de l'accusé impécunieux par l'établissement de programmes d'aide juridique (voir *R. c. Peterman* (2004), 70 O.R. (3d) 481 (C.A.)). De plus, l'avocat de la défense nommé en application du par. 24(1) de la *Charte* (voir par exemple *R. c. Rowbotham* (1988), 41 C.C.C. (3d) 1 (C.A. Ont.)) est rémunéré directement par lui, ce qui ne fait naître aucune crainte de partialité ou de conflit d'intérêts. Au contraire, ce faisant, le procureur général respecte ses attributions et sa responsabilité publique. En effet, même les juges des cours provinciales sont rémunérés par les procureurs généraux des provinces et ils sont néanmoins tenus pour indépendants (voir *Renvoi relatif aux juges de la Cour provinciale*).

[37] The Attorney General is not an ordinary party. This special character manifests itself in the role of Crown attorneys, who, as agents of the Attorney General, have broader responsibilities to the court and to the accused, as local ministers of justice (see *Boucher v. The Queen*, [1955] S.C.R. 16, at pp. 23-24, *per* Rand J.; *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at pp. 191-92, *per* Lamer J.).

(5) Limitations on the Courts' Inherent Jurisdiction in the Context of the Administration of Justice

[38] It is vital that each branch of government respect its proper institutional role and capacity in the administration of justice, in accordance with the Constitution and public accountability.

[39] Section 96 judges possess inherent power to make orders necessary to protect the judicial process and the rule of law. The courts must of course safeguard their own constitutional independence to assure the fairness of the judicial process and to protect the rights and freedoms of Canadians that are entrusted to them under the *Charter*. As the Canadian Judicial Council noted in its 2006 report, "[i]t is crucial to bear in mind that inherent powers, by definition, inhere in courts and their jurisdiction and so cannot be analysed independently of the role the judiciary is expected to play in the constitutional structure" (*Alternative Models of Court Administration* (2006) (online), at p. 46). As such, these powers are exercised within the framework for the administration of justice that the province has established.

[40] As the Court made clear in the *Provincial Judges Reference*, judicial independence includes a core administrative component, which extends to administrative decisions that bear "directly and immediately on the exercise of the judicial function" (para. 117). These were listed in *Valente*

[37] Le procureur général n'est pas une partie à l'instance comme une autre. Sa singularité se manifeste par le rôle dévolu au procureur de la Couronne qui, à titre de représentant du procureur général, a des obligations accrues envers la cour et envers l'accusé en tant que représentant local de la justice (voir *Boucher c. The Queen*, [1955] R.C.S. 16, p. 23-24, le juge Rand; *Nelles c. Ontario*, [1989] 2 R.C.S. 170, p. 191-192, le juge Lamer).

(5) Les limites de l'exercice de la compétence inhérente de la cour dans le contexte de l'administration de la justice

[38] Il est fondamental que chacun des pouvoirs de l'État respecte ses justes fonction et attribution institutionnelles en matière d'administration de la justice, conformément à la Constitution et à la responsabilité publique.

[39] Les cours visées à l'art. 96 possèdent le pouvoir inhérent de rendre les ordonnances nécessaires à la protection du processus judiciaire et de la primauté du droit. Elles doivent évidemment défendre leur propre indépendance constitutionnelle afin d'assurer l'équité de ce processus et de s'acquitter de leur obligation de protéger les droits et libertés que la *Charte* garantit aux Canadiens. Comme le signalait le Conseil canadien de la magistrature dans son rapport de 2006, « [i]l est essentiel d'avoir à l'esprit que les pouvoirs inhérents, par définition, sont inhérents aux tribunaux et à leur compétence de sorte qu'ils ne peuvent pas être analysés indépendamment du rôle que le pouvoir judiciaire est appelé à exercer dans la structure constitutionnelle » (*Modèles d'administration des tribunaux judiciaires* (2006) (en ligne), p. 52). Ces fonctions sont donc exercées à l'intérieur du cadre d'administration de la justice établi par la province.

[40] Dans le *Renvoi relatif aux juges de la Cour provinciale*, la Cour dit clairement que l'indépendance judiciaire comporte un volet administratif essentiel, lequel englobe les décisions administratives qui portent « directement et immédiatement sur l'exercice des fonctions judiciaires » (par. 117).

v. The Queen, [1985] 2 S.C.R. 673, at p. 709, as including:

> . . . assignment of judges, sittings of the court, and court lists — as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions . . . .

As this Court went on to hold in *Valente*, at pp. 711-12, while greater administrative autonomy or independence may be desirable, it is not essential to judicial independence (see also *Provincial Judges Reference*, at para. 253).

[41] The proper constitutional role of s. 96 courts does not permit judges to use their inherent jurisdiction to enter the field of political matters such as the allocation of public funds, absent a *Charter* challenge or concern for judicial independence. For this reason, it is generally accepted that courts of inherent jurisdiction do not have the power to appoint court personnel. Staffing the courts is the responsibility of the provincial government.

[42] Of course, a complaint that inadequate funding risks undermining the justice system may be subject to court oversight, whether by way of a *Charter* application or a challenge based on the constitutional principle of judicial independence, as was the case in the *Provincial Judges Reference*, where the closure of the Manitoba courts by withdrawing court staff on a series of Fridays, as a part of a wider deficit-reduction effort, was found unconstitutional (paras. 269-76).

[43] However, the allocation of resources between competing priorities remains a policy and economic question; it is a political decision and the legislature and the executive are accountable to the people for it.

Dans *Valente c. La Reine*, [1985] 2 R.C.S. 673, p. 709, elle précise qu'il s'agit notamment de ce qui suit :

> . . . l'assignation des juges aux causes, les séances de la cour, le rôle de la cour, ainsi que les domaines connexes de l'allocation de salles d'audience et de la direction du personnel administratif qui exerce ces fonctions . . .

Comme elle ajoute dans *Valente*, p. 711-712, une plus grande autonomie ou indépendance administrative peut se révéler souhaitable, mais elle n'est pas essentielle à l'indépendance judiciaire (voir aussi *Renvoi relatif aux juges de la Cour provinciale*, par. 253).

[41] La fonction constitutionnelle propre aux cours visées à l'art. 96 ne permet pas aux juges d'invoquer leur compétence inhérente pour s'immiscer dans un domaine relevant de la politique, comme l'affectation de fonds publics, sauf contestation fondée sur la *Charte* ou crainte d'atteinte à l'indépendance judiciaire. C'est pourquoi il est généralement admis que les cours dotées d'une compétence inhérente n'ont pas le pouvoir de nommer les membres de leur personnel. La dotation en personnel des tribunaux relève en effet du gouvernement provincial.

[42] On peut certes faire valoir devant un tribunal que le financement insuffisant compromet le système de justice, que ce soit en invoquant la *Charte* ou le principe constitutionnel de l'indépendance judiciaire. On l'a fait dans le *Renvoi relatif aux juges de la Cour provinciale*, où la Cour a jugé inconstitutionnelle la fermeture des tribunaux manitobains par le retrait du personnel plusieurs vendredis de suite aux fins d'un programme général de réduction du déficit (par. 269-276).

[43] Il demeure toutefois que l'affectation des ressources en fonction de priorités concurrentes relève de la politique et de l'économie; cette mesure ressortit au législatif et à l'exécutif, qui en sont responsables vis-à-vis de la population.

B. *Amici Curiae and the Inherent Jurisdiction of the Court*

(1) Appointing *Amici*

[44] While courts of inherent jurisdiction have no power to appoint the women and men who staff the courts and assist judges in discharging their work, there is ample authority for judges appointing *amici curiae* where this is necessary to permit a particular proceeding to be successfully and justly adjudicated.

[45] *Amici curiae* have long played a role in our system of justice. As early as the mid-14th century, the common law courts from which our superior courts are descended received the assistance of *amici* (see S. C. Mohan, "The *Amicus Curiae*: Friends No More?", [2010] *S.J.L.S.* 352, at pp. 356-60). Indeed, as one scholar has noted, "[t]here can be no doubt as to the age and wide acceptance of the amicus curiae. As to its origin, on the other hand, there is a great deal of doubt. Like so many things of great age, its roots are lost even though the practice still continues" (F. M. Covey, Jr., "Amicus Curiae: Friend of the Court" (1959), 9 *DePaul L. Rev.* 30, at p. 33). A number of cases have recognized the practice; in addition, there are statutory provisions that provide for the appointment of an *amicus* in certain circumstances.[4]

[46] A court's inherent jurisdiction to appoint an *amicus* in criminal trials is grounded in its authority to control its own process and function as a court of law. Much like the jurisdiction to exercise

4 In civil matters in Ontario, Rule 13.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, permits a court to appoint a friend of the court for the purpose of rendering assistance by way of argument. In this Court, Rule 92 of the *Rules of the Supreme Court of Canada*, SOR/2002-156, permits the Court or a judge to appoint an *amicus* in an appeal, while s. 53(7) of the *Supreme Court Act*, R.S.C. 1985, c. S-26, provides for the appointment of an *amicus* to argue in favour of an unrepresented interest where the Governor in Council has referred a matter to the Court for its consideration, and authorizes the Minister of Finance to pay the reasonable expenses of counsel out of funds authorized by Parliament for expenses of litigation.

B. *L'amicus curiae et la compétence inhérente de la cour*

(1) Nomination de l'*amicus*

[44] Bien qu'une cour dotée de la compétence inhérente ne puisse nommer les membres de son personnel appelés à appuyer ses juges dans leur travail, une abondante jurisprudence veut qu'elle puisse nommer un *amicus* lorsque cette mesure s'impose afin que justice puisse être rendue dans une instance en particulier.

[45] La fonction d'*amicus curiae* existe depuis longtemps dans notre système de justice. Dès le milieu du 14e siècle, les cours de common law, les ancêtres de nos cours supérieures, ont bénéficié des services d'*amici* (voir S. C. Mohan, « The *Amicus Curiae* : Friends No More? », [2010] *S.J.L.S.* 352, p. 356-360). En effet, comme le fait observer un auteur, [TRADUCTION] « [l]'ancienneté et la reconnaissance générale de la fonction d'*amicus curiae* ne font aucun doute. Ses origines sont en revanche assez incertaines. À l'instar de tant de choses anciennes, l'institution existe toujours même si on ne peut déterminer son origine » (F. M. Covey, Jr., « Amicus Curiae : Friend of the Court » (1959), 9 *DePaul L. Rev.* 30, p. 33). Non seulement la fonction d'*amicus* est reconnue par la jurisprudence, mais des dispositions législatives prévoient la nomination d'un *amicus* dans certaines situations[4].

[46] La compétence inhérente de la cour pour nommer un *amicus* lors d'un procès criminel s'appuie sur son pouvoir de faire respecter sa propre procédure et de constituer une cour de justice.

4 En Ontario, dans les affaires civiles, le tribunal est habilité par la règle 13.02 des *Règles de procédure civile*, R.R.O. 1990, Règl. 194, à nommer un ami de la cour appelé à l'aider par la formulation d'arguments. Notre Cour ou un de ses juges peut, suivant la règle 92 des *Règles de la Cour suprême du Canada*, DORS/2002-156, nommer un *amicus* dans le cas d'un appel. Le par. 53(7) de la *Loi sur la Cour suprême*, L.R.C. 1985, ch. S-26, prévoit la nomination d'un *amicus* pour défendre un intérêt non représenté lorsque le gouverneur en conseil soumet une question au jugement de la Cour, et il autorise le ministre des Finances à payer les frais raisonnables alors engagés par l'avocat, sur les crédits affectés par le Parlement aux frais de justice.

control over counsel when necessary to protect the court's process that was recognized in *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 18, the ability to appoint *amici* is linked to the court's authority to "request its officers, particularly the lawyers to whom the court afforded exclusive rights of audience, to assist its deliberations" (B. M. Dickens, "A Canadian Development: Non-Party Intervention" (1977), 40 *Mod. L. Rev.* 666, at p. 671).

[47] Thus, orders for the appointment of *amici* do not cross the prohibited line into the province's responsibility for the administration of justice, provided certain conditions are met. First, the assistance of *amici* must be essential to the judge discharging her judicial functions in the case at hand. Second, as my colleague Fish J. observes, much as is the case for other elements of inherent jurisdiction, the authority to appoint *amici* should be used sparingly and with caution, in response to specific and exceptional circumstances (para. 115). Routine appointment of *amici* because the defendant is without a lawyer would risk crossing the line between meeting the judge's need for assistance and the province's role in the administration of justice.[5]

[48] So long as these conditions are respected, the appointment of *amici* avoids the concern that it improperly trenches on the province's role in the administration of justice.

Par analogie avec la mesure prise à l'égard d'un avocat pour faire respecter sa procédure — dont la Cour reconnaît la légitimité dans *R. c. Cunningham*, 2010 CSC 10, [2010] 1 R.C.S. 331, par. 18 —, la nomination d'un *amicus* se rattache au pouvoir de la cour de [TRADUCTION] « demander aux auxiliaires de justice, en particulier les avocats auxquels elle accorde le droit exclusif de plaider devant elle, de l'aider dans l'accomplissement de sa tâche » (B. M. Dickens, « A Canadian Development : Non-Party Intervention » (1977), 40 *Mod. L. Rev.* 666, p. 671).

[47] La nomination judiciaire d'un *amicus* n'empiète donc pas sur la compétence de la province en matière d'administration de la justice, dès lors que certaines conditions sont réunies. Premièrement, le juge doit avoir besoin de l'aide d'un *amicus* pour s'acquitter de ses fonctions dans l'affaire en cause. Deuxièmement, comme le fait observer mon collègue le juge Fish, à l'instar d'autres éléments de la compétence inhérente, le pouvoir de la cour de nommer un *amicus* doit être exercé parcimonieusement et avec circonspection, et dans une situation particulière et exceptionnelle (par. 115). La nomination automatique d'un *amicus* chaque fois qu'un défendeur n'est pas représenté pourrait ne plus viser à répondre au besoin d'assistance du juge, mais relever de l'administration de la justice, laquelle ressortit à la province[5].

[48] Lorsque ces conditions sont respectées, la nomination d'un *amicus* n'empiète pas sur la fonction provinciale d'administration de la justice.

5 Making use of *amici* in this manner is not universally endorsed. In the United Kingdom, the Attorney General and Lord Chief Justice jointly issued guidance to the judiciary regarding the use of advocates to the court, as *amici* are known there (see "Memorandum — Requests for the appointment of an advocate to the court", reproduced in Lord Goldsmith, "Advocate to the Court", *Law Society Gazette*, February 1, 2002 (online)). This guidance specified that advocates to the court are traditionally appointed on points of law and do not normally lead evidence, examine witnesses, and, in particular, are not to be appointed solely because an accused is unrepresented (para. 4).

5 Cette conception du recours à l'*amicus* ne fait pas l'unanimité. Au Royaume-Uni, le procureur général et le lord juge en chef ont formulé de concert des lignes directrices destinées à la magistrature sur le recours à l'*advocate to the court*, l'équivalent de notre *amicus* (voir « Memorandum — Requests for the appointment of an advocate to the court », reproduit dans Lord Goldsmith, « Advocate to the Court », *Law Society Gazette*, 1er février 2002 (en ligne)). Ces lignes directrices précisent qu'un *advocate to the court* est habituellement nommé pour clarifier un point de droit et ne présente habituellement pas d'éléments de preuve, ni n'interroge de témoins et, en particulier, sa nomination ne tient pas uniquement au fait que l'accusé n'est pas représenté (par. 4).

(2) *Amici* as Defence Counsel

[49] Further, I agree with my colleague Fish J. that "[o]nce clothed with all the duties and responsibilities of defence counsel, the *amicus* can no longer properly be called a 'friend of the court'" (para. 114). *Amici* and court-appointed defence counsel play fundamentally different roles (see D. Berg, "The Limits of Friendship: the *Amicus Curiae* in Criminal Trial Courts" (2012), 59 *Crim. L.Q.* 67, at pp. 72-74).

[50] The issue of whether it was appropriate to appoint *amici* to effectively act as defence counsel was raised by the Attorney General of Quebec and the Attorney General of British Columbia, who were interveners in this Court. It was not challenged by the Attorney General of Ontario. However, to the extent that the terms for the appointment of *amici* mirror the responsibilities of defence counsel, they blur the lines between those two roles, and are fraught with complexity and bristle with danger.

[51] First, the appointment of *amici* for such a purpose may conflict with the accused's constitutional right to represent himself (see *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 972).

[52] Second, it can also defeat the judicial decision to refuse to grant state-funded counsel following an application invoking the accused's fair trial rights under the *Charter*. For instance, by expanding the role of the *amicus*, first to act as though he was defending a client who remained mute, and later to take instructions from the accused, the trial judge in *Imona Russel* undermined the court's earlier decisions to deny state-funded defence counsel.

[53] Third, there is an inherent tension between the duties of an *amicus* who is asked to represent the interests of the accused, especially where

(2) L'*amicus* appelé à exercer la fonction d'avocat de la défense

[49] Par ailleurs, je conviens avec mon collègue le juge Fish que « [d]ès que les devoirs et les obligations d'un avocat de la défense lui incombent, [l'*amicus*] ne peut plus être considéré à juste titre comme l'"ami de la cour" » (par. 114). L'*amicus* et l'avocat de la défense nommé par la cour jouent des rôles foncièrement différents (voir D. Berg, « The Limits of Friendship : the *Amicus Curiae* in Criminal Trial Courts » (2012), 59 *Crim. L.Q.* 67, p. 72-74).

[50] Intervenants devant notre Cour, les procureurs généraux du Québec et de la Colombie-Britannique soulèvent la question de savoir s'il est approprié de nommer un *amicus* pour tenir lieu dans les faits d'avocat de la défense. Le caractère approprié de cette nomination n'est pas contesté par le procureur général de l'Ontario. Toutefois, dans la mesure où le mandat de l'*amicus* s'apparente à celui de l'avocat de la défense, la ligne de séparation entre ces deux fonctions est brouillée et des complications et des risques en résultent.

[51] Premièrement, la nomination d'un *amicus* pour représenter un accusé peut aller à l'encontre du droit constitutionnel de ce dernier d'assurer sa propre défense (voir *R. c. Swain*, [1991] 1 R.C.S. 933, p. 972).

[52] Deuxièmement, elle peut aussi aller à l'encontre de la décision de ne pas accorder les services d'un avocat rémunéré par l'État rendue par un tribunal saisi d'une demande fondée sur le droit constitutionnel de l'accusé à un procès équitable. Par exemple, dans *Imona Russel*, en élargissant le rôle de l'*amicus*, d'abord pour agir dans l'instance comme s'il défendait un client qui choisissait de garder le silence, puis pour représenter l'accusé conformément à ses instructions, la juge du procès a court-circuité le refus initial des services d'un avocat rémunéré par l'État.

[53] Troisièmement, il existe une tension inhérente entre les obligations de l'*amicus* auquel on demande de représenter l'accusé, surtout lorsqu'il

counsel is taking instructions, as in *Imona Russel* and *Whalen*, and the separate obligations of the *amicus* to the court. This creates a potential conflict if the *amicus*' obligations to the court require legal submissions that are not favourable to the accused or are contrary to the accused's wishes. Further, the privilege that would be afforded to communications between the accused and the *amicus* is muddied when the *amicus*' client is in fact the trial judge.

[54] Thus, it seems to me that this current practice of appointing *amici* as defence counsel blurs the traditional roles of the trial judge, the Crown Attorney as a local minister of justice and counsel for the defence. Further, the use of *amici* to assist a trial judge in fulfilling her duty to assist an unrepresented accused might result in a trial judge doing something indirectly that she cannot do directly. While trial judges are obliged to assist unrepresented litigants, they are not permitted to give them strategic advice. Where an *amicus* is assigned and is instructed to take on a solicitor-client role, as in *Imona Russel* and *Whalen*, the court's lawyer takes on a role that the court is precluded from taking.

[55] Finally, there is a risk that appointing *amici* with an expanded role will undermine the provincial legal aid scheme. In this case, the Ontario legislature had passed the *Legal Aid Services Act, 1998*, S.O. 1998, c. 26, which provides for the representation of indigent accused. The inherent or implied jurisdiction of a court cannot be exercised in a way that would circumvent or undermine those laws. Absent a constitutional challenge, the judicial exercise of inherent or implied jurisdiction must operate within the framework of duly enacted legislation and regulations.

[56] For all these reasons, I conclude that a lawyer appointed as *amicus* who takes on the role of defence counsel is no longer a friend of the court.

agit sur les instructions de ce dernier, comme dans *Imona Russel* et *Whalen*, et ses obligations distinctes envers la cour. Un conflit pourrait en résulter si les obligations de l'*amicus* envers la cour l'obligeaient à faire valoir des points de droit qui ne sont pas favorables à l'accusé ou qui sont contraires aux vœux de ce dernier. Qui plus est, le privilège dont feraient l'objet les communications entre l'accusé et l'*amicus* serait compromis dans la mesure où le client de l'*amicus* serait en réalité le juge du procès.

[54] Il appert donc que la pratique actuelle de confier à l'*amicus* le mandat de défendre l'accusé brouille la délimitation traditionnelle des fonctions respectives du juge du procès, du procureur de la Couronne en tant que représentant local de la justice et de l'avocat de la défense. De plus, en ayant recours à un *amicus* pour mieux s'acquitter de son obligation d'aider l'accusé non représenté, le juge du procès pourrait faire indirectement ce qui lui est interdit de faire directement. Le juge du procès est certes tenu d'assister le plaideur non représenté, mais il ne lui est pas permis de donner des conseils d'ordre stratégique. Lorsque, comme dans les affaires *Imona Russel* et *Whalen*, un *amicus* est nommé puis se voit confier le mandat de représenter l'accusé comme dans le cadre d'une relation procureur-client, l'avocat de la cour exerce une fonction que la cour n'a pas elle-même le droit d'exercer.

[55] Enfin, la nomination d'un *amicus* au mandat élargi risque de porter atteinte au régime d'aide juridique de la province, en l'occurrence la *Loi de 1998 sur les services d'aide juridique*, L.O. 1998, ch. 26, que le législateur ontarien a adoptée afin que l'accusé impécunieux puisse être représenté. Le tribunal ne saurait exercer sa compétence inhérente ou tacite de manière à contourner cette loi ou à l'affaiblir. À moins d'une contestation constitutionnelle, le tribunal doit exercer sa compétence inhérente ou tacite dans le respect des dispositions législatives et réglementaires dûment adoptées.

[56] Pour toutes ces raisons, je conclus qu'une fois nommé *amicus*, l'avocat qui accepte de tenir le rôle d'avocat de la défense n'est plus l'ami de la cour.

(3) Compensating *Amici*

(a) *The Auckland Harbour Principle*

[57] I agree with my colleague Fish J. that the principle stated by the Privy Council in *Auckland Harbour Board v. The King*, [1924] A.C. 318, that "no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself" (p. 326), does not resolve the issue before us.

[58] However, the *Auckland Harbour* principle highlights the limits of the court's role in the administration of justice, a role that is based on history, convention, competence and capacity. As already noted, the government of the day bears the responsibility for weighing public priorities and then allocating the resources and designing the programs required to act on its policy choices.

[59] Obviously, court decisions can have ancillary financial consequences. Moving to larger venues for jury selections involving a number of panels, or continuing a sitting of the court late into the day, incurring overtime expenses for court staff, implicate greater costs for the public purse. Yet, they are legitimate exercises of a court's inherent jurisdiction to control its own process. In much the same way, an order appointing an *amicus* does not take on the character of an appropriation, but rather is one of the countless decisions that may be taken by a court that will have incidental consequences for the public purse.

[60] However, an order that the Attorney General must provide compensation at a particular rate goes beyond an order with ancillary financial consequences, and becomes an order directing the Attorney General to pay specific monies out of public funds. Such orders must be grounded in law.

(3) La rémunération de l'*amicus*

a) *Le principe de l'arrêt Auckland Harbour*

[57] Je conviens avec mon collègue le juge Fish que le principe énoncé par le Conseil privé dans l'arrêt *Auckland Harbour Board c. The King*, [1924] A.C. 318, à savoir que [TRADUCTION] « nulle somme ne peut être prélevée sur le Trésor constitué des recettes de l'État, sauf autorisation distincte du Parlement lui-même » (p. 326), ne permet pas de trancher en l'espèce.

[58] Ce principe met toutefois en évidence les limites de l'apport judiciaire à l'administration de la justice, un apport dont la teneur tient à l'histoire, aux conventions, à la compétence et à l'expertise. Rappelons qu'il incombe au gouvernement au pouvoir de déterminer les priorités publiques, puis d'affecter des ressources et de concevoir les programmes qui s'imposent.

[59] De toute évidence, une décision judiciaire peut accessoirement avoir des conséquences financières. Faire siéger le tribunal dans un autre lieu plus populeux pour y sélectionner des jurés et dresser plusieurs tableaux, ou poursuivre l'audience jusqu'à une heure tardive et occasionner ainsi le paiement d'heures supplémentaires au personnel de la cour, accroît les coûts. Pourtant, de telles mesures résultent d'un exercice légitime de la compétence inhérente de la cour en vue de faire respecter sa propre procédure. De même, à bien des égards, l'ordonnance portant nomination d'un *amicus* ne revêt pas le caractère d'une affectation, mais compte plutôt parmi les innombrables mesures judiciaires qui ont accessoirement une incidence sur les fonds publics.

[60] Toutefois, l'ordonnance qui enjoint au procureur général de rémunérer une personne selon un taux précis n'est plus une ordonnance qui a une incidence financière accessoire, mais bien une ordonnance qui somme le procureur général de verser telle somme prélevée sur le trésor. Or, une telle ordonnance doit s'appuyer sur une règle de droit.

[61] If not derived from a *Charter* challenge or authorized by specific statutory authority, the jurisdiction to fix the compensation of *amici* must be found within a court's inherent or implied jurisdiction.

(b) *Does the Courts' Inherent or Implied Jurisdiction Extend to Setting Rates of Compensation for Amici and Ordering the Province to Pay?*

[62] The question is whether a judge, acting properly in the exercise of her inherent or implied jurisdiction, can fix the rate of payment of an *amicus curiae* and order the province to pay the *amicus* out of public funds.

[63] The Court of Appeal's approach rests on the premise that the inherent or implied power to appoint an *amicus* would be meaningless unless the court has the authority to ensure that rates of compensation will be adequate to retain the *amicus of its choice*. The submission is that it will sometimes be necessary for the court to name a specific person as *amicus* in order to manage or salvage a high-risk trial. Without the power to fix a rate of compensation, it is argued that the court's ability to ensure the effective conduct of a trial is weakened and the judicial process imperilled.

[64] I agree that the courts have the jurisdiction to set terms to give effect to their authority to appoint *amici*. However, I do not accept the premise that the court's ability to fix rates of compensation for an *amicus* is essential to the power to appoint *amici*, or that its absence imperils the judiciary's ability to administer justice according to law in a regular, orderly and effective manner. To the contrary, the spectre of trial judges fixing and managing the fees of *amici* imperils the integrity of the judicial process.

[61] S'il ne découle pas d'une contestation fondée sur la *Charte* ou d'une autorisation légale expresse, le pouvoir de fixer la rémunération de l'*amicus* doit s'originer de la compétence inhérente ou tacite de la cour.

b) *Sa compétence inhérente ou tacite permet-elle à la cour de déterminer la rémunération de l'amicus et d'ordonner à la province de la lui verser?*

[62] La question est celle de savoir si, dans l'exercice de sa compétence inhérente ou tacite, la cour peut à bon droit fixer le taux de rémunération de l'*amicus curiae* et ordonner à la province de payer ces honoraires sur le Trésor.

[63] Le raisonnement de la Cour d'appel a pour la prémisse que le pouvoir inhérent ou tacite de nommer l'*amicus* est vide de sens si la cour ne peut faire en sorte que les fonds affectés à la rémunération de l'*amicus* lui permettent de retenir les services de la personne *de son choix*. On fait valoir que la cour devra parfois, pour gérer un procès où le risque d'échec est élevé, ou pour le mener à terme, recourir aux services d'une personne en particulier à titre d'*amicus*. Sans le pouvoir de déterminer sa rémunération, la cour serait moins en mesure d'assurer le bon déroulement du procès, et le processus judiciaire serait compromis.

[64] Je conviens que pour donner effet à son pouvoir de nommer un *amicus*, la cour a la compétence voulue pour fixer les conditions du mandat. Cependant, je disconviens que la faculté de déterminer la rémunération de l'*amicus* est essentielle à l'exercice du pouvoir de nommer l'*amicus*, ou que son inexistence empêche la cour de rendre justice dans le respect de la loi, d'une manière régulière, ordonnée et efficace. Au contraire, l'intégrité du processus judiciaire serait compromise si le juge du procès pouvait déterminer la rémunération de l'*amicus* et ordonner son paiement.

(i) Necessity

[65] Historically, courts have effectively appointed *amici* without the need to fix the rate of compensation. There is no dispute that a court has the ability to specify the general qualifications required for the task at hand. The Attorney General has the obligation to pay what is constitutionally adequate to serve the needs of the courts.

[66] As well, the experience with *Rowbotham* orders over the last two and a half decades has confirmed an attitude of restraint, as, even in those *Charter* cases, courts have not considered it necessary to direct the rates to be paid to state-funded lawyers appointed to represent the accused. A number of appellate courts have considered the issue and found it unnecessary to direct the rate of compensation (see *R. v. Chan*, 2002 ABCA 299, 317 A.R. 240 (*sub nom. R. v. Cai*), at para. 9; *R. v. Ho*, 2003 BCCA 663, 190 B.C.A.C. 187, at para. 73; *Peterman*, at para. 30). This is in line with the approach outlined by this Court in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 104, where a rate of remuneration for state-funded counsel was not specified.

[67] However, this is not to say that an order fixing rates of remuneration under the *Charter* is precluded, as s. 24(1) "should be allowed to evolve to meet the challenges and circumstances of [the case]" (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 59). It remains open to a court of competent jurisdiction to award such a remedy where a *Charter* right is at stake and it is appropriate and just to do so.

[68] Furthermore, this is not a case like *R. v. White*, 2010 SCC 59, [2010] 3 S.C.R. 374, where s. 694.1(3) of the *Criminal Code*, R.S.C. 1985, c. C-46, provided statutory authority for the Registrar of this Court to fix the fair and reasonable fees and disbursements of counsel appointed by the Court pursuant to s. 694.1(1), where counsel and the

(i) La nécessité

[65] Dans le passé, les tribunaux ont effectivement nommé des *amici* même s'ils n'avaient pas le pouvoir de déterminer leur rémunération. Nul ne conteste qu'il est loisible à la cour de préciser les qualifications générales requises pour s'acquitter du mandat. Il incombe au procureur général de payer la somme qui convient au regard de la Constitution pour répondre aux besoins des tribunaux.

[66] En outre, les ordonnances de type *Rowbotham* rendues au cours des 25 dernières années confirment la retenue judiciaire en cette matière, car même dans les affaires liées à la *Charte*, les tribunaux n'ont pas jugé nécessaire de prescrire le tarif de la rémunération des avocats commis d'office par l'État pour représenter l'accusé. Saisies de la question, des cours d'appel n'ont pas estimé nécessaire de fixer le taux de la rémunération (voir *R. c. Chan*, 2002 ABCA 299, 317 A.R. 240 (*sub nom. R. c. Cai*), par. 9; *R. c. Ho*, 2003 BCCA 663, 190 B.C.A.C. 187, par. 73; *Peterman*, par. 30). Cette approche est dans le droit fil de celle de notre Cour dans l'arrêt *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G. (J.)*, [1999] 3 R.C.S. 46, par. 104, où le taux de rémunération d'un avocat rémunéré par l'État n'a pas été fixé.

[67] Une ordonnance peut toutefois être rendue à cet égard sur le fondement de la *Charte*, car le par. 24(1) « doit pouvoir évoluer de manière à relever les défis et à tenir compte des circonstances de [l'espèce] » (*Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l'Éducation)*, 2003 CSC 62, [2003] 3 R.C.S. 3, par. 59). Il demeure loisible à la cour compétente d'accorder une telle réparation lorsqu'un droit garanti par la *Charte* est en jeu et qu'il est à la fois indiqué et juste de le faire.

[68] Qui plus est, la présente affaire ne s'apparente pas à *R. c. White*, 2010 CSC 59, [2010] 3 R.C.S. 374, où le par. 694.1(3) du *Code criminel*, L.R.C. 1985, ch. C-46, conférait au registraire de la Cour le pouvoir légal de fixer les honoraires et les débours justes et raisonnables de l'avocat nommé par la Cour en application du par. 694.1(1) lorsque le procureur

Attorney General could not agree, or *Ontario v. Figueroa* (2003), 64 O.R. (3d) 321 (C.A.), where the Attorney General in effect delegated to the court the task of finding an independent prosecutor for contempt proceedings that had been brought against Crown officials in order to avoid the appearance of a conflict of interest (para. 18); counsel for the Attorney General conceded that the court had jurisdiction to fix compensation (para. 13). Apart from these two cases and the cases at bar, I have not been directed to, nor have I been able to find, any appellate decision which has concluded that it was necessary to fix the rates of remuneration for state-funded counsel.

(ii) Limitations Imposed by Our Constitutional Order

[69] As I have explained, permitting judges to set rates and to order payment without authority based on a statute or derived from a constitutional challenge takes the judge out of the proper judicial role. A court's inherent or implied jurisdiction cannot surpass what the Constitution permits. As we have seen, the inherent jurisdiction of the court must respect the constitutional framework and the allocation of responsibility this framework makes. It is for the duly elected members of the legislature to determine what funds are expended on the administration of justice, not the judges.

[70] In cases where the lawyer contemplated by the court opts not to accept the compensation offered by the Attorney General, the court does not, in my view, have the ability to specify a rate of remuneration in order to secure the *amicus* of its choice. The inability to have the *amicus* of its choice does not deprive the court of its nature as a court of law. Even the accused, whose right to a fair trial is at stake, is not entitled to be provided with state-funded counsel of choice, provided he or she receives legal representation that gives a fair opportunity to make full answer and defence (see *R. v. Rockwood* (1989), 91 N.S.R. (2d) 305 (S.C. (App. Div.)), at paras. 15-20; *Chan*, at para. 18; *Child and Family Services of Winnipeg v. J. A.*, 2003 MBCA 154, 180 Man. R. (2d) 161, at para. 45;

général et l'avocat ne pouvaient s'entendre. Elle n'a pas non plus d'atomes crochus avec l'affaire *Ontario c. Figueroa* (2003), 64 O.R. (3d) 321 (C.A.), où le procureur général avait confié à la cour la tâche de trouver un poursuivant indépendant dans une instance d'outrage au tribunal engagée contre des fonctionnaires du ministère public afin qu'il n'y ait pas de conflit d'intérêts apparent (par. 18); le procureur général avait reconnu qu'il incombait à la cour de fixer la rémunération de ce poursuivant indépendant (par. 13). Hormis ces deux affaires, et celles dont nous sommes saisis en l'espèce, on n'a porté à mon attention — et je n'ai été en mesure de trouver — aucune décision où un tribunal d'appel conclut qu'il faut fixer le taux de la rémunération versée à un avocat rémunéré par l'État.

(ii) Les limites imposées par notre régime constitutionnel

[69] Comme je l'explique précédemment, le juge qui fixe la rémunération de l'*amicus* et ordonne son paiement sans l'autorisation de la loi ou celle qui découle d'une contestation constitutionnelle outrepasse ses attributions judiciaires. Une cour doit exercer sa compétence inhérente ou tacite dans le respect de la Constitution. Comme nous l'avons vu, elle doit alors tenir compte du cadre constitutionnel et de la répartition des attributions qui découle de ce dernier. Il appartient aux députés dûment élus de la législature, et non aux juges, de décider des sommes à consacrer à l'administration de la justice.

[70] Lorsque l'avocat pressenti par la cour refuse la rémunération offerte par le procureur général, la cour n'est pas habilitée, selon moi, à modifier cette rémunération afin de s'adjoindre l'*amicus* de son choix. L'impossibilité de recourir à cet *amicus* en particulier ne prive pas la cour de sa fonction de cour de justice. Même l'accusé, dont le droit à un procès équitable est en jeu, n'a pas droit aux services de l'avocat de son choix lorsque les honoraires sont payés par l'État; il suffit qu'un avocat lui permette de présenter une défense pleine et entière (voir *R. c. Rockwood* (1989), 91 N.S.R. (2d) 305 (C.S. (Div. d'appel)), par. 15-20; *Chan*, par. 18; *Child and Family Services of Winnipeg c. J. A.*, 2003 MBCA 154, 180 Man. R. (2d) 161, par. 45; *Peterman*, par. 26-28; *R. c. Ryan*, 2005

Peterman, at paras 26-28; *R. v. Ryan*, 2005 NLCA 44, 199 C.C.C. (3d) 161, at paras. 7-8; *R. v. Gagnon*, 2006 YKCA 12, 230 B.C.A.C. 200, at paras. 9-11).

[71] In Ontario, the Attorney General typically finds a number of appropriate lawyers willing to act as *amicus* for the consideration of the trial judge. Such a process respects the institutional and complementary constitutional roles of the courts, the Attorney General on behalf of the executive, and the legislature.

[72] The appointment of *amici* cannot be permitted to devolve into a routine way of getting complex trials completed. Fundamentally, providing judges with the assistance required to complete criminal trials in a fair and timely way is a matter concerning the administration of justice. As such, it is the responsibility of the province. Ultimately, it is the province's duty to find solutions to recurring problems such as those that arose in the cases before us. To routinely ask judges to resolve these problems by extraordinary orders taxes the inherent jurisdiction of the court with more than it can properly be made to bear.

[73] For example, if the increasing demands on trial judges are best met by the appointment of *amici* to assist, but not act for, the unrepresented accused, the province may create a roster of available and qualified counsel who are prepared to act at the rate offered by the Attorney General. The province may create a mechanism for the monitoring and oversight of those funds, or look to a staffed office to fulfill the role. It may be that the province chooses to enhance the legal aid plan or to establish a separate regime to address the different roles of *amici*.[6] It can choose to respond to public policy problems in a way that does not undermine other programs and priorities, including the legal

6 For instance, in Manitoba the appointment of *amici* is addressed in *The Legal Aid Manitoba Act*, C.C.S.M. c. L105, s. 3(2): "Subject to the approval of the council, Legal Aid Manitoba may provide legal aid requested by the minister, a judge, or an officer of a court or tribunal, including providing representation as a friend of the court, and legal information or advice to an organization or agency, or to persons within a geographic area."

NLCA 44, 199 C.C.C. (3d) 161, par. 7-8; *R. c. Gagnon*, 2006 YKCA 12, 230 B.C.A.C. 200, par. 9-11).

[71] En Ontario, le procureur général soumet habituellement à l'examen du juge du procès la candidature d'un certain nombre d'avocats compétents disposés à être nommés *amici*, ce qui respecte les fonctions institutionnelles des tribunaux, du procureur général (qui représente l'exécutif) et du législatif, de même que leurs fonctions constitutionnelles complémentaires.

[72] On ne saurait permettre la nomination systématique d'*amici* pour assurer le bon déroulement de procès complexes. Essentiellement, l'aide qu'il convient d'offrir au juge pour qu'il mène à terme un procès criminel de manière équitable et sans retard indu relève de l'administration de la justice et ressortit donc à la compétence de la province. En fin de compte, c'est à la province qu'il revient de trouver des solutions à des problèmes récurrents de la nature de ceux qui se sont posés dans les affaires visées par le pourvoi. Demander d'emblée à la cour une mesure extraordinaire ne tient pas compte des limites de sa compétence inhérente.

[73] Ainsi, par exemple, si le meilleur moyen de répondre aux exigences accrues qui sont faites au juge de première instance réside dans la nomination d'un *amicus* pour assister l'accusé non représenté, la province peut établir une liste de candidats qualifiés disposés à offrir leurs services au tarif offert par le procureur général. Elle peut créer un mécanisme de contrôle et de surveillance des fonds ainsi engagés, ou mettre sur pied un bureau doté du personnel requis pour s'acquitter de cette tâche. Elle choisira peut-être de bonifier le régime d'aide juridique ou d'établir un régime distinct pour les différentes fonctions dévolues à l'*amicus*[6]. Elle peut décider de s'attaquer aux problèmes de politique publique

6 Par exemple, au Manitoba, la nomination d'un *amicus* est prévue dans la *Loi sur la Société d'aide juridique du Manitoba*, C.P.L.M. ch. L105, par. 3(2) : « Sous réserve de l'approbation du conseil, la Société peut fournir à des personnes se trouvant dans une région géographique ou à des organismes les services d'aide juridique demandés par le ministre, un juge ou un auxiliaire de la justice, y compris les services de représentation qu'une personne rend à titre d'intervenant désintéressé, ainsi que des renseignements et des conseils juridiques. »

aid program. What is more, the government is accountable to the public for such choices.

[74] Of course, it remains the case that a failure to provide the appropriate support may compromise the judicial process in a specific case. For instance, in a criminal case, the absence of a qualified court reporter or interpreter may mean that the court cannot proceed with the trial. However, a trial judge cannot use her inherent jurisdiction to insist that the Attorney General pay the higher rates required to attract a particular court reporter or interpreter. Sometimes a trial cannot proceed, and must be rescheduled, despite the trial judge's or the Crown's best efforts.

[75] In those exceptional cases where *Charter* rights are not at stake but the judge must have help to do justice and appoints an *amicus*, the person appointed and the Attorney General should meet to set rates and mode of payment. The judge may be consulted, but should not make orders regarding payment that the Attorney General would have no choice but to obey.

[76] In the final analysis, if the assistance of an *amicus* is truly essential and the matter cannot be amicably resolved between the *amicus* and the Attorney General, the judge's only recourse may be to exercise her inherent jurisdiction to impose a stay until the *amicus* can be found. If the trial cannot proceed, the court can give reasons for the stay, so that the responsibility for the delay is clear.

(c) *The Integrity of the Judicial Process Would Be Imperilled*

[77] Finally, recognizing that courts have the inherent or implied power to set rates of compensation creates a very real risk of compromising the judicial role. The respondent Criminal Lawyers' Association of Ontario says that courts use their inherent jurisdiction to set rates of remuneration for

de manière à ne pas compromettre les autres programmes et priorités, y compris le programme d'aide juridique. Qui plus est, le gouvernement assume la responsabilité publique de ces choix.

[74] Bien entendu, l'absence de services d'appui adéquats peut compromettre le processus judiciaire dans un cas donné. Par exemple, dans un dossier criminel, l'absence d'un sténographe ou d'un interprète qualifié peut empêcher la cour d'instruire le procès. Or, le juge du procès ne peut pas exercer sa compétence inhérente pour exiger du procureur général qu'il offre la rémunération nécessaire à l'obtention des services d'un sténographe ou d'un interprète en particulier. Il arrive parfois que, malgré tous les efforts du juge du procès ou du ministère public, un procès ne puisse aller de l'avant et doive être reporté.

[75] Dans les cas exceptionnels où, sans qu'un droit garanti par la *Charte* ne soit en jeu, le juge doit obtenir l'aide d'un *amicus* pour rendre justice, le candidat retenu et le procureur général se rencontrent pour déterminer le tarif et les modalités de paiement. Ils peuvent consulter le juge, mais ce dernier doit s'abstenir de rendre, relativement au paiement, une ordonnance à laquelle le procureur général n'aurait d'autre choix que d'obéir.

[76] En dernière analyse, lorsque le recours à un *amicus* est vraiment essentiel et que l'avocat pressenti et le procureur général ne parviennent pas à s'entendre sur la rémunération, le juge peut n'avoir d'autre choix que, dans l'exercice de sa compétence inhérente, de suspendre l'instance jusqu'à la nomination d'un *amicus*. Si le procès ne peut aller de l'avant, la cour peut motiver la suspension d'instance et préciser la cause du retard.

c) *Atteinte à l'intégrité du processus judiciaire*

[77] Enfin, reconnaître à une cour de justice le pouvoir inhérent ou tacite de fixer un taux de rémunération crée un risque bien réel d'atteinte à la fonction judiciaire. L'intimée Criminal Lawyers' Association of Ontario soutient que les tribunaux exercent rarement leur compétence inhérente pour

amici infrequently and for small amounts, such that the sums involved are modest and do not engage social, economic or political policy. However, the practical result is that, in Ontario, 242 superior court judges would have the ability to instruct the Attorney General in the expenditure of funds on the administration of justice, in a piecemeal and inconsistent fashion. As noted above, such orders would potentially undermine the province's legal aid system.

[78] Decisions regarding rates of compensation for *amici* would put judges into the fray, requiring them to determine fair rates of compensation; to monitor the compensation claimed; or, as happened in *Imona Russel #2*, to appoint further counsel to monitor the fees and the time claimed, at a further fixed fee.

[79] Given the cost of lengthy trials, compensation orders for lawyers in a long, complex criminal trial can represent the expenditure of hundreds of thousands of dollars of public funds, reviewable only by an appellate court. There is a real risk that such a disregard of the separation of powers and the constitutional role and institutional capacity of the different branches of government could undermine the legal aid system and cause a lack of public confidence in judges and the courts. Indeed, as the High Court of Australia found in *Grollo v. Palmer* (1995), 184 C.L.R. 348, at p. 365, courts may not exercise non-judicial functions that would diminish public confidence in the integrity of the judiciary as an institution.

V. Conclusion

[80] In summary, the ability to fix rates of compensation is not necessary for the court to make its power to appoint *amici curiae* effective, and the judicial process will not be weakened or imperilled if compensation cannot be ordered. Indeed, even following a *Rowbotham* application, when the courts have the jurisdiction to direct compensation for counsel appointed under s. 24(1) of the *Charter*,

fixer la rémunération des *amici* et que, lorsqu'ils le font, le taux accordé est peu élevé, de sorte que les sommes en cause sont modestes et ne font pas intervenir des considérations sociales, économiques ou politiques. Or, il demeure que 242 juges des cours supérieures de l'Ontario pourraient dans les faits ordonner au procureur général d'affecter des fonds à l'administration de la justice, et ce, de manière sporadique et contradictoire. Je le répète, de telles ordonnances pourraient saper le régime provincial d'aide juridique.

[78] Décider de la rémunération des *amici* jetterait les juges dans la mêlée, car ils auraient à déterminer de justes taux de rémunération, à contrôler les honoraires réclamés ou, comme dans l'affaire *Imona Russel n^o^ 2*, à nommer un autre avocat pour contrôler les honoraires et les heures facturées, ce qui occasionne d'autres frais.

[79] Étant donné le coût d'un long procès, une ordonnance sur la rémunération d'un avocat dans un procès criminel à la fois long et complexe peut entraîner le versement de centaines de milliers de dollars prélevés sur le Trésor, et seule une cour d'appel pourrait réformer une telle ordonnance. Le risque existe bel et bien que le non-respect de la séparation des pouvoirs, ainsi que des attributions constitutionnelles et institutionnelles des différentes branches de l'État, porte atteinte au programme d'aide juridique et sape la confiance du public dans les juges et les tribunaux. En effet, comme l'a conclu la Haute Cour d'Australie dans *Grollo c. Palmer* (1995), 184 C.L.R. 348, p. 365, les tribunaux ne peuvent exercer de fonctions non judiciaires qui sont de nature à diminuer la confiance du public dans l'intégrité de l'institution judiciaire.

V. Conclusion

[80] En résumé, le pouvoir de fixer la rémunération de l'*amicus* n'est pas nécessaire à l'exercice réel du pouvoir de la cour de nommer un *amicus curiae*, et le processus judiciaire ne sera ni affaibli ni compromis si la rémunération ne peut faire l'objet d'une ordonnance judiciaire. En effet, même lorsqu'une demande de type *Rowbotham* a été présentée et que le tribunal a le pouvoir de fixer

the courts have rarely found it necessary to direct the rates payable to defence counsel.

[81] Allowing superior and statutory court judges to direct an Attorney General as to how to expend funds on the administration of justice, in the absence of a constitutional challenge or statutory authority, is incompatible with the different roles, responsibilities and institutional capacities assigned to trial judges, legislators and the executive in our parliamentary democracy.

[82] In the end, what concerned the Court of Appeal was the proper course to follow if the Attorney General is unreasonable and a particular lawyer is not prepared to accept the rates for service as *amicus*. While trial judges have a number of options regarding how to proceed in the face of such an impasse, they do not have the power to determine what a reasonable fee is or to order the government to pay it. Such orders cross an impermissible line. The other pillars of government are accountable for establishing spending priorities and, so long as their initiatives pass constitutional muster, have the institutional capacity to define public policy and find program solutions. The Court must allow provinces the flexibility they require to meet their constitutional obligation to fund *amici*, when essential.

[83] While the rule of law requires an effective justice system with independent and impartial decision makers, it does not exist independently of financial constraints and the financial choices of the executive and legislature. Furthermore, in our system of parliamentary democracy, an inherent and inalienable right to fix a trial participant's compensation oversteps the responsibilities of the judiciary and blurs the roles and public accountability of the three separate branches of

la rémunération de l'avocat nommé en application du par. 24(1) de la *Charte*, le tribunal saisi juge rarement nécessaire d'arrêter le tarif auquel aura droit l'avocat de la défense.

[81] Permettre au juge d'une cour supérieure ou d'un tribunal d'origine législative d'enjoindre à un procureur général d'affecter des fonds à l'administration de la justice de telle ou telle manière, malgré l'absence de toute contestation constitutionnelle ou du pouvoir légal de le faire, est incompatible avec les fonctions différentes et les compétences institutionnelles différentes du juge du procès, du législateur et de l'exécutif dans notre démocratie parlementaire.

[82] En définitive, la Cour d'appel s'est demandé quelle démarche devait être adoptée si le procureur général se montrait déraisonnable et qu'un avocat n'était pas disposé à accepter le tarif offert pour ses services d'*amicus*. Bien qu'un certain nombre de possibilités s'offrent à lui lorsqu'il se trouve dans une telle impasse, le juge du procès n'a pas le pouvoir de décider de ce qui constitue des honoraires raisonnables ni d'ordonner au gouvernement de les verser, car en rendant une telle ordonnance il franchit une limite qui ne saurait l'être. Les autres piliers de l'État assument la responsabilité de l'établissement de priorités financières et, dans la mesure où leurs décisions respectent la Constitution, ce sont eux qui disposent de l'expertise institutionnelle voulue pour définir la politique gouvernementale et proposer des programmes dont la création s'impose. La Cour doit permettre aux provinces de jouir de la souplesse nécessaire pour satisfaire à leur obligation constitutionnelle de financer les services d'*amici* jugés essentiels.

[83] La primauté du droit nécessite un système de justice efficace, doté de décideurs indépendants et impartiaux, mais elle n'existe pas indépendamment des contraintes financières et des choix financiers de l'exécutif et du législatif. Qui plus est, dans notre système de démocratie parlementaire, un droit inhérent et inaliénable de fixer la rémunération d'un participant à un procès outrepasserait les attributions judiciaires et brouillerait les fonctions et la responsabilité publique des trois branches distinctes

government. In my view, such a state of affairs would imperil the judicial process; judicial orders fixing the expenditures of public funds put public confidence in the judiciary at risk.

[84] For the reasons stated above, the ability to set rates of compensation for *amici* does not form part of the inherent jurisdiction of a superior court. Given this conclusion, it follows that the ability to set rates of compensation for *amici* does not form part of the implicit powers of a statutory court to function as a court of law.

[85] Accordingly, I would allow the appeal. In light of the public importance of the issues engaged by this appeal, the parties will bear their own costs.

The reasons of LeBel, Fish, Abella and Cromwell JJ. were delivered by

FISH J. (dissenting) —

I

[86] An *amicus curiae* is a friend of a court *in need* — and the friend *of that court* indeed.

[87] Accordingly, courts may appoint an *amicus* only when they require his or her assistance to ensure the orderly conduct of proceedings and the availability of relevant submissions. And once appointed, the *amicus* is bound by a duty of loyalty and integrity *to the court* and not to any of the parties to the proceedings.

[88] It is uncontested in this case that trial judges have jurisdiction to appoint an *amicus curiae* and to determine the role of the *amicus* in the proceedings before them. It is uncontested as well that the Attorney General who has conduct of the prosecution — in this case the Attorney General of Ontario — is then obliged to remunerate the *amicus* appropriately: A.F., at para. 3.

[89] The only question on this appeal is whether trial judges can themselves fix the fees to be paid

de l'État. À mon sens, le processus judiciaire en serait compromis; le prononcé d'ordonnances judiciaires portant affectation de fonds publics risquerait de miner la confiance du public dans les tribunaux.

[84] Pour les motifs qui précèdent, je suis d'avis que la faculté de déterminer la rémunération d'un *amicus* ne découle pas de la compétence inhérente d'une cour supérieure. Elle ne découle donc pas non plus du pouvoir tacite d'une cour d'origine législative de constituer une cour de justice.

[85] En conséquence, je suis d'avis d'accueillir le pourvoi. Compte tenu de l'importance pour le public des questions soulevées, les parties assumeront chacune leurs propres dépens.

Version française des motifs des juges LeBel, Fish, Abella et Cromwell rendus par

LE JUGE FISH (dissident) —

I

[86] L'*amicus curiae* est l'ami du tribunal *qui en a besoin*, et l'ami de nul autre.

[87] Par conséquent, le tribunal ne peut nommer un *amicus* que s'il a besoin de son aide pour le bon déroulement de l'instance et la formulation d'observations pertinentes. Une fois nommé, l'*amicus* a une obligation de loyauté et d'intégrité *envers le tribunal*, et non vis-à-vis de l'une ou l'autre des parties à l'instance.

[88] En l'espèce, nul ne conteste le pouvoir du juge du procès de nommer un *amicus curiae* et de déterminer son mandat dans l'instance. Nul ne conteste non plus que le procureur général qui poursuit — en l'espèce, celui de l'Ontario — est alors tenu de rémunérer l'*amicus* convenablement : m.a., par. 3.

[89] La seule question que soulève le présent pourvoi est celle de savoir si le juge peut lui-même

to the *amicus*. The appellant would answer that question in the negative; the respondents in the affirmative.

[90] I agree with the respondents. In my view the jurisdiction to fix the fees of *amici curiae* is necessarily incidental to the power of trial judges to appoint them. There is no constitutional impediment to vesting in trial judges the authority to do so when necessary in the circumstances.

[91] As I explain below, once a trial judge names and defines the role of an *amicus curiae*, a consensual approach ought to be favoured. The Attorney General and the *amicus* should be invited to agree on both the rate of remuneration and the manner in which the *amicus*'s budget is to be administered. If an agreement cannot be reached, the trial judge should fix the rate. The Attorney General then has the option of either paying the fee or staying the proceedings as a matter of prosecutorial discretion.

II

[92] This appeal concerns four distinct judgments, rendered in three cases and joined both in the Court of Appeal and in this Court for hearing and decision.

[93] In each instance, the trial judge appointed an *amicus curiae* and set the terms and conditions of the *amicus*'s compensation. The judge then ordered the Crown to remunerate the *amicus* at the rate and upon the conditions fixed by the court.

[94] Two of the judgments before us relate to the trial of William Imona Russel. After Mr. Imona Russel had discharged several experienced lawyers whom he had retained under legal aid certificates, the Crown — not the accused — requested that the trial judge appoint an *amicus*. The appointment of an *amicus*, the Crown contended, would serve the interests of justice by ensuring the orderly conduct of the trial in the event that Mr. Imona Russel persisted in his serial discharge of defence counsel.

fixer les honoraires de l'*amicus*. L'appelante répond par la négative, les intimés par l'affirmative.

[90] Je suis d'accord avec les intimés. À mon avis, le pouvoir du juge du procès de fixer les honoraires de l'*amicus curiae* est nécessairement accessoire à son pouvoir de le nommer. Nulle disposition constitutionnelle ne fait obstacle à l'exercice de ce pouvoir lorsque la situation l'exige.

[91] Comme je l'explique ci-après, dès que le juge du procès nomme un *amicus curiae* et définit son mandat, il y a lieu de favoriser une démarche consensuelle. Il faut inviter le procureur général et l'*amicus* à s'entendre sur le taux de rémunération de l'*amicus* et sur les modalités d'administration de son budget. À défaut d'accord, le juge fixe ce taux. Le procureur général peut alors soit verser les honoraires, soit suspendre l'instance dans l'exercice de son pouvoir discrétionnaire à titre de poursuivant.

II

[92] Le présent pourvoi vise quatre jugements distincts rendus dans trois affaires, puis réunis tant en Cour d'appel que devant notre Cour aux fins d'audition et de décision.

[93] Dans chacun des dossiers, le juge du procès a nommé un *amicus curiae* et fixé les conditions de sa rémunération. Il a alors ordonné au ministère public de rémunérer l'*amicus* au taux et aux conditions ainsi déterminés.

[94] Deux des jugements visés par le pourvoi ont trait au procès de William Imona Russel. Après que M. Imona Russel eut mis fin aux mandats de plusieurs avocats d'expérience dont il avait retenu les services grâce à des certificats d'aide juridique, le ministère public — et non l'accusé — a demandé à la juge du procès de nommer un *amicus*. Le ministère public soutenait qu'une telle mesure servirait l'intérêt de la justice en assurant le bon déroulement du procès advenant que M. Imona Russel continue à révoquer ses avocats les uns après les autres.

[95] An *amicus curiae* was appointed on June 17, 2008. The order set out the duties of the *amicus* as follows:

> To familiarize himself with this brief. If the accused discharges his lawyer or if the Court so orders, to advise the accused about points of law and legal issues; to discuss legal issues with the Crown on behalf of the accused; to speak to the court on behalf of the accused in relation to legal issues.

(*R. v. Imona Russel*, 2009 CarswellOnt 9725 (S.C.J.) ("*Imona Russel #1*"), at para. 7)

The order also stated that the *amicus* would be paid at the legal aid rate and that Legal Aid Ontario would manage the funding.

[96] After Mr. Imona Russel again dismissed his lawyer, Legal Aid refused to fund any new defence counsel. Mr. Imona Russel then brought an application for an order requiring the Attorney General to fund counsel as a remedy under s. 24(1) of the *Canadian Charter of Rights and Freedoms* for an infringement of his right to a fair trial (more commonly known as a "*Rowbotham* order": see *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.)). This application was denied and appeals against that decision were dismissed.

[97] The trial judge felt bound in these circumstances to expand the role of the *amicus* previously appointed, despite Mr. Imona Russel's protests and his refusal to cooperate with the *amicus*. The *amicus* was instructed to cross-examine witnesses, make objections to inadmissible evidence and raise legal arguments on behalf of Mr. Imona Russel. Effectively, as the trial judge noted, he was told "to defend the case as if he had a client who was choosing to remain mute": *Imona Russel #1*, at para. 13.

[98] Two months later, Mr. Imona Russel reversed his position and requested a further expansion of the role of the *amicus*. Subject to a minor disagreement

[95] Dans une ordonnance datée du 17 juin 2008, un *amicus curiae* a été nommé et son mandat a été défini comme suit :

> [TRADUCTION] Prendre connaissance du dossier. Si l'accusé met fin au mandat de son avocat ou si la Cour l'ordonne, conseiller l'accusé sur des points et des questions de droit; débattre des questions de droit avec le ministère public au nom de l'accusé; s'adresser au tribunal au nom de l'accusé sur des questions de droit.

(*R. c. Imona Russel*, 2009 CarswellOnt 9725 (C.S.J.) (« *Imona Russel n^o 1* »), par. 7)

L'ordonnance prévoyait également que l'*amicus* serait rémunéré selon le tarif de l'aide juridique et qu'Aide juridique Ontario s'occuperait des paiements.

[96] Après que M. Imona Russel eut encore une fois mis fin au mandat de son avocat, l'Aide juridique a refusé de payer les honoraires d'un nouvel avocat de la défense. M. Imona Russel a alors demandé une ordonnance enjoignant au procureur général de payer les honoraires d'un avocat, et ce, à titre de réparation fondée sur le par. 24(1) de la *Charte canadienne des droits et libertés* pour atteinte à son droit à un procès équitable (communément appelée ordonnance de type *Rowbotham* : voir *R. c. Rowbotham* (1988), 41 C.C.C. (3d) 1 (C.A. Ont.)). Sa demande a été rejetée, ainsi que tous ses appels.

[97] Étant donné la situation, la juge du procès a estimé qu'il lui fallait élargir le mandat de l'*amicus* déjà nommé, malgré les protestations de M. Imona Russel et son refus de collaborer avec l'*amicus.* L'*amicus* a été appelé à contre-interroger les témoins, à s'opposer à la preuve inadmissible et à présenter une argumentation juridique au nom de M. Imona Russel. Dans les faits, comme le signale la juge, on lui a enjoint [TRADUCTION] « d'agir dans l'instance comme s'il représentait un client qui choisissait de garder le silence » : *Imona Russel n^o 1*, par. 13.

[98] Deux mois plus tard, M. Imona Russel a changé d'avis et a demandé que le mandat de l'*amicus* soit encore accru. Sous réserve d'un

as to privilege of the communications between the *amicus* and the accused, this expansion was supported by the Crown. In the result, the trial judge ordered the *amicus* to take instructions from and act on behalf of Mr. Imona Russel as he would in a traditional solicitor-client relationship, subject to two notable exceptions: Mr. Imona Russel could not discharge the *amicus* and the *amicus* could not withdraw his services due solely to a breakdown in the relationship with the accused.

[99] Following this significant expansion of his duties and obligations, the *amicus* sought a variation of his order of appointment. The trial judge agreed to increase the *amicus*'s rate of remuneration to $192 per hour. This, she noted, was "the rate that would be paid [by the Attorney General] to a lawyer of [the *amicus*'s] year of call to prosecute or to represent the interests of a witness in a criminal case": *Imona Russel #1*, at para. 49.

[100] Several months later, being of the opinion that the budget of hours authorized by Legal Aid Ontario was not sufficient to permit him to adequately represent Mr. Imona Russel, the *amicus curiae* requested the appointment of an independent assessor to review Legal Aid's decision and to recommend a budget. Legal Aid initially agreed but later revised its position. The *amicus* then applied to the court for permission to withdraw.

[101] The trial judge held that the *amicus*'s request for an independent third party assessor was entirely reasonable. She ordered that a senior criminal lawyer be appointed to set a budget and to review, monitor and assess the accounts of the *amicus* on an ongoing basis: *R. v. Imona Russel*, 2010 CarswellOnt 10747 (S.C.J.) ("*Imona Russel #2*").

[102] The second case on appeal concerns the trial of Paul Whalen. Mr. Whalen was convicted of a number of serious indictable offences and the

léger désaccord quant au caractère privilégié des communications entre l'*amicus* et l'accusé, le ministère public a consenti à la mesure demandée. La juge a donc ordonné à l'*amicus* de représenter M. Imona Russel conformément à ses instructions, comme dans le cadre d'une relation classique procureur-client, sous réserve de deux exceptions importantes. M. Imona Russel ne pouvait mettre fin au mandat de l'*amicus*, et ce dernier ne pouvait cesser d'occuper au seul motif d'une mésentente entre eux.

[99] Après cet élargissement important de ses devoirs et obligations, l'*amicus* a demandé la modification de l'ordonnance pourvoyant à sa nomination. La juge du procès a accepté de porter sa rémunération à 192 $ l'heure, ce qui, selon elle, [TRADUCTION] « correspondait au taux que [le procureur général] verserait à un avocat admis au Barreau la même année que [l'*amicus*] pour agir en qualité de poursuivant ou pour défendre les intérêts d'un témoin dans une instance criminelle » : *Imona Russel n^o^ 1*, par. 49.

[100] Plusieurs mois plus tard, estimant que le nombre d'heures autorisé par Aide juridique Ontario ne lui permettait pas de bien représenter M. Imona Russel, l'*amicus* a demandé la nomination d'un évaluateur indépendant pour examiner la décision de l'Aide juridique et recommander un budget. Après avoir initialement consenti à cette nomination, l'Aide juridique s'est ravisée. L'*amicus* a alors demandé au tribunal la permission de cesser d'occuper.

[101] La juge du procès a statué que la demande de nomination d'un tiers évaluateur indépendant présentée par l'*amicus* était tout à fait raisonnable. Elle a ordonné qu'un criminaliste d'expérience soit mandaté pour établir un budget, puis faire droit ou non, après examen, aux demandes de paiement de l'*amicus* au fur et à mesure qu'elles étaient présentées : *R. c. Imona Russel*, 2010 CarswellOnt 10747 (C.S.J.) (« *Imona Russel n^o^ 2* »).

[102] Le deuxième dossier visé par le pourvoi est celui de Paul Whalen. À l'issue de son procès, il a été reconnu coupable d'un certain nombre

Crown applied to have him declared a dangerous offender. Mr. Whalen had dismissed two lawyers since the commencement of proceedings and was unrepresented. He had been unable to retain counsel under his legal aid certificate because of an ongoing boycott of legal aid work by criminal defence lawyers in Ontario. The trial judge was of the view that, given the complex expert evidence that would be led on the application, the fairness of the proceedings would be compromised unless an *amicus curiae* was appointed by the court.

d'infractions criminelles graves, et le ministère public a demandé qu'il soit déclaré délinquant dangereux. M. Whalen avait mis fin aux mandats de deux avocats depuis le début de l'instance, et il n'était plus représenté par avocat. Malgré l'obtention d'un certificat d'aide juridique, il n'avait pu retenir les services d'un avocat en raison d'un boycottage des mandats d'aide juridique par les avocats criminalistes ontariens. Le juge du procès a estimé, au vu de la complexité de la preuve d'expert qui serait présentée à l'appui de la demande, que l'équité de la procédure serait compromise, sauf nomination d'un *amicus curiae* par le tribunal.

[103] The trial judge appointed Anik Morrow as *amicus* because she had already started to develop a relationship of confidence with Mr. Whalen, a difficult client. The judge believed that appointing two other lawyers, as suggested by the Attorney General, created a risk of destabilizing the proceedings. The trial judge set Ms. Morrow's rate of compensation at $200 per hour and ordered Legal Aid Ontario to manage the account: *R. v. Whalen*, Sept. 18, 2009, No. 2178/1542 (Ont. Ct. J.).

[103] M^e^ Anik Morrow a alors été nommée *amicus* parce qu'elle avait déjà entrepris d'établir une relation de confiance avec M. Whalen, un client difficile. Le juge croyait que la nomination de deux autres avocats, comme le recommandait le procureur général, risquait de déstabiliser l'instance. Il a fixé la rémunération de M^e^ Morrow à 200 $ l'heure et ordonné à Aide juridique Ontario de s'occuper du paiement de ses honoraires : *R. c. Whalen*, 18 sept. 2009, n^o^ 2178/1542 (C.J. Ont.).

[104] The final case on appeal was initiated by Lawrence Greenspon, a senior counsel. Wahab Dadshani was charged with first degree murder. His case had been before the courts for more than five years when, three months before his trial was to commence, he decided to discharge Mr. Greenspon. As a result, the court appointed Mr. Greenspon as *amicus curiae* in order to ensure that the trial proceeded as scheduled, whether Mr. Dadshani had counsel or not. Mr. Greenspon performed only 3.25 hours of work as *amicus* and his appointment lasted only until Mr. Dadshani's new counsel confirmed his presence at trial. The trial judge set Mr. Greenspon's rate of remuneration for his work as *amicus curiae* at $250 per hour. In fixing this rate, the trial judge noted that Mr. Greenspon had more than 28 years of experience at the bar and was certified by the Law Society of Upper Canada as a specialist in criminal litigation: *R. v. Greenspon*, 2009 CarswellOnt 7359 (S.C.J.), at para. 49.

[104] M^e^ Lawrence Greenspon, un avocat chevronné, est à l'origine du dernier dossier visé par le pourvoi. Wahab Dadshani a été accusé de meurtre au premier degré. La procédure judiciaire était engagée depuis plus de cinq ans lorsque, trois mois avant son procès, il a décidé de révoquer le mandat de M^e^ Greenspon. Le tribunal a alors nommé M^e^ Greenspon *amicus curiae* de façon que le procès débute à la date prévue, que M. Dadshani ait un avocat ou non. M^e^ Greenspon n'a exercé sa fonction d'*amicus* que 3,25 heures. Son mandat n'a duré que jusqu'à la confirmation par le nouvel avocat de M. Dadshani qu'il serait présent au début du procès. La juge a fixé à 250 $ l'heure la rémunération de M^e^ Greenspon à titre d'*amicus curiae*. Pour fixer ce tarif, elle a signalé que M^e^ Greenspon avait plus de 28 années d'expérience comme avocat et qu'il était agréé par le Barreau du Haut-Canada en tant que spécialiste des procès criminels : *R. c. Greenspon*, 2009 CarswellOnt 7359 (C.S.J.), par. 49.

[105] The Crown appealed against all four decisions. In its view, trial judges have no jurisdiction to set the *amici*'s rates of remuneration, to determine how their budgets will be administered or to order the Attorney General to pay the *amici* at the rates fixed by the court. In the alternative, the Crown contended that the trial judges should have adopted the "least restrictive approach" and stayed the proceedings rather than order payment.

[106] The Ontario Court of Appeal unanimously dismissed the appeals. The court found that incidental to a judge's power to appoint an *amicus* is the power to set the terms and conditions of that appointment, including the rate of compensation and the monitoring of accounts. It also held that since the cases under appeal do not engage the *Charter*, a temporary stay of proceedings — the least restrictive approach according to the Quebec Court of Appeal in *Québec (Procureur général) v. C. (R.)* (2003), 13 C.R. (6th) 1, at paras. 162-65 — was not the appropriate remedy in the circumstances: *R. v. Imona Russel*, 2011 ONCA 303, 104 O.R. (3d) 721.

[107] The Crown now appeals to this Court against the judgment of the Ontario Court of Appeal.

III

[108] Exceptionally, trial judges may appoint an *amicus curiae* to ensure the orderly conduct of proceedings and the availability of relevant submissions. They should not be required to decide contested, uncertain, complex and important points of law or of fact without the benefit of thorough submissions.

[109] Courts are empowered in some instances by specific statutory provisions, such as s. 486.3 of the *Criminal Code*, R.S.C. 1985, c. C-46, to appoint counsel for particular purposes. They may also order the appointment of defence counsel pursuant to a *Rowbotham* application as a remedy under s. 24(1) of the *Charter*.

[105] Le ministère public a interjeté appel de chacune des quatre décisions. À son avis, le juge du procès n'a pas compétence pour déterminer la rémunération de l'*amicus* et les modalités d'administration de son budget, non plus que pour ordonner au procureur général de le rémunérer au taux qu'il fixe. Subsidiairement, il a soutenu que le juge du procès aurait dû prendre la « mesure la moins contraignante » et suspendre l'instance plutôt que d'ordonner le paiement d'honoraires.

[106] La Cour d'appel de l'Ontario a rejeté les appels à l'unanimité. Elle a conclu que le pouvoir du juge de fixer les conditions du mandat de l'*amicus*, y compris sa rémunération et le contrôle des demandes de paiement, était connexe à son pouvoir de nommer l'*amicus*. Puisque les décisions portées en appel n'emportaient pas l'application de la *Charte*, elle a également statué qu'une suspension temporaire — la mesure jugée la moins contraignante par la Cour d'appel du Québec dans l'arrêt *Québec (Procureur général) c. R.C.*, [2003] R.J.Q. 2027, par. 162-165 — ne constituait pas la réparation appropriée en l'espèce : *R. c. Imona Russel*, 2011 ONCA 303, 104 O.R. (3d) 721.

[107] Le ministère public se pourvoit aujourd'hui devant notre Cour contre le jugement de la Cour d'appel de l'Ontario.

III

[108] Le juge du procès peut, à titre exceptionnel, nommer un *amicus curiae* pour assurer le bon déroulement de l'instance et la formulation d'observations pertinentes. Il ne saurait être tenu de trancher une question de droit ou de fait contestée, aux contours incertains, complexe et importante en l'absence des plaidoiries complètes qui s'imposent.

[109] Dans certaines situations, le tribunal peut nommer un avocat à une fin particulière en vertu d'une disposition législative expresse, tel l'art. 486.3 du *Code criminel*, L.R.C. 1985, ch. C-46. Il peut également nommer un avocat de la défense par suite d'une demande de type *Rowbotham*, en guise de réparation suivant le par. 24(1) de la *Charte*.

[110] The appointment of *amici curiae* derives, however, from different sources and should be kept conceptually distinct.

[111] Superior courts are empowered by their inherent jurisdiction to appoint *amici curiae*. Most recently, in *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78, at paras. 24 and 29, this Court described the inherent jurisdiction of superior courts as follows:

> The inherent jurisdiction of the provincial superior courts is broadly defined as "a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so": I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23, at p. 51. These powers are derived "not from any statute or rule of law, but from the very nature of the court as a superior court of law" (Jacob, at p. 27) to enable "the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner" (p. 28). . . .
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> . . . In summary, Jacob states, "The inherent jurisdiction of the court may be invoked in an apparently inexhaustible variety of circumstances and may be exercised in different ways" . . . . [Emphasis deleted.]

See also *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at paras. 29-30; *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 18; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, at paras. 29-32; *Halsbury's Laws of England* (4th ed. (reissue) 2001), vol. 37, at para. 12.

[112] In the case of statutory courts, the power to appoint an *amicus* derives from the court's authority to control its own process in order to administer justice fully and effectively. Their authority to appoint *amici* is necessarily implied in the power to function as a court of law: *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, at paras. 70-71; *Cunningham*, at para. 19.

[110] Toutefois, la nomination d'un *amicus curiae* a une origine propre à elle et doit être considérée séparément sur le plan conceptuel.

[111] Les cours supérieures ont le pouvoir inhérent de nommer un *amicus curiae*. Tout récemment, dans l'arrêt *R. c. Caron*, 2011 CSC 5, [2011] 1 R.C.S. 78, par. 24 et 29, notre Cour décrivait comme suit la compétence inhérente des cours supérieures :

> La compétence inhérente des cours supérieures provinciales est largement définie comme étant [TRADUCTION] « une source résiduelle de pouvoirs, à laquelle la Cour peut puiser au besoin lorsqu'il est juste ou équitable de le faire » : I. H. Jacob, « The Inherent Jurisdiction of the Court » (1970), 23 *Curr. Legal Probs.* 23, p. 51. Ces pouvoirs émanent « non pas d'une loi ou d'une règle de droit, mais de la nature même de la cour en tant que cour supérieure de justice » (Jacob, p. 27) pour permettre « de maintenir, protéger et remplir leur fonction qui est de rendre justice, dans le respect de la loi, d'une manière régulière, ordonnée et efficace » (p. 28). . .
>
> . . .
>
> . . . En bref, Jacob dit ce qui suit : « La compétence inhérente de la cour peut être invoquée dans un nombre apparemment infini de circonstances et peut être exercée de différentes façons » . . . [Soulignement omis.]

Voir aussi *MacMillan Bloedel Ltd. c. Simpson*, [1995] 4 R.C.S. 725, par. 29-30; *R. c. Cunningham*, 2010 CSC 10, [2010] 1 R.C.S. 331, par. 18; *Canada (Commission des droits de la personne) c. Canadian Liberty Net*, [1998] 1 R.C.S. 626, par. 29-32; *Halsbury's Laws of England* (4e éd. (réédition) 2001), vol. 37, par. 12.

[112] Dans le cas d'un tribunal d'origine législative, le pouvoir de nommer un *amicus* découle de la maîtrise de sa propre procédure aux fins de l'administration efficace et sans réserve de la justice. Son pouvoir de nommer un *amicus* s'infère nécessairement de sa faculté de constituer une cour de justice : *R. c. 974649 Ontario Inc.*, 2001 CSC 81, [2001] 3 R.C.S. 575, par. 70-71; *Cunningham*, par. 19.

[113] The Crown did not, either before this Court or the courts below, contest the propriety of the *amicus* appointments in any of the cases before us. Nor did it challenge the established distinctions between defence counsel, whether appointed pursuant to a legal aid certificate or under a *Rowbotham* order, and *amicus curiae*. The Crown's appeal is restricted to a single question: whether trial judges have jurisdiction to fix an *amicus*'s rate of remuneration.

[114] I think it useful nonetheless to provide some guidance regarding the circumstances in which an *amicus* appointment is appropriate. An *amicus curiae* may play many roles but it is important to recognize at the outset that an *amicus* is *not* a defence counsel. Once clothed with all the duties and responsibilities of defence counsel, the *amicus* can no longer properly be called a "friend of the court".

[115] The discretion of trial judges to appoint an *amicus* is not unrestricted. The power to appoint should be exercised sparingly and with caution (see *Caron*, at para. 30), and appointments should be in response to specific and exceptional circumstances. Trial judges must not externalize *their* duty to ensure a fair trial for unrepresented accused by shifting the responsibility to *amici curiae* who, albeit under a different name, assume a role nearly identical to that of defence counsel.

[116] An accused is entitled to forego the benefit of counsel and elect instead to proceed unrepresented. An *amicus* should not be appointed to impose counsel on an unwilling accused or permit an accused to circumvent the established procedure for obtaining government-funded counsel: *Cunningham*, at para. 9. In the vast majority of cases, as long as a trial judge provides guidance to an unrepresented accused, a fair and orderly trial can be ensured without the assistance of an *amicus*. Such is the case even if the accused's defence is not then quite as effective as it would have been had the accused retained competent defence counsel.

[113] Le ministère public ne conteste pas devant nous, et il ne l'a pas fait devant les juridictions inférieures, l'opportunité de la nomination d'un *amicus* dans les dossiers dont nous sommes saisis. Il ne conteste pas non plus les distinctions établies entre l'avocat de la défense nommé en vertu d'un certificat d'aide juridique ou d'une ordonnance de type *Rowbotham* et l'*amicus curiae*. Seule une question est aujourd'hui en litige : le juge du procès a-t-il compétence pour déterminer la rémunération de l'*amicus*?

[114] Je crois néanmoins utile de donner quelques précisions sur les circonstances dans lesquelles la nomination d'un *amicus* est indiquée. L'*amicus* peut exercer bien des fonctions, mais il importe de reconnaître d'emblée qu'il n'est *pas* avocat de la défense. Dès que les devoirs et les obligations d'un avocat de la défense lui incombent, il ne peut plus être considéré à juste titre comme l'« ami de la cour ».

[115] Le pouvoir discrétionnaire du juge du procès de nommer un *amicus* n'est pas absolu. Il doit être exercé parcimonieusement et avec circonspection (voir *Caron*, par. 30) et dans une situation particulière et exceptionnelle. Le juge ne doit pas se décharger de *son* obligation d'assurer un procès équitable à l'accusé non représenté par avocat en s'en remettant à l'*amicus curiae* qui, bien que sous une appellation différente, s'acquitterait dès lors d'une fonction presque identique à celle d'un avocat de la défense.

[116] L'accusé peut renoncer aux services d'un avocat et décider de subir son procès sans être représenté. Un *amicus* ne doit pas être nommé pour lui imposer un avocat contre son gré ou lui permettre de contourner la procédure établie pour l'obtention des services d'un avocat rémunéré par l'État : *Cunningham*, par. 9. Dans la plupart des cas, si le juge guide et informe l'accusé non représenté, le procès peut se dérouler comme il convient et conformément à l'équité sans l'aide d'un *amicus*. Il en est ainsi même lorsque la défense de l'accusé n'est pas alors assurée aussi efficacement qu'elle l'aurait été par un avocat compétent.

[117] If appointed, an *amicus* may be asked to play a wide variety of roles: *R. v. Cairenius* (2008), 232 C.C.C. (3d) 13 (Ont. S.C.J.), at paras. 52-59, *per* Durno J. There is, as Rosenberg J.A. pointed out in *R. v. Samra* (1998), 41 O.R. (3d) 434 (C.A.), at p. 444, "no precise definition of the role of *amicus curiae* capable of covering all possible situations in which the court may find it advantageous to have the advice of counsel who is not acting for the parties".

[118] Regardless of what responsibilities the *amicus* is given, however, his defining characteristic remains his duty to the court and to ensuring the proper administration of justice. An *amicus*'s sole "client" is the court, and an *amicus*'s purpose is to provide the court with a perspective it feels it is lacking — all that an *amicus* does is in the public interest for the benefit of the court in the correct disposal of the case: *R. v. Lee* (1998), 125 C.C.C. (3d) 363 (N.W.T.S.C.), at para. 12.

[119] While the *amicus* may, in some circumstances, be called upon to "act" for an accused by adopting and defending the accused's position, his role is fundamentally distinct from that of a defence counsel who represents an accused person either pursuant to a legal aid certificate or under a *Rowbotham* order. Furthering the best interests of the accused may be *an incidental result*, but is not *the purpose*, of an *amicus* appointment.

[120] As Durno J. explained in *Cairenius*, at para. 62:

> . . . *amicus* is generally not counsel for the accused/applicant, there is no solicitor-client relationship, and *amicus* does not take instructions from a client. The general role of *amicus* is to assist the court. *Amicus*, as a friend of the court, has an obligation to bring facts or points of law to the court's attention that might be contrary to the interests of the applicant. This is contrary to the traditional role of defence counsel described in *Rondel v. Worsley*, [1969] 1 A.C. 191 (H.L.) at 227-8, and cited with approval by Rosenberg J.A. in *Samra* . . . .

[117] Lorsqu'il est nommé, l'*amicus* peut être appelé à jouer une grande variété de rôles : *R. c. Cairenius* (2008), 232 C.C.C. (3d) 13 (C.S.J. Ont.), par. 52-59, le juge Durno. Comme le souligne le juge Rosenberg dans l'arrêt *R. c. Samra* (1998), 41 O.R. (3d) 434 (C.A.), p. 444, il [TRADUCTION] « n'existe pas de définition précise du rôle de l'*amicus curiae* qui soit applicable à toutes les situations possibles où le tribunal peut trouver bénéfique d'obtenir les conseils d'un avocat qui n'agit pas pour les parties ».

[118] Toutefois, quel que soit le mandat confié à l'*amicus*, sa mission fondamentale demeure de s'acquitter de son devoir envers le tribunal et d'assurer la bonne administration de la justice. L'*amicus* a pour seul « client » le tribunal, et celui-ci le nomme afin de bénéficier d'un point de vue dont il s'estime privé; l'*amicus* s'acquitte de sa fonction dans l'intérêt public, au bénéfice du tribunal, afin qu'une juste décision soit rendue : *R. c. Lee* (1998), 125 C.C.C. (3d) 363 (C.S.T.N.-O.), par. 12.

[119] Bien que, dans certaines situations, l'*amicus* puisse être appelé à « agir » pour un accusé en adoptant et en défendant son point de vue, ce rôle est fondamentalement distinct de celui d'un avocat de la défense qui représenterait l'accusé après que ce dernier eut obtenu un certificat d'aide juridique ou demandé une ordonnance de type *Rowbotham*. Protéger l'intérêt de l'accusé peut être *un résultat accessoire*, mais non *l'objectif*, de la nomination de l'*amicus*.

[120] Comme l'explique le juge Durno dans l'arrêt *Cairenius*, par. 62 :

> [TRADUCTION] . . . l'*amicus* n'est généralement pas l'avocat de l'accusé/demandeur, il n'existe pas de relation procureur-client et l'*amicus* ne reçoit pas d'instructions d'un client. La fonction générale de l'*amicus* est d'aider le tribunal. En tant qu'ami de la cour, l'*amicus* a l'obligation de porter à son attention les faits ou les points de droit qui sont susceptibles d'être contraires à l'intérêt du demandeur. Sa fonction s'oppose donc au rôle traditionnel de l'avocat de la défense décrit dans l'arrêt *Rondel c. Worsley*, [1969] 1 A.C. 191 (H.L.), p. 227-228, cité avec approbation par le juge Rosenberg dans l'arrêt *Samra* . . .

[121] Where a trial judge appoints an *amicus*, these distinctions between an *amicus* and court-appointed defence counsel should be made clear both to the *amicus* and to the accused. The blurring of the line between the two roles in the present cases causes me some concern; however, as pointed out, that is not the issue before us.

[122] I turn now to the main issue raised on this appeal. In my view, a necessary corollary to a trial judge's power to appoint an *amicus* is the power to fix the *amicus*'s remuneration. I am unable, for three reasons, to adopt the contrary position urged by the appellant — one that would grant the provincial Attorney General the exclusive power to fix an *amicus*'s rate of remuneration.

[123] First, such a position would unduly weaken the courts' appointment power and ability to name an *amicus* of their choosing. Counsel available to serve as an *amicus* would be limited to those willing to accept appointment at the rate fixed by the Attorney General.

[124] Second, the integrity of the judicial process would be imperilled. It has not been suggested that the Attorney General would set the rate of remuneration unreasonably or impracticably low. Nonetheless, the reasoning of this Court in another context is equally relevant here: the ability of the court to ensure a fair and orderly process "should not be dependent upon a reliance on the continuous exemplary conduct of the Crown, something that is impossible to monitor or control": *R. v. Bain*, [1992] 1 S.C.R. 91, at p. 104.

[125] Finally, the Attorney General's unilateral control over the remuneration of *amici curiae* might create an appearance of bias and place *amici* themselves in an unavoidable conflict of interest. As *amici* often play a role that can be said to be adversarial to the Crown, if the Crown were permitted to determine unilaterally and exclusively how much an *amicus* is paid, the reasonable person might conclude that the "expectation . . . of

[121] Lorsque le juge du procès nomme un *amicus*, ces distinctions entre l'*amicus* et l'avocat de la défense commis d'office doivent être clairement signalées à l'*amicus* et à l'accusé. La confusion des deux rôles dans les dossiers visés par le pourvoi me préoccupe quelque peu, mais comme je l'ai déjà mentionné, nous ne sommes pas saisis de cette question.

[122] Je passe maintenant à la principale question en litige. À mon avis, le pouvoir du juge du procès de fixer la rémunération de l'*amicus* découle nécessairement du pouvoir qu'il a de le nommer. Je ne puis souscrire à la thèse contraire de l'appelante, à savoir que le procureur général d'une province aurait le pouvoir exclusif de déterminer le taux de rémunération de l'*amicus*, et ce, pour trois raisons.

[123] Premièrement, il en résulterait un affaiblissement injustifié du pouvoir de nomination du tribunal et de sa faculté de nommer l'*amicus* de son choix. Les seuls avocats susceptibles d'être nommés *amici* seraient ceux disposés à se satisfaire de la rémunération fixée par le procureur général.

[124] Deuxièmement, l'intégrité du processus judiciaire serait compromise. Nul ne prétend que la rémunération déterminée par le procureur général serait basse au point d'être déraisonnable ou irréaliste. Néanmoins, le raisonnement de notre Cour dans un autre contexte vaut également en l'espèce : la capacité du tribunal d'assurer l'équité et le bon déroulement du procès « ne devrait pas être fondée sur la confiance à l'égard du comportement exemplaire permanent du ministère public, chose qu'il n'est pas possible de surveiller ni de maîtriser » : *R. c. Bain*, [1992] 1 R.C.S. 91, p. 104.

[125] Enfin, le pouvoir unilatéral du procureur général de déterminer la rémunération de l'*amicus curiae* pourrait créer une apparence de partialité et faire en sorte que l'*amicus* se retrouve inévitablement en situation de conflit d'intérêts. Puisque l'*amicus* joue souvent un rôle qu'on peut qualifier d'opposé à celui du ministère public, si on conférait à ce dernier le pouvoir unilatéral et exclusif de déterminer la rémunération de l'*amicus*,

give and take" might lead the *amicus* to discharge his duties so as to curry favour with the Attorney General: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 187.

[126] There is, moreover, no constitutional impediment to a trial judge ordering the Ministry of the Attorney General to pay an *amicus* at a specific rate of remuneration fixed by the court.

[127] The fundamental constitutional principle derived from the decision of the Privy Council in *Auckland Harbour Board v. The King*, [1924] A.C. 318, provides that only Parliament can authorize payment out of money from the Consolidated Revenue Fund: see also *Constitution Act, 1867*, s. 126; *Financial Administration Act*, R.S.O. 1990, c. F.12 ("*FAA*"), s. 11.1(1).

[128] The *Auckland Harbour* principle, however, finds no application in the case at bar. The principle acts only to constrain the ability of the executive branch of government to spend money in the absence of authorization by the legislature. Since, however, the Attorney General has the authority to disburse public funds to pay *amici curiae* when their rate of remuneration *is not* fixed by the court, then the same authority necessarily exists even if their rate *is* fixed by the court.

[129] As a constitutional matter, the fees of *amici curiae* in this case can be paid by the Attorney General directly from the Consolidated Revenue Fund under a standing appropriation provided for in the *FAA*.

[130] Section 13 of the *FAA* provides that "[i]f any public money is . . . directed by the judgment of a court . . . to be paid by the Crown or the Lieutenant Governor and no other provision is made respecting it, such money is payable under warrant of the Lieutenant Governor, directed to the Minister of Finance, out of the Consolidated Revenue Fund". See also *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27, s. 22. As the Legislative Assembly

une personne raisonnable pourrait conclure que l'« attente [de] concessions mutuelles » est susceptible d'amener l'*amicus* à s'acquitter de ses fonctions de manière à gagner la faveur du procureur général : *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3, par. 187.

[126] En outre, nulle disposition constitutionnelle ne fait obstacle à ce qu'un tribunal ordonne au ministère du Procureur général de rémunérer un *amicus* à raison d'un taux fixé par ce tribunal.

[127] Suivant le principe constitutionnel fondamental qui se dégage de l'arrêt du Conseil privé *Auckland Harbour Board c. The King*, [1924] A.C. 318, seul le Parlement peut autoriser un paiement par prélèvement sur le Trésor : voir aussi la *Loi constitutionnelle de 1867*, art. 126; *Loi sur l'administration financière*, L.R.O. 1990, ch. F.12 (« *LAF* »), par. 11.1(1).

[128] Or, le principe de l'arrêt *Auckland Harbour* ne s'applique pas en l'espèce, car il a seulement pour effet de limiter le pouvoir de l'exécutif de dépenser sans l'autorisation du législateur. Mais comme le procureur général a le pouvoir de verser des fonds publics pour rémunérer l'*amicus curiae* dont le tarif *n*'est *pas* fixé par le tribunal, il a nécessairement le pouvoir de le faire lorsque le tarif de l'*amicus est* fixé par le tribunal.

[129] Sur le plan constitutionnel, les honoraires des *amici curiae* nommés en l'espèce peuvent être payés par le procureur général directement sur le Trésor par voie d'affectation permanente de crédits suivant la *LAF*.

[130] L'article 13 de la *LAF* dispose que « [l]orsque [. . .] la Couronne ou le lieutenant-gouverneur doivent prélever un paiement sur [l]es deniers [publics] afin d'exécuter [. . .] le jugement d'un tribunal [. . .] et qu'aucune autre disposition n'a été prise à cet égard, le paiement est fait sur le Trésor en vertu d'un mandat du lieutenant-gouverneur adressé au ministre des Finances ». Voir également la *Loi sur les instances*

has pre-approved the disbursement of funds for the purpose of satisfying court orders, there can be no violation of the *Auckland Harbour* principle.

[131] I note that s. 13 of the *FAA* does *not* itself grant courts the jurisdiction to order the Crown to expend money or remunerate *amici curiae*. Rather, this provision authorizes the executive branch to make payment once a valid court order is made and thus precludes the application of the *Auckland Harbour* principle.

IV

[132] Once a trial judge names and defines the role of an *amicus curiae* — with or without the assistance of the parties — a consensual approach ought to be favoured. This approach would invite the Attorney General and the *amicus* to meet and agree on the rate of remuneration and on the administration of the budget.

[133] Both parties should negotiate in good faith and with due regard for their respective obligations to the judicial process: Attorneys General should consider their duty to promote the sound administration of justice and *amici curiae* should keep in mind both the element of public service inherent in their role and the "privilege of belonging to a profession that is not simply a business": *Ontario v. Figueroa* (2003), 64 O.R. (3d) 321 (C.A.), at para. 28.

[134] The provincial Attorney General and the *amicus* should be given a limited time to negotiate based upon the state of proceedings and the urgency of the appointment. In general, negotiations should be given as little time as is practicable. Any dispute regarding remuneration should be resolved expeditiously, in a manner that does not delay, much less derail, the proceedings. Moreover, the *amicus* should not be permitted to hold proceedings hostage by extending negotiations in order to secure more generous compensation.

introduites contre la Couronne, L.R.O. 1990, ch. P.27, art. 22. Puisque l'Assemblée législative a autorisé au préalable le versement de fonds aux fins d'exécuter les ordonnances judiciaires, il ne saurait y avoir violation du principe de l'arrêt *Auckland Harbour*.

[131] Je signale que l'art. 13 de la *LAF* lui-même *ne* confère *pas* au tribunal le pouvoir d'ordonner au ministère public d'engager des sommes ou de rémunérer un *amicus curiae*. Il autorise plutôt l'exécutif à effectuer le paiement une fois l'ordonnance judiciaire dûment rendue, ce qui écarte l'application du principe de l'arrêt *Auckland Harbour*.

IV

[132] Lorsque, avec ou sans le concours des parties, le juge du procès nomme un *amicus curiae* et définit son mandat, il y a lieu de favoriser la démarche consensuelle en invitant le procureur général et l'*amicus* à s'entendre sur le taux de rémunération de ce dernier et sur l'administration de son budget.

[133] Les deux parties doivent négocier de bonne foi en tenant dûment compte de leurs obligations respectives à l'égard de la procédure judiciaire. Le procureur général doit en effet garder présente à l'esprit son obligation de promouvoir la bonne administration de la justice, et l'*amicus curiae* ne doit perdre de vue ni la notion de service public inhérente à sa fonction, ni son [TRADUCTION] « privilège d'exercer une profession qui ne se résume pas à exploiter une entreprise » : *Ontario c. Figueroa* (2003), 64 O.R. (3d) 321 (C.A.), par. 28.

[134] Le délai de négociation accordé au procureur général provincial et à l'*amicus* devrait être limité selon le stade de l'instance et l'urgence de la nomination. En général, le délai doit être le plus court possible. Tout différend sur la rémunération doit être réglé rapidement de manière à ne pas retarder l'instance, voire la faire avorter. Qui plus est, l'*amicus* ne doit pas être en mesure de tenir le sort de l'instance entre ses mains et de prolonger les négociations afin d'obtenir une rémunération plus généreuse.

[135] If the Attorney General and the *amicus* cannot reach agreement, the trial judge should fix the rate of remuneration. The Attorney General then retains the option of either paying the fee or staying the proceedings.

[136] The ultimate choice of whether to proceed with the prosecution in light of the associated costs appropriately remains that of the Attorney General. The proper balance between prosecutorial discretion and the jurisdiction of the court is thus preserved. A *Rowbotham* order achieves that same result by a different and well-established route, which is not in issue here. As Iacobucci and Major JJ. explained in *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, at para. 47:

> Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. Decisions that do not go to the nature and extent of the prosecution . . . do not fall within the scope of prosecutorial discretion. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum. [Emphasis in original.]

[137] In fixing the rate of remuneration, the trial judge should take into account a number of considerations. I believe that the factors identified by the Ontario Court of Appeal in *Figueroa* in determining the rate of remuneration of an independent prosecutor are equally applicable in the case of an *amicus* appointment. Goudge J.A. set out these factors in *Figueroa*, at paras. 27-30:

> In my view, a number of considerations should go into this task. While not exhaustive, that list includes the importance of the assignment undertaken, the legal complexity of the work to be done, the skill and

[135] Lorsque le procureur général et l'*amicus* ne parviennent pas à s'entendre, il appartient au juge du procès de déterminer la rémunération du second, auquel cas, le procureur général a toujours le choix de verser les honoraires ou de suspendre l'instance.

[136] La décision finale d'aller ou non de l'avant avec la poursuite à la lumière des frais engagés demeure à bon droit celle du procureur général. Le juste équilibre entre le pouvoir discrétionnaire du poursuivant et la compétence du tribunal est ainsi maintenu. L'ordonnance de type *Rowbotham* permet d'arriver au même résultat par une voie différente et bien établie, mais elle n'est pas en cause en l'espèce. Comme l'expliquent les juges Iacobucci et Major dans *Krieger c. Law Society of Alberta*, 2002 CSC 65, [2002] 3 R.C.S. 372, par. 47 :

> Fait important, le point commun entre les divers éléments du pouvoir discrétionnaire en matière de poursuites est le fait qu'ils comportent la prise d'une décision finale quant à savoir s'il y a lieu d'intenter ou de continuer des poursuites ou encore d'y mettre fin, d'une part, et quant à l'objet des poursuites, d'autre part. Autrement dit, le pouvoir discrétionnaire en matière de poursuites vise les décisions concernant la nature et l'étendue des poursuites ainsi que la participation du procureur général à celles-ci. Les décisions qui ne portent pas sur la nature et l'étendue des poursuites [. . .] ne relèvent pas du pouvoir discrétionnaire en matière de poursuites. Ces décisions relèvent plutôt de la compétence inhérente du tribunal de contrôler sa propre procédure une fois que le procureur général a choisi de se présenter devant lui. [Souligné dans l'original.]

[137] Pour déterminer quelque rémunération, le juge du procès doit tenir compte d'un certain nombre de considérations. Je crois que celles relevées par la Cour d'appel de l'Ontario dans l'arrêt *Figueroa* pour le cas d'un avocat du secteur privé appelé à représenter la poursuite s'appliquent également dans le cas d'un *amicus*. Dans *Figueroa*, le juge Goudge énumère ces considérations (par. 27-30) :

> [TRADUCTION] À mon avis, un certain nombre de considérations doivent être prises en compte à cette fin. Elles comprennent notamment l'importance du mandat, la complexité juridique du travail requis, la compétence

experience of counsel to be appointed and his or her normal rate charged to private sector clients. These considerations reflect the fact that, to some extent, this is a retainer like any other.

However, in several respects this is not a retainer like any other. First, the independent prosecutor is being asked by the court to serve the needs of the administration of justice. In my view, acting in the public interest in this way constitutes one manifestation of the professional responsibility that has characterized the legal profession at its best. To the extent that an independent prosecutor is performing such a public service, he or she ought not to expect to be remunerated at private sector rates. It is part of the privilege of belonging to a profession that is not simply a business.

Second, it must be remembered that the rate fixed for the independent prosecutor will be paid from public funds. In an age when there are so many pressing needs taxing that resource, I do not think that it should be used to pay at private sector rates.

Thus I would add these two considerations to the list. It is relevant to fixing a reasonable rate for the independent prosecutor that he or she is performing a public service paid for with public funds.

See also *R. v. White*, 2010 SCC 59, [2010] 3 S.C.R. 374.

[138] The Attorney General of Ontario urges us to accept that the legal aid tariff constitutes a presumptively reasonable remuneration for an *amicus*. While the legal aid tariff should be taken into account as a guide, it is certainly not determinative: *White*.

[139] It must be recalled that *amici* are not bound by the legal aid regime. Their client is the court, not an indigent accused, and they are "not parties to that implicit agreement between the defence bar and the state through which, it appears, defence counsel have agreed to effectively contribute a portion of their services to ensure that the broadest number of indigent defendants are afforded the legal representation they could not otherwise retain": *R. v. Chemama*, 2008 ONCJ 140 (CanLII), at para. 11.

et l'expérience de l'avocat nommé et le tarif qu'il exige normalement de ses clients du secteur privé. Ces éléments indiquent dans une certaine mesure qu'il s'agit d'un mandat comme un autre.

Toutefois, sous certains rapports, il ne s'agit pas d'un mandat comme tout autre. Premièrement, le tribunal demande à son titulaire de répondre aux besoins de l'administration de la justice. À mon sens, agir ainsi dans l'intérêt public constitue l'une des manifestations de la responsabilité professionnelle qui sied le mieux à la profession juridique. L'avocat de la poursuite indépendant qui exécute un tel mandat public ne doit pas s'attendre à être rémunéré aux tarifs du secteur privé, ce qui fait partie du privilège d'exercer une profession qui ne se résume pas à exploiter une entreprise.

Deuxièmement, il faut se souvenir que la rémunération fixée pour l'avocat de la poursuite indépendant sera payée sur les deniers publics. À une époque où tant de besoins pressants grèvent les ressources, je ne crois pas qu'elles doivent servir à payer des services aux tarifs du secteur privé.

J'ajouterais donc ces deux considérations. Lorsqu'il s'agit de fixer un tarif raisonnable pour l'avocat de la poursuite indépendant, il convient de prendre en compte le fait qu'il exécute un mandat public et qu'il est rémunéré sur les deniers publics.

Voir aussi l'arrêt *R. c. White*, 2010 CSC 59, [2010] 3 R.C.S. 374.

[138] Le procureur général de l'Ontario nous demande de faire droit à sa thèse voulant que la rémunération de l'*amicus* au tarif de l'aide juridique doive être tenue pour raisonnable. Certes, ce tarif doit être pris en compte à titre indicatif, mais il n'est certainement pas décisif : *White*.

[139] Rappelons que l'*amicus* n'est pas lié par le régime d'aide juridique. Son client est le tribunal, et non un accusé impécunieux, et il [TRADUCTION] « n'est pas partie à l'accord tacite entre les avocats de la défense, d'une part, et l'État, d'autre part, suivant lequel, apparemment, les premiers acceptent de faire don en partie de leurs services afin que le plus grand nombre de prévenus impécunieux qui, autrement, ne seraient pas représentés, aient droit aux services d'un avocat » : *R. c. Chemama*, 2008 ONCJ 140 (CanLII), par. 11.

[140] As mentioned earlier, I also favour a consensual approach to determining the manner in which an *amicus*'s budget and payment is to be managed. A reasonable budget is necessary to enable the *amicus* to do that which is expected of him. In my respectful view, subject to the agreement of an *amicus*, it would be inappropriate to consign the administration of *amici*'s budgets to Legal Aid. Legal Aid's expertise is in setting budgets for a person of modest means, which is not the applicable standard in the case of *amici* appointments.

V

[141] It has not been suggested — nor can it be — that an immoderate or unreasonable fee was set by the trial judges in any of the cases before us. In each instance, the fees fixed are substantially lower than the *amicus*'s private practice rates and are virtually identical to the fees paid *by the Crown* to similarly qualified counsel retained as *ad hoc* prosecutors, or to represent witnesses in criminal cases, or pursuant to s. 684 of the *Criminal Code*: *Imona Russel #1*, at para. 49; *Figueroa*; *Chemama*, at para. 14.

[142] The trial judges exercised their jurisdiction appropriately in setting the rates of remuneration and in providing for the management of the *amici*'s budgets. They committed no reviewable error of law in the exercise of their discretion.

VI

[143] For all of the foregoing reasons, I would dismiss the appeal.

Appeal allowed, LeBel, Fish, Abella *and* Cromwell JJ. *dissenting.*

Solicitor for the appellant: Attorney General of Ontario, Toronto.

[140] Comme je l'indique précédemment, je préconise également une démarche consensuelle pour déterminer les modalités d'administration du budget de l'*amicus* et sa rémunération. Un budget d'un montant raisonnable s'impose afin que l'*amicus* puisse s'acquitter de son mandat. Soit dit en tout respect, sauf consentement de l'*amicus*, il est inopportun de confier l'administration de son budget à l'Aide juridique. Celle-ci établit le budget de représentation de personnes peu fortunées en appliquant des normes qui ne sauraient valoir à l'égard de l'*amicus*.

V

[141] Nul n'a prétendu — ni ne peut prétendre — que les juges ont, en l'espèce, fixé des honoraires exagérés ou déraisonnables. Dans chacune des affaires, les honoraires accordés sont sensiblement inférieurs à ceux exigés par l'*amicus* de ses clients du privé et presque identiques à ceux versés *par le ministère public* à des avocats aux qualifications équivalentes pour exercer la fonction de poursuivant *ad hoc* ou pour représenter un témoin dans un dossier criminel, ou encore, sur le fondement de l'art. 684 du *Code criminel* : *Imona Russel n^o^ 1*, par. 49; *Figueroa*; *Chemana*, par. 14.

[142] Ils ont exercé leur compétence convenablement pour arrêter les taux de rémunération et les modalités de gestion des budgets des *amici*. Ils n'ont commis, dans l'exercice de leur pouvoir discrétionnaire, aucune erreur de droit susceptible de contrôle judiciaire.

VI

[143] Pour tous ces motifs, je suis d'avis de rejeter le pourvoi.

Pourvoi accueilli, les juges LeBel, Fish, Abella *et* Cromwell *sont dissidents.*

Procureur de l'appelante : Procureur général de l'Ontario, Toronto.

Solicitors for the respondent the Criminal Lawyers' Association of Ontario: Schreck Presser, Toronto; Louis P. Strezos & Associate, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitors for the intervener the British Columbia Civil Liberties Association: Sugden, McFee & Roos, Vancouver.

Solicitor for the intervener the Advocates' Society: John Norris, Toronto.

Solicitors for the intervener the Mental Health Legal Committee: Hiltz Szigeti, Toronto; Swandron Associates, Toronto; Supreme Advocacy, Ottawa.

Procureurs de l'intimée Criminal Lawyers' Association of Ontario : Schreck Presser, Toronto; Louis P. Strezos & Associate, Toronto.

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Ottawa.

Procureur de l'intervenant le procureur général du Québec : Procureur général du Québec, Québec.

Procureur de l'intervenant le procureur général du Manitoba : Procureur général du Manitoba, Winnipeg.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

Procureurs de l'intervenante l'Association des libertés civiles de la Colombie-Britannique : Sugden, McFee & Roos, Vancouver.

Procureur de l'intervenante Advocates' Society : John Norris, Toronto.

Procureurs de l'intervenant Mental Health Legal Committee : Hiltz Szigeti, Toronto; Swandron Associates, Toronto; Supreme Advocacy, Ottawa.

Tab 22

to say whether there has or has not been an infringement; that is a question to be determined at the trial of the action, and I will not say anything now, if I can help it, to prejudice the question. But the question which I have now to consider is that which the court is always bound to consider on an interlocutory application of this kind—namely, whether it would do more harm to grant than to refuse it. The manufacture of these articles by the plaintiffs was begun in April 1886. The plaintiffs, therefore, have taken upon themselves to do that which the defendant says is an infringement of his patent, and about which he has warned one of the plaintiffs' customers that the articles so made are an infringement of his patent, and has intimated that he intends taking legal proceedings against the plaintiffs. Whether he will really proceed, at present I do not know. But it seems to me that I should do more harm to the defendant, if I were now to grant this injunction, than I should to the plaintiffs by refusing it. The balance of convenience is in favour of my making no order upon this motion; and for that reason, without intimating my own opinion on any of the questions raised before me, which will have to be tried hereafter, I decline now to interfere by granting any injunction. The costs of the motion will be costs in the action.

Solicitors for the plaintiffs, *Field, Roscoe,* and *Co.*, agents for *Barlow, Smith,* and *Pinsent,* Birmingham.

Solicitors for the defendant, *Wilson, Bristows,* and *Carpmael.*

Jan. 27 *and Feb.* 1.

(Before STIRLING, J.)

Re LONDON AND LEEDS BANK; *Ex parte* CARLING. (*a*)

Company — Shareholder — Rescission — Misrepresentation — Insolvency of company — Time for bringing action.

Upon an application by a shareholder for rescission of his contract on the ground of fraud, it is not necessary to prove that the misstatements complained of were the sole inducement to enter into the contract.

The right of such shareholder to rescission is not barred by the mere fact that the company is unable to meet its engagements at the time when he repudiates, if he has no knowledge of the fact.

Tennent *v.* The City of Glasgow Bank (40 *L. T. Rep. N. S.* 694; 4 *App. Cas.* 615) *explained.*

THIS was an application by Nathan Carling for the removal of his name from the members' register of the London and Leeds Bank in respect of forty shares, and for repayment of 120*l.*, the amount paid thereon.

The London and Leeds Bank was incorporated under the Companies Acts 1862 and 1867 as a company limited by shares, with a nominal capital of 1,000,000*l.* in 100,000 shares of 10*l.* each.

On the 4th Sept. 1886 Carling saw an advertisement of the company in the *Leeds Mercury.* On the 6th he applied for and received a prospectus of the said company. The prospectus contained the following statements: 1. That the bank had arranged to take over several successful banking institutions of old standing. 2. That the directors had had an offer of support as to capital and business from a large and powerful bank in Paris.

These statements were admittedly false.

On the same day, after reading the prospectus, Carling sent in an application for forty shares, together with a cheque for 40*l.* On the 7th he received a letter of allotment of the whole number of the shares applied for. On the 9th he paid a further sum of 80*l.*, being the balance of the 3*l.* per share payable on allotment. On the 22nd he wrote by his solicitors repudiating his contract, and commenced an action against the company.

On the 24th a petition was presented for winding-up the company, and later in the same day Carling served upon the company a notice of motion asking for removal of his name from the register. The company was subsequently ordered to be wound-up.

It appeared from the affidavit of the liquidator that the company was insolvent on the 22nd Sept., and had been insolvent for a long time previously, and that a considerable number of acceptances had been dishonoured in August and September, and had not since been paid; that the landlords of the bank premises had levied a distress for rent, and that the office furniture had been condemned and sold; that in several actions against the company execution had been issued, and the sheriff had made a return of *nulla bona.*

In an affidavit sworn by Carling on the 27th Sept. he stated as follows:

3. I believed the statements and representations contained in the said prospectus, and on the faith thereof I on the 6th Sept. sent in an application to the said bank for forty shares upon the form attached to the said prospectus with my cheque for 40*l.*, being the deposit of 1*l.* per share.

6. When I wrote for forty shares in the said bank I did not expect to get an allotment of the whole number, as it is usual for applicants for shares only to get about a fourth of what they apply for, and I expected only to get an allotment of ten or fifteen shares at the outside, but when I got an allotment of the whole forty shares my suspicions were aroused. I consulted some friends, and read certain articles in the newspapers reflecting upon the said bank. I consulted my present solicitors, who set on foot inquiries for me.

Graham Hastings, Q.C. and *George Hart* for the applicant. — A shareholder who repudiates his contract before the presentation of a winding-up petition is not barred from obtaining rescission by the insolvency of the company. It is not enough that the company is insolvent, it must be notoriously insolvent, as shown by its shutting its doors and publicly stopping payment, which is notice to all the world that the company cannot meet its engagements. That was the case contemplated by Earl Cairns, L.C. in *Tennent* v. *The City of Glasgow Bank* (40 L. T. Rep. N. S. 694; 4 App. Cas. 615). That decision was not intended to cast upon a shareholder who seeks rescission the burden of taking an account of the assets and liabilities of the company in order to ascertain its solvency at the time of repudiation. It appears from Earl Cairns' speech in *Alexander Mitchell's case* (40 L. T. Rep. N. S. 758; 4 App. Cas. 567, 573), that the Glasgow Bank did in fact close its doors, and publicly announce the stoppage of the business. The question has been recently considered in *Re Scottish Petroleum Company* (49 L. T. Rep. N. S. 348; 23 Ch. Div. 413), where the cases are collected.

(*a*) Reported by H. B. HEMMING, Esq., Barrister-at-Law.

Buckley, Q.C. and *Oswald* for the liquidator.—First, there is no sufficient evidence that the applicant relied on the statements in the prospectus, inasmuch as he does not say that he was induced to take the shares, or that he would not have taken the shares but for those statements:

Bellairs v. *Tucker*, 13 Q. B. Div. 562;
Smith v. *Chadwick*, 50 L. T. Rep. N. S. 697; 9 App. Cas. 187.

On the contrary, the evidence shows that he invested his money in the company as a speculation. Secondly, the application is too late. A shareholder is a partner in the concern, and he loses his remedy when the rights of the creditors have intervened, *i.e.*, upon insolvency. That is the *ratio decidendi* of *Tennent's* case. The question does not turn upon the knowledge of the shareholder.

Hastings, Q.C. replied.

Cur. adv. vult.

STIRLING, J., after stating the nature of the claim, continued:—In the first place, I must consider what a person who complains that he has been induced by misrepresentations must prove in order that he may be entitled to repudiate his contract. Upon this I was referred to *Bellairs* v. *Tucker*, and the answer of the jury to the fourth question put to them there was, "That the plaintiff was misled by these false statements, and induced or materially influenced by them to part with his money." And it is said that I must find evidence of that. I think that is correct; but, in so saying, it is to be observed that it is quite clear from *Edgington* v. *Fitzmaurice* (53 L. T. Rep. N. S. 369; 29 Ch. Div. 459) that the material misstatement complained of need not be the sole inducement to take shares. There the plaintiff had been induced both by his own mistake and by the misstatements of the defendants, and he was held entitled to recover, although the action was against the defendants personally for deceit, and was not merely an action for the rescission of his contract. At p. 480, Cotton, L.J. says this: "But it was urged by the counsel for the appellants that the plaintiff himself stated that he would not have taken the debentures unless he had thought they were a charge upon the property, and that it was this mistaken notion that really induced the plaintiff to advance his money. In my opinion this argument does not assist the defendants if the plaintiff really acted on the statement in the prospectus. It is true that, if he had not supposed he would have had a charge, he would not have taken the debentures; but if he also relied on the misstatement in the prospectus, his loss none the less resulted from that misstatement. It is not necessary to show that the misstatement was the sole cause of his acting as he did. If he acted on that misstatement, though he was also influenced by an erroneous supposition, the defendants would still be liable." And Bowen, L.J. says: "Then the question remains, Did this misstatement contribute to induce the plaintiff to advance his money? Mr. Davey's argument has not convinced me that it did not. He contended that the plaintiff admits that he would not have taken the debentures unless he had thought they would give him a charge on the property, and therefore he was induced to take them by his own mistake, and the misstatement in the circular was not material. But such misstatement was material if it was actively present to his mind when he decided to advance his money. The real question is, what was the state of the plaintiff's mind, and if his mind was disturbed by the misstatement of the defendants, and such disturbance was in part the cause of what he did, the mere fact of his also making a mistake himself could make no difference. It resolves itself into a mere question of fact." And Fry, L.J. says this: "In my opinion, if the false statement of fact actually influenced the plaintiff, the defendants are liable, even though the plaintiff may have been also influenced by other motives." Taking that for my guide let me consider what the applicant really says: [His Lordship referred to paragraph 3 of Carling's affidavit.] Can I come to any other conclusion than that the miud of the applicant was influenced, and materially influenced, by this prospectus. *Primâ facie*, I should say not. The statements seem to me of such a nature as might influence a man who contemplated taking shares in this company. But then it is argued that he has not said that, if the statements were not there, he would not have taken the shares. But is that necessary? Upon that there are some pertinent observations in Lord Blackburn's speech in *Smith* v. *Chadwick* (50 L. T. Rep. N. S. 697; 9 App. Cas. 187). At p. 195 he says: "In an ordinary action of deceit the plaintiff alleges that false and fraudulent representations were made by the defendant to the plaintiff in order to induce him, the plaintiff, to act upon them. I think that, if he did act upon these representations, he shows damage; if he did not, he shows none. And I think the plaintiff in such a case must not only allege, but prove this. It is as to what is sufficient proof of this damage, that I wish to make any remarks. I do not think it is necessary, in order to prove this, that a plaintiff should be called as a witness to swear that he acted upon the inducement. At the time when *Pasley* v. *Freeman* (2 Sm. L. C. 66) was decided, and for many years afterwards, he could not be so called. 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 defendant did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement." Then he adds this, by way of warning: "I think the tribunal which has to decide the fact should remember that now, and for some years past, the plaintiff can be called as a witness on his own behalf, and that if he is not so called, or being so called does not swear that he was induced, it adds much weight to the doubts whether the inference was a true one. I do not say it is conclusive." The question is one of fact, which I must decide upon the evidence before me. There is the clear evidence in the affidavit of the applicant. And when the matter was before me in chambers, the liquidator made no application to cross-examine him, and up to the present time he has never asked that the applicant might be called on to give his evidence in court. Looking at this affidavit, I come to the conclusion that the mind of the applicant was materially influenced by the misstatements in the prospectus. There is, however, a statement in

part of the affidavit which I ought to refer to, in order that it may not be said that I have overlooked it. [His Lordship read paragraph 6 of the affidavit.] It is said that that shows that the investment was merely a speculation on the part of the applicant. I do not think there is enough in the statement to enable me to come to that conclusion. It is well known that, when a new company is started, there is often a great rush for shares, and that people send in applications for a larger amount of shares than they otherwise would, not expecting to have the full number allotted to them. I do not think that there is anything in that statement to disentitle the applicant to relief. Then, assuming that in other respects he is entitled, the question remains whether he has done enough before the commencement of the winding-up to entitle him to have his name removed from the register. For this purpose I must consider the dates. [His Lordship stated the facts relating to the application for shares and the allotment and the subsequent repudiation.] Upon that it is said that he is too late. The law applicable to the question within what time a shareholder may repudiate has been recently considered in *Re Scottish Petroleum Company* (49 L. T. Rep. N. S. 348; 23 Ch. Div. 413), and the law is thus stated by Baggallay, L.J.: "The cases appear to establish that, to enable a shareholder to escape, there must, before the commencement of the winding-up, be a repudiation of the shares, and that it must be followed up by active steps to be relieved from them, unless there is some agreement with the company which dispenses with the necessity of proceedings being taken by this particular shareholder." That statement of the law appears to me to be perfectly correct, and I say this because Lindley and Fry, L.JJ. put it in a slightly different way. Lindley, L.J. says: "If we look at these cases to see what principle is to be deduced from them, I think we find that the shareholder who seeks to be discharged must have done two things—he must have repudiated the contract, and have got his name taken off the register, subject to the qualification that if he has before the commencement of the winding-up taken proceedings to have his name removed, that will be sufficient." And Fry, L.J. says this: "It is enough if before the commencement of the winding-up, the shareholder takes proceedings to get his name removed, and duly prosecutes them." These observations are to be read with reference to the case actually before the court, which was a case where the applicant had not taken proceedings before the commencement of the winding-up. I am quite sure that these learned judges did not intend to depart from what Lord Cairns laid down in the House of Lords in *Tennent* v. *City of Glasgow Bank* (40 L. T. Rep. N. S. 694; 4 App. Cas. 615, 622.) That case in its facts clearly does not cover the present, and it was only by reason of some general observations of Lord Cairns that it was cited. At p. 621 he says this: "The case of *Oakes* v. *Turquand* (16 L. T. Rep. N. S. 808; L. Rep. 2 H. of L. 325), in this House, has established that it is too late, after winding-up has commenced, to rescind a contract for shares on the ground of fraud. This, no doubt, is on the grounds stated by the Lord President—that innocent third parties have acquired rights which would be defeated by rescission. The case of *Oakes* v. *Turquand*, however, while it decided negatively that a contract could not be rescinded on the ground of fraud after a winding-up had commenced, did not decide affirmatively the converse proposition that up to the time of the commencement of a winding-up, a contract to take shares could be rescinded on the ground of fraud. Whether it can or not be so rescinded up to that time must, I think, depend upon the particular circumstances of the case." Then at p. 622 he says: "But if the company has become insolvent, and has stopped payment, then, even irrespective of the winding-up, a wholly different state of things appears to me to arise. The assumption of new liabilities under such circumstances is an affair, not of the company, but of its creditors. The repudiation of shares which, while the company was solvent, would not, or need not, have inflicted any injury upon creditors, must now of necessity inflict a serious injury on creditors. I should, therefore, be disposed, in any case, to hesitate before admitting that, after a company has become insolvent and stopped payment, whether a winding-up has commenced or not, a rescission of a contract to take shares could be permitted as against creditors." Then he goes on to state the particular circumstances of that case which were these: That the bank publicly stopped payment on the 2nd Oct., that on the 5th Oct. the directors convened an extraordinary general meeting of shareholders for the purpose of considering, and, if thought fit, passing resolutions for winding-up the bank voluntarily by reason of its insolvency, and that Tennent took no steps to disaffirm his contract until the 21st Oct. Two circumstances were mentioned by Lord Cairns as material: first, the company being insolvent; and, secondly, stopping payment. There is nothing of the sort here. Applying the rule laid down by Lord Cairns, that the question whether or not a contract to take shares can be rescinded before the commencement of a winding-up must depend upon the particular circumstances of the case, I must consider what are the circumstances of this case. [His Lordship then read the affidavit of the liquidator as to the condition of the company, and observed that it did not state that the applicant had any knowledge of these circumstances.] What are the equities which would countervail against the equity of the applicant to have his name removed from the register? One class of cases is where the name of a shareholder has been on the register for a long time. I do not say that that alone would be conclusive, but it may be suggested, in such a case, that people have made advances on the faith of the name of that particular shareholder being on the register. But here the whole connection of the applicant with the company was considerably under three weeks, and most of the creditors must have had their debts contracted by the company before the applicant made his application for the shares. That was clearly so in the case of the holders of acceptances in August, and was probably so in the case of the holders of acceptances in September. It was certainly so in the case of the landlords in respect of their rent, and also in the case of the execution creditors of the company. Then it is suggested that, if I grant this application, I may be

interfering with the rights of the creditors, and that the company is commercially insolvent. But what were these creditors about? I am not told whether the company was still contracting business in September. If it was, then surely it was a going company. If it was not, what were these creditors doing? Were these creditors cognisant that advertisements for applications were still being issued? If they were, then it is clear that they were lying by, waiting to see what turn events might take. At all events, any one of such creditors, by presenting a petition, might have come in and stopped the whole concern at any moment. I cannot see that the creditors have any countervailing equity against the equity of the applicant to have his contract rescinded. The applicant appears to have done all that was required, and is entitled to have his name removed from the register and to prove in the winding-up for the 120*l.*

Solicitors: *M. Abrahams, Son,* and *Co.; W. F. Summerhays.*

Thursday, Feb. 10.

(Before STIRLING, J.)

Re TUCKER; BOWCHIER *v.* GORDON. (*a*)

Will—Construction—Gift till death or remarriage followed by gift over to a class living at death—Time of ascertaining class—Implication.

Testator directed his trustees to pay the income of a certain sum of money to A. B., the widow of W. B., for life, or until she should marry again, and from and immediately after her death or remarriage to pay and divide the said sum equally between all the children of A. B. and W. B. living at the death of their mother and the issue of deceased children, such issue to take their parents' share.

Held, that the class must be ascertained upon the marrying again of the widow.

Bainbridge *v.* Cream (19 *L. T. Rep. O. S.* 151; 16 *Beav.* 25) *followed with reluctance.*

WALTER TUCKER, who died on the 16th July 1874, by his will, dated the 9th March 1874, directed his trustees to invest the sum of 8000*l.* as therein mentioned, and to pay the dividends, interest, and annual produce arising from such sum unto Anna Maria Bowchier, widow of William Bowchier, during the term of her natural life or until she should marry again, for the benefit of herself and all the children of the said Anna Maria Bowchier by her late husband, the said William Bowchier, with a proviso that the trustees on each and every of such children attaining the age of twenty-one years should pay to him, her, or them out of the said principal sum of 8000*l.*, the sum of 500*l.* each, and after such payments should be made as aforesaid, should pay the interest arising from the remainder of the said sum of 8000*l.* unto the said Anna Maria Bowchier during her life or until she should marry again, and the testator directed his trustees from and immediately after the decease or marrying again of the said Anna Maria Bowchier, to stand possessed of the said sum of 8000*l.* or the balance thereof upon trust to pay and divide the same equally between all the said children living at the time of their mother's decease and the issue of any deceased child (if any), share and share alike as tenants in common, such issue, however, to take the share or interest, his, her, or their parent or parents would have been entitled to if living, and the testator gave and bequeathed all the residue of his real and personal estate and effects to James Gordon, Richard Wells Gibbs, and Henry Moore (since deceased), share and share alike as tenants in common, and he appointed the said residuary legatees trustees and executors of his will.

Mrs. A. M. Bowchier had six children by her late husband, viz., Frederick William Bowchier, Jane Beach Bowchier, Louisa Emily Bowchier, Mary Evens Jefferies Daly, the wife of Augustus Alexander Daly, John Taylor Bowchier, and Walter Herbert Bowchier, who died in 1876 an infant and unmarried.

The sum of 500*l.* was duly paid to each of the remaining five children upon their respectively attaining the age of twenty-one.

On the 6th March 1886, Mrs. A. M. Bowchier intermarried with George George.

Louisa Emily Bowchier died later in the same year.

Under these circumstances the question arose whether the children of Mrs. George by her late husband, William Bowchier, were entitled to an immediate division of the residue of the 8000*l.* upon the second marriage of their mother.

Two summonses were taken out on the 23rd and 24th June 1886 respectively, to determine this question, and were consolidated by an order of the 20th July 1886, and the conduct was given to Frederick William Bowchier.

Robinson, Q.C. and *J. Tanner* for the plaintiff, F. W. Bowchier.—There is a gift by implication to the children upon the remarriage of the mother. We rely, first, upon the direction to the trustees to pay and divide "immediately" after the death or marrying again of the mother; and, secondly, upon the fact that there is no express gift of the fund in the interval between marrying again and the death. The case is covered by

Stanford v. *Stanford,* 35 W. R. 191;
Bainbridge v. *Cream,* 19 L. T. Rep. O. S. 151; 16 Beav. 25.

Graham Hastings, Q.C. and *Gatey* for the personal representative of L. E. Bowchier.

Buckley, Q.C. and *Edward Ford* for the trustees and residuary legatees of the will.—The will ought to be construed as it stands. The rule laid down by Lord Cranworth, that words are to be construed according to their plain ordinary meaning, unless the context shows them to have been used in a different sense, or unless the rule, if acted on, would lead to some manifest absurdity or incongruity, applies. That rule is cited by Lord Blackburn with approval in *Rhodes* v. *Rhodes* (46 L. T. Rep. N. S. 467; 7 App. Cas. 205). The will contains a clear gift to a class to be ascertained at the death of the mother, some members of which may be still unborn; and it is surely doing less violence to the intention of the testator to disregard the word "immediately" in the common conveyancing phrase, "from and immediately after," than to alter the time at which the class is to be ascertained. In *Bainbridge* v. *Cream* no reasons are given, and that case is distinguishable by the fact that, by the terms of the will,

(*a*) Reported by H. B. HEMMING, Esq., Barrister-at-Law.

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escrow. But no such usage is stated. On the contrary, the thing sent for by the assured or his broker is, as I have already stated, clearly looked to as something complete before it is taken from the office, not as a document to be made perfect afterwards by some act of the assured.

On these grounds I have come to the conclusion, after much consideration, that the three learned Judges who were the majority giving their opinions to your Lordships were right; and so, that judgment ought to be for the Appellants.

Judgment reversed; and judgment given for the Plaintiff.
Lords' Journals, 16th July, 1867.

Attorneys for the Appellants: *Cotterill & Sons.*
Attorneys for the Respondent: *Roy & Cartwright.*

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July 22, 23, 25, 26, 29; *Aug.* 15.

RICHARD OAKES . . . . . APPELLANT;
AND
WILLIAM TURQUAND AND R. P. HARDING RESPONDENTS.

IN THE MATTER OF THE COMPANIES ACT, 1862; AND IN THE MATTER OF OVEREND, GURNEY, & Co., LIMITED.

W. PEEK, THE YOUNGER *v.* THE SAME.

Company—Contribution—Fraud—Winding-up.

Where a person has been, by the fraudulent misrepresentations of directors, or by their fraudulent concealment of facts, drawn into a contract to purchase shares in a company, the directors cannot enforce the contract against him, but he may rescind it. But he must do so within a reasonable time.

A contract induced by fraud is not void but voidable; and therefore though the persons who by their fraud induced it may not enforce it, other persons may, in consequence of it, acquire interests and rights, which they may enforce against the party who has been so induced to enter into it.

The Limited Liability Acts previous to 1862 do not destroy, but only restrict, the liability of a shareholder in a company formed under their provisions, and change the form of enforcing it.

The direct remedy of a creditor of an incorporated company is solely against the company, and not against its individual members as upon a contract with them. But though, as between the company and the member, the member might have a good legal or equitable defence to a call upon himself, he may be liable to contribute to the assets of the company required for the payment of the company's creditors.

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A member of a limited liability company which is wound up, resembles, with respect to creditors, a member of a company under the Acts of 1844, or a partner in a partnership which has become bankrupt. The only difference is as to the extent of the liability.

The *Companies Act* of 1862 did not introduce any rules or principles applicable to the acts or conduct of a shareholder in a company different from those which previously existed, but merely changed the form of proceeding so as to fit it to be applied to the principle of limited liability.

By that Act a contributory is a person who has agreed to become a member of the company, and whose name is upon the register.

Where a memorandum of association (which was registered) differed from the prospectus on which it professed to be founded, and on which, as setting forth the true objects of the association, *A.* had become a shareholder, though he, on discovering the difference, might have repudiated his shares, he could not after the failure of the company relieve himself from liability to contribute to the debts of the association, on the ground that he had been ignorant of something which, with proper diligence, he might have known.

It is the duty of a person taking shares in a company to use reasonable diligence in making himself acquainted with the provisions of the memorandum of association. He must take the consequences of neglect.

The certificate of the registrar under the *Companies Act*, 1862, is conclusive that all previous requisites have been complied with.

Semble, that at a meeting of shareholders called to agree to a voluntary winding up of a company, liquidators may be lawfully appointed, though no notice of the resolution to appoint them has been given.

A. applied, on the faith of statements in a prospectus, for shares in a limited liability company. They were allotted. His name was put on the register of shareholders. At the end of nine months the company failed. It was ordered to be wound up. *A.* then applied to have his name removed from the list of contributories:—

Held, affirming the decision of *Malins*, V.C., that it was properly placed there.

Henderson v. *The Royal British Bank* (7 E. & B. 356) adopted.

A variance between a prospectus and the memorandum of association of a company will not, necessarily and as of course, relieve a member of the company from his liability as a contributory.

Two persons, an original allottee of shares and a purchaser of shares, separately moved the Court to discharge an order declaring them contributories in the matter of a company which was being wound up. Their motions were refused with costs, and the Vice-Chancellor's order contained a direction requiring them (jointly in point of form) to pay costs to the liquidators:—

Held, that this form was erroneous; and that each must be made answerable for the costs incurred in his own petition.

THE first of these cases was an appeal against a decision of Vice-Chancellor *Malins*, by which the name of Mr. *Oakes* was kept on the register of members of the company called "*Overend, Gurney, & Co., Limited*," and he had been held liable to answer any call

that might be made upon him by the liquidators appointed to wind up the company.

The second was an appeal by Mr. *Peek* against a like decision, the only difference between the two cases themselves being, that Mr. *Oakes* was an original allottee of the shares in respect of which liability was fixed on him, while Mr. *Peek* had purchased his shares in the ordinary way.

Both the Appellants alleged, in substance, that the representations made by the directors of the company were false and fraudulent, and that in consequence of such false and fraudulent representations, and by means thereof, they had become the holders of the shares. They insisted, therefore, that they were, as a result of the imposition practised upon them, released from all liability to have their names kept on the list of members, and be made to contribute to the debts of the company. The company had begun business on the 1st of August, 1865, and stopped payment on the 10th of May, 1866. On the 11th of May Vice-Chancellor *Kindersley* made an order appointing, provisionally, Messrs. *Turquand* and *Harding* to be the official liquidators of the company. An extraordinary general meeting of the members of the company was called for the 11th of June, 1866, "to consider the position of the affairs of the company, and, if deemed expedient, to pass the following resolution:—'That the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same voluntarily.'" The meeting was held, and 363 shareholders, representing 30,193 shares, were present, and 623 shareholders, representing 26,312 shares, sent proxies. The resolution actually passed was this:—"That it has been proved to the satisfaction of this meeting that *Overend, Gurney, & Co., Limited,* cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same voluntarily, under the supervision of the Court, and that *William Turquand* and *Robert Palmer Harding,* of &c., be and are hereby appointed liquidators." Two shareholders (Mr. *Henry Kingscote* and Mr. *Henry Grissell*) and one depositor (Mr. *Charles Oppenheim*) were appointed a committee of supervision.

Petitions for winding up the company were presented, and were heard before Vice-Chancellor *Kindersley* on the 22nd of June, 1866,

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when the following order was made:—"That the voluntary winding up of the said *Overend, Gurney, & Co., Limited*, referred to in the affidavit of *William Bois*, filed on the 22nd of June, 1866, be continued, but subject to the supervision of this Court, and that *William Turquand* and *Robert Palmer Harding* be continued as liquidators, and that any of the proceedings under the said voluntary winding-up might be adopted, as the Judge should think fit."

The liquidators put the names of Mr. *Oakes* and of Mr. *Peek* on the list of contributories; and on the 20th of August, 1866, made a call of 10 per cent. on the members of the company in respect of the unpaid portion of the shares. Notice of motion to remove the names of these Appellants from the list, and to stay, as against them, all proceedings on the call, having been given, the motion was heard before Vice-Chancellor *Malins*, who, on the 9th of February and the 7th of March, 1867, made orders dismissing the motion, and directing that Mr. *Oakes* and Mr. *Peek* should pay the costs of the liquidators, and that the costs of Mr. *Oppenheim*, the depositor, who represented the creditors, should come out of the assets of the company. This appeal was brought against these orders.

The facts of the case necessary to raise the question of general liability were those above indicated. They have been so fully and so recently published in these Reports (1), and are so frequently mentioned by the noble and learned Lords in their judgments, that it has been deemed inexpedient to repeat them here. But a point was raised in this House as to the registration of the memorandum or articles of association, and as to that the facts were these:—The third article of the memorandum of association was in these terms: "The objects for which the company is established are—the receiving money on deposit, or by re-discount of bills, and the employment and investment of such money, and of the paid-up capital of the company in the discounting of bills, promissory notes, and other negotiable securities, and in making advances in loans, and investing in securities, and generally, the carrying on of the business of bill brokers and money dealers, as heretofore carried on by Messrs. *Overend, Gurney, & Co.*, at No. 65, *Lombard Street*, in the city of *London*; and, with a view to the above objects, the acquisition of such business upon terms to be agreed by the

(1) Law Rep. 3 Eq. 576.

directors, and the acquisition, whether by way of purchase or amalgamation, or otherwise, of such other business or businesses of a like character, and upon such terms, as the directors shall think expedient, and the doing of all *such* acts and things *as may, in the opinion of the directors, be* incidental or conducive to the attainment of the above objects."

On the 13th of July, 1865, Mr. *C. E. Jones*, the attesting witness to the memorandum of association, took it for registration to the Registrar of Joint Stock Companies. The registrar refused to receive it, unless the words marked above in italics were struck out. Mr. *Jones* consented, and they were struck out at once, without any communication being had with any other person. The memorandum was then registered.

Another point raised on the appeal was, that the Appellants ought not to have been ordered to pay the costs of the liquidators, especially not those of Mr. *Oppenheim*, as no notice of motion had been served on him, and also that the order to pay costs (which was in form an order on the Appellants jointly) was erroneous in that respect.

Mr. *Markham Giffard*, Q.C., and Mr. *Swanston*, for the Appellants:—

After very minutely stating the circumstances of the case, with a view to shew that the representations made by the projectors of the company, who constituted themselves its directors, were false and fraudulent, and were so within the knowledge of those persons, who carefully concealed this knowledge from the public, they contended that these circumstances put an end to the Appellants' liability. It was the duty of the promoters of a company to put those who were invited to be shareholders into a position to know the truth: *The Venezuela Company* v. *Kisch* (1), where the rule was laid down independently of any question of fraud in the concealment of facts. Even in *The Western Bank of Scotland* v. *Addie* (2), where the shareholder had received dividends and acted in the management of the concern, and so was held liable, it was declared that an action for deceit would, in a case of fraudulent representation, lie against the directors; and

(1) Law Rep. 2 H. L. 99. (2) Law Rep. 1 H. L. Sc. 145.

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though such action would not lie against the company in respect of the conduct of the directors, yet no rights would vest in the company as against the individuals thus defrauded. Statements so made in a prospectus as to produce a false impression, in consequence of which a contract is entered into, will not sustain that contract as a binding contract, even though such statements were not made with the wilful intention to deceive: *Smith* v. *The Reese River Mining Company* (1). When that case was before the Lords Justices, Lord *Cairns* expressly stated (2) that, "with regard to companies established under the Act of 1862, there is no contract whatever between a creditor of the company and a shareholder of the company. When the Legislature introduced the principle of limited liability it was absolutely necessary to give effect to that principle by setting up the company, and the company alone, as that with which creditors, or third persons, could contract." That opinion is decisive against the present claims. Here, too, the fraudulent intention could not be doubted; it was proved, not merely by the fact that the statements were in themselves untrue, but by the execution of the secret deed, which was intended to provide for a state of things carefully concealed from the public, and which was concealed from the public because if it had been disclosed not one person would have become a shareholder in the projected company. The shareholders had no means of testing the accuracy of the representations made to them, and their not having done so affords no answer to their claim for relief. Nor will the length of time that elapsed have that effect: *Rawlings* v. *Wickham* (3); *Bell's Case* (4).

The fact that this is a proceeding under a Winding-up Act makes no difference as to the rights of the parties. There may be a winding-up where there are no creditors. It does not preclude a party from disputing his liability: *Chapman and Barker's Case* (5). It is a mere substitute for the old proceedings under a dissolution of partnership. It settles the proportions of contribution among the parties who are really liable, but does nothing more.

Then it is said that even if the company could not enforce the

(1) Law Rep. 2 Eq. 264.
(2) Ibid. 2 Ch. Ap. 616.
(3) 1 Giff. 355; 3 De G. & J. 304.
(4) 25 Beav. 35.
(5) Law Rep. 3 Eq. 361.

contract against the shareholder on account of the misrepresentations by which he had been induced to enter into it, the creditors of the company are still entitled to the benefit of it. *Bright* v. *Hutton* (1) laid down the general proposition that a contributory was a person who had entered into a contract with the creditors. Without such contract he would not be liable. *The Bulch Mining Company's Case* (2) shews that a person who has been fraudulently induced to become a member of a company may, upon discovering the fraud, absolutely repudiate his contract, and relieve himself from his membership, and the creditors have no right against the deceived shareholder, for, as is there stated, "the creditors trust those who are liable as shareholders, those against whom the company is entitled to enforce the duty of shareholders." The company has no such right here, and the creditors of the company could not be in a better situation than the company itself, and consequently could not have any right to enforce against these Appellants "the duty of shareholders." [THE LORD CHANCELLOR:—The case here comes to this: The creditor finds the shareholder in the position in which the statute makes him a contributory. The creditor has then a right to come against him. At that time he has not avoided his liability; can he afterwards do so at his pleasure?] But before establishing any such right the creditor must shew that he became creditor in consequence of the credit he gave to the company, through the fact of the particular shareholder being a member of it. The doctrine of "holding out," as applicable to private partnerships, cannot apply to a case like this; besides, it would be contrary to the fact to introduce it here. There is not a particle of such proof in this case.

The principles acted on in *Cox* v. *Hickman* (3), which was the case of a private partnership, cannot properly be applied to a company, but even there it was declared that to make a man liable as a partner he must do some act by which a person is induced to give credit to the partnership. *Fox* v. *Clifton* (4), had previously announced the same rule, and in *Pott* v. *Eyton* (5), Lord Chief Justice *Tindal* founded his judgment on the circumstance that

(1) 3 H. L. C. 341.
(2) Law Rep. 2 Ex. 324.
(3) 8 H. L. C. 268, 304, *et seq.*
(4) 6 Bing. 776.
(5) 3 C. B. 32.

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"there was no evidence to shew that credit was in fact given to *Eyton*." Nothing was done here as in *Cockerell* v. *Aucompte* (1), or *Caldicott* v. *Griffiths* (2). No one living creature can shew, or even pretend to shew, that he gave credit to this company on account of Mr. *Oakes* or Mr. *Peek* belonging to it. The creditors here looked to the general company alone, and must recover from the company alone. The ordinary doctrine of liability upon taking shares in a company was applied in *Mixer's Case* (*Re Royal British Bank*) (3), overruling *Brockwell's Case* (4), but there the shareholder had executed the supplementary deed, and had received interest on his shares; besides which, *Mixer's Case* proceeded on different Acts of Parliament, namely, the Acts of 1848, 1849.

The cases of *Henderson* v. *The Royal British Bank* (5); *Daniell* v. *The Royal British Bank* (6); and *Powis* v. *Harding* (7), do not establish the liability here sought to be enforced. They depended on the special provisions of a particular statute, which gave an individual creditor a right to recover as against an individual shareholder. The provisions of the *Companies Act* of 1862 are entirely different. And even as to the former statute itself, and with regard to the same banking company, it was held in *Nicol's Case* (8) that shareholders who had been induced to become so by the fraud of the company, if they applied to be relieved as soon as they discovered the fraud, could not be placed on the list of contributories as generally liable for the debts of the company, but were so only when by their own acts, such as receiving dividends, and, though with the means of knowledge, not obtaining it, and not repudiating their shares, they had made themselves substantially members of the company. And *Clarke* v. *Dickson* (9) (though the decision there was adverse to the shareholder) distinctly recognises the principle that a person induced by fraud to enter into a contract under which he pays money, may rescind it at his option if he has not taken the benefit of the contract, and can restore the parties to the same situation in which they were when he entered into the contract.

(1) 2 C. B. (N.S.) 440.
(2) 8 Ex. 898.
(3) 4 De G. & J. 575.
(4) 4 Drew. 205.
(5) 7 E. & B. 356.
(6) 1 H. & N. 681.
(7) 1 C. B. (N.S.) 533.
(8) 3 De G. & J. 387, 421.
(9) E. B. & E. 148.

The prospectus and the memorandum here did not agree together. It was on the statements contained in the former that Mr. *Oakes* asked for his shares. The difference between the two documents avoided his contract. Those differences were very considerable, and if he had known the powers assumed by the directors under the memorandum or articles of association, he would not have taken the shares. *Ship's Case* (1), *Stewart's (The Vyksounsky Ironworks Company) Case* (2), and *Webster's Case* (3) (as to the same company), shew that the difference between these instruments entitles the Appellant to have his name removed from the list of shareholders.

Then the alteration in the memorandum itself put an end to all claim on the part of the company. The *Companies Act* of 1862 (25 & 26 Vict. c. 89), required the memorandum or articles of association, "signed by the subscribers to the memorandum," to be registered. That had not been done here. A memorandum was agreed to in a particular form—that form was subscribed as required by the statute, but before it was registered the form was altered by the act of the attesting witness without any assent on the part of the subscribers. There had, consequently, been no registration of the memorandum as required by the statute. This was not, therefore, in any sense an incorporated company within the terms of the statute. *Master* v. *Miller* (4), *Davidson* v. *Cooper* (5), shew that by the rules of law, independently of the statute, the alteration in the memorandum not having been assented to by the subscribers before the registration, it was wholly void: *Pigot's Case* (6) established that principle, and shewed that such a defence could be set up by plea of *non est factum*. *Doe* d. *Lewis* v. *Bingham* (7) appears to place on this rule the restriction, if the alterations were such as to affect the interest of the party objecting to them, but it admits the general rule itself. Here the alteration was such as materially to affect the interest of all parties.

There was no resolution properly passed for a voluntary winding up of the company. The resolution that did pass was not regular,

(1) 2 De G. J. & S. 544.
(2) Law Rep. 1 Ch. Ap. 574.
(3) Ibid. 2 Eq. 741.
(4) 4 T. R. 320.
(5) 11 M. & W. 778.
(6) 11 Co. Rep. 26.
(7) 4 B. & A. 672.

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for the notice which convened the meeting stated something very different from that which was adopted. There was, consequently, no valid voluntary winding up of the company, and the liquidators were improperly appointed: *In re The Stearic Acid Company* (1). If so, they had no right to make a call, and the order of the Vice-Chancellor, that they should be continued, could not make that valid which was originally and in itself invalid. The Vice-Chancellor's order was to continue the voluntary winding-up, and to continue the two persons appointed as liquidators. But there being no valid resolution for a voluntary winding-up, nor any valid appointment of liquidators, the Vice-Chancellor's order to continue both could not give force and validity to either of them. *The New Brunswick Company* v. *Boore* (2), is not applicable here, for the Appellant had not signed the memorandum of association, nor done any act as a member of the company. *Ward and Garfitt's Case* (3) was cited as to the power of the Court to alter the register.

Then, as to costs, there were two motions heard on two several notices. One order was made. Mr. *Oakes* and Mr. *Peek* were ordered, jointly and severally, to pay the costs. That was erroneous; there ought to have been separate orders, and each ought to have been ordered to pay his own costs. [THE LORD CHANCELLOR:— The House may make a proper order as to costs.]

Sir *R. Palmer*, Q.C., and Mr. *Mellish*, Q.C., for the Respondents, the liquidators:—

There are three questions in this case. First, whether on the original facts there ever was an equity of which Mr. *Oakes* would have been entitled to avail himself for the purpose of repudiating his shares in this company. On this question it was contended at much length that there had been no fraud practised and no misrepresentations put forth. Secondly, supposing there had been such an equity, if it had been taken advantage of in a proper time and manner, could it be so after the actual failure of the company? Thirdly, is it not clear by express enactment that this contract for shares entitled the creditors of the company, after the winding-up order was made, to come on these Appellants for contribution.

The Appellants here are liable to the creditors, no matter what

(1) 32 L. J. (Ch.) 784. (2) 3 H. & N. 249. (3) Law Rep. 4 Eq. 189.

equities they may have (if they have any), against the other shareholders. The party to be charged with liability must no doubt be a shareholder by the terms of the deed. That was so under the law which gave the creditor a remedy by *scire facias: Steward* v. *Greaves* (1); *Ness* v. *Angas* (2); and *Ness* v. *Armstrong* (3). That condition was fulfilled in this case. The Appellant was a shareholder by virtue of the deed of association, and the Act of 1862 makes him a shareholder as to creditors without reference to any equity as between himself and other shareholders. There was no necessity therefore to refer to the doctrine of "holding out" and the rules as to private partnerships. The fact of being a shareholder involved the consequence of being liable as a contributory. It was so in *Saunderson's Case* (4), though the transfer of the shares had not been fully completed; and in *Dodgson's Case* (5), where it was alleged that the shareholder had been deceived into taking the shares, it was held that though he might have a remedy against the directors, yet they were not so much the agents of the whole company as to affect its rights, and prevent the shareholder from being placed on the list of those who were to contribute to its assets. *Sutton's Case* (6) is to the same effect. Then came *Henderson* v. *The Royal British Bank* (7), *Daniell* v. *The Royal British Bank* (8), and *Powis* v. *Harding* (9). The first of these cases was important, and if not overruled must govern the present. It decided that, under the 7 & 8 Vict. c. 113, if there was an unsatisfied judgment against a joint stock bank, and it was sought to charge a shareholder therewith, he could not resist the claim on the ground that he was induced to become a shareholder by fraud on the part of the bank, and repudiated the contract as soon as he discovered the fraud, which was not until after the bank had stopped payment. The expressions used in the judgment of the Court, as delivered by Lord *Campbell*, were very strong. The opinion attributed to Lord *Cairns* in the *Reese River Mining Company's Case* (10), has been mistaken. His Lordship, in denying that under the Act of 1862 there was any contract between a creditor

(1) 10 M. & W. 711.
(2) 3 Ex. 805.
(3) 4 Ex. 21.
(4) 3 De G. & Sm. 66.
(5) Ibid. 85.
(6) 3 De G. & Sm. 264.
(7) 7 E. & B. 356.
(8) 1 H. & N. 681.
(9) 1 C. B. (N.S.) 533.
(10) Law Rep. 2 Ch. 604, 616.

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of the company and a shareholder of the company, did not mean to imply that the shareholder was freed from all liability to the creditor, but only to shew that under the Act of 1862 the liability did not assume the direct form of liability by contract. The contract may be with the company alone, but the shareholder is bound to the company to make good the engagements of the company, and is not protected against such an obligation farther than by the amount settled upon the principle of limited liability.

The Act of 1855 (18 & 19 Vict. c. 133) provided for the formation of limited liability companies, but kept them on the same footing as to general law as other companies. It abolished the proceeding by *scire facias* against the individual members, but it did not relieve them from all liability to creditors. It changed the form of enforcing their liability. The Act of the next year was similar to that afterwards passed in 1862, except that it omitted banking companies from its provisions. These were afterwards included by 21 & 22 Vict. c. 49. When new legislation was introduced the *scire facias* was not renewed, but the proceeding by winding up was adopted. The 18th, 23rd, 35th, 38th, 74th, and 82nd sections of the Act of 1862 (25 & 26 Vict. c. 89), are important clauses, on which the decision of this appeal must depend. They establish the liability of the shareholder to contribute to the debts of the company. The 18th section related to the incorporation of those who had subscribed the memorandum and of those who should afterwards become members, all of whom were to deemed incorporated by registration. The 23rd section answered the question who were to be members; they were, first, the subscribers to the memorandum, and next, "every other person who has agreed to become a member of the company, and whose name is entered on the register of members." The Appellants clearly come within that description. It is to be remarked that the 30th section prohibits any notice of a trust being received on the register, a prohibition, which shews the intention of making the register evidence of liability without allowing any question as to trust. In like manner, the 35th section shews that the register was intended to be conclusive evidence of the liability of the members. That section declares, that if the name of any person is improperly entered, or improperly omitted to be entered, on the

register, complaint may be made by the person aggrieved, by any member of the company, or by the company itself, to one of the Superior Courts, that the register may be rectified. Then, by the 38th section, in the event of a company formed under the Act being wound up, every present and past member shall be liable to contribute to the assets of the company to an amount sufficient for the payment of the debts and liabilities of the company. There is no restriction of any kind here. Membership is the test of liability. On what principle is it that the creditors of this company are to be deprived of the benefit of this enactment? The 48th section provided, that if the company should be reduced to less than seven members, the members who, knowing that fact, continued to carry on the business, should be "severally liable to the payment of the whole of the debts of the company contracted during such time." The 74th section referred in substance to the 38th, when it declared the meaning of "contributory" to be, "every person liable to contribute to the assets of a company under this Act, in the event of the same being wound up." The 82nd section allowed applications for winding-up to be made by any creditor or any contributory. All these provisions shewed the intention of the Legislature to be, that every person on the list of members of the company must be treated as a contributory liable to bear his share in satisfying the debts of the company, and proved that though the right of the creditor to get payment was to be enforced against the company, it was, through the company, to be enforced against every individual person who, as a member, had joined in carrying on the trade of the company.

The cases decided on the general law, independently of the statute, do not weaken the rights of the creditors. The case of *The Western Bank of Scotland* v. *Addie* (1), justifies the judgment of the Court below. In *Clarke* v. *Dickson* (2) Lord *Campbell* declared that a contract made on fraudulent representations was not void, but voidable, and that the only remedy of the person defrauded was by an action of deceit. And that decision had since been sustained in other Courts. He must submit to the consequences of his contract; he must take his remedy against those who misled him into making it. Lord *Campbell* repeated that opinion in

(1) Law Rep. 1 H. L. Sc. 145.

(2) E. B. & E. 148.

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Mixer's Case (1), and his opinion was adopted in this House in *The Western Bank of Scotland* v. *Addie* (2).

Many of the propositions contended for on the other side might be admitted, but they would not affect this case. *Huguenin* v. *Basely* (3) merely decided that persons claiming as volunteers under one who had obtained a benefit by fraud, could not enforce that benefit against the person defrauded. So, in *Smith* v. *The Reese River Mining Company* (4), and in *The Venezuela Company* v. *Kisch* (5), the contract made was not *ad idem* with that which was applied for, and the claim for relief was against the company, and before any order for winding up. In like manner, in *Ship's Case* (6), and in *Stewart's Case* (7), there was no contract. The same was the case in *Kennedy* v. *The Panama Railway Company*, recently decided (8). But in *Chapman and Barker's Case* (9), the party having been put on the register with his own assent, was held liable as a contributory to the claims of the creditors, though he might have a right to indemnity as against the company (10). The contract being not void, but voidable, the question is, whether that means void till affirmed, or valid till disaffirmed. It must be the latter: *Kingsford* v. *Merry* (11); *Pease* v. *Gloahec* (12). Then when must it be disaffirmed. The party seeking to avoid it must do so when he has the power to exercise such a right. He must exercise the right in due time: *White* v. *Garden* (13); *Deposit Life Assurance Company* v. *Ayscough* (14). Even then it will not have the effect of relating back to past transactions: *Stevenson* v. *Newnham* (15).

If a man thinks he has been deceived into joining a company, he cannot be relieved unless he proceeds for that purpose within a reasonable time: *Wilkinson's Case* (16); *Lawrence's Case* (17). Eighteen months were, in the first of these cases, held not to constitute a reasonable time. Nor will a much shorter time be

(1) 4 De G. & J. 575.
(2) Law Rep. 1 H. L. Sc. 145.
(3) 14 Ves. 273.
(4) Law Rep. 2 Eq. 264.
(5) 3 De G. J. & S. 122; Law Rep. 2 H. L. 99.
(6) 2 De G. J. & S. 544.
(7) Law Rep. 1 Ch. Ap. 574.
(8) Weekly Notes, 6 July, p. 209.
(9) Law Rep. 3 Eq. 361.
(10) See *Bargate* v. *Shortridge*, 5 H. L. C. 297.
(11) 1 H. & N. 503.
(12) Law Rep. 1 P. C. 219.
(13) 10 C. B. 919.
(14) 6 E. & B. 761.
(15) 13 C. B. 285, 302.
(16) Law Rep. 2 Ch. Ap. 536.
(17) Law Rep. 2 Ch. Ap. 412.

reasonable when there is a better opportunity of knowing the facts than existed in that case, which related to a bank established at *Madrid*. Here *Oakes* took the chance of profit, and not till he found that chance gone by, and the company a failure, did he repudiate the shares. *Elkington's Case* (1) shews, that under such circumstances he is not entitled to relief. The contract here was executed, and the cases of *Burnes* v. *Pennell* (2), *The National Exchange Company* v. *Drew* (3), and *New Brunswick Company* v. *Conybeare* (4), all shew, that to set aside such a contract a case of fraud must be distinctly proved as against the company, or those who represent the company. There is no such proof here. This last case is a strong authority for the Respondents, and it becomes more so as applied to the facts of the present case, if one word of Lord *Chelmsford's* judgment in it is altered. His Lordship speaks of an important "fact not misrepresented, but *concealed*." The expression "not communicated," would more exactly have applied to the circumstances there and here. [THE LORD CHANCELLOR agreed to the correction as to that case.]

As to Mr. *Peek*, it is clear from *Nicol's Case* (5), *Duranty's Case* (6), and *Ex parte Worth* (7), that all the objections which apply to Mr. *Oakes's* claim to relief, apply with even greater force to that of Mr. *Peek*. No false representations were made to him by the party with whom he contracted—the person from whom he purchased the shares.

As to the registration of the company. The certificate of registration is a conclusive answer to the objections now taken. Under the 7 & 8 Vict. c. 110, the certificate was held effectually to incorporate a company, although the deed registered was a defective deed: *The Barwen Iron Company* v. *Barnett* (8). In *Bird's Case* (9) it was held, expressly adopting the previous case, that the certificate of the registrar was, under the same statute, evidence of complete registration, although all the requisite provisions might not have been fully complied with. The alteration proposed by the registrar, and agreed to by the attesting witness, without the

(1) Law Rep. 2 Ch. Ap. 511.
(2) 2 H. L. C. 497.
(3) 2 Macq. Sc. Ap. 103.
(4) 9 H. L. C. 711–742.
(5) 3 De G. & J. 387.
(6) 26 Beav. 268.
(7) 4 Drew. 529.
(8) 8 C. B. 406.
(9) 1 Sim. (N.S.) 47.

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concurrence of the subscribers, is said to vitiate the deed, and *Pigot's Case* (1), was referred to. But that case, though it lays down the general proposition, that the alteration of a deed by strangers, and in a material part, will vitiate the deed, does not define the circumstances under which the alteration shall have that effect. Later cases have better explained that matter, and shew that the true ground of objection is, that the alteration has been made in the interest of the party making it: *Henfree* v. *Bromley* (2); *French* v. *Patton* (3); *Taylor* on Evidence (4); *Smith's* Leading Cases (5).

Then as to the order for winding up. The Court has power, under the 79th section of 25 & 26 Vict. c. 89, to make a compulsory order "whenever the company is unable to pay its debts," or "the Court is of opinion that it is just and equitable that the company should be wound up." The notice was sufficient, and the resolution adopted at the meeting was in conformity with it. The addition did not vitiate the resolution at the meeting; but even if it had done so, the Court had the power to direct the winding up of the company.

Mr. *Giffard* replied.

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15 Aug. THE LORD CHANCELLOR (Lord *Chelmsford*):—

My Lords, these are appeals from orders of Vice-Chancellor *Malins*, refusing to remove the names of the Appellants from the register of members of the company of *Overend, Gurney, & Co., Limited*, and from the list of contributories of the said company, and to rectify the register accordingly. The cases are of the greatest importance, and the decision of this House upon them will determine for the future the rights and liabilities of creditors and shareholders of a limited liability company upon its winding up under the *Companies Act*, 1862.

The Appellants dispute their liability to be placed upon the list of contributories, on the ground that they were induced to take shares in the company by false and fraudulent representations made by the directors in a prospectus issued by them on its for-

(1) 11 Co. Rep. 26. (2) 6 East, 310. (3) 9 East, 351.
(4) ss. 1617-18. (5) Ed. by Maude and Ch. 796, 831.

mation; that, consequently, their agreements to become shareholders in the company are not binding upon them, and that they never, by any subsequent act, affirmed them or acquiesced in their validity. The Appellant *Oakes* was an original allottee of his shares; the Appellant *Peek* purchased his in the market, either from an allottee, or from a purchaser from an allottee. In considering the case, I shall look at it throughout as if *Oakes* was the only Appellant, because if he fails to establish his right to be relieved from liability, *Peek* cannot possibly succeed.

The prospectus of the company was dated on the 12th of July, 1865. *Oakes*, on the 15th of July, applied for 100 shares, but twenty-five only were allotted to him. There can be no doubt that *Oakes* was induced by the prospectus to take his shares; and, therefore, the first question to be considered is, whether, as he alleges, the representations it contained were false and fraudulent.

The company was formed, as the prospectus states, "for the purpose of carrying into effect an arrangement for the purchase, from *Overend, Gurney, & Co.*, of their long-established business of bill brokers and money dealers." In order to form an opinion of the true character of the statements made in the prospectus, it is necessary to know what was the state of the firm of *Overend, Gurney, & Co.*, at the time when it was proposed to convert their partnership into a joint stock company. At this period they stood high in the commercial world. Their dealings and transactions were known to be of a most extensive description, and they were supposed to be carrying on their business upon a safe and sure basis. But it appears from the affirmation of Mr. *John Henry Gurney*, one of the firm, that, for some time before, the partners managing the business had been making considerable advances of an exceptional character to various parties and companies, upon securities of a speculative and uncertain nature, and that, "on a close examination which was undertaken prior to the transfer of the business to the company of '*Overend, Gurney, & Co., Limited*,' it was found that the doubtful advances amounted to £4,199,000, of which sum it was estimated that £1,082,000 only would be realized, leaving the sum of £3,117,000 to be provided."

From the same source of information we learn, that from the year 1860 the total result of all the operations of the firm had

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been a loss of about £500,000 a year. Mr. *Gurney* described the business carried on by *Overend, Gurney, & Co.* as having been of an exceedingly extensive and profitable nature, and stated that for the five years ending on the 31st December, 1860, after allowing interest upon capital, and upon the balances to the credit of the partners, the profits divided amongst the several partners averaged upwards of £190,000 per annum; but that, subsequent to that period, the actual net profits had not been ascertained or appropriated, but were reserved to meet the losses consequent upon the exceptional business before mentioned. From this statement it might be supposed that a different course was adopted with respect to the profits of the business after 1860 from that which had been pursued previously. But upon the cross-examination of Mr. *Gurney* he proved, that in 1855, and every succeeding year down to 1860, portions of the balances had always been employed in writing off losses.

Such was the condition of the partnership of *Overend, Gurney, & Co.*, at the time when it was proposed to turn it into a joint stock company.

The partners in the firm, who were to become directors of the new company, were, of course, acquainted with all these particulars, and the other persons, whose names appear on the prospectus as directors, must have been fully informed of them.

Under these circumstances the prospectus, which the Appellant alleges to be false and fraudulent, was issued. It is headed, in very large characters, with a name likely to attract attention and inspire confidence, "*Overend, Gurney, & Co., Limited,*" and describes the intended capital of the company to be £5,000,000, in 100,000 shares of £50 each, of which it is said it is not intended to call up more than £15 per share. After describing the purpose for which the company was formed, the prospectus proceeds: "the consideration for the goodwill being £500,000, one-half being paid in cash and the remainder in shares in the company, with £15 per share credited thereon, terms which, in the opinion of the directors, cannot fail to ensure a highly remunerative return to the shareholders."

It is said that everything which is stated in the prospectus is literally true, and so it is. But the objection to it is, not that it does not state the truth as far as it goes, but that it conceals most

material facts with which the public ought to have been made acquainted, the very concealment of which gives to the truth which is told the character of falsehood. If the real circumstances of the firm of *Overend, Gurney, & Co.* had been disclosed, it is not very probable that any company founded upon it would have been formed. Indeed, it was admitted in the course of the argument that if the true position of the affairs of *Overend, Gurney, & Co.* had been published it would have entailed the ruin of the old firm, and would have been utterly prohibitory of the formation of the new. To which the only answer which fairly suggests itself is, "Then no company ought ever to have been attempted, because it was only possible to entice persons to become shareholders by improper concealment of facts."

From the memorandum and articles of association and deed of covenant in relation to the business, to which applicants for shares were referred in the prospectus, nothing unfavourable to the prospects of the new company could be gathered. But from a deed of arrangement contemporaneous with the deed of covenant, the existence of which was not made known in the prospectus, the real conditions of the transfer of the business of *Overend, Gurney, & Co.* appear. It is true the prospectus states that the vendors guaranteed the company against any loss on the assets and liabilities transferred, which, it is said, was sufficient to inform, or, at least, to caution, persons disposed to take shares that there might be unsatisfied liabilities of *Overend, Gurney, & Co.* to be provided for. But without dwelling on the postponement of the full effect of the guarantie for three years by the private deed of arrangement, the statement that £500,000 were given as the consideration for the goodwill was calculated not merely to lull suspicion as to the state of the affairs of *Overend, Gurney, & Co.*, but to attract persons to join the proposed company. No one can for a moment suppose that if it had been possible to take the goodwill of *Overend, Gurney, & Co.'s* business into the market with a disclosure of all the circumstances attending the business, it would have realized a single shilling; but the parties, some of whom were both vendors and purchasers, arranged amongst themselves for the payment of a sum for this unmarketable goodwill, the half of which must have come out of the moneys of the shareholders.

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It is said that the directors believed *bonâ fide* that the company would be a profitable concern, and upon the strength of that opinion they themselves took shares, and never parted with those shares, although at one time they were at a premium.

With respect to this proof of the sincerity of their belief, it must be observed that they were each of them compelled to possess 200 shares as the qualification of a director under the articles of association. I entertain no doubt, however, that the directors were honestly and sincerely of opinion that if they could procure additional capital, and could carry on some of the business of *Overend, Gurney, & Co.* on a healthier system, the company would succeed. But as the experiment was to be made with other people's money as well as with their own, I think they were bound to furnish to others the information which they possessed themselves, and so enable others to form a competent judgment as to the prudence of embarking in the new concern.

If this had been a case between *Oakes* and the company, in which he sought to be relieved from his contract, as in *Venezuela Railway Company* v. *Kisch* (1), or the company had been suing him for calls, as in *The Bwlch-y-Plwm Lead Mining Company* v. *Baynes* (2), he would have succeeded in the one case, and the company would have failed in the other, on the ground—which, I venture to think, was correctly laid down in the recent case of *The Western Bank of Scotland* v. *Addie* (3) in this House—that "where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations" (and I would here add, "by fraudulent concealment") "of the directors, and the directors seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agent."

It is quite clear, therefore, that *Oakes* might originally have disaffirmed that contract, and divested himself of his shares, and that he never did any act to affirm it, nor was aware of the true state of the firm of *Overend, Gurney, & Co.* at the time of the

(1) Law Rep. 2 H. L. 99. (2) Law Rep. 2 Ex. 324.
(3) Law Rep. 1 H. L Sc. 145.

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formation of the new company, nor until after the failure. No dividend was paid to the shareholders, and no general meeting was called, the articles of association prescribing that the first general meeting should be held not more than twelve, nor less than ten months from the day of incorporation, and the company having come to an end before the twelve or even the ten months had expired.

Such was the position of *Oakes* when the order for winding up the company was made on the 22nd of June, 1866. His name being upon the register of shareholders, was placed (as a matter of course) by the liquidators upon the list of contributories. A motion was made before Vice-Chancellor *Malins* to remove his name from the list, when His Honour refused to make any order, and from that refusal the present appeal is brought.

The question, as I have already said, is one of the highest importance, involving present pecuniary interests to an enormous extent, and calling for a final decision upon the relation to each other of creditors and shareholders of limited companies in every case of a winding-up under the *Companies Act*, 1862.

On the part of the creditors, it is said that every person whose name is found upon the register at the time when the order for winding up is made is a shareholder, and liable to contribute towards the payment of the debts of the company to the extent of the sums due upon his shares, unless he can prove that his name was put upon the register without his consent.

On the part of the shareholders it is contended that a person who has been induced by fraud to enter into a contract to take shares, and whose name is afterwards placed upon the register, never becomes a shareholder, because his agreement, being obtained by fraud, is of no validity. In support of this proposition, the words of my noble and learned friend (Lord *Cranworth*) in *The Venezuela Railway Company* v. *Kisch* (1), were cited, where he said "The case of the Respondent is, that he never was a member, for that he was induced to take shares by fraudulent representations, which entitle him to repudiate and treat as null all which he was induced to do." My noble and learned friend never meant to deny the distinction between void and voidable contracts, or to say that

(1) Law Rep. 2 H. L. 99.

