Court of Appeal No. COA-24-CV-0468
Court File No. BK-21-02734090-0031

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, c. B-3, as amended

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.

BOOK OF AUTHORITIES OF MARIA ATHANASOULIS

October 16, 2024

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I N D E X

TAB NO.	DESCRIPTION
22.	*Bank of America Canada v Mutual Trust Co*, 2002 SCC 43
23.	*Fidler v Sun Life Assurance Co of Canada*, 2006 SCC 30
24.	*Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19
25.	*Dasham Carriers Inc. v. Gerlach*, 2013 ONCA 707
26.	*Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19
27.	*The Rosseau Group Inc. v. 2528061 Ontario Inc.*, 2023 ONCA 814
28.	*Kinbauri Gold Corp. v. Iamgold International African Mining Gold Corp.*, 2004 CanLII 36051
29.	*Kipfinch Developments Ltd. v. Westwood Mall (Mississauga) Limited*, 2010 ONCA 45
30.	*Baud Corp., N.V. v. Brook*, 1978 CanLII 16 301 (SCC)
31.	*642947 Ontario Ltd. v. Fleischer*, 2001 CanLII 8623 (ONCA)
32.	*Rougemount Capital Inc. v. Computer Associates International Inc.*, 2016 ONCA 847
33.	*Dosanjh v. Liang*, 2015 BCCA 18
34.	*Colonial Fastener Co. Ltd. v. Lightning Fastener Co. Ltd.*, [1937] SCR 36
35.	*Apotex Inc. v. Eli Lilly and Company*, 2018 FCA 217
36.	*Janssen Inc. v. Teva Canada Limited*, 2016 FC 593
37.	*Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67
38.	*Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5
39.	*Confederation Treasury Services Ltd. (Bankruptcy)*, 1997 CanLII 3091
40.	*Wiebe, Re*, 1995 CanLII 7367 (ON SC) [*Wiebe*]
41.	*Schnier v. Canada (Attorney General)*, 2016 ONCA 5
42.	*Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26
43.	*Mikelsteins v. Morrison Hershfield Limited*, 2019 ONCA 515
44.	Waddams, Law of Damages, 6th ed. (Carswell, 2021) at. 5.1

TAB NO.	DESCRIPTION
45.	Swan, Adamski and Na, Canadian Contract Law, 4th ed. (LexisNexus, 2018)
46.	Fridman, The Law of Contract in Canada, 6th ed. (Carswell, 2011)

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CITATION: YG Limited Partnership and YSL Residences (Re), 2021 ONSC 4178
COURT FILE NOS.: CV-21-00655373-00CL/BK-21-02734090-0031, CV-21-00661386-00CL & CV-21-00661530-00CL
DATE: 20210629

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED

AND:

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES

APPLICATION UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED

AND RE: 2504670 CANADA INC., 8451761 CANADA INC. and CHI LONG INC., Applicants

AND

CRESFORD CAPITAL CORPORATION, YSL RESIDENCES INC, 9615334 CANADA INC., YG LIMITED PARTNERSHIP and DANIEL CASEY, Respondents

AND RE: 2583019 ONTARIO INCORPORATED AS GENERAL PARTNER OF YONGESL INVESTMENT LIMITED PARTNERSHIP, 2124093 ONTARIO INC., SIXONE INVESTMENT LTD., E&B INVESTMENT CORPORATION and TAIHE INTERNATIONAL GROUP INC., Applicants

AND

9615334 CANADA INC. AS GENERAL PARTNER OF YG LIMITED PARTNERSHIP and YSL RESIDENCES INC., Respondents

BEFORE: S.F. Dunphy J.

COUNSEL: *Harry Fogul* and *Miranda Spence*, for YG Limited Partnership and YSL Residences Inc.

Shaun Laubman and *Sapna Thakker*, for 2504670 Canada Inc., 8451761 Canada Inc., and Chi Long Inc.

Alexander Soutter, for YongeSL Investment Limited Partnership, 2124093 Ontario Inc., SixOne Investment Ltd., E&B Investment Corporation, and TaiHe International Group Inc.

David Gruber, Jesse Mighton, and *Benjamin Reedijk,* for Concord Properties Developments Corp. and its affiliates

Jane Dietrich and *Michael Wunder,* for 2292912 Ontario Inc. and Timbercreek Mortgage Servicing Inc.

Robin B. Schwill, for KSV Restructuring Inc. in its capacity as the proposal trustee

Roger Gillot and *Justin Kanji,* for Kohn Pedersen Fox Associates PC

Reuben S. Botnick, for Royal Excavating & Grading Limited COB as Michael Bros. Excavation

Daniel Naymark and *Jamie Gibson*, for Sarven Cicekian, Mike Catsiliras, Ryan Millar and Marco Mancuso

Brendan Bowles and *John Paul Ventrella*, for GFL Infrastructure Group Inc.

Mark Dunn and *Carlie Fox*, for Maria Athanasoulis

George Benchetrit, for 2576725 Ontario Inc.

Joshua B. Sugar, for R. Avis Surveying Inc.

Paul Conrod, for Restoration Hardware Inc.

James MacLellan and *Jonathan Rosenstein,* for Westmount Guarantee Services Inc.

Albert Engle, for Priestly Demolition Inc.

HEARD at Toronto: June 23, 2021

AMENDED REASONS FOR INTERIM DECISION

Note: these reasons were amended on July 2, 2021 as more fully described in the in the concluding paragraphs hereof.

[1] The debtors are seeking approval of a bankruptcy proposal that has obtained the near unanimous approval of those affected creditors who cast a vote. Two groups of limited partnership unitholders have challenged the actions of the General Partner of the debtor YG Limited Partnership for much of the past year and urge me to annul the bankruptcy entirely or to reject the proposal and, if need be, to allow a Receiver or Trustee in bankruptcy to canvass the market fairly and objectively. Another unsecured creditor urges me to disregard much of the appraisal evidence tendered because she has been excluded from examining it and the result is a record that casts grave doubt as to whether fair value for stakeholders is being realized by this process.

[2] For the reasons that follow, I have decided that I will not approve the Proposal in the form it has been presented to me. The Proposal is yet able to be amended pursuant to art. 3.01 thereof and it is possible that an amendment may be formulated to address the concerns raised by the findings I outline below before a final decision on the fate of the Proposal is made.

Background facts

[3] A central issue in this case is the value of the "YSL Project" – the property owned by the debtor YSL as bare trustee for the limited partnership (the debtor YG LP) charged with developing it. Valuation is an area on which I must tread lightly in terms of what I can record in writing so as not to impact adversely any potential sale process that may be necessary in future.

[4] What follows is a general description of the capital structure of the debtors and the project sufficient to permit an understanding of the issues. For comparison purposes, it is relevant to consider the size of the project. There is no dispute that the "as if completed" value of the project is above $1 billion. How much above and based on which assumptions is an issue, but I provide the round figure solely for comparison purposes relative to the debt and equity interests discussed.

[5] The project is fully zoned and permitted for construction of an 85-story retail and condominium complex planned for the corner of Yonge St. and Gerard in downtown Toronto. Substantial pre-sales have been made. Demolition of the old structures and shoring up of the excavation have been largely completed. Unfortunately, things ground to halt in March of 2020 and the project has been stuck in the "hole in the ground" stage ever since.

The project ownership structure

[6] YP GP has a General Partner with nominal capital and a nominal interest in the limited partnership. The "equity" in the partnership effectively resides in the "A" units with approximately $14.8 million in capital but a capped right to return on that capital equivalent

to interest (12.25% per year rate of return) and the “B” units who alone receive all of the residual profits from the project without limit.

[7] The owner of the “B” units and the General Partner are under common control within the Cresford group of companies as are the parties recorded as payees of the $38.3 million related party debt to which I shall refer.

The project debt structure

[8] The secured debt – including registered mortgages and construction liens – stands at about $160 million. The figure for secured debt is slightly misleading. There is just over $100 million in deposits from condominium pre-sales made for the most part prior to 2019. These are insured by the second secured creditor whose claim would increase dollar for dollar if the relevant purchase agreements were repudiated and the deposits had to be returned. For this reason and to have an “apples to apples” idea of the debt structure, a figure of about $260 million in secured debt is appropriate.

[9] The third-party unsecured debt that has been identified by the Trustee is in the range of approximately $20 million plus or minus a few million dollars depending upon reserves allowed for claims yet to be filed or finalized. There are also various litigation claims outstanding the largest of which is from a former officer claiming that the limited partnership was a common employer and seeking, among other things, to enforce oral profit-sharing agreements. I have reviewed the Trustee’s report and in particular the Trustee’s reasoned conclusion that these claims are too contingent to be considered valid for voting purposes. I concur in that assessment. A conservative and prudent assessment of potential total unsecured claims is thus in the range of about $25 million – a figure advanced with full knowledge that the total of all contingent claims identified could be in the same order of magnitude again. For the purposes of this motion, I find the figures estimated by me above are reasonable – those findings are, of course, without prejudice to the creditors holding such claims proving them in due course.

[10] There is also $38.3 million in outstanding advances to YG LP recorded on its books from related parties. I have found those claims to be equity claims for all purposes relevant to this hearing for reasons I shall expand upon below.

[11] In round figures, one can thus consider there to be approximately $260 million of secured debt and about $20-$25 million of unsecured debt outstanding. The Proposal assumes all of the former and would pay 58% of the latter when finalized. The “fulcrum” stakeholders in this case are thus the unsecured creditors to the extent of the 42% of their claims that are compromised ($8.4 to $10.5 million) plus the “A” limited partners in YG LP ($14.8 million plus accrued “interest” entitlements) – such figures based upon the estimates and rulings that I have made and explained herein.

Summary of nine findings made

[12] The process of sifting through the mountains of evidence presented to me by the parties has been made exceptionally time-consuming and tedious by reason of the lack of usable electronic indexing in much of the materials filed. Tabs or electronic hyperlinks within compilations of electronically filed documents are non-existent in all but the most recently filed documents and there are many, many thousands of pages of documents presented. The profession is going to need to get on top of this problem as judges cannot and will not in future undertake such gargantuan efforts to sift through a case when a few moments of care and attention at the front end could simplify it to such a great degree.

[13] Time does not permit me to set forth in writing a complete account of my review of the evidence and my conclusions – a written summary of which I was about 75% through before the impossibility of completing it in the form intended within the time available became obvious. I shall instead present below nine conclusions which encapsulate my reasons for finding that the Proposal as it currently stands has failed to satisfy me of the matters required by s. 59(2) of the BIA or the common law test of good faith.

(i) The McCracken Affidavit is inadmissible

[14] As is often the case in Commercial Court matters, this case proceeded on a "real time" schedule. In addition to the bankruptcy case that was commenced with an NOI filed on behalf of the debtors on April 30, 2021, there were two applications commenced the day before by two groups of YG LP limited partners seeking, among other things, the removal of the General Partner and various declarations challenging the authority of the General Partner to act on behalf of the partnership in any capacity and alleging breaches of fiduciary duty by the General Partner. The Proposal itself was filed on May 27, 2021 working towards a scheduled June 10, 2021 creditor meeting. On June 1, 2021 I issued directions for the conduct of all three proceedings with a view to having the sanction hearing ready to proceed on June 23, 2021.

[15] The Proposal Sponsor is Concord Properties. Concord is not a party to any of these proceedings although it is central to all three. Concord sponsored the Proposal and is bearing all the costs of it under a Proposal Sponsor Agreement dated April 30, 2021.

[16] The limited partner applicants issued subpoenas to Mr. McCracken – apparently the officer of Concord responsible for this Proposal. On the advice of counsel, Mr. McCracken declined to appear absent an order compelling him to do so. Counsel took the position that leave was required under the Bankruptcy Rules to compel him to appear in the bankruptcy proceeding and declined to produce him.

[17] The position taken was a curious one given my specific direction on June 1 that I was *not* applying the BIA stay to the two applications and that specific aspects of both

applications would be heard and decided together on June 23, 2021 when the fairness hearing was conducted. The case timetable made specific allowances for responding records with respect to the limited partner applications and facta in relation to them. My ruling on June 1, 2021 was in both the civil and bankruptcy proceedings and bore the style of cause of both.

[18] Whether leave was or was not formally required to *compel* Mr. McCracken to appear, his failure has consequences in terms of the fairness of the process leading to the approval motion in front of me. The opponents of the Proposal were deprived of the opportunity to explore aspects of the unfairness or unreasonableness of the Proposal that they had raised. There was insufficient time available in the tight timetable to drop everything and bring a leave application. The position taken ran utterly contrary to the spirit and intent of my ruling on June 1, 2021 at which Concord's counsel appeared *and made submissions*. This is the sort of issue that counsel applying the "three C's" of the Commercial List ought to have agreed to disagree upon and produced the witness without prejudice to objections that might be raised.

[19] It is against the foregoing backdrop that the affidavit of Mr. McCracken – delivered the day prior to the fairness hearing – must be considered.

[20] The affidavit was filed far too late to permit any interested party to respond to it effectively or to cross-examine upon it. None of the subject-matter of the affidavit was new information. The affidavit was entirely devoted to providing responses to various issues seen in written arguments or that arose on the cross-examination of other witnesses.

[21] Concord appeared to consider itself sufficiently at interest to appear through counsel on June 1, 2021 while declining to submit to examination because of its non-party status when preparations for this hearing were in full swing a few days later. Permitting the admission of this affidavit at this juncture would be to sanction unfairness of the highest order. A timetable was worked out for the hearing of this motion – worked out, I might add, at a motion that Concord was present at through counsel. Whether or not Concord had the *right* to insist upon a further motion to compel its attendance during the pre-hearing procedures, it certainly knew that taking that position when there was no time available to challenge it in court would have the practical effect that it did.

[22] Lying in the weeds is a strategy, but it does not confer the right to spring out of them at will. I find the McCracken affidavit to be inadmissible and attach no weight to it.

(ii) No weight can be attached to the CBR April 2021 Appraisal

[23] The parties have very hotly debated the valuation evidence that is on the record before me. A portion of that valuation evidence has been sealed. My reason for doing so is straightforward: the approval of the Proposal cannot be taken for granted and it is thus

reasonably foreseeable that the project may have to be sold by a Trustee or Receiver in the near future and the ability of whichever court officer is charged with undertaking that sale to achieve the highest and best price available ought not to be impaired more than the circumstances already have by the disclosure of appraisals that may serve to skew market expectations. A significant portion of such evidence is part of the public record and between the public information and the use of carefully-framed circumlocutions I believe that I can convey my conclusions and reasons for them regarding the valuation evidence with reasonable clarity.

[24] Two of the appraisals before me, both from CBRE, are the most central to the questions I must determine. The first in time is dated August 8, 2019 providing CBRE's opinion of value as at July 30, 2019. This appraisal was prepared for the parent company of the debtors within the Cresford group and is based on the particular assumptions set out therein, including some supplied by Cresford. The second in time, also by CBRE, is dated April 30, 2021 as of March 16, 2021. This latter appraisal was prepared for Concord based on the assumptions set out therein, including some supplied by Concord. I shall not discuss in a public document the actual appraisal amounts in either, focusing instead on the differences between them.

[25] For present purposes, it is sufficient for me to observe that the 2021 CBRE appraisal is lower than the 2019 CBRE appraisal and lower by an amount that is significantly higher than the sum of the compromised amount of unsecured claims under the Proposal plus the total capital of the "B" unitholders in YG LP.

[26] I find that I can attach little weight to the 2021 CBRE appraisal in these circumstances because:

a. The assumptions given to CBRE by Concord were materially different than those used in the 2019 CBRE appraisal including as to such things as leasable square footage of residential and retail space;

b. When it formulated the instructions to CBRE, Concord was in the process of attempting to negotiate a Proposal to acquire the property through the bankruptcy process given lack of limited partner consents and was being commissioned at a time when Concord had a clear and obvious interest in having appraisal evidence suggesting that the project was at least partly underwater;

c. The downward alterations made by Concord to the square footage assumptions used by CBRE are unexplained, untested and appear to be admitted as having been quite preliminary at all events;

d. Concord did not submit Mr. McCracken to cross-examination to examine in depth the reasons for the significant negative difference between the two instructions given to CBRE on the conflicting appraisals;

e. The differences between the two have not been reasonably or adequately reconciled. There has been no general downward correction to residential real estate in Toronto that has been brought to the court's attention nor can the difference between the two appraisals reasonably be attributed solely to pandemic-induced alterations to the retail environment.

(iii) ALL Construction Lien Claims are Unaffected Creditors under the Proposal

[27] Under the Proposal, Construction Lien Claims are defined as "Unaffected Creditors". The Trustee indicates that the total amount of such claims is $11.865 million. Of this total, fifteen lien claimants with $9.19 million in lien claims outstanding entered into assignment agreements with the Proposal Sponsor. As these are non-voting Unaffected Creditors under the Proposal, Concord required them to file claims as Affected Creditors in order to acquire the right to vote and to name a proxy designated by Concord.

[28] There was some controversy about what precisely the lien claimants received in return for agreeing to convert claims that were to be paid $1.00 per $1.00 of valid claims under the Proposal into claims receiving no more than $0.58 per dollar of claim value. The Trustee-reported second-hand information from Concord denying any "side" deals does little to address this concern. Assurances as to the lack of a side deal do not serve the purpose of permitting a reasonable understanding of the main deal. None of them have been disclosed beyond a skeletal summary and Concord declined to permit a representative to be examined prior to the hearing.

[29] It is of course open to the Proposal Sponsor to make any proposal that satisfies the formal requirements of the BIA if the debtor is prepared to adopt it and submit it to the creditors and the creditors are willing to accept it with their eyes open. In this case however the Proposal Sponsor has induced $9.19 million of otherwise Unaffected Creditors to file claims as something they are not by definition (i.e. Affected Creditors) thereby effectively reducing the size of the cap from $65 million to $55.8 million and the maximum pool of funds available to the actual Affected Creditors described by the Proposal from $37.7 million to $32.4 million. These are material changes impacting all Affected Creditors that follow from arrangements made by the Proposal Sponsor outside the terms of the Proposal.

[30] The Proposal makes no provision for creditors "downshifting" their claims voluntarily. Lien claims are defined as "Unaffected Claims" and I see no basis for them to be accepted under the Proposal on any other basis particularly where doing so operates to the obvious detriment of the affected class members. This is not a case of a

secured creditor valuing its security and filing an unsecured claim for the shortfall. There are consequences to such a valuation exercise that are absent here.

[31] The “electing” lien claimants have little in common with the actual Affected Creditors who had no election to make. Despite having made the election, assuming there was any basis in the Proposal to make such an election (and it appears to me that there was not), such creditors retained their security intact. Pursuant to art. 9.01 of the Proposal, the Proposal would have “no effect upon Unsecured Creditors” which definition does not cease to apply to them by virtue of a make-shift “election” for which the Proposal makes no provision. They did not agree to surrender their security nor even to value it in the bankruptcy process. They agreed to sell their claims on whatever terms they chose to accept from the Proposal Sponsor secure in the knowledge that if, for any reason, the Proposal does not move forward, their security remains intact and unaffected.

[32] This is an element of unfairness in this that I find particularly disturbing. It is all the more disturbing when I am not at all persuaded that the unsecured creditors face the spectre of near certain annihilation in the event of a bankruptcy or receivership but face the very real prospect of additional and illegitimate dilution of their claim value were I to approve the Proposal as presented with the presence of lien claimants in the Affected Creditor pool.

(iv) The related party claims must be treated as equity

[33] A fundamental principle of the BIA is that equity claims are subordinate to debt claims. This principle is voiced in s. 60(1.7) of the BIA that provides quite simply that ”[n]o proposal that provides for the payment of an equity claim is to be approved by the court unless the proposal provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid”. Section 140.1 expresses a similar requirement in respect of dividends more generally. While there is some similarity behind the concept of “equity claims” in Canadian insolvency law and that of “equitable subordination” the two are separate and one and must not be confused with the other: *U.S. Steel Canada Inc. (Re)*, 2016 ONCA 662 (CanLII) at para. 101.

[34] The limited partner applicants submit that the intercompany advances appearing in the general ledger of YG LP should be treated as equity claims within the meaning of the BIA. The debtors on the other hand urge me to pass over this issue entirely arguing that approval of the proposal does not entail approval of any payment of intercompany claims. Such claims will ultimately be determined by the Trustee and if disallowed for any reason will receive no distribution.

[35] I cannot accept the debtors’ argument that I should sweep the equity claims under the carpet to be dealt with another day in another forum. This is so for the following reasons:

a. The applicant limited partners have no standing to challenge the proof of the related party claims within the bankruptcy process even if their claims against related parties are not themselves released by the Proposal.

b. On June 1, 2021 I directed that issues raised in the two applications would be dealt with on June 23. A theme in those applications was, among others, the allegation that the General Partner had been seeking to divert substantial payments to Cresford from various investor proposals negotiated by the Cresford group ahead of limited partners, the allegations that representations had been made in the Subscription Documents and elsewhere that Cresford entities would be paid out of distribution after the "A" unit limited partners, that counsel for Cresford had confirmed that the intercompany loans were subordinated to the limited partners, that the General Partner had acted in breach of its fiduciary duties and that the Proposal was not being advanced in good faith; and
c. The timetable I approved on June 1 specifically contemplated the foregoing aspects of those applications being dealt with on June 23, 2021.

[36] If the related party claims are equity claims under the BIA, then it is also highly likely that the notional purchase price for the project being paid by the Proposal Sponsor under the Proposal must be viewed as being $22 million less than it might otherwise appear, a fact that is also material to the matters I must consider on this motion.

[37] The allegations of the applicant limited partners in the two outstanding applications challenge the good faith with which the Proposal has been advanced by the General Partner in part on the theory that the Proposal has in fact been advanced to secure payment of the related party claims in priority to the "A" unitholders and without securing their consent.

[38] For the foregoing reasons, I cannot avoid a consideration of whether the related party claims are equity claims. My conclusions on that subject are an integral part of any conclusion I must make on the subject of good faith or the criteria to be considered under s. 59(2) of the BIA.

[39] Are the related party claims identified by the Trustee in this case "equity claims"?

[40] The BIA contains a definition of "equity claims" that is deliberately non-exhaustive. In *Sino-Forest Corporation (Re),* 2012 ONCA 816 (CanLII) (at para. 44) the Court of Appeal found that the term should be given an expansive meaning to best secure the remedial intentions of Parliament.

[41] Subsequent cases have explored the concept of "equity claim" with a view to fleshing out its parameters. Some of the guidelines that can be distilled from that jurisprudence include the following:

a. Neither the “intention of the parties” as between non-arm’s length parties nor the formal characterization they apply is conclusive as to the true nature of the transaction: *Tudor Sales Ltd. (Re),* 2017 BCSC 119 (CanLII) at para. 35 and *Alberta Energy Regulator v Lexin Resources Ltd*, 2018 ABQB 590 (CanLII) at para. 37.

b. The manner in which the transaction was implemented, and the economic reality of the surrounding circumstances must be examined to determine the true nature of the transaction with the form selected being merely the “point of departure” of the examination: *Lexin* at para. 37.

c. It is helpful to consider whether the parties to the transaction had a subjective intent to repay principal or interest on the alleged loan from the cash flows of the alleged borrower and, if so, was that expectation reasonable: *Lexin* at para. 41.

d. It is also helpful to consider the “list of factors” that courts have looked at in such cases – being careful not to apply them in a mechanical way or as a definitive checklist: *Lexin* at paras. 42-43.

e. Among the factors to examine are:

    i. the presence or absence of a fixed maturity date and schedule of payments (absence of such terms being a potential indicator of equity);

    ii. the presence or absence of a fixed rate of interest and interest payments. Again, it is suggested that the absence of a fixed rate of interest and interest payments is a strong indication that the advances were capital contributions rather than loans;

    iii. the source of repayments. If the expectation of repayment depends solely on the success of the borrower’s business, the cases suggest that the transaction has the appearance of a capital contribution;

    iv. the security, if any, for advances; and

    v. the extent to which the advances were used to acquire capital assets. The use of the advance to meet the daily operating needs for the corporation, rather than to purchase capital assets, is arguably indicative of bona fide indebtedness: Lexin at paras. 42-43.

[42] The related party claims may be broken down into different buckets for the purposes of this analysis. The first one consists of payments that were made to retire loans taken out for the specific purpose of financing equity interests in YG LP. This

involved loans used to buy out the $15 million investment of a former limited partner, loans used to finance the Cresford group of companies' $15 million equity investment in Class B units as well as interest paid on both of these loans some or all of which has been recorded as obligations of YG LP on its books.

[43] Clearly advances made or charged to YG LP for the direct or indirect purpose of financing the purchase of an equity interest in YG LP are likely to the point of certainly to be characterized as equity claims of YG LP for the purposes of insolvency law. The evidence to this point supports the reasonable inference that a very substantial portion of the advances charged to YG LP by non-arm's length parties can be so characterized.

[44] A second category of advances made can only be described as "miscellaneous" comprised of various sporadic payments made by members of the Cresford group of companies that were recorded in the ledger of the limited partnership net of other payments made by the limited partnership to the Cresford group.

[45] The terms of the intercompany advances recorded on the general ledger of the limited partnership share the following characteristics:

a. They were all non-interest bearing without any defined term or maturity date; and

b. There are no loan documents evidencing any of them.

[46] Such payments as there were from YG LP on account of these advances were sporadic. The nature of the YG LP project is such that there is no cash flow nor any expectation of cash flow being available to repay the intercompany advances recorded until project completion when deposits and sales proceeds become available. The evidence does not suggest that intercompany advances were primarily short-term bridge advances pending the receipt of project financing that was to be used to repay them.

[47] There is substantial evidence that the related party advances were intended to be subordinated to holders of "A" units of YG LP and are thus equity claims. In the interest of time, I shall only summarize this evidence:

a. Direct written representations were made to the investors in YG LP "A" units as part of the subscription process that after payment of "project expenses" only "external lenders" debt would be repaid ahead of them and that distributions to "Cresford" – unambiguously referencing the group of companies rather than one entity – would come after repayment of invested capital and the agreed return on investment to the limited partner investors;

b. Cresford's communications to the limited partners never disclosed the existence of any "debt" owed to Cresford even when portraying "current debt" in various discussions with or disclosures made to them until very

recently (and long after the advances in question were recorded on YG LP's books);

c. Other Cresford group projects with similar capital structures also made representations that intercompany advances were treated as equity;

d. There was a direct, written representations made by prior counsel to the General Partner in October 2020 that such intercompany advances were "subsequent in priority" to the YG LP "A" unit investors – that admission has since been retracted without an adequate explanation for why it was an alleged error; and

e. Cresford's CFO also advised that the YG LP "A" unitholders would be paid in priority to "Cresford" a term used to describe the related group of Cresford companies under common control.

[48] A review of the foregoing factors in light of the jurisprudence leads me to the conclusion that the related party advances must be considered as equity claims for the purposes of this motion at least. Virtually all indicators reviewed point towards equity and there is little to no evidence leaning the other way.

(v) The implied value of the Proposal is $22 million less than assumed

[49] The Proposal operates to reduce the payments made to unsecured creditors if claims are lower than the $65 million cap. The converse is not the case. Absent the lien claims and the intercompany claims there is no mathematical prospect of the $65 million cap being operative unless the contingent and late-filed claims are resolved at levels far in excess of any reasonable estimate. This means that the consideration paid by Concord under the Proposal must be considered to be worth $22 million less than it might have been had the related party claims not been equity claims.

(vi) The general partner had authority to file the NOI

[50] The two groups of limited partners have raised three broad categories of objections to the capacity of the general partner to have filed the NOI and sought approval of the Revised Proposal: (i) as a matter of law, all partners including limited partners, must approve filing for bankruptcy; (ii) pursuant to the Limited Partnership Agreement, the general partner lacked the authority to file for bankruptcy; and (iii) the general partner ceased to be general partner prior to the filing. I shall consider each of these in turn.

S. 85(1) of the BIA

[51] Section 85(1) of the BIA provides that it "applies to limited partnerships in like manner as if limited partnerships were ordinary partnerships, and, on all the general

partners of a limited partnership becoming bankrupt, the property of the limited partnership vests in the trustee.”.

[52] The limited partners’ position was that since all partners of a general partnership must authorize a bankruptcy filing and since s. 85(1) of the BIA applies the law in relation to general partnerships to limited partnerships in “like manner”, it follows that an NOI must be authorized by all limited partners in addition to the general partner. In support of this interpretation they cite the case of *Aquaculture component Plant V Limited Partnership (Re)*, 1995 CanLII 9324 (NS SC) where two NOI’s filed on behalf of limited partnerships were annulled on this basis.

[53] While the decision of Hamilton J. in the *Aquaculture* case is entitled to deference, it is not binding upon me. I find that I am unable to agree with its reasoning.

[54] The *Aquaculture* case stands quite alone in the jurisprudence on this topic – alone in the sense that none appear to have followed *or* disagreed with it as far as the research conducted by the parties has been able to determine. In the 26 years since it was decided, a significant number of limited partnerships have passed through our bankruptcy courts either for proposals or liquidations without apparent objection on this score. That practice of course does not have the effect of altering the law but it is at least a factor to consider given the number of times since then that Parliament has examined the BIA including with the addition of s. 59(4) that authorized changes to the constating documents of a debtor including a limited partnership.

[55] I reach a different conclusion than was reached in *Aquaculture* for the following reasons:

a. The use of general “in like manner” language in s. 85(1) of the BIA is intended to ensure that the provision is interpreted consistent with the objects of the BIA and not in a manner as to defeat those objects or render the benefits of the BIA largely inaccessible to limited partnerships. The procedure for filing an NOI was intended to offer debtors a swift and relatively low cost means of seeking creditor protection after a secured creditor gives the required ten-day notice of its intention to enforce. Requiring unanimous consent for filing of an NOI would have the practical effect of making the benefits of bankruptcy law unavailable to limited partnerships in practice in a large number of cases. Limited partnerships often have large numbers of limited partners and the time required to convene a meeting and obtain unanimous consent would require more time than secured creditors are required by law to give in the way of notice.

b. Provincial law generally provides that only general partners may bind a limited partnership (in Manitoba, s. 54(1) of the *The Partnership Act*, CCSM c P30) and the BIA treats partnerships and limited partnerships as a full

"debtor". The policy behind requiring all *general* partners to authorize a bankruptcy filing is obvious – all are liable without limit for the liabilities of the partnership. The same is not the case with a limited partnership.

c. Section 59 of *The Partnership Act* also provides that actions or suits in relation to the limited partnership may be brought and conducted by and against the general partners as if there were no limited partners. This too supports the proposition that the consent of limited partners is not required for the filing of an NOI on behalf of the partnership.

[56] I find that s. 85(1) of the BIA did not require the asset of each limited partner to the filing of an NOI.

[57] The limited partners also pointed to provisions of the Limited Partnership Agreement to allege that the General Partner had automatically ceased to be general partner of the partnership by reason of certain actions or that that it lacked the authority to file on behalf of the partnership.

Did the General Partner cease to be a general partner of YG LP at any time?

[58] The Proposal Sponsor Agreement is dated April 30, 2021 and was entered into between Concord as Proposal Sponsor and YG LP acting through the General Partner. It was executed prior to filing the NOI but *after* the two limited partner groups had filed their separate applications seeking, among other things, to remove the General Partner. To the extent it is relevant, there can be no question but that Concord was aware of the terms of the Limited Partnership Agreement at all relevant times when negotiating and entering into the Proposal Sponsor Agreement.

[59] Pursuant to s. 1.1 of the Proposal Sponsor Agreement, YG LP agreed to "use commercially reasonable efforts to effect a financial restructuring of [YG LP] that will result in the acquisition of the Property by the Proposal Sponsor together with [YG LP's] rights, title and interests in and to such Project-related contracts as may be stipulated". A draft of a proposal, substantially similar to the Proposal before this court for approval, was appended as a schedule to the Proposal Sponsor Agreement. The agreement was signed by Mr. Daniel Casey on behalf of each of the Cresford companies named as parties including YG LP.

[60] Section 10.14 of the YG LP Limited Partnership Agreement provides that "None of the following actions shall be taken unless it has *first* been approved by Special Resolution: (a) approving or disapproving the sale or exchange of all or substantially all of the business or assets of the Partnership"(emphasis added).

[61] The Proposal contemplated by the Proposal Sponsor Agreement clearly provides for the sale or exchange of all or substantially all of the business or assets of the Partnership. Section 1.1 of the Proposal Sponsor Agreement obliged YG LP to "use

commercially reasonable efforts" to cause this to occur, including by filing the NOI and to requesting court approval of the Proposal. As obliged by the Proposal Sponsor Agreement, YG LP filed an NOI, filed the Proposal and subsequently sought court approval of the Proposal.

[62] Entering into the Proposal Sponsor Agreement constituted the "approval" of YG LP to the sale or exchange of all or substantially all of the business or assets of the Partnership" even if approvals of other parties were also required in order to *complete* the transaction. The prohibition in art. 10.14(a) attaches to the approval of the action and not its completion.

[63] Section 7.1(c) of the Limited Partnership Agreement creates an Event of Default if the General Partner "becomes insolvent … consents to or acquiesces in the benefit of [the BIA]". By filing the NOI as a general partner of YG LP, the General Partner necessarily admitted to being insolvent at the time the NOI was filled out. There is no evidence that such state of insolvency arrived suddenly that day. The General Partner has accordingly admitted to the existence of an insolvency default under s. 7.1(c) of the Limited Partnership Agreement at some time prior to filing the NOI failing which no NOI would have been possible. By signing the Proposal Sponsor Agreement and agreeing to file the NOI to advance the Proposal, the General Partner also consented to the receiving the benefit of the BIA proposal provisions.

[64] For all of the foregoing reasons, the signing of the Proposal Sponsor Agreement amounts to an admission of further breaches of the Limited Partnership Agreement.

[65] Do such breaches entail the automatic removal of the authority of the General Partner to act as such at the time the NOI was actually filed? The answer in my view is that none of them have that effect.

[66] Section 11.2 of the Limited Partnership Agreement concerns the removal of the General Partner. Pursuant to s. 11.2(a), the General Partner "'may be removed" by a court of competent jurisdiction on certain named grounds. That has not occurred. Section 11.2(b) provides that the General Partner "shall cease to be general partner" if any of the named events occurs. None of the agreement to file an NOI, the state of being insolvent or the signing of the Proposal Sponsor Agreement can be read to be included in the list of events listed in s. 11.2(b). The *aftermath* of the filing of the NOI may well be such a trigger but the answer to that question would require me to contend with the effects of the automatic stay which has not been raised before me.

[67] Accordingly, I find that the NOI filed by the General Partner was not void or subject to any similar infirmity. The foregoing conclusion refers only to the actual filing of the NOI and specifically does not apply to the breaches of the Limited Partnership Agreement consequent upon entering into the Proposal Sponsorship Agreement discussed above.

(vii) The Proposal was the product of a flawed process and breaches of fiduciary duty by the General Partner

[68] There are two aspects to this part of the objections raised by the objecting limited partners. First, it is alleged that during the year leading up to the Proposal Sponsor Agreement, the General Partner breached its fiduciary duty to act in the best interests of the partnership by seeking to advance the interests of non-arm's length parties to the detriment of the limited partners while simultaneously frustrating every effort of the limited partners to access the information that the Limited Partnership Agreement and the Manitoba *Partnership Act* gave them the rights to see. Second, it is alleged that negotiating and entering into the Proposal Sponsor Agreement was a breach of fiduciary duties of the General Partner in that this was nothing less than deliberately negotiating and entering into an agreement to breach the Limited Partnership Agreement.

[69] As the sole general partner of YG LP, the General Partner was responsible for the management of the affairs of the limited partnership and was the only one able to bind the partnership. The General Partner owed a fiduciary duty to all of the partners of the firm in discharging that role and pursuant to s. 64 of *The Partnership Act*, is liable to account, both at law and in equity to the limited partners for its management of the firm.

[70] As I have outlined above, entering into the Proposal Sponsor Agreement was a clear violation of s. 10.14 of the Limited Partnership Agreement as it agreed to a process whereby substantially all of the property of the firm would be conveyed to a third party without the assent of the limited partners. The fact that the BIA stay of proceeding may impede or prevent the limited partners from seeking a direct remedy for that breach when the agreement was subsequently put into action by filing the NOI does not detract from the existence of a present breach the moment pen was put to paper. Further, whether the negotiations of the Proposal Sponsor Agreement consumed two weeks or two months, it was a breach of fiduciary duty to plan and then put into execution a deliberate breach of the Limited Partnership Agreement and doing so in the teeth of a pending application to stop the General Partner adds further weight to that conclusion.

[71] The debtors suggested that being in the proximity of insolvency dissolved or altered the fiduciary duties of the general partner owed to the limited partners. It is true that the law recognizes that the interests of creditors assume a greater weight the closer to insolvency the enterprise approaches. None of this dissolves the fiduciary obligations of the General Partner so much as it adds to them. It is at this point that the other aspect of the complaint of the limited partners enters the analysis.

[72] Nothing in what I have written suggests that a general partner cannot file an NOI where doing so appears on all of the facts and in the good faith exercise of the best business judgment of the general partner to be in the best interests of the enterprise as a whole to do so – a judgment that necessarily accounts for the obligations of the firm owed to its creditors.

[73] This filing was different because it came with strings attached: a binding Proposal Sponsor Agreement that granted exclusivity to a single party and obliged the General Partner to pursue one path and one path only to emerge from the process. Those strings did not get attached as a result of a process which itself discharged faithfully the fiduciary duties of the General Partner. Rather they were attached as the culmination of almost a year of battling to keep information away from limited partners that they had a right to access (in most cases at least) and the squandering of an expensively purchased window of restructuring breathing room looking not for the solution best able to discharge all of the obligations of the partnership but rather looking for the investor best able to secure the optimal outcome for the Cresford group of companies generally. In that process the limited partners were an obstacle to be circumvented and bankruptcy provided a possible key.

[74] Good faith in such circumstances is not assumed but must be shown. The evidence presented to me has rather persuasively convinced me that good faith took a back seat to self-interest.

[75] The parties have expended considerable effort in outlining the details of what occurred in that time frame. In the interests of time, I shall summarize the important take-aways from those events:

a. Until the Proposal Sponsor Agreement and the April 2021 CBRE report prepared for Concord, *all* appraisal evidence showed a profitable project likely to result in full coverage for all of the outstanding third-party debt obligations plus all of the obligations owed to limited partners;

b. The General Partner presented two potential transactions to the “A” unit limited partners in the second half of 2020 that provided for the full payment of all debt, the payment of approximately $38 million to non-arm’s length parties related to the General Partner and payment of obligations owed to the limited partners at a discount – the latter of the two proposals emanated from Concord;

c. The two proposals failed to proceed primarily because the General Partner was unable to provide a satisfactory explanation as to why Cresford related parties were to receive a substantial payment when limited partners were asked to accept a compromise the obligations due to them and limited partners had been assured that Cresford group obligations ranked behind them both when they made their investment and as late as October 2020 in a letter from counsel the debtors; and

d. The limited partners were in a continual tug-of-war trying to pry information out of the General Partner having had to resort to a court order at the

beginning of this year to obtain access to information that should have been available to them as of right.

[76] Few things are more precious in the restructuring business than time. YG LP was able to "purchase" more than a year of time with the forbearance arrangements that it worked out. That precious time appears to have been devoted solely to finding transactions that offered the greatest level of benefits for the Cresford group of companies. There is no evidence that any canvassing of the market – however constrained the market of developers capable of undertaking the completion of an 85-story mixed use tower in downtown Toronto may be – took place that was not indelibly tainted by the imperative of finding value for the Cresford group of companies rather than for the partnership itself.

(viii) The Affected Creditor vote was unanimous

[77] Despite the fact that I have found that fifteen of the forty-six votes cast in favour of the Proposal ought not to have been considered because they came from Unaffected Creditors, that determination does not impact the conclusion of the Trustee that the required statutory majorities voted in favour of the Proposal. There was but one negative vote cast and the Trustee disallowed that vote as being contingent. I have reviewed the Trustee's reasons for so ruling and find no fault with them. The removal of fifteen creditors and just over $9 million in claims does not detract from the fact that thirty-one creditors holding approximately $9 million in other claims cast votes in favour.

[78] While I am prepared to consider to some degree the impact of the assignment agreements negotiated by Concord (see below), I do not view such agreements as impacting the formal validity of the votes cast.

[79] I find that the Proposal received the required majority of two-thirds in value and over 50% in number of creditors voting in person or by proxy.

(ix) The probative value of most of the Affected Creditor vote is attenuated

[80] In the normal course, the agreement of a broad group of creditors to accept less than 100% of what they are owed is cogent evidence of the fairness and reasonable nature of a proposal. This is so as a matter of common sense and by a very long tradition in our law. It is not an indicator lightly to be ignored.

[81] I must also recognize that whatever doubts the evidence may raise as to the insolvency of the debtors in terms of the realizable value of their assets, there can be little doubt that the liquidity test for insolvency is met. The lien claimants have been unpaid for a year or more without any formal forbearance agreement. The first mortgagee has entered into a forbearance agreements but this expires on June 30, 2021.

[82] There was a window of time to find an out-of-court solution, but it would appear that the debtors have squandered it.

[83] The vote of the Affected Creditors *is* probative of fairness, but I find that its weight is attenuated in this case by the following circumstances:

a. Only a relatively small minority voted who did not also enter into assignment agreements;

b. The evidence is equivocal about precisely what consideration was received by those who entered into such assignment agreements – a relayed denial of "side-deals" without more adds little to the equation particularly when the deal itself is not disclosed;

c. Clearly if assigning creditors received or stand to receive more than the value allocated to them under the Proposal, their positive vote says little about the business judgment of the creditors at large to accept the value offered to satisfy their claims but says more about the willingness of the Proposal Sponsor to pay more than has been reflected in the Proposal itself.

d. This last-in-line class of creditors did not have available to it the range of information produced in connection with this approval motion.

Disposition

[84] I will not approve the Proposal in its present form. I have concluded that, as presented, the Proposal is not reasonable, it is not calculated to benefit the general body of creditors and there are serious issues regarding the good faith with which it has been prepared and presented by the debtors. The debtors and the Proposal Sponsor have the authority under art. 3.06 of the Proposal to amend the Proposal to address the concerns I have raised. It is up to them – with the approval of the Trustee – to do so if they are so inclined.

[85] I am directing the parties to return on Wednesday June 30 at 2:15 pm either to propose amendments to the Proposal that address the concerns I have raised in a substantive way or to address next steps.