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an agreement obtained by fraud is in no case any agreement at all. His language must be understood in its application to the case before him, in which the Respondent seeking relief from the contract into which he had been drawn by fraud, was entitled, if he chose to repudiate it, to treat it as null and void *ab initio*, and therefore to say that he never was a member.

The distinction between void and voidable contracts is one which will be found very necessary to be borne in mind when we come to consider the words of the *Companies Act*, 1862, upon which the question of *Oakes's* liability will ultimately turn. It is a settled rule of law, as Mr. Justice *Crompton* said, in *Clarke* v. *Dickson* (1): "that a contract induced by fraud is not void, but voidable only at the option of the party defrauded." If it were otherwise, if a contract induced by fraud were void, there would be an end of the question in this case, because a contract void in itself can have no valid beginning, and *Oakes* never would have become a shareholder of the company.

Before considering the provisions of the *Companies Act*, 1862, it will be necessary to advert to some of the previous Acts in *pari materiâ*, because it was pressed upon us in argument that, whatever may have been the decisions under former Acts, they are inapplicable to the case of companies with limited liability. A distinction between the *Companies Act*, 1862, and former Acts was suggested by Lord *Cairns* in the case of *The Reese River Mining Company, Ex parte J. Smith* (2), where His Lordship says: "There is, with regard to companies established under the Act of 1862, no contract whatever between a creditor and a shareholder in the company. The contract is between the creditor and the company, and when the Legislature introduced the principle of limited liability, it was absolutely necessary to give effect to that principle by setting up the company, and the company alone, as that with which creditors, or third persons, could contract."

The first Act, however, which enabled joint stock companies to limit their liability is the 18 & 19 Vict. c. 133 (1855), and that Act, by the 7th section, gave the same remedy, by execution against the shareholders, to the extent of the unpaid portions of their shares in the capital of the company, as creditors could use

(1) E. B. & E. 148. (2) Law Rep. 2 Eq. 264.

against shareholders of companies with unlimited liability, under the former Acts of 1844, 1848, and 1849.

The first Act which enabled a creditor to become a party to the winding-up of a company, whether with limited or unlimited liability, was the 19 & 20 Vict. c. 47, s. 69, and by the 61st section of this Act, in the event of a company being wound up, the existing shareholders were to be liable to contribute to the assets of the company to an amount sufficient to pay the debts of the company, and the costs, charges, and expenses of winding up the same, with this qualification, that if the company was limited no contribution should be required from any shareholder exceeding the amount (if any) unpaid on the shares held by him. This Act was followed by the 20 & 21 Vict. c. 77, which, by the 1st section, enacted that where an order was made for the winding-up of a company the Judge, in all cases in which it appeared expedient, and for the benefit of all parties interested, might call upon the creditors to appoint a person to represent them, and after the appointment of such representative the creditors were to be deemed parties to the winding-up.

These, and the subsequent Act of the 21 & 22 Vict. c. 60, contained all the provisions with respect to the rights of creditors against shareholders prior to the *Companies Act*, 1862. As I understand these Acts, they merely changed the remedy which the creditor previously possessed of issuing execution against the shareholder (which, as I have shewn, was continued to him when companies with limited liability were first established), into a right to obtain satisfaction of his debt by means of forced contributions, either by compelling a winding up of the company, or by becoming a party to a winding-up which had been already ordered. They do not appear to me to have changed the right of the creditor on the one hand, or the liability of the shareholder on the other; and therefore, I cannot adopt the argument of the counsel for the Appellant, that the cases which were decided upon the Acts prior to 1856 must be considered as inapplicable.

The case of *Henderson* v. *The Royal British Bank* (1), upon which, in his judgment, the Vice-Chancellor *Malins* placed great reliance, seems to me, unless the law has been altered by the

(1) 7 E. & B. 356.

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Companies Act, 1862, to be an authority of great weight against the Appellant. Lord *Campbell*, in describing the attempt of a shareholder to relieve himself from liability under similar circumstances to those in which the Appellant is placed, expressed his opinion in the strongest language. He said: "It would be monstrous to say, he having become a partner and a shareholder, and having held himself out to the world as such, and having so remained until the concern stopped payment, could by repudiating the shares on the ground that he had been defrauded, make himself no longer a shareholder, and thus get rid of his liability to the creditors of the bank, who had given credit to it on the faith that he was a shareholder." The decision in this case was considered so satisfactory that it was followed by the Court of Common Pleas in *Dossett* v. *Harding* (1), and by the Court of Exchequer in *Daniell* v. *The Official Manager of the Royal British Bank* (2), without anything more being said in either Court than an expression of acquiescence in the judgment.

The case of *Henderson* v. *The Royal British Bank*, being supported by such a weight of authority, will materially influence my opinion upon the present case, unless I can be satisfied that the *Companies Act*, 1862, has placed creditor and shareholders in a different relation to each other than that in which they previously stood.

I have shewn that if it was necessary to give effect to the principle of limited liability by setting up the company alone as that with which third persons could contract, this was done the very year after companies with limited liability were established, by taking away the *scire facias* of creditors, and enabling them to intervene in the winding up of a company. This power of petitioning for the winding up of a company was not first conferred upon, but merely continued to, creditors by the 82nd section of the Act of 1862.

The real question in this appeal is, whether the *Companies Act* of 1862 has placed a shareholder on such a different footing from that in which he stood at the time of the decision in *Henderson* v. *The Royal British Bank*, that his name being upon the register when the order for winding up was made, it is competent to him

(1) 1 C. B. (N.S.) 524; *Powis* v. *Harding*, Ibid. 533. (2) 1 H. & N. 681.

to defend himself against his *primâ facie* liability to contribute, by alleging and proving that he was induced by fraud to become a shareholder. There are very few sections of the Act which it will be necessary to consider.

By the 18th section, upon the registration of the memorandum of association and of the articles of association, the registrar shall certify that the company is incorporated, and, in the case of a limited company, that the company is limited, the subscribers of the memorandum of association, together with such other persons as may from time to time become members of the company, shall thereupon be a body corporate, &c., but with such liability on the part of the members to contribute to the assets of the company in the event of the same being wound up as is hereinafter mentioned.

The 38th section is here referred to, which, amongst the qualifications of the liabilities of contributories, provides that, in the case of a company limited by shares, no contribution shall be required from any member exceeding the amount (if any) unpaid on the shares in respect of which he is liable as a present or past member.

By the 23rd section, every person who has agreed to become a member of the company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company.

And by sect. 74, the term "contributory" shall mean every person liable to contribute to the assets of a company under this Act, in the event of the same being wound up.

The result of these provisions of the Act is, that a contributory is a person who has agreed to become a member of the company, and whose name is upon the register.

Did the Appellant then agree to become a member? His counsel answer this question in the negative; because they say that a person who is induced by fraud to enter into an agreement cannot be said to have agreed; the word "agreed" meaning having entered into a binding agreement. But this is a fallacy. The consent which binds the will and constitutes the agreement is totally different from the motive and inducement which led to the consent. An agreement induced by fraud is certainly, in one sense, not a binding agreement, as it is entirely at the

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option of the person defrauded whether he will be bound by it or not. In the present case, if the company formed on the basis of the partnership of *Overend, Gurney, & Co.*, had realized the expectations held out by the prospectus, the Appellant would probably have retained his shares, as he would have had an undoubted right to do. But when the order for winding up came, and found him with the shares in his possession, and his name upon the register, the agreement was a subsisting one. How could it then be said that he was not a person who had agreed to become a member? To hold otherwise would be to disregard the long and well-established distinction between void and voidable contracts.

It was said by the counsel for the Appellant that the *Companies Act*, 1862, was to be regarded merely as adjusting the rights of the shareholders *inter se*, and that, as the liquidators represented the company, the liability of the Appellant must be determined as between himself and the company, and not as respects creditors with whom he never contracted. It is true that there was no contract between the creditor and the shareholders, and that the creditor probably never thought of the shareholders in his dealings with the company. But he must be taken to have known what his rights were under the Act, and that he had the security of all the persons whose names were to be found upon the register, and who had agreed to become shareholders. The liability of the shareholders is not under a contract with the creditors, but it is a statutable liability under which the creditors have a right which attaches upon the shareholders to compel them to contribute to the extent of their shares towards the payment of the debts of the company.

It is not the mere fact of the name appearing upon the register which makes a person liable as a member of the company. If he has not agreed to become a member he cannot be made a contributory. This was the ground of decision in some of the cases which were cited to shew that the order for winding up did not preclude the Appellant from disputing his liability. As Vice-Chancellor *Wood* said, in *Chapman and Barker's Case* (1): "If the mere placing the name upon the register, rightly or wrongly, is to

(1) Law Rep. 3 Eq. 365.

give the creditors a right to proceed against the individual, any one of us now in this Court might find himself upon the register of some company, and liable to its creditors. It is an absurdity to say that I am to be liable because directors choose to put me down upon the register as a shareholder."

The want of consent was the ground on which *Ship's Case* (1) was decided. There the prospectus of a proposed company, described as a finance bank, stated several objects, some of which went beyond ordinary banking business. *Ship*, on the footing of the prospectus, applied, in May, 1864, for shares, and paid a deposit. On the 1st of June the company was registered, with a memorandum of association defining its objects, which went considerably beyond the objects mentioned in the prospectus, and on the same day the directors sent *Ship* a letter of allotment of his shares. In the December following the company failed. Upon an application by *Ship* to have his name removed from the register, on the ground that he never had agreed to become a shareholder in the company with these extended objects, and upon his oath that he never had notice of the extension of the objects of the company beyond those named in the prospectus, Vice-Chancellor *Wood* removed his name from the register, and his decision was afterwards affirmed by the Lords Justices. This case was followed by *Webster's Case* (2) and by *Stewart's Case* (3) both of which related to the same company, the *Russian (Vyksounsky) Ironworks Company*, where the objects of the company, as stated in the memorandum and articles of association, were more extensive than those stated in the prospectus, and in both of which cases the parties who were induced by the prospectus to become shareholders were removed from the list of contributories.

I confess that these decisions are not at all satisfactory to my mind. I think that persons who have taken shares in a company are bound to make themselves acquainted with the memorandum of association, which is the basis upon which the company is established. If they fail to do so, and the objects of the company are extended beyond those described in the prospectus (a fact which may be easily ascertained), the persons who have so taken

(1) 2 De G. J. & S. 544. (2) Law Rep. 2 Eq. 741.
(3) Law Rep. 1 Ch. 574.

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shares on the faith of the prospectus ought, in my opinion, to be held to be bound by acquiescence. In *Ship's Case* the Judges partly proceeded on the oath of the party that he never had notice of the extension of the objects of the company. However true this may be, it depends entirely upon the party's own assertion; and the answer to it is, "You might have made yourself acquainted with the proceedings of the company, and ought to have done so." Accordingly, in subsequent cases connected with the *Russian Iron Company, Lawrence's Case* (1), and *Kincaid's Case* (2), and in *Wilkinson's Case, In re Madrid Bank* (3), in which last case also there was a material variance between the prospectus and the memorandum of association, it was held that persons were bound, within a reasonable time after the allotment of shares, to inform themselves of the nature of the documents of title under which they and the company were proceeding to carry on trade, and in all these cases the parties were retained on the list of contributories.

In a still later case, that of *Ex parte Peel, In re Barned's Banking Company* (4), Lord *Cairns* expressed an opinion on the subject to which I entirely subscribe. He said: "It is the bounden duty of a person to ascertain, at the earliest practicable moment, what is the charter or title deed under which the company in which he has agreed to become a shareholder is carrying on business. I think he ought to be held bound to look to the memorandum and articles of association before he applies for shares. But even when the memorandum and articles of association are not in existence at the time, I think, at the very latest, when he receives his allotment of shares he ought to satisfy himself that there is nothing in the memorandum or articles of association to which he desires to make any objection." This appears to me to lay down a clear and precise rule, which will render unnecessary the consideration in each case whether a reasonable time has or has not elapsed from which acquiescence may be assumed, a question which has occasioned some variety, and apparent, if not actual, discrepancy in the decisions.

These views, thus expressed by Lord *Cairns*, in some degree apply to the case of the *Reese River Silver Mining Company* (5),

(1) Law Rep. 2 Ch. 412. (2) Law Rep. 2 Ch. 426. (3) Law Rep. 2 Ch. 536.
(4) Not reported. (5) Law Rep. 2 Eq. 264.

which appears to me not to have been well decided upon another ground. There is no doubt that *Smith* had been led to take shares in the company by the false representations of the flourishing condition of the mines contained in the prospectus. When the order for winding up the company was made, his name was upon the register. It is true that he had filed his bill against the company to be relieved of his shares, but he still held them, and the winding-up order found him in the condition of a person who had agreed to become a member, and whose name was upon the register, and who, therefore, exactly answered the description of a contributory contained in the *Companies Act*, 1862.

In the conclusion at which I have arrived in this case I rely altogether upon the words of the Act. I do not take into consideration the principle which has governed many decisions, as to which of two innocent persons is to suffer; but I cannot help remarking upon the singular state of things which would result from relieving the Appellant from his liability. The same right of relief established by him would belong to all the allottees of shares who had retained them in their possession; and in the winding up of this company the only contributories to the debts of the company would be the directors and those unfortunate shareholders who had purchased their shares in the market. So that although the shareholders who had suffered by the fraud of the directors might recover from them the full amount of the damages sustained, the creditors could only make the directors of this limited liability company contribute towards payment of their debts to the extent of their shares.

Upon the principal and important question in this case I entirely agree with the decision of Vice-Chancellor *Malins*.

But after His Honour had given judgment in this case, and even after his decree was enrolled, the Appellants made a fresh motion to have their names removed from the list of contributories upon grounds which were clearly open to them upon the original motion.

Two of them, indeed, are preliminary objections, which, if well founded, would have superseded all farther argument. For if there was no valid winding-up order, and no liquidators were duly appointed, there could be no list of contributories upon which the Appellant's names could be placed, and the whole of the proceed-

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ings must have fallen to the ground. The Vice-Chancellor, therefore, rightly refused to entertain the motion; but as the objections have been argued before your Lordships, it will be proper to consider them.

The first of them strikes at the root of the company's existence, for it asserts that there was no memorandum of association subscribed by seven persons, and, consequently, that there never was any incorporated company. This, as I understand, is founded upon an alleged variance between the prospectus and the memorandum of association, which is made the ground of a separate objection. The short answer to this objection is found in the *Companies Act*, 1862, which, in the 6th section, provides that any seven or more persons may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of the Act in respect of registration, form an incorporated company. And, by the 18th section, upon the registration of the memorandum of association, &c., the registrar shall certify under his hand that the company is incorporated, and a certificate of the incorporation of the company given by the registrar shall be conclusive evidence that all the requisitions of the Act in respect of registration have been complied with. I think the certificate prevents all recurrence to prior matters essential to registration, amongst which is the subscription of a memorandum of association by seven persons, and that it is conclusive in this case, that all previous requisites had been complied with.

The next objection to be considered is, that the official liquidators were not duly appointed. The ground of this objection is, that in the case of a voluntary winding-up, the appointment of liquidators can be made only at an extraordinary general meeting, the notice of which must specify the objects for which it is called, and that the notice issued by the directors omitted all mention of the intention to appoint liquidators. That notice, which was intituled "In the Matter of the *Companies Act*, 1862, as well as of *Overend, Gurney, & Co., Limited*," stated that the meeting would be held "to consider the position of the affairs of the company, and, if deemed expedient, to pass the following resolution: 'That the company cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same voluntarily.'"

The 133rd section of the *Companies Act*, 1862 (under which the notice was given), enacts that certain consequences shall ensue upon the voluntary winding up of a company, and amongst them that "liquidators shall be appointed for the purpose of winding up the affairs of the company, and distributing the property." The necessary consequence of a voluntary winding-up being the appointment of liquidators, I am disposed to think that they may be appointed at the same general meeting at which the resolution for voluntarily winding up is passed, without special notice.

But if it is doubtful whether liquidators were duly appointed at the extraordinary general meeting of the company, I think the Respondents may rely upon the appointments made by the orders of Vice-Chancellor *Kindersley*.

On the 11th of May, 1866, the Vice-Chancellor made an order, under the 85th section of the *Companies Act*, 1862, appointing, provisionally, Messrs. *Turquand & Harding*, to be the official liquidators of the estate and effects of the company. At the extraordinary general meeting, held on the 11th of June, 1866, it was resolved that the same two gentlemen should be appointed liquidators. If this was not a valid appointment, then as by the 141st section of the Act, "if from any cause whatever there is no liquidator acting in the case of a voluntary winding-up, the Court may, on the application of a contributory, appoint a liquidator or liquidators;" it was competent to Vice-Chancellor *Kindersley* to make an appointment. This he did by his order of the 22nd of June, 1866, for although that order is in terms "that *Turquand* and *Harding* be continued liquidators," it would be mere trifling to hold that, if necessary, it may not be held to be an original appointment.

The last objection is founded upon an alleged variance between the prospectus and the memorandum of association. It is said by the Appellant, that the proposal in the prospectus is limited to carrying on the business of *Overend, Gurney, & Co.;* but that the memorandum of the association extends to "the acquisition, whether by way of purchase, or amalgamation, or otherwise, of such other business or businesses of a like character, and upon such terms as the directors shall think expedient." And he contends, upon the authority of *Ship's Case*, that this variance

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releases him from the obligation of his contract. His excuse for not bringing this forward upon the original argument is, that until the first order of Vice-Chancellor *Malins*, made on the 9th of February, 1867, he believed that the memorandum and articles of association of the company were strictly confined to the company mentioned in the prospectus. But although the Appellant might have remained ignorant of the variance between the prospectus and the memorandum of association until the time that he mentions, it must have been previously known to his solicitor, and the memorandum of association is actually made an exhibit to an affidavit sworn by the Appellant's accountant on the 2nd of November, 1866. There is, therefore, no excuse for keeping back this objection at the time of the original hearing.

But the cases which have been mentioned in the course of my observations upon the principal question in this case will satisfy your Lordships that this objection ought not to prevail. There may be some doubt whether the terms of the memorandum of association are such a departure from the object put forward in the prospectus as to constitute a different company. But be that as it may, the Appellant had an opportunity during ten months of inspecting the memorandum of association, of which he was bound to avail himself; and his voluntary ignorance upon the subject until the winding-up order came precludes him from raising the objection.

It only remains to observe that all that has been said with respect to *Oakes* applies with greater force to *Peek*, even if his situation as a purchaser of shares in the market did not preclude him from most of the objections which have been raised in *Oakes's Case.*

In my opinion, my Lords, the decree of the Vice-Chancellor ought to be affirmed, but with a variation as to the costs, which must be borne by each of the Appellants in respect of his own case. I submit to your Lordships that these appeals ought to be dismissed with costs.

LORD CRANWORTH:—

My Lords, the Appellant, Mr. *Oakes*, in order to sustain his appeal, must make out two propositions. He must satisfy the

House, first, that he was induced to take his shares in *Overend, Gurney, & Co., Limited*, by the fraud of the company, or of those for whom the company became responsible; and, secondly, if that is made out, that he ought not to be retained on the list of contributories. The first question is one of fact, and its determination, however important to the parties concerned, is of no general interest. The other question is of very extensive consequence in the mercantile world. It is of the utmost importance that persons dealing with joint stock companies should be in no doubt as to who are the persons to whom they are entitled to look as liable to perform the obligations and pay the debts of the partnership.

I shall proceed at once to consider this second question—to determine what are the relative rights of Mr. *Oakes* and the creditors, and for this purpose shall assume it to be true that he was induced to take shares by the fraud of the company, or of those for whom the company became responsible. There is no doubt that the direct remedy of a creditor is solely against the incorporated company. He has no dealing with any individual shareholder, and if he is driven to bring an action to enforce any right he may have acquired, he must sue the company, and not any of the members of whom it is composed. This being so, the argument of the Appellant is, that it is only to the assets of the company that the creditor can resort, and so that the only question is, of what those assets consist. This question, he contends, so far as the assets consist of money to be recovered by legal process against other persons, whether shareholders or not, can only be solved by ascertaining what rights the company has against those other persons. If in any proceeding by the company instituted for the purpose of recovering money from any person, that person has a valid defence, whether legal or equitable, the Appellant contends that the sum claimed from him does not form part of the assets of the company. These assets, he says, consist solely of property in the actual possession of the company, or which the company can recover by means of legal proceedings. In this case the Appellant contends that he was induced to become a shareholder by means of a fraud which entitles him to repudiate the status of shareholder, and to say, as between himself and the company, that he never held a share. And if he can say this against the company, then

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the Appellant contends he can say it against all the world, for his liability is a liability to the company and to no one else.

But it must be borne in mind that a company formed under the statutes of 1862 is not a mere common law corporation; its rights and liabilities depend, in great measure, on statutable provisions; and in order fully to understand and interpret them we must consider not merely the enactments of the *Companies Act*, 1862, under which the firm of *Overend, Gurney, & Co., Limited*, was incorporated, but also the other Acts previously passed in *pari materia*. When it became the habit and interest of persons engaged in commerce to unite in great numbers for carrying on any particular trade, it soon became evident that the ordinary provisions of the laws of this country were ill adapted to the business of such bodies. It is a general principle of mercantile law that when two or more persons are associated in partnership for carrying on a trade every partner can bind his co-partners in all contracts made in the ordinary course of the business. But where a hundred persons or upwards are engaged in any particular trade to be managed by directors acting for the whole body, that principle plainly became very inconvenient in its application. So, again, it was a principle of our Courts that in any proceeding by or against a partnership, all the partners must either, as Plaintiffs or Defendants, be made parties to the proceeding. But when numerous members of a partnership, to the extent of many hundreds of persons, were concerned as partners, this rule would, if adhered to, have made litigation practically impossible, and would often have amounted to a denial of justice.

To meet these and many other difficulties arising from the same or similar causes, the Legislature has from time to time interfered, the last general Act on the subject being the *Companies Act*, 1862, under which *Overend, Gurney, & Co.*, became incorporated. I have already observed, that in order to understand the true effect of that statute it is necessary to consider some of those which preceded it. The first general statute to which I need refer is the *Banking Act*, 7 Geo. 4, c. 46. Before the passing of that Act it was not lawful for more than six persons to be united together as partners in carrying on the business of bankers. This restriction was removed by that statute as to banking partnerships carrying on business at

a distance of more than sixty-five miles from *London*. The Act provides that the company shall file annually at the Stamp Office a list of all the partners, open to general inspection. And in order to make it possible for such companies, the number of whose partners was unlimited, to maintain and defend suits instituted by and against them, they were bound to appoint a public officer, who, in all disputes between the company and third persons, should represent the company—an officer by whom the company might sue and be sued. Any creditor, or other person, having a demand on the company might proceed against the public officer, and on recovering judgment against him might issue execution against any member of the company, or any person who had ceased for not more than three years to be a member, but who was a member when the contract recovered on was entered into. Companies trading under the provisions of this Act were not incorporated. They were mere associations of individuals trading in partnership, but with several important statutable incidents connected with them. This Act was confined to banking partnerships. No general Act relating to partnerships in any other business was passed until the year 1844, although numerous private Acts had before that time been obtained by persons engaged in speculations requiring capital beyond what could be supplied from private resources, incorporating them, and introducing regulations for the benefit of creditors and other persons dealing with them.

In 1844 the Legislature passed the 7 & 8 Vict. c. 110, being the first general joint stock company Act. The provisions of that Act material for the question now before us, were as follows:—It was declared to apply, with some exceptions, to all companies the capital of which was divided into shares transferable without the consent of all the other shareholders. The persons intending to become shareholders were obliged to execute a deed stating the nature and particulars of the proposed business. A public office was appointed for keeping a register of, amongst other things, the name of every projected company; a statement of the nature of its intended business; the amount of its capital, and the names and addresses of every subscriber, with the number of the shares to be taken by him. The persons intending to form themselves into a company were obliged to furnish to the registrar these particulars,

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with many others to which I do not feel it necessary to advert, and on its being certified that this had been done, it is enacted that the shareholders shall be thenceforth incorporated for the purpose of carrying on the business mentioned in the deed, and shall so continue until it is dissolved and its affairs are wound up, but so, nevertheless, as not to restrict the liability of any shareholder under a judgment recovered against the company, it being expressly declared that every shareholder shall continue liable as if the company had not been incorporated.

As the company thus became incorporated for the purpose of its business, it was unnecessary that it should (as in the case of banking companies trading under 7 Geo. 4, c. 46) appoint a public officer for the purpose of suing and being sued. The company itself was able to bring and defend actions and suits in its own name without any special enactment for that purpose, but the statute provides that any person having recovered judgment against the company may, if he cannot obtain satisfaction from the funds of the incorporated body, obtain execution against any shareholder, or against any person who should have ceased for less than three years to be a shareholder, and who was a shareholder when the debt or liability accrued in respect of which the judgment was recovered. I have said that certain companies were excepted from the operation of this Act, and amongst those so excepted were all banking companies.

But concurrently with this Act another Act was passed, 7 & 8 Vict. c. 113, intituled "An Act to regulate Joint Stock Banks in *England*." It differed in some important particulars from the other Act. It did not incorporate any joint stock banking company, but it enabled persons desirous of forming themselves into such a company, upon complying with certain requisitions, to obtain, under the sanction of the Board of Trade, a royal charter of incorporation, subject to various statutable qualifications, and, amongst other things, that, notwithstanding the incorporation, the shareholders should be liable as if they were not incorporated, and there is the same provision as in the former *Banking Act*, and in the general *Joint Stock Companies Act*, making former shareholders liable in certain cases for a term of years after they have ceased to be shareholders.

It thus appears that, under the Act of the 7 & 8 Vict. c. 110, or the *Banking Act*, 7 & 8 Vict. c. 113, the provisions in these two statutes, so far as regards the present question, being nearly the same, the course which a creditor was to take in order to enforce a debt or demand, was to sue the incorporated company as his debtor, and having recovered judgment against that body, he was, in the first instance, to endeavour to levy his debt by an execution against it, and if that did not produce sufficient to satisfy him, then he was entitled to issue execution against any shareholder, or, within certain limits, against any of those who had been shareholders when his right arose. If the present question had arisen under either of these statutes the right of the creditor could not have been controverted. It would have been no answer on the part of any person who had agreed that his name should be on the list of shareholders, and against whom a *fi. fa.* had been sued out, to say that he had been induced by fraud to become a shareholder. This was decided by the Court of Queen's Bench, in a judgment delivered by Lord *Campbell* in the case of *Henderson* v. *Royal British Bank* (1), and nearly at the same time by the Courts of Common Pleas and Exchequer, in cases before them in which the circumstances were similar. Lord *Campbell* said: "It would be monstrous to say that the party against whom the application was made, having become a partner and a shareholder, and having held himself out to the world as such, and having so remained until the concern stopped payment, could, by repudiating the shares on the ground that he had been defrauded, make himself no longer liable." This observation commends itself so entirely to common sense that I cannot hesitate at once to accede to it.

When this passage was quoted in the argument at the bar, I doubted, and I believe I expressed a doubt, whether Lord *Campbell* had not been wrong in attributing the liability of the person against whom the application was made, in any respect to his having held himself out to the world as a partner, for a shareholder never takes any part in managing the joint business. But on farther reflection I think the observation was just. The application of the creditor was resisted by the shareholder on the ground that he had been induced by fraud to take shares. It is a fair answer,

(1) 7 E. & B. 356.

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by a creditor, to such a defence to say, "I know nothing of the circumstances which led you to become a shareholder; all I know is, that you in fact allowed yourself to be represented as being a shareholder, and on the faith of your being so I trusted the company." But whether the observation of Lord *Campbell* was or was not altogether warranted, the decision itself seems to me to be incontrovertible, and the only question, therefore, is, whether the same principles ought to govern a case like the present, arising not under the Act of 7 & 8 Vict. c. 113, but under the subsequent Act of 1862.

There are important differences between the provisions of the Act of 1862 and the two Acts of 1844. In the first place, all the enactments contained in the previous Acts for enforcing a debt or demand by execution against a shareholder are repealed. The creditor must, as under the former Acts, proceed against the company; but if, on recovering judgment against the company, he was unable to obtain satisfaction, he has no power to proceed against any individual shareholder. He must obtain an order for winding up the affairs of the company, by causing all its assets to be called in and distributed among all the creditors rateably, as in a bankruptcy. But there is another very material distinction between the two statutes, arising from the power given by the Act of 1862, of constituting a company whose shareholders shall not, like partners at common law, or like shareholders under the Acts of 7 & 8 Vict. c. 110 and c. 113, be indefinitely liable for all obligations of the partnership, but whose liability shall be limited to the extent and in the manner specified in the articles under which the incorporation takes place.

Two modes of limiting the responsibility of the shareholders are provided by the Act, but we need only advert to that which is described in the Act as a limitation by shares. Any joint stock company may adopt such a limitation by making it part of its constitution that the shareholders shall be liable only to the extent of so much of their shares as has not been paid up. This was the principle of limitation on which the firm of *Overend, Gurney, & Co., Limited*, was formed, and with which alone we have to deal.

It may be well to remark that the Act of 1862 (so far as we

have to deal with it) is identical with a previous Act passed in 1856, and for convenience, therefore, I will refer only to the Act of 1862.

It is obvious that when the Legislature had sanctioned the principle of limited liability, the powers given by the former Acts of taking out execution against individual shareholders necessarily fell to the ground. It would be impossible for a creditor to know to what extent his right to take the shareholder's goods in execution would exist. This difficulty, indeed, would not arise under the Act of 1862 as to companies formed with unlimited liability; but experience had shewn that the system of execution against individual shareholders often operated very unfairly, and the Legislature probably thought, and correctly thought, that companies with unlimited liability would be but few in number, and the remedy by winding up, which was necessarily adopted in the case of limited companies, was equally just and efficacious where there was no limit, and the same course of proceeding was therefore prescribed in both cases.

The first question then is, whether the change in the mode in which a creditor is obliged, under the Act of 1862, to seek relief, makes any difference as to who are liable to him as shareholders? I think not. In order to bring this question to a test, we may consider how the case would have stood if there had been no change effected by the Act of 1862, except in the mode of making a judgment available. Suppose that the statute of 1862 had only said that, in case of a judgment recovered against the company, the creditor should not levy execution against any individual shareholder, but should proceed to wind up the affairs of the company in the manner there pointed out, I can discover nothing which would in such circumstances relieve from responsibility any person who, if there had been no such change, would have been liable to an execution. The winding-up is but a mode of enforcing payment. It closely resembles a bankruptcy, and a bankruptcy has been called, not improperly, a statutable execution for the benefit of all creditors. The same description may be given to a winding-up, and as in the bankruptcy of an ordinary partnership every person against whom a judgment creditor of the firm could have levied execution as a partner, would be liable to have his

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estate administered in the bankruptcy, just so must every person against whom a creditor might, under the Acts of 1844, have levied execution as a shareholder, be liable to have his estate dealt with under a winding-up order. The change, therefore, from a right in the creditor to levy execution to a right to wind up the affairs of the company, does not seem to me to affect the question who are liable to the creditors; and as, according to the principle acted on in *Henderson* v. *The Royal British Bank*, the Appellant would certainly have been liable to have his goods taken in execution, so also he must be liable to be dealt with under a winding-up order.

But, if this change in the mode in which the creditor is to seek his remedy, makes no difference as to the persons liable to him, how is he affected by the introduction of the principle of limited liability? I cannot see that he is at all affected by it. His remedy is cut down in amount, but as to the persons liable to him the principle of limited liability has no effect. The introduction of that principle rendered necessary, as I have already stated, some substitute for the remedy by execution against individual shareholders, but it did no more. It plainly left every shareholder subject to all previous liabilities, except only that a line or boundary was fixed, beyond which his obligations could not be extended. I have, therefore, satisfied myself that if the Act of 1862 had done no more than introduce the principle of limited liability, and substitute a winding up of the affairs of the company for execution against individual shareholders, it left the law just as it stood when *Henderson's Case* was decided.

But it was argued that there are provisions in the Acts of 1844 expressly declaring the liability of shareholders to be the same as that of ordinary partners, but which provisions are not found in the Act of 1862. This difference, it was said, makes the principle of *Henderson's Case* inapplicable. The clause relied on for this purpose is the 25th section of the 7 & 8 Vict. c. 110, which, after providing that the persons taking shares, forming themselves into a company, and complying with the requirements of the Act, shall become incorporated, proceeds to say that such incorporation shall not in anywise restrict the liability of any shareholder under any judgment for payment of money recovered against the company;

but every shareholder shall, in respect of such moneys, be and continue liable as if the company had not been incorporated. This is the provision in the general *Joint Stock Companies Act of* 1844, and in the *Banking Act*, 7 & 8 Vict. c. 113, passed on the same day, there is, in sect. 7, a provision to the same effect. There is no such provision in the Act of 1862, and so it was contended that the Legislature must be understood to have contemplated a change in this particular.

I cannot, however, think that this is a fair inference. The introduction of limited liability made the retention of such a provision as those which existed in the Acts of 1844, and to which I have just referred, impossible; and the question is, whether we are to suppose that the Legislature contemplated any other changes as to the liability of shareholders beyond those which were the natural, indeed the necessary, consequence of limited liability? I think not. In the first place, the object of legislation on the subject of these companies has been to enable capitalists to carry on commercial speculations in numbers beyond what the ordinary machinery of the law could deal with. Except by the introduction of the principle of limited liability, legislation has been confined to the giving facilities for carrying on businesses differing in no respect from ordinary commercial partnerships save in the vast extent of capital embarked, and the great number of the partners engaged. I cannot conceive that the Legislature intended by the Act of 1862 to introduce any rules or principles as to the acts or conduct whereby a person should render himself liable to be treated as a shareholder different from those which existed previously. The omission of the clauses declaring shareholders to be liable, as if not incorporated, was, as I have pointed out, necessary; but the Act seems to me to contain, on the face of it, ample proof that the rights of creditors were not intended to be affected, except only by the introduction of the principle of limited liability.

In the first place, I will refer to the 49th section of the Act of 1844, 7 & 8 Vict. c. 110. It is there provided that the directors of every company shall keep a register of shareholders containing their names and addresses, shewing also the number of shares they respectively hold, and the amount paid up; and, by the 50th section, every shareholder is to have liberty to search this register

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at all reasonable times. Nobody, however, was to be at liberty to search it who was not a shareholder. There is a similar obligation in the Act of 1862 as to keeping a register; but there is an important change; for, by the 32nd section of that Act, it is provided that the register shall be open to the inspection not only of shareholders, but, on payment of one shilling, of all other persons, which would therefore include creditors. This seems to me strongly to indicate the intention of the Legislature that the creditors were to look to this document as shewing them to what extent they might trust the company. Before the introduction of the principle of limited liability such a power of inspection was not necessary, or, certainly, not at all so necessary. A creditor could hardly fail to know who were some at least of the shareholders, and there was no limit to the extent to which he might obtain execution against shareholders of wealth. But when the Legislature enabled shareholders to limit their liability, not merely to the amount of their shares, but to so much of that amount as should remain unpaid, it is obvious that no creditor could safely trust the company without having the means of ascertaining, first, who the shareholders might be, and, secondly, to what extent they would be liable. This is obviously the reason why the new statute opened the register to the inspection of all the world, indicating, as I think, very clearly that persons dealing with the company might trust to that register as containing a true exposition of the assets they had to rely on. The permission to all persons not shareholders to inspect the register, and so to ascertain who are shareholders, and to what extent they are liable, would have been an unwarrantable exposure of the affairs of the company, were it not that all persons have, or may have, an interest in knowing who are liable, and to what extent.

This view of the case is strongly confirmed by the language of the statute where it defines contributories. Sect. 74 defines contributories to be all persons liable to contribute to the assets in the event of the company being wound up; and sect. 38 declares that on that event every present and past member shall be liable to contribute subject to certain qualifications. In order to ascertain who are designated by the word "members" in sect. 38, we must refer to sect. 23, which states that every person who has

agreed to become a member, and whose name is entered on the register, shall be deemed to be a member of the company.

The name of Mr. *Oakes* was certainly entered on the register; if, therefore, he agreed to become a member within the meaning of this 23rd section, he is a contributory. The argument is, that he did not so agree, because all which he did, he did under the influence of fraud and misrepresentation. But assuming all that to be, and I believe it was, just as Mr. *Oakes* represents it, still he did agree to become a member—that is, he in fact agreed. He may have full rights against those who deceived him, but with that the outer world can have no concern. The Legislature took care to provide the register as the means of enabling persons dealing with the company to know to whom and to what they had to trust. It intended to put the persons whose names are on it in the same position towards creditors (subject, of course, to the statutable restrictions) as persons engaged in an ordinary partnership, or persons trading formerly under the Acts of 1844. In neither of those cases would it have been any answer to a creditor, that the person sought to be charged had been induced by fraud to become a partner or a shareholder, and I see no reason whatever for adopting any other principle here.

It was strongly pressed upon us that a decision against Mr. *Oakes* would be at variance with the case of the *Venezuela Railway Company* v. *Kisch* (1), decided in this House a few months since. But there is no inconsistency between the two decisions. The question there was not one in which creditors were concerned. It was the case of a person seeking, against a company, to be relieved from a contract into which he had by fraudulent representations of that company been induced to enter. This House held, conformably with the decision of the Lords Justices, considering the fraud to be established, that the company could not compel the person thus deceived to retain the shares which he had thus been fraudulently induced to purchase. This decision proceeded on grounds of obvious justice and good sense, on which Courts both of law and equity, including this House, have of late frequently acted. But it has no bearing on a question between the shareholders and creditors. Great stress was laid on a part of the language which I

(1) Law Rep. 2 H. L. 99.

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used in expressing my opinion, and which is supposed to be inconsistent with what I have given as my opinion in the present case; but I do not see any such inconsistency. The question there was, whether, as between *Kisch* the Respondent and the company, he was to be treated as a shareholder. This House held that he was not. He had been imposed upon by means of a fraudulent concealment of something which the company ought to have disclosed. The company contended that he must be taken to have known the facts which were concealed from him, for that those facts appeared on the face of the articles of association, and the statute provides that the articles of association shall bind every member whether he seals them or not. Mr. *Kisch* did not seal them, but the company contended that he must be taken, according to the statute, to have done so, and so to be aware of their contents. I thought that such an argument did not lie in the mouth of the directors, that they could not by fraudulently concealing what they ought to have disclosed, induce a person to become a member, and then say, your membership gives you, by force of the statute, knowledge which prevents you from alleging that there was fraudulent concealment. I was then, and am still, of opinion, that as between the parties then in litigation, and with reference to the clause in the statute to which I have referred, he was not a member. But such a case has evidently no bearing on a question between the shareholder and a creditor.

The conclusion at which I have thus arrived makes it not absolutely necessary that I should express any opinion on the question of fact. But it must not be supposed that because I do not investigate closely the question of fact, therefore I doubt the soundness of the opinion expressed by my noble and learned friend.

For the honour of the great mercantile community of the city of *London*, I wish I could have believed that the prospectus was honestly and fairly framed. But I cannot; I must believe that the truth was intentionally concealed, and hopes held out which those who framed the prospectus must have known would deceive those who trusted to it. There were both *suggestio falsi* and *suppressio veri*. But, for the reasons I have stated, this does not, in my view of the case, affect the liability of Mr. *Oakes*.

There were two or three matters of a minor character put forward in a supplemental form, to which I may advert, though I think they rest on no solid grounds. It was said Mr. *Oakes* never agreed to become a member of the company whose business is indicated by the memorandum of association actually filed. A change was made in that memorandum after he had agreed to take shares, and before it was filed. The change was not of any great importance, but I am far from saying that if Mr. *Oakes* had, within a reasonable time after he agreed to take shares, examined the memorandum, and found that it differed, in however small a degree, from that on the faith of which he had acted, he might not thereupon have repudiated his status as a shareholder. But it is impossible to allow a person who has taken shares, and has gone on for nearly a year taking his chance of profit, to turn round when the speculation has proved a failure, and claim to be released on the ground that he was ignorant of something with which the least diligence must have made him acquainted. It is the duty of a person taking shares in a company to use all reasonable diligence in ascertaining the terms of the memorandum of association, which is, in fact, his title deed. It was certainly very wrong to make any change in the language of the memorandum of association, but there is no reason to suppose that that act was done otherwise than with honest intentions.

The Appellant then contends, that in consequence of this change there never was an incorporated company. I think that the section of the Act giving effect to the certificate of the registrar is an answer to this suggestion. But farther, if there never was a company, then there could be no valid winding-up order, and the proper remedy of Mr. *Oakes* would be to get rid of that order, or to take such steps as might be right on the assumption that no such order exists. The same observation applies to the objection that there was no proper meeting sanctioning the winding-up.

The only point on which I think the decree of the Vice-Chancellor was wrong, is the mode in which he has given the costs. It was wrong to mix up together the costs of Mr. *Oakes*, and of the other Appellant, Mr. *Peek*. Each of these gentlemen must be answerable for the costs incurred in his own petition, and the decree must, in that respect, be varied.

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I need say nothing as to Mr. *Peek's* appeal, except that he certainly stands in no better position than Mr. *Oakes*.

I entirely agree with the opinion of my noble and learned friend with reference to the manner in which he recommended your Lordships to dispose of these appeals.

LORD COLONSAY:—

My Lords, in regard to one important part of the Appellant's case there is, unhappily, no room to doubt. I allude to the deceptive character of the prospectus. The evidence contained in the case itself discloses a state of matters to which no Court of law, no Court of equity, no Court administering law and equity, can hesitate to attach the legal character which the Vice-Chancellor has attached to it. The suggestions and arguments by which it was attempted to give to these transactions a different complexion, may have a legitimate influence on the judgment to be pronounced by a more numerous tribunal out of doors on the morality of some of the actions that have been brought before us, but they were not such as could weigh with this tribunal in dealing, as a Court, with the rights of contending parties. Upon this part of the case I do not consider it necessary to say more.

But out of the state of matters to which I have been alluding, the fictitious origin, and the disastrous termination of this great scheme of *Overend, Gurney, & Co., Limited*, has arisen the important question we are now called upon to decide. The company was announced as incorporated under the Act of 1862, with limited liability. The prospectus bore date the 12th of July, 1865. The company stopped payment the 11th of May, 1866. Proceedings were adopted for having the company wound up under the Act of 1862, and on the 22nd of June, 1866, Vice-Chancellor *Kindersley* made an order for winding up under the supervision of the Court.

Assuming, for the present, that the registration, and the proceedings for winding-up, to which I shall afterwards advert, were regular, and that the company is now properly in course of being wound up under the supervision of the Court, what is the position of the Appellant, Mr. *Oakes?* On the 16th of July, 1865, he applied for shares, which were allotted to him, on the 28th of July

he made the stipulated payments, and his name was placed on the register.

After the stoppage of the company, in May, 1866, some of the shareholders caused investigations to be made, which resulted in certain discoveries that have led to the present litigation. It does not distinctly appear whether Mr. *Oakes* was or was not a party to those investigations, but I think he is entitled to have it assumed in his favour that, if he was not directly a party to those investigations, he was at least watching those proceedings, and intending to avail himself of the result, of the investigations. In the meantime the liquidators had been making up a list of contributories, and had placed the name of Mr. *Oakes* on that list, and on, I think, the 20th of August, 1866 (there seems to be some difference in the statements as to the date, but at any rate it was about that time), they made a call of £10 per share on Mr. *Oakes*, and others. On the 30th of October, 1866, the Appellant's solicitors gave notice of a motion to have the Appellant's name taken off the register, and off the list of contributories, and to stay proceedings for enforcing the call. That application was ultimately refused by Vice-Chancellor *Malins*, and we are now reviewing his judgment.

The ground on which the Appellant rested his application was, that he had been induced to apply for, and accept, shares in the company entirely through fraud on the part of the directors, the fraudulent character of the prospectus issued by them, and that as soon as he became aware of the fraud, or could have become aware of it, and before he had dealt with the shares in any way, or had derived any benefit from them, he had challenged the transaction, and demanded to be relieved. He refers to the case of *Railway Company of Venezuela* v. *Kisch* (1), and other cases, as shewing that, at all events, in a question with the company he would be entitled to repudiate the contract, and to have his name removed from the register. Then, starting from that point, he says, as to the creditors of the company, that there was no privity of contract between him and them, that they did not transact with him, or with the shareholders, but only with the company in its corporate capacity, and that they cannot, through the liquidator, subject him to any liability to which the company could not have

(1) Law Rep. 2 H. L. 99.

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subjected him; that the liquidator could only take up the rights of the company subject to such equities as could be pleaded against the company; and, consequently, subject to the Appellant's right to be relieved from the contract to which he had been induced by the fraud of the company.

This view is rested, in some measure, on the corporate character of the company, and on certain recognised principles of law as to the relative position of the creditors of corporations and the individual members of such corporations, and it is contended that the the Act of 1862 must be read and construed with reference to these principles, and giving effect to them in so far as that Act has not expressly, or by necessary implication, displaced them as to companies such as this. The Appellant says that certain decisions and *dicta* that have been founded on by the liquidators are inapplicable, inasmuch as they occurred under a different state of the law, and as to companies which were then governed by a different statute—a statute that expressly provided that, in regard to such questions, they should be dealt with as if the companies were not incorporated. Farther, he examines the Act of 1862, and contends that there is nothing in the provisions of that Act, when read according to their true intendment, which can be held to deprive him of the relief he demands. The case of the *Reese River Mining Company* (1) is referred to as a recent and direct authority in favour of the Appellant.

Such is a brief outline of the case that was presented to us on behalf of the Appellant, and which was elucidated and enforced in argument with remarkable ability.

Up to a certain point the argument for the Appellant commanded my assent at the time, and I have not, on reflection, seen any sufficient reason to withdraw that assent. If this case had been presented to us in circumstances similar to those which existed in the case of *Kisch*—if while *Overend, Gurney, & Company, Limited*, was a going company, it had made a demand on Mr. *Oakes* for a call, and he had resisted it on the ground of fraud, I think he might have been entitled to succeed in that resistance, and to have his name removed from the register. Whether that would have finally exempted him from any possible contingent

(1) Law Rep. 2 Eq. 264; see also Law Rep. 2 Ch. Ap. 604.

demand in the event of an immediate stoppage and winding up of the company, I do not think it necessary to inquire. The case now before us has reference to a company which had stopped payment, and was in course of being wound up, while the Appellant's name was still on the register, and before any challenge was made. The cases, therefore, are not the same. It may be that the decision in the case of *Kisch* advances the Appellant a step in his argument. It may even be that it gives him a resting place for the engines by which he is to endeavour to remove other obstacles. But those other obstacles required to be removed, and the question is, whether they have been effectually removed by the power of the argument that was used?

Having given to the case the most careful consideration, I have come to the conclusion that the argument for the Appellant ought not to prevail. I think it proceeds on an erroneous view of the nature of these companies, and of the relative positions of the creditors and the members of these companies.

This company was formed under the provisions of the Act of 1862, which was a comprehensive, repealing, and consolidating Act, collecting, as it were, into one code the provisions which were thenceforth to be applicable to such companies.

During the immediately preceding period of thirty-seven years there had been a continuous course of legislation on the subject, beginning, in 1825, with the 6 Geo. 4, c. 91, which repealed the Act of the 6 Geo. 1, c. 18. After 1825 statute after statute followed in rapid succession, some fifteen or eighteen statutes having been passed on the subject before matters were brought into the position in which they have been placed by the Act of 1862.

Now, what was the tendency and scope of that course of legislation? An important part of it, indeed the great object of it, was to give to the formation of joint stock trading companies facilities and encouragement which had previously been withheld from them. The genius of the law of *England*, which regarded with disfavour the notion of an incorporated company having a *persona* distinguishable from its component members, was very unfavourable, if not an absolute barrier to the formation of joint stock companies. Accordingly the efforts of the Legislature were directed to giving to these companies a separate *persona*, yet not conferring

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upon them all the attributes of proper corporations without qualification. That principle pervades the whole of the legislation on the subject. I am not speaking of limited liability companies only. Limited liability is merely a step, and a recent step, in the progress. My observations apply to joint stock trading companies generally. The course of legislation was to rear up the company into a separate *persona*, with certain powers and privileges, but without conferring on it in an unqualified manner all the attributes of a perfect corporation. The companies were said to be incorporated, but they were only incorporated to certain effects—they were *quasi*-corporations.

In giving this position to joint stock trading companies, provisions were introduced on the one hand to preserve the members from unnecessary molestation by creditors of the company, and on the other hand to preserve the rights of creditors to ultimate payment out of the estates of the members. Among the most important of these were the provisions as to registration of the companies and of the shareholders, and the right of any one to inspect the register (which is given in the two next statutes) and the provisions for winding up, which were some of them embodied in separate statutes, of which there are two or three.

In 1855 came the first Limited Liability Act. Beyond giving power to limit the pecuniary amount of the liability of each shareholder it made no important alteration, I think, in law, in the relative position or rights of creditors or members. Indeed sect. 16 provides that it is to be taken as part of the Act of 1844, the 7 & 8 Vict. c. 110. In 1856 came an Act of the nature of a consolidating Act. In 1858 the limited liability principle was extended to banking companies.

In 1862 came the Act now in force, and which, I think, must be taken as the code applicable to these companies. It bears in the preamble of it to be intended to consolidate and extend the principles of those companies. It also sets forth the various departments into which it is divided, and seems to be a comprehensive code of law applicable to them.

Such having been the course of legislation, and such the character of the Act of 1862, we may expect to find in it a solution of the question, who are to be regarded and treated as contributories

when such companies come to be wound up? If we are not to look beyond the words of the Act of 1862 for a solution of that question, it does not appear to me that there would be much difficulty in the case. The 74th section tells us that "a 'contributory' shall mean every person liable to contribute to the assets of a company under this Act in the event of the same being wound up." Sect. 38, which relates to the liability of members, tells us that "in the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets" of such company. And sect. 23, which defines a member, tells us that every "person who has agreed to become a member of a company under this Act, and whose name is registered on the register of members, shall be deemed to be a member of the company."

The Appellant says that he cannot be held to have agreed to become a member, inasmuch as his application for an acceptance of shares was induced by fraud, and never having done anything to affirm the contract, he is still entitled to disaffirm it. I cannot agree in that. The contract was not void, it was only voidable. What does that mean? I think that point was well put by Mr. *Mellish* in the course of his arguments. He said, that a contract obtained by fraud is voidable, but not void; does it mean void till ratified, or valid till rescinded? The latter is the rule where the rights of third parties intervene. That I hold to be clearly the import of the doctrine that a contract induced by fraud is not void but voidable. I hold that the Appellant did agree to become a member of the company. He may have been induced to agree by fraud, but, having regard to the language of the statute, what we have to look to is, whether he has agreed to become a member or not. It might be a different case, and would be a different case, in regard to a party who had no power, no will, to give an assent, such as an insane person or a pupil. But when the question comes to be as to a party who has the power to act, although he may afterwards recall what he has done upon a certain footing, still in the meantime he has agreed, and what is only voidable, and not void, cannot be held as invalid until it has been rescinded. I do not very well see how that is to be got over.

In this case the Appellant says that all this must be read sub-

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ject to the overruling operation of certain legal principles. First, the principle that in corporations there is no privity of contract between the individual corporators and the creditors of the corporation; second, that in such questions there is no room for the doctrine of "holding out;" and thirdly, that as the claims or rights of the creditors can only be enforced through the corporation, they must be subject to any latent equities competent to the corporator as against the incorporation. These three propositions appear to me to involve several fallacies. First, it is a fallacy to hold that the liability of the partners of these companies must rest entirely on the same principle of contract which was the foundation of the liability of the partners of unincorporated companies prior to the institution of this class of associations. The question is, not whether there was any privity of contract between the Appellant and the creditors of the company, but it is, whether, under the constitution of these newly-created societies, there is a statutory liability imposed on persons in the position of the Appellant. Secondly, it is an error to hold that creditors are not supposed to trust to the responsibility of the shareholders. The careful regulations as to registers of shareholders, and the publicity to be given to them, form a sufficient answer to that argument. Indeed it is plain from the reason of the thing that no credit would otherwise be given to the abstraction of a company.

It is also a mistake to hold that these companies must, to all legal effects and consequences, be regarded as unqualified corporations, and in no respect as partnerships. I have already shewn that they partake in some respects of both capacities, and I have shewn how and why that condition of matters came into existence. Let us for a moment relieve our minds from the trammels imposed by a technical use of words, and look to the substance and reality of the thing. Why are these companies not partnerships? They are associations of individuals for the purpose of trading with the capital they contribute, and of participating in the profits to be derived from that trade. In several of the statutes they are called partnerships, and in one, if not more of them, provision is made for a deed of partnership. As to their being corporations, I have already shewn that they are so only subject to certain qualifications, and, indeed, in this very statute of 1862, the clause which incorpo-

rates them provides that, nevertheless, they shall be subject to certain qualifications and liabilities, and when we look to the subsequent part of the statute we find amongst those liabilities the liability of being contributories in the sense that I have described. I think it would be contrary to the tendency and scope of all the statutes to hold that these companies are stripped of all the characteristics of mercantile partnerships, and clothed with all the attributes of perfect corporations, without qualification.

I am, therefore, inclined to distrust an argument which seeks to subjugate the plain provisions of this code to the rules of law applicable to a state of things when no such companies existed.

There is another consideration which leads me to distrust this mode of moulding the provisions of the Act of 1862 into a different shape from that in which the statute presents them. That statute, as I have already observed, professes to consolidate into one code all the laws and rules applicable to these associations or aggregate societies. It prohibits their existence except under the cover and control of its provisions. It is a general statute, applicable to all parts of the kingdom, to *Scotland* as well as to *England*, which was not the case with several of the statutes preceding it in the series. In several of them *Scotland* was excepted—and why? Your Lordships know that the law of *Scotland* in regard to partnerships was not the same as the law of *England*—that in *Scotland*, as in some other countries, the separate *persona* of an unincorporated trading company was fully recognised, and that joint stock share companies for trading existed there at common law, and that the country had derived great advantage from them, as is recorded in a statute passed in the reign of *George* IV. There were other differences also.

Now, I apprehend that the Act of 1862 was intended to establish a uniform system of law in both ends of the island in regard to such companies. But if, in reference to joint stock companies in *England*, the provisions of the statute are not to be read in a literal or obvious sense, but are to be overridden, and qualified, and controlled by implications and inferences deduced from rules of the law of *England* applicable to a state of things antecedent to the existence of any such companies, then, by parity of reasoning in reference to joint stock companies in *Scotland*, the statute would

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be qualified and controlled by implications and inferences deduced from the different principles that had prevailed in *Scotland;* and thus there would be again produced a diversity instead of the uniformity which it was the object of the statute to establish. For these reasons I think that the line of argument which was put forward by the Appellant cannot be maintained.

My Lords, reference was made to the case of *The Reese River Mining Company* as being a direct authority in point (1). I do not think that the decision in that case was necessarily an authority in point, for the circumstances under which that case presented itself for decision appear, from the reports that I have seen of it, to have been materially different from the present. It appears that in that case the party had made an application to have his name removed from the register on the ground of fraud before there had been any proceedings for winding up the concern; and the import of the decision appears to have been, that the case must be dealt with in reference to the state of matters at the time that he made that application, and sought to repudiate the contract. Whether that decision was one which would, upon a consideration of the law, be upheld or not, is not a matter that I have occasion to go into now. I receive it with all the respect that is due to the Court that pronounced it; but it is, in that aspect of it, not the same as the present case. An opinion, indeed, was expressed by one of the Lords Justices which might go to an adverse view of the law to that which I have endeavoured to state, but with all the respect I must have for that opinion, and with all the deference I should be disposed to pay to it, I cannot yield up the opinion which I have now expressed as the deliberate result of a full investigation of the cases and the whole course of legislation in regard to these contracts.

As regards other objections which have been stated, and which are of a sort of subsidiary and supplementary character, I shall not add anything to the observations which have been made by my noble and learned friends who have already addressed the House on the subject. I entirely concur in their observations.

With reference to some questions that I myself put at the close of the argument, as to the effect that would be produced by sus-

(1) Law Rep. 2 Eq. 264; Law Rep. 2 Ch. Ap. 604.

taining the plea of the Appellant, whether it would not practically reduce the company to the mere directors who had originally issued the prospectus or not, I wish to explain that in putting those questions I did not form any opinion whatever as to the effect that would be due to that result. I had not at that time considered the whole matter of this case; but I wished to have before me all the facts which I thought might, or might not, enter as elements into the formation of my opinion. In forming my opinion I found it my duty to discharge altogether that element, and to hold that the fact of the Appellant being only associated as a dupe along with others, would not be a reason why he should not have justice dealt to him in the same manner as if he had been the only dupe. In such a proceeding the number of the dupes does not affect the character of the transaction. The greater number of dupes only shews the greater dexterity of the process of inflating the bubble of these concerns.

I therefore concur in the judgment which your Lordships have been advised to pronounce.

Mr. *Swanston*:—Will your Lordships permit me to ask your directions as to one point which I think, if not mentioned now, might afterwards lead to some misunderstanding of your judgment? The application to the Vice-Chancellor was to remove the Appellant's name from the list of contributories. Your Lordships have held that his name should not be removed as against the creditors. May I ask whether your Lordships would now think it right to express an opinion in your judgment as to whether his name should be removed from the list of contributories after the debts are paid?

THE LORD CHANCELLOR:—I really do not think these points ought to be allowed to be raised at this stage. It is becoming very much the fashion to bring up points after the original hearing. I do not think that that is right, or that it is a practice we ought to encourage.

Orders appealed from affirmed, with variation with respect to costs; appeals dismissed with costs.

Lords' Journals, August 15, 1867.

Solicitors for the Appellants: *J. & J. Linklater, Hackwood, & Addison.*

Solicitors for the Respondents: *Maynard, Son, Markby, & Denton.*

Tab 24

National Stadium Ltd. (Re)

Ontario Judgments

Ontario Supreme Court - High Court Division

Toronto Weekly Court

Orde J.

January 9, 1924

[1924] O.J. No. 9 | 55 O.L.R. 199

Case Summary

Company — Winding-up — Contributories — Written Application for Shares — Acceptance and Allotment — Shares only Partly Paid for — Fraud and Misrepresentation by Agents Procuring Subscriptions — Rescission — Necessity for Repudiation before Commencement of Winding-up — Stipulation as to Time for Payment for Shares — Liability not Subject to Call — Winding-up Act, R.S.C. 1906, ch. 144, sec. 51 — Repudiation before Winding-up not Followed by Action — Intervention of Creditors by Assignment under Bankruptcy Act — Non-fulfilment of Condition as to Site — Collateral Obligation.

Persons whom the liquidator, in the winding-up, under the Dominion Winding-up Act, of a company, formed for the purpose, inter alia, of erecting a building, sought to make contributories for the sums due upon shares only partly paid for, signed applications for shares; the applications were considered at a meeting of the directors, and the shares were in each case allotted, notice of allotment was given, and the name of each subscriber was entered on the share-register. There was fraud and misrepresentation on the part of the agents who procured the subscriptions for shares, but except in one case (W.'s) the subscribers did not become aware that the facts had been misrepresented to them until after the winding-up had been commenced:

Held, that one who contends that his subscription for shares ought to be rescinded, because it was induced by fraud, must effectually repudiate before the winding-up proceedings have commenced and the rights of creditors have intervened.

Oakes v. Turquand (1867), L.R. 2 H.L. 325, Tennent v. City of Glasgow Bank (1879), 4 App. Cas. 615, and Trusts and Guarantee Co. v. Smith *(1923), 54 O.L.R. 144*, followed.

(2) M. added at the foot of his application the words, "This subscription is given with the understanding that I am to be called upon for the balance of the money due when building operations commence:"

Held, that this stipulation had nothing to do with his becoming a shareholder; and the failure of the company to commence building operations did not entitle him to rescind his contract.

(3) M. contended that, as his subscription was a special one under which his liability to pay the balance due was fixed by the terms of the contract, he was not a shareholder whose liability to pay depended upon call, and so could not be placed on the list of contributories:

Held, that there is nothing in sec. 51 nor in any of the cognate sections of the Winding-up Act to justify the suggestion that in settling the list of contributories regard is to be had only to those shareholders whose liability is subject to call; to restrict the liquidator to a right of action for the balance due upon the subscription agreement might enable M. to raise a defence under the special stipulation as to the building operations, and thereby to defeat the whole purpose of the Companies Act by placing a holder of unpaid shares on the same footing as any other debtor to the company; and this contention should not prevail.

Re Port Arthur Waggon Co. Ltd., Tudhope's Case (1919-20), *45 O.L.R. 260*, *47 O.L.R. 565*, explained and distinguished.

(4) W. in 1921 unequivocally repudiated his subscription on the ground of fraud, but he brought no action until after the company had made an assignment under the Bankruptcy Act, in January, 1922. He then applied to the Registrar in Bankruptcy for leave to bring an action. The application was refused, but without dealing with the merits of W.'s claim:

Held, that the repudiating shareholder must not only repudiate, but also get his name removed, or commence proceedings to have it removed, before the winding-up.

In re Scottish Petroleum Co. (1883), 23 Ch. D. 413, 437, followed.

Be Western Canada Fire Insurance Co. (1915), 22 D.L.R. 19, not followed.

The rights of the creditors became fixed when the assignment in bankruptcy was made, and the rules applicable upon a winding-up then became effective.

Trusts and Guarantee Co. v. Smith, supra, followed.

(5) W. also relied, as entitling him to rescission, upon the non-fulfilment of a condition that the building should be erected upon a certain site:

Held, that the agreement constituted W. a shareholder in praesenti, and that the condition should be treated merely as a collateral obligation on the part of the company.

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1 APPEALS by Samuel McBride and others from an order or report of the Master of the Supreme Court of Ontario, in the course of a reference for the winding-up of the company, whereby the names of the appellants were placed on the list of contributories.

2 October 11, 1923. The appeals were heard by ORDE, J., in the Weekly Court, Toronto.

January 9, 1924. ORDE J

3 The Master's report was filed during the long vacation, and because of some misunderstanding as to the date when the time for giving notice of appeal therefrom began to run, owing to this Court's sittings not commencing until some time after the 1st September, the time for appealing was allowed to elapse. The appellants have applied specially for an extension of the time and for the hearing of their appeal. The application for an extension was not very strenuously opposed, and I think, in the circumstances, ought to be granted.

4 One of the defences raised in each case was that the subscription for shares had been induced by the fraud and misrepresentation of the agents who procured the subscriptions. It was admitted by counsel for all those sought to be made contributories, and for the liquidator, that each had signed an application for shares, that the applications were duly considered at a meeting of the directors, that the shares were in each case allotted, that notice of allotment was given, and that the name of each subscriber was entered in the share-register. Counsel for the liquidator also admitted that there was fraud and misrepresentation on the part of the agents who procured the subscriptions for shares. It was further admitted that, except in the case of Williams, the subscribers did not become aware of the non-existence of the alleged facts upon which they were induced to subscribe until after the winding-up had commenced.

5 All subscriptions were made upon a printed form, as follows:

"Application for stock of the National Stadium Limited.

"To the National Stadium Limited, Toronto:

"I hereby apply to the directors of the National Stadium Limited for the allotment or transfer to me of [Quicklaw note: Text is missing in paper copy.] shares of the capital stock of the National Stadium Limited, of the par value of $10 each and at the price of $10 per share.

"And I hereby agree with the National Stadium Limited to accept the shares now applied for or any lesser number that may be allotted or transferred to me. And I herewith remit the sum of $10 per share in full payment thereof.

"I hereby make and appoint Geo. W. Hunt, of the city of Toronto, my true and lawful attorney to sign and subscribe my name to the subscriber's agreement in the stock-books of the said company, and to accept such shares as may be allotted or transferred to me and to register me as the holder of such shares.

"And I hereby acknowledge receipt of a copy of the prospectus of said company.

"As witness my hand and seal at ... this ... day

of

1920.

"Signature ... "Name in full ... "Occupation ... "Address ...

"All cheques, drafts, money orders to be made payable to the order of the National Stadium Limited."

6 It will be observed that, according to the form, it was intended that each subscriber should remit the full amount of $10 per share with his subscription, thereby paying for the shares in full if they were allotted to him. But, so far as the appellants are concerned, only a part payment was made in each case.

7 McBride's Case.

8 McBride subscribed for 100 shares and paid $100 on account. He added at the foot of his subscription the following words: "This subscription is given with the understanding that I am to be called upon for the balance of the money due when building operations commence." In the company's letter acknowledging the subscription and cheque for $100, McBride was notified that the 100 shares had been allotted to him by the directors. The letter also stated: "We note that the balance of $900 is payable when building operations commence." Building operations never commenced, and McBride takes the further objection that his subscription was conditional, and, the condition not having been fulfilled, he is not liable.

9 McBride's contention that he is entitled to rescind on the ground of fraud may be disposed of in a few words. Ever since the judgment of the House of Lords in Oakes v. Turquand (1867), L.R. 2 H.L. 325, the law has been that one who alleges that his subscription for shares ought to be rescinded, because it was induced by fraud, must effectually repudiate before the winding-up proceedings have commenced and the rights of the creditors have intervened. As stated by Lord Cairns in Tennent v. City of Glasgow Bank (1879), 4 App. Cas. 615, at p. 621, "The case of Oakes v. Turquand in this House has established that it is too late, after winding-up has commenced, to rescind a contract for shares on the ground of fraud." See also Trusts and Guarantee Co. v. Smith *(1923), 54 O.L.R. 144*.

10 The question whether mere notice of repudiation, before winding-up has commenced, without further steps to rescind, which is raised in Williams's case, does not arise in McBride's case.

11 As to the effect of the stipulation that McBride was not to be called upon for the balance of his subscription until building operations commenced, unless it be established that the stipulation was a condition precedent to his becoming a shareholder at all, it cannot affect his status and liability as a member and shareholder of the company.

The stipulation has nothing to do with his becoming a shareholder: it is intended merely to postpone the company's right to call upon him for payment of "the balance of the money due." His obligation as a shareholder is expressly recognised. Failure of the company to commence building operations might not have entitled him to rescind his contract even before the winding-up, though he might then have successfully resisted a demand or call for further payments. But when winding-up commences the situation is completely altered. The subscriber's status as a shareholder and his corresponding obligation through the medium of the winding-up proceedings to the creditors become fixed. If there has been a failure by the company to perform some term of the contract -- not a condition precedent to the subscriber's becoming a shareholder at all -- then it is possible that the subscriber may be able to prove in the winding-up proceedings for damages for such breach, but he cannot rid himself of his membership in the company as a shareholder. McBride's appeal upon this ground also fails.

12 McBride raises a further objection. Relying upon the judgment in Re Port Arthur Waggon Co. Ltd., Tudhope's Case (1919-20), *45 O.L.R. 260*, *47 O.L.R. 565*, he says that, as his subscription was a special one under which his liability to pay the balance due was fixed by the terms of the contract (whether regarded as an immediate liability according to the printed form, or as dependent upon the special stipulation as to building operations being commenced), he is not a shareholder whose liability to pay depends upon call, and so cannot be placed on the list of contributories. In Tudhope's Case, Middleton, J., and the Appellate Division held that, as Tudhope by his subscription agreed to pay for his shares in full by monthly instalments, his liability to pay rested upon the terms of his contract, and that he was not, therefore, subject to "call." But what was sought by the liquidator in that case was to hold Tudhope liable after he had transferred his shares with the approval of the directors, and there had been a complete novation of the contract. The ground there taken by the liquidator was that the transfer came within the provision of the Dominion Companies Act which enacts that "no shares shall be transferred until all previous calls thereon are fully paid in." The Court held that there had been no "call" upon Tudhope within the meaning of that prohibition, and that there was nothing to prevent Tudhope, with the directors' approval, from transferring his unpaid shares to another and from being released by the company from all liability thereon. That conclusion having been reached, there could be no ground whatever for treating Tudhope as a shareholder or for putting him on the list of contributories. I understand the statement of my brother Riddell, at p. 571 of 47 O.L.R., that "Tudhope does not and cannot owe on any calls, but his liability is a debt only, and therefore he cannot be placed on the list of contributories," to refer to the particular circumstances of that case, and not to be a sweeping ruling that when a subscriber for shares agrees to pay for his shares in full or by instalments (thereby rendering a call in his case unnecessary), and he is still a shareholder when the winding-up commences, he cannot be placed on the list of contributories. If Tudhope's Case goes that length, then it gives to sec. 51 of the Winding-up Act, R.S.C. 1906, ch. 144, a restricted meaning wholly inconsistent with its language. That section says that "every shareholder ... of a company ... shall be liable to contribute the amount unpaid on his shares of the capital." There is nothing in this section nor in any of the cognate sections of the Winding-up Act to justify the suggestion that in settling the list of contributories regard is to be had only to those shareholders whose liability is subject to call. The list of contributories is designed to include all those who, as shareholders or members of the company (in other words, as partners in the undertaking), have not paid for their shares in full, and to whom the creditors may look for payment, or, in some cases, fully paid-up shareholders may look for contribution.

13 To restrict the liquidator merely to a right of action for the balance due upon the subscription agreement might enable McBride to raise a defence under the special stipulation as to the commencement of building operations, and thereby to defeat the whole purpose of the Companies Act by placing a holder of unpaid shares on the same footing as any other debtor to the company.

14 McBride's appeal must be dismissed with costs.

15 Williams's Case.

16 This case differs from McBride's and the others in one respect. The Master finds that Williams subscribed upon the strength of certain fraudulent misstatements made on behalf of the company which entitled him to repudiate his subscription; that he became aware of the fraud some time later; and that he thereupon unequivocally repudiated by letter on the 28th April, 1921. This was followed by a protracted correspondence as to a settlement, during which

Williams never abandoned his stand that he was entitled to repudiate. He did not, however, commence any action until after the company had made an assignment under the Bankruptcy Act in January, 1922. He then applied to the Registrar in Bankruptcy for leave to bring an action. The application was refused, but without in any way dealing with the merits of Williams's claim.

17 Counsel for Williams relies on the judgment of the Supreme Court of Alberta in Re Western Canada Fire Insurance Co. (1915), 22 D.L.R. 19, where it was held that if notice of repudiation is given by the subscriber prior to the commencement of the winding-up the repudiation is complete, and that failure to follow up his notice by bringing an action to rescind before the winding-up commences does not disentitle him to enforce his right to rescind against the liquidator and the creditors. This judgment is based upon some rather broad expressions of Lord Hatherley in Reese River Silver Mining Co. v. Smith (1869), L.R. 4 H.L. 64, and upon the argument of Mr. Haldane (afterwards Lord Chancellor) as counsel in In re Scottish Petroleum Co. (1883), 23 Ch. D. 413, 430, an argument which was not adopted by the Court in that case.

18 The learned Master has declined to follow this Alberta judgment, and I think rightly. The rule laid down by Lindley, L.J., in the Scottish Petroleum case, at p. 437, is the one which, in my judgment, should be followed, namely, "that the repudiating shareholder must not only repudiate, but also get his name removed, or commence proceedings to have it removed, before the winding-up." Here the rights of the creditors became fixed when the assignment in bankruptcy took place. The rules applicable upon a winding-up then became effective: Trusts and Guarantee Co. v. Smith, supra.

19 Among the admissions made before the Master this appears: "In regard to Nesbitt and Williams, a condition precedent that the Stadium should be built on the Christie street site." Williams relies on this as entitling him to rescission, the condition never having been complied with. It was said by counsel for the liquidator on the argument before me that the word "precedent" was not intended, and was either uttered inadvertently or was interpolated unintentionally by the stenographer. I can readily believe this. It is impossible to understand how the liquidator could have made such an admission. And the learned Master appears to have so regarded it, for he holds that the agreement constituted Williams a shareholder in praesenti within the meaning of Elkington's case (1867), L.R. 2 Ch. 511. Williams paid instalments on account of his subscription after the allotment of his shares to him. He did not himself treat the condition as a condition precedent, but as a collateral obligation on the part of the company.

20 I think the Master was right and that Williams's appeal must be dismissed with costs.

21 Cases of the Toronto and District Football Association et al.

22 These cases stand or fall with the others above mentioned. Their appeals will also be dismissed with costs.
Harcourt Ferguson, K.C., for the appellant McBride.

G. W. Adams, for the other appellants.

D. J. Nickle, for the liquidator.

Tab 25

2000 ABQB 4
Alberta Court of Queen's Bench

Blue Range Resource Corp., Re

2000 CarswellAlta 12, 2000 ABQB 4, [2000] 4 W.W.R. 738, [2000] A.W.L.D. 183, [2000] A.J. No. 14, 15 C.B.R. (4th) 169, 259 A.R. 30, 76 Alta. L.R. (3d) 338, 94 A.C.W.S. (3d) 223

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, C. C-36, as amended

In the Matter of Blue Range Resource Corporation

Romaine J.

Judgment: January 10, 2000
Docket: Calgary 9901-04070

Counsel: *R.J. (Bob) Wilkins* and *Gary Befus*, for Big Bear Exploration Ltd.
A. Robert Anderson and *Bryan Duguid*, for Enron Trade & Capital Resources Canada Corp.
Glen H. Poelman, for Creditors' Committee.
Virginia A. Engel, for MRF 1998 II Limited Partnership.

Subject: Insolvency; Torts; Contracts; Corporate and Commercial; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
IX Proving claim
IX.4 Practice and procedure
IX.4.g Miscellaneous
Bankruptcy and insolvency
X Priorities of claims
X.7 Unsecured claims
X.7.c Priority with respect to other unsecured creditors
Civil practice and procedure
III Parties
III.4 Standing
Torts
VIII Fraud, deceit, and misrepresentation
VIII.6 Remedies
VIII.6.c Miscellaneous

Headnote

Bankruptcy --- Priorities of claims — Unsecured claims — Priority with respect to other unsecured creditors

Respondent submitted takeover bid to obtain company by way of exchange of shares — Takeover bid was accepted and respondent became sole shareholder of company — Following takeover, respondent alleged company's shares were worthless and, as sole shareholder, caused company to apply for protection under Companies' Creditors Arrangement Act — Respondent made unsecured claim for value of shares exchanged in takeover bid — Applicant creditors of company applied for direction on preliminary issues with respect to respondent's claim — Respondent's alleged losses were inextricably intertwined with their shareholder interest in company — Creditors' claims typically had priority over those shareholders pursuant to principles of equity and assumption of risk — Claim by respondent for alleged loss and damages from share exchange was, in substance, claim by shareholder and ranked after claims of unsecured creditors — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Bankruptcy --- Proving claim — Practice and procedure — Miscellaneous issues

Respondent submitted takeover bid to obtain company by way of exchange of shares — Takeover bid was accepted and respondent became sole shareholder of company — Following takeover, respondent alleged company's shares were worthless and, as sole shareholder, caused company to apply for protection under Companies' Creditors Arrangement Act — Respondent made unsecured claim for value of shares exchanged in takeover bid — Respondent pursued claims through two different routes by filing notice of claim for damages for share exchange loss, and filing statement of claim alleging other causes of action — Judge made orders that precluded respondent from advancing claims beyond those set out in notice of claim — Respondent sought expedited trial for hearing claim set out in draft statement of claim — Applicant creditors of company applied for direction on preliminary issues with respect to respondent's claim — Respondent was not entitled to advance claims for heads of damages in statement of claim that were not set out in notice of claim — Respondent was attempting to indirectly attack effectiveness of previous judge's order that prevented respondent from advancing claims other than those set out in notice of claim — Under other circumstances, respondent might have been able to include claims under other heads of damages by attaching draft statement of claim to notice of claim — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Fraud and misrepresentation --- Remedies — Damages — Miscellaneous issues

Respondent submitted takeover bid to obtain company by way of exchange of shares — Takeover bid was accepted and respondent became sole shareholder of company — Following takeover, respondent alleged company's shares were worthless and, as sole shareholder, caused company to apply for protection under Companies' Creditors Arrangement Act — Respondent made unsecured claim for value of shares exchanged in takeover bid — Applicant creditors of company applied for direction on preliminary issues with respect to respondent's claim — Because of negligent misrepresentation, respondent was induced to give up something that was of substantially no cost to corporation, and it did not suffer any financial loss from share exchange as shares were created

from treasury — Party may not recover in tort for loss of something it never had — Alleged loss from share exchange was not loss incurred by respondent, rendering respondent improper party to bring claim — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.
Practice --- Parties — Standing
Respondent submitted takeover bid to obtain company by way of exchange of shares — Takeover bid was accepted and respondent became sole shareholder of company — Following takeover, respondent alleged company's shares were worthless and, as sole shareholder, caused company to apply for protection under Companies' Creditors Arrangement Act — Respondent made unsecured claim for value of shares exchanged in takeover bid — Applicant creditors of company applied for direction on preliminary issues with respect to respondent's claim — Because of negligent misrepresentation, respondent was induced to give up something that was of substantially no cost to corporation, and it did not suffer any financial loss from share exchange as shares were created from treasury — Party may not recover in tort for loss of something it never had — Alleged loss from share exchange was not loss incurred by respondent, rendering respondent improper party to bring claim — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

APPLICATION by creditors for direction with respect to respondent's claim.

***Romaine J.*:**

Introduction

1 This is an application for determination of three preliminary issues relating to a claim made by Big Bear Exploration Ltd. against Blue Range Resource Corporation, a company to which the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, applies. Big Bear is the sole shareholder of Blue Range, and submits that its claim should rank equally with claims of unsecured creditors. The preliminary issues relate to the ranking of Big Bear's claim, the scope of its entitlement to pursue its claim and whether Big Bear is the proper party to advance the major portion of the claim.

2 The Applicants are the Creditors' Committee of Blue Range and Enron Canada Corp., a major creditor. Big Bear is the Respondent, together with the MRF 1998 II Limited Partnership, whose partners are in a similar situation to Big Bear.

Facts

3 Between October 27, 1998 and February 2, 1999, Big Bear took the following steps:

> (a) it purchased shares of Blue Range for cash through The Toronto Stock Exchange on October 27 and 29, 1998;
>
> (b) it undertook a hostile takeover bid on November 13, 1998, by which it sought to acquire all of the issued and outstanding Blue Range shares;

(c) it paid for the Blue Range shares sought through the takeover bid by way of a share exchange: Blue Range shareholders accepting Big Bear's offer received 11 Big Bear shares for each Blue Range share;

(d) it issued Big Bear shares from treasury to provide the shares used in the share exchange.

4 The takeover bid was accepted by Blue Range shareholders and on December 12, 1998, Big Bear acquired control of Blue Range. It is now the sole shareholder of Blue Range.

5 Big Bear says that its decision to undertake the takeover was made in reliance upon information publicly disclosed by Blue Range regarding its financial situation. It says that after the takeover, it discovered that the information disclosed by Blue Range was misleading, and in fact the Blue Range shares were essentially worthless.

6 Big Bear as the sole shareholder of Blue Range entered into a Unanimous Shareholders' Agreement pursuant to which Big Bear replaced and took on all the rights, duties and obligations of the Blue Range directors. Using its authority under the Unanimous Shareholders' Agreement, Big Bear caused Blue Range to apply for protection under the CCAA. An order stipulating that Blue Range is a company to which the CCAA applies was granted on March 2, 1999.

7 On April 6, 1999, LoVecchio, J. issued an order which provides, in part, that:

(a) all claims of any nature must be proved by filing with the Monitor a Notice of Claim with supporting documentation, and

(b) claims not received by the Monitor by May 7, 1999, or not proved in accordance with the prescribed procedures, are forever barred and extinguished.

8 Big Bear submitted a Notice of Claim to the Monitor dated May 5, 1999 in the amount of $151,317,298 as an unsecured claim. It also filed a Notice of Motion on May 5, 1999, seeking an order lifting the stay of proceedings granted by the March 2, 1999 order for the purpose of filing a statement of claim against Blue Range. Big Bear's application for leave to file its statement of claim was denied by LoVecchio, J. on May 11, 1999.

9 On May 21, 1999, the Monitor issued a Notice of Dispute disputing in full the Big Bear claim. Big Bear filed a Notice of Motion on May 31, 1999 for:

(a) a declaration that the unsecured claim of Big Bear is a meritorious claim against Blue Range; and

(b) an order directing the expeditious trial and determination of the issues raised by the unsecured claim of Big Bear.

10 On October 4, 1999, LoVecchio, J. directed that there be a determination of two issues in respect of the Big Bear unsecured claim by way of a preliminary application. On October 28, 1999, I defined the two issues and added a third one.

11 Big Bear's Notice of Claim sets out the nature and amount of its claim against Blue Range. The amount is particularized by the schedule attached to the Notice of Claim, which identifies the claim as being comprised of the following components:

> (a) the price of shares acquired for cash on October 27 and 29, 1998 ($724,454.91);
>
> (b) the value of shares acquired by means of the share exchange of Big Bear treasury shares for Blue Range shares held by Blue Range shareholders ($147,687,298); and
>
> (c) "transaction costs," being costs incurred by Big Bear for consultants, professional advisers, filings, financial services, and like matters incidental to the share purchases generally, and the takeover bid in particular ($3,729,498).

Issue #1

12 With respect to the alleged share exchange loss, without considering the principle of equitable subordination, is Big Bear:

> (a) an unsecured creditor of Blue Range that ranks equally with the unsecured creditors of Blue Range; or
>
> (b) a shareholder of Blue Range that ranks after the unsecured creditors of Blue Range.

13 At the hearing, this question was expanded to include reference to the transaction costs and cash share purchase damage claims in addition to the alleged share exchange loss.

Summary of Decision

14 The nature of the Big Bear claim against Blue Range for an alleged share exchange loss, transaction costs and cash share purchase damages is in substance a claim by a shareholder for a return of what it invested *qua* shareholder. The claim therefore ranks after the claims of unsecured creditors of Blue Range.

Analysis

15 The position of the Applicants is that the share exchange itself was clearly an investment in capital, and that the claim for the share exchange loss derives solely from and is inextricably intertwined with Big Bear's interest as a shareholder of Blue Range. The Applicants submit that there are therefore good policy reasons why the claim should rank after the claims of unsecured

creditors of Blue Range, and that basic corporate principles, fairness and American case law support these policy reasons. Big Bear submits that its claim is a tort claim, allowable under the CCAA, and that there is no good reason to rank the claim other than equally with unsecured creditors. Big Bear submits that the American cases cited are inappropriate to a Canadian CCAA proceeding, as they are inconsistent with Canadian law.

16 There is no Canadian law that deals directly with the issue of whether a shareholder allegedly induced by fraud to purchase shares of a debtor corporation is able to assert its claim in such a way as to achieve parity with other unsecured creditors in a CCAA proceeding. It is therefore necessary to start with basic principles governing priority disputes.

17 It is clear that in common law shareholders are not entitled to share in the assets of an insolvent corporation until after all the ordinary creditors have been paid in full: *Re Central Capital Corp.* (1996), 132 D.L.R. (4th) 223 (Ont. C.A.) at page 245; *Canada Deposit Insurance Corp. v. Canadian Commercial Bank* (1992), 97 D.L.R. (4th) 385 (S.C.C.) at pages 402 and 408. In that sense, Big Bear acquired not only rights but restrictions under corporate law when it acquired the Blue Range shares.

18 There is no doubt that Big Bear has exercised its rights as a shareholder of Blue Range. Pursuant to the Unanimous Shareholders' Agreement, it authorized Blue Range to file an application under the CCAA "to attempt to preserve the equity value of [Blue Range] for the benefit of the sole shareholder of [Blue Range]" (Bourchier November 1, 1999 affidavit). It now attempts to recover its alleged share exchange loss through the claims approval process and rank with unsecured creditors on its claim. The issue is whether this is a collateral attempt to obtain a return on an investment in equity through equal status with ordinary creditors that could not be accomplished through its status as a shareholder.

19 In *Canada Deposit Insurance* (supra), the Supreme Court of Canada considered whether emergency financial assistance provided to the Canadian Commercial Bank by a group of lending institutions and government was properly categorized as a loan or as an equity investment for the purpose of determining whether the group was entitled to rank *pari passu* with unsecured creditors in an insolvency. The court found that, although the arrangement was hybrid in nature, combining elements of both debt and equity, it was in substance a loan and not a capital investment. It is noteworthy that the equity component of the arrangement was incidental, and in fact had never come into effect, and that the agreements between the parties clearly supported the characterization of the arrangement as a loan.

20 *Central Capital Corp.* (*supra*) deals with the issue of whether the holders of retractable preferred shares should be treated as creditors rather than shareholders under the CCAA because of the retraction feature of the shares. Weiler, J.A. commented at page 247 of the decision that it is necessary to characterize the true nature of a transaction in order to decide whether a claim

is a claim provable in either bankruptcy or under the CCAA. She stated that a court must look to the surrounding circumstances to determine "whether the true nature of the relationship is that of a shareholder who has equity in the company or whether it is that of a creditor owed a debt or liability."

21 The court in *Central Capital Corp.* found that the true nature of the relationship between the preferred shareholders and the debtor company was that of shareholders. In doing so, it considered the statutory provision that prevents a corporation from redeeming its shares while insolvent, the articles of the corporation, and policy considerations. In relation to the latter factor, the court commented that in an insolvency where debts will exceed assets, the policy of federal insolvency legislation precludes shareholders from looking to the assets until the creditors have been paid (*supra*, page 257).

22 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 and 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 a 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.

23 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. Although the matter is complicated by reason that the consideration paid for Blue Range shares by Big Bear was Big Bear treasury shares, the Notice of Claim filed by Big Bear quantifies the loss by assigning a value to the treasury shares. 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 principal that shareholders rank after creditors in respect of any return on their equity investment. Whether payment of the tort liability by Blue Range would affect Blue Range's stated capital account is irrelevant, since the shares were not acquired from Blue Range but from its shareholders.

24 In considering the question of the characterization of this claim, it is noteworthy that Mr. Tonken in his March 2, 1999 affidavit in support of Blue Range's application to apply the CCAA

did not include the Big Bear claim in his list of estimated outstanding debt, accounts payable and other liabilities. The affidavit does, however, set out details of the alleged mispresentations.

25 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 Given the true nature of the claim, where should it rank relative to the claims of unsecured creditors?

27 The CCAA does not provide a statutory scheme for distribution, as it is based on the premise that a Plan of Arrangement will provide a classification of claims which will be presented to creditors for approval. The Plan of Arrangement presented by CNRL in the Blue Range situation has been approved by creditors and sanctioned by the Court. Section 3.1 of the Plan states that claims shall be grouped into two classes: one for Class A Claimants and one for Class B Claimants, which are described as claimants that are "unsecured creditors" within the meaning of the CCAA, but do not include "a Person with a Claim which, pursuant to Applicable Law, is subordinate to claims of trade creditors of any Blue Range Entities." The defined term "Claims" includes indebtedness, liability or obligation of any kind. Applicable Law includes orders of this Court.

28 Although there are no binding authorities directly on point on the issue of ranking, the Applicants submit that there are a number of policy reasons for finding that the Big Bear claim should rank subordinate to the claims of unsecured creditors.

29 The first policy reason is based on the fundamental corporate principle that claims of shareholders should rank below those of creditors on an insolvency. Even though this claim is a tort claim on its face, it is in substance a claim by a shareholder for a return of what it paid for shares by way of damages. The Articles of Blue Range state that a holder of Class A Voting Common Shares is entitled to receive the "remaining property of the corporation upon dissolution in equal rank with the holders of all other common shares of the Corporation". As pointed out by Laskin, J. in *Central Capital (supra* at page 274):

> Holding that the appellants do not have provable claims accords with sound corporate policy. On the insolvency of a company the claims of creditors have always ranked ahead of the claims of shareholders for the return of their capital. Case law and statute law protect creditors by preventing companies from using their funds to prejudice creditors' chances of repayment. Creditors rely on these protections in making loans to companies.

30 Although what is envisaged here is not that Blue Range will pay out funds to retract shares, the result is the same: Blue Range would be paying out funds to the benefit of its sole shareholder to the prejudice of third-party creditors.

31 It should be noted that this is not a case, as in the recent restructuring of Eatons under the CCAA, where a payment to the shareholders was clearly set out in the Plan of Arrangement and approved by the creditors and the court.

32 As counsel for Engage Energy, one of the trade creditors, stated on May 11, 1999 during Big Bear's application for an order lifting the stay order under the CCAA and allowing Big Bear to file a statement of claim:

> We've gone along in this process with a general understanding in our mind as to what the creditor pool is, and as recently as middle of April, long after the evidence will show that Big Bear was identifying in its own mind the existence of this claim, public statements were continuing to be made, setting out the creditor pool, which did not include this claim. And this makes a significant difference in how people react to supporting an ongoing plan...

33 Another policy reason which supports subordinating the Big Bear claim is a recognition that creditors conduct business with corporations on the assumption that they will be given priority over shareholders in the event of an insolvency. This assumption was referred to by Laskin, J. in *Central Capital (supra)*, in legal textbooks (Hadden, Forbes and Simmonds, Canadian Business Organizations Law Toronto: Butterworths, 1984 at 310, 311), and has been explicitly recognized in American case law. The court in *Matter of Stirling Homex Corp.*, 579 F.2d 206 (U.S. 2nd Cir. N.Y. 1978) at page 211 referred to this assumption as follows:

> Defrauded stockholder claimants in the purchase of stock are presumed to have been bargaining for equity type profits and assumed equity type risks. Conventional creditors are presumed to have dealt with the corporation with the reasonable expectation that they would have a senior position against its assets, to that of alleged stockholder claims based on fraud.

34 The identification of risk-taking assumed by shareholders and creditors is not only relevant in a general sense, but can be illustrated by the behaviour of Big Bear in this particular case. In the evidence put before me, Big Bear's president described how, in the course of Big Bear's hostile takeover of Blue Range, it sought access to Blue Range's books and records for information, but had its requests denied. Nevertheless, Big Bear decided to pursue the takeover in the absence of information it knew would have been prudent to obtain. Should the creditors be required to share the result of that type of risk-taking with Big Bear? The creditors are already suffering the results of misrepresentation, if it occurred, in the inability of Blue Range to make full payment on its trade obligations.

35 The Applicants submit that a decision to allow Big Bear to stand *pari passu* with ordinary creditors would create a fundamental change in the assumptions upon which business is carried on between corporations and creditors, requiring creditors to re-evaluate the need to obtain secured status. It was this concern, in part, that led the court in *Stirling Homex* to find that it was fair and

equitable that conventional creditors should take precedence over defrauded shareholder claims (*supra* at page 208).

36 The Applicants also submit that the reasoning underlying the *Central Capital Corp.* case (where the court found that retraction rights in shares do not create a debt that can stand equally with the debt of shareholders) and the cases where shareholders have attempted to rescind their shareholdings after a corporation has been found insolvent is analogous to the Big Bear situation, and the same result should ensue.

37 It is clear that, both in Canada and in the United Kingdom, once a company is insolvent, shareholders are not allowed to rescind their shares on the basis of misrepresentation: *Re Northwestern Trust Co.*, [1926] S.C.R. 412 (S.C.C.) at 419; *Milne v. Durham Hosiery Mills Ltd.*, [1925] 3 D.L.R. 725 (Ont. C.A.); *Trusts & Guarantee Co. v. Smith* (1923), 54 O.L.R. 144 (Ont. C.A.); *Re National Stadium Ltd.* (1924), 55 O.L.R. 199 (Ont. C.A.); *Oakes v. Turquand* (1867), [1861-73] All E.R. Rep. 738 (U.K. H.L.) at page 743-744.

38 The court in *Northwestern Trust Co. (supra* at page 419) in obiter dicta refers to a claim of recission for fraud, and comments that the right to rescind in such a case may be lost due to a change of circumstances making it unjust to exercise the right. Duff, J. then refers to the long settled principle that a shareholder who has the right to rescind his shares on the ground of misrepresentation will lose that right if he fails to exercise it before the commencement of winding-up proceedings, and comments:

> The basis of this is that the winding-up order creates an entirely new situation, by altering the relations, not only between the creditors and the shareholders, but also among the shareholders *inter se*.

39 This is an explicit recognition that in an insolvency, a corporation may not be able to satisfy the claims of all creditors, thus changing the entire complexion of the corporation, and rights that a shareholder may have been entitled to prior to an insolvency can be lost or limited.

40 In the Blue Range situation, Big Bear has actively embraced its shareholder status despite the allegations of misrepresentation, putting Blue Range under the CCAA in an attempt to preserve its equity value and, in the result, holding Blue Range's creditors at bay. Through the provision of management services, Big Bear has participated in adjudicating on the validity of creditor claims, and has then used that same CCAA claim approval process to attempt to prove its claim for misrepresentation. It may well be inequitable to allow Big Bear to exercise all of the rights it had arising from its status as shareholder before CCAA proceedings had commenced without recognition of Blue Range's profound change of status once the stay order was granted. Certainly, given the weight of authority, Big Bear would not likely have been entitled to rescind its purchase of shares on the basis of misrepresentation, had the Blue Range shares been issued from treasury.

41 Finally, the Applicants submit that it is appropriate to take guidance from certain American cases which are directly on point on this issue.

42 The question I was asked to address expressly excludes consideration of the principle of "equitable subordination". The Applicants submit that the principle of equitable subordination that is excluded for the purpose of this application is the statutory principle codified in the U.S. Bankruptcy Code in 1978 (Bankruptcy Code, Rules and Forms (1999 Ed.) West Group, Subchapter 1, Section 510 (b)). This statutory provision requires notice and a full hearing, and relates to the ability of a court to subordinate an allowed claim to another claim using the principles of equitable subordination set out and defined in case law. The Applicants submit, however, that I should look to three American cases that preceded this statutory codification and that dealt with subordination of claims by defrauded shareholders to the claims of ordinary unsecured creditors on an equitable basis.

43 The first of these cases is *Stirling Homex (supra)*. The issue dealt with by the United States Court of Appeals, Second Circuit, is directly on point: whether claims filed by allegedly defrauded shareholders of a debtor corporation should be subordinated to claims filed by ordinary unsecured creditors for the purposes of formulating a reorganization plan. The court referred to the decision of *Pepper v. Litton*, 308 U.S. 295 at page 305, 60 S. Ct. 238, 84 L. Ed. 281 (U.S. Va. 1939)) where the Supreme Court commented that the mere fact that a shareholder has a claim against the bankrupt company does not mean it must be accorded *pari passu* status with other creditors, and that the subordination of that claim may be necessitated by principles of equity. Elaborating on this, the court in *Stirling Homex* (*supra* at page 213) stated that where the debtor corporation is insolvent, the equities favour the general creditors rather than the allegedly defrauded shareholders, since in this case, the real party against which the shareholders are seeking relief is the general creditors whose percentage of realization will be reduced if relief is given to the shareholders. The court quotes a comment made by an earlier Court of Appeals (*Newton National Bank v. Newbegin*, 74 F. 135 (U.S. C.C.A.8 Kan. 1896), 140:

> When a corporation becomes bankrupt, the temptation to lay aside the garb of a stockholder, on one pretense or another, and to assume the role of creditor, is very strong, and all attempts of that kind should be viewed with suspicion.

44 Although the court in *Stirling Homex* refers to its responsibility under US bankruptcy law to ensure that a plan of reorganization is "fair and equitable" and to the "absolute priority" rule of classification under US bankruptcy principles, it is clear that the basis for its decision is the general rule of equity, a "sense of simple fairness" (*supra*, page 215). Despite the differences that may exist between Canadian and American insolvency law in this area, this case is persuasive for its reasoning based on equitable principles.

45 If Big Bear's claim is allowed to rank equally with unsecured creditors, this will open the door in many insolvency scenarios for aggrieved shareholders to claim misrepresentation or fraud. There may be many situations where it could be argued that there should have been better disclosure of the corporation's declining fortunes, for who would deliberately have invested in a corporation that has become insolvent. Although the recognition that this may greatly complicate the process of adjudicating claims under the CCAA is not of itself sufficient to subordinate Big Bear's claim, it is a factor that may be taken into account.

46 The Applicants also cite the case of *Re U.S. Financial Inc.*, 648 F.2d 515 (U.S. 9th Cir. Cal. 1980). This case is less useful, as it was decided primarily on the basis of the absolute priority rule, but while the case was not decided on equitable grounds, the court commented that support for its decision was found in the recognition of the importance of recognizing differences in expectations between creditors and shareholders when classifying claims (*supra* at page 524). The court also stated that although both creditors and shareholders had been victimized by fraud, it was equitable to impose the risks of insolvency and illegality on the shareholders whose investment, by its very nature, was a risky one.

47 The final case cited to me on this issue is *Re THC Financial Corp.*, 679 F.2d 784 (U.S. 9th Cir. Hawaii 1982), where again the court concluded that claims of defrauded shareholders must be subordinated to the claims of the general creditors. The court commented that the claimant shareholders had bargained for equity-type profits and equity-type risks in purchasing their shares, and one such risk was the risk of fraud. As pointed out previously, Big Bear had an appreciation of the risks of proceeding with its takeover bid without access to the books and records of Blue Range and took the deliberate risk of proceeding in any event.

48 In *THC Financial Corp.*, the claimants argued that since they had a number of possible causes of action in addition to their claim of fraud, they should not subordinated merely because they were shareholders. The court found, however, that their claim was essentially that of defrauded shareholders and not as victims of an independent tort. All of the claimants' theories of recovery were based on the same operative facts - the fraudulent scheme.

49 Big Bear submits that ascribing some legal impediment to a shareholder pursuing a remedy in tort against a company in which it holds shares violates the principle set out in *Salomon v. Salomon & Co.* (1896), [1897] A.C. 22 (U.K. H.L.) that corporations are separate and distinct entities from their shareholders. In my view, this is not in issue. What is being sought here is not to limit a tort action by a shareholder against a corporation but to subordinate claims made *qua* shareholder to claims made by creditors in an insolvency situation. That shareholder rights with respect to claims against a corporation are not unlimited has already been established by the cases on rescission and recognized by statutory limitations on redemption and retraction. In this case, the issue is not the right to assert the claim, but the right to rank with creditors in the distribution of the proceeds of

a pool of assets that will be insufficient to cover all claims. No piercing of the corporate veil is being suggested or would result.

50 Counsel for Big Bear cautions against the adoption of principles set out in the American cases on the basis that some decisions on equitable subordination require inequitable conduct by the claimant as a precondition to subordinating a claim, referring to a three-part test set out in a number of cases. This discussion of the inequitable conduct precondition takes place in the broader context of equitable subordination for any cause as it is codified under Section 510 of the US Bankruptcy Code. In any event, it appears that more recent American cases do not restrict the use of equitable subordination to cases of claimant misconduct, citing, specifically, that stock redemption claims have been subordinated in a number of cases even when there is no inequitable conduct by the shareholder. "Stock redemption" is the term used for cases involving fraud or misrepresentation: *United States v. Noland*, 517 U.S. 535 (U.S. Ohio 1996); *Re Structurlite Plastics Corp.*, 193 B.R. 451 (U.S. Bankr. S.D. Ohio 1995). Some of the American cases draw a distinction between cases where misconduct is generally required before subordination will be imposed and cases where "the claim itself is of a status susceptible to subordination, such as ... a claim for damages arising from the purchase ... of a security of the debtor": *United States v. Noland (supra*, at paragraph 542).

51 The issue of whether equitable subordination as codified in Section 510 of the U.S. Bankruptcy Code should form part of the law in Canada has been raised in several cases but left undecided. Big Bear submits that these cases establish that if equitable subordination is to be part of Canadian law, it should be on the basis of the U.S. three-part test which includes the condition of inequitable conduct. Again, I cannot accept this submission. It is true that Iacobucci, J. in *Canada Deposit Insurance Corp.*, while he expressly refrains from deciding whether a comparable doctrine should exist in Canada, refers to the three-part test and states that he does not view the facts of the *Canada Deposit Insurance Corp.* case as giving rise to inequitable conduct. It should be noted, however, that that case did not involve a claim by a shareholder at all, since the lenders had never received the securities that were an option under the agreements, and that the relationship had at this point in the case been characterized as a debtor/creditor relationship.

52 At any rate, this case, together with *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 75 (Ont. Gen. Div. [Commercial List]) and *Unisource Canada Inc. v. Hongkong Bank of Canada* (1998), 43 B.L.R. (2d) 226 (Ont. Gen. Div.) all refer to the doctrine of equitable subordination codified in the U.S. Bankruptcy Code which is not in issue here. The latter two cases appear to have accepted the erroneous proposition that inequitable misconduct is required in all cases under the American doctrine.

53 Big Bear also submits that the equitable principles that exist in U.S. law which have led the courts to ignore separate corporate personality in the case of subsidiary corporations are related to equitable principles used to subordinate shareholder claims. The basis for this submission appears to be a reference by the British Columbia Court of Appeal in *B.G. Preeco I (Pacific Coast) Ltd. v.*

Bon Street Holdings Ltd. (1989), 43 B.L.R. 67 (B.C. C.A.) to the *Pepper v. Litton* case (*supra*) and the so-called "Deep Rock doctrine" under American law. I do not see a link between the comments made in *Pepper v. Litton* and referred to in *B.G. Preeco* on an entirely different issue and comments concerning the court's equitable jurisdiction in the case of claims by shareholders against insolvent corporations.

54 I acknowledge that caution must be used in following the approach taken in American cases to ensure that the principles underlying such approach do not arise from differences between U.S. and Canadian law. However, I find that the comments made by the American courts in these cases relating to the policy reasons for subordinating defrauded shareholder claims to those of ordinary creditors are persuasive, as they are rooted in principles of equity that are very similar to the equitable principles used by Canadian courts.

55 American cases are particularly useful in the areas of commercial and insolvency law given that the larger economy in the United States generates a wider variety of issues that are adjudicated by the courts. There is precedent for the use of such cases: Laskin, J. in *Central Capital Corp.* (*supra*) used the analysis set out in American case law on whether preferred shareholders can claim as creditors in an insolvency to help him reach his conclusion.

56 The three American cases decided on this direct issue before the 1978 statutory codification of the law of equitable subordination are not based on a doctrine of American law that is inconsistent with or foreign to Canadian common law. It is not necessary to adopt the U.S. absolute priority rule to follow the approach they espouse, which is based on equitable principles of fairness and policy. There is no principled reason to disregard the approach set out in these cases, which have application to Canadian business and economy, and I have found them useful in considering this issue.

57 Based on my characterization of the claim, the equitable principles and considerations set out in the American cases, the general expectations of creditors and shareholders with respect to priority and assumption of risk, and the basic equitable principle that claims of defrauded shareholders should rank after the claims of ordinary creditors in a situation where there are inadequate assets to satisfy all claims, I find that Big Bear must rank after the unsecured creditors of Blue Range in respect to the alleged share exchange loss, the claim for transaction costs and the claim for cash share purchase damages.

Issue #2

58 *Assuming (without admitting) misrepresentation by Blue Range and reliance on it by Big Bear, is the alleged share exchange loss a loss or damage incurred by Big Bear and, accordingly, is Big Bear a proper party to advance the claim for such a loss*?

Summary of Decision

59 As the alleged share exchange loss is not a loss incurred by Big Bear, Big Bear is not the proper party to advance this claim.

Analysis

60 The Applicants submit that negligence is only actionable if a plaintiff can prove that it suffered damages, as the purpose of awarding damages in tort is to compensate for actual loss. This is a significant difference between damages in tort and damages in contract. In order for a plaintiff to have a cause of action in negligent misrepresentation, it must satisfy the court as to the usual elements of duty of care and breach thereof, and it must establish that it has sustained damages from that breach.

61 The Applicants argue that Big Bear did not suffer any damages arising from the share exchange. The Big Bear shares used in the share exchange came from treasury: Big Bear did not use any corporate funds or corporate assets to purchase the Blue Range shares. As the shares used in the exchange did not exist prior to the transaction, Big Bear was essentially in the same financial position pre-issuance as it was post-issuance in terms of its assets and liabilities. The nature and composition of Big Bear's assets did not change as the treasury shares were created and issued for the sole purpose of the share exchange. Therefore, Big Bear did not sustain a loss in the amount of the value of the shares. The Applicants submit that the only potential loss is that of the pre-takeover shareholders of Big Bear, as the value of their shares may have been diluted as a result of the share exchange. However, even if there was such a loss, Big Bear is not the proper party to pursue such an action. Just as shareholders may not bring an action for a loss which properly belongs to the corporation, a corporation may not bring an action for a loss directly incurred by its shareholders.

62 Big Bear claims that it is entitled to recover the value of the Big Bear shares that were issued in furtherance of the share exchange. It says that it can prove all the elements of negligent misrepresentation: there was a special relationship; material misrepresentations were made to Big Bear; those representations were made negligently; Big Bear relied on those representations; and Big Bear suffered damage.

63 It submits that damages for negligent misrepresentation are calculated as the difference between the represented value of the shares less their sale value. Big Bear contends that it matters not that the consideration for the Blue Range shares was Big Bear shares issued from treasury. As long as the consideration is adequate consideration for legal purposes, its form does not affect the measure of damages awarded by the courts for negligent misrepresentation. Big Bear says that it bargained for a company with a certain value, and, in doing so, it gave up its own shares worth that value. Therefore, Big Bear submits that it clearly incurred a loss.

64 Big Bear submits that it is the proper party to pursue this head of damages. While the corporation has met the test for negligent misrepresentation, the shareholders likely could not, as

the representations in questions were not made to them. In any event, Big Bear indicates that it does not claim for any damages caused by dilution of the shares. It also notes that a claim for dilution would not be the same as the face value of the shares issued in the share exchange, which is the amount claimed in the Notice of Claim.

65 Big Bear's claim is in tort, not contract. This is an important distinction, as the issue at hand concerns the measure of damages. The measure of damages is not necessarily the same in contract as it is in tort.

66 It is a first principle of tort law that a person is entitled to be put in the position, insofar as possible, that he or she was before the tort occurred. While the courts were historically loath to award damages for pure economic loss, this position was softened in *Hedley Byrne & Co. v. Heller & Partners Ltd.* (1963), [1964] A.C. 465 (U.K. H.L.) where the court confirmed that damages could be recovered in this type of case. When assessing damages for negligent misrepresentation resulting in pure economic loss, the goal is to put the party who relied on the misrepresentation in the position which it would have been in had the misrepresentation not occurred. While the parties to this application appear to agree on this principle, it is the application thereof with which they disagree.

67 The proper measure of damages in cases of misrepresentation is discussed in *S.M. Waddams, The Law of Damages (Toronto: Canada Law Book Inc., Looseleaf, Dec. 1998)*, where the author states:

> The English and Canadian cases have consistently held that the proper measure [with respect to fraudulent misrepresentation] is the tortious measure, that is the amount of money required to put the plaintiff in the position that would have been occupied not if the statement had been true but if the statement had not been made. The point was made clearly in *McConnel v. Wright*, [1903] 1 Ch. 546 (C.A.):
>
> > It is not an action for breach of contract, and, therefore, no damages in respect of prospective gains which the person contracting was entitled by his contract to expect come in, but it is an action of tort - it is an action for a wrong done whereby the plaintiff was tricked out of certain money in his pocket; and therefore, prima facie, the highest limit of his damages is the whole extent of his loss, and that loss is measured by the money which was in his pocket and is now in the pocket of the company. That is the ultimate, final, highest standard of his loss. (at 5-19, 5-20)
>
> Since the decision of the House of Lords in 1963 in *Hedley Byrne Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.) it has been established that an action lies for negligent misrepresentation causing economic loss. It naturally follows from acceptance of out-of pocket loss rather than the contractual measure as the basic measure of damages for fraud, that the same basic measure applies to negligent misrepresentation. (at 5-28).

68 Big Bear claims to be entitled to the difference between the actual value and the exchange value of the shares. The flaw in this assertion is that it focuses on what Big Bear bargained for as opposed to what it actually received, which is akin to a contractual measure of damages. Big Bear clearly states that it is not maintaining an action in contract, only in tort. Damages in tort are limited to the losses which a plaintiff *actually incurs* as a result of the misrepresentation. Thus, Big Bear is not entitled to recover what it expected to receive as a result of the transaction; it is entitled to be compensated only for that which it actually lost. In other words, what did Big Bear have before the loss which it did not have afterwards? To determine what losses Big Bear actually sustained, its position after the share exchange must be compared with its position prior to the share exchange.

69 The situation at hand is unique. Due to a negligent misrepresentation, Big Bear was induced to give up something which, although it had value, was of substantially no cost to the corporation, and in fact did not even exist but for the misrepresentation. Big Bear created shares which had a value for the purpose of the share exchange, in that Blue Range shareholders were willing to accept them in exchange for Blue Range shares. However, outside of transaction costs, those shares had no actual cost to Big Bear, as compared to the obvious costs associated with a payment by way of cash or tangible assets. Big Bear cannot say that after the share exchange, it had lost approximately $150 million dollars, because the shares essentially did not exist prior to the transaction, and the cost of creating those shares is not equivalent to their face value. Big Bear retains the ability to issue a limitless number of shares from treasury in the future; any loss in this regard would not be equivalent to the actual value of the shares. Therefore, all that is required to return Big Bear to its pre-misrepresentation position is compensation for the actual costs associated with issuing the shares.

70 That Big Bear has not incurred a loss in the face value of the exchanged shares is demonstrated by comparing the existing facts with hypothetical situations in which such a loss may be found. Had Big Bear been required to pay for the shares used in the exchange, for instance, by purchasing shares from existing Big Bear shareholders, there would have been a clear loss of funds evidenced in the Big Bear financial statements. Big Bear's financial position prior to the exchange would have been significantly better than its position afterwards. However, no such difference results from the mere exchange of newly-issued shares. If there had been evidence that Big Bear was or could be compelled to redeem or retract the new shares at the value assigned to them at the time of the share exchange, Big Bear may have a loss in the amount of the exchange value of the shares. However, there is no evidence of such a redemption or retraction feature attaching to these shares.

71 In sum, Big Bear's position prior to the share exchange is that the Big Bear shares issued as part of the exchange did not exist. As a result of the alleged misrepresentation, Big Bear issued shares from treasury. These shares would not have been issued but for the misrepresentation. All that is required to put Big Bear back into the position it was in prior to the negligent misrepresentation is compensation for the cost of issuing the shares, which is not the same as

the exchange value of those shares. Although this is somewhat of an anomalous situation, it is consistent with the accepted tort principle that, except in cases warranting punitive damages, damages in tort are awarded to compensate for actual loss. A party may not recover in tort for a loss of something it never had. Indeed, if Big Bear was awarded damages for the share exchange equal to what it has claimed, it would be in a better position financially than it was prior to the exchange. To the extent that shareholders would indirectly benefit, they would not only be Big Bear's pre-exchange shareholders, who may have suffered a dilution loss, but a new group of shareholders, including former Blue Range shareholders who participated in the exchange.

72 Big Bear submits that it incurred other losses as a result of the misrepresentation. Transaction costs incurred in the share exchange may be properly characterized as damages in tort, as those costs would not have been incurred but for the negligent misrepresentation. The same is true for the Big Bear claim for cash expended to purchase Blue Range shares prior to the share exchange. However, as I have indicated in my decision on Issue #1, Big Bear's claim for transaction costs and for cash share purchase damages ranks after the claims of other unsecured creditors. There may also be losses such as loss of ability to raise equity. There was no evidence of this before me in this application, and I have addressed Big Bear's ability to advance a claim for this type of loss in the decision relating to Issue #3.

73 Finally, there may also be a loss in the form of dilution of the value of the Big Bear shares. However, as Big Bear admits in its submissions, no such claim is made by the corporation, and any loss relating to a diluted share value would not be the same amount as the exchange value of the shares.

74 In the result, I find that Big Bear is not the proper party to pursue a claim for the alleged share exchange loss.

Issue #3

Is Big Bear entitled to make or advance by way of argument in these proceedings the claims represented by the heads of damage specified in the draft Statement of Claim set out at Exhibit "F" to the affidavit of A. Jeffrey Tonken dated June 25, 1999?

75 In addition to claims for damages for negligent misrepresentation, the claims that are set out in the draft Statement of Claim are claims for remedies for oppressive and unfairly prejudicial conduct and claims for loss of opportunity to pursue valuable investments and endeavours and loss of ability to raise equity.

Summary of Decision

76 Given the orders made by LoVecchio, J. on April 6, 1999 and May 11, 1999, Big Bear is not entitled to advance the claims represented by the heads of damage specified in the draft Statement of Claim other than as set out in its Notice of Claim.

Analysis

77 Big Bear submits that it is clear that, in an appropriate case, a complex liability issue that arises in the context of CCAA proceedings may be determined by a trial, including provision for production and discovery: *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 11 (Ont. C.A.). Big Bear also submits that the court has the jurisdiction to overlook technical complaints about the contents of a Notice of Claim. The CCAA does not prescribe a claim form, nor set the rules for completion and contexts of a claim form, and it is common ground that in this case, the form used for the "Notice of Claim" was not approved by any order of the court. At any rate, Big Bear submits that it is not seeking to amend its claim to add new claims or to claim additional amounts.

78 It makes that assertion apparently on the basis that the major parties concerned with CCAA proceedings in the Blue Range matter were aware of the nature of Big Bear's additional claims by reason of the draft Statement of Claim attached to Mr. Tonken's May 5, 1999 affidavit, although that affidavit was filed in support of an application to lift the stay imposed under the CCAA, an application which was dismissed by LoVecchio, J. on May 11, 1999.

79 Big Bear characterizes the issue as whether it must prove the exact amount claimed in its Notice of Claim or otherwise have its claim barred forever. It submits that the bare contents of the Notice of Claim cannot be construed as a fixed election barring a determination and assessment of an unliquidated claim for tort damages, and that it would be inequitable to deny Big Bear a hearing on the substance of its claim based on a perceived technical deficiency in the contents of the Notice of Claim.

80 In summary, Big Bear asks that the court direct an expedited trial for the hearing of its claim as outlined in the draft Statement of Claim.

81 The Applicants submit that, by attempting now to make claims other than the claims set out in the Notice of Claim, Big Bear is attempting to indirectly and collaterally attack the orders of LoVecchio, J. dated April 6, 1999 and May 11, 1999, specifically:

> a) by adding claims for alleged heads of damage other than those specified in the Notice of Claim contrary to the claims bar order of April 6, 1999; and
>
> b) by attempting to include portions of the draft Statement of Claim relating to other alleged heads of damage in the Notice of Claim contrary to the May 11, 1999 order dismissing leave to file the draft Statement of Claim.

82 While it is true that a court has jurisdiction to overlook technical irregularities in a Notice of Claim, the issue is not whether the court should overlook technical non-compliance with, or ambiguity in, a form, but whether it is appropriate to do so in this case where previous orders have been made relating to these issues. Here, Big Bear chose to pursue its claims through two different routes. It filed a Notice of Claim alleging damages for a share exchange loss, transaction costs and the cost of shares purchased before the takeover bid, all damage claims that can reasonably be identified as being related to an action for negligent misrepresentation. At about the same time, it brought an application to lift the stay granted under the CCAA and file a Statement of Claim that alleged other causes of action. That application was dismissed, and the order dismissing it was never appealed. This is not a situation as in *Re Cohen* (1956), 19 W.W.R. 14 (Alta. C.A.) where a claim made on one basis was later sought to be made on a different basis, nor an issue of Big Bear lacking, the necessary information to make its claim, although quantification of damage may have been difficult to determine. Given the previous application by Big Bear, this is a collateral or indirect attack on the effectiveness of LoVecchio, J.'s orders, and should not be allowed: *R. v. Wilson* (1983), 4 D.L.R. (4th) 577 (S.C.C.) at 599). The effect of the two orders made by LoVecchio, J. is to prevent Big Bear from advancing its claim other than as identified in its Notice of Claim, which cannot reasonably be interpreted to extend beyond the claims for damages for negligent misrepresentation.

83 It is true that the Notice of Claim form is not designed for unliquidated tort claims. I do not accept, however, that it was not possible for Big Bear to include claims under other heads of damages in the claim process by, for example, attaching the draft Statement of Claim to the Notice of Claim, or by incorporating such claims by way of schedule or appendix, as was done with respect to the claims for damages for negligent misrepresentation.

84 I note that LoVecchio, J. issued a judgment after this application was heard relating to claims for relief from the impact of the claims procedure established by the court by a number of creditors who filed late or wished to amend their claims after the claims bar date of May 7, 1999 had passed. Although LoVecchio, J. allowed these claims, and found that it was appropriate in the circumstances to grant flexibility with respect to the applications before him, he noted that total amount of the applications made to him would be less than 1.4 million dollars, and the impact of allowing the applications was minimal to the remaining creditors. The applications before him do not appear to involve issues which had been the subject of previous court orders, as in the current situation, nor would they have the same implication to creditors as would Big Bear's claim. The decision of LoVecchio, J. in the circumstances of the applications before him is distinguishable from this issue.

Order accordingly.

End of Document

Tab 26

2010 ONSC 6229
Ontario Superior Court of Justice [Commercial List]

Nelson Financial Group Ltd., Re

2010 CarswellOnt 8655, 2010 ONSC 6229, 195 A.C.W.S. (3d) 319, 71 C.B.R. (5th) 153, 75 B.L.R. (4th) 302

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NELSON FINANCIAL GROUP LTD.

Pepall J.

Judgment: November 16, 2010
Docket: 10-8630-00CL

Counsel: Richard B. Jones, Douglas Turner, Q.C. for Noteholders / Moving Party
J.H. Grout, S. Aggarwal for Monitor
Pamela Foy for Ontario Securities Commission
Frank Lamie for Nelson Financial Group Ltd.
Robert Benjamin Mills, Harold Van Winssen for Respondents, Clifford Styles, Jackie Styles, Play Investments Ltd.
Michael Beardsley, Respondent for himself
Clifford Holland, Respondent for himself
Arnold Bolliger, Respondent for himself
John McVey, Respondent for himself
Joan Frederick, Respondent for herself
Rakesh Sharma, Respondent for himself
Larry Debono, Respondent for himself
Keith McClear, Respondent for himself

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Business associations
III Specific matters of corporate organization
III.3 Shareholders

III.3.a General principles

III.3.a.iii Whether creditor of corporation

Headnote

Business associations --- Specific matters of corporate organization — Shareholders — General principles — Whether creditor of corporation

N Ltd. raised funds by issuing promissory notes bearing 12 percent annual return and issued preference shares with typical annual dividend of 10 percent — Funds were then lent out at much higher interest rates — N Ltd. sought protection of Companies' Creditors Arrangement Act — Preferred shareholders alleged, inter alia, theft, fraud, misrepresentation, breach of trust, excessive dividend payments, conversion of notes into preferred shares while N Ltd. was insolvent, oppression, and breach of fiduciary duties against N Ltd. — Promissory note holders brought motion to have all claims of preferred shareholders against N Ltd. classified as equity claims within meaning of Act; and requesting that unsecured creditors be entitled to be paid in full before preferred shareholders and other relief — Motion granted, subject to two possible exceptions — Claims of preferred shareholders fell within ambit of s. 2 of Act, were governed by ss. 6(8) and 22.1 of Act, and therefore did not constitute claims provable for purposes of statute — Preferred shareholders were not creditors of N Ltd. — Shares were treated as equity in N Ltd.'s financial statements and in its books and records — Substance of arrangement between preferred shareholders and N Ltd. was relationship based on equity, not debt — Pursuant to ss. 6(8) and 22.1, equity claims are rendered subordinate to those of creditors — Types of claims advanced by preferred shareholders were captured by language of recent amendments to Act — Factual record on two possible exceptions was incomplete — Monitor to investigate both scenarios — Claims procedure to be amended.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

N Ltd. raised funds by issuing promissory notes bearing 12 percent annual return and issued preference shares with typical annual dividend of 10 percent — Funds were then lent out at much higher interest rates — N Ltd. sought protection of Companies' Creditors Arrangement Act — Preferred shareholders alleged, inter alia, theft, fraud, misrepresentation, breach of trust, excessive dividend payments, conversion of notes into preferred shares while N Ltd. was insolvent, oppression, and breach of fiduciary duties against N Ltd. — Promissory note holders brought motion to have all claims of preferred shareholders against N Ltd. classified as equity claims within meaning of Act; and requesting that unsecured creditors be entitled to be paid in full before preferred shareholders and other relief — Motion granted, subject to two possible exceptions — Claims of preferred shareholders fell within ambit of s. 2 of Act, were governed by ss. 6(8) and 22.1 of Act, and therefore did not constitute claims provable for purposes of statute — Preferred shareholders were not creditors of N Ltd. — Shares were treated as equity in N Ltd.'s financial statements and in its books and records — Substance of arrangement between preferred shareholders and N Ltd. was relationship based on equity, not debt — Pursuant to ss. 6(8) and 22.1, equity claims are rendered subordinate to those of creditors — Types of claims advanced by preferred shareholders were captured by language of recent amendments to Act — Factual record

on two possible exceptions was incomplete — Monitor to investigate both scenarios — Claims procedure to be amended.

MOTION by promissory note holders to determine whether certain claims of preferred shareholders constitute equity claims for purposes of *Companies' Creditors Arrangement Act*.

***Pepall J.*:**

1 This motion addresses the legal characterization of claims of holders of preferred shares in the capital stock of the applicant, Nelson Financial Group Ltd. ("Nelson"). The issue before me is to determine whether such claims constitute equity claims for the purposes of sections 6(8) and 22.1 of the *Companies' Creditors Arrangement Act* ("*CCAA*").

Background Facts

2 Nelson was incorporated pursuant to the *Business Corporations Act* of Ontario in September, 1990. Nelson raised money from investors and then used those funds to extend credit to customers in vendor assisted financing programmes. It raised money in two ways. It issued promissory notes bearing a rate of return of 12% per annum and also issued preference shares typically with an annual dividend of 10%. [1] The funds were then lent out at significantly higher rates of interest.

3 The Monitor reported that Nelson placed ads in selected publications. The ads outlined the nature of the various investment options. Term sheets for the promissory notes or the preferred shares were then provided to the investors by Nelson together with an outline of the proposed tax treatment for the investment. No funds have been raised from investors since January 29, 2010.

(a) Noteholders

4 As of the date of the *CCAA* filing on March 23, 2010, Nelson had issued 685 promissory notes in the aggregate principal amount of $36,583,422.89. The notes are held by approximately 321 people.

(b) Preferred Shareholders

5 Nelson was authorized to issue two classes of common shares and 2,800,000 Series A preferred shares and 2,000,000 Series B preferred shares, each with a stated capital of $25.00. The president and sole director of Nelson, Marc Boutet, is the owner of all of the issued and outstanding common shares. By July 31, 2007, Nelson had issued to investors 176,675 Series A preferred shares for an aggregate consideration of $4,416,925. During the subsequent fiscal year ended July 31, 2008, Nelson issued a further 172,545 Series A preferred shares and 27,080 Series B preferred shares. These shares were issued for an aggregate consideration of $4,672,383 net of share issue costs.

6 The preferred shares are non-voting and take priority over the common shares. The company's articles of amendment provide that the preferred shareholders are entitled to receive fixed preferential cumulative cash dividends at the rate of 10% per annum. Nelson had the unilateral right to redeem the shares on payment of the purchase price plus accrued dividends. At least one investor negotiated a right of redemption. Two redemption requests were outstanding as of the *CCAA* filing date.

7 As of the *CCAA* filing date of March 23, 2010, Nelson had issued and outstanding 585,916.6 Series A and Series B preferred shares with an aggregate stated capital of $14,647,914. The preferred shares are held by approximately 82 people. As of the date of filing of these *CCAA* proceedings, there were approximately $53,632 of declared but unpaid dividends outstanding with respect to the preferred shares and $73,652.51 of accumulated dividends.

8 Investors subscribing for preferred shares entered into subscription agreements described as term sheets. These were executed by the investor and by Nelson. Nelson issued share certificates to the investors and maintained a share register recording the name of each preferred shareholder and the number of shares held by each shareholder.

9 As reported by the Monitor, notwithstanding that Nelson issued two different series of preferred shares, the principal terms of the term sheets signed by the investors were almost identical and generally provided as follows:

- the issuer was Nelson;
- the par value was fixed at $25.00;
- the purpose was to finance Nelson's business operations;
- the dividend was 10% per annum, payable monthly, commencing one month after the investment was made;
- preferred shareholders were eligible for a dividend tax credit;
- Nelson issued annual T-3 slips on account of dividend income to the preferred shareholders;
- the preferred shares were non-voting (except where voting as a class was required), redeemable at the option of Nelson and ranked ahead of common shares; and
- dividends were cumulative and no dividends were to be paid on common shares if preferred share dividends were in arrears.

10 In addition, the Series B term sheet provided that the monthly dividend could be reinvested pursuant to a Dividend Reinvestment Plan ("DRIP").

11 The preferred shareholders were entered on the share register and received share certificates. They were treated as equity in the company's financial statements. Dividends were received by the preferred shareholders and they took the benefit of the advantageous tax treatment.

(c) Insolvency

12 Mr. Boutet knew that Nelson was insolvent since at least its financial year ended July 31, 2007. Nelson did not provide financial statements to any of the preferred shareholders prior to, or subsequent to, the making of the investment.

(d) Ontario Securities Commission

13 On May 12, 2010, the Ontario Securities Commission ("OSC") issued a Notice of Hearing and Statement of Allegations alleging that Nelson and its affiliate, Nelson Investment Group Ltd., and various officers and directors of those corporations committed breaches of the *Ontario Securities Act* in the course of selling preferred shares. The allegations include noncompliance with the prospectus requirements, the sale of shares in reliance upon exemptions that were inapplicable, the sale of shares to persons who were not accredited investors, and fraudulent and negligent misrepresentations made in the course of the sale of shares. The OSC hearing has been scheduled for the end of February, 2011.

(e) Legal Opinion

14 Based on the Monitor's review, the preferred shareholders were documented as equity on Nelson's books and records and financial statements. Pursuant to court order, the Monitor retained Stikeman Elliott LLP as independent counsel to provide an opinion on the characterization of the claims and potential claims of the preferred shareholders. The opinion concluded that the claims were equity claims. The Monitor posted the opinion on its website and also advised the preferred shareholders of the opinion and conclusions by letter. The opinion was not to constitute evidence, issue estoppel or res judicata with respect to any matters of fact or law referred to therein. The opinion, at least in part, informed Nelson's position which was supported by the Monitor, that independent counsel for the preferred shareholders was unwarranted in the circumstances.

(f) Development of Plan

15 The Monitor reported in its Eighth Report that a plan is in the process of being developed and that preferred shareholders would have their existing preference shares cancelled and would then be able to claim a tax loss on their investment or be given a new form of preference shares with rights to be determined.

Motion

16 The holders of promissory notes are represented by Representative Counsel appointed pursuant to my order of June 15, 2010. Representative Counsel wishes to have some clarity as to the characterization of the preferred shareholders' claims. Accordingly, Representative Counsel has brought a motion for an order that all claims and potential claims of the preferred shareholders against Nelson be classified as equity claims within the meaning of the *CCAA*. In addition, Representative Counsel requests that the unsecured creditors, which include the noteholders, be entitled to be paid in full before any claim of a preferred shareholder and that the preferred shareholders form a separate class that is not entitled to vote at any meeting of creditors. Nelson and the Monitor support the position of Representative Counsel. The OSC is unopposed.

17 On the return of the motion, some preferred shareholders were represented by counsel from Templeman Menninga LLP and some were self-represented. It was agreed that the letters and affidavits of preferred shareholders that were filed with the court would constitute their evidence. Oral submissions were made by legal counsel and by approximately eight individuals. They had many complaints. Their allegations against Nelson and Mr. Boutet range from theft, fraud, misrepresentation including promises that their funds would be secured, operation of a Ponzi scheme, breach of trust, dividend payments to some that exceeded the rate set forth in Nelson's articles, conversion of notes into preferred shares at a time when Nelson was insolvent, non-disclosure, absence of a prospectus or offering memorandum disclosure, oppression, violation of section 23(3) of the *OBCA* and of the *Securities Act* such that the issuance of the preferred shares was a nullity, and breach of fiduciary duties.

18 The stories described by the investors are most unfortunate. Many are seniors and pensioners who have invested their savings with Nelson. Some investors had notes that were rolled over and replaced with preference shares. Mr. McVey alleges that he made an original promissory note investment which was then converted arbitrarily and without his knowledge into preference shares. He alleges that the documents effecting the conversion did not contain his authentic signature.

19 Mr. Styles states that he and his company invested approximately $4.5 million in Nelson. He states that Mr. Boutet persuaded him to convert his promissory notes into preference shares by promising a 13.75% dividend rate, assuring him that the obligation of Nelson to repay would be treated the same or better than the promissory notes, and that they would have the same or a priority position to the promissory notes. He then received dividends at the 13.75% rate contrary to the 10% rate found in the company's articles. In addition, at the time of the conversion, Nelson was insolvent.

20 In brief, Mr. Styles submits that:

> (a) the investment transactions were void because there was no prospectus contrary to the provisions of the *Securities Act* and the Styles were not accredited investors; the preferred shares were issued contrary to section 23(3) of the *OBCA* in that Nelson was

> insolvent at the relevant time and as such, the issuance was a nullity; and the conduct of the company and its principal was oppressive contrary to section 248 of the *OBCA*; and that
>
> (b) the Styles' claim is in respect of an undisputed agreement relating to the conversion of their promissory notes into preferred shares which agreement is enforceable separate and apart from any claim relating to the preferred shares.

The Issue

21 Are any of the claims advanced by the preferred shareholders equity claims within section 2 of the *CCAA* such that they are to be placed in a separate class and are subordinated to the full recovery of all other creditors?

The Law

22 The relevant provisions of the *CCAA* are as follows.

Section 2 of the *CCAA* states:

> In this Act,
>
> "Claim" means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*;
>
> "Equity Claim" means a claim that is in respect of an equity interest, including a claim for, among others,
>
> (a) a dividend or similar payment,
>
> (b) a return of capital,
>
> (c) a redemption or retraction obligation,
>
> (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
>
> (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);"
>
> "Equity Interest" means
>
> (a) in the case of a corporation other than an income trust, a share in the corporation — or a warrant or option or another right to acquire a share in the corporation — other than one that is derived from a convertible debt, and

> (b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

Section 6(8) states:

> No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

Section 22.1 states:

> Despite subsection 22(1) creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

23 Section 2 of the *Bankruptcy and Insolvency Act* ("*BIA*") which is referenced in section 2 of the *CCAA* provides that a claim provable includes any claim or liability provable in proceedings under the Act by a creditor. Creditor is then defined as a person having a claim provable as a claim under the Act.

24 Section 121(1) of the *BIA* describes claims provable. It states:

> 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 Historically, the claims and rights of shareholders were not treated as provable claims and ranked after creditors of an insolvent corporation in a liquidation. As noted by Laskin J.A. in *Central Capital Corp., Re*[2], on the insolvency of a company, the claims of creditors have always ranked ahead of the claims of shareholders for the return of their capital. This principle is premised on the notion that shareholders are understood to be higher risk participants who have chosen to tie their investment to the fortunes of the corporation. In contrast, creditors choose a lower level of exposure, the assumption being that they will rank ahead of shareholders in an insolvency. Put differently, amongst other things, equity investors bear the risk relating to the integrity and character of management.

26 This treatment also has been held to encompass fraudulent misrepresentation claims advanced by a shareholder seeking to recover his investment: *Blue Range Resource Corp., Re*[3] In that

case, Romaine J. held that the alleged loss derived from and was inextricably intertwined with the shareholder interest. Similarly, in the United States, the Second Circuit Court of Appeal in *Matter of Stirling Homex Corp.*[4] concluded that shareholders, including those who had allegedly been defrauded, were subordinate to the general creditors when the company was insolvent. The Court stated that "the real party against which [the shareholders] are seeking relief is the body of general creditors of their corporation. Whatever relief may be granted to them in this case will reduce the percentage which the general creditors will ultimately realize upon their claims." *National Bank of Canada v. Merit Energy Ltd.*[5] and *EarthFirst Canada Inc., Re*[6] both treated claims relating to agreements that were collateral to equity claims as equity claims. These cases dealt with separate indemnification agreements and the issuance of flow through shares. The separate agreements and the ensuing claims were treated as part of one integrated transaction in respect of an equity interest. The case law has also recognized the complications and delay that would ensue if *CCAA* proceedings were mired in shareholder claims.

27 The amendments to the *CCAA* came into force on September 18, 2009. It is clear that the amendments incorporated the historical treatment of equity claims. The language of section 2 is clear and broad. Equity claim means a claim in respect of an equity interest and includes, amongst other things, a claim for rescission of a purchase or sale of an equity interest. Pursuant to sections 6(8) and 22.1, equity claims are rendered subordinate to those of creditors.

28 The Nelson filing took place after the amendments and therefore the new provisions apply to this case. Therefore, if the claims of the preferred shareholders are properly characterized as equity claims, the relief requested by Representative Counsel in his notice of motion should be granted.

29 Guidance on the appropriate approach to the issue of characterization was provided by the Ontario Court of Appeal in *Central Capital Corp., Re*[7]. Central Capital was insolvent and sought protection pursuant to the provisions of the *CCAA*. The appellants held preferred shares of Central Capital. The shares each contained a right of retraction, that is, a right to require Central Capital to redeem the shares on a fixed date and for a fixed price. One shareholder exercised his right of retraction and the other shareholder did not but both filed proofs of claim in the *CCAA* proceedings. In considering whether the two shareholders had provable debt claims, Laskin J.A. considered the substance of the relationship between the company and the shareholders. If the governing instrument contained features of both debt and equity, that is, it was hybrid in character, the court must determine the substance of the relationship between the company and the holder of the certificate. The Court examined the parties' intentions.

30 In *Central Capital*, Laskin J.A. looked to the share purchase agreements, the conditions attaching to the shares, the articles of incorporation and the treatment given to the shares in the company's financial statements to ascertain the parties' intentions and determined that the claims were equity and not debt claims.

31 In this case, there are characteristics that are suggestive of a debt claim and of an equity claim. That said, in my view, the preferred shareholders are, as their description implies, shareholders of Nelson and not creditors. In this regard, I note the following.

(a) Investors were given the option of investing in promissory notes or preference shares and opted to invest in shares. Had they taken promissory notes, they obviously would have been creditors. The preference shares carried many attractions including income tax advantages.

(b) The investors had the right to receive dividends, a well recognized right of a shareholder.

(c) The preference share conditions provided that on a liquidation, dissolution or winding up, the preferred shareholders ranked ahead of common shareholders. As in *Central Capital Corp.*, it is implicit that they therefore would rank behind creditors.

(d) Although I acknowledge that the preferred shareholders did not receive copies of the financial statements, nonetheless, the shares were treated as equity in Nelson's financial statements and in its books and records.

32 The substance of the arrangement between the preferred shareholders and Nelson was a relationship based on equity and not debt. Having said that, as I observed in *I. Waxman & Sons Ltd., Re*[8], there is support in the case law for the proposition that equity may become debt. For instance, in that case, I held that a judgment obtained at the suit of a shareholder constituted debt. An analysis of the nature of the claims is therefore required. If the claims fall within the parameters of section 2 of the *CCAA*, clearly they are to be treated as equity claims and not as debt claims.

33 In this case, in essence the claims of the preferred shareholders are for one or a combination of the following:

(a) declared but unpaid dividends;

(b) unperformed requests for redemption;

(c) compensatory damages for the loss resulting in the purchased preferred shares now being worthless and claimed to have been caused by the negligent or fraudulent misrepresentation of Nelson or of persons for whom Nelson is legally responsible; and

(d) payment of the amounts due upon the rescission or annulment of the purchase or subscription for preferred shares.

34 In my view, all of these claims fall within the ambit of section 2, are governed by sections 6(8) and 22.1 of the *CCAA*, and therefore do not constitute a claim provable for the purposes of the statute. The language of section 2 is clear and unambiguous and equity claims include "a claim that is in respect of an equity interest" and a claim for a dividend or similar payment and a claim for

rescission. This encompasses the claims of all of the preferred shareholders including the Styles whose claim largely amounts to a request for rescission or is in respect of an equity interest. The case of *National Bank of Canada v Merit Energy Ltd.*[9] is applicable in regard to the latter. In substance, the Styles' claim is for an equity obligation. At a minimum, it is a claim in respect of an equity interest as described in section 2 of the CCAA. Parliament's intention is clear and the types of claims advanced in this case by the preferred shareholders are captured by the language of the amended statute. While some, and most notably Professor Janis Sarra[10], advocated a statutory amendment that provided for some judicial flexibility in cases involving damages arising from egregious conduct on the part of a debtor corporation and its officers, Parliament opted not to include such a provision. Sections 6(8) and 22.1 allow for little if any flexibility. That said, they do provide for greater certainty in the appropriate treatment to be accorded equity claims.

35 There are two possible exceptions. Mr. McVey claims that his promissory note should never have been converted into preference shares, the conversion was unauthorized and that the signatures on the term sheets are not his own. If Mr. McVey's evidence is accepted, his claim would be qua creditor and not preferred shareholder. Secondly, it is possible that monthly dividends that may have been lent to Nelson by Larry Debono constitute debt claims. The factual record on these two possible exceptions is incomplete. The Monitor is to investigate both scenarios, consider a resolution of same, and report back to the court on notice to any affected parties.

36 Additionally, the claims procedure will have to be amended. The Monitor should consider an appropriate approach and make a recommendation to the court to accommodate the needs of the stakeholders. The relief requested in the notice of motion is therefore granted subject to the two aforesaid possible exceptions.

Motion granted.

Footnotes

1 The Monitor is aware of six preferred shareholders with dividends that ranged from 10.5% to 13.75% per annum.

2 (1996), 38 C.B.R. (3d) 1 (Ont. C.A.).

3 (2000), 15 C.B.R. (4th) 169 (Alta. Q.B.).

4 (1978), 579 F.2d 206 (U.S. 2nd Cir. N.Y.).

5 2001 CarswellAlta 913 (Alta. Q.B.), aff'd 2002 CarswellAlta 23 (Alta. C.A.).

6 2009 CarswellAlta 1069 (Alta. Q.B.).

7 Supra, note 2.

8 2008 CarswellOnt 1245 (Ont. S.C.J. [Commercial List]).

9 Supra, note 5.

10 "From Subordination to Parity: An International Comparison of Equity Securities Law Claims in Insolvency Proceedings" (2007) 16 Int. Insolv. Re., 181.

End of Document

Tab 27

2009 SCC 15
Supreme Court of Canada

B.M.P. Global Distribution Inc. v. Bank of Nova Scotia

2009 CarswellBC 809, 2009 CarswellBC 810, 2009 SCC 15, [2009] 1 S.C.R. 504, [2009] 8 W.W.R. 428, [2009] B.C.W.L.D. 2147, [2009] B.C.W.L.D. 2154, [2009] B.C.W.L.D. 2156, [2009] B.C.W.L.D. 2157, [2009] B.C.W.L.D. 2158, [2009] B.C.W.L.D. 2225, [2009] B.C.W.L.D. 2226, [2009] B.C.W.L.D. 2258, [2009] B.C.W.L.D. 2260, [2009] B.C.W.L.D. 2261, [2009] A.C.S. No. 15, [2009] S.C.J. No. 15, 175 A.C.W.S. (3d) 490, 268 B.C.A.C. 1, 304 D.L.R. (4th) 292, 386 N.R. 296, 452 W.A.C. 1, 58 B.L.R. (4th) 1, 94 B.C.L.R. (4th) 1, J.E. 2009-613

B.M.P. Global Distribution Inc. (Appellant) v. Bank of Nova Scotia doing business as the Scotiabank and the said Scotiabank (Respondent)

Bank of Nova Scotia doing business as the Scotiabank and the said Scotiabank (Appellant) v. B.M.P. Global Distribution Inc., 636651 B.C. Ltd., Audie Hashka and Paul Backman (Respondents)

McLachlin C.J.C., Binnie, LeBel, Deschamps, Rothstein JJ.

Heard: May 15, 2008
Judgment: April 2, 2009
Docket: 31930

Proceedings: reversing in part *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia* (2007), 2007 BCCA 52, [2007] 3 W.W.R. 649, 24 B.L.R. (4th) 201, 388 W.A.C. 252, 235 B.C.A.C. 252, 2007 CarswellBC 155, 278 D.L.R. (4th) 501, 63 B.C.L.R. (4th) 214 (B.C. C.A.); reversing in part *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia* (2005), 2005 CarswellBC 1826, 2005 BCSC 1091, 8 B.L.R. (4th) 247 (B.C. S.C.)

Counsel: Paul E. Jaffe, Dean Fox, for Appellant, Respondents on cross-appeal
D. Geoffrey G. Cowper, Q.C., Brook Greenberg, Jennifer Francis, for Respondent / Appellant on cross-appeal

Subject: Corporate and Commercial; Restitution; Torts
Related Abridgment Classifications
Bills of exchange and negotiable instruments
III Cheques
III.11 Forged or unauthorized cheques
III.11.a Forged cheques

III.11.a.i General principles
Financial institutions
VII Deposits
VII.7 Fraudulent transaction or deposit
Restitution and unjust enrichment
II Benefits conferred under mistake
II.1 Mistake of fact

Headnote

Bills of exchange and negotiable instruments --- Cheques — Forged or unauthorized cheques — Forged cheques — General principles

Individual plaintiffs sold plaintiff business, B Inc., which was paid for by fraudulent cheque — Plaintiffs deposited fraudulent cheque in their bank (bank N) — Hold was placed on cheque but funds were ultimately released and paid by drawee bank (bank R) — When cheque was found to be counterfeit, plaintiffs' bank accounts were frozen by bank N and charge back was executed in favour of bank R — Plaintiffs brought action for recovered amount, alleging breach of their banking contracts by bank N — Trial judge ordered bank N to pay plaintiffs $777,336.04 in damages (total of amounts debited) for breach of contract — Bank N successfully appealed; plaintiffs unsuccessfully cross-appealed seeking punitive damages — Plaintiffs further appealed and defendants cross-appealed on issue related to tracing — Appeal dismissed; cross-appeal allowed — Principle of finality of payment balanced against right to recover money paid under mistake of fact — In application of mistake of fact test, bank R had prima facie right to recover — Bank N not precluded by service contract from relying on common law related to mistake of fact — Bank R made mistaken payment, nothing precluded it from recovering and B Inc. had no defence to claim — Bank R was permitted to trace its contribution to balances in remaining accounts.

Restitution and unjust enrichment --- Benefits conferred under mistake — Mistake of fact — Recovery of overpayment

Individual plaintiffs sold plaintiff business, B Inc., which was paid for by fraudulent cheque — Plaintiffs deposited fraudulent cheque in their bank (bank N) — Hold was placed on cheque but funds were ultimately released and paid by drawee bank (bank R) — When cheque was found to be counterfeit, plaintiffs' bank accounts were frozen by bank N and charge back was executed in favour of bank R — Plaintiffs brought action for recovered amount, alleging breach of their banking contracts by bank N — Trial judge ordered bank N to pay plaintiffs $777,336.04 in damages (total of amounts debited) for breach of contract — Bank N successfully appealed; plaintiffs unsuccessfully cross-appealed seeking punitive damages — Plaintiffs further appealed and defendants cross-appealed on issue related to tracing — Appeal dismissed; cross-appeal allowed — Principle of finality of payment balanced against right to recover money paid under mistake of fact — In application of mistake of fact test, bank R had prima facie right to recover — Bank N not precluded by service contract from relying on common law related to mistake of fact — Bank R made mistaken payment, nothing precluded it from recovering and B Inc. had no defence to claim — Bank R was permitted to trace its contribution to balances in remaining accounts.

Financial institutions --- Deposits — General principles

Clearing cheques — Individual plaintiffs sold plaintiff business, B Inc., which was paid for by fraudulent cheque — Plaintiffs deposited fraudulent cheque in their bank (bank N) — Hold was placed on cheque but funds were ultimately released and paid by drawee bank (bank R) — When cheque was found to be counterfeit, plaintiffs' bank accounts were frozen by bank N and charge back was executed in favour of bank R — Plaintiffs brought action for recovered amount, alleging breach of their banking contracts by bank N — Trial judge ordered bank N to pay plaintiffs $777,336.04 in damages (total of amounts debited) for breach of contract — Bank N successfully appealed; plaintiffs unsuccessfully cross-appealed seeking punitive damages — Plaintiffs further appealed and defendants cross-appealed on issue related to tracing — Appeal dismissed; cross-appeal allowed — Principle of finality of payment balanced against right to recover money paid under mistake of fact — In application of mistake of fact test, bank R had prima facie right to recover — Bank N not precluded by service contract from relying on common law related to mistake of fact — Bank R made mistaken payment, nothing precluded it from recovering and B Inc. had no defence to claim — Bank R was permitted to trace its contribution to balances in remaining accounts.

Lettres de change et effets de commerce --- Chèques — Chèques contrefaits ou non autorisés — Chèques contrefaits — Principes généraux

Demandeurs ont vendu leur entreprise, B inc., laquelle a été achetée à l'aide d'un chèque frauduleux — Demandeurs ont déposé le chèque frauduleux à leur banque, la banque N — Chèque a été retenu mais les fonds ont plus tard été libérés et la banque R a effectué les opérations — Après qu'on eut découvert que le chèque était contrefait, la banque N a gelé les comptes bancaires des demandeurs et une annulation des crédits a été effectuée en faveur de la banque R — Demandeurs ont déposé une action en recouvrement, faisant valoir que la banque N avait contrevenu à ses obligations bancaires — Juge de première instance a condamné la banque N à payer 777 336,04 $ en dommages-intérêts aux demandeurs (soit le montant correspondant à la somme des montants débités) pour avoir contrevenu au contrat — Banque N a interjeté appel avec succès et les demandeurs ont échoué dans leur tentative d'interjeter un appel incident visant à obtenir des dommages-intérêts punitifs — Demandeurs ont par la suite formé un pourvoi et les défendeurs ont formé un pourvoi incident sur la question du suivi des fonds — Pourvoi rejeté; pourvoi incident accueilli — Principe de l'irrévocabilité du paiement doit être concilié avec le droit de recouvrer l'argent payé à la suite d'une erreur de fait — Conformément au critère établi en matière de recouvrement de sommes payées par erreur de fait, la banque R avait, à première vue, le droit au recouvrement — Il n'était pas interdit à la banque N, en vertu du contrat de service, de se fonder sur la doctrine établie en common law au sujet de l'erreur de fait — Banque R a effectué un paiement par erreur, rien ne s'opposait à ce qu'elle recouvre les fonds et B inc. n'avait aucun moyen de défense à opposer — Banque R pouvait suivre les sommes pour lesquelles elle a elle-même contribué aux soldes des comptes.

Restitution et enrichissement injustifié --- Avantages conférés à cause d'une erreur — Erreur de fait — Recouvrement

Demandeurs ont vendu leur entreprise, B inc., laquelle a été achetée à l'aide d'un chèque frauduleux — Demandeurs ont déposé le chèque frauduleux à leur banque, la banque N — Chèque a été retenu mais les fonds ont plus tard été libérés et la banque R a effectué les opérations — Après qu'on eut découvert que le chèque était contrefait, la banque N a gelé les comptes bancaires des demandeurs et une annulation des crédits a été effectuée en faveur de la banque R — Demandeurs ont déposé une action en recouvrement, faisant valoir que la banque N avait contrevenu à ses obligations bancaires — Juge de première instance a condamné la banque N à payer 777 336,04 $ en dommages-intérêts aux demandeurs (soit le montant correspondant à la somme des montants débités) pour avoir contrevenu au contrat — Banque N a interjeté appel avec succès et les demandeurs ont échoué dans leur tentative d'interjeter un appel incident visant à obtenir des dommages-intérêts punitifs — Demandeurs ont par la suite formé un pourvoi et les défendeurs ont formé un pourvoi incident sur la question du suivi des fonds — Pourvoi rejeté; pourvoi incident accueilli — Principe de l'irrévocabilité du paiement doit être concilié avec le droit de recouvrer l'argent payé à la suite d'une erreur de fait — Conformément au critère établi en matière de recouvrement de sommes payées par erreur de fait, la banque R avait, à première vue, le droit au recouvrement — Il n'était pas interdit à la banque N, en vertu du contrat de service, de se fonder sur la doctrine établie en common law au sujet de l'erreur de fait — Banque R a effectué un paiement par erreur, rien ne s'opposait à ce qu'elle recouvre les fonds et B inc. n'avait aucun moyen de défense à opposer — Banque R pouvait suivre les sommes pour lesquelles elle a elle-même contribué aux soldes des comptes.

Institutions financières --- Dépôts — Principes généraux

Compensation des chèques — Demandeurs ont vendu leur entreprise, B inc., laquelle a été achetée à l'aide d'un chèque frauduleux — Demandeurs ont déposé le chèque frauduleux à leur banque, la banque N — Chèque a été retenu mais les fonds ont plus tard été libérés et la banque R a effectué les opérations — Après qu'on eut découvert que le chèque était contrefait, la banque N a gelé les comptes bancaires des demandeurs et une annulation des crédits a été effectuée en faveur de la banque R — Demandeurs ont déposé une action en recouvrement, faisant valoir que la banque N avait contrevenu à ses obligations bancaires — Juge de première instance a condamné la banque N à payer 777 336,04 $ en dommages-intérêts aux demandeurs (soit le montant correspondant à la somme des montants débités) pour avoir contrevenu au contrat — Banque N a interjeté appel avec succès et les demandeurs ont échoué dans leur tentative d'interjeter un appel incident visant à obtenir des dommages-intérêts punitifs — Demandeurs ont par la suite formé un pourvoi et les défendeurs ont formé un pourvoi incident sur la question du suivi des fonds — Pourvoi rejeté; pourvoi incident accueilli — Principe de l'irrévocabilité du paiement doit être concilié avec le droit de recouvrer l'argent payé à la suite d'une erreur de fait — Conformément au critère établi en matière de recouvrement de sommes payées par erreur de fait, la banque R avait, à première vue, le droit au recouvrement — Il n'était pas interdit à la banque N, en vertu du contrat de service, de se fonder sur la doctrine établie en common law au sujet de l'erreur de fait — Banque R a effectué un paiement par erreur, rien ne s'opposait à ce qu'elle recouvre les fonds et B inc. n'avait aucun

moyen de défense à opposer — Banque R pouvait suivre les sommes pour lesquelles elle a elle-même contribué aux soldes des comptes.

The plaintiffs, AH and PB, owned interests in BMP. The plaintiffs met Mr. N in the United States, who eventually, upon oral agreement, offered to purchase the rights to distribute BMP bakeware in the United States for a price of US$1.2 million.

AH went to a branch of bank N, where BMP held an account, and deposited an unendorsed cheque for C$904,563 that was payable to BMP and drawn on the account of a corporation at bank R. A hold was put on the funds, but they were ultimately released and paid by bank R. When the cheque was found to be counterfeit, the plaintiffs' bank accounts were frozen by bank N and a charge back was executed in favour of bank R.

The plaintiffs brought an action for the recovered amount, alleging a breach of their banking contracts by bank N. The trial judge ordered bank N to pay the plaintiffs $777,336.04 in damages (the total of the amounts debited). Bank N successfully appealed the trial judge's decision and the plaintiffs unsuccessfully cross-appealed, seeking punitive damages. The plaintiffs further appealed and the defendants cross-appealed on the issue related to tracing the amounts in the plaintiffs' bank accounts.

Held: The appeal was dismissed; the cross-appeal was allowed.

The principle of finality of payment was balanced against the right to recover the money paid under a mistake of fact. In the application of the mistake of fact test, bank R had a prima facie right to recover. Furthermore, bank N was not precluded by the service contract from relying on the common law related to mistake of fact. In conclusion, bank R made a mistaken payment, nothing precluded it from recovering, and BMP had no defence to the claim, as it provided no consideration for the instrument and neither BMP nor bank S had changed their respective positions.

In addition, bank R was permitted to trace its contribution to balances in the remaining accounts of the plaintiffs. Leading cases showed that it was possible at common law to trace funds into bank accounts if it was possible to identify the funds, and mixing by the recipient was not a bar to recovery. In the case at bar, since the withdrawals of all those who received funds far exceeded their contributions, bank R was permitted to trace its own contribution to the balances remaining in the accounts.

Les demandeurs, AH et PB, avaient des intérêts dans BMP. Les demandeurs ont rencontré monsieur N aux États-Unis et ce dernier a, plus tard, offert verbalement de se porter acquéreur du droit de distribuer des articles de cuisson aux États-Unis pour 1,2 million $US.

AH s'est rendu dans une succursale de la banque N où BMP avait un compte et y a déposé un chèque non endossé au montant de 904 563 $CAN, payable à l'ordre de BMP et tiré sur le compte d'une société à la banque R. Les fonds ont été retenus mais ont plus tard été libérés et la banque R a effectué les opérations. Après qu'on eut découvert que le chèque était contrefait, la banque N a gelé les comptes bancaires des demandeurs et une annulation des crédits a été effectuée en faveur de la banque R.

Les demandeurs ont déposé une action en recouvrement, faisant valoir que la banque N avait contrevenu à ses obligations bancaires. Le juge de première instance a condamné la banque N à

payer 777 336,04 $ en dommages-intérêts aux demandeurs (soit le montant correspondant à la somme des montants débités). La banque N a interjeté appel avec succès à l'encontre de la décision du juge de première instance et les demandeurs ont échoué dans leur tentative d'interjeter un appel incident visant à obtenir des dommages-intérêts punitifs. Les demandeurs ont par la suite formé un pourvoi et les défendeurs ont formé un pourvoi incident sur la question du suivi des fonds dans les comptes bancaires des demandeurs.

Arrêt: Le pourvoi a été rejeté; le pourvoi incident a été accueilli.

Le principe de l'irrévocabilité du paiement doit être concilié avec le droit de recouvrer l'argent payé à la suite d'une erreur de fait. Conformément au critère établi en matière de recouvrement de sommes payées par erreur de fait, la banque R avait, à première vue, le droit au recouvrement. De plus, il n'était pas interdit à la banque N, en vertu du contrat de service, de se fonder sur la doctrine établie en common law au sujet de l'erreur de fait. En somme, la banque R a effectué un paiement par erreur, rien ne s'opposait à ce qu'elle recouvre les fonds, et BMP n'avait aucun moyen de défense à opposer puisqu'elle n'avait fourni aucune contrepartie et que ni la situation de BMP ni celle de la banque S avait changée.

De plus, la banque R a pu suivre les sommes pour lesquelles elle a elle-même contribué aux soldes des comptes des demandeurs. Des décisions importantes montraient qu'il était possible en common law de suivre des fonds portés au crédit de comptes bancaires s'il était possible de les identifier et que le fait que le récepteur ait opéré une confusion de fonds n'était pas un obstacle au recouvrement. En l'espèce, comme les retraits effectués par tous ceux qui ont reçu des fonds dépassaient de beaucoup leur contribution aux fonds, la banque R pouvait suivre les sommes pour lesquelles elle a elle-même contribué aux soldes des comptes.

APPEAL by plaintiffs from judgment reported at *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia* (2007), 2007 BCCA 52, [2007] 3 W.W.R. 649, 24 B.L.R. (4th) 201, 388 W.A.C. 252, 235 B.C.A.C. 252, 2007 CarswellBC 155, 278 D.L.R. (4th) 501, 63 B.C.L.R. (4th) 214 (B.C. C.A.); CROSS-APPEAL by defendants on issue of tracing.

POURVOI des demandeurs à l'encontre d'un jugement publié à *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia* (2007), 2007 BCCA 52, [2007] 3 W.W.R. 649, 24 B.L.R. (4th) 201, 388 W.A.C. 252, 235 B.C.A.C. 252, 2007 CarswellBC 155, 278 D.L.R. (4th) 501, 63 B.C.L.R. (4th) 214 (B.C. C.A.); POURVOI INCIDENT des défendeurs sur la question du suivi des comptes.

***Deschamps J.*:**

1. Facts

1 The issue in this case is whether a bank must pay damages to customers for debits made from their accounts when reversing credits that had been entered in relation to a forged cheque. The trial judge, although acknowledging that his conclusion was absurd, found for the holders of the accounts. With respect, I agree with the Court of Appeal, albeit for different reasons, that

the law does not dictate such a result. I also conclude that where money has been transferred in circumstances in which it can still be identified, tracing is permitted.

2 As Saunders J.A. wrote for the Court of Appeal, the tale in this case is a strange one. It started when Audie Hashka and Paul Backman met Sunn Newman in the United States. Newman was said to be associated with a concern called Sunrise Marketing. Hashka and Backman owned interests in the appellant, BMP Global Distribution Inc. ("BMP"), a company operating in British Columbia that distributed non-stick bakeware without any formal licence or written agreement with its supplier. As the trial judge found, neither party was known to the other and neither had any business information concerning the other. According to Hashka and Backman, upon their return to Canada, an oral agreement was reached by telephone that Newman or Sunrise Marketing would purchase the right to distribute the bakeware in the United States. In the trial judge's words, "Backman agreed that Hashka arrived at the price of US$1.2 million by pulling the number out of the air" (2005 BCSC 1091, 8 B.L.R. (4th) 247 (B.C. S.C.), at para.13). No projected cash flow statements, business plans or marketing plans were used as a basis for the negotiations, and BMP had conducted no research into Newman or Sunrise Marketing. The trial judge added: "Further, Newman did not request copies of BMP Global's financial statements or sales records (indicating a net loss of approximately $3,500), nor did BMP Global offer to provide this kind of information to Newman" (para. 13) According to Backman, he and Hashka decided to do business with Newman because he "was a sharp-looking guy that seemed like he had a lot of potential". Hashka testified that Newman "seemed like a businessman" because he "dressed well".

3 On October 22, 2001, Hashka went to a Burnaby branch of the Bank of Nova Scotia ("BNS") where BMP held an account. He said that he wanted to deposit an unendorsed cheque for C $904,563 that was payable to BMP. He informed the branch manager that the cheque was a down payment for distributorship rights for BMP's products in the eastern United States (trial judgment, at para. 20). The cheque was drawn on an account of a corporation called First National Financial Corporation ("First National") at a Toronto branch of the Royal Bank of Canada ("RBC"). The cheque had been received the same day, without a cover letter, in an envelope on which the sender's name and address appeared as E. Smith of 6-6855 Airport Road, Mississauga, Ontario, L4V 1Y9, (416) 312-7205. Neither the drawer of the cheque nor the sender was known to Hashka or Backman or was apparently linked to Newman. No attempts were made to contact either First National or E. Smith before the cheque was taken to the bank.

4 On receiving the cheque, BNS recorded it as a deposit to BMP's account. The cheque was not endorsed. BNS did not provide immediate access to the $904,563, because the funds already credited to the account were not sufficient to cover the amount of the cheque: the balance prior to the deposit was $59.67. The circumstances were so unusual that the branch manager informed Hashka and Backman that the funds would be held until the bank was satisfied that the instrument was authentic (trial judgment, at para. 282). BNS contacted RBC to ensure that there were sufficient funds in First National's account and that a hold had not been placed on the cheque.

BNS eventually received the funds in the ordinary course of business and released them on October 30, 2001. On that date and over the next ten days, BMP made numerous transactions, including a transfer of US$20,000 to a Citibank account in New York City whose holder Hashka and Backman said they did not know. The largest transfers were to accounts of Hashka and Backman and to an account opened on November 2, 2001 in the name of a holding company, 636651 B.C. Ltd., that was wholly controlled by Hashka. The Court of Appeal described this flurry of transactions as a dispersion of funds (2007 BCCA 52, 24 B.L.R. (4th) 201 (B.C. C.A.), at para. 11).

5 The movements of funds involving BMP's account and the accounts of Hashka, Backman and 636651 B.C. Ltd. can be summarized as follows:

1. On November 5, two cheques drawn on BMP's account were deposited in the account of 636651 B.C. Ltd., one, certified by BNS, in the amount of $100,000 and the other in the amount of $300,000. Prior to these deposits totalling $400,000, the balance of the account was zero. After the deposits, $7,000 was used to pay travelling expenses and personal expenses incurred by Hashka.

2. A total of $70,000 was transferred from BMP's account to Backman's chequing account by way of deposits of $50,000 on October 29 and $20,000 on November 1. Prior to these deposits, the balance in the account was $45.87. A total of $52, 351.81 was used to make purchases and retire outstanding debts incurred before the forged cheque was deposited in BMP's account. A deposit of $17.11 was made on November 3 as a result of a point of sale refund from a Future Shop store.

3. An amount of $3,000 was transferred from Backman's chequing account to his savings account. The prior balance of the savings account was $74.35. No other deposits were made into this account. From the savings account, $428.56 was used to pay outstanding debts incurred prior to the receipt of the forged cheque.

4. A total of $20,000 was transferred from BMP's account to Hashka's account. The prior balance in Hashka's account was $236.29. In addition, a payroll cheque for $3,022.49 was deposited on October 30. A total of $10,153.91 was used to pay personal debts, day-to-day expenses and entertainment expenses.

5. A certified cheque in the amount of $300,000 dated November 2, drawn by BMP and made to the order of BMP, was taken to the Bank of Montreal. On November 7, a bank draft issued by the Bank of Montreal for $300,100 was deposited by BMP in its account at BNS. No explanation has been provided for the disbursement or the subsequent deposit.

6 On November 9, 2001, RBC notified BNS that the cheque for $904,563 deposited in BMP's account on October 22, 2001 was counterfeit, as the drawer's signatures were forged and asked for BNS's assistance. BNS interrupted all transactions in BMP's account and in all related accounts and asked BMP for assistance in recovering the proceeds of the forged cheque. BMP insisted on

retaining the amount it still held. BNS then restrained the following amounts in accounts under its control that it had linked to the forged cheque:

BMP's account	$350,188.65
636651's account	$393,000.00
Backman's chequing account	$ 17,711.17
Hashka's account	$ 13,104.87
Backman's savings account	$ 2,645.79
Total	$776,650.48

In addition, BNS recovered $685.56 by reversing bill payments made from BMP's account. (When referring globally to the accounts other than that of BMP, I will call them the "related accounts".)

7 On December 6, 2001, RBC and BNS entered into an agreement in which RBC represented and warranted that the "cheque dated October 12, 2001, in the amount of nine hundred and four thousand five hundred and sixty-three dollars ($904,563.00) payable to BMP Global Distribution Inc. was counterfeited ... and was deposited into Scotiabank account number 30460 00178-17 ... and that the proceeds of the Counterfeit cheque are proceeds of fraud". Under this agreement, BNS was, at RBC's request, to transfer the restrained funds to RBC and RBC was to indemnify BNS for any losses related to the restraint and transfer. On December 7, 2001, BNS transferred $777,336.04 to RBC.

8 BMP's account was governed by a standard-form financial services agreement ("service agreement"). The relevant clauses are discussed below.

9 BMP, Hashka, Backman and 636651 B.C. Ltd. claimed damages equivalent to the restrained amounts, non-pecuniary damages for stress, wrongful disclosure of information and defamation, aggravated and punitive damages. Backman also claimed damages regarding BNS's failure to honour certain payment instructions while his account was restrained. The issue of damages for stress, wrongful disclosure of information and defamation is not before this Court.

2. Decisions of the Courts Below

2.1 British Columbia Supreme Court, 2005 BCSC 1091, 8 B.L.R. (4th) 247 (B.C. S.C.)

10 Cohen J. found that since BMP was not suing to enforce payment of the cheque, whether or not the cheque was a nullity or whether or not accepting BMP's position would allow a windfall to accrue to BMP had no bearing on the outcome of the litigation (paras. 284-85). In his view, BNS had violated the service agreement as well as the law applicable to banker/customer relations by charging back amounts credited to the accounts of BMP and the other plaintiffs. Cohen J. interpreted the service agreement as incorporating the clearing rules of the Canadian Payments Association ("clearing rules") and precluding BNS from charging back against its customer's

account. He reasoned that once "final settlement on the deposit of the Counterfeit Cheque had been reached between the BNS and the RBC", the funds in BMP's account "went from being a 'provisional' credit to being a 'final' credit. At that stage the relationship between the BNS and the plaintiffs was that of debtor/creditor" (para. 306). Regarding the related accounts, Cohen J. found that the law prevented a bank charging back against a customer's account without the customer's permission. He awarded the plaintiffs pecuniary damages because they had "suffered a loss of their right to demand repayment from the BNS of the BNS' debt to them by reason of the BNS' wrongful charge backs against their respective bank accounts" (para. 423). He assessed the total pecuniary damages at $777,336.04, the sum of all the charge backs and the reversed payments. He also awarded Backman $13.50 for a late charge due to BNS's failure to honour certain payment instructions while his account was restrained. Cohen J. also awarded damages for wrongful disclosure of information and defamation.

2.2 British Columbia Court of Appeal, 2007 BCCA 52, 24 B.L.R. (4th) 201 (B.C. C.A.)

11 The unanimous judgment of the Court of Appeal was rendered by Saunders J.A. She framed the issue as a fraud designed to place a credit in BMP's account for which BMP gave nothing. In her view, the courts were being asked to indirectly complete the fraud. She accepted the trial judge's finding that BNS had breached its banking agreement when it reversed the credit in BMP's account over BMP's opposition. However, she found that two characteristics of the case made it unusual. The first was that

> the fact of two banks, and the consequent issues arising of clearing rules and the *Bills of Exchange Act*, confuse what would be otherwise a simple conclusion in these circumstances. The interposition in the fraudster's scheme of the Royal Bank of Canada created the screen of the clearing system. In this sense, the fraud may be described as extra-layered. The issue is whether that extra layering, in the circumstances I have just described, entitles BMP to recover from the Bank of Nova Scotia, as ordered by the trial judge. [para. 26]

Indeed, Saunders J.A. said that if only one bank had been involved in the payment, it would have been entitled to debit BMP's account, because the money was paid under a mistake of fact. The second unusual characteristic was the fact that

> BMP is an innocent in the fraud. Thus we know that BMP did not overtly assist the author of the scheme in its iniquitous aspects, whether or not the author has already been paid, unknowingly, by the cheque to Citibank, or was a gratuitous fraudster, or was a fraudster who has not yet presented his bill. For that reason, the many cases concerning recovery of monies from persons implicated in a fraud have no bearing on this case. [para. 27]

12 Saunders J.A. did not delve further into what she called "the screen of the clearing system". She went on to find that

> on a plain reading of s. 48, the counterfeit cheque, because of the forged signatures on it, was wholly inoperative, setting the stage for a claim for return of monies advanced in reliance upon it.
>
> Section 48 demonstrates the *prima facie* empty asset that BMP builds its claim around.
>
> In equity, then, would this cheque have provided a basis upon which BMP could hope to retain the funds credited to its account? In my view the answer is no. [paras. 33-35]

13 Saunders J.A. then found that it would be against good conscience to give a monetary judgment that would accomplish the substance of the fraud. She added that BMP could not claim the windfall — it had lost nothing: it did not change its position as a result of the charge back. She found that the arguments about the alleged rights of BMP, 636651 B.C. Ltd., Hashka and Backman under the clearing system rules were inconsistent with the principles of equity. She also found that, except for the $100 added to the original amount of $300,000, the funds linked to the bank draft issued by the Bank of Montreal bore the same character as the credit obtained from the deposit of the forged cheque. Thus, BMP could not retain any proceeds essentially derived from fraud. Saunders J.A. awarded BMP nominal damages of $1 for BNS's reversal of the credit over BMP's opposition (paras. 3.0 and 51) plus the remaining $100 from the bank draft, and dismissed the cross-appeal on punitive damages.

14 As to the funds traced in the related accounts, Saunders J.A. found that the transfers were proper and that the cheques were actual bills of exchange, unlike the forged cheque. Absent a finding that the cheques in question were improper, BNS was entitled only to "a remedy of tracing, or an enquiry into the true ownership of the accounts" (para. 56). The appeals against 636651 B.C. Ltd., Hashka and Backman were thus dismissed.

15 BMP appeals the Court of Appeal's reversal of the trial judge's conclusion on damages and also asks for punitive damages. BNS cross-appeals on the issue of tracing in the related accounts. It seeks the reversal of the Court of Appeal's decision and of the trial judge's damages award in favour of the holders of the related accounts.

3. Positions of the Parties

16 BMP asks that the award of damages be restored. It argues that, whether the claim is viewed as one for debt or for damages for breach of contract, BNS's liability is the same: "It is not necessary for BMP to prove that it suffered a loss other than the loss of its right to demand payment of the amount credited to its account at BNS" (A.F., at para. 82). BMP also asks for punitive damages to sanction BNS for its conduct.

17 BNS takes the position that BMP never had any interest in the proceeds of the forged cheque and that it is not entitled to damages, whether general or punitive, resulting from BNS's decision to

return the funds to the victim of the fraud. BNS asserts what is essentially a defence *in rem*, relying on the inherent nullity of an instrument bearing the forged signatures of the drawer. It argues that this defence suffices for it to resist BMP's claim. In addition, BNS appeals the decision on the tracing of the funds in the related accounts on the basis that those funds were clearly identified as proceeds of the forged cheque and that none of the parties involved gave any consideration or suffered any detriment. BNS does not contest the $13.50 awarded as damages by the trial judge in relation to a late-payment charge Backman had to pay to a third party.

18 As the Court of Appeal mentioned, the case would have been simpler had only one bank been involved. However, in my view, BNS was not precluded from acknowledging that RBC could rely on the well-established doctrine of mistake of fact. Moreover, the conditions for tracing the funds in the related accounts are, in my view, met.

19 In sum, this case is about the restitution of amounts paid by RBC by mistake and the right to trace the proceeds. Since the case can be resolved by applying the common law rules on mistake of fact, I will begin by reviewing those rules. I will then apply the rules to the facts, and in doing so I will explain how the rules apply in the context of the relationship between the drawee and the collecting bank and between the customer and the bank; this will require a further discussion of the common law inasmuch as it has not been changed by the *Bills of Exchange Act*, R.S.C. 1985, c. B-4 ("*BEA*"). Finally, I will explain why, in my view, BNS could resist the claims of BMP and the holders of the related accounts.

4. Analysis

20 In *Bank and Customer Law in Canada* (2007), M. H. Ogilvie writes (at p. 284):

> [B]anks make payments by mistake for a variety of reasons, including simple error, either personal or by computer, in making a payment more than once, payment over an effective countermand, payment where there are insufficient funds, or payment of a forged or unauthorized cheque. *Prima facie*, in these situations, with the exception of insufficient funds which is treated as an overdraft, the bank is liable to reimburse the customer's account because it is in breach of contract with the customer. But the bank is also permitted to look to the recipient of the mistaken payment for restitution of the sum paid under a mistake of fact.

21 That a bank has a right to recover from a recipient a payment made under a mistake of fact was made clear in a restatement of the law by Goff J. (as he then was) in *Barclays Bank Ltd. v. W.J. Simms Son & Cooke (Southern) Ltd.*, [1979] 3 All E.R. 522 (Eng. Q.B.), at p. 541. Canadian courts have long recognized that right on the basis of the analytical framework adopted in *Royal Bank v. R.*, [1931] 2 D.L.R. 685 (Man. K.B.). Since *Simms*, however, and I agree with this approach, many Canadian courts have relied on the English case as setting the conditions for recovery in restitution by a bank, subject to Canadian law with respect to change of position, an issue that will be discussed below: *Royal Bank v. LVG Auctions Ltd.* (1983), 43 O.R. (2d) 582

(Ont. H.C.), aff'd (1984), 12 D.L.R. (4th) 768 (Ont. C.A.); *Toronto Dominion Bank v. Pella/Hunt Corp.* (1992), 10 O.R. (3d) 634 (Ont. Gen. Div.); *A.E. LePage Real Estate Services Ltd. v. Rattray Publications Ltd.* (1994), 120 D.L.R. (4th) 499 (Ont. C.A.), at p. 507: "*Barclay's Bank v. Simms* is the accepted authority explaining the obligations of a bank to its customer and its redress against the payee of a cheque who appears to be taking advantage of an innocent mistake on the part of a bank employee"; *Central Guaranty Trust Co. v. Dixdale Mortgage Investment Corp.* (1994), 24 O.R. (3d) 506 (Ont. C.A.), at p. 512, fn. 1; Ogilvie, at p. 285; P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (loose-leaf), at p. 10-32.

4.1 Simms Test for Recovering Money Paid Under a Mistake of Fact

22 The test laid down in *Simms* for recovering money paid under a mistake of fact (at p. 535) is straightforward:

> 1. If a person pays money to another under a mistake of fact which causes him to make the payment, he is *prima facie* entitled to recover it as money paid under a mistake of fact.
>
> 2. His claim may however fail if: (a) the payor intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law so to intend; (b) the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt; (c) the payee has changed his position in good faith, or is deemed in law to have done so.

23 The right of BNS to resist the claims of the appellant and the cross-respondents cannot be examined without regard to RBC's right to ask BNS to transfer the funds. Consequently, RBC's position is the starting point for the analysis.

4.2 Application of the Test

4.2.1 Prima Facie Right to Recover

24 On the first step of the *Simms* test, RBC has a *prima facie* right to recover. It is common ground that payment was made on the basis of a forged instrument. According to s. 48(1) *BEA*, a forged signature is wholly inoperative. It does not create a right to give a discharge for the bill or to enforce payment. RBC made the payment before discovering that the drawer's signatures were forged. BMP no longer disputes the fact that the instrument is a forgery, but it contends that RBC must bear the loss and that BNS was not entitled to restrain the funds and transfer them to RBC. This argument goes to the second step of the test. At the first step, there is no basis for denying that RBC has a *prima facie* right to recover the funds.

4.2.2 Right of the Payee to Keep the Proceeds, Consideration and Change of Position

25 I reiterate that the second step of the test involves three enquiries: (1) did the payor intend that the payee keep the money in any event or is the payor precluded by law from raising the mistake? (2) did the payee give consideration? and (3) did the payee change its position?

4.2.2.1 Right to Keep the Proceeds

26 In the first enquiry, the question is whether the payor intends or is deemed in law to intend the payee to receive the funds. In the case at bar, the drawee provided the funds under the mistaken assumption that the drawer's signatures were genuine. It is not in dispute — and is well settled in law — that RBC, as the drawee, had no right to pay the cheque out of the funds it held to the credit of First National, the purported drawer, and that RBC would be liable to reimburse its customer if it used the customer's funds to make the payment. Nor is the relationship between BNS and RBC in dispute. It is that of a collecting bank receiving funds from the drawee in order to remit them to the payee. The issue before the Court in this case is whether, as BMP argues, the loss must fall on the drawee bank.

27 Where a drawee provides funds to a collecting bank on presentation of an instrument bearing a forged signature of the drawer, the drawee will usually — unless a specific factual context dictates otherwise — be in a position to assert that it did not intend the payee to keep the funds. As I mentioned above, the drawee in this situation pays without the authority to do so and is liable to its customer, who has not signed as the drawer. Without such an instruction from the drawer, the payor cannot be said to have intended the payee to keep the money in any event. This is not a case where a party pays a debt it owes or where other similar circumstances preclude the payor from denying that it intended the payee to keep the funds.

28 However, whether the payor is deemed in law to intend that the payee keep the money requires further elaboration. BMP put forward three arguments in support of its claim. The first is that the principle of finality of payment forms part of the common law and that it prevents the drawee bank from recovering the paid proceeds of a forged cheque from anyone other than the forger. The second is that the scheme of the *BEA* does not allow RBC to recover from BNS or BMP. The third is that the service agreement between BNS and BMP precludes BNS from recovering such proceeds from BMP.

4.2.2.1.1 Principle of Finality of Payment

29 In Canadian law, the argument that the drawee should bear the loss is sometimes said to have originated in *R. v. Bank of Montreal* (1907), 38 S.C.R. 258 (S.C.C.). I will turn to that case in a moment, but since the two judges (Girouard J., with whom MacLennan J. concurred) who supported the principle of finality relied heavily on the older case of *Price v. Neal* (1762), 3 Burr. 1354, 97 E.R. 871 (Eng. K.B.), I will begin by discussing the latter.

30 In *Price v. Neal*, a drawee paid a first bill of exchange bearing a forged signature of the drawer. He then accepted a second, also bearing a forged signature of the drawer. After that acceptance, the bearer discounted the second bill, which the drawee eventually paid. A considerable amount of time elapsed before the drawee found out that the signatures on both bills were forged. Lord Mansfield held that the drawee was not entitled to recover in such a case.

31 *Price v. Neal* has been interpreted in various ways over the centuries. One of the interpretations serves as a basis for a broad statement that the principle of finality of payment requires the drawee to bear the loss where the drawer's signature is forged, irrespective of detrimental reliance (see: S. A. Scott, "Comment on Benjamin Geva's Paper: "Reflections on the Need to Revise the Bills of Exchange Act — Some Doctrinal Aspects" (1981-82), 6 *Can. Bus. L.J.* 331 ("Comment on Reflections"), at p. 342). A second interpretation of *Price v. Neal* is that the drawee cannot rely on the forgery after acceptance (or payment) of a bill bearing a signature he should know to be forged or is deemed to have negligently omitted to verify. Yet a third interpretation put forward for *Price v. Neal* limits its scope to instances where two innocent parties have equal equities but the holder of the bill has legal title to the money (see *Gorman v. Karpnale Ltd.*, [1991] 2 A.C. 548 (U.K. H.L.); B. Geva, "Reflections on the Need to Revise the Bills of Exchange Act — Some Doctrinal Aspects: Panel Discussion" (1981-82), 6 *Can. Bus. L.J.* 269 ("Reflections"), at pp. 308-9; J. S. Ziegel, B. Geva and R. C. C. Cuming, *Commercial and Consumer Transaction: Cases, Text and Materials* (3rd ed. 1995), vol. II, at p. 396, citing J. B. Ames, "The Doctrine of Price v. Neal" (1891), 4 *Harv. L. Rev.* 297, at pp. 297-99). In view of the various interpretations of *Price v. Neal*, I do not accept that it provides a basis for an unqualified rule that a drawee will never have any recourse against either the collecting bank or the payee where payment has been made on the forged signature of the drawer.

32 In Canada, *R. v. Bank of Montreal* is sometimes relied on in support of the principle of finality of payment. Upon closer examination, however, it cannot be said to stand for a hard and fast rule that the drawee is in all circumstances precluded from recovering from the collecting bank. First, the judges in *R. v. Bank of Montreal* who invoked *Price v. Neal* as having endorsed the principle of finality of payment did not discuss the third interpretation of that case. Second, the other judges who wrote in *R. v. Bank of Montreal* took a far more nuanced approach to the problem of the forged signature of the drawer.

33 In *R. v. Bank of Montreal*, the bank had honoured cheques bearing the forged signatures of officers of the Government of Canada. As the Government of Canada had not authorized the payments, it sought to recover the amounts of the forged cheques from the Bank of Montreal. The Bank of Montreal in turn took action against the collecting banks to recover the amounts they had received as a result of the forged cheques. Four different judges wrote reasons. All of them concluded that the drawee, the Bank of Montreal, had to return the funds to the drawer, the

Government of Canada. All of them also rejected the claim against the collecting banks, although the reasons they gave cannot easily be categorized.

34 Three of the five judges in *R. v. Bank of Montreal* (Davies, Idington, and Duff JJ.) were of the view that if the position of a collecting bank is altered, that bank can resist a claim by the drawee. Two of the judges (Davies and Idington JJ.) explicitly rejected Girouard J.'s adoption of the argument, based on *Price v. Neal*, of presumed or actual negligence on the drawee's part and the third (Duff J.) did not pronounce on it. Therefore, to argue that there is a clear rule that the drawee must suffer the loss is not supported by what is labeled as the *fons et origo* of the Canadian precedents on forged instruments. In addition, the fact that the Canadian courts subsequently embraced *Simms* also weakens the finality of payment argument significantly in a case involving payment of an instrument bearing a forged signature.

35 The assessment of the drawee's rights requires a more nuanced enquiry. The principle of finality of payment underlies both the common law rules and the *BEA's* provisions and serves as a general goal, but as laudable as it is, it does not negate rights that may otherwise accrue to a party. It cannot be raised by a payee as an indiscriminate bar to the recovery of a mistaken payment. I agree with Scott, Comment on Reflections, at p. 342, that:

> [N]o very convincing reason can be offered for refusing the drawee relief in the single instance where the mistake involves acceptance or payment on a forged drawer's signature, whilst relief is freely given to the drawee on all *other* acceptances or payments by mistake (including indeed various other kinds of forgeries; even the case where the drawer's own endorsement is forged on a bill payable to his order (s. 129(*b*)) [now s. 128(*b*)].

4.2.2.1.2 Provisions of the BEA

36 On the issue of whether the payor is deemed in law to intend that the payee keep the money, two provisions of the *BEA* warrant comment: ss. 128(*a*) and 165(3). These provisions are relevant in view both of BNS's role as BMP's agent for the purposes of collection on the instrument, and of the special status granted to a bank that receives an unendorsed cheque.

37 Section 128(a) *BEA* reads as follows:

> **128.** [Estoppel] The acceptor of a bill by accepting it is precluded from denying to a holder in due course
>
> > (a) the existence of the drawer, the genuineness of his signature and his capacity and authority to draw the bill;

38 In the instant case, the drawee (RBC), in requesting restitution from the collecting bank (BNS), was in fact denying to both the collecting bank and the payee the genuineness of the drawer's signatures. Consequently, the question is whether the payee and the collecting bank were

holders in due course and therefore entitled to rely on s. 128(a) *BEA*. I will discuss the payee's situation first, because the collecting bank has a special status which, in this case, is governed by s. 165(3), to which I will turn below.

39 The most common view is that a payee is not, as a general rule, a holder in due course because he or she has not acquired the instrument by way of negotiation (s. 55(1)(*b*) *BEA*). Yet in some factual circumstances, dealings may take place before the payee becomes the holder of the instrument, and some commentators consider that the negotiation requirement needs to be revisited: Geva, Reflections, at pp. 289 ff.; see also *St-Martin Supplies Inc. c. Boucley* (1968), [1969] C.S. 324 (C.S. Que.). This question need not be resolved for the purposes of the present case, however. It is another requirement for qualifying as a holder in due course under s. 55(1)(*b*) *BEA* that is lacking here: BMP did not take the instrument for value, so it was not a holder in due course. Since only a holder in due course can benefit from s. 128(a) *BEA*, even if RBC were deemed — by payment — to have accepted the forged cheque, it would not be precluded from denying to BMP the genuineness of the drawer's signatures.

40 The other provision that is relevant to RBC's right to recover the money it paid by mistake from BNS is s. 165(3) *BEA*. This provision reads as follows:

> **165.** . . .
>
> (3) Where a cheque is delivered to a bank for deposit to the credit of a person and the bank credits him with the amount of the cheque, the bank acquires all the rights and powers of a holder in due course of the cheque.

41 According to this provision, BNS acquired the status of a holder in due course by receiving the cheque from the payee and crediting the amount to the payee's account. Section 165(3) *BEA* deems the collecting bank to be in the same position as a party who has taken the bill free from any defect of title of prior parties. It has the same right as a party who has given consideration. Consequently, it can be argued that if BNS had chosen to do so, it could have refused to transfer to RBC the money it held on account of the fraudulent instrument. However, the question is not whether it could rely on the protection of s. 165(3) *BEA*, but whether it could restore the funds to RBC.

42 Section 165(3) *BEA* has been commented on many times. Parliament was initially criticized for acting at the request of the banking industry without understanding the potentially wide scope of the amendment (see: S. A. Scott, "The Bank is Always Right: Section 165(3) of the Bills of Exchange Act and its Curions Parliamentary History" (1973), 19 *McGill L.J.* 78. Then, following *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727 (S.C.C.), Ogilvie expressed the view in *Bank and Customer Law in Canada*, at p. 295, that the effect of the Court's narrow interpretation of s. 165(3) has been to make the collecting bank the drawer's insurer. The least that can be said is that the interpretation of the scope of s. 165(3) *BEA* is taking shape.

43 No prior case has concerned the effect s. 165(3) *BEA* will have where the deposited instrument bears a forged signature of the drawer. In *Boma*, at para. 43, Iacobucci J. explicitly refrained from discussing the applicability of the defence available to the collecting bank in circumstances where the instrument might be found not to be a bill of exchange. Although I have serious doubts about the soundness of an argument which would deprive the collecting bank of all protection on the basis that the instrument is a sham, not a cheque, I need not discuss it here in view of my position that the collecting bank is not required to rely on the protection potentially afforded by s. 165(3) *BEA*.

44 As Ogilvie clearly points out:

> Section 165(3) is drafted in broad terms, with the obvious policy of protecting a bank from liability in relation to cheques deposited in a customer's account by permitting a bank to presume that it was the drawer's intention that the payee receive the proceeds of the cheque, in complete contrast to the earlier law, where a bank enjoyed no such presumption. [pp. 292-93]

45 Section 165(3) *BEA* affords protection to a bank. The bank is not obligated to rely on this protection when restitution is claimed from it. The payee stands as a third party with respect to the protection. He or she cannot use the bank's shield as a sword against it. The purpose of granting the bank the status of a holder in due course is not to create an entitlement for the payee of a forged instrument. The payee may benefit from defences that are inherent in the rules on mistake of fact, but not from the protection afforded to a bank by s. 165(3) *BEA*. In other words, if the forged instrument were held to be a bill of exchange, BMP could not argue, for the purposes of the *Simms* test, that BNS was deemed in law to be entitled to receive the funds irrespective of the validity of the drawer's signatures.

4.2.2.1.3 The Service Agreement

46 BMP also argued, and the trial judge agreed, that BNS was not entitled to restrain the funds and transfer them to RBC because the service agreement governing the contractual relationship did not authorize this.

47 Historically, a contract governing a bank account consisted mainly of implied terms: *Bank of Montreal v. Quebec (Attorney General)* (1978), [1979] 1 S.C.R. 565 (S.C.C.), at p. 569 (*per* Pratte J.), citing *Joachimson v. Swiss Bank Corp.*, [1921] 3 K.B. 110 (Eng. C.A.), at p. 117 (*per* Bankes L.J.). Those terms were developed by the common law courts, and some of them were later codified in what is now the *BEA*.

48 Today, most bank account agreements, including the service agreement between BMP and BNS, are standard form contracts. However, terms may still be implied: *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711 (S.C.C.), at pp. 776-77; G. R. Hall, *Canadian Contractual Interpretation Law* (2007), at p. 125. In the instant case, BMP argues that under the

service agreement, BNS could charge back only the credits for which it had not received settlement. According to BNS, nothing in the service agreement precluded it from returning the funds to RBC and resisting the claim for damages.

4.2.2.1.3.1 The Provisional Payment Clause

49 The service agreement contains provisions under which amounts may be charged back in certain circumstances. Clause 4.7 reads as follows:

> **4.7** You authorize us to charge the following to any of your accounts, even if they are not specifically designated for the instruction or service:
>
> • the amount you ask us to pay in any instruction
>
> • the amount of any instruction we have paid to you or credited to your account and for which we do not receive settlement for any reason (including fraud, loss or endorsement error) together with all related costs
>
> • payment of any amount you owe us, including fees, charges, costs and expenses.

50 The right to charge back provisional credits when a customer's instruction to collect on a bill cannot be carried out has long been recognized at common law. Clause 4.7 clarifies that right but does not rule out other reversals of credit that are available at common law. Clause 4.7 gives the bank an explicit right to charge back amounts credited to the customer's account if an instrument is not settled. In the context of the service agreement, it is clear that the settlement referred to in this clause is the receipt of the funds through the banking system, and more particularly through the clearing mechanism available to members of the Canadian Payments Association.

51 The trial judge seems to have understood the doctrine of mistake of fact to be limited to provisional credits or, in other words, to situations where the collecting bank has not received the funds. This is not so. As a matter of fact, both the seminal cases of *R. v. Bank of Montreal* and *Royal Bank v. R.*, to which I referred above, concerned forgeries discovered long after the forged cheques had been paid. In *Royal Bank v. R.*, the drawee bank was held to be entitled to claim the amounts of the cheques from the payee, who was also its customer. *Royal Bank v. R.* shows that a bank is not necessarily precluded from claiming funds from the payee long after the instrument has been cleared.

52 The doctrine of mistake of fact is so ingrained in our law that it can be seen as an implied term of the contract. This is even more true in the case at bar, as a clause of the service agreement explicitly provides that BNS retains its rights under "any law". Clause 17.3 reads as follows:

> **17.3** This agreement takes precedence over any other agreement, service request or service materials relating to any instructions or services. However, we retain all our rights under any

> law respecting loans, set-offs, deposits and banking matters even if they are not described in this agreement.

53 Although the restraint of the funds by BNS could not be based on clause 4.7, since BNS had received settlement from RBC, the contract does not preclude the application of the common law where a payment has been made under a mistake of fact. Rather, the common law is implicitly incorporated, since it does not conflict with the explicit terms of the contract. Thus, clause 4.7 is not a bar to applying the common law to the relationship between BNS and BMP where BNS's role is no longer that of a collecting bank.

4.2.2.1.3.2 The Clearing Rules

54 In concluding that BNS did not have the right to restrain the funds and transfer them to RBC, the trial judge interpreted the service agreement as incorporating the clearing rules of the Canadian Payments Association. Cohen J. held that "the Agreement specifically refers to, and incorporates the time limit set out in the clearing Rules" (para. 292). With respect, I do not agree that the clearing rules are an obstacle to recovery.

55 The clearing rules themselves provide for the survival of the members' common law rights. Clause 1(*b*) of Rule A4 allows a negotiating bank to seek recourse outside the clearing system:

> Nothing in this Rule precludes a Drawee or a Negotiating Institution from exercising its rights and seeking recourse outside of the Clearing.

Moreover, the preamble to the rules contains an express disclaimer of application to third parties:

> Nothing in the Rules shall affect or be interpreted to affect the rights or liabilities of any party to any Payment Item, except as expressly provided in the Rules.

56 It is also recognized in the authorities that the clearing rules apply only to relations between members of the Canadian Payments Association and that they do not create entitlements for third parties. As B. Crawford states in *Payment, Clearing and Settlement in Canada* (2002), vol. 1, at p. 168:

> ... it must be abundantly clear in principle that the ACSS Rules, being internal documents of a corporation, may legitimately govern the relations of the members of the corporation but cannot place burdens on members of the public or bestow benefits on them in connection with their use on the CPA's clearing and settlement system.

57 I agree with the following statement by Evans J.A. in *National Bank of Greece (Canada) v. Bank of Montreal* (2000), [2001] 2 F.C. 288 (Fed. C.A.), at para. 19:

> This system operates only at the level of banking and similar institutions, and ... decisions of the compliance panel have no impact on either the private law rights and duties of banks, their customers, and the payers and payees of cheques, or the remedies available to enforce them.

(See also *Bank of Nova Scotia v. Regent Enterprises Ltd.* (1997), 157 Nfld. & P.E.I.R. 102 (Nfld. C.A.), at para. 38; *Toronto Dominion Bank v. Dauphin Plains Credit Union Ltd.* (1992), 90 D.L.R. (4th) 117 (Man. Q.B.), at p. 121, rev'd on other grounds (1992), 98 D.L.R. (4th) 736 (Man. C.A.), leave to appeal to S.C.C. refused, [1993] 2 S.C.R. vii (S.C.C.).)

58 Finally, I disagree with the trial judge that the service agreement governing the relationship between BNS and BMP incorporated the clearing rules for BMP's benefit. The trial judge based this conclusion on his analysis of clauses 4.1, 4.3, 4.4 (para. 296) and 4.7 (para. 297), as well as on the testimony of the branch manager, who stated: "[The service agreement] uses — That's correct. It used the clearing settlement system." (para. 291) This statement supports the fact that BNS "used" the clearing system. However, it does not mean that the rules were incorporated into the service agreement. Clauses 4.1, 4.3 and 4.4, to which the trial judge referred, read as follows:

> **4.1** You are responsible for settling payment of your instructions. Unless you have made specific arrangements with us, you will ensure that your accounts have sufficient cleared funds to settle any instructions at the time that you give us an instruction. We are not required to settle an instruction if sufficient cleared funds are not available in your account. The reported balances for your account may include amounts which are not cleared funds. Cleared funds means cash or any funds from any deposit which have been finally settled through the clearing system.
>
> **4.3** You acknowledge that we must clear instructions using a clearing system and are bound by the rules of any clearing system we use, including rules for endorsement of instructions, identity of payee and the time for final settlement. These rules affect our ability to honour your request to cancel instructions and the procedures we must follow to settle your instructions and clear funds for you.
>
> **4.4** We reserve the right to clear and transfer instructions by whatever method we choose, whether they are drawn on your account or negotiated by you. You grant us sufficient time to settle all instructions. You acknowledge that we may delay crediting your account until we receive the cleared funds for the instruction.

59 Clause 4.1 is a restatement of the bank's common law obligation to honour its customer's cheques and instructions when the customer has sufficient credit. Under clause 4.3, BMP acknowledged that BNS was bound by the clearing rules. The only consequence of this acknowledgment was that BMP would be precluded from claiming a breach of the agreement if a failure by BNS to honour its instructions was justified by the clearing rules BNS must abide by

in dealing with other banks. Clause 4.4 essentially gave BNS three types of rights: (1) to clear instructions in whatever way it chose; (2) to take sufficient time to settle instructions; and (3) to take sufficient time to credit the account. Clause 4.4 was silent as to whether the "credit" ever became a final and irreversible credit to BMP's account. It may be that the restraint of the funds by BNS was based on no express provision, but it is clear that the clearing rules were neither expressly nor implicitly incorporated for BMP's benefit.

60 In summary, the trial judge could not rely on the clearing rules to arrive at the conclusion that BMP had a right to the proceeds of the forged cheque. Consequently, I find that the first answer at the second step of the *Simms* test is that RBC did not intend and is not deemed in law to have intended that BMP receive the funds. Two other enquiries remain: whether consideration was given and whether a change of position occurred.

4.2.2.2 Consideration

61 The question whether BMP has given consideration is easily answered in light of the trial judge's finding of fact that BMP gave no value for the instrument. At the same time, BMP's position that RBC should bear the loss entails an implicit acknowledgment that neither itself nor BNS has given consideration for the instrument.

4.2.2.3 Change of Position

62 The question in the third enquiry is whether the payee has changed its position. In *Simms*, the condition that money cannot be recovered in the event of a change of position was seen to be linked to the defendant's being deprived of an opportunity to give a notice of dishonour. This prompted comments that the defence of change of position is more specific than the label would suggest: Geva, Reflections, at pp. 308 ff. However, leading English commentators on the subject now observe that the law has evolved and may now include defences of change of position that are not related to the *BEA's* notice requirements: Lord Goff and G. Jones, *The Law of Restitution* (6th ed. 2002), at p. 852, see: *Lipkin Gorman v. Karpnale Ltd.*. Similarly, leading Canadian commentators consider that since *Storthoaks (Rural Municipality) v. Mobil Oil Canada Ltd.* (1975), [1976] 2 S.C.R. 147 (S.C.C.), the defence of change of position has been "an established feature of Canadian law of mistaken payments": Maddaugh and McCamus, at p. 10-35, §10:500.10; see also: G. H. L. Fridman, *Restitution* (2nd ed. 1992), at p. 458. I see no reason why the general defence of change of position should not apply to mistaken payments made on forged cheques.

63 To conduct the change of position enquiry, it is necessary to determine whether the payee parted with the funds. In this case, BNS, as the collecting bank, received the funds from RBC for the benefit of the payee, BMP, and credited BMP's account. Once the collecting bank receives the funds from the drawee and credits the payee, its role as a collecting bank is terminated. It then becomes the holder of the funds under its contract with its customer. It is settled law that a customer is a creditor of the bank when he or she deposits funds into an account and that the bank holds

these funds as its own until the customer asks for repayment. This principle has gone unquestioned since *Foley v. Hill* (1848), 2 H.L.C. 28, 9 E.R. 1002 (U.K. H.L.). See: *Crawford and Falconbridge: Banking and Bills of Exchange* (8th ed. 1986), vol. 1, at pp. 742-43; Ogilvie, at p. 179.

64 Thus, although BNS's role was changed from that of a collecting bank to that of a borrower, for the purposes of the change of position analysis, it must be concluded that BNS remained the holder of the funds. Moreover, at the time they were restrained, the funds now claimed by BMP were still credited to its account. Therefore neither BNS as the holder of the funds nor the payee had changed its position.

65 In conclusion, BMP had not changed its position and the defence was available neither to it nor to BNS. It is worth noting that cases in which a person who is not a party to the fraud has neither given consideration nor changed its position will be rare. However, that is what has happened here according to the facts found by the trial judge. In these circumstances, all the conditions for recovery of the payment made by mistake are met. Other objections have been made, though, and I will discuss them now.

4.3 Jus Tertii Defence, Self-Help Arguments and Policy Considerations

66 The trial judge found that it was wrong for BNS to transfer the funds to RBC. He was of the view that BNS had favoured a bank to its customer's detriment. In his opinion, BNS was not entitled to exercise any of the rights that could have been exercised by RBC.

67 The *jus tertii* argument the trial judge relied on could be accepted only if RBC had no right to recover the funds from BNS. Only then could BNS be said to have acted in RBC's stead. Since I have concluded that BNS was entitled to give effect to RBC's claim for restitution of the moneys paid under mistake of fact, the *jus tertii* argument fails. This is the result of the application of the law to the highly singular facts of this case.

68 It is worth recalling some of the extremely unusual circumstances of this case: the sale price of the unlicensed distributorship was arrived at by "pulling the number out of the air", the cheque was received without a cover letter, the names of the sender and the drawer of the cheque were unknown, Newman, the purchaser, could not be reached and the payee had given no consideration. The fraud could not be clearer, nor could the origin of the funds. In my view, since the rightful owner had a legitimate claim against the recipient, BNS had no duty to give preference to BMP.

69 The funds received by BNS were RBC's own funds and RBC had no right to be repaid out of First National's account. BNS acted in a way that could have enabled the parties to avoid going through a series of judicial proceedings. This Court's reasoning in *Banque canadienne nationale v. Gingras*, [1977] 2 S.C.R. 554 (S.C.C.), at p. 564, applies with equal force here. BNS asked BMP for support in recovering the proceeds of the forged cheque. BMP insisted on retaining the funds even though it had given no consideration for them and even though the fraud was beyond dispute.

In this case, BNS's actions entailed no risk of curtailing the protection from which a holder in due course is entitled to benefit.

70 Furthermore, BMP objected to the joinder of the action RBC had eventually instituted against BMP, which was pending at the time this case was heard. It might have been easier for the trial judge to assess the parties' rights had the two proceedings been joined. In these circumstances, the argument that BNS had exercised a third party right or resorted to a self-help remedy not only sounds hollow and opportunistic, but is procedurally unfounded.

71 I can conceive of no policy consideration that would preclude BNS from responding to RBC's common law right in this case. As I mentioned above, neither *Price v. Neal* nor *R. v. Bank of Montreal* stands for a strict rule that the drawee must in all circumstances bear a loss resulting from a cheque bearing a forged signature of the drawer. There is no rule preventing RBC or BNS from arguing that the payment to BMP was made by mistake. The commentators find no convincing reason to establish an absolute rule against relief in the case of payment on the drawer's forged signature (B. Geva, "Conversion of Unissued Cheques and the Fictitious or Non-Existing Payee — *Borna v. CIBC*" (1997), 28 *Can. Bus. L.J.* 177, at p. 189; Scott, Comment on Reflections, at p. 342).

72 At common law, the principle of finality of payment must be balanced against the right of the owner of the funds to recover money paid under a mistake of fact. The common law affords a defence to an innocent party who has given consideration or changed his or her position. However, the person who is still in possession of the funds is in the best position to stop the fraud. To preclude means to prevent the continuation of a fraud in order to allow a fraudulent payment to be finalized would be a strange policy. Thus, there is no overarching policy consideration that would bar the payee's bank from resisting a claim based on a signature that has been proven to be forged where the payee has not used the funds and has neither given consideration for them nor changed his or her position.

73 The trial judge was of the view that BMP and the holders of the related accounts had suffered "a loss of their right to demand repayment from the BNS of the BNS' debt to them by reason of the BNS' wrongful charge backs against their respective bank accounts" (para. 423). In my view, BNS was entitled to object that since the cheque was forged, the funds could be and were returned to their rightful owner. The deposit of the forged instrument could not result in a debt to BMP in this case. Therefore, BMP did not lose anything, because the funds had to be returned to RBC. The trial judge's conclusion that BMP had lost the right to demand payment of a debt owed by BNS is erroneous, because the credit entry in the account had been made by mistake.

74 I have found that RBC made a mistaken payment, that nothing precluded it from recovering the funds and that BMP had no defence to the claim. More particularly, BNS was entitled not to raise a defence based on s. 165(3) *BEA*. KBC, in trying to trace the sums it had mistakenly paid, was informed that a portion amounting to over $776,000 was being held by BNS at the time the

fraud was discovered. An amount of $350,188.65 was still in BMP's account. BNS also restrained funds in the related accounts. The question the Court must now answer is whether the rules of evidence are a bar to restitution. I will now discuss this issue.

4.4 Right to Claim the Amounts in BMP's Account and to Trace Funds in the Related Accounts

75 Tracing is an identification process. The common law rule is that the claimant must demonstrate that the assets being sought in the hands of the recipient are either the very assets in which the claimant asserts a proprietary right or a substitute for them.

76 In the instant case, RBC's funds were first transferred through the clearing system to BNS in its capacity as collecting bank — and thus as agent — for BMP. BNS then made the entry in BMP's account to reflect the receipt of the funds from RBC. Finally, BMP made withdrawals from its account by way of transfers or cheques for deposit in the related accounts and, in the case of the transactions involving the $300,000 cheque, back to its own account. What is at issue here is a non-specific fund.

77 Under ordinary circumstances, an agent cannot be sued in the principal's stead. However, as stated by Lord Goff and Jones in *The Law of Restitution*, at p. 847, citing *British American Continental Bank v. British Bank for Foreign Trade* (1925), [1926] 1 K.B. 328 (Eng. C.A.),

> where the agent has paid the money over to his principal but has received it back again so that his position is as it was before he paid it over, he must make restitution.

Save for the $100 added to the bank draft, there is no issue of identification of the money in BMP's account. The unchallenged evidence is that it comes from the funds received from RBC. BNS, as agent, received the funds from RBC and, after crediting them to its principal, BMP, received them back under the banking contract. Having received the funds back, BNS had to make restitution to RBC. Therefore, BNS has a valid defence against BMP (see: *Bavins, Junr. & Sims v. London & Southwestern Bank Ltd.* (1899), [1900] 1 Q.B. 270 (Eng. C.A.)). BNS's status with respect to the funds in the related accounts is different. BNS was not acting as agent of the holders of the related accounts. A review of the rules on tracing will therefore be helpful.

78 It has been accepted that the English case of *Agip (Africa) Ltd. v. Jackson* (1990), [1992] 4 All E.R. 451 (Eng. C.A.) (aff'g (1989), [1992] 4 All E.R. 385 (Eng. Ch. Div.)), has been accepted as setting out rules with respect to tracing of money: *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805 (S.C.C.).

79 According to the Court of Appeal in *Agip*, tracing at law is permitted where a person has received money rightfully claimed by the claimant. Liability is based on mere receipt, and the extent of liability will depend on the amount received (*Agip* (C.A.), at pp. 463-64; *Agip* (Ch.), at p. 399; *Banque Belge pour l'Etranger v. Hambrouck*, [1921] 1 K.B. 321 (Eng. C.A.)). It is sometimes

said that funds cannot be traced to bank accounts at common law. This view overstates the rule and fails to take into account the fact that, as an evidentiary process, tracing is possible if identification is possible (see: D. R. Klinck, "'Two Distincts, Division None': Tracing Money into (and out of) Mixed Accounts" (1988), 2 *B.F.L.R.* 147, at p. 148, and L. D. Smith, *The Law of Tracing* (1997), at pp. 183 ff.). Indeed, no statement that tracing is impossible can be found in the case that is most often cited in support of the theory that funds cannot be traced to bank accounts at common law. If Lord Ellenborough C.J.'s comment in *Taylor v. Plumer* (1815), 3 M. & S. 562, 105 E.R. 721 (Eng. K.B.), is read in its entirety, it is clear that tracing is impossible only when the means of ascertainment fail:

> It makes no difference in reason or law into what other form, different from the original, the change may have been made, whether it be into that of promissory notes for the security of the money which was produced by the sale of the goods of the principal, as in *Scott v. Surman*, Willes, 400, or into other merchandize, as in *Whitecomb v. Jacob*, Salk. 160, for the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description. The difficulty which arises in such a case is a difficulty of fact and not of law, and the dictum that money has no ear-mark must be understood in the same way; i.e. as predicated only of an undivided and undistinguishable mass of current money.
>
> [Emphasis added; p. 726]

80 That it is possible at common law to trace money to bank accounts is illustrated by the cases of *Hambrouck* and *Agip*. In *Hambrouck*, a man named Hambrouck had fraudulently procured cheques drawn on the Banque Belge pour l'Étranger. He endorsed the cheques and deposited them in his account at Farrow's Bank. The cheques were cleared through the banking system and credited to Hambrouck's account. "*In substance* no other funds were paid into the account than the proceeds of these forged cheques" (Atkin L.J., at p. 331 (emphasis added)). Hambrouck then paid money out of that bank account to a Ms. Spanoghe, with whom he was living. A deposit was made in Ms. Spanoghe's account at the London Joint City and Midland Bank and, according to Atkin L.J., "[n]o other sums were at any time placed to that deposit account" (p. 332). On the basis of those facts, Bankes and Atkin L.JJ. were both of the opinion that the funds could be traced at common law to Ms. Spanoghe's account (pp. 328 and 335-36). Two points drawn from that case are important for our purposes: neither the fact that a cheque is cleared through the banking system before being deposited in the payee's account nor the fact that the payee has mixed the funds with other funds is sufficient to bar recovery at common law.

81 To fully understand the parallel between *Hambrouck* and *Agip*, it is important to follow the sequence of events in the latter case. *In Agip*, the Banque du Sud ("BdS") in Tunis received a payment order of $518,822.92 in favour of Baker Oil. BdS instructed Citibank to debit its account

and credit an account at Lloyds Bank. Lloyds Bank credited Baker Oil's account before receiving the funds from Citibank, thereby assuming the delivery risk. The next day, pursuant to instructions from accountants Jackson & Co., who controlled Baker Oil on behalf of their clients, Lloyds Bank transferred the funds to Jackson & Co.'s account. At the time the credit was entered in Baker Oil's account, there was no other money in the account; however, the balance of Jackson & Co.'s account was US$7,911.80 before the transfer. The Court of Appeal agreed with the trial judge that the mixing of the funds with the amount already in Jackson & Co.'s account was of no consequence and did not preclude tracing (pp. 465-66). In first instance, Millett J., as he then was, had stated in *Agip*, at p. 399:

> A fortiori it can be no defence for [Jackson, a partner of Jackson & Co.] to show that he has so mixed it with his own money that he cannot tell whether he still has it or not. Mixing by the defendant himself must therefore, be distinguished from mixing by a prior recipient. The former is irrelevant, but the latter will destroy the claim for it will prevent proof that the money received by the defendant was the money paid by the plaintiff.
>
> [Emphasis added.]

82 In *Agip*, the time when the fonds the plaintiff sought to trace ceased to be identifiable was when Lloyds Bank made the transfer to Jackson & Co.'s account before receiving the funds from Citibank: even though Lloyds Bank later recouped them, the funds used to make the payment belonged to Lloyds, and BdS's funds had to be traced through the clearing system. On that issue, the Court of Appeal also agreed with Millett, J. and quoted him (at p. 466):

> Unless Lloyds Bank's correspondent bank in New York was also Citibank, this involves tracing the money [BdS's funds] through the accounts of Citibank and Lloyds Bank's correspondent bank with the Federal Reserve Bank where it must have been mixed with other money. The money with which Lloyds Bank was reimbursed cannot therefore, without recourse to equity, be identified as being that of the Banque du Sud.

83 What distinguishes *Agip* from *Hambrouck* is that Lloyds Bank, having assumed the delivery risk, paid with its own money. This broke the link between the funds it paid and the fonds it received from Citibank. If passage through the clearing system could on its own eliminate any possibility of identifying the money, tracing at common law would long ago have become totally obsolete and the dictum of the Court of Appeal in *Agip* that mixing in Jackson & Co.'s account was of no consequence would be of little use. I cannot accept that the result in *Hambrouck* can be explained by an oversight that occurred because the interruption caused by passage through the clearing system was not argued: P. J. Millett, "Tracing the Proceeds of Fraud" (1991), 107 *L.Q. Rev.* 71, at p. 74, fn. 7). When, as in *Agip*, the chain is broken by one of the intervening parties paying from its own funds, identification of the claimant's funds is no longer possible. However, the clearing system should be a neutral factor: P. Birks, "Overview: Tracing, Claiming and Defences", in P. Birks, ed., *Laundering and Tracing* (2003), 289 at pp. 302-5. Indeed, I prefer to assess the

traceability of the asset after the clearing process and not see that process as a systematic break in the chain of possession of the funds. Just as the collecting bank receives the funds as the payee's agent, the clearing system is only a payment process. Paying through the clearing system amounts to no more than channelling the funds.

84 In *Hambrouck*, the funds received through the clearing system by Farrow's Bank, acting as the collecting bank, from the Banque Belge pour l'Étranger had not lost their "identity". In the same way, the funds in the case at bar have not lost theirs. BNS, acting as the collecting bank, received the funds from RBC through the clearing system and credited them to BMP. The asset traced by RBC is simply its own. It is not the chose in action or the account holders's personal claim against BNS: R. M. Goode, "The Right to Trace and its Impact in Commercial Transactions — I" (1976), 92 *L.Q. Rev.* 360, at p. 380. The transactions that followed were all conducted by the recipient and persons related to it who received the money from BMP. Moreover, the fact that some of the accounts had prior balances is not a bar to recovery. Not only were the balances not substantial — only one of the accounts contained over $100 — but the withdrawals by the holders significantly exceeded the balances. It is also worth noting that BNS was both the drawee and the payees' banker in all the transactions at issue, namely the transfers and payments from BMP's account and to the related accounts. There was no hiatus like the one in *Agip*, and the holders of the related accounts were not third parties who had given consideration or changed their positions.

85 In my view, *Taylor*, *Agip* and *Hambrouck* show that it is possible at common law to trace funds into bank accounts if it is possible to identify the funds. (See also: Goode, at pp. 378, 390-91 and 395.) According to *Agip* and *Hambrouck*, mixing by the recipient is not a bar to recovery. I do not see those cases as exceptions to a common law rule against tracing in mixed funds. Rather, I accept the view advanced by Lord Millett in *Foskett v. McKeown* (2000), [2001] 1 A.C. 102 (U.K. H.L.), at p. 132, that the rules for tracing money are the same as those for tracing into physical mixtures. This view is also supported by Professor L. D. Smith in his treatise *The Law of Tracing*, at pp. 74 and 194 ff. For our purposes, there is no need to review all the rules applicable to physical mixtures (*Lawrie v. Rathbun* (1876), 38 U.C.Q.B. 255 (Ont. H.C.); *Carter v. Long* (1896), 26 S.C.R. 430 (S.C.C.), at pp. 434-35; J. Ulph, "Retaining Proprietary Rights at Common Law Through Mixtures and Changes", [2001] *L.M.C.L.Q.* 449). Suffice it to say that, as between innocent contributors, contributions are followed first to amounts they have withdrawn. In the case at bar, since the withdrawals of all those who received funds far exceeded their contributions, RBC can trace its own contribution to the balances remaining in the accounts.

86 As Atkin L.J. mentioned in *Hambrouck*, the question to be asked is whether the money deposited in those accounts was "the product of, or substitute for, the original thing" (p. 335). In the instant case, the identification process is quite simple. I will not go back over the issue of the funds in BMP's account: there was no relevant movement of funds. Regarding the funds in the related accounts when BNS acted on BMP's instructions and transferred money to the accounts of 636651 B.C. Ltd., Backman (chequing and savings accounts) and Hashka, the transferred funds

were clearly related to the forged cheque BNS had mistakenly credited to BMP's account. The moneys used for the transfers came from BMP's account. The link is made with the funds RBC had used to pay the forged cheque.

87 One issue that was raised is whether certification of the cheques would be a bar to tracing. When a cheque is certified, the certification does not affect the nature of the funds. In discussing the effect of certification in *A.E. LePage Real Estate Services Ltd. v. Rattray Publications Ltd.*, at p. 505, Finlayson J.A. stated that certification of a cheque, like acceptance, is irrevocable; see also *Centrac Inc. v. Canadian Imperial Bank of Commerce* (1994), 21 O.R. (3d) 161 (Ont. C.A.). As a matter of law, to hold that certification is irrevocable would contribute to the acceptability of certified cheques as substitutes for cash and would also reflect the prevailing perception in the business world that it is irrevocable. However, BNS's intention in the instant case was not to revoke the certification. In fact, the certified cheques had already been honoured. As Maddaugh and McCamus point out (at p. 10-57):

> The fact that the drawee bank cannot resist payment on a cheque it has certified does not necessarily insulate the payee, however, from a subsequent restitutionary claim by the paying bank.

88 In *Rattray*, Finlayson J.A. stated that "where a drawee bank honours a cheque notwithstanding a valid countermand and the effect is to satisfy a just debt, the bank may [debit the customer's account and] successfully defend an action by the customer/drawer for reimbursement" (p. 509). Further, where a payment does not satisfy a just debt, the bank "may have an action in restitution against the holder of a certified cheque" (*Ibid*). Indeed, if a bank has certified a cheque, it cannot deny the authenticity of the drawer's signature and the sufficiency of the funds. However, certification does not affect the traceability of the underlying funds.

89 What remains to be discussed is the claim by way of cross-appeal concerning punitive damages.

4.5 Damages

90 The Court of Appeal found that BNS had breached the service agreement by reversing the credit in BMP's account without having been instructed to do so by BMP. However, it also found that BMP had suffered no real injury and accordingly awarded nominal damages of $1. In addition, it ordered BNS to pay BMP the difference of $100 between the bank draft of November 7, 2001, and the certified cheque of November 2, 2001. BNS does not contest this conclusion. BMP seeks an increase in the damages and Hashka, Backman and 636651 B.C. Ltd. seek an order for damages.

91 In light of my conclusion that BNS could resist BMP's claim on the basis of the doctrine of mistake of fact, it is my view that no additional damages can be awarded. Since RBC could trace

the funds with the assistance of BNS, the same reasoning applies to the restraint of funds and the reversal of credits. Therefore, the claim to have the trial judge's award restored fails.

92 BMP also seeks an award of punitive damages. The trial judge rejected this claim, finding that BNS's conduct did not warrant such an award. In view of my conclusions on BNS's right, this claim, too, can only fail.

5. Conclusion

93 Beyond the strangeness of its factual substratum, this case involves an application of the well-established doctrine of mistake of fact to very unusual facts. The business of collecting banks will rarely lend itself to the application of this doctrine because most of the time, the bank will have changed its position, or its customer will have drawn on the credited amount, or the funds will have been mixed in a way that precludes tracing. In this case, however, the application of common law principles leads to a logical conclusion. The Court of Appeal found support for that conclusion in equity and it may be that support can be found there, but the same result can be obtained at common law.

94 The appeal should be dismissed with costs and the Court of Appeal order affirmed. The cross-appeal should be allowed with costs and the awards of damages in favour of 636651 B.C. Ltd., Hashka and Backman set aside, save for the amount of $13.50 payable to Backman, which BNS does not contest.

Appeal dismissed; cross-appeal allowed.

Pourvoi rejeté; pourvoi incident accueilli.

Tab 28

1937 CarswellOnt 56
Ontario Supreme Court [Court of Appeal]

Carter v. Golland

1937 CarswellOnt 56, [1937] 4 D.L.R. 513, [1937] O.R. 881

Carter et al. v. Golland

Middleton, Fisher and Henderson JJ.A.

Heard: October 21, 1937
Judgment: November 2, 1937

Counsel: *R. L. Kellock, K.C.*, for the plaintiffs, appellants.
F. J. Hughes, K.C., for the defendant, respondent.

Subject: Contracts; Corporate and Commercial; Torts
Related Abridgment Classifications
Torts
VIII Fraud, deceit, and misrepresentation
VIII.6 Remedies
VIII.6.a Rescission
VIII.6.a.ii Recoverable loss
Headnote
Fraud and Misrepresentation --- Remedies — Rescission — Recoverable loss — Accounting of profits
Contracts — Fraud — Rescission — Sale of a business — Restitutio in integrum — Accounting of profits and allowance for depreciation — Rule in Equity.
Where a business has been sold and the purchaser, after carrying on the business for a period of time, discovers that representations of fact made by the seller as to the earning powers of the business were false to the knowledge of the seller, the Court may, at the suit of the purchaser, applying the rule in Equity, rescind the contract of sale, and direct an account be taken of profits and make an allowance for deterioration, even though the parties can not be restored to precisely the position they were in before the contract was made. *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218, at p. 1278; *Adam v. Newbigging* (1888), 13 App. Cas. 308, applied.

An appeal by the plaintiffs from the judgment of J. A. McEvoy J. dismissing the action.

The appeal was heard by Middleton, Fisher and Henderson JJ.A.

R. L. Kellock, K.C., for the plaintiffs, appellants, contended that the plaintiffs had been induced to purchase the business by the misrepresentations of fact made by the defendant as to the turnover of the business. The defendant, who had been familiar with the financial details of the business, must have known that her statements as to the volume of business done were in fact untrue: *Redican v. Nesbitt*, [1924] S.C.R. 135, at p. 147. The plaintiffs relied upon the statements made by the defendant and the statements were obviously material: *Leeson v. Darlow* (1926), 59 O.L.R. 421, at p. 432. The plaintiffs are therefore entitled to rescission of the contract of sale.

F. J. Hughes, K.C., for the defendant, respondent pointed out that the learned trial Judge, who had had the advantage of seeing the witnesses, had found that the statement as to volume of business was made by the defendant without any intention to deceive: *Borbas v. Borbas*, [1937] O.W.N. 249.

The plaintiffs can not claim rescission since they are still in possession of, and are carrying on, the business and have not elected to rescind, and can not and have not tendered restitution: *Dominion Royalty Corporation v. Goffatt*, [1935] S.C.R. 565; *United Shoe Machinery Company v. Brunet*, [1909] A.C. 330.

Kellock, K.C., in reply.

The judgment of the Court was delivered by *Middleton J.A.*:

1 An appeal from the judgment of the Honourable Mr. Justice J. A. McEvoy by which the action was dismissed.

2 The action was brought on the 25th January, 1937, by Sarah Carter and Thomas H. Carter for the purpose of rescinding a contract bearing date the 14th of October, 1936, for the sale and purchase of a retail grocery and butcher business and the premises in which it was carried on in Orillia, and was tried before Mr. Justice McEvoy on the 5th of May, 1937, and was dismissed.

3 The business in question was originally owned by the father of the defendant Mrs. Alma Lena Golland. It had existed for many years. The defendant was familiar with the business in a general way. When the father was old, she married the late Mr. Golland who had theretofore been employed as the butcher in connection with the business. Her husband then purchased the business and carried it on for five or six years until his death which occurred on the 18th of September, 1935.

4 Mr. Golland, by his will, appointed his widow and one John Ball executors, and gave to her an annuity of $400.00 per annum determinable upon remarriage. Whatever was not required was given to his relatives.

5 Mrs. Golland thereafter conducted the business personally and kept books of account. She was familiar with the business during the lifetime of her late husband, and also to a greater or less extent during the lifetime of her father. In May 1936, she advertised the business for sale, both

by publication in a newspaper and by circulars. Thomas H. Carter, learning that the business was for sale, on the 31st May, 1936, wrote to his brother Charles from Powassan where he then lived, asking him to make inquiries, particularly to ascertain the average monthly sales for the past year or more. Charles Carter then saw the defendant and she told him that the average sales monthly amounted to $3,600.00. This information was duly passed on to Thomas. At this interview, Mrs. Golland stated that, notwithstanding the advertisement and circular letters, the business was not for sale. In the meantime she was busily engaged in acquiring the outstanding interests in the business from her deceased husband's relatives. These having been obtained on the 26th August, 1936, she wrote, on September 16th, to Mr. Carter: "It was not until this week did I get everything settled, or had all the say about selling, but now that I have things in my own name, I am free to do what I wish", and asking him to communicate with his brother and ascertain if he was still considering the purchase of the business in question. Negotiations then took place resulting in an option (exhibit 3) to purchase by Thomas H. Carter. This was followed up by a formal document bearing date the 14th of October, 1936, between Mrs. Golland and Sarah Carter, wife of Thomas, who was substituted for him as purchaser at his request. The price fixed was $5,740.93. $2,000.00 was paid and the balance was stipulated to be paid on the 1st of December, 1936, and 15th December, 1936, interest on the unpaid purchase money five per cent.

6 Upon the purchaser being let into possession, he discovered that the turnover of the business was not nearly as much as he had been led to expect. In fact it was found that the turnover was less than $1,600.00 per month, instead of $3,600.00 as had been stated by Mrs. Golland. The Carters complained, but were told by the solicitor who conducted the transaction on behalf of Mrs. Golland to wait and see, that they had not enough knowledge from the time of the sale to the complaint to really know the possibility of the business. Some negotiations took place resulting in the bringing of this action on the 21st January, 1937, seeking rescission or, in the alternative, damages.

7 The defendant does not deny the making of the statement, nor does she deny that the statement is grossly untrue. Her excuse is that some time in the distant past she recalled a statement made by her father to her brother that the business was well on to $3,600.00 that month. Exhibit 30 is a statement showing the turnover of the business from September, 1932, to March, 1936. These figures were well known to her and she can give no explanation or excuse other than that indicated. Yet the learned trial Judge describes her as "most honest and straightforward in her answers on her examination and on her cross-examination. She admitted making the statement about the monthly returns and in my view she did not make the statement in order to deceive."

8 It is admittedly a very difficult task for an appellate Court to reverse a trial Judge on a pure question of fact. It is also, admittedly, a very difficult task for an appellate Court to find fraud where fraud has been negatived by the trial Judge, but where, as here, there is no question whatever about the making of the statement, and no question whatever about the statement being false to the knowledge of the defendant, and one has nothing by way of explanation except the defendant's own word that she did not intend to deceive, it is the duty, as I understand it, of the

appellate tribunal to act on this uncontradicted evidence. It is worthy of note that, in acquiring the outstanding interests, the value placed on the business by the defendant did not indicate any such turnover as she stated to the Carters.

9 The question then remains as to appropriate remedy. Obviously, justice demands the contract should be rescinded. The assessment of damages in a case like this is no easy matter. The turnover such as in fact exists will barely cover overhead charges. A turnover such as was represented, more than twice the amount, would not greatly increase the overhead, but would enable the owners of the business to earn a comfortable living. The defendant does not assent to rescission. She desires that the plaintiffs should be left to their claim for damages, and her counsel urges that, in so far as there cannot be *restitutio in integrum*, there cannot be rescission. No doubt this is a general principle of wide application, and often in appropriate cases the principle is stated as of universal application and without any indication that it has many limitations. I have found no better statement of the rule and of its limitations than that in *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218, at p. 1278:

> It is, I think, clear on principles of general justice, that as a condition to a rescission there must be a *restitutio in integrum*. The parties must be put *in statu quo.* See *per* Lord Cranworth in *Addie v. The Western Bank* (1867), L.R. 1 H.L. Sc. 145, at p. 165. It is a doctrine which has often been acted upon both at law and in equity. But there is a considerable difference in the mode in which it is applied in Courts of Law and Equity, owing, as I think, to the difference of the machinery which the Courts have at command. I speak of these Courts as they were at the time when this suit commenced, without inquiring whether the Judicature Acts make any, or if any, what difference.
>
> It would be obviously unjust that a person who has been in possession of property under the contract which he seeks to repudiate should be allowed to throw that back on the other party's hands without accounting for any benefit he may have derived from the use of the property, or if the property, though not destroyed, has been in the interval deteriorated, without making compensation for that deterioration. But as a Court of Law has no machinery at its command for taking an account of such matters, the defrauded party, if he sought his remedy at law, must in such cases keep the property and sue in an action for deceit, in which the jury, if properly directed, can do complete justice by giving as damages a full indemnity for all that the party has lost: see *Clarke v. Dickson* (1858), El. Bl. & El. 148, and the cases there cited.
>
> But a Court of Equity could not give damages, and, unless it can rescind the contract, can give no relief. And, on the other hand, it can take accounts of profits, and make allowance for deterioration. And I think the practice has always been for a Court of Equity to give this relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract. In *Lindsay Petroleum Company v. Hurd* (1874), L.R. 5 P.C. 221, at p. 239, it is said 'The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to

> give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.' I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry.

10 Where the subject matter of a sale is a business, it is plain that the case is widely different from the sale of a determinate piece of property. In the sale of a business, both parties contract with regard to a circulating stock, to things coming and things going in the daily transaction of the business rather than to the specific list of chattels; and "practical justice" can best be satisfied, and can well be satisfied, by having an account taken of the assets of the business at the time of the rescission and at the time of the acquisition of the business, just allowance being made for the expense of carrying on the business and for any depreciation that may have taken place. That this is the understanding of the Courts of highest resort is made plain by reference to the case of *Adam v. Newbigging* (1888), 13 App. Cas. 308. In Ashburner's Principles of Equity, 2nd ed., p. 82, after referring to the principle of the doctrine in question and to the exposition of that principle in *Clarke v. Dickson* (1858), El. Bl. & El. 148, the learned writer says:

> This rule, however, has no application where the subject-matter of the contract has been deteriorated by the mere fault of the vendor himself. Where a losing and insolvent business has been sold by means of the representation that it is solvent and profitable, the purchaser can rescind although the extent of the insolvency has increased before rescission is sought for . . . Moreover, where compensation can be made for any deterioration of the property, the deterioration is no bar to rescission, but only a ground for compensation.

11 *Hulton v. Hulton*, [1917] 1 K.B. 813, is an illustration of how free this rule as to restitution will yield to the demands of "practical justice".

12 There must here be rescission. It must be referred to the Master to take an account of the moneys paid, and to ascertain the amount of stock on hand as compared with the stock on hand at the date of the conveyance, and to ascertain what should be allowed to the plaintiffs for expenses in carrying on the business and what should be charged against them for any benefit they have in the meantime received. The balance due to the plaintiffs will constitute a charge upon the land and assets of the business. A reconveyance subject to the charge will be settled by the Master.

13 The plaintiffs are entitled to costs here and below.

Appeal allowed with costs.

Tab 29

2011 SCC 42
Supreme Court of Canada

Knight v. Imperial Tobacco Canada Ltd.

2011 CarswellBC 1968, 2011 CarswellBC 1969, 2011 SCC 42, [2011] 11 W.W.R. 215, [2011] 3 S.C.R. 45, [2011] B.C.W.L.D. 6757, [2011] B.C.W.L.D. 6758, [2011] B.C.W.L.D. 6759, [2011] B.C.W.L.D. 6761, [2011] B.C.W.L.D. 6832, [2011] B.C.W.L.D. 6931, [2011] B.C.W.L.D. 6932, [2011] B.C.W.L.D. 6933, [2011] B.C.W.L.D. 6948, [2011] A.C.S. No. 42, [2011] S.C.J. No. 42, 205 A.C.W.S. (3d) 92, 21 B.C.L.R. (5th) 215, 25 Admin. L.R. (5th) 1, 308 B.C.A.C. 1, 335 D.L.R. (4th) 513, 419 N.R. 1, 521 W.A.C. 1, 83 C.B.R. (5th) 169, 86 C.C.L.T. (3d) 1

Her Majesty The Queen in Right of Canada (Appellant / Respondent on cross-appeal) and Imperial Tobacco Canada Limited (Respondent / Appellant on cross-appeal) and Attorney General of Ontario and Attorney General of British Columbia (Interveners)

Attorney General of Canada (Appellant / Respondent on cross-appeal) and Her Majesty The Queen in Right of British Columbia (Respondent) Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., Rothmans Inc., JTI-MacDonald Corp., R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International Inc., B.A.T. Industries p.l.c., British American Tobacco (Investments) Limited, Carreras Rothmans Limited, Philip Morris USA Inc. and Philip Morris International Inc. (Respondents / Appellants on cross-appeal) and Attorney General of Ontario, Attorney General of British Columbia and Her Majesty The Queen in Right of the Province of New Brunswick (Interveners)

McLachlin C.J.C., Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: February 24, 2011
Judgment: July 29, 2011 *
Docket: 33559, 33563

Proceedings: reversing *British Columbia v. Imperial Tobacco Canada Ltd.* (2009), 313 D.L.R. (4th) 651, 2009 BCCA 540, 2009 CarswellBC 3307, 98 B.C.L.R. (4th) 201, [2010] 2 W.W.R. 385, 280 B.C.A.C. 100, 474 W.A.C. 100 (B.C. C.A.); reversing in part *British Columbia v. Imperial Tobacco Canada Ltd.* (2008), 2008 BCSC 419, 2008 CarswellBC 687, [2008] 12 W.W.R. 241, 292 D.L.R. (4th) 353, 82 B.C.L.R. (4th) 362 (B.C. S.C.); and reversing *Knight v. Imperial Tobacco Canada Ltd.* (2009), 2009 BCCA 541, 2009 CarswellBC 3300, [2010] 2 W.W.R. 9, 99 B.C.L.R. (4th) 93, 313 D.L.R. (4th) 695, 280 B.C.A.C. 160, 474 W.A.C. 160 (B.C. C.A.); reversing in part

Knight v. Imperial Tobacco Canada Ltd. (2007), 2007 BCSC 964, 2007 CarswellBC 1806, [2008] 4 W.W.R. 156, 76 B.C.L.R. (4th) 100 (B.C. S.C.)

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Nancy Brown for Intervener, Attorney General of British Columbia

Subject: Public; Torts; Civil Practice and Procedure; Corporate and Commercial; Insolvency; Tax — Miscellaneous

Related Abridgment Classifications

Guarantee and indemnity
III Indemnity
III.2 How right arising
III.2.d In equity
Public law
I Crown
I.3 Principles of tort regarding Crown
I.3.a Liability of Crown for torts of servants
I.3.a.ii Conditions for imposition of liability

I.3.a.ii.A Nature of deed or omission
I.3.a.ii.A.1 Application of provincial laws to federal bodies
Public law
I Crown
I.3 Principles of tort regarding Crown
I.3.a Liability of Crown for torts of servants
I.3.a.ii Conditions for imposition of liability
I.3.a.ii.C Whether duty of care existing
Torts
XV Negligence
XV.4 Contributory negligence
XV.4.e Miscellaneous

Headnote

Public law --- Crown — Principles of tort regarding Crown — Liability of Crown for torts of servants — Conditions for imposition of liability — Whether duty of care existing

I Ltd., tobacco company, was defendant in two cases — In first case, province brought action against group of 14 companies, including I Ltd. — Province sought to recover expense of treating tobacco-related illnesses — In second case, K brought class action against I Ltd. on behalf of class members who purchased "light" or "mild" cigarettes — In both cases, defendants issued third-party notices to Crown, but third-party notices were struck — Defendants' appeals were allowed in part, and negligent misrepresentation claims in both cases, as well as negligent design claim in K's case, were allowed to proceed to trial — Crown appealed claims allowed to go to trial — Defendants cross-appealed striking of other claims — Appeals allowed — Cross-appeals dismissed — It was plain and obvious that defendants' claims against Crown had no reasonable chance of success — Negligent misrepresentation claims were struck, as alleged statements were protected expressions of government policy, and recognizing duty of care would have exposed Crown to indeterminate liability — Crux of failure to warn claims was essentially same as negligent misrepresentation claims, and they were rejected for same policy reasons — Although both negligent design claims established prima facie duty of care, they also failed at second stage of analysis because they related to core government policy decisions.

Torts --- Negligence — Practice and procedure — Pleadings — Contributory negligence

I Ltd., tobacco company, was defendant in two cases — In first case, province brought action against group of 14 companies, including I Ltd. — Province sought to recover expense of treating tobacco-related illnesses — In second case, K brought class action against I Ltd. on behalf of class members who purchased "light" or "mild" cigarettes — In both cases, defendants issued third-party notices to Crown, but third-party notices were struck — Defendants' appeals were allowed in part, and negligent misrepresentation claims in both cases, as well as negligent design claim in K's case, were allowed to proceed to trial — Crown appealed claims allowed to go to trial — Defendants cross-appealed striking of other claims — Appeals allowed — Cross-appeals dismissed — It was plain and obvious that defendants' claims against Crown had no reasonable chance of success —

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Public law --- Crown — Principles of tort regarding Crown — Liability of Crown for torts of servants — Conditions for imposition of liability — Nature of deed or omission — Application of provincial laws to federal bodies

I Ltd., tobacco company, was defendant in two cases — In first case, province brought action against group of 14 companies, including I Ltd. — Province sought to recover expense of treating tobacco-related illnesses — In second case, K brought class action against I Ltd. on behalf of class members who purchased "light" or "mild" cigarettes — In both cases, defendants issued third-party notices to Crown, but third-party notices were struck — Defendants' appeals were allowed in part, and negligent misrepresentation claims in both cases, as well as negligent design claim in K's case, were allowed to proceed to trial — Crown appealed claims allowed to go to trial — Defendants cross-appealed striking of other claims — Appeals allowed — Cross-appeals dismissed — It was plain and obvious that defendants' claims against Crown had no reasonable chance of success — Crown did not qualify as "manufacturer" of tobacco products under Costs Recovery Act — Holding Crown accountable would have defeated legislature's intention of transferring health-care costs resulting from tobacco related wrongs from taxpayers to tobacco industry — It was therefore unnecessary to consider Crown's arguments that it would in any event be immune from liability under Cost Recovery Act — Crown was also not liable under Trade Practice Act or Business Practices and Consumer Protection Act, as Crown was not "supplier".

Guarantee and indemnity --- Indemnity — How right arising — In equity

I Ltd., tobacco company, was defendant in two cases — In first case, province brought action against group of 14 companies, including I Ltd. — Province sought to recover expense of treating tobacco-related illnesses — In second case, K brought class action against I Ltd. on behalf of class members who purchased "light" or "mild" cigarettes — In both cases, defendants issued third-party notices to Crown, but third-party notices were struck — Defendants' appeals were allowed in part, and negligent misrepresentation claims in both cases, as well as negligent design claim in K's case, were allowed to proceed to trial — Crown appealed claims allowed to go to trial — Defendants cross-appealed striking of other claims — Appeals allowed — Cross-appeals dismissed — It was plain and obvious that defendants' claims against Crown had no reasonable chance of success — Defendants could not establish that Crown was liable for equitable indemnity — When Crown directed tobacco industry about how it should conduct itself, it was doing so in its capacity as government regulator that was concerned about health of Canadians — It was unreasonable to infer that Crown was implicitly promising to indemnify industry for acting on its request.

Droit public --- Couronne — Principes de responsabilité délictuelle concernant la Couronne — Responsabilité délictuelle de la Couronne pour la conduite délictuelle des fonctionnaires — Conditions pour l'imposition d'une responsabilité — Si une obligation de diligence existe

I ltée, une compagnie de tabac, était poursuivie dans deux affaires — Dans la première affaire, la province avait entamé des procédures à l'encontre de 14 compagnies, dont I ltée — Province cherchait à se faire rembourser les sommes consacrées au traitement des maladies liées au tabagisme — Dans la deuxième affaire, K avait entamé un recours collectif à l'encontre de I ltée au nom des membres ayant acheté des cigarettes dites « légères » ou « douces » — Dans les deux cas, les défenderesses ont mis en cause l'État, mais les avis de mise en cause ont été radiés — Appels interjetés par les défenderesses ont été accueillis en partie et il a été conclu que la demande relative aux déclarations inexactes faites par négligence, dans les deux cas, ainsi que la demande relative à la conception négligente, dans l'affaire K, devaient être instruites — État a formé un pourvoi à l'encontre de l'instruction de ces demandes — Défenderesses ont formé un pourvoi incident à l'encontre de la radiation des autres demandes — Pourvois accueillis — Pourvois incidents rejetés — Il était évident que les demandes des défenderesses à l'encontre de l'État étaient vouées à l'échec — Demandes relatives aux déclarations inexactes faites par négligence ont été radiées puisque les affirmations visées étaient des expressions protégées de politique générale du gouvernement, et la reconnaissance d'une obligation de diligence exposerait le ministère public à une responsabilité indéterminée — Élément crucial des allégations de défaut de mise en garde reposait essentiellement sur les mêmes assises que celles relatives aux déclarations inexactes faites par négligence, et ces allégations ont été rejetées pour les mêmes considérations de politique générale — Bien que les deux demandes relatives à la conception négligente établissaient l'existence d'une obligation de diligence prima facie, elles devaient être rejetées à la deuxième étape de l'analyse parce qu'elles avaient trait à des décisions de politique générale fondamentale du gouvernement.

Délits civils --- Négligence — Procédure — Actes de procédure — Faute contributoire

I ltée, une compagnie de tabac, était poursuivie dans deux affaires — Dans la première affaire, la province avait entamé des procédures à l'encontre de 14 compagnies, dont I ltée — Province cherchait à se faire rembourser les sommes consacrées au traitement des maladies liées au tabagisme — Dans la deuxième affaire, K avait entamé un recours collectif à l'encontre de I ltée au nom des membres ayant acheté des cigarettes dites « légères » ou « douces » — Dans les deux cas, les défenderesses ont mis en cause l'État, mais les avis de mise en cause ont été radiés — Appels interjetés par les défenderesses ont été accueillis en partie et il a été conclu que la demande relative aux déclarations inexactes faites par négligence, dans les deux cas, ainsi que la demande relative à la conception négligente, dans l'affaire K, devaient être instruites — État a formé un pourvoi à l'encontre de l'instruction de ces demandes — Défenderesses ont formé un pourvoi incident à l'encontre de la radiation des autres demandes — Pourvois accueillis — Pourvois incidents rejetés — Il était évident que les demandes des défenderesses à l'encontre de l'État étaient vouées à l'échec — Demandes relatives aux déclarations inexactes faites par négligence ont été radiées puisque les affirmations visées étaient des expressions protégées de

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Droit public --- Couronne — Principes de responsabilité délictuelle concernant la Couronne — Responsabilité délictuelle de la Couronne pour la conduite délictuelle des fonctionnaires — Conditions pour l'imposition d'une responsabilité — Nature de l'acte ou de l'omission — Application des lois provinciales aux organismes fédéraux

I ltée, une compagnie de tabac, était poursuivie dans deux affaires — Dans la première affaire, la province avait entamé des procédures à l'encontre de 14 compagnies, dont I ltée — Province cherchait à se faire rembourser les sommes consacrées au traitement des maladies liées au tabagisme — Dans la deuxième affaire, K avait entamé un recours collectif à l'encontre de I ltée au nom des membres ayant acheté des cigarettes dites « légères » ou « douces » — Dans les deux cas, les défenderesses ont mis en cause l'État, mais les avis de mise en cause ont été radiés — Appels interjetés par les défenderesses ont été accueillis en partie et il a été conclu que la demande relative aux déclarations inexactes faites par négligence, dans les deux cas, ainsi que la demande relative à la conception négligente, dans l'affaire K, devaient être instruites — État a formé un pourvoi à l'encontre de l'instruction de ces demandes — Défenderesses ont formé un pourvoi incident à l'encontre de la radiation des autres demandes — Pourvois accueillis — Pourvois incidents rejetés — Il était évident que les demandes des défenderesses à l'encontre de l'État étaient vouées à l'échec — État n'avait pas la qualité de « fabricant » de produits du tabac au sens de la Costs Recovery Act — Tenir l'État responsable aurait contrecarré l'intention de la législature de faire passer des contribuables à l'industrie du tabac la responsabilité des coûts des soins de santé résultant d'une faute du fabricant — Il était, par conséquent, inutile de s'attarder sur l'argument avancé par l'État selon lequel ce dernier serait en tout état de cause à l'abri de toute responsabilité en vertu de la Cost Recovery Act — De plus, puisque l'État n'était pas un « fournisseur », sa responsabilité n'était pas engagée sous le régime de la Trade Practice Act ou de la Business Practices and Consumer Protection Act.

Garantie et indemnité --- Indemnité — Circonstances dans lesquelles le droit prend naissance — Sous le régime de l'equity

I ltée, une compagnie de tabac, était poursuivie dans deux affaires — Dans la première affaire, la province avait entamé des procédures à l'encontre de 14 compagnies, dont I ltée — Province cherchait à se faire rembourser les sommes consacrées au traitement des maladies liées au tabagisme — Dans la deuxième affaire, K avait entamé un recours collectif à l'encontre de I ltée au nom des membres ayant acheté des cigarettes dites « légères » ou « douces » — Dans les deux cas, les défenderesses ont mis en cause l'État, mais les avis de mise en cause ont été radiés — Appels

interjetés par les défenderesses ont été accueillis en partie et il a été conclu que la demande relative aux déclarations inexactes faites par négligence, dans les deux cas, ainsi que la demande relative à la conception négligente, dans l'affaire K, devaient être instruites — État a formé un pourvoi à l'encontre de l'instruction de ces demandes — Défenderesses ont formé un pourvoi incident à l'encontre de la radiation des autres demandes — Pourvois accueillis — Pourvois incidents rejetés — Il était évident que les demandes des défenderesses à l'encontre de l'État étaient vouées à l'échec — Défenderesses ne pouvaient pas établir que l'État devait verser une indemnité sous le régime de l'equity — Lorsque l'État a donné à l'industrie du tabac des directives sur la manière dont elle devrait se comporter, il le faisait à titre d'autorité de réglementation du gouvernement qui se souciait de la santé des Canadiens et des Canadiennes — Il était déraisonnable de déduire que l'État avait promis implicitement d'indemniser l'industrie pour avoir donné suite à sa demande.

I Ltd., a tobacco company, was a defendant in two cases. In the first case, the province of British Columbia brought an action against a group of 14 companies, including I Ltd. The province sought to recover the expense of treating tobacco-related illnesses. In the second case, K brought a class action against I Ltd. on behalf of class members who purchased "light" or "mild" cigarettes.

In both cases, the defendants issued third-party notices to the Crown. The third-party notices were struck. The defendants appealed, and their appeals were allowed in part. The negligent misrepresentation claims in both cases, as well as the negligent design claim in K's case, were allowed to proceed to trial.

The Crown appealed the claims allowed to go to trial; the defendants cross-appealed the striking of the other claims.

Held: The appeals were allowed; the cross-appeals were dismissed.

Per McLachlin C.J.C. (Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein, Cromwell JJ. concurring): It was plain and obvious that the defendants' claims against the Crown had no reasonable chance of success.

The negligent misrepresentation claims were struck, as the alleged statements were protected expressions of government policy, and recognizing a duty of care would have exposed the Crown to indeterminate liability. The crux of the failure to warn claims was essentially the same as the negligent misrepresentation claims, and they were rejected for the same policy reasons. Although both negligent design claims established a prima facie duty of care, they also failed at the second stage of the analysis because they related to core government policy decisions.

The Crown did not qualify as a "manufacturer" of tobacco products under the Costs Recovery Act. Holding the Crown accountable would have defeated the legislature's intention of transferring the health-care costs resulting from tobacco related wrongs from taxpayers to the tobacco industry. It was therefore unnecessary to consider the Crown's arguments that it would in any event be immune from liability under the Cost Recovery Act. The Crown was also not liable under the Trade Practice Act or the Business Practices and Consumer Protection Act, as the Crown was not a "supplier".

The defendants could not establish that the Crown was liable for equitable indemnity. When the Crown directed the tobacco industry about how it should conduct itself, it was doing so in its capacity as a government regulator that was concerned about the health of Canadians. It was

unreasonable to infer that the Crown was implicitly promising to indemnify the industry for acting on its request.

I ltée, une compagnie de tabac, était poursuivie dans deux affaires. Dans la première affaire, la province de la Colombie-Britannique avait entamé des procédures à l'encontre de 14 compagnies, dont I ltée. La province cherchait à se faire rembourser les sommes consacrées au traitement des maladies liées au tabagisme. Dans la deuxième affaire, K avait entamé un recours collectif à l'encontre de I ltée au nom des membres ayant acheté des cigarettes dites « légères » ou « douces ». Dans les deux cas, les défenderesses ont mis en cause l'État. Les avis de mise en cause ont été radiés. Les défenderesses ont interjeté appel et les appels ont été accueillis en partie. Il a été conclu que la demande relative aux déclarations inexactes faites par négligence, dans les deux cas, ainsi que la demande relative à la conception négligente, dans l'affaire K, devaient être instruites.

L'État a formé un pourvoi à l'encontre de l'instruction de ces demandes tandis que les défenderesses ont formé un pourvoi incident à l'encontre de la radiation des autres demandes.

Arrêt: Les pourvois ont été accueillis; les pourvois incidents ont été rejetés.

McLachlin, J.C.C. (Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Il était évident que les demandes des défenderesses à l'encontre de l'État étaient vouées à l'échec.

Les demandes relatives aux déclarations inexactes faites par négligence ont été radiées puisque les affirmations visées étaient des expressions protégées de politique générale du gouvernement, et la reconnaissance d'une obligation de diligence exposerait le ministère public à une responsabilité indéterminée. L'élément crucial des allégations de défaut de mise en garde reposait essentiellement sur les mêmes assises que celles relatives aux déclarations inexactes faites par négligence, et ces allégations ont été rejetées pour les mêmes considérations de politique générale. Bien que les deux demandes relatives à la conception négligente établissaient l'existence d'une obligation de diligence prima facie, elles devaient être rejetées à la deuxième étape de l'analyse parce qu'elles avaient trait à des décisions de politique générale fondamentale du gouvernement.

L'État n'avait pas la qualité de « fabricant » de produits du tabac au sens de la Costs Recovery Act. Tenir l'État responsable aurait contrecarré l'intention de la législature de faire passer des contribuables à l'industrie du tabac la responsabilité des coûts des soins de santé résultant d'une faute du fabricant. Il était, par conséquent, inutile de s'attarder sur l'argument avancé par l'État selon lequel ce dernier serait en tout état de cause à l'abri de toute responsabilité en vertu de la Cost Recovery Act. De plus, puisque l'État n'était pas un « fournisseur », sa responsabilité n'était pas engagée sous le régime de la Trade Practice Act ou de la Business Practices and Consumer Protection Act.

Les défenderesses ne pouvaient pas établir que l'État devait verser une indemnité sous le régime de l'equity. Lorsque l'État a donné à l'industrie du tabac des directives sur la manière dont elle devrait se comporter, il le faisait à titre d'autorité de réglementation du gouvernement qui se souciait de la santé des Canadiens et des Canadiennes. Il était déraisonnable de déduire que l'État avait promis implicitement d'indemniser l'industrie pour avoir donné suite à sa demande.

APPEAL by Crown from judgments reported at *British Columbia v. Imperial Tobacco Canada Ltd.* (2009), 313 D.L.R. (4th) 651, 2009 BCCA 540, 2009 CarswellBC 3307, 98 B.C.L.R. (4th) 201, [2010] 2 W.W.R. 385, 280 B.C.A.C. 100, 474 W.A.C. 100 (B.C. C.A.) and *Knight v. Imperial Tobacco Canada Ltd.* (2009), 2009 BCCA 541, 2009 CarswellBC 3300, [2010] 2 W.W.R. 9, 99 B.C.L.R. (4th) 93, 313 D.L.R. (4th) 695, 280 B.C.A.C. 160, 474 W.A.C. 160 (B.C. C.A.), allowing defendants' claims for negligent misrepresentation and negligent design; CROSS-APPEAL by defendants from judgments reported at *British Columbia v. Imperial Tobacco Canada Ltd.* (2009), 313 D.L.R. (4th) 651, 2009 BCCA 540, 2009 CarswellBC 3307, 98 B.C.L.R. (4th) 201, [2010] 2 W.W.R. 385, 280 B.C.A.C. 100, 474 W.A.C. 100 (B.C. C.A.) and *Knight v. Imperial Tobacco Canada Ltd.* (2009), 2009 BCCA 541, 2009 CarswellBC 3300, [2010] 2 W.W.R. 9, 99 B.C.L.R. (4th) 93, 313 D.L.R. (4th) 695, 280 B.C.A.C. 160, 474 W.A.C. 160 (B.C. C.A.), dismissing defendants' claims other than claims for negligent misrepresentation and negligent design.

POURVOI formé par l'État à l'encontre de jugements publiés à *British Columbia v. Imperial Tobacco Canada Ltd.* (2009), 313 D.L.R. (4th) 651, 2009 BCCA 540, 2009 CarswellBC 3307, 98 B.C.L.R. (4th) 201, [2010] 2 W.W.R. 385, 280 B.C.A.C. 100, 474 W.A.C. 100 (B.C. C.A.) et à *Knight v. Imperial Tobacco Canada Ltd.* (2009), 2009 BCCA 541, 2009 CarswellBC 3300, [2010] 2 W.W.R. 9, 99 B.C.L.R. (4th) 93, 313 D.L.R. (4th) 695, 280 B.C.A.C. 160, 474 W.A.C. 160 (B.C. C.A.), ayant accueilli les requêtes des défenderesses faisant valoir une déclaration inexacte faite par négligence et une conception négligente; POURVOI INCIDENT formé par les défenderesses à l'encontre de jugements publiés à *British Columbia v. Imperial Tobacco Canada Ltd.* (2009), 313 D.L.R. (4th) 651, 2009 BCCA 540, 2009 CarswellBC 3307, 98 B.C.L.R. (4th) 201, [2010] 2 W.W.R. 385, 280 B.C.A.C. 100, 474 W.A.C. 100 (B.C. C.A.) et à *Knight v. Imperial Tobacco Canada Ltd.* (2009), 2009 BCCA 541, 2009 CarswellBC 3300, [2010] 2 W.W.R. 9, 99 B.C.L.R. (4th) 93, 313 D.L.R. (4th) 695, 280 B.C.A.C. 160, 474 W.A.C. 160 (B.C. C.A.), ayant rejeté les requêtes des défenderesses faisant valoir d'autres moyens qu'une déclaration inexacte faite par négligence et une conception négligente.

***McLachlin C.J.C.*:**

I. Introduction

1 Imperial Tobacco ("Imperial") is a defendant in two cases before the courts in British Columbia, *British Columbia v. Imperial Tobacco Canada Ltd.*, Docket: S010421, and *Knight v. Imperial Tobacco Canada Ltd.*, Docket: L031300. In the first case, the Government of British Columbia is seeking to recover the cost of paying for the medical treatment of individuals suffering from tobacco-related illnesses from a group of 14 tobacco companies, including Imperial ("Costs Recovery case"). The second case is a class action brought against Imperial alone by Mr. Knight on behalf of class members who purchased "light" or "mild" cigarettes, seeking a refund of the cost of the cigarettes and punitive damages ("*Knight* case").

2 In both cases, the tobacco companies issued third-party notices to the Government of Canada, alleging that if the tobacco companies are held liable to the plaintiffs, they are entitled to compensation from Canada for negligent misrepresentation, negligent design, and failure to warn, as well as at equity. They also allege that Canada would itself be liable under the statutory schemes at issue in the two cases. In the *Costs Recovery* case, it is alleged that Canada would be liable under the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 ("*CRA*"), as a "manufacturer". In the *Knight* case, it is alleged that Canada would be liable as a "supplier" under the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("*BPCPA*"), and its predecessor, the *Trade Practice Act*, R.S.B.C. 1996, c. 457 ("*TPA*").

3 In both cases, Canada brought motions to strike the third party notices under r. 19(24) of the *Supreme Court Rules*, B.C. Reg. 221/90 (replaced by the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 9-5), arguing that it was plain and obvious that the third-party claims failed to disclose a reasonable cause of action. In both cases, the chambers judges agreed with Canada, and struck all of the third-party notices. The British Columbia Court of Appeal allowed the tobacco companies' appeals in part. A majority of 3-2 held that the negligent misrepresentation claims arising from Canada's alleged duty of care to the tobacco companies in both the *Costs Recovery* case and the *Knight* case should proceed to trial. A majority in the *Knight* case further held that the negligent misrepresentation claim based on Canada's alleged duty of care to consumers should proceed, as should the negligent design claims in the *Knight* case. The court unanimously struck the remainder of the tobacco companies' claims.

4 The Government of Canada appeals the finding that the claims for negligent misrepresentation and the claim for negligent design should be allowed to go to trial. The tobacco companies cross-appeal the striking of the other claims.

5 For the reasons that follow, I conclude that all the claims of Imperial and the other tobacco companies brought against the Government of Canada are bound to fail, and should be struck. I would allow the appeals of the Government of Canada in both cases and dismiss the cross-appeals.

II. Underlying Claims and Judicial History

A. The Knight Case

6 In the *Knight* case, consumers in British Columbia have brought a class action against Imperial under the *BPCPA* and its predecessor, the *TPA*. The class consists of consumers of light or mild cigarettes. It alleges that Imperial engaged in deceptive practices when it promoted low-tar cigarettes as less hazardous to the health of consumers. The class alleges that the levels of tar and nicotine listed on Imperial's packages for light and mild cigarettes did not reflect the actual deliveries of toxic emissions to smokers, and alleges that the smoke produced by light cigarettes

was just as harmful as that produced by regular cigarettes. The class seeks reimbursement of the cost of the cigarettes purchased, and punitive damages.

7 Imperial issued a third-party notice against Canada. It alleges that Health Canada advised tobacco companies and the public that low-tar cigarettes were less hazardous than regular cigarettes. Imperial alleges that while Health Canada was initially opposed to the use of health warnings on cigarette packaging, it changed its policy in 1967. It instructed smokers to switch to low-tar cigarettes if they were unwilling to quit smoking altogether, and it asked tobacco companies to voluntarily list the tar and nicotine levels on their advertisements to encourage consumers to purchase low-tar brands. Contrary to expectations, it now appears that low-tar cigarettes are potentially more harmful to smokers.

8 Imperial also alleges that Agriculture Canada researched, developed, manufactured, and licensed several strains of low-tar tobacco, and collected royalties from the companies, including Imperial, that used these strains. By 1982, Imperial pleads, the tobacco strains developed by Agriculture Canada were "almost the only tobacco varieties available to Canadian tobacco manufacturers" (*Knight* case, amended third-party notice of Imperial, at para. 97).

9 Imperial makes five allegations against Canada:

> 1) Canada is itself liable under the *BPCPA* and the *TPA* as a "supplier" of tobacco products that engaged in deceptive practices, and Imperial is entitled to contribution and indemnity from Canada pursuant to the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333.
>
> 2) Canada breached private law duties to consumers by negligently misrepresenting the health attributes of low-tar cigarettes, by failing to warn them against the hazards of low-tar cigarettes, and by failing to design its tobacco strain with due care. Consequently, Imperial alleges that it is entitled to contribution and indemnity from Canada under the *Negligence Act*.
>
> 3) Canada breached its private law duties to Imperial by negligently misrepresenting the health attributes of low-tar cigarettes, by failing to warn Imperial about the hazards of low-tar cigarettes, and by failing to design its tobacco strain with due care. Imperial alleges that it is entitled to damages against Canada to the extent of any liability Imperial may have to the class members.
>
> 4) In the alternative, Canada is obliged to indemnify Imperial under the doctrine of equitable indemnity.
>
> 5) If Canada is not liable to Imperial under any of the above claims, Imperial is entitled to declaratory relief against Canada so that it will remain a party to the action and be subject to discovery procedures under the *Supreme Court Rules*.

10 Canada brought an application to strike the third-party claims. It was successful before Satanove J. in the Supreme Court of British Columbia (*Knight v. Imperial Tobacco Canada Ltd.*, 2007 BCSC 964, 76 B.C.L.R. (4th) 100 (B.C. S.C.)). The chambers judge struck all of the claims against Canada. Imperial was partially successful in the Court of Appeal (2009 BCCA 541, 99 B.C.L.R. (4th) 93 (B.C. C.A.)). The Court of Appeal unanimously struck the statutory claim, the claim of negligent design between Canada and Imperial, and the equitable indemnity claim. However, the majority, *per* Tysoe J.A., held that the two negligent misrepresentation claims and the negligent design claim between Canada and consumers should be allowed to proceed. The majority reasons did not address the failure to warn claim. Hall J.A., dissenting, would have struck all the third-party claims.

B. The Costs Recovery Case

11 The Government of British Columbia has brought a claim under the *CRA* to recover the expense of treating tobacco-related illnesses caused by "tobacco related wrong[s]". Under the *CRA*, manufacturers of tobacco products are liable to the province directly. The claim was brought against 14 tobacco companies. British Columbia alleges that by 1950, these tobacco companies knew or ought to have known that cigarettes were harmful to one's health, and that they failed to properly warn the public about the risks associated with smoking their product.

12 Various defendants in the *Costs Recovery* case, including Imperial, brought third-party notices against Canada for its alleged role in the tobacco industry. I refer to them collectively as the "tobacco companies". The allegations in this claim are strikingly similar to those in the *Knight* case. The tobacco companies plead that Health Canada advised them and the public that low-tar cigarettes were less hazardous and instructed smokers that they should quit smoking or purchase low-tar cigarettes. The tobacco companies allege that Canada was initially opposed to the use of warning labels on cigarette packaging, but ultimately instructed the industry that warning labels should be used and what they should say. The tobacco companies also plead that Agriculture Canada researched, developed, manufactured and licensed the strains of low-tar tobacco which they used for their cigarettes in exchange for royalties.

13 The tobacco companies brought the following claims against Canada:

> 1) Canada is itself liable under the *CRA* as a "manufacturer" of tobacco products, and the tobacco companies are entitled to contribution and indemnity from Canada pursuant to the *Negligence Act*.
>
> 2) Canada breached private law duties to consumers for failure to warn, negligent design, and negligent misrepresentation, and the tobacco companies are entitled to contribution and indemnity from Canada to the extent of any liability they may have to British Columbia under the *CRA*.

3) Canada breached its private law duties owed to the tobacco companies for failure to warn and negligent design, and negligently misrepresented the attributes of low-tar cigarettes. The tobacco companies allege that they are entitled to damages against Canada to the extent of any liability they may have to British Columbia under the *CRA*.

4) In the alternative, Canada is obliged to indemnify the tobacco companies under the doctrine of equitable indemnity.

5) If Canada is not liable to the tobacco companies under any of the above claims, they are entitled to declaratory relief.

14 Canada was successful before the chambers judge, Wedge J., who struck all of the claims (2008 BCSC 419, 82 B.C.L.R. (4th) 362 (B.C. S.C.)). In the Court of Appeal, the majority, *per* Tysoe J.A., allowed the negligent misrepresentation claim between Canada and the tobacco companies to proceed (2009 BCCA 540, 98 B.C.L.R. (4th) 201 (B.C. C.A.)). Hall J.A., dissenting, would have struck all the third-party claims.

III. Issues Before the Court

15 There is significant overlap between the issues on appeal in the *Costs Recovery* case and the *Knight* case, particularly in relation to the common law claims. Both cases discuss whether Canada could be liable at common law in negligent misrepresentation, negligent design and failure to warn, and in equitable indemnity. To reduce duplication, I treat the issues common to both cases together.

16 There are also issues and arguments that are distinct in the two cases. Uniquely in the *Costs Recovery* case, Canada argues that all the contribution claims based on the *Negligence Act* and Canada's alleged duties of care to smokers should be struck because even if these alleged duties were breached, Canada would not be liable to the sole plaintiff British Columbia. The statutory claims are also distinct in the two cases. The issues may therefore be stated as follows:

1. What is the test for striking out claims for failure to disclose a reasonable cause of action?

2. Should the claims for contribution and indemnity based on the *Negligence Act* and alleged breaches of duties of care to smokers be struck in the *Costs Recovery* case?

3. Should the tobacco companies' negligent misrepresentation claims be struck out?

4. Should the tobacco companies' claims of failure to warn be struck out?

5. Should the tobacco companies' claims of negligent design be struck out?

6. Should the tobacco companies' claim in the *Costs Recovery* case that Canada could qualify as a "manufacturer" under the *CRA* be struck out?

7. Should Imperial's claim in the *Knight* case that Canada could qualify as a "supplier" under the *TPA* and the *BPCPA* be struck out?

8. Should the tobacco companies' claims of equitable indemnity be struck out?

9. If Canada is not liable to the tobacco companies under any of the third-party claims, are the tobacco companies nonetheless entitled to declaratory relief against Canada so that it will remain a party to both actions and be subject to discovery procedures under the *Supreme Court Rules*?

IV. Analysis

A. The Test for Striking Out Claims

17 The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the B.C. *Supreme Court Rules*. This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263 (S.C.C.), at para. 15; *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *D. (B.) v. Children's Aid Society of Halton (Region)*, 2007 SCC 38, [2007] 3 S.C.R. 83 (S.C.C.); *Odhavji Estate*; *Hunt*; *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 F.C.R. 735 (S.C.C.).

18 Although all agree on the test, the arguments before us revealed different conceptions about how it should be applied. It may therefore be useful to review the purpose of the test and its application.

19 The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

20 This promotes two goods — efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be — on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues,

the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.

21 Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562 (U.K. H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575 (U.K. H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *McAlister (Donoghue) v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

22 A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.), at p. 455. No evidence is admissible on such a motion: r. 19(27) of the *Supreme Court Rules* (now r. 9-5(2) of the *Supreme Court Civil Rules*). It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

23 Before us, Imperial and the other tobacco companies argued that the motion to strike should take into account, not only the facts pleaded, but the possibility that as the case progressed, the evidence would reveal more about Canada's conduct and role in promoting the use of low-tar cigarettes. This fundamentally misunderstands what a motion to strike is about. It is not about evidence, but the pleadings. The facts pleaded are taken as true. Whether the evidence substantiates the pleaded facts, now or at some future date, is irrelevant to the motion to strike. The judge on the motion to strike cannot consider what evidence adduced in the future might or might not show. To require the judge to do so would be to gut the motion to strike of its logic and ultimately render it useless.

24 This is not unfair to the claimant. The presumption that the facts pleaded are true operates in the claimant's favour. The claimant chooses what facts to plead, with a view to the cause of action

it is asserting. If new developments raise new possibilities — as they sometimes do — the remedy is to amend the pleadings to plead new facts at that time.

25 Related to the issue of whether the motion should be refused because of the possibility of unknown evidence appearing at a future date is the issue of speculation. The judge on a motion to strike asks if the claim has any reasonable prospect of success. In the world of abstract speculation, there is a mathematical chance that any number of things might happen. That is not what the test on a motion to strike seeks to determine. Rather, it operates on the assumption that the claim will proceed through the court system in the usual way — in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered in *the context of the law and the litigation process*, the claim has no reasonable chance of succeeding.

26 With this framework in mind, I proceed to consider the tobacco companies' claims.

B. Canada's Alleged Duties of Care to Smokers in the Costs Recovery Case

27 In the *Costs Recovery* case, Canada argues that all the claims for contribution based on its alleged duties of care to smokers must be struck. Under the *Negligence Act*, Canada submits, contribution may only be awarded if the third party would be liable to the plaintiff directly. It argues that even if Canada breached duties to smokers, such breaches cannot ground the tobacco companies' claims for contribution if they are found liable to British Columbia, the sole plaintiff in the *Costs Recovery* case. This argument was successful in the Court of Appeal.

28 The tobacco companies argue that direct liability to the plaintiff is not a requirement for being held liable in contribution. They argue that contribution in the *Negligence Act* turns on fault, not liability. The object of the *Negligence Act* is to allow defendants to recover from other parties that were also at fault for the damage that resulted to the plaintiff, and barring a claim against Canada would defeat this purpose, they argue.

29 I agree with Canada and the Court of Appeal that a third party may only be liable for contribution under the *Negligence Act* if it is directly liable to the plaintiff. In *Dominion Chain Co. v. Eastern Construction Co.*, [1978] 2 S.C.R. 1346 (S.C.C.), dealing with a statutory provision similar to that in British Columbia, Laskin C.J. stated:

> I am of the view that it is a precondition of the right to resort to contribution that there be liability to the plaintiff. I am unable to appreciate how a claim for contribution can be made under s. 2(1) by one person against another in respect of loss resulting to a third person unless each of the former two came under a liability to the third person to answer for his loss.
>
> [Emphasis added; p. 1354.]

30 Accordingly, it is plain and obvious that the private law claims against Canada in the *Costs Recovery* case that arise from an alleged duty of care to consumers must be struck. Even if Canada breached duties to smokers, this would have no effect on whether it was liable to British Columbia, the plaintiff in that case. This holding has no bearing on the consumer claim in the *Knight* case since consumers of light or mild cigarettes are the plaintiffs in the underlying action.

31 The discussion of the private law claims in the remainder of these reasons will refer exclusively to the claims based on Canada's alleged duties of care to the tobacco companies in both cases before the Court, and Canada's alleged duties to consumers in the *Knight* case.

C. The Claims for Negligent Misrepresentation

32 There are two types of negligent misrepresentation claims that remain at issue on this appeal. First, in the *Knight* case, Imperial alleges that Canada negligently misrepresented the health attributes of low-tar cigarettes to consumers, and is therefore liable for contribution and indemnity on the basis of the *Negligence Act* if the class members are successful in this suit. Second, in both cases before the Court, Imperial and the other tobacco companies allege that Canada made negligent misrepresentations to the tobacco companies, and that Canada is liable for any losses that the tobacco companies incur to the plaintiffs in either case.

33 Canada applies to have the claims struck on the ground that they have no reasonable prospect of success.

34 For the purposes of the motion to strike, we must accept as true the facts pleaded. We must therefore accept that Canada represented to consumers and to tobacco companies that light or mild cigarettes were less harmful, and that these representations were not accurate. We must also accept that consumers and the tobacco companies relied on Canada's representations and acted on them to their detriment.

35 The law first recognized a tort action for negligent misrepresentation in *Hedley Byrne*. Prior to this, parties were confined to contractual remedies for misrepresentations. *Hedley Byrne* represented a break with this tradition, allowing a claim for economic loss in tort for misrepresentations made in the absence of a contract between the parties. In the decades that have followed, liability for negligent misrepresentation has been imposed in a variety of situations where the relationship between the parties disclosed sufficient proximity and foreseeability, and policy considerations did not negate liability.

36 Imperial and the other tobacco companies argue that the facts pleaded against Canada bring their claims within the settled parameters of the tort of negligent misrepresentation, and therefore a *prima facie* duty of care is established. The majority in the Court of Appeal accepted this argument in both decisions below (*Knight* case, at paras. 45 and 66; *Costs Recovery* case, at para. 70).

37 The first question is whether the facts as pleaded bring Canada's relationships with consumers and the tobacco companies within a settled category that gives rise to a duty of care. If they do, a *prima facie* duty of care will be established: see *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643 (S.C.C.), at para. 15. However, it is important to note that liability for negligent misrepresentation depends on the nature of the relationship between the plaintiff and defendant, as discussed more fully below. The question is not whether negligent misrepresentation is a recognized tort, but whether there is a reasonable prospect that the relationship alleged in the pleadings will give rise to liability for negligent misrepresentation.

38 In my view, the facts pleaded do not bring either claim within a settled category of negligent misrepresentation. The law of negligent misrepresentation has thus far not recognized liability in the kinds of relationships at issue in these cases. The error of the tobacco companies lies in assuming that the relationships disclosed by the pleadings between Canada and the tobacco companies on the one hand and between Canada and consumers on the other are like other relationships that have been held to give rise to liability for negligent misrepresentation. In fact, they differ in important ways. It is sufficient at this point to note that the tobacco companies have not been able to point to any case where a government has been held liable in negligent misrepresentation for statements made to an industry. To determine whether such a cause of action has a reasonable prospect of success, we must therefore consider whether the general requirements for liability in tort are met, on the test set out by the House of Lords in *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.), and somewhat reformulated but consistently applied by this Court, most notably in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 (S.C.C.).

39 At the first stage of this test, the question is whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. If this is established, a *prima facie* duty of care arises and the analysis proceeds to the second stage, which asks whether there are policy reasons why this *prima facie* duty of care should not be recognized: *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129 (S.C.C.).

(1) Stage One: Proximity and Foreseeability

40 On the first branch of the test, the tobacco companies argue that the facts pleaded establish a sufficiently close and direct, or "proximate", relationship between Canada and consumers (in the *Knight* case) and between Canada and tobacco companies (in both cases) to support a duty of care with respect to government statements about light and mild cigarettes. They also argue that Canada could reasonably have foreseen that consumers and the tobacco industry would rely on Canada's statements about the health advantages of light cigarettes, and that such reliance was reasonable. Canada responds that it was acting exclusively in a regulatory capacity when it made

statements to the public and to the industry, which does not give rise to sufficient proximity to ground the alleged duty of care. In the *Costs Recovery* case, Canada also alleges that it could not have reasonably foreseen that the B.C. legislature would enact the *CRA* and therefore cannot be liable for the potential losses of the tobacco companies under that Act.

41 Proximity and foreseeability are two aspects of one inquiry — the inquiry into whether the facts disclose a relationship that gives rise to a *prima facie* duty of care at common law. Foreseeability is the touchstone of negligence law. However, not every foreseeable outcome will attract a commensurate duty of care. Foreseeability must be grounded in a relationship of sufficient closeness, or proximity, to make it just and reasonable to impose an obligation on one party to take reasonable care not to injure the other.

42 Proximity and foreseeability are heightened concerns in claims for economic loss, such as negligent misrepresentation: see, generally, *Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021 (S.C.C.); *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 (S.C.C.). In a claim of negligent misrepresentation, both these requirements for a *prima facie* duty of care are established if there was a "special relationship" between the parties: *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.). In *Hercules Management*, the Court, *per* La Forest J., held that a special relationship will be established where: (1) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (2) reliance by the plaintiff would be reasonable in the circumstances of the case (para. 24). Where such a relationship is established, the defendant may be liable for loss suffered by the plaintiff as a result of a negligent misstatement.

43 A complicating factor is the role that legislation should play when determining if a government actor owed a *prima facie* duty of care. Two situations may be distinguished. The first is the situation where the alleged duty of care is said to arise explicitly or by implication from the statutory scheme. The second is the situation where the duty of care is alleged to arise from interactions between the claimant and the government, and is not negated by the statute.

44 The argument in the first kind of case is that the statute itself creates a private relationship of proximity giving rise to a *prima facie* duty of care. It may be difficult to find that a statute creates sufficient proximity to give rise to a duty of care. Some statutes may impose duties on state actors with respect to particular claimants. However, more often, statutes are aimed at public goods, like regulating an industry (*Cooper*), or removing children from harmful environments (*D. (B.)*). In such cases, it may be difficult to infer that the legislature intended to create private law tort duties to claimants. This may be even more difficult if the recognition of a private law duty would conflict with the public authority's duty to the public: see, e.g., *Cooper* and *D. (B.)*. As stated in *D. (B.)*, "[w]here an alleged duty of care is found to conflict with an overarching statutory or public duty, this may constitute a compelling policy reason for refusing to find proximity" (at para. 28; see also *Fullowka v. Royal Oak Ventures Inc.*, 2010 SCC 5, [2010] 1 S.C.R. 132 (S.C.C.), at para. 39).

45 The second situation is where the proximity essential to the private duty of care is alleged to arise from a series of specific interactions between the government and the claimant. The argument in these cases is that the government has, through its conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care. In these cases, the governing statutes are still relevant to the analysis. For instance, if a finding of proximity would conflict with the state's general public duty established by the statute, the court may hold that no proximity arises: *D. (B.)*; see also *Heaslip Estate v. Mansfield Ski Club Inc.*, 2009 ONCA 594, 96 O.R. (3d) 401 (Ont. C.A.). However, the factor that gives rise to a duty of care in these types of cases is the specific interactions between the government actor and the claimant.

46 Finally, it is possible to envision a claim where proximity is based both on interactions between the parties and the government's statutory duties.

47 Since this is a motion to strike, the question before us is simply whether, assuming the facts pleaded to be true, there is any reasonable prospect of successfully establishing proximity, on the basis of a statute or otherwise. On one hand, where the sole basis asserted for proximity is the statute, conflicting public duties may rule out any possibility of proximity being established as a matter of statutory interpretation: *D. (B.)*. On the other, where the asserted basis for proximity is grounded in specific conduct and interactions, ruling a claim out at the proximity stage may be difficult. So long as there is a reasonable prospect that the asserted interactions could, if true, result in a finding of sufficient proximity, and the statute does not exclude that possibility, the matter must be allowed to proceed to trial, subject to any policy considerations that may negate the *prima facie* duty of care at the second stage of the analysis.

48 As mentioned above, there are two relationships at issue in these claims: the relationship between Canada and consumers (the *Knight* case), and the relationship between Canada and tobacco companies (both cases). The question at this stage is whether there is a *prima facie* duty of care in either or both these relationships. In my view, on the facts pleaded, Canada did not owe a *prima facie* duty of care to consumers, but did owe a *prima facie* duty to the tobacco companies.

49 The facts pleaded in Imperial's third-party notice in the *Knight* case establish no direct relationship between Canada and the consumers of light cigarettes. The relationship between the two was limited to Canada's statements to the general public that low-tar cigarettes are less hazardous. There were no specific interactions between Canada and the class members. Consequently, a finding of proximity in this relationship must arise from the governing statutes: *Cooper*, at para. 43.

50 The relevant statutes establish only general duties to the public, and no private law duties to consumers. The *Department of Health Act*, S.C. 1996, c. 8, establishes that the duties of the Minister of Health relate to "the promotion and preservation of the health of the people of Canada": s. 4(1). Similarly, the *Department of Agriculture and Agri-Food Act*, R.S.C. 1985, c. A-9, s. 4, the

Tobacco Act, S.C. 1997, c. 13, s. 4, and the *Tobacco Products Control Act*, S.C. 1988, c. 20, s. 3 (repealed), only establish duties to the general public. These general duties to the public do not give rise to a private law duty of care to particular individuals. To borrow the words of Sharpe J.A. of the Ontario Court of Appeal in *Eliopoulos v. Ontario (Minister of Health & Long Term Care)* (2006), 276 D.L.R. (4th) 411 (Ont. C.A.), "I fail to see how it could be possible to convert any of the Minister's public law discretionary powers, to be exercised in the general public interest, into private law duties owed to specific individuals": para. 17. At the same time, the governing statutes do not foreclose the possibility of recognizing a duty of care to the tobacco companies. Recognizing a duty of care on the government when it makes representations to the tobacco companies about the health attributes of tobacco strains would not conflict with its general duty to protect the health of the public.

51 Turning to the relationship between Canada and the tobacco companies, at issue in both of the cases before the Court, the tobacco companies contend that a duty of care on Canada arose from the transactions between them and Canada over the years. They allege that Canada went beyond its role as regulator of industry players and entered into a relationship of advising and assisting the companies in reducing harm to their consumers. They hope to show that Canada gave erroneous information and advice, knowing that the companies would rely on it, which they did.

52 The question is whether these pleadings bring the tobacco companies within the requirements for a special relationship under the law of negligent misrepresentation as set out in *Hercules Management*. As noted above, a special relationship will be established where (1) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation, and (2) such reliance would, in the particular circumstances of the case, be reasonable. In the cases at bar, the facts pleaded allege a history of interactions between Canada and the tobacco companies capable of fulfilling these conditions.

53 What is alleged against Canada is that Health Canada assumed duties separate and apart from its governing statute, including research into and design of tobacco and tobacco products and the promotion of tobacco and tobacco products (third-party statement of claim of Imperial in the *Costs Recovery* case, 5 A.R., vol. 2, at p. 66). In addition, it is alleged that Agriculture Canada carried out a programme of cooperation with and support for tobacco growers and cigarette manufacturers including advising cigarette manufacturers of the desirable content of nicotine in tobacco to be used in the manufacture of tobacco products. It is alleged that officials, drawing on their knowledge and expertise in smoking and health matters, provided both advice and directions to the manufacturers including advice that the tobacco strains designed and developed by officials of Agriculture Canada and sold or licensed to the manufacturers for use in their tobacco products would not increase health risks to consumers or otherwise be harmful to them (pp. 109-10). Thus, what is alleged is not simply that broad powers of regulation were brought to bear on the tobacco industry, but that Canada assumed the role of adviser to a finite number of manufacturers and that

there were commercial relationships entered into between Canada and the companies based in part on the advice given to the companies by government officials.

54 What is alleged with respect to Canada's interactions with the manufacturers goes far beyond the sort of statements made by Canada to the public at large. Canada is alleged to have had specific interactions with the manufacturers in contrast to the absence of such specific interactions between Canada and the class members. Whereas the claims in relation to consumers must be founded on a statutory framework establishing very general duties to the public, the claims alleged in relation to the manufacturers are not alleged to arise primarily from such general regulatory duties and powers but from roles undertaken specifically in relation to the manufacturers by Canada apart from its statutory duties, namely its roles as designer, developer, promoter and licensor of tobacco strains. With respect to the issue of reasonable reliance, Canada's regulatory powers over the manufacturers, coupled with its specific advice and its commercial involvement, could be seen as supporting a conclusion that reliance was reasonable in the pleaded circumstance.

55 The indices of proximity offered in *Hercules Management* for a special relationship (direct financial interest; professional skill or knowledge; advice provided in the course of business, deliberately or in response to a specific request) may not be particularly apt in the context of alleged negligent misrepresentations by government. I note, however, that the representations are alleged to have been made in the course of Health Canada's regulatory and other activities, not in the course of casual interaction. They were made specifically to the manufacturers who were subject to Health Canada's regulatory powers and by officials alleged to have special skill, judgment and knowledge.

56 Before leaving this issue, two final arguments must be considered. First, in the *Costs Recovery* case, Canada submits that there is no *prima facie* duty of care between Canada and the tobacco companies because the potential damages that the tobacco companies may incur under the *CRA* were not foreseeable. It argues that "[i]t was not reasonably foreseeable by Canada that a provincial government might create a wholly new type of civil obligation to reimburse costs incurred by a provincial health care scheme in respect of defined tobacco related wrongs, with unlimited retroactive and prospective reach" (A.F. at para. 36).

57 In my view, Canada's argument was correctly rejected by the majority of the Court of Appeal. It is not necessary that Canada should have foreseen the precise statutory vehicle that would result in the tobacco companies' liability. All that is required is that it could have foreseen that its negligent misrepresentations would result in a harm of some sort to the tobacco companies: *Hercules Management*, at paras. 25-26 and 42. On the facts pleaded, it cannot be ruled out that the tobacco companies may succeed in proving that Canada foresaw that the tobacco industry would incur this type of penalty for selling a more hazardous product. As held by Tysoe J.A., it is not necessary that Canada foresee that the liability would extend to health care costs specifically, or that provinces would create statutory causes of action to recover these costs. Rather, "[i]t is

sufficient that Canada could have reasonably foreseen in a general way that the appellants would suffer harm if the light and mild cigarettes were more hazardous to the health of smokers than regular cigarettes" (at para. 78).

58 Second, Canada argues that the relationship in this case does not meet the requirement of reasonable reliance because Canada was not acting in a commercial capacity, but rather as a regulator of an industry. It was therefore not reasonable for the tobacco companies to have relied on Canada as an advisor, it submits. This view was adopted by Hall J.A. in dissent, holding that "it could never have been the perception of the appellants that Canada was taking responsibility for their interests" (*Costs Recovery* case, at para. 51).

59 In my view, this argument misconceives the reliance necessary for negligent misrepresentation under the test in *Hercules Management*. When the jurisprudence refers to "reasonable reliance" in the context of negligent misrepresentation, it asks whether it was reasonable for the listener to rely on the speaker's statement as accurate, not whether it was reasonable to believe that the speaker is guaranteeing the accuracy of its statement. It is not plain and obvious that it was unreasonable for the tobacco companies to rely on Canada's statements about the advantages of light or mild cigarettes. In my view, Canada's argument that it was acting as a regulator does not relate to reasonable reliance, although it exposes policy concerns that should be considered at stage two of the *Anns/Cooper* test: *Hercules Management*, at para. 41.

60 In sum, I conclude that the claims between the tobacco companies and Canada should not be struck out at the first stage of the analysis. The pleadings, assuming them to be true, disclose a *prima facie* duty of care in negligent misrepresentation. However, the facts as pleaded in the *Knight* case do not show a relationship between Canada and consumers that would give rise to a duty of care. That claim should accordingly be struck at this stage of the analysis.

(2) Stage Two: Conflicting Policy Considerations

61 Canada submits that there can be no duty of care in the cases at bar because of stage-two policy considerations. It relies on four policy concerns: (1) that the alleged misrepresentations were policy decisions of the government; (2) that recognizing a duty of care would give rise to indeterminate liability to an indeterminate class; (3) that recognizing a duty of care would create an unintended insurance scheme; and (4) that allowing Imperial's claim would transfer responsibility for tobacco products to the government from the manufacturer, and the manufacturer "is best positioned to address liability for economic loss" (A.F., at para. 72).

62 For the reasons that follow, I accept Canada's submission that its alleged negligent misrepresentations to the tobacco industry in both cases should not give rise to tort liability because of stage-two policy considerations. First, the alleged statements are protected expressions of government policy. Second, recognizing a duty of care would expose Canada to indeterminate liability.

(a) Government Policy Decisions

63 Canada contends that it had a policy of encouraging smokers to consume low-tar cigarettes, and pursuant to this policy, promoted this variety of cigarette and developed strains of low-tar tobacco. Canada argues that statements made pursuant to this policy cannot ground tort liability. It relies on the statement of Cory J. in *Just v. British Columbia*, [1989] 2 S.C.R. 1228 (S.C.C.), that "[t]rue policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors" (p. 1240).

64 The tobacco companies, for their part, contend that Canada's actions were not matters of policy, but operational acts implementing policy, and therefore, are subject to tort liability. They submit that Canada's argument fails to account for the "facts" as pleaded in the third-party notices, namely that Canada was acting in an operational capacity, and as a participant in the tobacco industry. The tobacco companies also argue that more evidence is required to determine if the government's actions were operational or pursuant to policy, and that the matter should therefore be permitted to go to trial.

65 In the *Knight* case, the majority in the Court of Appeal, *per* Tysoe J.A., agreed with Imperial's submissions, holding that "evidence is required to determine which of the actions and statements of Canada in this case were policy decisions and which were operational decisions" (para. 52). Hall J.A. dissented; in his view, it was clear that all of Canada's initiatives were matters of government policy:

> [Canada] had a responsibility, as pleaded in the Third Party Notice, to protect the health of the Canadian public including smokers. Any initiatives it took to develop less hazardous strains of tobacco, or to publish the tar and nicotine yields of different cigarette brands were directed to this end. While the development of new strains of tobacco involved Agriculture Canada, in my view the government engaged in such activities as a regulator of the tobacco industry seeking to protect the health interests of the Canadian public. Policy considerations underlaid all of these various activities undertaken by departments of the federal government. [para. 100]

66 In order to resolve the issue of whether the alleged "policy" nature of Canada's conduct negates the *prima facie* duty of care for negligent misrepresentation established at stage one of the analysis, it is necessary to first consider several preliminary matters.

(i) Conduct at Issue

67 The first preliminary matter is the conduct at issue for purposes of this discussion. The third-party notices describe two distinct types of conduct — one that is related to the allegation of negligent misrepresentation and one that is not. The first type of conduct relates to representations

by Canada that low-tar and light cigarettes were less harmful to health than other cigarettes. The second type of conduct relates to Agriculture Canada's role in developing and growing a strain of low-tar tobacco and collecting royalties on the product. In argument, the tobacco companies merged the two types of conduct, emphasizing aspects that cast Canada in the role of a business operator in the tobacco industry. However, in considering negligent misrepresentation, only the first type of conduct — conduct relevant to statements and representations made by Canada — is at issue.

(ii) Relevance of Evidence

68 This brings us to the second and related preliminary matter — the helpfulness of evidence in resolving the question of whether the third-party claims for negligent misrepresentation should be struck. The majority of the Court Appeal concluded that evidence was required to establish whether Canada's alleged misrepresentations were made pursuant to a government policy. Likewise, the tobacco companies in this Court argued strenuously that insofar as Canada was developing, growing, and profiting from low-tar tobacco, it should not be regarded as a government regulator or policy maker, but rather a business operator. Evidence was required, they urged, to determine the extent to which this was business activity.

69 There are two problems with this argument. The first is that, as mentioned, it relies mainly on conduct — the development and marketing of a strain of low-tar tobacco — that is not directly related to the allegation of negligent misrepresentation. The only question at this point of the analysis is whether policy considerations weigh against finding that Canada was under a duty of care to the tobacco companies to take reasonable care to accurately represent the qualities of low-tar tobacco. Whether Canada produced strains of low-tar tobacco is not directly relevant to that inquiry. The question is whether, insofar as it made statements on this matter, policy considerations militate against holding it liable for those statements.

70 The second problem with the argument is that, as discussed above, a motion to strike is, by its very nature, not dependent on evidence. The facts pleaded must be assumed to be true. Unless it is plain and obvious that on those facts the action has no reasonable chance of success, the motion to strike must be refused. To put it another way, if there is a reasonable chance that the matter as pleaded may in fact turn out not to be a matter of policy, then the application to strike must be dismissed. Doubts as to what may be proved in the evidence should be resolved in favour of proceeding to trial. The question for us is therefore whether, assuming the facts pleaded to be true, it is plain and obvious that any duty of care in negligent misrepresentation would be defeated on the ground that the conduct grounding the alleged misrepresentation is a matter of government policy and hence not capable of giving rise to liability in tort.

71 Before we can answer this question, we must consider a third preliminary issue: what constitutes a policy decision immune from review by the courts?

(iii) What Constitutes a Policy Decision Immune from Judicial Review?

72 The question of what constitutes a policy decision that is generally protected from negligence liability is a vexed one, upon which much judicial ink has been spilled. There is general agreement in the common law world that government policy decisions are not justiciable and cannot give rise to tort liability. There is also general agreement that governments may attract liability in tort where government agents are negligent in carrying out prescribed duties. The problem is to devise a workable test to distinguish these situations.

73 The jurisprudence reveals two approaches to the problem, one emphasizing discretion, the other, policy, each with variations. The first approach focuses on the discretionary nature of the impugned conduct. The "discretionary decision" approach was first adopted in *Dorset Yacht Co. v. Home Office*, [1970] 2 W.L.R. 1140 (U.K. H.L.). This approach holds that public authorities should be exempt from liability if they are acting within their discretion, unless the challenged decision is irrational.

74 The second approach emphasizes the "policy" nature of protected state conduct. Policy decisions are conceived of as a subset of discretionary decisions, typically characterized as raising social, economic and political considerations. These are sometimes called "true" or "core" policy decisions. They are exempt from judicial consideration and cannot give rise to liability in tort, provided they are neither irrational nor taken in bad faith. A variant of this is the policy/operational test, in which "true" policy decisions are distinguished from "operational" decisions, which seek to implement or carry out settled policy. To date, the policy/operational approach is the dominant approach in Canada: *Just*; *Brown v. British Columbia (Minister of Transportation & Highways)*, [1994] 1 S.C.R. 420 (S.C.C.); *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445 (S.C.C.); *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145 (S.C.C.).

75 To complicate matters, the concepts of discretion and policy overlap and are sometimes used interchangeably. Thus Lord Wilberforce in *Anns* defined policy as a synonym for discretion (p. 500).

76 There is wide consensus that the law of negligence must account for the unique role of government agencies: *Just*. On the one hand, it is important for public authorities to be liable in general for their negligent conduct in light of the pervasive role that they play in all aspects of society. Exempting all government actions from liability would result in intolerable outcomes. On the other hand, "the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions": *Just*, at p. 1239. The challenge, to repeat, is to fashion a just and workable legal test.

77 The main difficulty with the "discretion" approach is that it has the potential to create an overbroad exemption for the conduct of government actors. Many decisions can be characterized as

to some extent discretionary. For this reason, this approach has sometimes been refined or replaced by tests that narrow the scope of the discretion that confers immunity.

78 The main difficulty with the policy/operational approach is that courts have found it notoriously difficult to decide whether a particular government decision falls on the policy or operational side of the line. Even low-level state employees may enjoy some discretion related to how much money is in the budget or which of a range of tasks is most important at a particular time. Is the decision of a social worker when to visit a troubled home, or the decision of a snow-plow operator when to sand an icy road, a policy decision or an operational decision? Depending on the circumstances, it may be argued to be either or both. The policy/operational distinction, while capturing an important element of why some government conduct should generally be shielded from liability, does not work very well as a legal test.

79 The elusiveness of a workable test to define policy decisions protected from judicial review is captured by the history of the issue in various courts. I begin with the House of Lords. The House initially adopted the view that all discretionary decisions of government are immune, unless they are irrational: *Dorset Yacht Co. v. Home Office*. It then moved on to a two-stage test that asked first whether the decision was discretionary and, if so, rational; and asked second whether it was a core policy decision, in which case it was entirely exempt from judicial scrutiny: *X (minors) v. Bedfordshire County Council*, [1995] 3 All E.R. 353 (U.K. H.L.). Within a year of adopting this two-stage test, the House abandoned it with a ringing declamation of the policy/operational distinction as unworkable in difficult cases, a point said to be evidenced by the Canadian jurisprudence: *Stovin v. Wise*, [1996] A.C. 923 (U.K. H.L.), *per* Lord Hoffman. In its most recent foray into the subject, the House of Lords affirmed that both the policy/operational distinction and the discretionary decision approach are valuable tools for discerning which government decisions attract tort liability, but held that the final test is a "justiciability" test: *Barrett v. Enfield LBC* (1999), [2001] 2 A.C. 550 (Eng. H.L.). The ultimate question on this test is whether the court is institutionally capable of deciding on the question, or "whether the court should accept that it has no role to play" (p. 571). Thus at the end of the long judicial voyage the traveller arrives at a test that essentially restates the question. When should the court hold that a government decision is protected from negligence liability? When the court concludes that the matter is one for the government and not the courts.

80 Australian judges in successive cases have divided between a discretionary/irrationality model and a "true policy" model. In *Sutherland Shire Council v. Heyman* (1985), 157 C.L.R. 424 (Australia H.C.), two of the justices (Gibbs C.J. and Wilson J.) adopted the *Dorset Yacht* rule that all discretionary decisions are immune, provided they are rational (p. 442). They endorsed the policy/operational distinction as a logical test for discerning which decisions should be protected, and adopted Lord Wilberforce's definition of policy as a synonym for discretion. Mason J., by contrast, held that only core policy decisions, which he viewed as a narrower subset of discretionary decisions, were protected (p. 500). Deane J. agreed with Mason J. for somewhat different reasons.

Brennan J. did not comment on which test should be adopted, leaving the test an open question. The Australian High Court again divided in *Pyrenees Shire Council v. Day*, [1998] H.C.A. 3, 192 C.L.R. 330, with three justices holding that a discretionary government action will only attract liability if it is irrational and two justices endorsing different versions of the policy/operational distinction.

81 In the United States, the liability of the federal government is governed by the *Federal Tort Claims Act* of 1946, 28 U.S.C. ("*FTCA*"), which waived sovereign immunity for torts, but created an exemption for discretionary decisions. Section 2680(a) excludes liability in tort for

> [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
>
> [Emphasis added.]

Significantly, s. 2680(h) of the *FTCA* exempts the federal government from any claim of misrepresentation, either intentional or negligent: *Office of Personnel Management v. Richmond*, 496 U.S. 414 (U.S.S.C. 1990), at p. 430; *U.S. v. Neustadt*, 366 U.S. 696 (U.S. Sup. Ct. 1961).

82 Without detailing the complex history of the American jurisprudence on the issue, it suffices to say that the cases have narrowed the concept of discretion in the *FTCA* by reference to the concept of policy. Some cases develop this analysis by distinguishing between policy and operational decisions: e.g., *Dalehite v. United States*, 346 U.S. 15 (U.S. Tex. 1953). The Supreme Court of the United States has since distanced itself from the approach of defining a true policy decision negatively as "not operational", in favour of an approach that asks whether the impugned state conduct was based on public policy considerations. In *United States v. Gaubert*, 499 U.S. 315 (U.S. Tex. 1991), White J. faulted the Court of Appeals for relying on "a nonexistent dichotomy between discretionary functions and operational activities" (p. 326). He held that the "discretionary function exception" of the *FTCA* "*protects only governmental actions and decisions based on considerations of public policy*" (at p. 323, citing *Berkovitz v. U.S.*, 486 U.S. 531 (U.S. Pa. S.C. 1988), at p. 537 (emphasis added)), such as those involving social, economic and political considerations: see also *United States v. S. A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (U.S. Cal. 1984).

83 In *Gaubert*, only Scalia J. found lingering appeal in defining policy decisions as "not operational", but only in the narrow sense that people at the operational level will seldom make policy decisions. He stated that "there is something to the planning vs. operational dichotomy — though ... not precisely what the Court of Appeals believed" (p. 335). That "something" is that "[o]rdinarily, an employee working at the operational level is not responsible for policy

decisions, even though policy considerations may be highly relevant to his actions". For Scalia J., a government decision is a protected policy decision if it "ought to be informed by considerations of social, economic, or political policy and is made by an officer whose official responsibilities include assessment of those considerations".

84 A review of the jurisprudence provokes the following observations. The first is that a test based simply on the exercise of government discretion is generally now viewed as too broad. Discretion can imbue even routine tasks, like driving a government vehicle. To protect all government acts that involve discretion unless they are irrational simply casts the net of immunity too broadly.

85 The second observation is that there is considerable support in all jurisdictions reviewed for the view that "true" or "core" policy decisions should be protected from negligence liability. The current Canadian approach holds that only "true" policy decisions should be so protected, as opposed to operational decisions: *Just*. The difficulty in defining such decisions does not detract from the fact that the cases keep coming back to this central insight. Even the most recent "justiciability" test in the U.K. looks to this concept for support in defining what should be viewed as justiciable.

86 A third observation is that defining a core policy decision negatively as a decision that it is not an "operational" decision may not always be helpful as a stand-alone test. It posits a stark dichotomy between two water-tight compartments — policy decisions and operational decisions. In fact, decisions in real life may not fall neatly into one category or the other.

87 Instead of defining protected policy decisions negatively, as "not operational", the majority in *Gaubert* defines them positively as discretionary legislative or administrative decisions and conduct that are grounded in social, economic, and political considerations. Generally, policy decisions are made by legislators or officers whose official responsibility requires them to assess and balance public policy considerations. The decision is a considered decision that represents a "policy" in the sense of a general rule or approach, applied to a particular situation. It represents "a course or principle of action adopted or proposed by a government": *New Oxford Dictionary of English* (1998), at p. 1434. When judges are faced with such a course or principle of action adopted by a government, they generally will find the matter to be a policy decision. The weighing of social, economic, and political considerations to arrive at a course or principle of action is the proper role of government, not the courts. For this reason, decisions and conduct based on these considerations cannot ground an action in tort.

88 Policy, used in this sense, is not the same thing as discretion. Discretion is concerned with whether a particular actor had a choice to act in one way or the other. Policy is a narrow subset of discretionary decisions, covering only those decisions that are based on public policy considerations, like economic, social and political considerations. Policy decisions are always

discretionary, in the sense that a different policy could have been chosen. But not all discretionary decisions by government are policy decisions.

89 While the main focus on the *Gaubert* approach is on the nature of the decision, the role of the person who makes the decision may be of assistance. Did the decision maker have the responsibility of looking at social, economic or political factors and formulating a "course" or "principle" of action with respect to a particular problem facing the government? Without suggesting that the question can be resolved simply by reference to the rank of the actor, there is something to Scalia J.'s observation in *Gaubert* that employees working at the operational level are not usually involved in making policy choices.

90 I conclude that "core policy" government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. This approach is consistent with the basic thrust of Canadian cases on the issue, although it emphasizes positive features of policy decisions, instead of relying exclusively on the quality of being "non-operational". It is also supported by the insights of emerging jurisprudence here and elsewhere. This said, it does not purport to be a litmus test. Difficult cases may be expected to arise from time to time where it is not easy to decide whether the degree of "policy" involved suffices for protection from negligence liability. A black and white test that will provide a ready and irrefutable answer for every decision in the infinite variety of decisions that government actors may produce is likely chimerical. Nevertheless, most government decisions that represent a course or principle of action based on a balancing of economic, social and political considerations will be readily identifiable.

91 Applying this approach to motions to strike, we may conclude that where it is "plain and obvious" that an impugned government decision is a policy decision, the claim may properly be struck on the ground that it cannot ground an action in tort. If it is not plain and obvious, the matter must be allowed to go to trial.

(iv) Conclusion on the Policy Argument

92 As discussed, the question is whether the alleged representations of Canada to the tobacco companies that low-tar cigarettes are less harmful to health are matters of policy, in the sense that they constitute a course or principle of action of the government. If so, the representations cannot ground an action in tort.

93 The third-party notices plead that Canada made statements to the public (and to the tobacco companies) warning about the hazards of smoking, and asserting that low-tar cigarettes are less harmful than regular cigarettes; that the representations that low-tar cigarettes are less harmful to health were false; and that insofar as consumption caused extra harm to consumers for which the

tobacco companies are held liable, Canada is required to indemnify the tobacco companies and/or contribute to their losses.

94 The third-party notices implicitly accept that in making the alleged representations, Health Canada was acting out of concern for the health of Canadians, pursuant to its policy of encouraging smokers to switch to low-tar cigarettes. They assert, in effect, that Health Canada had a policy to warn the public about the hazardous effects of smoking, and to encourage healthier smoking habits among Canadians. The third-party claims rest on the allegation that Health Canada accepted that some smokers would continue to smoke despite the adverse health effects, and decided that these smokers should be encouraged to smoke lower-tar cigarettes.

95 In short, the representations on which the third-party claims rely were part and parcel of a government policy to encourage people who continued to smoke to switch to low-tar cigarettes. This was a "true" or "core" policy, in the sense of a course or principle of action that the government adopted. The government's alleged course of action was adopted at the highest level in the Canadian government, and involved social and economic considerations. Canada, on the pleadings, developed this policy out of concern for the health of Canadians and the individual and institutional costs associated with tobacco-related disease. In my view, it is plain and obvious that the alleged representations were matters of government policy, with the result that the tobacco companies' claims against Canada for negligent misrepresentation must be struck out.

96 Having concluded that the claims for negligent misrepresentation are not actionable because the alleged representations were matters of government policy, it is not necessary to canvas the other stage-two policy grounds that Canada raised against the third-party claims relating to negligent misrepresentation. However, since the argument about indeterminate liability was fully argued, I will briefly discuss it. In my view, it confirms that no liability in tort should be recognized for Canada's alleged misrepresentations.

(b) Indeterminate Liability

97 Canada submits that allowing the defendants' claims in negligent misrepresentation would result in indeterminate liability, and must therefore be rejected. It submits that Canada had no control over the number of cigarettes being sold. It argues that in cases of economic loss, the courts must limit liability to cases where the third party had a means of controlling the extent of liability.

98 The tobacco companies respond that Canada faces extensive, but not indeterminate liability. They submit that the scope of Canada's liability to tobacco companies is circumscribed by the tort of negligent misrepresentation. Canada would only be liable to the smokers of light cigarettes and to the tobacco companies.

99 I agree with Canada that the prospect of indeterminate liability is fatal to the tobacco companies' claims of negligent misrepresentation. Insofar as the claims are based on

representations to consumers, Canada had no control over the number of people who smoked light cigarettes. This situation is analogous to *Cooper v. Hobart*, where this Court held that it would have declined to apply a duty of care to the Registrar of Mortgage Brokers in respect of economic losses suffered by investors because "[t]he Act itself imposes no limit and the Registrar has no means of controlling the number of investors or the amount of money invested in the mortgage brokerage system" (para. 54). While this statement was made in *obiter*, the argument is persuasive.

100 The risk of indeterminate liability is enhanced by the fact that the claims are for pure economic loss. In *Design Services Ltd. v. R.*, 2008 SCC 22, [2008] 1 S.C.R. 737 (S.C.C.), the Court, *per* Rothstein J., held that "in cases of pure economic loss, to paraphrase Cardozo C.J., care must be taken to find that a duty is recognized only in cases where the class of plaintiffs, the time and the amounts are determinate" (para. 62). If Canada owed a duty of care to consumers of light cigarettes, the potential class of plaintiffs and the amount of liability would be indeterminate.

101 Insofar as the claims are based on representations to the tobacco companies, they are at first blush more circumscribed. However, this distinction breaks down on analysis. Recognizing a duty of care for representations to the tobacco companies would effectively amount to a duty to consumers, since the quantum of damages owed to the companies in both cases would depend on the number of smokers and the number of cigarettes sold. This is a flow-through claim of negligent misrepresentation, where the tobacco companies are passing along their potential liability to consumers and to the province of British Columbia. In my view, in both cases, these claims should fail because Canada was not in control of the extent of its potential liability.

(c) Summary on Stage-Two Policy Arguments

102 In my view, this Court should strike the negligent misrepresentation claims in both cases as a result of stage-two policy concerns about interfering with government policy decisions and the prospect of indeterminate liability.

D. Failure to Warn

103 The tobacco companies make two allegations of failure to warn: B.A.T. alleges that Canada directed the tobacco companies not to provide warnings on cigarette packages (the labelling claim) about the health hazards of cigarettes; and Imperial alleges that Canada failed to warn the tobacco companies about the dangers posed by the strains of tobacco designed and licensed by Canada.

(1) Labelling Claim

104 B.A.T. alleges that by instructing the industry to not put warning labels on their cigarettes, Canada is liable in tort for failure to warn. In the *Knight* case, Tysoe J.A. did not address the failure to warn claims. Hall J.A., writing for the minority, would have struck those claims on stage-two grounds, finding that Canada's decision was a policy decision and that liability would be

indeterminate. Hall J.A. also held that liability would conflict with the government's public duties (para. 99). In the *Costs Recovery* case, Tysoe J.A. adopted Hall J.A.'s analysis from the *Knight* case in rejecting the failure to warn claim as between Canada and the tobacco companies (para. 89). B.A.T. challenges these findings.

105 The crux of this failure to warn claim is essentially the same as the negligent misrepresentation claim, and should be rejected for the same policy reasons. The Minister of Health's recommendations on warning labels were integral to the government's policy of encouraging smokers to switch to low-tar cigarettes. As such, they cannot ground a claim in failure to warn.

(2) Failure to Warn Imperial About Health Hazards

106 The Court of Appeal, *per* Tysoe J.A., held that the third-party notices did not sufficiently plead that Canada failed to warn the industry about the health hazards of its strains of tobacco. Imperial argues that this was in error, because the elements of a failure to warn claim are identical to the elements of the negligence claim, which was sufficiently pleaded.

107 Canada points out that the two paragraphs of the third-party notices that discuss failure to warn only mention the claims that relate to labels, and not the claim that Canada failed to warn Imperial about potential health hazards of the tobacco strains. Canada also argues that to support a claim of failure to warn, the plaintiff must not only show that the defendant acted negligently, but that the defendant was also under a positive duty to act. It submits that nothing in the third-party notices suggests that Canada was under such a positive duty here.

108 I agree with Canada that the tort of failure to warn requires evidence of a positive duty towards the plaintiff. Positive duties in tort law are the exception rather than the rule. In *Childs v. Desormeaux*, the Court held:

> Although there is no doubt that an omission may be negligent, as a general principle, the common law is a jealous guardian of individual autonomy. Duties to take positive action in the face of risk or danger are not free-standing. Generally, the mere fact that a person faces danger, or has become a danger to others, does not itself impose any kind of duty on those in a position to become involved. [para. 31]

Moreover, none of the authorities cited by Imperial support the proposition that a plea of negligence, without more, will suffice to raise a duty to warn: *Day v. Central Okanagan (Regional District)*, 2000 BCSC 1134, 79 B.C.L.R. (3d) 36 (B.C. S.C.), *per* Drossos J.; see also *Elias v. Headache & Pain Management Clinic* [2008 CarswellOnt 8657 (Ont. S.C.J.)], 2008 CanLII 53133, *per* Macdonald J. (paras. 6 to 9).

109 Even if pleading negligence were viewed as sufficient to raise a claim of duty to warn, which I do not accept, the claim would fail for the stage-two policy reasons applicable to the negligent misrepresentation claim.

E. Negligent Design

110 The tobacco companies have brought two types of negligent design claims against Canada that remain to be considered. First, they submit that Canada breached its duty of care to the tobacco companies when it negligently designed its strains of low-tar tobacco. The Court of Appeal held that the pleadings supported a *prima facie* duty of care in this respect, but held that the duty was negated by the stage-two policy concern of indeterminate liability. Second, Imperial submits that Canada breached its duty of care to the consumers of light and mild cigarettes in the *Knight* case. A majority of the Court of Appeal held that this claim should proceed to trial.

111 In my view, both remaining negligent design claims establish a *prima facie* duty of care, but fail at the second stage of the analysis because they relate to core government policy decisions.

(1) Prima Facie Duty of Care

112 I begin with the claim that Canada owed a *prima facie* duty of care to the tobacco companies. Canada submits that there was no *prima facie* duty of care since there is no proximity between Canada and the tobacco companies, relying on the same arguments that it raises in the negligent misrepresentations claims.

113 In my view, the Court of Appeal correctly concluded that Canada owed a *prima facie* duty of care towards the tobacco companies with respect to its design of low-tar tobacco strains. I agree with Tysoe J.A. that the alleged relationship in this case meets the requirements for proximity:

> If sufficient proximity exists in the relationship between a designer of a product and a purchaser of the product, it would seem to me to follow that there is sufficient proximity in the relationship between the designer of a product and a manufacturer who uses the product in goods sold to the public. Also, the designer of the product ought reasonably to have the manufacturer in contemplation as a person who would be affected by its design in the context of the present case. It would have been reasonably foreseeable to the designer of the product that a manufacturer of goods incorporating the product could be required to refund the purchase price paid by consumers if the design of the product did not accomplish that which it was intended to accomplish. [*Knight* case, para. 67]

114 The allegation is that Canada was acting like a private company conducting business, and conducted itself toward the tobacco companies in a way that established proximity. The proximity alleged is not based on a statutory duty, but on interactions between Canada and the tobacco

companies. Canada's argument that a duty of care would result in conflicting private and public duties does not negate proximity arising from conduct, although it may be a relevant stage-two policy consideration.

115 For similar reasons, I conclude that on the facts pleaded, Canada owed a *prima facie* duty of care to the consumers of light and mild cigarettes in the *Knight* case. On the facts pleaded, it is at least arguable that Canada was acting in a commercial capacity when it designed its strains of tobacco. As Tysoe J.A. held in the court below, "a person who designs a product intended for sale to the public owes a *prima facie* duty of care to the purchasers of the product" (para. 48).

(2) Stage-Two Policy Considerations

116 For the reasons given in relation to the negligent misrepresentation claim, I am of the view that stage-two policy considerations negate this *prima facie* duty of care for the claims of negligent design. The decision to develop low-tar strains of tobacco on the belief that the resulting cigarettes would be less harmful to health is a decision that constitutes a course or principle of action based on Canada's health policy. It was a decision based on social and economic factors. As a core government policy decision, it cannot ground a claim for negligent design. This conclusion makes it unnecessary to consider the argument of indeterminate liability also raised as a stage- two policy objection to the claim of negligent design.

F. The Direct Claims Under the Costs Recovery Act

117 The tobacco companies submit that the Court of Appeal erred when it held that it was plain and obvious that Canada could not qualify as a manufacturer under the *CRA*. They also present three alternative arguments: (1) that if Canada is not liable under the Act, it is liable under the recently adopted *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27 ("*HCCRA*"); (2) that if Canada is not liable under either the *CRA* or the *HCCRA*, it is nonetheless liable to the defendants for contribution under the *Negligence Act*; and (3) that in the further alternative, Canada could be liable for contribution under the common law (joint factum of Rothmans, Benson & Hedges ("RBH") and Philip Morris only).

118 Section 2 of the *CRA* establishes that "[t]he government has a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco related wrong". The words "manufacture" and "manufacturer" are defined in s. 1 of the Act as follows:

> **"manufacture"** includes, for a tobacco product, the production, assembly or packaging of the tobacco product;
>
> **"manufacturer"** means a person who manufactures or has manufactured a tobacco product and includes a person who currently or in the past

> (a) causes, directly or indirectly, through arrangements with contractors, subcontractors, licensees, franchisees or others, the manufacture of a tobacco product,
>
> (b) for any fiscal year of the person, derives at least 10% of revenues, determined on a consolidated basis in accordance with generally accepted accounting principles in Canada, from the manufacture or promotion of tobacco products by that person or by other persons,
>
> (c) engages in, or causes, directly or indirectly, other persons to engage in the promotion of a tobacco product, or
>
> (d) is a trade association primarily engaged in
>
> (i) the advancement of the interests of manufacturers,
>
> (ii) the promotion of a tobacco product, or
>
> (iii) causing, directly or indirectly, other persons to engage in the promotion of a tobacco product;

The third-party notices allege that Canada grew (manufactured) tobacco and licensed it to the tobacco industry for a profit, and that Canada "promoted" the use of mild or light cigarettes to the industry and the public. These facts, they say, brings Canada within the definition of "manufacturer" of the *CRA*.

119 Canada submits that it is not a manufacturer under the Act. In the alternative, it submits that it is immune from the operation of this provincial statute at common law and alternatively under the Constitution.

120 For the reasons that follow, I conclude that Canada is not a manufacturer under the Act. Indeed, holding Canada accountable under the *CRA* would defeat the legislature's intention of transferring the health-care costs resulting from tobacco related wrongs from taxpayers to the tobacco industry. This conclusion makes it unnecessary to consider Canada's arguments that it would in any event be immune from liability under the provincial Act. I would also reject the tobacco companies' argument for contribution under the *HCCRA* and the *Negligence Act*, and the common law contribution argument.

(1) Could Canada Qualify as a Manufacturer Under the Costs Recovery Act?

121 The Court of Appeal held that the definition of "manufacturer" could not apply to the Government of Canada. I agree. While the argument that Canada could qualify as a manufacturer under the *CRA* has superficial appeal, when the Act is read in context and all of its provisions are taken into account, it is apparent that the British Columbia legislature did not intend for Canada to

be liable as a manufacturer. This is confirmed by the text of the statute, the intent of the legislature in adopting the Act, and the broader context of the relationship between the province and the federal government.

(a) Text of the Statute

122 The definition of manufacturer in s. 1 "manufacturer" (b) of the Act includes a person who "for any fiscal year of the person, derives at least 10% of revenues, determined on a consolidated basis in accordance with generally accepted accounting principles in Canada, from the manufacture or promotion of tobacco products by that person or by other persons". Hall J.A. held that this definition indicated that the legislature intended the Act to apply to companies involved in the tobacco industry, and not to governments.

123 The tobacco companies respond that the definition of "manufacturer" is disjunctive since it uses the word "or", such that an individual will qualify as a manufacturer if it meets any of the four definitions in (a) to (d). Even if Canada is incapable of meeting the definition in (b) of the Act (deriving 10% of its revenues from the manufacture or promotion of tobacco products), Canada qualifies under subparagraphs (a) (causing the manufacture of tobacco products) and (c) (engaging in or causing others to engage in the promotion of tobacco products) on the facts pled, they argue.

124 Like the Court of Appeal, I would reject this argument. It is true that s. 1 must be read disjunctively, and that an individual will qualify as a manufacturer if it meets any of the four definitions in (a) to (d). However, the Act must nevertheless be read purposively and as a whole. A proper reading of the Act will therefore take each of the four definitions into account. It will also consider the rest of the statutory scheme, and the legislative context. When the Act is read in this way, it is clear that the B.C. legislature did not intend to include the federal government as a potential manufacturer under the *CRA*.

125 The fact that one of the statutory definitions is based on revenue percentage suggests that the term "manufacturer" is meant to capture businesses or individuals who earn profit from tobacco-related activities. This interpretation is reinforced by the provisions of the Act that establish the liability of defendants. Section 3(3)(b) provides that "each defendant to which the presumptions [provided in s. 3(2) of the *CRA*] apply is liable for the proportion of the aggregate cost referred to in paragraph (a) equal to its market share in the type of tobacco product". This language cannot be stretched to include the Government of Canada.

126 I conclude that the text of the *CRA*, read as a whole, does not support the view that Canada is a "manufacturer" under the Act.

(b) Legislative Intention

127 I agree with Canada that considerations related to legislative intent further support the view that Canada does not fall within the definition of "manufacturer". When the *CRA* was introduced in the legislature, the Minister responsible stated that "the industry" manufactured a lethal product, and that "the industry" composed of "tobacco companies" should accordingly be held accountable (B.C. *Debates of the Legislative Assembly*, vol. 20, 4th Sess., 36th Parl., June 7, 2000, at p. 16314). It is plain and obvious that the Government of Canada would not fit into these categories.

128 Imperial submits that it is improper to rely on excerpts from *Hansard* on an application to strike a pleading, since evidence is not admissible on such an application. However, a distinction lies between evidence that is introduced to prove a point of fact and evidence of legislative intent that is provided to assist the court in discerning the proper interpretation of a statute. The former is not relevant on an application to strike; the latter may be. Applications to strike are intended to economize judicial resources in cases where on the facts pled, the law does not support the plaintiff's claim. Courts may consider all evidence relevant to statutory interpretation, in order to achieve this purpose.

(c) Broader Context

129 The broader context of the statute strongly supports the conclusion that the British Columbia legislature did not intend the federal government to be liable as a manufacturer of tobacco products. The object of the Act is to recover the cost of providing health care to British Columbians from the companies that sold them tobacco products. As held by this Court in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 (S.C.C.):

> [T]he driving force of the Act's cause of action is compensation for the government of British Columbia's health care costs, not remediation of tobacco manufacturers' breaches of duty. While the Act makes the existence of a breach of duty one of several necessary conditions to a manufacturer's liability to the government, it is not the mischief at which the cause of action created by the Act is aimed. [para. 40]

The legislature sought to transfer the medical costs from provincial taxpayers to the private sector that sold a harmful product. This object would be fundamentally undermined if the funds were simply recovered from the federal government, which draws its revenue from the same taxpayers.

130 The tobacco companies' proposed application of the *CRA* to Canada is particularly problematic in light of the long-standing funding relationship between the federal and provincial governments with regards to health care. The federal government has been making health transfer payments to the provinces for decades. As held by Hall J.A.:

> If the *Costs Recovery Act* were to be construed to permit the inclusion of Canada as a manufacturer targeted for the recovery of provincial health costs, this would permit a direct

> economic claim to be advanced against Canada by British Columbia to obtain further funding for health care costs. In light of these longstanding fiscal arrangements between governments, I cannot conceive that the legislature of British Columbia could ever have envisaged that Canada might be a target under the *Costs Recovery Act*. [para. 33]

131 Imperial argues that the only way to achieve the object of the *CRA* is to allow the province to recover from all those who participated in the tobacco industry, including the federal government. I disagree. Holding the federal government accountable under the Act would defeat the legislature's intention of transferring the cost of medical treatment from taxpayers to the tobacco industry.

(d) Summary

132 For the foregoing reasons, I conclude that it is plain and obvious that the federal government does not qualify as a manufacturer of tobacco products under the *CRA*. This pleading must therefore be struck.

(2) Could Canada Be Found Liable Under the Health Care Costs Recovery Act?

133 The tobacco companies submit that if Canada is not liable under the *CRA*, it would be liable under the *HCCRA*, which creates a cause of action for the province to recover health care costs generally from wrongdoers (s. 8(1)). Canada submits that the *HCCRA* is inapplicable because it provides that the cause of action does not apply to cases that qualify as "tobacco related wrong[s]" under the *CRA* (s. 24(3)(b). RBH and Philip Morris respond that a "tobacco related wrong" under the *CRA* may only be committed by a "manufacturer". Consequently, if the *CRA* does not apply to Canada because it cannot qualify as a manufacturer, it is not open to Canada to argue that the more general *HCCRA* does not apply either.

134 In my view, the tobacco companies cannot rely on the *HCCRA* in a *CRA* action for contribution. While it is true that Canada is incapable of committing a tobacco-related wrong itself if it is not a manufacturer, the underlying cause of action in this case is that it is the defendants who are alleged to have committed a tobacco-related wrong. The *HCCRA* specifies that it does not apply in cases "arising out of a tobacco related wrong as defined in the *Tobacco Damages and Health Care Costs Recovery Act*" (s. 24(3)(b)). This precludes contribution claims arising out of that Act.

(3) Could Canada Be Liable for Contribution Under the Negligence Act if It Is not Directly Liable to British Columbia?

135 RBH and Philip Morris submit that even if Canada is not liable to British Columbia, it can still be held liable for contribution under the *Negligence Act*. They argue that direct liability to the plaintiff is not a requirement for being held liable in contribution.

136 As noted above, I agree with Canada's submission that, following *Giffels*, a party can only be liable for contribution if it is also liable to the plaintiff directly.

137 Accordingly, I would reject the argument that the *Negligence Act* in British Columbia allows recovery from a third party that could not be liable to the plaintiff.

(4) Could Canada Be Liable for Common Law Contribution?

138 RBH and Philip Morris submit that if this Court rejects the contribution claim under the *Negligence Act*, it should allow a contribution claim under the common law. They rely on this Court's decisions in *Bow Valley* and *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 S.C.R. 3 (S.C.C.), in which this Court recognized claims of contribution which were not permitted by statute.

139 I would reject this argument. In my view, the cases cited by RBH and Philip Morris support common law contribution claims only if the third party is directly liable to the plaintiff. In *Bow Valley*, the Court recognized a limited right of contribution "between tortfeasors", and noted that the defendants were "jointly and severally liable to the plaintiff" (paras. 101 and 102). A similar point was made by this Court in *Blackwater* (*per* McLachlin C.J.), which stated that a "common law right of contribution *between tortfeasors* may exist" (para. 68 (emphasis added)). There is no support in our jurisprudence for allowing contribution claims in cases where the third party is not liable to the plaintiff.

G. Liability Under the Trade Practices Act and the Business Practices and Consumer Protection Act

140 In the *Knight* case, Imperial alleges that Canada satisfies the definition of a "supplier" under the *Trade Practices Act* (*TPA*) and the *Business Practices and Consumer Protection Act* (*BPCPA*). The *TPA* was repealed and replaced by the *BPCPA* in 2004. Imperial argues that the Court of Appeal erred in striking its claim against Canada under these statutes.

141 In my view, Canada could not qualify as a "supplier" under the Acts on the facts pled. Section 1 of the *TPA* defined supplier as follows:

> "**supplier**" means a person, other than a consumer, who in the course of the person's business solicits, offers, advertises or promotes the disposition or supply of the subject of a consumer transaction or who engages in, enforces or otherwise participates in a consumer transaction, whether or not privity of contract exists between that person and the consumer, and includes the successor to, and assignee of, any rights or obligations of the supplier.

Section 1 of the *BPCPA* defines supplier as follows:

> **"supplier"** means a person, whether in British Columbia or not, who in the course of business participates in a consumer transaction by
>
> (a) supplying goods or services or real property to a consumer, or
>
> (b) soliciting, offering, advertising or promoting with respect to a transaction referred to in paragraph (a) of the definition of "consumer transaction",
>
> whether or not privity of contract exists between that person and the consumer, and includes the successor to, and assignee of, any rights or obligations of that person and, except in Parts 3 to 5 *[Rights of Assignees and Guarantors Respecting Consumer Credit; Consumer Contracts; Disclosure of the Cost of Consumer Credit]*, includes a person who solicits a consumer for a contribution of money or other property by the consumer;

142 The Court of Appeal unanimously held that neither definition could apply to Canada because its alleged actions were not undertaken "in the course of business". The court held that the pleadings allege that Canada promoted the use of mild or light cigarettes, but only in order to reduce the health risks of smoking, not in the course of a business carried on for the purpose of earning a profit (para. 35).

143 Imperial submits that it is not necessary for Canada to have been motivated by profit to qualify as a "supplier" under the Acts, provided it researched, designed and manufactured a defective product. Canada responds that its alleged purpose of improving the health of Canadians shows that it was not acting in the course of business. This was not a case where a public authority was itself operating in the private market as a business, but rather a case where a public authority sought to regulate the industry by promoting a type of cigarette.

144 I accept that Canada's purpose for developing and promoting tobacco as described in the third-party notice suggests that it was not acting "in the course of business" or "in the course of the person's business" as those phrases are used in the *TPA* or the *BPCPA*, and therefore that Canada could not be a "supplier" under either of those statutes. The phrases "in the course of business" and "in the course of the person's business" may have different meanings, depending of the context. On the one hand, they can be read as including all activities that an individual undertakes in his or her professional life: e.g., see discussion of the indicia of reasonable reliance above. On the other, they can be understood as limited to activities undertaken for a commercial purpose. In my view, the contexts in which the phrases are used in the *TPA* and the *BPCPA* support the latter interpretation. The definitions of "supplier" in both Acts refer to "consumer transaction[s]", and contrast suppliers, who must have a commercial purpose, with consumers. It is plain and obvious from the facts pleaded that Canada did not promote the use of low-tar cigarettes for a commercial purpose, but for a health purpose. Canada is therefore not a supplier under the *TPA* or the *BPCPA*, and the contribution claim based on this ground and the *Negligence Act* should be struck.

145 Having concluded that Canada is not liable under the *TPA* and the *BPCPA*, it is unnecessary to consider whether, if it were, Canada would be protected by Crown immunity.

H. The Claim for Equitable Indemnity

146 RBH and Philip Morris submit that if the tobacco companies are found liable in the *Costs Recovery* case, Canada is liable for "equitable indemnity" on the facts pleaded. They submit that whenever a person requests or directs another person to do something that causes the other to incur liability, the requesting or directing person is liable to indemnify the other for its liability. Imperial adopts this argument in the *Knight* case.

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 (S.C.C.), 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 & District Land Co. v. London & North Western Railway* (1886), 34 Ch. D. 261 (Eng. C.A.), at p. 275).

148 In my view, the Court of Appeal, *per* Hall J.A., correctly held that the tobacco companies could not establish this requirement of the claim:

> [I]f the notional reasonable observer were asked whether or not Canada, in the interaction it had over many decades with the appellants, was undertaking to indemnify them from some future liability that might be incurred relating to their business, the observer would reply that this could not be a rational expectation, having regard to the relationship between the parties. Likewise, if Canada through its agents had been specifically asked or a suggestion had been made to its agents by representatives of the appellants that Canada might in future be liable for any such responsibility or incur such a liability, the answer would have been firmly in the negative. [*Costs Recovery* case, para. 57]

When Canada directed the tobacco industry about how it should conduct itself, it was doing so in its capacity as a government regulator that was concerned about the health of Canadians. Under such circumstances, it is unreasonable to infer that Canada was implicitly promising to indemnify the industry for acting on its request.

I. Procedural Considerations

149 In the courts below, the tobacco companies argued that even if the claims for compensation against Canada are struck, Canada should remain a third party in the litigation for procedural reasons. The tobacco companies argued that their ability to mount defences against British

Columbia in the *Costs Recovery* case and the class members in the *Knight* case would be severely prejudiced if Canada was no longer a third party. This argument was rejected in chambers by both Wedge J. and Satanove J. The majority of the Court of Appeal found it unnecessary to consider the question, while Hall J.A. would have affirmed the holdings of the chambers judges.

150 The tobacco companies did not pursue this issue on appeal. I would affirm the findings of Wedge J., Satanove J. and Hall J.A. and strike the claims for declaratory relief.

V. Conclusion

151 I conclude that it is plain and obvious that the tobacco companies' claims against Canada have no reasonable chance of success, and should be struck out. Canada's appeals in the *Costs Recovery* case and the *Knight* case are allowed, and the cross-appeals are dismissed. Costs are awarded throughout against Imperial in the *Knight* case, and against the tobacco companies in the *Costs Recovery* case. No costs are awarded against or in favour of British Columbia in the *Costs Recovery* case.

Crown's appeals allowed; defendants' cross-appeals dismissed.

Pourvois de l'État accueillis; pourvois incidents des défenderesses rejetés.

Footnotes

* A corrigendum issued by the Court on September 29, 2011 has been incorporated herein.

Tab 30

2000 CarswellOnt 2522
Ontario Court of Appeal

Spasic Estate v. Imperial Tobacco Ltd.

2000 CarswellOnt 2522, [2000] O.J. No. 2690, 135 O.A.C. 126, 188 D.L.R. (4th) 577, 2 C.C.L.T. (3d) 43, 47 C.P.C. (4th) 12, 49 O.R. (3d) 699, 98 A.C.W.S. (3d) 558

Ljubisa Spasic, as Estate Trustee of the Estate of Mirjana Spasic, Plaintiff (Appellant) and Imperial Tobacco Limited, and Rothmans, Benson & Hedges Inc., Defendants (Respondents)

Borins, MacPherson, Sharpe JJ.A.

Heard: May 31, 2000
Judgment: July 21, 2000
Docket: CA C31079

Proceedings: reversing in part (1998), 42 O.R. (3d) 391, 44 C.C.L.T. (2d) 188, 27 C.P.C. (4th) 13 (Ont. Gen. Div.)

Counsel: *Robert S. Hart, Q.C.* and *Andreas G. Seibert*, for Appellant.
Deborah A. Glendinning and *Stephen Lamont*, for Respondent, Imperial Tobacco Limited.
Steven Sofer, for Respondent, Rothmans, Benson & Hedges.

Subject: Torts; Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
X Pleadings
X.1 General requirements
X.1.h Pleading evidence
Civil practice and procedure
X Pleadings
X.2 Statement of claim
X.2.f Striking out for absence of reasonable cause of action
X.2.f.v Cause not known in law
Civil practice and procedure
X Pleadings
X.8 Amendment
X.8.b Discretion of court
Torts

XX Spoliation
Torts
XXII Novel or unrecognized torts
Headnote
Torts --- Miscellaneous torts
Smoker brought action for damages against tobacco companies alleging personal injury, conspiracy to addict and injure smoker and tort of intentional spoliation of evidence — Tobacco companies were successful on motion to strike spoliation claim for disclosing no cause of action known to Ontario law — Motions judge granted leave to plaintiff to amend pleadings of material facts related to spoliation as part of conspiracy claim — Plaintiff appealed — Defendants cross-appealed — Appeal allowed in part — Cross-appeal dismissed — Tort of spoliation was radical claim recognized in other jurisdictions and previously recognized in Ontario — Spoliation claim was pleaded as alternative claim to be considered only if it was established that destruction and suppression of evidence by defendants resulted in plaintiff's inability to establish other nominate torts pleaded in statement of claim — Fact that claim was novel did not in itself operate as bar to remedy — Pleadings of spoliation were restored so that all issues and remedies could be considered by trial judge — Order of motions judge striking spoliation pleadings was set aside.
Practice --- Pleadings — Statement of claim — Striking out for absence of reasonable cause of action — Cause not known in law
Smoker brought action for damages against tobacco companies alleging personal injury, conspiracy to addict and injure smoker and tort of intentional spoliation of evidence — Tobacco companies were successful on motion to strike spoliation claim for disclosing no cause of action known to Ontario law — Motions judge granted leave to plaintiff to amend pleadings of material facts related to spoliation as part of conspiracy claim — Plaintiff appealed — Defendants cross-appealed — Appeal allowed in part — Cross-appeal dismissed — Tort of spoliation was radical claim recognized in other jurisdictions and previously recognized in Ontario — Spoliation claim was pleaded as alternative claim to be considered only if it was established that destruction and suppression of evidence by defendants resulted in plaintiff's inability to establish other nominate torts pleaded in statement of claim — Fact that claim was novel did not in itself operate as bar to remedy — Pleadings of spoliation were restored so that all issues and remedies could be considered by trial judge — Order of motions judge striking spoliation pleadings was set aside.

APPEAL by plaintiff from judgment reported at (1998), 42 O.R. (3d) 391, 44 C.C.L.T. (2d) 188, 27 C.P.C. (4th) 134 (Ont. Gen. Div.) striking out portions of statement of claim; CROSS-APPEAL by defendants from order granting plaintiff leave to amend pleadings.

The judgment of the court was delivered by *Borins J.A.*:

1 This is an appeal from the decision of Cameron J., reported in (1998), 42 O.R. (3d) 391 (Ont. Gen. Div.), striking out paragraphs 8 to 15 of the appellant's statement of claim, with leave to amend, as well as paragraph 16, consequent to the respondents' motions under rule 21.01(1)(b) of

the Rules of Civil Procedure. For the reasons that follow, I would allow the appeal and set aside the order of the motions judge, with the exception of that part of the order striking out paragraph 16.

Background

2 This is a "tobacco liability" case. The late Mirjana Spasic died of lung cancer in 1998 after smoking cigarettes for a lengthy period. Before her death, she commenced this claim against the respondent tobacco manufacturers. The claim is continued by her estate.

3 In her statement of claim, it is alleged that the defendants negligently and deceitfully manufactured defective and dangerous devices — tobacco products — and participated in a conspiracy to deceive the public about their defects and dangers. In an additional, or an alternative claim, she pleaded in paragraphs 8 to 15 that the defendants intentionally destroyed evidence relating to the inherent dangers of cigarettes, relying on the tort of intentional spoliation of evidence. In addition, in paragraph 16 she pleaded and relied on "the doctrine of *omnia praesumuntur contra spoliatorem*" — all things are presumed against a wrongdoer.

4 Paragraphs 8 to 15 are very detailed and comprise eight pages of the twenty-seven page statement of claim. There is no need to reproduce these paragraphs. A brief summary of their contents will suffice. It is pleaded that since the 1950s, the defendants knew that cigarettes were hazardous and "inherently defective" and that they "engaged in various schemes to conceal, destroy and alter evidence that established their knowledge." The schemes alleged included contrived document retention and destruction policies and plans. It is further pleaded that "as a result of the defendants' participation in such schemes, the plaintiff has been deprived of the opportunity to properly and fully investigate and prove the facts upon which her causes of action are based."

5 The respondents were successful in their motions to strike out paragraphs 8 to 16 on the ground that they did not disclose a reasonable cause of action. However, with respect to paragraphs 8 to 15, Cameron J. granted leave to the plaintiff to amend the statement of claim "by pleading material facts which included those relating to spoliation, as part of the circumstances constituting a wrong for which compensatory damages may be awarded." The respondents cross-appeal from the order granting the plaintiff leave to amend.

Reasons of the motions judge

6 In his reasons for judgment at p. 393, Cameron J. noted that the respondents attacked the spoliation claim on the ground that it was plain and obvious that it could not succeed because it failed to disclose a reasonable cause of action as no such cause of action existed under Ontario law.

7 At p. 394, Cameron J. set out the legal test which, in his view, applied to the respondents' motions:

> In order to survive a motion under rule 21.01(1)(b) there must be a legally sufficient claim for which a court may grant relief. "If there is no such claim, litigation of it would be a waste of both the parties' and the court's time": *Dawson v. Rexcraft Storage Inc.*, Ont. C.A., Docket No. C22661, August 13, 1998 [reported 164 D.L.R. (4th) 257, 20 R.P.R. (3d) 207]. The test on such a motion is whether it is plain and obvious that the pleading of the cause of action has no reasonable chance of success. A cause of action should not be struck merely because it is novel. In deciding the issue the facts pleaded must be assumed to be true: see *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at pp. 979-80, 74 D.L.R. (4th) 321; *Prete v. Ontario* (1993), 16 O.R. (3d) 161, 110 D.L.R. (4th) 94 (C.A.).