[86] These written reasons expand upon the summary reasons I presented orally in a hearing on June 29, 2021. I have released these reasons with relatively little opportunity to proof them and correct typographical errors or minor nits or stylistic glitches. I shall do so over the next week when I have more time available to me and the capacity to call upon my able assistant Ms. Daisy Ng to assist in that effort. Accordingly, I shall be releasing an amended version of these reasons over the course of the next week with such minor and non-substantive corrections.

_____

S.F. Dunphy J.

Date: June 29, 2021

The foregoing is the corrected text of my reasons. Orphaned words have been removed or obvious missing words restored along with corrections of minor errors only. The parties have received a blackline version to compare the changes. Since releasing these reasons, I have adjourned the hearing scheduled for June 30, 2021 at 2:15 until July 9, 2021 at 10:00am. In so doing, I issued the following additional directions:

> As KSV Restructuring Inc. ("KSV") will become the bankruptcy trustee and court-appointed receiver on July 9, 2021 if no satisfactory amended proposal is approved at that time, this Court hereby authorizes and directs KSV to undertake the steps towards formulating a sales process that it would be undertaking if it had been appointed the receiver today.
> KSV's costs of doing so from July 1, 2021 shall be deemed costs of the receiver upon the granting of a receivership order on July 9, 2021 failing which all such costs will be deemed to be costs of the Proposal Trustee in the proposal proceeding.

Issued: July 2,2021

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S.F. Dunphy J.

2

CITATION: BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc. 2020 ONSC 1953
COURT FILE NO.: CV-20-00637301-00CL & CV-20-00637297-00CL
DATE: 2020-03-30

ONTARIO

SUPERIOR COURT OF JUSTICE

[Commercial List]

BETWEEN:	)	
	)	
BCIMC CONSTRUCTION FUND CORPORATION AND BCIMC SPECIALTY FUND CORPORATION	)	*David Bish, Adam M. Slavens, Jeremy Opolsky* Counsel for the Applicants
Applicants	)	
– and –	)	
THE CLOVER ON YONGE INC., THE CLOVER ON YONGE LIMITED PARTNERSHIP, 480 YONGE STREET INC. AND 480 YONGE STREET LIMITED PARTNERSHIP	)	*Steven Graff, Ian Aversa, Jeremy Nemers* for the Respondents
Respondents	)	
AND BEWTWEEN	)	
BCIMC CONSTRUCTION FUND CORPORATION AND OTERA CAPITAL INC.	)	*David Bish, Adam M. Slavens, Jeremy Opolsky* Counsel for BCIMC Construction Fund Corporation
Applicants	)	*Virginie Gauthier, Allan Merskey and Peter Tae-Min Choi* counsel for Otera Capital Inc.
- and -	)	

33 YORKVILLE RESIDENCES INC. AND 33 YORKVILLE RESIDENCES LIMITED PARTNERSHIP	)))	*Steven Graff, Ian Aversa, Jeremy Nemers* for the Respondents
Respondents	)	See Schedule A for complete list of counsel

Heard: March 27, 2020

KOEHNEN J.

Overview

[1] This proceeding involves competing applications for the appointment of a receiver and manager pursuant to subsection 243(1) the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended and an application for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended.

[2] The hearing was held by telephone conference call due to the COVID-19 emergency on Friday, March 27, 2020. The hearing was held in accordance with: (a) the Notice to the Profession issued by Chief Justice Morawetz on March 15, 2020; and (b) the "Changes to Commercial List operations in light of COVID-19" developed by the Commercial List judges in consultation with the Commercial List Users Committee. The teleconference line was one provided by the Ontario Superior Court of Justice. Materials were sent to me by email before the hearing.

[3] At the end of the hearing I advised counsel that I would dismiss the CCAA application and grant the receivership application with reasons to follow. These are my reasons. I have issued two sets of reasons, a sealed confidential set of reasons and a public set of reasons. The public reasons contains all of the information in the confidential reasons except certain figures which have been redacted.

[4] In short, after considering the various factors that all sides brought to my attention, it struck me that a receivership was clearly the preferable route to take. Secured creditors with a blocking position to any plan objected to a CCAA proceeding. They had valid grounds for doing so. They had first mortgages in land, there was no concrete proposal at hand to have them paid out. The mortgagees had made demand on February 20. Demand was prompted by findings of financial irregularity within the debtors. The debtors had agreed to give the mortgagees receivership rights in the lending agreements they signed. Approving a CCAA proceeding would force lenders to continue to be bound to debtors in whom they no longer had any confidence by reason of the debtors' absence of transparency and forthrightness in its dealings with the lender. There was no evidence that a CCAA proceeding would have a material impact

on safeguarding jobs nor was there any evidence that it would materially safeguard the interests of other creditors more so than a receivership would.

A. The Parties

[5] The Receivership Applicants, BCIMC Construction Fund Corporation and BCIMC Specialty Fund Corporation are affiliates of the British Columbia Investment Management Corporation and help manage the pensions of over 500,000 British Columbia public servants.

[6] The receivership applicant Otera Capital Inc. is a subsidiary of the Caisse de Dépôt et Placement du Québec and is one of Canada's largest real estate lenders. For ease of reference I will refer to all three applicants as the Receivership Applicants.

[7] The Receivership Applicants asked me to appoint PricewaterhouseCoopers Inc. as receiver and manager over all of the undertakings, properties and assets of three residential condominium construction projects known as The Clover, Halo and 33 Yorkville.

[8] The BCIMC parties have advanced loans on all three projects. Otera has advanced loans only on 33 Yorkville where it has shared advances equally with the BCIMC parties.

[9] The Debtors are special-purpose, project-level entities for the development of each of the three projects.

[10] Each of the three projects is affiliated with The Cresford Group, which owns each project through individual, single asset, special purpose corporations. Cresford is a significant developer and builder of residential condominiums in the Toronto area.

[11] Clover and Halo object to the receivership application and have brought their own application to seek protection under the CCAA. The Yorkville project seeks to adjourn the receivership application in respect of it. The parties in the proceeding of each project are the corporate general partner and the corporate limited partnership entity.

(a) The Clover Project

[12] The Clover project is located at 595 Yonge St., north of Wellesley St. in Toronto. It is comprised of two towers; one 44 storeys, the other 18 storeys containing a total of 522 residential units. The Clover project is the most advanced of the three projects. Construction is well underway with the higher floors now under construction.

[13] The Clover Commitment Letter from the Receivership Applicants provides for two non-revolving construction loans in amounts of $172,616,007 and $37,450,668 and a non-revolving letter of credit facility of up to $3,000,000.

[14] As of March 2, 2020, the Receivership Applicants had advanced $107,668,017.82 under the Clover Facilities. In addition, $3,000,000 in letters of credit have been extended. The

Receivership Applicants also extended a mezzanine mortgage on Clover, with $34,035,878.69 in principal outstanding.

[15] The obligations are secured by, among other things, a first-ranking security interest in substantially all of the property, assets and undertaking of the Clover Debtors, and by registered first-ranking and third-ranking charges/mortgages in respect of real property.

[16] There are 499 purchasers of units in Clover who have paid a total of approximately $49 million in deposits.

(b) The Halo Project

[17] The Halo project is located at 480 Yonge St. south of Wellesley St. in Toronto. It calls for a 39-storey tower with 413 residential units set-back from the street to accommodate a historic clock tower. Halo is in early stages of construction.

[18] The Halo Commitment Letter provides for two non-revolving construction loans in amounts of $156,850,7747 and $29,292,804, respectively, and a non-revolving letter of credit facility in the amount of up to $2,000,000.

[19] As of March 2, 2020, the Receivership Applicants have advanced $47,429,211.83 in principal. In addition, $1,500,000 in letters of credit have been extended. The Receivership Applicants have also extended a mezzanine mortgage on the Halo project, with $25,725,159.27 in principal outstanding.

[20] The obligations are secured by, among other things, a first-ranking security interest in substantially all of the property, assets and undertaking of the Halo Debtors, and by registered first-ranking and third-ranking charges/mortgages in respect of real property.

[21] There are 388 purchasers of units in Halo who have paid a total of approximately $43 million in deposits.

(c) The Yorkville Project

[22] The Yorkville project is located at 33 Yorkville Ave between Bay and Yonge Streets in Toronto. Current plans call for one 43 and one 69 storey tower with 1,079 residential units and an eight storey podium. Excavation began in 2019 but no construction of the towers has begun.

[23] The Yorkville Commitment Letter provides for a non-revolving construction loan and a non-revolving letter of credit in amounts of up to $571,300,000 and $83,000,000, respectively.

[24] As of March 2, 2020, the Receivership Applicants had advanced $122,432,764.85 under the Facilities. In addition, $79,592,744.24 in letters of credit have been extended.

[25] The obligations are secured by, among other things, a first-ranking security interest in substantially all of the property, assets and undertaking of the Yorkville Debtors, and by registered first-ranking charges/mortgages in respect of real property.

[26] There are 918 purchasers of units in Yorkville who have paid a total of approximately $160 million in deposits.

[27] There are three other major secured creditors on the projects. Aviva Insurance Company of Canada has second and fourth priority mortgages. KingSett Capital Inc. has third ranking mortgages. Construction lien holders have liens of approximately $38,000,000 registered against the properties.

B. Deterioration of the Relationship

[28] In January 2020, the Receivership Applicants became aware of a statement of claim issued by Maria Athanasoulis against the Cresford Group. Ms. Athanasoulis was a former officer of Cresford who made allegations of financial irregularities within the Debtors. As a result, the Receivership Applicants appointed PWC and Altus Group Limited to investigate. Altus is a well-known quantity surveyor and cost consultant. The results of the investigation raised three issues showing a lack of transparency and forthrightness by the Debtors which led the Receivership Applicants to lose all confidence in the Debtors and which led the Receivership Applicants to conclude they no longer wanted anything to do with the projects.

[29] First, at the outset of the lending relationship, Cresford was required to inject equity into each project. It was important for the Receivership Applicants that Cresford had "skin in the game" in order to align Cresford's interests with those of the lenders.

[30] Instead of injecting its own funds, Cresford borrowed money at over 16% interest from a third party and used that loan as "equity" in the project. Cresford then used advances from the Receivership Applicants to pay for the 16% interest on its "equity". Approximately $10.668 million of the lenders' funds have been diverted from the three projects to service the interest on Cresford's "equity".

[31] Second, the projects have maintained two sets of books. A first set of accounting records shows costs that were consistent with the construction budget which had been presented to the lenders. Those records were used to obtain continued advances on the lending facilities. A second set of books records increases over the approved construction budgets. Approximately $ X of increased costs were hidden in this manner.

[32] In furtherance of the two sets of books, the Debtors had certain suppliers issue two invoices for the same supply. The first invoice was consistent with the approved construction budget. It was recorded in the accounting records that were available to the lenders and which showed costs in accordance with the budget. The second invoice from the supplier was for the amount by which the supply exceeded the construction budget. The second invoice was

recorded on the second accounting ledger kept for each project and was not disclosed to the lenders.

[33] Third, to help further hide increased costs, the Debtors sold units to suppliers at substantial discounts to their listing prices. Over $ X in discounted sales fall into this category.

[34] The agreements between the Receivership Applicants and the Debtors require the Debtors to inform the Receivership Applicants of any cost overruns, seek consent for material changes, always maintain sufficient financing to complete the projects and to fund any cost overruns with equity. The Debtors failed to do so.

[35] Cost overruns on the three projects come to more than $ X above the lender approved budget. The average rate of increase on each of the three projects is X %. Of those increases, approximately $ X were construction costs that were hidden from the lenders. The amount hidden on Clover was $ X; on Halo $ X and on 33 Yorkville, $ X.

[36] Although the Debtors dispute the precise amounts by which the projects are overbudget and take issue with what they say is an overly conservative approach by PWC, the Debtors' numbers would not change the economic viability of the projects. By way of example, PWC says 33 Yorkville is $ X over budget. The Debtors say PWC's number is overstated by $ X. Even if I assume the Debtors are correct, it would mean the Yorkville Project is over budget by $ X. All three Debtors agree that their projects are economically unviable. The only way to make the projects viable is to disclaim all of the agreements of purchase and sale for the condominium units and to sell the units anew at prices higher than those at which they were originally sold.

[37] In addition to the foregoing breaches, approximately $3.5 million in interest payments to the Receivership Applicants are overdue.

[38] On February 20, 2020, the Applicants made demand on the Debtors and sent notices under section 244 of the BIA giving notice of the Receivership Applicants' intention to enforce against security.

[39] The receivership application first came before me on March 2, 2020. The Debtors asked me to adjourn to enable them to respond to the allegations. At the time, Debtors' counsel suggested the allegations were questionable because the Receivership Applicants had attached the Athanasoulis statement of claim but had not attached the Cresford statement of defence. I adjourned the hearing to March 27, 2020 but indicated that the new hearing date was peremptory.

[40] Although the Debtors have had more than three weeks to respond to the allegations of the improper financial practices that led the Receivership Applicants to lose confidence in them, the Debtors have failed to do so. The Debtors do not deny the allegations. They do not explain them. They do not suggest they were the conduct of a rogue employee. They do not state that the irregularities were unknown to senior management. They remain completely silent about the

allegations. In these circumstances I can only assume that the allegations are true and were, at all material times, known to and accepted by senior management.

[41] In referring here to allegations of financial irregularity I am not referring to the allegations contained in Ms. Athanasoulis' statement of claim. I have not even read the statement of claim because it is of no evidentiary worth. Instead, I rely on the affidavits filed by the Receivership Applicants and on the pre-filing reports of PWC. Those materials have evidentiary value and have not been refuted. The allegations in Ms. Athanasoulis' statement of claim form the subject of a separate proceeding. Nothing in these reasons is intended to make any evidentiary findings in that action. The purpose of these reasons is solely to choose between a receivership or a CCAA proceeding based on the evidence before me on these applications.

C. The Prima Facie Right to a Receivership

[42] A receiver may be appointed where it is just and convenient equitable to do so.

[43] Although receivership is generally considered to be an extraordinary remedy, there is ample authority for the proposition that its extraordinary nature is significantly reduced when dealing with a secured creditor who has the right to a receivership under its security arrangements. See for example: *RMB Australia Holdings Limited v. Seafield Resources Ltd*., 2014 ONSC 5205 (Commercial List), paras. 28-29; *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 at para. 27.

[44] The relief becomes even less extraordinary when dealing with a default under a mortgage: *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, 1991 CarswellOnt 1511 (Ont. S.C.J.(Commercial List) at para. 20.

[45] In *Confederation Life*, at paras. 19-24 Farley J. set out four additional factors the court may consider in determining whether it is just and convenient to appoint a receiver:

(a) The lenders' security is at risk of deteriorating;

(b) There is a need to stabilize and preserve the debtors' business;

(c) Loss of confidence in the debtors' management;

(d) Positions and interests of other creditors.

[46] All four factors apply here.

[47] **Security at risk of deteriorating**: There is no doubt that the lenders' security is at risk of deteriorating. All three projects are overbudget. The Debtors acknowledge that the projects are economically unviable in light of the proceeds generated by the agreements of purchase and sale. Work has stopped on the projects. Trades are not being paid. Over $38,000,000 in construction liens have been registered since March 2. $3.5 million of interest is overdue. The

lenders are concerned about the risk of further deterioration as a result of liquidity problems that they fear may arise because of the Covid 19 emergency. These various factors make it necessary to gain control of the projects quickly.

[48] **The need to stabilize the business**: The Debtors agree that there is a need to stabilize the business. The only difference in this regard is whether it should be stabilized through a receivership or a CCAA proceeding.

[49] **Loss of confidence in management**: Given the length of time during which the financial irregularities have persisted, the deliberate, proactive nature of those irregularities and the deliberate efforts to hide the irregularities, the Receivership Applicants have a legitimate basis for a lack of confidence in management.

[50] **Position and interests of other creditors**: No other creditor has opposed the receivership application. Kingsett supports the receivership. Aviva has no preference between receivership or CCAA. Two lawyers appeared for limited partners in Yorkville. Mr. Mattalo supported the CCAA application. Ms. Roy was agnostic between the two but submitted that more time should be allowed for a transaction to materialize on the Yorkville project.

[51] In the circumstances, the Receivership Applicants have established *a prima facie* right to a receivership. The issue is which of a receivership or a CCAA proceeding is preferable.

D. The Debtors' Proposal

[52] The Debtors ask me to afford Clover and Halo CCAA protection and to adjourn the receivership application with respect to 33 Yorkville.

[53] The Debtors propose to sell the shares in the special purpose corporations that own the Clover and Halo projects to Concord Group Developments, one of Canada's leading developers of residential condominiums. It has developed over 150 condominium towers with over 39,000 units in Canada. It currently has more than 50 development projects in various stages of planning and development in Canada, the United States and the United Kingdom.

[54] The share sale to Concord would close on payment of one dollar. An additional $38,000,000 would be paid to a Cresford related person or entity upon completion of the following:

(a) Court approval of CCAA protection for Clover and Halo.

(b) Court approval of the disclaimer of existing condominium unit purchase contracts for Clover and Halo

(c) Completion of construction financing either with the existing lenders or new lenders.

[55] As part of the CCAA process Concord states that it will

(a) provide $20,000,000 of debtor-in-possession financing at a rate of 5%. $7,000,000 would be advanced during the first 10 days.

(b) Negotiate the resolution of creditors' claims.

(c) Offer unit purchasers a right of first refusal to re-purchase their units at "a discount to current market value."

[56] The Receivership Applicants oppose the CCAA application. They have indicated that they will not provide construction financing to Concord. They simply want their money paid and want nothing further to do with the project.

[57] With respect to Yorkville, the Debtor concedes there is nothing as far as advanced there is with Clover and Halo but points to a letter of intent for the purchase of the Yorkville property.

[58] Counsel for the purchaser under the letter of intent appeared on the application and produced a letter it had sent to the Debtor indicating that the letter of intent had expired on its terms but that the purchaser remains interested in pursuing a transaction. That purchaser is indifferent about whether they pursue the transaction through a receivership or a CCAA proceeding.

[59] I decline to grant the adjournment with respect to the Yorkville project. I indicated on March 2 that the March 27 date would be peremptory. I have been given no reason to depart from that direction. Even if there were a CCAA application with respect to the Yorkville project similar to the one for Clover and Halo, I would nevertheless appoint a receiver manager for the same reasons that I have decided to appoint a receiver manager for Clover and Halo.

E. Receivership or CCAA?

[60] In choosing between a receivership or a CCAA process, I must balance the competing interests of the various stakeholders to determine which process is more appropriate: *Romspen Investment Corp. v. 6711162 Canada Inc*., 2014 ONSC 2781 at para. 61.

[61] The factors addressed in argument relevant to this exercise were as follows:

(a) Payment of the Receivership Applicants

(b) Reputational damage

(c) Preservation of employment

(d) Speed of the process

(e) Protection of all stakeholders

(f) Cost

(g) Nature of the business

(a) Payment of the Receivership Applicants

[62] During the adjournment hearing on March 2, 2020 there was discussion about the desirability of ending the entire dispute by having the Receivership Applicants paid out. The Debtors submit that their proposal does so and is equivalent to having "Pulled a rabbit out of the hat." Unfortunately, I cannot agree.

[63] It was abundantly clear as of February 20, 2020 that the Debtors needed new financing when the Receivership Applicants demanded payment on their loans. As a practical matter it was clear before February 20 that the Debtors needed new financing. As soon as allegations of financial wrongdoing arose, the Debtors would have known that they had engaged in conduct that would likely lead a lender to terminate its relationship with them.

[64] Despite the assertion that the Debtors have "pulled a rabbit out of the hat," the CCAA proposal does not address the Receivership Applicants' concerns. The Receivership Applicants want their money back. What is currently on the table is a purchase agreement with Concord that is close to completion. The Debtors and Concord say it should have been completed on March 26, 2020 but was delayed because of a number of what they describe as "technical issues". Regardless of what the issues are, there is no enforceable agreement on the table although there may be in the near future.

[65] Even if that enforceable agreement materializes, it would not give the Receivership Applicants what they want. There is still no financing in place. Concord admits that it needs construction financing from either the existing lenders or new lenders. The Receivership Applicants will not provide financing.

[66] The Debtors point to a comfort letter from HSBC dated March 25, 2020 as evidence that Concord can obtain financing without difficulty. A closer read of that letter provides little comfort. On the one hand the letter states:

> We wish to confirm that Concord possesses significant capital, liquidity and credit lines, and is considered highly credit worthy, with consistent access to debt capital markets in order to facilitate large asset acquisitions and development projects.

[67] As the applicants point out however, Concord is not prepared to make any of its "significant capital liquidity and credit lines" available to pay out the Receivership Applicants.

Concord is not the buyer of the two projects. The existing sole purpose entities remain the owner of the projects. Concord is simply the new shareholder. It assumes no other liabilities.

[68] Finally, the HSBC letter goes on to state:

> In light of current market and economic conditions surrounding the COVID-19 health crisis, we are unable to comment specifically on financing aspects regarding the subject development projects at this time.

[69] From the perspective of the Receivership Applicants, this is the very problem. Far from pulling a rabbit out of the hat, the Debtors proposal would keep the Receivership Applicants in projects that, at least on the face of the HSBC letter, are currently not capable of obtaining new financing. In those circumstances one can readily expect that any new financing may well be conditional on the Receivership Applicants taking a discount on their debt or being forced to continue financing to avoid such a discount. Concord has not undertaken that the Receivership Applicants will be paid out without discount in any new financing.

[70] I intend no criticism of Concord by these comments. I would not expect them to make their own capital or liquidity available to the project. The whole point of financing through project specific entities is to insulate the assets of a larger group from the risks of a particular project. It is readily understandable and commercially reasonable that Concord would pursue that objective.

[71] At the same time, however, the Receivership Applicants should not necessarily be compelled to remain in the project either permanently or temporarily while they wait for a project specific company to obtain new financing without the Receivership Applicants having any control of the process. Forcing the Receivership Applicants to remain without control of the process is even more unfair when the contracts to which the Debtors agreed give the Receivership Applicants a right to control the process through a receivership.

(b) Reputational Damage

[72] The Debtors submit that a CCAA process is preferable to a receivership because it would cause less reputational damage to Cresford. In the circumstances of this case, that is irrelevant. Any reputational damage to Cresford is of its own making.

[73] One may well have sympathy for a debtor who is caught up in a cycle of increasing construction costs in Toronto's heated construction market. One has less sympathy for a debtor who hides those costs from lenders instead of being transparent and searching for a solution. One has even less sympathy for a debtor who from the outset of the relationship has misled a lender about the nature of the debtor's equity injection and one who uses $10.6 million of the lender's money to fund the interest on the debtor's equity injection. The Receivership Applicants lent money for construction costs. They did not lend money to finance the Debtor's equity injection.

[74] This is a situation where a debtor has acted in a manner which charitably would be described as lacking in transparency from the inception of its relationship with the creditor. The Debtors took a series of proactive steps to hide information from a creditor over a prolonged period.

[75] In those circumstances any reputational damage is of the Debtors' own making. The lenders should not now be required to incur even more risk in order to protect the Debtors' reputation.

[76] The Debtors note that there are many examples of CCAA applications involving Debtors who have engaged in wrongdoing such as Hollinger, YBM, Phillips Services and Enron. I am in no way suggesting that the presence of wrongdoing within a corporation automatically precludes a CCAA application. In many cases it is the presence of wrongdoing that demands and justifies a CCAA application. Whether wrongdoing affects the decision to afford CCAA protection depends on balancing the circumstances before the court in each case.

(c) Preservation of Employment

[77] The Debtors submit that a CCAA process will preserve jobs. They note that Cresford employs approximately 75 people. While CCAA proceedings often preserve jobs, the evidence before me does not support that assertion in this case.

[78] There is no evidence before me about how many of Cresford's 75 employees are devoted exclusively to the projects in issue nor is there any evidence about how many, if any, of those employees will lose their jobs as a result of a receivership. The CCAA proposal is one in which two of the three projects will be owned by Concord. Concord presumably has its own employees who would run the projects. As a result, any job losses within Cresford as a result of a receivership would likely also follow as a result of any sale in the CCAA proceeding. If, on the other hand, that is not the case because there is an arrangement with Concord to continue to use Cresford management, that would only exacerbate the problem from the perspective of the Receivership Applicants. It would mean that their debt remains in place for the foreseeable future and that the project would continue to be administered by the very people who engaged in the financial wrongdoing that created the problem in the first place.

[79] The situation with Yorkville is similar. While the Yorkville project is not being acquired by Concord, there are efforts underway to sell it as well.

[80] The vast majority of the jobs associated with the three projects are construction jobs. Construction personnel are not employed by the Debtors or Cresford but are employed by arms-length contractors that the Debtors have retained to build the projects. Construction contractors will be needed to complete the projects whether a new owner acquires through a receivership or through a CCAA proceeding. At the moment, construction on the projects is halted in any event because of the Covid 19 emergency and lack of financing.

[81] As a result of the foregoing, I do not see any marked difference between a receivership and a CCAA proceeding with respect to either immediate or long term employment.

(d) Speed of the Process

[82] The Debtors submit that the CCAA is faster than a receivership.

[83] During argument, the Debtor's and Concord's counsel described the steps in a CCAA proceeding. They struck me as fairly long and involved.

[84] In all likelihood, the first step in a CCAA proceeding would be to disclaim the sales of condominium units and to re-sell the units. This is the case because any construction financer would probably want to see a certain percentage of units sold before committing to financing.

[85] It will also require a process to negotiate with over 1800 purchasers (887 in the Clover and Halo projects) for new agreements or a process to sell the units to new purchasers. Each of the disclaimer and the approval of new agreements of purchase and sale will require a hearing and a court order. Even if there are no appeals from such orders, that process will take time.

[86] If Cresford and Concord can make arrangements to address the interests of secured creditors more quickly than the receivership takes, it can apply to the court to end the receivership.

(e) Protection of all Stakeholders

[87] The Debtors submit that their CCAA application will protect all stakeholders. The only stakeholder that I see being protected in the CCAA proceeding is Cresford as an equity stakeholder. It will receive $38,000,000 in a transaction beyond the scrutiny of the court. The condominium purchasers will lose their contracts. The employees will be replaced by Concord employees. The construction employees will not have jobs until new financing has been arranged. The creditors will be left to negotiate the best outcome they can in a CCAA proceeding. The only difference is that in a receivership Cresford will not necessarily receive $38,000,000 in cash.

[88] There has been no explanation in the materials before me to justify the receipt of $38,000,000 in cash by an equity holder when creditors like unitholders are certain to have to compromise their rights.

[89] In my view, it would be preferable to have a receiver acting as an officer of the court who can act without being hamstrung by closing a transaction that favours equity over creditors. This is all the more so because a receivership does not preclude the Concord transaction provided the Debtors and Concord can deal with secured creditors in a manner that is satisfactory to them or is at a minimum reasonable in the eyes of the court. If such a transaction is available, the Debtors and Concord can come before me at any time to present it. That transaction must however be concrete, not aspirational.

[90] Although the Debtors and Concord submit that their CCAA proposal would, after the agreements of purchase and sale have been disclaimed, allow former purchasers the opportunity to repurchase the units at a discount to current market value, that is a fairly vague commitment. Both the concepts of "discount" and of "current market value" are subject to considerable elasticity. They are not sufficiently concrete to lead me to prefer a CCAA proceeding over a receivership.

(f) Costs

[91] The Debtors submit that a CCAA proceeding will be less expensive than a receivership because Concord can manage the project less expensively than can PWC. PWC will incur significant fees that will prime other interests. While not stated explicitly, the implicit suggestion is that Concord will not charge fees. There is, however, a significant risk that Concord will charge internal management fees. There is no undertaking from Concord not to do so. Charging management and administration fees is a common way for developers to ensure that they get some of their expenses repaid early on. I accept that even if Concord charges fees, they are likely to be less than PWC's fees. Regardless of whether Concord does or does not charge fees, the risk of PWC's fees provides additional incentive to Cresford and Concord to present a transaction that sees secured creditors paid out quickly.

[92] The costs of financing a receivership or a CCAA proceeding are similar. Concord has offered a DIP loan of $20,000,000 at 5% interest. The Receivership Applicants have offered a loan of $29,000,000 at 5% interest.

[93] CCAA proceedings are inherently expensive. They require regular court attendances, probably with greater frequency than a receivership does. Both the proposed monitor, Ernst & Young and the proposed receiver, PWC and their counsel can be expected to have similar rates. In addition, PWC's work to date is fully recoverable pursuant to the security documents of the Receivership Applicants. In its work to date, PWC has acquired significant knowledge of the affairs of the Debtors, the advantage of which would be lost in a CCAA proceeding.

[94] Even if I accept that a CCAA proceeding will be less expensive than a receivership, that does not outweigh the equitable interests that the creditors have in a receivership by virtue of their lending agreements, the conduct of the Debtors, a CCAA transaction that would put $38,000,000 into the hands of equity holders before giving anything to creditors and the absence of other compelling stakeholder interests.

(g) Nature of the Business

[95] During the hearing before me there was considerable debate about the degree to which a CCAA proceeding was even available for a single-purpose land development company. There was some suggestion that there was a *prima facie* rule or inclination on the part of courts to the effect that CCAA proceedings were not appropriate for such businesses.

[96] In my view, the case law does not demonstrate a rule or an inclination one way or the other. Rather, the nature of the business and its particular circumstances are factors to take into account in every case when considering whether a CCAA proceeding is appropriate.

[97] More particularly, the cases that are sometimes used to suggest that courts are inclined against using CCAA proceedings for single-purpose land development companies do not turn on the issue of land development. Rather, they turn on the nature of the security and the position of security holders with respect to a CCAA proceeding. Even those factors, however, are not determinative. Rather, they are factors to weigh when determining the best avenue to pursue.

[98] In a much quoted paragraph from *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp*., 2008 BCCA 327 the British Columbia Court of Appeal stated at paragraph 36:

> Although the CCAA can apply to companies whose sole business is a single land development as long as the requirements set out in the CCAA are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exerting their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing.

[99] Although the paragraph refers to the nature of the business, the real thrust of the analysis turns on the nature of the security and the attitudes of the secured creditors.

[100] The proposition articulated in *Cliffs Over Maple Bay* has been widely accepted. See for example: *Romspen* at para. 61*; Dondeb Inc., Re*, 2012 ONSC 6087 (Commercial List), at para.16; *Octagon Properties Group Ltd.*, [2009] A.J. No. 936, 2009 CarswellAlta 1325 (Q.B.), at para. 17.

[101] The factors that the British Columbia Court of Appeal articulated in *Cliffs Over Maple Bay* are apposite here. The Receivership Applicants have a blocking position to any CCAA plan. They have expressed the view that they have no intention of compromising their debt within a CCAA proceeding. Their priorities are straightforward and there is little incentive on them to

compromise. They believe they will be in a better position by exerting their receivership remedies than by letting the Debtors remain in control and trying to refinance.

[102] As Justice Kent pointed out in *Octagon*, as para 17,

> …if I granted CCAA relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for CCAA relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt. I balance those reasons against the fact that even if the first mortgagees commence or continue in their foreclosure proceedings that process is also supervised by the court and to the extent that Octagon has reasonable arguments to obtain relief under the foreclosure process, it will likely obtain that relief.

[103] Once again it is the nature of the security and the secured creditor's attitude towards a CCAA proceeding that are the factors to consider in arriving at an equitable result.

[104] Here, the Receivership Applicants have indicated that they want nothing to do with the projects. They have a reasonable basis for coming to that view. I underscore, however, that the nature of the security and the secured creditor's views are not determinative. It may well be appropriate for a court to approve CCAA protection in the face of a first ranking secured creditor who expresses no desire to negotiate a compromise depending on the circumstances.

[105] In the case at hand where the breakdown in the relationship is caused by persistent and deliberate wrongdoing by the debtor, where there are no significant differences to the outcome for other stakeholders between a receivership or a CCAA proceeding and where there are no material employment concerns, there is no reason to restrain the exercise of the Receivership Applicants' contractual rights.

[106] The Debtors submit that cases in which receiverships have been preferred over CCAA proceedings in the context of land development companies are distinguishable.

[107] By way of example, the Debtors note that *Romspen* involved only one piece of development land, no operating business, no significant progress on development like there is with Clover and Halo and few employees. In addition, they point out that in *Romspen* there was no plan, no purchaser and no financing. Instead, the existing debtor just wanted to carry on.

[108] In my view that is not materially different from what we have here. There is no purchaser of the property and there is no financing. The same single purpose entity that owns the project now will continue to own the project. While the shareholder of the project specific entity might be different, the new shareholder does not have financing. Nor does the new shareholder have a plan. Instead, they have the conceptual outline of a plan that they would like to pursue. As noted earlier, I am not persuaded by the issue of employees for the reasons set out earlier.

Similarly, the state of development is moot because construction is frozen pending financing and the resolution of the Covid 19 emergency. Approval of the CCAA application will not allow construction to resume.

[109] More importantly, while different cases may help in identifying the range of factors to consider when deciding whether to afford CCAA protection, the actual conclusion of courts in different cases is of significantly less assistance unless those cases are pretty much identical to the one at hand. This is because factors assume different degrees of importance depending on the circumstances of each case.

[110] The Debtors also point to *Re 2607380 Ontario Inc.,* a recent unreported endorsement of Justice Conway dated March 6, 2020. The Debtors submit that *260* is relevant because it deals with a development project in which secured creditors preferred a receivership to a CCAA proceeding but one in which the court nevertheless granted CCAA protection. In addition, the Debtors say the case demonstrates that concerns about the debtor remaining in possession, can be addressed through enhanced monitor's powers including prohibitions on any expenditures above a certain threshold without the monitor's approval.

[111] In my view *Re 2607380 Ontario Inc*. does not assist the Debtors. In that case Conway J recognized that the choice between a receivership and a CCAA application is discretionary and requires the judge to balance competing interests of the various stakeholders to determine which process is more appropriate. In *Re 2607380 Ontario Inc.,* two of the three first ranking secured creditors supported the CCAA procedure. Only the third objected. Moreover, the applicant in that case had a concrete plan with specific timelines and development budget. That is not the case before me.

[112] With respect to the ability to give the monitor enhanced powers, that too depends on the circumstances of the case. If one is dealing with a relatively small operation, giving the monitor enhanced powers to approve low threshold expenditures may be appropriate. Where one is dealing with a large operation with many expenditures and there are significant concerns about how expenditures have been recorded and hidden in the past, enhanced monitor's powers will afford limited protection and be very expensive.

[113] For the reasons already set out above, the circumstances in this case render a receivership preferable to a CCAA procedure.

[114] For the reasons set out above an order will go appointing PWC as a receiver and manager of each of the Clover Halo and Yorkville projects.

_____

Koehnen J.

Released: March 30, 2020

SCHEDULE A – COUNSEL SLIP

David Bish, Adam Slavens, Jeremy Opolsky, for the Applicants, BCIMC Construction Fund Corporation and BCIMC Specialty Fund Corporation

Alan Mersky, Virginie Gauthier, Peter Choi, for the Applicants, Otéra Capital Inc.

Steven L. Graff, Ian Aversa, Jeremy Nemers for the Respondents

Geoff Hall, Heather Meredith, and Alex Steele for PricewaterhouseCoopers Inc.

Sean Zweig and Danish Afroz for KingSett Mortgage Corporation

Jonathan Rosenstein for Aviva Insurance Company of Canada and Westmount Guarantee Services Inc.

Haddon Murray for Tarion Warranty Corporation

David Gruber for Concord Group

Christopher J. Henderson and Diane Zimmer for City of Toronto and Toronto Parking Authority

Shara N. Roy, Aaron Grossman and Sahara Tailibi for 2504670 Ontario Inc., Pine Point International Inc., 2638006 Ontario Inc., Linda Yee Han Chan, Eric Yin Win Chan, 8451761 Canada Inc. and 2595683 Ontario Inc.

Shara N. Roy, Aaron Grossman and Sahara Tailibi for Homelife New World Realty Inc,, Paul Lam, Homelife Landmark Realty Inc., TradeWorld Realty Inc., Landpower Real Estate Ltd., Master's Choice Realty Inc., formerly known as Re/Max Master's Choice Realty Inc. and Michael Chen

Brandon Mattalo for certain limited partnership interests

Mark Dunn and Carlie Fox for Maria AthAthanasoulis

Bryan Hanna for 2379646 Ontario Inc.

Brandon Mattale for certain limited partnership investors

Matthew Gottlieb for KingSett Real Estate Growth LP 4

George Benchetrit for Ernst & Young as proposed Monitor

Maria Konyukhova for PJD Developments

DJ Miller for investors in YSL

CITATION: BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc. 2020 ONSC 1953
COURT FILE NO.: CV-20-00637301-00CL & CV-20-00637297-00CL
DATE: 2020-03-30

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

BCIMC CONSTRUCTION FUND CORPORATION AND BCIMC SPECIALTY FUND CORPORATION

Applicants

– and –

THE CLOVER ON YONGE INC., THE CLOVER ON YONGE LIMITED PARTNERSHIP, 480 YONGE STREET INC. AND 480 YONGE STREET LIMITED PARTNERSHIP

Respondents

AND BEWTWEEN

BCIMC CONSTRUCTION FUND CORPORATION AND OTERA CAPITAL INC.

Applicants

- and -

33 YORKVILLE RESIDENCES INC. AND 33 YORKVILLE RESIDENCES LIMITED PARTNERSHIP

Respondents

REASONS FOR JUDGMENT

Koehnen, J.

Released: March 30, 2020

3

CITATION: YG Limited Partnership and YSL Residences (Re), 2021 ONSC 5206
COURT FILE NOS.: CV-21-00655373-00CL/BK-21-02734090-0031, CV-21-00661386-00CL & CV-21-00661530-00CL
DATE: 20210716

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED

AND:

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES

APPLICATION UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED

AND RE: 2504670 CANADA INC., 8451761 CANADA INC. and CHI LONG INC., Applicants

AND

CRESFORD CAPITAL CORPORATION, YSL RESIDENCES INC, 9615334 CANADA INC., YG LIMITED PARTNERSHIP and DANIEL CASEY, Respondents

AND RE: 2583019 ONTARIO INCORPORATED AS GENERAL PARTNER OF YONGESL INVESTMENT LIMITED PARTNERSHIP, 2124093 ONTARIO INC., SIXONE INVESTMENT LTD., E&B INVESTMENT CORPORATION and TAIHE INTERNATIONAL GROUP INC., Applicants

AND

9615334 CANADA INC. AS GENERAL PARTNER OF YG LIMITED PARTNERSHIP and YSL RESIDENCES INC., Respondents

BEFORE: S.F. Dunphy J.

COUNSEL: *Harry Fogul* and *Miranda Spence*, for YG Limited Partnership and YSL Residences Inc.

Shaun Laubman and *Sapna Thakker*, for 2504670 Canada Inc., 8451761 Canada Inc., and Chi Long Inc.

Alexander Soutter, for YongeSL Investment Limited Partnership, 2124093 Ontario Inc., SixOne Investment Ltd., E&B Investment Corporation, and TaiHe International Group Inc.

David Gruber, Jesse Mighton, and *Benjamin Reedijk,* for Concord Properties Developments Corp. and its affiliates

Jane Dietrich and *Michael Wunder,* for 2292912 Ontario Inc. and Timbercreek Mortgage Servicing Inc.

Robin B. Schwill, for KSV Restructuring Inc. in its capacity as the proposal trustee

Roger Gillot and *Justin Kanji,* for Kohn Pedersen Fox Associates PC

Reuben S. Botnick, for Royal Excavating & Grading Limited COB as Michael Bros. Excavation

Jamie Gibson, for Sarven Cicekian, Mike Catsiliras, Ryan Millar and Marco Mancuso

Brendan Bowles, for GFL Infrastructure Group Inc.

Mark Dunn, for Maria Athanasoulis

James MacLellan and *Jonathan Rosenstein,* for Westmount Guarantee Services Inc.

Albert Engle, for Priestly Demolition Inc.

HEARD at Toronto: July 9 and 16, 2021

REASONS FOR DECISION #2 (REVISED PROPOSAL)

[1] On June 29, 2021, I rejected the debtor's application for approval of its Proposal (identified as "Amended Proposal #2) and provided my detailed reasons for doing so on July 2, 2021. In delivering my reasons, I indicated that that it remained possible for the debtors to amend their Proposal if they so chose. The debtors for their part asked me to adjourn the hearing until July 9, 2021 in order to permit them an opportunity to do so. I granted the requested adjournment.

[2] An amended proposal was filed immediately prior to the hearing on July 9, 2021 entitled "Amended Proposal #3" and I have been asked to consider approving such

Amended Proposal. I held a hearing on whether Amended Proposal #3 ought to be approved on July 9, 2021. Amended Proposal #3 was filed only a short while prior to that hearing. I delayed the start of the hearing for an hour to give parties time to review and analyse the document and proceeded to hear their submissions.

[3] As is usual, I called upon the Trustee to give its comments last. The Trustee requested a further week to review the document and to consider its position. I granted that request and the matter was adjourned to July 16, 2021 at 10:00 a.m. This second adjournment was granted – it must be noted – over the objections of the 1st mortgagee Timbercreek whose forbearance agreement with the debtors expired on June 30, 2021 and who has a long-standing hearing date for its receivership application on July 12, 2021. I adjourned the Timbercreek July 12, 2021 hearing to July 16, 2021 as well such that both proceedings were scheduled to appear before me on July 16, 2021.

[4] A term of the adjournment I granted was that the debtors and Timbercreek should both have circulated draft orders (Proposal approval order in the case of the debtors; Receivership Order in the case of Timbercreek) in advance of the hearing on July 16, 2021 with the expectation that I should sign one of the two orders on July 16, 2021.

[5] On July 15, 2021, a second version of Amended Proposal #3 was filed with the Official Receiver and the Trustee issued its Fourth Report commenting on version 2 of Amended Proposal #3. The Trustee's Fourth Report recommended approval of the Proposal as so amended.

[6] This Proposal has been through a few versions and the nomenclature can get confusing. The amendments made in version 2 of Amended Proposal #3 were minor and technical in nature – they did not adversely affect the rights of any Affected Creditor and at least one of them could just as easily have been added to the approval order outside of the Proposal without objection. My references to "Amended Proposal #3" below should be taken as referencing version 2 of Amended Proposal #3 unless the context requires otherwise.

[7] For the reasons that follow, I have decided to approve version 2 of Amended Proposal #3 and I have signed the approval order.

Background facts

[8] I shall not repeat my review of the facts nor my reasons for rejecting Amended Proposal #2 on June 29, 2021. My detailed reasons for that decision were released on July 2, 2021 and should be considered as if incorporated by reference herein.

[9] In broad strokes, the following summarizes the principal amendments made in Amended Proposal #3:

a. Lien claimants who assigned their claims to the Proposal Sponsor ($9.2 million) will not share in the pool of cash available to unsecured creditors under the Proposal – all lien claimants will be treated as Unaffected Creditors;

b. Related party claims ($38.3 million) will be treated as equity claims and not participate in the pool of cash available to unsecured creditors;

c. Unsecured creditors' recoveries will no longer be limited to $0.58 per dollar of proven claim but will share *pro rata* in the pool of cash available to unsecured creditors up to payment in full;

d. The Proposal Sponsor will fund the full cash pool on Proposal Implementation without reduction should proven claims come in below the amount of the cash pool ($30.9 million);

e. The pool of cash available to unsecured creditors is reduced from $37.7 million to $30.9 million but subject to the above changes reducing the claims eligible to share in the pool;

f. Secured creditors claims – including all construction lien claims – remain unaffected and are assumed by the Proposal Sponsor in purchasing the land and project assets;

g. After Affected Creditor claims have been resolved and all required payments made to them, any residual amount will be returned to the debtor YG Limited Partnership to be dealt with as the partners direct or the court orders; and

h. Proposal Implementation will occur three days after court approval.

[10] The Fourth Report of the Trustee summarized the impact of these changes. Some of the principal points made by the Trustee include the following:

a. Construction lien claimants who agreed to assign their claims to the Proposal Sponsor prior to these amendments might potentially receive less under their assignment agreements than they would under Amended Proposal #3 which had not been made when they agreed to assign their claims. The Trustee contacted the assigning creditors. Two were unable to be contacted but have voiced no objection one way or the other. The remainder of them expressed support for the approval of Amended Proposal #3 or made no objection to it. No assigning creditor was opposed.

b. Version 2 of Amended Proposal #3 contains material improvements to Amended Proposal #2 and addresses concerns raised in my decision of June 29, 2021.

c. Any payments to equity holders are entirely outside of the Proposal.

d. The Trustee has analyzed the known unsecured claims that would share in the $30.9 million pool available to Affected Creditors under Amended Proposal #3. The Trustee's estimate is that Affected Creditors will receive between 71% of their claims and payment in full under version 2 of Amended Proposal #3 as contrasted with between 40% and 58% of their claims under Amended Proposal #2. The lower assumption is based on all known claims being allowed in full as claimed with an identical estimate for claims not yet filed. In the event none of the disputed or contingent claims were allowed, the Affected Creditors would be paid in full and up to $19 million may be available to holders of equity claims.

[11] Amended Proposal #3 came with an additional element that the Proposal Sponsor felt it proper to disclose to the Court and the parties. The Proposal Sponsor made a parallel and entirely voluntary offer to holders of limited partnership units in YG LP as well as other claims found by me to be equity claims (i.e. the related party claims) to sell their equity interests for 12.5% of the value of such interests subject to certain structuring conditions.

[12] I cannot say at this juncture whether any equity holders will take the Plan Sponsor up on this offer. The objecting limited partners have shown little interest in it to date at least. The offer has conditions that may or may not be acceptable to them depending upon their own tax situation and their views of value.

[13] Fifty years after the Carter Commission report, it remains the case that business transactions are invariably structured to minimize tax which continues to impact similar economic transactions differently depending upon the structures used. I am satisfied that the "equity offer" is not a disguised transfer of value from creditors to holders of equity claims – the structures required to be used potentially deliver tax attributes to a buyer of the claims that would not otherwise be available. This proposal has been properly disclosed but I do not view it as being particularly relevant to my assessment of Amended Proposal #3. That proposal delivers additional value to creditors under all scenarios compared to its predecessor. There is no diversion of value from creditors to equity holders to be found here. I concur with the Trustee's assessment that the equity offer is quite independent of the Proposal and does not contravene the *BIA* provisions against payment to equity ahead of debt even if it turns out that creditors receive less than payment in full (and that would be a fairly speculative assumption to make).

[14] The Trustee's Fourth Report concluded that the Debtors were proceeding with the request for approval of the Amended Proposal #3 in good faith.

Analysis and discussion

[15] This amended proposal is not perfect. The process that led to it was far from ideal. However, as now amended, this Proposal provides a superior outcome for all classes of creditors under every conceivable scenario and addresses all of the concerns raised in my reasons of July 2, 2021 constructively and substantively.

[16] As so amended, I have no hesitation in finding that Amended Proposal #3 is reasonable, it is calculated to benefit the general body of creditors and is being advanced at this juncture in good faith notwithstanding the defects that I found marred the negotiation and presentation of the initial version of the Proposal.

[17] There were some critical foundational findings that I made in my reasons of July 2, 2021 including:

a. whatever breaches of the Limited Partnership Agreement may have occurred in the weeks and months prior to the filing of the NOI, the general partner *did* have authority to file the NOI;

b. the Affected Creditor vote in support of Amended Proposal #2 was in fact unanimous; and

c. whatever questions there may be regarding the solvency of the debtors from the perspective of the realizable value of their assets, there can be no question of the insolvency of the debtors from a liquidity point of view: secured and unsecured claims alike are overdue and unpaid and the debtors have no means to satisfy their claims in a timely way. Lien claims are more than a year in arrears for the most part while all forbearance periods have expired for the secured debt.

[18] While I found the probative value of the creditor vote to be attenuated somewhat by the factors I listed in those reasons, the vote did and does have probative value and it is material to note that unsecured creditors agreed to accept payment of less than full payment on their claims on June 15, 2021. All of the Affected Creditors will receive a superior outcome under Version 2 of Amended Proposal #3 under any reasonable assumptions. Their approval of the prior version of the Proposal remains as probative in the context of version 2 of Amended Proposal #3 if not more so.

[19] Version 2 of Amended Proposal #3 clearly satisfies the technical requirements of the *BIA* in that Amended Proposal #2 upon which the creditors did vote authorized the amendments that have been made in Amended Proposal #3 (including version 2 thereof).

[20] Version 2 of Amended Proposal #3 has constructively addressed each of the issues I raised in my June 29 ruling and my July 2 written reasons:

a. The construction lien claims will not dilute the recovery of the unsecured creditors in any way.

b. The related party claims are to be treated as equity claims and disentitled to share in the cash pool.

c. While I expressed grave concerns regarding the lack of good faith and the breaches of fiduciary duty that preceded the filing of the NOI and the entry into the Proposal Sponsor Agreement, those concerns were primarily focused on the efforts made to prefer related party claims over those of other stakeholders in the search for an investor. Amended Proposal #3 cannot undo the past of course but it has addressed those findings constructively. The related party claims are treated as equity claims.

d. There is a strong likelihood that proven creditor claims will be substantially lower than the $30.9 million pool available to satisfy them and Amended Proposal #3 ensures that such surplus is returned to the limited partnership instead of being retained by the Proposal Sponsor.

e. The claims of related parties and their priority relative to limited partners will be dealt with within the limited partnership structure itself, in broad daylight and subject to the full range of remedies open to the limited partners to protect their interests should the need arise. The conflicting interests that marred the development of Amended Proposal #2 have been substantially cured by the amendments effected by Amended Proposal #3. Related parties have been put in their proper place in the claims hierarchy.

[21] The strongest critique levelled at Amended Proposal #3 by the limited partners is that it does not answer the question of what the value of the project might have been had the project been offered on the open market in a competitive process. That is a fair criticism but not one that is sufficient to detract from the overwhelmingly positive attributes of this Proposal.

[22] The past cannot be undone and perfection is not the standard against which a proposal is to be measured. Section 59(2) of the *BIA* requires that approval of a proposal must be refused if its terms are not shown to be reasonable and calculated to benefit the general body of creditors. The common law has added to this the requirement that a proposal must be advanced in good faith.

[23] Amended Proposal #3 is both reasonable and calculated to benefit the general body of creditors. It provides for substantially improved outcomes to all creditors whose

claims were impaired by Amended Proposal #2 under any reasonable assessment of the facts. As noted above, it is quite likely that a surplus will remain to be returned to the limited partnership after all affected unsecured claims have been paid in full to be dealt with as the limited partners direct (or by court order if necessary).

[24] The debtors are insolvent today. They are properly in bankruptcy proceedings. Their creditors have a right to payment and – to the extent reasonably possible – to payment in full as soon as possible. Amended Proposal #3 offers payment in full to most secured creditors within a matter of days following court approval. Unsecured creditor payments will be subject to reasonable reserves for unresolved claims but these too will begin flowing in short order. This contrasts to a delay of *many* months on the most optimistic of scenarios were a receiver directed to sell the project.

[25] There is a public interest in moving this very substantial project out of the quicksand in which it has become stuck for over a year. Approval of Amended Proposal #3 at this juncture ensures that the Project is in the hands of a solvent entity with the wherewithal and experience necessary to put it back on track as soon as possible.

[26] The real question before me today is whether limited partners have the right to require creditors to run the risk of a sale process producing an inferior outcome to Amended Proposal #3 in order to test the hypothesis that a greater value might emerge from a fresh marketing of the project in a liquidation process that might result in payment of some or all of the limited partners' equity claims. In my view, they do not.

[27] It is possible that higher values could emerge from a liquidation process but that possibility is not a one way street. The dissatisfaction I expressed in my reasons of July 2, 2021 regarding the quality of the appraisal evidence before me does not imply any level of probability that market value today is *higher* than the values suggested by the April 2021 CBRE appraisal. I was dissatisfied with the quality of *all* of the appraisal evidence because of the lack of evidence reconciling the differences between them and, in particular, assessing the reasonableness of the assumptions made in each.

[28] It is noteworthy that version 2 of Amended Proposal #3 offers the real prospect that a return on equity of more than 100% of the invested capital of the limited partners may come back to YG LP. The limited partners assent will be needed to any use of those funds unless a court order is obtained. The possible upside to limited partners arising from a new sales process has thus become that much more remote under this last revision to the Proposal compared to the first.

[29] There are costs involved in conducting a receivership that would come ahead of any potential surplus being made available to equity claimants such as the limited partners. Some of the risk of a sale process producing a lower outcome could potentially be insured against by procuring a stalking horse bid to put a floor under the sale process.

There is no guarantee that a stalking horse bid would be available at or near the implied value of Amended Proposal #3. Stalking horse bids come with a price tag in the form of a break fee that is usually calculated as a percentage of the price. That too would stand to reduce the recoveries to unsecured creditors and create an additional hurdle to any prospect of additional recovery to limited partners.

[30] This is a real bankruptcy. There is nothing artificial about it. Creditors have been unpaid for over a year. I have before me a transaction that provides a pathway to payment of creditor claims in full and quickly while leaving a realistic prospect for equity claims to receive some significant recovery. Every other option requires the creditors – who bear no responsibility for the mess that this project has found itself in – being subjected to the real risk of partial non-payment and substantial delay being added to the very lengthy delay to which they have already been subjected in order to test the hypothesis that a few percentage points of additional value might potentially be found. That is not a risk that it is fair to impose on creditors on these facts and having regard to the important favourable changes made to the Proposal.

Disposition

[31] Accordingly, an order shall issue approving version 2 of Amended Proposal #3. I have reviewed the draft form of approval order uploaded and approved and signed same. It was amended slightly to include in the preamble corrected references to the limited partners who appeared and the evidence they filed.

[32] This Proposal satisfies the technical requirements of the *BIA*. I have concluded that version 2 of Amended Proposal #3 represents a valid amendment to Amended Proposal #2 in accordance with its terms and thus has received the required double majority of creditor approval. The terms of this Proposal are reasonable and calculated to benefit the general body of creditors. The amendments presented have satisfied the concerns raised by me regarding the good faith of the debtors in pursuing *this* Proposal.

[33] I wish in particular to note that I have included, as requested, an order pursuant to s. 195 of the *BIA* permitting provisional execution of the approval order notwithstanding appeal. I have made this order in consideration of two primary factors:

a. The secured creditors of YG LP have been deferred and stayed for a very, very long time at this point. Some of that deferral was purchased in the form of forbearance agreements with Timbercreek but the last negotiated extension – an extension that included every possible assurance that no further extensions would be sought – expired on June 30, 2021. I made it clear on July 9, 2021 that I would be approving the Proposal or a Receiver today. It would be unjust to Timbercreek to have its period of limbo indefinitely extended by the simple expedient of filing a Notice of Appeal and forcing Timbercreek to seek a lifting of an automatic stay to enforce its

security. This project is, at its core, a hard asset consisting of real estate, a bundle of approvals and a hole in the ground. There is no goodwill to speak of. It has been held in limbo for much more than a year at this point and it must either be put in the hands of someone who will bring it forward to completion under the Proposal or of a Receiver who will find someone who can.

b. Our courts have generally sought to achieve a degree of uniformity of practice as between the CCAA and the *BIA*. Approval of a CCAA Plan Is not subject to an automatic stay. An automatic stay in this case would operate as a functional veto of the Proposal itself because the result would be an almost certain slide into receivership unless the stay were promptly lifted.

[34] Timbercreek's receivership application was adjourned by me from July 12, 2016 until today. Based upon my approval of the Proposal today *and subject to the closing of version 2 of Proposal #3 in accordance with its terms by no later than July 31, 2021*, Timbercreek agrees that its application is moot. There is no reason to believe the Proposal will not be completed as planned, however, nothing can be taken for granted. I am adjourning Timbercreek's application to August 9, 2021 when I shall next be sitting. It is adjourned before me.

[35] Assuming (i) the Trustee confirms to me that the version 2 of Amended Proposal #3 has been completed and (ii) Timbercreek does not advise me in advance of August 9 of its intention to proceed, I shall endorse the Timbercreek application as withdrawn without costs on August 9, 2021. No attendances will be necessary from any party in that eventuality. If there is a reason for the application to move forward, I am relying on the Trustee and Timbercreek to so notify me as soon as practicable after July 31, 2021.

[36] A request was made by the limited partners to make submissions to me regarding costs of the bankruptcy proposal proceeding. For the avoidance of doubt, my signing of the order approving version 2 of Amended Proposal #3 has not disposed of the matter of costs of the proposal proceedings. I have made no order as to costs to this point nor have I heard submissions on the point.

[37] Any party seeking an order of costs in their favour shall have ten days from today to file written submissions and an outline of costs. Submissions should not exceed ten pages excluding the outline of costs. Cases need not be included beyond a hyperlinked table of cases. The Debtors and the Proposal Sponsor shall each have a further ten days to respond to any such requests for costs with similar size restrictions. All submissions are to be uploaded to CaseLines and copied to the Trustee. I am asking the Trustee to provide me with a consolidated set of submissions to which the Trustee may – but shall

not be required to – add its own additional comments in the form of a brief supplementary report.

[38] Lastly, I need to give some directions regarding the two civil applications that immediately preceded these bankruptcy proceedings brought by the limited partners of YG LP. My reasons of June 29, 2021 made a number of findings in relation to matters raised in those two applications. However, it must also be clear that neither my ruling of June 29, 2021 nor this decision has fully disposed of either civil application.

[39] It is certainly true that I made findings in the context of the bankruptcy proposal proceedings that were and are relevant to the two applications. Even if those findings were made in the context of the bankruptcy proceedings, the three proceedings were to a degree inextricably intertwined. I was asked to issue a formal order in relation to the findings I did make. I declined to do so not because I am resiling from any findings made – I do not – but because I did not and do not have the full scope of the claims of either application fleshed out before me. I directed certain matters to be explored and argued due to the interrelationship between the proceedings but I do not want my rulings in one context to be taken out of context in another.

[40] The safest course in my view is to let my rulings stand as made knowing that *res judicata* and issue estoppel can be applied as needed to avoid any abuse. I was asked to confirm – and do so now – that costs of those two civil applications have not been dealt with by me at all. They have not. The limited partner applicants in those two proceedings asked to make submissions regarding costs of the bankruptcy proposal proceeding and I have given them leave to do so as provided above. The costs of the two civil applications remain reserved to the judge disposing of them.

_____

S.F. Dunphy J.

Date: July 16, 2021

Addendum:

As noted, I have reviewed the originally signed reasons and made a small number of clerical and stylistic changes to the text as originally released. As well, I was advised by the Trustee that the transaction was in fact completed on July 22, 2021. Accordingly, I

have issued an endorsement today vacating the August 9, 2021 appointment reserved to hear the Timbercreek application and endorsed that matter as being abandoned without costs because moot. No party will be required to appear on August 9, 2021.

Date: July 27, 2021

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S.F. Dunphy J.

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CITATION: YG Limited Partnership (Re) 2023 ONSC 4638
COURT FILE NO.: BK-21-2734090-0031
DATE: 20230210

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC. OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

BEFORE: Kimmel J.

COUNSEL: *Matthew Milne-Smith*, counsel for KSV Restructuring Inc. (Proposal Trustee)

Alexander Soutter, counsel for Yonge SL Investment Limited Partnership

Mark Dunn / Sarah Stothart, counsel for Maria Athanasoulis

Jason Berall, counsel for Concord Properties Development Corp.

Shaun Laubman / Crystal Li, counsel for 2504670 Canada Inc., 8451761 Canada Inc. and Chi Long

HEARD: January 16, 2023

ENDORSEMENT

Background to the Proposal Trustee's Motion for Directions

[1] Maria Athanasoulis filed a proof of claim against YG Limited Partnership and YSL Residences Inc. (together, the "Debtor"). The proof of claim was filed in the context of a court approved proposal (the "Proposal") under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") in respect of unsecured claims she asserts as follows (together, the "Athanasoulis Claim"):

a. $1 million in respect of damages for wrongful dismissal (the "Wrongful Dismissal Claim"); and
b. $18 million in respect of damages for breach of an oral agreement that Ms. Athanasoulis would be paid 20 percent of the profits earned on the YSL Project (the "Profit Share Claim").

[2] The Debtor was developing the YSL Project, which was part of a broader development group controlled by Daniel Casey that used the brand name "Cresford".

[3] As part of the Proposal that was eventually approved by the court on July 16, 2021, Concord Properties Developments Corp. (the "Sponsor") acquired the YSL Project and set aside

$30.9 million to satisfy proven creditor claims, with the balance of that fund to be distributed to equity stakeholders (including the limited partners of the YG Limited Partnership, the "LPs").

[4] My November 1, 2022 endorsement dealt with the Sponsor's obligation to fund administrative fees and expenses incurred by KSV Restructuring Inc. (the "Proposal Trustee") in connection with the resolution of the Athanasoulis Claim: see *YG Limited Partnership (Re)*, 2022 ONSC 6138 (the "Funding Decision").

[5] The Funding Decision determined that the Sponsor was not obligated to fund phase 2 of an arbitration in which Ms. Athanasoulis and the Proposal Trustee had agreed to participate (the "Arbitration"). That determination was made on the basis that phase 2 of the proposed arbitration improperly delegated to the arbitrator the responsibility of determining the Athanasoulis Claim. In phase 2 of the arbitration, the arbitrator was asked to determine any damages payable in respect of the Wrongful Dismissal Claim and/or the Profit Share Claim, based on his findings in phase 1 of the arbitration (the "Phase 1 Arbitration Findings") that: Ms. Athanasoulis was wrongfully terminated (constructively dismissed) in December 2019 and that she had entered into a valid and enforceable oral profit sharing agreement that entitled her to 20 percent of the profits earned on any of Cresford's (including the Debtor's) current and future projects (the "Profit Sharing Agreement").

[6] The Funding Decision determined that the Sponsor is obligated to indemnify the Proposal Trustee for Administrative Fees and Expenses (as defined in the Funding Decision) reasonably incurred to itself determine the Athanasoulis Claim.

[7] The following specific orders and directions were provided in the Funding Decision with respect to the Proposal Trustee's determination of the Athanasoulis claim:

a. The Proposal Trustee shall reasonably determine and value the Athanasoulis Claim in a timely and principled manner. It will be afforded significant deference. All parties agree that it can use the Arbitration Award from phase 1 of the Arbitration and build on it so that time and effort is not wasted.
b. The Proposal Trustee shall, in its discretion, determine an appropriate procedure to receive the further evidence and submissions of Ms. Athanasoulis and other interested stakeholders. The Proposal Trustee may choose to share its proposed procedure with the other participating stakeholders and seek their input.
c. If expert inputs are deemed necessary to determine the Athanasoulis Claim, the Proposal Trustee may choose to invite expert evidence and input from Ms. Athanasoulis and then determine if it needs its own expert to review and comment upon what is provided.
d. The process by which the Proposal Trustee will determine the Athanasoulis Claim may need to account for the fact that the LPs are expected to advance claims that may require determinations from the Proposal Trustee and/or the court regarding the subordination and/or priority of their claims in relation to the Athanasoulis Claim, the enforceability of any proven Athanasoulis Claim as against them and the damages that they claim to be entitled to for alleged breaches of fiduciary and other

duties and contractual obligations that they seek to set-off against the Athanasoulis Claim, if the Athanasoulis Claim is allowed.

[8] In the Funding Decision, the court indicated that if the Proposal Trustee chose to share its proposed procedure for the determination of the Athanasoulis Claim with the Sponsor and/or other stakeholders, and if the parties require some further direction and assistance from the court, they may arrange a case conference before me.

[9] The Proposal Trustee engaged in a consultative process with Ms. Athanasoulis, the Sponsor and the LPs about the procedure for determining the Athanasoulis Claim. There were fundamental points of disagreement, largely between Ms. Athanasoulis on one side and the Sponsor and the LPs on the other.

[10] Based on the input received, the Proposal Trustee suggested the following compromise procedure for resolving the Athanasoulis Claim:

a. The Proposal Trustee will issue a notice pursuant to ss. 135(2) and (3) of the BIA, substantially in the form of the draft attached as an appendix to its report (the "Notice of Determination"). Under the draft Notice of Determination, the Proposal Trustee would allow the Wrongful Dismissal Claim in part (in the amount of $880,000) as an unsecured claim but would disallow the Profit Share Claim in its entirety. The Proposal Trustee bases its Notice of Determination upon:
    i. the proof of claim, as filed;
    ii. all material on the record in these proposal proceedings to date, together with all material on the record in the proceedings by the LPs against YSL Residences Inc. et al in court file numbers CV-21-00661386-00CL and CV-21-00661530-00CL and some additional submissions provided by the LPs to the Proposal Trustee (that were initially not shared with Ms. Athanasoulis but eventually were shared with her counsel prior to the January 16, 2023 hearing);
    iii. the partial arbitration award of Mr. William G. Horton (the "Arbitrator") dated March 28, 2022 (the "Partial Award");
    iv. all material filed and produced, and all testimony given, in phase 1 of the Arbitration; and
    v. all responses received by the Proposal Trustee from counsel to the LPs and counsel to Ms. Athanasoulis in respect of any information requests made by the Proposal Trustee.
b. Consistent with the Funding Decision, the Partial Award and factual findings and determinations therein form part of the "factual predicate upon which the determination of [Ms. Athanasoulis'] claim will proceed".
c. Ms. Athanasoulis may file any appeal pursuant to s. 135 of the BIA.
d. In the appeal, Ms. Athanasoulis shall not be required to adduce detailed evidence valuing and quantifying her profit share claim, but may address any issues raised in the Notice of Determination.

e. The LPs shall be entitled only to raise issues in the appeal that pertain directly to: (a) whether the LPs must be repaid in full prior to any payments being made on the Athanasoulis Claim; and (b) the enforceability of any element of the Athanasoulis Claim given the terms of the Limited Partnership Agreement (a point not decided in the Arbitration that may be separately advanced by the LPs if the enforceability is being argued on an appeal).
f. Ms. Athanasoulis will be entitled to make a full response to any materials filed by the LPs in this regard.
g. The LPs shall not be entitled to raise issues relating to any counterclaim or set-off that they may assert against Ms. Athanasoulis. Such issues will be addressed, if necessary, at a future distribution motion (see below), after the LPs breach of contract, tort and other claims against Ms. Athanasoulis have been decided in the separate legal proceedings in which they are being advanced (the "LP's Claims").
h. To the extent that the decision on appeal finds that a debt is owing and payable to Ms. Athanasoulis under her Profit Sharing Agreement, then a summary trial to quantify her damages will be scheduled.
i. Thereafter, if the Profit Share Claim is proven and determined to have any value then the LPs priority, subordination, and set-off arguments (in turn, dependent upon the determination of the LP's Claims against Ms. Athanasoulis being pursued in separate proceedings) can be raised for consideration in the context of any proposed distribution in respect of the Profit Share Claim.

[11] None of the other stakeholders wholly accepted or endorsed the Proposal Trustee's compromise procedure. Thus, the Proposal Trustee requested a case conference (held on December 21, 2022) at which the Proposal Trustee's within motion for directions regarding the procedure for determining the Athanasoulis Claim and related issues was scheduled. Despite the Proposal Trustee's discretion to determine the procedure and impose it on the stakeholders, it was appropriate for the Proposal Trustee bring this motion for directions given the divergent positions and competing interests at stake.

The Competing Positions

[12] Each stakeholder filed extensive materials on this motion. The focus of the motion, the submissions and this endorsement are on the procedure for determining the Profit Share Claim and any appeal therefrom. The procedure for the determination of the Wrongful Dismissal Claim and any appeal therefrom, and the positions of the parties regarding that procedure, will be addressed at the end of this endorsement.

a) The Proposal Trustee's Position

[13] The Proposal Trustee's position, reflected in its suggested, and rejected, compromise, is as follows:

a. The Proposal Trustee says that it does not require any further evidence or submissions to make its determination to disallow the Profit Share Claim. It

anticipates that it will disallow the Profit Share Claim for the reasons set out in its draft Notice of Determination, as follows:

i. The Profit Share Claim is, in substance, a claim in equity, rather than in debt, and is therefore not a provable claim under s. 121(1) of the BIA.

ii. The Profit Sharing Agreement was to be based on profits calculated using *pro forma* budgets, to be paid by the project owner when earned, usually upon the completion of a project (according to the Phase 1 Arbitration Findings). Under the Proposal, the YSL Project was effectively transferred to the Sponsor and the Debtor could no longer earn profits. As of the date of the Proposal, the Debtor had not completed the YSL Project. It was nothing more than a hole in the ground, such that there was no profit earned or to be shared by the Debtor at that time.

iii. Insofar as the Athanasoulis Claim relies on projected future profitability of the YSL Project as a contingent claim as at the date of the Proposal, that contingent and unliquidated claim is too speculative, and the alleged damages are too remote, to be considered a provable claim or subject to any meaningful and reasonable computation. Therefore, the claim is valued at zero dollars.

iv. Any claim by Ms. Athanasoulis for unrealized hypothetical gains (future profitability) of the YSL Project prior to the Proposal, dating back to the date of her wrongful termination, is inconsistent with the Phase 1 Arbitration Findings that profits were only payable under the Profit Sharing Agreement when earned at the completion of the YSL Project.

v. Even if she could predicate her claim on earned but unrealized profits at a point in time, Ms. Athanasoulis has admitted under oath that any entitlement she may have to a profit share would arise only after the LPs are repaid their original investment, and the Profit Share Claim is therefore subordinated to the LP's Claims since the LPs will not be receiving a full return of their equity investment in the YSL Project.

b. On this basis the Proposal Trustee suggests that it should issue its Notice of Determination based on the identified matters of principle and law, Ms. Athanasoulis should then appeal that determination (within the 30 days prescribed under s. 135(4) of the BIA) and the appeal should be decided based on the reasons provided for the disallowance in the Notice of Determination. This defers the significant time and expense that will be incurred to value the aspects of the Athanasoulis Claim that are dependent on the future profitability of the YSL Project (whether as at the date of her wrongful termination in December 2019 or as at the date of the Proposal) that will entail further evidence and expert analysis, at least until it is determined on appeal whether the Profit Share Claim is a provable claim.

c. The valuation of the Athanasoulis Claim, if found on appeal to be provable, will be determined in a summary trial thereafter, only if necessary.

d. The priorities, set-offs and other arguments of the LPs in relation to the Athanasoulis Claim will be determined in a later distribution hearing.

b) Ms. Athanasoulis' Position

[14] Ms. Athanasoulis does not accept the Proposal Trustee's determination that her claim is a claim in equity, although she does not dispute that her appeal of that ground of disallowance could be argued based on the existing record (as defined by the Proposal Trustee).

[15] However, Ms. Athanasoulis does not accept the Proposal Trustee's premise that profits were only payable upon completion of the YSL Project. This leads her to a different view of what is required for the determination of her Profit Share Claim on any appeal, because:

a. She claims that the damages from her Profit Share Claim (in other words, its value) should be calculated as at the date she was wrongfully terminated from her employment (the repudiation date), or as of the Proposal Date, based on the real and significant chance that existed at that time that the YSL Project would ultimately generate profits ("Future Oriented Damages").
b. Alternatively, she maintains that there is a distinction between earned vs. realized profits, and that her Profit Share Claim can be proven and valued based on "earned profits" even if none were realized because of the Proposal. She claims to have already received documents from the Debtor in the Arbitration that establish that, as of the date of the Proposal, the expenses of the YSL Project did not exceed its revenues, which she points to as an indication that it was "profitable" at least in that sense. Further, she claims to have documents evidencing the withdrawal or distribution of funds (profits) to others prior to the date of the Proposal. These are not future oriented profit calculations, and could be proven without the time and expense of significant further evidence, including from experts.

[16] Ms. Athanasoulis seeks to appeal all of the grounds upon which the Proposal Trustee intends to disallow her Profit Share Claim. If successful, she will ask the court to value her entitlements. She says that, while she has some of the necessary documents that she could submit now, she requires further disclosure from the Debtor and/or Cresford and others to establish the value of her Profit Share Claim (which she had anticipating obtaining in phase 2 of the Arbitration process). Ms. Athanasoulis asks that the court either order that disclosure and permit her to complete the evidentiary record before she is required to appeal the disallowance of her Profit Share Claim, or to declare now that the appeal will be *de novo* and she will be at liberty to put in further evidence on the appeal.

[17] Further, Ms. Athanasoulis challenges the premise of the Proposal Trustee's suggested procedure since its purported efficiency (in terms of time and cost savings) will only be achieved if she loses on appeal. If she wins, there will be at least three separate steps beyond the appeal itself:

a. The valuation of her claim at a summary trial.
b. The determination of the LPs damages in a separate proceeding, and then the determination of any entitlement that they have to set-off.
c. A distribution hearing (at which priorities will be determined).

[18] Ms. Athanasoulis argues that the Proposal Trustee's suggested incremental process is inefficient and not in keeping with the principles of speed, economy and finality that s. 135 of the BIA demands of a trustee in the determination and valuation of claims.

[19] At the hearing of this motion, Ms. Athanasoulis conceded that there might be a way to defer the briefing and argument of her Future Oriented Damages claims until after the determination of the appeal of whether the Profit Share Claim is a provable claim with a value of more than "zero".

[20] Ms. Athanasoulis challenges the LPs standing to participate in the appeal of the disallowance of the Athanasoulis Claim on any matters that are being addressed by the Proposal Trustee. However, she submits that since there is overlap between the priority and subordination issues as between the Profit Share Claim and the LPs allegation against her for breach of contract and misrepresentation, she considers it to be most expeditious for the LP's Claims to be adjudicated all at once in this proceeding to avoid a multiplicity of proceedings in respect of overlapping claims.

c) The LPs' and Sponsor's Positions

[21] The LPs' and the Sponsor's positions are largely aligned. Coming into the motion, they both argued that it was premature and unnecessary for any directions to be provided by the court, in particular (for the LPs) with respect to limiting the scope of the participation in the appeal. However, once at the hearing, all were content to make submissions and receive the court's advice and directions so that the matter can move forward.

[22] The LPs and Sponsor oppose the suggestion that the court can now order that Ms. Athanasoulis' appeal of the disallowance of her claim be heard as a *de novo* appeal. They contend that under s. 135 of the BIA, an appeal is to be a true appeal, and not *de novo*, unless the court is satisfied that there was some unfairness in the process of the determination of the claim under appeal.

[23] Neither the Sponsor nor the LPs expect to be providing any further evidence or submissions if the Proposal Trustee's suggested process is adopted. They have no objection to the court allowing Ms. Athanasoulis to file further evidence and submissions addressing the specific grounds of disallowance, the points raised in the LPs further brief and submissions on the issues of enforceability of the Profit Share Agreement under the Limited Partnership Agreement and/or on the issues of subordination and priority. They invite Ms. Athanasoulis to file further evidence relevant to the Proposal Trustee's grounds for its determination to disallow her Profit Share Claim so that the record is complete before the Notice of Determination is formally issued and she can then appeal (a true appeal) based on that record.

[24] The Sponsor and the LPs agree with the Proposal Trustee that the valuation questions (including any further factual or expert evidence to decide those questions) ought to be deferred with further directions to be provided when the appeal is decided, if necessary, as to how the Athanasoulis Claim will be valued and finally determined if the preliminary grounds of

disallowance are not found to preclude the proof of her Profit Share Claim. The parties concede that further evidence will be required if the Profit Share Claim is to be valued.

[25] The Proposal Trustee suggests the LPs play a limited role in the appeal process since the stated grounds for disallowance would only engage issues associated with their claims insofar as they relate to their entitlement to be repaid in full prior to any payments being made on the Athanasoulis Claim and the enforceability of any element of the Athanasoulis Claim given the terms of the Limited Partnership Agreement.

[26] Other aspects of the LPs' Claims and their claimed set-off would only arise in the event that the Athanasoulis Claim is allowed and valued above zero (upon or after any appeal). The LPs maintain that the LP's Claims cannot be determined in these bankruptcy proceedings. However, they acknowledge that there may be some overlap with the subordination/priority arguments that they seek to advance in relation to the determination of the Athanasoulis Claim and the LP's Claims being prosecuted outside of these proceedings. To that extent, they recognize that there may be some issues that, if determined in this process, will become *res judicata* and subject to issue estoppel in the LP's Claims civil proceeding. They are prepared to accept that outcome.

[27] The LPs are not content with the restricted role suggested for them by the Proposal Trustee in the appeal process. They contend that they should have full party standing on all issues if there is to be an appeal. They have also requested the opportunity to respond to any further evidence or submissions provided by Ms. Athanasoulis to the Proposal Trustee in support of her claim.

Analysis and Directions – Profit Share Claim

[28] The following issues require advice and direction from the court regarding the procedure for determining the Profit Share Claim:

a. Can and should the court provide directions now about whether the appeal of the Proposal Trustee's disallowance of the Profit Share Claim will be a true appeal or an appeal *de novo*?
b. What will the appeal record be comprised of if it is not an appeal *de novo*?
    i. Should Ms. Athanasoulis be permitted to obtain additional evidence by way of production from the Debtor and/or Cresford or others and an examination for discovery of a representative of them?
    ii. Should Ms. Athanasoulis be permitted to submit additional evidence and make further submissions before a final Notice of Determination is issued so that it is available to be considered by the Proposal Trustee and in the context of any appeal from the Notice of Determination?
c. What issues will the LPs have standing to participate in on the appeal?
d. What directions should the court provided regarding the procedure to be followed for the determination of the Profit Share Claim?

a) True Appeal or Appeal de novo

[29] The default for appeals of a trustee's decision under s. 135 of the BIA is that appeals are to proceed as true appeals, based on the materials relied upon by the trustee in its decision, and not *de novo*: see e.g. *Galaxy Sports Inc. (Re)*, 2004 BCCA 284, 29 B.C.L.R. (4th) 362, at para. 40; *Asian Concepts Franchising Corporation (Re)*, 2017 BCSC 1452, 51 C.B.R. (6th) 313, at para. 24. This is in keeping with the efficient and cost-effective administration of bankrupt estates and the objective of the BIA to enable parties to have their rights and claims determined in an expeditious fashion: see *Credifinance Securities Limited v. DSLC Capital Corp.*, 2011 ONCA 160, 74 C.B.R. (5th) 161, at para. 26.

[30] The court has discretion to conduct an appeal *de novo* "if the Trustee committed an error or the interests of justice require it": *Bambrick (Re)*, 2015 ONSC 7488, 32 C.B.R. (6th) 228, at para. 18. An appeal *de novo* may be ordered where to proceed otherwise would result in an injustice to the creditor: see *Credifinance*, at paras. 1, 18, 24.

[31] However, there is no basis for finding that there will be an injustice to Ms. Athanasoulis without an appeal *de novo*, or that the interests of justice require an appeal *de novo*. She was invited to provide further evidence and make further submissions if she wishes to do so before the Proposal Trustee makes the final determination of whether the Profit Share Claim is provable. No one opposes this. All parties agree that Ms. Athanasoulis should be provided with all material that the Proposal Trustee has received in connection with the Athanasoulis Claim, including material received from the LPs in December 2022 that was not initially provided to her but now has been.

[32] I do not agree with Ms. Athanasoulis' submission that there is an inherent injustice in the claims process simply because the Proposal Trustee originally agreed to arbitrate the entirety of her claim. The court ruled that procedure was an improper delegation of the Proposal Trustee's duty to determine whether the Athanasoulis Claim is provable and, if so, to value it. There is no injustice in the procedure for the determination of her claim being reset now, even if that means that the Profit Share Claim may not be fully valued (in respect of her Future Oriented Damages claims) until the determination of whether it is a provable claim and/or that it does not have a value greater than zero has been appealed and, only then, if she is successful.

[33] Nor do I agree that the Proposal Trustee's participation in phase 1 of the Arbitration and advocating for an outcome that is now reflected in its draft Notice of Determination creates an inherent injustice by allowing the Proposal Trustee to determine that her Profit Share Claim is not provable and should be disallowed. The Proposal Trustee intends to do so on similar grounds to those that it was urging the Arbitrator to consider to reach that same determination in the Arbitration. The fact that the Proposal Trustee had urged the Arbitrator to reach the same determination on the same grounds that the Proposal Trustee has now determined that the Profit Share Claim is not a provable claim, or should be valued at zero, does not derogate from the integrity of that determination. The Proposal Trustee is a court appointed officer. There is nothing in the record before the court to suggest that the Proposal Trustee did not impartially and fairly reach its determination regarding the Profit Share Claim.

[34] Ms. Athanasoulis' concern about the injustice of a true appeal is predicated on her preclusion from filing any further evidence or submissions in support of the Athanasoulis Claim before the Notice of Determination is formally issued. In circumstances where a creditor has not had a full opportunity to put forward its claim or to respond to the disallowance of a trustee, or the interests of justice otherwise require it, an appeal *de novo* may be appropriate: see *Credifinance*, at para. 24; *Charlestown Residential School, Re*, 2010 ONSC 4099, 70 C.B.R. (5th) 13; *Poreba, Re*, 2014 ONSC 277, at para. 27. See also *Bambrick*, at paras. 16-18.

[35] In any event, this claimed prejudice can be avoided by the directions that the court provides in this endorsement regarding additional evidence and submissions to be filed by Ms. Athanasoulis before the Notice of Determination is finalized. Ms. Athanasoulis raises a secondary concern about the delay that this procedure will entail while she gathers the necessary evidence. Notably, much of the anticipated delay would be for the retention and instruction of experts in connection with her Future Oriented Damages claims, that she has acknowledged could be deferred until after the appeal as long as her rights are preserved. However, some delay will be inevitable, particularly because, to avoid the prospect of any injustice, the Proposal Trustee will also be required to review and consider any such new evidence filed before making the final decision and issuing its Notice of Determination.

[36] I prefer to provide advice and directions now with a view to avoiding these injustices. In a complicated situation such as this, in which it is acknowledged that there are stakeholders with specific interests and evidence, it makes sense that a process be put in place to create a complete record for the Proposal Trustee's determination and for any appeal.

[37] I am not prepared to provide any directions now about whether any appeal taken from the final Notice of Determination issued by the Proposal Trustee will proceed *de novo*, rather than presumptively as a true appeal. If some injustice or prejudice ensues, those concerns will have to be raised with the appeal court.

b) The Appeal Record: Further Discovery and Evidence

[38] Section 135(1.1) of the BIA requires the Proposal Trustee to determine whether any contingent claim or unliquidated claim is provable and, if provable, the Proposal Trustee shall value it. The wording of this section at least allows for the possibility that the determination of whether a claim is provable might happen before the claim is valued.

[39] Ms. Athanasoulis was understandably concerned with the suggested procedure for determining the Athanasoulis Claim, in which the Proposal Trustee would issue its Notice of Determination of the Profit Share Claim based on the record to date and Ms. Athanasoulis would appeal that disallowance based on the existing record. When the court concluded that phase 2 of the Arbitration amounted to an improper delegation of the Proposal Trustee's responsibility for determining the Athanasoulis Claim, it was not intended that Ms. Athanasoulis be precluded from relying on any further evidence in support of the proof of her Profit Share Claim. Up until that time, she had quite justifiably assumed that there would be an opportunity for her to support her claim through the agreed upon arbitration process, which was cut short because of my Funding Decision, through no fault of her own.

[40] A trial-like procedure is not something that a claimant in a bankruptcy proceeding is entitled to, nor is it the norm. The proposed expansion of the Arbitration into that type of trial-like process is in part to blame for the court's decision to put an end to that process. The s. 135 claims process under the BIA is "intended to be an efficient and summary process" for the determination of claims: *Asian Concepts Franchising Corporation (Re)*, 2018 BCSC 1022, 62 C.B.R. (6th) 123, at para. 53.

[41] That said, the court recognizes that the Profit Share Claim is the most significant claim in this bankruptcy proceeding and that it is a complex fact-dependent claim. If there is information and documents to support the Athanasoulis Claim that she anticipated having the ability to obtain from the Proposal Trustee or the Debtor and/or Cresford in the context of the Arbitration, it is reasonable to make some accommodation to enable her to access that information and documentation and include it with the material that the Proposal Trustee will be asked to consider and that will be in the record for appeal purposes.

[42] While all parties recognize that there may be some efficiency in carving out the Future Oriented Damages from the Profit Share Claim pending the determination of whether it is a provable claim under s. 135(1.1) of the BIA, there remain aspects of the procedure suggested by the Proposal Trustee that are too limiting and unfair to Ms. Athanasoulis. They include:

a. Having been advised of the grounds upon which the Proposal Trustee intends to determine that the Profit Share Claim is not a provable claim, Ms. Athanasoulis should be permitted to put the evidence that she relies upon to counter the identified grounds for this determination.
b. Similarly, having now just received the materials and submissions provided by the LPs to the Proposal Trustee in respect of the positions they seek to assert on the question of whether the Profit Share Claim is a provable claim and on the question of the subordination of that claim to the LPs' interests which they say should be given priority, fairness requires that Ms. Athanasoulis be given the opportunity to put into the record any evidence and submissions that she relies upon to counter the LPs' positions.