8 The motions judge then referred to the decision of the Divisional Court in *Robb Estate v. St. Joseph's Health Care Centre* (1998), 42 O.R. (3d) 379 (Ont. Div. Ct.) in which a majority of the court, relying on *Endean v. Canadian Red Cross Society* (1998), 157 D.L.R. (4th) 465 (B.C. C.A.), ruled that a separate cause of action for spoliation by a party to the lawsuit did not exist in Ontario. He concluded at p. 396 that as he was "bound by the majority decision in *Robb Estate* as a matter of *stare decisis*," paragraphs 8 to 15 of the statement of claim were to be struck out on the ground that they did not disclose a reasonable cause of action. We were informed by counsel that although the Supreme Court of Canada granted leave to appeal in *Endean*, the appeal had been abandoned.

9 Strictly speaking, it was unnecessary for the motions judge to say more because he was bound to follow the decision of the Divisional Court in *Robb Estate*. However, he continued and expressed his views why a separate tort of spoliation by a party to the action, as contrasted with a tort of spoliation by a third party, is unnecessary. In doing so, he referred to the extensive American case law that is divided on whether the protection of the integrity of the adversary system requires a separate tort to prevent, or deter, the act of intentionally destroying or otherwise suppressing evidence in civil litigation rendering it difficult, or impossible, for a party to prove its case.

10 It appears that Cameron J., in concluding that a separate spoliation tort was unnecessary, was influenced by the position taken by those American courts which have reached a similar conclusion on the basis that the harm to a litigant caused by spoliation can be dealt with in other ways, such as various discovery sanctions, the "spoliation inference" captured by the Latin maxim *omnia praesumuntur contra spoliatorem* cited in *Armory v. Delamirie* (1722), 1 Str. 505, 93 E.R. 664 (Eng. K.B.), statutory punishments for obstruction of justice and referral to bar associations for professional sanctions. The spoliation inference represents a factual inference or a legal presumption that because a litigant destroyed a particular piece of evidence, that evidence would have been damaging to the litigant.

11 It was on the ground that the spoliation inference discussed by the Supreme Court of Canada in *St. Louis v. R.* (1896), 25 S.C.R. 649 (S.C.C.) provided an adequate remedy for spoliation that the court in *Endean* concluded that a separate tort of spoliation was not required. O'Driscoll J., writing

on behalf of a majority of the Divisional Court in *Robb Estate*, applied *Endean*, observing at p. 384 "that the foreseeable trend is to view 'spoliation' as an evidentiary rule that raises a presumption and not as a stand-alone, independent tort."

12 Writing in dissent in *Robb Estate*, Corbett J. observed at p. 390, correctly in my view, that *St. Louis* did not deal with the question of whether the tort of spoliation existed, or should exist, in Canada. The issue in *St. Louis* was whether the spoliation inference had been applied correctly by the lower courts. Referring to the principles stated in *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.) that a claim should not be struck out on the ground that it discloses no cause of action unless it is plain and obvious that it cannot succeed or merely because it is novel, Corbett J. stated at pp. 388-389:

> The tort of spoliation is essentially novel in Canada. Canadian authorities have traditionally viewed the destruction of evidence as a matter of evidence giving rise to procedural remedies, including rule 30.08(2) of our rules, where warranted. This view that procedural remedies are sufficient should not preclude consideration of a substantive remedy for the wilful destruction of evidence.

In concluding that the claim should not be struck out as failing to disclose a reasonable cause of action, she held at pp. 390-391:

> Given the seriousness of the claim involved and the policy objective of preserving records, particularly where the public body in question has a legal duty to preserve that record and to make it available to the public upon request, a tort of spoliation in some form may be appropriate.
>
> I am therefore of the view, and in agreement with [the motions judge] Feldman J., when she stated in her decision of March 18, 1998, at p. 6:
>
> > A motion such as this is not the place to set out a detailed treatise on the tort of spoliation for many reasons, chief among them being that as with virtually all legal analysis, a factual nexus is needed to properly assess the consequences of the various conclusions.

Analysis

13 I agree with those portions of the reasons of Corbett J. in *Robb Estate* which I have quoted. As I will explain, for the reasons of Wilson J. in *Hunt*, I am of the view that paragraphs 8 to 15 of the statement of claim should not have been struck out and that the appellant's claim pleaded in those paragraphs should be allowed to proceed to trial.

14 At the outset of my analysis it is helpful to repeat what this court said in *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.) at 264 in identifying the two categories of motions that are commonly brought under rule 21.01(1)(b):

> Because the purpose of a rule 21.01(1)(b) motion is to test whether the plaintiff's allegations (assuming they can be proved) state a claim for which a court may grant relief, the *only* question posed by the motion is whether the statement of claim states a legally sufficient claim, *i.e.*, whether it is substantively adequate. Consequently, the motions judge, as mandated by rule 21.01(2)(b), does not consider any evidence in deciding the motion. The motions judge addresses a purely legal question: whether, assuming the plaintiff can prove the allegations pleaded in the statement of claim, he or she will have established a cause of action entitling him or her to some form of relief from the defendant. Because dismissal of an action for failure to state a reasonable cause of action is a drastic measure, the court is required to give a generous reading to the statement of claim, construe it in the light most favourable to the plaintiff, and be satisfied that it is plain and obvious that the plaintiff cannot succeed: See *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321.
>
> In some cases, a statement of claim will be vulnerable to dismissal under rule 21.01(1)(b) because the plaintiff has sought relief for acts that are not proscribed under the law. The typical textbook example is a statement of claim that alleges that the defendant made a face at the plaintiff, or that the defendant drove a car of an offensive colour. In other cases, however, the statement of claim may be defective because it has failed to allege the necessary elements of a claim that, if properly pleaded, would constitute a reasonable cause of action.

In this appeal, it is the first category of a rule 21.01(1)(b) motion that is under consideration.

15 In my view, this court should apply the reasoning of Wilson J. in *Hunt* and permit the plaintiff's claim, based on the alleged spoliation of evidence by the respondents, to proceed to trial. The claim advanced in *Hunt* was very similar to the one advanced in this case. The plaintiff alleged that the defendant asbestos producers were negligent and, as well, that they conspired to withhold information concerning the effects of asbestos fibres on workers such as himself. He alleged that "after 1934 the defendants knew that asbestos fibres could cause disease in those exposed to the fibres .... that all of the defendants conspired to withhold information about the dangers associated with asbestos and that as a result of that conspiracy he contracted mesothelioma" (p. 963). At the time the plaintiff's claim was launched, the tort of conspiracy to withhold information was unknown in law. On this basis the defendants succeeded in striking out this portion of the plaintiff's claim.

16 Wilson J. delivered the reasons for the Supreme Court of Canada in *Hunt* in which she held that the plaintiff's claim should proceed to trial. In the course of her reasons she reviewed the jurisprudence of this province on the test to be applied when it is sought to strike out a statement of claim for failing to state a reasonable cause of action, and stated at p. 977:

> Thus, the Ontario Court of Appeal has firmly embraced the "plain and obvious" test and has made clear that it too is of the view that the test is rooted in the need for courts to ensure that

> their process is not abused. The fact that the case the plaintiff wishes to present may involve complex issues of fact and law or may raise a novel legal proposition should not prevent a plaintiff from proceeding with his action.

17 In his concurring reasons in the British Columbia Court of Appeal, Esson J.A. had specifically declined to embark upon a detailed consideration of the law of conspiracy, noting as Wilson J. stated at p. 967:

> It has not generally been part of our tradition and, given the complexity and novelty of some of the issues raised in this case, it would I think be particularly undesirable to render a such decisions [*sic*], as it were, in a vacuum.

At p. 986, Wilson J. approved of this approach:

> I agree completely with Esson J.A. that it is not appropriate at this stage to engage in a detailed analysis of the strengths and weaknesses of Canadian law on the tort of conspiracy.

18 As I have noted, this is not a case in which it is argued that a portion of the statement of claim should be struck out because it pleads a recognized claim which contains a radical defect. Rather, the position taken by the respondents is that the statement of claim sets forth a claim which has been recognized in some jurisdictions, but which has not been recognized in Ontario, nor should it be recognized. I would note, however, that prior to *Robb Estate* the tort of spoliation was permitted to proceed to trial by Molloy J. in *Coriale (Litigation Guardian of) v. Sisters of St. Joseph of Sault Ste. Marie* (1998), 41 O.R. (3d) 347 (Ont. Gen. Div.), from which, we were told, leave to appeal to the Divisional Court was refused. As she was of the opinion that it was not plain and obvious that spoliation could not form the basis of an independent tort, Molloy J. found that it was far preferable to develop legal precedent within the factual context of a trial and not on an interlocutory motion.

19 Wilson J.'s response to a similar argument in *Hunt* is found at pp. 989-991:

> If the facts as alleged by the plaintiff are true, and for the purposes of this appeal we must assume that they are, then it may well be that an agreement between corporations to withhold information about a toxic product might give rise to harm of a magnitude that could not have arisen from the decision of just one company to withhold such information. There may, accordingly, be good reason to extend the tort to this context. *However, this is precisely the kind of question that it is for the trial judge to consider in light of the evidence. It is not for this Court on a motion to strike out portions of a statement of claim to reach a decision one way or the other as to the plaintiff's chances of success. As the law that spawned the "plain and obvious" test makes clear, it is enough that the plaintiff has some chance of success*.
>
> The issues that will arise at the trial of the plaintiff's action in conspiracy will unquestionably be difficult. The plaintiff may have to make complex submissions about whether the evidence

> establishes that the defendants conspired either with a view to causing him harm or in circumstances where they should have known that their actions would cause him harm. He may well have to make novel arguments concerning whether it is enough that the defendants knew or ought to have known that a class of which the plaintiff was a member would suffer harm. The trial judge might conclude, as some of the defendants have submitted, that the plaintiff should have sued the defendants as joint tortfeasors rather than alleging the tort of conspiracy. But this Court's statements in *Inuit Tapirisat of Canada and Operation Dismantle Inc.*, as well as decisions such as *Dyson* and *Drummond-Jackson*, make clear that none of these considerations may be taken into account on an application brought under Rule 19(24) of the British Columbia Rules of Court.
>
> . . . . .
>
> The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. *Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society*. [Emphasis added.]

20 The respondents also submitted that a cause of action in spoliation is not available where the plaintiff has available another cause of action. Wilson J. rejected a similar argument in *Hunt* for two reasons. Her second reason, in my view, is applicable to this appeal. At pp. 991-992 she stated:

> This brings me to the second difficulty I have with the defendants' submission. It seems to me totally inappropriate on a motion to strike out a statement of claim to get into the question whether the plaintiff's allegations concerning other nominate torts will be successful. *This a matter that should be considered at trial where evidence with respect to the other torts can be led and where a fully informed decision about the applicability of the tort of conspiracy can be made in light of that evidence and the submissions of counsel*. If the plaintiff is successful with respect to the other nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. *If the plaintiff is unsuccessful with respect to the other nominate torts, then the trial judge can consider whether he might still succeed in conspiracy*. Regardless of the outcome, it seems to me inappropriate at this stage in the proceedings to reach a conclusion about the validity of the defendants' claims about merger. I believe that this matter is also properly left for the consideration of the trial judge. [Emphasis added.]

21 As I stated earlier, I view the plaintiff's claim based on the tort of spoliation as an additional, or alternative, claim to be considered only if it is established that the destruction or suppression of evidence by the respondents results in the inability of the plaintiff to establish the other nominate torts pleaded in the statement of claim. This, as well, is a good reason why trial

efficiency commends that the pleading of the tort of spoliation remain intact so that all of the issues may be considered by the same trial judge.

22 Therefore, I would apply the reasoning of Wilson J. in *Hunt* and permit the plaintiff's claim based on the tort of spoliation to proceed to trial. As in *Hunt*, there is no need to embark on a detailed consideration of the strengths and weaknesses of the law, including the Canadian law, on the tort of spoliation. If it is established that the conduct of the respondents resulted in harm to the plaintiff by making it impossible for her to prove her claim, then it will be for the trial judge, in the context of a complete record, to determine whether the plaintiff should have a remedy. This is how the progress of the common law is marked in cases of first impression, where the court has created a new cause of action where none had been recognized before. I need refer only to *McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562 (U.K. H.L.) as but one example. Expanding on what Wilson J. stated, when it is clear that a person's interests are entitled to legal protection against the conduct of another, the fact that the claim is novel will not in itself operate as a bar to a remedy. As well, I do not see why the existence of procedural sanctions or the "spoliation inference" which may, or may not, ameliorate the effects of spoliation should in themselves preclude the recognition of an independent tort. As the appellant relies on the spoliation inference, the trial judge will hear and consider evidence of spoliation in any event. I can see no reason why the trial judge should be precluded from considering all possible remedies, including a separate tort, on the basis of the record that will be developed.

23 In my view, this case represents a paradigm of when a claim should be permitted to proceed to trial. As Finlayson J.A. stated on behalf of this court in *R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.* (1991), 5 O.R. (3d) 778 (Ont. C.A.) at 782: "Matters of law which have not been settled fully in our jurisprudence should not be disposed of at this [interlocutory] stage of the proceedings." See, also, *Temilini v. Ontario Provincial Police Commissioner* (1990), 73 O.R. (2d) 664 (Ont. C.A.); *Hanson v. Bank of Nova Scotia* (1994), 19 O.R. (3d) 142 (Ont. C.A.).

24 For the assistance of the trial judge, consideration should be given to whether *Robb Estate* precludes the trial judge from determining whether the appellant's claim based on the tort of spoliation should be recognized, should this issue be raised. In my view, the trial judge should not be bound by the result in *Robb Estate*. While we are not required to overrule *Robb Estate*, I believe that there is good reason to doubt the correctness of the result reached by the majority. As I have indicated, I believe that the reasoning of the majority in purporting to apply *St. Louis*, which was also applied in *Endean*, is flawed. Cameron J. and counsel for the respondents referred to the substantial body of case law in the United States which has accepted and rejected the tort of spoliation. The very few Canadian cases which have considered the question are far from definitive. Accordingly, the trial judge is free to consider the appellant's claim based on the tort of spoliation as if it were a claim at first instance.

25 The appellant, as indicated earlier, has also appealed from the decision of the motions judge striking out paragraph 16 of the statement of claim in which "the doctrine of *omnia praesumuntur contra spoliatorem*" was pleaded and relied on. It was submitted that paragraph 16 is not objectionable as it is the pleading of a point of law, which is permitted by rule 25.06(2). I do not agree. The "doctrine," as is apparent from *St. Louis*, is a rule of evidence and states no principle of law. The maxim *res ipsa loquitur* is also a rule of evidence and states no principle of law: *Hellenius v. Lees* (1971), 20 D.L.R. (3d) 369 (S.C.C.) at 373. In *Hansen v. Weinmaster*, [1951] O.W.N. 868 (Ont. C.A.) at 869 it was held that there was no rule of pleading that requires the pleading of *res ipsa loquitur* as it is a rule of evidence. It follows that as *omnia praesumuntur contra spoliatorem* is a rule of evidence, there was no need to plead it, and the motions judge did not err in striking out paragraph 16.

26 I would, therefore, allow the appeal and set aside the order of Cameron J. with the exception of paragraph 16 of the statement of claim, which is to be struck out as it offends rule 25.06(2). In the circumstances, there is no need to consider the cross-appeal, and it is dismissed without costs. The appellant is to have costs of the motion and the appeal.

Appeal allowed in part; cross-appeal dismissed.

Tab 31

1989 CarswellMan 1
Supreme Court of Canada

Watkins v. Olafson

1989 CarswellMan 1, 1989 CarswellMan 333, [1989] 2 S.C.R. 750, [1989] 6 W.W.R. 481, [1989] S.C.J. No. 94, 100 N.R. 161, 17 A.C.W.S. (3d) 404, 39 B.C.L.R. (2d) 294, 50 C.C.L.T. 101, 61 D.L.R. (4th) 577, 61 Man. R. (2d) 81, J.E. 89-1369, EYB 1989-67171

WATKINS v. OLAFSON, AITKENHEAD and GOVERNMENT OF MANITOBA

Dickson C.J.C., Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and McLachlin JJ.

Heard: May 24, 1989
Judgment: September 28, 1989
Docket: No. 20598

Counsel: *R. B. Doyle, H. I. Pollock, Q.C.*, and *M. J. Pollock*, for appellant.
J.D.F. Strange, for respondent Ian Frank Olafson.
W.G. McFetridge and *S.J. Pierce*, for respondent Government of Manitoba.

Subject: Torts; Civil Practice and Procedure
Related Abridgment Classifications
Remedies
I Damages
I.3 General damages
I.3.a Future pecuniary loss
I.3.a.i Future loss of income or earning capacity
I.3.a.i.B Future loss of earning capacity
Remedies
I Damages
I.3 General damages
I.3.a Future pecuniary loss
I.3.a.iii Cost of future care
I.3.a.iii.F Miscellaneous
Remedies
I Damages
I.14 Valuation of damages
I.14.e Effect of taxes

Headnote

Damages --- Damages in tort — Personal injury — Prospective pecuniary loss — Extent of incapacity — Permanent incapacity

Damages --- Damages in tort — Personal injury — Cost of future care — General

Damages --- Damages in tort — Personal injury — Cost of future care — Income tax considerations

Damages — Personal injuries — Assessment — Gross-up for income tax — Experts testifying as to impact of taxation on award for future care — Trial judge properly considering evidence and including gross-up for taxation in lump sum award.

Damages — Personal injuries — Review of award — Motor vehicle accident rendering plaintiff quadriplegic — Trial court awarding lump sum judgment for future care — Appeal court substituting periodic payments, reducing amount for cost of future care and reducing award for lost earning capacity — In absence of enabling legislation or consent of all parties, appeal court lacking jurisdiction to force periodic payments on plaintiff — No demonstrable error in trial judge's calculation — Appeal court erring in substituting its own views on cost of future care.

Damages — Personal injuries — Assessment — Pecuniary damages — Loss of future earnings and benefits — Motor vehicle accident rendering plaintiff quadriplegic — Trial judge including in award damages for pre- and post-trial loss of earning capacity and amount for inflation — Appeal court improperly reducing amount for loss of earning capacity in absence of demonstrable error on trial judge's part — No legal foundation existing for inclusion of amount for inflation and appeal court properly deducting this amount.

Damages — Personal injuries — Assessment — Management and counselling fees — Trial judge awarding lump sum payment and including financial management fee — Appeal court substituting periodic payments and denying fee — Appeal court lacking jurisdiction to substitute award — Both lump sum award and management fee entirely appropriate in circumstances.

Damages — Personal injuries — Assessment — Pecuniary damages — Cost of future care — Motor vehicle accident rendering plaintiff quadriplegic — Trial judge including in award damages for future care as initial outlay and for ongoing care after carefully considering evidence — Trial judge properly making allowance for impact of taxation on award for future care — Appeal court erring in substituting its view of costs of future care in absence of any demonstrable errors in trial judge's methods or conclusions.

The plaintiff was rendered a quadriplegic in a motor vehicle accident where he had been a passenger in a van. At trial the judge awarded a lump sum payment of damages which included an amount both for pre-trial and post-trial loss of earning capacity and damages for ongoing future care, as well as a sum to cover initial outlays and a financial management fee. The defendant, the owner and driver of the other vehicle, appealed to the Court of Appeal, which reduced the damages for pre-trial and post-trial loss of earnings. It set aside the lump sum award for future care and ordered the provincial government to pay the plaintiff $3,000 per month, adjusted for inflation, and subject to deductions for ongoing care which the plaintiff might receive from the provincial government. The Court of Appeal also disallowed the investment counselling fee and rejected the

plaintiff's request for an "income tax gross-up" on the basis that it was no longer necessary under the structured judgment. The plaintiff appealed.

Held:

Appeal allowed in part.

In the absence of either enabling legislation or the consent of all parties, a court should not order a plaintiff to forego his or her traditional right to a lump-sum judgment for a series of periodic payments. The common law has generally held that the courts cannot award damages on a periodic basis and to permit courts to award periodic damages for personal injuries would involve the adoption of a new principle rather than the extension of an existing rule. Moreover, the legislatures are better equipped than the courts to deal with the complexities involved in the implementation of the notion of periodic payments into the law of tort. It would likewise be inappropriate for the court to order the defendants to purchase an annuity for the plaintiff's care.

The lump sum award for cost of future care should be "grossed-up" to allow for tax which will accrue on the interest income from the award. If no allowance was made for tax, the judgment would prove insufficient to provide the care required for the predicted lifespan of the plaintiff. An allowance for taxation is not so inherently speculative that it should not be taken into account. An award for lost earning capacity is discounted for earnings on income in the earlier years and such earnings are taxable. The effect is that the plaintiff will pay tax on the award for lost earning capacity. Accordingly, where the evidence supports an allowance for the impact of taxation on the award for cost of future care, as it did in this case, a gross-up for taxation should be awarded.

The Court of Appeal erred in reducing the amount awarded by the trial judge for initial expenditures. In view of the evidence in support of the expenses, it was not open to the Court of Appeal to disallow those items. Similarly, in the absence of error and in the face of evidence supporting the trial judge's conclusion, it was not appropriate for the Court of Appeal to substitute its views for those of the trial judge on the issue of what constitutes appropriate care for the plaintiff.

In the absence of any demonstrable error by the trial judge, the Court of Appeal erred in substituting its view for that of the trial judge on what the plaintiff's pre-trial earnings would have been. However, the trial judge erred in including in the award an amount for inflation for pre-trial wage loss to offset the fact that the plaintiff would be receiving his award for past earnings in dollars at the date of judgment, which were worth less than dollars in the years for which the award was made. At common law, interest was not payable upon money awards for damages in tort; only the actual money lost could be recovered. Interest is comprised of an allowance for inflation plus a percentage to reflect the "real" earnings on money. By making an award for inflation, the trial judge in effect made a partial award of prejudgment interest to the plaintiff.

The Court of Appeal erred in reducing the award for pre-trial loss of earnings to reflect the fact that the appellant was cared for by the state between the time of the accident and the date of the trial. In calculating loss of future earning capacity in cases where an award for future care is made, a deduction is made from the award for lost earning capacity for living expenses to avoid duplication between the two heads of damage. The Court of Appeal erred in applying similar reasoning to the plaintiff's pre-trial lost earnings. The basis for making such a deduction — duplication between two

heads of damage — was lacking, as there was no award for pre-trial cost of care. The government must abide by its decision not to counterclaim for the cost of the plaintiff's pre-trial care.
No deduction should be made on the pre-trial loss of earnings award to account for tax which the plaintiff would have had to pay on his earnings had he not been injured. This is the rule for post-trial loss of earning capacity and a different rule should not be applied to pre-trial earnings, where tax has never been deducted.
The trial judge's assessment of post-trial loss of earning capacity was supported by the evidence. The Court of Appeal erred in substituting its own opinion for the conclusion of the trial judge.
Finally, as the Court of Appeal's award of periodic payments could not stand, a management fee was appropriate and therefore should be allowed.

Appeal from judgment of Manitoba Court of Appeal, [1987] 5 W.W.R. 193, 40 C.C.L.T. 229, 48 Man. R. (2d) 81, varying personal injuries damage award of Wright J., 40 Man. R. (2d) 286.

The judgment of the court was delivered by *McLachlin J.*:

1 This appeal [from [1987] 5 W.W.R. 193, 40 C.C.L.T. 229, 48 Man. R. (2d) 81, varying 40 Man. R. (2d) 286] raises a number of issues relating to the assessment of damages in personal injury actions. The two main issues are, first, whether the court has the power to order periodic payments on account of future losses instead of a lump sum payment, and second, whether the court should make an allowance for taxation in calculating the amount required for future care. Other issues relate to details of the assessment of cost of future care and lost earning capacity.

The Background

2 The appellant Watkins was rendered a quadriplegic as a result of an automobile accident in July 1976. He was a passenger in a van owned by Aitkenhead and operated by Olafson. The accident occurred on a stretch of highway which was under construction under the authority of the provincial government. The issue of liability was tried separately and determined in favour of the appellant. The Manitoba Court of Appeal divided liability as follows: Olafson, for whom Aitkenhead was vicariously liable, 75 per cent; the provincial government, 25 per cent. The sole question before this court is the amount of damages to be awarded to the appellant.

3 At trial on the issue of damages, Watkins was awarded a total sum of $2,123,386.56, calculated as follows:

1. Non-pecuniary general damages	$180,000.00
2. Special damages to date of judgment	19,308.25
3. Damages for loss of earning capacity	
(a) To date of trial	263,000.00
(b) For the future	540,000.00
4. Damages for future care	

(a) Initial outlay	46,078.31
(b) Ongoing care	1,000,000.00
5. Financial management fee	75,000.00

Total	$2,123,386.56

4 The Court of Appeal reduced the damages for pre-trial loss of earning capacity to $125,000 and for post-trial loss of earnings to $400,000. It set aside the lump sum award for future care and ordered in its stead that the provincial government pay the plaintiff $3,000 per month, adjusted annually for inflation, subject to deductions for on-going care which the plaintiff might receive from the provincial government. The Court of Appeal disallowed the investment counselling fee and rejected Watkins' submission that he was entitled to an "income tax gross-up", stating that this was unnecessary under the structured judgment.

Issues

5 1. Did the Court of Appeal err in substituting periodic payments for a lump sum judgment?

6 2. Should allowance be made for the effect of taxation in calculating the cost of future care?

7 3. Did the Court of Appeal err in reducing the amount allowed by the trial judge for cost of future care?

8 4. Did the Court of Appeal err in reducing the award for lost earning capacity, past and future?

Discussion

9

1. Did the Court of Appeal Err in Substituting Periodic Payments for a Lump Sum Judgment?

10 The Court of Appeal ordered periodic payments of $3,000 per month for Watkins' future care. The court's concern was that having received a large lump sum award, Watkins might then choose to avail himself of state facilities for all or part of his future care. The result would be a windfall to him, which, in the words of Huband J.A. would be "manifestly unjust". Accordingly, the court ordered that the award for future care should be paid out on a monthly basis, with deductions from the $3,000 monthly payment to offset any benefits Watkins might receive from the government.

11 The imperfections of a lump sum, once-and-for-all award, as a means of providing for a plaintiff's cost of future care, have often been noted. Where the injury is serious and the period of

time for which care must be made lengthy, a large number of variables enters into the calculation. Should the plaintiff live longer than projected, or earn less on his capital than expected, he will run out of funds for his care. On the other hand, should chronic illness force him to live in an institution rather than his own home, or should he die earlier than forecast, the funds provided may turn out to be excessive, resulting in a windfall for him or his heirs at the defendant's expense.

12 Considerations such as these support the conclusion that in cases where care must be provided for a long period in the future, periodic payments are more consistent than the lump sum rule with the fundamental principles upon which the assessment of damages for personal injury are founded — the basic concepts of restitution in integrum and full but fair compensation. The whole basis of the claim advanced by the appellant is that in order to provide adequately for his future care he requires a monthly stream of income indexed for inflation for the rest of his life. Periodically paid sums capable of adjustment in the event of changed circumstances best ensure that this need will be met, given the impossibility of predicting the future with any real accuracy. At the same time, it is urged, the result would be fair to the defendants, ensuring they pay only what is actually required.

13 Thus it is not surprising that the periodic payment of damages for cost of future care has emerged as an attractive alternative to the lump sum award. Periodic payment schemes have been introduced in numerous American states. (The following U.S. states have legislation which permits court-awarded periodic payment of damages awards in the context of medical malpractice: Alabama, Alaska, California, Delaware, Florida, Illinois, Kansas, Louisiana, Maryland, New Mexico, New York, Oregon, South Dakota, Utah, Washington and Wisconsin. South Dakota and Washington make periodic payment of damages available in all actions for personal injury and totally disabling personal injury, respectively. See Ala. Code 6-5-486 (1975); Alaska Stat. 09.55.548 (1983); Cal. Civ. Proc. Code 667.7 (West 1980); Del. Code Ann. tit. 18, 6864 (Supp. 1984); Fla. Stat. Ann. 768.51 (West 1986); Ill. Ann. Stat. ch. 110, para. 2-1701 to 2-1719 (Smith-Hurd Supp. 1986); Kan. Stat. Ann. 60-2609 (1983); La. Rev. Stat. Ann. 40:1299.39 and 40:1299.43 (West Supp. 1986); Md. Cts. & Jud. Proc. Code Ann. 3-2A-08(b) (1974); N.H. Rev. Stat. Ann. 507-C:7 (1983); N.M. Stat. Ann. 41-5-7 (1978); N.Y. Civ. Prac. L & R. 5031 to 5039 (McKinney Supp. 1986); Or. Rev. Stat. 752.070 (1985); S.D. Codified Laws Ann. 21-3A-5 to 21-3A-13 (Supp. 1986); Utah Code Ann. 78-14-9.5 (Supp. 1986); Wash. Rev. Code Ann. 4.56.240 (Supp. 1983); Wis. Stat. Ann. 655.015 (West. Supp. 1985). Legislation authorizing courts to award damages on a periodic basis has also been enacted in Western Australia (see Motor Vehicle (Third Party) Insurance Act 1943-1972, s. 16 E(5)(a) (W. Aust.), which pertains to cases of personal injury or death caused by or arising out of the use of a motor vehicle. In Ontario, legislation permits periodic awards where the parties agree: Courts of Justice Act, S.O. 1984, c. 11, s. 129.) In addition, structured settlements, where parties agree voluntarily to a scheme of periodic future payments, have become increasingly common throughout Canada.

14 This case, however, poses a different issue. The issue here is not whether the legislature can impose or authorize periodic damage awards, or whether parties can voluntarily agree to

periodically paid compensation; that is conceded. Nor is the issue whether the ability to award damages by instalments would be desirable in some cases; clearly it would. Rather, the issue here is whether, in the absence of enabling legislation or the consent of all parties, a court can or should order that a plaintiff forego his traditional right to a lump-sum judgment for a series of periodic payments.

15 It is argued that the jurisprudence precludes a court from ordering periodic payments adjusted to future needs. The plaintiff, it is submitted, is entitled to receive his future care award as a lump sum; this fundamental principle of tort law cannot be changed by a court, but only by the legislature. The only case directly on point is that of *Fournier v. C.N.R.*, [1927] A.C. 167 (Quebec P.C.) [Que.]. In that case the jury awarded damages in the form of an annuity. The Privy Council described this as "illegal", stating at p. 169:

> The jury ... most unfortunately shaped the damages they awarded in a form quite improper and illegal. Instead of finding a verdict for a lump sum, they awarded an annuity of $300 to be paid annually to each of the children ... It is much to be regretted that the learned judge ... did not refuse to accept a verdict so shaped, and did not explain to them the proper principle upon which damages should be awarded.

Subsequent cases have accepted the proposition that it is not open to the courts to order periodic damage awards. In *Andrews v. Grand & Toy Alta. Ltd.*, [1978] 2 S.C.R. 229 at 236, [1978] 1 W.W.R. 577, 3 C.C.L.T. 225, 83 D.L.R. (3d) 452, 8 A.R. 182, 19 N.R. 50, Dickson J. (as he then was), speaking for the court, stated "our law of damages knows nothing of periodic payment". Similarly, in *Lewis v. Todd*, [1980] 2 S.C.R. 694, 14 C.C.L.T. 294, 115 D.L.R. (3d) 257, 34 N.R. 1 [Ont.], this court considered the form of relief available to dependants upon a fatal accident and stated, at p. 710:

> As it is not open to a court, in the absence of enabling legislation, to order periodic payments adjusted to future needs, the dependents receive immediately a capital sum roughly approximating the present value of the income they would have received had the deceased survived.

More recently, in *McErlean v. Sarel* (1987), 61 O.R. (2d) 396, 42 C.C.L.T. 78, 42 D.L.R. (4th) 577, *(*sub nom. *McErlean v. Brampton (City))* 22 O.A.C. 186, leave to appeal refused [1988] 1 S.C.R. xi, 63 O.R. (2d) x, 42 D.L.R. (4th) vi, 28 O.A.C. 399, 88 N.R. 204, a judgment delivered 3 1/2 months following the judgment of the Court of Appeal in the case at bar, a five-member panel of the Ontario Court of Appeal considered the issue of entitlement to a lump sum award. The court unanimously concluded, at p. 433, that:

> Whether or not a better system of compensation could be devised, and we are aware of various reform proposals in this regard, the respondent is legally entitled to a lump-sum judgment and is not legally obliged to accept periodic payments.

16 The respondents do not deny that the jurisprudence suggests that the courts cannot award damages on a periodic basis. They argue, however, that the time has come to change the law. The common law, they assert, evolves to meet the realities of contemporary society. Those realities, they submit, cry out for a rule permitting judges to award periodic damages in appropriate cases.

17 This branch of the case, viewed thus, raises starkly the question of the limits on the power of the judiciary to change the law. Generally speaking, the judiciary is bound to apply the rules of law found in the legislation and in the precedents. Over time, the law in any given area may change, but the process of change is a slow and incremental one, based largely on the mechanism of extending an existing principle to new circumstances. While it may be that some judges are more activist than others, the courts have generally declined to introduce major and far-reaching changes in the rules hitherto accepted as governing the situation before them.

18 There are sound reasons supporting this judicial reluctance to dramatically recast established rules of law. The court may not be in the best position to assess the deficiencies of the existing law, much less problems which may be associated with the changes it might make. The court has before it a single case; major changes in the law should be predicated on a wider view of how the rule will operate in the broad generality of cases. Moreover, the court may not be in a position to appreciate fully the economic and policy issues underlying the choice it is asked to make. Major changes to the law often involve devising subsidiary rules and procedures relevant to their implementation, a task which is better accomplished through consultation between courts and practitioners than by judicial decree. Finally, and perhaps most importantly, there is the long established principle that in a constitutional democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform.

19 Considerations such as these suggest that major revisions of the law are best left to the legislature. Where the matter is one of a small extension of existing rules to meet the exigencies of a new case and the consequences of the change are readily accessible, judges can and should vary existing principles. But where the revision is major and its ramifications complex, the courts must proceed with great caution.

20 The change in the law which we are asked to endorse in this case would constitute a major revision of the long-standing principles governing the assessment of damages for personal injury — in particular, the principle that judgment is to be rendered once and for all at the conclusion of a trial, and the correlative entitlement of the plaintiff to immediate execution on the entire award. Permitting courts to award periodic damages for personal injuries does not involve the extension of an existing rule, but the adoption of a new principle. We are not concerned with the right of a court to award the periodic payment of a judgment which has been finally delivered. Rules governing execution in several provinces permit this to be done. We are concerned rather with the proposal that the plaintiff lose his or her right to a final, once-and-for-all award, to be replaced by a scheme

under which the amount he or she receives may depend upon the ruling of the court on applications far in the future. The change is, moreover, fraught with complex ramifications extending beyond the rights and obligations of the parties at bar.

21 The arguments of the advocates of the award of damages on a periodic basis are powerful. But they leave unanswered the question of whether a court may abrogate the long-standing legal principle of the right to a once-and-for-all lump sum award, and cannot be considered in isolation from the difficulties which might ensue from empowering courts to grant periodic damages in tort. In attempting to remedy the shortcomings of the present system, care must be taken not to create new and greater difficulties.

22 One such difficulty is the review process presupposed by the Court of Appeal's award of periodic damages. The main purpose of the periodic award is to permit adjustment from time to time so that compensation may be more precisely tailored to need. But how is this tailoring to take place? Presumably further court hearings would be required, with the concomitant expense and worry entailed by documents, discovery, hearings and appeals. The result would be an increased burden on the parties and on the court system. Rules governing the review process would also be required, rules which might be better fashioned by non-judicial bodies.

23 Another difficulty involves security. In the case at bar security appears not to have been an issue, one of the respondents ordered to pay being a provincial government. Even so, concerns arise; could the plaintiff be certain that the government would not, at some future date, curtail his right to damages? Even with an apparently solvent defendant, it is unfair and unacceptable to place the plaintiff in the uncertain position of not being sure the money he needs to meet his or her needs will be forthcoming in the future. Most of those who have studied periodic payment schemes concur that they are unworkable unless sufficient security is posted. But, assuming security is necessary, how can a judge ensure compliance with an order that a reluctant defendant post security? What adverse consequences could be brought to bear on a defendant who refuses or professed to be unable to post the necessary security?

24 Further complexities arise when one attempts to define precisely when periodic damages should be available. Simply to leave the matter to the discretion of the judge is inadequate; some guidelines would need to be developed, if only to make the law reasonably predictable and promote settlements. Legislation in other jurisdictions suggests a variety of means to define when periodic payment of damages may be ordered. Some statutes limit such awards on the basis of the cause of action, for example, medical malpractice; other schemes predicate availability on the size of award; yet other statutes base the availability of periodic damages on the nature of the injury, limiting it to catastrophic, totally disabling injuries.

25 Yet another factor meriting examination is the lack of finality of periodic payments and the effect this might have on the lives of the plaintiff and the defendant. Unlike persons who join

voluntarily in marriage or contract — areas where the law recognizes periodic payments — the tortfeasor and his or her victim are brought together by a momentary lapse of attention. A scheme of reviewable periodic payments would bind them in an uneasy and unterminated relationship for as long as the plaintiff lives.

26 I raise these issues not to suggest that schemes for periodic payment should not be attempted, but rather to indicate some of the many complex considerations raised by the implementation of such schemes. A review of legislation in jurisdictions where periodic payments have been adopted reveals many different models premised on different answers to questions such as these. In my opinion, the legislatures are better equipped than the courts to deal with the complexities involved in implementation of the notion of periodic payments into our law of tort.

27 In summary, I conclude that the well-established limits on judicial law-making powers as well as the complexities associated with introduction of the concept of periodic payments into our law preclude the court from ordering periodic reviewable payments for future cost of care in the stead of the lump-sum judgment to which the plaintiff is entitled under existing legal principles. For the same reasons, it would be inappropriate for the court to order the defendant to purchase an annuity for the plaintiff's care during his lifetime.

2. Should Allowance be made for the Effect of Taxation in Calculating the Cost of Future Care?

28 This issue did not arise before the Court of Appeal, given its order for the periodic payment of damages for future care. Under existing tax law, which provides that damages for personal injuries are not taxable income, periodic payments would be tax-free. By contrast, the impact of taxation on a lump-sum award for cost of future care is highly significant. The sum is predicated on the assumption that the currently unused portion of the fund will be invested and earn income, for which a discount is made. That income will attract tax under the Income Tax Act, S.C. 1970-71-72, c. 63, as amended. If no allowance is made for this tax, the judgment will prove insufficient to provide the care required for the predicted lifespan of the plaintiff. The theory of "grossing-up" is that there should be an additional sum awarded to compensate for the tax that will accrue on the interest portion of the award.

29 In contrast to the issue of periodic payment of damages for future care, the jurisprudence on the question of "gross-up" for taxation of the award for cost of care is recent and unsettled. Thus the court does not face the difficulty of effecting a major change in the established law or depriving either party of an established right. The question is simply whether the impact of taxation is one of the factors which the court should consider in determining the amount required to provide for the future care of the plaintiff.

30 I turn first to the jurisprudence. The question of taxation in calculating damages for cost of future care was considered by this court in the "trilogy" of *Andrews v. Grand & Toy Alta. Ltd.*,

supra (hereinafter *Andrews*); *Thornton v. Prince George Bd. of Sch. Trustees*, [1978] 2 S.C.R. 267, [1978] 1 W.W.R. 607, 3 C.C.L.T. 257, 83 D.L.R. (3d) 480, 19 N.R. 552 [B.C.]; and *Arnold v. Teno; J.B. Jackson Ltd. v. Teno; Teno v. Arnold*, [1978] 2 S.C.R. 287, 3 C.C.L.T. 272, 83 D.L.R. (3d) 609, 19 N.R. 1 [Ont.]. The court made no allowance for taxation in those cases. Dickson J., as he then was, in *Andrews*, after alluding to the difficulty in predicting the actual tax burden and the relief from taxation to be obtained from medical deductions, declined to consider the impact of taxation on the award for future care. At p. 260 he stated:

> Because of the provision made in the *Income Tax Act* and because of the position taken in the Alberta Courts, I would make no allowance for that item.

This is far from a categorical statement that taxation can never be considered in calculating damages for the cost of future care. It was predicated largely on factors peculiar to the case, in particular the lack of evidence and absence of findings of the courts below.

31 The lower courts have taken different views of what *Andrews* decided on the question of allowing for the impact of tax in calculating the cost of future care. The Court of Appeal in Ontario took the view that the claims for gross-up in the trilogy had failed for want of sufficient proof, and went on to take taxation into account in calculating the cost of future care: *Fenn v. Peterborough* (1979), 25 O.R. (2d) 399 at 456, 9 C.C.L.T. 1, 104 D.L.R. (3d) 174; *Nielsen v. Kaufmann* (1986), 54 O.R. (2d) 188 at 201-207, 36 C.C.L.T. 1, 26 D.L.R. (4th) 21, 13 O.A.C. 32; *McErlean v. Sarel*, supra. In British Columbia, the Court of Appeal held in *Scarff v. Wilson*, 25th November 1988 [now reported [1989] 3 W.W.R. 259, 33 B.C.L.R. (2d) 290, 47 C.C.L.T. 109, 55 D.L.R. (4th) 247], reasons in this court delivered concurrently with the appeal at bar [reported ante, p. 293], that the trilogy ruled out an allowance for taxation. However, another panel of that court months later took the opposite view as to what the trilogy decided but found that it was bound to follow *Scarff v. Wilson* nevertheless: *Reekie v. Messervey*, 5th May 1989 [now reported 36 B.C.L.R. (2d) 316, 48 C.C.L.T. 217, 59 D.L.R. (4th) 481]).

32 I conclude that this court's views in the trilogy do not forbid taking into account the impact of taxation on the award for cost of future care, provided that the necessary evidentiary foundation is laid.

33 The case for taking the impact of taxation into account is strong. Academics and judges alike have recognized that unless the impact of taxation is taken into account, the award will prove insufficient to meet the plaintiff's projected needs. Professors Feldthusen and McNair in "General Damages in Personal Injury Suits: The Supreme Court's Trilogy" (1978), 28 U.T.L.J. 381, conclude [at p. 403]:

> Recognition of the effect of taxes, no matter how difficult to calculate, seems essential if awards are to be fair to the plaintiff.

McEachern C.J.B.C. in *Scarff v. Wilson* stated [at p. 274]:

> ... I see no reason in principle why the fund awarded for future costs of care should not be protected against the incidence of tax. Without gross-up, such a fund is clearly inadequate for the purpose for which it is intended.

In *McErlean v. Sarel* the Ontario Court of Appeal took a similar view [at p. 432]:

> As a matter of principle, regard has to be paid to the impact of taxation on income from the award for the cost of future care. If this impact is ignored, as the appellant submits it should be, then the award cannot accomplish its prime purpose, which is to assure that the plaintiff should be adequately cared for during the rest of his life.

34 Those who argue against making an allowance for taxation in calculating the cost of future care do so, not on the ground that the allowance is not required if the plaintiff is to be adequately provided for, but mainly on the basis that the calculation is so speculative that it should not be attempted. I cannot accept that allowance for taxation is so inherently speculative that it should not be taken into account. In the first place, difficulty of calculation is a weak basis for refusing to award a plaintiff damages to which he or she is in principle entitled. The entire exercise of assessing damages for future care over a period of decades is fraught with uncertainty; yet the courts do their best to calculate an appropriate award. Where there is a right, there must also be a remedy: *Ashby v. White* (1703), 2 Ld. Raym. 938 at 953, 92 E.R. 126 at 136, per Holt C.J.

35 In fact, the calculations for taxation in this case and in *Scarff v. Wilson* (reasons for judgment given concurrently) do not present excessive difficulty. In the case at bar an actuary and chartered accountant for the plaintiff and a chartered accountant for the defendants testified as to the impact of taxation on the award for the cost of future care. After reviewing their evidence, the trial judge concluded that $230,000 should be awarded for the impact of taxation on the award for the cost of future care. It is not suggested that this award was not supported by the evidence. In *Scarff v. Wilson* the opposing experts were able to agree on all relevant factors save for a few variables, and McEachern C.J.B.C. expressed the expectation that the calculation could be reduced to a computer model which would yield an estimate of the gross-up on the basis of the factors relevant to the particular case.

36 A second reason is advanced for declining to take taxation into account in calculating the award for future care; it is said that to do so would be anomalous since no allowance for tax is made on lost earning capacity: *R. v. Jennings*, [1966] S.C.R. 532, 57 D.L.R. (2d) 644 [Ont.] (where the effect would be to reduce the award rather than increase it). But it should not be overlooked that the award for lost earning capacity is also discounted for the earnings on income in the earlier years, and that such earnings are taxable. Thus the plaintiff is in fact paying tax on the award for lost earning capacity.

37 I conclude that an allowance should be made for the impact of taxation on the award for cost of future care where the evidence supports it, and that the evidence in this case meets that requirement. In my opinion, the trial judge was correct in allowing $230,000 as gross-up for taxation.

3. Did the Court of Appeal Err in Reducing the Amount Allowed by the Trial Judge for Cost of Future Care?

38 Three issues arise under this head: (1) did the Court of Appeal err in reducing the amount awarded by the trial judge for initial expenditures; (2) did the Court of Appeal err in substituting its view that the cost of future care should be based on living in a government subsidized apartment, for the trial judge's view that it should be based on costs of living in a detached home; and (3) did the Court of Appeal err in reducing the amount which the trial judge allowed for care and attendants?

39 I turn first to the question of initial outlay for equipment. The trial judge, relying on the recommendation of the Canadian Paraplegic Association, allowed $46,078.31 for initial outlay costs. The Court of Appeal reduced this sum by $8,429.40, representing $4,683 for the cost of a lift and $3,746.40 for the cost of an electric wheelchair. It felt that the lift was unnecessary because, assuming Watkins had his own home, there would be no need for a basement, and it expressed the view that the government had already provided Watkins with an electric wheelchair. These conclusions were contrary to the evidence, which supported the need for a home with a basement for storage and privacy reasons and indicated that the government loans only a limited number of wheelchairs to disabled persons after evaluation and approval of an assessment committee. There was no evidence Watkins had received such approval. In view of the evidence supporting the trial judge's finding on the need for a lift and for an electric wheelchair, it was not open to the Court of Appeal to disallow those items.

40 I turn next to the basis of the calculation for cost of future care. The trial judge was of the opinion that the award for future care should be calculated on the basis that Watkins was entitled to be cared for in his own home, despite the availability of less costly government care programs. He considered the home care program administered by the government and concluded that it did not offer "the required security of choice, continuity and standard for the service and equipment needs of Watkins living in a home environment."

41 The Court of Appeal took a different view of the matter. It concluded that a government subsidized apartment referred to as a "Fokus Unit" would provide reasonable accommodation for Watkins. A Fokus Unit is a specially constructed and equipped apartment in an ordinary apartment block designed to permit disabled individuals to live on their own. The Court of Appeal concluded that the award for future care should be predicated on the rental of a Fokus Unit. This greatly reduced the sum required for future care. No allowance for land, house construction, or exterior

and air-conditioning maintenance would be required, and cost of care would be reduced, in the court's view, by the government care program made available for residents of the units.

42 I am satisfied that the Court of Appeal should not have substituted its own views on what constitutes appropriate care for Watkins for the views of the trial judge. The trial judge carefully considered all the evidence, including the evidence relating to the Fokus Units, and concluded that those units would not make possible the care which Watkins needs. No error in that conclusion was demonstrated. On the contrary, the evidence appears to support the contention that the Fokus Units do not provide the care required by Watkins — 24-hour care of the sort required is not provided and there was no evidence of the availability of the units.

43 The trial judge's conclusion on the need for home care was not only supported by the evidence; it is in conformity with the emphasis on full and adequate compensation for seriously injured plaintiffs expressed by this court in *Andrews*, supra, per Dickson J. [at p. 246]:

> The standard of care expected in our society in physical injury cases is an elusive concept ... The standard to be applied to Andrews is not merely "provision", but "compensation": *i.e.* what is the proper compensation for a person who would have been able to care for himself and live in a home environment if he had not been injured? The answer must surely be home care.

44 In the absence of error and in the face of evidence supporting the trial judge's conclusion, it was not appropriate for the Court of Appeal to substitute its view for that of the trial judge on the issue of whether home care was required.

45 The third difference between the trial judge and the Court of Appeal on the cost of future care concerns the standard of care to which the plaintiff is entitled. On the basis of the evidence of the Canadian Para@_plegic Association the trial judge found that the monthly ongoing cost of care was $3,776.44. The Court of Appeal overturned the finding of the trial judge and concluded that the monthly cost of care was approximately $3,000. In effect, the Court of Appeal rejected the finding of the trial judge that the plaintiff should have one full-time attendant plus homemaker services. The conclusions of the trial judge are in accordance with the principles laid down by this court in *Andrews*, supra, where the paramountcy of adequate care for those seriously injured through the fault of others was affirmed. In my opinion, no error in the trial judge's method or conclusions is demonstrated, and the Court of Appeal should not have substituted its view of appropriate care for that of the trial judge.

4. Did the Court of Appeal Err in Reducing the Award for Lost Earning Capacity, Past and Future?

(a) Pre-Trial Earnings

46 Assessment of Watkins' pre-trial earnings loss was complicated by the fact that for two years prior to the accident, following the break-up of his marriage, he had chosen to interrupt his full-time employment. From 1969 to 1974 he had been employed in the design field. In 1974 he ceased full-time employment. At the time of the accident he was engaged in a silkscreen business which he had recently started with another person.

47 The plaintiff and the defendants presented different opinions as to what Watkins' pre-trial earnings would have been had he not been injured. The plaintiff's opinion was based on earnings of approximately $14,000 in his last full year of salaried employment in 1974. This produced a projected salary at the date of the accident (1976) of $17,475. This was then adjusted for the average wage increase in the industrial sector as well as for inflation for each year between the accident and the trial. The claim totalled $314,013, composed of $243,574 for past earnings and $70,460 for the inflation adjustment.

48 The defendants took a different approach. They attempted to calculate the position Watkins would have been in had he worked since 1976 to trial, after paying normal living expenses and income tax. This amount plus interest they put at $102,000. This was said to be far greater than the average percentage savings for the population at large.

49 The trial judge awarded $263,267 for pre-trial wage loss, including $47,754 for inflation. The Court of Appeal reduced the award to $125,000, citing the modest income of Watkins at the date of the accident and past earning history, the inappropriateness of an allowance for inflation, and the fact that his food and shelter had been totally provided by the government between the date of the accident and the trial.

50 Insofar as it relied on the modest income of Watkins at the time of the accident, the Court of Appeal seems to have been substituting its view of what Watkins would have earned for that of the trial judge. There was evidence to support the trial judge's conclusion that but for the accident Watkins would have returned to full-time work at a salary equivalent to what he had earned previously, adjusted for wage increases. No error having been demonstrated, it was not open to the Court of Appeal to substitute its view on this question.

51 The next question is whether the trial judge erred in including an amount for inflation. The amount was added to offset the fact that the plaintiff would be receiving his award for past earnings in 1985 dollars (the date of judgment), which were worth less than dollars in the years for which the award was made. At common law, interest was not payable upon money awards for damages in tort; all that could be recovered was the money lost. It was to remedy this situation that many provinces passed legislation permitting the courts to award pre-trial interest for moneys withheld pending judgment. The award here in issue is not for interest, but for inflation. Theoretically, interest is comprised of an allowance for inflation, plus an additional percentage, referred to as the "real" earnings on money. By making an award for inflation, the trial judge in effect made a

partial award of prejudgment interest to the plaintiff. In my opinion, no legal foundation exists for this award.

52 The final question is whether the trial judge should have made a deduction for the fact that the plaintiff was cared for by the state between the time of the accident and the time of trial. In calculating loss of future earning capacity in cases where an award for future care is made, a deduction is made from the award for lost earning capacity for living expenses to avoid duplication between the two heads of damage. The Court of Appeal in this case applied similar reasoning to the plaintiff's pre-trial lost income. However, the basis for making a deduction on this account — duplication between two heads of damage — was lacking, there being no award for pre-trial cost of care. No case was cited to us in which a deduction for living expenses has been made from damages for pre-trial loss of earning capacity and I see no need to introduce such a practice. If the Government of Manitoba had wished, it could have counterclaimed for the cost of the plaintiff's pre-trial care. Having failed to do so, it must abide by the result.

53 Nor should any deduction be made for tax which the plaintiff would have had to pay on his earnings had he not been injured. This is the rule for post-trial loss of earning capacity: *R. v. Jennings*, supra, at p. 546. No authority was cited for application of a different rule to pre-trial earnings, where tax has never been deducted.

54 I would confirm the trial judge's award for pre-trial loss of earning capacity, subject to a deduction for the allowance for inflation to which the plaintiff is not entitled.

(b) Post-Trial Loss of Earning Capacity

55 The trial judge assessed Watkins' loss of future earning capacity at $540,000. The Court of Appeal reduced it to $400,000 plus interest, on the basis that Watkins' probable income in 1985 was not $34,773 as found by the trial judge, but $25,000.

56 There was ample evidence to support the trial judge's finding as to Watkins' probable 1985 income. No error having been demonstrated, the Court of Appeal should not have substituted its own opinion for the conclusion of the trial judge. I would restore the trial judge's award for loss of future earning capacity.

5. Management Award

57 This court concluded in *Mandzuk v. I.C.B.C.*, [1988] 2 S.C.R. 650, *(*sub nom. *Mandzuk v. Vieira)* [1989] 5 W.W.R. 131, 36 B.C.L.R. (2d) 371, 47 C.C.L.T. 63, 53 D.L.R. (4th) 606, 89 N.R. 394, that a fee for the management of the fund may be awarded where appropriate. The trial judge found that such a fee was appropriate in this case. Given my conclusion that the Court of Appeal's award of periodic payments cannot stand, a management fee remains appropriate.

Conclusion

58 I would allow the appeal, set aside the order of the Court of Appeal and restore the judgment of the trial judge, subject to a deduction of $47,745 for the factor of inflation included in the award for loss of past earning capacity. The plaintiff is entitled to judgment in the sum of $2,075,632.56, together with costs throughout.

Appeal allowed in part.

Tab 32

2011 ONSC 1764
Ontario Superior Court of Justice

Dugal v. Manulife Financial Corp.

2011 CarswellOnt 1890, 2011 ONSC 1764, [2011] O.J. No. 1240, 200 A.C.W.S. (3d) 64

Mark Dugal, Ironworkers Ontario Pension Fund, et al., Plaintiffs/Moving Parties and Manulife Financial Corporation, et al, Defendants/Respondents

G.R. Strathy J.

Heard: February 8, 2011
Judgment: March 21, 2011
Docket: CV-09-383998-00CP

Counsel: Charles M. Wright, Michael D. Wright, Daniel Bach, Stephanie Dickson, for Plaintiffs / Moving Party
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Alexa Abiscott, for Defendants / Respondents, Gail Cook-Bennett, Arthur Sawchuk

Subject: Corporate and Commercial; Securities; Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
VII Limitation of actions
VII.1 Principles
VII.1.c Practice and procedure
VII.1.c.i Pleadings
VII.1.c.i.B Amending writ or pleadings
Securities
III Trading in securities
III.4 Prospectus
III.4.c Misrepresentation
Headnote
Securities --- Trading in securities — Prospectus — Misrepresentation
Plaintiffs brought class action for damages for negligence and misrepresentation in issuance of securities — Statement of claim also sought leave to assert secondary market misrepresentation under s. 138.3 of Securities Act — Neither original nor amended statement of claim made any reference to "prospectus" — Plaintiffs brought motion to further amend statement of claim to plead

prospectus misrepresentation under s. 130 of Act — Motion dismissed — Claim was barred by limitation period in s. 138 of Act — Limitation period was not interrupted by statement of claim — Defendants had no reason to understand from original or amended statement of claim that they were being sued for prospectus misrepresentation — None of constituent elements of cause of action under s. 130 was pleaded — Limitation period in Act was preserved by Limitations Act, 2002 — There was no provision for "special circumstances" in s. 138 of Securities Act — Even if exception were available, special circumstances did not exist — New claim was extraordinary cause of action and experienced securities counsel made considered decision not to plead it originally.

Civil practice and procedure --- Limitation of actions — Principles — Practice and procedure — Pleadings — Amending writ or pleadings

Plaintiffs brought class action for damages for negligence and misrepresentation in issuance of securities — Statement of claim also sought leave to assert secondary market misrepresentation under s. 138.3 of Securities Act — Neither original nor amended statement of claim made any reference to "prospectus" — Plaintiffs brought motion to further amend statement of claim to plead prospectus misrepresentation under s. 130 of Act — Motion dismissed — Claim was barred by limitation period in s. 138 of Act — Limitation period was not interrupted by statement of claim — Defendants had no reason to understand from original or amended statement of claim that they were being sued for prospectus misrepresentation — None of constituent elements of cause of action under s. 130 was pleaded — Limitation period in Act was preserved by Limitations Act, 2002 — There was no provision for "special circumstances" in s. 138 of Securities Act — Even if exception were available, special circumstances did not exist — New claim was extraordinary cause of action and experienced securities counsel made considered decision not to plead it originally.

MOTION by plaintiffs in class action to further amend statement of claim to plead s. 130 of Ont. *Securities Act*.

***G.R. Strathy J.*:**

1 The plaintiffs move to amend the statement of claim in this proposed class action. Some of the amendments were addressed in my endorsement dated January 19, 2011: *Dugal v. Manulife Financial Corp.*, 2011 ONSC 387, [2011] O.J. No. 327 (Ont. S.C.J.). This endorsement deals with the defendants' objection to a proposed amendment seeking to assert a cause of action for prospectus misrepresentation under s. 130 of the *Securities Act*, R.S.O. 1990, c. S.5, and similar provisions in the securities legislation of other provinces. The defendants claim that the cause of action is time-barred and that the amendment should be refused on that ground.

Overview of this Action

2 As I noted in my earlier endorsement, this action claims damages of $2.5 billion based on alleged misrepresentations by the defendant Manulife Financial Corporation ("Manulife" or "MFC"). The plaintiffs claim that Manulife represented that it "had in place enterprise-wide risk management systems, policies and practices that were effective, rigorous, disciplined, and prudent". They claim that, contrary to these representations, Manulife failed to have appropriate risk-management systems for its segregated funds and variable annuities. When the equities markets collapsed in the fourth quarter of 2008, Manulife increased its reserves by almost $5 billion to cover its contingent liabilities under these financial products, triggering a sharp decline in the price of its securities. The plaintiffs say that they, and other putative class members who purchased Manulife's securities during the class period, suffered losses as a result. They claim that their damages are due to the misrepresentations made by Manulife. They sue Manulife as well as various officers and directors.

3 In order to understand the issue on this motion, it will be necessary to examine the original statement of claim delivered by the plaintiffs as well as the amended statement of claim and the proposed fresh as amended statement of claim. I will begin, however, with a brief outline of the statutory cause of action for prospectus misrepresentation.

The Remedy under Section 130

4 Section 130 of the *Securities Act* provides a purchaser of a security under a prospectus with a remedy for misrepresentation, regardless of whether the purchaser relied on the misrepresentation in the prospectus. The remedy is available against the issuer and underwriters of the security as well as directors of the issuer and others who have signed the prospectus or have allowed their reports or statements to be used in the prospectus.

5 Section 130(1) provides:

> Where a prospectus, together with any amendment to the prospectus, contains a misrepresentation, a purchaser who purchases a security offered by the prospectus during the period of distribution or during distribution to the public has, without regard to whether the purchaser relied on the misrepresentation, a right of action for damages against,
>
> (a) the issuer or a selling security holder on whose behalf the distribution is made;
>
> (b) each underwriter of the securities who is required to sign the certificate required by section 59;
>
> (c) every director of the issuer at the time the prospectus or the amendment to the prospectus was filed;

(d) every person or company whose consent to disclosure of information in the prospectus has been filed pursuant to a requirement of the regulations but only with respect to reports, opinions or statements that have been made by them; and

(e) every person or company who signed the prospectus or the amendment to the prospectus other than the persons or companies included in clauses (a) to (d),

or, where the purchaser purchased the security from a person or company referred to in clause (a) or (b) or from another underwriter of the securities, the purchaser may elect to exercise a right of rescission against such person, company or underwriter, in which case the purchaser shall have no right of action for damages against such person, company or underwriter.

6 There are specific defences available under the section, including that:

• the purchaser purchased the securities with knowledge of the misrepresentation (s. 130(2));

• in the case of persons or companies other than the issuer or selling security holder, that the prospectus was filed without his or her consent (s. 130(3)(a));

• a person other than the issuer or selling security holder had reasonable grounds to believe that there had been no misrepresentation and in fact believed there had been no misrepresentation (s. 130(4)).

7 There are limitations of liability available to underwriters (s. 130(6)) as well as general limitations available to all defendants (s. 130(7), (9)).

8 Section 138 contains a limitation period of the earlier of 180 days after the plaintiff first had knowledge of the facts giving rise to the cause of action or three years after the date of the transaction that gave rise to the cause of action.[1]

9 Not only is s. 130 a purely statutory cause of action, it is a complete code governing such claims. The statutory cause of action is significant, particularly in the class action context, because it does not require proof of reliance, which is necessary ingredient of the cause of action for negligent misrepresentation at common law: see *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591, [2010] O.J. No. 1057 (Ont. S.C.J.) at paras. 129-160, leave to appeal to Div. Ct. granted, in part, 2010 ONSC 4068, [2010] O.J. No. 3183 (Ont. Div. Ct.).

The Original Statement of Claim

10 The plaintiffs' original statement of claim, issued on July 29, 2009, requested a declaration that the defendants made misrepresentations during the class period with respect to Manulife's risk management practices and that those misrepresentations were made negligently. The plaintiffs

sought damages and related relief. They also sought leave to assert the cause of action for secondary market misrepresentation set out in s. 138.3 of the *Securities Act*.

11 The pleading referred to Manulife's statutory obligations, as a reporting issuer in Ontario, to file public disclosure documents including quarterly interim financial statements, annual financial statements and management's discussion and analysis ("MD&A") documents with respect to its financial statements. It claimed that, during the class period, Manulife made misrepresentations concerning its risk management practices and failed to disclose that it had not adequately hedged its exposure to market fluctuations with respect to some of its financial products. The pleading claimed that these misrepresentations were made:

> ... in *inter alia*, MFC's disclosure statements during the Class Period, including MFC's interim and annual financial statements, annual reports, and management's discussion and analysis.
>
> [Emphasis added.]

12 The pleading identified specific annual reports in which the alleged misrepresentations were made.

13 The statement of claim alleged that on February 12, 2009 and May 7, 2009, Manulife announced write-downs totalling $3.6 billion.

14 Under the heading "The Defendants' Negligence", the pleading asserted that the defendants knew or ought to have known that a failure to ensure that Manulife's "disclosures" were accurate would cause the price of its securities to be inflated and would cause damage to those who purchased the securities while the price was inflated. It was pleaded that the defendants knew or ought to have known that Manulife's "disclosure documents" during the class period were materially misleading and that it failed to meet the standard of care by issuing false or misleading "disclosure documents" during the class period.

15 Under the next heading, "Negligent Misrepresentation", the statement of claim pleaded that:

> MFC made the Misrepresentations by issuing the disclosure documents referenced above. The Individual Defendants made the Misrepresentations by authorizing, permitting and/or acquiescing in the drafting and issuance of those disclosure documents, and/or by signing them.

16 The pleading alleged that the plaintiffs relied on the misrepresentations to their detriment by purchasing Manulife's securities during the class period.

17 The pleading continued:

> The Plaintiffs and each other Class Member relied upon the Misrepresentations by reading and acting upon disclosure documents containing the Misrepresentations, or alternatively, by reading and acting upon documents that contained information derived from the Misrepresentations.
>
> Further, or in the alternative, given the relationship as pleaded below between MFC's disclosures and the price of MFC's securities, the Plaintiffs and each other Class Member relied upon the Misrepresentations by the act of purchasing or acquiring MFC's securities in the open market.

18 In the next section of the pleading, under the heading "The Relationship between MFC's Disclosures and the Price of MFC's Securities", the plaintiffs pleaded that the price of Manulife's securities was directly affected by the issuance of the disclosure documents, which were filed with the regulatory authorities and transmitted to the financial press and analysts.

19 At the conclusion of the pleading, the plaintiffs stated that they intended to deliver a notice of motion seeking leave to assert the cause of action for misrepresentation in the secondary market, set out in Part XXIII.1 of the *Securities Act*, and if leave were to be granted, that they would seek leave under s. 138.8(1) to plead the causes of action for secondary market misrepresentation in s. 138.3.

20 It is noteworthy that nowhere in the statement of claim did the plaintiffs expressly claim that they, or any other class member, purchased securities under a prospectus. Indeed, nowhere in the statement of claim was there any reference to a prospectus, unless it can be found in the words "the Defendants made the Misrepresentation in, *inter alia*, MFC's disclosure statements during the Class Period ...". Considered in context and in light of the pleading as a whole, these could only be understood to refer to the statutory disclosure documents that Manulife was required to file as a reporting issuer. The allegations of negligence in the statement of claim relate to Manulife's "disclosures" and "disclosure documents".

21 The pleading continued that:

> The price of MFC's securities was directly affected during the Class Period by the issuance of the disclosure documents described herein ...
>
> The disclosure documents referenced above were filed, among other places, with SEDAR, EDGAR, the TSX and NYSE and thereby became immediately available to, and were reproduced for inspection by, the Class Members, other members of the investing public, financial analysts and the financial press.

22 The plaintiffs have acknowledged that they purchased securities only in the secondary market. Nowhere is there reference in the statement of claim to the statutory remedy for prospectus

misrepresentation under s. 130 of the *Securities Act*. There is repeated reference to the plaintiffs and class members having relied on the misrepresentations, and no reference to the "deemed reliance" provision of s. 130 of the *Securities Act*.

The Amended Statement of Claim

23 The statement of claim was amended, without leave, pursuant to rule 26.02(a) of the *Rules of Civil Procedure*, R.R.O. 1990, reg. 194, on November 17, 2009. The amended pleading made more specific references to Manulife's disclosure obligations, including references to MD&As and annual information forms. It did not add new causes of action to the claims in negligence or negligent misrepresentation. It retained the use of the term "disclosure documents" to refer to annual reports, interim financial statements and MD&As. There was no express reference to a prospectus or to section 130 of the *Securities Act*.

24 On May 18, 2010, the plaintiffs served their motion record for certification and for leave under s. 138.8(1) of the *Securities Act*. Included in the motion record was a proposed fresh as amended statement of claim, which contained, for the first time, specific allegations of prospectus misrepresentation under s. 130 of the *Securities Act*.

The Proposed Fresh as Amended Statement of Claim

25 The proposed fresh as amended statement of claim makes allegations of misrepresentations contained in ten prospectuses filed by Manulife during the period from February 2005 to December 2008. It is alleged that the prospectuses filed on February 9, 2005 and on March 13, 2007, contained references to the disclosure documents referred to in the pleading and which allegedly contained the misrepresentations at issue. These were base shelf prospectuses and in fact only five offerings of securities under prospectuses actually occurred during the proposed class period.

26 Under the heading in the proposed claim, "The Truth is Revealed", the plaintiffs allege that in a press release dated February 12, 2009, reporting Manulife's annual results for 2008 and the fourth quarter thereof, Manulife announced that it had increased its reserves by $5 billion to reflect its increased exposure due to declines in the equity markets. The plaintiffs say that this caused the price of Manulife's stock to drop dramatically, causing losses to members of the class. The February 12, 2009 date marks the end of the proposed class period.

27 Under the heading "Statutory Claims for Prospectus Misrepresentation", the proposed fresh as amended statement of claim asserts a claim against Manulife in relation to the March 13, 2007 Prospectus, and pleads that the individual defendants signed the prospectus and were directors at the time the securities under it were distributed.

28 The plaintiffs acknowledge that prospectus misrepresentation claims relating to securities sold under prospectuses filed by Manulife in 2005 and 2006 relate to transactions that occurred

outside the maximum three year limitation period in s. 138 of the *Securities Act* and those claims will be withdrawn.

The Submissions of the Parties

(a) Plaintiffs' Submissions

29 The plaintiffs acknowledge that the original statement of claim, which was filed within 180 days of the end of the proposed class period, did not refer specifically to a claim under s. 130 of the *Securities Act*. They say that it was not necessary for them to do so.

30 The plaintiffs say that the original statement of claim alleged that Manulife's 2005 annual report contained misrepresentations. They say that those representations were contained in the portion of the annual report that was Manulife's 2005 MD&A. They say that because the March 13, 2007 prospectus incorporated the 2005 MD&A by reference (a fact not alleged in the pleading), it was a necessary implication of these allegations that the prospectus contained misrepresentations. The plaintiffs also note that the proposed class definition was not limited to secondary market purchasers of Manulife's securities, but included "all persons ... who acquired MFC securities during the Class Period."

31 They say that the allegations in the original statement of claim were not limited to the disclosure documents, and that there was a reference to the misrepresentations having been made in "*inter alia*, MFC's disclosure statements" and that the words "disclosure documents" used elsewhere in the claim are sufficiently wide to include the prospectus. I might note in this regard that the language of the statement of claim was not consistent - sometimes the pleading referred to "the disclosure documents described herein" or the "disclosure documents referenced above" and sometimes it referred to "MFC's Class Period disclosure documents" or simply "MFC's disclosure documents".

32 The plaintiffs' submission is that they have pleaded the necessary facts underlying a s. 130 claim and it is not necessary to refer specifically to the section or to plead the cause of action in a formulaic way. They rely, in particular, on the decision of Rady J. in *McCann v. CP Ships Ltd.*, [2008] O.J. No. 5957 (Ont. S.C.J.) at paras. 46-48 and say that the language of the pleading in this case closely parallels the pleading in that case. I shall discuss that case below.

33 In the alternative, the plaintiffs say that, if the claim is time-barred, there is discretionary jurisdiction in the court, under the "special circumstances rule", to allow an amendment that would otherwise be time-barred: see *Basarsky v. Quinlan* (1971), [1972] S.C.R. 380, [1971] S.C.J. No. 118 (S.C.C.). They say that any defects in the pleading are technical in nature, that the s. 130 cause of action arises from the same events and the same documents as set out in the original claim, that the pleadings have not yet closed, and that the interests of a substantial class would be affected by refusing the amendment.

(b) Defendants' Submissions

34 The defendants object that the plaintiffs are proposing to amend the statement of claim to add a cause of action that was not previously asserted and is time-barred. They say that this creates a presumption of prejudice: see *Frohlick v. Pinkerton Canada Ltd.* (2008), 88 O.R. (3d) 401, [2008] O.J. No. 17 (Ont. C.A.) at para. 22. They note that s. 130 creates not just a statutory cause of action but is a comprehensive code that includes a "deemed reliance" provision and special provisions with respect to damages, liability of directors and officers and that it must be specifically pleaded.

35 The defendants say that the plaintiffs and class members had knowledge of the facts giving rise to the cause of action on February 12, 2009, the day when the plaintiffs say "the truth was revealed" and that the 180 day limitation period began to run on that date and expired long before the plaintiffs sought leave to assert the claim on May 18, 2010.

36 The defendants distinguish *McCann v. CP Ships Ltd.*, above, on the ground that the pleading in this action is not wide enough to include a s. 130 claim. They say that the "special circumstances" doctrine does not apply to the limitation period contained in s. 138 of the *Securities Act*, and, even if it does, it should have no application in the circumstances in this case.

37 Finally, the defendants say that the remedy under s. 130 is only available to someone who purchased securities that were offered by the prospectus. Not only is there no pleading that the plaintiffs purchased any securities under the prospectus, but it is now acknowledged that the plaintiffs purchased exclusively in the secondary market.

Jurisdiction

38 I am satisfied that it is appropriate to deal with a limitations issue on a pleadings amendment motion if it is plain and obvious from the pleading that no additional facts could be asserted to show that the limitation period has not expired: *Beardsley v. Ontario* (2001), 57 O.R. (3d) 1, [2001] O.J. No. 4574 (Ont. C.A.) at para. 21. The proposed amended pleading contains an acknowledgment that the "truth was revealed" on February 12, 2009, when Manulife announced its results for the fourth quarter of 2008, triggering an abrupt decline in the price of its securities. This marks the end of the class period and the date on which the plaintiffs had knowledge of the facts giving rise to the claim.

39 As well, for the reasons I expressed on the earlier amendment motion, it is appropriate to address the limitations issue prior to the amendment of the pleading: see *Dugal v. Manulife Financial Corp.*, above, at para. 5.

The Issues

40 There are four issues for consideration on this motion:

(a) whether the limitation period was interrupted by the delivery of the original statement of claim;

(b) if not, whether the claim was time-barred, as of May 18, 2010, when the proposed fresh as amended statement of claim was delivered;

(c) if so, whether the court has jurisdiction to extend the statutory limitation; and

(d) if so, whether the court should exercise its jurisdiction to do so.

(a) Was the limitation period interrupted by the delivery of the statement of claim?

41 The issue here is whether the material facts necessary to support a s. 130 claim were pleaded, however skeletally, in the original statement of claim. If the answer is "yes", then the inquiry need go no further and the plaintiff should be permitted to amend to flesh out the claim with particulars.

42 A pleading must contain a concise statement of the material facts on which the party relies: see rule 25.06. Pleadings are not required to state contentions of law and it is "no longer the case under Ontario practice that one formula or another must be invoked to relegate a claim to one or another type of action": see *Almas v. Spenceley*, [1972] 2 O.R. 429, [1972] O.J. No. 1730 (Ont. C.A.) at para. 13. The fact that the pleading does not expressly refer to s. 130 or invoke the precise language of the statute is not a fatal defect.

43 On the other hand, to assert the cause of action and to give fair notice to the defendant, the pleading must at least state the constituent elements of the s. 130 cause of action.

44 In order to assert a s. 130 claim, the plaintiff must plead:

(a) the existence of a prospectus;

(b) a misrepresentation in the prospectus;

(c) that the plaintiff purchased a security offered by the prospectus during the period of distribution;[2] and

(d) that the defendant was either the issuer of the prospectus or one of the persons, such as a director or expert, referred to in the section.

45 This is not a complicated cause of action to plead.

46 As noted above, the plaintiff relies on the decision of Rady J. in *McCann v. CP Ships Ltd.*. The action arose out of the restatement of the defendant's financial statements. An action was commenced claiming damages for negligent misrepresentation, for breach of s. 134 (insider tipping) of the *Securities Act* and under ss. 36 and 52 of the *Competition Act*, R.S.C. 1985, c. C-34.

There was no express claim under s. 130 of the *Securities Act*. The statement of claim was amended without leave pursuant to rule 26.02. The amended statement of claim referred to a prospectus and offering memorandum which allegedly incorporated the alleged misrepresentation by reference. There was no specific pleading of s. 130 of the *Securities Act* in the amended claim, but in its affidavit filed in support of the certification motion reference was made to that section.

47 The defendants moved to strike the pleadings of primary market claims on the ground that the plaintiff lacked capacity to assert them and also on the ground that they were time-barred.

48 Counsel for the plaintiff on that motion conceded that at the time the original pleading was drafted, no consideration had been given to a primary market claim, but said that the claim had been purposefully and broadly drafted to take into account the possibility of the claim being expanded in the future. The reference to "securities" was broad enough to refer to primary and secondary market claims and the references to the company's financial statements had been incorporated into the prospectus. The plaintiff argued that as a "sophisticated litigant" the defendant must have been aware that it was exposed to a claim beyond that arising from the sale of common shares in the secondary market.

49 Rady J. held that the plaintiff was not required to obtain leave to amend the statement of claim and that the plaintiff could assert a claim on behalf of class members who purchased under the prospectus even though he himself had no such claim: see *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197 (Ont. S.C.J.); *Healey v. Lakeridge Health Corp.*, 38 C.P.C. (6th) 145, [2006] O.J. No. 4277 (Ont. S.C.J.).

50 On the issue of whether the amendments were tenable in light of the limitations issue, Rady J. applied the test under rule 21 — that is, that it must be plain and obvious that the claim cannot succeed and that the pleading is to be read generously, with due allowance for drafting deficiencies.

51 Rady J. acknowledged that the "overall thrust of the original claim points to a secondary market claim", but held that there were pleadings that could be fairly read to encompass a primary market claim. Those pleadings were, at para. 47:

> The Plaintiff states that the Plaintiff and all, other persons and entities who purchased CP securities during the period described herein relied directly or indirectly upon the press releases and other public disclosures of the Defendants described herein in making a decision to purchase or otherwise acquire CP securities.
>
> Further, or in the alternative, the Plaintiff states that the Plaintiff and all other persons and entities who acquired CP securities during the period described herein were damaged by the Defendants' misrepresentations. Such misrepresentations caused the price of CP securities to appreciate substantially during the period described herein, and/or caused such securities to trade at a price substantially in excess of the price at which such securities would have

> traded had CP's disclosures relating to its financial results, and particularly to its net income, been materially accurate. Had the CP press releases and annual and interim reports described herein been materially accurate, the Plaintiff and all other persons and entities who acquired CP securities during the aforesaid period would have paid less for such securities, or would not have acquired such securities at all.

52 Accordingly, Rady J. held that the prospectus claim was not time-barred and could proceed.

53 I acknowledge that there are similarities between this statement of claim and the one before Rady J. in *McCann v. CP Ships Ltd.*. That said, every pleading must be considered as a whole and must stand on its own feet. To assert a cause of action so as to interrupt a limitation period and to give the defendant fair notice of why he or she is being sued, the pleading must at least allege the facts necessary to identify the constituent elements of the cause of action.

54 In this case, reading the original and amended statement of claim fairly, generously and as a whole, the defendants could only reasonably have understood that they were being sued for negligence and misrepresentations in Manulife's "disclosure documents" (which are clearly referable to annual reports, financial statements and MD&As) and that a claim would be asserted under Part XXIII.1 of the *Securities Act*. The defendants could have no reason to understand, again reading the claim fairly and generously, that they were being sued for misrepresentations that had been made in a prospectus. The fact that a prospectus may have incorporated one or more disclosure documents was not pleaded and, in the absence of such a pleading, the defendants would have no reason to understand that the plaintiff was claiming not simply common law misrepresentation, but a wholly different statutory remedy.

55 None of the constituent elements of the cause of action under s. 130 has been pleaded. There was no pleading that the plaintiffs (or anyone else) acquired their securities under a prospectus. There was no pleading that any of the alleged misrepresentations or disclosure documents were contained in a prospectus. As I have noted, the word "prospectus" was never even mentioned in the statement of claim.

56 In considering the pleading as a whole, it is appropriate to note that this is a multi-billion dollar class action. It has been commenced by very experienced securities lawyers. These same counsel acted for the class in *McCann v. CP Ships Ltd.*, which was decided more than a year before this action was commenced. This action asserts complex common law and statutory remedies for misrepresentation in the secondary market. It is inconceivable that counsel would have asserted a s. 130 claim without specifically pleading the section or referring to the prospectus containing the alleged misrepresentation. It is inconceivable that they would not have included a prospectus purchaser as a representative plaintiff or at least asserted a claim on behalf of prospectus purchasers.

57 The notice of motion for certification, dated May 18, 2010, stated that the nature of the claims asserted on behalf of the class were "negligence, negligent misrepresentation and, if leave is granted, liability for secondary market misrepresentation pursuant to Part XXIII.1 of the OSA." There was no reference at all to a cause of action under s. 130. Moreover, the plaintiffs' factum in support of the motion to amend the pleading describes the amendments as including "... the addition of certain prospectus claims." This language would not have been used, in either the certification notice of motion or the factum on the amendment motion if the plaintiffs' counsel regarded the existing pleading as asserting s. 130 claim.

58 I conclude that neither the original statement of claim nor the amended statement of claim contained a claim under s. 130.

(b) Was the claim time-barred?

59 At best, the claim was "commenced" on May 18, 2010, when the proposed fresh as amended statement of claim was delivered. The defendants submit that the limitation period began to run when "the truth was revealed" (to use the language of the proposed statement of claim) on February 12, 2009. The plaintiffs do not dispute this. This was more than 180 days before the proposed amended claim was delivered. The claim is, therefore, time-barred.

(c) Does the court have jurisdiction to extend the limitation period?

60 Limitation periods provide certainty and finality and assure the availability and reliability of evidence: see generally Graeme Mew, *The Law of Limitations* (Toronto: Butterworths, 1991) at 7-8. These purposes were expressed by the Ontario Law Reform Commission in its Report on Limitation of Actions (1969) at page 9:

> Lawsuits should be brought within a reasonable time. This is the policy behind limitation statutes... Underlying the policy is a recognition that it is not fair that an individual should be subject indefinitely to the threat of being sued over a particular matter... Furthermore, evidentiary problems are likely to arise as time passes. Witnesses become forgetful or die: documents may be lost or destroyed. Certainly, it is desirable that, at some point, there should be an end to the possibility of litigation in any dispute. A statute of limitation is sometimes referred to as an "Act of peace."

61 These underlying principles were expressed in an article by Professor Garry Watson, "Amendment of Proceedings After Limitation Periods" (1975) 53 Can. Bar Rev. 237 at 272 — 273:

> The policies underlying such statutes are designed to safeguard the interests of the defendant in two ways. Firstly, they seek to protect his interest in at some time being able to rely on the fact that he no longer will have to preserve or seek out evidence to defend claims against him.

> Secondly, they grant him protection 'from insecurity which may be economic or psychological or both', at some point in time he ought to be made secure in his reasonable expectation that contingent liabilities will no longer be asserted by legal action to disrupt his finances and affect his business and social relations. [References omitted.]

62 In *Wellwood v. Ontario Provincial Police* (2010), 102 O.R. (3d) 555, [2010] O.J. No. 2225 (Ont. C.A.), the Court of Appeal recently noted, at para. 77, that limitation periods have "the twin goals of finality and certainty in legal affairs" and that "the prevention of indefinite liability underlie the creation of limitation periods." It was for good reason that these statutes were described historically as "statutes of repose" or "statutes of peace".

63 The relatively short limitation period in s. 130 requires that prospectus purchasers, on becoming aware of the alleged misrepresentation, are not entitled to sit on their rights, but must act promptly. The extraordinary cause of action for misrepresentation without reliance must be exercised promptly. The proposed defendants, including issuers, directors and experts are entitled to prompt notice of the complaint.

64 The plaintiffs submit, as an alternative, that the "special circumstances" doctrine should be applied to allow an amendment to advance a cause of action that would otherwise have been time-barred. They rely on *Basarsky v. Quinlan*, above. In that case, the administrator of the deceased's estate commenced an action against the defendants under the provisions of the *Trustee Act*, R.S.A. 1955, c. 346, for damages sustained by the deceased. The defendants admitted liability and the action proceeded on the issue of damages. After the limitation period had expired, the plaintiff moved to amend the statement of claim to assert on claim on behalf of the deceased's widow and children under the *Fatal Accidents Act*, R.S.A. 1955, c. 111. The application was dismissed at first instance, and by the Appellate Division, on the ground that the limitation period had expired.

65 The Supreme Court of Canada reversed. It held that the "special circumstances" doctrine in *Weldon v. Neal* (1887), 56 L.J.Q.B. 621, 19 Q.B.D. 394 (Eng. C.A.), could be applied to permit the amendment notwithstanding the passage of the limitation period. In that case, Lord Esher M.R. observed, at 395:

> We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so.

66 In *Basarsky v. Quinlan*, the Supreme Court said that this rule would not frequently be invoked, because the circumstances warranting its application would not often occur. Nevertheless, it found that all the facts relating to the tort and the responsibility of the defendants had been pleaded, there had been discovery of the widow relating to issues that were only relevant to an action under the *Fatal Accidents Act*, and there was no suggestion that the defendants had been prejudiced. The absence of particulars was not fatal to the claim.

67 The "special circumstances" doctrine has been applied in other cases. In *Thoman v. Fleury* (1996), 28 O.R. (3d) 398, [1996] O.J. No. 1265 (Ont. C.A.), the Court of Appeal permitted the owner of an automobile to be added as a defendant after the expiry of a limitation period when the insurer of the vehicle had already been named as a party, albeit improperly, and the statement of claim identified the added defendant as a named insured under the insurer's policy. The Court of Appeal held that there was no prejudice, holding that the circumstances were equal to, or even surpassed those in *Basarsky v. Quinlan*.

68 In *Denton v. Jones (No. 2)* (1976), 14 O.R. (2d) 382, [1976] O.J. No. 2325 (Ont. H.C.), Grange J., as he then was, allowed an appeal from a Master's decision dismissing a motion to amend the statement of claim on the basis of the expiry of a limitation period. The plaintiff sued a dentist for negligence, alleging that the dentist had been retained to extract certain upper teeth but in fact extracted not only those teeth, but all the plaintiff's lower teeth as well. The claim was brought in negligence, but the amendment sought to add a claim for trespass to the person. Grange J. expressed some doubt as to whether the amendment of the claim to assert an alternative ground of relief arising out of the same facts amounted to pleading a new cause of action. He concluded, however, that there were "special circumstances" — all the necessary facts had been pleaded, there was no need to re-open discoveries and there was no possible prejudice to the defendants, other than the "inevitable prejudice of what might turn out to be the successful plea": see para. 8.

69 The plaintiffs say that the "special circumstances" doctrine applies here. They say that:

- the defendants were all named in the original pleading and knew well within the limitation period that claims were being made against them;
- the cause of action under s. 130 arises from the same events and the same documents as those explicitly pleaded;
- any defects in the statement of material facts in the pleading are of a technical nature;
- pleadings have not closed and there have been no discoveries; and
- refusal of the amendment would not simply affect the plaintiffs but other putative class members.

70 The defendants raise, as a threshold issue, the question of whether the "special circumstances" rule has any application in light of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B. The effect of the *Limitations Act, 2002* was discussed by the Court of Appeal in *Joseph v. Paramount Canada's Wonderland* (2008), 90 O.R. (3d) 401, [2008] O.J. No. 2339 (Ont. C.A.). Limitations provisions in certain statutes listed in the Schedule to that Act are preserved. The limitation period in s. 138 of the *Securities Act* is listed in the schedule and is therefore expressly preserved. Section 2 of the *Limitations Act, 2002* provides that the Act applies to claims pursued in court proceedings other than certain identified proceedings, which are not relevant.

71 Section 4 of the *Limitations Act, 2002* provides:

> Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

72 Section 20 provides:

> This Act does not affect the extension, suspension or other variation of a limitation period or other time limit by or under another Act.

73 The issue is whether, in light of these provisions, the "special circumstances" doctrine applies, either in relation to claims under the *Limitations Act, 2002* or, if not, to claims under the *Securities Act*.

74 The first question was addressed by the Court of Appeal in *Joseph v. Paramount Canada's Wonderland*, above. In that case, a statement of claim had been issued after the two year time limit in the new statute, as a result of inadvertence by the plaintiff's lawyer. A motion judge, applying the special circumstances doctrine, held that there was no prejudice to the defendant and permitted the action to proceed.

75 The Court of Appeal noted that the doctrine had been applied to motions brought under rule 26 of the *Rules of Civil Procedure* for the amendment of pleadings "on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment." It held that as a matter of statutory interpretation the new Act was not intended to preserve the court's common law discretion to extend the limitation period under special circumstances.

76 The question was whether the provision of s. 20 of the *Limitations Act, 2002*, which states that "[T]his Act does not affect the extension, suspension or other variation of a limitation period or other time limit by or under any other Act", could include an extension granted under the *Rules of Civil Procedure*, which are made pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The Court of Appeal concluded that the extension of the limitation period under rule 26.01 was done as

the result of the application of common law principles rather than "by or under another Act" within the meaning of s. 20. Feldman J.A., giving the judgment of the Court of Appeal, stated at para. 24:

> Because the Rules themselves are authorized to be made by the *Courts of Justice Act*, they are arguably made "under another Act". However, it is only the interpretation of the Rules by application of the common law that has incorporated the doctrine of special circumstances to extend limitation periods by adding parties or claims after the expiry of a limitation period. The Rules themselves do not do this. In my view, it would be extending the meaning of "under another Act" too far to interpret it as including the application of common law principles used to apply the Rules, even though the Rules themselves are made by regulation "under another Act".

77 The Court of Appeal noted that this interpretation was consistent with the intent of the new statute, which was to provide certainty in the application of limitation provisions.

78 The Court of Appeal in *Joseph v. Paramount Canada's Wonderland* contrasted the circumstances then before it, with its decision in *Guillemette v. Doucet* (2007), 88 O.R. (3d) 90, [2007] O.J. No. 4172 (Ont. C.A.), a case involving the assessment of a solicitor's account under the *Solicitors Act*, R.S.O. 1990, c. S.15. That statute contained a provision, s. 4, that provided that a client could not refer an account for assessment more than 12 months after the account was delivered "except under special circumstances to be proved to the satisfaction of the court." The *Solicitors Act* was not listed in the Schedule to the *Limitations Act, 2002*. The Court of Appeal in *Guillemette v. Doucet* held that although the new two year limitation period in the *Limitations Act, 2002* therefore "trumped" the twelve month period in the *Solicitors Act*, the "special circumstances" provision of the latter statute was preserved by s. 20 of the *Limitations Act, 2002*. Doherty J.A. observed at para. 31:

> Section 20 of the *Limitations Act* places a further qualification on the application of the limitations periods set out in the Act. Section 20 provides that nothing in the *Limitations Act* will affect a provision in another Act which extends, suspends or otherwise varies the limitation period found in another Act. Section 20 recognizes that individual statutes may provide for situations or conditions in which the limitation provisions in those statutes should be extended or modified. Those provisions may well be particularly apt for the limitation period addressed in that specific statute. The *Limitations Act* does not seek to standardize the circumstances in which limitation periods can be extended, suspended or otherwise varied by statute.

79 Doherty J.A. noted that this conclusion, while perhaps at odds with the purpose of the *Limitations Act, 2002*, reflected the historical treatment of solicitors' accounts, which is grounded in the Superior Court's inherent jurisdiction to review lawyers' accounts: see *Guillemette v. Doucet*, above, para. 35.

80 Based on these authorities, one could reasonably conclude that:

(a) the "special circumstances" doctrine has no application to claims that are subject to the general limitation period in the *Limitations Act, 2002*;

(b) the "special circumstances" doctrine has no application to motions under rule 26.01 to amend a pleading after the expiry of a limitation period; and

(c) "special circumstances" may nevertheless permit the extension of a limitation period where expressly authorized by statute.

81 The issue was further refined, however, by the decision of the Court of Appeal in *Bikur Cholim Jewish Volunteer Services v. Penna Estate* (2009), 94 O.R. (3d) 401, [2009] O.J. No. 841 (Ont. C.A.) ("*Bikur Cholim*"). In that case, the estate trustee of Lorraine Penna moved for a declaration that claims against Lorraine Penna, in connection with her trusteeship of the estate of her late husband Paul Penna, were barred by s. 38(3) of the *Trustee Act*, R.S.O. 1990, c. T.23.

82 Section 38(3) of the *Trustee Act* is specifically mentioned in the Schedule to the *Limitations Act*, 2002. Sections 38(2) and (3) provide:

(2) Except in cases of libel and slander, if a deceased person committed or is by law liable for a wrong to another in respect of his or her person or to another person's property, the person wronged may maintain an action against the executor or administrator of the person who committed or is by law liable for the wrong.

(3) An action under this section shall not be brought after the expiration of two years from the death of the deceased.

83 Lorraine Penna had died more than two years before the commencement of any proceeding against her.

84 The Court of Appeal observed that by virtue of s. 19(4) of the *Limitations Act, 2002*, the limitation period established by the *Trustee Act* was applicable. It then turned to the question of whether the doctrine of special circumstances continued to apply to the limitation period in that Act. It referred to *Giroux Estate v. Trillium Health Centre* (2005), 74 O.R. (3d) 341, [2005] O.J. No. 226 (Ont. C.A.) in which the court had held that the common law doctrine of fraudulent concealment applied to suspend the running of the s. 38(3) limitation period. Moldaver J.A. had concluded in that case, at para. 33:

I would not give effect to that argument. In my view, s. 38(3) was exempted from the new Act so that its common law status would be preserved and it would remain immune from the discoverability rule. In other words, the legislature intended that s. 38(3) should continue

> to be governed by common law principles. The doctrine of fraudulent concealment is one such principle.

85 The Court of Appeal in *Bikur Cholim* concluded that the same reasoning was applicable to the case before it. Rosenberg J.A., giving the Court's judgment, stated at para. 51:

> Applying the reasoning in *Giroux Estate*, the doctrine of special circumstances also survives the enactment of the *Limitation Act, 2002*, despite the fact that the doctrine has been abolished by s. 20 of that Act for cases governed by the limitation periods set out in that Act. Also see *Meady v. Greyhound Canada Transportation Corp.* (2008), 90 O.R. (3d) 774 (C.A.), at para. 22.

86 The Court of Appeal concluded, however, that special circumstances did not exist in the case before it. The respondents had been in possession of the material facts for many months before the limitation period expired, they were represented by counsel and they had a remedy against the real wrongdoer.

87 The *Bikur Cholim* case leaves open the question of whether the application of the special circumstances doctrine should be confined to cases where the statutory provision in the Schedule to the *Limitations Act, 2002* either contains its own discretionary extension provision or has historically been subject to a special circumstances exception. This would be consistent with the words of s. 20 which refer to "the extension, suspension or other variation of a limitation period or other time limit by or under another Act." In the case before me, it is difficult to understand why the legislature would have preserved the relatively short limitation period in s. 138.8 of the *Securities Act*, with its more stringent regime with respect to discoverability, but at the same time have left open the possibility of its extension by the special circumstances doctrine.

88 Not surprisingly, the parties have different interpretations of this line of cases. The plaintiffs say that the effect of *Giroux Estate* and *Bikur Cholim* is that "those cases governed by limitations provisions listed on the Schedule to the *Limitations Act, 2002* continue to be governed by the common law, including the special circumstances doctrine."

89 Manulife and the other defendants say that the holding in these cases is not quite as general as the plaintiffs urge. They say that the by exempting the *Trustee Act* limitation period from the *Limitations Act, 2002*, the legislature intended to permit the court to continue to apply the existing body of law, including the fraudulent concealment doctrine, which mitigated the potential harshness of an absolute limitation period that is unrelated to discoverability. They say that in the case of the *Securities Act* limitation period, there is a built-in discoverability provision and no body of law relating to special circumstances. They submit that it makes no sense to preserve the *Securities Act* limitation period and at the same time erode it through the application of the special circumstances rule.

90 In my respectful view, given the injunction that the special circumstances rule will be "infrequently invoked" as well as the philosophy of certainty and finality in the *Limitations Act, 2002*, it would make sense to confine the special circumstances rule to existing statutory exceptions, such as that contained in the *Solicitors Act*, or pre-existing common law exceptions engrafted on the legislative limitation period, such as that contained in the *Trustee Act*.

(d) Should the limitation period be extended?

91 If the "special circumstances" doctrine is available to extend the limitation period, I would decline to apply it. Bearing in mind the caution that the jurisdiction to allow an amendment after the expiry of a limitation will be "infrequently invoked", this is a case, like *Bikur Cholim*, in which there are no special circumstances other than these that would normally flow from the injustice of the limitation period expiring.

92 In *Frohlick v. Pinkerton Canada Ltd.*, above, Rouleau J., giving the judgment of the Court of Appeal, observed that on a motion to amend under rule 26.01, the expiry of a limitation period gives rise to a presumption of prejudice — at para. 17:

> In my view, the proper interpretation of rule 26.01 is that the expiry of a limitation period gives rise to a presumption of prejudice. This presumption of prejudice will be determinative unless the party seeking the amendment can show the existence of special circumstances that rebut the presumption.

93 Rouleau J. continued at paras. 22 — 25:

> Where a limitation period has passed, there will be a presumption of prejudice that cannot be compensated for by costs or an adjournment. The moving party must demonstrate why, on the facts of the case, the court should not apply the normal rule that the presumption of prejudice flowing from the loss of the limitation period is determinative. This involves a consideration of special circumstances that would lead the court to conclude that the presumption of prejudice should not apply.
>
> The statute establishing the limitation period may itself provide for relief in certain circumstances. Absent a statutory basis for relieving against the harshness of a limitation period, the court, faced with a rule 26.01 motion, will consider whether it would be unfair to allow the opposite party to rely on the limitation period given the relationship the proposed claim has to the existing and ongoing claim and the way that the action has progressed to date. The court will consider the true nature of all of the claims and the knowledge of the parties.
>
> In my view, rule 26.01 does not contemplate the addition of unrelated statute-barred claims by way of amendment to an existing statement of claim. Conceptually, this should be treated

no differently than the issuance of a new and separate statement of claim that advances a statute-barred claim.

There is no exhaustive list of what constitutes special circumstances in the context of rule 26.01. They are often procedural or informational mistakes made by a party that have not misled the opposite party or induced the opposite party to defend the claim differently than it would have if the amendment had been made before the limitation period expired.

94 This is not a case in which the cause of action being set up is incidental to or subsumed by the existing pleading. The section 130 claim is an extraordinary and special cause of action that is distinct from the common law claim for misrepresentation and from the statutory cause of action under Part XXIII.1 of the *Securities Act* for misrepresentation in the secondary market.

95 Nor is this a case in which the plaintiffs or their counsel made procedural errors or mistakes and no attempt was made to suggest otherwise. This is a case in which the plaintiffs had the assistance of very experienced securities counsel who were in possession of the material facts and who made a conscious decision to restrict the claim to a secondary market claim: see *Bikur Cholim*; *Meady v. Greyhound Canada Transportation Corp.*, 2008 ONCA 468, 90 O.R. (3d) 774 (Ont. C.A.).

96 To allow the claim to proceed based on "special circumstances" would defeat the very purpose of the 180 day limitation period in the *Securities Act* - it would promote uncertainty rather than certainty, and unrest in corporate affairs and securities markets, rather than repose.

Conclusion

97 For these reasons, the amendment to plead s. 130 of the *Securities Act* will not be allowed and, to that extent only, the plaintiffs' motion to amend the statement of claim is dismissed. The defendants are entitled to their costs. If not agreed within 10 days, written submissions may be made to me care of Judges' Administration.

Motion dismissed.

Footnotes

1 Other than in an action for rescission, where the limitation period is 180 days after the date of the transaction.

2 In a class action, brought as is the case here, by a secondary market purchaser, who asserts claims for misrepresentation in both the primary and secondary markets, it would be sufficient for the plaintiff to plead that the claim is also brought on behalf of class members who bought in the primary market: see *McCann v. CP Ships Ltd.* discussed later in these reasons.

Tab 33

2012 ONSC 3498
Ontario Superior Court of Justice

Allen v. Aspen Group Resources Corp.

2012 CarswellOnt 8069, 2012 ONSC 3498, [2012] O.J. No. 2924, 218 A.C.W.S. (3d) 301

R. Charles Allen, Plaintiff and Aspen Group Resources Corporation, Jack E. Wheeler, James E. Hogue, Wayne T. Egan, Anne Holland, Randall B. Kahn, Lenard Briscoe, Peter Lucas, Lane Gorman Trubitt L.L.P. and Weirfoulds LLP., Defendants

G.R. Strathy J.

Heard: April 4, 2012
Judgment: June 18, 2012
Docket: 02-CV-241587CP

Proceedings: additional reasons at *Allen v. Aspen Group Resources Corp.* (2012), 2012 ONSC 5028, 2012 CarswellOnt 11027 (Ont. S.C.J.)

Counsel: William E. Pepall, Lucas Lung, for Defendant / Moving Party, WeirFoulds LLP
Paul Bates, Jonathan Foreman, Robert L. Gain, for Plaintiff / Respondent
David Sischy, Joseph Groia, for Aspen Defendants
Sarah Shody, Kosta Kalogiros, for Defendant, Lenard Briscoe

Subject: Civil Practice and Procedure; Public; Torts; Corporate and Commercial; Securities
Related Abridgment Classifications
Civil practice and procedure
XVIII Summary judgment
  XVIII.6 Determination of question of law
Professions and occupations
VIII Lawyers
  VIII.1 Organization and regulation of profession
    VIII.1.c Law firms
      VIII.1.c.i Liability for acts of partner
Securities
V Takeover bids
  V.3 Penalties
Headnote
Civil practice and procedure --- Summary judgment — Determination of question of law

Plaintiffs brought class proceeding against A Corp, several individual defendants including E who was director of A and partner in defendant law firm WF LLP — Common issue certified whether WF liable in negligence or for breach of s. 131 of Securities Act — WF moved for summary dismissal of claim against it — Motion dismissed without prejudice to right to raise issue at trial — Since vicarious liability held to extend to equitable wrongs as well as common law wrongs, no reason not to extend it to statutory wrongs — Whether vicarious liability of partnership for partner's breach of Securities Act existed should be decided on full factual record.

Professions and occupations --- Barristers and solicitors — Organization and regulation of profession — Law firms — Liability for acts of partner

Plaintiffs brought class proceeding against A Corp, several individual defendants including E who was director of A and partner in defendant law firm WF LLP — Common issue certified whether WF liable in negligence or for breach of s. 131 of Securities Act — WF moved for summary dismissal of claim against it — Motion dismissed — E's activities on the A board were part of ordinary course of business of WF — E was responsible for preparation of takeover circular and signed certificate that it did not contain any untrue statement of material fact, did not omit any material fact and that it contained no misrepresentation likely to affect value — Since vicarious liability held to extend to equitable wrongs as well as common law wrongs, no reason not to extend it to statutory wrongs — Vicarious liability of partnership for partner's breach of Securities Act should be decided on full factual record.

Securities --- Takeover bids — Penalties

Plaintiffs brought class proceeding against A Corp, several individual defendants including E who was director of A and partner in defendant law firm WF LLP — Common issue certified whether WF liable in negligence or for breach of s. 131 of Securities Act — WF moved for summary dismissal of claim against it — Motion dismissed — E's activities on the A board were part of ordinary course of business of WF — E was responsible for preparation of takeover circular and signed certificate that it did not contain any untrue statement of material fact, did not omit any material fact and that it contained no misrepresentation likely to affect value — Since vicarious liability held to extend to equitable wrongs as well as common law wrongs, no reason not to extend it to statutory wrongs — Vicarious liability of partnership for partner's breach of Securities Act should be decided on full factual record.

ADDITIONAL REASONS to a decision reported at *Allen v. Aspen Group Resources Corp.* (2012), 2012 ONSC 5028, 2012 CarswellOnt 11027 (Ont. S.C.J.) on motion for summary judgment.

***G.R. Strathy J.*:**

1 WeirFoulds LLP (WeirFoulds) moves for summary judgment dismissing the claims against it.

2 This action results from the take-over of Endeavour Resources Inc. (Endeavour) by one of the defendants, Aspen Group Resources Corporation (Aspen), pursuant to an offer (the Offer) and take-over bid circular (the Circular), both dated November 23, 2001.

3 This action was certified as a class proceeding on December 4, 2009: *Allen v. Aspen Group Resources Corp.* (2009), 81 C.P.C. (6th) 298, [2009] O.J. No. 5213 (Ont. S.C.J.) (Certification Decision). Reference should be made to that decision for the underlying facts and allegations.

4 The class was defined as securities holders of Endeavour whose securities were acquired by Aspen.

5 The plaintiff claims that the defendants made certain misrepresentations or failed to disclose certain material facts in the Circular. He also asserts the statutory remedy for misrepresentation contained in section 131(1) of the *Securities Act*, R.S.O. 1990, c. S.5 against the directors of Aspen.

6 Through one of its partners, the defendant Wayne Egan (Egan), WeirFoulds acted as counsel for Aspen in the preparation of the Circular. Egan was also a director of Aspen. In that capacity, he signed a certificate stating that the Circular contained no untrue statement of fact and did not omit any material fact or contain any misrepresentation likely to affect the value of the securities that were the subject of the Offer.

7 The plaintiff claims that WeirFoulds was negligent in the preparation of the Circular and failed to ensure that it disclosed material facts. He alleges that Egan knew or ought to have known that the Circular was deficient. He also pleads that WeirFoulds is liable for Egan's negligence and breach of s. 131.

8 A common issue was certified with respect to WeirFoulds:

> Is the Defendant WeirFoulds LLP liable in negligence or for any breach of s. 131 of the Ontario *Securities Act* by the Defendant director Wayne Egan?

9 On the certification motion, counsel for WeirFoulds submitted that in signing the Circular, Egan was not acting in his capacity as a lawyer or as a partner in WeirFoulds. WeirFoulds argued that it could not be liable for Egan's actions *qua* director unless, in carrying out his duties as a director, he was carrying on the usual and ordinary business of the law firm (see Certification Decision para. 70). I addressed this submission as follows:

> It seems to me that it is arguable that a lawyer who, through his or her law firm, acts as external corporate counsel to a corporation and who also sits on the corporation's board, may well be acting in the ordinary course of the law firm's business when he or she takes a seat at the boardroom table. Indeed, such a relationship with the corporation may be encouraged by the law firm to strengthen the relationship with the client, to raise the profile of the lawyer and the law firm and to increase business. To the extent there are risks for the lawyer and the law firm, they undoubtedly can be offset by appropriate liability insurance. [Certification Decision, para. 71]

10 The evidence on this motion establishes the following facts:

- WeirFoulds has provided Aspen with advice on securities and corporate matters since 1995.
- Egan has been a director of Aspen since 1996.
- WeirFoulds has billed Aspen for the time spent by Egan in his capacity as a director of Aspen, including time Egan spent preparing for and attending directors' meetings, preparing agendas, and reviewing and revising minutes and related correspondence.
- The WeirFoulds partnership agreement provides that fees earned by partners as a result of outside directorships were deemed to be income of the partnership.
- Service as a director of a corporation required approval by the WeirFoulds management committee and Egan's directorship of Aspen had been so approved.
- WeirFoulds maintained a Directors & Officers' liability policy to insure the liability of its lawyers as outside directors, and the firm was named as an additional insured on the policy.
- WeirFoulds' website made reference to directorships held by its lawyers, including Egan.

11 This evidence supports the conclusion that Egan's activities on the Aspen Board were part of the ordinary course of the business of WeirFoulds.

12 The summary judgment motion raises the issue of whether there is a genuine issue requiring a trial concerning:

> (a) whether WeirFoulds owed a common law duty of care to class members — that is, to the securities holders of Endeavour — in connection with the preparation of the Circular for its client Aspen; and
>
> (b) whether WeirFoulds is vicariously liable for Egan's liability, if any, under s. 131 of the *Securities Act*.

13 In its recent decision in *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, [2011] O.J. No. 5431 (Ont. C.A.), the Court of Appeal for Ontario held that, on a summary judgment motion, except in cases where the parties consent or where there is no chance of success, the court must determine whether a "full appreciation" of the evidence and issues can be obtained without a trial and whether the "interest of justice" requires a trial.

The Duty of Care Issue

14 WeirFoulds says that the common law negligence claim must be dismissed, because it owed no duty of care to the shareholders of Endeavour with respect to the accuracy of the Circular.

15 WeirFoulds characterizes the plaintiff's claim against it as one for negligent advice to Aspen as opposed to misrepresentation in the Circular. It relies on the general rule that a solicitor owes a duty only to his or her client and not to the opposite party: *Baypark Investments Inc. v. Royal Bank* (2002), 57 O.R. (3d) 528, [2002] O.J. No. 58 (Ont. S.C.J.) at para. 33, aff'd *Baypark Investments Inc. v. Royal Bank*, [2002] O.J. No. 4377 (Ont. C.A.). See also *Seaway Trust Co. v. Markle* (1991), 7 C.C.L.T. (2d) 83, [1991] O.J. No. 479 (Ont. Gen. Div.), adopting the observations of the New Zealand Court of Appeal in *Allied Finance & Investments Ltd. v. Haddow & Co.*, [1983] N.Z.L.R. 22 (New Zealand C.A.):

> ... the relationship between two solicitors acting for their respective clients does not normally of itself impose a duty of care on one solicitor to the client of the other. Normally the relationship is not sufficiently proximate. Each solicitor is entitled to expect that the other party will look to his own solicitor for advice and protection. Lord Roskill says in *Junior Books* at p. 214, "The concept of proximity must always involve, at least in most cases, some degree of reliance. Lord Roskill illustrates this by citing observations in the *Hedley Byrne* case [1964] AC 465, and he attaches importance to where "the real reliance" was placed. And even if prima facie there were sufficient proximity for a duty of care, the consideration that the other party has a solicitor to protect his interests would normally negative a duty. That is to say, the second of Lord Wilberforce's questions in *Anns v. Merton London Borough Council*, [1978] A.C. 728, 752, would have to be answered against the duty even if the first was not.

16 In my view, WeirFoulds misstates the issue, with the result that it skews the proximity analysis.

17 The common law negligence claim against WeirFoulds is expressed in para. 72 of the statement of claim as follows:

> The law firm Weir Foulds [sic] LLP drafted the take-over circular and offer presented to the class members. The Defendant, Weir Foulds [sic] LLP had a duty to make appropriate enquiries and to ensure the disclosure of all material facts and material changes in the take-over documents. WeirFoulds LLP was or ought to have been fixed with knowledge of the alleged misrepresentations and was negligent in the preparation of documents delivered to the class members. The defendant, Egan, was at all material times a partner and agent of the defendant, WeirFoulds LLP. Egan acted in the ordinary course of business between 1996 and the present as legal counsel, a member of the Board of Directors and as a member of various committees of Aspen. Egan acted as lead counsel to Aspen in respect of the take-over bid circular. WeirFoulds LLP is liable for the conduct of the defendant, Egan.

18 The statement of claim contains allegations that the Circular and the Offer either misrepresented or failed to disclose a number of allegedly material facts.

19 The plaintiff's common law negligence claim is founded on the following facts:

- Egan was a partner in WeirFoulds and acted in the ordinary course of business of the law firm in providing legal advice to Aspen in connection with its take-over of Endeavour and in sitting as a director on Aspen's board.

- Egan was responsible for the preparation of the Circular.

- Egan knew that the Circular would be delivered to the shareholders of Endeavour for the purpose of soliciting their shares.

- Egan signed a certificate in the Circular stating that it contained no untrue statement of a material fact, did not omit to state a material fact and did not contain any misrepresentation likely to affect the value or the market price of the securities that were the subject of the Offer.

20 The issue is whether WeirFoulds owed a duty of care to the plaintiff, in light of these facts and other surrounding circumstances to which I will refer.

21 WeirFoulds acknowledges that there may be circumstances where a professional owes a duty of care to a non-client third party, applying the test articulated by the Supreme Court of Canada in *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.) at paras. 19-21. In the case of claims, for damages for "pure economic loss", such as the plaintiff's claim here, the court must also apply the additional scrutiny required by *Martel Building Ltd. v. R.*, 2000 SCC 60, [2000] 2 S.C.R. 860 (S.C.C.) at paras. 35, 37.

22 As WeirFoulds puts it in its factum:

> In determining whether there is a *prima facie* duty of care, the courts will consider whether there is a sufficiently close relationship (or relationship of proximity) between the plaintiff and the professional that in the reasonable contemplation of the professional, careless on his or her part may cause damage to the plaintiff. In the context of a claim for pure economic loss, the courts will consider whether there was reasonable reliance on the part of the plaintiff. Proximity will inhere when two criteria relating to reliance may be said to exist on the facts: (a) the defendant ought reasonably to have foreseen that the plaintiff would rely on the defendant's expertise, and (b) reliance, in the particular circumstances of the case, was reasonable.

23 WeirFoulds submits that it could not reasonably have foreseen that Endeavour shareholders would look to it for advice and protection in connection with the take-over. Endeavour had its own legal and financial advisors, who acted on behalf of and for the benefit of Endeavour's shareholders. Endeavour obtained an independent professional opinion concerning the fairness of the Offer and provided it to Endeavour's shareholders. It also jointly retained a consultant to provide information

and financial analysis to assist in determining the terms of its Offer. Endeavour's board consulted with its own lawyers and financial advisors and, having done so, recommended that Endeavour's shareholders accept the Aspen Offer. Allen admitted that he relied on the circular distributed by the directors of Endeavour and the reports of the independent experts.

24 The Circular itself, which was distributed to all Endeavour shareholders along with the Offer, contained the following statement at the top of the first page:

> This document is important and requires your immediate attention. If you are in any doubt as to how to deal with it, you should consult your investment dealer, stockbroker, bank manager, lawyer or other professional advisor. No securities commissions or similar authority in Canada has in any way passed upon the merits of the securities offered hereunder and any representation to the contrary is an offence.

25 The Circular and Offer also contained an independent auditor's report prepared by the defendant Lane Gorman Trubitt LLP.

26 WeirFoulds relies on *D'Amore Construction (Windsor) Ltd. v. Lawyers Professional Indemnity Co.* (2005), 249 D.L.R. (4th) 467, [2005] O.J. No. 448 (Ont. Div. Ct.) and *Seaway Trust Co. v. Markle*, above. I do not regard either one of these authorities as particularly on point. In the former case, it was held that a party represented by counsel in litigation was not owed a duty of care by counsel for another party. The plaintiff had sued his own counsel as well as the counsel for the other party. It was found that it was not foreseeable that the plaintiff would rely on the advice of someone who was not his lawyer.

27 In the *Seaway Trust* case, the plaintiff argued that a lawyer in a commercial transaction has a duty to disclose or to warn the opposing party if that party is about to enter into a transaction with the lawyer's client, which the lawyer knows is fraudulent, even where the lawyer is not a party to the fraud. It was held that there was no such duty.

28 In neither of these cases was there reliance by the plaintiff on a document that was prepared by the solicitor with the knowledge that it would be provided to the plaintiff for the purpose of informing the plaintiff's assessment of the transaction.

29 However, that was the case in *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399, [2012] O.J. No. 168 (Ont. S.C.J.). In the summary judgment motion in that case, I addressed the question of whether a duty of care was owed to investors by a lawyer who had prepared an opinion concerning the viability of a tax shelter. The promotional materials for the plan contained a "comfort letter" written by the lawyer. I held that there was a genuine issue requiring a trial as to whether the lawyer owed a duty of care to investors and, if so, whether there were policy reasons that would limit that duty.

30 I have come to the same conclusion here, for the following reasons.

31 First, following the framework set out in *Attis v. Canada (Minister of Health)* (2008), 93 O.R. (3d) 35 (Ont. C.A.), I would find that Egan could have foreseen that shareholders of Endeavour would suffer damages if the Circular contained misrepresentations. The Circular was prepared with the intention that it would be given to the shareholders of Endeavour. The whole purpose of the Circular was to provide those shareholders with the information necessary to evaluate Aspen's Offer and to make a decision whether or not to accept it. It was foreseeable that Endeavour shareholders would suffer a loss if the Circular contained untrue statements.

32 The next question is whether Egan and WeirFoulds, on the one hand, and the shareholders of Endeavour, on the other hand, were in a relationship of proximity that would support a *prima facie* duty of care. Having regard to considerations such as expectations, representations and reliance, is there a sufficient closeness in the relationship between the parties to make it "just and fair" to impose a duty of care on the defendant? See *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 (S.C.C.) at para. 34.

33 I am prepared to assume that this case does not fall within an existing category in which a duty of care has been recognized. That said, it bears considerable similarity to cases in which lawyers have been found to owe a duty of care to persons other than their client — or at least, where that allegation has survived a pleadings motion. See: *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman* (2001), 18 B.L.R. (3d) 240, [2001] O.J. No. 4622 (Ont. S.C.J.); *Delgrosso v. Paul* (1999), 45 O.R. (3d) 605, [1999] O.J. No. 5742 (Ont. Gen. Div.) and *Elms v. Laurentian Bank of Canada*, 2001 BCCA 429, 90 B.C.L.R. (3d) 195 (B.C. C.A.); *Robinson v. Rochester Financial Ltd.*, 2010 ONSC 463, [2010] O.J. No. 187 (Ont. S.C.J.), leave to appeal denied, 2010 ONSC 1899 (Ont. Div. Ct.); *Cannon v. Funds for Canada Foundation*, above.

34 In this case, the factors of expectation, representation and reliance all exist to some degree or another. The shareholders of Endeavour could reasonably expect that a lawyer who prepared and signed the Circular would ensure that it was accurate. There was an express representation by Egan that the Circular was accurate. It would be reasonable to expect that there would be reliance on the Circular by Endeavour's shareholders in deciding whether to tender their shares. Allen's evidence was that he read the Circular and that it was a factor in his decision to tender his shares. He also testified that he relied on the fact that WeirFoulds had created a document, in accordance with securities legislation, that did not misrepresent the facts.

35 I acknowledge that the relative weight to be applied to these factors and to be given to some of the counterbalancing factors identified by WeirFoulds will require a careful analysis. In my opinion, that analysis requires a trial, particularly in view of the novelty of the issue.

36 This brings me to the second stage of the analysis, whether the duty of care is negatived by policy considerations. As the Supreme Court of Canada said in *Cooper v. Hobart*, this stage of the analysis is particularly important in cases where a duty of care has not been previously recognized.

37 Here, WeirFoulds says that if any *prima facie* duty of care exists, it is negatived by public policy considerations. It says that imposing a duty of care would put any solicitor acting in an arm's length transaction into an irreconcilable conflict of interest and would mean that lawyers would not be at liberty to freely advise their clients with respect to their rights and obligations without breaching some duty to the other party.

38 A similar issue was addressed by Cumming J. in the YBM case, *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman*, above, albeit on a pleadings motion. Cumming J. found that the plaintiffs had properly pleaded the elements of a negligence claim, including a pleading that in drafting the prospectus, the law firm and its partner had a duty to ensure that it contained full and true disclosure of the material facts relating to the securities. Cumming J. found that the pleading was sufficient to give rise to a relationship of proximity that would give rise to a *prima facie* duty of care. He also found that a factual record would be necessary to resolve the question of whether there are policy considerations that would negative the scope of any duty and that it would not be appropriate to attempt to resolve these issues on the pleadings motion.

39 As a general rule, courts have been reluctant to determine novel or unsettled questions of law on summary judgment without a full factual record. The principle was expressed by the Court of Appeal in *Aronowicz v. EMTWO Properties Inc.* (2010), 98 O.R. (3d) 641 (Ont. C.A.) at para. 71:

> Generally, courts are reluctant to determine unsettled matters of law at a pre-trial stage — including on motions for summary judgment — on the theory that new or important questions of law should not be determined on an incomplete factual record: *Société Générale*, at para. 51; *Romano v. D'Onofrio* (2005), 77 O.R. (3d) 583, [2005] O.J. No. 4969 (C.A.), at para. 7: *Bendix Foreign Exchange Corp. v. Integrated Payment Systems Canada Inc.*, [2005] O.J. No. 2241, 18 C.P.C. (6th) 15 (C.A.), at para. 6. However, a court may determine a question of law on a motion for summary judgment if it has the necessary undisputed factual record before it, is in just as good a position as the trial judge would be to do so and is satisfied the only genuine issue is a question of law: see, for example, *Bader v. Rennie*, [2007] O.J. No. 3441, 229 O.A.C. 320 (Div. Ct.), at para. 22; *Robinson v. Ottawa (City)*, [2009] O.J. No. 262, 55 M.P.L.R. (4th) 283 (S.C.J.), at paras. 63-64; *Alexis v. Toronto Police Services Board*, [2009] O.J. No. 5170, 2009 ONCA 847, at para. 19.

40 In my view, determining whether there is a duty of care in this case, and, if so, whether it is negatived by policy considerations, is a complex, nuanced and important question that should be decided on a full record. I am not satisfied that I can obtain a full appreciation of the evidence or fairly resolve the issue without a trial.

41 The motion for summary judgment on this issue is therefore dismissed.

The Claim under s. 131 of the Securities Act

42 The plaintiff's claim against Egan is based on the statutory remedy under s. 131(1) of the *Securities Act* for misrepresentation in a take-over bid. This provision gives the security holder of an offeree a cause of action for misrepresentation against, among others, a director of the offeror. The section at the material time provided as follows:

> 131. (1) Where a take-over bid circular sent to the security holders of an offeree issuer as required by Part XX or any notice of change or variation in respect thereof contains a misrepresentation, every such security holder shall be deemed to have relied on the misrepresentation and may elect to exercise a right of action for rescission or damages against the offeror or a right of action for damages against,
>
> (a) every person who at the time the circular or notice, as the case may be, was signed was a director of the offeror;
>
> (b) every person or company whose consent in respect of the circular or notice, as the case may be, has been filed pursuant to a requirement of the regulations but only with respect to reports, opinions or statements that have been made by the person or company; and
>
> (c) each person who signed a certificate in the circular or notice, as the case may be, other than the person included in clause (a).

43 The plaintiff says that WeirFoulds is responsible for Egan's liability as a director under s. 131(1) by virtue of sections 6 and 11 of the *Partnerships Act*, R.S.O. 1990, c. P.5. The relevant provisions are:

> 6. Every partner is an agent of the firm and of the other partners for the purpose of the business of the partnership, and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he or she is a member, bind the firm and the other partners unless the partner so acting has in fact no authority to act for the firm in the particular matter and the person with whom the partner is dealing either knows that the partner has no authority, or does not know or believe him or her to be a partner.
>
> . . .
>
> 11. Where by any wrongful act or omission of a partner acting in the ordinary course of the business of the firm, or with the authority of the co-partners, loss or injury is caused to a person not being a partner of the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

44 WeirFoulds says that s. 11 of the *Partnerships Act* has no application to the statutory cause of action under s. 131 of the *Securities Act*. It does not rest its defence on the issue of whether Egan was acting in the ordinary course of the business of the WeirFoulds partnership in serving as a director of Aspen. It. Its submission has two branches.

45 First, WeirFoulds says that the doctrine of vicarious liability has no application to a statutory cause of action. It says that the liability of a director under s. 131(1) of the *Securities Act* is purely a creature of statute and leaves no room for the application of the principles expressed in the *Partnership Act* or for a finding of a secondary liability on the part of someone who is a partner of the director.

46 Second, WeirFoulds submits that, as a matter of statutory interpretation, s. 131 does not make law firms responsible for the statutory liability of their partners or employees who sit on corporate boards because:

(i) the ordinary and unequivocal meaning of s. 131(1)(a) appplies only to directors;

(ii) the liability under s. 131(1)(a) is personal to the director;

(iii) where the legislature has imposed liability on partners in the *Securities Act*, it has done so directly;

(iv) the *Partnerships Act* cannot be relied upon to extend liability under s. 131 to partnerships, because s. 131 is intended to be a complete code of liability — moreover, interpreting the *Partnerships Act* to extend liability under s. 131 to partners of the director would create an absurdity, because the partnership would be liable for the acts of partners who are directors, but not for the acts of employees who are directors; and

(v) accepting the plaintiff's position would unduly expand the scope of liability under s. 131 and would expand the scope of the various statutory causes of action under the *Securities Act* including s. 130 (misrepresentation in a prospectus), s. 130.1 (misrepresentation in an offering memorandum) and s. 138.3 (misrprepresentation in the secondary market).

47 I will begin by addressing the first submission that the vicarious liability of a partnership under the *Partnerships Act* does not apply to statutory causes of action.

Does Vicarious Liability Attach to Statutory Causes of Action?

48 The underlying rationale of s. 11 of the *Partnerships Act* is similar to the rationale behind the vicarious liability of an employer for the actions of an employee acting in the course of business. It is based on a combination of policy factors that are rooted in fairness, equitable compensation for injuries, loss spreading and risk control. This was explained by the House of Lords in *Majrowski v. Guy's and St. Thomas' NHS Trust* [2006] UKHL 34at para. 9:

> Whatever its historical origin, this common law principle of strict liability for another person's wrongs finds its rationale today in a combination of policy factors. They are summarised in Professor Fleming's *Law of Torts*, 9th ed, (1998) pages 409-410. Stated shortly, these factors are that all forms of economic activity carry a risk of harm to others, and fairness requires that those responsible for such activities should be liable to persons suffering loss from wrongs committed in the conduct of the enterprise. This is 'fair', because it means injured persons can look for recompense to a source better placed financially than individual wrongdoing employees. It means also that the financial loss arising from the wrongs can be spread more widely, by liability insurance and higher prices. In addition, and importantly, imposing strict liability on employers encourages them to maintain standards of 'good practice' by their employees. For these reasons employers are to be held liable for wrongs committed by their employees in the course of their employment.

See also: *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] S.C.J. No. 61 (S.C.C.) at paras. 25-32.

49 While these observations dealt with the employment relationship, the point is precisely the same in the case of a partnership.

50 In the *Majrowski* case, the issue was whether a trust could be liable under the *Protection from Harassment Act 1997*, 1997, c. 40 for the harassment of the respondent by an employee of the trust. The House of Lords, in dismissing an appeal from the Court of Appeal, affirmed that the trust could be held vicariously liable for the breach of the statute by an employee. Lord Nicholls observed, at para. 17:

> ...Unless the statute expressly or impliedly indicates otherwise, the principle of vicarious liability is applicable where an employee commits a breach of a statutory obligation sounding in damages while acting in the course of his employment.

51 Lord Carswell and Lord Brown expressly agreed with this observation.

52 Lord Nicholls explained the rationale for his conclusion at para. 10:

> With these policy considerations [set out in para. 9, above] in mind, it is difficult to see a coherent basis for confining the common law principle of vicarious liability to common law wrongs. The rationale underlying the principle holds good for equitable wrongs. The rationale also holds good for a wrong comprising a breach of a statutory duty or prohibition which gives rise to civil liability, provided always the statute does not expressly or impliedly indicate otherwise. A precondition of vicarious liability is that the wrong must be committed by an employee in the course of his employment. A wrong is committed in the course of employment only if the conduct is so closely connected with acts the employee is authorised

> to do that, for the purposes of the liability of the employer to third parties, the wrongful conduct may fairly and properly be regarded as done by the employee while acting in the course of his employment: see *Lister v Hesley Hall Ltd* [2002] 1 AC 215, 245, para 69, per Lord Millett, and *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366, 377, para 23. If this prerequisite is satisfied the policy reasons underlying the common law principle are as much applicable to equitable wrongs and breaches of statutory obligations as they are to common law torts.

53 He noted that this approach was supported by a number of cases and academic writers, including the decision of the British Columbia Court of Appeal in *Nelson v. Gubbins* (1981), 122 D.L.R. (3d) 340, [1981] B.C.J. No. 461 (B.C. C.A.), relied upon by WeirFoulds, which I will discuss below.

54 Lord Nicholls held that vicarious liability for statutory wrongs should be the general rule, in the absence of statutory language to the contrary:

> One further general question should be noted on the interpretation of statutory provisions in this context. The question can be framed this way. Does employers' vicarious liability arise *unless* the statutory provision expressly or impliedly *excludes* such liability? Or does employers' liability arise only *if* the statutory provision expressly or impliedly *envisages* such liability may arise? As already indicated, I prefer the first alternative. It is more consistent with the general rule that employers are liable for wrongs committed by employees in the course of their employment. The general rule should apply in respect of wrongs having a statutory source unless the statute displaces the ordinary rule. This accords with the approach adopted by Lord Oaksey in the passage cited above from *National Coal Board v England* [1954] AC 403, 422. [para. 16].

55 He found that there was nothing in the legislation to evidence an intention to exempt the statutory wrong from the usual rule of vicarious liability:

> As to the terms of the legislation, by section 3 Parliament created a new cause of action, a new civil wrong. Damages are one of the remedies for this wrong, although they are not the primary remedy. Parliament has spelled out some particular features of this new wrong: anxiety is a head of damage, the limitation period is six years, and so on. These features do not in themselves indicate an intention to exclude vicarious liability. Vicarious liability arises only if the new wrong is committed by an employee in the course of his employment, as already described. The acts of the employee must meet the 'close connection' test. If an employee's acts of harassment meet this test, I am at a loss to see why these particular features of this newly created wrong should be thought to place this wrong in a special category in which an employer is exempt from vicarious liability. It is true that this new wrong usually comprises

> conduct of an intensely personal character between two individuals. But this feature may also be present with other wrongs which attract vicarious liability, such as assault. [para. 25].

56 The test proposed by the House of Lords, then, was whether the statute in question expressly or impliedly evidenced an intention to exclude vicarious liability. It was found that there was no such intention and that there was, in fact, some express language in the statute that showed that Parliament intended the rules of vicarious liability to apply.

57 The issue has been dealt with by the Supreme Court of Canada, in a related context, in *3464920 Canada Inc. v. Strother*, 2007 SCC 24, [2007] 2 S.C.R. 177 (S.C.C.). The issue in that case was whether a law partnership was liable, under section 12 of the British Columbia *Partnership Act*, R.S.B.C. 1996, c. 348, for a breach by one of its partners of a fiduciary duty to a former client, by acquiring a personal interest in a competing business. This provision is the British Columbia equivalent of s. 11 of the Ontario statute.

58 Binnie J., who delivered the majority judgment of the Supreme Court, noted that there was no finding that the law partnership itself had breached a fiduciary duty to the client. The other partners had been unaware of the partner's breach of fiduciary duty. The question was whether the law firm was vicariously liable for the partner's personal profits.

59 The Court of Appeal had held that the firm was not vicariously liable, because the partner was on a "frolic of his own". The managing partner had directed him not to acquire an interest in the other firm. It was argued that, in spite of this, there was a statutory right of recovery under the provisions of the British Columbia *Partnership Act*.

60 Binnie J. concluded that the partnership's liability under the equivalent of s. 11 of the Ontario statute was not confined to common law torts and that the words "wrongful act or omission" could include equitable wrongs (at para. 100). He found that the inclusion of the words "loss or injury ... or any penalty" in the section indicated that such claims were to be treated as liabilities of the firm regardless of their legal origin — at para. 102:

> The combination of "loss, injury or penalty" suggests that the legislative purpose is to ensure that a delinquent partner's liability incurred "to any person who is not a partner", with the firm's authority or in the ordinary course of the firm's business, is to be treated as the obligation of the firm regardless of its legal origin. A money judgment resulting from an accounting of profits against the delinquent partner comes within this description, in my opinion.

61 Binnie J. went on to find that the actions of the "rogue" partner were in the ordinary course of the business of the partnership. He found, at para. 105, that:

> The "ordinary course of the business" test thus requires [the rogue partner's] wrong to be "so connected" with the partnership business that it can be said that [the partnership] introduced

> the risk of the wrong that befell [its client] and is thereby fairly and usefully charged "with its management and minimization".

62 Binnie J. held that even though the rogue partner deliberately kept the partnership "in the dark" concerning his actions, there were policy reasons why the firm should be held liable — at paras. 107 and 108:

> ...It is not possible, in my view, to disentangle [the partner's] wrongful act from the "ordinary business" of [the law firm] so as to hold that [the partner] was off "on a frolic of his own". In these circumstances the "twin objectives" of compensation of the wronged client and deterrence of faithless fiduciaries will generally be furthered by vicarious liability, e.g., by encouraging greater vigilance by other partners, even though in some cases (as here) it may be difficult to know what more the other partners ought to have done to keep [the partner] out of trouble.
>
> If [the law firm] is called on to pay monies to [the client]on the basis of vicarious liability, [the law firm] will no doubt seek to claim indemnity from [the partner]. If, in the circumstances, the claim is allowed and the rogue partner can pay, the firm is protected. If the rogue partner cannot pay, the legislature has decided that there is no good reason why the loss or injury should be inflicted on the innocent client rather than on the partnership which put the rogue partner in a professional position to do what he or she did.

63 Chief Justice McLachlin gave the dissenting judgment. She found that a breach of fiduciary duty had not been established. In her brief observations concerning the liability of the partnership for the acts of the rogue, she observed that the basis for the liability of the partnership was the *Partnership Act* and that the determination of whether an act was in the ordinary course of the firm's business requires that one look at the nature of the activity and not the manner in which the activity is performed. As she observed, it is possible for a solicitor to commit a fraud or other wrong in the course of the firm's practice: "It is the nature of the underlying transaction that is critical" (at para. 163).

64 The decision in *Strother* dealt with an equitable wrong, but in my view, there is no reason to distinguish between an equitable wrong and a statutory wrong. Both are a "wrongful act or omission". In the case of a statutory wrong, it will be necessary to examine the statute to determine whether vicarious liability is expressly or impliedly excluded. I will turn to that question shortly.

65 WeirFoulds refers, however, to three authorities that it says run contrary to a theory of vicarious liability for statutory wrongs.

66 The first is *Nelson v. Gubbins*, above, which was referred to by Lord Nicholls in *Majrowski* as a case in support of the proposition that the law of vicarious liability applies to statutory obligations unless the statute provides otherwise.

67 In that case, the plaintiffs, who were members of a First Nation, made a complaint under the *Human Rights Code*, R.S.B.C. 1979, c. 186, alleging that they had been unlawfully denied the right to occupy certain rental premises. The complaint was filed against the manager of the premises and the rental agent who was employed by the owner and who supervised the manager. The board of inquiry had found that the manager had "knowingly or with a wanton disregard" contravened the *Code* and was therefore liable for aggravated damages under the *Code*. It held that the rental agent was "vicariously liable" for the contravention.

68 The Board of Inquiry's findings of fact were somewhat confusing. It found that:

- the manager was employed by the owner of the premises and not by the rental agent;
- the rental agent was responsible for the administration of the premises and made the ultimate decision as to who should occupy the premises and gave directions to the manager;
- the manager contravened the statute "knowingly and with a wanton disregard" and was therefore liable for aggravated damages under the *Code*; and
- the manager was not an agent of the rental agent for any relevant purpose but that in her dealings with the plaintiffs, she was acting in the course and scope of her employment and that there was sufficient evidence to make the rental agent vicariously liable for the manager's contravention of the *Code*.

69 On appeal, a British Columbia Supreme Court Judge held that the rental agent was not vicariously liable. The plaintiffs appealed to the British Columbia Court of Appeal.

70 The Court of Appeal found that there were certain parts of the decision of the Board that indicated that it had found that the manager was an employee of the rental agent. It dealt with the appeal on the basis that the issue was whether the rental agent, as employer, was vicariously liable for the contravention of the *Code* by the manager. It held, however, that since the award of aggravated damages could only be made against a "person who contravened this Act", it applied only to the vicarious liability of the manager and not that of the rental agent.

71 Craig J.A., with whom Bull J.A. agreed, concluded that although there are sound policy reasons for extending vicarious liability to statutory causes of action, the wording of the statute in question made it clear that there was no express or implied intention to make the employer liable for the discriminatory conduct of the employee. He stated, at para. 19:

> If policy is the basis for the vicarious liability of a master at common law because of the culpable conduct of his servant, then, logically, it should be, also, the basis for statutory liability, subject, of course, to the intention of the Legislature as expressed under relevant legislation. It is not necessary, however, to resolve that problem in this particular case because,

> in my opinion, reading the words of the Statute in their context and in their ordinary and grammatical sense it cannot be said that the respondent is vicariously liable. If the Legislature had intended that an individual in the position of the respondent should be amenable to any of the orders which may be made under s. 17, it would have been a simple matter for the Legislature to have enacted words to the effect that any employer whose servant contravened the Act in the course of his employment would be deemed to have contravened the Act. The Legislature has not done so either expressly or impliedly.

72 I do not regard this case as particularly strong authority for WeirFoulds, because the decision turns on the interpretation of the statute in question. Indeed, the first sentence of the above extract is consistent with the observations of Binnie J. in *Strother* and of Lord Nicholls in *Majrowski*.

73 The second case relied upon by WeirFoulds is *Robichaud v. Brennan*, [1987] 2 S.C.R. 84, [1987] S.C.J. No. 47 (S.C.C.). That case involved a complaint to the Canadian Human Rights Commission, alleging sexual harassment by the complainant's supervisor at the Department of National Defence. The Review Tribunal had found that the Department was strictly liable for the actions of its supervisory personnel. The Federal Court of Appeal allowed the appeal of the Crown on the basis that the complaint was not sustainable against it.

74 In *Robichaud*, the Supreme Court of Canada allowed the complainant's appeal. It held that it was not necessary to analyze the issue by reference to theories of vicarious liability. The real purpose of the legislation was to eradicate discrimination and questions of motive or whether the person was acting in the course of their employment were not germane to giving effect to the goal of the legislation. Considering the purpose of the legislation as a whole and the scope of the remedies available, such as remedial measures that could only be instituted by the employer, it was clear that Parliament intended that the employer could be found liable for the acts of its employees in the course of their employment, interpreted in a broad sense. La Forest J., stated as follows at para. 17:

> Hence, I would conclude that the statute contemplates the imposition of liability on employers for all acts of their employees "in the course of employment", interpreted in the purposive fashion outlined earlier as being in some way related or associated with the employment. It is unnecessary to attach any label to this type of liability; it is purely statutory. However, it serves a purpose somewhat similar to that of vicarious liability in tort, by placing responsibility for an organization on those who control it and are in a position to take effective remedial action to remove undesirable conditions. ...

75 WeirFoulds emphasizes the use of the words "it is purely statutory" to suggest that the vicarious liability of the employer can only be imposed by statute. I disagree. I do not regard the decision of the Supreme Court as excluding the possibility that there can be vicarious liability for statutory wrongs committed by an employee. I regard it as simply stating that in this particular case,

considering the objects of the legislation and its particular provisions, it was unnecessary to engage in a vicarious liability analysis or to consider whether a conventional "course of employment" analysis was required.

76 The third authority relied upon by WeirFoulds is *R. v. Servacar Ltd.* (1983), 1 O.A.C. 96, [1983] O.J. No. 190 (Ont. C.A.), in which Dubin J.A., giving the judgment of the Court of Appeal for Ontario, stated at para. 10: "If liability is to be imposed on someone for the acts or omissions of others, then it is important that the statute clearly manifests such intention." WeirFoulds relies upon this general statement in support of the proposition that s. 131(1)(a) should not be extended to a partnership of which the director is a member, because it contains no express statement to that effect.

77 *Servacar* was a case in which a mechanic employed by a service station had inspected a vehicle and had issued a safety standards certificate certifying that the vehicle in question met the applicable equipment and performance standards. It was alleged that the vehicle did not meet those standards and both the mechanic and his employer were charged with an offence under the *Highway Traffic Act*, (now R.S.O. 1990, c. H.8), and were convicted.

78 The Court of Appeal, in setting aside the conviction of the service station, held that the obligation of the service station was to ensure that the vehicle was inspected by a mechanic who found that the vehicle complied with the applicable standards. That had occurred. There was no vicarious liability under the statute if the mechanic failed to perform his duty.

79 I do not regard this case as authority for the broad proposition asserted by WeirFoulds. In the first place, the statute in question, the *Highway Traffic Act*, is a penal statute and was quite properly strictly construed. As well, the Court of Appeal found that on the construction of the statute, no offence had been committed by the employer. In contrast, the *Partnership Act* evidences an unambiguous intent that a partnership should be liable for the acts of its partners in the course of the partnership's business.

Statutory Interpretation

80 I turn then to the second branch of WeirFoulds' submission on the s. 131(1) issue, to the effect that, as a matter of statutory interpretation, s. 131 of the *Securities Act* does not make law firms responsible for the statutory liability of their partners or employees.

81 I discussed s. 131 of the *Securities Act* in the original decision on certification: *Allen v. Aspen Group Resources Corp.*, above. The full text of the provision was attached as a schedule to my reasons. There is nothing in the express language of the section to indicate that the statutory liability is to extend to employers or partners of persons who were directors of the corporation or who signed a certificate in the Circular. On the other hand, there is nothing in the express language

to indicate that the vicarious liability of partners, imposed pursuant to common law and codified by the *Partnership Act*, is to be excluded.

82 It is well-settled that the modern rule of statutory interpretation requires that "the words of an Act ... 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": *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.) at para. 26, citing Elmer A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 87; *Friends of Lansdowne Inc. v. Ottawa (City)*, 2012 ONCA 273, [2012] O.J. No. 1860 (Ont. C.A.).

83 The take-over bid rules contained in s. 131 of the *Securities Act* followed the Kimber Report (*The Report of the Attorney General's Committee on Securities Legislation in Ontario* (Toronto: Queen's Printer, 1965)). The purpose of the legislation was to protect the interests of shareholders of the offeree by ensuring that they received adequate time, adequate information, and equal treatment from any bidder: see Jeffrey G. MacIntosh and Christopher C. Nicholls, *Essentials of Canadian Securities Law* (Toronto: Irwin Law, 2002) at 296. The requirement to deliver a circular is at the heart of the legislative scheme and is designed to ensure that all security holders of the offeree are equipped with the information necessary to make an informed decision on whether to tender in response to the bid. To ensure that the directors of the offeror exercise reasonable care to ensure that the circular is accurate, they are made personally liable for misrepresentations in the circular, subject to a defence of due diligence (s. 131(7)).

84 It seems to me, therefore, that the purpose of s. 131, and specifically that of s. 131(1)(a) giving a cause of action for misrepresentation against directors of offerors, is to ensure that directors exercise due diligence to ensure the accuracy of the circular and to provide a source of compensation to those who suffer loss as a result of the inaccuracy of the circular.

85 WeirFoulds' first submission on the statutory interpretation argument is that the plain meaning of s. 131(1)(a) creates a cause of action only against directors. It says nothing about those who employ the director or those who are in partnership with directors. In fact, under the pertinent legislation, only a natural personal can be a director — a partnership or corporation cannot be a director. In my view, this submission does not advance the inquiry. The issue is not whether WeirFoulds is or could be a director. It is whether WeirFoulds can be held accountable for the statutory liability of the partner who it placed at Aspen's boardroom table.

86 Moreover, WeirFoulds' submission on this point is really the argument that was rejected by Lord Nicholl in *Majrowski*, in holding that that the ordinary rule of vicarious liability should apply unless the statute excludes it expressly or by implication. I would reject WeirFoulds' submission for the reason expressed by Lord Nicholl at para. 16 of *Majrowski* and by Binnie J. at para. 102 of *Strother*, referred to above. The ordinary rule is that a partnership is liable for all wrongs committed

by a partner acting with the authority of the partnership and in the ordinary course of its business. Clear statutory language is required to displace that rule.

87 WeirFoulds' second submission is that the liability under s. 131(1)(a) is personal to the director. This is another way of saying that the section does not expressly state that there can be vicarious liability for the acts of the director. WeirFoulds says that, unlike the *Robichaud* case, where effectuating the purpose of the legislation could only be accomplished if the employer was responsible for the acts of employees, there is nothing in the legislation in this case to suggest that the legislature intended to extend liability to those other than directors. It says that this is confirmed by the "due diligence" defence, which is necessarily personal in nature. Similarly, s. 131(5)(b) provides a defence if the director, on becoming aware of a misrepresentation in the circular, withdraws the consent and gives reasonable notice of and the reason for withdrawal. WeirFoulds says that these are personal defences and that extending liability under s. 131 to partnerships and others who do not have control of or access to the pertinent information would not further the purposes of the legislation.

88 To say that the liability under s. 131(1)(a) is "personal" to the director is to state a conclusion rather than a reason. It seems to me that the case can be made that, although the legislation is silent on the point, the purpose of the legislation can best be accomplished by holding partnerships and corporations accountable for the actions of those they select to sit on corporate boards. This way, partnerships and corporations can ensure that their employees and partners are competent to fulfill the responsibilities of a board member. They can put in place appropriate standards and controls to make sure that the director exercises due diligence in the discharge of his or her responsibilities. The partnership, or the corporation that employs the director, obtains the benefit of fees earned by the director, and fairness suggests that it should be required to stand behind the director in the event shareholders suffer loss as a result of the director's failure to exercise due diligence.

89 WeirFoulds' third submission is that the statute should be read as a whole and where the legislature has sought to impose liability under the *Securities Act*, it has done so expressly. It points in particular to s. 134, which imposes liability on persons in a "special relationship with a reporting issuer" who engage in trading with knowledge of material facts not generally disclosed or who engage in tipping. Persons in a "special relationship" are defined to include insiders, affiliates and "associates", the latter being defined to include "any partner of that person or company" (see s. 1(1) and s. 76(5)). WeirFoulds submits that, applying the "legislative exclusion rule", if the legislature had wanted to include partners within the scope of the s. 131 liability, it would have used the term "associate" to describe those liable: see *University Health Network v. Ontario (Minister of Finance)* (2001), 208 D.L.R. (4th) 459, [2001] O.J. No. 4485 (Ont. C.A.) at paras. 30-31.

90 I do not agree with this submission. The objectives of s. 134 are entirely different from those of s. 131. The scope of the definition of "associate" is extremely broad and includes a wide group of persons who would not have vicarious liability for the underlying acts.

91 I might add here that the plaintiff relies on s. 131(11) of the *Securities Act*, which is titled "No derogation of rights" and which provides:

> The right of action for rescission or damages conferred by this section is in addition to and without derogation from any other right the security holders of the offeree issuer may have at law.

92 The plaintiff notes that s. 131(11) would preserve other remedies of the plaintiff, such as a common law cause of action for misrepresentation or a statutory oppression remedy. He submits that the sub-section is an express preservation of the common law rule of liability of partnerships, as embodied in the *Partnerships Act*.

93 In my view, as a matter of pure statutory interpretation, this submission fails. The subsection refers to the statutory "right of action" being in addition to "any other right" the security holders may have at law. The issue is not whether there is another right of action available to the plaintiff at law, it is whether the statutory right of action conferred by s. 131 is exclusive or inclusive of other rights conferred by other legislation — in this case, the right to hold a partnership liable for the acts of one of its partners in the ordinary course of the business of the firm.

94 The fourth submission of WeirFoulds is that s. 131 is intended to be a "complete code" governing claims based on misrepresentations in a take-over bid circular. It says that the provision is a "purely statutory cause of action" and that it is not appropriate to judicially expand it by imposing liability on parties who are not specifically mentioned in the statute. WeirFoulds relies, in part, on *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1764, [2011] O.J. No. 1240 (Ont. S.C.J.) at para. 9, in which I described the sibling provision in s. 130 (dealing with prospectus misrepresentation) as "a purely statutory cause of action, it is a complete code governing such claims." I found that it would not be appropriate to import the common law "special circumstances" doctrine to extend the limitation period expressed in the statute. I also held that even if I had jurisdiction to extend the limitation period, I would not do so in that case.

95 Related to this submission is WeirFoulds' argument that interpreting the *Partnerships Act* to impose liability on a partnership would create an absurdity, because while a partnership would be liable for the acts of its partner, it would not be liable for the acts of its employee, such as an associate lawyer sitting on the Board.

96 Section 131 is a complete code, in that it imposes a statutory liability for misrepresentation in a circular, without regard to reliance by the security holder. That does not, however, preclude the possibility that liabilities imposed by other statutes cannot attach to those whose conduct is regulated by the code.

97 As well, it seems to me entirely possible that the common law of vicarious liability could attach to WeirFoulds if it had inserted one of its associates into Aspen's Board in the ordinary course of business and while billing for his or her work. I see no reason in principle why the law firm could not be held vicariously liable for the associate's liability under s. 131.

98 WeirFoulds' fifth and final submission is that the plaintiff's position would set a "dangerous precedent", because it would unduly expand the scope of liability under s. 131. It would expose employers and partnerships to class action lawsuits based on the whole gamut of exposures under the *Securities Act* for take-over bids (s. 131), prospectuses (s. 130), offering memoranda (s. 130.1) and the secondary market (s. 138.3). It would result in them being fixed with knowledge obtained by the partner or employee in his or her capacity as a director. They say that expanding the statutory liability of directors to the firms in which they are partners would have a "chilling effect" on lawyers' willingness to act as directors.

99 I have set out earlier the reasons why, in my view, imposing liability on those who employ a director or who are in partnership with the director, is in keeping with the purpose of the *Securities Act*. It promotes the goals of compensation, loss distribution and risk management. Any other result would be unfair.

100 Imposing liability on WeirFoulds also fulfills the purpose of the *Partnership Act*. This statute reflects the principle that those who are responsible for the activities of a partnership and who profit from these activities should be held accountable to persons who suffer wrongs committed in the conduct of the business.

101 Egan sat on the Board of Aspen, because Aspen was a client of WeirFoulds. He was acting in the ordinary course of the business and as a partner of WeirFoulds when he sat at Aspen's boardroom table and when he signed the Circular. WeirFoulds billed for his work and the proceeds of those billings were shared by the partnership. To hold that WeirFoulds is insulated from his liability would be inconsistent with the *Partnerships Act* and would not promote the objectives of the *Securities Act*

102 Moreover, looking to the *Partnership Act*, the words "wrongful act or omission" in s. 11 are broad enough to include the statutory wrong of misrepresentation created by s. 131 of the *Securities Act*. In light of the decision in *Strother* to the effect that there can be liability for equitable wrongs as well as common law wrongs, I see no reason why s. 11 should not extend to statutory wrongs.

103 I do not, therefore, accept the submission of WeirFoulds that this decision will deter lawyers from acting as directors. On the contrary, it would result in a sharing of the risk and responsibility between the lawyer and his or her law firm. This result accomplishes the goals of both the *Securities Act* and the *Partnership Act*. It provides greater protection for the public, results in higher standards and controls, and puts the risk on the party most able to control and insure it.

104 I have decided, therefore, that the summary judgment motion under this head should be dismissed, without prejudice to the right of WeirFoulds to raise the issue at trial. As the action will proceed to trial under the common law duty of care issue in any event, the issue of WeirFoulds' liability under s. 131(1)(a) should also be left to a trial judge. The issue is one of first impression; neither the Court of Appeal nor the Supreme Court of Canada has directly addressed the issue in *Majrowski*. The issue is important to the business world and to the legal profession. It should be decided on a full factual record.

Conclusion

105 For the foregoing reasons, the summary judgment motions are dismissed, with costs. If not otherwise resolved, the parties may make written submissions as to costs, which shall be addressed to me care of Judges' Administration. The submissions shall not exceed five pages in length, excluding the costs outline.

Motions dismissed.

Tab 34

2017 BCSC 1525
British Columbia Supreme Court

Tucci v. Peoples Trust Company

2017 CarswellBC 2373, 2017 BCSC 1525, [2017] B.C.W.L.D. 5559,
[2017] B.C.W.L.D. 5580, [2017] B.C.W.L.D. 5669, 283 A.C.W.S. (3d) 88

Gianluca Tucci (Plaintiff) and Peoples Trust Company (Defendants)

D.M. Masuhara J.

Heard: June 27, 2016; June 28, 2016; June 29, 2016; August 5, 2016; November 4, 2016
Judgment: August 29, 2017
Docket: Vancouver S138544

Counsel: T.P. Charney, A. Greenwood, for Plaintiff
R. Hira, Q.C., A.N. Bultz, for Defendant

Subject: Civil Practice and Procedure; Contracts; Public; Torts; Municipal
Related Abridgment Classifications
Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.b Certification
V.2.b.i Plaintiff's class proceeding
V.2.b.i.H Miscellaneous
Contracts
IX Performance or breach
IX.8 Breach
IX.8.d Miscellaneous
Privacy and freedom of information
II Provincial privacy legislation
II.1 Constitutional issues
Headnote
Contracts --- Performance or breach — Breach — Miscellaneous
Defendant company did not adequately secure personal information collected on its online application portal and stored in online databases — Company's contract with its clients asserted that its privacy policies and practices were designed to comply with federal Personal Information Protection and Electronic Documents Act ("PIPEDA") or corresponding provincial privacy legislation, as applicable — Plaintiffs filed notice of civil clam — Plaintiffs brought application

for certification of class proceeding on grounds including breach of contract; company brought application to strike claim — Certification granted; application to strike granted in part — "Complete code" doctrine could not apply to this cause of action — Key feature of code is that it is meant to offer exhaustive account of law in area; it occupies field in that area, displacing existing common law rules and cutting off further common law evolution — It was alleged that contracts contained number of freestanding obligations relating to protection of privacy, and in addition that by express incorporation, and/or by necessary implication, contracts contained certain terms related to protection of privacy, some of which required compliance with PIPEDA — It is always open to parties to incorporate legislative requirements into their contracts, absent defence — It was not plain and obvious that PIPEDA foreclosed claim for breach of contract — Legislation provides for hearing de novo in Federal Court, where among other remedies, damages may be claimed, including damages for humiliation — It was also not plain and obvious that limitation of liability clause excluded company's liability.

Privacy and freedom of information --- Provincial privacy legislation — Constitutional issues

Defendant company did not adequately secure personal information collected on its online application portal and stored in online databases — Company's contract with its clients asserted that its privacy policies and practices were designed to comply with federal Personal Information Protection and Electronic Documents Act ("PIPEDA") or corresponding provincial privacy legislation, as applicable — Plaintiffs filed notice of civil clam — Plaintiffs brought application for certification of class proceeding; company brought application to strike claim — Certification granted; application to strike granted in part — While provincial superior courts may address federal common law, reasons behind not recognizing common law privacy tort in British Columbia appear to arise mainly from concerns about legislative intention behind provincial legislation such as Privacy Act or Freedom of Information and Protection of Privacy Act — Whether provincial legislature intended to abolish or preclude development of federal common law, and if it did whether it is constitutionally capable of doing so, are very different issues from whether provincial common law recognizes this tort — Question remained open whether there may be applicable federal common law — Such novel claim involving resolution of complex and undecided questions of constitutional law should be allowed to proceed.

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Miscellaneous

Defendant company did not adequately secure personal information collected on its online application portal and stored in online databases — Company's contract with its clients asserted that its privacy policies and practices were designed to comply with federal Personal Information Protection and Electronic Documents Act ("PIPEDA") or corresponding provincial privacy legislation, as applicable — Plaintiffs filed notice of civil clam — Plaintiffs brought application for certification of class proceeding on grounds including breach of contract; company brought application to strike claim — Certification granted; application to strike granted in part — Proposed class had estimated 11,000 to 13,000 members and included all persons residing in

Canada who completed online account application with company's application and whose personal information was contained on database in company's control that had been compromised and/or disclosed to others on Internet — Number of common issues met threshold for commonality — Given that this could have affected so many aspects of this litigation, interpretation of limitation of liability clause ought to be common issue as well — Class proceeding was preferable procedure — Fact that individual inquiries would be required was not determinative of question of preferability — Class was approved on opt-out basis.

APPLICATION for certification of class proceeding brought by plaintiffs; APPLICATION to strike claim brought by defendant.

***D.M. Masuhara J.*:**

I. INTRODUCTION

1 These Reasons deal with an application for an order certifying this action as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the "*CPA*").

2 The essence of the action is that the defendant, Peoples Trust Company ("Peoples Trust"), did not adequately secure personal information collected on its online application portal and stored in online databases. As a result, it is asserted that unauthorized persons were able to access the personal information, putting the proposed class members at risk of identity theft, cybercrime, and "phishing". The action is founded on (a) breach of contract, (b) negligence, (c) breach of confidence, (d) breach of privacy and intrusion upon seclusion, and, in the alternative, (e) unjust enrichment and waiver of tort.

3 The proposed class, estimated at 11,000 — 13,000 members, is described as:

> All persons residing in Canada who completed an online account application with PTC and whose personal information was contained on a database in the control of PTC which was compromised and/or disclosed to others on the internet.

4 There are two sub-classes proposed:

> i. The "Resident Sub-Class":
>
> > All persons residing in British Columbia who completed an online account application with PTC and whose Personal Information was contained on a database in the control of PTC which was compromised and/or disclosed to others on the internet; and
>
> ii. The "Non-Resident Sub-Class":

> All persons resident outside of British Columbia who completed an online account application with PTC and whose Personal Information was contained on a database in the control of PTC which was compromised and/or disclosed to others on the internet.

5 Subsequent to the filing of the application, Mr. Taylor was added as a plaintiff to this action. His qualifications are dealt with later in these Reasons. These Reasons refer to Mr. Tucci and Mr. Taylor collectively as the plaintiff or the applicant, unless the context requires otherwise.

II. BACKGROUND

A. The parties

1. The defendant Peoples Trust

6 The defendant Peoples Trust is a federally regulated trust company incorporated pursuant to the *Trust and Loan Companies Act*, S.C. 1991, c. 45. As such, it is subject to federal privacy legislation, as overseen by the Office of the Privacy Commissioner of Canada (the "Privacy Commissioner"). Peoples Trust's head office is in Vancouver and it has branch offices in Vancouver, Toronto, and Calgary. It provides financial products and services such as savings accounts, mortgages, and credit cards across Canada. Many of its services are provided online.

2. The plaintiffs

7 The plaintiff Mr. Tucci is an individual residing in Windsor, Ontario. In about October 2012, he applied online for a Peoples Trust tax-free savings account. Peoples Trust approved his application and opened his account.

8 The plaintiff Mr. Taylor is a retiree residing in Richmond, B.C. In about March 2009, he applied online for a savings account at Peoples Trust.

9 Both plaintiffs were notified by Peoples Trust that they may be at risk of identity theft because an online database containing personal information they provided had been accessed over the interest by unauthorized individuals located in the People's Republic of China.

B. The online applications

10 The plaintiff, like all applicants for deposit services, provided personal information including name, address, telephone number, email address, date of birth, Social Insurance Number, and occupation. Applicants for Peoples Trust credit card and other services must provide the same personal information and their mother's maiden name.

11 According to the plaintiff, the plaintiff and proposed class members entered agreements with the defendant related to the use of the defendant's website and the defendant's collection, retention, use, and disclosure of personal information. The terms of the agreements incorporated Peoples Trust's "Website Terms & Conditions" and "Terms & Conditions".

12 The Website Terms & Conditions included the following:

> 7. Privacy and Security
>
> PTC is committed to ensuring that personal information you have provided to us is accurate, confidential, and secure. Our privacy policies and practices have been designed to comply with the Personal Information Protection and Electronic Documents Act (Canada) or corresponding provincial privacy acts, as applicable (collectively, "Privacy Laws").
>
> 14. Applicable Law
>
> These terms and conditions, your access to and use of the Website, and all related matters are governed solely by the laws of British Columbia and applicable federal laws of Canada, excluding any rules of private international law or the conflict of laws that would lead to the application of any other laws. Any dispute between PTC and you or any other person arising from, connected with, or relating to the Website, this Agreement, or any related matters (collectively, "Disputes") must be resolved before the Courts of the Province of British Columbia, Canada, sitting in the City of Vancouver, and you hereby irrevocably submit and attorn to the original and exclusive jurisdiction of those Courts in respect of all Disputes. Any proceeding commenced by you or on your behalf regarding a Dispute must be commenced in a court of competent jurisdiction in Vancouver, British Columbia within six months after the Dispute arises, after which time any and all such proceedings regarding the Dispute are barred.

13 The Terms & Conditions included:

> 1.24 Privacy Policy
>
> We are committed to ensuring that the personal information you have provided to us is accurate, confidential, and secure. PTC's privacy policies and practices have been designed to comply with the federal Personal Information Protection and Electronic Documents Act ("PIPEDA") or corresponding provincial privacy legislation, as applicable (collectively "Privacy Laws").

14 Finally, Peoples Trust's privacy policy stated:

> 7. The security of your personal information is a priority for Peoples Trust

> We take steps to safeguard your personal information, regardless of the format in which it is held, including:
>
> > Physical security measures such as restricted access facilities and locked filing cabinets;
> >
> > Shredding of documents containing personal information;
> >
> > Electronic security measures for computerized personal information such as password protection, database encryption and personal identification numbers;
> >
> > Organizational processes such as limiting access to your personal information to a selected group of individuals;
> >
> > Requiring third parties given access to your personal information to protect and secure your personal information.

C. The security breach

15 In about September 2013, cybercriminals gained unauthorized access to the defendant's databases and stole website users' personal information. As a result, unsolicited text messages were sent to users of the defendant's website purporting to be from the defendant. The messages asked the recipients to call a telephone number based in the state of Utah. According to the plaintiff, these text messages were attempts at "phishing": soliciting money or information from individuals by pretending to be a trusted company.

D. Defendant's investigation and notification of authorities

16 The defendant says it became aware of a possible breach in the week of October 7, 2013. The defendant initiated a forensic investigation that confirmed that a database had been compromised in the attack, which originated from China. According to the plaintiff, the investigator informed the defendant of this on October 11, 2013.

17 The defendant notified the Vancouver Police Department, the RCMP, and affected patrons of the security breach. The defendant reported the security breach to the Privacy Commissioner on October 15, 2013.

E. Defendant's notification of customers

18 By letter dated October 25, 2013, the defendant informed all potentially affected persons of the security breach and of steps the defendant had taken to mitigate the risk of fraud and theft. The plaintiff estimates that the letter was sent to 11,000 — 13,000 individuals, including himself.

19 The letter advised that the defendant had arranged for flags to be placed on the customers' credit files to alert companies that the customers' data may have been compromised and that the

companies should take additional steps to verify their identity. The letter stated that the flags would stay on the credit files for six years unless cancelled earlier by the customer.

20 The letter advised the customers to:

> (a) never respond to unsolicited requests for banking or personal information;
>
> (b) treat as fraudulent emails or text messages purporting to be from the defendant asking for account or other information;
>
> (c) monitor for and report suspicious activity in their Peoples Trust accounts; and
>
> (d) obtain a copy of their credit report to ensure there has been no fraudulent use of their credit information.

F. Privacy Commissioner of Canada's investigation

21 As noted, the defendant reported the breach to the Privacy Commissioner on October 15, 2013. The Privacy Commissioner also received several complaints from affected individuals.

22 On January 7, 2014, the Privacy Commissioner initiated a complaint pursuant to s. 11(2) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 [*PIPEDA*]. The Commissioner's findings were reported on April 13, 2015. The Commissioner's findings were reported in the Office of the Privacy Commissioner's 2014 annual report to Parliament: *Privacy Protection:* A Global Affair*, Annual Report to Parliament 2014, Report on the* Personal Information Protection and Electronic Documents Act (Gatineau: Minister of Public Works and Government Services Canada, 2015).

23 The Annual Report addressed the security breach as follows (at p. 19):

> Our investigation observed that the company did not implement sufficiently strong safeguards in developing its online application web portal in order to protect the sensitive personal information being collected from customers. As well, when the breach occurred, the company lacked a comprehensive information security policy.
>
> There was also a lack of ongoing monitoring and maintenance to identify and address evolving digital vulnerabilities and threats. As a result, unbeknownst to the organization, a copy of the customer information — a duplicate of data held in the company's internal database — was being stored unnecessarily, unencrypted, and in perpetuity, on a web server that had not been updated to address a well-known vulnerability. Had this unnecessary duplicate not been on the web server in the first place, it would not have been compromised during the breach.

We also noted that during our investigation, Peoples Trust was very cooperative with our Office and demonstrated a timely and comprehensive breach response. For example, it immediately hired a consultant to identify the breach's cause and "plug the leak." It also implemented new measures to help affected individuals and reduce the risk of a future breach.

These included:

- providing clear and comprehensive notifications and offering credit alerts to those affected by the breach;
- ending the unnecessary retention of customers' personal information on the web server;
- enhancing technological safeguards to protect information collected online; and
- developing procedures and associated internal communications to support privacy protection practices, such as requiring greater diligence in selecting and hiring third parties for developing information management systems.

As a result, we concluded that the matter was well-founded and resolved.

G. History of this proceeding

24 The plaintiff's notice of civil claim was filed on November 18, 2013 and an amended notice of civil claim was filed on March 26, 2015.

25 The defendant served a notice of application to strike the claim under Rule 9-5 on July 30, 2014. The defendant filed this application on April 24, 2015.

26 For Reasons dated July 11, 2015, and indexed at 2015 BCSC 987 (B.C. S.C.), I ordered that the application to strike the claim be heard concurrently with the certification application, which at that time was scheduled to begin on April 18, 2016.

27 Subsequent amendments to the pleadings have been filed by the applicant. The pleadings reviewed are the plaintiff's Third Amended Notice of Civil Claim.

III. DISCUSSION

28 The goals of the *CPA* are access to justice, behaviour modification and judicial economy. These goals are to be kept in mind in the certification process. The requirements for obtaining certification are set out in s. 4(1) of the *CPA*:

> 4 (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of 2 or more persons;

(c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

(e) there is a representative plaintiff who

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

29 In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters, including the following (s. 4(2)):

(a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;

(b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

(c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

(d) whether other means of resolving the claims are less practical or less efficient;

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

30 The onus is on the party seeking certification to meet the requirements. The burden is not an onerous one. The cause of action requirement in s. 4(1)(a) is satisfied unless, assuming all the pleaded facts are true, it is plain and obvious that the claim cannot succeed: *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.) at 980; *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at para. 25. With respect to the other four requirements in s. 4(1), the applicant need only provide a minimum evidentiary basis that shows some basis in fact for each of them; the

certification hearing is procedural and not the forum where the merits of the action are decided: *Hollick* at paras. 24 — 25; *Ring v. Canada (Attorney General)*, 2010 NLCA 20 (N.L. C.A.) at para. 14, leave to appeal refused 2010 CanLII 61130 [2010 CarswellNfld 304 (S.C.C.)]. The "some basis in fact" standard does not require the court to resolve conflicting facts and evidence at the certification stage. The authorities on this point have reiterated that at the certification stage the court is ill-equipped to resolve such conflicts: *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 (S.C.C.) at para. 102 [*Microsoft*].

31 In this respect, I note (as I have in the past) the observation of Rothstein J., for the Court, in *Microsoft* at para. 105:

> Canadian courts have resisted the U.S. approach of engaging in a robust analysis of the merits at the certification stage. Consequently, the outcome of a certification application will not be predictive of the success of the action at the trial of the common issues. I think it important to emphasize that the Canadian approach at the certification stage does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial. After an action has been certified, additional information may come to light calling into question whether the requirements of s. 4(1) continue to be met. It is for this reason that enshrined in the *CPA* is the power of the court to decertify the action if at any time it is found that the conditions for certification are no longer met (s. 10(1)).

32 While not deciding the merits of the action, the court must equally avoid only symbolic scrutiny of the adequacy of the evidence. The court acting as a gatekeeper is to use the certification process as a meaningful screening device: *Microsoft* at para. 103.

33 If the five requirements under s. 4(1) have been established the court must certify the action.

A. Cause of action

34 The plaintiff pleads (a) breach of contract, (b) negligence, (c) breach of confidence, (d) breach of privacy and intrusion upon seclusion, and, in the alternative, (e) unjust enrichment and waiver of tort.

35 The defendant says that the civil claim does not disclose a cause of action. The defendant takes issue with each individual cause of action, saying that the plaintiff's pleadings suffer from numerous deficiencies. The defendant also says that its liability is limited by terms in the contracts the plaintiff seeks to rely on.