[43] A procedure must be established that will ensure that the evidence that Ms. Athanasoulis seeks to rely upon is available in an established record before the Proposal Trustee makes its determination of whether the Profit Share Claim is provable.

[44] Under a reservation of rights, the valuation of the Future Oriented Damages included in the Profit Share Claim (beyond the ascribed "zero" valuation by the Proposal Trustee for reasons that do not involve an actual valuation) can be deferred, along with all evidence and submissions about the calculation of these Future Oriented Damages, until after the appeal of the Proposal Trustee's determination to disallow it.

[45] As mentioned earlier, during oral argument, counsel for Ms. Athanasoulis agreed that it might be more efficient and economical to defer the valuation of her Future Oriented Damages claims (based on the repudiation date or the date of the Proposal), given that those valuations will be dependent upon expert input, until the appeal of the determination of whether the Profit

Share Claim is provable on the principled/legal grounds (equity vs. profit, earned vs. realized profits and subordinated to the LPs' Claims) has been decided (with a reservation of her right to pursue those Future Oriented Damages if the appeal succeeds).

[46] In addition to evidence that Ms. Athanasoulis may already have and that could be compiled for submission to the Proposal Trustee, she has identified further evidence that she may need to obtain from the Debtor (and/or Cresford). For example, evidence to counter the Proposal Trustee's determination that the Profit Share Claim is to be valued at zero predicated on the assumption that there were no profits in the YSL Project at, or at any time prior to, the date of the Proposal (because it was not built). Ms. Athanasoulis is entitled to test that determination. To do so she may need additional production from the Debtor and/or Cresford of historic financial documents, beyond those that she has already received. Insofar as the Proposal Trustee is in control of any of the Debtor's records that Ms. Athanasoulis may ask for, it too may be required to produce documents to Ms. Athanasoulis.

[47] I agree with Ms. Athanasoulis that if the goal is to create a record now that can be used for a true appeal, the issues identified in the Proposal Trustee's draft Notice of Determination warrant an opportunity for a further exchange of materials and some (circumscribed and limited) cross-examinations so that there is a complete record for the appeal.

[48] While the claims process is intended to a summary process and not a full adjudicative process with a trial, this is a complex claim with a multitude of competing interests. Fairness requires that Ms. Athanasoulis be given access to documentary records (and a witness from the Debtor or Cresford who can explain/prove them, if necessary) that she needs to prove her claim and counter the grounds upon which it is expected to be ruled by the Proposal Trustee not to be provable.

[49] The court has the jurisdiction to order this under its general discretionary powers in s. 183(1)(a) of the BIA. See also *Toronto-Dominion Bank v. Brad Duby Professional Corporation*, 2022 ONSC 6066, at para. 33. In this instance, the use of those powers in the unique circumstances of this case is appropriate to ensure procedural fairness in the determination of the Athanasoulis Claim and any appeals that may arise from the Proposal Trustee's determination.

c) Standing of the LPs on the Appeal of the Profit Share Claim Disallowance

[50] The LP's Claims are not part of this proceeding, except to the extent that they are relevant to the identified grounds for the Proposal Trustee's intended disallowance of the Profit Share Claim. I cannot accede to the request from Ms. Athanasoulis to order the LP's Claims to be adjudicated on their merits in this proceeding, absent the consent of the LPs, which is not forthcoming.

[51] The Proposal Trustee suggests that the LPs be entitled only to raise issues in the appeal that pertain directly to: (a) whether the LPs must be repaid in full prior to any payments being made on the Athanasoulis Claim (the enforceability of the Profit Share Claim as against the LPs, which in turn is tied into preliminary questions of subordination and priority); and (b) the

enforceability of any element of the Athanasoulis Claim given the terms of the Limited Partnership Agreement."

[52] The LPs argue that because they would be the ones most immediately and directly impacted by any aspect of the Athanasoulis Claim that is allowed, and by the value ascribed to any allowed claim, they should have full participation rights on all issues. At some level, every creditor has an interest in minimizing or eliminating the claims of other creditors on equal footing. That is not a reason to grant the LPs advance standing on an appeal, or even to give them full standing in the determination of the Athanasoulis Claim.

[53] The Proposal Trustee's suggestion is reasonable and strikes the appropriate balance. Subject, always, to the discretion of the judge hearing the appeal, I see no reason to grant the LPs *carte blanche* to double down on all the arguments already being made by the Proposal Trustee. The LPs have a legitimate interest in bringing forward any unique evidence, claims and arguments that they can offer, but not to duplicate or pile onto arguments already being made by the Proposal Trustee.

[54] I consider this situation to be distinguishable from another situation that arose in this case, in relation to a different proof of claim: see *YG Limited Partnership and YSL Residences Inc.*, 2022 ONSC 6548 (now under appeal). In that circumstance, the LPs were held not to have any standing to participate in the adjudication of a creditor's claim at the *de novo* appeal of a claim filed by CBRE involving a contract that the LPs had no involvement in or evidence to offer in respect thereof. The justification for not granting the LPs standing in that situation was fact specific (as it often is). Notably, as well, no one in the circumstances of this case is suggesting that the LPs should have no standing to address any issues on appeal.

[55] Here, the LPs have been afforded standing to provide evidence and make submissions to the Proposal Trustee in connection with the Notice of Determination regarding the "provability" of the Profit Share Claim. They have a unique perspective to offer with respect to their argument that the Profit Share Agreement should be found to be unenforceable because it is contrary to the Limited Partnership Agreement (a ground not relied upon by the Proposal Trustee but raised and therefore forms part of the record for appeal purposes that Ms. Athanasoulis must respond to).

[56] The LPs may also have a unique perspective on the preliminary question of whether the Profit Share Agreement can be enforced in the face of Ms. Athanasoulis' admissions that she agreed with the LPs that they would be paid out before her. These unique perspectives have been placed before the Proposal Trustee; Ms. Athanasoulis will be permitted to respond to and challenge them, and they will be "in play" on any appeal.

[57] Subject to the discretion and views of the judge hearing the appeal, I would anticipate that the LPs will have at least some status at the appeal to address at least these points, but perhaps not beyond them.

[58] Finally, the certainty and finality that the determination of these issues will bring is important because of the LP's Claims outside of this proceeding. The LPs need to be given

standing to participate in order for an issue estoppel to arise so as to prevent the re-litigation of the same points in the context of the LP's Claims.

[59] For all these reasons, it is anticipated that the LPs will be afforded an opportunity to participate on the appeal to the extent of any unique or added perspective or submissions that they have that are not advanced by the Proposal Trustee, or that the Proposal Trustee defers to the LPs on. In contrast, the LPs should not expect to be permitted to make submissions on points already being addressed by the Proposal Trustee, such as, the argument that the Profit Share Claim is a claim in equity, not a debt owing by the Debtor.

[60] The LPs asked to be afforded the opportunity to make further submissions in response to Ms. Athanasoulis' further evidence and submissions. I do not consider that to be necessary or appropriate. However, if the Proposal Trustee asks them for further information or documents after receiving the further evidence and submissions from Ms. Athanasoulis, whatever the LPs provide must be given to Ms. Athanasoulis as well.

d) Directions Regarding the Procedure for the Determination of the Profit Share Claim

[61] Having considered all the written and oral submissions received, and in the exercise of my discretion, the following directions are provided in respect of the suggested procedure by the Proposal Trustee for the determination and appeal of the Profit Share Claim:

a. Within one week of the release of this endorsement, Ms. Athanasoulis will be provided with a complete record of all evidence and submissions received from other stakeholders in connection with the Proposal Trustee's draft Notice of Determination with respect to her Profit Share Claim. This may have already occurred by the delivery of materials previously provided by the LPs to the Proposal Trustee just prior to the hearing of this motion; however, in the interests of completeness a further week is being afforded to ensure that she has now been provided with all materials.
b. Within two weeks of the release of this endorsement, Ms. Athanasoulis may make reasonable and targeted document requests from the Proposal Trustee, the Debtor and/or Cresford, or any other participating party for documents that she does not have and claims she needs to support the proof of the Athanasoulis Claim and to establish that it should be valued at more than "zero" (for example, in support of any grounds upon which she challenges the Proposal Trustee's determination that there were no profits in the YSL Project as at the date of the Proposal or at any time prior to that date).
c. Ms. Athanasoulis' requests shall be responded to, and any documents that are in the possession, control or power of the Proposal Trustee or the Debtor and/or Cresford shall be provided, within three weeks of any such request.
d. Within two months of the release of this endorsement, Ms. Athanasoulis shall deliver her submissions and a supplementary record containing any further evidence that she relies upon in support of the Athanasoulis Claim or that she relies upon to challenge any determination that may be made to disallow her Profit Share Claim on the grounds that:

i. it is equity, not debt;
ii. the YSL Project did not generate any profits at, or at any time prior to, the date of the Proposal;
iii. it is to be subordinated to the LPs return of equity (that will inevitably be subject to a shortfall) because of representations to that effect made to the LPs by Ms. Athanasoulis; and/or
iv. it is not enforceable as against the LPs because it was entered into in breach of the Limited Partnership Agreement, breach of fiduciary duties owed to the LPs by the general partner and/or misrepresentations made to the LPs by Ms. Athanasoulis.

e. The Proposal Trustee may request further submissions, evidence or documents in respect of its consideration and assessment of the supplementary material provided by Ms. Athanasoulis, the Debtor, the LPs or elsewhere as it deems appropriate. Any such evidence or documents shall be requested by the Proposal Trustee and provided to Ms. Athanasoulis within four weeks of the delivery of her supplementary record.

f. Within two weeks after the provision of any further evidence or documents received by the Proposal Trustee (or the deadline for so doing),
v. the Proposal Trustee may question (by way of an examination under oath) Ms. Athanasoulis about any evidence or submissions she provides in support of the proof of the Athanasoulis Claim;
vi. Ms. Athanasoulis may examine a representative of the Debtor and/or Cresford under oath on the question of whether there were any profits in the YSL Project as at the date of the Proposal or at any time prior to that date.

g. The Proposal Trustee shall deliver to all interested parties its final Notice of Determination in accordance with s. 135(3) of the BIA (which may, in the Proposal Trustee's discretion, be revised from the draft Notice of Determination previously delivered, taking into account the additional evidence and submissions it receives) within two weeks of the completion of any questioning/cross-examinations (or the date for their completion having lapsed).

h. Ms. Athanasoulis may thereafter appeal the Proposal Trustee's Notice of Determination and its anticipated disallowance of any aspect of the Athanasoulis Claim in the normal course in accordance with s. 135(3) of the BIA.

i. Subject to the discretion of the appeal judge, the LPs standing on the appeal shall be limited to submissions in respect of the impact of the prohibition contained in the Limited Partnership Agreement on non-arm's length agreements (such as the Profit Sharing Agreement), on the question of enforceability of the Profit Share Claim and in respect of the priority/subordination of the Profit Share Claim to the LPs recovery of their initial investment based on alleged breaches of contractual and fiduciary duties and alleged misrepresentations.

j. If the parties require further directions or clarifications from the court as they progress through these steps, a case conference may be requested before me through the Commercial List scheduling office.

[62] I realize that this will result in a number of months delay in the ultimate determination of the Athanasoulis Claim before any appeal; however, it is still a far less cumbersome process than what was contemplated by the Arbitration, and it is a process that places the determination of the provability of the Athanasoulis Claim, and its valuation, in the hands of the Proposal Trustee.

[63] To be clear, it is not expected that there will be any material or submissions at this time regarding the Future Oriented Damages (whether calculated at the repudiation date or the Proposal date). If Ms. Athanasoulis is successful on appeal of any disallowance of the Profit Share Claim, the parties shall make an appointment for a case conference before me (if my schedule permits within the time frame requested) to seek directions about the process for the determination of the more complex valuation question that will likely require expert input.

Analysis and Directions – Wrongful Dismissal Claim

[64] The Proposal Trustee allowed the Wrongful Dismissal Claim in part and valued it at $880,000. $120,000 was discounted because the Proposal Trustee determined that this amount had already been paid to Ms. Athanasoulis in the context of another proceeding. It has not been suggested that there is a need for further evidence or submissions in respect of the Proposal Trustee's determination of this claim reflected in the draft Notice of Determination. If Ms. Athanasoulis has further evidence or submissions on the narrow question of whether she has already received $120,000 on account of this claim, those may be provided to the Proposal Trustee when she delivers her supplementary record in connection with the Profit Share Claim (as indicated in the previous section, to be provided within two months of this endorsement).

[65] The issues raised for the court's consideration in respect of this aspect of the Athanasoulis Claim are:

a. Whether the LPs have standing in respect of the determination of the Wrongful Dismissal Claim.
b. Should the allowed portion of this claim be paid out in a manner consistent with other employee claims, or deferred until the appeal and other steps in the determination of the entire Athanasoulis Claim have been resolved?

[66] The Proposal Trustee is of the view that the LPs have no standing with respect to the Proposal Trustee's determination of the Wrongful Dismissal Claim for the reasons set out in the decision of Osborne J. in respect of the CBRE claim (discussed earlier in this endorsement at paragraph 54, *YG Limited Partnership and YSL Residences Inc*.). The Proposal Trustee is aware that certain of the LPs have appealed this decision.

[67] There has been no indication that the LPs have any unique perspective or evidence to offer in respect of this issue (unlike the Profit Share Claim, where they do, and have accordingly been afforded rights of participation commensurate with their unique perspective and evidence). I do not see any basis on which they should be involving themselves in the determination or valuation of the Wrongful Dismissal Claim.

[68] It will be a matter for the Proposal Trustee to decide, but it was indicated at the hearing that the "allowed" portion of the Wrongful Dismissal Claim will be treated in same way as "like" employee claims which, if not appealed, have been paid out at 70 cents on the dollar.

Costs and Final Disposition

[69] The Proposal Trustee does not seek costs from any party in respect of this motion.

[70] Ms. Athanasoulis and the LPs asked that the court reserve to the parties the ability to request their costs of this motion if there is a future adjudication of costs in connection with the determination and valuation of the Athanasoulis Claim. That makes sense and I so order.

[71] The Court's orders and directions are set out in paragraph 61 in the previous sections of this endorsement and will not be repeated. This endorsement and the orders and directions contained in it shall have the immediate effect of a court order without the necessity of a formal order being taken out. Any party may take out a formal order by following the procedure under r. 59.

Kimmel J.

Date: February 10, 2023

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Court No. 16664 **2009 SKQB 458**
Estate No. 23-1096208 J.C.S.

IN THE COURT OF QUEEN'S BENCH
PROVINCE OF SASKATCHEWAN
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE BANKRUPTCY OF
DARRELL GORDON PYNE

BETWEEN

BUSINESS DEVELOPMENT BANK OF CANADA

Applicant

- and –

PINDER BUECKERT & ASSOCIATES INC., Trustee,

Respondents

Jeff Pinder, for the trustee, Pinder and Bueckert
Clayton Barry, for the Business Development Bank
Richard Gibbons, for the bankrupt Darrell Pyne

JUDGMENT LIAN M. SCHWANN, Q.C.
November 26, 2009 Registrar in Bankruptcy

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[1] There are two matters before me. The first is an appeal under s. 135 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") by the Business Development Bank of Canada ("BDC") of the trustee's disallowance of its security, and the second is Darrell Pyne's application for discharge from bankruptcy. All parties agreed to adjourn the bankrupt's discharge hearing pending the outcome of the BDC appeal. This is my decision on the appeal.

Factual Backdrop

[2] The bankrupt operated a mobile welding business as a sole proprietor under the business name "Pyne's Welding". He borrowed $50,000 from BDC for purposes of building a welding shop, purchasing tools and equipment and creating working capital for Pyne's Welding.

[3] Pyne executed a general security agreement with BDC on June 20, 2007 ("GSA") to secure repayment of the loan. Pursuant to its terms, security was granted in all of Pyne's present and after acquired personal property, including all trade equipment and goods, and without limitation, all machinery, tools, fixtures, motor vehicles and all parts, components, attachments, accessories, accessions thereto.

[4] The GSA was registered in the Personal Property Registry ("PPR") on June 19, 2007. At no time did BDC take a specific security interest in the bankrupt's 1997 Ford F 350 truck, the subject matter at the core of this appeal, nor did BDC register the truck by serial number at the PPR.

[5] The terms of repayment were generous. Pyne was given a one year grace period with payments to commence in July 2008. No payments were made and the loan fell into default. Pyne assigned into bankruptcy on August 7, 2008.

[6] The truck in question was far more than a mere vehicle as Pyne operated his mobile welding business from it. Welding equipment required to operate his mobile business was affixed in some manner to the truck, with his welding tools also stored in it although not affixed to it. In his affidavit Pyne claims to have maintained continuous possession of the truck and equipment from the time of insolvency until the date of hearing but for the month of June 2009 when he placed the truck at an auction house believing it was non-exempt. Receiving legal advice to the contrary, he reclaimed the truck and has since asserted an exemption over it.

[7] In the Statement of Affairs prepared and signed by Pyne an exemption was claimed over the truck.

[8] Pyne has no other source of income and is dependent on the truck, equipment and tools to earn a living both now and in the future.

[9] BDC filed a proof of claim with the trustee claiming a security interest pursuant to the terms of its GSA. The trustee disallowed the security to the extent of $50,086.78 giving the following reasons:

> The value of your general security agreement is based on assets at the date of bankruptcy and subject to provincial exemptions. We have determined that the value of your security attaches to the non-exempt portion of the tools of trade ($1,500.00). The general security agreement does not attach to furniture and appliances, personal effects, real property or any motorized vehicle that is not registered by serial number.

Position of the Parties

BDC

[10] BDC acknowledges that it did not specifically register its interest by serial number of the truck. As the truck falls under 'equipment' within the meaning of *The Personal Property Security Act, 1993,* S.S. 1993, c.P-6.2 (*"PPSA")*, the truck is considered a 'serial numbered good'. They argue that the *PPSA* is designed to maximize protection for secured creditors who register goods by serial number without forcing them to do so. Failure to register by serial number simply affects priorities under the Act, and a secured creditor who describes equipment in generic terms has priority against the trustee in bankruptcy.

[11] BDC further argues that as its security was properly executed and registered, the trustee's disallowance was improper and should be quashed. The fact Pyne may not have sufficient exigible assets to satisfy the amount of the secured loan does not mean that its security is invalid and consequently disallowed. Disallowance of security results in it being extinguished which is inconsistent with the 'hands off' approach accorded secured creditors under the *BIA* and prejudicial to its rights.

[12] In the absence of any evidence that the security was not executed or was unperfected, the trustee improperly disallowed it. Instead, they argue, the trustee should have allowed its security but listed BDC as an unsecured creditor for the appropriate amount. By disallowing the security, the trustee has improperly extinguished BDC's rights under the security agreement thereby preventing it

from a full and proper exercise of its rights.

[13] With regard to the exemption issue, BDC says Pyne lost this status over the truck because he was no longer engaged in the mobile welding business on the date of assignment. They refer to his Statement of Affairs in which Pyne admits to having ceased business one month prior to assignment. In the alternative, they argue, the 'welding rig' was more akin to 'trade tools' or 'equipment' rather than a motor vehicle. And finally, BDC says that even if the unit was exempt, Pyne voluntarily waived his exemption by delivering the truck to the auctioneer.

The Trustee

[14] When security takes the form of a general security agreement, the trustee typically values available assets and compares that valuation to the amount secured. In disallowing BDC's security, the trustee accepted Pyne's valuation of the truck set out in his Statement of Affairs ($15,000), factored in the exemption and concluded there would be no realization for BDC.

[15] BDC's failure to register its security by serial number against the truck formed the second basis for disallowance. The trustee's position is simple. The *PPSA* requires serial number registration for vehicles which BDC failed to do, accordingly, in a dispute with the trustee in bankruptcy, BDC loses. The trustee concedes that if the unit constitutes 'tools' as opposed to a 'vehicle', BDC was not required to register by serial number to preserve its priority.

Pyne

[16] Pyne claimed exempt status over the truck in his Statement of Affairs. His counsel claims Pyne's right to exemption must be ascertained at the date of assignment, as reflected in that document. He says Pyne was actively involved in using his truck and equipment to pursue journeyman status as a welder at the time of assignment and throughout his bankruptcy, and continues to utilize his truck and welding equipment to earn income. The fact Pyne may have temporarily placed the truck with an auctioneer for a month following assignment (June 2009) is irrelevant. Nothing happened to the truck; it simply sat on the lot.

[17] For a period of time Pyne worked as an employee of a welding company however was soon

laid off. At paragraph 7 of his affidavit Pyne said: "That I intend to continue to operate my welding business using the 1997 Ford F 350 and the welding equipment and tools located on it to earn my living and will need it in the future as an independent welder."

Legislative Backdrop

[18] This appeal arises out of s.135 of the *BIA.* It provides:

> Trustee shall examine proof
> 135. (1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.
>
> Determination of provable claims
> (1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.
> Disallowance by trustee
>
> (2) The trustee may disallow, in whole or in part,
> (*a*) any claim;
> (*b*) any right to a priority under the applicable order of priority set out in this Act; or
> (*c*) any security.
>
> Notice of determination or disallowance
> (3) Where the trustee makes a determination under subsection (1.1) or, pursuant to subsection (2), disallows, in whole or in part, any claim, any right to a priority or any security, the trustee shall forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (1.1) or whose claim, right to a priority or security was disallowed under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.
>
> Determination or disallowance final and conclusive
> (4) A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.
>
> Expunge or reduce a proof
> (5) The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter. [emphasis added]

Analysis

[19] There are two issues in this appeal:

(a) whether the appeal is on the record or *de novo* and the appropriate standard of review; and

(b) whether the trustee erred in disallowing BDC's security on the basis that the truck had no value on realization or because BDC failed to register its interest by serial number.

(a) nature of a s. 135 appeal and standard of review

[20] The trustee is required by the *BIA* to examine each proof of claim. Under s. 135(2), the trustee is empowered to disallow any claim in whole or in part, or to disallow any security. The disallowance is final and conclusive unless appealed pursuant to s. 135(4) within the time permitted for doing so.

[21] An appeal under s. 135 must begin with consideration of whether a s. 135 appeal is a true appeal, in which case fresh evidence cannot be admitted, or if it is to proceed on a *de novo* basis. Case law is divided on this point. (see: *Re Eskasoni Fisheries Ltd.* (2000), 16 C.B.R.(4th) 173 (NSSC); *Re Galaxy Sports Inc*., 2004 BCCA 284, 1 C.B.R. (5th) 20; *Johnson v. Erdman*, 2005 SKQB 515, 18 C.B.R. (5th) 97 (under appeal to SKCA)).

[22] Subsequent cases have concluded that, notwithstanding the decisions in *Galaxy Sports* and *Johnson*, courts may determine this issue on a case by case basis having regard to the facts and circumstances of each. (*Re San Juan Resources, Inc.*, 2009 ABQB 55, 52 C.B.R. (5th) 97; see also *Lloyd's Non-Marine Underwriters v. J.J. Lacey Insurance Ltd*., 2008 NLTD 9; 41 C.B.R. (5th) 137)

[23] I am prepared to treat this as a *de novo* appeal. The trustee did not prepare and file a 'record' however several affidavits were filed which effectively served the same purpose as well as providing a foundation for the eventual discharge hearing. There has been no loss of efficiency or increased formality in receiving this material and hearing argument on a *de novo* basis.

[24] Where the trustee's decision involves a question of law or the interpretation of a statute, the standard of review is correctness. On the other hand, where the matter under consideration is factual in nature or involves a discretionary element, the standard of review is reasonableness. (*Eskasoni*

and *Lloyd's Non-Marine Underwriters*)

b) disallowance of security because the truck had no realizable value or failure to register by serial number

[25] The trustee has a duty to examine every proof of claim and every proof of security along with the grounds in support to determine the validity of each. (s. 135(1)). If further evidence is required for such purpose, the trustee may demand it.

[26] Section 135(2) empowers a trustee to disallow any security in whole or in part. On its face, this provision confers broad discretionary authority on trustees, however this section must be read in light of the overarching scheme of the *BIA* and other provisions of the *Act* pertaining to secured creditors.

[27] The interface between trustees acting pursuant to the *BIA* and secured creditors has been broadly described as follows:

> From its inception, bankruptcy law has been viewed as a regime that does not directly affect the position of secured creditors of the bankrupt. The hands-off approach to security interests in bankrupts' property is highlighted in section 136 of the BIA. This section sets out the priority structure that must be applied by a trustee in bankruptcy when distributing the property of the bankrupt among the various claimants to it. All the priority rules set out in the section are made 'subject to the rights of secured creditors.' This approach is also evident in section 70(1) that states the effect of an assignment or receiving order in bankruptcy on the rights of creditors of the bankrupt. The 'rights of secured creditors' are excepted from the precedence that bankruptcy has over the creditors' rights arising outside of bankruptcy. Section 71(2) vests the bankrupt's property in the trustee 'subject to … the rights of secured creditors.' Section 69.3, which stays enforcement of creditors' rights against a bankrupt, affects secured creditors, but only in very limited circumstances and for only a short period of time. (Cuming, Walsh & Wood, *Personal Property Security Law* (Toronto: Irwin Law, 2005) at p. 427.)

[28] The power of disallowance of security was added by amendment to the *Act* in 1992 (S.C. 1992, c. 27, s. 53) and there have been few decided cases. Two issues which have received judicial treatment involve the finality and enforceability of the underlying security interest by a s. 135 determination and the interplay between partial disallowance of security and the redemption / realization provisions of the *Act.*

[29] The effect of a trustee's disallowance of security and the finality of the s. 135 process arose

in the Saskatchewan case of *Chaban v. Chaban (Bankrupt) et al.* (1998), 165 Sask. R. 114. In a related foreclosure action the plaintiff argued that disallowance of security under s. 135, which he failed to appeal, did not affect his right to realize upon his security (a mortgage) in accordance with provincial law. Rather, he argued, the disallowance simply operated as a bar to claim on estate dividends. Smith, J. (as she then was) held to the contrary in finding that disallowance of security under s. 135 was final and binding which consequently meant the security was extinguished. At para. 8 she said:

> **8** This argument does not succeed. It is true that s. 69.3(2) provides that "the bankruptcy of a debtor does not prevent a secured creditor from realizing or otherwise dealing with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed". That provision, however, is expressly subject to ss. 79 and 127 to 135. A review of those sections makes it clear that even if the secured creditor does not seek to participate in the dividends of the estate, the trustee may require a proof of claim, and may take actions that affect the security interest. That power extends to the power set out in s. 135(2)(c) to disallow the security. This provision would be meaningless if the secured creditor were permitted, despite the disallowance, to realize upon the security as against the trustee, as the plaintiff seeks to do in this action. It is my conclusion that the effect of a final and binding disallowance of a security under s. 135 is that the creditor's security is gone and the trustee assumes the bankrupt's interest in that property free of the security interest claimed. This conclusion is supported by the learned authors of Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada* (3rd ed.) Vol. 2, who, at G section 68, have commented on the above noted fiat of Krueger J. in the instant case. They agreed that the court had properly held that to remove the caveat the trustee had to follow the procedure prescribed by *The Land Titles Act*, but they go on to express the view that, in such an application, the disallowance would be conclusive:
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> > If the claim was properly disallowed, the disallowance is final and conclusive, and the creditor's security is gone. If the proper procedure had been followed, the court would have had no discretion but to remove the caveat. The *Bankruptcy and Insolvency Act* governs in this situation, not provincial law.

[The *Chaban* decision was overturned on appeal on different grounds (177 Sask.R. 139 (Sask.C.A.).]

[30] The other line of cases concerns the apparent overlap and confusion between the trustee's duty to examine the security and the valuation and redemption of it. "The matter of the redemption and sale of security is dealt with in ss. 128(3), 129 and 130. There is no conflict between ss. 128(3), 129, 130 and 135; they are dealing with different matters." Houlden and Morawetz, *Bankruptcy & Insolvency Law*, looseleaf, fourth ed., vol 2, pages 5-190.

[31] *McEwen (Re)* (1997), 47 C.B.R. (3d) 64 (N.B.Q.B.) (upheld on appeal at (1997), 193 N.B.R. (2d) 31 (N.B.C.A.) addressed the question of whether the trustee's valuation of security under s. 135 is the same value to be used for purposes of redemption or realization under s. 130 of the *Act*. In this

case the trustee partially disallowed the security to the extent of $349,059, allowing only the market value of the property of roughly $25,335. (The mortgage payout was $374,395.) The bank appealed the partial disallowance but in related proceedings the trustee served a s. 128(1) notice on the bank requiring it to file proof of security. The bank responded by filing its mortgage and valuing the property in question equal to the amount outstanding on the mortgage. Pursuant to s. 130 the bank required the trustee to elect to either redeem the security or require it to be realized. The trustee valued the secured property at the market value of the asset which was substantially less than the bank's mortgage and disallowed the balance under s. 135(2)(c).

[32] The trustee applied for directions on the amount required to be paid to either redeem the security or pay out if the property were sold. The trustee argued that the pay out price on redemption or realization was the same value declared by the trustee in its s. 135(2)(c) determination. In effect, the trustee drew a direct link between the security disallowance process in s. 135 and the redemption process in s. 129. The court did not accept the trustee's position saying the following:

> 21 I am not persuaded by this argument. Section 135 does not go to the value of the security for the purpose of redemption or sale. That section goes to the allowance or disallowance, in whole or in part, of the security itself for the purpose of the distribution of dividends from the bankrupt estate.
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> 22 The matters of redemption and sale are dealt with in section 128(3), 129 and 130. Section 128(3) is clear and I do not see where it is repugnant to the intent and purpose of section 135(2). …
>
> . . .
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> 24 This appears to me to be the way the Act contemplates redemption by the Trustee or realization on the security to take place. I find nothing in the election required under section 128(3) to indicate anything to the contrary or to relate values associated with a disallowance under section 134(2) to effect the operation of section 128(3).

[33] The New Brunswick Court of Appeal agreed with the lower court's reasoning, framing the issue and the Judge's reasoning in this way:

> 5 The Judge noted that ss. 128-130 deal with redemption and realization, and that s. 128(3) "is clear and I do not see where it is repugnant to the intent and purpose of section 135(2)." He commented that s. 128(3) permits the Trustee to redeem the security upon payment of either the money owed to the secured creditor or the value of the security as assessed by the secured creditor. Further, if the trustee is dissatisfied with the secured creditor's assessed value, s. 129 provides the Trustee with a procedure to force a sale of the security. The Judge concluded that a disallowance of value under s. 135(2) does not affect the operation of s. 128(3) and, as a result, Trustee elections to redeem or realize under either ss. 128 or 129 of the Act are also not affected.

[34] The decision in *St. Anne-Nackawic Pulp Co. (Trustee of) v. New Brunswick (Minister of Business*), 2005 NBQB 99, 11 C.B.R. (5th) 296, touches on these same issues. By notice under

s. 128(1) of the *BIA* the trustee required the secured creditor (Province) to file proof of security along with a valuation of the security on an individual asset basis. The security held by the Province was a 'wrap around' security (debenture and general security agreement) with no specific debt assigned to particular assets. The Court held that because of the nature of the Province's security, s. 128 of the *BIA* did not require the Province to assign a particular value to each piece of security and only when the secured creditor requires the trustee to make an election under s. 130 is individual valuation required.

Application to the facts of this case

[35] Where a security is disallowed by a trustee, the onus rests with the appellant to prove the validity of the security. (*Re Adomako* (1998), 5 C.B.R. (4th) 158)

a) valuation of asset ground

[36] Section 135 does not specify the grounds upon which a security can be disallowed or for that matter the information required to be filed by a secured party. Form 31 - Proof of Claim – requires secured creditors to provide a copy of the security documents and full particulars including the date on which the security was given and the value at which the security is assessed.

[37] The trustee did not challenge the validity of BDC's security agreement and accepts that it was registered at the PPR before the date of assignment. Disallowance was based simply on a valuation exercise by comparing the value of the truck (ascertained from the Statement of Affairs) to the amount of BDC's security.

[38] The trustee characterized its 'valuation approach' to security disallowance as accepted practice for both secured creditors and trustees alike in this province. With respect, this approach improperly mixes redemption and sale of assets with proof of security. The New Brunswick Court of Appeal in *McEwen* made clear that the power of disallowance under s. 135 does not involve an assessment of collateral value. Section 128(3) empowers trustees to redeem the security upon

payment of the amount owed to the secured creditor or the value of the security as assessed. If that doesn't prove satisfactory to the trustee, s.129 allows the trustee to force the sale of the collateral.

[39] While the trustee's approach in this case may be a pragmatic one when faced with a GSA and minimal debtor assets, disallowance based purely on the trustee's assessment of available assets and other practicalities unfairly and improperly prejudices BDC's position. As observed in *Chaban,* disallowance of security under s. 135 is final and conclusive and effectively extinguishes rights of secured creditors absent a successful appeal. This is a stark result with residual effect. As BDC appropriately points out, disallowance eliminates other rights such as subsequent enforcement if Pyne voluntarily sells the truck or recovery of insurance proceeds if the welding rig is damaged or lost.

[40] On its face, and without any suggestion otherwise, BDC's security was properly executed, registered at the PPR before assignment and is in all respects a valid and enforceable security agreement. The trustee's disallowance of security on this ground was improper and is set aside. Because of my conclusion on this ground, it is unnecessary to decide the exemption issue at this time.

b) failure to register by serial number ground

[41] The second ground upon which BDC's security was disallowed is BDC's failure to register the truck by serial number. It is clear that under provincial law, an unperfected security interest is subordinate to the trustee in bankruptcy. (*The Personal Property Security Act, 1993*, S.S. 1993, c. P-6.2 ("*PPSA*"), s. 20(2)(a)).

[42] It is common ground that the security interest of BDC was registered in June 2007, a full year before Pyne's assignment into bankruptcy and that BDC did not register by serial number. It is also undisputed that the truck falls under category of 'equipment' for purposes of the *PPSA* (see s. 2(1)(p)), which is a 'serial numbered good' by virtue of s. 2(1)(u) of *The Personal Property Security Regulations*.

[43] Failure to register by serial number is not *per se* fatal but instead affects priorities. The consequence of this failure has been described in this fashion:

> Different consequences are associated with the decision to describe serial numbered equipment in the general collateral description field. When "serial numbered goods" are held by the debtor as equipment or inventory, the secured party has the option to describe the goods in general terms or specifically by serial number. The choice of one method of registration over the other is not without consequence. If the secured party chooses to describe the equipment by serial number in the appropriate field on the financing statement, the maximum level of protection against competing interests is obtained. . . . If the secured party chooses to describe the equipment only in general terms in the general collateral description field of the financing statement, his security interest has priority only with respect to seizing creditors and the trustee in bankruptcy of the debtor. (Cuming and Wood, *Saskatchewan and Manitoba Personal Property Security Acts Handbook* (Toronto: Carswell, 1994) at pp. 280-81)
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> * * *
>
> If the secured party fails to describe the equipment by serial number, it will be considered perfected in respect of a competition with a trustee in bankruptcy or an enforcement creditor. However, it will be considered unperfected in competitions with other secured parties, and will risk subordination if the competing secured party has described the equipment by serial number. (Cuming, Walsh & Wood, p. 324; see also *PPSA*, *supra*, ss. 30(6), 30(7), 35(4).)

[44] Neither the *BIA* or provincial law provides the trustee with the status to attack the priority of BDC's description of equipment in generic terms instead of by serial number registration. This is a legal question and therefore the standard of review is correctness. The trustee erred in its interpretation and application of the *PPSA* on this issue therefore the trustee's disallowance on this ground was improper and should be set aside.

Disposition

[45] The appeal is allowed and the trustee's disallowance of BDC's security is set aside. BDC shall have costs of $500 payable from the estate.

DATED at the City of Regina, in the Province of Saskatchewan, this 26th day of November, 2009.

"Lian Schwann, Q.C."

Registrar in Bankruptcy

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CITATION: In the Matter of the Proposal of Casimir Capital, 2015 ONSC 2819
COURT FILE NO.: 31-1836747
DATE: 20150424

ONTARIO

SUPERIOR COURT OF JUSTICE

IN BANKRUPTCY AND INSOLVENCY

COMMERCIAL LIST

IN THE MATTER OF THE PROPOSAL OF CASIMIR CAPITAL LTD. A COMPANY INCORPORATED PURSUANT TO THE LAWS OF THE PROVINCE OF ONTARIO OF THE CITY OF TORONTO IN THE PROVINCE OF ONTARIO

COUNSEL: *Peter-Paul E. Du Vernet* for Casimir Capital, the Moving Party

Steven L. Graff and Miranda Spence
For Crowe Soberman Inc., trustee in bankruptcy of Casimir Capital Ltd., a bankrupt

Robert B. MacDonald for Royal Capital Management Corp.

Christopher Stanek for Gowling Lafleur Henderson LLP

James B. Camp for Adam Thomas

John Salmas for Fidessa Canada Corp.

BEFORE: **L. A. Pattillo J.:**

HEARD: January 27, 2015

ENDORSEMENT

Introduction

[1] Casimir Capital Ltd. (the "Debtor") moves by way of appeal from or review of the decision of the Proposal Trustee at the July 28, 2014 first meeting of creditors (the "Meeting") permitting certain creditors to vote.

[2] At the Meeting, 93.7% of the creditors, with proofs of claim totaling $1,446,600.13 voted against Casimir's proposal (the "Proposal"). Only 6.3% of creditors, with proofs of claim totaling $97,247.63 voted in favour of the Proposal.

[3] The Debtor now moves pursuant to s. 135(5) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985. C. B-3 as amended ("BIA"), to set aside or annul the deemed assignment in bankruptcy; to set aside the Proofs of Claim of Royal Capital Management Corp. ("RoyCap"), Gowling Lafleur Henderson LLP ("Gowlings"), Adam Thomas ("Thomas") and Fidessa Canada Corp. ("Fidessa") (collectively the "Disputed Creditors") and the votes cast by the Disputed Creditors at the Meeting; and a declaration that the Meeting was ineffective or adjourned.

[4] For the reasons that follow, I dismiss the Debtor's motion. In my view, the Proposal Trustee was correct in permitting the Disputed Creditors to vote on the Proposal at the Meeting. Further, and even if the votes of the Disputed Creditors are set aside, 69.4% of the remaining creditors whose claims were not disputed voted against the Proposal such that it would not have passed in any event.

Background

[5] The following are my findings of fact from the material filed.

[6] The Debtor is an Ontario company and carried on the business as an intermediary or broker of various underwritings and placements. Up until January 31, 2014 when it resigned, it was a member and registered as a securities dealer with the Investment Industry Regulatory Organization of Canada ("IIROC"). It is wholly owned by Casimir Capital Group, LLC, a holding company based in New

York, which in turn is owned by Richard Sands ("Sands") who is a director of the Debtor.

[7] On February 11, 2014, the Debtor filed a Notice of Intention to Make a Proposal. Crowe Soberman Inc. was the Proposal Trustee. The Debtor filed the Proposal on March 11, 2014. As part of the Proposal proceedings, the Debtor's creditors filed proofs of claim with the Proposal Trustee. The creditors who filed proofs of claim included RoyCap ($650,000); Gowlings ($246,823.14), Thomas ($103,517.00) and Fidessa ($225,258.68).

[8] At the time of filing its Notice of Intention to make a proposal, the Debtor filed a statement of affairs, sworn by Sands, which listed the assets and liabilities, and included a listing all of the creditors of the Debtor and the amounts owing to them which totaled $3,926,161.05. The listing specifically included the amounts owing to RoyCap, Gowlings, Thomas and Fidessa. The assets listed consisted of cash on hand and accounts receivable and totaled $490,839.26. No amounts were listed for claims against the Disputed Creditors.

[9] On March 18, 2014, the Proposal Trustee sent Notice of the Proposal to all of the Debtor's creditors as listed by it along with a Notice of the First Meeting of Creditors on March 31, 2014, the Proposal Trustee's Report on the Proposal, the Debtor's Statement of Affairs, a Proof of Claim form, voting letter and general proxy.

[10] In deciding whether to allow or disallow a creditor's proof of claim as filed, the Proposal Trustee reviewed the documents accompanying the proof of claim and determined that:

a) The liabilities and the amounts claimed by the creditor had been listed in the statement of affairs sworn by Sands on behalf of the Debtor;

b) The liabilities and amounts claimed by the creditor had been disclosed to the Proposal Trustee by the Debtor at the time of filing the notice of intention to make a proposal;

c) The proof of claim had been completed in accordance with the provisions of the BIA; and

d) The creditor's proof of claim contained the proper supporting documentation that corroborated the amount claimed.

[11] The first meeting of creditors proceeded on March 31, 2014. Counsel for the Debtor tabled a letter containing proposed amendments to the Proposal along with two Notices of Dispute regarding the proofs of claim filed by RoyCap and Gowlings.

[12] The Debtor's Notice of Dispute with respect to the RoyCap claim for $650,000, which is the balance owing on a loan, outlined certain events which the Debtor claimed led to a loss of capital and business in excess of the amount of RoyCap's claim. Specifically the Debtor alleged that RoyCap conspired with Thomas (the Debtor's former CEO) to attempt to acquire the Debtor and gain IIROC approval for repayment of $800,000 to RoyCap; and that RoyCap made a demand for payment of its loan which was contrary to the provisions of the loan agreement. The Debtor claimed damages and asserted an equitable set-off in respect of RoyCap's claim.

[13] The Notice of Dispute with respect to Gowling's claim of $246,823.14, which is for legal services rendered, outlined certain events which the Debtor claimed led to a loss of capital and business in excess of the amount of Gowling's claim. The Debtor alleged that Gowlings ceased acting for it in the spring of 2013 and then represented Thomas and his interests in conflict to the Debtor; that Gowlings deliberately withheld invoices which distorted the Debtor's balance sheet with respect to certain capital requirements mandated by IIROC and permitted a payment to RoyCap which in turn impaired the Debtor's capital. As with RoyCap, the Debtor asserted that it had suffered substantial damages and was entitled to set off any amount found due to Gowlings. No evidence or documents were filed to support either of the claims.

[14] The letter from Debtor's counsel accompanying the two Notices of Dispute stated that if there was no release of directors in the final Proposal "the debtor disputes the claim of Adam Thomas for the reasons reflected in the disputes of the claims of RoyCap and Gowlings."

[15] Following the above noted claims review process, the Proposal Trustee admitted each of the Disputed Creditors' proofs of claim, as filed, and conducted itself through the Proposal proceeding as if the claims had been admitted.