36 There are two issues that touch on multiple causes of action, and which I will address first: (1) forum selection and choice of law, and (2) whether *PIPEDA* is a complete code that precludes common law claims for breach of privacy.

1. Forum selection & choice of law

(a) Plaintiff's position

37 The plaintiff says that this proceeding is brought in this Court based on the forum selection clause in the contract (stated at para. 11 above), which provides that disputes concerning the contract or the website must be brought in this Court.

38 The plaintiff says that "the federal laws of Canada, including the common law" are available to found the class members' claims because (a) Peoples Trust is a federally-licenced trust company; (b) the choice of law clause provides that federal common law applies; (c) Peoples Trust is subject to *PIPEDA*; and (d) Peoples Trust entered into contracts with class members across Canada.

39 In the alternative, the plaintiff says that the choice of law clause is invalid for ambiguity or "the circumstances" are such that the Court should disregard it, and that the laws of British Columbia apply to all claims other than intrusion upon seclusion. The plaintiff does not specify what "the circumstances" may be. The plaintiff says in the further alternative that the law of the place in which the class member resided applies to intrusion upon seclusion (although as the plaintiff did not plead a primary alternative for intrusion upon seclusion I do not think this is a "further" alternative).

(b) Defendant's position

40 The defendant does not take issue with the plaintiff's choice of forum and does not expressly counter the plaintiff's submissions on choice of law. However, as will be seen, the defendant submits that the common law of British Columbia, not "federal common law", applies to the plaintiff's common law claims. The defendant also submits that the Applicable Law clause is "invalid and inapplicable" because it would result in contracting out of *PIPEDA*, which is binding public interest legislation.

(c) Analysis

41 ln my view, it is not plain and obvious that there are no reasonable causes of action available under federal common law.

42 The choice of law provision refers to "applicable federal laws". This is certainly broad enough to potentially include federal common law. The real issue is whether there exists any "applicable" federal common law with respect to any of the claims: breach of contract, negligence, breach of confidence, intrusion upon seclusion, unjust enrichment, and waiver of tort. On this point I note that although the plaintiff asserts that the federal common law founds the claims, nowhere in the submissions is any cause of action differentiated from provincial common law other than the tort of intrusion upon seclusion.

43 There is no doubt that some federal common law exists: *Wewayakum Indian Band v. R.*, [1989] 1 S.C.R. 322 (S.C.C.) [hereinafter Roberts] at 339-340. Defining what is and is not federal common law for the purpose of determining whether any applicable federal common law exists is more difficult. Most recently, in *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54 (S.C.C.), the Supreme Court of Canada referred, at para. 41, to federal law as including "a rule of the common law dealing with a subject matter of federal legislative competence".

44 Counsel's submissions on this point were limited. The plaintiff referred to *Condon v. R.*, 2014 FC 250 (F.C.), varied 2015 FCA 159 (F.C.A.), as an example of the application of the federal common law of intrusion upon seclusion. However, the mere fact that the Federal Court applied a common law doctrine does not mean that that doctrine constitutes federal common law. *Condon* was not concerned with whether the tort of intrusion upon seclusion was part of federal common law. Although the Federal Court's jurisdiction is limited to administering the "laws of Canada", there was no challenge to its jurisdiction in *Condon*, and in any event "[w]here a case is in 'pith and substance' within the court's statutory jurisdiction, the Federal Court may apply provincial law incidentally necessary to resolve the issues presented by the parties": *Miida Electronics Inc. v. Mitsui O.S.K. Lines Ltd.*, [1986] 1 S.C.R. 752 (S.C.C.) at 781.

45 The case law discloses a number of examples of federal common law: the law of aboriginal title:*Roberts* at 339-340; federal crown liability: *Canadian Pacific Ltd. v. Quebec North Shore Paper Co.* (1976), [1977] 2 S.C.R. 1054 (S.C.C.) at 1063; the execution of Federal Court judgments: *British Columbia (Deputy Sheriff, Victoria) v. Canada*, [1992] 4 W.W.R. 432 (B.C. C.A.); and even, perhaps, a federal common law of contributory negligence: *Gottfriedson v. Canada (Attorney General)*, 2013 FC 546 (F.C.), aff'd 2014 FCA 55 (F.C.A.) (finding it unnecessary to express an opinion on this issue, however), at paras. 33-35.

46 The case law does not, however, disclose much in the way of method. A "rule of the common law dealing with a subject matter of federal legislative competence" cannot include every rule of the common law that Parliament could modify: *Roberts* at 338-339. It has been speculated by some that the test is exclusive legislative competence: *R. v. Prytula*, [1979] 2 F.C. 516 (Fed. C.A.) at 523-525, aff'd in *R. v. Rhine*, [1980] 2 S.C.R. 442 (S.C.C.) (SCC not expressing an opinion on this point). I do not purport to express a definitive opinion on the merits of this test.

47 As a rule of thumb, it may be true that common law torts are "matters of provincial law": *Canadian Transit Co. v. Windsor (City)*, 2015 FCA 88 (F.C.A.), rev'd in *Windsor* though not on this point. But "legal institutions, such as 'tort' cannot be invariably attributed to sole provincial legislative regulation or be deemed to be, as common law, solely matters of provincial law": *Rhine* at 447.

48 It appears at least arguable, then, that the federal common law is available.

49 With respect to intrusion upon seclusion in particular, although a number of decisions have held that there is no common law tort of breach of privacy in British Columbia, those decisions cannot fairly be read as addressing whether such a cause of action is recognized under federal common law: *Hung v. Gardiner*, 2002 BCSC 1234 (B.C. S.C.), aff'd 2003 BCCA 257 (B.C. C.A.), at para. 110; *Bracken v. Vancouver Police Board*, 2006 BCSC 189 (B.C. S.C.) at paras. 28; *Mohl v. University of British Columbia*, 2009 BCCA 249 (B.C. C.A.), leaved to appeal ref'd [2009] S.C.C.A. No. 340 (S.C.C.), at para. 13; *Demcak v. Vo*, 2013 BCSC 899 (B.C. S.C.) at para. 8; *Ari v. Insurance Corp. of British Columbia*, 2013 BCSC 1308 (B.C. S.C.) at para. 63 [*Ari BCSC*]; *Ari v. Insurance Corp. of British Columbia*, 2015 BCCA 468 (B.C. C.A.) at para. 9 [*Ari BCCA*]; *Cook v. Insurance Corp. of British Columbia*, 2014 BCSC 1289 (B.C. S.C.) at paras. 48, 72.

50 The issue simply does not appear in any of these cases. While provincial superior courts may address federal common law, the reasons behind not recognizing a common law privacy tort in British Columbia appear to arise mainly from concerns about the legislative intention behind provincial legislation such as the BC *Privacy Act*, R.S.B.C. 1996, c. 373, or the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165. Whether the provincial legislature intended to abolish or preclude the development of federal common law, and if it did whether it is constitutionally capable of doing so, appear to me to be very different issues from whether the provincial common law recognizes this tort.

51 The absence of consideration of the federal common law is significant, as although the tort of negligence, for example, may in general be a matter of provincial law, maritime negligence falls within exclusive federal legislative competence: *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 (S.C.C.). It is therefore possible for a cause of action to be characterized as federal common law in one context and not in others.

52 The question remains open whether there may be applicable federal common law. In my view, such a novel claim involving the resolution of complex and undecided questions of constitutional law should be allowed to proceed.

53 The facts pleaded on this point are somewhat thin. The fact that Peoples Trust entered into contracts across Canada is irrelevant. By this logic, when Peoples Trust entered into its first contract concerning the matters at issue, federal common law could not apply; but once it entered into a second (or perhaps, third, or hundredth) similar contract with a person somewhere else in the country, federal common law became applicable. To hold that the law applicable to a contract changes because an unrelated third party enters into a similar contract in a different location does not make sense. Further, as described above, being within federal legislative competence is not, on its own, sufficient to ground federal common law. Reading the pleadings generously, however, being federally licensed and subject to *PIPEDA* appear to advert to more than simple legislative competence. Given the uncertainty around the test for federal common law, and the lack

of argument on this point, I cannot conclude that this is bound to fail. Further, it seems at least arguable to me that the choice of law provision has incorporated federal common law.

54 For these reasons, it is not plain and obvious to me that there is no reasonable cause of action under federal common law.

55 The defendant's submissions on the applicability and validity of the choice of law term appear to conflate forum selection with choice of law. The clause may or may not be valid to the extent that it might bar recourse to the procedures under *PIPEDA*, but that has nothing to do with what law applies.

56 Turning to the plaintiff's alternative argument, it appears that if this is the case, the parties will be essentially in agreement on what law applies except for the law related to the tort of intrusion upon seclusion. I note, however, that the plaintiff has not made the ambiguity or validity of the choice of law provision a common issue. In my view, if this alternative argument is to proceed, that will need to be an issue as it affects many of the claims. I address the choice of law submissions on intrusion upon seclusion below.

2. Is PIPEDA a complete code?

(a) Defendant's position

57 The defendant says that *PIPEDA* is a complete code that ousts common law claims for breach of privacy. As the substance of the plaintiff's complaint is that the defendant failed to take reasonable steps to maintain the security of the plaintiff's data, the plaintiff can only pursue his complaint using the remedies and procedures provided by *PIPEDA*. In other words, the plaintiff's civil causes of action are foreclosed by *PIPEDA* "because it is the only statute which applies to the alleged causes of action and it constitutes a complete code to the substance of the plaintiff's complaint".

(b) Plaintiff's position

58 The plaintiff says that *PIPEDA* is not a complete code that ousts common law breach of privacy claims. He points to three cases that concluded that *PIPEDA* was not a complete code: *Condon* at para. 115; *Chandra v. Canadian Broadcasting Corp.*, 2015 ONSC 5303 (Ont. S.C.J.) at para. 33; *Romana v. Canadian Broadcasting Corp.*, 2016 MBQB 33 (Man. Q.B.) at paras. 22 — 24.

59 The plaintiff also notes that in *Hopkins v. Kay*, 2015 ONCA 112 (Ont. C.A.), leave to appeal refused 2015 CanLII 69422 [*Peterborough Regional Health Centre v. Hesse*, 2015 CarswellOnt 16503 (S.C.C.)], the Court held that the Ontario *Personal Health Information Protection Act*, S.O. 2004, c. 3, Sch A ("*PHIPA*") is not a complete code that ousts common law breach of privacy claims. The plaintiff says that *PIPEDA* is similar to *PHIPA* because both statutes only permit a

complainant to seek damages in court after the Commissioner has made a report or an order. One reason the Court gave for finding that *PHIPA* is not a complete code is that a complainant cannot seek damages under *PHIPA* absent a Commissioner's order (I note that a person may also seek damages following a conviction under *PHIPA*, but I do not think this would alter the argument).

60 Further, according to the plaintiff even if *PIPEDA* were a complete code, it would not oust the plaintiff's breach of contract or negligence claims.

61 With respect to the breach of contract claim, the plaintiff alleges that the contracts between the class members and the defendant incorporated certain statutory provisions from *PIPEDA* and provincial privacy legislation by reference. The exhaustive code doctrine "cannot apply to a breach of contract" because "[t]he parties are free to make a contract including a contract to provide security and privacy measures" that incorporates statutory provisions.

62 As to negligence, the plaintiff says that "the allegations of negligence do not arise from *PIPEDA*"; rather, "[t]he framework for the negligence claim is the defendant's failure to adhere to its own privacy policy and the security measures set out in the contract". The plaintiff says that *PIPEDA* merely informs the standard of care, and that "negligence actions in the common law provinces for breach of an organization's own privacy policies and security measures have unanimously been allowed to proceed and certified as common issues", citing *Condon*; *John Doe v. R.*, 2015 FC 916 (F.C.) at paras. 33 — 36; *Hynes v. Western Regional Integrated Health Authority*, 2014 NLTD(G) 137 (N.L. T.D.) at paras. 27 — 30; *Evans v. Bank of Nova Scotia*, 2014 ONSC 2135 (Ont. S.C.J.) at paras. 31 — 34.

(c) Analysis

63 I agree with the plaintiff's submissions that *PIPEDA* is not a complete code and therefore no claims are barred.

64 The "complete code" doctrine is described in Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada, 2014) at 537, 554:

> The key feature of a code is that it is meant to offer an exhaustive account of the law in an area; it occupies the field in that area, displacing existing common law rules and cutting off further common law evolution.
>
> [. . .]
>
> Legislation constitutes a complete code if it provides a comprehensive regulation of the matter in question, leaving no room for the operation of the common law. A code may take the form of a series of rules set out in a statute or it may confer powers on an institution or office to establish, administer and enforce a program.

65 For helpful considerations in determining whether and to what extent legislation is a complete code, Sullivan refers to *Pleau v. Canada (Attorney General)*, 1999 NSCA 159 (N.S. C.A.) at paras. 50-52:

> [50] First, consideration must be given to the process for dispute resolution established by the legislation . . . . Relevant to this consideration are, of course, the provisions of the legislation . . . particularly as regards the question of whether the process is expressly or implicitly regarded as an exclusive one. Language consistent with exclusive jurisdiction, the presence or absence of privative clauses and the relationship between the dispute resolution process and the overall legislative scheme should be considered.
>
> [51] Second, the nature of the dispute and its relation to the rights and obligations created by the overall scheme of the legislation . . . should be considered. In essence, this involves a determination of how closely the dispute in question resembles the sorts of matters which are, in substance, addressed by the legislation . . . . What is required is an assessment of the "essential character" of the dispute, the extent to which it is, in substance, regulated by the legislative . . . scheme and the extent to which the court's assumption of jurisdiction would be consistent or inconsistent with that scheme.
>
> [52] Third, the capacity of the scheme to afford effective redress must be considered. Simply put, the concern is that where there is a right, there ought to be a remedy.
>
> [Emphasis in original.]

66 The Court of Appeal addressed this issue recently in the context of its jurisprudence regarding the *Competition Act*, R.S.C. 1985, c. C-34 in *Godfrey v. Sony Corporation*, 2017 BCCA 302 (B.C. C.A.) at paras. 164-186. The essential distinction in the jurisprudence appears to be that while a simple breach of the *Competition Act* could not in itself ground relief in restitution, a breach could nonetheless form an element of a distinct cause of action, such as conspiracy.

67 Legislation, if it forms a complete code, does so not at large but in respect of some matter. Depending on how that matter is defined, legislation may be a complete code with respect to the specific rights it grants but not with respect to all common law principles with which it may overlap to any extent. Thus legislation may preclude restitution based on a simple statutory breach but not civil causes of action, an element of which involves breach of a statute. Even more broadly, it may not preclude a cause of action which involves facts which may also establish a breach of statute, although no element of the cause of action involves establishing a statutory breach.

68 The fundamental concern is respect for the division of powers, which is achieved by accurately determining legislative intent. That task is guided by two principles: the legislature is presumed not to intend to alter the common law but is also presumed not to intend to create a parallel cause of action where legislation contains an adequate enforcement regime for the rights

it grants. Ultimately, the legislation must be examined as a whole in accordance with the modern principle of statutory interpretation.

69 Dealing with breach of contract first, in my view the "complete code" doctrine cannot apply to this cause of action in any event.

70 The defendant refers to two cases in support of the proposition that *PIPEDA* is a complete code, excluding all claims, including breach of contract: *Ari BCCA* and *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182 (B.C. C.A.).

71 *Ari BCCA* concerns the enforcement of a statutory breach by way of an action in negligence. In my view it is not applicable here. As set out below, this case is not about the enforcement of *PIPEDA* through civil causes of action, and this case does not address the permissibility of incorporating legislation into a contract.

72 *Macaraeg* does not stand for the asserted proposition. It deals with whether the rights granted by the *Employment Standards Act*, R.S.B.C. 1996, c. 113 are implied *by law* into employment contracts. The Court of Appeal holds at para. 73 that "the general rule is there is no cause of action at common law to enforce statutorily-conferred rights", except where the legislature intends those rights to be enforceable by civil action. The Court of Appeal goes on to find that the terms of the *ESA* are not implied by law into employment contracts because the legislation provides an adequate enforcement regime. The Court of Appeal says nothing about whether parties may agree to incorporate statutory requirements into a contract.

73 The rights here are distinct from those in *Macaraeg* as they are not alleged to be "statutorily-conferred". Rather, they are alleged to be conferred by the agreement between the parties. The plaintiff alleges various express or implied terms, referring to various express provisions of the contract. While the pleadings could have been drafted more clearly, as I read them, the plaintiff is not alleging that the provisions of *PIPEDA* are implied by law into all contracts between entities regulated by *PIPEDA* and persons to whom they owe a duty under *PIPEDA*. Rather, it is alleged that the contracts contained a number of freestanding obligations relating to the protection of privacy, and in addition that by express incorporation, and/or by necessary implication, the contracts contained certain terms related to the protection of privacy, some of which required compliance with *PIPEDA*. It is always open to parties to incorporate legislative requirements into their contracts, absent of course some defence such as illegality.

74 Further, the effect of the defendant's argument with respect to breach of contract would be to turn *PIPEDA* into a statutory ceiling. Parties would not be able to contract for protections other than those already provided by statute. I can find nothing in the legislation that would suggest such an intention.

75 For these reasons, it is not plain and obvious to me that *PIPEDA* forecloses a claim for breach of contract.

76 Turning to negligence, it is also not plain and obvious to me that *PIPEDA* forecloses this type of claim.

77 In my view there is no suggestion in the legislation of any intention to preclude common law claims with respect to the violations of a company's own policies and contractual security measures which result in reasonably foreseeable harm. The same set of facts may or may not result in a violation of both those policies and *PIPEDA*, but that is not the test. The source of the duty and the nature of the inquiry are distinct. Further, the legislation expressly provides at s. 12(1)(b) for the Privacy Commissioner to decline to investigate in favour of other procedures where:

> the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under the laws of Canada, other than this Part, or the laws of a province[.]

78 I do note that, in my view, the enforcement regime is adequate.

79 The legislation provides for a hearing *de novo* in the Federal Court, where among other remedies damages may be claimed, including for humiliation: ss. 14, 16; *Englander v. Telus Communications Inc.*, 2004 FCA 387 (F.C.A.) at para. 48. While a person may only apply after first filing a complaint with the Commissioner, they may then apply to the Federal Court regardless of the disposition of the complaint and even if the investigation was discontinued: s. 14(1). There is a narrow set of circumstances where a person seemingly will not be entitled to a hearing because the investigation will never start. *PIPEDA s.* 12(1) states that the Commissioner shall investigate a complaint unless:

> (a) the complainant ought first to exhaust grievance or review procedures otherwise reasonably available;
>
> (b) the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under the laws of Canada, other than this Part, or the laws of a province; or
>
> (c) the complaint was not filed within a reasonable period after the day on which the subject matter of the complaint arose.

80 None of these render the enforcement regime in any way inadequate. Subsection (a) merely delays an investigation by requiring a person to *first* access reasonably available review procedures. It does not permanently deprive a person of access to a remedy. Under subsection (b), allowing matters to be dealt with under other more appropriate procedures similarly does not

deprive a person of access to a remedy - on the contrary, it facilitates access. Finally, penalizing *unreasonable* delay cannot be seen as so unfair as to render the enforcement regime inadequate.

81 The plaintiff has referred to a number of cases which address the adequacy of the enforcement regime in *PIPEDA* in the context of the tort of intrusion upon seclusion. In my view none of them assist the plaintiff.

82 First is the statement of the Ontario Court of Appeal in *Jones v. Tsige*, 2012 ONCA 32 (Ont. C.A.) at para. 50:

> [50] *PIPEDA* is federal legislation dealing with "organizations" subject to federal jurisdiction and does not speak to the existence of a civil cause of action in the province. While BMO is subject to *PIPEDA*, there are at least three reasons why, in my view, Jones should not be restricted to the remedy of a *PIPEDA* complaint against BMO. First, Jones would be forced to lodge a complaint against her own employer rather than against Tsige, the wrongdoer. Second, Tsige acted as a rogue employee contrary to BMO's policy and that may provide BMO with a complete answer to the complaint. Third, the remedies available under *PIPEDA* do not include damages, and it is difficult to see what Jones would gain from such a complaint.

83 None of the reasons referred to by the Ontario Court of Appeal can justify a finding in this case that *PIPEDA* is inadequate. Peoples Trust is the alleged wrongdoer here and it is an organization to which *PIPEDA* applies. There is no suggestion in the pleadings or anywhere else of a rogue employee. Finally, the remedies available under *PIPEDA* do include damages: s. 16(c).

84 In *Chandra v. Canadian Broadcasting Corp.*, 2015 ONSC 5303 (Ont. S.C.J.) at para. 33, the court held that *PIPEDA* did not oust the Ontario common law privacy tort:

> [33] Under *PIPEDA*, upon completion of the Privacy Commissioner's investigation, he or she issues a report containing recommendations on how to resolve the complaint. But, as already noted, the legislation specifically leaves open to a complainant the option of bringing a civil proceeding. Because of that feature, PIPEDA does not, in my view, constitute the "complete code" which the CBC defendants advocate it does.

85 I respectfully cannot agree with this reasoning. It seems rather to support the opposite conclusion: *PIPEDA* provides for an enforcement regime that involves civil proceedings in the Federal Court which can result in monetary damages for a breach of privacy. Such a process cannot be seen as inadequate, though it does not provide for proceedings in other courts. More significant to the case, I think, is that *PIPEDA* does not apply to the collection of information for journalistic purpose as noted by the court at paras. 32-37.

86 In *Romana*, Master Berthaudin held, in the context of a motion to strike pleadings, that it was not plain and obvious that a claim pursuant to *The Privacy Act*, C.C.S.M., c. P125 was precluded by

PIPEDA or the federal *Privacy Act*, R.S.C. 1985, c. P-21. This case essentially followed *Chandra* and for that reason is not assistive.

87 The final case referred to is *Condon*. *Condon* concerned the federal *Privacy Act*. Further, the portion referred to by the plaintiff was discussing the issue of preferable procedure, not whether the enforcement regime of the federal *Privacy Act* was adequate. It is simply not relevant.

88 Nonetheless, given the distinct source of the duty at issue, the distinct nature of the interest protected, and the express provision for other procedures to deal with matters which may also constitute a violation of *PIPEDA*, I am not prepared to infer from an adequate enforcement regime that parliament intended to abolish all common law remedies which may overlap to any extent.

89 Given my conclusion above, it is also not plain and obvious to me that *PIPEDA* forecloses any other type of claim.

3. Breach of contract

(a) Plaintiff's position

(i) Contract terms

90 The plaintiff alleges that he and the proposed class plaintiffs entered identical or substantially similar contracts with the defendant for the provision of services and use of the defendant's website and with respect to the collection, retention, and disclosure of personal information. As part of the agreement, the plaintiff was required to provide the personal information to the defendant. The plaintiff says that the Website Terms & Conditions of Use and the Terms & Conditions posted on the defendant's website are incorporated into the agreement.

91 The plaintiff says that the contract contained the following express or implied terms:

> a. PTC would comply with all relevant statutory obligations regarding the collection, retention, and disclosure of the Plaintiff's and Class Members' Personal Information, including the obligations set out in (collectively, the "Statutes"):
>
> > i. *PIPEDA*;
> >
> > ii. The *Personal Information Protection Act*, SBC 2003, c 63 ("BC *PIPA*"); and
> >
> > iii. The *Personal Information Protection Act*, SA 2003, C P-6.5 ("AB *PIPA*").
>
> b. PTC would not collect, retain, or disclose the Personal Information except in the manner and for the purposes expressly authorized by the Contract or the Statutes;

c. PTC would keep the Personal Information of the Plaintiff and the Class Members secure and confidential;

d. PTC would take steps to prevent the Personal Information from being lost, disseminated, or disclosed to unauthorized persons;

e. PTC would not disclose the Personal Information without consent;

f. PTC would protect the Personal Information from compromise, disclosure, loss, or theft;

g. PTC would delete, destroy, or not retain the Personal Information and would not disclose the Personal Information when the Plaintiff or Class Members no longer required PTC's services, except as required by law, and

h. PTC would exercise care and caution in selecting its outside technology providers or vendors to ensure that the Personal Information would be protected from compromise, disclosure, or theft.

92 The plaintiff then cites s. 5(1) of *PIPEDA*. Section 5 provides:

Compliance with obligations

5 (1) Subject to sections 6 to 9, every organization shall comply with the obligations set out in Schedule 1.

(2) The word *should*, when used in Schedule 1, indicates a recommendation and does not impose an obligation.

Appropriate purposes

(3) An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.

[Emphasis in original.]

93 The plaintiff then cites the following portions of Schedule 1 to *PIPEDA*:

4.5 Principle 5 — Limiting Use, Disclosure, and Retention

Personal information shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required by law. Personal information shall be retained only as long as necessary for the fulfilment of those purposes.

. . .

4.5.3

4.7.5

Personal information that is no longer required to fulfil the identified purposes should be destroyed, erased, or made anonymous. Organizations shall develop guidelines and implement procedures to govern the destruction of personal information.

. . .

4.7 Principle 7 — Safeguards

Personal information shall be protected by security safeguards appropriate to the sensitivity of the information.

4.7.1

The security safeguards shall protect personal information against loss or theft, as well as unauthorized access, disclosure, copying, use, or modification. Organizations shall protect personal information regardless of the format in which it is held.

4.7.2

The nature of the safeguards will vary depending on the sensitivity of the information that has been collected, the amount, distribution, and format of the information, and the method of storage. More sensitive information should be safeguarded by a higher level of protection. The concept of sensitivity is discussed in Clause 4.3.4.

4.7.3

The methods of protection should include

(a) physical measures, for example, locked filing cabinets and restricted access to offices;

(b) organizational measures, for example, security clearances and limiting access on a "need-to-know" basis; and

(c) technological measures, for example, the use of passwords and encryption.

. . .

Care shall be used in the disposal or destruction of personal information, to prevent unauthorized parties from gaining access to the information (see Clause 4.5.3).

94 The plaintiff cites ss. 34 — 35 of BC *PIPA*:

Protection of personal information

34 An organization must protect personal information in its custody or under its control by making reasonable security arrangements to prevent unauthorized access, collection, use, disclosure, copying, modification or disposal or similar risks.

Retention of personal information

35 (1) Despite subsection (2), if an organization uses an individual's personal information to make a decision that directly affects the individual, the organization must retain that information for at least one year after using it so that the individual has a reasonable opportunity to obtain access to it.

(2) An organization must destroy its documents containing personal information, or remove the means by which the personal information can be associated with particular individuals, as soon as it is reasonable to assume that

(a) the purpose for which that personal information was collected is no longer being served by retention of the personal information, and

(b) retention is no longer necessary for legal or business purposes.

95 Finally, the plaintiff cites portions of AB *PIPA*:

Compliance with Act

5 (1) An organization is responsible for personal information that is in its custody or under its control.

(2) For the purposes of this Act, where an organization engages the services of a person, whether as an agent, by contract or otherwise, the organization is, with respect to those services, responsible for that person's compliance with this Act.

. . .

(5) In meeting its responsibilities under this Act, an organization must act in a reasonable manner.

(6) Nothing in subsection (2) is to be construed so as to relieve any person from that person's responsibilities or obligations under this Act.

Policies and practices

6 (1) An organization must develop and follow policies and practices that are reasonable for the organization to meet its obligations under this Act.

. . .

Protection of information

34 An organization must protect personal information that is in its custody or under its control by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure, copying, modification, disposal or destruction.

. . .

Retention and destruction of information

35 (1) An organization may retain personal information only for as long as the organization reasonably requires the personal information for legal or business purposes.

(2) Within a reasonable period of time after an organization no longer reasonably requires personal information for legal or business purposes, the organization must

(a) destroy the records containing the personal information, or

(b) render the personal information non-identifying so that it can no longer be used to identify an individual.

(ii) Breach

96 The plaintiff says that the defendant breached the contract by:

a. Recklessly and improperly maintaining, securing, disseminating, disclosing, or releasing the Personal Information of the Plaintiff and the Class Members;

b. Failing to comply with the obligations set out in the Statutes;

c. Retaining the Personal Information of Class Members who did not require PTC's products or services and who are not PTC customers, and for no proper purpose;

d. Failing to implement sufficiently strong safeguards in developing its online application web portal;

e. Failing to treat security as its most important priority;

f. Failing to ensure that the online banking site was secure;

g. Failing to strictly manage access to its online databases;

h. Failing to implement, manage and/or update systems for ongoing monitoring and maintenance to address evolving digital vulnerabilities and threats and specifically to ensure that security was not breached;

i. Failing to encrypt the breached database containing the Personal Information; and

j. Failing to destroy the online applications of Class Members who did not open a PTC account.

97 In written submissions, the plaintiff adds that Peoples Trust also breached the contract by not adhering to its own internal policy for the protection of personal information, and in particular the Privacy Policy, and by not destroying the personal information as required by contract. The Privacy Policy states, in part:

7. The security of your information is a priority for Peoples Trust

We take steps to safeguard your personal information, regardless of the format in which it is held, including:

Physical security measures such as restricted access facilities and locked filing cabinets.

Shredding of documents containing personal information.

Electronic security measures for computerized personal information such as password protection, database encryption and personal identification numbers.

Organizational processes such as limiting access to your personal information to a selected group of individuals.

Requiring third parties given access to your personal information to protect and secure your personal information.

(iii) Limitation of liability clauses

98 The plaintiff says that a defence based on limitation of liability clauses "cannot be raised to determine if the pleadings disclose a reasonable cause of action" and, at most, the clauses "may form a proposed common issue of contract interpretation", citing *Charlton v. Abbott Laboratories Ltd.*, 2013 BCSC 1712 (B.C. S.C.) at paras. 64 — 65, rev'd 2015 BCCA 26 (B.C. C.A.).

99 The plaintiff says it will be up to the trial judge to construe the clauses. However, the plaintiff adds that:

(a) the contract is one of adhesion and must be interpreted strictly against the defendant, citing *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415 (S.C.C.) at paras. 7 — 9, 15 and others;

(b) clause 8 in the Website Terms & Conditions does not mention a security breach or theft of personal information and is therefore of no assistance to the defendant; and

(c) clause 1.22 assists the plaintiff because it allows for claims for direct damages resulting from "gross negligence, fraud or wilful misconduct", does not prohibit civil actions or claims arising from the agreement, and is "under inclusive, vague, ambiguous and unworkable".

(b) *Defendant's position*

100 The defendant says that the plaintiff's breach of contract claim is bound to fail because:

(a) the plaintiff has not pleaded material facts that would constitute a breach of contract;

(b) the plaintiff has not suffered compensable damages, in part because the alleged damages are too remote from the alleged breach; and

(c) the limitation of liability clauses precludes the plaintiff's claims.

(i) Breach

101 The defendant says that the plaintiff has not pleaded material facts that would constitute a breach of contract. The defendant says that, assuming the pleaded facts are true, the defendant agreed to take reasonable steps to protect personal information. However, the plaintiff has not pleaded that the contract contained a term that there were be no unauthorized access to the information; thus, "[t]he mere fact that the plaintiff's security was breached cannot constitute a breach of a contractual (or statutory) commitment to take reasonable steps to prevent such a security breach". According to the defendant, the plaintiff has merely pleaded that a security breach occurred and has not pleaded any material facts to support the conclusion that Peoples Trust did not take reasonable steps to prevent a security breach.

102 The defendant says that the plaintiff's pleading that the defendant breached the contracts by "recklessly and improperly maintaining . . . the Personal Information of the Plaintiff" and "[f]ailing to comply with the obligations set out in the Statutes" are not material facts but are conclusions of law, citing *Watson v. Bank of America Corp.*, 2015 BCCA 362 (B.C. C.A.) at para. 10; *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.) at 491.

103 The defendant summarizes its argument as follows:

102. The plaintiff has, in essence, pleaded only the following material facts in relation to his claims for breach of contract or warranty: the defendant had a contractual commitment to take reasonable steps to prevent a security breach; and a security breach occurred. This is not a pleading that the contractual commitment at issue was actually breached. Taking the factual (not legal) pleadings as true, it is submitted that the plaintiff has not pleaded the specific facts that would establish that the security steps taken by the defendant were unreasonable. This is a necessary element of establishing a breach of contract or warranty. As there are no such

material facts pleaded it is plain and obvious that the claims in contract and warranty must fail and should not be certified.

104 Finally, the defendant says that paragraphs 54(a) — (b) of the plaintiff's certification submissions are not properly pleaded and do not disclose a cause of action.

(ii) Compensable damages & remoteness

105 With respect to remoteness, the defendant cites *P. (C.) v. RBC Life Insurance Co.*, 2015 BCCA 30 (B.C. C.A.) at paras. 59 — 62, leave to appeal refused 2015 CanLII 56681 [2015 CarswellBC 2574 (S.C.C.)]. The defendant says that the alleged damages "are elusive because they are too remote to have been contemplated by the alleged class members at the time they provided their personal information".

106 The defendant also says that the "plaintiff's claim of damages for breach of contract fail for the same reasons explained . . . regarding damages for negligence". These reasons are discussed below under the "Damages" heading.

(iii) Limitations of liability

107 With respect to limitations of liability, the defendant points to a portion of the Website Terms & Conditions of Use, attached as Exhibit C to Mr. Tucci's affidavit, including in part:

> 8. Warranties and Limitation of Liability
>
> . . .
>
> Your use of this Website is at your own risk. In no event will PTC, its Affiliates and Providers, and any other parties involved in creating and delivering this Website's contents be liable for any damages, losses or expenses of any kind arising from or in connection with this Website or its use.
>
> . . .
>
> PTC is not responsible in any manner for direct, indirect, special or consequential damages, howsoever caused, arising out of use of this Website including but not limited to, damages arising from or related to the installation, use, or maintenance of personal computer hardware, equipment software, or any Internet access services.

108 The defendant also refers to the "Terms and Conditions", which are Exhibit D to Mr. Tucci's affidavit and provide in part:

> 1.22 **Limitation of Liability**

> You understand and agree that, except as specifically provided by these Agreement Terms, PTC will be liable to you only for direct damages resulting from gross negligence, fraud or willful misconduct of PTC arising directly from the performance by PTC of its obligations under these Agreement Terms and PTC will not be liable to you for any other direct damages. In addition, PTC will not under any circumstances be liable to you for any other damages, including without limitation, indirect, incidental, special, punitive or consequential losses or damages, even if PTC was advised of the possibility of damages or was negligent.

109 Thus, the defendant says that even if the contractual damages are not too remote, the plaintiff must demonstrate that these limitation of liability clauses "do not exclude any possible contractual liability", citing *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4 (S.C.C.) at paras. 121 — 123; *Felty v. Ernst & Young LLP*, 2015 BCCA 445 (B.C. C.A.) at paras. 45 — 52.

(c) Analysis

110 First, I do not think it is plain and obvious that there is no cause of action for breach of contract here, particularly if the plaintiff's pleadings are amended to further particularize the alleged obligations and breaches thereof. The material facts pleaded include a failure to have a comprehensive information security policy, the lack of ongoing monitoring and maintenance, storage of an unencrypted, perpetual copy of personal information, and a failure to immediately notify class members of the breach. These could all arguably support a claim in breach of contract for the obligations alleged.

111 I do not agree with the defendant's submissions on compensable damages. Proof of damages is not a required element of a breach of contract claim: *Fraser Park South Estates Ltd. v. Lang Michener Lawrence & Shaw*, 2001 BCCA 9 (B.C. C.A.) at para. 46, leave to appeal to SCC refused [2001] S.C.C.A. No. 72 (S.C.C.).

112 Regarding the limitation of liability clause: according to *Tercon*, there is a three-step analysis for exclusion of liability clauses: (1) interpret the contract to see if it the clause applies; (2) if it does apply, determine if it was unconscionable and therefore invalid at the time of contract formation; (3) if it was valid at formation, determine if overriding public policy factors make the clause unenforceable. These questions are not for determination at this stage. It is not plain and obvious that the clause excludes the defendant's liability here. In my view, given that this may affect so many aspects of this litigation, the interpretation of the limitation of liability clause ought to be a common issue as well.

4. Negligence

(a) Plaintiff's position

113 The plaintiff says that the defendant owed a duty of care that required the defendant to: (a) store the personal information securely; (b) not to disclose the personal information except as permitted by the contract; and (c) to destroy the personal information securely and in a timely manner.

114 The plaintiff says that the defendant knew or ought to have known of the serious risk of disclosure of personal information but took inadequate steps to prevent disclosure. The plaintiff particularizes the acts and omissions that he says constitute a breach of the standard of care at para. 9 of Part 3 of the notice of civil claim.

115 The plaintiff says that damages are properly pleaded, and that the plaintiff need only "specify the nature of the damages claimed" citing *Condon FCA* at para. 20.

116 The plaintiff says that similar negligence claims have been certified in the past, such as *Rowlands v. Durham Region Health*, 2011 ONSC 719 (Ont. S.C.J.).

(b) Defendant's position

117 The defendant says that the plaintiff's negligence claim is premised on a negligent breach of privacy, and that there is no such tort in British Columbia, cite *Ari BCCA* at para. 63; *Ari BCSC* at paras. 80 — 86; *Cook* at paras. 144 — 156. Therefore, it is plain and obvious that the plaintiff's negligence claim does not disclose a reasonable cause of action.

118 The defendant goes on to say that the plaintiff has not sufficiently pleaded material facts with respect to damages. The defendant's submissions on this point are discussed below. Since damage is an essential element of any negligence claim, the defendant says that it is plain and obvious that this claim will fail: *Davidson v. Lee, Roche & Kelly*, 2008 ONCA 373 (Ont. C.A.) at para. 6.

(c) Analysis

119 In my view, it is not plain and obvious that the claim in negligence is bound to fail.

120 The plaintiff alleges the duty of care in this case arises from the defendant's own policies and the contracts, not from its statutory obligations. That distinguishes this case from others involving a claim based in a duty of care said to arise from a statutory duty, such as *Ari BCCA* and *Cook*, as well as *R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 (S.C.C.), which sets out the more general framework for assessing statutory breaches in the context of civil liability.

121 As no duty of care appears to have been recognized in this context, the appropriate framework is the test from *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.) as refined in *Cooper v. Hobart*, 2001 SCC 79 (S.C.C.) at para. 30:

> At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the Anns test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a prima facie duty of care arises. At the second stage of the Anns test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care.

122 The issue here is whether it is plain and obvious that Peoples Trust did not owe the class a duty of care respecting their personal information.

123 In my view it is not plain and obvious that the first stage of the *Anns/Cooper* test is not met. The plaintiff has pleaded sufficient facts capable of establishing that harm was reasonably foreseeable. The information collected by Peoples Trust was sensitive and collected in the course of online applications for financial services. It is arguably reasonably foreseeable that harm such as identity theft could result if such information were disclosed or not securely stored, and it was again arguably foreseeable to Peoples Trust given the various policies and contractual terms it developed. Further, the plaintiff has pleaded sufficient facts that could establish a close and direct relationship between Peoples Trust and individuals who applied to it for financial services.

124 The more difficult issue is whether there are countervailing policy concerns.

125 In *Ari BCCA*, the Court of Appeal held that ICBC, a public entity, did not owe a duty of care to the plaintiff. The duty of care in this case was said to arise based solely on the statutory duty imposed on public entities by s. 30 of *FIPPA* see e.g. paras. 2, 6, 12, 50.

126 The Court of Appeal held that a duty of care was negated based on four policy considerations. First, the alleged duty of care raised the spectre of indeterminate liability because:

> the source of the alleged duty or obligation arises solely out of *Freedom of Information and Protection of Privacy Act, s.* 30, [so] every public body collecting personal information could be subject to the same private law duty of care.
>
> (para. 50)

127 Second, the legislation was drafted in a purposive manner, raising issues around the exercise of discretion, policy decisions, indeterminacy of the standard of care, and the extent to which the legislation could be said to suggest it should found a private law duty of care:

> Other reasons arise out of the broad and purposive manner in which s. 30 is drafted. Section 30 does not legislate a specific standard of care. The duty is to "make reasonable security arrangements". "Reasonableness" denotes a range of acceptable conduct. This suggests a public body may make its own policy decisions as to the manner in which it fulfills this statutory obligation. The duty is therefore a contextual one, and would no doubt vary depending on the nature of the business of the particular body. Furthermore, there is nothing in the broad wording of the section that suggests it should found a new private law duty of care to an individual, as opposed to the public at large.
>
> (para. 51)

128 Third, the claim related to policy rather than operational decisions of ICBC, and "policy decisions of public bodies are not actionable in negligence": para. 52.

129 Finally, "the availability of administrative remedies under [*FIPPA*] militate[d] against the recognition of a duty of care"; *FIPPA* provided a:

> comprehensive complaint and remedy scheme for violations of s. 30 (or violations of a public body's duty to make reasonable security arrangements to protect personal information). Where a statute comprehensively regulates the matter at issue by, for example, establishing an institution or office administering and enforcing a regulatory program, it is proper to infer that the legislature did not intend common law remedies to exist[.]
>
> (para. 53)

130 In *Cook*, Steeves J. similarly rejected a duty of care respecting the collection, use and disclosure of personal information. The basis of his rejection was that the substance of the plaintiff's claim was violations of *FIPPA* (para. 153), and "[i]t would be conjecture to conclude that the legislature intended to include a private right (and private damages) in *FIPA*" (para. 154). Further, the plaintiff's claim concerned policy rather than operational decisions:

> In general, the respondent here claims that the applicants were negligent when they collected, used and disclosed his personal information. As discussed above, the Commissioner is authorized by FIPA to investigate and make decisions (including reviews) about these matters. In his claim the respondent urges this court to make them. Applying the case law discussed above, that is not the role of this court. Once those decisions are made by the proper authority there may be claims in negligence about how they are implemented but that is not the claim here; those decisions have not yet been made.
>
> (para. 155)

131 In my view, this case is distinguishable from both *Ari BCCA* and *Cook*. This case involves a duty of care said to arise from the organization's own privacy policies and security measures rather than a duty of care said to arise from a legislated standard applicable to public authorities. I agree with the statement of Crawford J. that the finding that the duty of care in *Ari BCCA* was based on a statutory breach which was "[f]undamental to Madam Justice Garson's reasons": *McIvor v. MLK Pharmacies Ltd.*, 2016 BCSC 2249 (B.C. S.C.) at para. 16.

132 It is for that reason that the same concerns about indeterminate liability do not arise. The same duty is not legislated for all private entities. Similarly, concerns about purposive drafting do not arise because there is no legislative provision at issue, nor does the policy/operational distinction because Peoples Trust is not a public entity.

133 The only policy concern potentially at play is the availability of administrative remedies. In my view, this does not negate a duty of care, for the reasons already set out above.

134 The parties directed my attention to *McIvor*, in which Crawford J. declined to strike out a claim in negligence for the wrongful disclosure of pharmacy records. The plaintiff framed her allegation of negligence as follows:

> The Incident was caused or contributed [to] by the Defendant MLK, or its servants, agents or employees and/or the Defendant Kidd, and the Defendant [sic, Plaintiff] pleads the provisions of *PIPA* and other statues in alleging the Defendants were negligent in disclosing the Plaintiff's personal information.

135 Crawford J. found that medical professionals owed a duty of care to keep client information in confidence under the common law (para. 26), and even a fiduciary duty to do so (paras. 27-28). *PIPA* did not remove those duties for the individual pharmacist defendant, Mr. Kidd (para. 29). However, *PIPA* did cover the field with respect to the corporate defendant (para. 31).

136 The basis for the distinction between Kidd and the corporate defendant is not expressly stated, but the plaintiff framed the negligence claim as a breach of a statutory duty, and the bulk of Crawford J.'s discussion of the law is concerned with *Ari BCSC* and *Facilities Subsector Bargaining Assn. v. B.C.N.U.*, 2009 BCSC 1562 (B.C. S.C.). Both of those cases involved duties of care said to arise from statutory duties. In my view, this case is again distinguishable as the corporate defendant's duty of care was said to arise from a statutory duty, whereas Crawford J. found that Kidd's duty instead arose from his professional duties.

5. Breach of confidence

(a) Plaintiff's position

137 The plaintiff says breach of confidence has been properly pleaded. It requires that confidential communication be communicated in confidence and that the information communicated was misused by the party receiving it to the detriment of the plaintiff: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.) at 608, 635; *Rodaro v. Royal Bank* [2002 CarswellOnt 1047 (Ont. C.A.)], 2002 CanLII 41834 at para. 48.

(b) Defendant's position

138 The defendant says that "misuse" for the purpose of this tort requires the intentional use for the purpose of obtaining a benefit, and the defendant cannot be said to have intentionally been victimized by cybercriminals: *Alberta (Information & Privacy Commissioner) v. A.F.L.*, 2005 ABQB 927 (Alta. Q.B.) at para. 28.

139 The defendant also says that damage is an essential element of this tort, and that for the reasons given for the negligence claim the plaintiff has not pleaded material facts that constitute compensable damages in relation to breach of confidence: *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 (S.C.C.) at paras. 52 — 54; *No Limits Sportswear Inc. v. 0912139 B.C. Ltd.*, 2015 BCSC 1698 (B.C. S.C.) at paras. 30 — 31.

(c) Analysis

140 The key issue here seems to be whether the information was "misused". In *Lac Minerals*, La Forest J. said "[a]ny use other than a permitted use is prohibited" (at p. 642). As stated at 638-639, this cause of action focuses not on the manner of use, but the purpose:

> The receipt of confidential information in circumstances of confidence establishes a duty not to use that information for any other purpose than that for which it was conveyed. If the information is used for such a purpose, and detriment results, the confider will be entitled to a remedy.
>
> [Emphasis added.]

141 While this cause of action is not so narrowly defined as the defendant argues in that the non-permitted purpose need not be specifically to obtain a profit, it is clear that in order for there to be misuse, there must be use for a non-permitted purpose. The plaintiff has not pleaded any facts capable of establishing that the information was used for a non-permitted purpose.

142 As to damages, it appears that whether or not "detriment" is a necessary element of breach of confidence is not entirely clear: see *No Limits*. However, in *Cadbury*, Binnie J. said at para. 53 that "La Forest J. [in *Lac Minerals*] regarded detriment as a broad concept, large enough for example to include the emotional or psychological distress that would result from the disclosure of intimate information". I think the plaintiff has pleaded a "detriment" here.

143 As the misuse element has not been properly pleaded, this cause of action must fail and is therefore struck.

6. Breach of privacy and intrusion upon seclusion

(a) Plaintiff's position

144 The plaintiff says that *Jones* confirmed the existence of the tort of intrusion upon seclusion. The plaintiff cites the elements in paras. 70-71 of *Jones*:

> [70] I would essentially adopt as the elements of the action for intrusion upon seclusion the Restatement (Second) of Torts (2010) formulation which, for the sake of convenience, I repeat here:
>
> > One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.
>
> [71] The key features of this cause of action are, first, that the defendant's conduct must be intentional, within which I would include reckless; second, that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. However, proof of harm to a recognized economic interest is not an element of the cause of action. I return below to the question of damages, but state here that I believe it important to emphasize that given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum.

145 The plaintiff says that the Court in *Jones* said that the breach need not be wilful, and recklessness will suffice. Here, the plaintiff says that the defendant's conduct was reckless. Further, the plaintiff says that he need not prove harm to an economic interest.

146 The plaintiff also cites *Hynes* at para. 25, where the court certified a claim for intrusion upon seclusion because the *Privacy Act*, R.S.N.L. 1990, c. P-22 did not occupy the field.

147 The plaintiff acknowledges that the common law tort of breach of privacy has not been recognized in British Columbia but says that the choice of law clause "adopts federal common law". The plaintiff points to *Condon*, where the Federal Court certified a claim for the tort of intrusion upon seclusion after the defendant lost a hard drive containing the personal information of student loan recipients.

148 Alternatively, the plaintiff says that if "federal common law" does not apply, the applicable law for this claim is the law of the place where the injury occurred, and that a sub-class should

be created for class members from provinces that recognize a common law breach of privacy tort, citing *Ladas v. Apple Inc.*, 2014 BCSC 1821 (B.C. S.C.).

149 Finally, the plaintiff urges this Court to "keep in play" the intrusion upon seclusion claim in British Columbia, saying "there has not yet been a disposition by the court as to whether intrusion upon seclusion should be recognized in British Columbia.

(b) Defendant's position

150 The defendant says that "it is indisputable that there is no common law tort of invasion of privacy or intrusion upon seclusion in British Columbia": *Ari BCCA* at para. 9 and others, and accordingly the plaintiff's claims for this tort do not disclose a cause of action. The plaintiff does not plead the statutory tort under the B.C. *Privacy Act*, s. 1.

(c) Analysis

151 Dealing first with the plaintiff's primary submissions, for the reasons given above I have concluded it is not plain and obvious that there is no federal common law tort of intrusion upon seclusion.

152 Further, if the federal common law recognizes the tort of intrusion upon seclusion, the plaintiff has pleaded all the required elements. While it may be a stretch to call the disclosure here reckless, it is not plain and obvious that this must fail. It is also a stretch to say that the defendant invaded the plaintiff's private affairs, as that was done by a third party. However, it does not appear plain and obvious to me at this stage that being sufficiently reckless may not result in that conduct in effect being attributed to the defendant. This is a relatively new tort and it should be allowed to develop through full decisions. The information concerned here is also the type of information identified in *Jones* the disclosure of which might be regarded by the reasonable person as highly offensive.

153 Turning next to the submissions that the tort should be allowed to proceed under B.C. common law, it is plain and obvious that there is no reasonable cause of action under B.C. common law.

154 I agree with the plaintiff that the statements in the case law respecting the availability of this cause of action have been, in the main, conclusory: *Hung v. Gardiner*, 2002 BCSC 1234 (B.C. S.C.) at para. 110, aff'd 2003 BCCA 257 (B.C. C.A.); *Bracken v. Vancouver Police Board*, 2006 BCSC 189 (B.C. S.C.) at para. 13; *Mohl v. University of British Columbia*, 2009 BCCA 249 (B.C. C.A.) at para. 13; *Demcak v. Vo*, 2013 BCSC 899 (B.C. S.C.) at para. 8. It is also true that these cases did not specifically consider the tort of intrusion upon conclusion. I do not however consider that either of these factors make it other than plain and obvious that there is no reasonable cause of action for breach of privacy or intrusion upon seclusion in British Columbia.

155 The rationale is obvious: British Columbia already has an intentional privacy tort in the B.C. *Privacy Act*: *Foote v. Canada (Attorney General)*, 2015 BCSC 849 (B.C. S.C.) at para. 116. The plaintiff argues that intrusion upon seclusion is "an important one to keep in play" because while the B.C. *Privacy Act* prohibits intentional conduct, the tort of intrusion upon seclusion includes reckless conduct within its definition of intention. But defining the elements of the tort was a policy decision the legislature was entitled to make, and one which ought not to be undercut by this Court's development of a substantially identical but slightly broader common law tort. If, as the plaintiff argues, the B.C. *Privacy Act* requires updating to deal with societal changes, that is a task for the legislature.

156 On the plaintiff's alternative choice of law submission, it is plain and obvious that there is no cause of action based on the residence of class members.

157 There is a flaw in the plaintiff's submissions: residence does not necessarily correspond to where harm is experienced. Even if I were to accept that the applicable law was the law of the location where class members experienced harm, and I decline to comment on that point, it would only be by coincidence that this was the law of their residence. Without deciding what the predominant element of the tort is, I can see no element that would result in the choice of law rule being the law of a person's residence.

158 The plaintiff argued in the alternative that the choice of law rule for intrusion upon seclusion was a novel issue and should go forward on that basis. It is indeed a novel issue. But the plaintiff has pleaded that the law of the class members' residences give them a cause of action. This is bound to fail based on the present assertion.

7. Unjust Enrichment and waiver of tort

(a) Plaintiff's position

159 In the alternative, the plaintiff waives the torts and claims restitution of and a constructive trust over the defendant's unlawful gains.

160 The plaintiff says that the issue of whether waiver of tort is an independent cause of action or merely a remedy for unjust enrichment should not be resolved at the certification stage and, as a benefits-based claim, the claim may be established without proof of any loss by the plaintiff, citing *Serhan Estate v. Johnson & Johnson* (2006), 85 O.R. (3d) 665 (Ont. Div. Ct.) at para. 68; *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 (B.C. C.A.) at para. 31, leave to appeal refused 2010 CanLII 32435 [2010 CarswellBC 1361 (S.C.C.)]; *Pro-Sys* at paras. 93 — 97.

161 The plaintiff says, citing *Steele v. Toyota Canada Inc.*, 2011 BCCA 98 (B.C. C.A.) at paras. 45 — 52, leave to appeal refused 2011 CanLII 69654 [2011 CarswellBC 2854 (S.C.C.)], that at the certification stage:

(a) waiver of tort can be framed as an independent cause of action;

(b) the plaintiff does not need to plead all the elements of an action in unjust enrichment; and

(c) damages are not an essential element of a claim in waiver of tort.

162 The plaintiff says that the pleadings allege all three elements of a claim in unjust enrichment. With respect to the lack of juristic reason, the plaintiff seems to say that the due to the defendant's breach of contract, the contract is not a juristic reason for the enrichment: *Garland v. Consumers' Gas Co.*, 2004 SCC 25 (S.C.C.) at para. 57; *Tracy (Guardian ad litem of) v. Instaloans Financial Solution Centres (B.C.) Ltd.*, 2009 BCCA 110 (B.C. C.A.) at paras. 16 — 17, leave to appeal refused [2009] S.C.C.A. No. 194 (S.C.C.); *Buckley v. Tutty* (1971), 125 C.L.R. 353 (Australia H.C.) at 376, [1971] H.C.A. 71 (Australia H.C.).

163 The plaintiff says he has properly pleaded waiver of tort both as an independent cause of action and as a remedy.

164 The plaintiff also says he has pleaded the elements of a constructive trust based on wrongful conduct and a constructive trust based on unjust enrichment, citing *Infineon* at paras. 31 — 33; *Garland* at para. 30; *Insurance Corp. of British Columbia v. Dragon Driving School Canada Ltd.*, 2006 BCCA 584 (B.C. C.A.) at paras. 59 — 63; Donald M. Waters, ed., *Waters' Law of Trusts in Canada*, 3d ed (Toronto: Carswell, 2005) at 461.

(b) Defendant's position

165 The defendant reiterates its submission that *PIPEDA* is a complete code and forecloses a claim in waiver of tort. I have already rejected this argument. The defendant says *PIPEDA s.* 16 clearly limits recovery to actual damages: *Koubi v. Mazda Canada Inc.*, 2012 BCCA 310 (B.C. C.A.) at paras. 64, 80, varying 2010 BCSC 650 (B.C. S.C.), leave to appeal refused [2012] S.C.C.A. No. 398 (S.C.C.); *Low v. Pfizer Canada Inc.*, 2015 BCCA 506 (B.C. C.A.) at paras. 93 — 97, leave to appeal refused [2016] S.C.C.A. No. 55 (S.C.C.).

166 The defendant also says that there is no connection between the alleged wrongful conduct and the alleged benefit flowing to the defendant. Thus, no "sufficient causal connection exists[s] between the wrongful conduct and the amount for which the defendants could be ordered to account": *Heward v. Eli Lilly & Co.* [2007 CarswellOnt 611 (Ont. S.C.J.)], 2007 CanLII 2651 at para. 101, aff'd 2008 CanLII 32303 [2008 CarswellOnt 3837 (Ont. Div. Ct.)]; cf. *Sentinel Hill Ltd. Partnerships v. Canada (Attorney General)* [2007 CarswellOnt 2124 (Ont. S.C.J.)], 2007 CanLII

11729 at para. 6, aff'd 2008 ONCA 132 (Ont. C.A.), leave to appeal refused [2008] S.C.C.A. No. 167 (S.C.C.). There is no causal connection between the alleged inadequate security measures and "the gross revenue . . . or alternatively the net income" received by the defendant "as a result of the fees, interest, and service charges generated on products or services" it provided: *Wakelam v. Johnson & Johnson*, 2014 BCCA 36 (B.C. C.A.) at para. 69, leave to appeal refused [2014] S.C.C.A. No. 125 (S.C.C.).

167 The defendant disputes the plaintiff's argument that damages are not an essential element for a claim of waiver of tort, saying that *Steele v. Toyota Canada Inc.*, 2011 BCCA 98 (B.C. C.A.) has been overtaken by more recent SCC and BCCA jurisprudence: *Charlton v. Abbott Laboratories Ltd.*, 2015 BCCA 26 (B.C. C.A.) at paras. 119 — 124; *Koubi CA*, at paras. 64 — 77; *Pro-Sys*, at paras. 130 — 135.

168 With respect to unjust enrichment, the defendant says the pleadings do not establish a deprivation that corresponds with the alleged enrichment. Further, the defendant says that the contract is a juristic reason for any enrichment and the plaintiff cannot simultaneously bring unjust enrichment and breach of contract claims: *Pro-Sys* at para. 85; *Garland* at para. 44.

169 Finally, the defendant says that there is no basis to impose a constructive trust because the claim is purely monetary and there is no referential property: *Pro-Sys* at paras. 91 — 92.

(c) Analysis

170 The elements required to establish unjust enrichment are: (1) an enrichment to the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment: *Garland* at para. 30.

171 I agree with the defendant that there is no unjust enrichment claim here. A contract is a juristic reason for payment under the contract; an action in unjust enrichment fails if the contract explains the transfer. The plaintiff does not allege that the contract, or any part of it, is void or unenforceable (this distinguishes *Garland* and *Tracy*, which involved payments that were *illegal* under the *Criminal Code*).

172 In *Watson v. Bank of America Corp.*, 2014 BCSC 532 (B.C. S.C.), the Court certified the claim in waiver of tort and said the following:

> [158] Waiver of tort is a doctrine that allows a plaintiff to disgorge a defendant's gains from tortious conduct rather than recover his or her own loss. It is a benefit-based claim as opposed to a loss-based claim. The doctrine is the subject of substantial judicial and academic debate (*Andersen v. St. Jude Medical, Inc.*, 2012 ONSC 3660at para. 579 [*St. Jude*]):
>
> > [579] . . . the primary debate about waiver of tort has been whether the doctrine exists as an independent cause of action in restitution (the independence theory) or is parasitic

> of an underlying tort (the parasitic theory). Under the parasitic theory, waiver of tort may only be invoked where all of the elements of the underlying tort have been proven, including damage to the plaintiff if that is an element of the tort. If, however, waiver of tort exists as an independent cause of action, by invoking the doctrine, a plaintiff can claim the benefits that accrued to the defendant as a result of the defendant's wrongful conduct, even if the plaintiff suffered no harm. It is also noteworthy that the independence theory of waiver of tort is not the same as an action for unjust enrichment, as the plaintiff does not have to demonstrate a deprivation that corresponds to the defendant's enrichment.

> As a result, it may not be necessary for a plaintiff to establish every element of the underlying tort, including proof of loss.

> [159] Given this controversy, courts have generally refused to strike the claim at the pleadings stage; usually in favor of deferring the decision to a trial judge with the benefit of a full factual record (*Koubi* at paras. 15-40; *St. Jude* at paras. 578-582). However, it is doubtful that a full factual record is necessary, or even helpful, when considering the debate (*St. Jude* at paras. 584-587). The Court in *Koubi* did impose a minimal constraint on the doctrine at the certification stage (at paras. 79-80). Nevertheless, the Court in *Microsoft*, despite being presented with an opportunity, held that the appeal was not the proper place to resolve the debate and instead merely found that it was not plain and obvious that the claim would fail (at paras. 93-97).

> [160] I echo the comments in *Koubi* and *St. Jude* that the debate needs to be resolved, but if *Microsoft* was not a proper venue for resolution then neither is this certification motion where the debate has received little attention from the parties. The plaintiff has pled and argued for a very standard waiver of tort claim based on the alleged overcharges; the kind that has been certified in many other class actions. . . .

> [161] Accordingly, the plaintiff has properly pled a claim in waiver of tort.

173 I do not agree with the defendant's submission that the debate regarding whether loss must be proven for waiver of tort has been resolved by more recent jurisprudence. *Koubi CA* and *Charlton* simply state that neither the *Business Practices and Consumer Protection Act*, SBC 2004, c. 2, nor the *Sale of Good Act*, R.S.B.C. 1996, c. 410, can ground a claim in waiver of tort. *Pro-Sys* states that aggregate damages cannot stand in for proof of loss.

174 Nonetheless, it is my view that this claim is bound to fail whether it is a remedy or a cause of action. As a cause of action, it would require a legal wrong by the defendant and a benefit flowing to the defendant as a result: *Koubi CA* at para. 41. Here, the plaintiff has not pleaded that a benefit flowed to the defendant as a result of its failure to secure the personal information. The fees, service charges, etc. collected by Peoples Trust are not connected to the legal wrong. As a

remedy, the plaintiff would recover the benefit the defendant obtained from the underlying wrong. But again, the underlying wrong is unconnected to the benefits that the plaintiff asserts.

8. Damages

(a) Plaintiff's position

175 The plaintiff says that the proposed class members' damages include (a) damage to credit reputation; (b) mental distress; (c) costs incurred in preventing identity theft; (d) out-of-pocket expenses; (e) wasted time, inconvenience, frustration, and anxiety associated with taking precautionary steps to address the breach; (f) time lost taking these steps; and (g) likely, or a real and substantial possibility, of future damages due to identity theft and phishing attempts.

176 The plaintiff says that damages are properly pleaded, and that the plaintiff need only "specify the nature of the damages claimed": *Condon FCA* at para. 20.

177 The plaintiff Tucci says he and the proposed class suffered damages "including time-consuming, inconvenient, frustrating measures required to determine whether their Personal Information was involved in the Breach, and further steps to protect themselves from identity theft".

178 The plaintiff Tucci says he spent at least five hours taking steps to "address" the breach by calling the defendant and credit reporting agencies, taking the steps recommended by the defendant, and additional steps to protect against identity theft. He says that "thousands of [c]lass [m]embers" had similar experiences and wasted countless hours due to the privacy breach. The plaintiff says their losses should not go unremedied.

179 The plaintiff says that the contract offered peace of mind in that "in exchange for applying for [the defendant's] products and services, the [P]ersonal [I]nformation would not be lost, disseminated, or disclosed to unauthorized persons". Therefore, the proposed class members are entitled to damages for emotional upset, disappointment, and anxiety resulting from the breach: *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30 (S.C.C.) at paras 38 — 49.

180 The plaintiff also says that the class is entitled to damages to pay for active credit monitoring services rather than the passive monitoring provided by the credit flags. The plaintiff says this recognizes the increased risk of identity theft resulting from the breach. The plaintiff cites Vincent R. Johnson, *Credit-Monitoring Damages in Cybersecurity Tort Litigation* (2011) 19:1 Geo. Mason L. Rev. 113.

181 The plaintiff points to U.S. cases where the court has awarded damages for credit monitoring or has ordered defendants to provide adequate credit monitoring services: *1-800-E. W. Mortg. Co. v. Bournazian* [, Doc. No. 09CV2123 (U.S. Mass. Sup. Jud. Ct. July 18, 2010)], 2010 WL 3038962

at *1-3; *Allstate Ins. Co. v. Linea Latina De Accidentes, Inc.* [, Doc. No. 09-3681 (U.S. Dist. Ct. D. Minn. November 24, 2010)] (JNE/JJK), 2010 WL 5014386, at *2-4. It is submitted that these damages are analogous to damages for medical monitoring due to increased risk caused by the defendant, citing *Johnson* at 152, which have been certified as common issues: *Andersen v. St. Jude Medical Inc.* (2003), 67 O.R. (3d) 136 (Ont. S.C.J.) at paras. 45, 63, leave to appeal refused [2005] O.T.C. 50 (Ont. Div. Ct.) (certifying as a common issue "Should the defendants be required to implement a medical monitoring regime and, if so, what should that regime comprise and how should it be established?") and *Banerjee v. Shire Biochem Inc.*, 2010 ONSC 889 (Ont. S.C.J.) at paras. 28, 33, 55 (certifying the same question).

182 The plaintiff also says they are entitled to nominal damages for breach of contract even if the breach did not cause them economic damages, citing *Fraser Park South Estates Ltd. v. Lang Michener Lawrence & Shaw*, 2001 BCCA 9 (B.C. C.A.) at para. 46. The plaintiff also points to *Neil v. Equifax Canada Inc.*, 2005 SKPC 105 (Sask. Prov. Ct.) at para. 29; *Stasiuk v. Boisvert*, 2005 ABQB 798 (Alta. Q.B.) at para. 18; and *Tanglewood (Sierra Homes) Inc. v. Bell Canada*, 2010 CarswellOnt 7687, [2010] O.J. No. 2344 (Ont. S.C.J.) at paras. 71 — 78 as examples of damages of this nature to recognize a variety of non-quantifiable harms.

183 With respect to the breach of privacy tort claims, the plaintiff says that damage should be awarded to remedy "intangible harm such as hurt feelings, embarrassment or mental distress, rather than damages for pecuniary losses", citing *Jones* at para. 77. The plaintiff says "[m]arking the wrong that has been done is especially important in . . . actions for invasion of privacy that involve violations of the *PIPEDA*, which has quasi-constitutional status *Lavigne v. Canada (Commissioner of Official Languages)*, 2002 SCC 53 (S.C.C.) at paras. 24 — 25.

184 The plaintiff cites *Nammo v. TransUnion of Canada Inc.*, 2010 FC 1284 (F.C.) at paras. 71 and 77, for the proposition that damages may be awarded for *PIPEDA* breaches even where the plaintiff cannot quantify the harm suffered, and that damage awards should assessed with a view to vindicating the right violated and deterring future breaches, in addition to compensation.

(b) Defendant's position

185 The defendant says that the plaintiff has not properly pleaded the damages element of his claims in breach of contract, negligence, and breach of confidence:

> (a) The defendant says that the "plaintiff's claim of damages for breach of contract fail for the same reasons explained . . . regarding damages for negligence".
>
> (b) The defendant says that the plaintiff has not sufficiently pleaded material facts with respect to damages. Since damage is an essential element of any negligence claim, it is plain and obvious that this claim will fail: *Davidson* at para. 6.

(c) The defendant says that damage is an essential element of the tort of breach of confidence, and that for the reasons given for the negligence claim the plaintiff has not pleaded material facts that constitute compensable damages in relation to breach of : *Cadbury*, at paras. 52 — 54; *No Limits* at paras. 30 — 31.

186 The defendant says that the damages pleaded by the plaintiff in paras. 20 — 21 of Part 1, and paras. 14 — 15 of Part 3, of the Notice of Civil Claim are not material facts supporting a claim for damages but are mere conclusory assertions that damages exist. The remainder of the damages claims are for, in essence, damages for lost time, inconvenience, and the risk of identity theft.

187 The defendant cites *Mazzonna v. DaimlerChrysler Financial Services Canada Inc./Services financiers DaimlerChrysler inc.*, 2012 QCCS 958 (C.S. Que.), in which the Court refused to certify a proposed class action arising from the defendant's loss of a data tape containing personal information. In *Mazzonna*, the Court concluded that the plaintiff failed to meet the threshold of showing *prima facie* the existence of compensable damages:

> [56] In the Court's view, the Petitioner fails to meet the test that she has suffered damages.
>
> [57] She did indeed suffer anxiety; she has had to change, minimally, some of her habits. However, these inconveniences were negligible, so much so that she never felt the need to take any steps to alleviate her anxiety. The most she did was to keep the minimum amount of money in the account from which her lease payments were made and to check, twice a month, rather than once a month, on the Internet, whether her account had been tampered with.
>
> [58] This is not enough to meet the threshold, however *prima facie*, of the existence of "compensable" damages.

188 The defendant cites *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 (S.C.C.) at para. 9:

> [9] This said, psychological disturbance that rises to the level of personal injury must be distinguished from psychological upset. Personal injury at law connotes serious trauma or illness: see *Hinz v. Berry*, [1970] 2 Q.B. 40 (C.A.), at p. 42; *Page v. Smith*, at p. 189; Linden and Feldthusen, at pp. 425-27. The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept. The need to accept such upsets rather than seek redress in tort is what I take the Court of Appeal to be expressing in its quote from *Vanek v. Great Atlantic & Pacific Co. of Canada* (1999), 48 O.R. (3d) 228 (C.A.): "Life goes on" (para. 60). Quite simply, minor and transient upsets do not constitute personal *injury*, and hence do not amount to damage.

189 The defendant says that, as in *Mazzonna*, the plaintiff's pleaded damages are "in the nature of ordinary annoyances and anxieties and do not constitute compensable damages".

190 The defendant says that the mental distress and wasted time and inconvenience amount to psychological upset, anxiety, or agitation that are not compensable injury: *Koubi BCSC* at paras. 131 — 146; *Healey v. Lakeridge Health Corp.*, 2011 ONCA 55 (Ont. C.A.) at paras. 60 — 66.

191 With respect to the risk of identity theft, the defendant says that the claim is entirely speculative.

192 With respect to out-of-pocket expenses, the defendant says that the nature of these expenses is "entirely unclear" and that the plaintiff has not pleaded any material facts suggesting that such expenses were actually incurred. The defendant cites *Perestrello E. Companhia Limitada v. United Paint Co.* (1968), [1969] 1 W.L.R. 570 (Eng. C.A.), leave to appeal refused [1969] 1 W.L.R. 580 (H.L.), and in particular the Court's statement at 579:

> The same principle gives rise to a plaintiff's undoubted obligation to plead and particularise any item of damage which represents out-of-pocket expenses, or loss of earnings, incurred prior to the trial, and which is capable of substantially exact calculation. Such damage is commonly referred to as special damage or special damages but is no more than an example of damage which is "special" in the sense that fairness to the defendant requires that it be pleaded.
>
> The obligation to particularise in this latter case arises not because the nature of the loss is necessarily unusual, but because a plaintiff who has the advantage of being able to base his claim upon a precise calculation must give the defendant access to the facts which make such calculation possible.

193 In response to the plaintiff citing *Rowlands*, the defendant says that in the reasons for approving the settlement (2012 ONSC 3948 (Ont. S.C.J.)) the Court "highlighted its approval of [*Mazonna*] in concluding that the pleaded damages were minor, transient and non-compensable".

194 The defendant says that the plaintiff's pleadings on punitive damages are conclusion of law; and the only remedies available for a breach of *PIPEDA* are those provided on *PIPEDA*: *Koubi CA* at paras. 63 — 65; *Wakelam* at para. 66; *Unlu v. Air Canada*, 2015 BCSC 1453 (B.C. S.C.) at para. 63.

(c) Analysis

195 In my view, the plaintiff's pleadings are sufficient for the cause of action requirement in respect to breach of contract. Proof of damages, as stated above, is not a requirement for breach

of contract. Similarly, the element of detriment for breach of confidence was adequately pleaded, although that claim failed on the misuse element.

196 Turning to negligence, the plaintiff has pleaded sufficient material facts capable of establishing damages. I will deal with each type of loss alleged in turn.

197 In my view, it is not plain and obvious that damage to credit reputation cannot constitute a compensable harm.

198 I agree with the defendant that the types of mental distress alleged by the plaintiff do not rise to the level of harm which is "serious and prolonged and rise[s] above the ordinary annoyances" referred to in *Mustapha* at para. 9. Inconvenience, frustration and anxiety are part of normal life. More importantly, there are no material facts alleged which could rise to the required level.

199 Out of pocket expenses are clearly a type of compensable harm. The defendant appears to have conflated the loss element of negligence with principles regarding pleading certain heads of damages. It may be that the plaintiff ought to particularize the expenses claim further, but that is not an element of the tort of negligence. Costs incurred in preventing identity theft appear to be substantially similar to this.

200 It is also not plain and obvious that wasted time and inconvenience associated with taking precautionary steps to address the breach are not compensable harms. I consider that the issue of anxiety and frustration are better dealt with under mental distress, above. I note that the court in *Rowlands* did not, in fact, "approve" *Mazzonna*, but simply noted it was useful for assessing the risks of the action. Further, the finding in *Mazzonna* was based on an examination of the representative plaintiff in advance of the certification hearing. That is not the case here. The plaintiff cannot be faulted for not having provided detailed evidence of this kind of damages when such was never required. This may need to be further particularized later, however.

201 The likelihood of the risk of identity theft is not a matter that can be determined at this stage. The plaintiff has pleaded that there is a "real and substantial chance" that the information will be used to engage in a number of forms of identity theft. Given that the information is said to have been stolen by cybercriminals, it is certainly not plain and obvious that this risk will not be proven to be a sufficiently significant risk to be compensable in some manner. The analogy to medical risks does not appear to me to be so lacking in merit that this must fail. Further, the novel issue of credit monitoring services as a remedy does not appear bound to fail.

202 For these reasons the plaintiff has sufficiently pleaded the loss element of negligence.

203 As to punitive damages, no damages are claimed for a violation of *PIPEDA* and so the defendant's submissions are misdirected on this point. Even if they were not misdirected, however, they would still be wrong. All of the cases referred to (*Koubi CA*, *Wakelam* and *Unlu*) concerned

statutory regimes that prescribed specific remedies. *PIPEDA*, on the other hand, provides a wide discretion as to remedy:

> 16 The Court may, in addition to any other remedies it may give,
>
> (a) order an organization to correct its practices in order to comply with sections 5 to 10;
>
> (b) order an organization to publish a notice of any action taken or proposed to be taken to correct its practices, whether or not ordered to correct them under paragraph (a); and
>
> (c) award damages to the complainant, including damages for any humiliation that the complainant has suffered.
>
> [Emphasis added.]

204 It is nonetheless plain and obvious to me that there is no claim for punitive damages here. Punitive damages are awarded for misconduct which is high-handed, malicious, or which otherwise merits condemnation: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 (S.C.C.). The pleadings here do not allege anything remotely approaching that level. I agree with the defendant that the pleadings on punitive damages also essentially plead conclusions of law rather than material facts.

B. Identifiable class

205 Section 4(1)(b) of the *CPA* requires an identifiable class of two or more persons to certify a class proceeding. Defining the scope of the class is crucial: it identifies individuals who have a possible claim against the defendant, it identifies those individuals entitled to notice of the certification and, if relief is rewarded, it identifies those who are bound by the judgment: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.) at para. 38.

206 A class should be defined so that it is not overly broad; all attempts to narrow the class, without doing so arbitrarily, should be made: *Hollick* at para. 21. Where the scope of the class is not obvious, it is the putative representative of the class who bears the burden of ensuring the scope is appropriately narrowed. The Court in *Hollick* also noted that implicit in the "identifiable class" requirement is the requirement that there be some rational relationship between the class and common issues: para. 20.

207 The class definition must state objective criteria from which class members could be identified: *Western Canadian Shopping Centres* at para. 38.

208 The proposed class is stated as:

> All persons residing in Canada who completed an online account application with PTC [Peoples Trust Company] and whose Personal Information was contained on a database in the control of PTC which was compromised and/or disclosed to others on the internet.

209 The plaintiff proposes two sub-classes:

> i. The "Resident Sub-Class":
>
> > All persons residing in British Columbia who completed an online account application with PTC and whose Personal Information was contained on a database in the control of PTC which was compromised and/or disclosed to others on the internet; and
>
> ii. The "Non-Resident Sub-Class":
>
> > All persons resident outside of British Columbia who completed an online account application with PTC and whose Personal Information was contained on a database in the control of PTC which was compromised and/or disclosed to others on the internet.

210 In the notice of application, the plaintiff asks that the class be certified in an opt-out basis for B.C. class members and on an opt-in basis for non-resident class members. However, in submissions the plaintiff asks that it be certified on an opt-out basis for both subclasses.

1. Plaintiff's position

(a) 2 or more persons

211 The plaintiff estimates that the class contains about 11,000 to 13,000 members and points to the following:

> (a) Mr. Hislop's admission that there was an unauthorized intrusion into a database containing the personal information of about 11,000 persons.
>
> (b) the Privacy Commissioner's report which states that the personal information of "some 12,000 customers was compromised" by the breach.
>
> (c) a November 9, 2013 Toronto Star article stating that "about 12,000 to 13,000 customers have been notified in writing" of the breach.

212 The plaintiff says that the defendant sent the letter to about 12,000 — 13,000 individuals and that Peoples Trust has records about the class members to whom it sent the letter advising of the breach, which can be made available in document discovery and therefore the identity of the other class members can be determined from the defendant's records.

(b) Objectively identifiable

213 The plaintiff says that the class is defined by reference to objective criteria: the class includes those who completed an online account application with Peoples Trust and whose personal information was in a database in Peoples Trust control that was compromised and/or disclosed to others on the internet by the breach.

(c) Opt-out class for non-resident members

214 The plaintiff acknowledges that normally, class members residing outside of British Columbia must opt-in to a B.C. class proceeding. However, the plaintiff says that this case is exceptional because, by entering into their contracts with the defendant, the non-resident class members agreed that the contract would be governed by B.C. law and submitted and attorned to the jurisdiction of this Court and/or agreed to be bound by a decision of this Court.

215 The plaintiff citing *Bisaillon c. Concordia University*, 2006 SCC 19 (S.C.C.) at para. 16; *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2013 SCC 58 (S.C.C.) at para. 109 submits, that a flexible and generously interpretation of the *CPA* militates in favour of certifying a national opt-out class. Specifically, it is argued that:

> (a) members of the non-resident subclass have agreed to be bound by judgments of this Court and therefore future suits will be *res judicata*, citing *Harrington v. Dow Corning Corp.*, 2000 BCCA 605 (B.C. C.A.) at para. 74;
>
> (b) jurisdictional issues do not arise (*Lee v. Direct Credit West Inc.*, 2014 BCSC 462 (B.C. S.C.) at para. 52) because, in addition to there being a real and substantial connection between the proceeding and this jurisdiction, all proposed class members submitted and attorned to the jurisdiction of this Court;
>
> (c) requiring non-residents to opt-in after they have already attorned to the exclusive jurisdiction of the B.C. courts works to their disadvantage and is contrary to the goals of the *CPA*: *Lee* at para. 58.

216 The plaintiff points to *Lee* at paras. 59 — 65, where Griffin J. certified a non-resident class on an opt-out basis for the class members who agreed that any claims would be brought in B.C. and governed by B.C. law. I also note that in *Lee*, the representative plaintiff was not a B.C. resident.

2. Defendant's position

217 The defendant says the class definition does not meet the requirements because:

> (a) there is insufficient evidence of two or more class members
>
> (b) it is merits based because it is based on an individual's subjective experience and/or it is overbroad because it includes individuals who have suffered no compensable damage;

(c) it is a national opt-out class, contrary to s. 16 of the *CPA*.

(a) Two or more persons

218 As noted, the defendant says that there is insufficient evidence of two or more class members. In particular, the defendant says that this requirement is not met because "[t]here is no direct evidence from any person other than Mr. Tucci that has allegedly been affected in this case" and "[n]o affidavit evidence has been put forward setting out the grievances of any other potential class member".

219 The defendant cites *Ladas* at paras. 163 — 168, and says that the first affidavit of Mr. David Robins, sworn March 20, 2015, "suffers from deficiencies like Ms. Marcia's Affidavit #5 referred to in *Ladas* at paras. 153 — 157" and "offers no substantive evidence proving who could be part of the proposed class".

(b) Objectively identifiable & merits based

220 The defendant says that it is not possible to objectively identify class members because the proposed class is merits based: *Frohlinger v. Nortel Networks Corp.* [2007 CarswellOnt 240 (Ont. S.C.J.)], 2007 CanLII 696 at paras. 19-23; *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2005), 78 O.R. (3d) 98 (Ont. S.C.J.).

221 At one point, the defendant submits that the class is defined based on whether a class member has suffered damages: *Cotter v. Levy*, [2000] O.T.C. 140 (Ont. S.C.J.) at paras. 6-7; *Chadha v. Bayer Inc.* (2001), 54 O.R. (3d) 520, 200 D.L.R. (4th) 309 (Ont. Div. Ct.).

222 However, the defendant also argues that the proposed class definition is unnecessarily broad because it includes individuals who have suffered no damages. The defendant provides this example: *Unlu* at para. 80, *Jiang v. Peoples Trust Co.*, 2016 BCSC 368 (B.C. S.C.) at paras. 114-117, *Ladas v. Apple Inc.*, 2014 BCSC 1821 (B.C. S.C.) at paras. 144 — 146; *Hollick* at para. 21; and *Ileman v. Rogers Communications Inc.*, 2014 BCSC 1002 (B.C. S.C.) at paras. 122-128, aff'd 2015 BCCA 260 (B.C. C.A.), leave to appeal refused 2016 CanLII 6850 [2016 CarswellBC 332 (S.C.C.)]:

> Suppose a person whose information was breached is simply unaffected. That person spent no time reviewing their credit records and suffered no stress as a result of the cyberattack. That person has suffered no damages. The class definition, however, would include this person.

223 The defendant points to *Ileman* at paras. 122 — 128, saying the Court "found it was not possible to objectively identify, at the outset, who met the definition. In other words, the proposed class definition sought to broadly capture all those individuals based on the subjective merits of their individual claims." The defendant says that this reasoning was adopted in *Unlu* at paras. 81

— 84 and *Jiang* at paras. 96 — 103, 114 — 117. The defendant says that the class definition here suffers from a similar problem.

(c) Opt-out class for non-resident members

224 The defendant says that the plaintiff's request that both B.C. residents and non-residents be required to opt-out of the proceeding offends a basic requirement of the *CPA*, namely, that provided in s. 16(2):

> 16(2) . . . a person who is not a resident of British Columbia may, in the manner and within the time specified in the certification order made in respect of a class proceeding, opt in to that class proceeding if the person would be, but for not being a resident of British Columbia, a member of the class involved in the class proceeding.

225 The defendant says that non-residents cannot be automatically included in a B.C. class proceeding because the *CPA* does not authorize "national" classes. The defendant contrasts this with the Ontario *Class Proceedings Act, 1992*, S.O. 1992, c. 6, and the Alberta *Class Proceedings Act*, S.A. 2003, c C-16.5.

226 The defendant says that this court "should not unnecessarily extend its authority over residents of other provinces who have taken no steps to bring themselves before it". The defendant also makes a policy argument: to avoid unnecessary conflicts between courts, "when there is concurrent jurisdiction between provinces, certification should be limited to permitting non-residents to opt-in": *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (S.C.C.); *Meeking v. Cash Store Inc.*, 2013 MBCA 81 (Man. C.A.), leave to appeal granted 2014 CanLII 8254 [2014 CarswellMan 88 (S.C.C.)].

227 The defendant seeks to distinguish *Lee* on the basis that the claims cannot be adjudicated by this court, i.e. there is no cause of action because *PIPEDA* is a complete code. The defendant says that non-residents should pursue their complaint through *PIPEDA* or, if the class is certified, on an opt-in basis.

3. Analysis

228 I agree with the plaintiff's submissions. The class is objectively identifiable and there is some basis in fact that there are two or more members. With respect to the non-resident opt-out class, I follow Griffin J.'s reasoning at paras. 48-67 in *Lee*. The plaintiff is however incorrect on the point of *res judicata.* Attorning to a jurisdiction is not the same as agreeing to be bound by a suit in that jurisdiction to which one is not a party. It is only when the class is certified that the principle of *res judicata* applies beyond the plaintiff, and then only to members of the defined class.

229 I am not persuaded by defendant's submissions on this topic. The defendant seems to say that the proposed class membership is limited to those who suffered damage as a result of the privacy breach, and that the issue of damage in this case is "entirely dependent on a subjective analysis". Thus, says the defendant, the definition is subjective and merits-based.

230 The defendant seems to conflate "subjective" and "merits-based" and seems to misread *Jiang*, *Ileman* and *Unlu*. The defendant says that in *Ileman*, the Court "found it was not possible to objectively identify, at the outset, who met the definition. In other words, the proposed class definition sought to broadly capture all those individuals based on the subjective merits of their individual claims". But *Ileman*, *Jiang*, and *Unlu* were BPCPA cases where the class definition problems were related to subjectivity (regarding consumer transactions), *not* to being merits-based.

231 Further, even if there were not now direct evidence of two or more persons by way of the two plaintiffs, the first Robins affidavit in no way resembles the affidavit in *Ladas*. There, the affidavit was a mere three paragraphs. It attached two exhibits, one a list of individuals interested in being part of the class and the other a number of signed retainer agreements. It did not specify how the former was compiled or that the affiant had had any contact with them. The retainers provided no information about the operating system used on various devices, and the case was based around a certain application used by a certain operating system. Thus, the information in the affidavit could not even be logically connected with the proposed class definition.

232 The requirement is some basis in fact. Here, the first Robins affidavit points to a *Toronto Star* article stating that 12,000-13,000 people were notified by Peoples Trust of the breach, and a website set up by the affiant's law firm, through which 109 individuals have registered and submitted responses to a questionnaire about the impact of the breach on them. While on its own the article may have been insufficient, in my view the website and questionnaire responses suffice to bring this into the "some basis in fact" territory.

C. Common issues

233 At the heart of any class proceeding is the resolution of common issues: *Thorburn v. British Columbia*, 2013 BCCA 480 (B.C. C.A.) at para. 35. The critical factors and considerations in determining whether an issue is common to the proposed class members are:

> (a) whether resolution of the common issue will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres* at para. 39;
>
> (b) the common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each member's claim: *Western Canadian Shopping Centres* at para. 39; *Hollick* at para. 18; and

(c) success for one class member on a common issue need not mean success for all, but success for one member must not mean failure for another: *Dell'Aniello c. Vivendi Canada inc.*, 2014 SCC 1 (S.C.C.) at para. 45; *Watson BCCA* at para. 151.

234 In general, the threshold to meet the commonality requirement is low; there must be a rational connection between the class and the proposed common issues and each common issue must be a triable legal or factual issue. An issue can be common even if it is a very limited aspect of the liability question. The issue need not dispose of the litigation but rather; whether it has a reasonable prospect of advancing the litigation through its determination. Commonality may be satisfied "whether or not common issues predominate over issues affecting only individual members": s. 4(1)(c). While the plaintiff must show "some basis in fact" to satisfy the commonality requirement, this only requires evidence establishing that these questions are common to the class: *Microsoft* at para. 110.

1. Proposed common issues

235 The common issues proposed by the plaintiff are set out in Schedule A to the plaintiff's notice of application as follows:

Breach of Contract and Warranty

1. Did the Class Members enter into a Contract with the Defendant regarding the collection, retention and disclosure of Personal Information?

2. Did the Contract between the Defendant and the Class Members contain terms that the Defendant would:

a. Keep the Personal Information confidential;

b. Take steps to secure the Personal Information and prevent it from being lost, stolen, disseminated, or disclosed except as provided by the Contract or applicable statutes;

c. Not disclose the Personal Information except as provided by the Contract and applicable statutes;

d. Ensure third parties given access to the Personal Information also secured the Personal Information and ensured that it would not be lost, stolen, disseminated, or disclosed except as provided by the Contract and applicable statutes;

e. Delete, destroy, or otherwise not retain the Personal Information when the Class Members no longer required the Defendant's services, except as provided by the Contract and applicable statutes?

3. As a result of its collection, retention, loss, or disclosure of the Personal Information, did the Defendant breach any of the terms of the Contract or Warranty particularized in paragraph 2? If yes, why?

Negligence

4. Did the Defendant owe the Class Members a duty of care in its collection, retention, loss, or disclosure of the Personal Information?

5. If the answer to #4 is yes, did the Defendant breach its duty of care in its collection, retention, loss, or disclosure of the Personal Information? If yes, why?

Breach of confidence

6. Did the Class Members communicate the Personal Information to the Defendant?

7. Did the Defendant misuse the Personal Information in its collection, retention, loss, or disclosure of the Personal Information, and was that misuse to the detriment of the Class Members?

8. If the answers to #6 and #7 are yes, did the Defendant breach the confidence of the Class Members in its collection, retention, loss, or disclosure of the Personal Information? If yes, why?

Invasion of privacy and intrusion upon seclusion

9. Did the Defendant willfully or recklessly invade the privacy of or intrude upon the seclusion of the Class Members in its collection, retention, loss, or disclosure of the Personal Information in a manner that would be highly offensive to a reasonable person?

10. If the answer to #9 is yes, did the Defendant commit the tort of invasion of privacy? If yes, why?

Unjust enrichment

11. Was the Defendant unjustly enriched by its receipt of fees, interest, and service charges from the Class Members?

Damages

12. Is the Defendant liable to pay damages to the Class Members for:

a. Breach of contract or warranty?

b. Negligence?

c. Breach of confidence?

d. Invasion of privacy or intrusion on seclusion?

e. Unjust enrichment?

13. Can the Class Members' damages be assessed in the aggregate pursuant to section 29 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50? If so, in what amount?

14. Does the Defendant's conduct justify an award of punitive damages? If so, why and in what amount?

15. Are the Class Members entitled to pre- and post-judgment interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996 c. 79? If so, at what rate?

2. Plaintiff's position

236 The plaintiff's claim raises a number of issues that are common to the class.

(a) Common issues: breach of contract (1 — 3)

237 The plaintiff says that questions relating to the interpretation and enforceability of standard form contracts are regularly certified as common issues and that this case should be no exception. The plaintiff says the question of what obligations were imposed by the contracts can be determined on a class-wide basis because the agreements are of a standard form that is essentially the same for all the class members. With respect to breach, the plaintiff says that the alleged privacy breach relates to one incident that affected all class members. Therefore, the court can answer these questions by reference to the People Trust application process, the contract language, the statutory provisions, and the defendant's conduct. No evidence or participation from the class members will be required.

238 The plaintiff points out that the answer to the common questions need not be identical for each class member, and the answer can be nuanced to account for variations over time or across the class, citing *Dell'Aniello c. Vivendi Canada inc.*, 2014 SCC 1 (S.C.C.) at para. 46; *Stanway v. Wyeth Canada Inc.*, 2012 BCCA 260 (B.C. C.A.) at paras. 14-15, citing *Rumley v. British Columbia*, 2001 SCC 69 (S.C.C.) at para. 32.

(b) Common issues: negligence (4-5)

239 The plaintiff says that negligence issues are regularly certified as common issues, including in data breaches or loss of personal information claims. As examples, the plaintiff points to *Rowlands* at para. 6(a) (the defendant lost a USB key containing personal information) and *Larose c. Banque Nationale du Canada*, 2010 QCCS 5385 (C.S. Que.): personal information was stored unencrypted by the defendant and subsequently stolen.

240 The plaintiff says that the existence of a duty of care, the standard of care, and the existence of a breach can be answered in common for the class because they focus on the defendant's conduct.

(c) Common issues: breach of confidence (6-8)

241 The plaintiff says proposed issues 6 — 8 can be considered by reference to the defendant's conduct, which was identical with respect to each proposed class member.

(a) Question 6 considers whether the class members' provision of the personal information, which was done pursuant to a contract and application process that was substantially the same for all members, constitutes a "communication" for the purposes of this tort.

(b) Question 7 can be assessed by considering the defendant's use of the personal information, the nature of the information itself, and whether the breach caused detriment to the class members; and

(c) Question 8 considers whether communication and misuse to the class members' detriment amount to a breach of confidence.

(d) *Invasion of privacy and intrusion upon seclusion (9-10)*

242 The plaintiff says that these questions can be answered on a class-wide basis and that the answer depends solely on the defendant's conduct, the nature of the class members' privacy interest, and on the expectations of a reasonable person. He says that a similar question was certified in *Rowlands* at para. 6(d). He says that proof of damage is not a required element of the cause of action, citing *Jones* at para. 71.

(e) Unjust enrichment (11)

243 The plaintiff claims in the alternative "waiver of tort and restitution of and a constructive trust over the unlawful gains" of the defendant. The plaintiff says this question focuses solely on the defendant's conduct.

244 The plaintiff points to prior certification of unjust enrichment claims: *Infineon*; *Steele v. Toyota Canada Inc.*, 2011 BCCA 98 (B.C. C.A.); *Serhan*.

(f) Damages (12 — 15)

245 The plaintiff says that these questions consider whether damages are an appropriate remedy for each cause of action, and that "basic entitlement to an award does not require evidence from individual [c]lass [m]embers" and can be done on a common basis.

246 With respect to aggregate damages, the plaintiff points out that an aggregate damage assessment does not require "mathematical accuracy". The plaintiff quotes from *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (U.S. Sup. Ct. 1931) at 563:

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amends for his acts. In such cases, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. . . . [T]he risk of uncertainty should be thrown upon the wrongdoer instead of the injured party.

247 The plaintiff says a nominal award, in recognition of time wasted, inconvenience, frustration, anger, or stress, is "well-suited to aggregate calculation or partial aggregate calculation" because it is a general recognition of harm suffered rather than a calculation of the financial value of a loss. The plaintiff says that a nominal award for an individual "can be easily extrapolated to the class as a whole". The plaintiff says that this assessment can be aided by information from the defendant's "database of information from putative [c]lass [m]embers they have maintained, which could be queried to determine the typical experience of [c]lass [m]embers as far as telephone calls to contact the [d]efendant, time spent on hold, time spent dealing with banks and credit reporting agencies, and so on".

248 The plaintiff also says that class proceedings are "particularly well-suited for the hearing of a claim for punitive damages", citing *Chace v. Crane Canada Inc.* [1997 CarswellBC 2832 (B.C. C.A.)], 1997 CanLII 4058 at para. 24 because it reflects the overall culpability of the defendant and need not be linked to the harm caused to any particular claimant: *Rumley v. British Columbia*, 1999 BCCA 689 (B.C. C.A.) at para. 48, aff'd 2001 SCC 69 (S.C.C.). For this reason, the plaintiff says punitive damages are regularly certified as common issues: *Jones v. Zimmer GmbH*, 2011 BCSC 1198 (B.C. S.C.), aff'd 2013 BCCA 21 (B.C. C.A.); *Stanway v. Wyeth Canada Inc.*, 2011 BCSC 1057 (B.C. S.C.), aff'd 2012 BCCA 260 (B.C. C.A.); *Fulawka v. Bank of Nova Scotia*, 2010 ONSC 1148 (Ont. S.C.J.) at para. 152, aff'd 2012 ONCA 443 (Ont. C.A.), leave to appeal refused [2012] S.C.C.A. No. 326 (S.C.C.). The plaintiff says that the defendant's conduct is more important to the assessment than the impact on any individual class members.

249 The plaintiff says that court order interest is a common issue.

3. Defendant's position

250 The defendant says that the plaintiff has not proposed appropriate common issues.

(a) Cause of action issues (1 — 11)

251 The defendant says there are no valid causes of action. The defendant also says that, even if there are causes of action, there are no compensable damages and hence "a common issues trial still cannot proceed". Further, even if compensable damages could be determined, "the problems arising from assessing a merits based class definition are encountered again because of the subjective inquiries that would be required to consider the proposed common issues": *578115 Ontario Inc. v. Sears Canada Inc.*, 2010 ONSC 4571 (Ont. S.C.J.) at para. 43; *Chadha v. Bayer Inc.* (2001), 63 O.R. (3d) 22 (Ont. C.A.) at para. 52; *Pro-Sys* at para. 118.

252 The defendant says that the generality with which the common issues are framed "masks the complexity and substance of the underlying factual issues necessary for their adjudication". "In order to properly address the alleged causes of action, there would need to be a much more detailed series of questions regarding the impact upon each putative class member and the damages actually experienced".

(b) Damages and remedies (12 — 14)

253 The defendant says that "[i]n the absence of a common issue and success for the plaintiff and the class on that issue, a common issue about remedies is unfounded". The defendant says that as there is no cause of action disclosed, the damage and remedy issues are not common.

254 The defendant says that the aggregate damage issue should not be certified because the plaintiff has not put forth any basis in fact as to methodology for determining aggregate damage: *Charlton BCCA* at para. 112; *Clark v. Energy Brands Inc.*, 2014 BCSC 1891 (B.C. S.C.) at paras. 95 — 113. As there is no proposed methodology, there is no basis to certify this issue.

255 With respect to punitive damages, the defendant says that the plaintiff frames the question "too broadly, attempting to capture the defendant for any conduct arising out of response to the security breach". The defendant quotes the following from *Koubi BCSC* at para. 155 (also citing *Jiang* at para. 136):

> [155] There is an absence of commonality necessary for a common issue. The results of the inquiry as to whether, in any particular circumstances, the defendants acted in a highhanded or reprehensible manner cannot be extrapolated to the experiences of other members of the proposed class. Therefore, in the particular circumstances of this case, the question of whether punitive damages would serve a rational purpose cannot be determined until after individual issues of causation and compensatory damages.

256 Finally, the defendant says that the court-order interest issue is parasitic and does not meaningfully advance the action in the absence of substantive common issues, citing *Jiang* at para. 137; *Clark* at para. 138.

4. Analysis

257 In my view, common issues 1-3 meet the threshold for commonality. Common issues 4 and 5 are approved as they deal mainly with the defendant's conduct. While issue 4 is stated quite generally, in my view the issue of the reasonable foreseeability of harm and proximity between the defendant and class members can be adjudicated based on facts sufficiently common to all class members. Issues 6-8 are not approved as breach of confidence has been struck. Issues 9 and 10 are approved, albeit only with respect to the potential federal common law tort. Issue 11 is not approved as unjust enrichment and waiver of tort have been struck. Issues 12 (a) and (d) are approved, but damages for negligence cannot go forward as loss and causation must be proven before damages are owed, damages for unjust enrichment cannot go forward as that cause of action was struck, and damages for invasion of privacy/intrusion upon seclusion is an individualized inquiry. With respect to aggregate damages, it seems that the plaintiff has only proposed a method to calculate aggregate nominal damages, not aggregate compensatory damages: querying a database to determine class members' typical experience in terms of time wasted, inconvenience, etc. Given the nature of nominal damages, this seems appropriate, and expert evidence is unnecessary for such a method. Without a method for compensatory damages, the common issue for compensatory aggregate damages is not certified. Issue 13 is approved with respect to nominal damages only. The common issue relating to punitive damages is not approved. Common issue 15 is also certified.

D. Preferable procedure

258 Section 4(1)(d) of the *CPA* states that the court must determine whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues.

259 Section 4(2) of the *CPA* identifies specific criteria that must be considered in assessing preferability:

> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

260 The preferability analysis should be conducted through the lens of the three principal aims of class actions: judicial economy, access to justice, and behaviour modification: *Hollick* at para. 27.

261 The test for preferability is two-fold: first, a court must assess whether the class action would be a fair, efficient and manageable method of advancing the claim; second, the court must determine whether the class action would be preferable to other reasonably available means of resolving the claims of class members: *Hollick* at paras. 27 — 28; *Knight v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 235 (B.C. C.A.) at para. 24.

262 In *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69 (S.C.C.), Cromwell J., for the Court, wrote:

> [21] In order to determine whether a class proceeding would be the preferable procedure for the "resolution of the common issues", those common issues must be considered in the context of the action as a whole and "must take into account the importance of the common issues in relation to the claims as a whole": *Hollick*, at para. 30. McLachlin C.J. in *Hollick* accepted the words of a commentator to the effect that in comparing possible alternatives with the proposed class proceeding, "it is important to adopt a practical cost-benefit approach to this procedural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court": para. 29, citing W. K. Branch, *Class Actions in Canada* (loose-leaf 1998, release 4), at para. 4.690.

1. Defendant's position

263 The plaintiff has failed to show that a class action in this case would be the "preferable procedure" for the fair and efficient resolution of the common issues (*CPA*, s. 4(1)(d)). Here, any attempted common trial would flounder under inevitably individual issues and inquiries. This would not promote judicial economy or improve access to justice.

264 The defendant says that this action will quickly break down into individual enquiries into individual-specific issues; in particular, regarding each class member's entitlement to actual damages. The defendant cites the following from *Williams v. Mutual Life Assurance Co. of Canada* [2003 CarswellOnt 1209 (Ont. C.A.)], 2003 CanLII 48334 at para. 54:

> [54] I am not persuaded that the appellant has shown that allowing a class action would serve the interests of access to justice. . . . More importantly, it seems to me that since resolution of the common issue would play such a minimal role in resolution of the individual claims, the potential members of the class would be faced with the same costs to litigate their claim as if they were bringing the claims as individuals and not members of the class.

265 The defendant says the vague, general common questions of law would not meaningfully advance the litigation: citing *MacKinnon v. National Money Mart Co.*, 2005 BCSC 271 (B.C. S.C.) at para. 28.

266 The defendant says that there are other ways for the class to enforce their rights and, even if there were not, this is insufficient because a class proceeding would not be fair, efficient, and manageable: *Caputo v. Imperial Tobacco Ltd.* [2004 CarswellOnt 423 (Ont. S.C.J.)], 2004 CanLII 24753 at paras. 62, 67 — 68; *Marshall v. United Furniture Warehouse Limited Partnership*, 2013 BCSC 2050 (B.C. S.C.) at para. 235, aff'd 2015 BCCA 252 (B.C. C.A.); *Clark* at paras. 137 — 138; *Unlu* at para. 93. The defendant says that a class proceeding "does not adequately address the individual issues and it would curtail the defendant's right to adequately defend itself, particularly on the issues of individual class member's entitlement to, and quantum of, any damages".

2. Plaintiff's position

267 Pursuing this action as an individual action would likely entail substantial costs that the plaintiffs would be unable to afford. The plaintiff has proposed a workable methodology for the determination of the claims advanced in this action. There are no other preferable means to resolve the claims of the class members.

268 As to s. 4(2)(a), the plaintiff says that the proposed common issues are at the heart of the litigation. In particular, the issue of whether the defendant "is liable for the Breach" is the predominant liability issue. The plaintiff points out that the application process, contracts, and security breach were substantially the same for all class members. The plaintiff notes that, even if damages cannot be determined in the aggregate, s. 7(a) of the *CPA* provides that this cannot itself be a basis to refuse certification.

269 With respect to s. 4(2)(b), the plaintiff says that there is no evidence that any class members have an interest in controlling separate actions and, given the small amount of damages for each member, it is unlikely that any class member would have a valid interest in individually prosecuting an action. The plaintiff lists many advantages of a class proceeding, such as the tolling of the limitation period for the entire class, the availability of class counsel through contingency arrangements, the ability of class members to participate in the litigation if desired, protection from adverse costs rulings, and the fact that any order or settlement will accrue to the benefit of the entire class without resorting to estoppel.

270 As to s. 4(2)(c), the plaintiff says that neither he nor class counsel are aware of any other proceedings in Canadian courts in relation to the breach, the only other process being undertaken is the Privacy Commissioner's investigation.

271 With respect to s. 4(2)(d), the plaintiff says that individual litigation is the only real alternative to a class proceeding and, given the cost of litigation compared to the low value of individual claims, that is an "illusory alternative". Thus, the other means of resolving the claims are less practical or efficient.

272 Finally, as to s. 4(2)(e), the plaintiff submits that there is no indication that a class proceeding will create greater difficulties than alternative means of seeking relief, especially if the aggregate damage provisions are available or if the Court adopts the proposed automated distribution method for distributing the monetary award: *Heward*; *Nanaimo Immigrant Settlement Society v. British Columbia*, 2001 BCCA 75 (B.C. C.A.) at para. 20. The plaintiff says that all of the same issues would need to be considered in individual litigation, but in a less controlled procedural environment.

3. Analysis

273 I am persuaded by the applicant's submissions and find that class proceeding is the preferable procedure. I agree that there will be a need for individual inquiries here. However, the fact that individual inquiries will be required is not determinative of the question of preferability. In this case, my view is that the individual inquiries can be satisfactorily dealt with in a post-common issues process, should the case proceed to that stage.

E. Representative plaintiff

274 Section 4(1)(e) of the *CPA* mandates that the representative plaintiff must be able to fairly and adequately represent the class, must have developed a plan for proceeding, and must not have a conflict with the class on the common issues. The representative plaintiff must be prepared and able to vigorously represent the interests of the class.

275 Section 2(1) provides that "[o]ne member of a class of persons who are resident in British Columbia may commence a proceeding in the court on behalf of the members of that class."

1. Defendant's position

276 The defendant submits that the plaintiff is not an appropriate representative plaintiff and has not proposed a workable litigation plan. The plaintiff is not a resident of British Columbia, as required by the *CPA*. Nor is the plaintiff's boilerplate litigation plan workable, as it fails to explain, and simply assumes away, how the critical and determinative individual issues will be adjudicated.

277 Since the commencement of the hearing, counsel for the plaintiff has identified Mr. Andrew Taylor, a resident of British Columbia. He is a retiree who formerly worked in operations and customer service in the airline industry. His affidavit indicates that he has retained counsel to

advance the within action on his behalf and the proposed class members. Having read the materials I am satisfied as to his ability to serve as a representative plaintiff.

278 With respect to the litigation plan, the defendant says that the proposed litigation plan is not workable. The defendant says that the plan does not address how the individual issues would be resolved: *Koubi BCSC* at para. 195; *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 (Ont. S.C.J.) at para. 223; *Miller v. Merck Frosst Canada Ltd.*, 2013 BCSC 544 (B.C. S.C.) at para. 217, aff'd 2015 BCCA 353 (B.C. C.A.), leave to appeal refused (2016), [2015] S.C.C.A. No. 431 (S.C.C.). The defendant says that "there will be significant individual issues regarding the nature and scope of harm allegedly suffered by each class member. These issues will require full discovery and mini-trials will be required on an individual basis to provide a fair procedure for the determination of the individual issues".

279 The defendant says that only individual issues dealt with in the litigation plan relate to quantification of damages by a court-appointed administrator; the defendant says that a claims form will not address "substantive individual issues". The defendant says it has the right to challenge class members' evidence and lead responsive evidence before the court decides the questions at issue, and that the litigation plan assumes that liability and entitlement to damages will be established on a class-wide basis. The defendant says that "forms alone" cannot deal with the individual issues that will arise in this case and that the plaintiff proposes that "procedural fairness relevant to the defence of his claims be sacrificed for expediency". The defendant says that entitlement to and the quantum of damages cannot be left to an administrator even with an arbitrator as an avenue of an appeal and amounts to an inappropriate delegation of the court's adjudicative powers, citing *Keatley Surveying Ltd. v. Teranet Inc.*, 2012 ONSC 7120 (Ont. S.C.J.) at paras. 244 — 246, rev'd 2014 ONSC 1677 (Ont. Div. Ct.) at paras. 122 — 123.

2. Plaintiff's position

280 The plaintiff is prepared to represent the interests of the class members. He is familiar with the substance of the claim and the role of the representative plaintiff. The plaintiff is not aware of conflicts with other members of the class with respect to the proposed common issues.

281 The plaintiff says the proposed litigation plan is a workable method for advancing the litigation. It addresses the issues and demonstrates that the plaintiff and class counsel have thought through the proceeding and its complexities, particularly if proof of damage and the quantum of restitution can be determined on an aggregate basis. The plaintiff says that this proceeding will proceed in two phases: the first will involve interpretation of the contracts and determination of the defendant's liability. If aggregate damages are determined, a "systematic computer method" can be used to determine and deliver the individual entitlements to the class members.

282 The plaintiff says he has a viable notification plan and that he does not anticipate that any class members will opt out of the proceeding.

3. Analysis

283 The addition of Mr. Taylor as a plaintiff addresses the issue raised by the defendant in respect to residency. I am also satisfied that the other qualifications have been met by Mr. Taylor.

284 On the question of addressing individual inquiries, the plan does not reflect a method. My view is that this aspect can be dealt with in an efficient and fair way. Individual inquiries are a frequent aspect of class proceedings. The plaintiff is required to file a proposal for dealing with this as a condition to certification. Otherwise, I find the plan satisfactory at this stage. Class proceeding are flexible and dynamic, and a litigation plan need only be a workable framework for moving the case forward: *Godfrey* at para. 255.

IV. CONCLUSION

285 For these reasons:

1. This action is certified as a class proceeding;

2. The class is approved on an opt-out basis, and defined as: All persons residing in Canada who completed an online account application with People Trust and whose personal information was contained on a database in the control of Peoples Trust which was compromised and/or disclosed to others on the internet.

3. Two subclasses are approved, defined as:

   i. The "Resident Sub-Class": All persons residing in British Columbia who completed an online account application with People Trust and whose Personal Information was contained on a database in the control of People Trust which was compromised and/or disclosed to others on the internet; and

   ii. The "Non-Resident Sub-Class": All persons resident outside of British Columbia who completed an online account application with People Trust and whose Personal Information was contained on a database in the control of People Trust which was compromised and/or disclosed to others on the internet;

4. The common issues approved are 1-5, 9-10 for the purposes of the federal common law only, 12(a) and (d), 13 for nominal damages only, and 15;

5. A common issue regarding the effect of the Limitation of Liability clause is to be added;

6. The representative plaintiffs are approved;

7. The litigation plan is approved, subject to the requirement that the plaintiff file a revised litigation plan in the manner described above.

Application for certification granted; application to strike claim granted in part.

End of Document

Tab 35

1987 CarswellOnt 347
Supreme Court of Canada

Frame v. Smith

1987 CarswellOnt 347, 1987 CarswellOnt 969, [1987] 2 S.C.R. 99, [1987] W.D.F.L. 1896, [1987] S.C.J. No. 49, [1988] 1 C.N.L.R. 152, 23 O.A.C. 84, 42 D.L.R. (4th) 81, 42 C.C.L.T. 1, 6 A.C.W.S. (3d) 263, 78 N.R. 40, 9 R.F.L. (3d) 225, 9 W.D.C.P. 125, J.E. 87-1003, EYB 1987-67479

FRAME v. SMITH and SMITH

Dickson C.J.C., Beetz, McIntyre, Chouinard, * Lamer, Wilson and La Forest JJ.

Heard: March 20, 1986
Judgment: September 17, 1987
Docket: No. 18164

Counsel: *S.B. Smart*, for appellant.
G. Frink, for respondents.

Subject: Family; Torts
Related Abridgment Classifications
Family law
X Custody and access
X.13 Enforcement
Headnote
Family Law --- Custody and access — Access — Enforcement of order
Children — Custody and access — Civil action for interference with access — Father awarded access — Mother deliberately denying access notwithstanding specific access orders — Father incurring expenses and suffering stress because of denial of access — Father having no cause of action based on mother's interference with access rights — Family Law Act; Children's Law Reform Act.
Following separation, the mother was awarded custody and the father was granted liberal access. Subsequently, more specific access orders were made. The wife moved with the children to various cities without notifying the father, changed the children's names and religion, told them the father was not their father, intercepted the father's letters to the children and denied him telephone contact with the children. As a result of the mother's actions, the father incurred considerable expense and underwent emotional stress. The father sued for damages for wrongful interference with his legal relationship with his children. The mother's application to strike was granted at trial and upheld by the Ontario Court of Appeal. The father appealed to the Supreme Court of Canada.

Held:
Appeal dismissed.
Per La Forest J. (Dickson C.J.C., Beetz, McIntyre and Lamer JJ. concurring)
No tort action exists for wrongful interference with access rights. The old causes of action which gave some protection to a father's interest in his children have been abolished and the tort of conspiracy cannot be extended to cover the situation. Any possible judicial initiative to protect access rights civilly has been overtaken by legislative action. The legislature has devised a comprehensive scheme for dealing with family breakdown, custody and access which does not envisage additional civil action. Further, a breach of a statutorily authorized order for access does not give rise to a fiduciary relationship on which a cause of action can be grounded. Permitting civil actions against custodial parents cannot be said to be in the best interests of the child, whether it be by creating a tort or by recognizing a fiduciary relationship arising out of a court order.
Per Wilson J. (dissenting)
The torts of conspiracy, intentional infliction of mental suffering and unlawful interference with another's relationship should not extend to the family law situation. Such actions would do little to encourage and develop the parent-child relationship and could lead to abuse, unreasonable litigation and vindictive behaviour. Nor can a person assert a civil cause of action based on the "right" of access embodied in a court order because of the potential for abuse and the comprehensive nature of custody/access enforcement legislation.
A person who has been denied access may, however, assert a cause of action based on breach of a fiduciary duty. Such a cause of action should only be allowed in any particular case if there is no risk of harm to the children and where there has been a sustained denial of access causing severe damage to the relationship between the access parent and the child. In the circumstances, the father could establish an actionable breach of fiduciary duty and should be entitled to equitable compensation.

Appeal from judgment of Ontario Court of Appeal dismissing appeal from judgment of Boland J. granting order to strike for want of reasonable cause of action.

Wilson J. **(dissenting):**

1 The central issue in this case is whether the courts should recognize a common law parental right of access to children or, alternatively, a right to recover damages for interference with an order for access made by a court pursuant to statutory authority. The issue arises in the context of an application to strike out the plaintiff's statement of claim as disclosing no reasonable cause of action. Because this is the context there is no evidence in the record to support the allegations made in the statement of claim but, in accordance with well established principles, the facts as pleaded must for this limited purpose be taken as proved.

1. The Facts

2 In September 1962 the appellant (plaintiff) and the respondent Eleanor Smith were married in Winnipeg. In the ensuing years they had three children. The eldest, Richard, was born in 1963; Kathleen was born in 1967; and the youngest, Diane, was born in 1969. In November 1970 Eleanor Smith left the appellant to live with another man. She subsequently returned to the matrimonial home in Montreal for a brief period of time. However, she left again, ostensibly to stay with her parents in Winnipeg and to seek counselling. She took the children with her. Once in Winnipeg she instituted proceedings for their custody. At some stage — it is not clear from the pleadings precisely when — the appellant took similar steps in Manitoba. On 12th August 1971 a judge of the family court in Winnipeg awarded Eleanor Smith custody of the three children. The appellant was awarded "generous visiting privileges".

3 Some time around February 1972 Eleanor Smith and the co-defendant Johnston Smith began living together. During 1973 they left Winnipeg and took the children with them. They did not tell the appellant that they were leaving the city. After several months of searching the appellant managed to locate his children who were with the respondents in Toronto. He was prevented from seeing his children. The respondents told him "You are not their father. Stay away from them". So the appellant applied to the Ontario courts to spell out his access rights more specifically. On 22nd November 1974 Master Davidson of the Supreme Court of Ontario ordered Eleanor Smith to provide specified access to the appellant so that he could see and spend time with his children. A further order for access was made by Master Davidson in January 1975. In October 1976 the ap pellant went to Toronto to see his children but found the house deserted and no indication where the children or the respondents had gone. The respondents knew the appellant was coming to Toronto to see his children on that occasion. It took the appellant six months of searching to find them. They were living with the respondents in Denver, Colorado. On being discovered there, they all moved back to Toronto.

4 The appellant pleads that from 1972 on the respondents made it extremely difficult, if not impossible, for him to have any contact with his children. They deliberately limited or prevented telephone contact. They diverted the letters and gifts he sent them. They also instructed the children not to attempt to contact the appellant. The children were told not to use their real surname, Frame; they were to use the surname, Smith. Against the express wishes of the appellant the children's religion was changed by the respondents. Throughout the years the respondents told the children that the appellant was not their father, that they were to regard Johnston Smith as their father.

5 The appellant has since 1972 expended considerable amounts of money trying to maintain his relationship with his children. He has sought the assistance of the courts to no avail. The respondents' behaviour has frustrated him at every turn. Moreover, since 1977 the appellant has had to seek medical treatment for severe depression resulting from the respondents' conduct. They have effectively deprived him of a normal, meaningful, parent-child relationship or, indeed, of any relationship at all with his children.

6 In April 1982 the appellant issued a writ against the respondents in the Supreme Court of Ontario. A statement of claim was filed some months later. It contained several allegations concerning the respondents' interference with the appellant's access to his children and identified a number of heads under which the cause of action might be subsumed including wilful infliction of harm on the appellant, intentional interference with a legal right of the appellant and conspiracy to do either or both. The appellant sought general damages of $1,000,000, punitive damages of $500,000 and special damages estimated at $25,000. He did not seek access to his children as they were by that time all over 15 years of age and his relationship with them had been completely destroyed.

2. The Courts Below

7 In response to the statement of claim counsel for the respondents moved under R. 126 of the Ontario Rules of Practice for an order striking it out as disclosing no reasonable cause of action. Boland J., considering herself bound by the earlier decision of Gray J. in *Schrenk v. Schrenk*, 32 O.R. (2d) 122, affirmed (1982), 36 O.R. (2d) 480 (C.A.), made the order.

8 The appellant appealed to the Ontario Court of Appeal. His appeal failed. In an endorsement on the record Blair J.A. indicated that the court was unable to distinguish this claim from the claim in *Schrenk*, supra, and he saw no reason to depart from the position taken in that case.

3. The Issue

9

(i) General considerations

10 The appellant argues that all the elements of a cause of action have been pleaded, namely, wilful infliction of harm or intentional interference with a legal right. He adds that these causes of action are not prohibited by s. 69(4) of the Family Law Reform Act, R.S.O. 1980, c. 152, which provides as follows:

> (4) No action shall be brought by a parent for the enticement, harbouring, seduction or loss of services of his or her child or for any damages resulting therefrom.

In substance, the appellant's case rests on the premise that tort liability is founded on a general principle of liability for wilful damage subject to certain exceptions. Accordingly, he argues, the abrogation of certain heads of liability by s. 69(4) of the Family Law Reform Act only negates a claimant's ability to recover for the infliction of harm in those specific situations. The appellant argues that the harm he has experienced falls outside these discrete categories and is therefore actionable.

11 The appellant's argument is reminiscent of one side of a debate begun in the last century which is yet to be resolved. It has been described in Solomon, Feldmusen and Mills, Cases and Materials on the Law of Torts, 2nd ed. (1986), as follows (at p. 6):

> Initially, the search for a theoretical basis for tort law centred on the issue of whether there was a general principle of tortious liability. Sir John Salmond argued that tort law was merely a patchwork of distinct causes of action, each protecting different interests and each based on separate principles of liability [see Salmond, *The Law of Torts* (6th ed., 1924) at pp. 9-10]. Essentially the law of torts was a finite set of independent rules, and the courts were not free to recognize new heads of liability. In contrast, writers such as Pollock contended that the law of torts was based upon the single unifying principle that all harms were tortious unless they could be justified [see Pollock, *The Law of Torts* (13th ed., 1929) at p. 21]. The courts were thus free to recognize new torts. Glanville Williams suggested a compromise between the two viewpoints. He argued that tort law historically exhibited no comprehensive theory, but that the existing categories of liability were sufficiently flexible to enable tort law to grow and adapt.

12 While it would perhaps be interesting for the court to join in this debate, I think that Dr. Glanville Williams' pragmatic resolution of the question correctly characterizes the task before the court when confronted with a heretofore unprecedented basis for liability: see Williams, "The Foundations of Tortious Liability" (1939), 7 Cambridge Law J. 111. He wrote at p. 131:

> Why should we not settle the argument by saying simply that there are some general rules creating liability (recognizing the plaintiff's interest, conferring upon him a right not to be damaged), and some equally general rules exempting from liability (refusing to recognize the plaintiff's interest, or recognizing a conflicting interest in the defendant, and thus conferring a privilege upon the defendant to cause damage)? Between the two is a stretch of disputed territory, with the Courts as an unbiased boundary commission. If, in an unprovided case, the decision passes for the plaintiff, it will be not because of a general theory of liability but because the Court feels that here is a case in which existing principles of liability may properly be extended.

Thus, whatever one considers the theoretical foundation of liability to be, it is not enough for the appellant simply to invoke a general principle of freedom from harm. Rather, he must show why "existing principles of liability may properly be extended", that is, he must identify the nature of the right he invokes and justify its protection. But the appellant in the circumstances of this case must do more. Because he is claiming protection for a right involving the wellbeing of children, in addition to justifying its protection by an existing principle of liability, the appellant must also satisfy the court that to afford legal protection for such a right would be in the best interests of children.

13 The award of a court order of custody to one parent and access to the other is premised on the existence of a relationship between the custodial parent and the child and another relationship between the non-custodial parent and the child, the maintenance and development of both relationships being considered by the court making the order to be in the best interests of the child. But the bitterness arising from litigation brought by one parent against the other may result in the destruction of one or both of the child's relationships. At the very least it may cause conflict in the child's loyalties. This cannot be in the child's best interests and the traumatization and upset caused by it can clearly be detrimental.

14 By the same token, however, it clearly cannot be in the best interests of children to have custodial parents defy with impunity court orders designed to preserve their relationship with their non-custodial parents. The order for access to the non-custodial parent would not have been made had it not been found by the trial judge to be in the child's best interests. Accordingly, the custodial parent who denies access to the other parent is sacrificing the child's best interests as so found to his or her own selfish interests and this would appear, as a general principle at least, to favour a policy of intervention by the law to protect the child's best interests in such circumstances. This is not to deny that in specific cases that general policy of intervention in order to uphold what has been found to be in the child's best interests may have to yield to a greater threat to the child's interests arising from the fact of litigation by one parent against the other. It is simply to say that the limits on any cause of action which the law might recognize would have to be the result of a weighing of the positive against the negative factors impacting on the children.

15 The proper test for the disposition of a motion under R. 126 (now R. 21.01(1)(*b*)) to strike out a statement of claim as disclosing no cause of action must also be borne in mind. It is well established that the power to strike is to be exercised sparingly and only when there is no doubt that no cause of action exists: see *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441, 12 Admin. L.R. 16, 13 C.R.R. 287, 18 D.L.R. (4th) 481, 59 N.R. 1; *A.G. Can. v. Inuit Tapirisat of Can.*, [1980] 2 S.C.R. 735, 115 D.L.R. (3d) 1, 33 N.R. 304; *Moore Dry Kiln Co. of Can. v. Green Cedar Lumber Co.* (1982), 37 O.R. (2d) 300 (H.C.). It is also well established that "a pleading should not be struck out unless it is incurable by a proposed amendment": *Dom. Bank v. Jacobs*, [1951] O.W.N. 421 at 423, [1951] 3 D.L.R. 233 (H.C.). While the normal rule in such motions is that any doubt is to be resolved in favour of finding the existence of the cause of action and permitting the action to proceed, given the overriding importance of ensuring that such litigation is in the best interests of the children in a particular case, the court may impose a more stringent standard before it allows the action to be brought.

16 With these considerations in mind, I turn to an examination of the various causes of action advanced by the appellant.

(ii) Possible causes of action

17 The appellant correctly notes that s. 69(4) of the Family Law Reform Act abolishes the old actions of enticement, harbouring or seduction and loss of services. As well, it should be added that this court has already unanimously rejected "alienation of affections" as a separate head of liability: see *Kungl v. Schiefer*, [1962] S.C.R. 443, 33 D.L.R. (2d) 278 [Ont.]. In that case Cartwright J. held that there was no separate action for alienation apart from an action for criminal conversation or enticement. Now that these causes of action have been abolished by the Family Law Reform Act, clearly, no recovery can be permitted for "alienation of affections" in respect of these causes of action. The appellant advances a number of other causes of action.

(a) Conspiracy

18 Counsel for the appellant submitted that the tort of conspiracy was available to the appellant. This court in *Can. Cement LaFarge Ltd. v. B.C. Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 at 471-72, [1983] 6 W.W.R. 385, 21 B.L.R. 254, 24 C.C.L.T. 111, 72 C.P.R. (2d) 1, 145 D.L.R. (3d) 385, 47 N.R. 191, while conceding that "the law concerning the scope of the tort of conspiracy is far from clear", held that the law of torts recognizes a conspiracy claim against two or more defendants 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.

This case would seem to fit within either of these two branches. The plaintiff may well be able to establish at trial that the predominant purpose of the defendants' conduct was to cause injury to the plaintiff. In addition, since the defendants' conduct in violating the court order was unlawful, if it is proved at trial that the conduct was directed at the plaintiff and that the defendants should have known that injury to the plaintiff was likely to and did result, this case would fall squarely within the second branch. In my view, therefore, given this court's holding in *Can. Cement LaFarge Ltd. v. B.C. Lightweight Aggregate Ltd.*, supra, this tort is capable of extension to the family law context. The real question is whether such an extension should be permitted.

19 It would be my view that the tort of conspiracy should not be extended to the family law context. Although "the law concerning the scope of the tort of conspiracy is far from clear", the criticisms which have been levelled at the tort give good reason to pause before extending it beyond the commercial context. As was said by Estey J. in *Can. Cement LaFarge Ltd.* at p. 473:

> 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* ... In fact, the action may have lost much of its usefulness in our commercial world, and survives in our law as an anomaly.

20 The criticisms of the tort to which Estey J. refers focus on the rationale for the tort and thus are not confined to the commercial context but extend to other contexts as well. The rationale of the tort was explained by Bowen L.J. in *Mogul S.S. Co. v. McGregor, Gow & Co.* (1889), 23 Q.B.D. 598 at 616 (C.A.):

> ... a combination may make oppressive or dangerous that which if proceeded only from a single person would be otherwise ...

Noting that in many cases this "totem of numbers" is demonstrably false, one commentator asserts that "the question of abolishing ... conspiracy to injure must be seriously considered": Peter Burns, "Civil Conspiracy: An Unwieldy Vessel Rides a Judicial Tempest" (1982), 16 U.B.C.L. Rev. 229 at 254. Another commentator notes that the tort "rests rather shakily on a notion of plurality which derives more from magic than reason": Peter G. Heffey, "The Survival of Civil Conspiracy: A Question of Magic or Logic" (1975), 1 Monash Univ. Law Rev. 136. This court, however, affirmed the ongoing existence of the tort in *Can. Cement LaFarge Ltd.* Estey J. stated at p. 473:

> ... 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.

21 In light of these comments I would not extend the tort of civil conspiracy to the custody and access context. Such an extension would not be consistent with the rationale expressed in *Mogul*, namely, that the tort be available where the fact of combination creates an evil which does not exist in the absence of combination. I do not believe that in cases such as the one at bar the combination makes "oppressive or dangerous that which if proceeded only from a single person would be otherwise". The conduct of the custodial parent, if proven, is equally "oppressive or dangerous" whether done singly or in combination. If the tort of conspiracy is applied to the facts of this case, an arbitrary and unjustifiable distinction would emerge. The alleged conspiracy by the defendants would be actionable but the same conduct done by the spouse alone would not be actionable (for reasons to be discussed post). The differing treatment of these two situations for no principled reason and, indeed, the lack of any principle supporting the extension of the tort to the "conspiracy" in this case, lead me to conclude that this tort should not be extended to the family law context.

22 Another rather arbitrary distinction inherent in the conspiracy concept is the distinction between an actual agreement (actionable) and a likely but unproven agreement (not actionable): *Mulcahy v. R.* (1868), L.R. 3 H.L. 306. Proving such an agreement is a very difficult task. Resolving this difficulty in the family law context by extending the tort to "likely" agreements or "presumed"

agreements would, in effect, presume the spouse's "friend" liable merely because of his or her association with the custodial spouse, a rather drastic step.

23 But the paramount concern in extending the tort of conspiracy into the family law context is, I think, that such an extension would not be in the best interests of children. If the tort only applies to conduct in combination it would do little to encourage the maintenance and development of a relationship between both parents and their children. Yet it would be tailor-made for abuse. It would lend itself so readily to malicious use by one spouse against the other. The fact that the action is against not only the ex-spouse but also his or her "friend" may well provide an incentive to the plaintiff to litigate. Moreover, a single "agreement" to deny the plaintiff one visitation would be actionable and the success of that action would depend largely on uncertain evidence of agreement and intention as to which each party might be expected to take a fundamentally different view. These factors — incentive to litigate, low threshold for actionability, uncertainty of success and issues of credibility with respect to the crucial evidence — suggest frequent resort to this cause of action as a "weapon" with little possibility of amicable settlement. These concerns are aggravated by the fact that, if the tort of conspiracy were introduced into the family law context, it would be difficult to restrict it to the area of custody and access. Acts which contributed to marriage breakdown would also be actionable as conspiracy and the potential for detrimental impact on the children could be substantial. Having regard to the overriding concern for the best interests of the children, I am not persuaded that the tort of conspiracy should be extended to encompass the claim of the plaintiff.

(b) Other torts

24 Counsel for the appellant submitted that the torts of intentional infliction of mental suffering and unlawful interference with another's relationship could cover the facts as pleaded. It may well be that the tort of intentional infliction of mental suffering could be extended to cover the facts alleged by the appellant. The requirements of this cause of action were set out in the case of *Wilkinson v. Downton*, [1897] 2 Q.B. 57. In that case the defendant as a "practical joke" told the plaintiff that her husband had been involved in an accident and had broken his legs. The plaintiff believed the defendant and as a result suffered nervous shock and a number of physical consequences. In granting recovery, Wright J. stated at p. 59:

> One question is whether the defendant's act was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant, regard being had to the fact that the effect was produced on a person proved to be in an ordinary state of health and mind. I think that it was. It is difficult to imagine that such a statement, made suddenly and with apparent seriousness, could fail to produce grave effects under the circumstances upon any but an exceptionally indifferent person, and therefore an intention to produce such an effect must be imputed, and it is no answer in law to say that more harm was done than was anticipated, for that is commonly the case with all wrongs.

> The other question is whether the effect was, to use the ordinary phrase, too remote to be in law regarded as a consequence for which the defendant is answerable.

25 In this case, the conduct of the respondents may have been "plainly calculated to produce some effect of the kind which was produced". Certainly the conduct appears to be of the extreme and outrageous character which was held in *Wilkinson v. Downton*, supra, to be required before this cause of action exists. But there are a number of disadvantages associated with this tort which make me reluctant to extend it to the facts of this case. One such disadvantage is that a visible and provable illness caused by the defendant's action must be present for this tort to be actionable: see *Guay v. Sun Publishing Co.*, [1953] 2 S.C.R. 216 at 238, [1953] 4 D.L.R. 577 [B.C.], per Estey J.; *Radovskis v. Tomm* (1957), 65 Man. R. 61, 21 W.W.R. 658 at 664, 9 D.L.R. (2d) 751 (Q.B.). This requirement is based on the need to discourage spurious claims — an especially pressing need in the family law context where unnecessary and vexatious litigation is to be discouraged. Another disadvantage associated with this tort is that, even if it were extended to cover the case at bar, it might not provide the plaintiff with the compensation that he wishes. According to John G. Fleming, The Law of Torts, 6th ed. (1983), p. 32, "our courts, while at last admitting that injury to the nervous system is capable of causing recognisable physical harm, are not yet prepared to protect emotional security as such ..." If such a cause of action were extended to the facts of this case the appellant could only be entitled to recover damages stemming from recognizable physical or psychopathological harm caused by the actions of the defendant. This would include only the damages stemming from the appellant's treatment for mental depression. In my view, if another cause of action better vindicates the plaintiff's interest and is in the best interests of the children, this particular cause of action should not be recognized.

26 Finally, and most importantly, the extension of this cause of action to the custody and access context would not appear to be in the best interests of children. Like the tort of conspiracy the tort of intentional infliction of mental suffering would be relatively ineffective in encouraging conduct conducive to the maintenance and development of a relationship between both parents and their children. It is obvious also that such a cause of action, if it were made available throughout the family law context, would have the same potential for petty and spiteful litigation and, perhaps worse, for extortionate and vindictive behaviour as the tort of conspiracy. Indeed, the tort of intentional infliction of mental suffering appears to be an ideal weapon for spouses who are undergoing a great deal of emotional trauma which they believe is maliciously caused by the other spouse. It is not for this court to fashion an ideal weapon for spouses whose initial, although hopefully short-lived, objective is to injure one another, especially when this will almost inevitably have a detrimental effect on the children. Yet, if this cause of action were extended to encompass the facts of this case, it seems to me that there is no rational basis upon which its extension to other areas of family law could be resisted. The gist of the tort is the intentional infliction of mental suffering regardless of the relationship between plaintiff and defendant. It would be available in respect of all inter-spousal conduct both before and after marital breakdown. I would therefore not

extend this common law tort to the family law context where the spinoff effects on the children could only be harmful.

27 There would appear to be no generalized tort of "wrongful interference with another's relationship" as the appellant submits. The law of torts up to this point has protected only certain types of relationships from interference. Relief has been granted for interference with contractual relationships (e.g., *Lumley v. Gye* (1853), 2 E. & B. 216, 118 E.R. 749), interference through intimidation and unlawful means (e.g., *Rookes v. Barnard*, [1964] A.C. 1129, [1964] 1 All E.R. 367 (H.L.)), and interference with economic relations through injurious falsehood (e.g., *Ratcliffe v. Evans*, [1892] 2 Q.B. 524 (C.A.)). The common denominator of these torts is that they constitute wrongful interference with economic relationships and I do not think they should be extended to a non-economic relationship such as the one under review. As in the case of the tort of intentional infliction of mental suffering, if they were extended to the area of custody and access, there is no rational basis upon which their extension to other areas of family law could be resisted. They would be available in respect of all inter-spousal conduct both before and after marital breakdown and torts grounded in intimidation and injurious falsehood would again seem to be tailor-made for spouses, so motivated, to use against each other. Their extension to the family law area would not, it seems to me, be in the best interests of children.

28 But there are two other causes of action which could loosely be said to fall within the rubric of "wrongful interference with another's relationship" and which may well cover the case at bar. These are (a) a cause of action for interference with a right of access founded on the common law or the court order, and (b) a cause of action for breach of a fiduciary duty owed by the custodial to the non-custodial parent to respect the latter's relationship with the child. As neither has traditionally been regarded as a "tort", I shall deal with them under separate headings.

(c) The enforcement of a parental right

29 The appellant submitted by way of alternative to his claims in tort that a parent has at common law a right of access to his children upon which a civil suit can be based. He submitted further that a parent has a legally enforceable right of access pursuant to the order of the court. These might be seen as separate sources of his parental right or, alternatively, the court order might be viewed as declaratory of his common law right for purposes of enforcement. The respondents submitted that there was no such thing as a right of access at common law, that access was part of a bundle of rights compendiously constituting custody, that the sole source of the appellant's access right was the court order and that the mechanisms for enforcement enacted in the Children's Law Reform Amendment Act, S.O. 1982, c. 20, were the only means of enforcement. They did not include the type of cause of action pleaded in this case.

30 I believe that there is considerable support for the view that access as a distinct juridical concept is purely a creature of statute. Prior to statute, fathers had an almost absolute common

law right to the custody of their children to the total exclusion of mothers: see, for example, *R. v. Greenhill* (1836), 4 Ad. & El. 624, 111 E.R. 922, and for a general discussion see Susan Maidment, Child Custody and Divorce: The Law in Social Context (1984), at pp. 93-95. It was not until 1839 that the rigours of this common law rule were ameliorated. In that year the British Parliament empowered the Court of Chancery in the Custody of Infants Act, 1839 (U.K.), 2 & 3 Vict., c. 54, (Talfourd's Act), to make an order for the access of a mother to her children. The same statute permitted women to apply for custody of their children under 7 years of age. But there could be no order for access except as an adjunct to an order for custody. Custody and access were conceptually linked under Talfourd's Act and have been so ever since. It is therefore doubtful that a common law right of access exists independently of statute.

31 Even if a common law parental right of access pre-existed and survived the passage of Talfourd's Act, the subsequent development of the law of custody and access may have effectively eliminated it. The English Supreme Court of Judicature Act, 36 & 37 Vict., c. 66, expressly stipulated that in matters concerning the custody and guardianship of infants the rules of equity were to prevail over the common law: see the Judicature Act, R.S.O. 1980, c. 223, s. 25, repealed and replaced by Courts of Justice Act, S.O. 1984, c. 11, s. 109. The paramountcy of the father's claim at common law had to yield to an equitable weighing of the merits of the respective claims of each parent and in this context the question of what would be best for the child became an important consideration. In 1886, the British Parliament passed the Guardianship of Infants Act, 1886 (49 & 50 Vict., c. 27), which provided in s. 5 that a court could make "such order as it may think fit regarding the custody of [an] infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father ..." In Ontario this statute was essentially duplicated in the Guardianship of Minors Act, S.O. 1887, c. 21.

32 At first the courts were much more comfortable assessing the competing claims of parents than they were in trying to decide what was in the best interests of children. But over time the best interests of children increasingly became an important concern of the court and today it is the paramount concern. See the Children's Law Reform Act, as amended by the Children's Law Reform Amendment Act, S.O. 1982, c. 20, s. 1, which added s. 24, for a statutory expression of this principle. In light of these developments it can be said with some assurance that the concept of "parental rights" has fallen into disfavour. Parental responsibilities yes, but rights no. It appears, therefore, that the appellant is on shaky ground when he bases his case for damages on a violation or destruction of his "parental right" to access at common law. The access right has become the child's right, not the parent's right, and it would be a regressive step to recognize today a cause of action in the parent based on an outmoded concept of parental rights in children: see, for example, *M v. M (child: access)*, [1973] 2 All E.R. 81. Accordingly, to summarize, I believe that the appellant cannot rely on the common law as the source of his right. He must rely on the court order because: (a) it is doubtful that a common law right of access independent of the statutory right granted by the court exists; and (b) even if such a right survived or came into existence after the enactment

of Talfourd's Act, it could not have survived to the present day in the face of the shift in emphasis from parental rights to children's rights. In my view, the court order, which establishes that the appellant's ac cess to his children is in his children's best interests, is the only possible source of the right he claims.

33 Three very persuasive factors lead me to hold that the appellant does not have a civil cause of action based on the "right" of access embodied in the court order. First, it is simply not in the child's best interests to recognize the general availability of an action based on the court order. Such an action would be available every time a visitation was denied by the custodial parent. Litigation could occur frequently, thus multiplying the traumatizing effects of the marriage breakdown on the child. Second, a civil action for breach of a court order has never been recognized by our law as a method of enforcing court orders. And third, the legislature, in spelling out the enforcement mechanisms, has not provided for such an action.

34 Since the appellant instituted his action, the Children's Law Reform Amendment Act, S.O. 1982, c. 20, has been passed. Section 19(*a*) as enacted by that statute re-affirms that all matters relating to custody and access are to be decided in the child's best interests. Section 19(*d*) states that the Act is intended to provide for the more effective enforcement of custody and access orders. Section 35 permits the court to order supervised access, if necessary, and it may attach any conditions it considers appropriate. Section 37 empowers the court to authorize any person to apprehend the child so as to give effect to the entitlement of that person to access or custody. The police or the sheriff may be empowered by the court to apprehend the child to that end. An application for apprehension may be made ex parte. Section 38 may be used to require any person who may remove a child from Ontario to post a bond, to give up his or her passport and to transfer specific property to a named trustee to be held subject to the terms and conditions specified in the order. Section 39 allows a Provincial Court (Family Division) to impose fines of up to $1,000 and/or up to 90 days' imprisonment for contempt of a court order. Finally, s. 40 enables the court to order any person or public body to assist a parent in finding his or her child by giving the name and address of the person with whom the child resides. It is apparent from these provisions that the legislature is not unaware of the problem in relation to the enforcement of these orders. Yet it has not seen fit to provide a civil cause of action. I think we must assume that it acted advisedly in this regard. I would hold, therefore, that no cause of action can be based directly on the court order.

(d) Breach of fiduciary duty

35 The final cause of action to be considered is breach of fiduciary duty. This possibility was not advanced by counsel in his original material but, since the issue before the court was whether the statement of claim should be struck out "as disclosing no reasonable cause of action", the court was of the view that it should be addressed. Counsel was accordingly invited to file written submissions of which we have had the benefit.

36 In the past the question whether a particular relationship is subject to a fiduciary obligation has been approached by referring to categories of relationships in which a fiduciary obligation has already been held to be present. Some recognized examples of these categories are relationships between directors and corporations, solicitors and clients, trustees and beneficiaries, agents and principals, life tenants and remaindermen, and partners. As well, it has frequently been noted that the categories of fiduciary relationship are never closed: see, for example, *Guerin v. R.*, [1984] 2 S.C.R. 335 at 384, [1984] 6 W.W.R. 481, [1985] 1 C.N.L.R. 120, 13 D.L.R. (4th) 321, (sub nom. *Guerin v. Can.)* 55 N.R. 161, per Dickson J. (as he then was); *Int. Corona Resources Ltd. v. Lac Minerals Ltd.* (1986), 53 O.R. (2d) 737, 9 C.P.R. (3d) 7, 39 R.P.R. 113, 32 B.L.R. 15, 25 D.L.R. (4th) 504 (H.C.); *Standard Invts. Ltd. v. C.I.B.C.* (1985), 52 O.R. (2d) 473, 30 B.L.R. 193, 22 D.L.R. (4th) 410, 11 O.A.C. 318 (C.A.); *English v. Dedham Vale Properties Ltd.*, [1978] 1 W.L.R. 93, [1978] 1 All E.R. 382 at 398 (Ch. D.); *Tufton v. Sperni*, [1952] 2 T.L.R. 516 at 522 (C.A.); R. Goff and G. Jones, The Law of Restitution, 2d ed. (1978), pp. 490-91. An extension of fiduciary obligations to new "categories" of relationship presupposes the existence of an underlying principle which governs the imposition of the fiduciary obligation.

37 However, there has been a reluctance throughout the common law world to affirm the existence of and give content to a general fiduciary principle which can be applied in appropriate circumstances. Sir Anthony Mason ("Themes and Prospects", in P. Finn (ed.), Essays in Equity (1985), p. 246) is probably correct when he says that "the fiduciary relationship is a concept in search of a principle". As a result there is no definition of the concept "fiduciary" apart from the contexts in which it has been held to arise and, indeed, it may be more accurate to speak of relationships as having a fiduciary component to them rather than to speak of fiduciary relationships as such: see J.C. Shepherd, The Law of Fiduciaries (1981), pp. 4-8. Perhaps the biggest obstacle to the development of a general fiduciary principle has been the fact that the content of the fiduciary duty varies with the type of relationship to which it is applied. It seems on its face therefore to comprise a collection of unrelated rules such as the rule against self-dealing, the misappropriation of as sets rule, the conflict and profit rules and (in Canada) a special business opportunity rule: see R.P. Austin, "The Corporate Fiduciary: Standard Investments Ltd. v. Canadian Imperial Bank of Commerce" (1986-87), 12 Can. Bus. L.J. 96, at pp. 96-97; P.D. Finn, Fiduciary Obligations (1977). The failure to identify and apply a general fiduciary principle has resulted in the courts relying almost exclusively on the established list of categories of fiduciary relationships and being reluctant to grant admittance to new relationships despite their oft-repeated declaration that the category of fiduciary relationships is never closed.

38 A few commentators have attempted to discern an underlying fiduciary principle but, given the widely divergent contexts emerging from the case law, it is understandable that they have differed in their analyses: see, for example, E. Vinter, A Treatise on the History and Law of Fiduciary Relationships and Resulting Trusts, 3rd ed. (1955); Ernest J. Weinrib, "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1; Gareth Jones, "Unjust Enrichment and the Fiduciary's Duty

of Loyalty" (1968), 84 L.Q.R. 472; George W. Keeton and L.A. Sheridan, Equity (1969), pp. 336-52; Shepherd, ante, at p. 94. Yet there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.

39 Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

40 (1) The fiduciary has scope for the exercise of some discretion or power.

41 (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

42 (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

43 Very little need be said about the first characteristic except this, that unless such a discretion or power is present there is no need for a superadded obligation to restrict the damaging use of the discretion or power: see, for example, *R.H. Deacon & Co. v. Varga*, [1973] 1 O.R. 233, 30 D.L.R. (3d) 653, 1 N.R. at 80 (C.A.), affirmed [1975] 1 S.C.R. 39, 41 D.L.R. (3d) 767, 1 N.R. 79.

44 With respect to the second characteristic it is, of course, the fact that the power or discretion may be used to affect the beneficiary in a damaging way that makes the imposition of a fiduciary duty necessary. Indeed, fiduciary duties are frequently imposed on those who are capable of affecting not only the legal interests of the beneficiary but also the beneficiary's vital non-legal or "practical" interests. For example, it is generally conceded that a director is in a fiduciary relationship to the corporation. But the corporation's interest which is protected by the fiduciary duty is not confined to an interest in the property of the corporation but extends to non-legal, practical interests in the financial wellbeing of the corporation and perhaps to even more intangible practical interests such as the corporation's public image and reputation. Another example is found in cases of undue influence where a fiduciary uses a power over the beneficiary to obtain money at the expense of the beneficiary. The beneficiary's interest in such a case is a pecuniary interest. Finally, in *Reading v. A.G.*, [1951] A.C. 507, [1951] 1 All E.R. 617 (H.L.), a British soldier who was able to smuggle items past Egyptian guards because these guards excused uniformed soldiers from their inspections was held to be a fiduciary. The Crown's interest was a "practical" or even a "moral" one, namely, that its uniform should not be used in corrupt ways. The soldier-fiduciary had no power to change the legal position of the British Crown, so how could the Crown's legal interests have been affected by the soldier's action? The same can be said of the Crown's interest in *A.G. v. Goddard* (1929), 98 L.J.K.B. 743, where the Crown was able to recover bribes which had been paid to its employee, a sargeant in the Metropolitan Police. In my view, what was protected in that case was not a "legal" interest but a vital and substantial "practical" interest.

45 The third characteristic of relationships in which a fiduciary duty has been imposed is the element of vulnerability. This vulnerability arises from the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power. Because of the requirement of vulnerability of the beneficiary at the hands of the fiduciary, fiduciary obligations are seldom present in the dealings of experienced businessmen of similar bargaining strength acting at arm's length: see, for example, *Jirna Ltd. v. Mister Donut of Can. Ltd.*, [1972] 1 O.R. 251, 3 C.P.R. (2d) 40, 22 D.L.R. (3d) 639 (C.A.), affirmed [1975] 1 S.C.R. 2, 12 C.P.R. (2d) 1, 40 D.L.R. (3d) 303. The law takes the position that such individuals are perfectly capable of agreeing as to the scope of the discretion or power to be exercised, i.e., any "vulnerability" could have been prevented through the more prudent exercise of their bargaining power and the remedies for the wrongful exercise or abuse of that discretion or power, namely, damages, are adequate in such a case.

46 A similar three-fold formulation of the principle underlying fiduciary obligation has recently been adopted by the Australian High Court in deciding whether a sole distributor of a product has fiduciary obligations. In *Hospital Products Ltd. v. U.S. Surgical Corp.* (1984), 55 A.L.R. 417 at 432, Gibbs C.J. considered the following test "not inappropriate in the circumstances":

> ... there were two matters of importance in deciding when the court will recognize the existence of the relevant fiduciary duty. First, if one person is obliged, or undertakes, to act in relation to a particular matter in the interests of another and is entrusted with the power to affect those interests in a legal or practical sense, the situation is ... analogous to a trust. Secondly, ... the reason for the principle lies in the special vulnerability of those whose interests are entrusted to the power of another to the abuse of that power.

Mason J. in the same case stated (at p. 454) that the critical feature in these relationships is that:

> ... the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.

A similar formulation of the principle was enunciated in at least one Canadian case. In *Misener v. H.L. Misener & Son Ltd.* (1977), 2 B.L.R. 106, 3 R.P.R. 265, 77 D.L.R. (3d) 428, 21 N.S.R. (2d) 92 (C.A.), Macdonald J.A. enunciated the principle in this way at p. 440:

> The reason such persons [directors] are subjected to the fiduciary relationship apparently is because they have a leeway for the exercise of discretion in dealing with third parties which can affect the legal position of their principals.

As well, it has been advanced by many learned commentators: see, generally, Weinrib, ante, at pp. 4-9; Shepherd, ante, at pp. 98, 138-41; Harold Brown, "Franchising — A Fiduciary Relationship" (1971), 49 Texas Law Rev. 650 at 664.

47 In my view, the relationship between the custodial parent and the non-custodial parent fits within the fiduciary principle I have described. There is no doubt that prior to the custody and access order the parent who will become the non-custodial parent has a very substantial interest in his or her relationship with the child. The granting of the access order confirms that the relationship between the non-custodial parent and the child is of benefit to the child and therefore worth preserving. That relationship pre-dated the access order and it continues to subsist after the access order is made. It is not itself created by the access order. But the custody and access order, by splitting access from custody, puts the custodial parent in a position of power and authority which enables him or her, if so motivated, to affect the non-custodial parent's relationship with his or her child in an injurious way. The selfish exercise of custody over a long period of time without regard to the access order can utterly destroy the non-custodial parent's relationship with his child. The non-custodial parent (and, of course, the child also) is completely vulnerable to this. Yet the underlying premise in a grant of custody to one parent and access to the other is that the custodial parent will facilitate the exercise of the other's access rights for the sake of the child. This is reflected in s. 16(10) of the Divorce Act, S.C. 1986, c. 4, which provides:

> (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

The custodial parent is expected to act in good faith not only towards the non-custodial parent but also towards the children. Section 16(10) makes it clear that this is one of the qualifications of a good custodial parent.

48 It seems to me that the three underlying characteristics of relationships in which fiduciary duties are imposed are present in the relationship under review. The custodial parent has been placed as a result of the court's order in a position of power and authority over the children with the potential to prejudicially affect and indeed utterly destroy their relationship with their non-custodial parent through improper exercise of the power. There can be no doubt also that the requisite vulnerability is present and that in practical terms there is little that the non-custodial parent can do to restrain the custodial parent's improper exercise of authority or to obtain redress for it. The options open to an aggrieved non-custodial parent in the face of a campaign by a custodial parent to cut the non-custodial parent off from the child are exceedingly limited. As mentioned above, s. 37 of the Children's Law Reform Act gives courts the authority to direct a sheriff or police force, or both, to locate, apprehend and deliver back a child who is being unlawfully withheld

from a person entitled to custody or access. This does not appear to be an appropriate means of compelling a custodial parent to permit access and it seems unlikely that any parent sensitive to his or her child's feelings would resort to it. The option of refusing payment of child maintenance in order to secure a right of access is not available to a non-custodial spouse: *Wright v. Wright* (1973), 1 O.R. (2d) 337, 12 R.F.L. 200, 40 D.L.R. (3d) 321 (C.A.). The powers of the court to order a custodial parent to post a bond or other security, to have support payments made to a specified trustee who holds them subject to certain conditions, and to have the custodial parent give up his or her passport are usually ineffective. The forfeiture of the bond or other security and the withholding of support payments by a trustee may not be in the child's best interests (it may affect the custodial parent's ability to meet the expenses of raising the child) and the giving up of the passport only prevents the child from being removed from the country. Section 39 of the Children's Law Reform Act allows a Provincial Court (Family Division) to impose fines of up to $1,000 and/or imprisonment of up to 90 days for contempt. But imprisoning and fining the custodial parent will usually not be in the child's best interests and will therefore seldom be available to the non-custodial parent. As James G. McLeod has written (annotation to *O'Byrne v. Koresec* (1986), 2 R.F.L. (3d) 104 at 105):

> Where they [access orders] are wilfully ignored, proper sanctions must be imposed. Such actions may be a fine ... or imprisonment ... Neither of these sanctions, however, is entirely appropriate. In many cases, the custodial spouse may not have the resources to pay the fine without resort to funds required for day-to-day living expenses, in which event the child will suffer ... Where imprisonment is ordered, one approach would be to imprison the custodial parent over weekends when access by the other parent could be enjoyed, so as to minimize disruption to the children. Even then, the children may suffer from the knowledge (which they will surely gain!) that one parent has put the other parent in jail.

49 It is sometimes suggested that transferring custody is an appropriate means of punishing the custodial parent for an ongoing denial of access: see, for example, the suggestions made in *Woodburn v. Woodburn* (1975), 21 R.F.L. 179 at 182-83, 11 N.S.R. (2d) 528 (S.C.); *Jones v. Jones* (1970), 1 R.F.L. 295 at 295-96 (Ont. C.A.); *Currie v. Currie* (1975), 18 R.F.L. 47 at 55 (Alta. S.C.); *Donald v. Donald* (1973), 6 N.B.R. (2d) 665 at 668 (C.A.). And indeed this is being done: see *Nayar v. Nayar* (1981), 24 R.F.L. (2d) 400 (B.C.C.A.), and *Fast v. Fast* (1983), 33 R.F.L. (2d) 337, 27 Sask. R. 96 (C.A.). But again, because of the bonding that takes places between the custodial parent and his or her child over a period of time, such a step may not be in the child's best interests. In *Racine v. Woods*, [1983] 2 S.C.R. 173, *(*sub nom. *A.N.R. v. L.J.W.)* 36 R.F.L. (2d) 1, [1984] 1 W.W.R. 1, [1984] 1 C.N.L.R. 161, 1 D.L.R. (4th) 193, 24 Man. R. (2d) 314, 48 N.R. 362, a case involving a custody dispute between an Indian child's natural parents and the child's adopted parents, this court stressed the need for children to have continuity of relation ships. It held that, while an Indian child's cultural heritage and background were important factors to be considered by the court in applying the best interests doctrine, these factors had declined in importance in light of the degree of psychological bonding which had developed with the foster parents. Because of

this psychological bonding a transfer of custody may not be a suitable remedy. Finally, as has been indicated above, there are good reasons for not extending common law causes of action in tort in order to permit the non-custodial parent to obtain redress for the custodial parent's denial of access.

50 I have already indicated that substantial non-legal, practical interests are protected by the imposition of fiduciary duties in appropriate cases. It cannot be denied that the non-custodial parent's interest in his or her child is as worthy of protection as some interests commonly protected by a fiduciary duty. For example, just as a corporation has a substantial interest in its relationship to corporate opportunities and customers that is worthy of protection (see, for example, *Can. Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592, 11 C.P.R. (2d) 206, 40 D.L.R. (3d) 371 [Ont.]), it can be said that a non-custodial parent has a substantial interest in his or her relationship with his or her child that is worthy of protection. However, one salient distinction between the non-custodial, parent-child relationship and the corporation-customer relationship is that the former involves a substantial non-economic interest of the parent while the latter normally involves a substantial economic interest of the corporation. But I believe that this distinction should not be determinative. The non-custodial parent's interest in the relationship with his or her child is without doubt of tremendous importance to him or her. To deny relief because of the nature of the interest involved, to afford protection to material interests but not to human and personal interests would, it seems to me, be arbitrary in the extreme. In contract law equity recognizes interests beyond the purely economic when, instead of awarding damages in the market value of real estate against a vendor who has wrongfully refused to close, it grants specific performance. Other non-economic interests should also be capable of protection in equity through the imposition of a fiduciary duty. I would hold, therefore, that the appellant's interest in a continuing relationship with his or her child is capable of protection by the imposition of such a duty.

51 Before a cause of action for breach of fiduciary duty can be said to exist in this limited area within the field of family law, it is necessary to ask the same question as was asked in the context of the various torts proposed by the appellant, namely, should existing fiduciary principles be extended? In examining this question it will again be necessary to consider the possibility that this cause of action might be used as a weapon by vindictive spouses and, more important still, it is necessary to consider whether or not the extension of fiduciary principles to this particular relationship would be in the best interests of children.

52 This cause of action has, in my view, a number of significant advantages over the others. First, it arises only in one particular circumstance, the circumstance of vulnerability created by the splitting of the custody and access of children by the issuance of a court order. Unlike some of the torts examined this action would not be available in any other family law context. This is a very important consideration in light of the possible detrimental impact on children of recurring lawsuits by one parent against the other.

53 Second, the cause of action for breach of fiduciary duty creates a very strong incentive to custodial parents to exercise their custodial rights so as to further the best interests of their children, to recognize that their children are entitled to an ongoing relationship with their other parent and that it is a serious matter to use the authority confided in them by an order of the court to deprive their children of this other dimension in their lives. I believe that this cause of action will help to promote a healthy and beneficial relationship between a child and both parents and is, in this respect, much more conducive to the best interests of the child than the tort actions previously considered.

54 Finally, unlike the causes of action in tort, the cause of action for breach of fiduciary duty allows the court to take into account conduct of a non-custodial parent (whether related to custody and access issues or not) which might be contrary to the best interests of children. When considering breaches of equitable duty and awarding equitable remedies the court has a wide scope for the exercise of discretion which does not exist in respect of common law causes of action. In the context of breach of fiduciary duty this discretion would allow the court to deny relief to an aggrieved party or grant relief on certain terms if that party's conduct has disabled him or her from full relief, e.g., non-payment of spousal support or previous abuse of access rights. There is neither precedent nor historical basis for the exercise of such a discretion in the case of a common law tort action. The tort would be actionable regardless of the inequitable conduct of the plaintiff.

55 It may be objected that despite these advantages which the action for breach of fiduciary duty possesses over the tort actions I have examined, the availability of any action would be contrary to the best interests of children because of the unavoidable deleterious effects of litigation on children. To some extent, this objection is well founded. Inter-spousal litigation may create a conflict of loyalties in the children and may also have the effect of impairing child support. But it is within the jurisdiction of the courts, particularly courts of equity, to prevent a cause of action from proceeding if there is any risk of injury to the children's interests. The interests of the children are the paramount concern. I would hold, therefore, that the cause of action for breach of fiduciary duty can proceed only if there is no risk that the support of the children will be impaired and no risk of a harmful conflict of loyalties arising in the children. The former condition may be satisfied when the children are fully grown and self-supporting or where the custodial parent has substantial assets. The latter condition may be satisfied where the relationship between the non-custodial parent and the children has been so severely damaged by the custodial parent's conduct that it is unlikely that a conflict of loyalties would occur. Accordingly, it will not be every denial of access rights that will give rise to a cause of action for breach of fiduciary duty but only where a sustained course of conduct has caused severe damage to the non-custodial parent-child relationship to the detriment of both the non-custodial parent and the child.

56 The legislature has provided a series of remedies for the violation of the court order by the denial of access rights on specific occasions. As I have indicated earlier in the context of a

common law cause of action enforcing a parental right of access, it is not open to this court to introduce common law causes of action which the legislature did not see fit to provide in order to redress the violation of a court order. The ability of the court to introduce common law actions into areas where the legislature has intervened was recently addressed by this court in *Seneca College of Applied Arts & Technology Bd. of Gov. v. Bhadauria*, [1981] 2 S.C.R. 181, 22 C.P.C. 130, 14 B.L.R. 157, 17 C.C.L.T. 106, 81 C.L.L.C. 14,117, 2 C.H.R.R. D/468, 124 D.L.R. (3d) 193, 37 N.R. 455. In that case the plaintiff sought recognition of a new common law tort against unjustified invasion of one's interest not to be discriminated against in respect of an employment opportunity on grounds of race or national origin. The plaintiff urged that this common law right of action arose directly from a breach of the Ontario Human Rights Code, R.S.O. 1970, c. 318, as amended. This court denied the existence of such an action because of "the comprehensiveness of the Code in its administrative and adjudicative features, the latter including a wide right of appeal to the Courts on both fact and law" (at p. 183, per Laskin C.J.C.). Laskin C.J.C. noted, at p. 188, that there was "a narrow line between founding a civil cause of action directly upon a breach of a statute and as arising from the statute itself and founding a civil cause of action at common law by reference to policies reflected in the statute and standards fixed by the statute". In his view, the proposed action fell into the former category. Laskin C.J.C. at p. 189 also stated:

> It is one thing to apply a common law duty of care to standards of behaviour under a statute; that is simply to apply the law of negligence in the recognition of so-called statutory torts. It is quite a different thing to create by judicial fiat an obligation — one in no sense analogous to a duty of care in the law of negligence — to confer an economic benefit upon certain persons, with whom the alleged obligor has no connection, and solely on the basis of a breach of statute which itself provides comprehensively for remedies for its breach.

57 In my view, the recognition of the existence of a cause of action for breach of fiduciary duty, limited in the way I have suggested ante, is in no way inconsistent with the *Seneca College* case. There are two distinguishing features which lead me to this view. First, what is being proposed in this case is a form of equitable relief. The comments made in *Seneca College* were restricted to common law relief. There is every reason to believe that it would require stronger statutory language to oust the jurisdiction of the court to grant equitable relief for an equitable wrong such as breach of fiduciary duty. As already pointed out, the extensive statutory intervention of the legislature in the area of corporate law has not succeeded in ousting the equitable jurisdiction of the court to grant relief for breach of fiduciary duty in that context. Historically, courts of equity have even been willing to grant equitable relief supplementing statutory relief for a statutory wrong. For example, courts of equity have granted injunctions restraining the commission of certain acts even where a statute proscribes and provides remedies for the commission of those acts. This is done whenever the applicable statutory remedies are ineffective to prevent their commission and severe harm will result: Halsbury's Laws of England, 4th ed., vol. 16, para. 1215, p. 815; *A.G. v. Sharp*, [1931] 1 Ch. 121 (C.A.); *A.G. v. Premier Line, Ltd.*, [1932] 1 Ch. 303. I believe, therefore, that it would take clear and compelling statutory language to oust equity's broad inherent jurisdiction

to give equitable relief in appropriate circumstances. No such statutory language exists in any of the legislation applicable to this case.

58 Second, the cause of action for breach of fiduciary duty is not founded "directly upon breach of a statute". Instead, it falls on the other side of the line drawn by Laskin C.J.C. — i.e., it is a cause of action existing independently of the statute founded "by reference to the policies reflected in the statute and standards fixed by the statute". While the legislature's enforcement scheme is dedicated to the enforcement of the court order as such, the cause of action for breach of fiduciary duty is dedicated to the protection of the child's relationship with his or her non-custodial parent on which the court order was based. That relationship was not created by the court order. The remedy is accordingly given not for individual violations of the court order or the statute but for an entire course of conduct designed to undermine or destroy the underlying relationship which access was intended to preserve and foster.

59 Accordingly, it would be my view that the cause of action for breach of fiduciary duty should be extended to this narrow but extremely important area of family law where the non-custodial parent is completely at the mercy of the custodial parent by virtue of that parent's position of power and authority over the children. If this is a situation which for very good reason the common law is ill-equipped to handle, resort to equity is entirely appropriate so that no just cause shall go without a remedy. The breach will be actionable only when judgment recovery will not impair child support and when the non-custodial parent-child relationship has been so severely damaged by the custodial parent's conduct as to make it highly unlikely that the action brought by the non-custodial parent would be the cause of any conflict of loyalties in the children. Such a cause of action, properly tailored as only equity can do and has done in other contexts, will create a strong incentive to further the best interests of children while eliminating the more harmful effects commonly associated with inter-spousal litigation.

60 One word of caution may be in order. At times, a perfectly legitimate exercise by the custodial parent of his or her custodial rights or custodial obligations will result in an individual denial of access to the other parent. It is not the role of the court to review this sort of exercise of discretion with respect to the child. It is only when a sustained course of conduct designed to destroy the relationship is being engaged in that there is a breach of the duty. If and when a custodial parent comes to believe that continued access to the child by the other parent is not in the child's interests or is harmful to the child, the proper course for the custodial parent to follow is not to engage in ongoing wilful violations of the access order but to apply to the court to vary or rescind it.

(iii) The remedy

61 The remedies normally awarded for breach of fiduciary duty are the imposition of a constructive trust and the accounting of profits. Neither remedy is applicable here. However, equitable compensation is also an available remedy: see, for example, *Seager v. Copydex Ltd.*,

[1967] 1 W.L.R. 923, [1967] 2 All E.R. 415 (C.A.) ; *Dowson and Mason Ltd. v. Potter*, [1986] 2 All E.R. 418 (C.A.); *Nocton v. Ashburton (Lord)*, [1914] A.C. 932 at 946, 956, 957 (H.L.); *U.S. Surgical Corp. v. Hosp. Products Int. Pty. Ltd.*, [1982] 2 N.S.W.L.R. 766 at 816 (S.C.). The purpose of equitable compensation is to restore to the plaintiff what has been lost through the defendant's breach or the value of what has been lost.

62 The issue in the leading case of *Nocton v. Ashburton (Lord)* was the liability of the appellant's solicitor to his client, the respondent, in respect of advice given by the solicitor that the client release part of the premises comprised in a mortgage held by him. Neville J. dismissed the action but the Court of Appeal held the appellant liable in damages for deceit. The House of Lords disagreed that the solicitor was liable in tort but held that the solicitor had failed to discharge his fiduciary duty to the client. This was a matter falling within the exclusive jurisdiction of equity. Viscount Haldane explained [p. 952] that the Court of Chancery, being a court of conscience, "could order the defendant, not ... to pay damages as such, but to make restitution, or to compensate the plaintiff by putting him in as good a position pecuniarily as that in which he was before the injury".

63 Viscount Haldane pointed out that it was no bar to an award of equitable compensation that the plaintiff would have had a remedy in damages for breach of contract. It might be to the plaintiff's advantage to claim for compensation in equity. Viscount Haldane stated at p. 957:

> My Lords, since the Judicature Act any branch of the Court may give both kinds of relief, and can treat what is alleged either as a case of negligence at common law or as one of breach of fiduciary duty. The judgment of Jessel M.R. in *Cockburn v. Edwards* [(1881) 18 Ch. D. 449] may, I think, really be regarded as an illustration of the latter jurisdiction. In the case with which we are dealing the statement of claim was framed mainly on the lines of breach of fiduciary duty. This was probably deliberately done in order to endeavour to get over the difficulty occasioned by the Statute of Limitations as regards any mere case of negligence in the original mortgage transaction of 1904. As a consequence fraud has been charged in the peculiar sense in which it was the practice to charge it in Chancery procedure in cases of this kind. But the facts alleged would none the less, if proved, have afforded ground for an action for mere negligence.

He then goes on to conclude at p. 957:

> It was really an action based on the exclusive jurisdiction of a Court of Equity over a defendant in a fiduciary position in respect of matters which at law would also have given a right to damages for negligence.

64 In a learned article on "The Equitable Remedy of Compensation" (1982), 13 Melbourne Univ. Law Rev. 349, the author, Ian E. Davidson, discusses the fact that the quantum of common

law damages and of equitable compensation need not necessarily be the same because different principles apply. Quoting from p. 352:

> Although compensation in Equity will often produce the same result as damages the common law and equitable remedies utilise different rules to achieve the similar goal of compensating a plaintiff for loss suffered. This can lead to significant differences in the ultimate awards. For example, common law damages in negligence and contract are subject to requirements of foreseeability and remoteness which are not relevant to Equity when it restores property or money lost by breach of an equitable obligation. This is brought out by the judgment of Street J. in *Re Dawson (deceased)* [(1966), 2 N.S.W.R. 211] which illustrates the different principles involved in the assessment of compensation in Equity and damages at law.

65 While it is premature at this stage to consider the proper level of compensation should the appellant succeed in this case, I would think that equitable compensation would allow the appellant to recover not only his out-of-pocket expenses incurred throughout the campaign to destroy his relationship with his children but also a realistic sum for his pain and suffering which in this case would include compensation for the severe depression he suffered as a result of the respondents' conduct. In assessing the appropriate sum for "pain and suffering" some assistance may be gleaned from cases allowing recovery for "loss of guidance, care and companionship" in wrongful death actions pursuant to s. 60 of the Family Law Reform Act (now s. 61 of the Family Law Act, S.O. 1986, c. 4). In examining these cases regard should be paid to the apt comments made by J. Holland J. in *Zik v. High* (1981), 35 O.R. (2d) 226 at 237 (H.C.):

> ... s. 60 of the *Family Law Reform Act, 1978* cries out for the exercise of judicial restraint in the general interest of the public in the assessment of damages consequent upon an inquiry to another as in this case. I say this because uncontrolled by such restraint the ceiling under the heading of loss of guidance, care and companionship for an award could be unlimited. Much of s. 60, as I view it, was a legislative attempt to codify the principle laid down in *St. Lawrence & Ottawa Railway Co. v. Lett* (1885), 11 S.C.R. 422, and enunciated once again by the Supreme Court of Canada in *Vana v. Tosta et al.*, [1968] S.C.R. 71 ... that loss of care and guidance, where a mother was killed leaving children, was a measurable pecuniary loss but that the amount to be awarded under that heading should be modest, although not merely conventional.

These comments are especially appropriate in this context where the prospect of very sizable awards may encourage unmeritorious actions possibly detrimental to the children's best interests.

66 The usefulness of the remedy of equitable compensation for breach of fiduciary duty is hard to assess from the case law since the award made in many of the cases is not always identified as equitable compensation. For example, in *Seager v. Copydex*, supra, the plaintiff, while negotiating with the defendant company to market his patented carpet grip "Invisigrip", disclosed details of

the grip. Later the defendant applied to patent a grip very similar to the plaintiff's using the same name "Invisigrip". Its assistant manager who had been present at the confidential interview was named as the inventor in the patent application. The Court of Appeal found the defendant liable for breach of confidence and held the plaintiff entitled to damages to be assessed by the Master on the basis of reasonable compensation for the use of confidential information. Lord Denning M.R. stated at p. 932:

> It may not be a case for injunction or even for an account, but only for damages, depending on the worth of the confidential information to him [the defendant] in saving him time and trouble.

The court made no reference to any problem in awarding damages for breach of purely equitable obligations, particularly in a case where an injunction would not be granted, nor did it refer to the inherent compensatory jurisdiction of equity which would appear to be the proper basis for the award. Nor did it discuss the inherent jurisdiction of equity to award equitable compensation when the issue of the correct basis for assessing the damages was referred back to it in *Seager v. Copydex Ltd. (No. 2)*, [1969] 1 W.L.R. 809. Davidson concludes in his article that awards of damages in cases such as *Seager* are applications of the compensatory jurisdiction of equity affirmed in *Nocton v. Ashburton (Lord)* although not identified by the courts as such.

4. Conclusion

67 The facts as pleaded in the statement of claim could, if proved, give rise to a cause of action for breach of fiduciary duty. The plaintiff alleges that the defendants engaged in a course of conduct over a substantial period of time designed to defeat his access rights and destroy his relationship with his children, that they were in fact successful in so doing, and that he incurred financial loss, the loss of his relationship with his children, and damage to his psychiatric and physical health as a consequence. The action should therefore proceed to trial.

5. Disposition

68 I would allow the appeal, set aside the orders of the Ontario Court of Appeal and of Boland J. and direct the respondents to file their statement of defence to the action within 20 days. The appellant should have his costs both here and in the courts below.

***La Forest J. (Dickson C.J.C., Beetz, Mcintyre*, and *Lamer JJ.* concurring):**

69 The issue in this case is whether the appellant has a right of action against his former spouse and her present husband for interfering with his access to his children.

Background

70 This appeal arises out of a motion to strike out a statement of claim on the ground that it discloses no cause of action. That being the case, it must be assumed, for the purposes of the motion, that the facts pleaded are true. The most salient of these are as follows.

71 Richard Frame and Eleanor Smith were formerly husband and wife and had three children, now aged 24, 19 and 18. The couple separated in 1970, and in 1971 a Manitoba court granted the wife custody of the children, with generous visiting privileges to her husband. Later orders of access were issued in Ontario in 1974 and 1975. According to the husband, however, his former wife has done everything in her power to frustrate his access to the children. She has moved between Winnipeg, Toronto, Denver and Ottawa, making access and visitation, in his words, impossible. She changed the children's surname and religion, told them that the appellant was not their father, forbade telephone conversation with him, and intercepted his letters to them. The husband alleges that as a result of his former wife's conduct he has undergone considerable expense and has suffered severe emotional and psychic distress. He claims that she and her present husband are liable for any damages flowing from their wrongful interference with the legal relationship he had with his children. Accordingly, he seeks recovery not only of his out-of-pocket expenses (estimated at $25,000), but of general and punitive damages in the sum of $1,000,000 and $500,000, respectively. The endorsement on the writ of summons reads as follows:

> The Plaintiff's claim is for damages as a result of the defendants' failure to permit the plaintiff to exercise the right to access to his children or alternatively, damages relating to the defendants' wilful denial or refusal to permit the plaintiff from exercising his lawful right to access to his children or alternatively, damages arising from the defendants' conspiracy to commit acts in order to prevent the plaintiff from exercising his legal rights and for damages related to the plaintiff's loss of opportunity to develop a meaningful human relationship and have social companionship and contact with his children and to provide and give to the said children proper parental love, care and guidance.

72 The defendants moved for an order to have the action struck out under R. 126 of the Ontario Rules of Practice. Considering herself bound by the similar case of *Schrenk v. Schrenk*, 32 O.R. (2d) 122, affirmed (1982), 36 O.R. (2d) 480 (C.A.), Boland J. made the order. On appeal to the Ontario Court of Appeal, that court, too, considered itself bound by its earlier decision in Schrenk and dismissed the appeal.

73 The appellant then sought and was granted leave to appeal to this court.

Possible Tort Liability

74 Despite their deep human and social importance, the interest of parents in the love and companionship of their children and the reciprocal interest of children in the love and companionship of their parents were not, at common law, accorded specific protection. The

Restatement of the Law of Torts (1938), s. 699, puts the parent's common law position in these words: "One who, without more, alienates from its parents the affection of a child, whether a minor or of full age, is not liable to the child's parent". There were the old actions of enticement, harbouring, or seduction or loss of services that gave some protection to a father's interest in his children, but these actions had a distinctly pecuniary flavour. In any event, they have now been abolished in Ontario by the Family Law Reform Act, R.S.O. 1980, c. 152, s. 69(4).

75 In the United States, a separate tort of "alienation of affections" was developed to protect the reciprocal interest of spouses in one another's companionship, but from the mid-1930s onward, it began to fall into disfavour and, along with the traditional actions already mentioned, was abolished in many of the states. It simply did not sit well in an age of "rapidly shifting husbands and wives and ever-increasing family catastrophes": for an account, see Alan Milner, "Injuries to Consortium in Modern Anglo-American Law" (1958), 7 Int. & Comp. Law Q. 417, especially at pp. 435-36. The extension of the tort in a few state courts to allow parents to sue for the loss of affection of their children received anything but universal approval: see Milner, ante; Clay A. Mosberg, Note, "A Parent's Cause of Action for the Alienation of a Child's Affection" (1973-74), 22 Kansas Law Rev. 684. Opening the gates to a multiplicity of actions within the family circle and against close family friends was not viewed as an undiluted good. Indeed, in Michigan, one of the few states where this extension was made, the state legislature went out of its way to abolish it: see Mosberg, ante, pp. 689-90. In Canada, this court, in *Kungl v. Schiefer*, [1962] S.C.R. 443, 33 D.L.R. (2d) 278, rejected an action by a husband to recover damages for the alienation of the affection of his wife, holding that no such tort existed in Canada. In this, it followed the lead of the English courts where, in *Gottlieb v. Gleiser*, [1958] 1 Q.B. 267, [1957] 3 All E.R. 715, Denning L.J. made it clear that such domestic matters lie outside the realm of the law altogether.

76 The husband in the present case also sought to rely on the tort of conspiracy but, as my colleague Wilson J. explains in her judgment, there are grave disadvantages associated with applying this tort to circumstances like the present. Further, as she notes, this court has made it clear that it does not look kindly upon the extension of this tort, which it regards as an anomaly: see *Can. Cement LaFarge Ltd. v. B.C. Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 at 473, [1983] 6 W.W.R. 385, 21 B.L.R. 254, 24 C.C.L.T. 111, 72 C.P.R. (2d) 1, 145 D.L.R. (3d) 385, 47 N.R. 191, per Estey J. Wilson J., in her judgment, has also adequately disposed of the possibility of other existing torts applying to the circumstances of this case. It is also doubtful, as she observes, that a parent had at common law a right of access, as opposed to custody, upon which an action could be grounded. There is no pecuniary interest here and, in any event, any possible interest seems to be very much akin to that which would have been protected by the rejected tort of alienation of affections.

77 It would, of course, be possible for the courts to devise a new tort to meet the situation. And the temptation to do so is clearly present, for one cannot help but feel sympathy for the appellant and others in like situations. But there are formidable arguments against the creation of such a

remedy. I have already mentioned the undesirability of provoking suits within the family circle. The spectacle of parents not only suing their former spouses but also the grandparents, and aunts and uncles of their children, to say nothing of close family friends, for interfering with rights of access is one that invites one to pause. The disruption of the familial and social environment so important to a child's welfare may well have been considered reason enough for the law's inaction, though there are others.

78 There are also serious difficulties in defining such a tort. At what stage and for what actions should one be able to claim interference with access? Is advice or encouragement to a child sufficient? It is notorious that free, and not always disinterested and wise, advice abounds in a family setting. There are degrees of interference, of course, and some interference is malicious and some is not, but where the line is to be drawn defies specification. It seems to me that there is no clear boundary between ordinary interruptions to access and sustained, putatively actionable interference, and where the point is reached where permissible advice intended for the child's benefit stops and malicious obstruction begins is virtually impossible to divine. This is especially so because, as Alan Milner, ante, at p. 429, has pointed out, "when there is dislike, a desire to injure is never far behind". Besides, the awarding of damages will do little to bring back love and companionship, but it may, in some cases, well deprive a child of the support he or she might otherwise obtain from a custodial parent and relatives. If, on the other hand, the action is generally limited to the recovery of expenses, it will be of little use to most parents given the costs, in time and money, of court actions. These and other practical considerations are sufficient to raise serious doubts about whether an action at law is the appropriate way to deal with this type of situation. This probably explains the reticence of the courts in finding a remedy at common law.

79 But what really determines the matter, in my view, is that any possible judicial initiative has been overtaken by legislative action. In all the provinces (and at the federal level for that matter), legislation has been enacted to deal with the modern phenomenon of frequent family breakdowns and, in particular, to provide for custody of and access to children. (In Ontario, the Children's Law Reform Act, R.S.O. 1980, c. 68, as amended by the Children's Law Reform Amendment Act, 1982, S.O. 1982, c. 20, now deals with the matter in a comprehensive manner. In particular, the courts are given the role of ensuring that issues involving custody of and access to children are determined on the basis of the best interests of the children (see ss. 19(*a*), 24(1)). Numerous remedies are provided for the enforcement of orders granting custody or access. The court can give such directions as it considers appropriate for the supervision of those having custody of or access to the children (s. 35). It may, on application, make an order restraining any person from molesting, annoying or harassing the applicant or a child in the applicant's custody (s. 36). It may also empower the applicant or someone on his or her behalf to apprehend a child to give effect to the applicant's entitlement to custody or access (s. 37(1)). In certain circumstances, it may direct the sheriff or the police to do so (s. 37(2)), and empower them to enter and search any place where they have reasonable and probable grounds for believing the child may be, and to use such assistance or force as may be reasonable in the circumstances (s. 37(5)). The court may also take

steps to prevent a child from being removed from the province (s. 38). In addition to its powers in respect of contempt, the court is empowered to impose a fine or imprisonment for wilful contempt of, or resistance to, its process or orders in respect of custody or access (s. 39).

80 It seems obvious to me that the legislature intended to devise a comprehensive scheme for dealing with these issues. If it had contemplated additional support by civil action, it would have made provision for this, especially given the rudimentary state of the common law. Indeed, as we saw, the legislature in a separate statute (the Family Law Reform Act) went out of its way to abolish all the relevant, if inadequate, remedies then existing at common law. Gray J. in *Schrenk*, supra, assumed that an action like the present fell within the ambit of these abolished common law remedies, and I agree that the statute shows a clear disposition not to permit recourse to the courts for civil actions of this nature. There is more here than the usual presumption that the legislature must be taken to have known the pre-existing law. It had acted on the basis of a Report on Family Law (1969) prepared by the Ontario Law Reform Commission.

81 In adopting this position, I am merely following the approach taken by this court in a number of recent cases. In *Seneca College of Applied Arts & Technology Bd. of Gov. v. Bhadauria*, [1981] 2 S.C.R. 181, 22 C.P.C. 130, 17 C.C.L.T. 106, 81 C.L.L.C. 14,117, 14 B.L.R. 157, 2 C.H.R.R.D/468, 124 D.L.R. (3d) 193, 37 N.R. 455, the court had to deal with the issue whether the repeated denial of employment on the ground of racial discrimination gave rise to a common law tort. As is the case here, a comprehensive statute, the Ontario Human Rights Code, had been enacted to deal with the problem in the face of rudimentary common law development. As here too, the substance of the right was defined by the statute and an array of remedies had been devised to enforce it. Laskin C.J.C., speaking for the court, at p. 189, made it clear that there was no room "to create by judicial fiat an obligation ... to confer ... [a] benefit upon certain persons ... solely on the basis of a breach of a statute which itself provides comprehensively for remedies for its breach". The present case, in my view, affords a complete parallel to that situation.

82 More generally, what the present action appears to contemplate is the enforcement of a statutory duty, or what amounts to the same thing, an order made by virtue of a statutory discretion, by means of a civil action rather than by means of the remedies provided by the Act. This court had occasion to deal with that issue in *R. in Right of Can. v. Sask. Wheat Pool*, [1983] 1 S.C.R. 205, [1983] 3 W.W.R. 97, 23 C.C.L.T. 121, 143 D.L.R. (3d) 9, 45 N.R. 425. There the Canadian Wheat Board sought to recover damages against the Pool for having delivered infested grain out of its terminal elevators contrary to a statutory provision; no negligence was pleaded. The action failed. The court flatly rejected the notion of a nominate tort of statutory breach; if the legislature wished to provide for a civil action, it held, it could do so. Any other course would simply allow the courts to choose, in no predictable fashion, to grant a civil remedy for a statutory breach whenever they thought fit. The tenor of the court's approach may be gleaned from the following passage of the judgment of the present Chief Justice, then Dickson J. at pp. 215-16:

> The pretence of seeking what has been called a "will o' the wisp", a non-existent intention of Parliament to create a civil cause of action, has been harshly criticized. It is capricious and arbitrary, "judicial legislation" at its very worst ...
>
> It is a "bare faced fiction" at odds with accepted canons of statutory interpretation: "the legislature's silence on the question of civil liability rather points to the conclusion that it either did not have it in mind or deliberately omitted to provide for it" (Fleming, *The Law of Torts*, 5th ed., 1977, at p. 123). Glanville Williams is now of the opinion that the "irresolute course" of the judicial decisions "reflect no credit on our jurisprudence" and, with respect, I agree. He writes:
>
> > The failure of the judges to develop a governing attitude means that it is almost impossible to predict, outside the decided authorities, when the courts will regard a civil duty as impliedly created. In effect the judge can do what he likes, and then select one of the conflicting principles stated by his predecessors in order to justify his decision.

83 There is no need today to supplement legislative action in this way. Indeed, to do so may well do violence to the comprehensive statutory scheme provided by the legislature: see *St. Anne Nackawic Pulp & Paper Co. v. C.P.W.U., Loc. 219*, [1986] 1 S.C.R. 704, 86 C.L.L.C. 14,037, 28 D.L.R. (4th) 1, 73 N.B.R. (2d) 236, 184 A.P.R. 236, 68 N.R. 112, per Estey J., especially at p. 721. I shall have more to say about this later. As well, when it is subsequently desired to make changes to a legislative scheme, common law accretions are difficult to deal with adequately.

84 In my view, therefore, the appellant husband has not established a proper basis for an action in tort.

Possible Fiduciary Obligation

85 Much of what I have already stated seems to me, with respect, to apply with equal force to the possibility, about which this court invited counsel to make additional submissions, that the appellant may have an action for a breach of fiduciary obligation arising out of the court order granting him access to the child. All the reasons for not permitting a tort action apply equally to an action for the breach of such an obligation. The legislature created the rights of custody and access and, as we saw, provided a whole array of remedies for enforcing them, from directions for supervising access, to restraining orders against interference, to apprehending the child, if necessary by permitting entries into premises and searches by the police or the sheriff, to fines and imprisonment. Why the legislature should be thought to have intended enforcement by an action for breach of a fiduciary obligation when there is a failure to comply with an access order, when an intention to permit a tortious action will not be implied, I fail to understand. All the more so when the legislature had taken pains to abolish all non-statutory actions that had any obvious relevance to the matter. Indeed there are in my view stronger reasons to doubt that the legislature would have

contemplated recourse to this action. It is extremely ill-defined and it would scarcely be one that would immediately leap to mind.

86 There is no greater clarity as to when an action for a breach of fiduciary obligation would arise than is the case respecting possible tortious action for interference with access. Even if one assumes that not every breach of the right of access can give rise to an action, at what point precisely does an action arise? As I noted in discussing a possible tort action, precision is virtually impossible in this area. The fact that the court may have some discretion in awarding damages does not alter the fact that there may be a wide area of conduct that might be thought by litigants to warrant suit. These are but a few of the uncertainties that surround this amorphous remedy. These uncertainties have the potential to generate pyrrhic, excessive and often needless litigation.

87 Permitting such an action may well be violative of the express direction of the Act that custody of and access to children should, in situations like these, be accorded solely on the basis of the children's best interests. The legislature may well have thought that allowing a civil action would have this effect. I might mention here that the courts will not permit violence to be done indirectly to a legislative scheme. In other contexts, not only have they refused to allow a tort action, but they have gone further and not permitted what had traditionally been permissible contractual actions: see, for example, *St. Anne Nackawic*, supra.

88 In sum, it is by no means certain that permitting civil actions against the custodial parents can be said to be in the best interests of the child, whether this be by creating a tort or recognizing a fiduciary relationship arising out of a court order. Resort even to fines and imprisonment, which is permitted by the Act, has been described as not "entirely appropriate": see James G. McLeod, annotation to *O'Byrne v. Koresec* (1986), 2 R.F.L. (3d) 104 at 105. That is because these may encroach on the resources of the custodial parent and because the child may suffer from the knowledge that one parent has taken such drastic action against the other. This applies, and in some respects with greater force to a legal action. Damages can impose a far greater financial burden than the fine of up to $1,000 which may be imposed under the Act (s. 39(1)). Furthermore, though the imprisonment of one parent at the behest of the other may be damaging to the child, litigation by one against the other over a protracted period may well be even more damaging.

89 For these reasons, I cannot accept that a breach of the statutorily authorized order in the present case gives rise to a fiduciary relationship on which a cause of action can be grounded.

Conclusion

90 No possible basis for a cause of action having been presented, I would dismiss the appeal with costs.

Appeal dismissed.

Footnotes

* Chouinard J. took no part in the judgment

Tab 36

1998 CarswellOnt 1
Supreme Court of Canada

Rizzo & Rizzo Shoes Ltd., Re

1998 CarswellOnt 1, 1998 CarswellOnt 2, [1998] 1 S.C.R. 27, [1998] A.C.S. No. 2, [1998] S.C.J. No. 2, 106 O.A.C. 1, 154 D.L.R. (4th) 193, 221 N.R. 241, 33 C.C.E.L. (2d) 173, 36 O.R. (3d) 418 (headnote only), 50 C.B.R. (3d) 163, 76 A.C.W.S. (3d) 894, 98 C.L.L.C. 210-006, J.E. 98-201

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited, Appellants v. Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited, Respondent and The Ministry of Labour for the Province of Ontario, Employment Standards Branch, Party

Gonthier, Cory, McLachlin, Iacobucci, Major JJ.

Heard: October 16, 1997
Judgment: January 22, 1998
Docket: 24711

Proceedings: reversing (1995), 30 C.B.R. (3d) 1 (C.A.); reversing (1991), 11 C.B.R. (3d) 246 (Ont. Gen. Div.)

Counsel: *Steven M. Barrett* and *Kathleen Martin*, for the appellants.
Raymond M. Slattery, for the respondent.
David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

Subject: Employment; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
X Priorities of claims
X.2 Preferred claims
X.2.d Wages and salaries of employees
X.2.d.iv Type of wages claimable
Labour and employment law
III Employment standards legislation
III.2 Object of legislation

Labour and employment law
III Employment standards legislation
III.13 Termination of employment
III.13.b Termination pay
III.13.b.i Entitlement
Labour and employment law
III Employment standards legislation
III.13 Termination of employment
III.13.c Severance pay
III.13.c.i Entitlement

Headnote

Bankruptcy --- Priorities of claims — Preferred claims — Wages and salaries of employees — Type of wages claimable

Trustee in bankruptcy closed bankruptcy employer's stores and paid employees all outstanding wages, commissions and vacation pay up to termination date — Ministry of Labour determined that employees were owed termination and severance pay, and filed claim with trustee which trustee disallowed — Court of Appeal ultimately upheld trustee's disallowance — Employees appealed — Appeal allowed — Termination resulting from bankruptcy gave rise to unsecured provable claim for termination and severance pay — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 121 — Employment Standards Act, R.S.O. 1980, c. 137, ss. 40(1), 40(7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Interpretation Act, R.S.O. 1990, c. I.11, s. 10.

Employment law --- Termination and dismissal — Termination of employment by employer — Severance pay under employment standards legislation

Trustee in bankruptcy closed bankruptcy employer's stores and paid employees all outstanding wages, commissions and vacation pay up to termination date — Ministry of Labour determined that employees were owed termination and severance pay, and filed claim with trustee which trustee disallowed — Court of Appeal ultimately upheld trustee's disallowance — Employees appealed — Appeal allowed — Termination resulting from bankruptcy gave rise to unsecured provable claim for termination and severance pay — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 121 — Employment Standards Act, R.S.O. 1980, c. 137, ss. 40 (1), 40(7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Interpretation Act, R.S.O. 1990, c. I.11, s. 10.

Faillite --- Priorité des créances — Créances prioritaires — Traitements et salaires des employés — Types de traitements exigibles

Syndic a procédé à la fermeture des magasins du failli et a payé tous les traitements, commissions et paies de vacances dus aux employés jusqu'à la date de cessation d'emploi — Ministère du travail a déterminé que les employés avaient droit à une indemnité de cessation d'emploi et a présenté une preuve de réclamation au syndic, lequel a rejeté la preuve de réclamation — Ultérieurement, la Cour d'appel a confirmé la décision du syndic — Employés ont formé un pourvoi — Pourvoi a

été accueilli — Cessation d'emploi résultant de la faillite donnait lieu à une réclamation prouvable ordinaire au titre des indemnités de cessation d'emploi — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, c. B-3, art. 121 — Loi sur les normes d'emploi, L.R.O. 1980, c. 137, art. 40(1), 40(7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, c. 22, art. 2(3) — Loi d'interprétation, L.R.O. 1990, c. I.11, art. 10.

Droit du travail --- Cessation d'emploi et indemnité de congédiement — Résiliation du contrat d'emploi par l'employeur — Indemnité de cessation d'emploi en vertu de la législation sur les normes du travail

Syndic a procédé à la fermeture des magasins du failli et a payé tous les traitements, commissions et paies de vacances dus aux employés jusqu'à la date de cessation d'emploi — Ministère du travail a déterminé que les employés avaient droit à une indemnité de cessation d'emploi et a présenté une preuve de réclamation au syndic, lequel a rejeté la preuve de réclamation — Ultérieurement, la Cour d'appel a confirmé la décision du syndic — Employés ont formé un pourvoi — Pourvoi a été accueilli — Cessation d'emploi résultant de la faillite donnait lieu à une réclamation prouvable ordinaire au titre des indemnités de cessation d'emploi — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, c. B-3, art. 121 — Loi sur les normes d'emploi, L.R.O. 1980, c. 137, art. 40(1), 40(7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, c. 22, art. 2(3) — Loi d'interprétation, L.R.O. 1990, c. I.11, art. 10.

An employer which operated a chain of shoe stores was petitioned into bankruptcy on April 13, 1989. A receiving order was made the following day, and on that day the employment of the employer's employees ended. The trustee in bankruptcy paid all wages, salaries, commissions, and vacation pay which had been earned by the employees up to the date on which the receiving order was made. A few months later, the provincial Ministry of Labour audited the employer' records, and determined that the former employees were owed termination pay and vacation pay thereon. The Ministry accordingly filed a proof of claim for these amounts with the trustee. The trustee subsequently disallowed the claims, inter alia, on the grounds that the bankruptcy of the employer did not constitute a dismissal of the employees from employment; thus, no entitlement to severance, termination or vacation pay was triggered under the *Employment Standards Act* (the "ESA"), and there was no claim provable in bankruptcy. The Ministry's appeal to the Ontario Court of Justice (General Division) was allowed. On appeal to the Ontario Court of Appeal, the court overturned the decision and restored the trustee's decision. The employees resumed an appeal to the Supreme Court of Canada which had been discontinued by the Ministry.

Held: The appeal was allowed.

Section 40(7) of the ESA provided that where an employee's employment was terminated contrary to the ESA's minimum notice provisions, the employer was required to pay termination pay equal to the amount the employee would have received for the applicable notice period. Section 40a of the ESA further provided that the employer must pay severance pay to each employee whose employment had been terminated, and who had been employed for five years or more. Section 2(3) of the *Employment Standards Amendment Act, 1981* (the "ESAA"), which enacted s. 40a of the ESA, also included a transitional provision such that the amendments did not apply to bankrupt

or insolvent employers whose assets had been distributed among creditors or whose proposal under the *Bankruptcy Act* (the "BA") had been accepted prior to the day the amendments received royal assent. A fair, large, and liberal construction of the words "terminated by the employer" was mandated by s. 10 of the *Interpretation Act* if the provisions of the ESA were to be given a meaning consistent with its spirit, purpose, and intention. The purpose of the various provisions of the ESA is to protect employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. Interpreting ss. 40 and 40a of the ESA to apply only to non-bankruptcy-related terminations was incompatible with the object of that statute, and the objects of the termination and severance pay provisions themselves. Moreover, if the ESA's amendments were not intended to apply to terminations caused by operation of the BA, then the transitional provisions of s. 2(3) of the ESAA would have no readily apparent purpose. The inclusion of s. 2(3) of the ESAA necessarily implied that the severance pay obligation did in fact extend to bankrupt employers. To limit the application of those provisions only to employees not terminated through bankruptcy would lead to absurd results, and defeat the purpose of the ESA. Therefore, termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the BA for termination and severance pay in accordance with ss. 40 and 40a of the ESA. A declaration that the employer's former employees were entitled to make claims for termination pay, including vacation pay due thereon and severance pay as unsecured creditors, was substitued for the order of the Court of Appeal.

Un employeur, qui exploitait une chaîne de magasins, a fait l'objet de procédures en faillite et a été déclaré failli en date du 13 avril 1989. Une ordonnance de séquestre a été émise le jour suivant et c'est à ce moment que les contrats d'emploi entre l'employeur et ses employés ont pris fin. Le syndic a versé tous les traitements, salaires, commissions et paies de vacances gagnés par les employés à la date de l'ordonnance de séquestre. Quelques mois plus tard, le ministère du Travail de la province a procédé à la vérification des livres de l'employeur et déterminé que les employés avaient droit à une indemnité de cessation d'emploi de même que le montant y afférent à titre de paie de vacances. Le ministère a donc soumis une preuve de réclamation à l'égard de ces montants au syndic. Le syndic a rejeté la preuve de réclamation au motif, notamment, que la faillite ne constituait pas un congédiement des employés, et ne donnait donc pas droit à une indemnité de cessation d'emploi, une indemnité de licenciement ni une paie de vacances en vertu de la *Loi sur les normes d'emploi* (la « LNE »). Par conséquent, il ne pouvait y avoir de réclamation prouvable à ce titre. Le pourvoi du ministère à la Cour de l'Ontario (Division générale) a été accueilli. En appel à la Cour d'appel de l'Ontario, la Cour a infirmé le jugement de première instance et a confirmé la décision du syndic. Le ministère s'est désisté de son pourvoi et les employés ont repris le pourvoi à la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli.

L'article 40(7) de la LNE prévoyait que, lorsque le contrat d'emploi était résilié sans respecter les dispositions de la LNE relatives à l'avis minimal de cessation d'emploi, l'employeur était tenu de verser une indemnité égale au montant que l'employé aurait reçu pour la période d'avis applicable. D'autre part, l'art. 40a de la LNE prévoyait que l'employeur devait verser une indemnité

de cessation d'emploi à chaque employé dont le contrat d'emploi a été résilié et qui travaillait pour l'employeur depuis cinq ans ou plus. L'article 2(3) de la *Employment Standards Amendment Act, 1981* (la « ESAA »), qui édictait l'entrée en vigueur l'art. 40a de la LNE, comprenait aussi une disposition transitoire afin que les amendements ne s'appliquent pas aux employeurs faillis ou insolvables dont les biens avaient été distribués aux créanciers et dont la proposition concordataire en vertu de la *Loi sur la faillite et l'insolvabilité* (la « LFI ») avait été acceptée avant le jour où les amendements ont reçu la sanction royale. L'article 10 de la *Loi d'interprétation* commandait une interprétation juste, généreuse et libérale des mots « l'employeur licencie » afin que les dispositions de la LNE aient un sens qui s'accorde avec l'esprit, l'objet et l'intention de cette loi. L'objectif des diverses dispositions de la LNE est de protéger les employés contre les effets nuisibles d'un bouleversement économique soudain qui peuvent survenir en raison de l'absence de la possibilité de chercher un autre emploi. Interpréter les art. 40 et 40a de la LNE de manière à ce qu'ils s'appliquent uniquement lorsque des cessations d'emploi ne résultent pas d'une faillite était contraire à l'objet de cette loi et même à l'objet des dispositions sur l'indemnité de cessation d'emploi. En outre, si les amendements à la LNE n'étaient pas censés s'appliquer aux cessations d'emploi opérées par la LFI, alors les dispositions transitoires de l'art. 2(3) de la ESAA sembleraient dépourvues d'objet. L'inclusion de l'art. 2(3) de la ESAA impliquait nécessairement que l'obligation de verser une indemnité de cessation d'emploi s'étendait aussi aux employeurs faillis. Restreindre l'application de ces dispositions aux seuls employés non licenciés par suite d'une faillite mènerait à des résultats absurdes et viderait la LNE de son objet. Ainsi, aux termes de l'art. 121 de la LFI, la cessation d'emploi découlant de la faillite de l'employeur donne lieu à une réclamation prouvable ordinaire dans la faillite, à titre d'indemnité de licenciement et d'indemnité de cessation d'emploi, conformément aux art. 40 et 40a de la LNE. Une ordonnance déclarant que les anciens employés de l'employeur ont le droit de présenter des demandes d'indemnité de licenciement, y compris la paie de vacances y afférent, et des demandes d'indemnité de cessation d'emploi en tant que créanciers ordinaires a été substituée à l'ordonnance de la Cour d'appel.

APPEAL by employees of bankrupt employer from decision reported at (1995), 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 22 O.R. (3d) 385, *(*sub nom. *Ontario Ministry of Labour v. Rizzo & Rizzo Shoes Ltd.)* 95 C.L.L.C. 210-020, *(*sub nom. *Re Rizzo & Rizzo Shoes Ltd. (Bankrupt))* 80 O.A.C. 201 (C.A.), reversing decision reported at (1991), 11 C.B.R. (3d) 246, 6 O.R. (3d) 441, 92 C.L.L.C. 14,013 (Gen. Div.), reversing disallowance of claim by trustee in bankruptcy.

POURVOI interjeté par les employés d'un employeur failli à l'encontre d'un arrêt publié à (1995), 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 22 O.R. (3d) 385, *(*sub nom. *Ontario Ministry of Labour v. Rizzo & Rizzo Shoes Ltd.)* 95 C.L.L.C. 210-020, *(*sub nom. *Re Rizzo & Rizzo Shoes Ltd. (Bankrupt))* 80 O.A.C. 201 (C.A.), infirmant un arrêt publié à (1991), 11 C.B.R. (3d) 246, 6 O.R. (3d) 441, 92 C.L.L.C. 14,013 (Gen. Div.), infirmant le rejet par le syndic d'une preuve de réclamation dans la faillite.

The judgment of the court was delivered by *Iacobucci J.*:

1 This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

2 Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65% of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

3 Pursuant to the receiving order, the respondent, Zittrer, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July, 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

4 In November 1989, the Ministry of Labour for the Province of Ontario (Employment Standards Branch) (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the *Employment Standards Act*, R.S.O. 1980, c. 137, as amended (the "*ESA*"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately $2.6 million and for severance pay totalling $14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the *ESA*.

5 The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the

discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

2. Relevant Statutory Provisions

6 The relevant versions of the *Bankruptcy Act* (now the *Bankruptcy and Insolvency Act*) and the *Employment Standards Act* for the purposes of this appeal are R.S.C. 1985, c. B-3 (the "*BA*"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "*ESA*") respectively:

> *Employment Standards Act*, R.S.O. 1980, c. 137, as amended:
>
> **7.**--
>
> (5) Every contract of employment shall be deemed to include the following provision:
>
> All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the *Employment Standards Act*.
>
> **40**.-- (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,
>
> (a) one weeks notice in writing to the employee if his or her period of employment is less than one year;
>
> (b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;
>
> (c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;
>
> (d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;
>
> (e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;
>
> (f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;

(g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;

(h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,

and such notice has expired.

. . . . .

(7) Where the employment of an employee is terminated contrary to this section,

(a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . . . .

40*a* ...

(1a) Where,

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or

(b) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2.--(1) Part XII of the said Act is amended by adding thereto the following section:

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

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

> **121.** (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Interpretation Act, R.S.O. 1990, c. I.11

> **10.** Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.
>
> . . . . .
>
> **17.** The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

3. Judicial History

A. Ontario Court (General Division) (1991), 6 O.R. (3d) 441 (Ont. Gen. Div.)

7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the *BA*. Relying on *U.F.C.W., Local 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C.), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the *ESA* such that liability for such payments would arise on bankruptcy as well.

8 In addressing this question, Farley J. began by noting that the object and intent of the *ESA* is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the *ESA* is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the *ESA*.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the *BA*. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the *BA*.

11 Even if bankruptcy does not terminate the employment relationship so as to trigger the *ESA* termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the *ESA*. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

12 Farley J. also considered s. 2(3) of the *Employment Standards Amendment Act, 1981*, S.O. 1981, c. 22 (the "*ESAA*"), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the *ESA*. Farley J. concluded that the claim by Rizzo's former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

B. Ontario Court of Appeal (1995), 22 O.R (3d) 385

13 Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the *ESA*. He noted, at p. 390, that the termination pay provisions use phrases such as "[n]o employer shall terminate the employment of an employee" (s. 40(1)), "the notice required by an employer to terminate the employment" (s. 40(2)), and "[a]n employer who has terminated or proposes to terminate the employment of employees" (s. 40(5)). Turning to severance pay, he quoted s. 40*a*(1)(*a*) (at p. 391) which includes the phrase "employees have their employment terminated by an employer". Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the *ESA*, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

14 In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (Ont. S.C.), wherein Houlden J. (as

he then was) concluded that the *ESA* termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C.), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

> The plain language of ss. 40 and 40*a* does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a petition by one of its creditors. No entitlement to either termination or severance pay ever arose.

15 Regarding s. 7(5) of the *ESA*, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the *ESAA*. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40*a*.

16 Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

4. Issues

17 This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*?

5. Analysis

18 The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40*a* of the *ESA*, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee...." Similarly, s. 40*a*(1) begins with the words, "Where...fifty or more employees have their employment terminated by an employer...." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by the employer".

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated

"by the employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by the employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by the employer" for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> 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.

Recent cases which have cited the above passage with approval include: *Canada (Procureure générale) c. Hydro-Québec*, *(*sub nom. *R. v. Hydro-Québec)* [1997] 3 S.C.R. 213 (S.C.C.); *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.); *Verdun v. Toronto Dominion Bank*, [1996] 3 S.C.R. 550 (S.C.C.); *Friesen v. R.*, [1995] 3 S.C.R. 103 (S.C.C.).

22 I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit."

23 Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

24 In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.), at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.* (1997), 219 N.R. 161 (S.C.C.). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of "...the interests of employees by requiring employers to comply with certain minimum standards, including minimum periods of notice of termination." Accordingly, the majority concluded, at p. 1003, that, "...an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible, is to be favoured over one that does not."

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the *ESA* requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (2nd ed. 1993), at pp. 572-81.

26 Similarly, s. 40*a*, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546 (Ont. C.A.), Robins J.A. quoted with approval at pp. 556-57 from the words of D.D. Carter in the course of an employment standards determination in *Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont. Arb. Bd.), at p. 19, wherein he described the role of severance pay as follows:

> Severance pay recognizes that an employee does make an investment in his employer's business -- the extent of this investment being directly related to the length of the employee's service. This investment is the seniority that the employee builds up during his years of service....Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

27 In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40*a* of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well

established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes, supra*, at p. 88).

28 The trial judge properly noted that, if the *ESA* termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees 'fortunate' enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the *ESA* would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the *ESA* to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the *Employment Standards Amendment Act, 1981*, ("*ESAA*") introduced s.40*a*, the severance pay provision, to the *ESA*. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

> **2.** ...
>
> (3) Section 40*a* of the said Act does not apply to an employer who became bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40*a* was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the *ESA*. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., *R. v. Vasil*, [1981] 1 S.C.R. 469 (S.C.C.), at p. 487; *R. v. Paul*, [1982] 1 S.C.R. 621 (S.C.C.), at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

32 In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

33 I find support for my conclusion in the decision of Saunders J. in *Royal Dressed Meats Inc.*, *supra*. Having reviewed s. 2(3) of the *ESAA*, he commented as follows:

> ...any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the *ESA*...it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

34 This interpretation is also consistent with statements made by the Minister of Labour at the time he introduced the 1981 amendments to the *ESA*. With regard to the new severance pay provision he stated:

> The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.
>
> . . . . .
>
> ...the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a

> proposal to creditors has already been reached. [Ontario, Legislative Assembly, *Debates*, No. 36, at pp. 1236-37 (June 4, 1981)]

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

> For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this Act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions. [Ontario, Legislative Assembly, *Debates*, No. 48, at p. 1699 (June 16, 1981)]

35 Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463 (S.C.C.), at p. 484, Sopinka J. stated:

> ...until recently the courts have balked at admitting evidence of legislative debates and speeches....The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

36 Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Canada (Attorney General)*, [1983] 1 S.C.R. 2 (S.C.C.), at p. 10; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513 (S.C.C.), at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40*a* of the *ESA*, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

37 The Court of Appeal's reasons relied heavily upon the decision in *Malone Lynch*, *supra*. In *Malone Lynch*, Houlden J. held that s. 13, the group termination provision of the former *ESA*, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the *ESA* then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect." Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

38 Two years after *Malone Lynch* was decided, the 1970 *ESA* termination pay provisions were amended by the *Employment Standards Act, 1974*, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 *ESA* eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the *Malone Lynch* decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 *ESA* have no application to a bankrupt employer. For this reason, I do not accept the *Malone Lynch* decision as persuasive authority for the Court of Appeal's findings. I note that the courts in *Royal Dressed Meats*, *supra*, and *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (B.C. S.C.), declined to rely upon *Malone Lynch* based upon similar reasoning.

39 The Court of Appeal also relied upon *Re Kemp Products Ltd.*, *supra*, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the *ESA*. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343 (Ont. C.A.), which cited the decision in *Malone Lynch*, *supra* with approval.

40 As I see the matter, when the express words of ss. 40 and 40*a* of the *ESA* are examined in their entire context, there is ample support for the conclusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025 (S.C.C.)). I also note that the intention of the Legislature as evidenced in s. 2(3) of the *ESSA*, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim *ESA* termination and severance pay where their termination has resulted from their employer's bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the *ESA*, namely, to protect the interests of as many employees as possible.

41 In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and

inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Therefore, I conclude that termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *BA* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the *ESA*.

42 I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the *ESA* underwent another amendment. Sections 74(1) and 75(1) of the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the *Interpretation Act* directs that, "the repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law." As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

6. Disposition and Costs

43 I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo's former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

Appeal allowed.

Pourvoi accueilli.

Tab 37

2017 ABCA 420
Alberta Court of Appeal

R. v. Stevenson

2017 CarswellAlta 2651, 2017 ABCA 420, [2018]
A.W.L.D. 632, 143 W.C.B. (2d) 605, 61 Alta. L.R. (6th) 273

Her Majesty the Queen (Respondent) and Rand Tyler Stevenson (Appellant)

Frans Slatter, Brian O'Ferrall, Thomas W. Wakeling JJ.A.

Heard: December 5, 2017
Judgment: December 11, 2017
Docket: Calgary Appeal 1601-0246-A

Proceedings: affirming *R. v. Stevenson* (2015), [2015] A.J. No. 1278, 2015 CarswellAlta 2167, 2015 ABQB 740, D.K. Miller J. (Alta. Q.B.); reversing in part *R. v. Stevenson* (2015), 2015 ABPC 96, 2015 CarswellAlta 716, T.G. Hironaka Prov. J. (Alta. Prov. Ct.)

Counsel: D. Young, Y. Somji, for Respondent
D.W. Kobylnyk, for Appellant

Subject: Civil Practice and Procedure; Corporate and Commercial; Securities
Related Abridgment Classifications
Securities
III Trading in securities
III.1 Definitions
III.1.a Security
Headnote
Securities --- Trading in securities — Definitions — Security
Cease Trading Order (CTO) was issued against corporation and three accused who were alleged to have illegally traded and distributed securities — While CTO was in place, corporation entered into loan agreements with 24 lenders — Accused alleged corporation would share its part of estate proceeds with lenders in exchange for their financing of project via loan agreements — Lenders received no returns — Trial judge found loan agreements were not securities under Securities Act — Crown successfully appealed holding loan agreements constituted securities within definition in Act — Accused appealed — Appeal dismissed — Interpretation by summary conviction appeal court judge was correct — Loan agreements expressly described loan as investment — Even if loan agreements not "notes", they would still fall within other parts of definition of securities:

"evidence of indebtedness", "profit-sharing agreement" and "investment contract" — Impossible for those raising funds from public to contract out of Securities Act, and inclusion of disclaimer in documentation was ineffective and irrelevant Securities Act, R.S.A. 2000, c. S-4, s 1(ggg).

APPEAL from decision reported at *R. v. Stevenson* (2015), 2015 ABQB 740, 2015 CarswellAlta 2167, [2015] A.J. No. 1278 (Alta. Q.B.), convicting accused of securities offence.

***Per curiam*:**

1 The appellant was charged with a number of offences under the Securities Act, RSA 2000, c. S–4 arising out of the raising of money from the public through "Loan Agreements". The appellant was acquitted at trial on the basis that the Loan Agreements did not constitute "securities", but was convicted on appeal: *R. v. Stevenson*, 2015 ABQB 740 (Alta. Q.B.), reversing *R. v. Stevenson*, 2015 ABPC 96 (Alta. Prov. Ct.).

2 Provincial Court Judge described the transactions as follows:

> 9 Between early May 2009 and late September 2011, OCI entered into Loan Agreements with 24 Alberta resident lenders listed in the active counts in the Information (collectively Lenders). The same form of Loan Agreement (a copy of which is attached as Appendix A) was used for each loan and lender. The Lenders advanced a total of at least $1,003,000.00 to OCI pursuant to these Loan Agreements. Most of the Lenders entered into more than one Loan Agreement with OCI.
>
> 10 Each of the Loan Agreements states that it is for a term of six months, and provides for a return of four (4) to two hundred (200) times the amount advanced to OCI payable "from the profits of the Corporation's income".
>
> 11 All of the Lenders were introduced to OCI and its reason for soliciting funds (commonly referred to by the Lenders as the "Project") by Derricott. For each lender Derricott's presentation was done by using what the Lenders referred to as the "Book" or the "Binder" (Exhibit 43) and which contained 70 pages of pictures, documents, bank statements and other material purporting to explain the Project.
>
> . . .
>
> 14 Except for minor variations, the Lenders generally conveyed a consistent understanding of the reason OCI required funds as explained to them by Derricott; that is: Stevenson had met an individual from the Philippines (described as a Filipino farmer or fisherman named Romeo or "Romy" Santiago) who was the sole beneficiary of a large estate ranging in value from millions to billions of dollars (the "Estate") left to him by an aunt, Candelaria Y. Santiago. Ms. Santiago apparently accumulated the wealth in some fashion associated with her position in the government or employ of former Philippine dictator, Ferdinand Marcos. Stevenson was

purportedly helping the beneficiary, Romy, probate the Estate and gain access to the assets of the Estate, in return for which Romy had contracted to pay a portion of the Estate to OCI. In exchange for their financing the associated costs of this Project, Stevenson and OCI were to share their portion of the Estate proceeds with the Lenders in the amounts set out in their Loan Agreements.

3 The operative clauses of the Loan Agreements read as follows:

THE PARTIES HERETO AGREE, THAT:

1. The Lender is loaning money in the Corporation for a period expected to be no longer than SIX MONTHS (6 months) from the date of the loan, with the Corporation having the option to pay the Lender the principle sum of the loan plus a premium amount of money in consideration of the use of the loan funds by the Corporation.

2. The term of this Agreement is for SIX MONTHS (6 months).

3. The amount given to the Corporation as a loan is: *Twenty Five Thousand* Canadian Dollars.

4. The Corporation shall pay the Lender from the profits of the Corporation's income.

5. The Corporation shall pay the Lender a premium amount of money based on a formula of the principle [sic] amount of the load funds plus a factor of four times the original amount loaned, which is a total payout of: *One Million Five Hundred Thousand* Canadian Dollars.

6. In the event of the expiry of the six month time period of this Agreement, any outstanding principle [sic] shall be placed upon the books of the Corporation as an outstanding liability.

7. This investment is in the form of a loan, and is not subject to any securities law, regulation, rules or forms of conduct. This investment and the loan of moneys does not constitute the transaction of any form of securities, stocks, bonds, or other financial instrument subject to regulation by Government under securities law.

The trial judge accepted the appellant's argument that the Loan Agreements were "simply contracts between the parties and should be enforced in accordance with the intention of the parties and the normal rules of contract law". He found each Loan Agreement was a "separate, distinct, and private transaction", not a "security".

4 In allowing the appeal, the summary conviction appeal court judge noted the lengthy and complex definition of "security" in the *Securities Act*, which contains the following specific inclusions among a list of 26 items:

> 1 In this Act, . . .
>
> (ggg) "security" includes . . .
>
> (ii) any document constituting evidence of title to or interest in the capital, assets, property, profits, earnings or royalties of any person or company; . . .
>
> (v) any bond, debenture, note or other evidence of indebtedness; . . .
>
> (ix) any profit-sharing agreement or certificate; . . .
>
> (xiv) any investment contract . . .
>
> The Crown is only required to show that the Loan Agreements fit within one of these components of the definition, but it argued that they actually fit within all four. The summary conviction appeal court judge found at para. 17 that the Loan Agreements were clearly "evidence of indebtedness", and also met the other three branches of the definition. He noted that there was no blanket exemption for "private transactions".

5 The "facts" surrounding the Loan Agreements are not in dispute. Whether the Loan Agreements, as found on the facts, constitute "securities" is a question of law reviewable for correctness: *R. v. Shepherd*, 2009 SCC 35 (S.C.C.) at para. 20, [2009] 2 S.C.R. 527 (S.C.C.); *R. v. A. (M.A.)*, 2014 ABCA 52 (Alta. C.A.) at para. 7, 201496 Alta. L.R. (5th) 44569 A.R. 142(Alta. C.A.). Whether the *Securities Act* admits of an exception for "private transactions" is an extricable question of law, and the standard of review is correctness. Administrative law cases such as *Gill Financial Corp., Re*, 2003 BCCA 169, 11 B.C.L.R. (4th) 102 (B.C. C.A.) engage a different standard of review paradigm, because the law recognizes the expertise of the securities commissions in technical matters.

6 The raising of funds from the public is one of the most highly regulated activities in Canada. The Securities Act regulates virtually every aspect of such transactions, and all the persons and institutions that engage in them: *Reference re Securities Act (Canada)*, 2011 ABCA 77 (Alta. C.A.) at para. 3, 201141 Alta. L.R. (5th) 145510 A.R. 200(Alta.)C.A., affm'd 2011 SCC 66S.C.C. at paras. 100–101, [2011] 3 S.C.R. 837 (S.C.C.). The basic structure of the Act is that no "issuer" may "distribute" securities to the general public unless those engaged in the distribution are "registered", and a "prospectus" has been approved by the Securities Commission. The Act regulates both the initial or "primary" distribution of the securities, as well as secondary trading in securities. Some regulatory functions are delegated to the stock exchanges and other organizations, which are themselves highly regulated. There are numerous exemptions for particular transactions, particular participants in the industry, particular issuers, and particular purchasers of securities. It was conceded that no exemptions were available here.

7 The appellant argued in the Provincial Court that the Loan Agreements were not securities, because they were "simply contracts between the parties and should be enforced in accordance with the intention of the parties and the normal rules of contract law". A "distribution" or sale of securities is, however, always a contract if viewed in isolation. As was stated in *Reference re Securities Act (Canada)* (ABCA) at para. 19: "The regulation of the raising of funds from members of the public has at its core the regulation of particular investment contracts." Declaring or observing that a particular transaction is a "private contract" provides no answer to the scope of the *Securities Act*.

8 The appellant relied in part on an *obiter* statement in *R. v. Kirk*, 2014 ABQB 517, 1 Alta. L.R. (6th) 206, 596 A.R. 9 (Alta. Q.B.):

> 60 Even though *Securities Act* s 93 refers to the perpetration of a "fraud," that "fraud" is not just any fraud. It is fraud that results from the person's engaging or participating in "any act, practice or course of conduct relating to a security or exchange contract." In other words, the legislation itself limits the type of action that would "perpetrate a fraud." That "action" falls within the general purposes of the *Securities Act* and is not just "any action." For example, if individuals are involved in a transaction between themselves, such as a personal loan evidenced by a promissory note (which might fall within the definition of "security" under the *Securities Act*), a misrepresentation or fraud in respect of that transaction would not trigger an action under the *Securities Act*, as it would not fall within "Alberta securities laws"; it is a private transaction. (emphasis added)
>
> ***Kirk*** is a decision on the constitutionality of the *Securities Act*. The argument was that the *Securities Act* was unconstitutional because it dealt with "fraud" which is criminal law and so a federal area of responsibility. The reliance on the very general statement in ***Kirk***, to the effect that some "private transactions" might not be caught by the *Act*, is misplaced. The point being made was that the *Securities Act* is narrow and focused, because it only deals with "fraud" in the securities context. ***Kirk*** does not deal directly with the transactions that are covered or excluded from the *Act*.

9 The *Securities Act* is very broadly worded legislation, designed to cover virtually every method by which money could be raised from the public. It is contradictory to argue that money "raised from the general public" is nevertheless merely a series of "private transactions"; that is exactly what the *Securities Act* is designed to regulate. That characterization could be placed on any method of raising money from the public. Every sale of shares by a corporation to a member of the public is, at one level, a "private transaction". The entire process of raising money from the general public is, however, regulated under the Act.

10 The Provincial Court Judge found that the lenders believed they were advancing personal loans, and also noted the provision in the Loan Agreements:

> 7. This investment is in the form of a loan, and is not subject to any securities law, regulation, rules or forms of conduct. This investment and the loan of moneys does not constitute the transaction of any form of securities , stocks, bonds, or other financial instrument subject to regulation by Government under securities law.
>
> It is, however, impossible for those raising funds from the public to contract themselves out of the *Securities Act*, and this inclusion in the documentation is ineffective and irrelevant.

11 As noted, the fact that the loans might be described as "personal" is not decisive. Equally irrelevant is whether the lenders are happy with their investment, feel that they were fairly dealt with, or believe that full disclosure was made to them. An issuer must comply with the Act even if the investors make a fortune. As P. T. Barnum noted: "There's one born every minute"; the *Securities Act* is designed to protect them, along with all investors. The Act regulates all raising of money from the public, not just situations where the outcome of the investment is negative or the purchasers of the securities are unhappy.

12 Likewise, the definition of a "security" is a question of statutory interpretation, and the opinions of individual lenders and investors as to whether they were dealing in such an instrument is irrelevant. The interpretation of statutes is a question of law, and evidence on this subject is not admissible: *R. v. Century 21 Ramos Realty Inc.* (1987), 58 O.R. (2d) 737 (Ont. C.A.) at p. 752; *Canada Safeway Ltd. v. Manitoba*, 2003 MBCA 78 (Man. C.A.) at para. 7, (2003), [2004] 1 W.W.R. 395 (Man. C.A.).

13 The appellant argues that a more realistic interpretation of the Act was needed, or else all sorts of routine transactions would be caught by it. The Act and its related subordinate regulations, however, have numerous provisions designed to deal with overbreadth. Some trades in "securities" are exempt from the registration and prospectus requirements of the Act. For example, under s. 2.4 and 2.5 of National Instrument 45–106: Prospectus and Registration Exemptions, certain trades of securities to "close friends and business associates" of directors or officers of the issuer are exempt. Under s. 2.30 "isolated distributions" that are not a part of "successive transactions of a like nature" are exempt. Even though these trades are "exempt trades", they are still trades in "securities". There is, however, no general exemption for "private transactions".

14 The appellant relied on *Ontario (Securities Commission) v. Tiffin*, 2016 ONCJ 543, 133 O.R. (3d) 341 (Ont. C.J.), which in turn relied on American case law such as Reves v. Ernst & Young494 U.S. 56(U.S. Ark. S.C. 1990). Counsel for the respondent advised the Court that *Tiffin* is under appeal. *Tiffin* relied on a finding in *Reves* that not all "notes" are securities.

15 *Reves* involved the interpretation of the term "any note" in the definition of "security" in the *Securities Exchange Act of 1934*. The American courts have restricted the term to notes that have an "investment" character to them, on the theory that Congress did not intend the statute

to reach other "commercial" notes. All notes are presumed to be securities unless the opposite is shown. The presumption can be rebutted by considering several factors: a) if the motivation is an investment with a view to a profit, it is likely a security. If it is to finance an asset purchase or to meet short term funding needs, it may not be; b) if there is a "plan of distribution" and "common trading for speculation or investment" it is likely a security; c) if there is a public expectation that the notes are securities, they will be dealt with as such; and d) if some factor such as the existence of another regulatory scheme significantly reduces the risk of the instrument, the application of the *Securities Acts* may be unnecessary.

16 *Reves* itself does not create any general exemption for "private transactions", and it deals only with the specific term "notes", not all types of securities in general. Further, the notes in *Reves* were found to be securities. Given the comprehensive and complex regulation of securities in Alberta, there is no apparent need for any judicially created exemptions to the securities regime. There are numerous conditions and exemptions built into the Alberta securities regulation system that are designed to deal with the issues raised in *Reves*.

17 In any event, the Loan Agreements involved in this appeal would meet the test in *Reves* for securities. The Loan Agreements expressly describes the loan as an investment; "This investment is in the form of a loan . . . " They recite that the lender wishes to lend his or her "capital funds to the corporation with the intent of receiving a return in consideration of the risk taken by the Lender." The corporation is "to receive the investment from the lender to carry on the operations and activities of the Corporation with the intent to earn profits from the use of the investment capital funds from the Lender". The obligation to repay is only triggered if, as and when the company makes profits: the Corporation has an "option to pay the lender the principle [sic] sum of the loan plus a premium." If the loan is not repaid, it simply gets placed on the books as an outstanding liability, creating a long term investment.

18 Further, even if the Loan Agreements are not "notes", they would still fall within the other components of the definition of "securities": "evidence of indebtedness", "profit-sharing agreement" and "investment contract".

19 *Tiffin* was prepared to recognize a general exemption from the statute for transactions that were purely private in nature, and had no element of raising funds from the public, even though there is no such exemption in the Ontario statute. It appears the trades in *Tiffin* may have qualified as exempt trades with "close friends and business associates", which undermines the rationale in *Reves* justifying such a judge-made exemption. That approach has been found to be necessary in the United States, apparently because of the very wide wording of their statute. The Alberta regime has its own built-in exemptions for the issuing of securities to close friends and business associates, and no common-law exception is appropriate.

20 *Tiffin* turns on the fact that all of the funds were raised from close friends of Tiffin himself. It appears to suggest that a particular instrument would be a "security" if used to raise funds from the general public, but not a "security" if used to raise funds from friends. The Alberta statute does not recognize a distinction in the characterisation of an instrument as a "security" depending on the identity of the purchaser or investor. The test is functional: Is the issuer raising funds from the public for investment purposes? On the facts of this case funds were raised from members of the public on the expectation that they would participate in the gains to be made from the venture.

21 The Loan Agreements are clearly within the definition of "securities". The interpretation of the summary conviction appeal court judge was correct, and the appeal is dismissed.

Appeal dismissed.

Tab 38

2002 CarswellOnt 3469
Ontario Superior Court of Justice

Ontario (Securities Commission) v. Buckingham Securities Corp.

2002 CarswellOnt 3469, [2002] O.J. No. 4036, 117 A.C.W.S. (3d) 520

Ontario Securities Commission, Applicant and Buckingham Securities Corporation, Respondent

Ground J.

Heard: June 3-9, 2002
Judgment: October 17, 2002
Docket: 01-CL-4192

Counsel: *Kevin McElcheran*, *Ruth Promislow*, for BDO Dunwoody Limited, Receiver and Manager of Buckingham Securities Corporation
Heath Whiteley, for W.D. Latimer Co. Limited

Subject: Corporate and Commercial; Securities
Related Abridgment Classifications
Securities
III Trading in securities
III.6 Margin transactions
III.6.b Pledging of customer's securities
Securities
IV Brokers
IV.1 Nature of relationship
IV.1.c Fiduciary duties
Securities
IV Brokers
IV.3 Duties of broker
IV.3.b Instructions of client
Headnote
Securities and commodities --- Broker and customer — Nature of relationship — Fiduciary duties
Securities and commodities --- Broker and customer — Duties of broker — Instructions of client — Failure to obey — General
Securities and commodities --- Margin transactions — Pledging of customer's securities — General

***Ground J.*:**

Reasons

1 This is a trial of issues, within the above Application, directed by Colin Campbell, J. with respect to a priority dispute as between former customers of Buckingham Securities Corporation ("Buckingham") and W.D. Latimer Co. Limited ("Latimer"). Latimer claims a security interest in the securities of customers of Buckingham pledged by Buckingham to Latimer pursuant to a Customer Account Agreement entered into between Buckingham and Latimer dated May 7, 1997, (the "Latimer Agreement") when Buckingham initially opened an account with Latimer. The Latimer Agreement provided for both cash and margin accounts although Buckingham initially opened only a cash account with Latimer.

The Latimer Agreement provides in part as follows:

> That all securities and credit balances held by Latimer for the Customer's account shall be subject to a general lien for any and all indebtedness to Latimer howsoever arising and in whatever account appearing including any liability arising by reason of any guarantee by the Customer of the account of any other person, that Latimer is authorized hereby to sell, purchase, pledge, or re-pledge any or all such securities without notice or advertisement to satisfy this lien, that Latimer may at any time without notice whenever Latimer carries more than one account for the customer, enter credit or debit balances, whether in respect of securities or money, to any of such accounts and make such adjustments between such accounts as Latimer may in its sole discretion deem fit, that any reference to the Customer's account in this clause shall include any account in which the Customer has an interest whether jointly or otherwise.

Background

2 From its inception in May, 1997, to July, 2000, Buckingham was registered as a securities dealer with the Ontario Securities Commission (the "OSC") under the *Ontario Securities Act* R.S.O. 1990, c. S-5 (the "OSA"). Buckingham provided investment services to its customers, which numbered approximately 1,000 on an active basis. The OSC renewed Buckingham's registrant status each year.

3 Buckingham, not being a member of the Investment Dealers Association ("IDA"), was required to trade through member firms of the Investment Dealers Association (the "IDA"). From May, 1997, to July, 2000, Buckingham conducted the majority of its trading using a margin account (the "Canaccord Account") at Canaccord Capital Corporation ("Canaccord"). On July 28, 2000, Buckingham transferred the securities it held at Canaccord to a margin account at Latimer (the "Latimer Account") established pursuant to the Latimer Agreement. No further Agreement was

entered into between Buckingham and Latimer when the margin account was opened. Latimer is registered as a securities dealer in Ontario, Quebec, Alberta and British Columbia; a member of the Toronto Stock Exchange, the Montreal Exchange and the Canadian Venture Exchange; and a member of the IDA.

4 In mid June, 2001, the OSC attended at the offices of Buckingham and inspected its records. There was no evidence as to what prompted this attendance by the OSC. On July 6, 2001, (the "Cease Trade Date"), the OSC issued a Temporary Cease Trade Order prohibiting the trading of securities in Buckingham's account with Latimer.

5 BDO Dunwoody Limited was appointed Receiver and Manager (the "Receiver") of the assets and undertaking of Buckingham by order dated July 26, 2001.

6 As at August 16, 2001, Buckingham owed Latimer $1,902,641.76 in respect of the Latimer Account, with interest accruing at prime plus 4%.

7 Each of the forms of the Client Account Agreement entered into between Buckingham and its customers provides as follows:

> As continuing collateral security for the payment of any Indebtedness which is now or which may in the future be owing by the Client to Buckingham Securities Corp., the Client hereby hypothecates and pledges to Buckingham Securities Corp. all his Securities and Cash, including any free credit balances, which may now or hereafter be in any of his accounts with Buckingham Securities Corp. (collectively, the "Collateral"), whether held in the Account or in any other accounting which the Client has an interest and whether or not any amount owing relates to the Collateral hypothecated or pledged. So long as any indebtedness remains unpaid, the Client authorizes Buckingham Securities Corp., without notice, to use at any time and from time to time the Collateral in the conduct of Buckingham Securities business, including the right to, (a) combine any of the Collateral with the property of Buckingham Securities Corp. or other clients or both; (b) hypothecate or pledge any of the Collateral which are held in Buckingham Securities Corp. possession as security for its own indebtedness; (c) loan any of the collateral to Buckingham Securities Corp. for its own purposes; or (d) use any of the Collateral for making delivery against a sale, whether a short sale or otherwise and whether such sale is for the Account or for the account of any other client of Buckingham Securities Corp.

or provides:

> You shall have the right, from time to time and without notice to me, to lend any securities held by you for or on my account with you either to yourselves as brokers or to others and to raise money thereon and carry them in your general loans and pledge and re-pledge them either separately or with your own securities or those of others or otherwise in such a manner

and for such an amount and for such purposes as you may deem advisable and to deliver them on sales for others, without retaining in your possession or control securities of like, kind and amount.

8 The trades processed by Buckingham through Latimer involved both cash accounts which held fully paid securities for Buckingham's customers and margin accounts which held marginable securities for Buckingham's customers. Securities held in a cash account are fully paid and must be segregated. With a margin account, if there is no borrowing by the customer, the securities in the account are fully paid and must be segregated. If there is borrowing by the customer, the broker must determine the net loan value of the securities and may have to segregate securities if the loan value exceeds the amount of borrowing. Securities that are not marginable because the trading prices are below a minimum amount have to be fully segregated. A software system called the ISM System used by most brokers and investment dealers determines the marginability of the securities held in the account of any particular customer. This determination is based upon the trading price of the various securities and the margin limit for various securities and will vary on a daily basis. The ISM System will also show which securities in a customer's account have to be segregated as fully paid or excess margin securities. Segregation is required by Section 117 of Regulation 1015 pursuant to the OSA and by the by-laws and regulations of the IDA.

9 The accounts operated by Buckingham with Canaccord and, subsequently with Latimer, were omnibus accounts which included inventory securities of Buckingham, securities owned by employees of Buckingham and predominantly securities owned by customers of Buckingham. Because the Buckingham account with Latimer was an omnibus account, Latimer would treat all of the securities in the account as Buckingham's securities and would segregate the securities in that account using the ISM System in the same way as Latimer would segregate securities in the account of any other customer of Latimer. Latimer viewed it as Buckingham's responsibility to ensure that the securities in its customers' accounts were properly segregated.

10 In addition to monthly statements for each customer, which would indicate all securities held for such customer, the market value of such securities and whether such securities were segregated, the ISM System produces Segregation Allocation Reports, Segregation Control Reports and Security Position Reports. Segregation Allocation Reports show how many shares of each security ought to be segregated for each customer. Segregation Control Reports show whether a particular security is over-segregated or under-segregated and Security Position Reports show how many shares of each security are held by each customer and with which broker. It is my understanding that only the Segregation Allocation Reports would clearly indicate which securities of which customer ought to be segregated. Buckingham's monthly statements to its customers and its Segregation Allocation Reports showed that customers' securities were not being segregated as required by Regulation 1015 pursuant to the OSA.

11 It is the position of the Receiver that Buckingham was in breach of its trust and fiduciary obligations to its customers when it pledged their fully paid and excess margin securities to Latimer pursuant to the terms of the Latimer Agreement and further that Latimer knew or ought to have known or should be found to have had constructive knowledge of the fact that Buckingham was pledging such securities in breach of its trust and fiduciary obligations to its customers. The Receiver therefore submits that the pledge of such securities to Latimer is void and that Latimer is required to return such securities to the Receiver on behalf of Buckingham's customers or to account to the Receiver for such securities.

12 At the time of the transfer of Buckingham's account from Canaccord to Latimer in July, 2000, Mr. Sesto DeLuca ("DeLuca"), the President of Latimer, attended at Buckingham's office where he was advised as to Buckingham's "back office system" for processing orders from its customers and was advised that Buckingham used the ISM System for purposes of preparation of customers' monthly statements and for Segregation Allocation Reports, Segregation Control Reports and Security Position Reports. DeLuca's evidence is that he did not review any of such statements or Reports. Following such a visit, DeLuca wrote to Mr. David Bromberg ("Bromberg"), the President of Buckingham, to set out the terms of margin trading between Buckingham and Latimer including commissions to be charged by Latimer and the margin account facility to be provided by Latimer to Buckingham. In such letter, DeLuca stated "I would therefore request some assurance from you that your firm has the appropriate systems in place to ensure the proper segregation of your client's (sic) securities". Bromberg's reply of July 25, 2000, to DeLuca stated "securities are segregated into clients accounts as Certificates are received or trade tickets are executed". The reference in this letter from Buckingham to securities being segregated when the trade tickets are executed is not correct. Segregation takes place on the settlement date which is three days after the trade date in the vast majority of cases. At the request of DeLuca, Bromberg wrote a further letter of July 26, 2000, which stated "this is to confirm the following: all our clients accounts are segregated on a regular basis using the ISM Segregation System".

13 It was Bromberg's evidence that he thought that the references in the correspondence to "segregation" meant having securities segregated by customer so that Buckingham would know which securities are held by which customers. It was also Bromberg's evidence that, for this purpose, he showed DeLuca a Security Position Report which showed which customers of Buckingham held shares of a particular security issuer. DeLuca denies that he saw any such Report. DeLuca did request and obtained a copy of the most recent renewal of registration of Buckingham with the OSC. DeLuca did not ask for or examine the financial statements of Buckingham and did not update the financial information from that given to Latimer by Buckingham when it initially opened an account with Latimer in 1997. The margin facility provided by Latimer to Buckingham was approximately $2,000,000 and the market value of the securities in the Buckingham account transferred from Canaccord to Latimer was approximately $13,000,000. It was DeLuca's evidence that he assumed that Buckingham was entitled to pledge to Latimer the marginable securities in

the Buckingham account and that they would have more than sufficient value to cover the margin facility of $2,000,000. It was also DeLuca's evidence that he did not know that Buckingham was not in fact segregating securities in its customers' accounts although he acknowledged that he could have determined this from Buckingham's monthly customer statements or from Buckingham's Segregation Allocation Reports, none of which were examined by him. DeLuca did receive a list of the securities being transferred from Canaccord to Latimer, which indicated that many of the securities being transferred were non-marginable.

14 The opinion evidence of expert, Mr. Brian Sutton, called by the Receiver was that Regulation 1300.1 of the IDA, the "Know Your Client" rule required Latimer to satisfy itself as to the credit-worthiness of Buckingham and to ensure that Buckingham was properly segregating its customers' accounts and was not pledging to it securities which could not be pledged. His evidence was also that Latimer could determine the credit-worthiness of Buckingham by reviewing the Form 9 filed by Buckingham with the OSC. It was Mr. Sutton's opinion that it was not appropriate for Latimer to rely on the three-year old financial information from Buckingham when opening the margin account for Buckingham in July, 2000. Mr. Sutton's evidence was that in a cash account there is always a safekeeping agreement if the registrant is to hold the securities. Mr. Sutton conceded that for Latimer to know which securities of Buckingham's customers had to be segregated, it would have to know with respect to each customer which securities were fully paid, which were excess margin securities, which, if any, were in delinquent cash accounts not subject to a safekeeping agreement and which, if any, were in an under-margined customer margin account, as well as each Buckingham's customer's account balance and the loan value of such account. Mr. Sutton also agreed that this information could change daily and would have to be tracked by Latimer.

15 The opinion evidence of expert witness, Ms. Joni Alexander called by Latimer, was that Latimer did comply with the "Know Your Client" rule with respect to Buckingham. In her opinion, the suitability requirement is not relevant, the credit- worthiness and identity was satisfied because Latimer had dealt with Buckingham before, had reviewed Buckingham's current registration with the OSC and had the Application of Buckingham and a Customer Account Agreement with Buckingham on file. With respect to business conduct, Latimer had reviewed the account to be transferred from Canaccord to ensure that there was adequate collateral for the margin facility that was to be provided to Buckingham. It was also the evidence of Ms. Alexander that Latimer did not need to look through Buckingham to each Buckingham customer account to determine whether the securities pledged by Buckingham to Latimer were eligible to be pledged and that, in any event, this would be impractical in view of the detailed knowledge which Latimer would have to have of each of Buckingham customer account. Ms. Alexander testified that each cash account does not require a safekeeping arrangement. That is a specific type of custody arrangement between a registrant and a customer. She was also of the opinion that the number of "penny stocks" in the Buckingham account should not necessarily have triggered Latimer to enquire as to whether securities were being improperly pledged by Buckingham as these stocks could have been inventory of Buckingham, could have been in delinquent cash accounts or, could have been in

under-margined margin accounts. It was Ms. Alexander's evidence that it would not be the normal practice for a "jitney broker" such as Latimer to inquire whether its registrant/client had authority from its customers, or whether it was entitled to pledge the securities in its account to the jitney broker or to ask for the Segregation Allocation Reports of its registrant/customers.

16 Where there was a conflict in the evidence between that of Bromberg and that of DeLuca, I preferred the evidence of DeLuca. He has extensive knowledge of the brokerage business and his evidence was straightforward, consistent and logical. He conceded that he could have made further inquiries to determine whether Buckingham was segregating its clients' securities and that an examination of certain of Buckingham's statements and reports would have indicated a failure to segregate. Bromberg's evidence, on the other hand, was confused, inconsistent and unresponsive. He either has an abysmal lack of knowledge about the brokerage business or his evidence is simply not credible. This is particularly true of his evidence that he thought the reference to segregation of accounts in his letters to Latimer referred to accounts being segregated as among Buckingham's customers. Anyone with any familiarity with the regulation of the securities industry would be aware of the requirement to segregate securities for margin purposes based upon securities being fully paid or excess margin securities. Accordingly, in my view, Bromberg's evidence in this regard is not credible and the statements made in the letters from Buckingham to Latimer are either negligent or intentional misrepresentations made by Buckingham to Latimer. It was, in my view, reasonable for Latimer to assume that these statements indicated segregation as required by the Regulation under the OSA and the IDA by-laws. Latimer was aware that Buckingham used the ISM System and clearly had the information available to it to determine what securities must be segregated.

17 With respect to the expert evidence, I preferred the evidence of Ms. Alexander where there was a conflict. Her evidence with respect to compliance with the "Know Your Client" rule in a situation where a jitney broker is dealing with a registrant/customer appeared to me to be more practical than that of Mr. Sutton as did her evidence that it would not be practical for a jitney broker to look through the account of its registrant/customer to the customers of that registrant to determine whether the securities in the account were properly segregated. Mr. Sutton conceded that in order for Latimer to do that it would have to have very detailed knowledge of the securities of each customer of Buckingham which could change daily and which would have to be tracked by Latimer.

18 There was some conflict in the expert evidence before the court as to whether Latimer was required in accordance with the "Know Your Client" rule under the IDA rules to inquire as to Buckingham's financial position and to update the information with respect to Buckingham from that provided when Buckingham first opened an account with Latimer in 1997. The evidence is that DeLuca did not ask for an updated financial statement of Buckingham or an update of the financial information provided in 1997 but simply obtained a copy of the latest renewal of Buckingham's

registration with the OSC. The "Know Your Client" rule is contained in Regulation 1300 of IDA and provides in part as follows:

> **Identity and Creditworthiness**
>
> (a) Each Member shall use due diligence to learn and remain informed of the essential facts relative to every customer and to every order or account accepted.
>
> **Business Conduct**
>
> (b) Each Member shall use due diligence to ensure that the acceptance of any order for any account is within the bounds of good business practice.
>
> **Suitability Generally**
>
> (c) Subject to Regulation 1300.1(e), each Member shall use due diligence to ensure that the acceptance of any order from a customer is suitable for such customer based on factors including the customer's financial situations, investment knowledge, investment objectives and risk tolerance.

19 On both these issues, it was the opinion of Ms. Alexander, whose evidence I preferred., that Latimer had complied with industry standards in establishing the margin account for Buckingham. It was her evidence that a jitney broker would not be expected to obtain further information with respect to credit-worthiness when it is satisfied as to its registrant/customers registration status with the OSC and where it already had on file an Application and a Customer Account Agreement with the registrant/customer.

20 With respect to business conduct, it was her opinion that Latimer had satisfied this requirement by reviewing the securities in the account to be transferred from Canaccord to ensure that there was adequate collateral for the margin facility being provided to Buckingham and that a jitney broker would not be expected to look through Buckingham to the accounts of Buckingham's customers to determine whether securities had been segregated or were qualified to be pledged to the jitney broker to secure the margin account in view of the impracticality of the detailed knowledge which Latimer would have to have of each Buckingham customer account. She conceded that if Latimer had made further inquiries and had reviewed Buckingham's documents such as customer monthly statements or Segregation Allocation Reports, it would have become aware that securities were not being properly segregated by Buckingham.

Issues

21 The issues in this proceeding are as follows:

(1) Did a trust relationship exist between Buckingham and its customers pursuant to the Client Account Agreements entered into between Buckingham and its customers or pursuant to the OSA?

(2) If a trust relationship did exist, was Buckingham in breach of its obligations to its customers in pledging its customers' fully paid and excess margin securities to Latimer?

(3) If Buckingham was in breach, did Latimer have actual or constructive notice of Buckingham's breach?

I will deal with the issues in the above order.

Reasons

22 Did a trust relationship exist between Buckingham and its customers pursuant to the Client Account Agreements entered into between Buckingham and its customers or pursuant to the OSA?

Section 117 of Regulation 1015 (R.R.O. 1990) under the OSA provides:

> (1) Securities held by a registrant for a client that are unencumbered and that are either fully paid for or are excess margin securities but that are not held pursuant to a written safekeeping agreement shall be,
>
> a) segregated and identified as being held in trust for the client; and
>
> b) described as being held in segregation on the registrant's security position record, client's ledger and statement of account.
>
> (2) Segregated securities may be used by the registrant, by sale or loan, whenever a client becomes indebted to the registrant but only to the extent reasonably necessary to cover the indebtedness.
>
> (3) Bulk segregation of securities described in subsection (1) is permissible.

23 Latimer has submitted, based on the authority of *Chesebrough v. Willson*, [2001] O.J. No. 940 (Ont. S.C.J.), that the Regulations under the OSA are administrative and directory only and do not create a trust relationship between a broker and its customers and that, even if a trust relationship is established, the provisions of the Client Account Agreements entered into between Buckingham and its customers specifically permit the pledging of the customer securities in support of loans to Buckingham for its own account. Latimer does concede, however, that there is a duty on Buckingham to protect and safeguard fully paid and excess margin securities and to deliver them in specie when directed. The court in *Chesebrough* , *supra*, concluded that Regulation 1015, at a minimum, required registrants to protect and safeguard fully paid or excess margin securities

and deliver them in specie when required, even if it did not have the effect of establishing a trust relationship and imposing upon the registrant all the duties and obligations of a trustee at law. In the case at bar, Buckingham was clearly in breach of both these obligations to its customers.

24 For a trust to come into existence, there must be three certainties: certainty of intention, certainty of subject matter and certainty of object. In the relationship between Buckingham and its customers with respect to their segregated securities which the Receiver submits constitutes a trust relationship, there is certainty of subject matter in that it is the fully paid or excess margin securities of Buckingham's customers which must be segregated and "identified as being held in trust". The fact that the components of the subject matter of the trust may fluctuate is not relevant. In any investment trust, the subject matter of the trust fluctuates as investments are purchased and sold. There is also certainty of object in that the beneficiaries of such trust are the customers of Buckingham who hold such securities. With respect to certainty of intention, the trust relationship is imposed upon the parties by virtue of Regulation 1015 pursuant to the OSA.

25 In *Chesebrough* , *supra*, Sheppard J. concluded with respect to such Regulation and similar statutory provisions and institutional by-laws as follows at paragraph 41:

> Yet counsel contends that this statutory and regulatory regime requiring a registrant to hold customer's fully-paid securities separate and apart from their own and others created and imposed upon it (the registrant) a trust relationship such that the registrant (Midland Walwyn) stood in a trust relationship to the plaintiff; that Midland Walwyn became a trustee for the plaintiff and in some way was then duty-bound to act as a trustee at law in its dealings with the plaintiff. I have considerable difficulty in accepting that proposition. In my view, all the cited regulations and by-laws do nothing more than to regulate registrants or members and direct them how they shall deal with a customer's securities like the shares owned by the plaintiff. Regulations whether passed under a statute or by an association cannot create and impose a trust relationship between two parties, imposing on the party holding the securities all the duties and responsibilities which the law imposes on a trustee created by deed or by-law. These regulations are administrative and directory only; they do nothing more than direct a registrant or member how prescribed securities are to be handled and recorded.
>
> Again, I repeat one must distinguish between a trust relationship between the trustee and beneficiary with all attendant duties and responsibilities and an administrative trust created for the proper dealing with other people's property, which I suggest creates no further obligation than a duty on the person holding the property to protect and safeguard it and deliver it in specie when required. Certainly, if the securities are misappropriated and cannot be returned, a breach of trust arises entitling the customer to an award of damages....
>
> Characterizing the shares as being impressed with a trust for industry regulatory requirements does not a fortiori make the registrant a trustee with all the attendant duties and responsibilities of a trustee except for being obliged to deliver the trust property in specie when directed....

26 With great respect, I am unable to adopt this distinction between a trust created by deed or law and a statutory trust. The authorities dealing with or interpreting trust or deemed trust provisions of statutes do not draw any distinction between the duties imposed upon a trustee of a statutory trust as opposed to a trustee of a trust created by deed or law. In *Ward-Price v. Mariners Haven Inc.* (2001), 57 O.R. (3d) 410 (Ont. C.A.), in considering the statutory trust created under the *Condominium Act* R.S.O. 1990 ch. c-26 Borins, J.A. made reference to the expressed statutory trust created under that Act and stated at page 419:

> "Although it may be argued that this trust lacks, in some respects, the three certainties of intention, object and subject-matter, this does not affect its essential character as a trust". As McLachlin J. pointed out in *British Columbia v. Henfrey Blair Ltd.*, [1989] 2 S.C.R. 24 at p. 35, 59 D.L.R. (4th) 726, at p. 742: "the provinces may define "trust" as they choose for matters within their own legislative competence....".

(See also *Commercial Union Life Assurance Co. of Canada v. John Ingle Insurance Group Inc.*, [2002] O.J. No. 3200 (Ont. C.A.) with respect to the statutory trust created under Subsection 402(1) of the *Insurance Act* R.S.O. (1990) ch. I-8; *D.E. & J.C. Hutchison Contracting Co. v. Windigo Community Development Corp.*, [1998] O.J. No. 4999 (Ont. Gen. Div.) with respect to the statutory trust created pursuant to Part 2 of the *Construction Lien Act* R.S.O. (1990) ch. c-30).

27 In addition, it appears to me to be clear from such authorities that certainty of intention can be established by the intention of the legislature to create a trust relationship being evidenced by the wording of a statute or Regulation.

28 Accordingly, in my view, the relationship between Buckingham and its customers holding fully paid or excess margin securities was a trust relationship with all the attendent duties and responsibilities of a trustee applicable.

If a trust relationship did exist, was Buckingham in breach of its obligations to its customers in pledging its customers' fully paid and excess margin securities to Latimer?

29 The pledging by Buckingham of its customers fully paid and excess margin securities to Latimer was, in my view, clearly a breach of Buckingham's obligations as a trustee to its customers. I am not satisfied that the provisions of the Client Account Agreements entered into by the majority of Buckingham's customers permitted Buckingham to breach such obligations. Subsection 1(1) of the OSA defines "Ontario securities law" as the OSA, Regulations made under the OSA and any decision of the Commission or a Director with reference to a particular person or company. Subsection 122(1) of the OSA provides that every person or company that contravenes Ontario securities law is guilty of an offence. It would be clearly contrary to public policy to permit a registrant and its customers to contract out of the obligation of the registrant to comply with Ontario securities law. In any event, the Buckingham Client Account Agreements provide:

> All Transactions in Securities for the Account shall be subject to the constitutions, by-laws, rules, rulings, regulations, customs and usages of the exchanges or markets and their clearing houses, if any, where made and to all laws, regulations and orders of any applicable governmental or regulatory authorities (all collectively referred to as "Applicable Rules and Regulations") or
>
> All transactions shall be subject to the constitution, by-laws, rule, rulings, regulations, customs and usages of the exchange or market, and its clearing house, if any, where made, and to all laws and all regulations and orders of any governmental or regulatory authority that may be applicable.

30 Accordingly, I am of the view that Buckingham was in breach of the above provisions and of its statutory trust obligations in pledging to Latimer securities of Buckingham's customers which were required to be segregated and that the provisions of the Client Account Agreements permitting pledging of such securities do not negate such contractual and statutory obligations.

If Buckingham was in breach of its obligations to its customers, did Latimer have actual or constructive notice of Buckingham's breach?

31 It is not alleged by the Receiver that Latimer had actual knowledge of Buckingham's breach of its trust obligations to its customers or of its breach of Ontario securities law. In the case at bar, the only basis upon which Latimer could be found to have constructive knowledge of the breach of trust by Buckingham would be under the line of cases establishing liability on third parties for "knowing receipt" of property transferred to them in breach of trust. The basis for liability of a third party in the "knowing receipt" cases is summarized by La Forest J. in *Citadel General Assurance Co. v. Lloyds Bank Canada* (1997), 152 D.L.R. (4th) 411 (S.C.C.) at pg. 434 as follows:

> However, in "knowing receipt" cases, which are concerned with the receipt of trust property for one's own benefit, there should be a lower threshold of knowledge required of the stranger to the trust. More is expected of the recipient, who, unlike the accessory, is necessarily enriched at the plaintiff's expense. Because the recipient is held to this higher standard, constructive knowledge (that is, knowledge of facts sufficient to put a reasonable person on notice or inquiry) will suffice as the basis for restitutionary liability. Iacobucci J. reaches the same conclusion in *Gold, supra*, where he finds, at para. 46, that a stranger in receipt of trust property "need not have actual knowledge of the equity [in favour of the plaintiff]; (constructive?) notice will suffice.
>
> > [49] This lower threshold of knowledge is sufficient to establish the "unjust" or "unjustified" nature of the recipient's enrichment, thereby entitling the plaintiff to a restitutionary remedy. As I wrote in *Lac Minerals, supra*, at p. 670, "the determination that the enrichment is 'unjust' does not refer to abstract notions of morality and justice,

> but flows directly from the finding that there was a breach of a legally recognized duty for which the courts will grant relief". In "knowing receipt" cases, relief flows from the breach of a legally recognized duty of inquiry. More specifically, relief will be granted where a stranger to the trust, having received trust property for his or her own benefit and having knowledge of facts which would put a reasonable person on inquiry, actually fails to inquire as to the possible misapplication of trust property. It is this lack of inquiry that renders the recipient's enrichment unjust.

32 In the case at bar, Latimer was clearly aware that Buckingham had an obligation to segregate its customers' securities. It would also have been aware that Buckingham's monthly statements to its customers and Segregation Allocation Reports prepared by Buckingham using the ISM System would have indicated whether the securities of Buckingham's customers were in fact segregated. The evidence is that DeLuca made no effort to review customers' monthly statements or Segregation Allocation Reports of Buckingham and, in order to satisfy Latimer that Buckingham was segregating customers' securities, simply requested the two letters from Buckingham referred to above.

33 The obligation on the third party recipient in the "knowing receipt" cases is to make inquiries which a reasonable person in the circumstances of the recipient would have made. Once the recipient is put on notice that a breach of trust may have occurred by its acceptance of property transferred to it, as stated in *Citadel General Assurance Co. supra*, "relief will be granted where a stranger to the trust, having received trust property for his or her own benefit and having knowledge of facts which would put a reasonable person on inquiry, actually fails to inquire as to the possible misapplication of trust property".

34 The Receiver has submitted the receipt by Latimer of the two letters from Buckingham with reference to segregation and should have put Latimer on inquiry with respect to segregation. In particular, the Receiver refers to the statement in the letter of July 25, 2000, that "securities are segregated into client accounts as certificates are received or trade tickets are executed", which statement is not correct, should have alerted Latimer. I am unable to accept this submission. Upon receipt of the July 25, 2000 letter, Latimer requested a further letter clarifying the statement with respect to segregation and was assured in the letter of July 26, 2000, that "all our clients accounts are segregated on a regular basis using the ISM Segregation System". In addition, it appears to me that a reasonable person in the brokerage business in the circumstances would have assumed that the reference to segregation was to segregation in accordance with the requirements of the OSA. Latimer was aware that Buckingham used the ISM System and had the ability to effect segregation in accordance with the requirements of the OSA.

35 Accordingly, I am not satisfied that, on the facts of the case at bar, Latimer had knowledge of facts which would have put a reasonable person in Latimer circumstances on inquiry. In any event, even if one should conclude that Latimer ought to have put on inquiry, it was not required

to conduct an impractical or extensive inquiry nor is it to be held to a standard of perfection. Latimer must only show that it acted reasonably under the circumstances. It is the opinion of Ms. Alexander that Latimer complied with industry standards and did all that was required to satisfy itself as to Buckingham's business conduct and to ensure that Buckingham was segregating its customers' securities. It appears to me that, if Latimer was in compliance with industry standards and practice and conducted itself in a manner consistent with that followed by other brokers in similar circumstances, it has satisfied the requirement of making reasonable inquiries. Although it may appear to this court that the industry practice as to due diligence and documentation in the establishment of customer accounts with brokers may be somewhat casual in the case of a registrant opening an account with a jitney broker and, although it is apparent that by making certain further inquiries, Latimer would have become aware that Buckingham was not complying with the segregation requirements of the Regulation under the OSA, I am unable to conclude that Latimer failed to make reasonable inquiries in all the circumstances of this case.

36 Although having found that a trust relationship existed between Buckingham and its customers who held fully paid or excess margin securities, the issue may be moot, counsel for the Receiver did submit that, if a trust relationship did not exist between Buckingham and its customers, there was clearly a fiduciary relationship between them. I do not agree that, in every instance, a fiduciary relationship exists between a broker and its customers. In *Hodgkinson v. Simms* (1994), 117 D.L.R. (4th) 161 (S.C.C.), La Forest J. at pg. 183, citing with approval the decision of Keenan J. in *Varcoe v. Sterling* (1992), 7 O.R. (3d) 204 (Ont. Gen. Div.), stated as follows:

> "Much of this case law was recently canvassed by Keenan J. in *Varcoe v. Sterling* (1992), 7 O.R. (3d) 204, 33 A.C.W.S. (3d) 1184 (Gen. Div.), in an effort to demarcate the boundaries of the fudiciary principle in the broker-client relationship". Keenan J. stated, at pp. 234-6:
>
> > The relationship of broker and client is not per se a fiduciary relationship.... Where the elements of trust and confidence and reliance on skill and knowledge and advice are present, the relationship is fiduciary and the obligations that attach are fiduciary. On the other hand, if those elements are not present, the fiduciary relationship does not exist... The circumstances can cover the whole spectrum from total reliance to total independence. An example of total reliance is found in the case of *Ryder v. Osler, Wills, Bickle Ltd.* (1985), 49 O.R. (2d) 609, 16 D.L.R. (4th) 80 (H.C.J.). A $400,000 trust for the benefit of an elderly widow was deposited with the broker. An investment plan was prepared and approved and authority given to operate a discretionary account.... At the other end of the spectrum is the unreported case of *Merit Investment Corp. v. Mogil*, [1989] O.J. No. 429, Ont. H.C.J., Anderson J., March 23, 1989 [summarized at 14 A.C.W.S. (3d) 378], in which the client used the brokerage firm for processing orders. He referred to the account executive as an "order-taker", whose advice was not sought and whose warnings were ignored.

> The relationship of the broker and client is elevated to a fiduciary level when the client reposes trust and confidence in the broker and relies on the broker's advice in making business decisions. When the broker seeks or accepts the client's trust and confidence and undertakes to advise, the broker must do so fully, honestly and in good faith.... It is the trust and reliance placed by the client which gives to the broker the power and in some cases, discretion, to make a business decision for the client. Because the client has reposed that trust and confidence and has given over that power to the broker, the law imposes a duty on the broker to honour that trust and respond accordingly.
>
> In my view, this passage represents an accurate statement of fiduciary law in the context of independent professional advisory relationships, whether the advisers be accountants, stockbrokers, bankers, or investment counsellors. Moreover, it states a principled and workable doctrinal approach. Thus, where a fiduciary duty is claimed in the context of a financial advisory relationship, it is at all events a question of fact as to whether the parties' relationship was such as to give rise to a fiduciary duty on the part of the advisor.

37 I would adopt the above statement of Keenan, J. as to the existence of a fiduciary relationship between a broker and its customers. In my view, there is no evidence before this court to establish that the relationship between Buckingham and its customers was such as to give rise to a fiduciary duty on the part of Buckingham, apart from the statutory trust imposed upon Buckingham by Regulation 1015 under the O.S.A.

38 Accordingly, on the issues to be tried in this proceeding, I find as follows:

1. A trust relationship did exist between Buckingham and its customers who held fully paid or excess margin securities.

2. Buckingham was in breach of such trust relationship in pledging its customers' fully paid and excess margin securities to Latimer.

3. Latimer did not have actual or constructive knowledge of such breach of trust.

39 Counsel may make brief written submissions to me on the costs of this proceeding on or before November 15, 2002.

Tab 39

2015 ONCA 681
Ontario Court of Appeal

Nortel Networks Corp., Re

2015 CarswellOnt 15461, 2015 ONCA 681, 127 O.R. (3d) 641, 259 A.C.W.S. (3d) 15, 32 C.B.R. (6th) 21, 340 O.A.C. 234, 391 D.L.R. (4th) 283

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

In the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Janet Simmons, E.E. Gillese, Paul Rouleau JJ.A.

Heard: April 29, 2015
Judgment: October 13, 2015
Docket: CA C59703

Proceedings: affirming *Nortel Networks Corp., Re* (2014), 121 O.R. (3d) 228, 2014 ONSC 4777, 2014 CarswellOnt 17193 (Ont. S.C.J. [Commercial List])

Counsel: Richard B. Swan, S. Richard Orzy, Gavin H. Finlayson, for Appellant, Ad Hoc Group of Bondholders
Andrew Kent, Brett Harrison, for Respondent, Bank of New York Mellon
Edmond Lamek, for Respondent, Law Debenture Trust Company of New York
Benjamin Zarnett, Graham D. Smith, for Monitor and Respondent, Canadian Debtors
Kenneth D. Kraft, John J. Salmas, for Respondent, Wilmington Trust, National Association
Kenneth T. Rosenberg, Ari N. Kaplan, for Respondent, Canadian Creditors' Committee
Tracy Wynne, for Joint Administrators (EMEA)
Scott A. Bomhof, Adam M. Slavens, for Nortel Networks Inc./U.S. Debtors

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.4 Appeals
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Groups of companies were subject to proceedings under Companies' Creditors Arrangement Act (CCAA) — Appellants were ad hoc group of bondholders holding crossover bonds that were issued or guaranteed by Canadian entities of companies and they provided for continuing accrual of interest until payment — Holders of crossover bonds filed claims for principal and pre-filing interest in amount of US$4.092 billion and they also claimed they were entitled to post-filing interest under terms of crossover bonds — In context of joint allocation trial, CCAA judge found that the common law "interest stops rule" applied in context of CCAA and holders of crossover bond claims were not legally entitled to claim or receive any amounts under relevant indentures above and beyond outstanding principal debt and pre-petition interest — Bondholders' appealed — Appeal dismissed — Main purposes of interest stops rule were fairness to creditors and achieving orderly administration of insolvent debtor's estate — Interest stops rule had been consistently applied in bankruptcy and winding-up proceedings — While there were differences between CCAA and other insolvency schemes, same principles supporting conclusion that interest stops rule was necessary in bankruptcy and insolvency proceedings, namely, fair treatment of creditors and orderly administration of insolvent debtor's estate, applied with equal force to CCAA proceedings — As interest stops rule applied upon bankruptcy under Bankruptcy and Insolvency Act, it should also apply in CCAA proceedings unless rule was ousted by CCAA, which it was not — If interest stops rule did not apply in CCAA proceedings then creditors who did not have contractual right to post-filing interest would have skewed incentives against reorganization under CCAA — CCAA created conditions for preserving status quo and if post filing interest was available to only one set of creditors then status quo was not preserved — If interest stops rule did not apply to CCAA proceedings then key objective of CCAA, to facilitate restructuring of corporations through flexibility and creativity, might be undermined due to uneven entitlement to interest that might be created — Principle of fairness supported application of interest stops rule — Interest stops rule was not contrary to established CCAA practice and it did not prevent CCAA plan from providing for post-filing interest — There were rational reasons for adopting interest stops rule in CCAA context.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Appeals

Groups of companies were subject to proceedings under Companies' Creditors Arrangement Act (CCAA) — Appellants were ad hoc group of bondholders holding crossover bonds that were issued or guaranteed by Canadian entities of companies and they provided for continuing accrual of interest until payment — Holders of crossover bonds filed claims for principal and pre-filing interest in amount of US$4.092 billion and they also claimed they were entitled to post-filing interest under terms of crossover bonds — In context of joint allocation trial, CCAA judge found that the common law "interest stops rule" applied in context of CCAA and holders of crossover bond claims were not legally entitled to claim or receive any amounts under relevant indentures above and beyond outstanding principal debt and pre-petition interest — Bondholders' appealed — Appeal dismissed — Main purposes of interest stops rule were fairness to creditors

and achieving orderly administration of insolvent debtor's estate — Interest stops rule had been consistently applied in bankruptcy and winding-up proceedings — While there were differences between CCAA and other insolvency schemes, same principles supporting conclusion that interest stops rule was necessary in bankruptcy and insolvency proceedings, namely, fair treatment of creditors and orderly administration of insolvent debtor's estate, applied with equal force to CCAA proceedings — As interest stops rule applied upon bankruptcy under Bankruptcy and Insolvency Act, it should also apply in CCAA proceedings unless rule was ousted by CCAA, which it was not — If interest stops rule did not apply in CCAA proceedings then creditors who did not have contractual right to post-filing interest would have skewed incentives against reorganization under CCAA — CCAA created conditions for preserving status quo and if post filing interest was available to only one set of creditors then status quo was not preserved — If interest stops rule did not apply to CCAA proceedings then key objective of CCAA, to facilitate restructuring of corporations through flexibility and creativity, might be undermined due to uneven entitlement to interest that might be created — Principle of fairness supported application of interest stops rule — Interest stops rule was not contrary to established CCAA practice and it did not prevent CCAA plan from providing for post-filing interest — There were rational reasons for adopting interest stops rule in CCAA context.

The group of companies were subject to proceedings under the Companies' Creditors Arrangement Act (CCAA). The appellants were an ad hoc group of bondholders holding crossover bonds, which were unsecured bonds that were issued or guaranteed by the Canadian entities of the companies. The indentures provided for the continuing accrual of interest until payment, at contractually specified interest rates, as well as other post-filing payment obligations. Other claimants, including pensioners and former employees, did not have a provision for interest on amounts owing. The holders of the crossover bonds filed claims for principal and pre-filing interest in the amount of US$4.092 billion. They also claimed they were entitled to post-filing interest and related claims under the terms of the crossover bonds of approximately US$1.6 billion.

In the context of a joint allocation trial, the CCAA judge found that the common law "interest stops rule" applied in the context of the CCAA. The CCAA judge found that the holders of the crossover bond claims were not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest, namely, above and beyond US$4.092 billion. The crossover bondholders appealed.

Held: The appeal was dismissed.

Per Rouleau J.A. (Simmons and Gillese JJ.A. concurring): The pari passu principle provided that the assets of an insolvent debtor were to be distributed amongst classes of creditors rateably and equally as those assets were found at the date of insolvency. The pari passu principle was the foremost principle in insolvency law. The pari passu principle was grounded in the need to treat all creditors fairly and to ensure an orderly distribution of assets. A necessary corollary of the pari passu principle was the interest stops rule. The interest stops rule was a fundamental tenant of insolvency law. Absent the interest stops rule, the fair and orderly distribution sought by the pari passu principle could not be achieved. The main purposes behind the interest stops rule were

fairness to creditors and to achieve the orderly administration of an insolvent debtor's estate. The interest stops rule had been consistently applied in bankruptcy and winding-up proceedings.
There were differences between the CCAA and other insolvency schemes. However, the same principles supporting the conclusion that the interest stops rule was necessary in bankruptcy and insolvency proceedings, namely, the fair treatment of creditors and the orderly administration of an insolvent debtor's estate, applied with equal force to CCAA proceedings. The CCAA was an integrated insolvency regime, which included the Bankruptcy and Insolvency Act (Act). In keeping with the idea of harmonization, as the interest stops rule applied upon bankruptcy under the Act, it should also apply in CCAA proceedings unless the rule was ousted by the CCAA, which it was not. If the interest stops rule did not apply in CCAA proceedings then the creditors who did not have a contractual right to post-filing interest would have skewed incentives against reorganization under the CCAA. Such creditors would have an incentive to proceed under the Act or the Winding-up and Restructuring Act where the interest stops rule applied to prevent creditors who had a contractual right to interest from improving their proportionate claim against the debtor at the expense of other creditors. The CCAA created conditions for preserving the status quo and if post filing interest was available to only one set of creditors then the status quo was not preserved.
If the interest stops rule did not to apply CCAA proceedings then the key objective of the CCAA, to facilitate the restructuring of corporations through flexibility and creativity, might be undermined due to the uneven entitlement to interest that might be created. Creditors who had an entitlement to post-filing interest might be less motivated to compromise. The ability to find a compromise acceptable to all creditors would be more challenging if the amount of a creditor's legal entitlement was constantly shifting as post-interest accrued. The principle of fairness supported the application of the interest stops rule. The interest stops rule was not contrary to established CCAA practice and it did not prevent a CCAA plan from providing for post-filing interest. There were rational reasons for adopting the interest stops rule in the CCAA context.
The interest stops rule did not preclude the payment of post-filing interest under a plan of compromise or arrangement. Nothing in the CCAA judge's reasons prevented the bondholders from seeking and obtaining post-filing interest through a negotiated plan.

APPEAL by bondholders from judgment reported at *Nortel Networks Corp., Re* (2014), 2014 ONSC 4777, 2014 CarswellOnt 17193, 121 O.R. (3d) 228 (Ont. S.C.J. [Commercial List]), finding interest stops rule applied in *Companies' Creditors Arrangement Act* proceedings and that bondholders were not legally entitled to claim or receive any amounts beyond outstanding principal debt and pre-petition interest.

***Paul Rouleau J.A.*:**

A. Overview

1 This appeal represents another chapter in the Nortel proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), which has been on-going since

January 2009. A parallel proceeding under Chapter 11 of the United States *Bankruptcy Code* has also been on-going in Delaware since that time.

2 The *Ad Hoc* Group of Bondholders (the "appellant") brings this appeal with leave. The group represents substantial holders of "crossover bonds", which are unsecured bonds either issued or guaranteed by certain of the Canadian Nortel entities. The relevant indentures provide for the continuing accrual of interest until payment, at contractually specified interest rates, as well as other post-filing payment obligations, such a make-whole provisions and trustee fees.

3 In contrast, the claims of other claimants, such as Nortel pensioners and former employees, do not have a provision for interest on amounts owing to them.

4 Holders of the crossover bonds have filed claims for principal and pre-filing interest in the amount of US$4.092 billion against each of the Canadian and U.S. Nortel estates. They also claim they are entitled to post-filing interest and related claims under the terms of the crossover bonds. As of December 31, 2013, the amount of this claim was approximately US$1.6 billion. The total of these two amounts represents a significant portion of the proceeds generated from the worldwide sale of Nortel's business lines and other Nortel assets, totalling approximately $7.3 billion. This latter amount is apparently not growing at any appreciable rate because of the conservative nature of the investments made with it pending the outcome of the insolvency proceedings.

5 In the context of a joint allocation trial, the *CCAA* judge directed that two issues be argued:

> 1. whether the holders of the crossover bond claims are legally entitled ... to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US$4.092 billion); and
>
> 2. if it is determined that the crossover bondholders are so entitled, what additional amounts are such holders entitled to so claim and receive.

6 The *CCAA* judge answered the first question in the negative and so he did not need to answer the second question. In reaching that conclusion, he accepted that the common law "interest stops rule", which has been held to be a fundamental tenet of insolvency law, applies in the *CCAA* context. He disagreed with the appellant's submission that the Supreme Court of Canada's decision in *NAV Canada c. Wilmington Trust Co.*, 2006 SCC 24, [2006] 1 S.C.R. 865 (S.C.C.) [hereinafter *Canada 3000*], and this court's subsequent decision in *Stelco Inc., Re*, 2007 ONCA 483, 35 C.B.R. (5th) 174 (Ont. C.A.), are binding authority that the interest stops rule does not apply in the *CCAA* context.

7 On appeal, the appellant raises two related issues — whether the *CCAA* judge erred in concluding that an interest stops rule applies in *CCAA* proceedings and, if not, whether he erred in concluding that the holders of Crossover Bond Claims are not legally entitled to claim or receive

any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest.

8 I would dismiss the appeal. As I will explain, there are sound legal and policy reasons for applying the interest stops rule in the *CCAA* context, and as I read *Stelco Inc., Re* and *Canada 3000*, they do not preclude such a result. Nor do I see a basis for varying the order that he made.

B. Background

9 In the *CCAA* court's initial order of January 14, 2009, the Canadian Debtors [1] were directed, subject to certain exceptions, to make no payments of principal or interest on account of amounts owing by the Canadian Debtors to any of their creditors as of the filing date, unless approved by the Monitor. Further, all proceedings and enforcement processes, and all rights and remedies of any person against the Canadian Debtors were stayed absent consent of the Canadian Debtors and the Monitor, or leave of the court.

10 In accordance with a claims procedure order dated July 30, 2009, claims against the Canadian Debtors were required to be filed by a claims bar date. Under a subsequent claims resolution order dated September 16, 2010, a disputed claim could be brought before the *CCAA* court for final determination.

11 As previously noted, holders of the crossover bonds filed proofs of claim that included not only the principal amount of the debt and interest accrued to the date of insolvency but also contractual claims for interest and other amounts post-filing.

12 In May 2014, a joint allocation trial, conducted by way of video-link by the *CCAA* judge in Ontario and Judge Gross in Delaware, commenced on the issue of the allocation of the sale proceeds among the debtor estates, including the Canadian and U.S. estates. In his 2015 decision, the *CCAA* judge, citing the "fundamental tenet of insolvency law that all debts shall be paid *pari passu*" and that "all unsecured creditors receive equal treatment" held that the $7.3 billion in funds generated from the Nortel liquidation should be allocated on a *pro rata* basis as among the estates: 2015 ONSC 2987, 23 C.B.R. (6th) 249 (Ont. S.C.J. [Commercial List]), at para. 209. He ordered, at para. 258, that the funds be allocated among the debtor estates in accordance with a number of principles, including the principle that each debtor estate "is to be allocated that percentage of the [liquidation proceeds] that the total allowed claims against that Estate bear to the total allowed claims against all Debtor Estates." A number of parties have sought leave to appeal that decision.

13 It was on June 24, 2014, while the joint allocation trial was proceeding, that the *CCAA* judge directed that the two issues set out above be decided.

C. Decision Below

14 The *CCAA* judge began his analysis with a review of cases applying the interest stops rule in the bankruptcy and winding-up context. He noted the relationship between the interest stops rule and the *pari passu* principle, which he described as "a fundamental tenet of insolvency law" that requires equal treatment of unsecured creditors. He found there was "no reason to not apply the [common law] interest stops rule to a CCAA proceeding because the CCAA does not expressly provide for its application." The issue was "whether the rule should apply to this CCAA proceeding."

15 He went on to conclude that "[t]here is no controlling authority in Canada in a case such as this in which there is a contested claim being made by bondholders for post-filing interest against an insolvent estate under the CCAA, let alone under a liquidating CCAA process, or in which the other creditors are mainly pensioners with no contractual right to post-filing interest." In reaching this conclusion, he distinguished *Stelco* and *Canada 3000* and found that the application of the interest stops rule was supported by the more recent decisions in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter *Century Services*], and *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.).

16 The *CCAA* judge thus ordered that "holders of Crossover Bond Claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US$4.092 billion)."

D. Issues on Appeal

17 The appellant raises two related issues:

> 1. Did the *CCAA* judge err in concluding that an interest stops rule applies in *CCAA* proceedings?
>
> 2. If the *CCAA* judge did not err in concluding that an interest stops rule applies in *CCAA* proceedings, did he err in holding that holders of Crossover Bonds Claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest?

E. Analysis

(1) Did the CCAA judge err in concluding that an interest stops rule applies in CCAA proceedings?

18 The appellant, supported by the Bank of New York Mellon and the Law Debenture Trust Company of New York as indenture trustees, submits that the *CCAA* judge erred in concluding that the interest stops rule applies.

19 First, the appellant submits he applied inapplicable case law and misinterpreted case law in concluding that the rule did and should apply. Among other things, the appellant criticizes the *CCAA* judge's application of the Supreme Court of Canada's decisions in *Century Services* and *Indalex*, which deal with the inter-play between the *CCAA* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*").

20 The appellant also submits that the application of the interest stops rule in the *CCAA* context is inconsistent with the *CCAA* and would have negative practical consequences.

21 Finally, the appellant submits that *Canada 3000* and *Stelco* are binding authority that preclude the application of the interest stops rule in the *CCAA* context and that the *CCAA* judge violated the principle of *stare decisis* in refusing to follow them.

22 I will deal with these submissions in turn, beginning with a discussion of the interest stops rule and the related *pari passu* principle.

(a) Should the interest stops rule apply in CCAA proceedings?

(i) Origin and scope of the interest stops rule

23 It is well settled that the *pari passu* principle applies in insolvency proceedings. This principle, to the effect that "the assets of the insolvent debtor are to be distributed amongst classes of creditors rateably and equally, as those assets are found at the date of insolvency" is said to be one of the "governing principles of insolvency law" in Canada: *Canada (Attorney General) v. Confederation Life Insurance Co.*, [2001] O.T.C. 486 (Ont. S.C.J. [Commercial List]), at para. 20, *per* Blair J.[2] In fact, the *pari passu* principle has been said to be the foremost principle in the law of insolvency not just in Canada but around the world: Rizwaan J. Mokal "Priority as Pathology: The *Pari Passu* Myth" (2001) 60:3 Cambridge L.J. 581, at p. 581. According to an article in the Cambridge Law Journal, "[c]ommentators claim to have found [the *pari passu*] principle entrenched in jurisdictions far removed ... in geography and time": Mokal, at pp. 581-582.

24 The *pari passu* principle is rooted in the need to treat all creditors fairly and to ensure an orderly distribution of assets.

25 As explained in *Humber Ironworks & Shipbuilding Co., Re* (1869), 4 Ch. App. 643 (Eng. Ch. Div.), nearly 150 years ago, a necessary corollary of the *pari passu* principle is the interest stops rule. Absent the interest stops rule, the fairness and orderly distribution sought by the *pari passu* principle could not be achieved. Selwyn L.J. explained the rationale for the interest stops rule, at pp. 645-646:

> In the present case we have to consider what are the positions of the creditors of the company, when, as here, there are some creditors who have a right to receive interest, and others having debts not bearing interest.
>
> . . . . .
>
> It is very difficult to conceive a case in which the assets of a company could be ... immediately realized and divided; but suppose they had a simple account at a bank, which could be paid the next day, that would be the course of proceeding. Justice, I think, requires that that course of proceeding should be followed, and that no person should be prejudiced by the accidental delay which, in consequence of the necessary forms and proceedings of the Court, actually takes place in realizing the assets; but that, in the case of an insolvent estate, all the money being realized as speedily as possible, should be applied equally and rateably in payment of the debts as they existed at the date of the winding-up. I, therefore, think that nothing should be allowed for interest after that date.

26 Giffard L.J. similarly stated, at p. 647-648:

> That rule ... works with equality and fairness between the parties; and if we are to consider convenience, it is quite clear that, where an estate is insolvent, convenience is in favour of stopping all the computations at the date of the winding-up.
>
> . . . . .
>
> I may add another reason, that I do not see with what justice interest can be computed in favour of creditors whose debts carry interest, while creditors whose debts do not carry interest are stayed from recovering judgment, and so obtaining a right to interest.

27 Thus, the primary purpose behind the common law interest stops rule is fairness to creditors. Another purpose is to achieve the orderly administration of an insolvent debtor's estate.

28 The common law interest stops rule has been consistently applied in proceedings under bankruptcy and winding-up legislation. In fact, as explained by Blair J. in *Confederation Life Insurance Co.* at paras. 22-23, the rule has been applied even when the legislation might be read to the contrary:

> This common law principle has been applied consistently in Canadian bankruptcy and winding-up proceedings. This is so notwithstanding the language of subsection 71(1) of the *Winding-Up Act* and section 121 of the *BIA*, which might be read to the contrary, in my view.
>
> . . . . .
>
> Yet, the "interest stops" principle has always applied to the payment of post-insolvency interest, and the provisions of subsection 71(1) have never been interpreted to trump the common law insolvency "interest stops rule".

29 I will now turn to the question of whether the interest stops rule should be applied in the *CCAA* context.

(ii) Should the interest stops rule apply in CCAA proceedings?

30 The respondents [3] maintain that one would expect the interest stops rule to apply in *CCAA* proceedings given that *CCAA* proceedings are insolvency proceedings to which the common law *pari passu* principle applies. Consistent with the *pari passu* principle and the related interest stops rule, creditors in *CCAA* proceedings must surely expect to be treated fairly and not see creditors with interest entitlements have their claims grow, post-insolvency, disproportionately to those with no, or lesser, interest entitlements. In the respondents' submission, the same reasoning used by courts to conclude that the interest stops rule applies in winding-up and bankruptcy proceedings leads to the conclusion that the interest stops rule applies in *CCAA* proceedings.

31 The appellant, on the other hand, submits that *CCAA* proceedings are different from other insolvency proceedings in that they do not immediately or permanently alter the rights of creditors. The filing is intended to give the debtor breathing space so that a plan of compromise or arrangement can be negotiated with creditors and the business can continue. The objective of a *CCAA* proceeding is a consensual, statutory compromise in the form of a *CCAA* plan. Such a *CCAA* plan can provide for any kind of distribution, provided it is approved by the requisite majority of creditors and the court.

32 In the appellant's submission, until a plan is negotiated or the proceeding is converted to bankruptcy or winding-up, the rights of creditors are not altered; rather, their rights to execute on them are simply stayed. In the appellant's view, therefore, unless and until this sought-after compromise of rights is negotiated, only the exercise of the rights is stayed. The *CCAA* filing does not affect the right to accrue interest; it only stays the collection of that interest.

33 The appellant further argues that the *CCAA* judge's decision is contrary to the established *CCAA* practice and the reasonable expectations of the parties in this proceeding. In particular, the appellant notes that a *CCAA* plan may, and often does, provide for the recovery of post-filing interest. The appellant also submits that the application of the interest stops rule would allow debtors to obtain a permanent interest holiday simply by filing for *CCAA* protection, even if the filing were later withdrawn, causing a permanent prejudice to the creditors not contemplated by the *CCAA*. And, the appellant submits that an interest stops rule would create a disincentive for creditors to participate in *CCAA* proceedings since they would not be compensated for delays under the *CCAA* even if there were ultimately assets available to do so

34 I do not accept the appellant's submissions on this point. Admittedly, there are differences between the *CCAA* and other insolvency schemes, including that the *CCAA* does not provide for a fixed scheme of distribution. Further, assuming a plan of compromise or arrangement under the

CCAA is negotiated it may or may not result in a distribution to creditors. Nevertheless, in my view, the same principles that underpin the conclusion that the interest stops rule is necessary in bankruptcy and winding-up proceedings — namely, the fair treatment of creditors and the orderly administration of an insolvent debtor's estate - apply with equal force to *CCAA* proceedings. I say so for several reasons.

35 First, the *CCAA* is part of an integrated insolvency regime, which also includes the *BIA*. The Supreme Court of Canada in *Century Services* considered the *CCAA* regime and opined, at para. 24, that "[w]ith parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation". The court went on to explain, at para. 78, that the *CCAA* and *BIA* are related and "no 'gap' exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy".

36 Consistent with the notion of harmonization, because the common law interest stops rule applies upon bankruptcy under the *BIA*, it should follow that the common law rule also applies in a *CCAA* proceeding unless, of course, the rule is ousted by the *CCAA*. The *CCAA* does not address entitlement to claim post-filing interest let alone oust the common law rule with clear wording.

37 Second, if the interest stops rule were not to apply in *CCAA* proceedings, the creditors who do not have a contractual right to post-filing interest would, as the Supreme Court explained in *Century Services* at para. 47, have "skewed incentives against reorganizing under the *CCAA*" and this would "only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert." This concern over skewed incentives was confirmed in *Indalex* where the Supreme Court held, at para. 51, that "[i]n order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements" to those they would receive under the *BIA*.

38 Without an interest stops rule under the *CCAA*, the creditors with no claim to post-filing interest would have an incentive to proceed under the *BIA* or the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, where the interest stops rule operates to prevent creditors, such as the appellant, who have a contractual right to interest from improving their proportionate claim against the debtor at the expense of other creditors.

39 Third, as recognized by the Supreme Court in *Century Services* at para. 77, the "*CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all". This is achieved through grouping all claims within a single proceeding and staying all actions against the debtor, thus putting creditors on an equal footing: *Century Services*, para. 22.

40 As submitted by the Canadian Creditors' Committee, if post-filing interest is available to one set of creditors while the other creditors are prevented from asserting their rights to sue the debtor and obtaining a judgment that bears interest, the *status quo* has not been preserved.

41 Fourth, if the interest stops rule were not to apply in *CCAA* proceedings, the key objective of that statute — to facilitate the restructuring of corporations through flexibility and creativity — may be undermined. This is because of the asymmetrical entitlement to interest that would be created. Creditors with an entitlement to post-filing interest may be less motivated to compromise than those creditors without such an entitlement. Using the case under appeal as an example, if post-filing interest is allowed to accrue, the delay and failure to reach a compromise will see the appellant's proportionate claim against the assets of the debtors rise very significantly at the expense of other creditors. One could well understand that if the urgency for reaching a compromise and the incentive to compromise are significantly lower for one group of unsecured creditors than for the balance of the unsecured creditors, restructuring will be more difficult to achieve and the ability to reach creative solutions will be lessened.

42 Furthermore, if the amount of an unsecured creditor's legal entitlement is constantly shifting as post-filing interest accrues, the ability to find a compromise that is acceptable to all creditors at any one point in time will pose a greater challenge than if the entitlements are fixed as of the date of filing.

43 Fifth, the principle of fairness supports the application of the interest stops rule. Insolvency proceedings are intended to be fair processes for liquidating or restructuring insolvent corporations. How, one may ask, is it fair if the appellant, an unsecured creditor, sees its claim against the assets of the debtor balloon from $4.092 billion to $5.692 billion (as of December 31, 2013) because of contractual provisions when the claims of unsecured creditors, who have no such contractual provisions and who have been prevented for almost seven years by the *CCAA* stay from converting their claims into court judgments that would bear interest, have seen no increase at all? Delays in liquidating the Nortel assets have helped the Monitor achieve the very significant recoveries made ($7.3 billion) and, in fairness, this achievement should be for the benefit of all creditors.

44 Finally, I wish to respond to the appellant's concerns.

45 As to past practice and the reasonable expectations of the parties, I do not view the existence of an interest stops rule as being contrary to established *CCAA* practice or as preventing a *CCAA* plan from providing for post-filing interest. Parties may negotiate for a plan that provides for payments of more or less than a creditor's legal entitlement in lieu of the foregone interest. Thus, I do not accept the appellant's submission that there would be a disincentive to participate in *CCAA* proceedings, which is based on the premise that post-filing interest may not be recovered under a *CCAA* plan.

46 The appellant also raised the concern that a debtor company could obtain a permanent interest holiday, resulting in unfairness. The appellant says that if there are proceeds over and above the amounts needed to satisfy the pre-filing claims of creditors, those proceeds would be for the benefit of the shareholders of the debtor. This follows from the fact that the *CCAA* contains no provision for the payment of a "surplus" to creditors and the interest stops rule would prevent the unsecured creditors from recovering any post-filing interest. The debtor could therefore resort to the *CCAA* to stop interest from accruing and operate his business interest free.

47 This hypothetical raises the same concern about the loss of post-filing interest but in a somewhat different way. The concern is that a debtor may seek *CCAA* protection to avoid the obligation to pay interest.

48 There may well be exceptional situations where, at some point in a *CCAA* proceeding, the common law interest stops rule risks working an unfairness of some sort. I leave for another day what orders, if any, might be made by a *CCAA* judge in cases such as the hypothetical presented by the appellant where a debtor might be considered to benefit unfairly as a result of the common law interest stops rule. I note, however, that in order to achieve the remedial purpose of the *CCAA*, *CCAA* courts have been innovative in their interpretation of their stay power and in the exercise of their authority in the administration of *CCAA* proceedings. This approach has been specifically endorsed by the Supreme Court of Canada in *Century Services* and would no doubt guide the court should the need arise: see, for example, paras. 61 and 70.

49 In conclusion, there are sound reasons for adopting an interest stops rule in the *CCAA* context. I now turn to the argument that *Canada 3000* and *Stelco* preclude the application of the rule.

(b) Are Canada 3000 and Stelco binding authorities to the effect that the interest stops rule does not apply in CCAA proceedings?

50 The appellant vigorously maintains that the *CCAA* judge was bound by *Canada 3000* and *Stelco*, which both confirm that the interest stops rule does not apply in *CCAA* proceedings.

51 I would not give effect to this submission. As I will explain, both of these decisions should be read narrowly and do not constitute a precedent with respect to the issue raised in this appeal — whether the common law interest stops rule applies in *CCAA* proceedings.

(i) Canada 3000

Background and lower court decisions

52 The decision in *Canada 3000* arose out of the collapse of three airlines — Canada 3000 Airlines Ltd. and Royal Aviation Inc. (collectively "Canada 3000"), and Inter-Canadian (1991) Inc. ("Inter-Canadian"). Canada 3000 filed for protection under the *CCAA* and, three days later,

filed for bankruptcy. Inter- Canadian filed a *BIA* proposal but the proposal ultimately failed and so it too was placed into bankruptcy effective as of the date it filed its notice of intention to make a proposal.

53 At the time the airlines collapsed, they owed significant amounts in unpaid airport and navigation charges. As a result, various airport authorities and NAV Canada sought remedies under the *Airport Transfer (Miscellaneous Matters) Act*, S.C. 1992, c. 5 ("*Airports Act*") and the *Civil Air Navigation Services Commercialization Act*, S.C. 1996, c. 20 ("*CANSCA*"). In particular, they sought orders seizing and detaining aircraft leased by the bankrupt airlines. While the lessors of the planes retained legal title to the aircraft, the bankrupt airlines were the registered owner for the purposes of the *Aeronautics Act*, R.S.C. 1985, c. A- 2.

54 The airport authorities and NAV Canada brought proceedings in Ontario and Quebec.

55 In Ontario, Ground J. dismissed motions for orders permitting the airport authorities and NAV Canada to seize and detain the aircraft leased by Canada 3000: *Canada 3000 Inc., Re* (2002), 33 C.B.R. (4th) 184 (Ont. S.C.J.). On the question of interest, he concluded, at para. 73, that the airport authorities and NAV Canada were entitled to charge interest on the unpaid charges up to the date of payment or the posting of security for payment.

56 On appeal from Ground J.'s decision, this court held that the interest question need not be determined since the airport authorities and NAV Canada did not have the right to detain the aircraft: *Canada 3000 Inc., Re* (2004), 69 O.R. (3d) 1 (Ont. C.A.), at para. 197.

Supreme Court's decision

57 On appeal to the Supreme Court of Canada, the court determined that the airport authorities and NAV Canada had the right to detain the aircraft leased and operated by the bankrupt airlines. The issue of post-filing interest was, therefore, an issue the court had to decide.

58 In deciding that issue, Binnie J. made the following comment at para. 96:

> While a CCAA filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the [*BIA*].
>
> [Emphasis added.]

59 The appellant submits that the underlined words are binding *ratio* and must be followed in this case.

60 While I agree that Binnie J.'s comment about the *CCAA* is not *obiter*, I am not convinced that it should be read as broadly as the appellant contends. In *R. v. Henry*, 2005 SCC 76, [2005] 3

S.C.R. 609 (S.C.C.), Binnie J. warned, at para. 57, against reading "each phrase in a judgment ... as if enacted in a statute". Rather, the question to be asked is "what did the case decide?".

61 To answer what *Canada 3000* decided about post-filing interest under the *CCAA*, it is important to consider the context in which Binnie J. made his comment, including the facts of the case, the issues before the court, the structure of his reasons, the wording he used, and what he said as well as what he did not say.

62 At para. 40., Binnie J. defined the "two major questions raised by the appeals" as follows: (1) "are the *legal titleholders* liable for the debt incurred by the registered owners and operators of the failed airlines to the service providers?" and (2) "even if they are not so liable, are *the aircraft* to which they hold title subject on the facts of this case to judicially issued seizure and detention orders to answer for the unpaid user charges incurred by Canada 3000 and Inter-Canadian?" (emphasis in original). The answer to those two questions turned on the interpretation of the *Airports Act* and *CANSCA*. As Binnie J. noted at para. 36, the case was "from first to last an exercise in statutory interpretation".

63 After engaging in a lengthy exercise of statutory interpretation, he concluded that: (1) under s. 55 of *CANSCA*, the legal titleholders were not jointly and severally liable for the charges due to NAV Canada; and (2) under s. 56 of *CANSCA* and s. 9 of the *Airports Act*, the airport authorities and NAV Canada were entitled to apply for an order detaining the aircraft operated by the failed airlines.

64 Binnie J. then addressed eight additional arguments made by the parties and just before his last paragraph on disposition, he included a section simply entitled "Interest", starting at para. 93.

65 He began his analysis of the interest issue by outlining the statutory authority for charging interest: s. 9(1) of the *Airports Act* expressly provided for the payment of interest, and while *CANSCA* did not explicitly provide for interest, a regulation under *CANSCA* imposed interest: para. 93.

66 "The question then", said Binnie J. at para. 95, was "how long the interest can run". He addressed that question as follows, at paras. 95-96:

> The airport authorities and NAV Canada have possession of the aircraft until the charge or amount in respect of which the seizure was made is paid. It seems to me that this debt must be understood in real terms and must include the time value of money.
>
> Given the authority to charge interest, my view is that interest continues to run to the first of the date of payment, the posting of security or bankruptcy. If interest were to stop accruing before payment has been made, then the airport authorities and NAV Canada would not recover the full amount owed to them in real terms. Once the owner, operator or titleholder

> has provided security, the interest stops accruing. The legal titleholder is then incurring the cost of the security and losing the time value of money. It should not have to pay twice. While a CCAA filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the [*BIA*].
>
> [Emphasis added.]

67 Significantly, Binnie J. made no mention in his reasons of the common law interest stops rule or the related *pari passu* principle. Nor did he cite any case law dealing with those issues. In fact, even though it is well established that the interest stops rules applies under the *BIA*, he did not rely on the common law rule in support of his finding that interest stopped on bankruptcy. Instead, he relied on ss. 121 and 122 of the *BIA* in concluding that the interest payable under the *Airports Act* and the regulation under *CANSCA* did not accrue post-bankruptcy.

68 Binnie J.'s analysis of the issue is rooted in the factual and statutory context of the case. In discussing the accrual of interest under the *CCAA*, he specified that the interest was on "unpaid charges", namely charges under *CANSCA* and the *Airports Act*. Binnie J. was not answering an abstract legal question but rather deciding how long interest ran in the particular factual and statutory context.

69 In effect, I read Binnie J. as saying that a *CCAA* filing does not stop the accrual of interest under *CANSCA* or the *Airports Act* but the statutory provisions of the *BIA* ss. 121 and 122 do. He was not deciding whether, in the absence of the right to interest under *CANSCA* and the *Airports Act*, interest would have accrued or been stopped by the common law interest stops rule.

70 Let me add that I agree with the *CCAA* judge's comment that Binnie J.'s statement in *Canada 3000* should "now be construed in light of *Century Services* and *Indalex*". In fact, one can well imagine that the court's interpretation of *CANSCA* and the *Airports Act* as allowing the accrual of interest in a *CCAA* proceeding but not in a *BIA* proceeding might have been different had it reached the Supreme Court after these two more recent cases. That question, however, is for another day. For now, I turn to this court's decision in *Stelco*.

(ii) Stelco

Background and motion judge's decision

71 The post-filing interest issue in *Stelco* arose in "the final chapter of the financial restructuring of Stelco" under the *CCAA*: *Stelco Inc., Re* (2006), 24 C.B.R. (5th) 59 (Ont. S.C.J. [Commercial List]), at para. 1. The final chapter involved competing claims to a portion of the amount payable to the holders of subordinated notes (the "Junior Noteholders") pursuant to Stelco's plan of

arrangement (the "Plan"). The claim to these funds ("Turnover Proceeds") was made by the "Senior Debentureholders".

72 The dispute over the Turnover Proceeds arose after Stelco's Plan had been sanctioned and Stelco had emerged from restructuring with its debt reorganized. The Senior Debentureholders claimed the Turnover Proceeds on the basis of subordination provisions contained in the Note Indenture under which Stelco had issued convertible unsecured subordinated debentures to the Junior Noteholders.

73 Under the terms of the Note Indenture, the Junior Noteholders expressly agreed that, in the event that the debtor became insolvent, they would subordinate their right of repayment until after repayment in full of "Senior Debt".

[74] The plan of arrangement that had been approved was a "no interest" plan, meaning that distribution from Stelco to the creditors did not include or account for post-filing interest. The Plan, however, provided that the rights as between the Senior Debentureholders and the Junior Noteholders were preserved. The Senior Debentureholders, who had not received payment of post-filing interest from Stelco under the Plan, demanded payment of it from the Junior Noteholders pursuant to the terms of the Note Indenture. The Junior Noteholders argued, among other things, that the subordination provisions did not survive the Plan's implementation and that the Senior Debentureholders were not entitled to claim post-filing interest from them.

75 The motion judge, and on appeal, this court ruled in favour of the Senior Debentureholders. The courts found that the Plan was expressly drafted to preserve the subordination provisions and that the *CCAA* does not purport to affect rights as between creditors to the extent that they do not directly involve the debtor.

How to read Stelco?

76 The appellant and the respondents offer different readings of *Stelco*.

77 The appellant argues that this court's decision is binding authority for the proposition that the interest stops rule does not apply in the *CCAA* context. The passages relied on by the appellant include para. 67:

> [T]here is no persuasive authority that supports an Interest Stops Rule in a *CCAA* proceeding. Indeed, the suggested rule is inconsistent with the comment of Justice Binnie in [*Canada 3000*] at para. 96, where he said:
>
> > While a *CCAA* filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the [*BIA*].

78 The respondents, for their part, read the case more narrowly as a resolution of an inter-creditor dispute. They submit that the *ratio* of the case is that there was no rule that prohibited giving effect to the agreed upon inter- creditor postponement. To the extent that this court discussed the interest stops rule in the abstract, its comments are *obiter*.

79 I agree with the respondents. In my view, the court in *Stelco* did not need to decide whether the interest stops rule applies in *CCAA* proceedings for it to decide the inter-creditor dispute before the court and so its statements about the rule's application are not binding.

80 This court expressly noted, at para. 44, that it was dealing with an inter-creditor dispute. The Junior Noteholders had accepted the subordination terms in the Note Indenture. They had agreed not to be paid anything, in the event of insolvency, until those who held Senior Debt were paid principal and interest in full. The court affirmed, at para. 44, that the *CCAA* does not change the relationship among creditors where it does not directly involve the debtor.

81 As noted, this was a "no interest" plan, meaning that the Senior Debentureholders received no post-filing interest from Stelco. Rather, they sought and eventually received payment of post-filing interest from the Junior Noteholders' share of the proceeds. The court found that the Stelco Plan contemplated the continued accrual of interest to Senior Debentureholders for the purpose of their rights as against the Junior Noteholders after the *CCAA* filing date: paras. 59 and 70. It noted that *CCAA* plans can and sometimes do provide for payments in excess of claims filed in *CCAA* proceedings. There was no rule precluding the payment of post-filing interest to the Senior Debentureholders in accordance with the Stelco Plan: para. 70.

82 The court's conclusion that the Junior Noteholders could not rely on the interest stops rule is consistent with the traditional interest stops rule. The interest stops rule relates to claims by creditors against the debtor. It does not deal with arrangements as between creditors. In other words, whether or not the interest stops rule applies in *CCAA* proceedings did not need to be decided because the agreement between creditors fell outside the scope of that rule.

83 The appellant makes two further submissions based on its interpretation of s. 6.2(1) of the Note Indenture. That paragraph reads as follows:

> 6.2 Distribution on Insolvency or Winding-up.
>
> . . . . .
>
> (1) the holders of all Senior Debt will first be entitled to receive payment in full of the principal thereof, premium (or any other amount payable under such Senior Debt), if any, and interest due thereon, before the Debentureholders will be entitled to receive any payment or distribution of any kind or character, whether in cash, property or

> securities, which may be payable or deliverable in any such event in respect of any of the Debentures;
>
> [Emphasis added.]

84 The first argument is that the Senior Debentureholders were only entitled to receive principal, premium and interest "which may be payable or deliverable in any such event", the event being insolvency or bankruptcy proceedings. Therefore, the court must have concluded, at least implicitly, that the Senior Debentureholders would have been entitled to maintain their claim for post-filing interest against Stelco.

85 The second argument is that, by the terms of s. 6.2(1), the Senior Debentureholders were only entitled to interest "due thereon" and so they could not claim post-filing interest from the Junior Noteholders unless they could claim post-filing interest from Stelco.

86 I would not give effect to either submission.

87 In *Stelco*, the court did not address either argument and we do not have a copy of the entire agreement nor do we have the other agreements that form part of the factual matrix. Without that context, this court is not in the position to interpret s. 6.2(1).

88 In my view, the key question for this court is not how to properly interpret s. 6.2(1) but, rather, how we should read the reasons in *Stelco*. What did the *Stelco* court decide, and specifically, should we read the panel as implicitly deciding that the Senior Debentureholders could not recover post-filing interest from the Junior Noteholders unless they could claim post-filing interest against Stelco?

89 In discussing post-filing interest, the court's only mention of the Senior Debentureholders' claim as against Stelco is found at paras. 57-59, where the panel expressly rejected the argument that "any claim the Senior [Debentureholders] have for interest must be based on a "claim" [as defined in the Plan] they have against Stelco for such interest" and that "[i]f the Senior Debt does not include post-filing interest, there can be no claim against the [Junior] Noteholders for such amounts": see paras. 58-59.

90 Admittedly, the panel made this comment in discussing the effect of the Stelco Plan as opposed to the effect of the interest stops rule. However, as I read the section on post-filing interest as a whole, the court is saying that the Junior Noteholders agreed to be bound by the deal they made. They had agreed to the subordination provisions that guaranteed full payment to the Senior Debentureholders in the event of insolvency, and the Plan affirmed that the Senior Noteholders could claim the full amount that would have been owing had there been no *CCAA* filing. In this court's words at para. 70, there is no interest stops rule "that precludes such a result." In my view, therefore, this court did not make an implicit finding that the Senior Debentureholders had to be

able to claim post-filing interest from Stelco in order to claim post-filing interest from the Junior Noteholders.

91 In conclusion, I consider the comment that there is no persuasive authority that supports an interest stops rule in *CCAA* proceedings to be *obiter*. *Stelco* dealt with the effect of an agreement as between creditors as to how, between them, they would share distributions. Whether or not interest stops upon a *CCAA* filing was of no import in answering that question.

(2) If the CCAA judge did not err in concluding that an interest stops rule applies in CCAA proceedings, did he err in holding that holders of Crossover Bonds Claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest?

92 The appellant objects to the wording of the *CCAA* judge's order. It provides that "holders of Crossover Bond Claims are not legally entitled to claim *or receive* any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest" (emphasis added). While the appellant asked the *CCAA* judge to amend his order to delete "or receive", he refused. The appellant submits that, to the extent this precludes the bondholders from receiving post-filing interest under a *CCAA* plan, the *CCAA* judge erred. The appellant notes that all the parties in this proceeding agree that a *CCAA* plan may provide for post-filing interest.

93 As I explained above, the interest stops rule does not preclude the payment of post-filing interest under a plan of compromise or arrangement.

94 As I read the *CCAA* judge's reasons and order, he did not decide otherwise. His decision confirms that the common law interest stops rule applies in *CCAA* proceedings. If a plan of compromise or arrangement is concluded, it should not, for example, be read as limiting any right to recover post-filing interest creditors may have as amongst themselves, as existed in *Stelco*, or from non-parties. Nor does it dictate what any creditor may seek in bargaining for a fair plan of compromise or arrangement. In that regard, I do not interpret the *CCAA* judge's use of the words "or receive" as preventing the appellant from seeking and obtaining such a result in a negotiated plan. In particular, I note the *CCAA* judge's comment at para. 35 of his reasons that "the parties would of course be free to include post-filing interest payments in a plan of arrangement, as is sometimes done."

95 The appellant also seeks clarification as to the effect of the words "*any amounts* under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest" (emphasis added). The appellant notes that, without clarification, the wording of the order could potentially preclude the recovery of other contractual entitlements under the relevant indentures, such as costs and make-whole provisions, even though no arguments were advanced before the *CCAA* judge with respect to any amounts other than post-filing interest.

96 The issue the *CCAA* judge was directed to answer was "whether the holders of the crossover bond claims ... [were] legally entitled ... to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest". As indicated in the appellant's factum, the only arguments advanced before the *CCAA* judge related to post-filing interest and not any other amounts under the indentures. The appellant does not appear to have made submissions to the *CCAA* judge with respect to the costs and make-whole fees it now raises in its factum. This court is in no position to deal with the new argument raised by the appellant. Further, beyond making the broad submission noted above, the appellant did not expand on that submission and direct the court to the specific claims or indenture provisions it relies on in support of its argument or explain why the claims should not be caught by the order.

97 As I have already indicated, the *CCAA* judge's order confirms that the interest stops rule, and the limits imposed by the rule, apply in *CCAA* proceedings. To the extent that the appellant maintains that there are other contractual entitlements under the relevant indentures not covered by the interest stops rule, it is up to the *CCAA* court to decide if those can now be raised and ruled upon.

F. Final Comments

98 I acknowledge that the Nortel *CCAA* proceedings are exceptional, particularly with respect to the length of the delay. The amount the appellant claims for post-filing interest and related claims under the indentures, and the resulting impact on other unsecured creditors is so great because of the length of that process. The principle, however, is the same whether the *CCAA* process is short or long. After the imposition of a stay in *CCAA* proceedings, allowing one group of unsecured creditors to accumulate post-filing interest, even for a relatively short period of time, would constitute unfair treatment vis-à-vis other unsecured creditors whose right to convert their claim into an interest-bearing judgment is stayed.

99 This decision does not purport to change or limit the powers of *CCAA* judges. Although the decision clearly settles at the outset of a *CCAA* proceeding whether there is a legal entitlement to post-filing interest, it does not dictate how the proceeding will progress thereafter until a plan of compromise or arrangement is approved, or the *CCAA* proceeding is otherwise brought to an end.

100 The determination of legal entitlement is important as it clearly establishes the starting point in a *CCAA* proceeding. It tells creditors, debtors and the court what legal claim a particular creditor has. Its significance is not only for purposes of setting the voting rights of creditors on any proposed plan of compromise or arrangement, it also ensures that, in assessing any such proposed plan, the parties will know what they are or are not compromising and the court will be equipped to consider the fairness of such a plan.

G. Disposition

101 For these reasons, I would dismiss the appeal. Pursuant to the agreement of the parties, I would award the respondent Monitor, as successful party, costs as against the appellant fixed in the amount of $40,000, inclusive of disbursements and applicable taxes. I would make no other order as to costs.

***Janet Simmons J.A.*:**

I agree

***E.E. Gillese J.A.*:**

I agree

Appeal dismissed.

Footnotes

1 There are five Canadian Debtors: Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Technology Corporation, Nortel Networks International Corporation and Nortel Networks Global Corporation.

2 As explained in Roderick J. Wood's text on bankruptcy and insolvency law, "insolvency law is the wider concept, encompassing bankruptcy law but also including non-bankruptcy insolvency systems.": Roderick J. Wood, *Bankruptcy & Insolvency Law* (Toronto: Irwin Law Inc., 2009), at p. 1.

3 The respondents are the Monitor, the Canadian Debtors, the Canadian Creditors' Committee and the Wilmington Trust, National Association. While technically The Bank of New York Mellon and the Law Debenture Trust Company of New York are also respondents, they support the appellant's position and so my use of the term "respondents" excludes them.

Tab 40

2005 CarswellOnt 6818
Ontario Court of Appeal

Stelco Inc., Re

2005 CarswellOnt 6818, [2005] O.J. No. 4883, 11 B.L.R. (4th) 185, 144 A.C.W.S. (3d) 15, 15 C.B.R. (5th) 307, 204 O.A.C. 205, 261 D.L.R. (4th) 368, 78 O.R. (3d) 241

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC., AND OTHER APPLICANTS LISTED IN SCHEDULE "A"

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

Goudge, Sharpe, Blair JJ.A.

Heard: November 14, 2005
Judgment: November 17, 2005
Docket: CA C44436, M33171

Proceedings: additional reasons at *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 6510, 15 C.B.R. (5th) 305 ((Ont. C.A.)); affirmed *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 6483, 15 C.B.R. (5th) 297 ((Ont. S.C.J. [Commercial List]))

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Ken Rosenberg for United Steelworkers of America
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Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency
VI Proposal
VI.10 Practice and procedure
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.e Miscellaneous

Headnote

Bankruptcy and insolvency --- Proposal — Practice and procedure

Leave to appeal order made in Companies' Creditors Arrangement Act proceeding — S Inc. presented Proposed Plan of Compromise or Arrangement (Plan) to its unsecured creditors for approval — Plan included subordinated debenture holders, senior debt holders, and trade creditors in same group for purposes of voting on Plan — Prior to vote on Plan, subordinated debenture holders brought motion seeking order classifying themselves as separate class for voting purposes on basis that they had different interests from rest of group — Supervising judge dismissed motion — Subordinated debenture holders sought leave to appeal dismissal of motion — Leave to appeal granted — Leave is only sparingly granted with regard to orders made in Companies' Creditors Arrangement Act (CCAA) proceedings because of their "real time" dynamic and because of generally discretionary character underlying many of orders made by supervising judges in such proceedings — Here, leave to appeal was granted because proposed appeal raised issue of significance to practice, namely nature of common interest test to be applied by courts for purposes of classification of creditors in CCAA proceedings — Where there is urgency that leave application be expedited in public interest, court will do so in this area of law as it does in other area; however, where what is involved is essentially attempt to review discretionary order made on facts of case, in tightly supervised process with which judge is intimately familiar, collapsed process that was made available in this particular situation will not generally be afforded — Issues raised on this appeal, and timing factor involved, warranted expedited procedure that was ordered.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

S Inc. presented Proposed Plan of Compromise or Arrangement (Plan) to its unsecured creditors for approval — Plan included subordinated debenture holders, senior debt holders, and trade creditors in same group for purposes of voting on Plan — Prior to vote, subordinated debenture holders brought motion seeking order classifying themselves as separate class for voting purposes on basis that they had different interests from rest of group — Supervising judge dismissed motion — Subordinated debenture holders appealed from dismissal of motion — Appeal dismissed — No error could be found in supervising judge's factual findings or in his exercise of discretion in determining that subordinated debenture holders should remain in same class as other creditors — There was no material distinction between legal rights of subordinated debenture holders and those of senior debt holders vis-à-vis S Inc. — Supervising judge was correct in law in applying

principles dealing with commonality of interest test as summarized in recent case, which principles were cited with approval by Court of Appeal in another recent decision — Principles applied by supervising judge were not inconsistent with earlier decision of present court in other case dealing with common interest test, because differing interests in question were not different legal interest as between two creditors; they were different legal interests as between each of creditors and debtor company — Case cited by subordinated debenture holders did not deal with issue of whether creditors with divergent interests as amongst themselves, as opposed to divergent legal interests vis-à-vis debtor company, could be forced to vote as members of common class — Creditors should be classified in accordance with their contract rights, i.e., according to their respective interests in debtor company — To hold classification and voting process hostage to vagaries of potentially infinite variety of disputes, as between already disgruntled creditors who had been caught in maelstrom of Companies' Creditors Arrangement Act (CCAA) restructuring, would run risk of hobbling that process unduly and could lead to very type of fragmentation and multiplicity of discrete classes or sub-classes of classes that judges have warned might well defeat purpose of CCAA.

ADDITIONAL REASONS to judgment reported at *Stelco Inc., Re* (2005), 2005 CarswellOnt 6510, 15 C.B.R. (5th) 305 (Ont. C.A.).

***Blair J.A.*:**

Background

1 This appeal arises out of the reorganization of Stelco Inc., and related companies, pursuant to the *Companies' Creditors Arrangement Act* ("CCAA"). [1] Stelco has been in the midst of this fractious process for approximately twenty-one months. Justice Farley has been the supervising judge throughout.

2 Stelco has presented a Proposed Plan of Compromise or Arrangement to its creditors for their approval. The vote was scheduled for Tuesday, November 15, 2005. On Thursday, November 10, a group of creditors known as the Informal Independent Converts' Committee ("the Converts' Committee) sought an order from the supervising judge, amongst other things, classifying the Subordinated Debenture Holders whom they represent as a separate class for voting purposes. Justice Farley dismissed the motion. In the face of the pending vote, the Converts' Committee sought leave to appeal on Thursday afternoon (The courts were closed on Friday, November 11, for Remembrance Day). Rosenberg J.A. dealt with the matter and directed that the application for leave, and if leave be granted, the appeal, be heard by a panel of this court on Monday, November 14, 2005.

3 This panel heard the application for leave and the appeal on Monday. We concluded that leave should be granted, but that the appeal must be dismissed, and at the conclusion of argument — and

in order to clarify matters so that the vote could proceed the following day — we issued a brief endorsement with our decision, but indicating that more detailed reasons would follow.

4 The endorsement read as follows:

> In our view, the appellants have not demonstrated a different legal interest from the other unsecured creditors vis à vis the debtor, nor any basis for setting aside the finding of Farley J. that there are no different practical interests such that the appellants deserve a separate class. We see no legal error or error in principle in his exercise of discretion.
>
> Leave to appeal is granted, but the appeal must therefore be dismissed. Because of the importance of the issue for Ontario practice in this area, we propose to expand somewhat on these reasons in due course.

5 These are those expanded reasons.

Facts

6 Stelco's Proposed Plan is made to unsecured creditors only. It is not intended to affect the claims of secured creditors.

7 The Converts' Committee represents unsecured creditors who hold $90 million of convertible unsecured subordinated debentures issued by Stelco pursuant to a Supplemental Trust Indenture dated January 21, 2002, and due in 2007. With interest, the claims of the Subordinated Debenture Holders now amount to approximately $110 million. Those claims are subordinated to approximately $328 million in favour of Senior Debt Holders. In addition, Stelco has unsecured trade debts totalling approximately, $228 million. In the Proposed Plan, these three groups of unsecured creditors — the Subordinated Debenture Holders (represented by the Converts' Committee), the Senior Debt Holders, and the Trade Creditors — have all been included in the same class for the purposes of voting on the Proposed Plan or any amended version of it.

8 The Converts' Committee takes issue with this, and seeks to have the Subordinated Debenture Holders classified as a separate class of creditors for voting purposes. They argue that their interests are different than those of the Bondholders and that creditors who do not have common interests should not be classified in the same group for voting purposes. They submit, therefore, that the supervising judge erred in law in not granting them a separate classification. In that regard, they rely upon this court's decision in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.). They also argue that the supervising judge was wrong, on the facts contained in the record, in finding that the Subordinated Debenture Holders and the Bondholders did not have conflicting interests.

9 In making their argument about a different interest, the appellants rely upon their status as subordinated debt holders as shaped particularly by Articles 6.2 and 6.3 of the Supplemental

Trust Indenture. In essence those provisions reinforce the subordinated nature of their debt. They stipulate (a) that if the Subordinated Debenture Holders receive any payment from Stelco, or any distribution from the assets of Stelco, before the Senior Debt is fully paid, they are obliged to remit any such payment or distribution to the Senior Debt Holders until the latter have been paid in full (Art. 6.2(3)), but (b) that no such payment or distribution by Stelco shall be deemed to constitute a payment on the Subordinated Debenture Holders' debt (Art. 6.3). The parties refer to these provisions as the "Turnover Payment" provisions.

10 In short, although Stelco is obliged to pay both groups of creditors in full, as between the Subordinated Debenture Holders and the Senior Debt Holders, the latter are entitled to be paid in full before the former receive anything. The Supplemental Trust Indenture makes it clear that the provisions of Article 6 "are intended solely for the purpose of defining the relative rights of [the Subordinated Debenture Holders] and the holders of the Senior Debt" (Art. 6.3).

11 The appellants contend that the Turnover Payment provisions distinguish their interests from those of the Subordinated Debenture Holders when it comes to voting on Stelco's Proposed Plan. They say that the Subordinated Debenture Holders' interest in maximizing the amounts to be made available to unsecured creditors ends once they have received full recovery, in part as a result of the Turnover Payments that the Subordinated Debenture Holders will be required to make from their portion of the funds. On the other hand, the Subordinated Debenture Holders will have an interest in seeking more because their recovery, for practical purposes, will have only begun once that point is reached.

12 The respondents submit, for their part, that the appellants are seeking a separate classification for a collateral purpose, i.e., so that they will be able to veto the Proposed Plan, or at least threaten to veto it, unless they are granted a benefit to which they are not entitled — the elimination of their subordinated position by virtue of the Turnover Payment provisions.

13 Farley J. rejected the appellants' arguments. The thrust of his decision in this regard is found in paragraphs 13 and 14 of his reasons:

> [13] I would note as well that the primary and most significant attribute of the ConCom debt and that of the BondCom debt/Senior Debt [2] plus the trade debt vis-à-vis Stelco is that it is all unsecured debt. Thus absent valid reason to have separate classes it would be reasonable, logical, rational and practical to have all this unsecured debt in the same class. Certainly that would avoid any unnecessary fragmentation — and in this respect multiplicity of classes does not mean that that fragmentation starts only when there are many classes. Unless more than one class is necessary, fragmentation would start at two classes. Fragmentation if necessary, but not necessarily fragmentation.
>
> [14] Is it necessary to have more than one class? Firstly, it would not appear to me that as between Stelco and the unsecured creditors overall there is any material distinction. Secondly,

> there would not appear to me to be any confiscation of any rights (or the other side of the coin any new imposition of obligations) upon the holders of the ConCom debt. The subrogation issue was something which these holders assumed on the issue of that debt. Thirdly, I do not see that there is a realistic conflict of interest. Each group of unsecured creditors including the ConCom debt holders and the BondCom debt holders has the same general interest vis-à-vis Stelco, namely to extract from Stelco through the Plan the maximum value in the sense of consideration possible. . . . That situation is not impacted for our purposes here in this motion by the possibility that in a subsequent dispute between the ConCom holders and the BondCom holders there may be a difference of opinion as to the variation of the consideration obtained.

14 We agree with his conclusion and see no basis to interfere with his findings in that regard.

The Leave Application

15 The principles to be applied by this court in determining whether leave to appeal should be granted to someone dissatisfied with an order made in a CCAA proceeding are not in dispute. Leave is only sparingly granted in such matters because of their "real time" dynamic and because of the generally discretionary character underlying many of the orders made by supervising judges in such proceedings. There must be serious and arguable grounds that are of real and significant interest to the parties. The court has assessed this criterion on the basis of a four-part test, namely,

> a) whether the point on appeal is of significance to the practice;
>
> b) whether the point is of significance to the action;
>
> c) whether the appeal is *prima facie* meritorious or frivolous; and
>
> d) whether the appeal will unduly hinder the progress of the action.

See *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.) at para. 24; *Country Style Food Services Inc., Re*, [2002] O.J. No. 1377, 158 O.A.C. 30 (Ont. C.A. [In Chambers]) at para. 15; *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 33 (Alta. C.A. [In Chambers]) at para. 7.

16 Here, we granted leave to appeal because the proposed appeal raised an issue of significance to the practice, namely the nature of the "common interest" test to be applied by the courts for purposes of the classification of creditors in CCAA proceedings. Although the law seems to have progressed in the lower courts along the lines developed in Alberta, beginning with the decision of Paperny J. in *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), this court has not dealt with the issue since its decision in *Nova Metal Products Inc. v. Comiskey (Trustee of)*, *supra*, and the Converts' Committee argues that the Alberta line of authorities is contrary to *Nova Metal Products Inc.*

17 A brief further comment respecting the leave process may be in order.

18 The court recognizes the importance of its ability to react in a responsible and timely fashion to the appellate needs arising in the "real time" dynamics of CCAA restructurings. Often, as in the case of this restructuring, they involve a significant public dimension. For good policy reasons, however, appellate courts in Canada — including this one — have developed relatively stringent parameters for the granting of leave to appeal in CCAA cases. As noted, leave is only sparingly granted. The parameters as set out in the authorities cited above remain good law.

19 Merely because a corporate restructuring is a big one and money is no object to the participants in the process, does not mean that the court will necessarily depart from the normal leave to appeal process that applies to other cases. In granting leave to appeal in these circumstances, we do not wish to be taken as supporting a notion that the fusion of leave applications with the hearing of the appeal in CCAA restructurings — particularly in major ones such as this one involving Stelco — has become the practice. Where there is an urgency that a leave application be expedited in the public interest, the court will do so in this area of the law as it does in other areas. However, where what is involved is essentially an attempt to review a discretionary order made on the facts of the case, in a tightly supervised process with which the judge is intimately familiar, the collapsed process that was made available in this particular situation will not generally be afforded.

20 As these reasons demonstrate, however, the issues raised on this particular appeal, and the timing factor involved, warranted the expedited procedure that was ordered by Justice Rosenberg.

The Appeal

No Error in Law or Principle

21 Everyone agrees that the classification of creditors for CCAA voting purposes is to be determined generally on the basis of a "commonality of interest" (or a "common interest") between creditors of the same class. Most analyses of this approach start with a reference to *Sovereign Life Assurance Co. v. Dodd* (1892), [1891-94] All E.R. Rep. 246 (Eng. C.A.), which dealt with the classification of creditors for voting purposes in a winding-up proceeding. Two passages from the judgments in that decision are frequently cited:

At pp. 249-250 Lord Esher said:

> The Act provides that the persons to be summoned to the meeting, all of whom, it is to be observed, are creditors, are persons who can be divided into different classes, classes which the Act[3] recognizes, though it does not define. The creditors, therefore, must be divided into different classes. What is the reason for prescribing such a course? It is because the creditors composing the different classes have different interests, and, therefore, if a different state of

> facts exists with respect to different creditors, which may affect their minds and judgments differently, they must be separated into different classes.

At p. 251, Bowen L.J. stated:

> The word "class" used in the statute is vague, and to find out what it means we must look at the general scope of the section, which enables the court to order a meeting of a "class of creditors" to be summoned. It seems to me that we must give such a meaning to the term 'class' as will prevent the section being so worked as to produce confiscation and injustice, and that we must confine its meaning to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

22 These views have been applied in the CCAA context. But what comprises those "not so dissimilar" rights and what are the components of that "common interest" have been the subject of debate and evolution over time. It is clear that classification is a fact-driven exercise, dependent upon the circumstances of each particular case. Moreover, given the nature of the CCAA process and the underlying flexibility of that process — a flexibility which is its genius — there can be no fixed rules that must apply in all cases.

23 In *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), Paperny J. nonetheless extracted a number of principles to be considered by the courts in dealing with the commonality of interest test. At para. 31 she said:

> In summary, the cases establish the following principles applicable to assessing commonality of interest:
>
> 1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;
>
> 2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
>
> 3. The commonality of interests are to be viewed purposively, bearing in mind the object of the C.C.C.A., namely to facilitate reorganizations if possible.
>
> 4. In placing a broad and purposive interpretation on the C.C.C.A., the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
>
> 5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.
>
> 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.

24 In developing this summary of principles, Paperny J. considered a number of authorities from across Canada, including the following: *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.); *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.); *Fairview Industries Ltd., Re* (1991), 11 C.B.R. (3d) 71 (N.S. T.D.); *Woodward's Ltd., Re* (1993), 84 B.C.L.R. (2d) 206 (B.C. S.C.); *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 166 (B.C. S.C.); *Northland Properties Ltd., Re* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.); *NsC Diesel Power Inc., Re* (1990), 79 C.B.R. (N.S.) 1 (N.S. T.D.); *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154 (Alta. C.A.), (*sub nom. Amoco Acquisition Co. v. Savage*); *Wellington Building Corp., Re* (1934), 16 C.B.R. 48 (Ont. S.C.). Her summarized principles were cited by the Alberta Court of Appeal, apparently with approval, in a subsequent *Canadian Airlines Corp., Re* decision: *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 33 (Alta. C.A. [In Chambers]) at para. 27.

25 In the passage from his reasons cited above (paragraphs 13 and 14) the supervising judge in this case applied those principles. In our view he was correct in law in doing so.

26 We do not read the foregoing principles as being inconsistent with the earlier decision of this court in *Nova Metal Products Inc. v. Comiskey (Trustee of)*. There the court applied a common interest test in determining that the two creditors in question ought not to be grouped in the same class of creditors for voting purposes. But the differing interests in question were not different legal interests as between the two creditors; they were different legal interests as between each of the creditors and the debtor company. One creditor (the Bank) held first security over the debtor company's receivables and the other creditor (RoyNat) held second security on those assets; RoyNat, however, held first security over the debtor's building and realty, whereas the Bank was second in priority in relation to those assets. The two creditors had differing commercial interests in how the assets should be dealt with (it was in the interests of the bank, with a smaller claim, to collect and retain the more realizable receivable assets, but in the interests of RoyNat to preserve the cash flow and have the business sold as a going concern). Those differing commercial interests were rooted in differing legal interests as between the individual creditors and the debtor company, arising from the different security held. Because of the size of its claim, RoyNat would dominate any group that it was in, and Finlayson J.A. was of the view that RoyNat, as the holder of second security, should not be able to override the Bank's legal interest as the first secured creditor with respect to the receivables by virtue of its voting rights. On the basis that there was "no true community of interest" between the secured creditors (p. 259), given their different legal interests, he ordered that the Bank be placed in a separate class for voting purposes.

27 *Nova Metal Products Inc. v. Comiskey (Trustee of)* did not deal with the issue of whether creditors with divergent interests as amongst themselves — as opposed to divergent legal interests vis-à-vis the debtor company — could be forced to vote as members of a common class. Nor did it apply an "identity of interest" test — a test that has been rejected as too narrow and too likely

to lead to excessive fragmentation: see *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia*, *supra*,); *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, *supra*; *Fairview Industries Ltd., Re*, *supra*; *Woodward's Ltd., Re*, *supra*. In our view, there is nothing in the decision in *Nova Metal Products Inc.* that is inconsistent with the evolutionary set of principles developed in the Alberta jurisprudence and applied by the supervising judge here.

28 In addition to commonality of interest concerns, a court dealing with a classification of creditors issue needs to be alert to concerns about the confiscation of legal rights and about avoiding what the parties have referred to as "a tyranny of the minority". Examples of the former include *Nova Metal Products Inc. v. Comiskey (Trustee of)* [4] and *Wellington Building Corp., Re*, *supra* [5]. Examples of the latter include *Sklar-Peppler*, *supra* [6] and *Campeau Corp., Re* (1991), 10 C.B.R. (3d) 100 (Ont. Gen. Div.) [7].

29 Here, as noted earlier in these reasons, the respondents argue that the appellants are seeking a separate classification in order to extract a benefit to which they are not entitled, namely a concession that the Turnover Payment requirements of their subordinated position be extinguished by the Proposed Plan, thus avoiding their obligation to transfer payments to the Senior Debt Holders until they have been paid in full, and freeing up all of the distribution the appellants will receive from Stelco for payment on account of their own claims. On the other hand, the appellants point to this conflict between the Subordinated Debenture Holders and the Senior Debt Holders as evidence that they do not have a commonality of interest or the ability to consult together with a view to whatever commonality of interest they may have vis-à-vis Stelco.

30 We agree with the line of authorities summarized in *Canadian Airlines Corp., Re* and applied by the supervising judge in this case which stipulate that the classification of creditors is determined by their legal rights in relation to the debtor company, as opposed to their rights as creditors in relation to each other. To the extent that other authorities at the trial level in other jurisdictions may suggest to the contrary — see, for example *NsC Diesel Power Inc., Re*, *supra* — we prefer the Alberta approach.

31 There are good reasons for such an approach.

32 First, as the supervising judge noted, the CCAA itself is more compendiously styled "An act to facilitate compromises and arrangements between companies and their creditors". There is no mention of dealing with issues that would change the nature of the relationships as between the creditors themselves. As Tysoe J. noted in *Pacific Coastal Airlines Ltd. v. Air Canada*, [2001] B.C.J. No. 2580 (B.C. S.C.) at para. 24 (after referring to the full style of the legislation):

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes

dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

33 In this particular case, the supervising judge was very careful to say that nothing in his reasons should be taken to determine or affect the relationship between the Subordinate Debenture Holders and the Senior Debt Holders.

34 Secondly, it has long been recognized that creditors should be classified in accordance with their contract rights, that is, according to their respective interests in the debtor company: see Stanley E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947) 25 Can. Bar. Rev. 587, at p. 602.

35 Finally, to hold the classification and voting process hostage to the vagaries of a potentially infinite variety of disputes as between already disgruntled creditors who have been caught in the maelstrom of a CCAA restructuring, runs the risk of hobbling that process unduly. It could lead to the very type of fragmentation and multiplicity of discrete classes or sub-classes of classes that judges and legal writers have warned might well defeat the purpose of the Act: see Stanley Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", *supra*; Ronald N. Robertson Q.C., "Legal Problems on Reorganization of Major Financial and Commercial Debtors", Canadian Bar Association — Ontario Continuing Legal Education, 5th April 1983 at 19-21; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, *supra*, at para. 27; *Northland Properties Ltd., Re*, *supra*; *Sklar-Peppler*, *supra*; *Woodward's Ltd., Re*, *supra*.

36 In the end, it is important to remember that classification of creditors, like most other things pertaining to the CCAA, must be crafted with the underlying purpose of the CCAA in mind, namely facilitation of the reorganization of an insolvent company through the negotiation and approval of a plan of compromise or arrangement between the debtor company and its creditors, so that the debtor company can continue to carry on its business to the benefit of all concerned. As Paperny J. noted in *Canadian Airlines Corp., Re*, "the Court should be careful to resist classification approaches that would potentially jeopardize viable Plans."

Discretion and Fact Finding

37 Having concluded that the supervising judge made no error in law or principle in his approach to the classification issue, we can find no error in his factual findings or in his exercise of discretion in determining that the Subordinate Debenture Holders should remain in the same class as the Senior Debt Holders and Trade Creditors in the circumstances of this case.

38 We agree that there is no material distinction between the legal rights of the Subordinated Debenture Holders and those of the Senior Debt Holders vis-à-vis Stelco. Each is entitled to be paid the monies owing under their respective debt contracts. The only difference is that the former creditors are subordinated in interest to the latter and have agreed to pay over to the latter any

portion of their recovery received until the Senior Debt has been paid in full. As between the two groups of creditors, this merely reflects the very deal the Subordinated Debenture Holders bought into when they purchased their subordinated debentures. For that reason, the supervising judge was also entitled to determine that this was not a case involving any confiscation of legal rights.

39 Finally, the supervising judge's finding that there is no "realistic conflict of interest" between the creditors is supported on the record. Each has the same general interest in relation to Stelco, namely to be paid under their contracts, and to maximize the amount recoverable from the debtor company through the Plan negotiation process. We do not accept the argument that the Senior Debt Holder's efforts will be moderated in some respect because they will be content to make their recovery on the backs of the Subordinated Debenture Holders through the Turnover Payment process. In order to carry the class, the Senior Debt Holders will require the support of the Trade Creditors, whose interest is not affected by the subordination agreement. Thus the Senior Debt Holders will be required to support the maximization approach.

40 We need not deal with whether a realistic and genuine conflict of interest, produced by different legal positions of creditors vis-à-vis each other, could ever warrant separate classes, as we are satisfied that even if it could, this is not such a case.

Disposition

41 Accordingly, we would not interfere with the supervising judge's decision that the appellants had not made out a case for a separate class. The appeal is therefore dismissed.

***Goudge J.A.*:**

I agree.

***Sharpe J.A.*:**

I agree.

Application granted; appeal dismissed.

Footnotes

1 R.S.C. 1985, c. C-36, as amended.

2 Farley J. uses the term "ConCom debt" to refer to the debt represented by the Converts' Committee (i.e., that of the Subordinated Debenture Holders), and the term "BondCom debt" to refer to that of the Senior Debt Holders.

3 The *Joint Stock Companies Arrangement Act*, 1870.

4 A second secured creditor with superior voting power was separated from a first secured creditor for voting purposes, in order prevent the former from utilising its superior voting strength to adversely affect the latter's prior security position.

5 The court refused to allow subsequent mortgagees to vote in the same class as a first mortgagee because in the circumstances the subsequent mortgagees would be able to use their voting power to destroy the priority rights and security of the first mortgagee.

6 Borins J., as he then was, warned against the dangers of "excessive fragmentation" and of creating "a special class simply for the benefit of the opposing creditor, which would give that creditor the potential to exercise an unwarranted degree of power".

7 Montgomery J. declined to grant a separate classification to a minority group of creditors who would use that classification to extract benefits to which it was not otherwise entitled.

End of Document

Tab 41

2004 CarswellOnt 1211
Ontario Superior Court of Justice [Commercial List]

Stelco Inc., Re

2004 CarswellOnt 1211, [2004] O.J. No. 1257, [2004] O.T.C. 284, 129 A.C.W.S. (3d) 1065, 48 C.B.R. (4th) 299

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

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

Farley J.

Heard: March 5, 2004
Judgment: March 22, 2004
Docket: 04-CL-5306

Counsel: Michael E. Barrack, James D. Gage, Geoff R. Hall for Applicants
David Jacobs, Michael McCreary for Locals, 1005, 5328, 8782 of the United Steel Workers of America
Ken Rosenberg, Lily Harmer, Rob Centa for United Steelworkers of America
Bob Thornton, Kyla Mahar for Ernst & Young Inc., Monitor of the Applicants
Kevin J. Zych for Informal Committee of Stelco Bondholders
David R. Byers for CIT
Kevin McElcheran for GE
Murray Gold, Andrew Hatnay for Retired Salaried Beneficiaries
Lewis Gottheil for CAW Canada and its Local 523
Virginie Gauthier for Fleet
H. Whiteley for CIBC
Gail Rubenstein for FSCO
Kenneth D. Kraft for EDS Canada Inc.