[16] At the first meeting on March 31, 2014, the Debtor entered into discussions with RoyCap and Gowlings with respect to the potential settlement of claims and verbally agreed to provide a settlement proposal within 48 hours. The meeting was then adjourned by the creditors to permit settlement discussions to arrive at an acceptable proposal.

[17] Following the meeting, no settlement offer was forthcoming from the Debtor. Accordingly, on May 22, 2014, the Proposal Trustee sent notice to all creditors reconvening the First Meeting on June 2, 2014. On June 2nd, as a result of continuing discussions between RoyCap, Gowlings and the Debtor, the First Meeting was again adjourned by the creditors to July 11, 2014. On July 11, 2014, the First Meeting was again adjourned due to settlement discussions.

[18] On July 15, 2014, the Proposal Trustee advised the Debtor that a vote would be called at the next meeting of creditors and, based on the votes of the creditors that had been filed with it, the Proposal would be defeated resulting in a deemed bankruptcy pursuant to s. 57(a) of the BIA.

[19] On July 18, 2014, the Proposal Trustee advised the Debtor that the resumption of the first meeting of creditors would take place on July 28, 2014. A notice of the reconvened meeting for July 28, 2014 was sent to all known creditors on July 21, 2014.

[20] On July 24, 2014, counsel for the Debtor wrote to the Proposal Trustee and advised that the Debtor intended to commence proceedings to invalidate the claims of RoyCap, Gowlings and Thomas. No further details were provided but the letter did say that "a detailed analysis with supporting documents substantiating the claims is available … and the documents for your use to conduct an inquiry and investigation of the claims if you are so advised."

[21] In an email the following day, the Debtor's counsel confirmed that the Debtor requested that the Proposal Trustee investigate the circumstances giving rise to RoyCap's, Gowlings' and Thomas' claims. The email ended by stating: "accordingly it would not be appropriate to consider any meeting or administration until the Casimir claim is determined and the disputed creditor claims resolved."

[22] On July 28, 2014, prior to the Meeting, the Proposal Trustee pointed out to counsel for the Debtor that based on the votes received, even if the claims of RoyCap, Gowlings and Thomas were removed, the Proposal would not pass. In response, counsel indicated that the Debtor would also look to invalidate the claims of Fidessa and two other individuals.

[23] At the Meeting, counsel for the Debtor requested the Proposal Trustee to mark the claims of RoyCap, Gowlings and Thomas together with Fidessa and the two other individuals raised that morning as "objected to" and suggested an adjournment in order to allow for the opportunity to seek direction from the court. The request was denied by the creditors in attendance and, following a motion to vote on the Proposal, 93.7% of the creditors with proofs of claim totaling $1,446,600.13 voted against the Proposal. Only 6.3% of creditors with proofs of claim totaling $97,247.63 voted in favour of the Proposal.

[24] The proofs of claim of the Disputed Creditors totaled $1,225,598.82. If those proofs of claim are expunged, creditors with proofs of claim totaling $318,248.94 remain. Of these remaining creditors, 69.4% or $221,001.31 of claims voted against the Proposal.

Position of the Parties

[25] The Debtor submits that in light of its claims for damages against the Disputed Creditors, the Proposal Trustee erred in allowing the Disputed Creditors to vote at the Meeting. The Debtor submits its claims are for amounts that exceed the Disputed Creditors' claims and accordingly, operate to expunge the Disputed Creditors' claims pursuant to equitable set-off. Having marked the proofs of claim "objected to", the Proposal Trustee was obliged to have considered the Debtor's claims which it failed to do.

[26] As part of its submissions to this court, the Debtor has set out the basis of its claims in some detail. It concedes that given the nature of the claims and the credibility issues that the claims raise, that such claims cannot be resolved on this motion. It submits that a trial of an issue should be directed to determine the validity of its claims and, in the event they are successful, whether equitable set-off is available to reduce or expunge the Disputed Claims in their entirety. In the interim, the vote on its Proposal should be held in abeyance.

Discussion

[27] Section 66(1) of the BIA provides that all provisions of the BIA (except Division II which is not applicable) apply to proposals.

[28] Section 108 of the BIA provides as follows:

> 108 (1) The chair of any meeting of creditors has power to admit or reject a proof of claim for the purpose of voting but his decision is subject to appeal to the court.
>
> (2) Notwithstanding anything in this Act, the chair may, for the purpose of voting, accept any letter or printed matter transmitted by any form or mode of telecommunication as proof of the claim of a creditor.
>
> (3) Where the chair is in doubt as to whether a proof of claim should be admitted or rejected, he shall mark the proof as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained.

[29] Section 135(5) of the BIA provides: "The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of a debtor if the trustee declines to interfere in the matter."

[30] A proposal under the BIA is a voluntary procedure. It is initiated by an insolvent person or entity. It is clear from the provisions in the BIA dealing with proposals and in particular the time limits provided that the procedure is to be carried out in a timely and cost effective manner.

[31] While the cases are somewhat divided on whether a proceeding under either s. 108 or s. 135(5) of the BIA is an appeal on the record or *de novo*, in my view, in the circumstances of this case where the challenge relates to a proposal trustee's decision to allow a proof of claim at the first meeting of creditors for the purposes of voting, the review should be on the record and not *de novo*. See: *Re Galaxy Sports Inc.*, 2004 BCCA 284 (BCCA); *Nalcor Energy v. Grant Thornton Poirier Ltd.*, [2015] N.B.J. No. 26 at paras. 19 to 21.

[32] It makes no sense, particularly in this case where a trial of the issue is required, to proceed with a hearing *de novo*. Such a procedure will only delay the bankruptcy for an indefinite period while exhausting the limited funds available to the Debtor in expensive legal proceedings. Nor is it appropriate in my view, to

allow the Debtor a second kick at the can, so to speak, by placing evidence before the court that was not before the Proposal Trustee at the time. See: *Re Canadian Triton International Ltd*. (1997), 49 C.B.R. (3d) 192 (Ont. S.C.) at para. 5.

[33] The standard of review in respect of an appeal of the chair's decision to admit or reject a proof of claim for voting under s. 108 of the BIA or the trustee's decision to allow or disallow a proof of claim under s. 135 of the BIA is correctness: *Re Galaxy Sports*.

[34] In my view, based on the facts of this case, the Debtor's appeal is more appropriately pursuant to s. 108. The issue involves the question of whether the Disputed Creditors should have been permitted to vote at the Meeting which is the subject matter of s. 108. By contrast, s. 135(5) deals with expunging or reducing proofs of claim where the trustee declines to interfere.

[35] Further, and notwithstanding that the Proposal Trustee marked the Disputed Creditors' proofs of claim as "objected to", I consider that the appeal is pursuant to s. 108(1) of the BIA and not s. 108(3). It is clear from the record and I find that the Proposal Trustee had made the decision to admit the Disputed Creditors proofs of claim for the purposes of voting prior to the Meeting. The Debtor provided no new information concerning its claims against the Disputed Creditors at the Meeting. The Proposal Trustee only marked the disputed proofs of claim "objected to" at the request of the Debtor's representative and not because he was in any doubt about them.

[36] Based on the information before the Proposal Trustee leading up to and at the Meeting on July 28 2014, I am satisfied that the Proposal Trustee, as the chair of the Meeting, was correct in allowing the Disputed Creditors to vote.

[37] The Debtor, who was clearly insolvent, voluntarily initiated the proposal proceeding. As part of that proceeding, the Debtor filed a statement of affairs which listed the Debtor's creditors and included the Disputed Creditor's claims without any qualification or listing of its alleged claims against them. In such circumstances, the steps taken by the Proposal Trustee in reviewing and validating the proofs of claims filed, including the Disputed Creditors, for the purpose of voting at the first meeting were more than sufficient.

[38] Further, the Debtor only raised its claims against the Disputed Creditors at the first meeting of creditors on March 31, 2014 and thereafter provided very

general information, no back up documentation and took no steps to pursue the claims in the courts although it had more than four months to do so. The claims are contingent and unliquidated. There was simply no way, based on the information and more specifically the lack of information before it, that the Proposal Trustee could have evaluated the claims in order to disallow the Disputed Creditors' proofs of claim and their vote.

[39] If and when a bankruptcy occurs, the Proposal Trustee, then the Trustee in Bankruptcy will have sufficient time to review the bona fides of any claim by the bankrupt in considering whether to allow a Disputed Creditor's claim in the bankruptcy.

[40] In my view, the Debtor or its principal attempted to use the alleged claims to delay the proposal process in order to arrive at a settlement with the Disputed Creditors. It was only when that didn't happen that it has embarked on this motion to annul the Disputed Creditors votes and set aside the Meeting, all to avoid bankruptcy.

[41] The Trustee submits that the Debtor's motion to have its deemed bankruptcy set aside fails in any event given that even if the Disputed Creditors' claims are disallowed and their votes are disregarded, the result of the votes of the remaining creditors establishes the Proposal would not have passed in any event.

[42] The Debtor disagrees. It submits that if the Disputed Creditors' claims are disallowed, a new meeting should be called to consider the acceptance of its Proposal or amended Proposal. It submits that when it went to the Meeting on July 28, 2014, it was under the understanding a settlement had been reached with the creditors. It was blindsided when its settlement was rejected at the meeting and the vote proceeded with. It submits that another meeting, properly constituted, would permit it to place a revised Proposal before all creditors.

[43] I reject the Debtor's submissions that there was any settlement reached prior to the meeting or that it was blindsided at the meeting. There is no evidence in the record of such events. The record does indicate that beginning with the first meeting on March 31, 2014, the Debtors and the creditors were talking settlement. The meeting kept getting adjourned because of settlement discussions. But there is no indication a settlement or even a tentative settlement was ever reached. Any settlement would have to come in the form of an amended Proposal. There is no

indication the Debtor ever filed an amended Proposal. Although it lodged $300,000 with the Proposal Trustee in respect of a revised Proposal, on July 25 2014, three days before the Meeting, the Debtor requested the Proposal Trustee return the deposited funds to it. That step, in my view, is more indicative of no settlement being reached. In my view, the Debtor simply wants the opportunity to put an amended Proposal before the creditors. The Debtor had that opportunity up until the Meeting. It has long since passed.

[44] I agree with the Trustee that the Debtor's motion to have its deemed assignment set aside fails in any event because even if the Disputed Creditors votes are set aside, the votes of the remaining creditors still defeat the Proposal.

Conclusion

[45] For the above reasons, therefore, the Debtor's motion is dismissed.

[46] The Proposal Trustee and the Disputed Creditors requested costs. The Debtor has very little funds. To order costs against it would deplete the few assets available to the creditors. The Proposal Trustee's costs should be recovered in the bankruptcy. All parties who opposed submitted that costs should be awarded against Casimir Capital Group, LLC, the Debtor's parent. While I have no doubt that the parent and Sands were the directing minds behind the Debtor's motion, neither is a party to the proceedings. Accordingly, no order as to costs.

L. A. Pattillo J.

Released: April 24, 2015

7

2010 ONSC 4099
Ontario Superior Court of Justice

Charlestown Residential School, Re

2010 CarswellOnt 5343, 2010 ONSC 4099, [2010] O.J. No. 3140, 191 A.C.W.S. (3d) 19, 70 C.B.R. (5th) 13

In Bankruptcy and Insolvency

In the Matter of the Bankruptcy of Charlestown Residential School of the Town of Caledon, In the Province of Ontario

Reg. Janet E. Mills

Heard: March 26, 2010
Judgment: July 21, 2010
Docket: Estate No. 32-1187570

Counsel: J.R. Smith for Creditor, Wayne Dunster
R.J. van Kessel for Trustee

Subject: Insolvency; Estates and Trusts

MOTION by trustee in bankruptcy for determination of whether creditor was entitled to hearing *de novo* when appealing from notice of disallowance.

***Reg. Janet E. Mills*:**

1 This motion is in respect of a Notice of Disallowance issued by the Trustee in response to a Proof of Claim filed by the Creditor. The preliminary decision to be made is whether the hearing is to be a true appeal of the Disallowance or if it is to be a hearing *de novo* of the merits of the claim such that new or additional evidence may be adduced in support of the claim. For the reasons set out below, I have concluded that appeals of this nature are generally to proceed as true appeals based on the materials relied upon by the Trustee in the decision to disallow a claim. However, in this particular case, the appeal is to be a hearing *de novo* as to proceed otherwise would result in an injustice to the creditor.

2 On April 3, 2009 Charlestown Residential School ("Charlestown") made an Assignment in Bankruptcy and listed Mr. Dunster as an unsecured creditor with an estimated claim of $210,000. A Proof of Claim was filed on June 29, 2009 by counsel on behalf of Mr. Dunster, valuing the claim at $397,130.24. Attached to the claim was Schedule A which purported to be a Statement of Accounts, a Canada Life "internal use only" chart of Life Expectancy, a Memorandum of Agreement dated June 30, 2004 (the "Agreement") and a Promissory Note issued the same day by Charlestown to support the Agreement.

3 Mr. Dunster was previously employed by Charlestown for many years as its Executive Director. It was agreed between them that Mr. Dunster would retire effective June 30, 2004 and that he would receive an annual allowance on a gratuitous basis in accordance with a prescribed payment schedule. There was no stated termination date but the Agreement did provide the payments would end immediately on the death of Mr. Dunster or upon his violation of certain covenants contained in the Agreement. The Promissory Note was to stand as collateral security to the undertaking to pay the allowance as contained in the Agreement.

4 The payments were made as contemplated until Charlestown's assignment. In valuing the claim for bankruptcy purposes, Mr. Dunster relied upon the Canada Life chart of Life Expectancy to calculate the years remaining on the Agreement. The chart specifically states that it is for Canada Life internal use only and that is was effective as at June 15, 2001. There was no medical evidence offered to support the current health of Mr. Dunster or whether the chart continued to be relevant for calculating life expectancy in 2009.

5 After reviewing the Proof of Claim, the Trustee concluded there were serious issues related to the Claim and contacted counsel to discuss her concerns. The Trustee invited counsel to provide additional information but none was forthcoming.

6 On September 14, 2009 a Notice of Disallowance was issued by the Trustee disallowing the Claim in whole pursuant to subsection 135(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "*BIA*"). The Disallowance was founded on the basis that the payment of the allowance to Mr. Dunster was characterized in the Agreement as "gratuitous" and therefore was not a debt enforceable at law. Further, the absence of a termination date for the payment obligation made it vague or uncertain and the Promissory Note did not stand as an independent debt instrument. Lastly, the Trustee relied upon the *Employment Standards Act* and common law for any entitlement Mr. Dunster may have had to reasonable notice for the termination of his employment. For all these reasons, the Claim was disallowed.

7 An appeal of the Notice of Disallowance was issued within the statutory 30 day limitation period as provided in subsection 135(4) of the *BIA*. Following the commencement of the appeal, the Trustee delivered an Amended Notice of Disallowance to include additional bases upon which her decision was founded, specifically that the Canada Life chart was not appropriate documentation to value the Claim and that the amount of the Claim was not calculated on a current value basis with the appropriate discount for the acceleration of the payments.

8 In her affidavit, the Trustee also states that she reviewed the corporate books and records in her assessment process and as a result of the information contained therein, she concluded the Claim ought to be disallowed. As the information related to the personnel records of Mr. Dunster, the Trustee refused to divulge the particulars of the information without the consent of Mr. Dunster or a court order to ensure his privacy was protected. To the date of the hearing, the information had not been disclosed to Mr. Dunster and it was not made available to the court, although it had apparently influenced the Trustee in her decision to disallow the Claim at first instance and in the amended disallowance.

9 The Creditor has attempted to address the concerns expressed by the Trustee in the Notice of Disallowance by submitting additional evidence to support the Proof of Claim. Counsel for the Trustee objects, maintaining the appeal should be in the form of a true appeal and, in the absence of a motion to adduce fresh evidence, based solely on the evidence presented to the Trustee. Counsel for the creditor submits the appeal is a hearing *de novo* where the creditor may introduce evidence in addition to that originally put before the Trustee. There are competing lines of case law in the country on this issue.

10 The decision of the Registrar in *Eskasoni Fisheries Ltd., Re*, 2000 CarswellNS 116 (N.S. S.C.), held that where a creditor appeals to the court from a Trustee disallowance, the appeal is to proceed by way of trial *de novo*. The Registrar found that the court is not limited to only the information that was before the Trustee, but rather was entitled to accept and consider all relevant information in assessing the admissibility of the claim. If there is then a further appeal taken from the decision of the Registrar or Judge, the appeal is a true appeal and ought to be limited to the court record. The distinction was made on the basis that the Trustee is acting as an administrator of the bankruptcy estate when determining whether to admit or disallow proven claims. There is no hearing and there is no formal record created. To ensure justice is served, the appeal to the Registrar must proceed as a hearing *de novo.*

11 The countervailing position is taken by the British Columbia Court of Appeal in *Galaxy Sports Inc., Re*, 2004 CarswellBC 1112 (B.C. C.A.) where it was held that an appeal under s.135(4) of the *BIA* is not intended to be a trial *de novo* but a true appeal. The court specifically declined to follow *Eskasoni Fisheries Ltd.* on the basis that BC law makes it clear that unless the statute that provides for the appeal also states that it is to be in the form of a trial *de novo*, the appeal will be an ordinary appeal.

12 The Court of Appeal in *Galaxy* was prepared to grant considerable deference to the experience and expertise of the Trustee in restructurings and insolvency. The Court noted:

> If "fresh evidence" — i.e., evidence not before the trustee or chair at the time of his or her decision — were to be adduced in Supreme Court on appeal *as a matter of course*, it seems to me that much would be lost in the way of efficiency in the operation of the bankruptcy scheme generally. Creditors who neglected to file proofs of claim in compliance with the requirements of s. 124 would suffer no practical consequences if, in Farley J.'s phrase, they could expect to "cooper up"

> their proofs at a later date in court; and the business now conducted at creditors' meetings by trustees (who are generally supervised by inspectors under the *BIA*) would be largely co-opted to courts of law, with all the attendant expense, delay and formality.

13 The Alberta Court of Queen's Bench appears to have attempted to align the *Eskasoni* and *Galaxy* decisions in *San Juan Resources Inc., Re*, 2009 CarswellAlta 98 (Alta. Q.B.), finding that a hearing *de novo* ought not be as of right, but rather restricted only to those cases where an injustice might result if the creditor is not permitted to adduce new or fresh evidence.

14 This approach is compelling in so far as it recognizes the experience and expertise of the Trustee who, by the provisions of s. 135 of the *BIA*, is required to carefully examine every proof of claim and act equitably in determining whether to allow or disallow a claim. Where additional information is needed, the Trustee is entitled to request further documentary support for the Proof of Claim to assist in making a final determination and, in accordance with s. 135(4), the decision of the Trustee is to be final and conclusive unless appealed within thirty days of the notice of disallowance having been served.

15 It is also reasonable to place a positive onus upon a creditor to properly prove his or her claim in bankruptcy at the first instance.

16 By granting a degree of deference to the decision of the Trustee, this appeal process promotes an efficient and cost effective means by which to administer a bankruptcy or insolvency estate while ensuring that an aggrieved creditor is afforded proper justice. An appeal may proceed as a *de novo* hearing in circumstances where an injustice would be the result if restricted to just the record.

17 Correctness is the appropriate standard of review for the disallowance of a proof of claim; reasonableness is the standard to be applied to factual decisions made by the Trustee exercising his or her discretion, such as the valuation of a contingent or unliquidated claims (*Galaxy Sports Inc., Re*, *supra*.).

18 Where an error has been committed by the Trustee or the interests of justice would only be served with an appeal *de novo*, it is open to the court to direct the appeal proceed accordingly failing which, the appeal of a Notice of Disallowance ought to proceed based on the record before the Trustee.

19 In the case before me, the Trustee appears to have reached out to the creditor's counsel by telephone for additional information but the request was not reduced to writing so it is unclear as to the nature or extent of the information sought. Further, the Trustee reviewed materials not otherwise available to the creditor to assist in formulating her decision to disallow the claim. This alone amounts to an injustice if the appeal was to proceed based solely on the record of the documents submitted by the creditor.

20 In addition, the Trustee relies upon an Amended Notice of Disallowance delivered without leave of the court nor with the consent of the creditor as is required for the amendment of pleadings (*Eskasoni Fisheries Ltd., Re*, *supra*.) subsequent to the launching of the appeal from the original Notice of Disallowance. One must conclude that the additional grounds for disallowance were only considered by the Trustee after the appeal was commenced and the Amended Notice of Disallowance was an effort by the Trustee to "cooper up" the original notice. It would be an injustice to allow the Amended Notice of Disallowance to stand and to deny the creditor the opportunity in a hearing *de novo* to fully respond with all relevant evidence to the grounds for disallowance raised by the Trustee.

21 As such, in the ordinary course, appeals of a Notice of Disallowance issued by a Trustee pursuant to s. 135(4) of the *BIA* are to proceed as true appeals unless to do so would result in an injustice to the rights of the aggrieved creditor. The appeal of the Notice of Disallowance issued in this Estate shall proceed by way of a hearing *de novo* before a Registrar in Bankruptcy as, based on the evidence before me, to proceed otherwise would result in an injustice to Mr. Dunster. I am not seized of this matter.

Motion granted.

End of Document

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Paul Housen *Appellant*

v.

Rural Municipality of Shellbrook No. 493 *Respondent*

INDEXED AS: HOUSEN *v.* NIKOLAISEN

Neutral citation: 2002 SCC 33.

File No.: 27826.

2001: October 2; 2002: March 28.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Torts — Motor vehicles — Highways — Negligence — Liability of rural municipality for failing to post warning signs on local access road — Passenger sustaining injuries in motor vehicle accident on rural road — Trial judge apportioning part of liability to rural municipality — Whether Court of Appeal properly overturning trial judge's finding of negligence — The Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.

Municipal law — Negligence — Liability of rural municipality for failing to post warning signs on local access road — Passenger sustaining injuries in motor vehicle accident on rural road — Trial judge apportioning part of liability to rural municipality — Whether Court of Appeal properly overturning trial judge's finding of negligence — The Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.

Appeals — Courts — Standard of appellate review — Whether Court of Appeal properly overturning trial judge's finding of negligence — Standard of review for questions of mixed fact and law.

The appellant was a passenger in a vehicle operated by N on a rural road in the respondent municipality. N

Paul Housen *Appelant*

c.

Municipalité rurale de Shellbrook nº 493 *Intimée*

RÉPERTORIÉ : HOUSEN *c.* NIKOLAISEN

Référence neutre : 2002 CSC 33.

Nº du greffe : 27826.

2001 : 2 octobre; 2002 : 28 mars.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

Délits civils — Véhicules automobiles — Routes — Négligence — Responsabilité d'une municipalité rurale qui omet d'installer des panneaux d'avertissement le long d'une voie d'accès locale — Blessures subies par un passager dans un accident automobile sur une route rurale — Responsabilité imputée en partie à la municipalité rurale par la juge de première instance — La Cour d'appel a-t-elle eu raison d'infirmer la décision de la juge de première instance concluant à la négligence de la municipalité rurale? — The Rural Municipality Act, 1989, S.S. 1989-90, ch. R-26.1, art. 192.

Droit municipal — Négligence — Responsabilité d'une municipalité rurale qui omet d'installer des panneaux d'avertissement le long d'une voie d'accès locale — Blessures subies par un passager dans un accident automobile sur une route rurale — Responsabilité imputée en partie à la municipalité rurale par la juge de première instance — La Cour d'appel a-t-elle eu raison d'infirmer la décision de la juge de première instance concluant à la négligence de la municipalité rurale? — The Rural Municipality Act, 1989, S.S. 1989-90, ch. R-26.1, art. 192.

Appels — Tribunaux judiciaires — Norme de contrôle applicable en appel — La Cour d'appel a-t-elle eu raison d'infirmer la décision de la juge de première instance concluant à la négligence de la municipalité rurale? — Norme de contrôle applicable à l'égard des questions mixtes de fait et de droit.

L'appelant était passager dans le véhicule conduit par N sur une route rurale située sur le territoire de la

failed to negotiate a sharp curve on the road and lost control of his vehicle. The appellant was rendered a quadriplegic as a result of the injuries he sustained in the accident. Damages were agreed upon prior to trial in the amount of $2.5 million, but at issue were the respective liabilities, if any, of the municipality, N and the appellant. On the day before the accident, N had attended a party at the T residence not far from the scene of the accident. He continued drinking through the night at another party where he met up with the appellant. The two men drove back to the T residence in the morning where N continued drinking until a couple of hours before he and the appellant drove off in N's truck. N was unfamiliar with the road, but had travelled on it three times in the 24 hours preceding the accident, on his way to and from the T residence. Visibility approaching the area of the accident was limited due to the radius of the curve and the uncleared brush growing up to the edge of the road. A light rain was falling as N turned onto the road from the T property. The truck fishtailed a few times before approaching the sharp curve where the accident occurred. Expert testimony revealed that N was travelling at a speed of between 53 and 65 km/hr when the vehicle entered the curved portion of the road, slightly above the speed at which the curve could be safely negotiated under the conditions prevalent at the time of the accident.

The road was maintained by the municipality and was categorized as a non-designated local access road. On such non-designated roads, the municipality makes the decision to post signs if it becomes aware of a hazard, or if there are several accidents at one spot. The municipality had not posted signs on any portion of the road. Between 1978 and 1987, three other accidents were reported in the area to the east of the site of the appellant's accident. The trial judge held that the appellant was 15 percent contributorily negligent in failing to take reasonable precautions for his own safety in accepting a ride from N, and apportioned the remaining joint and several liability 50 percent to N and 35 percent to the municipality. The Court of Appeal overturned the trial judge's finding that the municipality was negligent.

Held (Gonthier, Bastarache, Binnie and LeBel JJ. dissenting): The appeal should be allowed and the judgment of the trial judge restored.

municipalité intimée. N a été incapable de prendre un virage serré et il a perdu la maîtrise de son véhicule. L'appelant est devenu quadriplégique à la suite des blessures subies dans l'accident. Les parties ont convenu avant le procès du montant des dommages-intérêts, qui ont été fixés à 2,5 millions de dollars. La question en litige était celle de savoir si la municipalité, N et l'appelant étaient responsables et, dans l'affirmative, dans quelles proportions. Le jour qui a précédé l'accident, N avait assisté à une fête à la résidence des T, non loin de la scène de l'accident. Durant la nuit, il a continué de boire à une autre fête, où il a rencontré l'appelant. Le matin, les deux hommes sont retournés en automobile à la résidence des T, où N a continué de boire, cessant de le faire quelques heures avant de prendre la route dans sa camionnette en compagnie de l'appelant. N n'était pas familier avec le chemin en question, mais il l'avait emprunté à trois reprises au cours des 24 heures qui avaient précédé l'accident pour aller et venir de la résidence des T. À l'approche de l'endroit de l'accident, la distance de visibilité était réduite en raison du rayon de courbure du virage et de la présence de broussailles poussant jusqu'au bord du chemin Une faible pluie tombait lorsque N s'est engagé sur le chemin en quittant la résidence des T. L'arrière de la camionnette a zigzagué à plusieurs reprises avant que le véhicule n'arrive aux abords du virage serré où l'accident est survenu. Selon le témoignage d'un expert, N roulait à une vitesse se situant entre 53 et 65 km/h lorsque le véhicule s'est engagé dans la courbe, soit une vitesse légèrement supérieure à celle à laquelle le virage pouvait être pris en sécurité eu égard aux conditions qui existaient au moment de l'accident.

Le chemin, qui était entretenu par la municipalité, appartenait à la catégorie des voies d'accès locales non désignées. La municipalité installe des panneaux de signalisation sur ces chemins si elle constate l'existence d'un danger ou si plusieurs accidents se produisent au même endroit. Elle n'avait installé aucune signalisation le long de cette portion du chemin. On a signalé trois autres accidents survenus de 1978 à 1987 à l'est du lieu de l'accident dont a été victime l'appelant. La juge de première instance a estimé que l'appelant était responsable de négligence concourante dans une proportion de 15 p. 100, du fait qu'il avait omis de prendre des précautions raisonnables pour assurer sa propre sécurité en acceptant de monter à bord du véhicule de N, et elle a réparti le reste de la responsabilité solidairement entre N (50 p. 100) et la municipalité (35 p. 100). La Cour d'appel a infirmé la conclusion de la juge de première instance selon laquelle la municipalité avait été négligente.

Arrêt (les juges Gonthier, Bastarache, Binnie et LeBel sont dissidents) : Le pourvoi est accueilli et la décision de la juge de première instance est rétablie.

Per McLachlin C.J. and L'Heureux-Dubé, Iacobucci, Major and Arbour JJ.: Since an appeal is not a re-trial of a case, consideration must be given to the standard of review applicable to questions that arise on appeal. The standard of review on pure questions of law is one of correctness, and an appellate court is thus free to replace the opinion of the trial judge with its own. Appellate courts require a broad scope of review with respect to matters of law because their primary role is to delineate and refine legal rules and ensure their universal application.

The standard of review for findings of fact is such that they cannot be reversed unless the trial judge has made a "palpable and overriding error". A palpable error is one that is plainly seen. The reasons for deferring to a trial judge's findings of fact can be grouped into three basic principles. First, given the scarcity of judicial resources, setting limits on the scope of judicial review in turn limits the number, length and cost of appeals. Secondly, the principle of deference promotes the autonomy and integrity of the trial proceedings. Finally, this principle recognizes the expertise of trial judges and their advantageous position to make factual findings, owing to their extensive exposure to the evidence and the benefit of hearing the testimony *viva voce*. The same degree of deference must be paid to inferences of fact, since many of the reasons for showing deference to the factual findings of the trial judge apply equally to all factual conclusions. The standard of review for inferences of fact is not to verify that the inference can reasonably be supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts, a stricter standard. Making a factual conclusion of any kind is inextricably linked with assigning weight to evidence, and thus attracts a deferential standard of review. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion.

Le juge en chef McLachlin et les juges L'Heureux-Dubé, Iacobucci, Major et Arbour : Étant donné que l'appel ne constitue pas un nouveau procès, il faut se demander quelle est la norme de contrôle applicable en appel à l'égard des diverses questions que soulève le pourvoi. La norme de contrôle applicable aux pures questions de droit est celle de la décision correcte et, en conséquence, il est loisible aux cours d'appel de substituer leur opinion à celle des juges de première instance. Les cours d'appel ont besoin d'un large pouvoir de contrôle à l'égard des questions de droit pour être en mesure de s'acquitter de leur rôle premier, qui consiste à préciser et à raffiner les règles de droit et à veiller à leur application universelle.

Suivant la norme de contrôle applicable aux conclusions de fait, ces conclusions ne peuvent être infirmées que s'il est établi que le juge de première instance a commis une « erreur manifeste et dominante ». Une erreur manifeste est une erreur qui est évidente. Les diverses raisons justifiant la retenue à l'égard des conclusions de fait du juge de première instance peuvent être regroupées sous trois principes de base. Premièrement, vu la rareté des ressources dont disposent les tribunaux, le fait de limiter la portée du contrôle judiciaire a pour effet de réduire le nombre, la durée et le coût des appels. Deuxièmement, le respect du principe de la retenue envers les conclusions favorise l'autonomie et l'intégrité du procès. Enfin, ce principe permet de reconnaître l'expertise du juge de première instance et la position avantageuse dans laquelle il se trouve pour tirer des conclusions de fait, étant donné qu'il a l'occasion d'examiner la preuve en profondeur et d'entendre les témoignages de vive voix. Il faut faire preuve du même degré de retenue envers les inférences de fait, car nombre de raisons justifiant de faire preuve de retenue à l'égard des constatations de fait du juge de première instance valent autant pour toutes ses conclusions factuelles. La norme de contrôle ne consiste pas à vérifier si l'inférence peut être raisonnablement étayée par les conclusions de fait du juge de première instance, mais plutôt si ce dernier a commis une erreur manifeste et dominante en tirant une conclusion factuelle sur la base de faits admis, ce qui suppose l'application d'une norme plus stricte. Une conclusion factuelle — quelle que soit sa nature — exige nécessairement qu'on attribue un certain poids à un élément de preuve et, de ce fait, commande l'application d'une norme de contrôle empreinte de retenue. Si aucune erreur manifeste et dominante n'est décelée en ce qui concerne les faits sur lesquels repose l'inférence du juge de première instance, ce n'est que lorsque le processus inférentiel lui-même est manifestement erroné que la cour d'appel peut modifier la conclusion factuelle.

Questions of mixed fact and law involve the application of a legal standard to a set of facts. Where the question of mixed fact and law at issue is a finding of negligence, it should be deferred to by appellate courts, in the absence of a legal or palpable and overriding error. Requiring a standard of "palpable and overriding error" for findings of negligence made by either a trial judge or a jury reinforces the proper relationship between the appellate and trial court levels and accords with the established standard of review applicable to a finding of negligence by a jury. Where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error. A determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law, and is thus subject to a standard of palpable and overriding error, unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law, subject to a standard of correctness.

Here, the municipality's standard of care was to maintain the road in such a reasonable state of repair that those requiring to use it could, exercising ordinary care, travel upon it with safety. The trial judge applied the correct test in determining that the municipality did not meet this standard of care, and her decision should not be overturned absent palpable and overriding error. The trial judge kept the conduct of the ordinary motorist in mind because she stated the correct test at the outset, and discussed implicitly and explicitly the conduct of a reasonable motorist approaching the curve. Further, her apportionment of negligence indicates that she assessed N's conduct against the standard of the ordinary driver as does her use of the term "hidden hazard" and her consideration of the speed at which motorists should have approached the curve.

The Court of Appeal's finding of a palpable and overriding error by the trial judge was based on the erroneous presumption that she accepted 80km/h as the speed at which an ordinary motorist would approach the curve, when in fact she found that a motorist exercising

Les questions mixtes de fait et de droit supposent l'application d'une norme juridique à un ensemble de faits. Lorsque la question mixte de fait et de droit en litige est une conclusion de négligence, il y a lieu de faire preuve de retenue à l'égard de cette conclusion en l'absence d'erreur de droit ou d'erreur manifeste et dominante. Le fait d'exiger l'application de la norme de l'« erreur manifeste et dominante » aux fins de contrôle d'une conclusion de négligence tirée par un juge ou un jury consolide les rapports qui doivent exister entre les juridictions d'appel et celles de première instance et respecte la norme de contrôle bien établie qui s'applique aux conclusions de négligence tirées par les jurys. Si la question litigieuse en appel soulève l'interprétation de l'ensemble de la preuve par le juge de première instance, cette interprétation ne doit pas être infirmée en l'absence d'erreur manifeste et dominante. La question de savoir si le défendeur a respecté la norme de diligence suppose l'application d'une norme juridique à un ensemble de faits, ce qui en fait une question mixte de fait et de droit. Cette question est alors assujettie à la norme de l'erreur manifeste et dominante, à moins que le juge de première instance n'ait clairement commis une erreur de principe en déterminant la norme applicable ou en appliquant cette norme, auquel cas l'erreur peut constituer une erreur de droit, qui est assujettie à la norme de la décision correcte.

En l'espèce, la norme de diligence à laquelle devait se conformer la municipalité consistait à tenir le chemin dans un état raisonnable d'entretien, de façon que ceux qui devaient l'emprunter puissent, en prenant des précautions normales, y circuler en sécurité. La juge de première instance a appliqué le bon critère juridique en concluant que la municipalité n'avait pas respecté cette norme et sa décision ne devrait pas être infirmée en l'absence d'erreur manifeste et dominante. La juge de première instance a eu à l'esprit la conduite de l'automobiliste moyen puisqu'elle a commencé son examen de la norme de diligence en formulant dès le départ le critère approprié, puis elle s'est interrogée, tant explicitement qu'implicitement, sur la façon dont conduirait l'automobiliste raisonnable en s'approchant du virage. De plus, le fait qu'elle a imputé une partie de la responsabilité à N indique qu'elle a évalué sa conduite au regard du critère du conducteur moyen, tout comme l'indique le fait qu'elle a utilisé l'expression « danger caché » et qu'elle s'est demandé à quelle vitesse les automobilistes auraient dû approcher du virage.

La conclusion de la Cour d'appel portant que la juge de première instance avait commis une erreur manifeste et dominante reposait sur la présomption erronée selon laquelle la juge aurait accepté que l'automobiliste moyen approcherait du virage à 80 km/h, alors que dans les faits

ordinary care could approach the curve at greater than the speed at which it would be safe to negotiate it. This finding was based on the trial judge's reasonable and practical assessment of the evidence as a whole, and is far from reaching the level of palpable and overriding error.

The trial judge did not err in finding that the municipality knew or ought to have known of the disrepair of the road. Because the hazard in this case was a permanent feature of the road, it was open to the trial judge to draw the inference that a prudent municipal councillor ought to be aware of it. Once this inference has been drawn, then unless the municipality can rebut the inference by showing that it took reasonable steps to prevent such a hazard from continuing, the inference will be left undisturbed. Prior accidents on the road do not provide a direct basis for finding that the municipality had knowledge of the particular hazard, but this factor, together with knowledge of the type of drivers using this road, should have caused the municipality to investigate the road which would have resulted in actual knowledge. To require the plaintiff to provide concrete proof of the municipality's knowledge of the state of disrepair of its roads is to set an impossibly high burden on the plaintiff. Such information was within the particular sphere of knowledge of the municipality, and it was reasonable for the trial judge to draw an inference of knowledge from her finding that there was an ongoing state of disrepair.

The trial judge's conclusion on the cause of the accident was a finding of fact subject to the palpable and overriding error standard of review. The abstract nature of the inquiry as to whether N would have seen a sign had one been posted before the curve supports deference to the factual findings of the trial judge. The trial judge's factual findings on causation were reasonable and thus should not have been interfered with by the Court of Appeal.

Per Gonthier, Bastarache, Binnie and LeBel JJ. (dissenting): A trial judge's findings of fact will not be overturned absent palpable and overriding error principally in recognition that only the trial judge observes witnesses and hears testimony first hand and is therefore better able to choose between competing versions of events. The process of fact-finding involves

elle a estimé qu'il était possible qu'un automobiliste prenant des précautions normales s'approche du virage à une vitesse supérieure à la vitesse sécuritaire pour effectuer la manœuvre. Loin de constituer une erreur manifeste et dominante, cette conclusion découlait d'une évaluation raisonnable et réaliste de l'ensemble de la preuve par la juge de première instance.

La juge de première instance n'a pas commis d'erreur en concluant que la municipalité connaissait ou aurait dû connaître le mauvais état du chemin. Étant donné que, en l'espèce, le danger était une caractéristique permanente du chemin, il était loisible à la juge de première instance d'inférer que le conseiller municipal prudent aurait dû être au fait du danger. Dès l'instant où une telle inférence est tirée, elle demeure inchangée à moins que la municipalité ne puisse la réfuter en démontrant qu'elle a pris des mesures raisonnables pour faire cesser le danger. Les accidents survenus antérieurement sur le chemin ne constituent pas une preuve directe permettant de conclure que la municipalité connaissait l'existence du danger particulier en cause, mais ce facteur, conjugué à la connaissance du type de conducteurs utilisant le chemin, aurait dû inciter la municipalité à faire enquête à l'égard du chemin en question, ce qui lui aurait permis de prendre connaissance concrètement de l'existence du danger. Exiger du demandeur qu'il apporte la preuve concrète de la connaissance par la municipalité du mauvais état d'entretien de ses chemins revient à imposer à ce dernier un fardeau inacceptablement lourd. Il s'agit d'information relevant du domaine de connaissance de la municipalité et, selon nous, il était raisonnable que la juge de première instance infère de sa conclusion relative au mauvais état d'entretien persistant du chemin que la municipalité possédait la connaissance requise.

La conclusion de la juge de première instance quant à la cause de l'accident était une conclusion de fait assujettie à la norme de contrôle de l'« erreur manifeste et dominante ». Le caractère théorique de l'analyse de la question de savoir si N aurait aperçu un panneau de signalisation installé avant la courbe justifie de faire montre de retenue à l'égard des conclusions factuelles de la juge de première instance. Les constatations factuelles de cette dernière relativement à la causalité étaient raisonnables et la Cour d'appel n'aurait donc pas dû les modifier.

Les juges Gonthier, Bastarache, Binnie et LeBel (dissidents) : Les conclusions de fait du juge de première instance ne sont pas modifiées en l'absence d'erreur manifeste ou dominante, principalement parce qu'il est le seul à avoir l'occasion d'observer les témoins et d'entendre les témoignages de vive voix, et qu'il est, de ce fait, plus à même de choisir entre deux versions

not only the determination of the factual nexus of the case but also requires the judge to draw inferences from facts. Although the standard of review is identical for both findings of fact and inferences of fact, an analytical distinction must be drawn between the two. Inferences can be rejected for reasons other than that the inference-drawing process is deficient. An inference can be clearly wrong where the factual basis upon which it relies is deficient or where the legal standard to which the facts are applied is misconstrued. The question of whether the conduct of the defendant has met the appropriate standard of care in the law of negligence is a question of mixed fact and law. Once the facts have been established, the determination of whether or not the standard of care was met will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care, a question of law within the purview of both the trial and appellate courts.

A question of mixed fact and law in this case was whether the municipality knew or should have known of the alleged danger. The trial judge must approach this question having regard to the duties of the ordinary, reasonable and prudent municipal councillor. Even if the trial judge correctly identifies this as the applicable legal standard, he or she may still err in assessing the facts through the lens of that legal standard, a process which invokes a policy-making component. For example, the trial judge must consider whether the fact that accidents had previously occurred on different portions of the road would alert the ordinary, reasonable and prudent municipal councillor to the existence of a hazard. The trial judge must also consider whether the councillor would have been alerted to the previous accident by an accident-reporting system, a normative issue reviewable on a standard of correctness. Not all matters of mixed fact and law are reviewable according to the standard of correctness, but neither should they be accorded deference in every case.

Section 192 of the *Rural Municipality Act, 1989*, requires the trial judge to examine whether the portion of the road on which the accident occurred posed a hazard to the reasonable driver exercising ordinary care. Here, the trial judge failed to ask whether a reasonable driver exercising ordinary care would have been able to safely drive the portion of the road on which the accident

divergentes d'un même événement. Le processus de constatation des faits exige non seulement du juge qu'il dégage le nœud factuel de l'affaire, mais également qu'il tire des inférences des faits. Bien que la norme de contrôle soit la même et pour les conclusions de fait et pour les inférences de fait, il importe néanmoins de faire une distinction analytique entre les deux. Des inférences peuvent être rejetées pour d'autres raisons que le fait que le processus qui les a produites est lui-même déficient. Une inférence peut être manifestement erronée si ses assises factuelles présentent des lacunes ou si la norme juridique appliquée aux faits est mal interprétée. Dans le contexte du droit relatif à la négligence, la question de savoir si la conduite du défendeur est conforme à la norme de diligence appropriée est une question mixte de fait et de droit. Une fois les faits établis, la décision touchant la question de savoir si le défendeur a respecté ou non la norme de diligence est, dans la plupart des cas, contrôlable selon la norme de la décision correcte, puisque le juge de première instance doit apprécier les faits au regard de la norme de diligence appropriée, question de droit qui relève autant des cours de première instance que des cours d'appel.