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.b Qualifying company

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Application of Act

Steel company S Inc. applied for protection under Companies' Creditors Arrangement Act ("CCAA") on January 29, 2004 — Union locals moved to rescind initial order and dismiss initial application of S Inc. and its subsidiaries on ground S Inc. was not "debtor company" as defined in s. 2 of CCAA because S Inc. was not insolvent — Motion dismissed — Given time and steps involved in reorganization, condition of insolvency perforce required expanded meaning under CCAA — Union affiant stated that S Inc. will run out of funding by November 2004 — Given that November was ten months away from date of filing, S Inc. had liquidity problem — S Inc. realistically cannot expect any increase in its credit line with its lenders or access to further outside funding — S Inc. had negative equity of $647 million — On balance of probabilities, S Inc. was insolvent and therefore was "debtor company" as at date of filing and entitled to apply for CCAA protection.

MOTION by union that steel company was not "debtor company" as defined in *Companies' Creditors Arrangement Act*.

***Farley J.*:**

1 As argued this motion by Locals 1005, 5328 and 8782 United Steel Workers of America (collectively "Union") to rescind the initial order and dismiss the application of Stelco Inc. ("Stelco") and various of its subsidiaries (collectively "Sub Applicants") for access to the protection and process of the *Companies' Creditors Arrangement Act* ("CCAA") was that this access should be denied on the basis that Stelco was not a "debtor company" as defined in s. 2 of the CCAA because it was not insolvent.

2 Allow me to observe that there was a great deal of debate in the materials and submissions as to the reason(s) that Stelco found itself in with respect to what Michael Locker (indicating he was "an expert in the area of corporate restructuring and a leading steel industry analyst") swore to at paragraph 12 of his affidavit was the "current crisis":

> 12. Contending with weak operating results and resulting tight cash flow, management has deliberately chosen not to fund its employee benefits. By contrast, Dofasco and certain other steel companies have consistently funded both their employee benefit obligations as well as debt service. If Stelco's management had chosen to fund pension obligations, presumably with borrowed money, *the current crisis* and related restructuring plans would focus on

debt restructuring as opposed to the reduction of employee benefits and related liabilities. [Emphasis added.]

3 For the purpose of determining whether Stelco is insolvent and therefore could be considered to be a debtor company, it matters not what the cause or who caused the financial difficulty that Stelco is in as admitted by Locker on behalf of the Union. The management of a corporation could be completely incompetent, inadvertently or advertently; the corporation could be in the grip of ruthless, hard hearted and hard nosed outside financiers; the corporation could be the innocent victim of uncaring policy of a level of government; the employees (unionized or non-unionized) could be completely incompetent, inadvertently or advertently; the relationship of labour and management could be absolutely poisonous; the corporation could be the victim of unforeseen events affecting its viability such a as a fire destroying an essential area of its plant and equipment or of rampaging dumping. One or more or all of these factors (without being exhaustive), whether or not of varying degree and whether or not in combination of some may well have been the cause of a corporation's difficulty. The point here is that Stelco's difficulty exists; the only question is whether Stelco is insolvent within the meaning of that in the "debtor company" definition of the CCAA. However, I would point out, as I did in closing, that no matter how this motion turns out, Stelco does have a problem which has to be addressed - addressed within the CCAA process if Stelco is insolvent or addressed outside that process if Stelco is determined not to be insolvent. The status quo will lead to ruination of Stelco (and its Sub Applicants) and as a result will very badly affect its stakeholder, including pensioners, employees (unionized and non-unionized), management, creditors, suppliers, customers, local and other governments and the local communities. In such situations, time is a precious commodity; it cannot be wasted; no matter how much some would like to take time outs, the clock cannot be stopped. The watchwords of the Commercial List are equally applicable in such circumstances. They are communication, cooperation and common sense. I appreciate that these cases frequently invoke emotions running high and wild; that is understandable on a human basis but it is the considered, rational approach which will solve the problem.

4 The time to determine whether a corporation is insolvent for the purpose of it being a "debtor company" and thus able to make an application to proceed under the CCAA is the date of filing, in this case January 29, 2004.

5 The Monitor did not file a report as to this question of insolvency as it properly advised that it wished to take a neutral role. I understand however, that it did provide some assistance in the preparation of Exhibit C to Hap Steven's affidavit.

6 If I determine in this motion that Stelco is not insolvent, then the initial order would be set aside. See *Montreal Trust Co. of Canada v. Timber Lodge Ltd.* (1992), 15 C.B.R. (3d) 14 (P.E.I. C.A.). The onus is on Stelco as I indicated in my January 29, 2004 endorsement.

7 S. 2 of the CCAA defines "debtor company" as:

> "debtor company" means any company that:
>
> (a) is bankrupt or insolvent;
>
> (b) has committed an act of bankruptcy within the meaning of *Bankruptcy and Insolvency Act* ["BIA"] or deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;
>
> (c) has made an authorized assignment against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or
>
> (d) is in the course of being wound-up under the *Winding-Up and Restructuring Act* because the company is insolvent.

8 Counsel for the Existing Stelco Lenders and the DIP Lenders posited that Stelco would be able to qualify under (b) in light of the fact that as of January 29, 2004 whether or not it was entitled to receive the CCAA protection under (a) as being insolvent, it had ceased to pay its pre-filing debts. I would merely observe as I did at the time of the hearing that I do not find this argument attractive in the least. The most that could be said for that is that such game playing would be ill advised and in my view would not be rewarded by the exercise of judicial discretion to allow such an applicant the benefit of a CCAA stay and other advantages of the procedure for if it were capriciously done where there is not reasonable need, then such ought not to be granted. However, I would point out that if a corporation did capriciously do so, then one might well expect a creditor-initiated application so as to take control of the process (including likely the ouster of management including directors who authorized such unnecessary stoppage); in such a case, while the corporation would not likely be successful in a corporation application, it is likely that a creditor application would find favour of judicial discretion.

9 This judicial discretion would be exercised in the same way generally as is the case where s. 43(7) of the BIA comes into play whereby a bankruptcy receiving order which otherwise meets the test may be refused. See *Kenwood Hills Development Inc., Re* (1995), 30 C.B.R. (3d) 44 (Ont. Bktcy.) where at p. 45 I observed:

> The discretion must be exercised judicially based on credible evidence; it should be used according to common sense and justice and in a manner which does not result in an injustice: See *Re Churchill Forest Industries (Manitoba) Ltd.* (1971), 16 C.B.R. (NS) 158 (Man. Q.B.).

10 Anderson J. in *MTM Electric Co., Re* (1982), 42 C.B.R. (N.S.) 29 (Ont. Bktcy.) at p. 30 declined to grant a bankruptcy receiving order for the eminently good sense reason that it would be

counterproductive: "Having regard for the value of the enterprise and having regard to the evidence before me, I think it far from clear that a receiving order would confer a benefit on anyone." This common sense approach to the judicial exercise of discretion may be contrasted by the rather more puzzling approach in *TDM Software Systems Inc., Re* (1986), 60 C.B.R. (N.S.) 92 (Ont. S.C.).

11 The Union, supported by the International United Steel Workers of America ("International"), indicated that if certain of the obligations of Stelco were taken into account in the determination of insolvency, then a very good number of large Canadian corporations would be able to make an application under the CCAA. I am of the view that this concern can be addressed as follows. The test of insolvency is to be determined on its own merits, not on the basis that an otherwise technically insolvent corporation should not be allowed to apply. However, if a technically insolvent corporation were to apply and there was no material advantage to the corporation and its stakeholders (in other words, a pressing need to restructure), then one would expect that the court's discretion would be judicially exercised against granting CCAA protection and ancillary relief. In the case of Stelco, it is recognized, as discussed above, that it is in crisis and in need of restructuring - which restructuring, if it is insolvent, would be best accomplished within a CCAA proceeding. Further, I am of the view that the track record of CCAA proceedings in this country demonstrates a healthy respect for the fundamental concerns of interested parties and stakeholders. I have consistently observed that much more can be achieved by negotiations outside the courtroom where there is a reasonable exchange of information, views and the exploration of possible solutions and negotiations held on a without prejudice basis than likely can be achieved by resorting to the legal combative atmosphere of the courtroom. A mutual problem requires a mutual solution. The basic interest of the CCAA is to rehabilitate insolvent corporations for the benefit of all stakeholders. To do this, the cause(s) of the insolvency must be fixed on a long term viable basis so that the corporation may be turned around. It is not achieved by positional bargaining in a tug of war between two parties, each trying for a larger slice of a defined size pie; it may be achieved by taking steps involving shorter term equitable sacrifices and implementing sensible approaches to improve productivity to ensure that the pie grows sufficiently for the long term to accommodate the reasonable needs of the parties.

12 It appears that it is a given that the Sub Applicants are in fact insolvent. The question then is whether Stelco is insolvent.

13 There was a question as to whether Stelco should be restricted to the material in its application as presented to the Court on January 29, 2004. I would observe that CCAA proceedings are not in the nature of the traditional adversarial lawsuit usually found in our courtrooms. It seems to me that it would be doing a disservice to the interest of the CCAA to artificially keep the Court in the dark on such a question. Presumably an otherwise deserving "debtor company" would not be allowed access to a continuing CCAA proceeding that it would be entitled to merely because some potential evidence were excluded for traditional adversarial technical reasons. I would point out that in such a case, there would be no prohibition against such a corporation reapplying (with

the additional material) subsequently. In such a case, what would be the advantage for anyone of a "pause" before being able to proceed under the rehabilitative process under the CCAA. On a practical basis, I would note that all too often corporations will wait too long before applying, at least this was a significant problem in the early 1990s. In *Inducon Development Corp., Re* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), I observed:

> Secondly, CCAA is designed to be remedial; it is not, however, designed to be preventative. CCAA should not be the *last* gasp of a dying company; it should be implemented, if it is to be implemented, at a stage prior to the death throe.

14 It seems to me that the phrase "death throe" could be reasonably replaced with "death spiral". In *Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]), I went on to expand on this at p. 228:

> I would also observe that all too frequently debtors wait until virtually the last moment, the last moment, or in some cases, beyond the last moment before even beginning to think about reorganizational (and the attendant support that any successful reorganization requires from the creditors). I noted the lamentable tendency of debtors to deal with these situations as "last gasp" desperation moves in *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.). To deal with matters on this basis minimizes the chances of success, even if "success" may have been available with earlier spade work.

15 I have not been able to find in the CCAA reported cases any instance where there has been an objection to a corporation availing itself of the facilities of the CCAA on the basis of whether the corporation was insolvent. Indeed, as indicated above, the major concern here has been that an applicant leaves it so late that the timetable of necessary steps may get impossibly compressed. That is not to say that there have not been objections by parties opposing the application on various other grounds. Prior to the 1992 amendments, there had to be debentures (plural) issued pursuant to a trust deed; I recall that in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, 1 O.R. (3d) 289 (Ont. C.A.), the initial application was rejected in the morning because there had only been one debenture issued but another one was issued prior to the return to court that afternoon. This case stands for the general proposition that the CCAA should be given a large and liberal interpretation. I should note that there was in *Enterprise Capital Management Inc. v. Semi-Tech Corp.* (1999), 10 C.B.R. (4th) 133 (Ont. S.C.J. [Commercial List]) a determination that in a creditor application, the corporation was found not to be insolvent, but see below as to BIA test (c) my views as to the correctness of this decision.

16 In *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) I observed at p. 32:

> One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA

> facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors.

17 In *Anvil Range Mining Corp., Re* (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), the court stated to the same effect:

> The second submission is that the plan is contrary to the purposes of the CCAA. Courts have recognized that the purpose of the CCAA is to enable compromises to be made for the common benefit of the creditors and the company and to keep the company alive and out of the hands of liquidators.

18 Encompassed in this is the concept of saving employment if a restructuring will result in a viable enterprise. See *Diemaster Tool Inc. v. Skvortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133 (Ont. Gen. Div.). This concept has been a continuing thread in CCAA cases in this jurisdiction stretching back for at least the past 15 years, if not before.

19 I would also note that the jurisprudence and practical application of the bankruptcy and insolvency regime in place in Canada has been constantly evolving. The early jails of what became Canada were populated to the extent of almost half their capacity by bankrupts. Rehabilitation and a fresh start for the honest but unfortunate debtor came afterwards. Most recently, the *Bankruptcy Act* was revised to the BIA in 1992 to better facilitate the rehabilitative aspect of making a proposal to creditors. At the same time, the CCAA was amended to eliminate the threshold criterion of there having to be debentures issued under a trust deed (this concept was embodied in the CCAA upon its enactment in 1933 with a view that it would only be large companies with public issues of debt securities which could apply). The size restriction was continued as there was now a threshold criterion of at least $5 million of claims against the applicant. While this restriction may appear discriminatory, it does have the practical advantage of taking into account that the costs (administrative costs including professional fees to the applicant, and indeed to the other parties who retain professionals) is a significant amount, even when viewed from the perspective of $5 million. These costs would be prohibitive in a smaller situation. Parliament was mindful of the time horizons involved in proposals under BIA where the maximum length of a proceeding including a stay is six months (including all possible extensions) whereas under CCAA, the length is in the discretion of the court judicially exercised in accordance with the facts and the circumstances of the case. Certainly sooner is better than later. However, it is fair to observe that virtually all CCAA cases which proceed go on for over six months and those with complexity frequently exceed a year.

20 Restructurings are not now limited in practical terms to corporations merely compromising their debts with their creditors in a balance sheet exercise. Rather there has been quite an emphasis recently on operational restructuring as well so that the emerging company will have the benefit of a long term viable fix, all for the benefit of stakeholders. See *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) at p. 314 where Borins J. states:

> The proposed plan exemplifies the policy and objectives of the Act as it proposes a regime for the court-supervised re-organization for the Applicant company intended to avoid the devastating social and economic effects of a creditor-initiated termination of its ongoing business operations and enabling the company to carry on its business in a manner in which it is intended to cause the least possible harm to the company, its creditors, its employees and former employees and the communities in which its carries on and carried on its business operations.

21 The CCAA does not define "insolvent" or "insolvency". Houlden & Morawetz, *The 2004 Annotated Bankruptcy and Insolvency Act* (Toronto, Carswell; 2003) at p. 1107 (N5) states:

> In interpreting "debtor company", reference must be had to the definition of "insolvent person" in s. 2(1) of the *Bankruptcy and Insolvency Act* . . .
>
> To be able to use the Act, a company must be bankrupt or insolvent: *Reference re Companies' Creditors Arrangement Act (Canada)*, 16 C.B.R. 1, [1934] S.C.R. 659, [1934] 4 D.L.R. 75. The company must, in its application, admit its insolvency.

22 It appears to have become fairly common practice for applicants and others when reference is made to insolvency in the context of the CCAA to refer to the definition of "insolvent person" in the BIA. That definition is as follows:

> s. 2(1) . . .
>
> > "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and
> >
> > > (a) who is for any reason unable to meet his obligations as they generally become due,
> > >
> > > (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
> > >
> > > (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

23 Stelco acknowledges that it does not meet the test of (b); however, it does assert that it meets the test of both (a) and (c). In addition, however, Stelco also indicates that since the CCAA does not have a reference over to the BIA in relation to the (a) definition of "debtor company" as being a company that is "(a) bankrupt or insolvent", then this term of "insolvent" should be given the meaning that the overall context of the CCAA requires. See the modern rule of statutory

interpretation which directs the court to take a contextual and purposive approach to the language of the provision at issue as illustrated by *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at p. 580:

> 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.

24 I note in particular that the (b), (c) and (d) aspects of the definition of "debtor company" all refer to other statutes, including the BIA; (a) does not. S. 12 of the CCAA defines "claims" with reference over to the BIA (and otherwise refers to the BIA and the *Winding-Up and Restructuring Act*). It seems to me that there is merit in considering that the test for insolvency under the CCAA may differ somewhat from that under the BIA, so as to meet the special circumstances of the CCAA and those corporations which would apply under it. In that respect, I am mindful of the above discussion regarding the time that is usually and necessarily (in the circumstances) taken in a CCAA reorganization restructuring which is engaged in coming up with a plan of compromise and arrangement. The BIA definition would appear to have been historically focussed on the question of bankruptcy - and not reorganization of a corporation under a proposal since before 1992, secured creditors could not be forced to compromise their claims, so that in practice there were no reorganizations under the former *Bankruptcy Act* unless all secured creditors voluntarily agreed to have their secured claims compromised. The BIA definition then was essentially useful for being a pre-condition to the "end" situation of a bankruptcy petition or voluntary receiving order where the upshot would be a realization on the bankrupt's assets (not likely involving the business carried on - and certainly not by the bankrupt). Insolvency under the BIA is also important as to the Paulian action events (eg., fraudulent preferences, settlements) as to the conduct of the debtor *prior* to the bankruptcy; similarly as to the question of provincial preference legislation. Reorganization under a plan or proposal, on the contrary, is with a general objective of the applicant continuing to exist, albeit that the CCAA may also be used to have an orderly disposition of the assets and undertaking in whole or in part.

25 It seems to me that given the time and steps involved in a reorganization, and the condition of insolvency perforce requires an expanded meaning under the CCAA. Query whether the definition under the BIA is now sufficient in that light for the allowance of sufficient time to carry through with a realistically viable proposal within the maximum of six months allowed under the BIA? I think it sufficient to note that there would not be much sense in providing for a rehabilitation program of restructuring/reorganization under either statute if the entry test was that the applicant could not apply until a rather late stage of its financial difficulties with the rather automatic result that in situations of complexity of any material degree, the applicant would not have the financial resources sufficient to carry through to hopefully a successful end. This would indeed be contrary to the renewed emphasis of Parliament on "rescues" as exhibited by the 1992 and 1997 amendments to the CCAA and the BIA.

26 Allow me now to examine whether Stelco has been successful in meeting the onus of demonstrating with credible evidence on a common sense basis that it is insolvent within the meaning required by the CCAA in regard to the interpretation of "debtor company" in the context and within the purpose of that legislation. To a similar effect, see *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 103 D.L.R. (4th) 609 (Ont. C.A.), leave to appeal to S.C.C. dismissed [(1993), 49 C.P.R. (3d) ix (S.C.C.)] wherein it was determined that the trial judge was correct in holding that a party was not insolvent and that the statutory definition of insolvency pursuant to the BIA definition was irrelevant to determine that issue, since the agreement in question effectively provided its own definition by implication. It seems to me that the CCAA test of insolvency advocated by Stelco and which I have determined is a proper interpretation is that the BIA definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring. That is, there should be a reasonable cushion, which cushion may be adjusted and indeed become in effect an encroachment depending upon reasonable access to DIP between financing. In the present case, Stelco accepts the view of the Union's affiant, Michael Mackey of Deloitte and Touche that it will otherwise run out of funding by November 2004.

27 On that basis, allow me to determine whether Stelco is insolvent on the basis of (i) what I would refer to as the CCAA test as described immediately above, (ii) BIA test (a) or (iii) BIA test (c). In doing so, I will have to take into account the fact that Stephen, albeit a very experienced and skilled person in the field of restructurings under the CCAA, unfortunately did not appreciate that the material which was given to him in Exhibit E to his affidavit was modified by the caveats in the source material that in effect indicated that based on appraisals, the fair value of the real assets acquired was in excess of the purchase price for two of the U.S. comparators. Therefore the evidence as to these comparators is significantly weakened. In addition at Q. 175-177 in his cross examination, Stephen acknowledged that it was reasonable to assume that a purchaser would "take over some liabilities, some pension liabilities and OPEB liabilities, for workers who remain with the plant." The extent of that assumption was not explored; however, I do note that there was acknowledgement on the part of the Union that such an assumption would also have a reciprocal negative effect on the purchase price.

28 The BIA tests are disjunctive so that anyone meeting any of these tests is determined to be insolvent: see *Optical Recording Laboratories Inc., Re* (1990), 75 D.L.R. (4th) 747 (Ont. C.A.) at p. 756; *Viteway Natural Foods Ltd., Re* (1986), 63 C.B.R. (N.S.) 157 (B.C. S.C.) at p. 161. Thus, if I determine that Stelco is insolvent on *any one* of these tests, then it would be a "debtor company" entitled to apply for protection under the CCAA.

29 In my view, the Union's position that Stelco is not insolvent under BIA (a) because it has not entirely used up its cash and cash facilities (including its credit line), that is, it is not yet as of

January 29, 2004 run out of liquidity conflates inappropriately the (a) test with the (b) test. The Union's view would render the (a) test necessarily as being redundant. See *R. v. Proulx*, [2000] 1 S.C.R. 61 (S.C.C.) at p. 85 for the principle that no legislative provision ought to be interpreted in a manner which would "render it mere surplusage." Indeed the plain meaning of the phrase "unable to meet his obligations as they generally become due" requires a construction of test (a) which permits the court to take a purposive assessment of a debtor's ability to meet his future obligations. See *King Petroleum Ltd., Re* (1978), 29 C.B.R. (N.S.) 76 (Ont. S.C.) where Steele J. stated at p. 80:

> With respect to cl. (a), it was argued that at the time the disputed payments were made the company was able to meet its obligations as they generally became due because no major debts were in fact due at that time. This was premised on the fact that the moneys owed to Imperial Oil were not due until 10 days after the receipt of the statements and that the statements had not then been received. I am of the opinion that this is not a proper interpretation of cl. (a). *Clause (a) speaks in the present and future tenses and not in the past*. I am of the opinion that the company was an "insolvent person" within the meaning of cl. (a) because by the very payment-out of the money in question it placed itself in a position that it was unable to meet its obligations as they would generally become due. In other words, it had placed itself in a position that it would not be able to pay the obligations that it knew it had incurred and which it knew would become due in the immediate future. [Emphasis added.]

30 *King Petroleum Ltd.* was a case involving the question in a bankruptcy scenario of whether there was a fraudulent preference during a period when the corporation was insolvent. Under those circumstances, the "immediate future" does not have the same expansive meaning that one would attribute to a time period in a restructuring forward looking situation.

31 Stephen at paragraphs 40-49 addressed the restructuring question in general and its applicability to the Stelco situation. At paragraph 41, he outlined the significant stages as follows:

> The process of restructuring under the CCAA entails a number of different stages, the most significant of which are as follows:
>
> (a) identification of the debtor's stakeholders and their interests;
>
> (b) arranging for a process of meaningful communication;
>
> (c) dealing with immediate relationship issues arising from a CCAA filing;
>
> (d) sharing information about the issues giving rise to the debtor's need to restructure;
>
> (e) developing restructuring alternatives; and
>
> (f) building a consensus around a plan of restructuring.

32 I note that January 29, 2004 is just 9-10 months away from November 2004. I accept as correct his conclusion based on his experience (and this is in accord with my own objective experience in large and complicated CCAA proceedings) that Stelco would have the liquidity problem within the time horizon indicated. In that regard, I also think it fair to observe that Stelco realistically cannot expect any increase in its credit line with its lenders or access further outside funding. To bridge the gap it must rely upon the stay to give it the uplift as to prefiling liabilities (which the Union misinterpreted as a general turnaround in its cash position without taking into account this uplift). As well, the Union was of the view that recent price increases would relieve Stelco's liquidity problems; however, the answers to undertaking in this respect indicated:

> With respect to the Business Plan, the average spot market sales price per ton was $514, and the average contract business sales price per ton was $599. The Forecast reflects an average spot market sales price per ton of $575, and average contract business sales price per ton of $611. The average spot price used in the forecast considers further announced price increases, recognizing, among other things, the timing and the extent such increases are expected to become effective. The benefit of the increase in sales prices from the Business Plan is essentially offset by the substantial increase in production costs, and in particular in raw material costs, primarily scrap and coke, as well as higher working capital levels and a higher loan balance outstanding on the CIT credit facility as of January 2004.

I accept that this is generally a cancel out or wash in all material respects.

33 I note that $145 million of cash resources had been used from January 1, 2003 to the date of filing. Use of the credit facility of $350 million had increased from $241 million on November 30, 2003 to $293 million on the date of filing. There must be a reasonable reserve of liquidity to take into account day to day, week to week or month to month variances and also provide for unforeseen circumstances such as the breakdown of a piece of vital equipment which would significantly affect production until remedied. Trade credit had been contracting as a result of appreciation by suppliers of Stelco's financial difficulties. The DIP financing of $75 million is only available if Stelco is under CCAA protection. I also note that a shut down as a result of running out of liquidity would be complicated in the case of Stelco and that even if conditions turned around more than reasonably expected, start-up costs would be heavy and quite importantly, there would be a significant erosion of the customer base (reference should be had to the Slater Hamilton plant in this regard). One does not liquidate assets which one would not sell in the ordinary course of business to thereby artificially salvage some liquidity for the purpose of the test: see *Pacific Mobile Corp., Re* (1979), 32 C.B.R. (N.S.) 209 (C.S. Que.) at p. 220. As a rough test, I note that Stelco (albeit on a consolidated basis with all subsidiaries) running significantly behind plan in 2003 from its budget of a profit of $80 million now to a projected loss of $192 million and cash has gone from a positive $209 million to a negative $114 million.

34 Locker made the observation at paragraph 8 of his affidavit that:

> 8. Stelco has performed poorly for the past few years primarily due to an inadequate business strategy, poor utilization of assets, inefficient operations and generally weak management leadership and decision-making. This point is best supported by the fact that Stelco's local competitor, Dofasco, has generated outstanding results in the same period.

Table 1 to his affidavit would demonstrate that Dofasco has had superior profitability and cashflow performance than its "neighbour" Stelco. He went on to observe at paragraphs 36-37:

> 36. Stelco can achieve significant cost reductions through means other than cutting wages, pensions and benefits for employees and retirees. Stelco could bring its cost levels down to those of restructured U.S. mills, with the potential for lowering them below those of many U.S. mills.
>
> 37. Stelco could achieve substantial savings through productivity improvements within the mechanisms of the current collective agreements. More importantly, a major portion of this cost reduction could be achieved through constructive negotiations with the USWA in an out-of-court restructuring that does not require intervention of the courts through the vehicle of CCAA protection.

I accept his constructive comments that there is room for cost reductions and that there are substantial savings to be achieved through productivity improvements. However, I do not see anything detrimental to these discussions and negotiations by having them conducted within the umbrella of a CCAA proceeding. See my comments above regarding the CCAA in practice.

35 But I would observe and I am mystified by Locker's observations at paragraph 12 (quoted above), that Stelco should have borrowed to fund pension obligations to avoid its current financial crisis. This presumes that the borrowed funds would not constitute an obligation to be paid back as to principal and interest, but rather that it would assume the character of a cost-free "gift".

36 I note that Mackey, without the "laundry list" he indicates at paragraph 17 of his second affidavit, is unable to determine at paragraph 19 (for himself) whether Stelco was insolvent. Mackey was unable to avail himself of all available information in light of the Union's refusal to enter into a confidentiality agreement. He does not closely adhere to the BIA tests as they are defined. In the face of positive evidence about an applicant's financial position by an experienced person with expertise, it is not sufficient to displace this evidence by filing evidence which goes no further than raising questions: see *Anvil Range Mining Corp.*, *supra* at p. 162.

37 The Union referred me to one of my decisions *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1993), 13 O.R. (3d) 7 (Ont. Gen. Div.) where I stated as to the MacGirr affidavit:

> The Trustee's cause of action is premised on MacGirr's opinion that STC was insolvent as at August 3, 1990 and therefore the STC common shares and promissory note received by Trustco in return for the Injection had no value at the time the Injection was made. Further, MacGirr ascribed no value to the opportunity which the Injection gave to Trustco to restore STC and salvage its thought to be existing $74 million investment. In stating his opinion MacGirr defined solvency as:
>
> > (a) the ability to meet liabilities as they fall due; and
> >
> > (b) that assets exceed liabilities.
>
> On cross-examination MacGirr testified that in his opinion on either test STC was insolvent as at August 3, 1990 since as to (a) STC was experiencing then a negative cash flow and as to (b) the STC financial statements incorrectly reflected values. As far as (a) is concerned, I would comment that while I concur with MacGirr that at some time in the long run a company that is experiencing a negative cash flow will eventually not be able to meet liabilities as they fall due but that is not the test (which is a "present exercise"). On that current basis STC was meeting its liabilities on a timely basis.

38 As will be seen from that expanded quote, MacGirr gave his own definitions of insolvency which are not the same as the s. 2 BIA tests (a), (b) and (c) but only a very loose paraphrase of (a) and (c) and an omission of (b). Nor was I referred to the *King Petroleum Ltd.* or *Proulx* cases *supra*. Further, it is obvious from the context that "*sometime in the long run . . . eventually*" is not a finite time in the foreseeable future.

39 I have not given any benefit to the $313 - $363 million of improvements referred to in the affidavit of William Vaughan at paragraph 115 as those appear to be capital expenditures which will have to be accommodated within a plan of arrangement or after emergence.

40 It seems to me that if the BIA (a) test is restrictively dealt with (as per my question to Union counsel as to how far in the future should one look on a prospective basis being answered "24 hours") then Stelco would not be insolvent under that test. However, I am of the view that that would be unduly restrictive and a proper contextual and purposive interpretation to be given when it is being used for a restructuring purpose even under BIA would be to see whether there is a reasonably foreseeable (at the time of filing) expectation that there is a looming liquidity condition or crisis which will result in the applicant running out of "cash" to pay its debts as they generally become due in the future without the benefit of the say and ancillary protection and procedure by court authorization pursuant to an order. I think this is the more appropriate interpretation of BIA (a) test in the context of a reorganization or "rescue" as opposed to a threshold to bankruptcy consideration or a fraudulent preferences proceeding. On that basis, I would find Stelco insolvent from the date of filing. Even if one were not to give the latter interpretation to the BIA (a) test,

clearly for the above reasons and analysis, if one looks at the meaning of "insolvent" within the context of a CCAA reorganization or rescue solely, then of necessity, the time horizon must be such that the liquidity crisis would occur in the sense of running out of "cash" but for the grant of the CCAA order. On that basis Stelco is certainly insolvent given its limited cash resources unused, its need for a cushion, its rate of cash burn recently experienced and anticipated.

41 What about the BIA (c) test which may be roughly referred to as an assets compared with obligations test. See *New Quebec Raglan Mines Ltd. v. Blok-Andersen*, [1993] O.J. No. 727 (Ont. Gen. Div. [Commercial List]) as to fair value and fair market valuation. The Union observed that there was no intention by Stelco to wind itself up or proceed with a sale of some or all of its assets and undertaking and therefore some of the liabilities which Stelco and Stephen took into account would not crystallize. However, as I discussed at the time of the hearing, the (c) test is what one might reasonably call or describe as an "artificial" or notional/hypothetical test. It presumes certain things which are in fact not necessarily contemplated to take place or to be involved. In that respect, I appreciate that it may be difficult to get one's mind around that concept and down the right avenue of that (c) test. See my views at trial in *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, [2001] O.J. No. 3394 (Ont. S.C.J. [Commercial List]) at paragraphs 13, 21 and 33; affirmed [2003] O.J. No. 5242 (Ont. C.A.). At paragraph 33, I observed in closing:

> 33 . . . They (and their expert witnesses) all had to contend with dealing with rambling and complicated facts and, in Section 100 BIA, a section which is difficult to administer when fmv [fair market value] in a notational or hypothetical market involves ignoring what would often be regarded as self evidence truths but at the same time appreciating that this notational or hypothetical market requires that the objects being sold have to have realistic true to life attributes recognized.

42 The Court of Appeal stated at paragraphs 24-25 as follows:

> 24. Nor are the appellants correct to argue that the trial judge also assumed an imprudent vendor in arriving at his conclusion about the fair market value of the OYSF note would have to know that in order to realize value from the note any purchaser would immediately put OYSF and thus OYDL itself into bankruptcy to pre-empt a subsequent triggering event in favour of EIB. While this was so, and the trial judge clearly understood it, the error in this submission is that it seeks to inject into the analysis factors subjected to the circumstances of OYDL as vendor and not intrinsic to the value of the OYSF note. The calculation of fair market value does not permit this but rather must assume an unconstrained vendor.
>
> 25. The Applicants further argue that the trial judge eroded in determining the fair market value of the OYSF note by reference to a transaction which was entirely speculative because it was never considered by OYDL nor would have it been since it would have resulted in OYDL's own bankruptcy. I disagree. The transaction hypothesized by the trial

> judge was one between a notational, willing, prudent and informed vendor and purchaser based on factors relevant to the OYSF note itself rather than the particular circumstances of OYDL as the seller of the note. This is an entirely appropriate way to determine the fair market value of the OYSF note.

43 Test (c) deems a person to be insolvent if "the aggregate of [its] property is not, at a fair valuation, sufficient, or of disposed at a fairly conducted sale under legal process would not be sufficient to enable payment of all [its] obligations, due and accruing due." The origins of this legislative test appear to be the decision of Spragge V-C in *Davidson v. Douglas* (1868), 15 Gr. 347 (Ont. Ch.) at p. 351 where he stated with respect to the solvency or insolvency of a debtor, the proper course is:

> to see and examine whether all his property, real and personal, be sufficient if presently realized for the payment of his debts, and in this view we must estimate his land, as well as his chattel property, not at what his neighbours or others may consider to be its value, but at what it would bring in the market at a forced sale, or a sale where the seller cannot await his opportunities, but must sell.

44 In *Clarkson v. Sterling* (1887), 14 O.R. 460 (Ont. C.P.) at p. 463, Rose J. indicted that the sale must be fair and reasonable, but that the determination of fairness and reasonableness would depend on the facts of each case.

45 The Union essentially relied on garnishment cases. Because of the provisions relating as to which debts may or may not be garnished, these authorities are of somewhat limited value when dealing with the test (c) question. However I would refer to one of the Union's cases *Bank of Montreal v. I.M. Krisp Foods Ltd.*, [1996] S.J. No. 655 (Sask. C.A.) where it is stated at paragraph 11:

> 11. Few phrases have been as problematic to define as "debt due or accruing due". The Shorter Oxford English Dictionary, 3rd ed. defines "accruing" as "arising in due course", but an examination of English and Canadian authority reveals that not all debts "arising in due course" are permitted to be garnisheed. (See Professor Dunlop's extensive research for his British Columbia Law Reform Commission's Report on Attachment of Debts Act, 1978 at 17 to 29 and is text Creditor-Debtor Law in Canada, 2nd ed. at 374 to 385.)

46 In *Barsi v. Farcas* (1923), [1924] 1 D.L.R. 1154 (Sask. C.A.), Lamont J.A. was cited for his statement at p. 522 of *Webb v. Stenton* (1883), 11 Q.B.D. 518 (Eng. C.A.) that: "an accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation."

47 Saunders J. noted in *633746 Ontario Inc. (Trustee of) v. Salvati* (1990), 79 C.B.R. (N.S.) 72 (Ont. S.C.) at p. 81 that a sale out of the ordinary course of business would have an adverse effect on that actually realized.

48 There was no suggestion by any of the parties that any of the assets and undertaking would have any enhanced value from that shown on the financial statements prepared according to GAAP.

49 In *King Petroleum Ltd.*, *supra* at p. 81 Steele J. observed:

> To consider the question of insolvency under cl. (c) I must look to the aggregate property of the company and come to a conclusion as to whether or not it would be sufficient to enable payment of all obligations due and accruing due. There are two tests to be applied: First, its fair value and, secondly, its value if disposed of at a fairly conducted sale under legal process. The balance sheet is a starting point, but the evidence relating to the fair value of the assets and what they might realize if disposed of at a fairly conducted sale under legal process must be reviewed in interpreting it. In this case, I find no difficulty in accepting the obligations shown as liabilities because they are known. I have more difficulty with respect to the assets.

50 To my view the preferable interpretation to be given to "sufficient to enable payment of all his obligations, due and accruing due" is to be determined in the context of this test as a whole. What is being put up to satisfy those obligations is the debtor's assets and undertaking *in total*; in other words, the debtor in essence is taken as having sold everything. There would be no residual assets and undertaking to pay off any obligations which would not be encompassed by the phrase "all of his obligations, due and accruing due". Surely, there cannot be "orphan" obligations which are left hanging unsatisfied. It seems to me that the intention of "due and accruing due" was to cover off all obligations of whatever nature or kind and leave nothing in limbo.

51 S. 121(1) and (2) of the BIA, which are incorporated by reference in s. 12 of the CCAA, provide in respect to provable claims:

> S. 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 bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.
>
> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such claim shall be made in accordance with s. 135.

52 *Houlden and Morawetz 2004 Annotated supra* at p. 537 (G28(3)) indicates:

> The word "liability" is a very broad one. It includes all obligations to which the bankrupt is subject on the day on which he becomes bankrupt except for contingent and unliquidated claims which are dealt with in s. 121(2).

However contingent and unliquidated claims would be encompassed by the term "obligations".

53 In *Gardner v. Newton* (1916), 29 D.L.R. 276 (Man. K.B.), Mathers C.J.K.B. observed at p. 281 that "contingent claim, that is, a claim which may or may not ripen into a debt, according as some future event does or does not happen." See *A Debtor (No. 64 of 1992), Re*, [1993] 1 W.L.R. 264 (Eng. Ch. Div.) at p. 268 for the definition of a "liquidated sum" which is an amount which can be readily ascertained and hence by corollary an "unliquidated claim" would be one which is not easily ascertained, but will have to be valued. In *Gagnier, Re* (1950), 30 C.B.R. 74 (Ont. S.C.), there appears to be a conflation of not only the (a) test with the (c) test, but also the invocation of the judicial discretion not to grant the receiving order pursuant to a bankruptcy petition, notwithstanding that "[the judge was] unable to find the debtor is bankrupt". The debtor was able to survive the (a) test as he had the practice (accepted by all his suppliers) of providing them with post dated cheques. The (c) test was not a problem since the judge found that his assets should be valued at considerably more than his obligations. However, this case does illustrate that the application of the tests present some difficulties. These difficulties are magnified when one is dealing with something more significantly complex and a great deal larger than a haberdashery store - in the case before us, a giant corporation in which, amongst other things, is engaged in a very competitive history including competition from foreign sources which have recently restructured into more cost efficient structures, having shed certain of their obligations. As well, that is without taking into account that a sale would entail significant transaction costs. Even of greater significance would be the severance and termination payments to employees not continued by the new purchaser. Lastly, it was recognized by everyone at the hearing that Stelco's plants, especially the Hamilton-Hilton works, have extremely high environmental liabilities lurking in the woodwork. Stephen observed that these obligations would be substantial, although not quantified.

54 It is true that there are no appraisals of the plant and equipment nor of the assets and undertaking of Stelco. Given the circumstances of this case and the complexities of the market, one may realistically question whether or not the appraisals would be all that helpful or accurate.

55 I would further observe that in the notional or hypothetical exercise of a sale, then all the obligations which would be triggered by such sale would have to be taken into account.

56 All liabilities, contingent or unliquidated would have to be taken into account. See *King Petroleum Ltd.*, *supra* p. 81; *Salvati*, *supra* pp. 80-1; *Maybank Foods Inc. (Trustee of) v. Provisioners Maritimes Ltd.* (1989), 45 B.L.R. 14 (N.S. T.D.) at p. 29; *Challmie, Re* (1976), 22 C.B.R. (N.S.) 78 (B.C. S.C.), at pp. 81-2. In *Challmie* the debtor ought to have known that his guarantee was very much exposed given the perilous state of his company whose liabilities he had

guaranteed. It is interesting to note what was stated in *Maybank Foods Inc. (Trustee of)*, even if it is rather patently obvious. Tidman J. said in respect of the branch of the company at p. 29:

> Mr. MacAdam argues also that the $4.8 million employees' severance obligation was not a liability on January 20, 1986. The *Bankruptcy Act* includes as obligations both those due and accruing due. Although the employees' severance obligation was not due and payable on January 20, 1986 it was an obligation "accruing due". The Toronto facility had experienced severe financial difficulties for some time; in fact, it was the major, if not the sole cause, of Maybank's financial difficulties. I believe it is reasonable to conclude that a reasonably astute perspective buyer of the company has a going concern would have considered that obligation on January 20, 1986 and that it would have substantially reduced the price offered by that perspective buyer. Therefore that obligation must be considered as an obligation of the company on January 20, 1986.

57 With the greatest of respect for my colleague, I disagree with the conclusion of Ground J. in *Enterprise Capital Management Inc.*, *supra* as to the approach to be taken to "due and accruing due" when he observed at pp. 139-140:

> It therefore becomes necessary to determine whether the principle amount of the Notes constitutes an obligation "due or accruing due" as of the date of this application.
>
> There is a paucity of helpful authority on the meaning of "accruing due" for purposes of a definition of insolvency. Historically, in 1933, in *P. Lyall & Sons Construction Co. v. Baker*, [1933] O.R. 286 (Ont. C.A.), the Ontario Court of Appeal, in determining a question of set-off under the *Dominion Winding-Up Act* had to determine whether the amount claimed as set-off was a debt due or accruing due to the company in liquidation for purposes of that Act. Marsten J. at pp. 292-293 quoted from Moss J.A. in *Mail Printing Co. v. Clarkson* (1898), 25 O.R. 1 (Ont. C.A.) at p. 8:
>
> > A debt is defined to be a sum of money which is certainly, and at all event, payable without regard to the fact whether it be payable now or at a future time. And an accruing debt is a debt not yet actually payable, but a debt which is represented by an existing obligation: Per Lindley L.J. in *Webb v. Stenton* (1883), 11 Q.D.D. at p. 529.
>
> Whatever relevance such definition may have had for purposes of dealing with claims by and against companies in liquidation under the old winding-up legislation, it is apparent to me that it should not be applied to definitions of insolvency. To include every debt payable at some future date in "accruing due" for the purposes of insolvency tests would render numerous corporations, with long term debt due over a period of years in the future and anticipated to be paid out of future income, "insolvent" for the purposes of the BIA and therefore the CCAA. For the same reason, I do not accept the statement quoted in the Enterprise factum from the decision of the Bankruptcy Court for the Southern District of New York in *Centennial Textiles*

> *Inc., Re*, 220 B.R. 165 (U.S.N.Y.D.C. 1998) that "if the present saleable value of assets are less than the amount required to pay existing debt as they mature, the debtor is insolvent". In my view, the obligations, which are to be measured against the fair valuation of a company's property as being obligations due and accruing due, must be limited to obligations currently payable or properly chargeable to the accounting period during which the test is being applied as, for example, a sinking fund payment due within the current year. Black's Law Dictionary defines "accrued liability" as "an obligation or debt which is properly chargeable in a given accounting period, but which is not yet paid or payable". The principal amount of the Notes is neither due nor accruing due in this sense.

58 There appears to be some confusion in this analysis as to "debts" and "obligations", the latter being much broader than debts. Please see above as to my views concerning the floodgates argument under the BIA and CCAA being addressed by judicially exercised discretion even if "otherwise warranted" applications were made. I pause to note that an insolvency test under general corporate litigation need not be and likely is not identical, or indeed similar to that under these insolvency statutes. As well, it is curious to note that the cut off date is the end of the current fiscal period which could have radically different results if there were a calendar fiscal year and the application was variously made in the first week of January, mid-summer or the last day of December. Lastly, see above and below as to my views concerning the proper interpretation of this question of "accruing due".

59 It seems to me that the phrase "accruing due" has been interpreted by the courts as broadly identifying obligations that will "become due". See *Viteway Natural Foods Ltd.* below at pp. 163-4 - at least at some point in the future. Again, I would refer to my conclusion above that *every obligation* of the corporation in the hypothetical or notional sale must be treated as "accruing due" to avoid orphan obligations. In that context, it matters not that a wind-up pension liability may be discharged over 15 years; in a test (c) situation, it is crystallized on the date of the test. See *Optical Recording Laboratories Inc. supra* at pp. 756-7; *Viteway Natural Foods Ltd., Re* (1986), 63 C.B.R. (N.S.) 157 (B.C. S.C.) at pp. 164-63-4; *Consolidated Seed Exports Ltd., Re* (1986), 62 C.B.R. (N.S.) 156 (B.C. S.C.) at p. 163. In *Consolidated Seed Exports Ltd.*, Spencer J. at pp. 162-3 stated:

> In my opinion, a futures broker is not in that special position. The third definition of "insolvency" may apply to a futures trader at any time even though he has open long positions in the market. Even though Consolidated's long positions were not required to be closed on 10th December, the chance that they might show a profit by March 1981 or even on the following day and thus wipe out Consolidated's cash deficit cannot save it from a condition of insolvency on that day. The circumstances fit precisely within the third definition; if all Consolidated's assets had been sold on that day at a fair value, the proceeds would not have covered its obligations due and accruing due, including its obligations to pay in March 1981 for its long positions in rapeseed. The market prices from day to day establish a fair valuation. . . .

> The contract to buy grain at a fixed price at a future time imposes a present obligation upon a trader taking a long position in the futures market to take delivery in exchange for payment at that future time. It is true that in the practice of the market, that obligation is nearly always washed out by buying an offsetting short contract, but until that is done the obligation stands. The trader does not know who will eventually be on the opposite side of his transaction if it is not offset but all transactions are treated as if the clearing house is on the other side. It is a present obligation due at a future time. It is therefore an obligation accruing due within the meaning of the third definition of "insolvency".

60 The possibility of an expectancy of future profits or a change in the market is not sufficient; *Consolidated Seed Exports Ltd.* at p. 162 emphasizes that the test is to be done on that day, the day of filing in the case of an application for reorganization.

61 I see no objection to using Exhibit C to Stephen's affidavit as an aid to review the balance sheet approach to test (c). While Stephen may not have known who prepared Exhibit C, he addressed each of its components in the text of his affidavit and as such he could have mechanically prepared the exhibit himself. He was comfortable with and agreed with each of its components. Stelco's factum at paragraphs 70-1 submits as follows:

> 70. In Exhibit C to his Affidavit, Mr. Stephen addresses a variety of adjustments to the Shareholder's Equity of Stelco necessary to reflect the values of assets and liabilities as would be required to determine whether Stelco met the test of insolvency under Clause C. In cross examination of both Mr. Vaughan and Mr. Stephen only one of these adjustments was challenged - the "Possible Reductions in Capital Assets."
>
> 71. The basis of the challenge was that the comparative sales analysis was flawed. In the submission of Stelco, none of these challenges has any merit. Even if the entire adjustment relating to the value in capital assets is ignored, the remaining adjustments leave Stelco with assets worth over $600 million less than the value of its obligations due and accruing due. This fundamental fact is not challenged.

62 Stelco went on at paragraphs 74-5 of its factum to submit:

> 74. The values relied upon by Mr. Stephen if anything, understate the extent of Stelco's insolvency. As Mr. Stephen has stated, and no one has challenged by affidavit evidence or on cross examination, in a fairly conducted sale under legal process, the value of Stelco's working capital and other assets would be further impaired by: (i) increased environmental liabilities not reflected on the financial statements, (ii) increased pension deficiencies that would be generated on a wind up of the pension plans, (iii) severance and termination claims and (iv) substantial liquidation costs that would be incurred in connection with such a sale.

> 75. No one on behalf of the USWA has presented any evidence that the capital assets of Stelco are in excess of book value on a stand alone basis. Certainly no one has suggested that these assets would be in excess of book value if the related environmental legacy costs and collective agreements could not be separated from the assets.

63 Before turning to that exercise, I would also observe that test (c) is also disjunctive. There is an insolvency condition if the total obligation of the debtor exceed either (i) a fair valuation of its assets or (ii) the proceeds of a sale fairly conducted under legal process of its assets.

64 As discussed above and confirmed by Stephen, if there were a sale under legal process, then it would be unlikely, especially in this circumstance that values would be enhanced; in all probability they would be depressed from book value. Stephen took the balance sheet GAAP calculated figure of equity at November 30, 2003 as $804.2 million. From that, he deducted the loss for December 2003 - January 2004 of $17 million to arrive at an equity position of $787.2 million as at the date of filing.

65 From that, he deducted, reasonably in my view, those "booked" assets that would have no value in a test (c) sale namely: (a) $294 million of future income tax recourse which would need taxable income in the future to realize; (b) $57 million for a write-off of the Platemill which is presently hot idled (while Locker observed that it would not be prohibitive in cost to restart production, I note that neither Stephen nor Vaughn were cross examined as to the decision not to do so); and (c) the captialized deferred debt issue expense of $3.2 million which is being written off over time and therefore, truly is a "nothing". This totals $354.2 million so that the excess of value over liabilities before reflecting obligations not included in the financials directly, but which are, substantiated as to category in the notes would be $433 million.

66 On a windup basis, there would be a pension deficiency of $1252 million; however, Stephen conservatively in my view looked at the Mercer actuary calculations on the basis of a going concern finding deficiency of $656 million. If the $1252 million windup figure had been taken, then the picture would have been even bleaker than it is as Stephen has calculated it for test (c) purposes. In addition, there are deferred pension costs of $198.7 million which under GAAP accounting calculations is allowed so as to defer recognition of past bad investment experience, but this has no realizable value. Then there is the question of Employee Future Benefits. These have been calculated as at December 31, 2003 by the Mercer actuary as $909.3 million but only $684 million has been accrued and booked on the financial statements so that there has to be an increased provision of $225.3 million. These off balance sheet adjustments total $1080 million.

67 Taking that last adjustment into account would result in a *negative* equity of ($433 million minus $1080 million) or *negative* $647 million. On that basis without taking into account possible reductions in capital assets as dealt with in the somewhat flawed Exhibit E nor environmental and other costs discussed above, Stelco is insolvent according to the test (c). With respect to Exhibit E,

I have not relied on it in any way, but it is entirely likely that a properly calculated Exhibit E would provide comparators (also being sold in the U.S. under legal process in a fairly conducted process) which tend to require a further downward adjustment. Based on test (c), Stelco is significantly, not marginally, under water.

68 In reaching my conclusion as to the negative equity (and I find that Stephen approached that exercise fairly and constructively), please note my comments above regarding the possible assumption of pension obligations by the purchaser being offset by a reduction of the purchase price. The 35% adjustment advocated as to pension and employee benefits in this regard is speculation by the Union. Secondly, the Union emphasized cash flow as being important in evaluation, but it must be remembered that Stelco has been negative cash flow for some time which would make that analysis unreliable and to the detriment of the Union's position. The Union treated the $773 million estimated contribution to the shortfall in the pension deficiency by the Pension Benefits Guarantee Fund as eliminating that as a Stelco obligation. That is not the case however as that Fund would be subrogated to the claims of the employees in that respect with a result that Stelco would remain liable for that $773 million. Lastly, the Union indicated that there should be a $155 million adjustment as to the negative equity in Sub Applicants when calculating Stelco's equity. While Stephen at Q. 181-2 acknowledged that there was no adjustment for that, I agree with him that there ought not to be since Stelco was being examined (and the calculations were based) on an unconsolidated basis, not on a consolidated basis.

69 In the end result, I have concluded on the balance of probabilities that Stelco is insolvent and therefore it is a "debtor company" as at the date of filing and entitled to apply for the CCAA initial order. My conclusion is that (i) BIA test (c) strongly shows Stelco is insolvent; (ii) BIA test (a) demonstrates, to a less certain but sufficient basis, an insolvency and (iii) the "new" CCAA test again strongly supports the conclusion of insolvency. I am further of the opinion that I properly exercised my discretion in granting Stelco and the Sub Applicants the initial order on January 29, 2004 and I would confirm that as of the present date with effect on the date of filing. The Union's motion is therefore dismissed.

70 I appreciate that all the employees (union and non-union alike) and the Union and the International have a justifiable pride in their work and their workplace - and a human concern about what the future holds for them. The pensioners are in the same position. Their respective positions can only be improved by engaging in discussion, an exchange of views and information reasonably advanced and conscientiously listened to and digested, leading to mutual problem solving, ideas and negotiations. Negative attitudes can only lead to the detriment to all stakeholders. Unfortunately there has been some finger pointing on various sides; that should be put behind everyone so that participants in this process can concentrate on the future and not inappropriately dwell on the past. I understand that there have been some discussions and interchange over the past two weeks since the hearing and that is a positive start.

Motion dismissed.

APPENDIX

Tab 42

2013 SCC 6
Supreme Court of Canada

Indalex Ltd., Re

2013 CarswellOnt 733, 2013 CarswellOnt 734, 2013 SCC 6, [2013] 1 S.C.R. 271, [2013] W.D.F.L. 1591, [2013] W.D.F.L. 1592, [2013] S.C.J. No. 6, 20 P.P.S.A.C. (3d) 1, 223 A.C.W.S. (3d) 1049, 2 C.C.P.B. (2nd) 1, 301 O.A.C. 1, 354 D.L.R. (4th) 581, 439 N.R. 235, 8 B.L.R. (5th) 1, 96 C.B.R. (5th) 171, J.E. 2013-185, D.T.E. 2013T-97

Sun Indalex Finance, LLC (Appellant) and United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville (Respondents)

George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors (Appellant) and United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville (Respondents)

FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited (Appellant) and United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville (Respondents)

United Steelworkers (Appellant) and Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership) and Superintendent of Financial Services (Respondents) and Superintendent of Financial Services, Insolvency Institute of Canada, Canadian Labour Congress, Canadian Federation of Pensioners, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers Association (Interveners)

McLachlin C.J.C., LeBel, Deschamps, Abella, Rothstein, Cromwell, Moldaver JJ.

Heard: June 5, 2012
Judgment: February 1, 2013
Docket: 34308

Proceedings: reversing *Indalex Ltd., Re* (2011), 89 C.C.P.B. 39, 276 O.A.C. 347, 331 D.L.R. (4th) 352, 17 P.P.S.A.C. (3d) 194, 75 C.B.R. (5th) 19, 104 O.R. (3d) 641, 2011 C.E.B. & P.G.R. 8433, 2011 ONCA 265, 2011 CarswellOnt 2458 (Ont. C.A.); reversing *Indalex Ltd., Re* (2010),

79 C.C.P.B. 301, 2010 ONSC 1114, 2010 CarswellOnt 893 (Ont. S.C.J. [Commercial List]); and reversing in part *Indalex Ltd., Re* (2011), 81 C.B.R. (5th) 165, 92 C.C.P.B. 277, 2011 ONCA 578, 2011 CarswellOnt 9077 (Ont. C.A.); additional reasons to *Indalex Ltd., Re* (2011), 89 C.C.P.B. 39, 276 O.A.C. 347, 331 D.L.R. (4th) 352, 17 P.P.S.A.C. (3d) 194, 75 C.B.R. (5th) 19, 104 O.R. (3d) 641, 2011 C.E.B. & P.G.R. 8433, 2011 ONCA 265, 2011 CarswellOnt 2458 (Ont. C.A.)

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Éric Vallières, Alexandre Forest, Yoine Goldstein, for Intervener, Canadian Association of Insolvency and Restructuring Professionals
Mahmud Jamal, Jeremy Dacks, Tony Devir, for Intervener, Canadian Bankers Association

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Pensions — I Ltd. was part of group of companies that became insolvent — Bankruptcy protection was sought — I Ltd. was administrator of two registered pension plans — Salaried plan was in process of being wound up when Companies' Creditors Arrangement Act proceedings began — Executive plan was closed but not wound up — Amended initial order was obtained, authorizing I Ltd. to borrow from debtor-in-possession ("DIP") lenders and granting them priority over all other creditors — Pension plan members brought unsuccessful motions for declaration that deemed trust equal to unfunded pension liability was enforceable against proceeds of sale of assets of I Ltd. — In allowing plan members' appeal, Court of Appeal ordered distribution from reserve fund in order to pay amount of each plan's deficiency — I Ltd., monitor, secured creditor, and trustee in bankruptcy appealed order — Appeal allowed — With respect to salaried plan, I Ltd. was deemed to hold in trust amount necessary to satisfy wind-up deficiency — Deemed trust did not apply to

wind-up deficiency with respect to executive plan — As result of application of doctrine of federal paramountcy, DIP charge superseded deemed trust.

Bankruptcy and insolvency --- Property of bankrupt — Pension funds

Trusts — I Ltd. was part of group of companies that became insolvent — Bankruptcy protection was sought — I Ltd. was administrator of two registered pension plans — Salaried plan was in process of being wound up when Companies' Creditors Arrangement Act proceedings began — Executive plan was closed but not wound up — Amended initial order was obtained, authorizing I Ltd. to borrow from debtor-in-possession ("DIP") lenders and granting them priority over all other creditors — Pension plan members brought unsuccessful motions for declaration that deemed trust equal to unfunded pension liability was enforceable against proceeds of sale of assets of I Ltd. — In allowing plan members' appeal, Court of Appeal ordered distribution from reserve fund in order to pay amount of each plan's deficiency — I Ltd., monitor, secured creditor, and trustee in bankruptcy appealed order — Appeal allowed — With respect to salaried plan, I Ltd. was deemed to hold in trust amount necessary to satisfy wind-up deficiency — Deemed trust did not apply to wind-up deficiency with respect to executive plan — As result of application of doctrine of federal paramountcy, DIP charge superseded deemed trust.

Pensions --- Administration of pension plans — Administrators, trustees and custodians — Fiduciary duties — Miscellaneous

I Ltd. was part of group of companies that became insolvent — Bankruptcy protection was sought — I Ltd. was administrator of two registered pension plans — Salaried plan was in process of being wound up when Companies' Creditors Arrangement Act proceedings began — Executive plan was closed but not wound up — Amended initial order was obtained, authorizing I Ltd. to borrow from debtor-in-possession ("DIP") lenders and granting them priority over all other creditors — Pension plan members brought unsuccessful motions for declaration that deemed trust equal to unfunded pension liability was enforceable against proceeds of sale of assets of I Ltd. — In allowing plan members' appeal, Court of Appeal ordered distribution from reserve fund in order to pay amount of each plan's deficiency — I Ltd., monitor, secured creditor, and trustee in bankruptcy appealed order — Appeal allowed — I Ltd.'s fiduciary obligations as plan administrator conflicted with management decisions that needed to be taken in best interests of corporation — I Ltd. should have taken steps to ensure that interests of plan members were protected, but did not do so — With respect to salaried plan, I Ltd. was deemed to hold in trust amount necessary to satisfy wind-up deficiency, but DIP charge superseded deemed trust by application of doctrine of federal paramountcy.

Pensions --- Administration of pension plans — Administrators, trustees and custodians — Fiduciary duties — Liabilities for breach

I Ltd. was part of group of companies that became insolvent — Bankruptcy protection was sought — I Ltd. was administrator of two registered pension plans — Salaried plan was in process of being wound up when Companies' Creditors Arrangement Act proceedings began — Executive plan was closed but not wound up — Amended initial order was obtained, authorizing I Ltd. to borrow from debtor-in-possession ("DIP") lenders and granting them priority over all other creditors — Pension

plan members brought unsuccessful motions for declaration that deemed trust equal to unfunded pension liability was enforceable against proceeds of sale of assets of I Ltd. — In allowing plan members' appeal, Court of Appeal ordered distribution from reserve fund in order to pay amount of each plan's deficiency — I Ltd., monitor, secured creditor, and trustee in bankruptcy appealed order — Appeal allowed — I Ltd.'s fiduciary obligations as plan administrator conflicted with management decisions that needed to be taken in best interests of corporation — I Ltd. should have taken steps to ensure that interests of plan members were protected, but did not do so — Constructive trust remedy was not available, as required condition was not met — With respect to salaried plan, I Ltd. was deemed to hold in trust amount necessary to satisfy wind-up deficiency, but DIP charge superseded deemed trust by application of doctrine of federal paramountcy.

Pensions --- Administration of pension plans — Administrators, trustees and custodians — Miscellaneous

I Ltd. was part of group of companies that became insolvent — Bankruptcy protection was sought — I Ltd. was administrator of two registered pension plans — Salaried plan was in process of being wound up when Companies' Creditors Arrangement Act proceedings began — Executive plan was closed but not wound up — Amended initial order was obtained, authorizing I Ltd. to borrow from debtor-in-possession ("DIP") lenders and granting them priority over all other creditors — Pension plan members brought unsuccessful motions for declaration that deemed trust equal to unfunded pension liability was enforceable against proceeds of sale of assets of I Ltd. — In allowing plan members' appeal, Court of Appeal ordered distribution from reserve fund in order to pay amount of each plan's deficiency — I Ltd., monitor, secured creditor, and trustee in bankruptcy appealed order — Appeal allowed — I Ltd.'s fiduciary obligations as plan administrator conflicted with management decisions that needed to be taken in best interests of corporation — I Ltd. should have taken steps to ensure that interests of plan members were protected, but did not do so — With respect to salaried plan, I Ltd. was deemed to hold in trust amount necessary to satisfy wind-up deficiency, but DIP charge superseded deemed trust by application of doctrine of federal paramountcy.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — Miscellaneous

Collateral attack doctrine — I Ltd. was part of group of companies that became insolvent — Bankruptcy protection was sought — I Ltd. was administrator of two registered pension plans — Salaried plan was in process of being wound up when Companies' Creditors Arrangement Act proceedings began — Executive plan was closed but not wound up — Amended initial order was obtained, authorizing I Ltd. to borrow from debtor-in-possession ("DIP") lenders and granting them priority over all other creditors — Pension plan members brought unsuccessful motions for declaration that deemed trust equal to unfunded pension liability was enforceable against proceeds of sale of assets of I Ltd. — In allowing plan members' appeal, Court of Appeal ordered distribution from reserve fund in order to pay amount of each plan's deficiency — I Ltd., monitor, secured creditor, and trustee in bankruptcy appealed order — Appeal allowed — It could not be argued that plan members were barred from defending their interests by collateral attack doctrine — Argument that plan members should have appealed amended initial order authorizing DIP charge, and were

precluded from subsequently arguing that their claim ranked in priority to that of DIP lenders, was not convincing — With respect to salaried plan, I Ltd. was deemed to hold in trust amount necessary to satisfy wind-up deficiency, but DIP charge superseded deemed trust by application of doctrine of federal paramountcy.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous

Distribution of proceeds — I Ltd. was part of group of companies that became insolvent — Bankruptcy protection was sought — I Ltd. was administrator of two registered pension plans — Salaried plan was in process of being wound up when Companies' Creditors Arrangement Act proceedings began — Executive plan was closed but not wound up — Amended initial order was obtained, authorizing I Ltd. to borrow from debtor-in-possession ("DIP") lenders and granting them priority over all other creditors — Pension plan members brought unsuccessful motions for declaration that deemed trust equal to unfunded pension liability was enforceable against proceeds of sale of assets of I Ltd. — In allowing plan members' appeal, Court of Appeal ordered distribution from reserve fund in order to pay amount of each plan's deficiency — I Ltd., monitor, secured creditor, and trustee in bankruptcy appealed order — Appeal allowed — With respect to salaried plan, I Ltd. was deemed to hold in trust amount necessary to satisfy wind-up deficiency — Deemed trust did not apply to wind-up deficiency with respect to executive plan — As result of application of doctrine of federal paramountcy, DIP charge superseded deemed trust.

Personal property security --- Priority of security interest — Security interests versus other interests — Under provincial law — Statutory and deemed trusts

Companies' Creditors Arrangement Act — I Ltd. was part of group of companies that became insolvent — Bankruptcy protection was sought — I Ltd. was administrator of two registered pension plans — Salaried plan was in process of being wound up when Companies' Creditors Arrangement Act proceedings began — Executive plan was closed but not wound up — Amended initial order was obtained, authorizing I Ltd. to borrow from debtor-in-possession ("DIP") lenders and granting them priority over all other creditors — Pension plan members brought unsuccessful motions for declaration that deemed trust equal to unfunded pension liability was enforceable against proceeds of sale of assets of I Ltd. — In allowing plan members' appeal, Court of Appeal ordered distribution from reserve fund in order to pay amount of each plan's deficiency — I Ltd., monitor, secured creditor, and trustee in bankruptcy appealed order — Appeal allowed — With respect to salaried plan, I Ltd. was deemed to hold in trust amount necessary to satisfy wind-up deficiency — Deemed trust did not apply to wind-up deficiency with respect to executive plan — As result of application of doctrine of federal paramountcy, DIP charge superseded deemed trust.

Bankruptcy and insolvency --- Priorities of claims — Preferred claims — Wages and salaries of employees — Creation of statutory trust

Pension plans — I Ltd. was part of group of companies that became insolvent — Bankruptcy protection was sought — I Ltd. was administrator of two registered pension plans — Salaried plan was in process of being wound up when Companies' Creditors Arrangement Act proceedings began — Executive plan was closed but not wound up — Amended initial order was obtained, authorizing I Ltd. to borrow from debtor-in-possession ("DIP") lenders and granting them priority

over all other creditors — Pension plan members brought unsuccessful motions for declaration that deemed trust equal to unfunded pension liability was enforceable against proceeds of sale of assets of I Ltd. — In allowing plan members' appeal, Court of Appeal ordered distribution from reserve fund in order to pay amount of each plan's deficiency — I Ltd., monitor, secured creditor, and trustee in bankruptcy appealed order — Appeal allowed — With respect to salaried plan, I Ltd. was deemed to hold in trust amount necessary to satisfy wind-up deficiency — Deemed trust did not apply to wind-up deficiency with respect to executive plan — As result of application of doctrine of federal paramountcy, DIP charge superseded deemed trust.

Bankruptcy and insolvency --- Bankruptcy and insolvency jurisdiction — Constitutional jurisdiction of Federal government and provinces — Paramountcy of Federal legislation

I Ltd. was part of group of companies that became insolvent — Bankruptcy protection was sought — I Ltd. was administrator of two registered pension plans — Salaried plan was in process of being wound up when Companies' Creditors Arrangement Act ("CCAA") proceedings began — Executive plan was closed but not wound up — Amended initial order was obtained, authorizing I Ltd. to borrow from debtor-in-possession ("DIP") lenders and granting them priority over all other creditors — Pension plan members brought unsuccessful motions for declaration that deemed trust equal to unfunded pension liability was enforceable against proceeds of sale of assets of I Ltd. — In allowing plan members' appeal, Court of Appeal ordered distribution from reserve fund in order to pay amount of each plan's deficiency — I Ltd., monitor, secured creditor, and trustee in bankruptcy appealed order — Appeal allowed — With respect to salaried plan, I Ltd. was deemed to hold in trust amount necessary to satisfy wind-up deficiency, but DIP charge superseded deemed trust by application of doctrine of federal paramountcy — Federal and provincial laws were inconsistent, as they gave rise to different, and conflicting, orders of priority — Section 30(7) of Personal Property Security Act required part of proceeds from asset sale to be paid to plan's administrator before other secured creditors were paid — However, amended initial order provided that DIP charge ranked in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise — This court-ordered priority based on CCAA had same effect as statutory priority.

Estates and trusts --- Trusts — Constructive trust — Gains by fiduciaries

Breach of fiduciary duty — I Ltd. was part of group of companies that became insolvent — Bankruptcy protection was sought — I Ltd. was administrator of two registered pension plans — Salaried plan was in process of being wound up when Companies' Creditors Arrangement Act proceedings began — Executive plan was closed but not wound up — Amended initial order was obtained, authorizing I Ltd. to borrow from debtor-in-possession ("DIP") lenders and granting them priority over all other creditors — Pension plan members brought unsuccessful motions for declaration that deemed trust equal to unfunded pension liability was enforceable against proceeds of sale of assets of I Ltd. — In allowing plan members' appeal, Court of Appeal ordered distribution from reserve fund in order to pay amount of each plan's deficiency — I Ltd., monitor, secured creditor, and trustee in bankruptcy appealed order — Appeal allowed — I Ltd.'s fiduciary obligations as plan administrator conflicted with management decisions that needed to be taken in best interests of corporation — I Ltd. should have taken steps to ensure that interests of plan

members were protected, but did not do so — Constructive trust remedy was not available, as required condition was not met — With respect to salaried plan, I Ltd. was deemed to hold in trust amount necessary to satisfy wind-up deficiency, but DIP charge superseded deemed trust by application of doctrine of federal paramountcy.

Constitutional law --- Distribution of legislative powers — Relation between federal and provincial powers — Paramountcy of federal legislation — Miscellaneous

I Ltd. was part of group of companies that became insolvent — Bankruptcy protection was sought — I Ltd. was administrator of two registered pension plans — Salaried plan was in process of being wound up when Companies' Creditors Arrangement Act ("CCAA") proceedings began — Executive plan was closed but not wound up — Amended initial order was obtained, authorizing I Ltd. to borrow from debtor-in-possession ("DIP") lenders and granting them priority over all other creditors — Pension plan members brought unsuccessful motions for declaration that deemed trust equal to unfunded pension liability was enforceable against proceeds of sale of assets of I Ltd. — In allowing plan members' appeal, Court of Appeal ordered distribution from reserve fund in order to pay amount of each plan's deficiency — I Ltd., monitor, secured creditor, and trustee in bankruptcy appealed order — Appeal allowed — With respect to salaried plan, I Ltd. was deemed to hold in trust amount necessary to satisfy wind-up deficiency, but DIP charge superseded deemed trust by application of doctrine of federal paramountcy — Federal and provincial laws were inconsistent, as they gave rise to different, and conflicting, orders of priority — Section 30(7) of Personal Property Security Act required part of proceeds from asset sale to be paid to plan's administrator before other secured creditors were paid — However, amended initial order provided that DIP charge ranked in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise — This court-ordered priority based on CCAA had same effect as statutory priority.

Bankruptcy and insolvency --- Practice and procedure in courts — Costs — Miscellaneous

I Ltd. was part of group of companies that became insolvent — Bankruptcy protection was sought — I Ltd. was administrator of two registered pension plans — Salaried plan was in process of being wound up when Companies' Creditors Arrangement Act proceedings began — Executive plan was closed but not wound up — Amended initial order was obtained, authorizing I Ltd. to borrow from debtor-in-possession lenders and granting them priority over all other creditors — Pension plan members brought unsuccessful motions for declaration that deemed trust equal to unfunded pension liability was enforceable against proceeds of sale of assets of I Ltd. — In allowing plan members' appeal, Court of Appeal ordered distribution from reserve fund in order to pay amount of each plan's deficiency — Court also issued costs endorsement that approved payment of costs of executive plan's members from that plan's fund, but declined to order payment of costs to union from fund of salaried plan — I Ltd., monitor, secured creditor, and trustee in bankruptcy appealed order, and union appealed costs endorsement — Appeal from order allowed; appeal from costs endorsement dismissed; Court of Appeal's orders with respect to costs of that appeal set aside, and all parties to bear their own costs in Court of Appeal and present appeal — There was no error in principle in Court of Appeal's refusal to order union costs to be paid out of pension fund,

particularly in light of disposition of present appeal — Union's submissions as to costs were largely based on inaccurate reading of Court of Appeal's costs endorsement.

Pensions --- Practice in pension actions — Costs

I Ltd. was part of group of companies that became insolvent — Bankruptcy protection was sought — I Ltd. was administrator of two registered pension plans — Salaried plan was in process of being wound up when Companies' Creditors Arrangement Act proceedings began — Executive plan was closed but not wound up — Amended initial order was obtained, authorizing I Ltd. to borrow from debtor-in-possession lenders and granting them priority over all other creditors — Pension plan members brought unsuccessful motions for declaration that deemed trust equal to unfunded pension liability was enforceable against proceeds of sale of assets of I Ltd. — In allowing plan members' appeal, Court of Appeal ordered distribution from reserve fund in order to pay amount of each plan's deficiency — Court also issued costs endorsement that approved payment of costs of executive plan's members from that plan's fund, but declined to order payment of costs to union from fund of salaried plan — I Ltd., monitor, secured creditor, and trustee in bankruptcy appealed order, and union appealed costs endorsement — Appeal from order allowed; appeal from costs endorsement dismissed; Court of Appeal's orders with respect to costs of that appeal set aside, and all parties to bear their own costs in Court of Appeal and present appeal — There was no error in principle in Court of Appeal's refusal to order union costs to be paid out of pension fund, particularly in light of disposition of present appeal — Union's submissions as to costs were largely based on inaccurate reading of Court of Appeal's costs endorsement.

Pensions --- Payment of pension — Bankruptcy or insolvency of employer — Registered plans

Deficiency in plans' funding.

Pensions --- Administration of pension plans — Valuation and funding of plans — Deficiency

Insolvency of employer.

Civil practice and procedure --- Costs — Costs of appeals — Miscellaneous

Faillite et insolvabilité --- Biens du failli — Biens détenus en fiducie — Divers

Régimes de retraite — I Ltd. faisait partie d'un groupe de sociétés qui est devenu insolvable — Mesures de protection offertes en matière de faillite ont été déclenchées — I Ltd. administrait deux régimes de retraite enregistrés — Régime des salariés était en cours de liquidation lorsque les procédures sous le régime de la Loi sur les arrangements avec les créanciers des compagnies ont été engagées — Régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé — Ordonnance initiale modifiée a été rendue autorisant I Ltd. à emprunter aux prêteurs au débiteur-exploitant (« DE ») et accordant à ces derniers une priorité sur tous les autres créanciers — Participants des régimes ont déposé des requêtes en vue d'obtenir un jugement déclaratoire portant que le produit de la vente des actifs de I Ltd. était grevé d'une fiducie présumée d'un montant équivalent au passif non capitalisé au titre des pensions — En accueillant l'appel interjeté par les participants, la Cour d'appel a ordonné de combler le déficit de chacun des régimes par prélèvement sur le fonds de réserve — I Ltd., le contrôleur, un créancier garanti et le syndic de faillite ont formé un pourvoi à l'encontre de l'ordonnance — Pourvoi accueilli — En ce qui concernait le régime des salariés, I Ltd. était présumée détenir en fiducie le montant nécessaire pour combler le déficit

de liquidation — Fiducie présumée ne s'appliquait pas à un déficit de liquidation relativement au régime des cadres — Application de la doctrine de la prépondérance fédérale faisait en sorte que la sûreté accordée aux prêteurs DE avait priorité sur la fiducie présumée.

Faillite et insolvabilité --- Biens du failli — Fonds de pension

Fiducies — I Ltd. faisait partie d'un groupe de sociétés qui est devenu insolvable — Mesures de protection offertes en matière de faillite ont été déclenchées — I Ltd. administrait deux régimes de retraite enregistrés — Régime des salariés était en cours de liquidation lorsque les procédures sous le régime de la Loi sur les arrangements avec les créanciers des compagnies ont été engagées — Régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé — Ordonnance initiale modifiée a été rendue autorisant I Ltd. à emprunter aux prêteurs au débiteur-exploitant (« DE ») et accordant à ces derniers une priorité sur tous les autres créanciers — Participants des régimes ont déposé des requêtes en vue d'obtenir un jugement déclaratoire portant que le produit de la vente des actifs de I Ltd. était grevé d'une fiducie présumée d'un montant équivalent au passif non capitalisé au titre des pensions — En accueillant l'appel interjeté par les participants, la Cour d'appel a ordonné de combler le déficit de chacun des régimes par prélèvement sur le fonds de réserve — I Ltd., le contrôleur, un créancier garanti et le syndic de faillite ont formé un pourvoi à l'encontre de l'ordonnance — Pourvoi accueilli — En ce qui concernait le régime des salariés, I Ltd. était présumée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation — Fiducie présumée ne s'appliquait pas à un déficit de liquidation relativement au régime des cadres — Application de la doctrine de la prépondérance fédérale faisait en sorte que la sûreté accordée aux prêteurs DE avait priorité sur la fiducie présumée.

Régimes de retraite --- Administration des régimes de retraite — Administrateurs, fiduciaires et dépositaires — Obligations fiduciaires — Divers

I Ltd. faisait partie d'un groupe de sociétés qui est devenu insolvable — Mesures de protection offertes en matière de faillite ont été déclenchées — I Ltd. administrait deux régimes de retraite enregistrés — Régime des salariés était en cours de liquidation lorsque les procédures sous le régime de la Loi sur les arrangements avec les créanciers des compagnies ont été engagées — Régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé — Ordonnance initiale modifiée a été rendue autorisant I Ltd. à emprunter aux prêteurs au débiteur-exploitant (« DE ») et accordant à ces derniers une priorité sur tous les autres créanciers — Participants des régimes ont déposé des requêtes en vue d'obtenir un jugement déclaratoire portant que le produit de la vente des actifs de I Ltd. était grevé d'une fiducie présumée d'un montant équivalent au passif non capitalisé au titre des pensions — En accueillant l'appel interjeté par les participants, la Cour d'appel a ordonné de combler le déficit de chacun des régimes par prélèvement sur le fonds de réserve — I Ltd., le contrôleur, un créancier garanti et le syndic de faillite ont formé un pourvoi à l'encontre de l'ordonnance — Pourvoi accueilli — Il y avait un conflit entre les obligations fiduciaires qui incombaient à I Ltd. en sa qualité d'administrateur des régimes et les décisions de gestion qu'elle devait prendre dans le meilleur intérêt de la société — I Ltd. aurait dû prendre des mesures pour assurer la protection des intérêts des participants au régime, mais ne l'a pas fait — En ce qui concernait le régime des salariés, I Ltd. était présumée détenir en fiducie le montant

nécessaire pour combler le déficit de liquidation, mais en raison de la doctrine de la prépondérance fédérale, la sûreté accordée aux prêteurs DE avait priorité sur la fiducie présumée.

Régimes de retraite --- Administration des régimes de retraite — Administrateurs, fiduciaires et dépositaires — Obligations fiduciaires — Responsabilité découlant de la violation

I Ltd. faisait partie d'un groupe de sociétés qui est devenu insolvable — Mesures de protection offertes en matière de faillite ont été déclenchées — I Ltd. administrait deux régimes de retraite enregistrés — Régime des salariés était en cours de liquidation lorsque les procédures sous le régime de la Loi sur les arrangements avec les créanciers des compagnies ont été engagées — Régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé — Ordonnance initiale modifiée a été rendue autorisant I Ltd. à emprunter aux prêteurs au débiteur-exploitant (« DE ») et accordant à ces derniers une priorité sur tous les autres créanciers — Participants des régimes ont déposé des requêtes en vue d'obtenir un jugement déclaratoire portant que le produit de la vente des actifs de I Ltd. était grevé d'une fiducie présumée d'un montant équivalent au passif non capitalisé au titre des pensions — En accueillant l'appel interjeté par les participants, la Cour d'appel a ordonné de combler le déficit de chacun des régimes par prélèvement sur le fonds de réserve — I Ltd., le contrôleur, un créancier garanti et le syndic de faillite ont formé un pourvoi à l'encontre de l'ordonnance — Pourvoi accueilli — Il y avait un conflit entre les obligations fiduciaires qui incombaient à I Ltd. en sa qualité d'administrateur des régimes et les décisions de gestion qu'elle devait prendre dans le meilleur intérêt de la société — I Ltd. aurait dû prendre des mesures pour assurer la protection des intérêts des participants au régime, mais ne l'a pas fait — Exigences permettant de reconnaître l'application d'une fiducie par interprétation à titre de mesure réparatrice n'étaient pas satisfaites — En ce qui concernait le régime des salariés, I Ltd. était présumée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation, mais en raison de la doctrine de la prépondérance fédérale, la sûreté accordée aux prêteurs DE avait priorité sur la fiducie présumée.

Régimes de retraite --- Administration des régimes de retraite — Administrateurs, fiduciaires et dépositaires — Divers

I Ltd. faisait partie d'un groupe de sociétés qui est devenu insolvable — Mesures de protection offertes en matière de faillite ont été déclenchées — I Ltd. administrait deux régimes de retraite enregistrés — Régime des salariés était en cours de liquidation lorsque les procédures sous le régime de la Loi sur les arrangements avec les créanciers des compagnies ont été engagées — Régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé — Ordonnance initiale modifiée a été rendue autorisant I Ltd. à emprunter aux prêteurs au débiteur-exploitant (« DE ») et accordant à ces derniers une priorité sur tous les autres créanciers — Participants des régimes ont déposé des requêtes en vue d'obtenir un jugement déclaratoire portant que le produit de la vente des actifs de I Ltd. était grevé d'une fiducie présumée d'un montant équivalent au passif non capitalisé au titre des pensions — En accueillant l'appel interjeté par les participants, la Cour d'appel a ordonné de combler le déficit de chacun des régimes par prélèvement sur le fonds de réserve — I Ltd., le contrôleur, un créancier garanti et le syndic de faillite ont formé un pourvoi à l'encontre de l'ordonnance — Pourvoi accueilli — Il y avait un conflit entre les obligations

fiduciaires qui incombaient à I Ltd. en sa qualité d'administrateur des régimes et les décisions de gestion qu'elle devait prendre dans le meilleur intérêt de la société — I Ltd. aurait dû prendre des mesures pour assurer la protection des intérêts des participants au régime, mais ne l'a pas fait — En ce qui concernait le régime des salariés, I Ltd. était présumée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation, mais en raison de la doctrine de la prépondérance fédérale, la sûreté accordée aux prêteurs DE avait priorité sur la fiducie présumée.

Faillite et insolvabilité --- Procédure devant les tribunaux — Appels — Divers

Règle interdisant les contestations indirectes — I Ltd. faisait partie d'un groupe de sociétés qui est devenu insolvable — Mesures de protection offertes en matière de faillite ont été déclenchées — I Ltd. administrait deux régimes de retraite enregistrés — Régime des salariés était en cours de liquidation lorsque les procédures sous le régime de la Loi sur les arrangements avec les créanciers des compagnies ont été engagées — Régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé — Ordonnance initiale modifiée a été rendue autorisant I Ltd. à emprunter aux prêteurs au débiteur-exploitant (« DE ») et accordant à ces derniers une priorité sur tous les autres créanciers — Participants des régimes ont déposé des requêtes en vue d'obtenir un jugement déclaratoire portant que le produit de la vente des actifs de I Ltd. était grevé d'une fiducie présumée d'un montant équivalent au passif non capitalisé au titre des pensions — En accueillant l'appel interjeté par les participants, la Cour d'appel a ordonné de combler le déficit de chacun des régimes par prélèvement sur le fonds de réserve — I Ltd., le contrôleur, un créancier garanti et le syndic de faillite ont formé un pourvoi à l'encontre de l'ordonnance — Pourvoi accueilli — On ne pouvait pas affirmer que les participants au régme ne pouvaient pas défendre leurs intérêts en raison de la règle interdisant les contestations indirectes — Prétention selon laquelle les participants auraient dû interjeter appel de l'ordonnance initiale modifiée autorisant la charge DE et qu'ils ne devaient pas être admis à prétendre plus tard que leur créance avait priorité sur celle des prêteurs DE n'était pas convaincante — En ce qui concernait le régime des salariés, I Ltd. était présumée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation, mais en raison de la doctrine de la prépondérance fédérale, la sûreté accordée aux prêteurs DE avait priorité sur la fiducie présumée.

Faillite et insolvabilité --- Administration de l'actif — Vente des actifs — Divers

Partage du produit de la vente — I Ltd. faisait partie d'un groupe de sociétés qui est devenu insolvable — Mesures de protection offertes en matière de faillite ont été déclenchées — I Ltd. administrait deux régimes de retraite enregistrés — Régime des salariés était en cours de liquidation lorsque les procédures sous le régime de la Loi sur les arrangements avec les créanciers des compagnies ont été engagées — Régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé — Ordonnance initiale modifiée a été rendue autorisant I Ltd. à emprunter aux prêteurs au débiteur-exploitant (« DE ») et accordant à ces derniers une priorité sur tous les autres créanciers — Participants des régimes ont déposé des requêtes en vue d'obtenir un jugement déclaratoire portant que le produit de la vente des actifs de I Ltd. était grevé d'une fiducie présumée d'un montant équivalent au passif non capitalisé au titre des pensions — En accueillant l'appel interjeté par les participants, la Cour d'appel a ordonné de combler le déficit de chacun des régimes par prélèvement sur le fonds de réserve — I Ltd., le contrôleur, un créancier garanti et le syndic

de faillite ont formé un pourvoi à l'encontre de l'ordonnance — Pourvoi accueilli — En ce qui concernait le régime des salariés, I Ltd. était présumée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation — Fiducie présumée ne s'appliquait pas à un déficit de liquidation relativement au régime des cadres — Application de la doctrine de la prépondérance fédérale faisait en sorte que la sûreté accordée aux prêteurs DE avait priorité sur la fiducie présumée.
Sûretés mobilières --- Ordre de priorité de la sûreté — Sûreté par rapport à d'autres intérêts — En vertu de la législation provinciale — Fiducies d'origine législative et présumées
Loi sur les arrangements avec les créanciers des compagnies — I Ltd. faisait partie d'un groupe de sociétés qui est devenu insolvable — Mesures de protection offertes en matière de faillite ont été déclenchées — I Ltd. administrait deux régimes de retraite enregistrés — Régime des salariés était en cours de liquidation lorsque les procédures sous le régime de la Loi sur les arrangements avec les créanciers des compagnies ont été engagées — Régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé — Ordonnance initiale modifiée a été rendue autorisant I Ltd. à emprunter aux prêteurs au débiteur-exploitant (« DE ») et accordant à ces derniers une priorité sur tous les autres créanciers — Participants des régimes ont déposé des requêtes en vue d'obtenir un jugement déclaratoire portant que le produit de la vente des actifs de I Ltd. était grevé d'une fiducie présumée d'un montant équivalent au passif non capitalisé au titre des pensions — En accueillant l'appel interjeté par les participants, la Cour d'appel a ordonné de combler le déficit de chacun des régimes par prélèvement sur le fonds de réserve — I Ltd., le contrôleur, un créancier garanti et le syndic de faillite ont formé un pourvoi à l'encontre de l'ordonnance — Pourvoi accueilli — En ce qui concernait le régime des salariés, I Ltd. était présumée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation — Fiducie présumée ne s'appliquait pas à un déficit de liquidation relativement au régime des cadres — Application de la doctrine de la prépondérance fédérale faisait en sorte que la sûreté accordée aux prêteurs DE avait priorité sur la fiducie présumée.
Faillite et insolvabilité --- Priorité des créances — Réclamations privilégiées — Traitements et salaires des employés — Création d'une fiducie par la loi
Régimes de retraite — I Ltd. faisait partie d'un groupe de sociétés qui est devenu insolvable — Mesures de protection offertes en matière de faillite ont été déclenchées — I Ltd. administrait deux régimes de retraite enregistrés — Régime des salariés était en cours de liquidation lorsque les procédures sous le régime de la Loi sur les arrangements avec les créanciers des compagnies ont été engagées — Régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé — Ordonnance initiale modifiée a été rendue autorisant I Ltd. à emprunter aux prêteurs au débiteur-exploitant (« DE ») et accordant à ces derniers une priorité sur tous les autres créanciers — Participants des régimes ont déposé des requêtes en vue d'obtenir un jugement déclaratoire portant que le produit de la vente des actifs de I Ltd. était grevé d'une fiducie présumée d'un montant équivalent au passif non capitalisé au titre des pensions — En accueillant l'appel interjeté par les participants, la Cour d'appel a ordonné de combler le déficit de chacun des régimes par prélèvement sur le fonds de réserve — I Ltd., le contrôleur, un créancier garanti et le syndic de faillite ont formé un pourvoi à l'encontre de l'ordonnance — Pourvoi accueilli — En ce qui concernait le régime des salariés, I Ltd. était présumée détenir en fiducie le montant nécessaire pour combler le déficit

de liquidation — Fiducie présumée ne s'appliquait pas à un déficit de liquidation relativement au régime des cadres — Application de la doctrine de la prépondérance fédérale faisait en sorte que la sûreté accordée aux prêteurs DE avait priorité sur la fiducie présumée.

Faillite et insolvabilité --- Compétence en matière de faillite et d'insolvabilité — Compétence constitutionnelle du gouvernement fédéral et des provinces — Prépondérance de la compétence fédérale

I Ltd. faisait partie d'un groupe de sociétés qui est devenu insolvable — Mesures de protection offertes en matière de faillite ont été déclenchées — I Ltd. administrait deux régimes de retraite enregistrés — Régime des salariés était en cours de liquidation lorsque les procédures sous le régime de la Loi sur les arrangements avec les créanciers de compagnies (« LACC ») ont été engagées — Régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé — Ordonnance initiale modifiée a été rendue autorisant I Ltd. à emprunter aux prêteurs au débiteur-exploitant (« DE ») et accordant à ces derniers une priorité sur tous les autres créanciers — Participants des régimes ont déposé des requêtes en vue d'obtenir un jugement déclaratoire portant que le produit de la vente des actifs de I Ltd. était grevé d'une fiducie présumée d'un montant équivalent au passif non capitalisé au titre des pensions — En accueillant l'appel interjeté par les participants, la Cour d'appel a ordonné de combler le déficit de chacun des régimes par prélèvement sur le fonds de réserve — I Ltd., le contrôleur, un créancier garanti et le syndic de faillite ont formé un pourvoi à l'encontre de l'ordonnance — Pourvoi accueilli — En ce qui concernait le régime des salariés, I Ltd. était présumée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation, mais en raison de la doctrine de la prépondérance fédérale, la sûreté accordée aux prêteurs DE avait priorité sur la fiducie présumée — Dispositions fédérales et provinciales étaient inconciliables, car elles produisaient des ordres de priorité différents et conflictuels — Article 30(7) de la Loi sur les sûretés mobilières exigeait qu'une partie du produit de la vente soit versée à l'administrateur du régime de retraite par priorité sur les paiements aux autres créanciers garantis — Or, l'ordonnance initiale amendée prévoyait que la sûreté accordée aux prêteurs DE prenait rang devant toutes les autres sûretés, y compris les fiducies, privilèges, charges et grèvements, d'origine législative ou autre — Cette priorité d'origine judiciaire fondée sur la LACC avait le même effet qu'une priorité d'origine législative.

Successions et fiducies --- Fiducies — Fiducie par interprétation — Profits des fiduciaires

Manquement à l'obligation fiduciaire — I Ltd. faisait partie d'un groupe de sociétés qui est devenu insolvable — Mesures de protection offertes en matière de faillite ont été déclenchées — I Ltd. administrait deux régimes de retraite enregistrés — Régime des salariés était en cours de liquidation lorsque les procédures sous le régime de la Loi sur les arrangements avec les créanciers de compagnies ont été engagées — Régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé — Ordonnance initiale modifiée a été rendue autorisant I Ltd. à emprunter aux prêteurs au débiteur-exploitant (« DE ») et accordant à ces derniers une priorité sur tous les autres créanciers — Participants des régimes ont déposé des requêtes en vue d'obtenir un jugement déclaratoire portant que le produit de la vente des actifs de I Ltd. était grevé d'une fiducie présumée d'un montant équivalent au passif non capitalisé au titre des pensions — En accueillant l'appel

interjeté par les participants, la Cour d'appel a ordonné de combler le déficit de chacun des régimes par prélèvement sur le fonds de réserve — I Ltd., le contrôleur, un créancier garanti et le syndic de faillite ont formé un pourvoi à l'encontre de l'ordonnance — Pourvoi accueilli — Il y avait un conflit entre les obligations fiduciaires qui incombaient à I Ltd. en sa qualité d'administrateur des régimes et les décisions de gestion qu'elle devait prendre dans le meilleur intérêt de la société — I Ltd. aurait dû prendre des mesures pour assurer la protection des intérêts des participants au régime, mais ne l'a pas fait — Exigences permettant de reconnaître l'application d'une fiducie par interprétation à titre de mesure réparatrice n'étaient pas satisfaites — En ce qui concernait le régime des salariés, I Ltd. était présumée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation, mais en raison de la doctrine de la prépondérance fédérale, la sûreté accordée aux prêteurs DE avait priorité sur la fiducie présumée.

Droit constitutionnel --- Partage des compétences législatives — Rapport entre les compétences fédérales et compétences provinciales — Prépondérance des lois fédérales — Divers

I Ltd. faisait partie d'un groupe de sociétés qui est devenu insolvable — Mesures de protection offertes en matière de faillite ont été déclenchées — I Ltd. administrait deux régimes de retraite enregistrés — Régime des salariés était en cours de liquidation lorsque les procédures sous le régime de la Loi sur les arrangements avec les créanciers de compagnies (« LACC ») ont été engagées — Régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé — Ordonnance initiale modifiée a été rendue autorisant I Ltd. à emprunter aux prêteurs au débiteur-exploitant (« DE ») et accordant à ces derniers une priorité sur tous les autres créanciers — Participants des régimes ont déposé des requêtes en vue d'obtenir un jugement déclaratoire portant que le produit de la vente des actifs de I Ltd. était grevé d'une fiducie présumée d'un montant équivalent au passif non capitalisé au titre des pensions — En accueillant l'appel interjeté par les participants, la Cour d'appel a ordonné de combler le déficit de chacun des régimes par prélèvement sur le fonds de réserve — I Ltd., le contrôleur, un créancier garanti et le syndic de faillite ont formé un pourvoi à l'encontre de l'ordonnance — Pourvoi accueilli — En ce qui concernait le régime des salariés, I Ltd. était présumée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation, mais en raison de la doctrine de la prépondérance fédérale, la sûreté accordée aux prêteurs DE avait priorité sur la fiducie présumée — Dispositions fédérales et provinciales étaient inconciliables, car elles produisaient des ordres de priorité différents et conflictuels — Article 30(7) de la Loi sur les sûretés mobilières exigeait qu'une partie du produit de la vente soit versée à l'administrateur du régime de retraite par priorité sur les paiements aux autres créanciers garantis — Or, l'ordonnance initiale amendée prévoyait que la sûreté accordée aux prêteurs DE prenait rang devant toutes les autres sûretés, y compris les fiducies, privilèges, charges et grèvements, d'origine législative ou autre — Cette priorité d'origine judiciaire fondée sur la LACC avait le même effet qu'une priorité d'origine législative.

Faillite et insolvabilité --- Procédure devant les tribunaux — Frais — Divers

I Ltd. faisait partie d'un groupe de sociétés qui est devenu insolvable — Mesures de protection offertes en matière de faillite ont été déclenchées — I Ltd. administrait deux régimes de retraite enregistrés — Régime des salariés était en cours de liquidation lorsque les procédures sous le

régime de la Loi sur les arrangements avec les créanciers de compagnies ont été engagées — Régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé — Ordonnance initiale modifiée a été rendue autorisant I Ltd. à emprunter aux prêteurs au débiteur-exploitant et accordant à ces derniers une priorité sur tous les autres créanciers — Participants des régimes ont déposé des requêtes en vue d'obtenir un jugement déclaratoire portant que le produit de la vente des actifs de I Ltd. était grevé d'une fiducie présumée d'un montant équivalent au passif non capitalisé au titre des pensions — En accueillant l'appel interjeté par les participants, la Cour d'appel a ordonné de combler le déficit de chacun des régimes par prélèvement sur le fonds de réserve — Cour a également rendu une décision concernant les frais qui approuvait le paiement des dépens des participants au régime des cadres sur leur caisse de retraite, mais a refusé d'ordonner que les dépens du syndicat soient acquittés sur la caisse de retraite du régime des salariés — I Ltd., le contrôleur, un créancier garanti et le syndic de faillite ont formé un pourvoi à l'encontre de l'ordonnance, et le syndicat a interjeté appel à l'encontre de la décision concernant les frais — Pourvoi à l'encontre de l'ordonnance accueilli; pourvoi à l'encontre de l'adjudication des dépens rejeté; ordonnances de la Cour d'appel relatives aux dépens afférents aux appels interjetés devant elle annulées, et il a été ordonné que chacune des parties paie ses propres dépens devant la Cour d'appel et devant la Cour suprême du Canada — Décision de la Cour d'appel de refuser d'ordonner que les frais du syndicat soient acquittés sur la caisse de retraite n'était entachée d'aucune erreur de principe, surtout considérant l'issue du présent pourvoi — Prétentions du syndicat relativement aux frais reposaient en grande partie sur une interprétation erronée de la décision de la Cour d'appel concernant les frais.
Régimes de retraite --- Procédure dans le cadre d'actions concernant des régimes de retraite — Frais I Ltd. faisait partie d'un groupe de sociétés qui est devenu insolvable — Mesures de protection offertes en matière de faillite ont été déclenchées — I Ltd. administrait deux régimes de retraite enregistrés — Régime des salariés était en cours de liquidation lorsque les procédures sous le régime de la Loi sur les arrangements avec les créanciers de compagnies (« LACC ») ont été engagées — Régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé — Ordonnance initiale modifiée a été rendue autorisant I Ltd. à emprunter aux prêteurs au débiteur-exploitant et accordant à ces derniers une priorité sur tous les autres créanciers — Participants des régimes ont déposé des requêtes en vue d'obtenir un jugement déclaratoire portant que le produit de la vente des actifs de I Ltd. était grevé d'une fiducie présumée d'un montant équivalent au passif non capitalisé au titre des pensions — En accueillant l'appel interjeté par les participants, la Cour d'appel a ordonné de combler le déficit de chacun des régimes par prélèvement sur le fonds de réserve — Cour a également rendu une décision concernant les frais qui approuvait le paiement des dépens des participants au régime des cadres sur leur caisse de retraite mais a refusé d'ordonner que les dépens du syndicat soient acquittés sur la caisse de retraite du régime des salariés — I Ltd., le contrôleur, un créancier garanti et le syndic de faillite ont formé un pourvoi à l'encontre de l'ordonnance, et le syndicat a interjeté appel à l'encontre de la décision concernant les frais — Pourvoi à l'encontre de l'ordonnance accueilli; pourvoi à l'encontre de l'adjudication des dépens rejeté; ordonnances de la Cour d'appel relatives aux dépens afférents aux appels interjetés devant elle annulées, et il a été ordonné que chacune des parties paie ses propres dépens devant la Cour

d'appel et devant la Cour suprême du Canada — Décision de la Cour d'appel de refuser d'ordonner que les frais du syndicat soient acquittés sur la caisse de retraite n'était entachée d'aucune erreur de principe, surtout considérant l'issue du présent pourvoi — Prétentions du syndicat relativement aux frais reposaient en grande partie sur une interprétation erronée de la décision de la Cour d'appel concernant les frais.

Régimes de retraite --- Paiement de la rente — Faillite ou insolvabilité de l'employeur — Régimes enregistrés

Déficit dans le financement des régimes.

Régimes de retraite --- Administration des régimes de retraite — Évaluation et financement des régimes — Déficit

Insolvabilité de l'employeur.

Procédure civile --- Frais — Frais d'appel — Divers

I Ltd. was a Canadian subsidiary of I Corp. U.S. The I Ltd. group became insolvent. I Corp. U.S. sought bankruptcy protection. I Ltd. obtained a stay under the Companies' Creditors Arrangement Act ("CCAA"). I Ltd. was the administrator of two registered pension plans. The salaried plan was in the process of being wound up when the CCAA proceedings began. The executive plan was closed but not wound up. Protection under the CCAA was obtained, and both plans faced funding deficiencies. An amended initial order was obtained, authorizing I Ltd. to borrow from debtor-in-possession ("DIP") lenders and granting them priority over all other creditors. I Ltd. sold its assets. Plan members brought motions for a declaration that a deemed trust equal in amount to the unfunded pension liability was enforceable against the proceeds of sale.

In dismissing the motions, the court found that the deemed trust did not apply to the wind-up deficiencies, because the associated payments were not "due" or "accruing due" as of the date of the wind-up. The court found that the executive plan did not have a wind-up deficiency, since it had not yet been wound up. The plan members appealed successfully. The Court of Appeal found that the deemed trust created by s. 57(4) of the Pension Benefits Act ("PBA") applied to all amounts due with respect to plan wind-up deficiencies. The Court of Appeal found that executive plan members had a claim arising from I Ltd.'s breach of fiduciary obligations in failing to adequately protect plan members' interests. The Court of Appeal found that imposing a constructive trust over the reserved fund in favour of plan members was an appropriate remedy. The Court of Appeal found that the deemed trust had priority over the DIP charge because the issue of federal paramountcy had not been raised when the amended initial order was issued, and that I Ltd. had stated that it intended to comply with any deemed trust requirements. The Court of appeal ordered the court-appointed monitor to make a distribution from the reserve fund in order to pay the amount of each plan's deficiency. It also issued a costs endorsement that approved payment of the costs of the executive plan's members from that plan's fund, but declined to order the payment of costs to the union from the fund of the salaried plan. I Ltd., the monitor, a secured creditor, and I Corp. U.S.'s trustee in bankruptcy appealed the main order, and the union appealed the costs endorsement.

Held: The appeal of the main order was allowed, and the union's appeal of the costs endorsement was dismissed. The Court of Appeal's orders with respect to the costs of appeal before that court

were set aside, and it was ordered that all parties bear their own costs in the Court of Appeal and in the Supreme Court of Canada.

Per Deschamps J. (Moldaver J. concurring): The Court of Appeal correctly held with respect to the salaried plan, which had been wound up, that I Ltd. was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency. The relevant provisions, legislative history and purpose were all consistent with inclusion of the wind-up deficiency in the protection afforded to members with respect to employer contributions upon the wind up of their pension plan. The deemed trust did not apply to the employer's wind-up deficiency with respect to the executive plan. Unlike s. 57(3) of the PBA, which provides that the deemed trust protecting employer contributions exists while a plan is ongoing, s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up.

As a result of the application of the doctrine of federal paramountcy, the DIP charge superseded the deemed trust. Subject to the application of the rules on the admissibility of new evidence, the doctrine of paramountcy could be raised even if it was not invoked in an initial proceeding. The federal and provincial laws in this case were inconsistent, as they gave rise to different, and conflicting, orders of priority. Section 30(7) of the (provincial) Personal Property Security Act required a part of the proceeds from the sale to be paid to the plan's administrator before other secured creditors were paid. However, the amended initial order provided that the DIP charge ranked in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise. This court-ordered priority based on the (federal) CCAA had the same effect as a statutory priority.

I Ltd.'s fiduciary obligations as plan administrator conflicted with management decisions that needed to be taken in the best interests of the corporation. The fact that I Ltd., as plan administrator, might have to claim accrued contributions from itself meant that it would have to simultaneously adopt conflicting positions on whether contributions had accrued as of the date of liquidation and whether a deemed trust had arisen in respect of wind-up deficiencies. This was indicative of a clear conflict between I Ltd.'s interests and those of the plan members. I Ltd. should have taken steps to ensure that the interests of the plan members were protected, but did not do so. On the contrary, it contested the position that the plan members advanced.

It could not be argued that the plan members were barred from defending their interests by the collateral attack doctrine. The argument that the plan members should have appealed the amended initial order authorizing the DIP charge, and were precluded from subsequently arguing that their claim ranked in priority to that of the DIP lenders, was not convincing. Among other things, the plan members did not receive notice of the motion to approve the DIP financing.

Even though I Ltd. breached its fiduciary duty to notify the plan members of the motion that resulted in the amended initial order, their claim remained subordinate to that of I Corp. U.S. (subrogated, as I Corp. U.S. was, to the DIP lenders' priority). In terms of an equitable remedy, there was no evidence that the lenders committed a wrong or that they engaged in inequitable conduct. The constructive trust remedy was not available, because proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced

to such property. There was agreement with Cromwell J. that this condition was not met. It was unreasonable for the Court of Appeal to re-order the priorities in this case. It was difficult to see what gains the plan members would have secured had they received notice of the motion that resulted in the amended initial order. The plan members were allowed to fully argue their case.

There was agreement with Cromwell J. on the appeal from the costs endorsement.

Per Cromwell J. (concurring in the result) (McLachlin C.J.C., Rothstein J. concurring): The deemed trust did not apply to the disputed funds. The Court of Appeal erred in finding that the s. 57(4) (PBA) deemed trust applied to the wind-up deficiency. There could be no deemed trust for the executive plan, because the plan had not been wound up at the relevant date. At issue was the salaried plan. The most plausible grammatical and ordinary sense of the words "accrued to the date of the wind-up" was that the amounts referred to were precisely ascertained immediately before the effective date of the plan's wind-up. The wind-up deficiency only arose upon wind-up and it was neither ascertained nor ascertainable on the date fixed for wind-up. The broader statutory context reinforced this view: the language of the deemed trusts in s. 57(3) and (4) was virtually exactly repeated in s. 75(1)(a), suggesting that both deemed trusts referred to the liability on wind-up referred to in s. 75(1)(a) and not to the further and distinct wind-up deficiency liability created under s. 75(1)(b). The legislative evolution and history of these provisions showed that the legislature never intended to include the wind-up deficiency in a statutory deemed trust. There was disagreement with Deschamps J.'s position that the wind-up deficiency could be said to have accrued to the date of wind-up.

The corporation failed in its duty to the plan beneficiaries as their administrator, and the beneficiaries ought to have been afforded more procedural protections in the CCAA proceedings. The Court of Appeal took too expansive a view of the fiduciary duties owed by I Ltd. as plan administrator. The only breach of fiduciary duty occurred when, upon insolvency, I Ltd.'s corporate interests were in obvious conflict with its fiduciary duty as plan administrator to ensure that all contributions were made to the plans when due. The breach was not in failing to avoid this conflict — the conflict itself was unavoidable. The breach was in failing to address the conflict to ensure that the plan beneficiaries had the opportunity to have representation in the CCAA proceedings as if there were independent plan administrators.

The Court of Appeal erred in using the equitable remedy of constructive trust to defeat the super priority ordered by the CCAA judge. The Court of Appeal erred in principle in finding that the asset in this case resulted from the breach of fiduciary duty such that it would be unjust for the party in breach to retain it. I Ltd.'s failure to meaningfully address conflicts of interest that arose during the CCAA proceedings did not result in any such asset. Imposing a constructive trust was wholly disproportionate to I Ltd.'s breach of fiduciary duty.

Although there was disagreement with Deschamps J. with respect to the scope of the s. 57(4) deemed trust, there was agreement that if there was a deemed trust in this case, it would have been superseded by the DIP loan because of the operation of the doctrine of federal paramountcy.

The union's submissions as to costs were largely based on an inaccurate reading of the Court of Appeal's costs endorsement. The Court of Appeal did not require the consent of plan beneficiaries

as a prerequisite to ordering payment of costs from the fund. It was not correct to suggest that the costs endorsement would restrict recovery of beneficiary costs to instances when there is a surplus in the pension trust fund or preclude financing of beneficiary action when a fund was in deficit. The costs endorsement did not lay down a rule that a union representing pension beneficiaries cannot recover costs from the fund because the union itself is not a beneficiary. The litigation raised novel points of law with all of the uncertainty and risk inherent in such an undertaking. The failure of that litigation left no basis to impose the costs consequences of taking the risk on all of the plan members of an already underfunded plan. The union's apparent premise that if the executive plan members had their costs paid out of the fund, so too should the salaried plan members, was not an accurate statement of the order made with respect to the executive plan. The Court of Appeal did not apply what the union referred to as the "costs payment test" to the executive plan because the costs order was the product of an agreement and did not order payment of costs out of the fund as a whole. In the case of the union request, there was no such agreement and no such limitation of risk to the supporters of the litigation. There was no error in principle in the Court of Appeal's refusal to order the union costs to be paid out of the pension fund, particularly in light of the disposition of the present appeal.

Per LeBel J. (dissenting) (Abella J. concurring): There was agreement that no deemed trust could arise under s. 57(4) of the PBA in the case of the executive plan because that plan had not been wound up when the CCAA proceedings were initiated. In the case of the salaried plan, there was agreement with Deschamps J. that a deemed trust arose in respect of the wind-up deficiency, but also that the DIP super-priority prevailed because of the federal paramountcy doctrine.

However, the remedy of a constructive trust was available and it was appropriate to impose it in the circumstances of this case. A view different from that of the majority in the present decision was taken with regard to the nature and extent of the fiduciary duties of an employer who elects to act as administrator of a pension plan governed by the PBA. This dual status did not entitle the employer to greater leniency in the determination and exercise of its fiduciary duties or excuse wrongful actions. I Ltd. not only neglected its obligations towards the beneficiaries, but took a course of action that was actively inimical to their interests. The seriousness of these breaches amply justified the decision of the Court of Appeal to impose a constructive trust. The conditions that generally justify the imposition of a constructive trust were met. The imposition of the trust did not disregard the different corporate personalities of I Ltd. and I Corp. U.S. It properly acknowledged the close relationship between the two companies, the second in effect controlling the first. This relationship needed to be taken into consideration.

I Ltd. était une filiale canadienne de la société I É.-U. Le groupe I Ltd. est devenu insolvable. I É.-U. s'est placée sous la protection des règles applicables en matière de faillite. I Ltd. a obtenu une ordonnance de suspension sous le régime de la Loi sur les arrangements avec les créanciers des compagnies (« LACC »). I Ltd. administrait deux régimes de retraite enregistrés. Le régime des salariés était en cours de liquidation lorsque les procédures sous le régime de la LACC ont été engagées. Le régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé. La protection du régime de la LACC a été accordée, et les deux régimes de retraite accusaient

un déficit de capitalisation. Une ordonnance initiale modifiée a été rendue autorisant I Ltd. à emprunter aux prêteurs au débiteur-exploitant (« DE ») et accordant à ces derniers une priorité sur tous les autres créanciers. I Ltd. a vendu tous ses actifs. Les participants des régimes ont déposé des requêtes en vue d'obtenir un jugement déclaratoire portant que le produit de la vente était grevé d'une fiducie présumée d'un montant équivalent au passif non capitalisé au titre des pensions.

En rejetant les requêtes, le tribunal a conclu que la fiducie présumée ne s'appliquait pas aux déficits de liquidation parce que les paiements afférents n'étaient pas [TRADUCTION] « échus » ou « à échoir » à la date de la liquidation. Le tribunal a conclu que l'on ne pouvait pas parler de déficit de liquidation relativement au régime des cadres puisqu'il n'était pas encore liquidé. Les participants des régimes ont interjeté appel avec succès. La Cour d'appel a conclu que la fiducie présumée créée à l'art. 57(4) de la Loi sur les régimes de retraite (« LRR ») s'appliquait à toutes les sommes dues au titre des déficits de liquidation des régimes. La Cour d'appel a conclu que les participants au régime des cadres pouvaient faire valoir une réclamation contre I Ltd. pour manquement à son obligation fiduciaire de protéger adéquatement leurs intérêts. La Cour d'appel a jugé que d'imposer une fiducie par interprétation grevant le fonds de réserve au profit des participants était une réparation appropriée. La Cour d'appel a conclu que la fiducie présumée avait priorité sur la charge DE parce que la question de la prépondérance fédérale n'avait pas été invoquée lorsque l'ordonnance initiale modifiée a été rendue et qu'I Ltd. avait déclaré qu'elle allait se conformer à toutes les exigences d'une fiducie présumée. La Cour d'appel a ordonné au contrôleur désigné par le tribunal de combler le déficit de chacun des régimes par prélèvement sur le fonds de réserve. Dans sa décision relative à l'adjudication des dépens, elle a également approuvé le paiement des dépens des participants au régime des cadres sur leur caisse de retraite, mais elle a refusé d'ordonner que les dépens du syndicat soient acquittés sur la caisse de retraite du régime des salariés. I Ltd., le contrôleur, un créancier garanti et le syndic de faillite d'I É.-U. ont formé un pourvoi à l'encontre de l'ordonnance principale et le syndicat a formé un pourvoi à l'encontre de l'adjudication des dépens.

Arrêt: Le pourvoi à l'encontre de l'ordonnance principale a été accueillie et le pourvoi du syndicat à l'encontre de l'adjudication des dépens a été rejeté. Les ordonnances de la Cour d'appel relatives aux dépens afférents aux appels interjetés devant elle ont été annulées et il a été ordonné que chacune des parties paie ses propres dépens devant la Cour d'appel et devant la Cour suprême du Canada.

Deschamps, J. (Moldaver, J., souscrivant à son opinion) : C'était à bon droit que la Cour d'appel a jugé qu'I Ltd. était présumée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation du régime des salariés, dont la liquidation avait pris effet. Le texte, l'historique législatif et l'objet des dispositions pertinentes concordaient tous avec l'inclusion du déficit de liquidation dans la protection offerte aux participants à l'égard des cotisations de l'employeur à la liquidation des régimes. La fiducie présumée ne s'appliquait pas au déficit de liquidation de l'employeur relativement au régime des cadres. Contrairement à l'art. 57(3) de la LRR, selon lequel la fiducie présumée protégeant les cotisations de l'employeur existe pendant que le régime est en vigueur, l'art. 57(4) prévoit que la fiducie présumée en cas de liquidation ne prend naissance qu'à la liquidation du régime.

L'application de la doctrine de la prépondérance fédérale donnait à la charge DE priorité sur la fiducie présumée. Sous réserve de l'application des règles régissant l'admissibilité de nouveaux éléments de preuve, la doctrine de la prépondérance fédérale pouvait être soulevée même si elle n'avait pas été invoquée dans une procédure initiale. En l'espèce, les dispositions fédérales et provinciales étaient inconciliables, car elles produisaient des ordres de priorité différents et conflictuels. L'article 30(7) de la Loi sur les sûretés mobilières (provinciale) exigeait qu'une partie du produit de la vente soit versée à l'administrateur du régime de retraite par priorité sur les paiements aux autres créanciers garantis. Toutefois, l'ordonnance initiale modifiée accordait à la charge DE priorité sur toutes les autres sûretés, y compris les fiducies, privilèges, charges et grèvements, d'origine législative ou autre. Cette priorité d'origine judiciaire fondée sur la LACC (fédérale) avait le même effet qu'une priorité d'origine législative.

Il y avait un conflit entre les obligations fiduciaires qui incombaient à I Ltd. en sa qualité d'administrateur des régimes et les décisions de gestion qu'elle devait prendre dans le meilleur intérêt de la société. Le fait qu'I Ltd. pouvait, en sa qualité d'administrateur des régimes de retraite, avoir à se réclamer à elle-même les cotisations accumulées l'amènerait à devoir adopter simultanément des positions opposées quant à savoir si des cotisations s'étaient accumulées à la date de la liquidation et si les déficits de capitalisation étaient protégés par une fiducie présumée. Cet exemple démontrait qu'il existait manifestement un conflit entre les intérêts d'I Ltd. et ceux des participants au régime. I Ltd. aurait dû prendre des mesures pour assurer la protection des intérêts des participants au régime, mais ne l'a pas fait. Elle a, au contraire, contesté la position défendue par les participants au régime.

La règle interdisant les contestations indirectes ne pouvait donc être invoquée pour empêcher les participants de défendre leurs intérêts. La prétention selon laquelle les participants auraient dû interjeter appel de l'ordonnance initiale modifiée autorisant la charge DE et qu'ils ne devaient pas être admis à prétendre plus tard que leur créance avait priorité sur celle des prêteurs DE n'était pas convaincante. Entre autres choses, les participants n'ont pas reçu avis de la requête demandant au tribunal d'autoriser le financement DE.

Bien qu'I Ltd. ait manqué à son obligation fiduciaire d'informer les participants de la requête en modification de l'ordonnance initiale, leur créance demeurait subordonnée à celle d'I É.-U. (I É.-U. étant subrogée aux prêteurs DE en conséquence de la priorité). À propos d'une réparation en equity, la preuve ne révélait aucune inconduite ni injustice de la part des prêteurs. La fiducie par interprétation n'était pas une réparation que l'on pouvait imposer, car la réparation de la nature d'un droit de propriété n'était généralement accordée qu'à l'égard d'un bien ayant un lien direct avec un acte fautif ou d'un bien qui pouvait être rattaché à un tel bien. On partageait l'avis du juge Cromwell que cette condition n'était pas remplie. Il était déraisonnable pour la Cour d'appel de modifier l'ordre de priorité en l'espèce. Il était difficile de voir comment les participants auraient pu améliorer leur position même s'ils avaient reçu avis de la requête en modification de l'ordonnance initiale. Les participants ont pu faire valoir pleinement leur position.

On convenait avec le juge Cromwell au sujet de l'adjudication des dépens.

Cromwell, J. (souscrivant au résultat des juges majoritaires) (McLachlin, J.C.C., Rothstein, J., souscrivant à son opinion) : La fiducie présumée ne visait pas les fonds en cause. La Cour d'appel a commis une erreur en concluant que la fiducie présumée prévue à l'art. 57(4) de la LRR s'appliquait au déficit de liquidation. Il ne pouvait y avoir de fiducie présumée au bénéfice du régime des cadres, car celui-ci n'avait pas encore été liquidé à la date considérée. Le litige ne portait que sur le régime des salariés. Suivant son sens ordinaire et grammatical le plus plausible, l'expression « accumulées à la date de la liquidation » renvoyait aux sommes déterminées de façon précise immédiatement avant la date de prise d'effet de la liquidation du régime. Le déficit de liquidation n'était constaté qu'à l'issue de la liquidation, et il n'était ni déterminé ni déterminable à la date de liquidation prévue. Le contexte législatif général confortait ce point de vue. Le texte de l'art. 57(3) et (4) qui dispose qu'il y a fiducie présumée est repris presque en tous points à l'art. 75(1)a), ce qui permettait de conclure que, dans les deux cas de fiducie présumée, le législateur renvoyait à l'obligation qui existait à la liquidation suivant l'art. 75(1)a) et non à celle, supplémentaire et distincte, qui était liée au déficit de liquidation et qui découlait de l'art. 75(1)b). L'évolution et l'historique de ces dispositions laissaient croire que le législateur n'a jamais voulu que le déficit de liquidation fasse l'objet d'une fiducie présumée d'origine législative. On ne partageait pas l'opinion de la juge Deschamps selon laquelle on pouvait considérer que le déficit de liquidation était accumulé à la date de la liquidation.

La société a manqué à ses obligations d'administrateur des régimes, et les bénéficiaires auraient dû obtenir de meilleures garanties procédurales dans le cadre de la procédure fondée sur la LACC. La Cour d'appel a conféré une portée excessive aux obligations fiduciaires d'I Ltd. en tant qu'administrateur des régimes. I Ltd. a seulement manqué à son obligation fiduciaire lorsque, une fois devenue insolvable, ses intérêts sont clairement entrés en conflit avec son obligation fiduciaire d'administrateur d'assurer le versement aux régimes de toutes les cotisations devenues exigibles. Son manquement résidait dans l'omission non pas d'éviter ce conflit, qui était en soi inévitable, mais de pallier le problème en veillant à ce que les bénéficiaires des régimes puissent être représentés dans le cadre de la procédure fondée sur la LACC comme si l'administrateur des régimes avait été indépendant.

La Cour d'appel a eu tort de recourir à la fiducie par interprétation, une réparation en equity, pour écarter la superpriorité accordée par le tribunal saisi sur le fondement de la LACC. La Cour d'appel a commis une erreur de principe lorsqu'elle a conclu que l'actif convoité résultait du manquement à l'obligation fiduciaire, de sorte qu'il serait injuste que la partie fautive se l'approprie. L'omission d'I Ltd. de véritablement pallier les conflits d'intérêts auxquels donnait lieu la procédure fondée sur la LACC n'a pas donné lieu à un tel actif. L'imposition d'une fiducie par interprétation était clairement une mesure disproportionnée par rapport au manquement d'I Ltd. à son obligation fiduciaire.

Bien que l'on ne partageait pas l'opinion de la juge Deschamps concernant la portée de la fiducie présumée prévue à l'art. 57(4), on s'accordait avec elle pour affirmer que si l'on devait conclure à l'existence d'une fiducie présumée dans le présent dossier, elle devait prendre rang avant la créance DE en application de la doctrine de la prépondérance fédérale.

Les prétentions du syndicat au sujet des frais reposaient en grande partie sur une interprétation erronée de la décision de la Cour d'appel à cet égard. La Cour d'appel ne considérait pas que le consentement des bénéficiaires du régime était une condition préalable au paiement des dépens à partir de la caisse de retraite. Il était erroné de laisser entendre que la décision relative aux dépens faisait en sorte que les bénéficiaires ne pouvaient être indemnisés des dépens que lorsqu'il existait un surplus dans la caisse de retraite en fiducie ou qu'ils ne pouvaient financer l'exercice d'un recours lorsque la caisse était déficitaire. La décision de la Cour d'appel relativement aux frais n'établissait pas la règle qu'un syndicat représentant les bénéficiaires d'une caisse de retraite ne pouvait être indemnisé de ses dépens par la caisse de retraite parce qu'il n'était pas lui-même bénéficiaire. Comme l'instance engagée en l'espèce portait sur des points de droit nouveaux, il était entendu que son issue était incertaine. L'échec du recours ne saurait justifier que tous les participants d'un régime déjà sous-capitalisé subissent les conséquences pécuniaires du risque couru. L'argument du syndicat reposait apparemment sur la prémisse que les participants du régime des salariés devraient obtenir paiement de leurs dépens à partir de leur caisse de retraite puisque c'est ce à quoi les participants au régime des cadres avaient droit. Or, telle n'était pas la teneur exacte de l'ordonnance de la Cour d'appel relative au régime des cadres. La Cour d'appel n'appliquait pas au régime des cadres le critère qui, selon le syndicat, vaudrait pour le paiement des dépens, car l'ordonnance relative aux dépens découlait d'un accord et elle ne prévoyait pas le paiement des dépens par prélèvement sur la caisse de retraite dans sa globalité. S'agissant de la demande du syndicat, nul accord n'était intervenu au même effet, et ce n'était pas seulement les participants derrière le recours qui s'exposaient au risque lié à l'issue de celui-ci. Il n'y avait aucune erreur de principe dans le refus de la Cour d'appel d'ordonner que les dépens du syndicat soient payés à partir de la caisse de retraite, étant donné surtout l'issue du présent appel.

LeBel, J. (dissident) (Abella, J., souscrivant à son opinion) : On s'accordait à dire que le régime des cadres ne pouvait être protégé par aucune fiducie présumée résultant de l'application de l'art. 57(4) de la LRR, puisque ce régime n'avait pas été liquidé lorsque la procédure fondée sur la LACC a été enclenchée. On partageait l'opinion de la juge Deschamps, laquelle reconnaissait l'existence d'une fiducie présumée dans le cas du déficit de liquidation du régime des salariés mais aussi que la créance des prêteurs DE avait priorité sur toutes les autres créances, par application du principe de la prépondérance fédérale.

Toutefois, la fiducie par interprétation pouvait s'appliquer aux présentes circonstances et devrait être imposée en l'espèce. On a adopté un point de vue différent de celui des juges majoritaires en ce qui a trait à la nature et la portée des obligations fiduciaires d'un employeur qui choisit d'administrer un régime de retraite régi par la LRR. Sa double fonction n'autorisait pas l'employeur à faire preuve de laxisme dans la définition et l'exercice de ses obligations fiduciaires, ni ne justifiait ses actes répréhensibles. I Ltd. a non seulement manqué à ses obligations envers les bénéficiaires, mais a adopté en fait une démarche qui allait à l'encontre de leurs intérêts. La gravité de ces manquements justifiait amplement la décision de la Cour d'appel d'imposer une fiducie par interprétation. Les conditions qui justifient généralement l'imposition d'une fiducie par interprétation étaient satisfaites. En imposant la fiducie, la Cour n'a pas négligé le fait qu'I Ltd.

et I É.-U. constituaient des personnes morales distinctes. Elle a tenu compte à juste titre de leurs rapports étroits, la seconde contrôlant dans les faits la première. Il fallait prendre ces rapports en compte.

APPEAL by company, monitor, secured creditor, and trustee in bankruptcy from judgment reported at *Indalex Ltd., Re* (2011), 89 C.C.P.B. 39, 276 O.A.C. 347, 331 D.L.R. (4th) 352, 17 P.P.S.A.C. (3d) 194, 75 C.B.R. (5th) 19, 104 O.R. (3d) 641, 2011 C.E.B. & P.G.R. 8433, 2011 ONCA 265, 2011 CarswellOnt 2458 (Ont. C.A.), ordering distribution from reserve fund to pay amount of pension plan deficiencies; APPEAL by union from judgment reported at *Indalex Ltd., Re* (2011), 81 C.B.R. (5th) 165, 92 C.C.P.B. 277, 2011 ONCA 578, 2011 CarswellOnt 9077 (Ont. C.A.), issuing costs endorsement.

POURVOI formé par une société, un contrôleur, un créancier garanti et un syndic de faillite à l'encontre d'une décision publiée à *Indalex Ltd., Re* (2011), 89 C.C.P.B. 39, 276 O.A.C. 347, 331 D.L.R. (4th) 352, 17 P.P.S.A.C. (3d) 194, 75 C.B.R. (5th) 19, 104 O.R. (3d) 641, 2011 C.E.B. & P.G.R. 8433, 2011 ONCA 265, 2011 CarswellOnt 2458 (Ont. C.A.), ayant ordonné de combler le déficit des régimes par prélèvement sur le fonds de réserve; POURVOI formé par un syndicat à l'encontre d'un jugement publié à *Indalex Ltd., Re* (2011), 81 C.B.R. (5th) 165, 92 C.C.P.B. 277, 2011 ONCA 578, 2011 CarswellOnt 9077 (Ont. C.A.), ayant adjugé les dépens.

***Deschamps J.*:**

1 Insolvency can trigger catastrophic consequences. Often, large claims of ordinary creditors are left unpaid. In insolvency situations, the promise of defined benefits made to employees during their employment is put at risk. These appeals illustrate the materialization of such a risk. Although the employer in this case breached a fiduciary duty, the harm suffered by the pension plans' beneficiaries results not from that breach, but from the employer's insolvency. For the following reasons, I would allow the appeals of the appellants Sun Indalex Finance, LLC; George L. Miller, Indalex U.S.'s trustee in bankruptcy and FTI Consulting Canada ULC.

2 To improve the prospect of pensioners receiving their full benefits after a pension plan is wound up, the Ontario legislature has protected contributions to the pension fund that have accrued but are not yet due at the time of the wind up by providing for a deemed trust that supersedes all other provincial priorities over certain assets of the plan sponsor (s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), and s. 30(7) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*")). The parties disagree on the scope of the deemed trust. In my view, the relevant provisions and the context lead to the conclusion that it extends to contributions the employer must make to ensure that the pension fund is sufficient to cover liabilities upon wind up. In the instant case, however, the deemed trust is superseded by the security granted to the creditor that loaned money to the employer, Indalex Limited ("Indalex"), during the insolvency proceedings. In addition, although the employer, as plan administrator, may have put itself in a position of

conflict of interest by failing to give the plan's members proper notice of a motion requesting financing of its operations during a restructuring process, there was no realistic possibility that, had the members received notice and had the *CCAA* court found that they were secured creditors, it would have ordered the priorities differently. Consequently, it would not be appropriate to order an equitable remedy such as the constructive trust ordered by the Court of Appeal.

I. Facts

3 Indalex is a wholly owned Canadian subsidiary of a U.S. company, Indalex Holding Corp. ("Indalex U.S."). Indalex and its related companies formed a corporate group (the "Indalex Group") that manufactured aluminum extrusions. The U.S. and Canadian operations were closely linked.

4 In 2009, a combination of high commodity prices and the economic recession's impact on the end-user market for aluminum extrusions plunged the Indalex Group into insolvency. On March 20, 2009, Indalex U.S. filed for Chapter 11 bankruptcy protection in Delaware. On April 3, 2009, Indalex applied for a stay under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), and Morawetz J. granted the stay in an initial order. He also appointed FTI Consulting Canada ULC (the "Monitor") to act as monitor.

5 At that time, Indalex was the administrator of two registered pension plans. One was for its salaried employees (the "Salaried Plan"), the other for its executives (the "Executive Plan"). Members of the Salaried Plan included seven employees for whom the United Steelworkers ("USW") acted as bargaining agent. The Salaried Plan was in the process of being wound up when the *CCAA* proceedings began. The effective date of the wind up was December 31, 2006. The Executive Plan had been closed but not wound up. Overall, the deficiencies of the pension plans' funds concern 49 persons (members of the Salaried Plan and the Executive Plan are referred to collectively as the "Plan Members").

6 Pursuant to the initial order made by Morawetz J. on April 3, 2009, Indalex obtained protection under the *CCAA*. Both plans faced funding deficiencies when Indalex filed for the *CCAA* stay. The wind-up deficiency of the Salaried Plan was estimated at $1.8 million as of December 31, 2008. The funding deficiency of the Executive Plan was estimated at $3.0 million on a wind-up basis as of January 1, 2008.

7 From the beginning of the insolvency proceedings, the Indalex Group's reorganization strategy was to sell both Indalex and Indalex U.S. as a going concern while they were under *CCAA* and Chapter 11 protection. To this end, Indalex and Indalex U.S. sought to enter into a common agreement for debtor-in-possession ("DIP") financing under which the two companies could draw from joint credit facilities and would guarantee each other's liabilities.

8 Indalex's financial distress threatened the interests of all the Plan Members. If the reorganization failed and Indalex were liquidated under the *Bankruptcy and Insolvency Act*, R.S.C.

1985, c. B-3 ("*BIA*"), they would not have recovered any of their claims against Indalex for the underfunded pension liabilities, because the priority created by the provincial statute would not be recognized under the federal legislation: *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.). Although the priority was not rendered ineffective by the *CCAA*, the Plan Members' position was uncertain.

9 The Indalex Group solicited terms from a variety of possible DIP lenders. In the end, it negotiated an agreement with a syndicate consisting of the pre-filing senior secured creditors. On April 8, 2009, the *CCAA* court issued an Amended and Restated Initial Order ("Amended Initial Order") authorizing Indalex to borrow US$24.4 million from the DIP lenders and grant them priority over all other creditors ("DIP charge") in that amount. In his endorsement of the order, Morawetz J. made a finding that Indalex would be unable to achieve a going-concern solution without DIP financing. Such financing was necessary to support Indalex's business until the sale could be completed.

10 The Plan Members did not participate in the initial proceedings. The initial stay had been granted *ex parte*. The *CCAA* judge ordered Indalex to serve a copy of the stay order on every creditor owed $5,000 or more within 10 days of the initial order of April 3. As of April 8, when the motion to amend the initial order was heard, none of the Executive Plan's members had been served with that order; nor did any of them receive notice of the motion to amend it. The USW did receive short notice, but chose not to attend. Morawetz J. authorized Indalex to proceed on the basis of an abridged time for service. The Plan Members were given notice of all subsequent proceedings. None of the Plan Members appealed the Amended Initial Order to contest the DIP charge.

11 On June 12, 2009, Indalex applied for authorization to increase the DIP loan amount to US $29.5 million. At the hearing, the Executive Plan's members initially opposed the motion, seeking to reserve their rights. After it was confirmed that the motion was merely to increase the amount of the DIP charge (without changing the terms of the loan), they withdrew their opposition and the court granted the motion.

12 On April 22, 2009, the court extended the stay of proceedings and approved a marketing process for the sale of Indalex's assets. The Plan Members did not oppose the application to approve the marketing process. Under the approved bidding procedure, the Indalex Group solicited a wide variety of potential buyers.

13 Indalex received a bid from SAPA Holding AB ("SAPA"). It was for approximately US $30 million, and SAPA did not assume responsibility for the pension plans' wind-up deficiencies. According to the Monitor's estimate, the liquidation value of Indalex's assets was US$44.7 million. Indalex brought an application for an order approving a bidding procedure for a competitive auction and deeming SAPA's bid to be a qualifying bid. The Executive Plan's members opposed the application, expressing concern that the pension liabilities would not be assumed. Morawetz

J. nevertheless issued the order on July 2, 2009; in it, he approved the bidding procedure for sale, noting that the Executive Plan's members could raise their objections at the time of approval of the final bid.

14 The bidding procedure did not trigger any competing bids. On July 20, 2009, Indalex and Indalex U.S. brought motions before their respective courts to approve the sale of substantially all their assets under the terms of SAPA's bid. Indalex also moved for approval of an interim distribution of the sale proceeds to the DIP lenders. The Plan Members opposed Indalex's motion. First, they argued that it was estimated that a forced liquidation would produce greater proceeds than SAPA's bid. Second, they contended that their claims had priority over that of the DIP lenders because the unfunded pension liabilities were subject to a statutory deemed trust under the *PBA*. They also contended that Indalex had breached its fiduciary obligations by failing to meet its obligations as a plan administrator throughout the insolvency proceedings.

15 The court dismissed the Plan Members' first objection, holding that there was no evidence supporting the argument that a forced liquidation would be more beneficial to suppliers, customers and the 950 employees. It approved the sale on July 20, 2009. The order in which it did so directed the Monitor to make a distribution to the DIP lenders. With respect to the second objection, however, Campbell J. ordered the Monitor to hold a reserve in an amount to be determined by the Monitor, leaving the Plan Members' arguments based on their right to the proceeds of the sale open for determination at a later date.

16 The sale to SAPA closed on July 31, 2009. The Monitor collected $30.9 million in proceeds. It distributed US$17 million to the DIP lenders, paid certain fees, withheld a portion to cover various costs and retained $6.75 million in reserve pending determination of the Plan Members' rights. At the closing, Indalex owed US$27 million to the DIP lenders. The payment of US$17 million left a US$10 million shortfall in the amount owed to these lenders. The DIP lenders called on Indalex U.S. to cover this shortfall under the guarantee contained in the DIP lending agreement. Indalex U.S. paid the amount of the shortfall. Since Indalex U.S. was, as a term of the guarantee, subrogated to the DIP lenders' priority, it became the highest ranking creditor of Indalex, with a claim for US$10 million.

17 Following the sale of Indalex's assets, its directors resigned. Indalex U.S., a part of Indalex Group, took over the management of Indalex, whose assets were limited to the sale proceeds held by the Monitor. A Unanimous Shareholder Declaration was executed on August 12, 2009; in it, Mr. Keith Cooper was appointed to manage Indalex's affairs. Mr. Cooper was an employee of FTI Consulting Inc.

18 In accordance with the right reserved by the court on July 20, 2009, the Plan Members brought motions on August 28, 2009 for a declaration that a deemed trust equal in amount to the unfunded pension liability was enforceable against the proceeds of the sale. They contended that

they had priority over the secured creditors pursuant to s. 57(4) of the PBA and s. 30(7) of the *PPSA*. Indalex, in turn, brought a motion for an assignment in bankruptcy to secure the priority regime it argued for in opposing the Plan Members' motions.

19 On October 14, 2009, while judgment was pending, Indalex U.S. converted the Chapter 11 restructuring proceeding in the U.S. into a Chapter 7 liquidation proceeding. On November 5, 2009, the Superintendent of Financial Services ("Superintendent") appointed the actuarial firm of Morneau Sobeco Limited Partnership ("Morneau") to replace Indalex as administrator of the plans.

20 On February 18, 2010, Campbell J. dismissed the Plan Members' motions, concluding that the deemed trust did not apply to the wind-up deficiencies, because the associated payments were not "due" or "accruing due" as of the date of the wind up. He found that the Executive Plan did not have a wind-up deficiency, since it had not yet been wound up. He thus found it unnecessary to rule on Indalex's motion for an assignment in bankruptcy (2010 ONSC 1114, 79 C.C.P.B. 301 (Ont. S.C.J. [Commercial List])). The Plan Members appealed the dismissal of their motions.

21 The Ontario Court of Appeal allowed the Plan Members' appeals. It found that the deemed trust created by s. 57(4) of the *PBA* applies to all amounts due with respect to plan wind-up deficiencies. Although the court noted that it was likely that no deemed trust existed for the Executive Plan on the plain meaning of the provision, it declined to address this question, because it found that the Executive Plan's members had a claim arising from Indalex's breach of its fiduciary obligations in failing to adequately protect the Plan Members' interests (2011 ONCA 265, 104 O.R. (3d) 641 (Ont. C.A.)).

22 The Court of Appeal concluded that a constructive trust was an appropriate remedy for Indalex's breach of its fiduciary obligations. The court was of the view that this remedy did not harm the DIP lenders, but affected only Indalex U.S. It imposed a constructive trust over the reserved fund in favour of the Plan Members. Turning to the question of distribution, it also found that the deemed trust had priority over the DIP charge because the issue of federal paramountcy had not been raised when the Amended Initial Order was issued, and that Indalex had stated that it intended to comply with any deemed trust requirements. The Court of Appeal found that there was nothing in the record to suggest that not applying the paramountcy doctrine would frustrate Indalex's ability to restructure.

23 The Court of Appeal ordered the Monitor to make a distribution from the reserve fund in order to pay the amount of each plan's deficiency. It also issued a costs endorsement that approved payment of the costs of the Executive Plan's members from that plan's fund, but declined to order the payment of costs to the USW from the fund of the Salaried Plan (2011 ONCA 578, 81 C.B.R. (5th) 165 (Ont. C.A.)).

24 The Monitor, together with Sun Indalex, a secured creditor of Indalex U.S., and George L. Miller, Indalex U.S.'s trustee in bankruptcy, appeals the Court of Appeal's order. Both the

Superintendent and Morneau support the Plan Members' position as respondents. A number of stakeholders are also participating in the appeals to this Court. In addition, USW appeals the costs endorsement. As I agree with my colleague Cromwell J. on the appeal from the costs endorsement, I will not deal with it in these reasons.

II. Issues

25 The appeals raise four issues:

1. Does the deemed trust provided for in s. 57(4) of the *PBA* apply to wind-up deficiencies?

2. If so, does the deemed trust supersede the DIP charge?

3. Did Indalex have any fiduciary obligations to the Plan Members when making decisions in the context of the insolvency proceedings?

4. Did the Court of Appeal properly exercise its discretion in imposing a constructive trust to remedy the breaches of fiduciary duties?

III. Analysis

A. Does the Deemed Trust Provided for in Section 57(4) of the PBA Apply to Windup Deficiencies?

26 The first issue is whether the statutory deemed trust provided for in s. 57(4) of the *PBA* extends to wind-up deficiencies. This question is one of statutory interpretation, which requires examination of both the wording and context of the relevant provisions of the *PBA*. Section 57(4) of the *PBA* affords protection to members of a pension plan with respect to their employer's contributions upon wind up of the plan. The provision reads:

> **57.** . . .
>
> (4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

27 The most obvious interpretation is that where a plan is wound up, this provision protects all contributions that have accrued but are not yet due. The words used appear to include the contribution the employer is to make where a plan being wound up is in a deficit position. This quite straightforward interpretation, which is consistent with both the historical broadening of the protection and the remedial purpose of the provision, is being challenged on the basis of a narrow definition of the word "accrued". I do not find that this argument justifies limiting the protection afforded to plan members by the Ontario legislature.

28 The *PBA* sets out the rules for the operation of funded contributory defined benefit pension plans in Ontario. In an ongoing plan, an employer must pay into a fund all contributions it withholds from its employees' salaries. In addition, while the plan is ongoing, the employer must make two kinds of payments. One relates to current service contributions — the employer's own regular contributions to the pension fund as required by the plan. The other ensures that the fund is sufficient to meet the plan's liabilities. The employees' interest in having the contributions made while the plan is ongoing is protected by a deemed trust provided for in s. 57(3) of the *PBA*.

29 The *PBA* also establishes a comprehensive scheme for winding up a pension plan. Section 75(1)(a) imposes on the employer the obligation to "pay" an amount equal to the total of all "payments" that are due or that have accrued and have not been paid into the fund. In addition, s. 75(1)(b) sets out a formula for calculating the amount that must be paid to ensure that the fund is sufficient to cover all liabilities upon wind up. Within six months after the effective date of the wind up, the plan administrator must file a wind-up report that lists the plan's assets and liabilities as of the date of the wind up. If the wind-up report shows an actuarial deficit, the employer must make wind-up deficiency payments. Consequently, s. 75(1)(a) and (b) jointly determine the amount of the contributions owed when a plan is wound up.

30 It is common ground that the contributions provided for in s. 75(1)(a) are covered by the wind-up deemed trust. The only question is whether it also applies to the deficiency payments required by s. 75(1)(b). I would answer this question in the affirmative in view of the provision's wording, context and purpose.

31 It is readily apparent that the wind-up deemed trust provision (s. 57(4) PBA) does not place an express limit on the "employer contributions accrued to the date of the wind up but not yet due", and I find no reason to exclude contributions paid under s. 75(1)(b). Section 75(1)(a) explicitly refers to "an amount equal to the total of all payments" that have *accrued*, even those that were not yet due as of the date of the wind up, whereas s. 75(1)(b) contemplates an "amount" that is calculated on the basis of the value of assets and of liabilities that have *accrued* when the plan is wound up. Section 75(1) reads as follows:

> **75.** (1) Where a pension plan is wound up, the employer shall pay into the pension fund,
>
> (a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and
>
> (b) an amount equal to the amount by which,
>
> (i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

32 Since both the amount with respect to payments (s. 75(1)(a)) and the one ascertained by subtracting the assets from the liabilities accrued as of the date of the wind up (s. 75(1)(b)) are to be paid upon wind up as employer contributions, they are both included in the ordinary meaning of the words of s. 57(4) of the *PBA*: "amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations". As I mentioned above, this reasoning is challenged in respect of s. 75(1)(b), not of s. 75(1)(a).

33 The appellant Sun Indalex argues that since the deficiency is not finally quantified until well after the effective date of the wind up, the liability of the employer cannot be said to have accrued. The Monitor adds that the payments the employer must make to satisfy its wind-up obligations may change over the five-year period within which s. 31 of the *PBA* Regulations, R.R.O. 1990, Reg. 909, requires that they be made. These parties illustrate their argument by referring to what occurred to the Salaried Plan's fund in the case at bar. In 2007-8, Indalex paid down the vast majority of the $1.6 million wind-up deficiency associated with the Salaried Plan as estimated in 2006. By the end of 2008, however, this deficiency had risen back up to $1.8 million as a result of a decline in the fund's asset value. According to this argument, the amount could not have accrued as of the date of the wind up, because it could not be calculated with certainty.

34 Unlike my colleague Cromwell J., I find this argument unconvincing. I instead agree with the Court of Appeal on this point. The wind-up deemed trust concerns "employer contributions accrued to the date of the wind up but not yet due under the plan or regulations". Since the employees cease to accumulate entitlements when the plan is wound up, the entitlements that are used to calculate the contributions have all been accumulated before the wind-up date. Thus the liabilities of the employer are complete — have accrued — before the wind up. The distinction between my approach and the one Cromwell J. takes is that he requires that it be possible to perform the calculation before the date of the wind up, whereas I am of the view that the time when the calculation is actually made is not relevant as long as the liabilities are assessed as of the date of the wind up. The date at which the liabilities are *reported* or the employer's *option* to spread its contributions as allowed by the regulations does not change the legal nature of the contributions.

35 In *Ontario Hydro-Electric Power Commission v. Albright* (1922), 64 S.C.R. 306 (S.C.C.), Duff J. considered the meaning of the word "accrued" in interpreting the scope of a covenant. He found that

> the word "accrued" according to well recognized usage has, as applied to rights or liabilities the meaning simply of completely constituted — and it may have this meaning although it appears from the context that the right completely constituted or the liability completely constituted is one which is only exercisable or enforceable *in futuro* — a debt for example which is *debitum in praesenti solvendum in futuro*.
>
> [Emphasis added; pp. 312-13.]

36 Thus, a contribution has "accrued" when the liabilities are completely constituted, even if the payment itself will not fall due until a later date. If this principle is applied to the facts of this case, the liabilities related to contributions to the fund allocated for payment of the pension benefits contemplated in s. 75(1)(b) are completely constituted at the time of the wind up, because no pension entitlements arise after that date. In other words, no new liabilities accrue at the time of or after the wind up. Even the portion of the contributions that is related to the elections plan members may make upon wind up has "accrued to the date of the wind up", because it is based on rights employees earned before the wind-up date.

37 The fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes (*Canadian Pacific Ltd. v. Ontario (Minister of Revenue)* (1998), 41 O.R. (3d) 606 (Ont. C.A.), at p. 621). The use of the word "accrued" does not limit liabilities to amounts that can be determined with precision. As a result, the words "contributions accrued" can encompass the contributions mandated by s. 75(1)(b) of the *PBA*.

38 The legislative history supports my conclusion that wind-up deficiency contributions are protected by the deemed trust provision. The Ontario legislature has consistently expanded the protection afforded in respect of pension plan contributions. I cannot therefore accept an interpretation that would represent a drawback from the protection extended to employees. I will not reproduce the relevant provisions, since my colleague Cromwell J. quotes them.

39 The original statute provided solely for the employer's obligation to pay all amounts required to be paid to meet the test for solvency (*The Pension Benefits Act, 1965*, S.O. 1965, c. 96, s. 22(2)), but the legislature subsequently afforded employees the protection of a deemed trust on the employer's assets in an amount equal to the sums withheld from employees as contributions and sums due from the employer as service contributions (s. 23*a*, added by *The Pension Benefits Amendment Act, 1973*, S.O. 1973, c. 113, s. 6). In a later version, it protected not only contributions

that were due, but also those that had accrued, with the amounts being calculated as if the plan had been wound up (*The Pension Benefits Amendment Act, 1980*, S.O. 1980, c. 80).

40 Whereas *all* employer contributions were originally covered by a single provision, the legislature crafted a separate provision in 1980 that specifically imposed on the employer the obligation to fund the wind-up deficiency. At the time, it was clear from the words used in the provision that the amount related to the wind-up deficiency was excluded from the deemed trust protection (*The Pension Benefits Amendment Act, 1980*). In 1983, the legislature made a distinction between the deemed trust for ongoing employer contributions and the one for certain payments to be made upon wind up (ss. 23(4)(a) and 23(4)(b), added by *Pension Benefits Amendment Act, 1983*, S.O. 1983, c. 2, s. 3). In that version, the wind-up deficiency payments were still excluded from the deemed trust. However, the legislature once again made changes to the protection in 1987. The 1987 version is, in substance, the one that applies in the case at bar. In the *Pension Benefits Act, 1987*, S.O. 1987, c. 35, a specific wind-up deemed trust was maintained, but the wind up deficiency payments were no longer excluded from it, because the limitation that had been imposed until then with respect to payments that were due or had accrued while the plan was ongoing had been eliminated. My comments to the effect that the previous versions excluded the wind-up deficiency payments do not therefore apply to the 1987 statute, since it was materially different.

41 Whereas it is clear from the 1983 amendments that the deemed trust provided for in s. 23(4)(b) was intended to include only current service costs and special payments, this is less clear from the subsequent versions of the *PBA*. To give meaning to the 1987 amendment, I have to conclude that the words refer to a deemed trust in respect of *all* "employer contributions accrued to the date of the wind up but not yet due under the plan or regulations".

42 The employer's liability upon wind up is now set out in a single section which elegantly parallels the wind-up deemed trust provision. It can be seen from the legislative history that the protection has expanded from (1) only the service contributions that were due, to (2) amounts payable calculated as if the plan had been wound up, to (3) amounts that were due and had accrued upon wind up but excluding the wind-up deficiency payments, to (4) all amounts due and accrued upon wind up.

43 Therefore, in my view, the legislative history leads to the conclusion that adopting a narrow interpretation that would dissociate the employer's payment provided for in s. 75(1)(b) of the *PBA* from the one provided for in s. 75(1)(a) would be contrary to the Ontario legislature's trend toward broadening the protection. Since the provision respecting wind-up payments sets out the amounts that are owed upon wind up, I see no historical, legal or logical reason to conclude that the wind-up deemed trust provision does not encompass all of them.

44 Thus, I am of the view that the words and context of s. 57(4) lend themselves easily to an interpretation that includes the wind-up deficiency payments, and I find additional support for this

in the purpose of the provision. The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. This purpose militates against adopting the limited scope proposed by Indalex and some of the interveners. In the case of competing priorities between creditors, the remedial purpose favours an approach that includes all wind-up payments in the value of the deemed trust in order to achieve a broad protection.

45 In sum, the relevant provisions, the legislative history and the purpose are all consistent with inclusion of the wind-up deficiency in the protection afforded to members with respect to employer contributions upon the wind up of their pension plan. I therefore find that the Court of Appeal correctly held with respect to the Salaried Plan, which had been wound up as of December 31, 2006, that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency.

46 The situation is different with respect to the Executive Plan. Unlike s. 57(3), which provides that the deemed trust protecting employer contributions exists while a plan is ongoing, s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up. This is a choice made by the Ontario legislature. I would not interfere with it. Thus, the deemed trust entitlement arises only once the condition precedent of the plan being wound up has been fulfilled. This is true even if it is certain that the plan will be wound up in the future. At the time of the sale, the Executive Plan was in the process of being, but had not yet been, wound up. Consequently, the deemed trust provision does not apply to the employer's wind-up deficiency payments in respect of that plan.

47 The Court of Appeal declined to decide whether a deemed trust arose in relation to the Executive Plan, stating that it was unnecessary to decide this issue. However, the court expressed concern that a reasoning that deprived the Executive Plan's members of the benefit of a deemed trust would mean that a company under *CCAA* protection could avoid the priority of the *PBA* deemed trust simply by not winding up an underfunded pension plan. The fear was that Indalex could have relied on its own inaction to avoid the consequences that flow from a wind up. I am not convinced that the Court of Appeal's concern has any impact on the question whether a deemed trust exists, and I doubt that an employer could avoid the consequences of such a security interest simply by refusing to wind up a pension plan. The Superintendent may take a number of steps, including ordering the wind up of a pension plan under s. 69(1) of the *PBA* in a variety of circumstances (see s. 69(1)(d), *PBA*). The Superintendent did not choose to order that the plan be wound up in this case.

B. Does the Deemed Trust Supersede the DIP Charge?

48 The finding that the interests of the Salaried Plan's members in all the employer's wind-up contributions to the Salaried Plan are protected by a deemed trust does not mean that part of the money reserved by the Monitor from the sale proceeds must be remitted to the Salaried Plan's

fund. This will be the case only if the provincial priorities provided for in s. 30(7) of the *PPSA* ensure that the claim of the Salaried Plan's members has priority over the DIP charge. Section 30(7) reads as follows:

> (7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the *Employment Standards Act* or under the *Pension Benefits Act*.

The effect of s. 30(7) is to enable the Salaried Plan's members to recover from the reserve fund, insofar as it relates to an account or inventory and its proceeds in Ontario, ahead of all other secured creditors.

49 The Appellants argue that any provincial deemed trust is subordinate to the DIP charge authorized by the *CCAA* order. They put forward two central arguments to support their contention. First, they submit that the *PBA* deemed trust does not apply in *CCAA* proceedings because the relevant priorities are those of the federal insolvency scheme, which do not include provincial deemed trusts. Second, they argue that by virtue of the doctrine of federal paramountcy the DIP charge supersedes the *PBA* deemed trust.

50 The Appellants' first argument would expand the holding of *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), so as to apply federal bankruptcy priorities to *CCAA* proceedings, with the effect that claims would be treated similarly under the *CCAA* and the *BIA*. In *Century Services*, the Court noted that there are points at which the two schemes converge:

> Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. [para. 23]

51 In order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements. Yet this does not mean that courts may read bankruptcy priorities into the *CCAA* at will. Provincial legislation defines the priorities to which creditors are entitled until that legislation is ousted by Parliament. Parliament did not expressly apply all bankruptcy priorities either to *CCAA* proceedings or to proposals under the *BIA*. Although the creditors of a corporation that is attempting to reorganize may bargain in the shadow of their bankruptcy entitlements, those entitlements remain only shadows until bankruptcy occurs. At the outset of the insolvency proceedings, Indalex opted for a process governed by the *CCAA*, leaving no doubt that although it wanted to protect its employees' jobs, it would not survive as their employer. This was not a case in which a failed arrangement forced a company into liquidation under the *BIA*. Indalex achieved the goal it was pursuing. It chose to sell its assets under the *CCAA*, not the *BIA*.

52 The provincial deemed trust under the *PBA* continues to apply in *CCAA* proceedings, subject to the doctrine of federal paramountcy (*Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, [2004] 1 S.C.R. 60 (S.C.C.), at para. 43). The Court of Appeal therefore did not err in finding that at the end of a *CCAA* liquidation proceeding, priorities may be determined by the *PPSA*'s scheme rather than the federal scheme set out in the *BIA*.

53 The Appellants' second argument is that an order granting priority to the plan's members on the basis of the deemed trust provided for by the Ontario legislature would be unconstitutional in that it would conflict with the order granting priority to the DIP lenders that was made under the *CCAA*. They argue that the doctrine of paramountcy resolves this conflict, as it would render the provincial law inoperative to the extent that it is incompatible with the federal law.

54 There is a preliminary question that must be addressed before determining whether the doctrine of paramountcy applies in this context. This question arises because the Court of Appeal found that although the *CCAA* court had the power to authorize a DIP charge that would supersede the deemed trust, the order in this case did not have such an effect because paramountcy had not been invoked. As a result, the priority of the deemed trust over secured creditors by virtue of s. 30(7) of the *PPSA* remained in effect, and the Plan Members' claim ranked in priority to the claim of the DIP lenders established in the *CCAA* order.

55 With respect, I cannot accept this approach to the doctrine of federal paramountcy. This doctrine resolves conflicts in the application of overlapping valid provincial and federal legislation (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.), at paras. 32 and 69). Paramountcy is a question of law. As a result, subject to the application of the rules on the admissibility of new evidence, it can be raised even if it was not invoked in an initial proceeding.

56 A party relying on paramountcy must "demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law" (*Canadian Western Bank*, at para. 75). This Court has in fact applied the doctrine of paramountcy in the area of bankruptcy and insolvency to come to the conclusion that a provincial legislature cannot, through measures such as a deemed trust, affect priorities granted under federal legislation (*Husky Oil*).

57 None of the parties question the validity of either the federal provision that enables a *CCAA* court to make an order authorizing a DIP charge or the provincial provision that establishes the priority of the deemed trust. However, in considering whether the *CCAA* court has, in exercising its discretion to assess a claim, validly affected a provincial priority, the reviewing court should remind itself of the rule of interpretation stated in *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.) (at p. 356), and reproduced in *Canadian Western Bank* (at para. 75):

> When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.

58 In the instant case, the *CCAA* judge, in authorizing the DIP charge, did not consider the fact that the Salaried Plan's members had a claim that was protected by a deemed trust, nor did he explicitly note that ordinary creditors, such as the Executive Plan's members, had not received notice of the DIP loan motion. However, he did consider factors that were relevant to the remedial objective of the *CCAA* and found that Indalex had in fact demonstrated that the *CCAA*'s purpose would be frustrated without the DIP charge. It will be helpful to quote the reasons he gave on April 17, 2009 in authorizing the DIP charge ((2009), 52 C.B.R. (5th) 61 (Ont. S.C.J. [Commercial List])):

> (a) the Applicants are in need of the additional financing in order to support operations during the period of a going concern restructuring;
>
> (b) there is a benefit to the breathing space that would be afforded by the DIP Financing that will permit the Applicants to identify a going concern solution;
>
> (c) there is no other alternative available to the Applicants for a going concern solution;
>
> (d) a stand-alone solution is impractical given the integrated nature of the business of Indalex Canada and Indalex U.S.;
>
> (e) given the collateral base of Indalex U.S., the Monitor is satisfied that it is unlikely that the Post-Filing Guarantee with respect to the U.S. Additional Advances will ever be called and the Monitor is also satisfied that the benefits to stakeholders far outweighs the risk associated with this aspect of the Post-Filing Guarantee;
>
> (f) the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing against the assets of the Applicants;
>
> (g) the Pre-Filing Security has been reviewed by counsel to the Monitor and it appears that the unsecured creditors of the Canadian debtors will be in no worse position as a result of the Post-Filing Guarantee than they were otherwise, prior to the CCAA filing, as a result of the limitation of the Canadian guarantee set forth in the draft Amended and Restated Initial Order ...; and
>
> (h) the balancing of the prejudice weighs in favour of the approval of the DIP Financing. [para. 9]

59 Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the *CCAA* judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12, 2009 are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate" (2009 CanLII 37906 [2009 CarswellOnt 4263 (Ont. S.C.J.)], at paras. 7 and 8).

60 In this case, compliance with the provincial law necessarily entails defiance of the order made under federal law. On the one hand, s. 30(7) of the *PPSA* required a part of the proceeds from the sale related to assets described in the provincial statute to be paid to the plan's administrator before other secured creditors were paid. On the other hand, the Amended Initial Order provided that the DIP charge ranked in priority to "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise" (para. 45). Granting priority to the DIP lenders subordinates the claims of other stakeholders, including the Plan Members. This court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

C. Did Indalex Have Fiduciary Obligations to the Plan Members?

61 The fact that the DIP financing charge supersedes the deemed trust or that the interests of the Executive Plan's members are not protected by the deemed trust does not mean that Plan Members have no right to receive money out of the reserve fund. What remains to be considered is whether an equitable remedy, which could override all priorities, can and should be granted for a breach by Indalex of a fiduciary duty.

62 The first stage of a fiduciary duty analysis is to determine whether and when fiduciary obligations arise. The Court has recognized that there are circumstances in which a pension plan administrator has fiduciary obligations to plan members both at common law and under statute (*Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273 (S.C.C.), at para. 41). It is clear that the indicia of a fiduciary relationship attach in this case between the Plan Members and Indalex as plan administrator. Sun Indalex and the Monitor do not dispute this proposition.

63 However, Sun Indalex and the Monitor argue that the employer has a fiduciary duty only when it acts as plan administrator — when it is wearing its administrator's "hat". They contend that, outside the plan administration context, when directors make decisions in the best interests of the corporation, the employer is wearing solely its "corporate hat". On this view, decisions made by the employer in its corporate capacity are not burdened by the corporation's fiduciary obligations to its pension plan members and, consequently, cannot be found to conflict with plan members' interests. This is not the correct approach to take in determining the scope of the fiduciary obligations of an employer acting as plan administrator.

64 Only persons or entities authorized by the *PBA* can act as plan administrators (ss. 1(1) and 8(1)(a)). The employer is one of them. A corporate employer that chooses to act as plan administrator accepts the fiduciary obligations attached to that function. Since the directors of a corporation also have a fiduciary duty to the corporation, the fact that the corporate employer can act as administrator of a pension plan means that s. 8(1)(a) of the *PBA* is based on the assumption that not all decisions taken by directors in managing a corporation will result in conflict with the corporation's duties to the plan's members. However, the corporate employer must be prepared to resolve conflicts where they arise. Reorganization proceedings place considerable burdens on any debtor, but these burdens do not release an employer that acts as plan administrator from its fiduciary obligations.

65 Section 22(4) of the *PBA* explicitly provides that a plan administrator must not permit its own interest to conflict with its duties in respect of the pension fund. Thus, where an employer's own interests do not converge with those of the plan's members, it must ask itself whether there is a potential conflict and, if so, what can be done to resolve the conflict. Where interests do conflict, I do not find the two hats metaphor helpful. The solution is not to determine whether a given decision can be classified as being related to either the management of the corporation or the administration of the pension plan. The employer may well take a sound management decision, and yet do something that harms the interests of the plan's members. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a "corporate hat". What is important is to consider the consequences of the decision, not its nature.

66 When the interests the employer seeks to advance on behalf of the corporation conflict with interests the employer has a duty to preserve as plan administrator, a solution must be found to ensure that the plan members' interests are taken care of. This may mean that the corporation puts the members on notice, or that it finds a replacement administrator, appoints representative counsel or finds some other means to resolve the conflict. The solution has to fit the problem, and the same solution may not be appropriate in every case.

67 In the instant case, Indalex's fiduciary obligations as plan administrator did in fact conflict with management decisions that needed to be taken in the best interests of the corporation. Indalex had a number of responsibilities as plan administrator. For example, s. 56(1) of the *PBA* required it to ensure that contributions were paid when due. Section 56(2) required that it notify the Superintendent if contributions were not paid when due. It was also up to Indalex under s. 59 to commence proceedings to obtain payment of contributions that were due but not paid. Indalex, as an employer, paid all the contributions that were due. However, its insolvency put contributions that had accrued to the date of the wind up at risk. In an insolvency context, the administrator's claim for contributions that have accrued is a provable claim.

68 In the context of this case, the fact that Indalex, as plan administrator, might have to claim accrued contributions from itself means that it would have to simultaneously adopt conflicting positions on whether contributions had accrued as of the date of liquidation and whether a deemed trust had arisen in respect of wind-up deficiencies. This is indicative of a clear conflict between Indalex's interests and those of the Plan Members. As soon as it saw, or ought to have seen, a potential for conflict, Indalex should have taken steps to ensure that the interests of the Plan Members were protected. It did not do so. On the contrary, it contested the position the Plan Members advanced. At the very least, Indalex breached its duty to avoid conflicts of interest (s. 22(4), *PBA*).

69 Since the Plan Members seek an equitable remedy, it is important to identify the point at which Indalex should have moved to ensure that their interests were safeguarded. Before doing so, I would stress that factual contexts are needed to analyse conflicts between interests, and that it is neither necessary nor useful to attempt to map out all the situations in which conflicts may arise.

70 As I mentioned above, insolvency puts the employer's contributions at risk. This does not mean that the decision to commence insolvency proceedings entails on its own a breach of a fiduciary obligation. The commencement of insolvency proceedings in this case on April 3, 2009 in an emergency situation was explained by Timothy R. J. Stubbs, the then-president of Indalex. The company was in default to its lender, it faced legal proceedings for unpaid bills, it had received a termination notice effective April 6 from its insurers, and suppliers had stopped supplying on credit. These circumstances called for urgent action by Indalex lest a creditor start bankruptcy proceedings and in so doing jeopardize ongoing operations and jobs. Several facts lead me to conclude that the stay sought in this case did not, in and of itself, put Indalex in a conflict of interest.

71 First, a stay operates only to freeze the parties' rights. In most cases, stays are obtained *ex parte*. One of the reasons for refraining from giving notice of the initial stay motion is to avert a situation in which creditors race to court to secure benefits that they would not enjoy in insolvency. Subjecting as many creditors as possible to a single process is seen as a way to treat all of them more equitably. In this context, plan members are placed on the same footing as the other creditors

and have no special entitlement to notice. Second, one of the conclusions of the order Indalex sought was that it was to be served on all creditors, with a few exceptions, within 10 days. The notice allowed any interested party to apply to vary the order. Third, Indalex was permitted to pay all pension benefits. Although the order excluded special solvency payments, no ruling was made at that point on the merits of the creditors' competing claims, and a stay gave the Plan Members the possibility of presenting their arguments on the deemed trust rather than losing it altogether as a result of a bankruptcy proceeding, which was the alternative.

72 Whereas the stay itself did not put Indalex in a conflict of interest, the proceedings that followed had adverse consequences. On April 8, 2009, Indalex brought a motion to amend and restate the initial order in order to apply for DIP financing. This motion had been foreseen. Mr. Stubbs had mentioned in the affidavit he signed in support of the initial order that the lenders had agreed to extend their financing, but that Indalex would be in need of authorization in order to secure financing to continue its operations. However, the initial order had not yet been served on the Plan Members as of April 8. Short notice of the motion was given to the USW rather than to all the individual Plan Members, but the USW did not appear. The Plan Members were quite simply not represented on the motion to amend the initial stay order requesting authorization to grant the DIP charge.

73 In seeking to have a court approve a form of financing by which one creditor was granted priority over all other creditors, Indalex was asking the *CCAA* court to override the Plan Members' priority. This was a case in which Indalex's directors permitted the corporation's best interests to be put ahead of those of the Plan Members. The directors may have fulfilled their fiduciary duty to Indalex, but they placed Indalex in the position of failing to fulfil its obligations as plan administrator. The corporation's interest was to seek the best possible avenue to survive in an insolvency context. The pursuit of this interest was not compatible with the plan administrator's duty to the Plan Members to ensure that all contributions were paid into the funds. In the context of this case, the plan administrator's duty to the Plan Members meant, in particular, that it should at least have given them the opportunity to present their arguments. This duty meant, at the very least, that they were entitled to reasonable notice of the DIP financing motion. The terms of that motion, presented without appropriate notice, conflicted with the interests of the Plan Members. Because Indalex supported the motion asking that a priority be granted to its lender, it could not at the same time argue for a priority based on the deemed trust.

74 The Court of Appeal found a number of other breaches. I agree with Cromwell J. that none of the subsequent proceedings had a negative impact on the Plan Members' rights. The events that occurred, in particular the second DIP financing motion and the sale process, were predictable and, in a way, typical of reorganizations. Notice was given in all cases. The Plan Members were represented by able counsel. More importantly, the court ordered that funds be reserved and that a full hearing be held to argue the issues.

75 The Monitor and George Miller, Indalex U.S.'s trustee in bankruptcy, argue that the Plan Members should have appealed the Amended Initial Order authorizing the DIP charge, and were precluded from subsequently arguing that their claim ranked in priority to that of the DIP lenders. They take the position that the collateral attack doctrine bars the Plan Members from challenging the DIP financing order. This argument is not convincing. The Plan Members did not receive notice of the motion to approve the DIP financing. Counsel for the Executive Plan's members presented the argument of that plan's members at the first opportunity and repeated it each time he had an occasion to do so. The only time he withdrew their opposition was at the hearing of the motion for authorization to increase the DIP loan amount after being told that the only purpose of the motion was to increase the amount of the authorized loan. The *CCAA* judge set a hearing date for the very purpose of presenting the arguments that Indalex, as plan administrator, could have presented when it requested the amendment to the initial order. It cannot now be argued, therefore, that the Plan Members are barred from defending their interests by the collateral attack doctrine.

D. Would an Equitable Remedy Be Appropriate in the Circumstances?

76 The definition of "secured creditor" in s. 2 of the *CCAA* includes a trust in respect of the debtor's property. The Amended Initial Order (at para. 45) provided that the DIP lenders' claims ranked in priority to all trusts, "statutory or otherwise". Indalex U.S. was subrogated to the DIP lenders' claim by operation of the guarantee in the DIP lending agreement.

77 Counsel for the Executive Plan's members argues that the doctrine of equitable subordination should apply to subordinate Indalex U.S.'s subrogated claim to those of the Plan Members. This Court discussed the doctrine of equitable subordination in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558 (S.C.C.), but did not endorse it, leaving it for future determination (p. 609). I do not need to endorse it here either. Suffice to say that there is no evidence that the lenders committed a wrong or that they engaged in inequitable conduct, and no party has contested the validity of Indalex U.S.'s payment of the US$10 million shortfall.

78 This leaves the constructive trust remedy ordered by the Court of Appeal. It is settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property. I agree with my colleague Cromwell J. that this condition is not met in the case at bar. I adopt his reasoning on this issue.

79 Moreover, I am of the view that it was unreasonable for the Court of Appeal to reorder the priorities in this case. The breach of fiduciary duty identified in this case is, in substance, the lack of notice. Since the Plan Members were allowed to fully argue their case at a hearing specifically held to adjudicate their rights, the *CCAA* court was in a position to fully appreciate the parties' positions.

80 It is difficult to see what gains the Plan Members would have secured had they received notice of the motion that resulted in the Amended Initial Order. The *CCAA* judge made it clear, and his finding is supported by logic, that there was no alternative to the DIP loan that would allow for the sale of the assets on a going-concern basis. The Plan Members presented no evidence to the contrary. They rely on conjecture alone. The Plan Members invoke other cases in which notice was given to plan members and in which the members were able to fully argue their positions. However, in none of those cases were plan members able to secure any additional benefits. Furthermore, the Plan Members were allowed to fully argue their case. As a result, even though Indalex breached its fiduciary duty to notify the Plan Members of the motion that resulted in the Amended Initial Order, their claim remains subordinate to that of Indalex U.S.

IV. Conclusion

81 There are good reasons for giving special protection to members of pension plans in insolvency proceedings. Parliament considered doing so before enacting the most recent amendments to the *CCAA*, but chose not to (*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, in force September 18, 2009, SI/2009-68; see also Bill C-501, *An Act to amend the Bankruptcy and Insolvency Act and other Acts (pension protection)*, 3rd Sess., 40th Parl., March 24, 2010 (subsequently amended by the Standing Committee on Industry, Science and Technology, March 1, 2011)). A report of the Standing Senate Committee on Banking, Trade and Commerce gave the following reasons for this choice:

> Although the Committee recognizes the vulnerability of current pensioners, we do not believe that changes to the BIA regarding pension claims should be made at this time. Current pensioners can also access retirement benefits from the Canada/Quebec Pension Plan, and the Old Age Security and Guaranteed Income Supplement programs, and may have private savings and Registered Retirement Savings Plans that can provide income for them in retirement. The desire expressed by some of our witnesses for greater protection for pensioners and for employees currently participating in an occupational pension plan must be balanced against the interests of others. As we noted earlier, insolvency — at its essence — is characterized by insufficient assets to satisfy everyone, and choices must be made.
>
> The Committee believes that granting the pension protection sought by some of the witnesses would be sufficiently unfair to other stakeholders that we cannot recommend the changes requested. For example, we feel that super priority status could unnecessarily reduce the moneys available for distribution to creditors. In turn, credit availability and the cost of credit could be negatively affected, and all those seeking credit in Canada would be disadvantaged. *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at p. 98; see also p. 88.)

82 In an insolvency process, a *CCAA* court must consider the employer's fiduciary obligations to plan members as their plan administrator. It must grant a remedy where appropriate. However, courts should not use equity to do what they wish Parliament had done through legislation.

83 In view of the fact that the Plan Members were successful on the deemed trust and fiduciary duty issues, I would not order costs against them either in the Court of Appeal or in this Court.

84 I would therefore allow the main appeals without costs in this Court, set aside the orders made by the Court of Appeal, except with respect to orders contained in paras. 9 and 10 of the judgment of the Court of Appeal in the former executive members' appeal and restore the orders of Campbell J. dated February 18, 2010. I would dismiss USW's costs appeal without costs.

***Cromwell J.*:**

I. Introduction

85 When a business becomes insolvent, many interests are at risk. Creditors may not be able to recover their debts, investors may lose their investments and employees may lose their jobs. If the business is the sponsor of an employee pension plan, the benefits promised by the plan are not immune from that risk. The circumstances leading to these appeals show how that risk can materialize. Pension plans and creditors find themselves in a zero-sum game with not enough money to go around. At a very general level, this case raises the issue of how the law balances the interests of pension plan beneficiaries with those of other creditors.

86 Indalex Limited, the sponsor and administrator of employee pension plans, became insolvent and sought protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). Although all current contributions were up to date, the company's pension plans did not have sufficient assets to fulfill the pension promises made to their members. In a series of court-sanctioned steps, which were judged to be in the best interests of all stakeholders, the company borrowed a great deal of money to allow it to continue to operate. The parties injecting the operating money were given a super priority over the claims by other creditors. When the business was sold, thereby preserving hundreds of jobs, there was a shortfall between the sale proceeds and the debt. The pension plan beneficiaries thus found themselves in a dispute about the priority of their claims. The appellant, Sun Indalex Finance LLC, claimed it had priority by virtue of the super priority granted in the *CCAA* proceedings. The trustee in bankruptcy of the U.S. Debtors (George Miller) and the Monitor (FTI Consulting) joined in the appeal. The plan beneficiaries claimed that they had priority by virtue of a statutory deemed trust under the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), and a constructive trust arising from the company's alleged breaches of fiduciary duty.

87 The Ontario Court of Appeal sided with the plan beneficiaries and Sun Indalex, the trustee in bankruptcy and the Monitor all appeal. The specific legal points in issue are:

> A. Did the Court of Appeal err in finding that the statutory deemed trust provided for in s. 57(4) of the *PBA* applied to the salaried plan's wind-up deficiency?
>
> B. Did the Court of Appeal err in finding that Indalex breached the fiduciary duties it owed to the pension plan beneficiaries as the plans' administrator and in imposing a constructive trust as a remedy?
>
> C. Did the Court of Appeal err in concluding that the super priority granted in the *CCAA* proceedings did not have priority by virtue of the doctrine of federal paramountcy?
>
> D. Did the Court of Appeal err in its cost endorsement respecting the United Steelworkers ("USW")?

88 My view is that the deemed trust does not apply to the disputed funds, and even if it did, the super priority would override it. I conclude that the corporation failed in its duty to the plan beneficiaries as their administrator and that the beneficiaries ought to have been afforded more procedural protections in the *CCAA* proceedings. However, I also conclude that the Court of Appeal erred in using the equitable remedy of a constructive trust to defeat the super priority ordered by the *CCAA* judge. I would therefore allow the main appeals.

II. Facts and Proceedings Below

A. Overview

89 These appeals concern claims by pension fund members for amounts owed to them by the plans' sponsor and administrator which became insolvent.

90 Indalex Limited is the parent company of three non-operating Canadian companies. I will refer to both Indalex Limited individually and to the group of companies collectively as "Indalex", unless the context requires further clarity. Indalex Limited is the wholly owned subsidiary of its U.S. parent, Indalex Holding Corp. which owned and conducted related operations in the U.S. through its U.S. subsidiaries which I will refer to as the "U.S. debtors".

91 In late March and early April of 2009, Indalex and the U.S. debtors were insolvent and sought protection from their creditors, the former under the Canadian *CCAA*, and the latter under the United States Bankruptcy Code, 11 U.S.C., Chapter 11. The dispute giving rise to these appeals concern the priority granted to lenders in the *CCAA* process for funds advanced to Indalex and whether that priority overrides the claims of two of Indalex's pension plans for funds owed to them.

92 Indalex was the sponsor and administrator of two registered pension plans relevant to these proceedings, one for salaried employees and the other for executive employees. At the time of seeking *CCAA* protection, the salaried plan was being wound up (with a wind-up date of December 31, 2006) and was estimated to have a wind-up deficiency (as of the end of 2007) of roughly $2.252 million. The executive plan, while it was not being wound up, had been closed to new members since 2005. It was estimated to have a deficiency of roughly $2.996 million on wind up. At the time the *CCAA* proceedings were started, all regular current service contributions had been made to both plans.

93 Shortly after Indalex received *CCAA* protection, the *CCAA* judge authorized the company to enter into debtor in possession ("DIP") financing in order to allow it to continue to operate. The court granted the DIP lenders, a syndicate of banks, a "super priority" over "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise": initial order, at para. 35 (joint A.R., vol. I, at pp. 123-24). Repayment of these amounts was guaranteed by the U.S. debtors.

94 Ultimately, with the approval of the *CCAA* court, Indalex sold its business; the purchaser did not assume pension liabilities. A reserve fund was established by the *CCAA* Monitor to answer any outstanding claims. The proceeds of the sale were not sufficient to pay back the DIP lenders and so the U.S. debtors, as guarantors, paid the shortfall and stepped into the shoes of the DIP lenders in terms of priority.

95 The appellant Sun Indalex is a pre-*CCAA* secured creditor of both Indalex and the U.S. debtors. It claims the reserve fund on the basis that the US$10.75 million paid by the guarantors would otherwise have been available to Sun Indalex as a secured creditor of the U.S. debtors in the U.S. bankruptcy proceedings. The respondent plan beneficiaries claim the reserve fund on the basis that they have a wind-up deficiency which is covered by a deemed trust created by s. 57(4) of the *PBA*. This deemed trust includes "an amount of money equal to employer contributions *accrued to the date of the wind up but not yet due* under the plan or regulations" (s. 57(4)). They also claim the reserve fund on the basis of a constructive trust arising from Indalex's failure to live up to its fiduciary duties as plan administrator.

96 The reserve fund is not sufficient to pay back both Sun Indalex and the pension plans and so the main question on the main appeals is which of the creditors is entitled to priority for their respective claims.

97 The judge at first instance rejected the plan beneficiaries' deemed trust arguments and held that, with respect to the wind-up deficiency, the plan beneficiaries were unsecured creditors, ranking behind those benefitting from the "super priority" and secured creditors (2010 ONSC 1114, 79 C.C.P.B. 301 (Ont. S.C.J. [Commercial List])). The Court of Appeal reversed this ruling and held that pension plan deficiencies were subject to deemed and constructive trusts which had

priority over the DIP financing and over other secured creditors (2011 ONCA 265, 104 O.R. (3d) 641 (Ont. C.A.)). Sun Indalex, the trustee in bankruptcy and the Monitor appeal.

B. Indalex's CCAA Proceedings

(1) The Initial Order (Joint A.R., vol. I, at p. 112)

98 As noted earlier, Indalex was in financial trouble and, on April 3, 2009, sought and obtained protection from its creditors under the *CCAA*. The order (which I will refer to as the initial order) also contained directions for service on creditors and others: paras. 39-41. The order also contained a so-called "comeback clause" allowing any interested party to apply for a variation of the order, provided that that party served notice on any other party likely to be affected by any such variation: para. 46. It is common ground that the plan beneficiaries did not receive notice of the application for the initial order but the *CCAA* court nevertheless approved the method of and time for service. Full particulars of the deficiencies in the pension plans were before the court in the motion material and the initial order addressed payment of the employer's current service pension contributions.

(2) The DIP Order (Joint A.R., vol. I, at p. 129)

99 On April 8, 2009, in what I will refer to as the DIP order, the *CCAA* judge, Morawetz J., authorized Indalex to borrow funds pursuant to a DIP credit agreement. The judge ordered among many other things, the following:

- He approved abridged notice: para. 1;
- He allowed Indalex to continue making current service contributions to the pension plans, but not special payments: paras. 7(a) and 9(b);
- He barred all proceedings against Indalex, except by consent of Indalex and the Monitor or leave of the court, until May 1, 2009: para. 15;
- He granted the DIP lenders a so-called super priority:

> THIS COURT ORDERS that each of the Administration Charge, the Directors' Charge and the DIP Lenders Charge (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trust, liens, charges and encumbrances, statutory or otherwise (collectively, "Encumbrances") in favour of any Person. [Emphasis added; para. 45.]

- He required Indalex to send notice of the order to all known creditors, other than employees and creditors to which Indalex owed less than $5,000 and stated that Indalex and the Monitor were "at liberty" to serve the Initial Order to interested parties: paras. 49-50.

100 In his endorsement for the DIP order, Morawetz J. found that "there is no other alternative available to the Applicants [Indalex] for a going concern solution" and that DIP financing was necessary: (2009), 52 C.B.R. (5th) 61 (Ont. S.C.J. [Commercial List]), at para. 9(c). He noted that the Monitor in its report was of the view that approval of the DIP agreement was both necessary and in the best interests of Indalex and its stakeholders, including its creditors, employees, suppliers and customers: paras. 14-16.

101 The USW, which represented some of the members of the salaried plan, was served with notice of the motion that led to the DIP order, but did not appear. Morawetz J. specifically ordered as follows with regard to service:

> THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged so that this Application is properly returnable today and hereby dispenses with further service thereof. [DIP order, at para. 1]

(3) The DIP Extension Order (Joint A.R., vol. I, at p. 156)

102 On June 12, 2009, Morawetz J. heard and granted an application by Indalex to allow them to borrow approximately $5 million more from the DIP lenders, thus raising the allowed total to US$29.5 million.

103 Counsel for the former executives received the motion material the night before. Counsel for USW was also served with notice. At the motion, the former executives (along with second priority secured noteholders) sought to "reserve their rights with respect to the relief sought": 2009 CanLII 37906 [2009 CarswellOnt 4263 (Ont. S.C.J.)], at para. 4. Morawetz J. wrote that any "reservation of rights" would create uncertainty for the DIP lenders with regard to priority, and may prevent them from extending further advances. Moreover, the parties had presented no alternative to increased DIP financing, which was both "necessary and appropriate" and would, it was to be hoped, "improve the position of the stakeholders": paras. 5-9.

(4) The Bidding Order ((2009), 79 C.C.P.B. 101 (Ont. S.C.J. [Commercial List]))

104 On July 2, 2009, Indalex brought a motion for approval of proposed bidding procedures for Indalex's assets. Morawetz J. decided that a stalking horse bid by SAPA Holding AB ("SAPA") for Indalex's assets could count as a qualifying bid. Counsel on behalf of the members of the executive plan appeared, with the concern that "their position and views have not been considered in this process": para. 8. In his decision, Morawetz J. decided that these arguments could be dealt with later, at a sale approval motion: para. 10. The judge said:

> The position facing the retirees is unfortunate. The retirees are currently not receiving what they bargained for. However, reality cannot be ignored and the nature of the Applicants'

> insolvency is such that there are insufficient assets to meet its liabilities. The retirees are not alone in this respect. The objective of these proceedings is to achieve the best possible outcome for the stakeholders.
>
> [Emphasis added; para. 9.]

(5) The Sale Approval Order (Joint A.R., vol. I, at p. 166)

105 On July 20, 2009, Indalex brought two motions before Campbell J.

106 The first motion sought approval for the sale of Indalex's assets as a going concern to SAPA. SAPA was not to assume any pension liabilities. Campbell J. granted an order approving this sale.

107 The second motion sought approval for an interim distribution of the sale proceeds to the DIP lenders. Counsel on behalf of the executive plan members and the USW, representing some of the salaried employees, objected to the planned distribution of the sale proceeds on grounds that a statutory deemed trust applied to the deficiencies in their plans and that Indalex had breached fiduciary duties that it owed to them. Campbell J. ordered the Monitor to pay the DIP agent from the sale proceeds, but also ordered the Monitor to set up a reserve fund in an amount sufficient to answer, among other things, the claims of the plan beneficiaries pending resolution of those matters. Campbell J. ordered that the U.S. debtors be subrogated to the DIP lenders to the extent that the U.S. debtors were required under the guarantee to satisfy the DIP lenders' claims: para. 14.

(6) The Sale and Distribution of Funds

108 SAPA bought Indalex's assets on July 31, 2009. Taking the reserve fund into account, the sale did not produce sufficient funds to repay the DIP lenders in full and so the U.S. debtors paid US$10,751,247 as guarantor to the DIP lenders: C.A. reasons, at para. 65.

(7) The Order Under Appeal

109 On August 28, 2009, Campbell J. heard claims by the USW (appearing on behalf of some members of the salaried plan) and counsel appearing on behalf of the executive plan members that the wind-up deficiency was subject to a deemed trust. He rejected these claims in a written decision on February 18, 2010. He decided that the s. 57(4) *PBA* deemed trust did not apply to wind-up deficiencies. The executive plan had not been wound up, and therefore there was no wind-up deficiency to be the subject of the deemed trust. As for the salaried plan, Campbell J. held that the windup deficiency was not an obligation that had "accrued to the date of the wind up" and as a result did not fall within the terms of the s. 57(4) deemed trust.

110 Indalex had asked for the stay granted under the initial order to be lifted so that it could assign itself into bankruptcy. Because he did not find a deemed trust, Campbell J. did not feel that he needed to decide on the motion to lift the stay.

(8) The Decision of the Ontario Court of Appeal

111 The Ontario Court of Appeal allowed an appeal from the decision of Campbell J.

112 Writing for a unanimous panel, Gillese J.A. decided that the s. 57(4) deemed trust is applicable to wind-up deficiencies. She took the view that s. 57(4)'s reference to "employer contributions accrued to the date of the wind up but not yet due" included all amounts that the employer owed on the wind-up of its pension plan: para. 101. In particular, she concluded that the deemed trust applied to the wind-up deficiency in the salaried plan. Gillese J.A. declined, however, to decide whether the deemed trust also applied to deficiencies in the executive plan, which had not been wound up by the relevant date: paras. 110-12. A decision on this latter point was unnecessary given her finding on the applicability of a constructive trust in this case.

113 Gillese J.A. found that the super priority provided for in the DIP order did not trump the deemed trust over the salaried plan's wind-up deficiency. Morawetz J. had not "invoked" the issue of paramountcy or made an explicit finding that the requirements of federal law required that the provincially created deemed trust must be overridden: paras. 178-79. Gillese J.A. also took the view that this Court's decision in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), did not mean that provincially created priorities that would be ineffective under the *Bankruptcy and Insolvency* Act, R.S.C. 1985, c. B-3 ("BIA"), were also ineffective under the *CCAA*: paras. 185-96. The deemed trust therefore ranked ahead of the DIP security.

114 In addition to her findings regarding deemed trusts, Gillese J.A. granted the plan beneficiaries a constructive trust over the amount of the reserve fund on the ground that Indalex, as pension plan administrator, had breached fiduciary duties that it owed to the plan beneficiaries during the *CCAA* proceedings.

115 She held that as a plan administrator who was also an employer, Indalex had fiduciary duties both to the plan beneficiaries and to the corporation: para. 129. In her view, Indalex was subject to both sets of duties throughout the *CCAA* proceedings and it had breached its duties to the plan beneficiaries in several ways. While Indalex had the right to initiate *CCAA* proceedings, this action made the plan beneficiaries vulnerable and therefore triggered its fiduciary obligations as plan administrator: paras. 132-33. Gillese J.A. enumerated the many ways in which she thought Indalex subsequently failed as plan administrator: it did nothing in the *CCAA* proceedings to fund the deficit in the underfunded plans; it applied for *CCAA* protection without notice to the beneficiaries; it obtained DIP financing on the condition that DIP lenders be granted a super priority over "statutory trusts"; it obtained this financing without notice to the plan beneficiaries; it sold its assets knowing the purchaser was not taking over the plans; and it attempted to enter into voluntary bankruptcy, which would defeat any deemed trust claims the beneficiaries might have asserted: para. 139. Gillese J.A. also noted that throughout the *CCAA* proceedings Indalex was in a conflict of interest because it was acting for both the corporation and the beneficiaries.

116 Indalex's failure to live up to its fiduciary duties meant that the plan beneficiaries were entitled to a constructive trust over the amount of the reserve fund: para. 204. Since the beneficiaries had been wronged by Indalex, and the U.S. debtors were not, with respect to Indalex, an "arm's length innocent third party" the appropriate response was to grant the beneficiaries a constructive trust: para. 204. Her conclusion on this point applied equally to the salaried and executive plans.

III. Analysis

A. First Issue: Did the Court of Appeal Err in Finding That the Deemed Statutory Trust Provided for in Section 57(4) of the PBA Applied to the Salaried Plan's Wind-up Deficiency?

(1) Introduction

117 The main issue addressed here concerns whether the statutory deemed trust provided for in s. 57(4) of the *PBA* applies to wind-up deficiencies, the payment of which is provided for in s. 75(1)(b).

118 The deemed trust created by s. 57(4) applies to "employer contributions accrued to the date of the wind-up but not yet due under the plan or regulations". Thus, to be subject to the deemed trust, the pension plan must be wound up and the amounts in question must meet three requirements. They must be (1) "employer contributions", (2) "accrued to the date of the wind-up" and (3) "not yet due". A wind-up deficiency arises "[w]here a pension plan is wound up": s. 75(1). I agree with my colleagues that there can be no deemed trust for the executive plan, because that plan had not been wound up at the relevant date. What follows, therefore, is relevant only to the salaried plan.

119 The wind-up deficiency payments are "employer contributions" which are "not yet due" as of the date of wind-up within the meaning of the *PBA*. The main issue before us, therefore, boils down to the narrow interpretative question of whether the wind-up deficiency described in s. 75(1)(b) is "accrued to the date of the windup".

120 Campbell J. at first instance found that it was not, while the Court of Appeal reached the opposite conclusion. In essence, the Court of Appeal reasoned that the deemed trust in s. 57(4) "applies to all employer contributions that are required to be made pursuant to s. 75", that is, to "all amounts owed by the employer on the wind-up of its pension plan": para. 101.

121 I respectfully disagree with the Court of Appeal's conclusion for three main reasons. First, the most plausible grammatical and ordinary sense of the words "accrued to the date of the wind up" is that the amounts referred to are precisely ascertained immediately before the effective date of the plan's wind-up. The wind-up deficiency only arises upon wind-up and it is neither ascertained nor ascertainable on the date fixed for wind-up. Second, the broader statutory context reinforces

this view: the language of the deemed trusts in s. 57(3) and (4) is virtually exactly repeated in s. 75(1)(a), suggesting that both deemed trusts refer to the liability on wind-up referred to in s. 75(1)(a) and not to the further and distinct wind-up deficiency liability created under s. 75(1)(b). Finally, the legislative evolution and history of these provisions show, in my view, that the legislature never intended to include the wind-up deficiency in a statutory deemed trust.

122 Before turning to the precise interpretative issue, it will be helpful to provide some context about the employer's wind-up obligations and the deemed trust provisions that are the subject of this dispute.

(2) Employer Obligations on Wind Up

123 A "wind up" means that the plan is terminated and the plan assets are distributed: see *PBA*, s. 1(1), definition of "wind up". The employer's liability on wind-up consists of two main components. The first is provided for in s. 75(1)(a) and includes "an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund". This liability applies to contributions that were due as at the wind-up date but does *not* include payments required by s. 75(1)(b) that arise as a result of the wind up: A. N. Kaplan, *Pension Law* (2006), at pp. 541-42. This second liability is known as the wind-up deficiency amount. The employer must pay all additional sums to the extent that the assets of the pension fund are insufficient to cover the value of all immediately vested and accelerated benefits and grow-in benefits: Kaplan, at p. 542. Without going into detail, there are certain statutory benefits that may arise only on wind-up, such as certain benefit enhancements and the potential for acceleration of pension entitlements. Thus, wind-up will usually result in additional employer liabilities over and above those arising from the obligation to pay all benefits provided for in the plan itself: see, e.g., ss. 73 and 74; Kaplan, at p. 542. As the Court of Appeal concluded, the payments provided for under s. 75(1)(a) are those which the employer had to make while the plan was ongoing, while s. 75(1)(b) refers to the employer's obligation to make up for any wind-up deficiency: paras. 90-91.

124 For convenience, the provision as it then stood is set out here.

> **75.** (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,
>
> (a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and
>
> (b) an amount equal to the amount by which,

> (i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,
>
> (ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and
>
> (iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,
>
> exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

125 While a wind up is effective as of a fixed date, a wind up is nonetheless best thought of not simply as a moment or a single event, but as a process. It begins by a triggering event and continues until all of the plan assets have been distributed. To oversimplify somewhat, the wind-up process involves the following components.

126 The assets and liabilities of the plan as of the wind-up date must be determined. As noted earlier, the precise extent of the liability, while *fixed as of that date*, will not be ascertained or ascertainable *on that date*. The extent of the liability may depend on choices open to plan beneficiaries under the plan and on the exercise by them of certain statutory rights beyond the options that would otherwise have been available under the plan itself. The plan members must be notified of the wind-up and have their entitlements and options set out for them and given an opportunity to make their choices. The plan administrator must file a wind-up report which includes a statement of the plan's assets and liabilities, the benefits payable under the terms of the plan, and the method of allocating and distributing the assets including the priorities for the payment of benefits: *PBA*, s. 70(1), and R.R.O. 1990, Reg. 909, s. 29 (the "*PBA* Regulations").

127 Benefits to members may take the form of "cash refunds, immediate or deferred annuities, transfers to registered retirement saving plans, [etc.] ... In principle, the value of these benefits is the present value of the benefits accrued to the date of plan termination": The *Mercer Pension Manual* (loose-leaf), vol. 1, at p. 10-41. That present value is an actuarial calculation performed on the basis of various assumptions including assumptions about investment return, mortality and so forth.

128 If, when the assets and liabilities are calculated, the assets are insufficient to satisfy the liabilities, the employer (i.e. the plan sponsor) must make up for any wind-up deficiency: *PBA*, s. 75(1)(b). An employer can elect to space these payments out over the course of five years: *PBA* Regulations, s. 31(2). Because these payments are based on the extent to which there is a deficit between assets in the pension plan and the benefits owed to beneficiaries, their amount varies with

the market and other assumed elements of the calculation over the course of the permitted five years.

129 To take the salaried plan as an example, at the time of wind-up, all regular current service contributions had been made: C.A. reasons, at para. 33. The wind-up deficiency was initially estimated to be $1,655,200. Indalex made special wind-up payments of $709,013 in 2007 and $875,313 in 2008, but as of December 31, 2008, the wind-up deficiency was $1,795,600 — i.e. higher than it had been two years before, notwithstanding that payments of roughly $1.6 million had been made: C.A. reasons, at para. 32. Indalex made another payment of $601,000 in April 2009: C.A. reasons, at para. 32.

(3) The Deemed Trust Provisions

130 The *PBA* contains provisions whose purpose is to exempt money owing to a pension plan, and which is held or owing by the employer, from being seized or attached by the employer's other creditors: Kaplan, at p. 395. This is accomplished by creating a "deemed trust" with respect to certain pension contributions such that these amounts are held by the employer in trust for the employees or pension beneficiaries.

131 There are two deemed trusts that we must examine here, one relating to employer contributions that are *due but have not been paid* and another relating to employer contributions *accrued but not due*. This second deemed trust is the one in issue here, but it is important to understand how the two fit together.

132 The deemed trust relating to employer contributions "due and not paid" is found in s. 57(3). The *PBA* and *PBA* regulations contain many provisions relating to contributions required by employers, the due dates for which are specified. Briefly, the required contributions are these.

133 When a pension is ongoing, employers need to make regular current service cost contributions. These are made monthly, within 30 days after the month to which they relate: *PBA* Regulations, s. 4(4)3. There are also special payments, which relate to deficiencies between a pension plan's assets and liabilities. There are "going-concern" deficiencies and "solvency" deficiencies, the distinction between which is unimportant for the purposes of these appeals. A plan administrator must regularly file actuarial reports, which may disclose deficiencies: *PBA* Regulations, s. 14. Where there is a going-concern deficiency the employer must make equal monthly payments over a 15-year period to rectify it: *PBA* Regulations, s. 5(1)(b). Where there is a solvency deficiency, the employer must make equal monthly payments over a five-year period to rectify it: *PBA* Regulations, s. 5(1)(e). Once these regular or special payments become due but have not been paid, they are subject to the s. 57(3) deemed trust.

134 I turn next to the s. 57(4) deemed trust, which gives rise to the question before us. The subsection provides that "[w]here a pension plan is wound up ... an employer who is required to

pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan *an amount of money equal to employer contributions accrued to the date of the wind up but not yet due* under the plan or regulations."

135 When a pension plan is wound up there will be an interrupted monthly payment period, which is sometimes referred to as the stub period. During this stub period regular and special liabilities will have accrued but not yet become due. Section 58(1) provides that money that an employer is required to pay "accrues on a daily basis". Because the amounts referred to in s. 57(4) are not yet due, they are not covered by the s. 57(3) deemed trust, which applies only to payments that are *due*. The two provisions, then, operate in tandem to create a trust over an employer's unfulfilled obligations, which are "due and not paid" as well as those which have "accrued to the date of the wind up but [are] not yet due".

(4) The Interpretative Approach

136 The issue we confront is one of statutory interpretation and the well-settled approach is that "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": E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.), at para. 26. Taking this approach it is clear to me that the sponsor's obligation to pay a wind-up deficiency is not covered by the statutory deemed trust provided for in s. 57(4) of the *PBA*. In my view, the deficiency neither "accrued", nor did it arise within the period referred to by the words "to the date of the wind up".

(a) Grammatical and Ordinary Sense of the Words "Accrued" and "to the Date of the Wind Up"

137 The Court of Appeal failed to take sufficient account of the ordinary and grammatical meaning of the text of the provisions. It held that "the deemed trust in s. 57(4) applies *to all employer contributions that are required to be made pursuant to s. 75*": para. 101 (emphasis added). However, the plain words of the section show that this conclusion is erroneous. Section 75(1)(a) refers to liability for employer contributions that "*are due* ... and that have not been paid". These amounts are thus *not* included in the s. 57(4) deemed trust, because it addresses only amounts that have "accrued to the date of the wind up *but [are] not yet due*". Amounts "due" are covered by the s. 57(3) deemed trust and not, as the Court of Appeal concluded by the deemed trust created by s. 57(4). The Court of Appeal therefore erred in finding, in effect, that amounts which "are due" could be included in a deemed trust covering amounts "not yet due".

138 In my view, the most plausible grammatical and ordinary sense of the phrase "accrued to the date of the wind up" in s. 57(4) is that it refers to the sums that are ascertained immediately before the effective wind-up date of the plan.

139 In the context of s. 57(4), the grammatical and ordinary sense of the term "accrued" is that the amount of the obligation is "fully constituted" and "ascertained" although it may not yet be payable. The amount of the wind-up deficiency is not fully constituted or ascertained (or even ascertainable) before or even on the date fixed for wind up and therefore cannot fall under s. 57(4).

140 Of course, the meaning of the word "accrued" may vary with context. In general, when the term "accrued" is used in relation to legal rights, its common meaning is that the right has become fully constituted even though the monetary implications of its enforcement are not yet known or knowable. Thus, we speak of the "accrual" of a cause of action in tort when all of the elements of the cause of action come into existence, even though the extent of the damage may well not be known or knowable at that time: see, e.g., *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53 (S.C.C.). However, when the term is used in relation to a sum of money, it will generally refer to an amount that is at the present time either quantified or exactly quantifiable but which may or may not be due.

141 In some contexts, a liability is said to accrue when it becomes due. An accrued liability is said to be "properly chargeable" or "owing on a given day" or "completely constituted": see, e.g., *Black's Law Dictionary* (9th ed. 2009), at p. 997, "accrued liability"; D.A. Dukelow, *The Dictionary of Canadian Law* (4th ed. 2011), at p. 13, "accrued liability"; *Ontario Hydro-Electric Power Commission v. Albright* (1922), 64 S.C.R. 306 (S.C.C.).

142 In other contexts, an amount which has accrued may not yet be due. For example, we speak of "accrued interest" meaning a precise, quantified amount of interest that has been earned but may not yet be payable. The term "accrual" is used in the same way in "accrual accounting". In accrual method accounting, "transactions that give rise to revenue or costs are recognized in the accounts when they are earned and incurred respectively": B. J. Arnold, *Timing and Income Taxation: The Principles of Income Measurement for Tax Purposes* (1983), at p. 44. Revenue is earned when the recipient "substantially completes performance of everything he or she is required to do as long as the amount due is ascertainable and there is no uncertainty about its collection": P. W. Hogg, J. E. Magee and J. Li, *Principles of Canadian Income Tax Law* (7th ed., 2010), at s. 6.5(b); see also Canadian Institute of Chartered Accountants, *CICA Handbook — Accounting*, Part II, s. 1000, at paras. 41-44. In this context, the amount must be ascertained at the time of accrual.

143 The *Hydro-Electric Power Commission* case offers a helpful definition of the word "accrued" in this sense. On a sale of shares, the vendor undertook to provide on completion "a sum estimated by him to be equal to sinking fund payments [on the bonds and debentures] *which shall have accrued but shall not be due* at the time for completion": p. 344 (emphasis added). The bonds and debentures required the company to pay on July 1 of each year a fixed sum for each electrical horsepower sold and paid for during the preceding calendar year. A dispute arose as to

what amounts were payable in this respect on completion. Duff J. held that in this context accrued meant "completely constituted", referring to this as a "well recognized usage": p. 312. He went on:

> Where ... a lump sum is made payable on a specified date and where, having regard to the purposes of the payment or to the terms of the instrument, this sum must be considered to be made up of an accumulation of sums in respect of which the right to receive payment is completely constituted before the date fixed for payment, then it is quite within the settled usage of lawyers to describe each of such accumulated parts as a sum accrued or accrued due before the date of payment: p. 316.

Thus, at every point at which a liability to pay a fixed sum arose under the terms of the contract, that liability accrued. It was fully constituted even though not yet due because the obligation to make the payment was in the future. In reaching this conclusion, Duff J. noted that the bonds and debentures used the word "accrued" in contrast to "due" and that this strengthened the interpretation of "accrued" as an obligation fully constituted but not yet payable. Similarly in s. 57(4), the word "accrued" is used in contrast to the word "due".

144 Given my understanding of the ordinary meaning of the word "accrued", I must respectfully disagree with my colleague, Justice Deschamps' position that the wind-up deficiency can be said to have "accrued" to the date of wind up. In her view, "[s]ince the employees cease to accumulate entitlements when the plan is wound up, the entitlements that are used to calculate the contributions have all been accumulated before the wind-up date" (para. 34) and "no new liabilities accrue at the time of or after the wind up" (para. 36). My colleague maintains that "[t]he fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes" (para. 37 referring to *Canadian Pacific Ltd. v. Ontario (Minister of Revenue)* (1998), 41 O.R. (3d) 606 (Ont. C.A.)).

145 I cannot agree that no new liability accrues on or after the wind up. As discussed in more detail earlier, the wind-up deficiency in s. 75(1)(b) is made up of the difference between the plan's assets and liabilities calculated as of the date of wind up. On wind up, the *PBA* accords statutory entitlements and protections to employees that would not otherwise be available: Kaplan, at p. 532. Wind up therefore gives rise to new liabilities. In particular, on wind up, and only on wind up, plan beneficiaries are entitled, under s. 74, to make elections regarding the payment of their benefits. The plan's liabilities cannot be determined until those elections are made. Contrary to what my colleague Justice Deschamps suggests, the extent of the wind-up deficiency depends on employee rights that arise only upon wind up and with respect to which employees make elections only after wind up.

146 Moreover, the wind-up deficiency will vary after wind up because the amount of money necessary to provide for the payment of the plan sponsor's liabilities will vary with the market. Section 31 of the *PBA* Regulations allows s. 75 payments to be spaced out over the course of five

years. As we have seen, the amount of the wind-up deficiency will fluctuate over this period (I set out earlier how this amount in fact fluctuated markedly in the case of the salaried plan in issue here). Thus, while estimates are periodically made and reported after the wind up to determine how much the employer needs to pay, the precise amount of the wind-up deficiency is not ascertained or ascertainable on the date of the wind up.

147 I turn next to the ordinary and grammatical sense of the words "to the date of the wind up" in s. 57(4). In my view, these words indicate that only those contributions that accrue before the date of wind up, and not those amounts the liability for which arises only on the day of wind up — that is, the wind-up deficiency — are included.

148 Where the legislature intends to include the date of wind up, it has used suitable language to effect that purpose. For example, the English version of a provision amending the *PBA* in 2010 (c. 24, s. 21(2)), s. 68(2)(c), indicates which trade unions are entitled to notice of the wind up:

> (2) If the employer or the administrator, as the case may be, intends to wind up the pension plan, the administrator shall give written notice of the intended wind up to,
>
> . . . . .
>
> (c) each trade union that represents members of the pension plan or that, on the date of the wind up, represented the members, former members or retired members of the pension plan;

In contrast to the phrase "to the date of wind up", "on the date of wind up" clearly includes the date of wind up. (The French version does not indicate a different intention.) Similarly, s. 70(6), which formed part of the *PBA* until 2012 (rep. S.O. 2010, c. 9, s. 52(5)), read as follows:

> (6) On the partial wind up of a pension plan, members, former members and other persons entitled to benefits under the pension plan shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up.

The words "on the effective date of the partial wind up" indicate that the members are entitled to those benefits from the date of the partial wind up, in the sense that members can claim their benefits beginning on the date of the wind up itself. This is how the legislature expresses itself when it wants to speak of a period of time including a specific date. By comparison, "to the date of the wind up" is devoid of language that would include the actual date of wind up. This conclusion is further supported by the structure of the *PBA* and its legislative history and evolution, to which I will turn shortly.

149 To sum up with respect to the ordinary and grammatical meaning of the phrase "accrued to the date of the wind up", the most plausible ordinary and grammatical meaning is that such amounts are fully constituted and precisely ascertained immediately before the date fixed as the date of wind up. Thus, according to the ordinary and grammatical meaning of the words, the wind-

up deficiency obligation set out in s. 75(1)(b) has not "*accrued* to the date of the wind up" as required by s. 57(4). Moreover, the liability for the wind-up deficiency arises where a pension plan is wound up (s. 75(1)(b)) and so it cannot be a liability that "accrued *to the date of the wind up*" (s. 57(4)).

(b) The Scheme of the Act

150 As discussed earlier, s. 57 establishes deemed trusts over funds which must be contributed to a pension plan, including the one in s. 57(4), which is at issue here. It is helpful to consider these deemed trusts in the context of the obligations to pay funds which give rise to them. Specifically, the relationship between the deemed trust provisions in s. 57(3) and (4), on one hand, and s. 75(1), which sets out liabilities on wind up on the other. According to my colleague Justice Deschamps, s. 75(1) "elegantly parallels the wind-up deemed trust provision" (para. 42) such that the deemed trusts must include the wind-up deficiency. I disagree. In my view, the deemed trusts parallel only s. 75(1)(a), which does not relate to the wind-up deficiency. The correspondence between the deemed trusts and s. 75(1)(a), and the absence of any such correspondence with s. 75(1)(b), makes it clear that the wind-up deficiency is not covered by the deemed trust provisions.

151 I would recall here the difference between the deemed trusts created by s. 57(3) and (4). While a plan is ongoing, there may be payments which the employer is required to, but has failed to make. The s. 57(3) trust applies to these payments because they are "*due and not paid*". When a plan is wound up, however, there will be payments that are outstanding in the sense that they are fully constituted, but not yet due. This occurs with respect to the so-called stub period referred to earlier. During this stub period, regular and special liabilities will accrue on a daily basis, as provided for in s. 58(1), but may not be due at the time of wind up. While s. 57(3) cannot apply to these payments because they are not yet due, the deemed trust under s. 57(4) applies to these payments because liability for them has "accrued to the date of the wind up" and they are "*not yet due*".

152 The important point is how these two deemed trust provisions relate to the wind-up liabilities as described in ss. 75(1)(a) and 75(1)(b). The two paragraphs refer to sums of money that are different in kind: while s. 75(1)(a) refers to liabilities that accrue before wind up and that are created elsewhere in the Act, s. 75(1)(b) creates a completely new liability that comes into existence only once the plan is wound up. There is no dispute, as I understand it, that these two paragraphs refer to different liabilities and that it is the liability described in s. 75(1)(b) that is the wind-up deficiency in issue here. The parties do not dispute that s. 75(1)(a) does *not* include wind-up deficiency payments.

153 It is striking how closely the text of s. 75(1)(a) — which does not relate to the wind-up deficiency — tracks the language of the deemed trust provisions in s. 57(3) and (4). As noted, s. 57(3) deals with "employer contributions due and not paid", while s. 57(4) deals with "employer

contributions accrued to the date of the wind up but not yet due." Section 75(1)(a) includes both of these types of employer contributions. It refers to "payments that ... are due ... and that have not been paid" (i.e. subject to the deemed trust under s. 57(3)) or that have "accrued and that have not been paid" (i.e. subject to the deemed trust under s. 57(4) to the extent that these payments accrued to the date of wind up). This very close tracking of the language between s. 57(3) and (4) on the one hand and s. 75(1)(a) on the other, and the absence of any correspondence between the language of these deemed trust provisions with s. 75(1)(b), suggests that the s. 57(3) and (4) deemed trusts refer to the liability described in s. 75(1)(a) and not to the wind-up deficiency created by s. 75(1)(b). It is difficult to understand why, if the intention had been for s. 57(4) to capture the windup deficiency liability under s. 75(1)(b), the legislature would have so closely tracked the language of s. 75(1)(a) alone in creating the deemed trusts. Thus, in my respectful view, the elegant parallel to which my colleague, Justice Deschamps refers exists only between the deemed trust and s. 75(1)(a), and not between the deemed trust and the wind-up deficiency.

154 I conclude that the scheme of the *PBA* reinforces my conclusion that the ordinary grammatical sense of the words in s. 57(4) does not extend to the wind-up deficiency provided for in s. 75(1)(b).

(c) Legislative History and Evolution

155 Legislative history and evolution may form an important part of the overall context within which a provision should be interpreted. Legislative evolution refers to the various formulations of the provision while legislative history refers to evidence about the provision's conception, preparation and enactment: see, e.g., *Canada (Attorney General) v. Mowat*, 2011 SCC 53, [2011] 3 S.C.R. 471 (S.C.C.), at para. 43.

156 Both the legislative evolution and history of the *PBA* show that it was never the legislature's intention to include the wind-up deficiency in the deemed trust. The evolution and history of the *PBA* are rather intricate and sometimes difficult to follow so I will review them briefly here before delving into a more detailed analysis.

157 The deemed trust was first introduced into the *PBA* in 1973. At that time, it covered employee contributions held by the employer and employer contributions that were due but not paid. In 1980, the *PBA* was amended so that the deemed trust was expanded to include employer contributions whether they were due or not. Also, new provisions were added allowing for employee elections and requiring additional payments by the employer where a plan was wound up. The 1980 amendments gave rise to confusion on two fronts: first, it was unclear whether the payments that were required on wind up were subject to the deemed trust; second, it was unclear whether a lien over some employer contributions covered the same amount as the deemed trust. In 1983, both these points were clarified. The sections were reworded and rearranged to make it clear that the wind-up deficiency was distinct from the amounts covered by the deemed trust, and that

the lien and the deemed trust covered the same amount. A statement by the responsible Minister in 1982 confirms that *the deemed trusts were never intended to cover the wind-up deficiency*.

158 My colleague, Justice Deschamps maintains that this history suggests an evolution in the intention of the legislature from protecting "only the service contributions that were due ... to all amounts due and accrued upon wind up" (para. 42). I respectfully disagree. In my view, the history and evolution of the *PBA* leading up to and including 1983 show that the legislature never intended to include the windup deficiency in the deemed trust. Moreover, legislative evolution after 1983 confirms that this intention did not change.

(i) The Pension Benefits Amendment Act, 1973, S.O. 1973, c. 113

159 So far as I can determine, statutory deemed trusts were first introduced into the *PBA* by *The Pension Benefits Amendment Act*, *1973*, S.O. 1973, c. 113, s. 6. Those amendments created deemed trusts over two amounts: employee pension contributions received by employers (s. 23*a*(1), similar to the deemed trust in the current s. 57(1)) and employer contributions that had fallen due under the plan (s. 23*a*(3), similar to the current s. 57(3) deemed trust for employer contributions "due and not paid"). The full text of these provisions and those referred to below, up to the current version of the 1990 Act, are found in the Appendix.

(ii) The Pension Benefits Amendment Act, 1980, S.O. 1980, c. 80

160 Ontario undertook significant pension reform leading to *The Pension Benefits Amendment Act, 1980*, S.O. 1980, c. 80; see Kaplan at pp. 54-56. I will concentrate on the deemed trust provisions and how they related to the liabilities on wind up and, for ease of reference, I will refer to the sections as they were renumbered in the 1980 consolidation: R.S.O. 1980, c. 373. The 1980 legislation expanded the deemed trust relating to employer contributions. Although far from clear, the new provisions appear to have created a deemed trust and lien over the employer contributions whether otherwise payable or not and calculated as if the plan had been wound up on the relevant date.

161 It was unclear after the reforms of 1980 whether the deemed trust applied to all employer contributions that arose on wind up. According to s. 23(4), on any given date, the trust extended to an amount to be determined "as if the plan had been wound up on that date". However, the provisions of the 1980 version of the Act did not explicitly state what such a calculation would include. Under s. 21(2) of the 1980 statute, the employer was obligated to pay on wind up "all amounts that would otherwise have been required to be paid to meet the tests for solvency ..., up to the date of such termination or winding up". Under s. 32, however, the employer had to make a payment on wind up that was to be "[i]n addition" to that due under s. 21(2). Whether the legislature intended that the trust should cover this latter payment was left unclear.

162 It was also unclear whether the lien applied to a different amount than was subject to the deemed trust. According to s. 23(3), "the members have a lien upon the assets of the employer in such amount that in the ordinary course of business would be entered into the books of account whether so entered or not". This comes in the middle of two portions of the provision which explicitly refer to the deemed trust, but it is not clear whether the legislature intended to refer to the same amount throughout the provision.

(iii) The Pension Benefits Amendment Act, 1983, S.O. 1983, c. 2

163 The 1983 amendments substantially clarified the scope of the deemed trust and lien for employer contributions. They make clear that neither the deemed trust nor the lien applied to the wind-up deficiency; the responsible Minister confirmed that this was the intention of the amendments.

164 The new provision was amended by s. 3 of the 1983 amendments and is found in s. 23(4) which provided:

> (4) An employer who is required by a pension plan to contribute to the pension plan shall be deemed to hold in trust for the members of the pension plan an amount of money equal to the total of,
>
> (a) all moneys that the employer is required to pay into the pension plan to meet,
>
> (i) the current service cost, and
>
> (ii) the special payments prescribed by the regulations,
>
> that are due under the pension plan or the regulations and have not been paid into the pension plan; and
>
> (b) where the pension plan is terminated or wound up, any other money that the employer is liable to pay under clause 21 (2) (a).

Section 21(2)(a) provides that on wind up, the employers must pay an amount equal to *the current service cost and the special payments* that "have accrued to and including the date of the termination winding up but, under the terms of the pension plan or the regulations, are not due on that date"; the provision adds that these amounts shall be deemed to accrue on a daily basis. These provisions make it clear that the s. 23(4) deemed trust applies only to the special payments and current service costs that have accrued, on a daily basis, up to and including the date of wind up. The deemed trust clearly does not extend to the wind-up deficiency.

165 The provision referring to the additional payments required on wind up also makes clear that those payments are not within the scope of the deemed trust. These additional liabilities were

described by s. 32, a provision very similar to s. 75(1)(b). These amounts are first, the amount guaranteed by the Guarantee Fund and, second, the value of pension benefits vested under the plan that exceed the value of the assets of the plan. Section 32(2) specifies that these amounts *are* "*in addition* to the amounts that the employer is liable to pay under subsection 21(2)" (which are the payments comparable to the current s. 75(1)(a) payments) and that *only the latter* fall within the deemed trust. The inevitable conclusion is that, in 1983, the wind-up deficiency was not included in the scope of the deemed trust.

166 The 1983 amendments also clarified the scope of the lien. They indicated that the scope of the lien was identical to the scope of the deemed trust. Section 23(5) specified that the lien extended only to the amounts that were deemed to be held in trust under s. 23(4) (i.e. the *current service costs and special payments that had accrued to and including the date of the wind up but are not yet due)*.

167 This makes two things clear: that the lien covers the same amounts as the deemed trust, and that neither covers the wind-up deficiency.

168 A brief, but significant piece of legislative history seems to me to dispel any possible doubt. In speaking at first reading of the 1983 amendments, the Minister responsible, the Honourable Robert Elgie said this:

> The first group of today's amendments makes up the housekeeping changes needed for us to do what we set out to do in late 1980; that is, to guarantee pension benefits following the windup of a defined pension benefit plan. These amendments will clarify the ways in which we can attain that goal.
>
> In Bill 214 [i.e. the 1980 amendments] the employees were given a lien on the employer's assets for employee contributions to a pension plan collected by the employer, as well as accrued employer contributions....
>
> Unfortunately, this protection has resulted in different legal interpretations on the extent of the lien. An argument has been advanced that the amount of the lien includes an employer's potential future liability on the windup of a pension plan. This was never intended and is not necessary to provide the required protection. The amendment to section 23 clarified the intent of Bill 214. [Emphasis added.]
>
> (*Legislature of Ontario Debates: Official Report (Hansard)*, No. 99, 2nd Sess., 32nd Parl., July 7, 1982, p. 3568)

The 1983 amendments made the scope of the lien correspond precisely to the scope of the deemed trust over the employer's accrued contributions. It is thus clear from this statement that it was never the legislative intention that either should apply to "an employer's potential future liability" on wind up (i.e. the wind-up deficiency). In 1983, there is therefore, in my view, virtually irrefutable

evidence of legislative intent to do exactly the opposite of what the Court of Appeal held in this case had been done.

169 Subsequent legislative evolution shows no change in this legislative intent. In fact, subsequent amendments demonstrate a clear legislative intent to exclude from the deemed trust employer liabilities that arise only upon wind up of the plan.

(iv) Pension Benefits Act, 1987, S.O. 1987, c. 35

170 Amendments to the *PBA* in 1987 resulted in it being substantially in its current form. With those amendments, the extent of the deemed trusts was further clarified. The provision in the 1983 version of the Act combined within a single subsection a deemed trust for employer contributions that were due and not paid (s. 23(4)(a)) and employer contributions that had accrued to and including the date of wind up but which were not yet due (s. 23(4)(b), referring to s. 21(2)(a)). In the 1987 amendments, these two trusts were each given their own subsection and their scope was further clarified. Moreover, after the 1987 revision, one no longer had to refer to a separate provision (formerly s. 21(2)(a)) to determine the scope of the trust covering payments that were accrued but not yet due. Thus, while the substance of the provisions did not change in 1987, their form was simplified.

171 The new s. 58(3) (which is exactly the same as the current s. 57(3)) replaced the former s. 23(4)(a). This created a trust for employer contributions due and not paid. Section 58(4) (which is exactly the same as s. 57(4) stood at the time) replaced the former s. 23(4)(b) and part of s. 21(2)(a) and created a trust that arises on wind up and covers "employer contributions accrued *to the date of the wind up* but not yet due".

172 The 1987 amendment also shows that the legislature adverted to the difference between "to the date of the wind up" and "to and including" the date of wind up and chose the former. This is reflected in a small but significant change in the wording of the relevant provisions. The former provision, s. 23(4)(b), by referring to s. 21(2)(a) captured current service costs and special payments that "have *accrued to and including* the date of the termination or winding up." The new version in s. 58(4) deletes the words "and including", putting the section in its present form. This deletion, to my way of thinking, reinforces the legislative intent to *exclude* from the deemed trust liabilities that arise only *on* the date of wind up. Respectfully, the legislative record does not support Deschamps J.'s view that there was a legislative evolution towards a more expanded deemed trust. Quite the opposite.

173 To sum up, I draw the following conclusions from this review of the legislative evolution and history. The legislation differentiates between two types of employer liability relevant to this case. The first is the contributions required to cover current service costs and any other payments that are either due or have accrued on a daily basis up to the relevant time. These are the payments referred to in the current s. 75(1)(a), that is, payments due or accrued but not paid. The second

relates to additional contributions required when a plan is wound up which I have referred to as the wind-up deficiency. These payments are addressed in s. 75(1)(b). The legislative history and evolution show that the deemed trusts under s. 57(3) and (4) were intended to apply only to the former amounts and that it was never the intention that there should be a deemed trust or a lien with respect to an employer's potential future liabilities that arise once the plan is wound up.

(d) The Purpose of the Legislation

174 Excluding the wind-up deficiency from the deemed trust is consistent with the broader purposes of the legislation. Pension legislation aims at important protective purposes. These protective purposes, however, are not pursued at all costs and are clearly intended to be balanced with other important interests within the context of a carefully calibrated scheme: *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152 (S.C.C.), at paras. 13-14.

175 In this instance, the legislature has created trusts over contributions that were due or accrued to the date of the wind up in order to protect, to some degree, the rights of pension plan beneficiaries and employees from the claims of the employer's other creditors. However, there is also good reason to think that the legislature had in mind other competing objectives in not extending the deemed trust to the wind-up deficiency.

176 First, if there were to be a deemed trust over all employer liabilities that arise when a plan is wound up, much simpler and clearer words could readily be found to achieve that objective.

177 Second, extending the deemed trust protections to the wind-up deficiency might well be viewed as counter-productive in the greater scheme of things. A deemed trust of that nature might give rise to considerable uncertainty on the part of other creditors and potential lenders. This uncertainty might not only complicate creditors' rights, but it might also affect the availability of funds from lenders. The wind-up liability is potentially large and, while the business is ongoing, the extent of the liability is unknown and unknowable for up to five years. Its amount may, as the facts of this case disclose, fluctuate dramatically during this time. A liability of this nature could make it very difficult to assess the creditworthiness of a borrower and make an appropriate apportionment of payment among creditors extremely difficult.

178 While I agree that the protection of pension plans is an important objective, it is not for this Court to decide the extent to which that objective will be pursued and at what cost to other interests. In her conclusion, Justice Deschamps notes that although the protection of pension plans is a worthy objective, courts should not use the law of equity to re-arrange the priorities that Parliament has established under the *CCAA*. This is a matter of policy where courts must defer to legislatures (reasons of Justice Deschamps, at para. 82). In my view, my colleague's comments on this point are equally applicable to the policy decisions reflected in the text of the *PBA*. The decision as to the level of protection that should be provided to pension beneficiaries is one to

be left to the Ontario legislature. Faced with the language in the *PBA*, I would be slow to infer that the broader protective purpose, with all its potential disadvantages, was intended. In short, the interpretation I would adopt is consistent with a balanced approach to protection of benefits which the legislature intended.

179 For these reasons, I am of the respectful view that the Court of Appeal erred in finding that the s. 57(4) deemed trust applied to the wind-up deficiency.

B. Second Issue: Did the Court of Appeal Err in Finding That Indalex Breached the Fiduciary Duties it Owed to the Pension Beneficiaries as the Plans' Administrator and in Imposing a Constructive Trust as a Remedy?

(1) Introduction

180 The Court of Appeal found that during the *CCAA* proceedings Indalex breached its fiduciary obligations as administrator of the pension plans: para. 116. As a remedy, it imposed a remedial constructive trust over the reserve fund, effectively giving the plan beneficiaries recovery of 100 cents on the dollar in priority to all other creditors, including creditors entitled to the super priority ordered by the *CCAA* court.

181 The breaches identified by the Court of Appeal fall into three categories. First, Indalex breached the prohibition against a fiduciary being in a position of conflict of interest because its interests in dealing with its insolvency conflicted with its duties as plan administrator to act in the best interests of the plans' members and beneficiaries: para. 142. According to the Court of Appeal, the simple fact that Indalex found itself in this position of conflict of interest was, of itself, a breach of its fiduciary duty as plan administrator. Second, Indalex breached its fiduciary duty by applying, without notice to the plans' beneficiaries, for *CCAA* protection: para. 139. Third, Indalex breached its fiduciary duty by seeking and/or obtaining various relief in the *CCAA* proceedings including the "super priority" in favour of the DIP lenders, approval of the sale of the business knowing that no payment would be made to the underfunded plans over the statutory deemed trusts and seeking to be put into bankruptcy with the intention of defeating the deemed trust claims: para. 139. As a remedy for these breaches of fiduciary duty the court imposed a constructive trust.

182 In my view, the Court of Appeal took much too expansive a view of the fiduciary duties owed by Indalex as plan administrator and found breaches where there were none. As I see it, the only breach of fiduciary duty committed by Indalex occurred when, upon insolvency, Indalex's corporate interests were in obvious conflict with its fiduciary duty as plan administrator to ensure that all contributions were made to the plans when due. The breach was not in failing to avoid this conflict — the conflict itself was unavoidable. Its breach was in failing to address the conflict to ensure that the plan beneficiaries had the opportunity to have representation in the *CCAA* proceedings as if there were independent plan administrators. I also conclude that a remedial constructive trust is not available as a remedy for this breach.

183 This part of the appeals requires us to answer two questions which I will address in turn:

(i) What fiduciary duties did Indalex have in its role as plan administrator and did it breach them?

(ii) If so, was imposition of a constructive trust an appropriate remedy?

(2) What Fiduciary Duties did Indalex Have in its Role as Plan Administrator and Did it Breach Those Duties?

(a) Legal Principles

184 The appellants do not dispute that Indalex, in its role of administrator of the plans, had fiduciary duties to the members of the plan and that when it is acting in that role it can only act in the interests of the plans' beneficiaries. It is not necessary for present purposes to decide whether a pension plan administrator is a *per se* or *ad hoc* fiduciary, although it must surely be rare that a pension plan administrator would not have fiduciary duties in carrying out that role: *Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273 (S.C.C.), at para. 41, aff'g 2008 ONCA 394, 67 C.C.P.B. 1 (Ont. C.A.), at para. 55.

185 However, the conclusion that Indalex as plan administrator had fiduciary duties to the plan beneficiaries is the beginning, not the end of the inquiry. This is because fiduciary duties do not exist at large, but arise from and relate to the specific legal interests at stake: *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, [2011] 2 S.C.R. 261 (S.C.C.), at para. 31. As La Forest J. put it in *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.):

> The obligation imposed [on a fiduciary] may vary in its specific substance depending on the relationship ... [N]ot every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty.... It is only in relation to breaches of the specific obligations imposed because the relationship is one characterized as fiduciary that a claim for breach of fiduciary duty can be founded.
>
> [Emphasis added; pp. 646-47.]

186 The nature and scope of the fiduciary duty must, therefore, be assessed in the legal framework governing the relationship out of which the fiduciary duty arises: see, e.g., *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, [2011] 2 S.C.R. 175 (S.C.C.), at para. 141; *Perez v. Galambos*, 2009 SCC 48, [2009] 3 S.C.R. 247 (S.C.C.), at paras. 36-37; *B. (K.L.) v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403 (S.C.C.), at para. 41. So, for example, as a general rule, a fiduciary has a duty of loyalty including the duty to avoid conflicts of interest: see, e.g., *3464920 Canada Inc. v. Strother*, 2007 SCC 24, [2007] 2 S.C.R. 177 (S.C.C.), at para. 35; *Lac Minerals*, at pp. 646-47. However, this general rule may have to be modified in light of

the legal framework within which a particular fiduciary duty must be exercised. In my respectful view, this is such a case.

(b) The Legal Framework of Indalex's Dual Role as a Plan Administrator and Employer

187 In order to define the nature and scope of Indalex's role and fiduciary obligations as a plan administrator, we must examine the legal framework within which the administrator functions. This framework is established primarily by the plan documents and the relevant provisions of the *PBA*. It is to these sources, first and foremost, that we look in order to shape the specific fiduciary duties owed in this context.

188 Turning first to the plan documents, I take the salaried plan as an example. Under it, the company is appointed the plan administrator: art. 13.01. The term "Company" is defined to mean Indalex Limited and any reference in the plan to actions taken or discretion to be exercised by the Company means Indalex acting through the board of directors or any person authorized by the board for the purposes of the plan: art. 2.09. Article 13.01 provides that the "Management Committee of the Board of Directors of the Company will appoint a Pension and Benefits Committee to act on behalf of the Company in its capacity as administrator of the Plan. The Pension and Benefits Committee will decide conclusively all matters relating to the operation, interpretation and application of the Plan." Thus, the Pension and Benefits Committee is to act on behalf of the company and by virtue of art. 2.09 its acts are considered those of the company. Article 13.02 sets out the duties of the Pension and Benefits Committee which include the "performance of all administrative functions not performed by the Funding Agent, the Actuary or any group annuity contract issuer": art. 13.02(1).

189 The plan administrator also has statutory powers and duties by virtue of the *PBA*. Section 22 lists the general duties of plan administrators, three of which are particularly relevant to these appeals:

> **22.** (1) [Care, diligence and skill] The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.
>
> (2) [Special knowledge and skill] The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.
>
> . . . . .
>
> (4) [Conflict of interest] An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

190 Not surprisingly, the powers and duties conferred on the administrator by the legislation are administrative in nature. For the most part they pertain to the internal management of the pension fund and to the relationship among the pension administrator, the beneficiaries, and the Superintendent of Financial Services ("Superintendent"). The list includes: applying to the Superintendent for registration of the plan and any amendments to it as well as filing annual information returns: ss. 9, 12 and 20 of the *PBA*; providing beneficiaries and eligible potential beneficiaries with information and documents: ss. 10(1)12 and 25; ensuring that the plan is administered in accordance with the *PBA* and its regulations and plan documents: s. 19; notifying beneficiaries of proposed amendments to the plan that would reduce benefits: s. 26; paying commuted value for pensions: s. 42; and filing wind-up reports if the plan is terminated: s. 70.

191 Of special relevance for this case are two additional provisions. Under s. 56, the administrator has a duty to ensure that pension payments are made when due and to notify the Superintendent if they are not and, under s. 59, the administrator has the authority to commence court proceedings when pension payments are not made.

192 The fiduciary duties that employer-administrators owe to plan beneficiaries relate to the statutory and other tasks described above; these are the "specific legal interests" with respect to which the employer-administrator's fiduciary duties attach.

193 Another important aspect of the legal context for Indalex's fiduciary duties as a plan administrator is that it was acting in the dual role of an employer-administrator. This dual role is expressly permitted under s. 8(1)(a) of the *PBA*, but this provision creates a situation where a single entity potentially owes two sets of fiduciary duties (one to the corporation and the other to the plan members).

194 This was the case for Indalex. As an employer-administrator, Indalex acted through its board of directors and so it was that body which owed fiduciary duties to the plan members. The board of directors also owed a fiduciary duty to the company to act in its best interests: *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 122(1)(*a*); *BCE Inc., Re*, 2008 SCC 69, [2008] 3 S.C.R. 560 (S.C.C.), at para. 36. In deciding what is in the best interests of the corporation, a board may look to the interests of shareholders, employees, creditors and others. But where those interests are not aligned or may conflict, it is for the directors, acting lawfully and through the exercise of business judgment, to decide what is in the overall best interests of the corporation. Thus, the board of Indalex, as an employer-administrator, could not always act exclusively in the interests of the plan beneficiaries; it also owed duties to Indalex as a corporation.

(c) Breaches of Fiduciary Duty

195 Against the background of these legal principles, I turn to consider the Court of Appeal's findings in relation to Indalex's breach of its fiduciary duties as administrator of the plans. As

noted, they fall into three categories: being in a conflict of interest position; taking steps to reduce pension obligations in the *CCAA* proceedings; and seeking bankruptcy status.

(i) Conflict of Interest

196 The questions here are first what constitutes a conflict of interest or duty between Indalex as business decision-maker and Indalex as plan administrator and what must be done when a conflict arises?

197 The Court of Appeal in effect concluded that a conflict of interest arises whenever Indalex makes business decisions that have "the potential to affect the Plans beneficiaries' rights" (para. 132) and that whenever such a conflict of interest arose, the employer-administrator was immediately in breach of its fiduciary duties to the plan members. Respectfully, this position puts the matter far too broadly. It cannot be the case that a conflict arises simply because the employer, exercising its management powers in the best interests of the corporation, does something that has the potential to affect the plan beneficiaries.

198 This conclusion flows inevitably from the statutory context. The existence of apparent conflicts that are inherent in the two roles being performed by the same party cannot be a breach of fiduciary duty because those conflicts are specifically authorized by the statute which permits one party to play both roles. As noted earlier, the *PBA* specifically permits employers to act as plan administrators (s. 8(1)(a)). Moreover, the broader business interests of the employer corporation and the interests of pension beneficiaries in getting the promised benefits are almost always at least potentially in conflict. Every important business decision has the potential to put at risk the solvency of the corporation and therefore its ability to live up to its pension obligations. The employer, within the limits set out in the plan documents and the legislation generally, has the authority to amend the plan unilaterally and even to terminate it. These steps may well not serve the best interests of plan beneficiaries.

199 Similarly, the simple existence of the sort of conflicts of interest identified by the Court of Appeal — those inherent in the employer's exercise of business judgment — cannot of themselves be a breach of the administrator's fiduciary duty. Once again, that conclusion is inconsistent with the statutory scheme that expressly permits an employer to act as plan administrator.

200 How, then, should we identify conflicts of interest in this context?

201 In *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631 (S.C.C.), Binnie J. referred to the *Restatement Third, The Law Governing Lawyers* (2000), at § 121, to explain when a conflict of interest occurs in the context of the lawyer-client relationship: para. 31. In my view, the same general principle, adapted to the circumstances, applies with respect to employer-administrators. Thus, a situation of conflict of interest occurs when there is a substantial risk that the employer-administrator's representation of the plan beneficiaries would be materially and adversely affected

by the employer-administrator's duties to the corporation. I would recall here, however, that the employer-administrator's obligation to represent the plan beneficiaries extends only to those tasks and duties that I have described above.

202 In light of the foregoing, I am of the view that the Court of Appeal erred when it found, in effect that a conflict of interest arose whenever Indalex was making decisions that "had the potential to affect the Plans beneficiaries' rights": para. 132. The Court of Appeal expressed both the potential for conflict of interest or duty and the fiduciary duty of the plan administrator much too broadly.

(ii) Steps in the CCAA Proceedings to Reduce Pension Obligations and Notice of Them

203 The Court of Appeal found that Indalex breached its fiduciary duty simply by commencing *CCAA* proceedings knowing that the plans were underfunded and by failing to give the plan beneficiaries notice of the proceedings: para. 139. As I understand the court's reasons, the decision to commence *CCAA* proceedings was solely the responsibility of the corporation and not part of the administration of the pension plan: para. 131. The difficulty which the Court of Appeal saw arose from the potential of the *CCAA* proceedings to result in a reduction of the corporation's pension obligations to the prejudice of the beneficiaries: paras. 131-32.

204 I respectfully disagree. Like Justice Deschamps, I find that seeking an initial order protecting the corporation from actions by its creditors did not, on its own, give rise to any conflict of interest or duty on the part of Indalex (reasons of Justice Deschamps, at para. 72).

205 First, it is important to remember that the purpose of *CCAA* proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:

> ... the purpose of the *CCAA* ... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57 (dissenting):

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

For this reason, I would be very reluctant to find that, simply by virtue of embarking on *CCAA* proceedings, an employer-administrator breaches its duties to plan members.

206 Second, the facts of this case do not support the contention that the interests of the plan beneficiaries and the employer were in conflict with respect to the decision to seek *CCAA* protection. It cannot seriously be suggested that some other course would have protected more fully the rights of the plan beneficiaries. The Court of Appeal did not suggest an alternative to seeking *CCAA* protection from creditors, nor did any of the parties. Indalex was in serious financial difficulty and its options were limited: either make a proposal to its creditors (under the *CCAA* or under the *BIA*), or go bankrupt. Moreover, the plan administrator's duty and authority do not extend to ensuring the solvency of the corporation and an independent administrator could not reasonably expect to be consulted about the plan sponsor's decision to seek *CCAA* protection. Finally, the application for *CCAA* proceedings did not reduce pension obligations other than to temporarily relieve the corporation of making special payments and it was the only step with any prospect of the pension funds obtaining from the insolvent corporation the money that would become due. There was thus no conflict of duty or interest between the administrator and the employer when protective action was taken for the purpose of preserving the *status quo* for the benefit of all stakeholders.

207 The Court of Appeal also found that it was a breach of fiduciary duty not to give the plan beneficiaries notice of the initial application for *CCAA* protection. Again, here, I must join Deschamps J. in disagreeing with the Court of Appeal's conclusion. Section 11(1) of the *CCAA* as it stood at the time of the proceedings, provided that parties could commence *CCAA* proceedings without giving notice to interested persons:

> **11.** (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

208 This provision was renumbered but not substantially changed when the Act was amended in September of 2009 (S.C. 2005, c. 47, s. 128, in force Sept. 18, 2009, SI/2009-68). Although it is not appropriate in every case, *CCAA* courts have discretion to make initial orders on an *ex parte* basis. This may be an appropriate — even necessary — step in order to prevent "creditors from moving to realize on their claims, essentially a 'stampede to the assets' once creditors learn of the debtor's financial distress": J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 55 ("*Rescue!*"); see also *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194 (Ont. C.A.), at para. 7. The respondents did not challenge Morawetz J.'s decision to exercise his discretion to make an *ex parte* order in this case.

209 This is not to say, however, that *ex parte* initial orders will always be required or acceptable. Without attempting to be exhaustive or to express any final view on these issues, I simply note

that there have been at least three ways in which courts have mitigated the possible negative effect on creditors of making orders without notice to potentially affected parties. First, courts have been reluctant to grant *ex parte* orders where the situation of the debtor company is not urgent. In *Rescue!*, Janis Sarra explains that courts are increasingly expecting applicants to have given notice before applying for a stay under the *CCAA*: p. 55. An example is *Marine Drive Properties Ltd., Re*, 2009 BCSC 145, 52 C.B.R. (5th) 47 (B.C. S.C.), a case in which Butler J. held that "[i]nitial applications in *CCAA* proceedings should not be brought without notice merely because it is an application under that Act. The material before the court must be sufficient to indicate an emergent situation": para. 27. Second, courts have included "come-back" clauses in their initial orders so that parties could return to court at a later date to seek to set aside some or all of the order: *Rescue!*, at p. 55. Note that such a clause was included in the initial order by Morawetz J.: para. 46. Finally, courts have limited their initial orders to the issues that need to be resolved immediately and have left other issues to be resolved after all interested parties have been given notice. Thus, in *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]), Morawetz J. limited the initial *CCAA* order so that priorities were only granted over the party that had been given notice. The discussion of suspending special payments or granting creditors priority over pension beneficiaries was left to a later date, after the parties that would be affected had been given notice. A similar approach was taken in the case of *AbitibiBowater Inc., Re*, 2009 QCCS 6459 (C.S. Que.). In his initial *CCAA* order, Gascon J. put off the decision regarding the suspension of past service contributions or special payments to the pension plans in question until the parties likely to be affected could be advised of the applicant's request: para. 7.

210 Failure to give notice of the initial *CCAA* proceedings was not a breach of fiduciary duty in this case. Indalex's decision to act as an employer-administrator cannot give the plan beneficiaries any greater benefit than they would have if their plan was managed by a third party administrator. Had there been a third party administrator in this case, Indalex would not have been under an obligation to tell the administrator that it was planning to enter *CCAA* proceedings. The respondents are asking this Court to give the advantage of Indalex's knowledge as employer to Indalex as the plan administrator in circumstances where the employer would have been unlikely to disclose the information itself. I am not prepared to blur the line between employers and administrators in this way.

211 I conclude that Indalex did not breach its fiduciary duty by commencing *CCAA* proceedings or by not giving notice to the plan beneficiaries of its intention to seek the initial *CCAA* order.

212 I turn next to the Court of Appeal's conclusion that seeking and obtaining the DIP orders without notice to the plan beneficiaries and seeking and obtaining the sale approval order constituted breaches of fiduciary duty.

213 To begin, I agree with the Court of Appeal that "just because the initial decision to commence *CCAA* proceedings is solely a corporate one ... does not mean that all subsequent decisions made

during the proceedings are also solely corporate ones": para. 132. It was at this point that Indalex's interests as a corporation came into conflict with its duties as a pension plan administrator.

214 The DIP orders could easily have the effect of making it impossible for Indalex to satisfy its funding obligations to the plan beneficiaries. When Indalex, through the exercise of business judgment, sought *CCAA* orders that would or might have this effect, it was in conflict with its duty as plan administrator to ensure that all contributions were paid when due.

215 I do not think, however, that the simple existence of this conflict of interest and duty, on its own, was a breach of fiduciary duty in these circumstances. As discussed earlier, the *PBA* expressly permits an employer to be a pension administrator and the statutory provisions about conflict of interest must be understood and applied in light of that fact. Moreover, an independent plan administrator would have no decision-making role with respect to the conduct of *CCAA* proceedings. So in my view, the difficulty that arose here was not the existence of the conflict itself, but Indalex's failure to take steps so that the plan beneficiaries would have the opportunity to have their interests protected in the *CCAA* proceedings as if the plans were administered by an independent administrator. In short, the difficulty was not the existence of the conflict, but the failure to address it.

216 Despite Indalex's failure to address its conflict of interest, the plan beneficiaries, through their own efforts, were represented at subsequent steps in the *CCAA* proceedings. The effect of Indalex's breach was therefore mitigated, a point which I will discuss in greater detail when I turn to the issue of the constructive trust.

217 Nevertheless, for the purposes of providing some guidance for future *CCAA* proceedings, I take this opportunity to briefly address what an employer-administrator can do to respond to these sorts of conflicts. First and foremost, an employer-administrator who finds itself in a conflict must bring the conflict to the attention of the *CCAA* judge. It is not enough to include the beneficiaries in the list of creditors; the judge must be made aware that the debtor, as an administrator of the plan is, or may be, in a conflict of interest.

218 Given their expertise and their knowledge of particular cases, *CCAA* judges are well placed to decide how best to ensure that the interests of the plan beneficiaries are fully represented in the context of "real-time" litigation under the *CCAA*. Knowing of the conflict, a *CCAA* judge might consider it appropriate to appoint an independent administrator or independent counsel as *amicus curiae* on terms appropriate to the particular case. Indeed, there have been cases in which representative counsel have been appointed to represent tort claimants, clients, pensioners and non-unionized employees in *CCAA* proceedings on terms determined by the judge: *Rescue!*, at p. 278; see, e.g., *First Leaside Wealth Management Inc., Re*, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]); *Nortel Networks Corp., Re* (2009), 75 C.C.P.B. 206 (Ont. S.C.J. [Commercial List]). In other circumstances, a *CCAA* judge might find that it is feasible to give notice directly to the pension

beneficiaries. In my view, notice, though desirable, may not always be feasible and decisions on such matters should be left to the judicial discretion of the *CCAA* judge. Alternatively, the judge might consider limiting draws on the DIP facility until notice can be given to the beneficiaries: *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]), at para. 24. Ultimately, the appropriate response or combination of responses should be left to the discretion of the *CCAA* judge in a particular case. The point, as well expressed by the Court of Appeal, is that the insolvent corporation which is also a pension plan administrator cannot "simply ignore its obligations as the Plans' administrator once it decided to seek *CCAA* protection": para. 132.

219 I conclude that the Court of Appeal erred in finding that Indalex breached its fiduciary duties as plan administrator by taking the various steps it did in the *CCAA* proceedings. However, I agree with the Court of Appeal that it breached its fiduciary duty by failing to take steps to ensure that the plan beneficiaries had the opportunity to be as fully represented in those proceedings as if there had been an independent plan administrator.

(iii) The Bankruptcy Motion

220 At the same time Indalex applied for the sale approval order, it also applied to lift the *CCAA* stay so that it could file an assignment into bankruptcy. As Campbell J. put it, this was done "to ensure the priority regime [it] urged as the basis for resisting the deemed trust": para. 52. The Court of Appeal concluded that this was a breach of Indalex's fiduciary duties because the motion was brought "with the intention of defeating the deemed trust claims and ensuring that the Reserve Fund was transferred to [the U.S. debtors]": para. 139. I respectfully disagree.

221 It was certainly open to Indalex as an employer to bring a motion to voluntarily enter into bankruptcy. A pension plan administrator has no responsibility or authority in relation to that step. The problem here is not that the motion was brought, but that Indalex failed to meaningfully address the conflict between its corporate interests and its duties as plan administrator.

222 To sum up, I conclude that Indalex did not breach any fiduciary duty by undertaking *CCAA* proceedings or seeking the relief that it did. The breach arose from Indalex's failure to ensure that its pension plan beneficiaries had the opportunity to have their interests effectively represented in the insolvency proceedings, particularly when Indalex sought the DIP financing approval, the sale approval and the motion for bankruptcy.

(3) Was Imposing a Constructive Trust Appropriate in This Case?

223 The next issue is whether a remedial constructive trust is, as the Court of Appeal concluded, an appropriate remedy in response to the breach of fiduciary duty.

224 The Court of Appeal exercised its discretion to impose a constructive trust and its exercise of this discretion is entitled to deference. Only if the discretion has been exercised on the basis

of an erroneous principle should the order be overturned on appeal: *Donkin v. Bugoy*, [1985] 2 S.C.R. 85 (S.C.C.), cited in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.), at para. 54, by Sopinka J. (dissenting, but not on this point). In my respectful view, the Court of Appeal's erroneous conclusions about the scope of a plan administrator's fiduciary duties require us to examine the constructive trust issue anew. Moreover, the Court of Appeal, in my respectful opinion, erred in principle in finding that the asset in this case resulted from the breach of fiduciary duty such that it would be unjust for the party in breach to retain it.

225 As noted earlier, the Court of Appeal imposed a constructive trust in favour of the plan beneficiaries with respect to funds retained in the reserve fund equal to the total amount of the wind-up deficiency for both plans. In other words, upon insolvency of Indalex, the plan beneficiaries received 100 cents on the dollar as a result of a judicially imposed trust taking priority over secured creditors, and indeed over other unsecured creditors, assuming there was no deemed trust for the executive plan.

226 I have explained earlier why I take a different view than did the Court of Appeal of Indalex's breach of fiduciary duty. In light of what I conclude was the breach which could give rise to a remedy, my view is that the constructive trust cannot properly be imposed in this case and the Court of Appeal erred in principle in exercising its discretion to impose this remedy.

227 I part company with the Court of Appeal with respect to several aspects of its constructive trust analysis; it is far from clear to me that any of the conditions for imposing a constructive trust were present here. However, I will only address one of them in detail. As I will explain, a remedial constructive trust for a breach of fiduciary duty is only appropriate if the wrongdoer's acts give rise to an identifiable asset which it would be unjust for the wrongdoer (or sometimes a third party) to retain. In my view, Indalex's failure to meaningfully address conflicts of interest that arose during the *CCAA* proceedings did not result in any such asset.

228 As the Court of Appeal recognized, the governing authority concerning the remedial constructive trust outside the domain of unjust enrichment is *Soulos*. In *Soulos*, McLachlin J. (as she then was) wrote that a constructive trust may be an appropriate remedy for breach of fiduciary duty: paras. 19-45. She laid out four requirements that should generally be satisfied before a constructive trust will be imposed: para. 45. Although, in *Soulos*, McLachlin J. was careful to indicate that these are conditions that "generally" must be present, all parties in this case accept that these four conditions must be present before a remedial constructive trust may be ordered for breach of fiduciary duty. The four conditions are these:

> (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;

> (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
>
> (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
>
> (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected. [para. 45]

229 My concern is with respect to the second requirement, that is, whether the breach resulted in an asset in the hands of Indalex. A constructive trust arises when the law imposes upon a party an obligation to hold specific property for another: D. W. M. Waters, M. R. Gillen and L. D. Smith, *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 454 ("*Waters*"). The purpose of imposing a constructive trust as a remedy for a breach of duty or unjust enrichment is to prevent parties "from retaining property which in 'good conscience' they should not be permitted to retain": *Soulos*, *at* para. 17. It follows, therefore, that while the remedial constructive trust may be appropriate in a variety of situations, the wrongdoer's conduct toward the plaintiff must generally have given rise to assets in the hands of the wrongdoer (or of a third party in some situations) which cannot in justice and good conscience be retained. That cannot be said here.

230 The Court of Appeal held that this second condition was present because "[t]he assets [i.e. the reserve fund monies] are directly connected to the process in which Indalex committed its breaches of fiduciary obligation": para. 204. Respectfully, this conclusion is based on incorrect legal principles. To satisfy this second condition, it must be shown that the breach *resulted in* the assets being in Indalex's hands, not simply, as the Court of Appeal thought, that there was a "connection" between the assets and "the process" in which Indalex breached its fiduciary duty. Recall that in *Soulos* itself, *the defendant's acquisition of the disputed property was a direct result of his breach of his duty of loyalty* to the plaintiff: para. 48. This is not our case. As the Court observed, in the context of an unjust enrichment claim in *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), at p. 995;

> ... for a constructive trust to arise, the plaintiff must establish a direct link to the property which is the subject of the trust by reason of the plaintiff's contribution.

231 While cases of breach of fiduciary duty are different in important ways from cases of unjust enrichment, La Forest J. (with Lamer J. concurring on this point) applied a similar standard for proprietary relief in *Lac Minerals*, a case in which wrongdoing was the basis for the constructive

trust: p. 678, quoted in *Waters'*, at p. 471. His comments demonstrate the high standard to be met in order for a constructive trust to be awarded:

> The constructive trust awards a right in property, but that right can only arise once a right to relief has been established. In the vast majority of cases a constructive trust will not be the appropriate remedy.... [A] constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. [p. 678]

232 The relevant breach in this case was the failure of Indalex to meaningfully address the conflicts of interest that arose in the course of the *CCAA* proceedings. (The breach that arose with respect to the bankruptcy motion is irrelevant because that motion was not addressed and therefore could not have given rise to the assets.) The "assets" in issue here are the funds in the reserve fund which were retained from the proceeds of the sale of Indalex as a going concern. Indalex's breach in this case did not give rise to the funds which were retained by the Monitor in the reserve fund.

233 Where does the respondents' claim of a procedural breach take them? Taking their position at its highest, it would be that the DIP approval proceedings and the sale would not have been approved. This position, however, is fatally flawed. Turning first to the DIP approval, there is no evidence to support the view that, had Indalex addressed its conflict in the DIP approval process, the DIP financing would have been rejected or granted on different terms. The *CCAA* judge, being fully aware of the pension situation, ruled that the DIP financing was "required", that there was "no other alternative available to the Applicants for a going concern solution", and that "the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing": endorsement of Morawetz J., April 8, 2009, at paras. 6 and 9. In effect, the respondents are claiming funds which arose only because of the process to which they now object. Taking into account that there was an absence of any evidence that more favourable financing terms were available, that the judge's decision was made with full knowledge of the plan beneficiaries' claims, and that he found that the DIP financing was necessary, the respondents' contention is not only speculative, it also directly contradicts the conclusions of the *CCAA* judge.

234 Turning next to the sale approval and the approval of the distribution of the assets, it is clear that the plan beneficiaries had independent representation but that this did not change the result. Although, perhaps with little thanks to Indalex, the interests of both plans were fully and ably represented before Campbell J. at the sale approval and interim distribution motions in July of 2009.

235 The executive plan retirees, through able counsel, objected to the sale on the basis that the liquidation values set out in the Monitor's seventh report would provide greater return for unsecured creditors. The motions judge dismissed this objection "on the basis *that there was no clear evidence to support the proposition and in any event the transaction as approved did preserve*

value for suppliers, customers and preserve approximately 950 jobs": trial reasons of Campbell J., at para. 13 (emphasis added). Both the executive plan retirees and the USW, which represented some members of the salaried plan, objected to the proposed distribution of the sale proceeds. In response to this objection, it was agreed that those objections would be heard promptly and that the Monitor would retain sufficient funds to satisfy the pensioners' claims if they were upheld: trial reasons of Campbell J., at paras. 14-16.

236 There is no evidence to support the contention that Indalex's breach of its fiduciary duty as pension administrator resulted in the assets retained in the reserve fund. I therefore conclude that the Court of Appeal erred in law in finding that the second condition for imposing a constructive trust — i.e. that the assets in the defendant's hands must be shown to have resulted from the defendant's breaches of duty to the plaintiff — had been established.

237 I would add only two further comments with respect to the constructive trust. A major concern of the Court of Appeal was that unless a constructive trust were imposed, the reserve funds would end up in the hands of other Indalex entities which were not operating at arm's length from Indalex. The U.S. debtors claimed the reserve fund because it had paid on its guarantee of the DIP loans and thereby stepped into the shoes of the DIP lender with respect to priority. Sun Indalex claims in the U.S. bankruptcy proceedings as a secured creditor of the U.S. debtors. The Court of Appeal put its concern this way: "To permit Sun Indalex to recover on behalf of [the U.S. debtors] would be to effectively permit the party who breached its fiduciary obligations to take the benefit of those breaches, to the detriment of those to whom the fiduciary obligations were owed": para. 199.

238 There are two difficulties with this approach, in my respectful view. The U.S. debtors paid real money to honour their guarantees. Moreover, unless there is a legal basis for ignoring the separate corporate personality of separate corporate entities, those separate corporate existences must be respected. Neither the parties nor the Court of Appeal advanced such a reason.

239 Finally, I would note that imposing a constructive trust was wholly disproportionate to Indalex's breach of fiduciary duty. Its breach — the failure to meaningfully address the conflicts of interest that arose during the *CCAA* process — had no adverse impact on the plan beneficiaries in the sale approval process which gave rise to the "asset" in issue. Their interests were fully represented and carefully considered before the sale was approved and the funds distributed. The sale was nonetheless judged to be in the best interests of the corporation, all things considered. In my respectful view, imposing a $6.75 million penalty on the other creditors as a remedial response to this breach is so grossly disproportionate to the breach as to be unreasonable.

240 A judicially ordered constructive trust, imposed long after the fact, is a remedy that tends to destabilize the certainty which is essential for commercial affairs and which is particularly important in financing a workout for an insolvent corporation. To impose a constructive trust

in response to a breach of fiduciary duty to ensure for the plan beneficiaries some procedural protections that they in fact took advantage of in any case is an unjust response in all of the circumstances.

241 I conclude that a constructive trust is not an appropriate remedy in this case and that the Court of Appeal erred in principle by imposing it.

C. Third Issue: Did the Court of Appeal Err in Concluding That the Super Priority Granted in the CCAA Proceedings Did Not Have Priority by Virtue of the Doctrine of Federal Paramountcy?

242 Although I disagree with my colleague Justice Deschamps with respect to the scope of the s. 57(4) deemed trust, I agree that if there was a deemed trust in this case, it would be superseded by the DIP loan because of the operation of the doctrine of federal paramountcy: paras. 48-60.

D. Fourth Issue: Did the Court of Appeal Err in its Cost Endorsement Respecting the USW?

(1) Introduction

243 The disposition of costs in the Court of Appeal was somewhat complex. Although the costs appeal relates only to the costs of the USW, it is necessary in order to understand their position to set out the costs order below in full.

244 With respect to the costs of the appeal to the Court of Appeal, no order was made for or against the Monitor due to its prior agreement with the former executives and the USW. However, the court ordered that the former executives and the USW, as successful parties, were each entitled to costs on a partial indemnity basis fixed at $40,000 inclusive of taxes and disbursements from Sun Indalex and the U.S. Trustee, payable jointly and severally: costs endorsement, 2011 ONCA 578, 81 C.B.R. (5th) 165 (Ont. C.A.), at para. 7.

245 Morneau Shepell Ltd., the Superintendent, and the former executives reached an agreement with respect to legal fees and disbursements and the Court of Appeal approved that agreement. The former executives received full indemnity legal fees and disbursements in the amount of $269,913.78 to be paid from the executive plan attributable to each of the 14 former executives' accrued pension benefits, allocated among the 14 former executives in relation to their pension entitlement from the executive plan. In other words, the costs would not be borne by the other three members of the executive plan who did not participate in the proceedings: C.A. costs endorsement, at para. 2. The costs of the appeal payable by Sun Indalex and the U.S. Trustee were to be paid into the fund of the executive plan and allocated among the 14 former executives in relation to their pension entitlement from the executive plan.

246 USW sought an order for payment of its costs from the fund of the salaried plan. However, the Court of Appeal declined to make such an order because the USW was in a "materially different position" than that of the former executives: costs endorsement, at para. 3. The latter were beneficiaries to the pension fund (14 of the 17 members of the plan), and they consented to the payment of costs from their individual benefit entitlements. Those who had not consented would not be affected by the payment. In contrast, the USW was the bargaining agent (not the beneficiary) for only 7 of the 169 beneficiaries of the salaried plan, none of whom was given notice of, or consented to, the payment of legal costs from the salaried plan. Moreover, the USW sought and seeks an order that its costs be paid out of the fund. This request is significantly different than the order made in favour of the former executives. The former executives explicitly ensured that their choice to pursue the litigation would not put at risk the pension benefits of those members who did not retain counsel even though of course those members would benefit in the event the litigation was successful. The USW is not proposing to insulate the 162 members whom it does not represent from the risk of litigation; it seeks an order requiring all members to share the risk of the litigation even though it represents only 7 of the 169. The proposition advanced by the USW was thus materially different from that advanced on behalf of the executive plan and approved by the court.

(2) Standard of Review

247 In *Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)*, 2009 SCC 39, [2009] 2 S.C.R. 678 (S.C.C.), Rothstein J. held that "costs awards are quintessentially discretionary": para. 126. Discretionary costs decisions should only be set aside on appeal if the court below "has made an error in principle or if the costs award is plainly wrong": *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9, [2004] 1 S.C.R. 303 (S.C.C.), at para. 27.

(3) Analysis

248 I do not see any basis to interfere with the Court of Appeal's costs endorsement in this case. In my view, the USW's submissions are largely based on an inaccurate reading of the Court of Appeal's costs endorsement. Contrary to what the USW submits, the Court of Appeal did *not* require the consent of plan beneficiaries as a prerequisite to ordering payment of costs from the fund. Nor is it correct to suggest that the costs endorsement would "restrict recovery of beneficiary costs to instances when there is a surplus in the pension trust fund" or "preclude financing of beneficiary action when a fund is in deficit": USW factum, at paras. 71 and 76. Nor would I read the Court of Appeal's brief costs endorsement as laying down a rule that a union representing pension beneficiaries cannot recover costs from the fund because the union itself is not a beneficiary.

249 The premise of the USW's appeal appears to be that it was entitled to costs because it met what it refers to in its submissions as the Costs Payment Test and that if the executive plan

members got their costs out of their pension fund, the union should get its costs out of the salaried employees' pension fund. Respectfully, I do not accept the validity of either premise.

250 The decision whether to award costs from the pension fund remains a discretionary matter. In *Nolan*, Rothstein J. surveyed the various factors that courts have taken into account when deciding whether to award a litigant its costs out of a pension trust. The first broad inquiry considered in *Nolan* was into whether the litigation concerned the due administration of the trust. In connection with this inquiry, courts have considered the following factors: (1) whether the litigation was primarily about the construction of the plan documents; (2) whether it clarified a problematic area of the law; (3) whether it was the only means of clarifying the parties' rights; (4) whether the claim alleged maladministration; and (5) whether the litigation had no effect on other beneficiaries of the trust fund: *Nolan*, at para. 126.

251 The second broad inquiry discussed in *Nolan* was whether the litigation was ultimately adversarial: para. 127. The following factors have been considered: (1) whether the litigation included allegations by an unsuccessful party of a breach of fiduciary duty; (2) whether the litigation only benefited a class of members and would impose costs on other members if successful; and (3) whether the litigation had any merit.

252 I do not think that it is correct to elevate these two inquiries (which constitute the Costs Payment Test articulated by the USW) to a test for entitlement to costs in the pension context. The factors set out in *Nolan* and other cases cited therein are best understood as highly relevant considerations guiding the exercise of judicial discretion with respect to costs.

253 The litigation undertaken here raised novel points of law with all of the uncertainty and risk inherent in such an undertaking. The Court of Appeal in essence decided that the USW, representing only 7 of 169 members of the plan, should not without consultation be able to in effect impose the risks of that litigation on all of the plan members, the vast majority of whom were not union members. Whatever arguments might be raised against the Court of Appeal's decision in light of the success of the litigation and the sharing by all plan members of the benefits, the failure of the litigation seems to me to leave no basis to impose the cost consequences of taking that risk on all of the plan members of an already underfunded plan.

254 The second premise of the USW appeal appears to be that if the executive plan members have their costs paid out of the fund, so too should the salaried plan members. Respectfully, however, this is not an accurate statement of the order made with respect to the executive plan.

255 The Court of Appeal's order with respect to the executive plan meant that only the pension fund attributable to those members of the plan who actually supported the litigation — the vast majority I would add — would contribute to the costs of the litigation even though all members of the plan would benefit in the case of success. As the Court of Appeal noted:

> The individual represented Retirees, who comprise 14 of 17 members of the Executive Plan, have consented to the payment of costs from their individual benefit entitlements. Those who have not consented will not be affected by the payment. [Costs endorsement, at para. 3]

256 The Court of Appeal therefore approved an agreement as to costs which did not put at further risk the pension funds available to satisfy the pension entitlements of those who did not support the litigation. Thus, the Court of Appeal did not apply what the USW refers to as the Costs Payment Test to the executive plan because the costs order was the product of agreement and did not order payment of costs out of the fund as a whole.

257 In the case of the USW request, there was no such agreement and no such limitation of risk to the supporters of the litigation.

258 I see no error in principle in the Court of Appeal's refusal to order the USW costs to be paid out of the pension fund, particularly in light of the disposition of the appeal to this Court. I would dismiss the USW costs appeal but without costs.

IV. Disposition

259 I would allow the Sun Indalex, FTI Consulting and George L. Miller appeals and, except as noted below, I would set aside the orders of the Ontario Court of Appeal and restore the February 18, 2010 orders of Campbell J.

260 With respect to costs, I would set aside the Court of Appeal's orders with respect to the costs of the appeals before that court and order that all parties bear their own costs in the Court of Appeal and in this Court.

261 I would not disturb paras. 9 and 10 of the order of the Court of Appeal in the former executives' appeal so that the full indemnity legal fees and disbursements of the former executives in the amount of $269,913.78 shall be paid from the fund of the executive plan attributable to each of the 14 former executives' accrued pension benefits, and specifically such amounts shall be allocated among the 14 former executives in relation to their pension entitlement from the executive plan and will not be borne by the other three members of the executive plan.

262 I would dismiss the USW costs appeal, but without costs.

***LeBel J.* (dissenting):**

I. Introduction

263 The members of two pension plans set up by Indalex Limited ("Indalex") stand to lose half or more of their pension benefits as a consequence of the insolvency of their employer and of the

arrangement approved by the Ontario Superior Court of Justice under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The Court of Appeal for Ontario found that the members were entitled to a remedy. For different and partly conflicting reasons, my colleagues Justices Deschamps and Cromwell would hold that no remedy is available to them. With all due respect for their opinions, I would conclude, like the Court of Appeal, that the remedy of a constructive trust is open to them and should be imposed in the circumstances of this case, for the following reasons.

264 I do not intend to summarize the facts of this case, which were outlined by my colleagues. I will address these facts as needed in the course of my reasons. Before moving to my areas of disagreement with my colleagues, I will briefly indicate where and to what extent I agree with them on the relevant legal issues.

265 Like my colleagues, I conclude that no deemed trust could arise under s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), in the case of the Executive Plan because this plan had not been wound up when the *CCAA* proceedings were initiated. In the case of the Salaried Employees Plan, I agree with Deschamps J. that a deemed trust arises in respect of the wind-up deficiency. But, like her, I accept that the debtor-in-possession ("DIP") super priority prevails by reason of the application of the federal paramountcy doctrine. I also agree that the costs appeal of the United Steelworkers should be dismissed.

266 But, with respect for the opinions of my colleagues, I take a different view of the nature and extent of the fiduciary duties of an employer who elects to act as administrator of a pension plan governed by the *PBA*. This dual status does not entitle the employer to greater leniency in the determination and exercise of its fiduciary duties or excuse wrongful actions. On the contrary, as we shall see below, I conclude that Indalex not only neglected its obligations towards the beneficiaries, but actually took a course of action that was actively inimical to their interests. The seriousness of these breaches amply justified the decision of the Court of Appeal to impose a constructive trust. To that extent, I propose to uphold the opinion of Gillese J.A. and the judgment of the Court of Appeal (2011 ONCA 265, 104 O.R. (3d) 641).

II. The Employer as Administrator of a Pension Plan: Its Fiduciary Duties

267 Before entering into an analysis of the obligations of an employer as administrator of a pension plan under the *PBA*, it is necessary to consider the position of the beneficiaries. Who are they? At what stage are they in their lives? What are their vulnerabilities? A fiduciary relationship is a relationship, grounded in fact and law, between a vulnerable beneficiary and a fiduciary who holds and may exercise power over the beneficiary in situations recognized by law. Any analysis of such a relationship requires careful consideration of the characteristics of the beneficiary. It ought not stop at the level of a theoretical and detached approach that fails to address how, very

concretely, this relationship works or can be twisted, perverted or abused, as was the situation in this case.

268 The beneficiaries were in a very vulnerable position relative to Indalex. They did not enjoy the protection that the existence of an independent administrator might have given them. They had no say and no input in the management of the plans. The information about the plans and their situation came from Indalex in its dual role as employer and manager of the plans. Their particular vulnerability arose from their relationship with Indalex, acting both as their employer and as the administrator of their retirement plans. Their vulnerability was substantially a consequence of that specific relationship (*Perez v. Galambos*, 2009 SCC 48, [2009] 3 S.C.R. 247 (S.C.C.), at para. 68, *per* Cromwell J.). The nature of this relationship had very practical consequences on their interests. For example, as Gillese J.A. noted in her reasons (at para. 40) the consequences of the decisions made in the course of management of the plan and during the *CCAA* proceedings signify that the members of the Executive Plan stand to lose one-half to two-thirds of their retirement benefits, unless additional money is somehow paid into the plan. These losses of benefits are, in all probability, permanent in the case of the beneficiaries who have already retired or who are close to retirement. They deeply affect their lives and expectations. For most of them, what is lost is lost for good. No arrangement will allow them to get a start on a new life. We should not view the situation of the beneficiaries as regrettable but unavoidable collateral damage arising out of the ebbs and tides of the economy. In my view, the law should give the members some protection, as the Court of Appeal intended when it imposed a constructive trust.

269 Indalex was in a conflict of interest from the moment it started to contemplate putting itself under the protection of the *CCAA* and proposing an arrangement to its creditors. From the corporate perspective, one could hardly find fault with such a decision. It was a business decision. But the trouble is that at the same time, Indalex was a fiduciary in relation to the members and retirees of its pension plans. The "two hats" analogy offers no defence to Indalex. It could not switch off the fiduciary relationship at will when it conflicted with its business obligations or decisions. Throughout the arrangement process and until it was replaced by an independent administrator (Morneau Shepell Ltd.) it remained a fiduciary.

270 It is true that the *PBA* allows an employer to act as an administrator of a pension plan in Ontario. In such cases, the legislature accepts that conflicts of interest may arise. But, in my opinion, nothing in the *PBA* allows that the employer *qua* administrator will be held to a lower standard or will be subject to duties and obligations that are less stringent than those of an independent administrator. The employer remains a fiduciary under the statute and at common law (*PBA*, s. 22(4)). The employer is under no obligation to assume the burdens of administering the pension plans that it has agreed to set up or that are the legacy of previous decisions. However, if it decides to do so, a fiduciary relationship is created with the expectation that the employer will be able to avoid or resolve the conflicts of interest that might arise. If this proves to be impossible, the employer is still "seized" with fiduciary duties, and cannot ignore them out of hand.

271 Once Indalex had considered the *CCAA* process and decided to proceed in that manner, it should have been obvious that such a move would trigger conflicts of interest with the beneficiaries of the pension plans and that these conflicts would become untenable, as per the terms of s. 22(4) of the *PBA*. Given the nature of its obligations as administrator and fiduciary, it was impossible to wear the "two hats". Indalex had to discharge its corporate duties, but at the same time it had to address its fiduciary obligations to the members and beneficiaries of the plans. I do not fault it for applying under the *CCAA*, but rather for not relinquishing its position as administrator of the plans at the time of the application. It even retained this position once it engaged in the arrangement process. Other conflicts and breaches of fiduciary duties and of fundamental rules of procedural equity in the Superior Court flowed from this first decision. Moreover, Indalex maintained a strongly adversarial attitude towards the interest of the beneficiaries throughout the arrangement process, while it was still, at least in form, the administrator of the plans.

272 The option given to employers to act as administrators of pension plans under the *PBA* does not constitute a licence to breach the fiduciary duties that flow from this function. It should not be viewed as an invitation for the courts to whitewash the consequences of such breaches. The option is predicated on the ability of the employer-administrator to avoid the conflicts of interests that cause these breaches. An employer deciding to assume the position of administrator cannot claim to be in the same situation as the Crown when it discharges fiduciary obligations towards certain groups in society under the Constitution or the law. For those cases, the Crown assumes those duties because it is obligated to do so by virtue of its role, not because it chooses to do so. In such circumstances, the Crown must often balance conflicting interests and obligations to the broader society in the discharge of those fiduciary duties (*Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, [2011] 2 S.C.R. 261 (S.C.C.), at paras. 37-38). If Indalex found itself in a situation where it had to balance conflicting interests and obligations, as it essentially argues, it could not retain the position of administrator that it had willingly assumed. The solution was not to place its function as administrator and its associated fiduciary duties in abeyance. Rather, it had to abandon this role and diligently transfer its function as manager to an independent administrator.

273 Indalex could apply for protection under the *CCAA*. But, in so doing, it needed to make arrangements to avoid conflicts of interests. As nothing was done, the members of the plans were left to play catch up as best they could when the process that put in place the DIP financing and its super priority was initiated. The process had been launched in such a way that it took significant time before the beneficiaries could effectively participate in the process. In practice, the United Steelworkers union, which represented only a small group of the members of the Salaried Employees Plan, acted for them after the start of the procedures. The members of the Executive Plan hired counsel who appeared for them. But, throughout, there were problems with notices, delays and the ability to participate in the process. Indeed, during the *CCAA* proceedings, the Monitor and Indalex seemed to have been more concerned about keeping the members of the plans out of the process rather than ensuring that their voices could be heard. Two paragraphs of the

submissions to this Court by Morneau Shepell Ltd., the subsequently appointed administrator of the plan, aptly sums up the behaviour of Indalex and the Monitor towards the beneficiaries, whose representations were always deemed to be either premature or late:

> When counsel for the Retirees again appeared at a motion to approve the bidding procedure, his objections were considered premature:
>
> > In my view, the issues raised by the retirees do not have any impact on the Bidding Procedures. The issues can be raised by the retirees on any application to approve a transaction — but that is for another day. [(2009), 79 C.C.P.B. 101 (Ont. S.C.J.), at para. 10, *per* Morawetz J.]
>
> Only when counsel appeared at the sale approval motion, as directed by the motions judge, were the concerns of the pension plan beneficiaries heard. At that time, the Appellants complain, the beneficiaries were too late and their motion constituted a collateral attack on the original DIP Order. However, it cannot be the case that stakeholder groups are too early, until they are too late. [Factum, at paras. 54-55]

274 I must also mention the failed attempt to assign Indalex in bankruptcy once the sale of its business had been approved. One of the purposes of this action was essentially to harm the interests of the members of the plans. At the time, Indalex was still wearing its two hats, at least from a legal perspective. But its duties as a fiduciary were clearly not at the forefront of its concerns. There were constant conflicts of interest throughout the process. Indalex did not attempt to resolve them; it brushed them aside. In so acting, it breached its duties as a fiduciary and its statutory obligations under s. 22(4) *PBA*.

III. Procedural Fairness in CCAA Proceedings

275 The manner in which this matter was conducted in the Superior Court was, at least partially, the result of Indalex disregarding its fiduciary duties. The procedural issues that arose in that court did not assist in mitigating the consequences of these breaches. It is true that, in the end, the beneficiaries obtained, or were given, some information pertaining to the proceedings and that counsel appeared on their behalf at various stages of the proceedings. However, the basic problem is that the proceedings were not conducted according to the spirit and principles of the Canadian system of civil justice.

276 I accept that those procedures are often urgent. The situation of a debtor requires quick and efficient action. The turtle-like pace of some civil litigation would not meet the needs of the application of the *CCAA*. However, the conduct of proceedings under this statute is not solely an administrative process. It is also a judicial process conducted according to the tenets of the adversarial system. The fundamentals of such a system must not be ignored. All interested parties are entitled to a fair procedure that allows their voices to be raised and heard. It is not an answer

to these concerns to say that nothing else could be done, that no other solution would have been better, that, in substance, hearing the members would have been a waste of time. In all branches of procedure whether in administrative law, criminal law or civil action, the rights to be informed and to be heard in some way remain fundamental principles of justice. Those principles retain their place in the *CCAA*, as some authors and judges have emphasized (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 55-56; *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]), at para. 5, *per* Farley J.). This was not done in this case, as my colleagues admit, while they downplay the consequences of these procedural flaws and breaches.

IV. Imposing a Constructive Trust

277 In this context, I see no error in the decision of the Court of Appeal to impose a constructive trust (paras. 200-207). It was a fair decision that met the requirements of justice, under the principles set out by our Court in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 (S.C.C.), and in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.). The remedy of a constructive trust was justified in order to correct the wrong caused by Indalex (*Soulos*, at para. 36, *per* McLachlin J. (as she then was)). The facts of the situation met the four conditions that generally justify the imposition of a constructive trust (*Soulos*, at para. 45), as determined by Justice Gillese in her reasons, at paras. 203 and 204: (1) the defendant was under an equitable obligation in relation to the activities giving rise to the assets in his or her hands; (2) the assets in the hands of the defendant were shown to have resulted from deemed or actual agency activities of the defendant in breach of his or her equitable obligation to the plaintiff; (3) the plaintiff has shown a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendants remain faithful to their duties; and (4) there are no factors which would render imposition of a constructive trust unjust in all the circumstances of the case, such as the protection of the interests of intervening creditors.

278 In crafting such a remedy, the Court of Appeal was relying on the inherent powers of the courts to craft equitable remedies, not only in respect of procedural issues, but also of substantive questions. Section 9 of the *CCAA* is broadly drafted and does not deprive courts of their power to fill in gaps in the law when this is necessary in order to grant justice to the parties (G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law, 2007* (2008), 41, at pp. 78-79).

279 The imposition of the trust did not disregard the different corporate personalities of Indalex and Indalex U.S. It properly acknowledged the close relationship between the two companies, the second in effect controlling the first. This relationship could and needed to be taken into consideration in order to determine whether a constructive trust was a proper remedy.

280 For these reasons, I would uphold the imposition of a constructive trust and I would dismiss the appeal with costs to the respondents.

Order accordingly.

Ordonnance en conséquence.

Appendix

The Pension Benefits Amendment Act, 1973, S.O. 1973, c. 113

6. The said Act is amended by adding thereto the following sections:

23*a*. — (1) Any sum received by an employer from an employee pursuant to an arrangement for the payment of such sum by the employer into a pension plan as the employee's contribution thereto shall be deemed to be held by the employer in trust for payment of the same after his receipt thereof into the pension plan as the employee's contribution thereto and the employer shall not appropriate or convert any part thereof to his own use or to any use not authorized by the trust.

(2) For the purposes of subsection 1, any sum withheld by an employer, whether by payroll deduction or otherwise, from moneys payable to an employee shall be deemed to be a sum received by the employer from the employee.

(3) Any sum required to be paid into a pension plan by an employer as the employer's contribution to the plan shall, when due under the plan, be deemed to be held by the employer in trust for payment of the same into the plan in accordance with the plan and this Act and the regulations as the employer's contribution and the employer shall not appropriate or convert any part of the amount required to be paid to the fund to his own use or to any use not authorized by the terms of the pension plan.

Pension Benefits Act, R.S.O. 1980, c. 373

21. . . .

(2) Upon the termination or winding up of a pension plan filed for registration as required by section 17, the employer is liable to pay all amounts that would otherwise have been required to be paid to meet the tests for solvency prescribed by the regulations, up to the date of such termination or winding up, to the insurer, administrator or trustee of the pension plan.

. . . . .

23. — (1) Where a sum is received by an employer from an employee under an arrangement for the payment of the sum by the employer into a pension plan as the employee's contribution thereto, the employer shall be deemed to hold the sum in trust for the employee until the sum is paid into the pension plan whether or not the sum has in fact been kept separate and

apart by the employer and the employee has a lien upon the assets of the employer for such amount that in the ordinary course of business would be entered in books of account whether so entered or not.

. . . . .

(3) Where an employer is required to make contributions to a pension plan, he shall be deemed to hold in trust for the members of the plan an amount calculated in accordance with subsection (4), whether or not,

(a) the employer contributions are payable into the plan under the terms of the plan or this Act; or

(b) the amount has been kept separate and apart by the employer,

and the members have a lien upon the assets of the employer in such amount that in the ordinary course of business would be entered into the books of account whether so entered or not.

(4) For the purpose of determining the amount deemed to be held in trust under subsection (3) on a specific date, the calculation shall be made as if the plan had been wound up on that date.

. . . . .

32. In addition to any amounts the employer is liable to pay under subsection 21 (2), where a defined benefit pension plan is terminated or wound up or the plan is amended so that it is no longer a defined benefit pension plan, the employer is liable to the plan for the difference between,

(a) the value of the assets of the plan; and

(b) the value of pension benefits guaranteed under subsection 31 (1) and any other pension benefit vested under the terms of the plan,

and the employer shall make payments to the insurer, trustee or administrator of the pension plan to fund the amount owing in such manner as is prescribed by regulation.

Pension Benefits Amendment Act, 1983, S.O. 1983, c. 2

2. Subsection 21 (2) of the said Act is repealed and the following substituted therefor:

(2) Upon the termination or winding up of a registered pension plan, the employer of employees covered by the pension plan shall pay to the administrator, insurer or trustee of the pension plan,

(a) an amount equal to,

(i) the current service cost, and

(ii) the special payments prescribed by the regulations,

that have accrued to and including the date of the termination or winding up but, under the terms of the pension plan or the regulations, are not due on that date; and

(b) all other payments that, by the terms of the pension plan or the regulations, are due from the employer to the pension plan but have not been paid at the date of the termination or winding up.

(2a) For the purposes of clause (2) (a), the current service cost and special payments shall be deemed to accrue on a daily basis.

3. Section 23 of the said Act is repealed and the following substituted therefor:

23. — (1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension plan as the employee's contribution to the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension plan.

(2) For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from moneys payable to an employee shall be deemed to be money received by the employer from the employee.

(3) The administrator or trustee of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsection (1).

(4) An employer who is required by a pension plan to contribute to the pension plan shall be deemed to hold in trust for the members of the pension plan an amount of money equal to the total of,

(a) all moneys that the employer is required to pay into the pension plan to meet,

(i) the current service cost, and

(ii) the special payments prescribed by the regulations,

that are due under the pension plan or the regulations and have not been paid into the pension plan; and

(b) where the pension plan is terminated or wound up, any other money that the employer is liable to pay under clause 21 (2) (a).

(5) The administrator or trustee of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsection (4).

(6) Subsections (1) and (4) apply whether or not the moneys mentioned in those subsections are kept separate and apart from other money.

. . . . .

8. Sections 32 and 33 of the said Act are repealed and the following substituted therefor:

32. — (1) The employer of employees who are members of a defined benefit pension plan that the employer is bound by or to which the employer is a party and that is partly or wholly wound up shall pay to the administrator, insurer or trustee of the plan an amount of money equal to the amount by which the value of the pension benefits guaranteed by section 31 plus the value of the pension benefits vested under the defined benefit pension plan exceeds the value of the assets of the plan allocated in accordance with the regulations for payment of pension benefits accrued with respect to service in Ontario.

(2) The amount that the employer is required to pay under subsection (1) is in addition to the amounts that the employer is liable to pay under subsection 21 (2).

(3) The employer shall pay the amount required under subsection (1) to the administrator, insurer or trustee of the defined benefit pension plan in the manner prescribed by the regulations.

Pension Benefits Act, 1987, S.O. 1987, c. 35

58. — (1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

. . . . .

(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

. . . . .

59. — (1) Money that an employer is required to pay into a pension fund accrues on a daily basis.

(2) Interest on contributions shall be calculated and credited at a rate not less than the prescribed rates and in accordance with prescribed requirements.

. . . . .

75. — (1) A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least fifty-five, at the effective date of the wind up of the pension plan in whole or in part, has the right to receive,

(a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;

(b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

. . . . .

76. — (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Commission declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 40 (3) (50 per cent rule) and section 75,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

Pension Benefits Act, R.S.O. 1990, c. P.8

57. (1) [Trust property] Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

(2) [Money withheld] For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from money payable to an employee shall be deemed to be money received by the employer from the employee.

(3) [Accrued contributions] An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

(4) [Wind up] Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

. . . . .

58. (1) [Accrual] Money that an employer is required to pay into a pension fund accrues on a daily basis.

(2) [Interest] Interest on contributions shall be calculated and credited at a rate not less than the prescribed rates and in accordance with prescribed requirements.

. . . . .

74. (1) [Activating events] This section applies if a person ceases to be a member of a pension plan on the effective date of one of the following activating events:

1. The wind up of a pension plan, if the effective date of the wind up is on or after April 1, 1987.

2. The employer's termination of the member's employment, if the effective date of the termination is on or after July 1, 2012. However, this paragraph does not apply if the termination occurs in any of the circumstances described in subsection (1.1).

3. The occurrence of such other events as may be prescribed in such circumstances as may be specified by regulation.

(1.1) [Same, termination of employment] Termination of employment is not an activating event if the termination is a result of wilful misconduct, disobedience or wilful neglect of duty by the member that is not trivial and has not been condoned by the employer or if the termination occurs in such other circumstances as may be prescribed.

(1.2) [Exceptions, election by certain pension plans] This section does not apply with respect to a jointly sponsored pension plan or a multi-employer pension plan while an election made under section 74.1 for the plan and its members is in effect.

(1.3) [Benefit] A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least 55 on the effective date of the activating event has the right to receive,

(a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;

(b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the activating event had not occurred and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the activating event had not occurred and if the member's membership continued to that date.

(2) [Part year] In determining the combination of age plus employment or membership, one-twelfth credit shall be given for each month of age and for each month of continuous employment or membership on the effective date of the activating event.

(3) [Member for 10 years] Bridging benefits offered under the pension plan to which a member would be entitled if the activating event had not occurred and if his or her membership were continued shall be included in calculating the pension benefit under subsection (1.3) of a person who has at least 10 years of continuous employment with the employer or has been a member of the pension plan for at least 10 years.

(4) [Prorated bridging benefit] For the purposes of subsection (3), if the bridging benefit offered under the pension plan is not related to periods of employment or membership in the pension plan, the bridging benefit shall be prorated by the ratio that the member's actual period of employment bears to the period of employment that the member would have to the earliest date on which the member would be entitled to payment of pension benefits and a full bridging benefit under the pension plan if the activating event had not occurred.

(5) [Notice of termination of employment] Membership in a pension plan that is wound up includes the period of notice of termination of employment required under Part XV of the *Employment Standards Act, 2000*.

(6) [Application of subs. (5)] Subsection (5) does not apply for the purpose of calculating the amount of a pension benefit of a member who is required to make contributions to the pension fund unless the member makes the contributions in respect of the period of notice of termination of employment.

(7) [Consent of employer] For the purposes of this section, where the consent of an employer is an eligibility requirement for entitlement to receive an ancillary benefit, the employer shall be deemed to have given the consent.

(7.1) [Consent of administrator, jointly sponsored pension plans] For the purposes of this section, where the consent of the administrator of a jointly sponsored pension plan is an eligibility requirement for entitlement to receive an ancillary benefit, the administrator shall be deemed to have given the consent.

(8) [Use in calculating pension benefit] A benefit described in clause (1.3) (a), (b) or (c) for which a member has met all eligibility requirements under this section shall be included in calculating the member's pension benefit or the commuted value of the pension benefit.

. . . . .

75. (1) [Liability of employer on wind up] Where a pension plan is wound up, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

End of Document

Tab 43

CV-19-616261

Re Hi-Rise Capital Ltd

Endorsement

1) This motion is not opposed. It is granted on the terms of the attached Distribution Plan Approval Order.

Hainey J.

November 23, 2020

Court File No.: CV-19-616261-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	MONDAY, THE 23rd
	)	
	)	
MR. JUSTICE HAINEY	)	DAY OF NOVEMBER, 2020

IN THE MATTER OF SECTION 60 OF THE TRUSTEE ACT, R.S.O. 1990, C. T.23, AS AMENDED, AND RULE 10 OF THE ONTARIO RULES OF CIVIL PROCEDURE, R.R.O. 1990, REG. 194, AS AMENDED

AND IN THE MATTER OF HI-RISE CAPITAL LTD. AND IN THE MATTER OF ADELAIDE STREET LOFTS INC.

ORDER
(Distribution Plan Approval)

THIS MOTION, made by Miller Thomson LLP, in its capacity as Court-appointed Representative Counsel in this proceeding (in such capacity, "**Representative Counsel**"), appointed pursuant to the Order of the Honourable Mr. Justice Hainey dated March 21, 2019 (the "**Appointment Order**") to represent the interests of all individuals and/or entities ("**Investors**", which term does not include persons who have opted out of such representation in accordance with the Appointment Order (the "**Opt Out Investors**")) that have invested funds in a syndicated mortgage investment (the "**Mortgage**") administered by Hi-Rise Capital Ltd. ("**Hi-Rise**"), in respect of the proposed development known as the "Adelaide Street Lofts" (the "**Project**") at the property municipally known as 263 Adelaide Street West, Toronto, Ontario (the "**Property**") and owned by Adelaide Street Lofts Inc. (the "**Company**"), was heard this day at the Court House, 330 University Avenue, Toronto, Ontario,

ON READING the Sixth Report of Representative Counsel dated November 6, 2020 (the "**Sixth Report**") and the Supplementary Sixth Report dated November 20, 2020 (the "**Supplementary Report**") and on hearing the submissions of Representative Counsel, counsel to

Hi-Rise, the Company, the Financial Services Regulatory Authority of Ontario, Meridian Credit Union Limited ("**Meridian**"), the Opt Out Investors, and Lanterra Developments Ltd.,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

APPROVAL OF REPORT & CONDUCT

2. **THIS COURT ORDERS** that the Sixth Report and Supplementary Report of Representative Counsel and the activities and conduct of Representative Counsel, as disclosed therein, be and are hereby approved, provided that such approval is without prejudice to Objecting Investors (as such term is defined at paragraph 10(b) of the Sixth Report).

APPROVAL OF DISTRIBUTION PLAN

3. **THIS COURT ORDERS** that Representative Counsel be and it is hereby authorized (but not obligated) to implement and conduct the Distribution Plan (as defined in the Sixth Report) in respect of the Investors in accordance with the procedures described in the attached Schedule "A" (the "**Distribution Plan Procedures**").

4. **THIS COURT ORDERS AND DECLARES** that all Investors whose investments in the Mortgage are held in trust by Community Trust Company (collectively, the "**Registered Investors**") shall, for the purposes of the Distribution Plan and entitlements calculated thereunder, be treated *pari passu*, and shall share *pro rata* in a single class based on the amounts of investments (including accrued interest).

5. **THIS COURT ORDERS AND DECLARES** that, all Investors whose investments in the Mortgage are held in trust and administered by Hi-Rise (collectively, the "**Non-Registered Investors**") shall, for the purposes of the Distribution Plan and entitlements calculated thereunder, be treated *pari passu*, and shall share *pro rata* in a single class based on the amounts of investments (including accrued interest), provided that the claims and entitlements of Objecting Investors

shall be determined in accordance with the Distribution Plan Procedures.

NOTICE OF PAYMENT AMOUNTS

6. **THIS COURT ORDERS** that the form of Investor Payment Notice (including the attached Objection Notice) attached as Schedule "B" hereto be and it is hereby approved.

7. **THIS COURT ORDERS** that, unless otherwise authorized by this Court, any Investor who does not file an Objection Notice with Representative Counsel during the Objection Period (as such terms are defined in the form of Investor Payment Notice attached as Schedule "B" hereto) shall be deemed to have: (i) accepted the Investor Claim Amount and the Investor Payment Amount set out in his or her Investor Payment Notice, and (ii) waived any further objection to the Investor Claim Amount and the Investor Payment Amount set out in his or her Investor Payment Notice or any further distribution amounts under the Distribution Plan.

RESOLUTION OF OBJECTIONS

8. **THIS COURT ORDERS AND DECLARES** that Representative Counsel is authorized to settle the claim of any Objecting Investor or any Investor who files an Objection Notice on such terms as are deemed reasonable and appropriate as determined by Representative Counsel and approved by the Official Committee.

NOTICES & COMMUNICATIONS

9. **THIS COURT ORDERS** that any notice or other communication to be given under this Order by an Investor to Representative Counsel shall be in writing in substantially the form provided for in this Order and will be sufficiently given only if given by mail, telecopier, courier or other means of communication addressed as set out in the Distribution Procedures. Representative Counsel shall be deemed to have received any document sent pursuant to this Order two (2) Business Days (as defined in the Distribution Procedures) after the document is sent by mail and one (1) Business Day after the document is sent by courier, e-mail or facsimile transmission.

facsimile transmission. An Investor shall be deemed to have received any document sent pursuant to this Order one (1) Business Day after the document is sent by any means.

OTHER ADMINISTRATIVE MATTERS

11. **THIS COURT ORDERS** that the Dissolved Corporate Investor Procedure, the Incapacitated Investor Procedure and the Deceased Investor Procedure (as such terms are defined in the Sixth Report) be and they are hereby approved.

12. **THIS COURT ORDERS** that Representative Counsel is hereby authorized and entitled to adopt and implement any other procedures it deems necessary in its sole discretion as it relates to its implementation of the Distribution Plan.

13. **THIS COURT ORDERS** that Representative Counsel is entitled to rely on and comply with any assignment of claim, direction regarding payment of funds or other similar document signed by an Investor directing that an Investor Payment Amount (or any part thereof) be directed to a third-party, provided that an original of such signed document is delivered to Representative Counsel by a law firm.

GENERAL

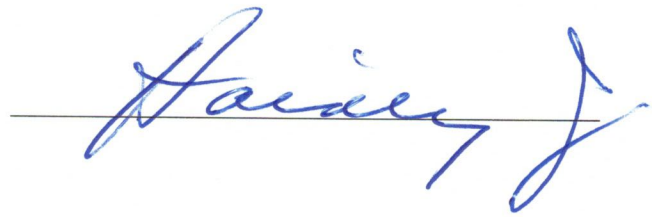
14. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist Representative Counsel and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to Representative Counsel, as an officer of this Court, as may be necessary or desirable to give effect to this Order, or to assist Representative Counsel and its agents in carrying out the terms of this Order.

15. **THIS COURT ORDERS** that Representative Counsel be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order,

16. **THIS COURT ORDERS** that Representative Counsel may apply to this Court for advice and direction in connection with the discharge or variation of its powers and duties under this Order.

SEALING ORDER

17. **THIS COURT ORDERS** that Confidential Appendices 1 and 2 to the Sixth Report shall be permanently sealed and not form part of the public record.



Tab 44

ESSENTIALS OF CANADIAN LAW

THE LAW OF CONTRACTS

JOHN D. McCAMUS

Professor of Law
Osgoode Hall Law School, York University

IRWIN LAW

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obligation to make further inquiries with respect to the precise nature of that advice. If, however, the bank is in possession of information not available to the solicitor that suggests a lack of free will, the bank must pass this information on to the solicitor.[178] If it has not been, or if the bank knows or ought to know that the solicitor has not offered adequate advice, the solicitor's advice is of no assistance to the bank.[179]

A finding that there exists constructive notice does not, of course, settle the question of whether undue influence did exist. A burden remains on the party alleging undue influence to establish either actual undue influence occurred or that a presumption of undue influence arises that cannot be successfully rebutted. Thus, in *Bank of Montreal v. Duguid*,[180] a case in which a wife guaranteed her husband's investment loan from the bank, the existence of a close relationship and a disadvantageous transaction gave rise to constructive notice on the part of the bank, but did not, in itself, give rise to the presumption of undue influence. Indeed, a majority of the court held that the fact that the wife was a real estate agent who would have understood the nature of and the risks involved in the transaction, together with the absence of evidence of a relationship in which the wife placed her trust and confidence in the husband with respect to financial matters, precluded a finding of presumed undue influence.

7) Remedies

Once undue influence is found, the remedy traditionally available to the unduly influenced plaintiff is an equitable rescission of the impugned transaction. As in other rescissionary contexts, there are limits on the availability of this relief. The traditional bars to relief preclude rescission in circumstances where the transaction has been affirmed, where a return to the *status quo ante* cannot be effected, where third-party rights to the subject matter of the transaction have arisen or where the defence of laches arises as a result of the passage of a reasonable period of time within which to seek relief.

It is important to note, however, that the requirement of a restoration of the *status quo ante*—a giving back and a taking back on both sides—has been ameliorated by an increased willingness on the part of the courts to substitute monetary compensation for a specific restoration of the *status quo ante*. Thus, transactions may be set aside, even

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178 *Ibid.* at 473.
179 *Ibid.* at 468 and 473.
180 Above note 93.

Tab 45

1 Law of Restitution, Looseleaf Edition § 5:18

Law of Restitution, Looseleaf Edition |
Peter D. Maddaugh, John D. McCamus

Part II. Remedies

Chapter 5. Equitable Remedies

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§ 5:18. Rescission

Legal Topics

The equitable remedy of rescission involves the setting aside of a transaction and the granting of such incidental relief as will restore the parties to their previous position.[1] Agreements may be set aside on equitable grounds if they have been induced by fraudulent or innocent misrepresentation,[2] or on the basis of a fundamental mistake,[3] or in circumstances amounting to undue influence,[4] or where the agreement is held to constitute an unconscionable bargain.[5] Though these are the principal grounds for rescission considered herein, rescissionary relief is also available in other contexts. Thus, where a fiduciary engages in an improper purchase of trust property[6] or an improper sale of the fiduciary's own property to the principal,[7] one of the remedies available is the avoiding of the transaction. As well, gifts effected by a deed may be rescinded if shown to be motivated by a mistake.[8]

The remedy of rescission is an instrument of restitutionary relief in that it normally involves a restoration of the value of benefits conferred by each party. Indeed, it is commonly said that it is a condition of the availability of such relief that it is possible to effect a *restitutio in integrum* of both parties[9]—there must be a restoration of the *status quo ante*. In the normal case, then, the decree of rescission will protect the restitutionary interests of both parties to the transaction. As we shall see, however, this requirement is not strictly interpreted to require a precise restitution *in specie*. Courts of equity possess broad powers to make any necessary allowances or to require an accounting of profits in order to do what is "practically just".[10] For example, where deterioration in the value of an asset transferred under the agreement renders precise restitution impossible, an award of monetary compensation may be included as an element in the decree.[11] The restitutionary relief afforded upon rescission may be either proprietary or personal in nature. Accordingly, where the setting aside of the transaction involves the revesting of property in either party, the relief granted is proprietary in nature. Where the decree merely requires the payment of money, the relief is personal in nature.

Although a typical decree simply involves setting aside a transaction and requiring a restoration of benefits transferred or their value, the rescissionary remedy is a flexible instrument and courts possess a broad discretion to set aside agreements on terms. In *Solle v. Butcher*,[12] for example, the English Court of Appeal set aside an agreement to lease residential premises because of a mutual mistake relating to the amount of rent that could be charged. The Court imposed a condition on this relief to the effect that the defendant landlord must be willing to offer to let the premises to the plaintiff tenant at the lawful rate.[13] In *Instone v. A. Schroeder Music Publishing Co. Ltd.*,[14] in which an agreement whereby a song writer promised exclusive services to a publishing company was set aside on grounds of unconscionability, the defendant

publisher was permitted to retain such copyrights in songs as had already been assigned to it and exploit them upon the agreed terms. Similarly, in *Bank of Montreal v. Murphy*,[15] a case where a guarantee was subject to being set aside on the ground that it was misrepresented to involve liability for only half of the guaranteed amount, the British Columbia Court of Appeal held that the guarantee remained enforceable with respect to half of the stated amount.

The availability of rescissionary relief is subject to a number of limitations. Apart from the *restitutio in integrum* requirement referred to above, those of general application appear to be three in number. Relief will not be allowed if the impugned transaction has been affirmed, if there has been laches or undue delay in seeking relief, or if third party rights have intervened.[16] The precise application of these limitations may vary to some extent from one context to the next. Thus, the right to rescind for misrepresentation may be lost by affirmation after the representee becomes aware of the nature of the misrepresentation.[17] In the context of undue influence, however, an affirmation will not be effective unless made after the undue influence has ceased to have effect.[18] Although laches or undue delay is a limitation of general application to equitable relief, it is doubtful that delay, *per se* would support a denial of relief in the absence of some further factor such as affirmation or a change of circumstances to the detriment of the other party.[19] Again, in cases of undue influence, the delay must occur after the influence has terminated.[20] In short, although undue delay weighs in the balance against the granting of relief, it is merely one of a number of considerations taken into account in the exercise of this discretion to withhold relief.

The general principle that a transaction will not be set aside where an interest in property transferred under the agreement has been acquired for value by a *bona fide* third party rests on an equitable policy of

insulating such third parties from the effect of equitable interests in property. Thus, the traditional approach is that once third party rights have intervened, the claim for rescission should be dismissed.[21] In order to implement a policy of protecting third parties, however, it is obviously not necessary to deny all possible forms of relief between the parties *inter se.* Hence, it is perhaps not surprising that Canadian courts have been willing to substitute money compensation for property transferred on to a third party purchaser—at least in cases where the property so transferred constitutes only a portion of the sum of property transferred under the agreement.[22] It may be, however, that the granting of monetary compensation against the initial transferee in cases where all of the property has been transferred to a *bona fide* purchaser might be thought to be inconsistent with the traditional inability of equity to grant relief in the form of damages. We suggest that this traditional limitation on equitable relief should not be considered to persist in the present context. As Professor Birks has noted,[23] where the party seeking rescission has paid money to the other party, the rescission claim is in effect an *in personam* judgment requiring payment of a money equivalent of the benefit transferred. Relief in such cases is not contingent upon the plaintiff being able to trace the actual moneys paid in the defendant's hands. There is no reason, in principle, why similar relief should not be allowed in cases where the benefit transferred is in the form of property other than money which has then been resold to a third party. A number of Canadian decisions granting recovery in damages in lieu of rescission in cases of misrepresentation,[24] undue influence[25] and unconscionability[26] may be seen to conform with this view.[27] In a recent unconscionability case, the Supreme Court of Canada made such an award in lieu of rescission as “equitable compensation” for the undervaluing of a wife's proper entitlement under a separation agreement.[28] Moreover, the recognition of a general *in personam* restitutionary claim arising from the old law of

quasi-contract and now resting on the unjust enrichment principle could be extended to embrace claims of this kind.[29] It would be consistent with the unjust enrichment analysis to suggest that in a case where proprietary relief in the form of rescission is no longer possible, an *in personam* restitutionary claim should nonetheless remain a possibility.[30]

Footnotes

1 See, generally, D. O'Sullivan, S. Elliott, and R. Zakrzewski, The Law of Rescission, 2d ed. (Oxford, Oxford University Press, 2014). "Rescission" is to be distinguished from "repudiation". See, *e.g.*, Guarantee Co. of North America v. Gordon Capital Corp., [1999] 3 S.C.R. 423 at pp. 439-45, 178 D.L.R. (4th) 1, *per* Iacobucci and Bastarache JJ. Rescission is not available as a matter of right; it is a matter for the discretion of the court. See, *e.g.*, Hurstanger Ltd. v. Wilson, [2007] 1 W.L.R. 2351 (C.A.).

2 See, generally, §§ 20:1 et seq.

3 See, generally, §§ 17:1 et seq.

4 See, generally, §§ 26:1 et seq., under Heading § 26:8, "Undue Influence".

5 See, generally, §§ 29:1 et seq.

6 See, *e.g.*, Silkstone and Haigh Moor Coal Co. v. Edey, [1900] 1 Ch. 167

7 See, *e.g.*, Armstrong v. Jackson, [1917] 2 K.B. 822.

8 See, *e.g.*, Lady Hood of Avalon v. MacKinnon, [1909] 1 Ch. 476. And

see, generally, §§ 10:1 et seq., under Heading § 10:7, “Mistaken Gifts”.

9 See, *e.g.*, Erlanger v. New Sombrero Phosphate Co. (1878), 3 App. Cas. 1218 (H.L.), at p. 1278, *per* Lord Blackburn. See also Halpern v. Halpern, [2006] 3 W.L.R. 946 (C.A.). And see S. Worthington, “The Proprietary Consequences of Restitution”, [2002] Rest. L. Rev. 28, and W. Swadling, “Rescission, Property and the Common Law” (2005), 121 L.Q. Rev. 123.

10 Erlanger v. New Sombrero Phosphate Co. (1878), 3 App. Cas. 1218 (H.L.), at pp. 1278-9. See also O'Sullivan v. Management Agency & Music Ltd., [1985] Q.B. 428 (C.A.). And see, generally, §§ 20:1 et seq., under Heading § 20:3, “Inability to Make Restitutio in Integrum”.

11 See, *e.g.*, Addison v. Ottawa Auto & Taxi Co. (1913), 16 D.L.R. 318, 30 O.L.R. 51 (S.C. App. Div.), and Wiebe v. Butchart's Motors Ltd., [1949] 4 D.L.R. 838, [1949] 2 W.W.R. 688 (B.C.C.A.).

12 Solle v. Butcher, [1950] 1 K.B. 671 (C.A.). And see, generally, §§ 17:1 et seq., under Heading § 17:2, “Mistake in Assumptions”.

13 Further, the landlord was held entitled to reasonable compensation for the tenant's use and occupation of the premises to date.

14 Instone v. A. Schroeder Music Publishing Co. Ltd., [1974] 1 All E.R. 171 (C.A.), affd [1974] 3 All E.R. 616 (H.L.).

15 Bank of Montreal v. Murphy, [1986] 6 W.W.R. 610, 36 B.L.R. 36 (B.C.C.A.).

16 Baranick v. Counsel Trust Co. (1994), 12 B.L.R. (2d) 39 at p. 52, 37 R.P.R. (2d) 202 (Ont. Ct. (Gen. Div.)), affd 17 B.L.R. (2d) 140 (C.A.), *per* Rosenberg J., and Foy v. Royal Bank of Canada (1995), 37 C.P.C. (3d) 262 (Ont. Ct. (Gen. Div.)), at p. 268, *per* Ground J.

17 See, *e.g.*, Clough v. London & North Western Ry. Co. (1871), L.R. 7 Exch. 26. And see, generally, §§ 20:1 et seq., under Heading § 20:10, "Affirmation".

18 See, *e.g.*, Mitchell v. Homfray (1881), 8 Q.B.D. 587 (C.A.).

19 See, *e.g.*, Lindsay Petroleum Co. v. Hurd (1874), L.R. 5 P.C. 221, at pp. 239-40, *per* Sir Barnes Peacock. And see, generally, §§ 20:1 et seq., under Heading § 20:12, "Laches". For an extreme illustration in the context of undue influence, see Bester v. Perpetual Trustee Co. Ltd., [1970] 3 N.S.W.R. 30 (S.C.) (delay of twenty years not laches in the absence of detrimental reliance).

20 See, *e.g.*, Allcard v. Skinner (1887), 36 Ch. D. 145 (C.A.).

21 See, *e.g.*, Clough v. London & North Western Ry. (1871), L.R. 7 Exch. 26; Laverty v. Eastern Sales Ltd. (1955), 37 M.P.R. 254 (N.B.C.A.); Wilson v. Harrison (1979), 35 N.S.R. (2d) 499 (S.C.); Coldunell Ltd. v. Gallon, [1986] Q.B. 1184 (C.A.); Baranick v. Counsel Trust Co. (1994), 12 B.L.R. (2d) 39, 37 R.P.R. (2d) 202 (Ont. Ct. (Gen. Div.)), affd 17 B.L.R. (2d) 140 (C.A.); Foy v. Royal Bank of Canada (1995), 37 C.P.C. (3d) 262 (Ont. Ct. (Gen. Div.)). On the question of *bona fides*, see Lancashire Loans Ltd. v. Black, [1934] 1 K.B. 380 (C.A.), and Avon Finance Co. Ltd. v. Bridger, [1985] 2 All E.R. 281 (C.A.).

22 Trans-Canada Trading Co. Ltd. v. M. Loeb Ltd., [1947] 2 D.L.R. 849, [1947] O.W.N. 432 (H.C.J.), and Kupchak v. Dayson Holdings Co. Ltd. (1965), 53 D.L.R. (2d) 482, 53 W.W.R. 65 (B.C.C.A.).

23 P.B.H. Birks, An Introduction to the Law of Restitution (Oxford, Clarendon Press, 1985), pp. 170-73.

24 See, *e.g.*, Dusik v. Newton (1985), 62 B.C.L.R. 1, 31 A.C.W.S. (2d) 199 *sub nom.Dusik v. Gooderham* (C.A.), and Bank of Montreal v.

Murphy, [1986] 6 W.W.R. 610, 36 B.L.R. 36 (B.C.C.A.). See also Fleischhaker v. Fort Garry Agencies Ltd. (1957), 11 D.L.R. (2d) 599, 23 W.W.R. 390 (Man. C.A.).

25 See, *e.g.*, Treadwell v. Martin (1976), 67 D.L.R. (3d) 493, 13 N.B.R. (2d) 137 (S.C. App. Div.).

26 See, *e.g.*, Paris v. Machnick (1972), 32 D.L.R. (3d) 723, 7 N.S.R. (2d) 634 (S.C.T.D.), and Junkin v. Junkin (1978), 86 D.L.R. (3d) 751, 20 O.R. (2d) 118 (H.C.J.). See also McCarthy v. Kenny, [1939] 3 D.L.R. 556 (Ont. H.C.J.).

27 It should be noted that the remedial law of misrepresentation and unconscionability has been modified to some extent by consumer protection legislation in a number of Canadian provinces. These developments are considered further within. See, generally, §§ 20:1 et seq., under Heading § 20:15, "Business Practices Legislation" (misrepresentation), and §§ 29:1 et seq., under Heading § 29:5, "Unconscionable Transaction Legislation" (unconscionability).

28 Rick v. Brandsema, [2009] 1 S.C.R. 295, 303 D.L.R. (4th) 193.

29 See, generally, §§ 4:1 et seq., under Heading § 4:8, "The Modern Restitutionary Claim".

30 For a statement to this effect, see Dusik v. Newton (1985), 62 B.C.L.R. 1, 31 A.C.W.S. (2d) 199 *sub nom.Dusik v. Gooderham* (C.A.), at p. 48 B.C.L.R., *per curiam.* See, generally, S. Worthington, "The Proprietary Consequences of Rescission", [2002] Rest. L. Rev. 28.

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Tab 46

CARSWELL

SECURITIES REGULATION IN CANADA

4TH EDITION

by

Mark R. Gillen, B.COMM, M.B.A., LL.B., LL.M.
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Territories in 1901.[125] Ontario followed the English *Companies Act, 1900* approach of specifying contents for prospectus disclosure in 1906.[126] Amendments to *The Ontario Companies Act* in 1907 extended its application to oral solicitations by making subscriptions for shares based on oral representations voidable by the subscriber unless the subscriber had been given a copy of the prospectus.[127] In 1912 the Act was amended to extend the prospectus requirement to underwritten offerings by deeming an issuer to have offered securities to the public where any underwriter had offered them.[128] Legislation in Quebec in 1924 also set out specific disclosure requirements on a sale of shares or debentures.[129]

3. Statutory Liability for Misrepresentations in a Prospectus

A statutory remedy for a misrepresentation in a prospectus was provided to investors with the adoption of the English *Directors Liability Act, 1890*.[130] That Act was adopted in Ontario in 1891.[131] Similar provisions were enacted in other provinces.[132]

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125 Ordinances of the Northwest Territories, 1901, c 20, s 56. The Northwest Territories *Companies Ordinance* was carried forward in Alberta and appeared in its revised statutes (see the *Companies Act*, RSA 1922, c 156, s 57) and by Saskatchewan appearing in its revised statutes (RSS 1909, c 72, s 56).

126 See *An Act respecting Prospectuses issued by Companies*, SO 1906, c 27, s 5, which in the following year was put in *The Ontario Companies Act*, SO 1907, c 34, s 99. The provision was removed by *The Companies Act, 1928*, SO 1928, c 32, s 10, and replaced with s 4 of *The Companies Information Act*, SO 1928, c 33.

127 SO 1907, c 34, s 97(3).

128 *The Ontario Companies Act*, SO 1912, c 31, s 97.

129 See *An Act respecting the issuance and sale of shares, bonds and other securities*, SQ 1924, c 64, s 1 that added articles 6119f, 6119g, and 6119h to R.S.Q. 1909 (to which articles 6119a to 6119d had been added after article 6119 by SQ 1914, c 51, and to which article 6119e had been added by SQ 1918, c 61).

130 See the discussion of that Act *supra* Part III B 4.

131 *Directors' Liability Act*, SO 1891, c 34. The *Directors' Liability Act* provision appeared in *The Ontario Companies Act*, SO 1907, c 34, s 102 (later *The Companies Act*, RSO 1927, c 218, s 109), but was repealed in *The Companies Act, 1928*, SO 1928, c 32, s 10, and apparently not replaced until it appeared again in modified form in *The Securities Act, 1947*, SO 1947, c 98.

132 See, e.g., *The Companies Ordinance*, Ordinances of the Northwest Territories, 1901, c 20, s 57, which was carried forward in Alberta and appeared in its revised statutes (see the *Companies Act*, RSA 1922, c 156, s 58) and by Saskatchewan appearing in its revised statutes (RSS 1909, c. 72, s. 57). See also the *Companies Act*, SBC 1910, c 7, s 90; and the *Nova Scotia Companies Act*, SNS 1900, c 11, s 106.

Tab 47

Report of the Attorney General's Committee on Securities Legislation in Ontario

ONTARIO

Province of Ontario

REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON SECURITIES LEGISLATION IN ONTARIO

March 1965

THE HONOURABLE A. A. WISHART, Q.C.

The Attorney General of Ontario

SIR, We have the honour to present to you the Report of your Committee on Securities Legislation.

"J. R. KIMBER"

Chairman

"W. B. COMMON"

"R. A. DAVIES"

"C. W. GOLDRING"

"T. A. M. HUTCHISON"

"H. I. MACDONALD"

"H. C. F. MOCKRIDGE"

"J. S. YOERGER"

"H. L. BECK"

Secretary

"H. P. CRAWFORD"

Secretary

"M. L. FRIEDLAND"

Legal Associate

TORONTO, MARCH 11, 1965.

amendment. These securities may not be sold nor may offers to buy be accepted prior to the time the prospectus is accepted for filing."

(d) In order further to assure that the preliminary prospectus is substantially in accordance with the Act, the Committee recommends that such preliminary prospectus should be signed in the same manner as the final prospectus is required to be signed. See Paragraph 5.23.

(e) The Committee does not think it feasible to require that the report by the auditors on the financial statements in the preliminary prospectus be signed by the auditors at the time of its filing. There should, however, be a requirement that the auditors of the issuing company must, at the time of the filing of the preliminary prospectus with the Commission, provide a letter to the Commission to the effect that such auditors have reviewed the form and content of the financial statements contained in the preliminary prospectus and that, although an audit has not been completed, such financial statements appear to be a reasonable presentation of the financial position and earnings of the company.

Post-Effective Period and Rescission

5.29 After the prospectus has been accepted for filing by the Commission, the underwriters and members of the selling group will be permitted to proceed with the sale of the securities. No further literature other than that permitted during the waiting period should be distributed. The procedure with respect to the delivery of the final prospectus and the creation of a legal obligation to purchase the securities being issued should ensure that no agreement of purchase or sale should be binding on the purchaser until the later to occur of: (i) the expiration of two business days after the receipt by the purchaser of a copy of the final prospectus; or (ii) the expiration of one business day after the receipt by the purchaser of the confirmation notice of the sale. The confirmation notice should have conspicuously printed thereon a statement indicating that the purchaser is not obliged to purchase until the expiration of the above-mentioned periods and that the purchaser can avoid any liability to purchase by notifying, within the time limits indicated, the person who forwarded the confirmation notice that he does not wish to purchase. If this procedure is followed, although the purchaser may have agreed to purchase securities prior to the receipt of the final prospectus, he will have a minimum period within which to examine the prospectus before becoming legally obligated to complete his purchase. In a case where a purchaser has seen a preliminary prospectus, the examination of the final prospectus should not be an onerous task.

5.30 The Committee considered what rights of rescission should exist if the prospectus contains materially misleading statements. We also considered rescission in relation to the problems arising from amendments to the prospectus where a change in material facts occurs during the period of primary distribution to the public. If the prospectus delivered to the purchaser contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements contained in the prospectus, in the light of the circumstances in which they were made, not misleading, then the purchaser should have a right of rescission. Such right of rescission should exist not only where the prospectus

as accepted for filing contains information that was at that time misleading, but also where, because of a change in circumstances, the information was misleading when the prospectus was delivered to the purchaser. The Committee therefore recommends that, without derogating from any common law rights a purchaser may have, if the prospectus delivered to a purchaser includes, as of the date of delivery, any untrue statement of a material fact or, as of the date of delivery, omits to state a material fact necessary in order to make the statements contained therein, in the light of the circumstances in which they were made, not misleading, the purchaser should have a right of rescission, exercisable by action commenced prior to the first to occur of:

(a) 30 days after the fact that such information is misleading first comes to the attention of the purchaser; or

(b) 60 days after the delivery of the prospectus to such purchaser.

The prospectus should have conspicuously printed thereon or therein a statement describing the above-mentioned rights of rescission.

The Corporations Information Act

5.31 The Committee recommends that the prospectus requirements of The Corporations Information Act (Ontario) be repealed as serving no useful purpose.

Tab 48

is an attempt to make legal their existing illegal practices, and does so in a practical manner.

Paragraph 9 - Sale of Shares by Banks, Loan and Trust Companies and Insurance Companies

By reason of the existing section 19(1)(3) in combination with section 41, banks, loan and trust companies and insurance companies can sell their shares without filing a prospectus. Views have been expressed that this is illogical and questionable. The funds these companies receive by way of deposit or guaranteed certificates are subject to trust provisions and governmental supervision and a prospectus may not be required, but this supervision does not ensure that the public is receiving full plain and true disclosure of the affairs of the company when it comes to the sale of shares. In connection with the shares there is no guarantee from the company or trust fund established to ensure that the investors will receive back the money invested. This point overlaps into the Insurance and Trust Companies Branch of your Department and is a point which should be discussed with Mr. Richards in order to have the benefit of his views. I have raised the question with him, but I am not certain that his views are the same as mine.

This change does not eliminate the exemption these companies have from the registration provisions of the Act.

Paragraph 10 - Waiting Period

While the present statute provides for a prospectus and the delivery of it when primary distribution takes place, in fact the prospectus is delivered after the contract of purchase has been made. If the Act is a disclosure statute and if the document used to make disclosure is the prospectus, logic dictates that the prospectus should be delivered before the contract is effective. The new section 66 provides a 2 day waiting period during which the purchaser has an opportunity of reading the prospectus and giving notice to cancel his offer to purchase if he so desires. This may cause some complications to the industry but it is one I feel they can live with and will not create any problem for the responsible dealers. The persons most likely to have difficulty with the provision are those persons who have made extravagant verbal representations not supported by the disclosure in the prospectus.

Paragraph 11 - Right of Rescission for Untrue Statements in a Prospectus

The purpose of this change is to give an additional right to a purchaser which does not now exist at law. Basically at law a purchaser has a right of rescission if he relied on an untrue statement. The present section permits him the right of rescission if the untrue statement is in a prospectus, even though the purchaser may not have read it. It is felt that this is a significant additional right and hence it will make persons filing prospectuses exercise greater care in preparing prospectuses and will avoid the necessity of the purchaser establishing that

he relied on the untrue statement. This right is in addition to any other right a purchaser may have under the existing law.

Paragraph 12 - Take-Over Bids

As the explanatory notes set forth this item implements your Committee's recommendation. It is my feeling that the public apart from the professionals will be in favour of this form of legislation, although some may feel that it is not extensive enough. On the other hand, the professionals may oppose it as being too technical and too restrictive. In fact, however, it merely carries out in a new field the basic concept of The Securities Act that there should be disclosure. The fact that there should be rules has been recognized in that The Toronto Stock Exchange and other similar bodies a few years ago adopted a code of ethics applicable to take-over bids. Despite the adoption of that code some of these groups have questioned the merits of having legislation in this field. Rules such as these are included in the legislation which exists in Great Britain where take-over bids are very common and the rules have not prevented take-overs. These rules are not designed to prevent take-overs, but only to inform the public as to the essential facts in connection with them.

Paragraph 13 - Extra Provincial Companies

Ontario has, of course, power to make any rules it wishes with respect to Ontario corporations. The power is less extensive when it comes to dealing with Canada corporations and extra Provincial corporations. Constitutional and practical problems arise. Parts X, XI, and XII have attempted within reasonable limits to apply to these non-Ontario corporations the same rules which will apply to Ontario corporations. This is done for the purpose of protecting the investor. The rules have been made applicable to two classes of companies:-

(a) those listed on The Toronto Stock Exchange

(b) those companies which sell shares in Ontario

It will be seen that the legislation has little retroactive effect.

The provisions also provide two exempting powers. They exempt from the rules those companies who, by the law of the jurisdiction in which they are incorporated, cannot comply with the Ontario rules and also gives to the Commission the power to exempt in whole or in part companies which are already complying substantially with the Ontario rules by reason of complying with some other law. For example, a company such as International Nickel by reason of its listing on the New York Stock Exchange complies with the American Federal Securities laws. It is contemplated that the Commission would accept filings made by that company under the American laws as compliance with the Ontario law. This would avoid a

Tab 49

THE LAW OF CONTRACT IN CANADA

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manuscript, and could then order the return of the manuscript to the author, despite the passage of title from one party to the other. The conduct of the company being inequitable, the court could provide the author with a suitable remedy.

These are exceptional, and unusual cases. More frequently the jurisdiction of the court to rescind a contract on equitable grounds is invoked in three main instances. The first is where the contract resulted from some fraud, which induced a mistake on the part of the defrauded party.[178] The second is where the mistake in question was the result of an innocent, non-fraudulent misrepresentation.[179] The third, which comprehends a somewhat mixed variety of instances, though sharing a general underlying character, is where the contract was procured, without fraud in the common-law sense, but as a consequence of what in equity is regarded as fraud, that is, by the use of undue influence, or some unconscionable conduct which renders the bargain questionable on equitable grounds, even though it may be perfectly valid at common law.[180]

Rescission may be granted even where the contract is not susceptible of attack at common law.[181] When it is, the purpose of the court is to produce *restitutio in integrum*.[182] This has two major consequences. In the first place, there cannot be rescission of part of a contract: all of it must be rescinded, or else none.[183] Second, there may have to be, and the court has the power to order, adjustments, perhaps involving monetary payments by way of compensation for use of property, or reimbursement of expenses, so as to ensure that, so far as is within the capability of the court, the parties are restored to their original situations, before the contract was ever concluded between them.[184]

Rescission is only possible where to grant such remedy would not operate to the prejudice of a third and innocent party, who was not implicated in the original contract and so ought not to be affected adversely by the subsequent, later avoidance

178 Above, pp. 285-293.

179 But perhaps only if there has been a total failure of consideration: see *Komarniski v. Marien*, [1979] 4 W.W.R. 267 (Sask. Q.B.). The passage from "More frequently" to here was quoted by Menzies J. in *Trippel v. Parker* (2002), 164 Man. R. (2d) 104 at 112 (Man. Q.B.); additional reasons at (2003), 175 Man. R. (2d) 4 (Man. Q.B.); affirmed (2004), 318 Man. R. (2d) 231 (Man. C.A.).

180 Above, pp. 312-330. This and the previous paragraph were quoted by Joyal J. *TDL Group Ltd. v. Zabco Holdings Inc.* (2008), 232 Man. R. (2d) 225 at 229 (Man. Q.B.). This paragraph, from "More frequently" to the end, was quoted by Bayda J.A. in *Carlson v. Big Bud Tractors of Can. Ltd.* (1981), 7 Sask. R. 337 at 356 (Sask. C.A.).

181 *Ivanochko v. Sych* (1967), 58 W.W.R. 633 (Sask. C.A.).

182 *Stephenson v. Bromley*, [1928] 4 D.L.R. 737 at 742 (Man. C.A.) *per* Fullarton J.A.

183 *Fleming v. Mair*, [1921] 2 W.W.R. 421 (Sask. C.A.); *Kingu v. Walmar Ventures Ltd.* (1986), 10 B.C.L.R. (2d) 15 (B.C.C.A.).

184 See *e.g.*, *Stephenson v. Bromley*, above; *Lambert v. Slack*, [1926] 2 D.L.R. 166 at 172 (Sask. C.A.) *per* Lamont J.A.; *Int. Casualty Co. v. Thomson* (1913), 48 S.C.R. 167; *Stearns v. Neys*, [1929] 3 W.W.R. 177 (Alta. S.C.); *Fleischhaker v. Fort Garry Agencies Ltd.* (1957), 11 D.L.R. (2d) 599 (Man. C.A.); *Bell v. Robutka* (1966), 55 D.L.R. (2d) 436 (Alta. C.A.); *Jarvis v. Maguire* (1961), 35 W.W.R. 289 (B.C.C.A.); *Walters v. Capron* (1964), 50 W.W.R. 444 (B.C.S.C.); *Kupchak v. Dayson Holding Ltd.*; *Dayson Holding Ltd. v. Palms Motel Ltd.* (1965), 53 D.L.R. (2d) 482 at 487-488 (B.C.C.A.) *per* Davey J.A.

of that transaction.[185] If granting rescission would have such an effect, a court of equity will refuse that remedy, leaving the plaintiff to his common-law remedy, that is, damages, if it is available in the circumstances.[186] Nor will rescission be granted if the plaintiff's contract is inequitable or he has been guilty of delay, or *laches*.[187]

(ii) *Fraud*

Wherever a party can successfully allege that he was induced to enter into a contract by reason of the fraudulent conduct of the other party (or the other party's agent),[188] the contract in question may be rescinded by the court,[189] even if the contract is executed,[190] and even if the contract is one transferring an interest in land.[191]

The plaintiff must establish the fraud,[192] and its effect.[193] Since an allegation of fraud is serious it must be proved by strong and clear evidence.[194] This does not mean that the plaintiff must discharge the criminal law burden of proof beyond a reasonable doubt. It means that before a court will conclude that the defendant is guilty of fraud there must be satisfactory proof of the validity of the allegation.[195] The fraud in question must relate to matters of fact. A fraudulent misrepresentation is one that misstates some existing or past fact, on which the plaintiff relies to

185 *Consol. Invts. Ltd. v. Acres*, [1917] 1 W.W.R. 1426 (Alta. C.A.); *Barry v. Stoney Point Canning Co.* (1917), 55 S.C.R. 51 at 66 *per* Idington J. See, however, *Stewart v. Complex 329 Ltd.* (1990), 109 N.B.R. (2d) 115 (N.B.Q.B.), where the fact that a third party had acquired an interest in the business that was the subject-matter of the contract to be rescinded did not prevent rescission.

186 Compare the language of Lamont J.A. in *Fleming v. Mair*, [1921] 2 W.W.R. 421 (Sask. C.A.) and that of MacFarlane J. in *Guest v. Beecroft* (1957), 22 W.W.R. 481 at 486 (B.C.S.C.).

187 Compare above, p. 748, below, p. 769.

188 *Hitchcock v. Sykes* (1914), 49 S.C.R. 403. Lack of diligence on the part of the plaintiff will not be a defence: *Stewart v. Complex 329 Ltd.*, above.

189 *Kupchak v. Dayson Holding Ltd.*; *Dayson Holding Ltd. v. Palms Motel Ltd.*, above; *Krahnbiel v. Dondaneau* (1955), 17 W.W.R. 436 (B.C.S.C.); *Nesbitt, Thomson & Co. v. Pigott*, [1941] S.C.R. 520; *Keatley v. Churchman* (1921), 62 D.L.R. 139 (Alta. S.C.); affirmed [1922] 2 W.W.R. 993 (Alta. C.A.); *Muise v. Whalen* (1990), 96 N.S.R. (2d) 298 (N.S.T.D.); *Stewart v. Complex 329 Ltd.*, above; *TWT Enterprises Ltd. v. Westgreen Devs. (North) Ltd.*, [1991] 3 W.W.R. 80 (Alta. Q.B.); affirmed [1992] 5 W.W.R. 341 (Alta. C.A.). Or the defrauded party can plead *non est factum*: *Brown v. Prairie Leaseholds Ltd.* (1953), 9 W.W.R. (N.S.) 577 (Man. Q.B.); affirmed (1954), 12 W.W.R. 464 (Man. C.A.).

The plaintiff will also be able to recover common-law damages for deceit: *Bank of Montreal v. Weisdepp* (1917), 34 D.L.R. 26 at 31 (B.C.C.A.) *per* McPhillips J.A.; *Goulet v. Clarkson*, [1949] 1 D.L.R. 847 (B.C.S.C.) (where the remedy of rescission was barred by the plaintiff's own conduct after discovery of the fraud); *Barron v. Kelly* (1918), 56 S.C.R. 455.

190 *Burns v. Ambler* (1963), 42 W.W.R. 254 (B.C.S.C.).

191 *Redican v. Nesbitt*, [1924] S.C.R. 135 at 146-147 *per* Duff J.; *Kingu v. Walmar Ventures Ltd.* (1986), 10 B.C.L.R. (2d) 15 at 21 (B.C.C.A.) *per* McLachlin J.A.

192 *Popowich v. Dromarsky*, [1946] 1 W.W.R. 570 (Alta. C.A.).

193 *Alexander v. Enderton* (1914), 15 D.L.R. 588 at 591 (Man. K.B.); affirmed (1914), 25 Man. R. 82 (Man. C.A.) *per* Martin C.J.; *Pioneer Tractor Co. v. Peebles* (1913), 15 D.L.R. 275 (Sask. S.C.); affirmed (1914), 18 D.L.R. 477 (Sask. C.A.); affirmed (1915), 8 W.W.R. 632 (S.C.C).

194 *Lasby v. Johnson*, [1928] 3 W.W.R. 447 (Sask. C.A.).

195 *Scott v. Cresswell*, [1975] 3 W.W.R. 193 (Alta. C.A.); *Nor. & Central Gas Corp. v. Hillcrest Collieries Ltd.*; *Byron Creek Collieries Ltd. v. Coleman Collieries Ltd.*, [1976] 1 W.W.R. 481 at 528-529 (Alta. T.D.).

Tab 50

SNELL'S EQUITY

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2. Impossibility of Restitutio In Integrum

15-014 Rescission will be barred where restitutio in integrum is impossible.[64] Restitutio in integrum will only be possible where the party seeking rescission "is able to put those against whom it is asked in the same situation in which they stood when the contract was entered into".[65] The concern of the bar is to protect the defendant from unjustified prejudice; that circumstances have changed such that it is no longer possible fully to restore the claimant will not preclude rescission.[66] In making their election, it is for the claimant to decide whether they are content to get back less than they gave. The bar is usually applied in cases where the party seeking rescission is unable to make satisfactory counter-restitution of what they have received, but it may also apply where the circumstances have changed in some other way such that the defendant would be unjustifiably prejudiced were the contract now set aside, particularly where the defendant has not been guilty of conscious wrongdoing.[67]

The bar applies in relation to all of the grounds for rescission and whether rescission is sought at law or in equity.[68] However, the bar is applied more strictly at law than it is in equity.[69] As rescission at law occurs automatically upon the innocent party's communication of their election, rescission will only be possible where the circumstances are such that the other party is immediately and fully restored to their original position. There is no difficulty in the case of a purely executory contract, for the obligations are simply extinguished. Where instead the innocent party has received a benefit under the contract, rescission will only be possible either where the benefit is an asset that can be specifically returned and title to which can re-vest automatically,[70] or where the common law affords the defendant a claim to recover the benefit. For example, the mere fact money has been paid is not a bar because, upon rescission, whichever party has paid will acquire a claim against the other for restitution on the ground of total failure of consideration.[71] If the claimant has enjoyed a benefit under the contract which cannot be returned, such as the intermediate possession of land,[72] rescission will be barred at law.

Where rescission is barred at law, it may nonetheless be possible in equity owing to the greater flexibility the court enjoys in adjusting the positions of the parties.

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64 *Erlanger v The New Sombrero Phosphate Co* (1878) 3 App. Cas. 1218 at 1278.

65 *The Western Bank of Scotland v Addie* (1867) L.R. 1 Sc. App. 145 at 164–65.

66 *Spence v Crawford* [1939] 3 All E.R. 271 HL(Sc) at 279.

67 *Erlanger v The New Sombrero Phosphate Co* (1878) 3 App. Cas. 1218 at 1278–79; *Spence v Crawford* [1939] 3 All E.R. 271 HL(Sc) at 281–82.

68 For example the bar has recently been held to apply in cases of duress: *Halpern v Halpern* [2008] Q.B. 195 CA at [72].

69 *Erlanger v The New Sombrero Phosphate Co* (1878) 3 App. Cas. 1218 at 1278.

70 Completed contracts for the transfer of estates in land are not capable of rescission at law: *Feret v Hill* (1854) 15 C.B. 206 at 223–37; *Canham v Barry* (1855) 15 C.B. 597 at 611–12; *R. v Saddlers' Co* (1863) 10 H.L.C. 303 at 422; *Taylor v Chester* (1869) L.R. 4 Q.B. 309 at 311–12. Those cases all concerned unregistered land but the same rule applies by analogy to registered land, where rectification of the register is required or else the execution and deliverance of a registrable transfer. Similarly, rescission at law cannot re-vest shares other than bearer shares, for here again a register is determinative of legal title: *Civil Service Co-operative Society v Blyth* (1914) 17 C.L.R. 601 at 613; *Sons of Gwalia Ltd v Margaretic* (2007) 232 A.L.R. 232 HCA at [55].

71 For example *Clough v London and North Western Railway* (1871) L.R. 7 Ex. 26 at 37. However rescission will be barred where the claimant is insolvent such that all the other party would acquire is a claim in the insolvency: *Greater Pacific Investments Pty Ltd v Australian National Industries* (1996) 39 N.S.W.L.R. 143 CA at 151–52.

72 *Hunt v Silk* (1804) 5 East 449; *Blackburn v Smith* (1848) 2 Ex. 783; and see *Clark v Dickson* (1858) El. Bl. & Bl. 148.

3. Intervention of Third Party Rights

15-015 Rescission is barred where it would defeat rights which third parties have acquired without notice of the circumstances entitling the claimant to rescind.[86] Accordingly, while there is no special difficulty in rescinding a multipartite contract where all of the other parties are implicated in the wrongdoing,[87] there can be no rescission where only one of the parties whose rights would be destroyed is innocent.[88] For instance, a surety under a tripartite loan agreement cannot avoid their obligation by reference to the debtor's fraud if the creditor did not have constructive notice of it.[89] The bar does not apply in favour of volunteers.[90]

The bar is not activated where the only effect of rescission would be to make a third party's rights less valuable, as by shrinking the wrongdoer's resources or increasing the claims on them. Thus the claimant in *Scholefield v Templer* avoided a release of the defendant's obligations as surety notwithstanding that the claimant had known that third parties would advance the defendant money on the faith of the release and had even written to the third parties assuring them that the defendant had been released.[91] The third parties' rights against the defendant debtor remained intact although they were less valuable because rescission created a competing claim on their assets. It appears that the bar will only be activated where the consequence of rescission is to destroy or necessarily frustrate the third party's rights.

It is long established both at law and in equity that if A transfers an asset to B under a voidable contract, and, before the contract is avoided, B sells the asset to C who does not have notice of the circumstances that make the contract voidable, C will take the asset free from any claim by A to recover it.[92] The fact that the third party, C, has securely acquired an asset from the wrongdoer, B, has never, however, been treated in equity as barring rescission of the contract between A and B. Following rescission the claimant A may be entitled either to trace into the proceeds of the sale if they remain identifiable in the B's hands,[93] or else to claim a financial accounting of those proceeds.[94]

Well-known obiter dicta suggest that a different rule applies at law, such that where C securely acquires from B rights in an asset B had acquired from A under a voidable contract, not only is C's title protected but the contract between A and

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Smith New Court Securities Ltd v Citibank [1997] A.C. 254 at 262 (shares); *O'Sullivan v Management Agency and Music Ltd* [1985] 1 Q.B. 428 CA (services). See Ch.18 below.

86 *Tennent v The City of Glasgow Bank and Liquidators* (1879) 4 App. Cas. 615 HL(Sc) at 620–21. A classical application of this, although one that is no longer of great practical importance, is the rule that a shareholder cannot avoid their statutory contract with the company once it has gone into liquidation or is on the verge of doing so: *Oakes v Turquand* (1867) L.R. 2 H.L. 325.

87 *Savery v King* (1856) 5 H.L.C. 627 CA; *Dunbar Bank Plc v Nadeem* [1998] 3 All E.R. 876.

88 *Re Metal Constituents, Ltd (Lord Lurgan's Case)* [1902] 1 Ch. 707 at 710; *Senanayake v Cheng* [1966] A.C. 63 PC at 80; *Society of Lloyds v Leighs* [1997] 6 Re. L.R. 289 CA.

89 *Moody v Condor Insurance Ltd* [2006] 1 W.L.R. 1847.

90 *Hunter BNZ Finance Ltd v CG Maloney Pty Ltd* (1988) 18 N.S.W.L.R. 420 at 433–34, 438.

91 *Scholefield v Templer* (1859) 4 De. G. & J. 429.

92 At law: *White v Garden* (1851) 10 C.B. 919; *Cundy v Lindsay* (1878) 3 App. Cas. 459 at 463–64; in equity: *Hawes v Wyatt* (1790) 2 Cox 263.

93 For example *El Ajou v Dollar Land Holdings Plc* [1993] 3 All E.R. 717 at 735; *Twinsectra Ltd v Yardley* [1999] Lloyd's Rep. Bank 438 CA at 461–62; *Shalson v Russo* [2005] Ch. 281 at 320–22.

94 For example *New Sombrero Phosphate Co v Erlanger* (1877) 5 Ch. D. 73 CA at 125; *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch. 392 CA at 434.

ONTARIO SECURITIES COMMISSION	and	BRIDGING FINANCE INC. ET AL	Court File No. CV-21-00661458-00CL
Applicant		Respondents	

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at TORONTO

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(Re: Unitholder Priority Motion returnable November 16 & 17, 2022)

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