En l'espèce, la question de savoir si la municipalité connaissait ou aurait dû connaître le danger dont on alléguait l'existence était une question mixte de fait et de droit. Le juge de première instance doit examiner cette question eu égard aux obligations qui incombent au conseiller municipal moyen, raisonnable et prudent. Même en supposant que le juge de première instance détermine correctement la norme juridique applicable, il lui est encore possible de commettre une erreur lorsqu'il apprécie les faits à la lumière de cette norme juridique, processus qui implique notamment l'établissement de politiques d'intérêt général. Par exemple, il doit se demander si le fait que des accidents se soient déjà produits à d'autres endroits du chemin alerterait le conseiller municipal moyen, raisonnable et prudent de l'existence d'un danger. Il doit également se demander si ce conseiller aurait appris l'existence de l'accident antérieur par un système d'information sur les accidents, question normative qui est contrôlable selon la norme de la décision correcte. Les questions mixtes de fait et de droit ne sont pas toutes contrôlables suivant cette norme, mais elles ne commandent pas systématiquement une attitude empreinte de retenue.

Suivant la norme de diligence énoncée à l'art. 192 de la *Rural Municipality Act, 1989*, la juge de première instance devait se demander si le tronçon du chemin sur lequel s'est produit l'accident constituait un danger pour le conducteur raisonnable prenant des précautions normales. En l'espèce, la juge de première instance a omis de se demander si un tel conducteur aurait pu rouler

occurred. This amounted to an error of law. The duty of the municipality is to keep the road in such a reasonable state of repair that those required to use it may, exercising ordinary care, travel upon it with safety. The duty is a limited one as the municipality is not an insurer of travellers using its streets. Although the trial judge found that the portion of the road where the accident occurred presented drivers with a hidden hazard, there is nothing to indicate that she considered whether or not that portion of the road would pose a risk to the reasonable driver exercising ordinary care. Where an error of law has been found, the appellate court has jurisdiction to take the factual findings of the trial judge as they are and to reassess these findings in the context of the appropriate legal test. Here, the portion of the road on which the accident occurred did not pose a risk to a reasonable driver exercising ordinary care because the condition of the road in general signalled to the reasonable driver that caution was needed.

The trial judge made both errors of law and palpable and overriding errors of fact in determining that the municipality should have known of the alleged state of disrepair. She made no finding that the municipality had actual knowledge of the alleged state of disrepair, but rather imputed knowledge to it on the basis that it should have known of the danger. As a matter of law, the trial judge must approach the question of whether knowledge should be imputed to the municipality with regard to the duties of the ordinary, reasonable and prudent municipal councillor. The question is then answered through the trial judge's assessment of the facts of the case. The trial judge erred in law by approaching the question of knowledge from the perspective of an expert rather than from that of a prudent municipal councillor and by failing to appreciate that the onus of proving that the municipality knew or should have known of the disrepair remained on the plaintiff throughout. She made palpable and overriding errors in fact by drawing the unreasonable inference that the municipality should have known that the portion of the road on which the accident occurred was dangerous from evidence that accidents had occurred on other parts of the road. As the municipality had not received any complaints from motorists respecting the absence of signs on the road, the lack of super-elevation on the curves, or the presence of vegetation along the sides of the road, it had no particular reason to inspect that segment of the road for the presence of hazards. The question of the municipality's knowledge is inextricably linked to the standard of care. A municipality can only be expected to have knowledge of those hazards which pose a risk to the reasonable driver exercising ordinary care, since these are the only hazards for which there is

en sécurité sur le tronçon en question. Il s'agissait d'une erreur de droit. Les municipalités ont l'obligation de tenir les chemins dans un état raisonnable d'entretien de façon que ceux qui doivent les emprunter puissent, en prenant des précautions normales, y circuler en sécurité. Il s'agit d'une obligation de portée limitée, car les municipalités ne sont pas les assureurs des automobilistes qui roulent dans leurs rues. Bien que la juge de première instance ait conclu que la portion du chemin où s'est produit l'accident exposait les conducteurs à un danger caché, il n'y a rien qui indique qu'elle s'est demandé si cette portion du chemin présentait un risque pour le conducteur raisonnable prenant des précautions normales. La cour d'appel qui décèle une erreur de droit a compétence pour reprendre telles quelles les conclusions de fait du juge de première instance et les réévaluer au regard du critère juridique approprié. En l'espèce, la portion du chemin où s'est produit l'accident ne présentait pas de risque pour un conducteur raisonnable prenant des précautions normales, car l'état de ce chemin en général avertissait l'automobiliste raisonnable que la prudence s'imposait.

La juge de première instance a commis et des erreurs de droit et des erreurs de fait manifestes et dominantes en statuant que la municipalité intimée aurait dû connaître le mauvais état dans lequel se trouvait, prétendait-on, le chemin. La juge de première instance n'a pas conclu que la municipalité intimée connaissait concrètement le prétendu mauvais état du chemin, mais elle lui a plutôt prêté cette connaissance pour le motif qu'elle aurait dû connaître l'existence du danger. Sur le plan juridique, le juge de première instance doit se demander s'il y a lieu de présumer que la municipalité connaissait ce fait, eu égard aux obligations qui incombent au conseiller municipal moyen, raisonnable et prudent. Il répond ensuite à cette question en appréciant les faits de l'espèce dont il est saisi. Dans la présente affaire, la juge de première instance a fait erreur en droit en examinant la question de la connaissance requise du point de vue du spécialiste plutôt que du point de vue du conseiller municipal prudent et en ne reconnaissant pas que le fardeau de prouver que la municipalité connaissait ou aurait dû connaître le mauvais état du chemin ne cessait jamais d'incomber au demandeur. La juge de première instance a commis une erreur de fait manifeste et dominante en inférant déraisonnablement que la municipalité intimée aurait dû savoir que la partie du chemin où l'accident s'est produit était dangereuse, compte tenu de la preuve que des accidents avaient eu lieu ailleurs sur ce chemin. La municipalité n'avait aucune raison particulière d'aller inspecter cette portion du chemin pour voir s'il y existait des dangers, puisqu'elle n'avait reçu aucune plainte d'automobilistes relativement à l'absence de signalisation, à l'absence de surélévation des courbes ou à la présence d'arbres et de végétation en bordure du

a duty to repair. Here, the municipality cannot have been expected to have knowledge of the hazard that existed at the site of the accident, since the hazard did not pose a risk to the reasonable driver. Implicit in the trial judge's reasons was the expectation that the municipality should have known about the accidents through an accident reporting system, a palpable error, absent any evidence of what might have been a reasonable system.

With respect to her conclusions on causation, which are conclusions on matters of fact, the trial judge ignored evidence that N had swerved on the first curve he negotiated prior to the accident, and that he had driven on the road three times in the 18 to 20 hours preceding the accident. She further ignored the significance of the testimony of the forensic alcohol specialist which pointed overwhelmingly to alcohol as the causal factor which led to the accident, and erroneously relied on one statement by him to support her conclusion that a driver at N's level of impairment would have reacted to a warning sign. The finding that the outcome would have been different had N been forewarned of the curve ignores the fact that he already knew the curve was there. The fact that the trial judge referred to some evidence to support her findings on causation does not insulate them from review by this Court. An appellate court is entitled to assess whether or not it was clearly wrong for the trial judge to rely on some evidence when other evidence points overwhelmingly to the opposite conclusion.

Whatever the approach to the issue of the duty of care, it is only reasonable to expect a municipality to foresee accidents which occur as a result of the conditions of the road, and not, as in this case, as a result of the condition of the driver. To expand the repair obligation of municipalities to require them to take into account the actions of unreasonable or careless drivers when discharging this duty would signify a drastic and unworkable change to the current standard.

chemin. La question de la connaissance de l'intimée est intimement liée à celle de la norme de diligence. Une municipalité est uniquement censée avoir connaissance des dangers qui présentent un risque pour le conducteur raisonnable prenant des précautions normales, puisqu'il s'agit des seuls dangers à l'égard desquels existe une obligation d'entretien. En l'espèce, on ne pouvait attendre de l'intimée qu'elle connaisse le danger qui existait à l'endroit où l'accident est survenu, puisque ce danger ne présentait tout simplement pas de risque pour le conducteur raisonnable. Il ressort implicitement des motifs de la juge de première instance que la municipalité aurait censément dû connaître l'existence des accidents grâce à un système d'information en la matière, erreur manifeste en l'absence de quelque élément de preuve indiquant ce qui aurait pu constituer un système raisonnable.

Relativement aux conclusions de la juge de première instance sur le lien de causalité, qui sont des conclusions de fait, celle-ci a fait abstraction de la preuve que le véhicule de N avait fait une embardée dans la première courbe et que ce dernier avait roulé à trois reprises sur le chemin en question au cours des 18 à 20 heures ayant précédé l'accident. La juge de première instance a également omis de tenir compte de l'importance du témoignage du spécialiste judiciaire en matière d'alcool, qui menait irrésistiblement à la conclusion que l'alcool avait été le facteur causal de l'accident, et elle a erronément invoqué une déclaration de celui-ci au soutien de sa conclusion que N aurait réagi à un panneau de signalisation. La conclusion que le résultat aurait été différent si N avait été prévenu de l'existence de la courbe ne tient pas compte du fait qu'il savait déjà qu'elle existait. Le fait que la juge de première instance ait mentionné certains éléments de preuve au soutien de ses conclusions sur le lien de causalité n'a pas pour effet de soustraire ces conclusions au pouvoir de contrôle de notre Cour. Le tribunal d'appel est habilité à se demander si le juge de première instance a clairement fait erreur en décidant comme il l'a fait sur le fondement de certains éléments de preuve alors que d'autres éléments mènent irrésistiblement à la conclusion inverse.

Indépendamment de l'approche choisie à l'égard de la question de l'obligation de diligence, il n'est que raisonnable d'attendre d'une municipalité qu'elle prévoit les accidents qui surviennent en raison de l'état du chemin, et non, comme en l'espèce, ceux qui résultent de l'état du conducteur. Élargir l'obligation d'entretien des municipalités en exigeant qu'elles tiennent compte, dans l'exécution de cette obligation, des actes des conducteurs déraisonnables ou imprudents, entraînerait une modification radicale et irréalisable de la norme actuelle.

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Gary D. Young, *Q.C.*, *Denis I. Quon* and *M. Kim Anderson*, for the appellant.

Michael Morris and *G. L. Gerrand*, *Q.C.*, for the respondent.

The judgment of McLachlin C.J. and L'Heureux-Dubé, Iacobucci, Major and Arbour JJ. was delivered by

IACOBUCCI AND MAJOR JJ. —

I. Introduction

A proposition that should be unnecessary to state is that a court of appeal should not interfere with a trial judge's reasons unless there is a palpable and overriding error. The same proposition is sometimes stated as prohibiting an appellate court from reviewing a trial judge's decision if there was some evidence upon which he or she could have relied to reach that conclusion.

Authority for this abounds particularly in appellate courts in Canada and abroad (see *Gottardo Properties (Dome) Inc. v. Toronto (City)* (1998), 162 D.L.R. (4th) 574 (Ont. C.A.); *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114; *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, 2001 SCC 60). In addition scholars, national and international, endorse it (see C. A. Wright in "The Doubtful Omniscience of Appellate Courts" (1957), 41 *Minn. L. Rev.* 751, at p. 780; and the Honourable R. P. Kerans in *Standards of Review Employed by Appellate Courts* (1994); and American Bar Association, Judicial Administration Division, *Standards Relating to Appellate Courts* (1995), at pp. 24-25).

The role of the appellate court was aptly defined in *Underwood v. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199 (C.A.), at p. 204, where it was stated:

The appellate court must not retry a case and must not substitute its views for the views of the trial judge according to what the appellate court thinks the evidence establishes on its view of the balance of probabilities.

Gary D. Young, *c.r.*, *Denis I. Quon* et *M. Kim Anderson*, pour l'appelant.

Michael Morris et *G. L. Gerrand*, *c.r.*, pour l'intimée.

Version française du jugement du juge en chef McLachlin et des juges L'Heureux-Dubé, Iacobucci, Major et Arbour rendu par

LES JUGES IACOBUCCI ET MAJOR —

I. Introduction

Il va sans dire qu'une cour d'appel ne devrait modifier les conclusions d'un juge de première instance qu'en cas d'erreur manifeste et dominante. On reformule parfois cette proposition en disant qu'une cour d'appel ne peut réviser la décision du juge de première instance dans les cas où il existait des éléments de preuve qui pouvaient étayer cette décision. 1

Il existe une abondante jurisprudence étayant cette proposition, particulièrement des décisions émanant de cours d'appel, tant au Canada qu'à l'étranger (voir *Gottardo Properties (Dome) Inc. c. Toronto (City)* (1998), 162 D.L.R. (4th) 574 (C.A. Ont.); *Schwartz c. Canada*, [1996] 1 R.C.S. 254; *Toneguzzo-Norvell (Tutrice à l'instance de) c. Burnaby Hospital*, [1994] 1 R.C.S. 114; *Van de Perre c. Edwards*, [2001] 2 R.C.S. 1014, 2001 CSC 60). En outre, des auteurs, tant à l'échelle nationale qu'internationale, y souscrivent (voir C. A. Wright, « The Doubtful Omniscience of Appellate Courts » (1957), 41 *Minn. L. Rev.* 751, p. 780; l'honorable R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994); et American Bar Association, Judicial Administration Division, *Standards Relating to Appellate Courts* (1995), p. 24-25). 2

Le rôle des tribunaux d'appel a été défini de manière judicieuse dans l'arrêt *Underwood c. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199 (C.A.), p. 204, où la cour a dit ceci : 3

[TRADUCTION] La cour d'appel ne doit pas juger l'affaire de nouveau, ni substituer son opinion à celle du juge de première instance en fonction de ce qu'elle pense que la preuve démontre, selon son opinion de la prépondérance des probabilités.

4 While the theory has acceptance, consistency in its application is missing. The foundation of the principle is as sound today as 100 years ago. It is premised on the notion that finality is an important aim of litigation. There is no suggestion that appellate court judges are somehow smarter and thus capable of reaching a better result. Their role is not to write better judgments but to review the reasons in light of the arguments of the parties and the relevant evidence, and then to uphold the decision unless a palpable error leading to a wrong result has been made by the trial judge.

Quoique cette théorie soit généralement acceptée, elle n'est pas appliquée de manière systématique. Le fondement de cette théorie est aussi valide aujourd'hui qu'il l'était il y a 100 ans. Cette théorie repose sur l'idée que le caractère définitif des décisions est un aspect important du processus judiciaire. Personne ne prétend que les juges des cours d'appel seraient, d'une manière ou d'une autre, plus intelligents que les autres et donc capables d'arriver à un meilleur résultat. Leur rôle n'est pas de rédiger de meilleurs jugements, mais de contrôler les motifs à la lumière des arguments des parties et de la preuve pertinente, puis de confirmer la décision à moins que le juge de première instance n'ait commis une erreur manifeste ayant conduit à un résultat erroné.

5 What is palpable error? The *New Oxford Dictionary of English* (1998) defines "palpable" as "clear to the mind or plain to see" (p. 1337). The *Cambridge International Dictionary of English* (1996) describes it as "so obvious that it can easily be seen or known" (p. 1020). The *Random House Dictionary of the English Language* (2nd ed. 1987) defines it as "readily or plainly seen" (p. 1399).

Qu'est-ce qu'une erreur manifeste? Le *Trésor de la langue française* (1985) définit ainsi le mot « manifeste » : « . . . Qui est tout à fait évident, qui ne peut être contesté dans sa nature ou son existence. [. . .] *erreur manifeste* » (p. 317). *Le Grand Robert de la langue française* (2e éd. 2001) définit ce mot ainsi : « Dont l'existence ou la nature est évidente. [. . .] Qui est clairement, évidemment tel. [. . .] *Erreur, injustice manifeste* » (p. 1139). Enfin, le *Grand Larousse de la langue française* (1975) donne la définition suivante de « manifeste » : « . . . Se dit d'une chose que l'on ne peut contester, qui est tout à fait évidente : *Une erreur manifeste* » (p. 3213).

6 The common element in each of these definitions is that palpable is plainly seen. Applying that to this appeal, in order for the Saskatchewan Court of Appeal to reverse the trial judge the "palpable and overriding" error of fact found by Cameron J.A. must be plainly seen. As we will discuss, we do not think that test has been met.

L'élément commun de ces définitions est qu'une chose « manifeste » est une chose qui est « évidente ». Si l'on applique ce critère au présent pourvoi, il faut que l'« erreur manifeste et dominante » décelée par le juge Cameron soit évidente pour que la Cour d'appel de la Saskatchewan puisse infirmer la décision de la juge de première instance. Comme nous le verrons plus loin, nous ne croyons pas qu'on a satisfait à ce critère en l'espèce.

II. The Role of the Appellate Court in the Case at Bar

II. Le rôle de la Cour d'appel en l'espèce

7 Given that an appeal is not a retrial of a case, consideration must be given to the applicable standard of review of an appellate court on the various issues which arise on this appeal. We therefore find it helpful to discuss briefly the standards of review relevant

Étant donné que l'appel ne constitue pas un nouveau procès, il faut se demander quelle est la norme de contrôle applicable en appel à l'égard des diverses questions que soulève le présent pourvoi. Nous estimons donc utile d'examiner brièvement

to the following types of questions: (1) questions of law; (2) questions of fact; (3) inferences of fact; and (4) questions of mixed fact and law.

A. *Standard of Review for Questions of Law*

On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness: Kerans, *supra*, at p. 90.

There are at least two underlying reasons for employing a correctness standard to matters of law. First, the principle of universality requires appellate courts to ensure that the same legal rules are applied in similar situations. The importance of this principle was recognized by this Court in *Woods Manufacturing Co. v. The King*, [1951] S.C.R. 504, at p. 515:

> It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced . . . should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of relationship between the courts.

A second and related reason for applying a correctness standard to matters of law is the recognized law-making role of appellate courts which is pointed out by Kerans, *supra*, at p. 5:

> The call for universality, and the law-settling role it imposes, makes a considerable demand on a reviewing court. It expects from that authority a measure of expertise about the art of just and practical rule-making, an expertise that is not so critical for the first court. Reviewing courts, in cases where the law requires settlement, make law for future cases as well as the case under review.

les normes de contrôle se rapportant à chacune des catégories de questions suivantes : (1) les questions de droit; (2) les questions de fait; (3) les inférences de fait; (4) les questions mixtes de fait et de droit.

A. *La norme de contrôle applicable aux questions de droit*

Dans le cas des pures questions de droit, la règle fondamentale applicable en matière de contrôle des conclusions du juge de première instance est que les cours d'appel ont toute latitude pour substituer leur opinion à celle des juges de première instance. La norme de contrôle applicable à une question de droit est donc celle de la décision correcte : Kerans, *op. cit.*, p. 90.

Au moins deux raisons justifient l'application de la norme de la décision correcte aux questions de droit. Premièrement, le principe de l'universalité impose aux cours d'appel le devoir de veiller à ce que les mêmes règles de droit soient appliquées dans des situations similaires. Notre Cour a reconnu l'importance de ce principe dans *Woods Manufacturing Co. c. The King*, [1951] R.C.S. 504, p. 515 :

> [TRADUCTION] Il est fondamental, pour assurer la bonne administration de la justice, que l'autorité des décisions soit scrupuleusement respectée par tous les tribunaux qui sont liées par elles. Sans cette adhésion générale et constante, l'administration de la justice sera désordonnée, le droit deviendra incertain et la confiance dans celui-ci sera ébranlée. Il importe plus que tout que le droit, tel qu'il a été énoncé, [. . .] soit accepté et appliqué comme l'exige notre tradition; et même au risque de nous tromper, tous les juges étant faillibles, nous devons préserver totalement l'intégrité des rapports entre les tribunaux.

Une deuxième raison, connexe, d'appliquer la norme de la décision correcte aux questions de droit tient au rôle qu'on reconnaît aux cours d'appel en matière de création du droit et qu'a souligné Kerans, *op. cit.*, p. 5 :

> [TRADUCTION] Le principe de l'universalité — et le rôle de création du droit qu'il emporte — exige beaucoup du tribunal de révision. Il exige de ce tribunal qu'il fasse preuve d'un certain degré d'expertise dans l'art d'élaborer une règle de droit juste et pratique, expertise qui ne revêt pas une importance aussi cruciale pour le premier tribunal. Dans les affaires où le droit n'est pas fixé, le tribunal de révision élabore des règles de droit applicables tout autant à d'éventuelles affaires qu'à celle dont il est saisi.

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Thus, while the primary role of trial courts is to resolve individual disputes based on the facts before them and settled law, the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application. In order to fulfill the above functions, appellate courts require a broad scope of review with respect to matters of law.

B. *Standard of Review for Findings of Fact*

10 The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error": *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at p. 808; *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298, 2000 SCC 12, at para. 42; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, at para. 57. While this standard is often cited, the principles underlying this high degree of deference rarely receive mention. We find it useful, for the purposes of this appeal, to review briefly the various policy reasons for employing a high level of appellate deference to findings of fact.

11 A fundamental reason for general deference to the trial judge is the presumption of fitness — a presumption that trial judges are just as competent as appellate judges to ensure that disputes are resolved justly. Kerans, *supra*, at pp. 10-11, states that:

> If we have confidence in these systems for the resolution of disputes, we should assume that those decisions are just. The appeal process is part of the decisional process, then, only because we recognize that, despite all effort, errors occur. An appeal should be the exception rather than the rule, as indeed it is in Canada.

12 With respect to findings of fact in particular, in *Gottardo Properties*, *supra*, Laskin J.A. summarized the purposes underlying a deferential stance as follows (at para. 48):

Ainsi, alors que le rôle premier des tribunaux de première instance consiste à résoudre des litiges sur la base des faits dont ils disposent et du droit établi, celui des cours d'appel est de préciser et de raffiner les règles de droit et de veiller à leur application universelle. Pour s'acquitter de ces rôles, les cours d'appel ont besoin d'un large pouvoir de contrôle à l'égard des questions de droit.

B. *La norme de contrôle applicable aux questions de fait*

Suivant la norme de contrôle applicable aux conclusions de fait, ces conclusions ne peuvent être infirmées que s'il est établi que le juge de première instance a commis une « erreur manifeste et dominante » : *Stein c. Le navire « Kathy K »*, [1976] 2 R.C.S. 802, p. 808; *Ingles c. Tutkaluk Construction Ltd.*, [2000] 1 R.C.S. 298, 2000 CSC 12, par. 42; *Ryan c. Victoria (Ville)*, [1999] 1 R.C.S. 201, par. 57. On cite souvent cette norme, mais rarement les principes justifiant ce degré élevé de retenue. Pour les besoins du présent pourvoi, nous estimons qu'il est utile d'examiner brièvement les diverses considérations de principe qui incitent les cours d'appel à faire preuve d'un degré élevé de retenue à l'égard des conclusions de fait.

L'une des raisons fondamentales de cette retenue générale à l'égard des conclusions des juges de première instance tient à la présomption d'aptitude à juger — présomption selon laquelle les juges de première instance sont tout aussi aptes que les juges d'appel à apporter des solutions justes aux litiges. Kerans, *op. cit.*, dit ceci aux p. 10-11 :

> [TRADUCTION] Si nous nous fions à ces systèmes pour régler les différends, il nous faut présumer que les décisions qu'ils produisent sont justes. La procédure d'appel ne fait en conséquence partie du processus décisionnel que parce que nous reconnaissons que, malgré tous les efforts déployés, des erreurs se produisent. L'appel devrait être l'exception plutôt que la règle, ce qui est d'ailleurs le cas au Canada.

Pour ce qui est des conclusions de fait en particulier, dans *Gottardo Properties*, précité, le juge Laskin de la Cour d'appel de l'Ontario a résumé ainsi les objectifs qui sous-tendent le principe de la retenue judiciaire (au par. 48) :

Deference is desirable for several reasons: to limit the number and length of appeals, to promote the autonomy and integrity of the trial or motion court proceedings on which substantial resources have been expended, to preserve the confidence of litigants in those proceedings, to recognize the competence of the trial judge or motion judge and to reduce needless duplication of judicial effort with no corresponding improvement in the quality of justice.

Similar concerns were expressed by La Forest J. in *Schwartz*, *supra*, at para. 32:

It has long been settled that appellate courts must treat a trial judge's findings of fact with great deference. The rule is principally based on the assumption that the trier of fact is in a privileged position to assess the credibility of witnesses' testimony at trial. . . . Others have also pointed out additional judicial policy concerns to justify the rule. Unlimited intervention by appellate courts would greatly increase the number and the length of appeals generally. Substantial resources are allocated to trial courts to go through the process of assessing facts. The autonomy and integrity of the trial process must be preserved by exercising deference towards the trial courts' findings of fact; see R. D. Gibbens, "Appellate Review of Findings of Fact" (1992), 13 *Adv. Q.* 445, at pp. 445-48; *Fletcher v. Manitoba Public Insurance Co.*, [1990] 3 S.C.R. 191, at p. 204.

See also in the context of patent litigation, *Consolboard Inc. v. MacMillan Bloedel (Saskatchewan) Ltd.*, [1981] 1 S.C.R. 504, at p. 537.

In *Anderson v. Bessemer City*, 470 U.S. 564 (1985), at pp. 574-75, the United States Supreme Court also listed numerous reasons for deferring to the factual findings of the trial judge:

The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate

[TRADUCTION] La retenue est souhaitable pour diverses raisons : pour limiter le nombre et la durée des appels, pour promouvoir l'autonomie et l'intégrité des procédures devant le tribunal de première instance ou la cour des requêtes auxquelles de nombreuses ressources ont été consacrées, pour maintenir la confiance des plaideurs, pour reconnaître la compétence du juge de première instance ou du juge des requêtes, et pour réduire la multiplication inutile des procédures qui n'entraînent aucune amélioration correspondante de la qualité de la justice.

Le juge La Forest a exprimé des préoccupations semblables dans l'arrêt *Schwartz*, précité, par. 32 :

Il est établi depuis longtemps que les cours d'appel doivent faire preuve d'une grande retenue à l'égard des conclusions de fait d'un juge de première instance. La règle se justifie principalement par la situation avantageuse dont bénéficie le juge des faits pour ce qui est d'évaluer la crédibilité des témoignages entendus au procès. [. . .] D'autres préoccupations liées à la politique judiciaire ont par ailleurs été invoquées pour justifier la règle. Une intervention illimitée des cours d'appel ferait augmenter considérablement le nombre et la durée des appels en général. D'importantes ressources sont mises à la disposition des tribunaux de première instance pour qu'ils puissent évaluer les faits. Il faut préserver l'autonomie et l'intégrité du procès en faisant preuve de retenue à l'égard des conclusions de fait des tribunaux de première instance; voir R. D. Gibbens, « Appellate Review of Findings of Fact » (1992), 13 *Adv. Q.* 445, aux pp. 445 à 448; *Fletcher c. Société d'assurance publique du Manitoba*, [1990] 3 R.C.S. 191, à la p. 204.

Voir aussi, dans le contexte d'une poursuite touchant un brevet, *Consolboard Inc. c. MacMillan Bloedel (Saskatchewan) Ltd.*, [1981] 1 R.C.S. 504, p. 537.

13 Dans *Anderson c. Bessemer City*, 470 U.S. 564 (1985), p. 574-575, la Cour suprême des États-Unis a aussi dressé une liste de raisons qui justifient de faire preuve de retenue à l'égard des conclusions de fait des juges de première instance :

[TRADUCTION] La raison d'être de la retenue à l'égard des conclusions de fait du juge de première instance ne se limite pas au fait que ce dernier est mieux placé pour statuer sur la crédibilité. Le rôle principal du juge de première instance est de constater les faits, et l'expérience qu'il acquiert en s'acquittant de ce rôle lui confère son expertise à cet égard. Si les cours d'appel refaisaient le travail du juge de première instance, il est fort possible que ces efforts n'amélioreraient que marginalement l'exactitude des conclusions de fait, malgré

their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road.'" . . . For these reasons, review of factual findings under the clearly-erroneous standard — with its deference to the trier of fact — is the rule, not the exception.

14 Further comments regarding the advantages possessed by the trial judge have been made by R. D. Gibbens in "Appellate Review of Findings of Fact" (1991-92), 13 *Advocates' Q.* 445, at p. 446:

> The trial judge is said to have an expertise in assessing and weighing the facts developed at trial. Similarly, the trial judge has also been exposed to the entire case. The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged.
>
> The corollary to this recognized advantage of trial courts and judges is that appellate courts are not in a favourable position to assess and determine factual matters. Appellate court judges are restricted to reviewing written transcripts of testimony. As well, appeals are unsuited to reviewing voluminous amounts of evidence. Finally, appeals are telescopic in nature, focussing narrowly on particular issues as opposed to viewing the case as a whole.

15 In our view, the numerous bases for deferring to the findings of fact of the trial judge which are discussed in the above authorities can be grouped into the following three basic principles.

(1) Limiting the Number, Length and Cost of Appeals

16 Given the scarcity of judicial resources, setting limits on the scope of judicial review is to be

les ressources judiciaires considérables qui devraient être réaffectées à cette fin. En outre, les parties à un appel ont déjà dû consacrer énergies et ressources à convaincre le juge de première instance de la justesse de leur version des faits; ce serait abuser que de leur demander de convaincre trois autres juges en appel. Comme l'a dit notre Cour dans un contexte différent, le procès sur le fond devrait être considéré comme « "l'épreuve principale" [. . .] plutôt que comme un "banc d'essai" ». [. . .] Pour ces motifs, le contrôle des décisions de fait selon la norme de la décision manifestement erronée — et la retenue envers le juge de première instance qu'elle suppose — est la règle, et non l'exception.

D'autres observations sur les avantages dont disposent le juge de première instance ont été formulées par R. D. Gibbens dans « Appellate Review of Findings of Fact » (1991-92), 13 *Advocates' Q.* 445, p. 446 :

> [TRADUCTION] On dit que le juge de première instance possède de l'expertise dans l'évaluation et l'appréciation des faits présentés au procès. Il a également entendu l'affaire au complet. Il a assisté à toute la cause et son jugement final reflète cette connaissance intime de la preuve. Cette connaissance, acquise par le juge au fil des jours, des semaines voire des mois qu'a durés l'affaire, peut se révéler beaucoup plus profonde que celle de la cour d'appel, dont la perception est beaucoup plus limitée et étroite, et souvent déterminée et déformée par les diverses ordonnances et décisions qui sont contestées.

Cet avantage reconnu des tribunaux et des juges de première instance a pour corollaire que les cours d'appel ne sont pas dans une position favorable pour évaluer et apprécier les questions de fait. Les juges des cours d'appel n'examinent que la transcription des témoignages. De plus, les appels ne se prêtent pas à l'examen de dossiers volumineux. Enfin, les appels ont un caractère « focalisateur », en ce qu'ils s'attachent à des questions particulières plutôt qu'à l'ensemble de l'affaire.

À notre avis, ces diverses raisons justifiant la retenue à l'égard des conclusions de fait du juge de première instance peuvent être regroupées sous les trois principes de base suivants.

(1) Réduire le nombre, la durée et le coût des appels

Vu la rareté des ressources dont disposent les tribunaux, il faut encourager l'établissement

encouraged. Deferring to a trial judge's findings of fact not only serves this end, but does so on a principled basis. Substantial resources are allocated to trial courts for the purpose of assessing facts. To allow for wide-ranging review of the trial judge's factual findings results in needless duplication of judicial proceedings with little, if any improvement in the result. In addition, lengthy appeals prejudice litigants with fewer resources, and frustrate the goal of providing an efficient and effective remedy for the parties.

(2) Promoting the Autonomy and Integrity of Trial Proceedings

The presumption underlying the structure of our court system is that a trial judge is competent to decide the case before him or her, and that a just and fair outcome will result from the trial process. Frequent and unlimited appeals would undermine this presumption and weaken public confidence in the trial process. An appeal is the exception rather than the rule.

(3) Recognizing the Expertise of the Trial Judge and His or Her Advantageous Position

The trial judge is better situated to make factual findings owing to his or her extensive exposure to the evidence, the advantage of hearing testimony *viva voce*, and the judge's familiarity with the case as a whole. Because the primary role of the trial judge is to weigh and assess voluminous quantities of evidence, the expertise and insight of the trial judge in this area should be respected.

C. *Standard of Review for Inferences of Fact*

We find it necessary to address the appropriate standard of review for factual inferences because the reasons of our colleague suggest that a lower standard of review may be applied to the inferences of fact drawn by a trial judge. With respect, it is our

de limites à la portée du contrôle judiciaire. La retenue à l'égard des conclusions de fait du juge de première instance sert cet objectif d'une manière rationnelle. D'importantes ressources sont allouées aux tribunaux de première instance aux fins d'évaluation des faits. Permettre un large contrôle des conclusions factuelles des juges de première instance entraîne une inutile répétition de procédures judiciaires, tout en n'améliorant que peu ou pas le résultat. En outre, de longs appels causent préjudice aux plaideurs moins bien nantis et compromettent l'objectif qui consiste à mettre à leur disposition des recours efficients et efficaces.

(2) Favoriser l'autonomie du procès et son intégrité

17 L'organisation de notre système judiciaire repose sur la présomption que le juge de première instance est qualifié pour trancher l'affaire dont il est saisi et qu'une solution juste et équitable résultera du procès. Des appels fréquents et illimités affaibliraient cette présomption et saperait la confiance du public dans le processus judiciaire. L'appel est l'exception, non la règle.

(3) Reconnaître l'expertise du juge de première instance et sa position avantageuse

18 Le juge de première instance est celui qui est le mieux placé pour tirer des conclusions de fait, parce qu'il a l'occasion d'examiner la preuve en profondeur, d'entendre les témoignages de vive voix et de se familiariser avec l'affaire dans son ensemble. Étant donné que le rôle principal du juge de première instance est d'apprécier et de soupeser d'abondantes quantités d'éléments de preuve, son expertise dans ce domaine et sa connaissance intime du dossier doivent être respectées.

C. *La norme de contrôle applicable aux inférences de fait*

19 Nous estimons nécessaire de nous pencher sur la question de la norme de contrôle appropriée quant aux inférences de fait des juges de première instance, parce que les motifs de notre collègue suggèrent qu'une norme de contrôle moins exigeante peut

view, that to apply a lower standard of review to inferences of fact would be to depart from established jurisprudence of this Court, and would be contrary to the principles supporting a deferential stance to matters of fact.

20 Our colleague acknowledges that, in *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, this Court determined that a trial judge's inferences of fact and findings of fact should be accorded a similar degree of deference. The relevant passage from *Geffen* is the following (*per* Wilson J., at pp. 388-89):

> It is by now well established that findings of fact made at trial based on the credibility of witnesses are not to be reversed on appeal unless it is established that the trial judge made some palpable and overriding error which affected his assessment of the facts . . . . Even where a finding of fact is not contingent upon credibility, this Court has maintained a non-interventionist approach to the review of trial court findings. . . .
>
> And even in those cases where a finding of fact is neither inextricably linked to the credibility of the testifying witness nor based on a misapprehension of the evidence, the rule remains that appellate review should be limited to those instances where a manifest error has been made. Hence, in *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78, this Court refused to overturn a trial judge's finding that certain goods were defective, stating at pp. 84-85 that it is wrong for an appellate court to set aside a trial judgment where the only point at issue is the interpretation of the evidence as a whole (citing *Métivier v. Cadorette*, [1977] 1 S.C.R. 371).

This view has been reiterated by this Court on numerous occasions: see *Palsky v. Humphrey*, [1964] S.C.R. 580, at p. 583; *Schwartz*, *supra*, at para. 32; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 426, *per* La Forest J.; *Toneguzzo-Norvell*, *supra*. The United States Supreme Court has taken a similar position: see *Anderson*, *supra*, at p. 577.

21 In discussing the standard of review of the trial judge's inferences of fact, our colleague states, at para. 103, that:

être appliquée à cet égard. En toute déférence, nous sommes d'avis que l'application d'une telle norme de contrôle romprait avec la jurisprudence établie de notre Cour en la matière et serait contraire aux principes justifiant le respect d'une attitude empreinte de retenue à l'égard des constatations de fait.

Notre collègue reconnaît que dans l'arrêt *Geffen c. Succession Goodman*, [1991] 2 R.C.S. 353, notre Cour a jugé qu'il fallait faire preuve du même degré de retenue à l'égard des inférences de fait du juge de première instance qu'à l'égard de ses constatations de fait. Voici le passage pertinent des motifs de madame le juge Wilson (aux p. 388-389) :

> C'est maintenant un principe bien établi que les constatations de fait d'un juge de première instance, fondées sur la crédibilité des témoins, ne doivent pas être infirmées en appel à moins qu'il ne soit prouvé que le juge de première instance a commis une erreur manifeste et dominante qui a faussé son appréciation des faits [. . .] Même si une constatation de fait ne dépend pas de la crédibilité, notre Cour a pour principe de ne pas intervenir pour réviser les constatations des tribunaux de première instance . . .
>
> Et même dans les cas où une constatation de fait n'est ni liée inextricablement à la crédibilité du témoin ni fondée sur une mauvaise compréhension de la preuve, la règle reste la même : l'examen en appel devrait se limiter aux cas où une erreur manifeste a été commise. C'est pourquoi, dans l'arrêt *Schreiber Brothers Ltd. c. Currie Products Ltd.*, [1980] 2 R.C.S. 78, notre Cour a refusé d'infirmer la conclusion du juge de première instance que certaines marchandises étaient défectueuses, disant, aux pp. 84 et 85, qu'une cour d'appel ne peut à bon droit infirmer une décision de première instance lorsque la seule question en litige porte sur l'interprétation de l'ensemble de la preuve (citant *Métivier c. Cadorette*, [1977] 1 R.C.S. 371).

Notre Cour a réitéré cette opinion à maintes reprises : voir *Palsky c. Humphrey*, [1964] R.C.S. 580, p. 583; *Schwartz*, précité, par. 32; *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377, p. 426, le juge La Forest; *Toneguzzo-Norvell*, précité. La Cour suprême des États-Unis a adopté une position semblable : voir *Anderson*, précité, p. 577.

Dans son examen de la norme de contrôle applicable aux inférences de fait du juge de première instance, notre collègue dit ce qui suit, au par. 103 :

In reviewing the making of an inference, the appeal court will verify whether it can reasonably be supported by the findings of fact that the trial judge reached and whether the judge proceeded on proper legal principles. . . . While the standard of review is identical for both findings of fact and inferences of fact, it is nonetheless important to draw an analytical distinction between the two. If the reviewing court were to review only for errors of fact, then the decision of the trial judge would necessarily be upheld in every case where evidence existed to support his or her factual findings. In my view, this Court is entitled to conclude that inferences made by the trial judge were clearly wrong, just as it is entitled to reach this conclusion in respect to findings of fact. [Emphasis added.]

With respect, we find two problems with this passage. First, in our view, the standard of review is not to verify that the inference can be reasonably supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts, which implies a stricter standard.

Second, with respect, we find that by drawing an analytical distinction between factual findings and factual inferences, the above passage may lead appellate courts to involve themselves in an unjustified reweighing of the evidence. Although we agree that it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add the caution that where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error. As stated above, trial courts are in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.

La cour d'appel qui contrôle la validité d'une inférence se demande si celle-ci peut raisonnablement être étayée par les conclusions de fait tirées par le juge de première instance et si celui-ci a appliqué les principes juridiques appropriés. [. . .] Bien que la norme de contrôle soit la même et pour les conclusions de fait et pour les inférences de fait, il importe néanmoins de faire une distinction analytique entre les deux. Si le tribunal de révision ne faisait que vérifier s'il y a des erreurs de fait, la décision du juge de première instance serait alors nécessairement confirmée dans tous les cas où il existe des éléments de preuve étayant les conclusions de fait de ce dernier. Selon moi, notre Cour a le droit de conclure que les inférences du juge de première instance étaient manifestement erronées, tout comme elle peut le faire à l'égard des conclusions de fait. [Nous soulignons.]

En toute déférence, nous estimons que ce passage comporte deux erreurs. Premièrement, selon nous, la norme de contrôle ne consiste pas à vérifier si l'inférence peut être raisonnablement étayée par les conclusions de fait du juge de première instance, mais plutôt si ce dernier a commis une erreur manifeste et dominante en tirant une conclusion factuelle sur la base de faits admis, ce qui suppose l'application d'une norme plus stricte.

22

Deuxièmement, nous croyons en toute déférence qu'en faisant une distinction analytique entre les conclusions factuelles et les inférences factuelles, le passage précité pourrait amener les cours d'appel à soupeser la preuve à nouveau et sans raison. Bien que nous partagions l'opinion selon laquelle il est loisible à une cour d'appel de conclure qu'une inférence de fait tirée par le juge de première instance est manifestement erronée, nous tenons toutefois à faire la mise en garde suivante : lorsque des éléments de preuve étayent cette inférence, il sera difficile à une cour d'appel de conclure à l'existence d'une erreur manifeste et dominante. Comme nous l'avons dit précédemment, les tribunaux de première instance sont dans une position avantageuse pour apprécier et soupeser de vastes quantités d'éléments de preuve. Pour tirer une inférence factuelle, le juge de première instance doit passer les faits pertinents au crible, en apprécier la valeur probante et tirer une conclusion factuelle. En conséquence, lorsque cette conclusion est étayée par des éléments de preuve, modifier cette conclusion équivaut à modifier le poids accordé à ces éléments par le juge de première instance.

23 We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts. As we discuss below, it is our respectful view that our colleague's finding that the trial judge erred by imputing knowledge of the hazard to the municipality in this case is an example of this type of impermissible interference with the factual inference drawn by the trial judge.

24 In addition, in distinguishing inferences of fact from findings of fact, our colleague states, at para. 102, that deference to findings of fact is "principally grounded in the recognition that only the trial judge enjoys the opportunity to observe witnesses and to hear testimony first-hand", a rationale which does not bear on factual inferences. With respect, we disagree with this view. As we state above, there are numerous reasons for showing deference to the factual findings of a trial judge, many of which are equally applicable to all factual conclusions of the trial judge. This was pointed out in *Schwartz*, *supra*. After listing numerous policy concerns justifying a deferential approach to findings of fact, at para. 32 La Forest J. goes on to state:

> This explains why the rule [that appellate courts must treat a trial judge's findings of fact with great deference] applies not only when the credibility of witnesses is at issue, although in such a case it may be more strictly applied, but also to all conclusions of fact made by the trial judge. [Emphasis added.]

Nous rappelons qu'il n'appartient pas aux cours d'appel de remettre en question le poids attribué aux différents éléments de preuve. Si aucune erreur manifeste et dominante n'est décelée en ce qui concerne les faits sur lesquels repose l'inférence du juge de première instance, ce n'est que lorsque le processus inférentiel lui-même est manifestement erroné que la cour d'appel peut modifier la conclusion factuelle. La cour d'appel n'est pas habilitée à modifier une conclusion factuelle avec laquelle elle n'est pas d'accord, lorsque ce désaccord résulte d'une divergence d'opinion sur le poids à attribuer aux faits à la base de la conclusion. Comme nous le verrons plus loin, nous estimons en toute déférence que constitue un exemple de ce genre d'intervention inadmissible à l'égard d'une inférence de fait la conclusion de notre collègue selon laquelle la juge de première instance a commis une erreur en prêtant à la municipalité la connaissance du danger dans la présente affaire.

De plus, en établissant une distinction entre les inférences de fait et les conclusions de fait, notre collègue dit, au par. 102, que la retenue à l'égard des secondes « repose principalement sur le fait que, puisqu'il [le juge de première instance] est le seul à avoir l'occasion d'observer les témoins et d'entendre les témoignages de vive voix », justification non pertinente dans le cas des inférences de fait. En toute déférence, nous ne partageons pas cette opinion. Comme nous l'avons dit plus tôt, il existe de nombreuses raisons de faire preuve de retenue à l'égard des constatations de fait du juge de première instance, dont plusieurs valent autant pour toutes ses conclusions factuelles. Cette observation a été faite dans l'arrêt *Schwartz*, précité. Après avoir énuméré les nombreuses considérations de politique judiciaire invoquées pour justifier la règle de la retenue à l'égard des constatations de fait, le juge La Forest, au par. 32, ajoute :

> Cela explique pourquoi la règle [selon laquelle les cours d'appel doivent faire preuve d'une grande retenue à l'égard des conclusions de fait des juges de première instance] s'applique non seulement lorsque la crédibilité des témoins est en cause, quoiqu'elle puisse alors s'appliquer plus strictement, mais également à toutes les conclusions de fait tirées par le juge de première instance. [Nous soulignons.]

Recent support for deferring to all factual conclusions of the trial judge is found in *Toneguzzo-Norvell*, *supra.* McLachlin J. (as she then was) for a unanimous Court stated, at pp. 121-22:

> A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.
>
> . . .
>
> I agree that the principle of non-intervention of a Court of Appeal in a trial judge's findings of facts does not apply with the same force to inferences drawn from conflicting testimony of expert witnesses where the credibility of these witnesses is not in issue. This does not however change the fact that the weight to be assigned to the various pieces of evidence is under our trial system essentially the province of the trier of fact, in this case the trial judge. [Emphasis added.]

We take the above comments of McLachlin J. to mean that, although the same high standard of deference applies to the entire range of factual determinations made by the trial judge, where a factual finding is grounded in an assessment of credibility of a witness, the overwhelming advantage of the trial judge in this area must be acknowledged. This does not, however, imply that there is a lower standard of review where witness credibility is not in issue, or that there are not numerous policy reasons supporting deference to all factual conclusions of the trial judge. In our view, this is made clear by the underlined portion of the above passage. The essential point is that making a factual conclusion, of any kind, is inextricably linked with assigning weight to evidence, and thus attracts a deferential standard of review.

Although the trial judge will always be in a distinctly privileged position when it comes to

Notre Cour a récemment donné son appui à la règle de la retenue judiciaire à l'égard de l'ensemble des conclusions factuelles du juge de première instance dans l'arrêt *Toneguzzo-Norvell*, précité. Madame le juge McLachlin (maintenant Juge en chef), qui a rédigé le jugement unanime de notre Cour, a dit ceci, aux p. 121-122 :

> Une cour d'appel n'est manifestement pas autorisée à intervenir pour le simple motif qu'elle perçoit la preuve différemment. Il appartient au juge de première instance, et non à la cour d'appel, de tirer des conclusions de fait en matière de preuve.
>
> . . .
>
> Je reconnais que le principe de non-intervention d'une cour d'appel dans les conclusions de fait d'un juge de première instance ne s'applique pas avec la même vigueur aux conclusions tirées de témoignages d'expert contradictoires lorsque la crédibilité de ces derniers n'est pas en cause. Il n'en demeure pas moins que, selon notre système de procès, il appartient essentiellement au juge des faits, en l'espèce le juge de première instance, d'attribuer un poids aux différents éléments de preuve. [Nous soulignons.]

Nous considérons que ces propos du juge McLachlin signifient que, bien que le même degré élevé de retenue s'applique à l'ensemble des décisions factuelles du juge de première instance, lorsqu'une telle conclusion factuelle repose sur l'appréciation de la crédibilité d'un témoin, il faut reconnaître l'énorme avantage dont jouit le juge de première instance à cet égard. Cela ne veut toutefois pas dire qu'une norme de contrôle moins rigoureuse s'applique lorsque la question en jeu ne porte pas sur la crédibilité d'un témoin, ni qu'il n'existe pas de nombreuses considérations de principe justifiant de faire montre de retenue à l'égard de toutes les conclusions factuelles. À notre avis, cela ressort clairement du passage souligné dans l'extrait précité. Le point essentiel est qu'une conclusion factuelle — quelle que soit sa nature — exige nécessairement qu'on attribue un certain poids à un élément de preuve et, de ce fait, commande l'application d'une norme de contrôle empreinte de retenue.

Bien que le juge de première instance soit toujours dans une position privilégiée pour apprécier

assessing the credibility of witnesses, this is not the only area where the trial judge has an advantage over appellate judges. Advantages enjoyed by the trial judge with respect to the drawing of factual inferences include the trial judge's relative expertise with respect to the weighing and assessing of evidence, and the trial judge's inimitable familiarity with the often vast quantities of evidence. This extensive exposure to the entire factual nexus of a case will be of invaluable assistance when it comes to drawing factual conclusions. In addition, concerns with respect to cost, number and length of appeals apply equally to inferences of fact and findings of fact, and support a deferential approach towards both. As such, we respectfully disagree with our colleague's view that the principal rationale for showing deference to findings of fact is the opportunity to observe witnesses first-hand. It is our view that the trial judge enjoys numerous advantages over appellate judges which bear on all conclusions of fact, and, even in the absence of these advantages, there are other compelling policy reasons supporting a deferential approach to inferences of fact. We conclude, therefore, by emphasizing that there is one, and only one, standard of review applicable to all factual conclusions made by the trial judge — that of palpable and overriding error.

la crédibilité des témoins, ce n'est pas là le seul domaine où il bénéficie d'un avantage sur les juges des cours d'appel. Parmi les avantages dont jouit le juge de première instance sur le plan des inférences factuelles, mentionnons son expertise relative en matière d'appréciation et d'évaluation de la preuve, de même que la connaissance unique qu'il possède de la preuve souvent abondante produite par les parties. Cette familiarité avec toute la trame factuelle lui est d'une grande utilité lorsque vient le moment de tirer des conclusions de fait. En outre, les considérations relatives au coût, au nombre et à la durée des appels sont tout aussi pertinentes pour ce qui est des inférences de fait que pour ce qui est des conclusions de fait, et justifient l'application aux unes comme aux autres d'une norme empreinte de retenue. En conséquence, nous ne partageons pas l'opinion de notre collègue selon laquelle la raison principale justifiant de faire montre de retenue à l'égard des conclusions de fait est la possibilité qu'a le juge de première instance d'observer les témoins directement. Nous sommes d'avis que le juge de première instance jouit, par rapport aux juges d'appel, de nombreux avantages qui influent sur toutes les conclusions de fait et que, même si ces avantages n'existaient pas, d'autres considérations impérieuses justifient de faire montre de retenue à l'égard des inférences de fait. Par conséquent, nous concluons en soulignant qu'il n'y a qu'une seule et unique norme de contrôle applicable à toutes les conclusions factuelles tirées par le juge de première instance, soit celle de l'erreur manifeste et dominante.

D. *Standard of Review for Questions of Mixed Fact and Law*

26 At the outset, it is important to distinguish questions of mixed fact and law from factual findings (whether direct findings or inferences). Questions of mixed fact and law involve applying a legal standard to a set of facts: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35. On the other hand, factual findings or inferences require making a conclusion of fact based on a set of facts. Both mixed fact and law and fact findings often involve drawing inferences; the difference lies in whether the inference drawn is legal

D. *La norme de contrôle applicable aux questions mixtes de fait et de droit*

D'entrée de jeu, il importe de distinguer les questions mixtes de fait et de droit des conclusions factuelles (qu'il s'agisse de conclusions directes ou d'inférences). Les questions mixtes de fait et de droit supposent l'application d'une norme juridique à un ensemble de faits : *Canada (Directeur des enquêtes et des recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 35. Par contre, les conclusions ou les inférences de fait exigent que soit tirée une conclusion factuelle d'un ensemble de faits. Tant les questions mixtes de fait et de droit que les questions

or factual. Because of this similarity, the two types of questions are sometimes confounded. This confusion was pointed out by A. L. Goodhart in "Appeals on Questions of Fact" (1955), 71 *L.Q.R.* 402, at p. 405:

> The distinction between [the perception of facts and the evaluation of facts] tends to be obfuscated because we use such a phrase as "the judge found as a fact that the defendant had been negligent," when what we mean to say is that "the judge found as a fact that the defendant had done acts A and B, and as a matter of opinion he reached the conclusion that it was not reasonable for the defendant to have acted in that way."

In the case at bar, there are examples of both types of questions. The issue of whether the municipality ought to have known of the hazard in the road involves weighing the underlying facts and making factual findings as to the knowledge of the municipality. It also involves applying a legal standard, which in this case is provided by s. 192(3) of the *Rural Municipality Act, 1989*, S.S. 1989-90, c. R-26.1, to these factual findings. Similarly, the finding of negligence involves weighing the underlying facts, making factual conclusions therefrom, and drawing an inference as to whether or not the municipality failed to exercise the legal standard of reasonable care and therefore was negligent.

Once it has been determined that a matter being reviewed involves the application of a legal standard to a set of facts, and is thus a question of mixed fact and law, then the appropriate standard of review must be determined and applied. Given the different standards of review applicable to questions of law and questions of fact, it is often difficult to determine what the applicable standard of review is. In *Southam*, *supra*, at para. 39, this Court illustrated how an error on a question of mixed fact and law can amount to a pure error of law subject to the correctness standard:

> . . . if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the

de fait exigent souvent du tribunal qu'il tire des inférences; la différence réside dans le caractère — juridique ou factuel — de ces inférences. En raison de cette similitude, on confond parfois les deux catégories de questions. Cette confusion a été soulignée par A. L. Goodhart dans « Appeals on Questions of Fact » (1955), 71 *L.Q.R.* 402, p. 405 :

> [TRADUCTION] La distinction entre [la perception des faits et l'appréciation de ceux-ci] a tendance à être embrouillée parce que nous utilisons la formule « le juge a conclu au fait que le défendeur avait été négligent », alors que ce que nous voulons dire, c'est que « le juge a constaté le fait que le défendeur a commis les actes A et B et, suivant son opinion, il a conclu qu'il n'était pas raisonnable pour ce dernier d'avoir agi ainsi ».

L'affaire qui nous occupe présente des exemples des deux catégories de questions. Pour répondre à la question de savoir si la municipalité aurait dû connaître le danger présenté par le chemin, il faut apprécier les faits à l'origine de l'affaire et tirer des conclusions factuelles relativement à la connaissance de la municipalité. Il faut appliquer à ces conclusions factuelles une norme juridique qui, en l'occurrence, est énoncée au par. 192(3) de la *Rural Municipality Act, 1989*, S.S. 1989-90, ch. R-26.1. De même, pour pouvoir conclure à la négligence, il faut apprécier les faits essentiels, en tirer des conclusions factuelles puis en dégager une inférence, c'est-à-dire se demander si la municipalité a oui ou non omis de respecter la norme de diligence raisonnable et si elle a, par conséquent, été négligente ou non.

27

Une fois établi que la question examinée exige l'application d'une norme juridique à un ensemble de faits et qu'il s'agit donc d'une question mixte de fait et de droit, il faut alors déterminer quelle est la norme de contrôle appropriée et l'appliquer. Vu les diverses normes de contrôle qui s'appliquent aux questions de droit et aux questions de fait, il est souvent difficile de déterminer celle qui s'applique. Dans l'arrêt *Southam*, précité, par. 39, notre Cour a expliqué comment une erreur touchant une question mixte de fait et de droit peut constituer une pure erreur de droit, assujettie à la norme de la décision correcte :

> . . . si un décideur dit que, en vertu du critère applicable, il lui faut tenir compte de A, B, C et D, mais que, dans les

decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

Therefore, what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law.

28 However, where the error does not amount to an error of law, a higher standard is mandated. Where the trier of fact has considered all the evidence that the law requires him or her to consider and still comes to the wrong conclusion, then this amounts to an error of mixed law and fact and is subject to a more stringent standard of review: *Southam*, *supra*, at paras. 41 and 45. While easy to state, this distinction can be difficult in practice because matters of mixed law and fact fall along a spectrum of particularity. This difficulty was pointed out in *Southam*, at para. 37:

> . . . the matrices of facts at issue in some cases are so particular, indeed so unique, that decisions about whether they satisfy legal tests do not have any great precedential value. If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

29 When the question of mixed fact and law at issue is a finding of negligence, this Court has held that

faits, il ne prend en considération que A, B, et C, alors le résultat est le même que s'il avait appliqué une règle de droit lui dictant de ne tenir compte que de A, B et C. Si le bon critère lui commandait de tenir compte aussi de D, il a en fait appliqué la mauvaise règle de droit et commis, de ce fait, une erreur de droit.

Par conséquent, ce qui peut paraître une question mixte de fait et de droit peut, après plus ample examen, se révéler en réalité une pure erreur de droit.

Cependant, lorsque l'erreur ne constitue pas une erreur de droit, une norme de contrôle plus exigeante s'impose. Dans les cas où le juge des faits examine tous les éléments de preuve que le droit lui commande de prendre en considération mais en tire néanmoins une conclusion erronée, il commet alors une erreur mixte de fait et de droit, qui est assujettie à une norme de contrôle plus rigoureuse : *Southam*, précité, par. 41 et 45. Bien que facile à énoncer, cette distinction peut s'avérer difficile à établir en pratique parce que les questions mixtes de fait et de droit s'étalent le long d'un spectre comportant des degrés variables de particularité. Cette difficulté a été soulignée dans l'arrêt *Southam*, par. 37 :

> . . . il arrive que les faits dans certaines affaires soient si particuliers, de fait qu'ils soient si uniques, que les décisions concernant la question de savoir s'ils satisfont aux critères juridiques n'ont pas une grande valeur comme précédents. Si une cour décidait que le fait d'avoir conduit à une certaine vitesse, sur une route donnée et dans des conditions particulières constituait de la négligence, sa décision aurait peu de valeur comme précédent. Bref, plus le niveau de généralité de la proposition contestée se rapproche de la particularité absolue, plus l'affaire prend le caractère d'une question d'application pure, et s'approche donc d'une question de droit et de fait parfaite. Voir R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), aux pp. 103 à 108. Il va de soi qu'il n'est pas facile de dire avec précision où doit être tracée la ligne de démarcation; quoique, dans la plupart des cas, la situation soit suffisamment claire pour permettre de déterminer si le litige porte sur une proposition générale qui peut être qualifiée de principe de droit ou sur un ensemble très particulier de circonstances qui n'est pas susceptible de présenter beaucoup d'intérêt pour les juges et les avocats dans l'avenir.

Lorsque la question mixte de fait et de droit en litige est une conclusion de négligence, notre

a finding of negligence by the trial judge should be deferred to by appellate courts. In *Jaegli Enterprises Ltd. v. Taylor*, [1981] 2 S.C.R. 2, at p. 4, Dickson J. (as he then was) set aside the holding of the British Columbia Court of Appeal that the trial judge had erred in his finding of negligence on the basis that "it is wrong for an appellate court to set aside a trial judgment where there is not palpable and overriding error, and the only point at issue is the interpretation of the evidence as a whole" (see also *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78, at p. 84).

Cour a jugé que les cours d'appel devaient faire preuve de retenue à l'égard de la conclusion du juge de première instance. Dans l'arrêt *Jaegli Enterprises Ltd. c. Taylor*, [1981] 2 R.C.S. 2, p. 4, le juge Dickson (plus tard Juge en chef) a infirmé la décision de la Cour d'appel de la Colombie-Britannique portant que le juge de première instance avait erronément conclu à la négligence, pour le motif qu'« une cour d'appel commet une erreur lorsqu'elle infirme un jugement de première instance s'il n'y a pas une erreur manifeste et dominante, et si l'interprétation de l'ensemble de la preuve est le seul point en litige » (voir aussi l'arrêt *Schreiber Brothers Ltd. c. Currie Products Ltd.*, [1980] 2 R.C.S. 78, p. 84).

This more stringent standard of review for findings of negligence is appropriate, given that findings of negligence at the trial level can also be made by juries. If the standard were instead correctness, this would result in the appellate court assessing even jury findings of negligence on a correctness standard. At present, absent misdirection on law by the trial judge, such review is not available. The general rule is that courts accord great deference to a jury's findings in civil negligence proceedings:

30

Il convient d'appliquer cette norme de contrôle plus exigeante aux conclusions de négligence, étant donné que de telles conclusions peuvent également être tirées par des jurys en première instance. Si la norme applicable était celle de la décision correcte, il s'ensuivrait que les cours d'appel appliqueraient cette norme pour contrôler même des conclusions de négligence tirées par jurys. Actuellement, il n'y a ouverture à un tel contrôle que si le juge du procès a donné des directives erronées au jury sur le droit applicable. Suivant la règle générale, les tribunaux font montre d'une grande retenue envers les conclusions des jurys dans les procès civils pour négligence :

> The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it.
>
> (*McCannell v. McLean*, [1937] S.C.R. 341, at p. 343)

> [TRADUCTION] Le principe pertinent a été énoncé dans bon nombre d'arrêts de notre Cour, à savoir qu'il n'y a pas lieu d'écarter le verdict d'un jury parce qu'il va à l'encontre du poids de la preuve, à moins que le verdict en question ne soit nettement déraisonnable et injuste au point de convaincre le tribunal qu'aucun jury examinant la preuve dans son ensemble et agissant de façon judiciaire n'aurait pu le prononcer.
>
> (*McCannell c. McLean*, [1937] R.C.S. 341, p. 343)

See also *Dube v. Labar*, [1986] 1 S.C.R. 649, at p. 662, and *C.N.R. v. Muller*, [1934] 1 D.L.R. 768 (S.C.C.). To adopt a correctness standard would change the law and undermine the traditional function of the jury. Therefore, requiring a standard of "palpable and overriding error" for findings of negligence made by either a trial judge or a jury rein-

Voir également *Dube c. Labar*, [1986] 1 R.C.S. 649, p. 662, et *C.N.R. c. Muller*, [1934] 1 D.L.R. 768 (C.S.C.). Adopter la norme de la décision correcte aurait pour effet de modifier le droit et de porter atteinte au rôle traditionnel du jury. Par conséquent, le fait d'exiger l'application de la norme de l'« erreur manifeste et dominante » aux

forces the proper relationship between the appellate and trial court levels and accords with the established standard of review applicable to a finding of negligence by a jury.

31 Where, however, the erroneous finding of negligence of the trial judge rests on an incorrect statement of the legal standard, this can amount to an error of law. This distinction was pointed out by Cory J. in *Galaske v. O'Donnell*, [1994] 1 S.C.R 670, at pp. 690-91:

> The definition of the standard of care is a mixed question of law and fact. It will usually be for the trial judge to determine, in light of the circumstances of the case, what would constitute reasonable conduct on the part of the legendary reasonable man placed in the same circumstances. In some situations a simple reminder may suffice while in others, for example when a very young child is the passenger, the driver may have to put the seat belt on the child himself. In this case, however, the driver took no steps whatsoever to ensure that the child passenger wore a seat belt. It follows that the trial judge's decision on the issue amounted to a finding that there was no duty at all resting upon the driver. This was an error of law.

Galaske, *supra*, is an illustration of the point made in *Southam*, *supra*, of the potential to extricate a purely legal question from what appears to be a question of mixed fact and law. However, in the absence of a legal error or a palpable and overriding error, a finding of negligence by a trial judge should not be interfered with.

32 We are supported in our conclusion by the analogy which can be drawn between inferences of fact and questions of mixed fact and law. As stated above, both involve drawing inferences from underlying facts. The difference lies in whether the inference drawn relates to a legal standard or not. Because both processes are intertwined with the weight assigned to the evidence, the numerous policy reasons which support a deferential stance to the trial judge's inferences of fact, also, to a certain extent, support showing

fins de contrôle d'une conclusion de négligence tirée par un juge ou un jury consolide les rapports qui doivent exister entre les juridictions d'appel et celles de première instance et respecte la norme de contrôle bien établie qui s'applique aux conclusions de négligence tirées par les jurys.

Toutefois, lorsque le juge du procès conclut erronément à la négligence par suite d'une formulation incorrecte de la norme juridique, cela peut constituer une erreur de droit. Cette distinction a été faite par le juge Cory dans l'arrêt *Galaske c. O'Donnell*, [1994] 1 R.C.S. 670, p. 690-691 :

> La définition de la norme de diligence est une question mixte de droit et de fait. Il incombera habituellement au juge du procès de déterminer, compte tenu des circonstances de l'espèce, ce qui constituerait une conduite raisonnable de la part de la personne raisonnable légendaire placée dans la même situation. Dans certains cas, un simple rappel suffira, tandis que dans d'autres, par exemple lorsqu'un très jeune enfant est passager, le conducteur peut avoir à attacher lui-même la ceinture de sécurité de l'enfant. Cependant, en l'espèce, le conducteur n'a pris aucune mesure pour veiller à ce que l'enfant porte sa ceinture de sécurité. Il s'ensuit que la décision du juge du procès sur la question équivalait à une conclusion qu'aucune obligation n'incombait au conducteur, ce qui constituait une erreur de droit.

L'arrêt *Galaske*, précité, illustre bien l'idée exposée dans l'arrêt *Southam*, précité, selon laquelle il est possible de dégager une pure question de droit de ce qui paraît être une question mixte de fait et de droit. Toutefois, en l'absence d'erreur de droit ou d'une erreur manifeste et dominante, la conclusion de négligence tirée par un juge de première instance ne doit pas être modifiée.

L'analogie qui peut être établie entre les inférences de fait et les questions mixtes de fait et de droit étaye notre conclusion. Comme nous l'avons dit précédemment, dans les deux cas des inférences doivent être tirées des faits à l'origine de l'affaire. La différence dépend de la question de savoir si l'inférence se rapporte à une norme juridique ou non. Parce que le résultat des deux processus est tributaire du poids accordé à la preuve, les diverses considérations de principe justifiant de faire montre de retenue à l'égard des inférences de

deference to the trial judge's inferences of mixed fact and law.

Where, however, an erroneous finding of the trial judge can be traced to an error in his or her characterization of the legal standard, then this encroaches on the law-making role of an appellate court, and less deference is required, consistent with a "correctness" standard of review. This nuance was recognized by this Court in *St-Jean v. Mercier*, [2002] 1 S.C.R. 491, 2002 SCC 15, at paras. 48-49:

> A question "about whether the facts satisfy the legal tests" is one of mixed law and fact. Stated differently, "whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact" (*Southam*, at para. 35).
>
> Generally, such a question, once the facts have been established without overriding and palpable error, is to be reviewed on a standard of correctness since the standard of care is normative and is a question of law within the normal purview of both the trial and appellate courts. [Emphasis added.]

A good example of this subtle principle can be found in *Rhône (The) v. Peter A.B. Widener (The)*, [1993] 1 S.C.R. 497, at pp. 515-16. In that case the issue was the identification of certain individuals within a corporate structure as directing minds. This is a mixed question of law and fact. However, the erroneous finding of the courts below was easily traceable to an error of law which could be extricated from the mixed question of law and fact. The extricable question of law was the issue of the functions which are required in order to be properly identified as a "directing mind" within a corporate structure (pp. 515-16). In the opinion of Iacobucci J. for the majority of the Court (at p. 526):

> With respect, I think that the courts below overemphasized the significance of sub-delegation in this case. The key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy on an

fait du juge de première instance justifient également, dans une certaine mesure, de faire de même à l'égard de ses inférences mixtes de fait et de droit.

33 Par contre, lorsqu'il peut être établi que la conclusion erronée du juge de première instance découle d'une erreur quant à la norme juridique à appliquer, ce facteur touche au rôle de création du droit de la cour d'appel, et une retenue moins élevée s'impose, conformément à la norme de la décision « correcte ». Notre Cour a apporté cette nuance dans l'arrêt *St-Jean c. Mercier*, [2002] 1 R.C.S. 491, 2002 CSC 15, par. 48-49 :

> La question qui consiste « à déterminer si les faits satisfont au critère juridique » est une question mixte de droit et de fait ou, en d'autres termes, « la question de savoir si le défendeur a respecté la norme de diligence appropriée est une question de droit et de fait » (*Southam*, par. 35).
>
> Une fois les faits établis sans erreur manifeste et dominante, cette question doit généralement être révisée suivant la norme de la décision correcte puisque la norme de diligence est normative et constitue une question de droit qui relève de la compétence habituelle des tribunaux de première instance et d'appel. [Nous soulignons.]

34 Un bon exemple de ce principe subtil est l'arrêt *Rhône (Le) c. Peter A.B. Widener (Le)*, [1993] 1 R.C.S. 497, p. 515-516. La question en litige dans cette affaire consistait à déterminer si certaines personnes faisaient partie des âmes dirigeantes d'une société. Il s'agit d'une question mixte de droit et de fait. Toutefois, la conclusion erronée des juridictions inférieures était facilement imputable à une erreur de droit qui pouvait être dégagée de la question mixte de droit et de fait. La question de droit ainsi isolable était celle des fonctions que devait remplir une personne pour qu'on puisse à bon droit la considérer comme une « âme dirigeante » de la société (p. 515-516). Le juge Iacobucci s'est exprimé ainsi au nom des juges de la majorité, à la p. 526 :

> En toute déférence, je crois que les juridictions inférieures ont trop insisté sur l'importance de la subdélégation en l'espèce. Le facteur clé qui permet de distinguer les âmes dirigeantes des employés ordinaires est la capacité d'exercer un pouvoir décisionnel sur les questions de politique générale de la personne morale, plutôt que

operational basis, whether at head office or across the sea.

35 Stated differently, the lower courts committed an error in law by finding that sub-delegation was a factor identifying a person who is part of the "directing mind" of a company, when the correct legal factor characterizing a "directing mind" is in fact "the capacity to exercise decision-making authority on matters of corporate policy". This mischaracterization of the proper legal test (the legal requirements to be a "directing mind") infected or tainted the lower courts' factual conclusion that Captain Kelch was part of the directing mind. As this erroneous finding can be traced to an error in law, less deference was required and the applicable standard was one of correctness.

36 To summarize, a finding of negligence by a trial judge involves applying a legal standard to a set of facts, and thus is a question of mixed fact and law. Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule, as stated in *Jaegli Enterprises*, *supra*, is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

le simple fait de mettre en œuvre ces politiques dans un cadre opérationnel, que ce soit au siège social ou en mer.

En d'autres termes, les juridictions inférieures ont commis une erreur de droit en concluant que la subdélégation était un facteur permettant de qualifier une personne d'« âme dirigeante » d'une société, alors que le facteur juridique applicable à cet égard est en fait « la capacité d'exercer un pouvoir décisionnel sur les questions de politique générale de la personne morale ». Cette formulation erronée du critère juridique approprié (les conditions juridiques requises pour être une « âme dirigeante ») a entaché ou vicié la conclusion factuelle des juridictions inférieures selon laquelle le capitaine Kelch était une âme dirigeante de la société. Comme cette conclusion erronée était imputable à une erreur de droit, un degré moindre de retenue s'imposait et la norme applicable était celle de la décision correcte.

En résumé, la conclusion de négligence que tire le juge de première instance suppose l'application d'une norme juridique à un ensemble de faits et constitue donc une question mixte de fait et de droit. Les questions mixtes de fait et de droit s'étalent le long d'un spectre. Lorsque, par exemple, la conclusion de négligence est entachée d'une erreur imputable à l'application d'une norme incorrecte, à l'omission de tenir compte d'un élément essentiel d'un critère juridique ou à une autre erreur de principe semblable, une telle erreur peut être qualifiée d'erreur de droit et elle est contrôlée suivant la norme de la décision correcte. Les cours d'appel doivent cependant faire preuve de prudence avant de juger que le juge de première instance a commis une erreur de droit lorsqu'il a conclu à la négligence, puisqu'il est souvent difficile de départager les questions de droit et les questions de fait. Voilà pourquoi on appelle certaines questions des questions « mixtes de fait et de droit ». Si le principe juridique n'est pas facilement isolable, il s'agit alors d'une « question mixte de fait et de droit », assujettie à une norme de contrôle plus rigoureuse. Selon la règle générale énoncée dans l'arrêt *Jaegli Enterprises*, précité, si la question litigieuse en appel soulève l'interprétation de l'ensemble de la preuve par le juge de première instance, cette interprétation ne doit pas être infirmée en l'absence d'erreur manifeste et dominante.

In this regard, we respectfully disagree with our colleague when he states at para. 106 that "[o]nce the facts have been established, the determination of whether or not the standard of care was met by the defendant will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care. In many cases, viewing the facts through the legal lens of the standard of care gives rise to a policy-making or law-setting function that is the purview of both the trial and appellate courts". In our view, it is settled law that the determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law. This question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law.

III. Application of the Foregoing Principles to this Case: Standard of Care of the Municipality

A. *The Appropriate Standard of Review*

We agree with our colleague that the correct statement of the municipality's standard of care is that found in *Partridge v. Rural Municipality of Langenburg*, [1929] 3 W.W.R. 555 (Sask. C.A.), *per* Martin J.A., at pp. 558-59:

> The extent of the statutory obligation placed upon municipal corporations to keep in repair the highways under their jurisdiction, has been variously stated in numerous reported cases. There is, however, a general rule which may be gathered from the decisions, and that is, that the road must be kept in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety. What is a reasonable state of repair is a question of fact, depending upon all the surrounding circumstances; "repair" is a relative term, and hence the facts in one case afford no fixed rule

37 À cet égard, nous ne pouvons en toute déférence pas souscrire à l'opinion de notre collègue lorsqu'il affirme, au par. 106, qu'« [u]ne fois les faits établis, la décision touchant la question de savoir si le défendeur a respecté ou non la norme de diligence est, dans la plupart des cas, contrôlable selon la norme de la décision correcte, puisque le juge de première instance doit apprécier les faits au regard de la norme de diligence appropriée. Dans bien des cas, l'examen des faits à travers le prisme juridique de la norme de diligence implique l'établissement de politiques d'intérêt général ou la création de règles de droit, rôle qui relève autant des cours de première instance que des cours d'appel ». À notre avis, il est bien établi en droit que la question de savoir si le défendeur a respecté la norme de diligence suppose l'application d'une norme juridique à un ensemble de faits, ce qui en fait une question mixte de fait et de droit. Cette question est assujettie à la norme de l'erreur manifeste et dominante, à moins que le juge de première instance n'ait clairement commis une erreur de principe isolable en déterminant la norme applicable ou en appliquant cette norme, auquel cas l'erreur peut constituer une erreur de droit.

III. Application des principes qui précèdent à l'espèce : la norme de diligence applicable à la municipalité

A. *La norme de contrôle appropriée*

38 À l'instar de notre collègue, nous sommes d'avis que la norme de diligence applicable à la municipalité a été convenablement énoncée par le juge Martin dans l'arrêt *Partridge c. Rural Municipality of Langenburg*, [1929] 3 W.W.R. 555 (C.A. Sask.), p. 558-559 :

> [TRADUCTION] L'étendue de l'obligation légale d'entretien qui incombe aux corporations municipales à l'égard des routes qui se trouvent sur leur territoire a été énoncée de diverses façons dans nombre de décisions publiées. Il est toutefois possible de dégager la règle générale suivante de ces décisions : le chemin doit être tenu dans un état raisonnable d'entretien, de façon que ceux qui doivent l'emprunter puissent, en prenant des précautions normales, y circuler en sécurité. La question de savoir en quoi consiste un état raisonnable d'entretien est une question de fait, qui est fonction de toutes

by which to determine another case where the facts are different . . . .

However, we differ from the views of our colleague in that we find that the trial judge applied the correct test in determining that the municipality did not meet its standard of care, and thus did not commit an error of law of the type mentioned in *Southam*, *supra*. The trial judge applied all the elements of the *Partridge* standard to the facts, and her conclusion that the respondent municipality failed to meet this standard should not be overturned absent palpable and overriding error.

B. *The Trial Judge Did Not Commit an Error of Law*

39 We note that our colleague bases his conclusion that the municipality met its standard of care on his finding that the trial judge neglected to consider the conduct of the ordinary motorist, and thus failed to apply the correct standard of care, an error of law, which justifies his reconsideration of the evidence (para. 114). As a starting point to the discussion of the ordinary or reasonable motorist, we emphasize that the failure to discuss a relevant factor in depth, or even at all, is not itself a sufficient basis for an appellate court to reconsider the evidence. This was made clear by the recent decision of *Van de Perre*, *supra*, where Bastarache J. says, at para. 15:

. . . omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial. As stated in *Van Mol (Guardian ad Litem of) v. Ashmore* (1999), 168 D.L.R. (4th) 637 (B.C.C.A.), leave to appeal refused [2000] 1 S.C.R. vi, an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence.

les circonstances de l'espèce; le terme « entretien » est une notion relative et, par conséquent, les faits propres à une affaire donnée ne permettent pas de dégager de règle déterminée permettant de trancher une autre affaire présentant des circonstances différentes . . .

Toutefois, contrairement à notre collègue, nous estimons que la juge de première instance a appliqué le bon critère juridique en concluant que la municipalité n'avait pas respecté la norme de diligence à laquelle elle était tenue, et que la juge n'a donc pas commis une erreur de droit du genre de celle décrite dans l'arrêt *Southam*, précité. La juge de première instance a appliqué aux faits de l'espèce tous les éléments du critère énoncé dans l'arrêt *Partridge*, et sa conclusion que la municipalité défenderesse n'a pas respecté ce critère ne devrait pas être infirmée en l'absence d'erreur manifeste et dominante.

B. *La juge de première instance n'a pas commis d'erreur de droit*

Nous soulignons que notre collègue fonde sa décision que la municipalité a respecté la norme de diligence sur sa conclusion que la juge de première instance a négligé de prendre en compte le comportement de l'automobiliste moyen et n'a donc pas appliqué la bonne norme de diligence, commettant ainsi une erreur de droit le justifiant de réexaminer la preuve (par. 114). Pour les besoins de l'analyse du critère de l'automobiliste moyen ou raisonnable, nous tenons au départ à signaler que l'omission d'examiner en profondeur un facteur pertinent, voire de ne pas l'examiner du tout, n'est pas en soi un fondement suffisant pour justifier une cour d'appel de réexaminer la preuve. Ce principe a été clairement énoncé dans l'arrêt récent *Van de Perre*, précité, où le juge Bastarache a dit ceci, au par. 15 :

. . . des omissions dans les motifs ne signifieront pas nécessairement que la cour d'appel a compétence pour examiner la preuve entendue au procès. Comme le dit l'arrêt *Van Mol (Guardian ad Litem of) c. Ashmore* (1999), 168 D.L.R. (4th) 637 (C.A.C.-B.), autorisation d'appel refusée [2000] 1 R.C.S. vi, une omission ne constitue une erreur importante que si elle donne lieu à la conviction rationnelle que le juge de première instance doit avoir oublié, négligé d'examiner ou mal interprété la preuve de telle manière que sa conclusion en a été affectée. Faute d'une telle conviction rationnelle, la cour d'appel ne peut pas réexaminer la preuve.

In our view, as we will now discuss, there can be no reasoned belief in this case that the trial judge forgot, ignored, or misconceived the question of the ordinary driver. It would thus be an error to engage in a re-assessment of the evidence on this issue.

The fact that the conduct of the ordinary motorist was in the mind of the trial judge from the outset is clear from the fact that she began her standard of care discussion by stating the correct test, quoting the above passage from *Partridge*, *supra*. Absent some clear sign that she subsequently varied her approach, this initial acknowledgment of the correct legal standard is a strong indication that this was the standard she applied. Not only is there no indication that she departed from the stated test, but there are further signs which support the conclusion that the trial judge applied the *Partridge* standard. The first such indication is that the trial judge did discuss, both explicitly and implicitly, the conduct of an ordinary or reasonable motorist approaching the curve. The second indication is that she referred to the evidence of the experts, Mr. Anderson and Mr. Werner, both of whom discussed the conduct of an ordinary motorist in this situation. Finally, the fact that the trial judge apportioned negligence to Mr. Nikolaisen indicates that she assessed his conduct against the standard of the ordinary driver, and thus considered the conduct of the latter.

The discussion of the ordinary motorist is found in the passage from the trial judgment immediately following the statement of the requisite standard of care:

> Snake Hill Road is a low traffic road. It is however maintained by the R.M. so that it is passable year round. There are permanent residences on the road. It is used by farmers for access to their fields and cattle. Young people frequent Snake Hill Road for parties and as such the road is used by those who may not have the same degree of familiarity with it as do residents.

À notre avis, comme nous allons le voir, la présente espèce ne peut faire naître la conviction rationnelle que la juge de première instance a oublié d'examiner la question du conducteur moyen, en a fait abstraction ou l'a mal interprétée. Il serait donc erroné de réexaminer la preuve relative à cette question.

40 Le fait que, dès le départ, la juge de première instance a eu à l'esprit la conduite de l'automobiliste moyen ressort clairement du fait qu'elle a commencé son examen de la norme de diligence en formulant le critère approprié, c'est-à-dire en citant le passage susmentionné de l'arrêt *Partridge*, précité. En l'absence d'indications claires qu'elle a subséquemment modifié sa méthode d'analyse, cette mention initiale de la norme juridique appropriée constitue un indice solide qu'il s'agit bien de la norme qu'elle a appliquée. Non seulement rien n'indique qu'elle s'est écartée du critère énoncé, mais d'autres indices étayent la conclusion qu'elle a appliqué le critère de l'arrêt *Partridge*. Le premier de ces indices est que la juge s'est bel et bien interrogée, tant explicitement qu'implicitement, sur la conduite de l'automobiliste moyen ou raisonnable s'approchant du virage. Le deuxième indice est qu'elle a fait état des témoignages des experts, MM. Anderson et Werner, qui ont tous deux analysé le comportement de l'automobiliste moyen se trouvant dans cette situation. Enfin, le fait que la juge de première instance ait imputé une partie de la responsabilité à M. Nikolaisen indique qu'elle a évalué sa conduite eu égard au critère du conducteur moyen, et qu'elle a donc pris en compte la conduite de ce dernier.

41 On trouve l'analyse relative à l'automobiliste moyen dans cet extrait du jugement de première instance qui suit immédiatement l'énoncé de la norme de diligence requise :

> [TRADUCTION] Le chemin Snake Hill est un chemin à faible débit de circulation. Il est néanmoins entretenu par la M.R. à longueur d'année afin de le garder carrossable. Des résidences permanentes sont situées en bordure de celui-ci. Les fermiers l'utilisent pour accéder à leurs champs et à leur bétail. Des jeunes gens empruntent le chemin Snake Hill pour se rendre à des fêtes, de sorte qu'il est utilisé par des conducteurs qui ne le connaissent pas toujours aussi bien que les résidents de l'endroit.

There is a portion of Snake Hill Road that is a hazard to the public. In this regard I accept the evidence of Mr. Anderson and Mr. Werner. Further, it is a hazard that is not readily apparent to users of the road. It is a hidden hazard. The location of the Nikolaisen rollover is the most dangerous segment of Snake Hill Road. Approaching the location of the Nikolaisen rollover, limited sight distance, created by uncleared bush, precludes a motorist from being forewarned of an impending sharp right turn immediately followed by a left turn. While there were differing opinions on the *maximum* speed at which this curve can be negotiated, I am satisfied that when limited sight distance is combined with the tight radius of the curve and lack of superelevation, this curve cannot be *safely* negotiated at speeds greater than 60 kilometres per hour when conditions are favourable, or 50 kilometres per hour when wet.

. . . where the existence of that bush obstructs the ability of a motorist to be forewarned of a hazard such as that on Snake Hill Road, it is reasonable to expect the R.M. to erect and maintain a warning or regulatory sign so that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation. [Underlining added; italics in original.]

([1998] 5 W.W.R. 523, at paras. 84-86)

42 In our view, this passage indicates that the trial judge did consider how a motorist exercising ordinary care would approach the curve in question. The implication of labelling the curve a "hidden hazard" which is "not readily apparent to users of the road", is that the danger is of the type that cannot be anticipated. This in turn implies that, even if the motorist exercises ordinary care, he or she will not be able to react to the curve. As well, the trial judge referred explicitly to the conduct of a motorist exercising ordinary care: "it is reasonable to expect the R.M. to erect and maintain a warning or regulatory sign so that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation" (para. 86 (emphasis added)).

Il y a, sur le chemin Snake Hill, un tronçon qui présente un danger pour le public. À cet égard, je retiens les témoignages de MM. Anderson et Werner. En outre, il s'agit d'un danger qui n'est pas facilement décelable par les usagers du chemin. Il s'agit d'un danger caché. L'endroit où le véhicule de M. Nikolaisen a fait un tonneau est situé sur le tronçon le plus dangereux du chemin Snake Hill. À l'approche de cet endroit, des broussailles réduisent la distance de visibilité de l'automobiliste et l'empêchent de voir l'imminence d'un virage à droite serré, qui est immédiatement suivi d'un virage à gauche. Bien que des opinions divergentes aient été émises quant à la vitesse *maximale* à laquelle ce virage peut être pris, je suis d'avis que, vu la distance de visibilité réduite, l'existence d'une courbe serrée et l'absence de surélévation du chemin, ce virage ne peut être pris *en sécurité* à une vitesse supérieure à 60 kilomètres à l'heure dans des conditions favorables, ou 50 kilomètres à l'heure sur chaussée humide.

. . . à l'endroit où la présence des broussailles empêche les automobilistes de voir venir un danger comme celui qui existe sur le chemin Snake Hill, il est raisonnable de s'attendre à ce que la M.R. installe et maintienne un panneau d'avertissement ou de signalisation afin qu'un automobiliste prenant des précautions normales soit prévenu et puisse réduire sa vitesse et prendre des mesures correctives avant d'arriver à l'endroit dangereux. [Nous soulignons; en italique dans l'original.]

([1998] 5 W.W.R. 523, par. 84-86)

À notre avis, cet extrait indique que la juge de première instance a effectivement pris en compte la façon dont l'automobiliste prenant des précautions normales s'approcherait du virage en question. Qualifier le virage de [TRADUCTION] « danger caché », danger qui « n'est pas facilement décelable par les usagers du chemin », implique que le danger en est un qu'il est impossible de prévoir. Il s'ensuit que, même si l'automobiliste prend des précautions normales, il ne pourra pas réagir à la présence du virage. Par ailleurs, la juge de première instance a explicitement fait état de la conduite de l'automobiliste prenant des précautions normales : [TRADUCTION] « [I]l est raisonnable de s'attendre à ce que la M.R. installe et maintienne un panneau d'avertissement ou de signalisation afin qu'un automobiliste prenant des précautions normales soit prévenu et puisse réduire sa vitesse et prendre des mesures correctives avant d'arriver à l'endroit dangereux » (par. 86 (nous soulignons)).

With respect to the speed of a motorist approaching the curve, there is also an indication that the trial judge considered the conduct of an ordinary motorist. First, she stated that she accepted the evidence of Mr. Anderson and Mr. Werner with respect to the finding that the curve constituted a hazard to the public. The evidence given by these experts suggests that between 60 and 80 km/h is a reasonable speed to drive parts of this road, and at that speed, the curve presents a hazard. Their evidence also indicates their general opinion that the curve was a hazardous one. Mr. Anderson refers to the curve being difficult to negotiate at "normal speeds". Also, Mr. Anderson states that "if you're not aware that this curve is there, the sharp course of the curve, and you enter too far into it before you realize that the curve is there, then you have to do a tighter radius than 118 metres in order to get back on track to be able to negotiate the second curve". He also states that "you could be lulled into thinking you've got an 80 kilometres an hour road until you are too far into the tight curve to be able to respond".

43 Relativement à la vitesse à laquelle les automobilistes s'approchent du virage, il existe également un indice confirmant que la juge de première instance a pris en compte la conduite de l'automobiliste moyen. Premièrement, elle a dit qu'elle acceptait les témoignages de MM. Anderson et de Werner en ce qui concerne la conclusion que la courbe constituait un danger pour le public. Leurs témoignages suggèrent qu'une vitesse de 60 à 80 km/h est une vitesse raisonnable à certains endroits de ce chemin et que, à cette vitesse, la courbe constitue un danger. Leurs témoignages indiquent également qu'ils estiment de façon générale que la courbe est dangereuse. De dire M. Anderson, le virage est difficile à prendre à des [TRADUCTION] « vitesses normales ». Il ajoute que, [TRADUCTION] « si on ne connaît pas la présence de ce virage à cet endroit, le caractère prononcé du virage, et qu'on ne s'aperçoit pas qu'il y a un virage avant de s'être déjà engagé trop loin dans celui-ci, il faut tourner dans un rayon inférieur à 118 mètres pour corriger sa trajectoire afin d'être en mesure de prendre le deuxième virage ». Il affirme également qu' [TRADUCTION] « on peut être amené à croire qu'on se trouve sur une route où il est possible de rouler à 80 km/h, jusqu'à ce qu'on soit engagé trop loin dans le virage serré pour être capable de réagir ».

The Court of Appeal found that, given the nature and condition of Snake Hill Road, the contention that this rural road would be taken at 80 km/h by the ordinary motorist was untenable. However, it is clear from the trial judge's reasons that she did not take 80 km/h as the speed at which the ordinary motorist would approach the curve. Instead she found, based on expert evidence, that "this curve cannot be *safely* negotiated at speeds greater than 60 kilometres per hour when conditions are favourable, or 50 kilometres per hour when wet" (para. 85 (emphasis in original)). From this finding, coupled with the finding that the curve was hidden and unexpected, the logical conclusion is that the trial judge found that a motorist exercising ordinary care could easily be deceived into approaching the curve at speeds in excess of the safe speed for the curve, and subsequently be taken by surprise. Therefore, the trial judge found that the curve was hazardous to the ordinary

44 La Cour d'appel a jugé que, vu la nature et l'état du chemin Snake Hill, la prétention selon laquelle l'automobiliste moyen roulerait sur cette route rurale à 80 km/h était insoutenable. Toutefois, il ressort clairement des motifs de la juge de première instance qu'elle ne considérait pas que l'automobiliste moyen s'approcherait du virage à 80 km/h. Elle a plutôt conclu, à partir des témoignages des experts, que [TRADUCTION] « ce virage ne peut être pris *en sécurité* à une vitesse supérieure à 60 kilomètres à l'heure dans des conditions favorables, ou 50 kilomètres à l'heure sur chaussée humide » (par. 85 (en italique dans l'original)). De cette constatation, conjuguée à celle que le virage était caché et imprévu, il est logique de conclure que la juge de première instance a estimé que l'automobiliste prenant des précautions normales pouvait aisément être amené à s'approcher du virage à des vitesses supérieures à la vitesse sécuritaire pour le prendre, et se retrouver ensuite pris au dépourvu. La juge de première

motorist and it follows that she applied the correct standard of care.

45 In our respectful view, our colleague errs in agreeing with the Court of Appeal's finding that the trial judge should have addressed the conduct of the ordinary motorist more fully (para. 124). At para. 119, he writes:

> A proper application of the test demands that the trial judge ask the question: "How would a reasonable driver have driven on this road?" Whether or not a hazard is "hidden" or a curve is "inherently" dangerous does not dispose of the question.

And later, he states, "In my view, the question of how the reasonable driver would have negotiated Snake Hill Road necessitated a somewhat more in-depth analysis of the character of the road" (para. 125). With respect, requiring the trial judge to have made this specific inquiry in her reasons is inconsistent with *Van de Perre*, *supra*, which makes it clear that an omission or a failure to discuss a factor in depth is not, in and of itself, a basis for interfering with the findings of the trial judge and reweighing the evidence. As we note above, it is clear that although the trial judge may not have conducted an extensive review of this element of the *Partridge* test, she did indeed consider this factor by stating the correct test, then applying this test to the facts.

46 We note that in relying on the evidence of Mr. Anderson and Mr. Werner, the trial judge chose not to base her decision on the conflicting evidence of other witnesses. However, her reliance on the evidence of Mr. Anderson and Mr. Werner is insufficient proof that she "forgot, ignored, or misconceived" the evidence. The full record was before the trial judge and we can presume that she reviewed all of it, absent further proof that the trial judge forgot, ignored or misapprehended the evidence, leading to an error in law. It is open to a trial judge to prefer the evidence of some witnesses over others:

instance a donc conclu que le virage était dangereux pour l'automobiliste moyen et il s'ensuit qu'elle a appliqué la norme de diligence appropriée.

En toute déférence, notre collègue commet une erreur en souscrivant à la conclusion de la Cour d'appel selon laquelle la juge de première instance aurait dû examiner de manière plus approfondie la conduite de l'automobiliste moyen (par. 124). Il écrit ceci, au par. 119 :

> Pour bien appliquer le critère juridique, le juge de première instance doit se poser la question suivante : « Comment un conducteur raisonnable aurait-il roulé sur ce chemin? » Le fait de conclure qu'il existe ou non un danger « caché » ou qu'une courbe est quelque chose d'« intrinsèquement » dangereux ne vide pas la question.

Plus loin, il dit : « À mon avis, la question de savoir comment un conducteur raisonnable aurait roulé sur le chemin Snake Hill nécessitait un examen un peu plus approfondi de la nature du chemin » (par. 125). En toute déférence, considérer que la juge de première instance aurait dû faire cette analyse particulière dans ses motifs est incompatible avec l'arrêt *Van de Perre*, précité, lequel établit clairement que l'omission ou le défaut d'analyser un facteur en profondeur ne constitue pas, en soi, une raison justifiant de modifier les conclusions du juge de première instance et de réexaminer la preuve. Comme nous l'avons dit précédemment, il est clair que, quoique la juge de première instance n'ait peut-être pas fait une analyse approfondie de ce volet du critère énoncé dans l'arrêt *Partridge*, elle a effectivement tenu compte de ce facteur en formulant le critère approprié puis en l'appliquant aux faits de l'espèce.

Nous tenons à souligner que, en s'appuyant sur les témoignages de MM. Anderson et Werner, la juge de première instance a choisi de ne pas fonder sa décision sur les témoignages contradictoires rendus par d'autres témoins. Toutefois, cela ne suffit pas pour établir qu'elle a « oublié, négligé d'examiner ou mal interprété » la preuve. La juge de première instance disposait de l'ensemble du dossier et on peut présumer qu'elle l'a étudié d'un bout à l'autre, en l'absence d'autre indication qu'elle a oublié, négligé d'examiner ou mal interprété la preuve, commettant ainsi une erreur de droit. Le juge de première

Toneguzzo-Norvell, *supra*, at p. 123. Mere reliance by the trial judge on the evidence of some witnesses over others cannot on its own form the basis of a "reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (*Van de Perre*, *supra*, at para. 15). This is in keeping with the narrow scope of review by an appellate court applicable in this case.

A further indication that the trial judge considered the conduct of an ordinary motorist on Snake Hill Road is her finding that both Mr. Nikolaisen and the municipality breached their duty of care to Mr. Housen, and that the defendant Nikolaisen was 50 percent contributorily negligent. Since a finding of negligence implies a failure to meet the ordinary standard of care, and since Mr. Nikolaisen's negligence related to his driving on the curve, to find that Mr. Nikolaisen's conduct on the curve failed to meet the standard of the ordinary driver implies a consideration of that ordinary driver on the curve. The fact that the trial judge distinguished the conduct of Mr. Nikolaisen in driving negligently on the road from the conduct of the municipality in negligently failing to erect a warning sign is evidence that the trial judge kept the municipality's legal standard clearly in mind in its application to the facts, and that she applied this standard to the ordinary driver, not the negligent driver.

To summarize, in the course of her reasons, the trial judge first stated the requisite standard of care from *Partridge*, *supra*, relating to the conduct of the ordinary driver. She then applied that standard to the facts referring again to the conduct of the ordinary driver. Finally, in light of her finding that the municipality breached this standard, she apportioned negligence between the driver and the municipality in a way which again entailed a consideration of the

instance peut retenir la déposition de certains témoins de préférence à d'autres : *Toneguzzo-Norvell*, précité, p. 123. Le fait pour le juge de première instance de s'appuyer sur certains témoignages plutôt que sur d'autres ne peut à lui seul fournir l'assise d'une « conviction rationnelle que le juge de première instance doit avoir oublié, négligé d'examiner ou mal interprété la preuve de telle manière que sa conclusion en a été affectée » (*Van de Perre*, précité, par. 15). Cette conclusion est compatible avec la portée restreinte de l'examen qu'il convient de faire en appel dans la présente affaire.

47 Une autre indication que la juge de première instance s'est interrogée sur la façon dont conduit l'automobiliste moyen sur le chemin Snake Hill est sa conclusion que M. Nikolaisen et la municipalité ont tous deux manqué à leur obligation de diligence envers M. Housen, et que le défendeur Nikolaisen était responsable de négligence concourante dans une proportion de 50 p. 100. Comme une conclusion de négligence implique un manquement à la norme de diligence habituelle, et comme la négligence de M. Nikolaisen était liée à sa manière de conduire dans le virage, la conclusion que sa conduite à cet endroit ne respectait pas le critère du conducteur moyen suppose qu'on s'est demandé comment ce conducteur s'approcherait du virage. La distinction qu'a établie la juge de première instance entre la négligence dont a fait preuve M. Nikolaisen lorsqu'il roulait sur le chemin et celle dont la municipalité a fait montre en omettant d'installer un panneau d'avertissement prouve qu'elle n'a pas perdu de vue la norme juridique régissant la municipalité et l'application de cette norme aux faits, et que la juge a appliqué cette norme au conducteur moyen, et non au conducteur négligent.

48 En résumé, dans ses motifs la juge de première instance a d'abord énoncé la norme de diligence requise par l'arrêt *Partridge*, précité, relativement à la conduite de l'automobiliste moyen. Elle a ensuite appliqué cette norme aux faits, se reportant encore une fois à la conduite de l'automobiliste moyen. Enfin, vu sa conclusion que la municipalité avait manqué à cette norme de diligence, elle a réparti la responsabilité entre le conducteur

ordinary driver. As such, we are overwhelmingly drawn to the conclusion that the conduct of the ordinary driver was both considered and applied by the trial judge.

49 Thus, we conclude that the trial judge did not commit an error of law with respect to the municipality's standard of care. On this matter, we disagree with the basis for the re-assessment of the evidence undertaken by our colleague (paras. 122-42) and regard this re-assessment to be an unjustified intrusion into the finding of the trial judge that the municipality breached its standard of care. This finding is a question of mixed law and fact which should not be overturned absent a palpable and overriding error. As discussed below, it is our view that no such error exists, as the trial judge conducted a reasonable assessment based on her view of the evidence.

C. *The Trial Judge Did Not Commit A Palpable or Overriding Error*

50 Despite this high standard of review, the Court of Appeal found that a palpable and overriding error was made by the trial judge ([2000] 4 W.W.R. 173, 2000 SKCA 12, at para. 84). With respect, this finding was based on the erroneous presumption that the trial judge accepted 80 km/h as the speed at which an ordinary motorist would approach the curve, a presumption which our colleague also adopts in his reasons (para. 133).

51 As discussed above, the trial judge's finding was that an ordinary motorist could approach the curve in excess of 60 km/h in dry conditions, and 50 km/h in wet conditions, and that at such speeds the curve was hazardous. The trial judge's finding was not based on a particular speed at which the curve would be approached by the ordinary motorist. Instead, she found that, because the curve was hidden and sharper than would be anticipated, a motorist exercising ordinary care could approach it at greater than

et la municipalité d'une manière qui, une fois de plus, atteste la prise en compte du critère du conducteur moyen. En conséquence, nous en venons irrésistiblement à la conclusion que la juge de première instance a pris en compte et appliqué ce critère.

Par conséquent, nous estimons que la juge de première instance n'a pas commis d'erreur de droit en ce qui concerne la norme de diligence à laquelle était tenue la municipalité. Sur ce point, nous ne souscrivons pas aux raisons sur lesquelles se fondent notre collègue pour réexaminer la preuve (aux par. 122 à 142) et nous considérons ce réexamen comme une intervention injustifiée relativement à la conclusion de la juge de première instance portant que la municipalité a manqué à la norme de diligence à laquelle elle était tenue. Cette conclusion porte sur une question mixte de droit et de fait et elle ne peut pas être infirmée en l'absence d'erreur manifeste et dominante. Comme nous le verrons plus loin, nous sommes d'avis qu'aucune erreur de cette nature n'a été commise, car la juge de première instance a fait une analyse raisonnable, fondée sur son appréciation de la preuve.

C. *La juge de première instance n'a pas commis d'erreur manifeste ou dominante*

Malgré cette norme de contrôle sévère, la Cour d'appel a jugé que la juge de première instance avait commis une erreur manifeste et dominante ([2000] 4 W.W.R. 173, 2000 SKCA 12, par. 84). En toute déférence, cette conclusion repose sur la présomption erronée selon laquelle la juge aurait accepté que l'automobiliste moyen approcherait du virage à 80 km/h, présomption qu'adopte également notre collègue dans ses motifs (par. 133).

Comme nous l'avons vu plus tôt, la conclusion de la juge de première instance était que l'automobiliste moyen pourrait s'approcher du virage à une vitesse supérieure à 60 km/h sur chaussée sèche, et 50 km/h sur chaussée humide, mais qu'à ces vitesses le virage était dangereux. Cette conclusion n'était pas fondée sur une vitesse précise à laquelle l'automobiliste moyen s'approcherait du virage. La juge de première instance a plutôt estimé que, parce que le virage est caché et plus serré que ce à quoi on

the speed at which it would be safe to negotiate the curve.

As we explain in greater detail below, in our opinion, not only is this assessment far from reaching the level of a palpable and overriding error, in our view, it is a sensible and logical way to deal with large quantities of conflicting evidence. It would be unrealistic to focus on some exact speed at which the curve would likely be approached by the ordinary motorist. The findings of the trial judge in this regard were the result of a reasonable and practical assessment of the evidence as a whole.

In finding a palpable and overriding error, Cameron J.A. relied on the fact that the trial judge adopted the expert evidence of Mr. Anderson and Mr. Werner which was premised on a *de facto* speed limit of 80 km/h taken from *The Highway Traffic Act*, S.S. 1986, c. H-3.1. However, whether or not the experts based their testimony on this limit, the trial judge did not adopt that limit as the speed of the ordinary motorist approaching the curve. Again, the trial judge found that the curve could not be taken safely at greater than 60 km/h dry and 50 km/h wet, and there is evidence in the record to support this finding. For example, Mr. Anderson states:

If you don't anticipate the curve and you get too far into it before you start to do your correction then you can get into trouble even at, probably at 60. Fifty you'd have to be a long ways into it, but certainly at 60 you could.

It is notable too that both Mr. Anderson and Mr. Werner would have recommended installing a sign, warning motorists of the curve, with a posted limit of 50 km/h.

Although clearly the curve could not be negotiated safely at 80 km/h, it could also not be

s'attend normalement, il était possible qu'un automobiliste prenant des précautions normales s'en approche à une vitesse supérieure à la vitesse sécuritaire pour prendre le virage.

52 Comme nous allons le préciser plus loin, nous sommes d'avis que non seulement cette appréciation est-elle loin de constituer une erreur manifeste et dominante, mais elle est une réponse judicieuse et logique eu égard à l'abondance d'éléments de preuve contradictoires. Il serait irréaliste de fixer une quelconque vitesse à laquelle l'automobiliste moyen s'approcherait vraisemblablement du virage. Les conclusions de la juge de première instance à cet égard découlent d'une évaluation raisonnable et réaliste de l'ensemble de la preuve.

53 En concluant à l'existence d'une erreur manifeste et dominante, le juge Cameron de la Cour d'appel s'est appuyé sur le fait que la juge de première instance avait retenu les témoignages d'expert de MM. Anderson et Werner, lesquels étaient fondés sur la vitesse limite *de facto* de 80 km/h prévue par la *Highway Traffic Act*, S.S. 1986, ch. H-3.1. Toutefois, que le témoignage des experts ait été ou non fondé sur cette limite, la juge de première instance n'a pas retenu cette vitesse comme étant celle à laquelle l'automobiliste moyen s'approche du virage. Rappelons que la juge de première instance a estimé qu'il n'était pas possible d'aborder le virage en sécurité à une vitesse supérieure à 60 km/h sur chaussée sèche et 50 km/h sur chaussée humide, et il existe au dossier des éléments étayant cette conclusion. Par exemple, M. Anderson a dit ceci :

[TRADUCTION] Si vous ne prévoyez pas l'arrivée du virage et que vous vous engagez trop loin dans celui-ci avant d'amorcer votre manœuvre correctrice, vous risquez d'avoir des ennuis même à, probablement à 60. À cinquante il faudrait que vous soyez engagé assez loin, mais à 60 vous pourriez certainement en avoir.

Il convient également de signaler que MM. Anderson et Werner auraient tous deux recommandé l'installation d'un panneau avertissant les automobilistes de l'imminence du virage et fixé la vitesse maximale permise à 50 km/h.

54 Le virage ne pouvait manifestement pas être pris en sécurité à 80 km/h, mais il ne pouvait l'être non

negotiated safely at much slower speeds. It should also be noted that the trial judge did not adopt the expert testimony of Mr. Anderson and Mr. Werner in its entirety. She stated: "There is a portion of Snake Hill Road that is a hazard to the public. In this regard I accept the evidence of Mr. Anderson and Mr. Werner" (para. 85 (emphasis added)). It cannot be assumed from this that she accepted a *de facto* speed limit of 80 km/h especially when one bears in mind (1) the trial judge's statement of the safe speeds of 50 and 60 km/h, and (2) the fact that both these experts found the road to be unsafe at much lower speeds than 80 km/h.

55 Given that the trial judge did not base her standard of care analysis on a *de facto* speed limit of 80 km/h, it then follows that the Court of Appeal's finding of a palpable and overriding error cannot stand.

56 Furthermore, the narrowly defined scope of appellate review dictates that a trial judge should not be found to have misapprehended or ignored evidence, or come to the wrong conclusions merely because the appellate court diverges in the inferences it draws from the evidence and chooses to emphasize some portions of the evidence over others. As we are of the view that the trial judge committed no error of law in finding that the municipality breached its standard of care, we are also respectfully of the view that our colleague's re-assessment of the evidence on this issue (paras. 129-42) is an unjustified interference with the findings of the trial judge, based on a difference of opinion concerning the inferences to be drawn from the evidence and the proper weight to be placed on different portions of the evidence. For instance, in the opinion of our colleague, based on some portions of the expert evidence, a reasonable driver exercising ordinary care would approach a rural road at 50 km/h or less, because a reasonable driver would have difficulty seeing the sharp radius of the curve and oncoming traffic (para. 129). However, the trial judge, basing her assessment on other portions of the expert evidence, found that the nature of the road was such that a motorist could be

plus à des vitesses beaucoup plus réduites. Il convient également de souligner que la juge de première instance n'a pas retenu intégralement les témoignages d'expert de MM. Anderson et Werner. Elle a dit : [TRADUCTION] « Il y a, sur le chemin Snake Hill, un tronçon qui présente un danger pour le public. À cet égard, je retiens les témoignages de MM. Anderson et Werner » (par. 85 (nous soulignons)). Ces propos ne permettent pas de présumer qu'elle acceptait une vitesse limite *de facto* de 80 km/h, particulièrement si l'on se rappelle (1) qu'elle a dit qu'on pouvait rouler en sécurité à des vitesses de 50 et de 60 km/h, et (2) que ces deux experts ont considéré que le chemin n'était pas sûr même à des vitesses bien inférieures à 80 km/h.

Puisque la juge de première instance n'a pas fondé son analyse de la norme de diligence sur une vitesse limite *de facto* de 80 km/h, il s'ensuit que la conclusion de la Cour d'appel relativement à l'existence d'une erreur manifeste et dominante ne saurait être confirmée.

En outre, vu la portée restreinte de la révision en appel, on ne saurait conclure qu'un juge de première instance a négligé d'examiner la preuve, l'a mal interprétée ou est arrivé à des conclusions erronées, simplement parce que le tribunal d'appel tire des inférences divergentes de la preuve et décide d'accorder plus d'importance à certains éléments qu'à d'autres. Étant d'avis que la juge de première instance n'a pas commis d'erreur de droit en concluant que la municipalité avait violé la norme de diligence à laquelle elle était tenue, nous estimons aussi, en toute déférence, que le réexamen de la preuve auquel procède notre collègue sur cette question (aux par. 129 à 142) constitue une intervention injustifiée relativement aux conclusions de la juge de première instance, fondée sur une divergence d'opinions quant aux inférences devant être tirées de la preuve et au poids qu'il convient d'accorder à divers éléments. Par exemple, notre collègue est d'avis, sur la foi de certaines parties des témoignages d'expert, qu'un conducteur raisonnable prenant des précautions normales roulerait sur une route rurale à une vitesse maximale de 50 km/h, parce qu'il aurait de la difficulté à voir que le virage est serré et s'il vient des véhicules en sens inverse (par. 129). Or, se

deceived into believing that the road did not contain a sharp curve and thus would approach the road normally, unaware of the hidden danger.

We are faced in this case with conflicting expert evidence on the issue of the correct speed at which an ordinary motorist would approach the curve on Snake Hill Road. The differing inferences from the evidence drawn by the trial judge and the Court of Appeal amount to a divergence on what weight should be placed on various pieces of conflicting evidence. As noted by our colleague, Mr. Sparks was of the opinion that "[if] you can't see around the corner, then, you know, drivers would have a fairly strong signal . . . that due care and caution would be required". Similar evidence of this nature was given by Mr. Nikolaisen, and indeed even by Mr. Anderson and Mr. Werner. This is contrasted with evidence such as that given by Mr. Anderson and Mr. Werner that a reasonable driver would be "lulled" into thinking that there is an 80 km/h road ahead of him or her.

As noted by McLachlin J. in *Toneguzzo-Norvell*, *supra*, at p. 122 and mentioned above, "the weight to be assigned to the various pieces of evidence is under our trial system essentially the province of the trier of fact". In that case, a unanimous Court found that the Court of Appeal erred in interfering with the trial judge's factual findings, on the basis that it was open to the trial judge to place less weight on certain evidence and accept other, conflicting evidence which the trial judge found to be more convincing (*Toneguzzo-Norvell*, at pp. 122-23). Similarly, in this case, the trial judge's factual findings concerning the proper speed to be used on approaching the curve should not be interfered with. It was open to her to choose to place more weight on certain portions of the evidence of Mr. Anderson and Mr. Werner, where the evidence was conflicting. Her assessment of the proper speed was a reasonable inference based on the evidence and does not reach

fondant sur d'autres parties des témoignages d'expert, la juge de première instance a estimé que la nature du chemin était telle qu'un automobiliste pourrait être amené à croire que le chemin ne comporte pas de virage serré et, de ce fait, à y rouler normalement, sans soupçonner l'existence du danger caché.

57 En l'espèce, nous sommes en présence de témoignages d'expert contradictoires sur la question de la vitesse à laquelle l'automobiliste moyen s'approcherait du virage du chemin Snake Hill. Les inférences différentes que la juge de première instance et la Cour d'appel tirent de la preuve équivalent à une divergence d'opinion quant au poids à accorder à divers éléments de preuve contradictoires. Le témoin Sparks a émis l'opinion suivante, que cite également notre collègue : [TRADUCTION] « [Si] vous ne pouvez voir, de l'autre côté du virage, alors, vous savez, cela devrait envoyer un message clair aux conducteurs [. . .] que l'attention et la prudence s'imposent ». M. Nikolaisen, et même MM. Anderson et Werner ont d'ailleurs témoigné au même effet. Cela contraste avec l'affirmation de MM. Anderson et Werner selon laquelle un conducteur raisonnable serait [TRADUCTION] « amené » à croire qu'il se trouve sur un chemin où l'on peut rouler à 80 km/h.

58 Comme l'a souligné madame le juge McLachlin, à la p. 122 de l'arrêt *Toneguzzo-Norvell*, précité, « selon notre système de procès, il appartient essentiellement au juge des faits [. . .] d'attribuer un poids aux différents éléments de preuve ». Dans cette affaire, notre Cour a conclu à l'unanimité que la Cour d'appel avait commis une erreur en modifiant les conclusions de fait du juge de première instance, au motif qu'il était loisible à celui-ci d'accorder un poids moins grand à certains éléments de preuve et à accepter d'autres éléments contradictoires, qu'il considérait plus convaincants. (*Toneguzzo-Norvell*, p. 122-123). De même, en l'espèce, il n'y a pas lieu de modifier les conclusions de fait de la juge de première instance au sujet de la vitesse à laquelle il faudrait approcher du virage. Il lui était loisible d'accorder plus de poids à certaines parties des témoignages de MM. Anderson et Werner, dans les cas où la preuve était contradictoire. Son

the level of a palpable and overriding error. As such, the trial judge's findings with respect to the standard of care should not be overturned.

IV. Knowledge of the Municipality

59 We agree with our colleague that s. 192(3) of *The Rural Municipality Act*, *1989*, requires the plaintiff to show that the municipality knew or should have known of the disrepair of Snake Hill Road before the municipality can be found to have breached its duty of care under s. 192. We also agree that the evidence of the prior accidents, in and of itself, is insufficient to impute such knowledge to the municipality. However, we find that the trial judge did not err in her finding that the municipality knew or ought to have known of the disrepair.

60 As discussed, the question of whether the municipality knew or should have known of the disrepair of Snake Hill Road is a question of mixed fact and law. The issue is legal in the sense that the municipality is held to a legal standard of knowledge of the nature of the road, and factual in the sense of whether it had the requisite knowledge on the facts of this case. As we state above, absent an isolated error in law or principle, such a finding is subject to the "palpable and overriding" standard of review. In this case, our colleague concludes that the trial judge erred in law by failing to approach the question of knowledge from the perspective of a prudent municipal councillor, and holds that a prudent municipal councillor could not be expected to become aware of the risk posed to the ordinary driver by the hazard in question. He also finds that the trial judge erred in law by failing to recognize that the burden of proving knowledge rested with the plaintiff. With respect, we disagree with these conclusions.

appréciation de la vitesse appropriée constituait une inférence raisonnable, fondée sur la preuve, et elle ne constitue pas une erreur manifeste et dominante. Dans ce contexte, il n'y a pas lieu d'écarter ses conclusions concernant la norme de diligence.

IV. Connaissance de la municipalité

À l'instar de notre collègue, nous estimons que le par. 192(3) de la *Rural Municipality Act, 1989*, oblige le demandeur à démontrer que la municipalité connaissait ou aurait dû connaître le mauvais état du chemin Snake Hill pour qu'il soit possible de conclure qu'elle a manqué à l'obligation de diligence qui lui incombe en vertu de l'art. 192. Nous sommes nous aussi d'avis que la preuve des accidents antérieurs n'est pas, en soi, suffisante pour prêter cette connaissance à la municipalité. Cependant, nous arrivons à la conclusion que la juge de première instance n'a pas commis d'erreur lorsqu'elle a conclu que la municipalité connaissait ou aurait dû connaître le mauvais état du chemin.

Comme nous l'avons vu, la question de savoir si la municipalité connaissait ou aurait dû connaître le mauvais état du chemin Snake Hill est une question mixte de droit et de fait. Il s'agit, d'une part, d'une question de droit en ce que la municipalité est tenue à une norme juridique qui lui impose de connaître la nature du chemin, et, d'autre part, d'une question de fait en ce qu'il faut déterminer si, eu égard aux faits de l'espèce, elle avait la connaissance requise. Comme nous l'avons dit précédemment, en l'absence d'erreur de droit ou de principe isolable, une telle conclusion est assujettie à la norme de contrôle de l'erreur « manifeste et dominante ». En l'espèce, notre collègue conclut que la juge de première instance a commis une erreur de droit en ne considérant pas la question de la connaissance du point de vue du conseiller municipal prudent, et il estime qu'on ne pouvait s'attendre à ce qu'un conseiller municipal prudent s'aperçoive du risque que le danger en question faisait courir au conducteur moyen. Il est également d'avis que la juge de première instance a commis une erreur de droit en ne reconnaissant pas que la charge de prouver la connaissance incombait au demandeur. En toute déférence, nous ne pouvons souscrire à ces conclusions.

The hazard in question is an unsigned and unexpected sharp curve. In our view, when a hazard is, like this one, a permanent feature of the road which has been found to present a risk to the ordinary driver, it is open to the trial judge to draw an inference, on this basis alone, that a prudent municipal councillor ought to be aware of the hazard. In support of his conclusion on the issue of knowledge, our colleague states that the municipality's knowledge is inextricably linked to the standard of care, and ties his finding on the question of knowledge to his finding that the curve did not present a hazard to the ordinary motorist (para. 149). We agree that the question of knowledge is closely linked to the standard of care, and since we find that the trial judge was correct in holding that the curve presented a hazard to the ordinary motorist, from there it was open to the trial judge to find that the municipality ought to have been aware of this hazard. We further note that as a question of mixed fact and law this finding is subject to the "palpable and overriding" standard of review. On this point, however, we restrict ourselves to situations such as the one at bar where the hazard in question is a permanent feature of the road, as opposed to a temporary hazard which reasonably may not come to the attention of the municipality in time to prevent an accident from occurring.

61 Le danger en question est une courbe serrée et soudaine, qui n'est annoncée par aucune signalisation. À notre avis, lorsqu'un danger constitue, comme celui-ci qui nous intéresse, une caractéristique permanente qui, a-t-on jugé, présente un risque pour le conducteur moyen, le juge de première instance peut, pour ce seul motif, inférer qu'un conseiller municipal prudent aurait dû connaître l'existence d'un danger. Pour étayer sa conclusion sur la question de la connaissance, notre collègue affirme que la connaissance de la municipalité est intimement liée à celle de la norme de diligence, et il lie sa conclusion sur la connaissance à sa conclusion selon laquelle la courbe ne constituait pas un danger pour l'automobiliste moyen (par. 149). Nous reconnaissons que la question de la connaissance est étroitement liée à celle de la norme de diligence, et, comme nous estimons que la juge de première instance a eu raison de conclure que la courbe présentait un danger pour l'automobiliste moyen, elle pouvait dès lors juger que la municipalité aurait dû connaître ce danger. Soulignons également que cette conclusion visant une question mixte de fait et de droit est assujettie à la norme de contrôle de l'erreur « manifeste et dominante ». Sur ce point, toutefois, nous limitons la portée de notre opinion aux situations analogues à celle qui nous occupe, où le danger constitue une caractéristique permanente du chemin, par opposition à un danger temporaire dont une municipalité pourrait raisonnablement ne pas être informée en temps utile pour empêcher un accident de survenir.

In addition, our colleague relies on the evidence of the lay witnesses, Craig and Toby Thiel, who lived on Snake Hill Road, and who testified that they had not experienced any difficulties with it (para. 149). With respect, we find three problems with this reliance. First, since the curve was found to be a hazard based on its hidden and unexpected nature, relying on the evidence of those who drive the road on a daily basis does not, in our view, assist in determining whether the curve presented a hazard to the ordinary motorist, or whether the municipality ought to have been aware of the hazard. In addition, in finding that the municipality ought to have known of the disrepair, the trial judge clearly chose not to rely on the above evidence. As we state above,

62 Par ailleurs, notre collègue se fonde sur les dépositions de témoins ordinaires, Craig et Toby Thiel, qui habitaient sur le chemin Snake Hill et qui ont témoigné n'avoir jamais éprouvé de difficulté à conduire à cet endroit (par. 149). En toute déférence, nous estimons que le fait de se fonder sur ces témoignages pose trois problèmes. D'abord, vu la conclusion que la courbe constituait un danger à cause de sa nature cachée et imprévue, ce n'est pas en se basant sur le témoignage de ceux qui empruntent quotidiennement le chemin qu'il est possible, à notre avis, de déterminer si cette courbe présentait un danger pour l'automobiliste moyen, ou si la municipalité aurait dû connaître l'existence du danger. De plus, en concluant que la municipalité

it is open for a trial judge to prefer some parts of the evidence over others, and to re-assess the trial judge's weighing of the evidence, is, with respect, not within the province of an appellate court.

63 As well, since the question of knowledge is to be approached from the perspective of a prudent municipal councillor, we find the evidence of lay witnesses to be of little assistance. In *Ryan*, *supra*, at para. 28, Major J. stated that the applicable standard of care is that which "would be expected of an ordinary, reasonable and prudent person in the same circumstances" (emphasis added). Municipal councillors are elected for the purpose of managing the affairs of the municipality. This requires some degree of study and of information gathering, above that of the average citizen of the municipality. Indeed, it may in fact require consultation with experts to properly meet the obligation to be informed. Although municipal councillors are not experts, to equate the "prudent municipal councillor" with the opinion of lay witnesses who live on the road is incorrect in our opinion.

64 It is in this context that we view the following comments of the trial judge, at para. 90:

> If the R.M. did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known. While four accidents in 12 years may not in itself be significant, it takes on more significance given the close proximity of three of these accidents, the relatively low volume of traffic, the fact that there are permanent residences on the road and the fact that the road is frequented by young and perhaps less experienced drivers. I am not satisfied that the R.M. has established that in these circumstances it took reasonable steps to prevent this state of disrepair on Snake Hill Road from continuing.

aurait dû connaître le mauvais état du chemin, la juge de première instance a clairement choisi de ne pas se fonder sur les témoignages susmentionnés. Comme nous l'avons dit précédemment, le juge de première instance peut préférer certaines parties de la preuve à d'autres, et, en toute déférence, il n'appartient pas au tribunal d'appel de procéder à nouveau à l'appréciation de la preuve, tâche déjà accomplie par le juge du procès.

Qui plus est, étant donné que la question de la connaissance doit être considérée du point de vue du conseiller municipal prudent, nous estimons que le témoignage des témoins ordinaires est peu utile. Dans l'arrêt *Ryan*, précité, par. 28, le juge Major a dit que la norme de diligence qui s'applique est celle de la personne agissant aussi diligemment que « le ferait une personne ordinaire, raisonnable et prudente placée dans la même situation » (nous soulignons). Les conseillers municipaux sont élus pour gérer les affaires de la municipalité. Pour s'acquitter de cette tâche, il leur faut, dans un cas donné, examiner la situation et recueillir de l'information, faire davantage que ce que fait le simple citoyen de la municipalité. De fait, ils peuvent avoir à consulter des experts pour respecter leur obligation d'être informés. Bien que les conseillers municipaux ne soient pas des experts, il est à notre avis erroné d'assimiler le point de vue du « conseiller municipal prudent » à l'opinion de témoins ordinaires qui habitent sur le chemin.

C'est à la lumière de ce contexte que nous interprétons les commentaires suivants de la juge de première instance (au par. 90) :

> [TRADUCTION] Si la M.R. ne connaissait pas concrètement le danger intrinsèque que comporte cette portion du chemin Snake Hill, elle aurait dû le connaître. Le fait que quatre accidents se soient produits en 12 ans n'est peut-être pas significatif en soi, mais il le devient si l'on considère que trois de ces accidents sont survenus à proximité, qu'il s'agit d'une route à débit de circulation relativement faible, que des résidences permanentes sont situées en bordure de celle-ci et que le chemin est fréquenté par des conducteurs jeunes et peut-être moins expérimentés. Je ne suis pas convaincue que la M.R. a établi avoir, dans ces circonstances, pris des mesures raisonnables pour remédier au mauvais état du chemin Snake Hill.

From this statement, we take the trial judge to have meant that, given the occurrence of prior accidents on this low-traffic road, the existence of permanent residents, and the type of drivers on the road, the municipality did not take the reasonable steps it should have taken in order to ensure that Snake Hill Road did not contain a hazard such as the one in question. Based on these factors, the trial judge drew the inference that the municipality should have been put on notice and investigated Snake Hill Road, in which case it would have become aware of the hazard in question. This factual inference, grounded as it was on the trial judge's assessment of the evidence, was in our view, far from reaching the requisite standard of palpable and overriding error, proper.

Selon notre interprétation, la juge de première instance a voulu dire que, compte tenu des accidents antérieurs sur ce chemin à faible débit de circulation, de la présence de résidents permanents et du type de conducteurs qui empruntent le chemin, la municipalité n'a pas pris les mesures raisonnables qu'elle aurait dû prendre pour faire en sorte que le chemin Snake Hill ne comporte pas de danger comme celui en cause. À partir de ces éléments, la juge de première instance a inféré que la municipalité aurait dû être informée de la situation sur le chemin Snake Hill et aurait dû faire enquête à cet égard, ce qui lui aurait permis de prendre connaissance de l'existence du danger. Cette inférence factuelle, qui repose sur l'appréciation de la preuve faite par la juge de première instance, était selon nous fondée et loin de constituer l'erreur manifeste et dominante requise par la norme pertinente.

Although we agree with our colleague that the circumstances of the prior accidents in this case do not provide a direct basis for the municipality to have had knowledge of the particular hazard in question, in the view of the trial judge, they should have caused the municipality to investigate Snake Hill Road, which in turn would have resulted in actual knowledge. In this case, far from causing the municipality to investigate, the evidence of Mr. Danger, who had been the municipal administrator for 20 years, was that, until the time of the trial, he was not even aware of the three accidents which had occurred between 1978 and 1987 on Snake Hill Road. As such, we do not find that the trial judge based her conclusion on any perspective other than that of a prudent municipal councillor, and therefore that she did not commit an error of law in this respect. Moreover, we do not find that she imputed knowledge to the municipality on the basis of the occurrence of prior accidents on Snake Hill Road. The existence of the prior accidents was simply a factor which caused the trial judge to find that the municipality should have been put on notice with respect to the condition of Snake Hill Road (para. 90).

65 À l'instar de notre collègue, nous estimons que les circonstances des accidents survenus antérieurement, en l'espèce, ne constituent pas une preuve directe que la municipalité aurait dû avoir connaissance du danger particulier en cause, mais, selon la juge de première instance, ces circonstances auraient dû inciter la municipalité à faire enquête à l'égard du chemin Snake Hill, ce qui lui aurait permis de prendre connaissance concrètement du danger. Dans la présente affaire, les accidents antérieurs sont loin d'avoir incité la municipalité à faire enquête. D'ailleurs, M. Danger, administrateur de la municipalité pendant 20 ans, a témoigné que, jusqu'au procès, il n'était même pas au fait des trois accidents survenus entre 1978 et 1987 sur le chemin Snake Hill. En conséquence, nous n'estimons pas que la juge de première instance a fondé sa conclusion sur quelque autre point de vue autre que celui du conseiller municipal prudent, et elle n'a donc pas commis d'erreur de droit à cet égard. De plus, nous sommes d'avis qu'elle n'a pas prêté à la municipalité la connaissance requise sur la base des accidents antérieurs. L'existence de ces accidents ne constituait rien de plus qu'un des éléments qui l'ont amenée à conclure que la municipalité aurait dû être au fait de l'état du chemin Snake Hill (par. 90).

We emphasize that, in our view, the trial judge did not shift the burden of proof to the municipality

66 Nous tenons à souligner que la juge de première instance n'a pas, à notre avis, transféré le fardeau de

on this issue. Once the trial judge found that there was a permanent feature of Snake Hill Road which presented a hazard to the ordinary motorist, it was open to her to draw an inference that the municipality ought to have been aware of the danger. Once such an inference is drawn, then, unless the municipality can rebut the inference by showing that it took reasonable steps to prevent such a hazard from continuing, the inference will be left undisturbed. In our view, this is what the trial judge did in the above passage when she states: "I am not satisfied that the R.M. has established that in these circumstances it took reasonable steps to prevent this state of disrepair on Snake Hill Road from continuing" (para. 90 (emphasis added)). The fact that she drew such an inference is clear from the fact that this statement appears directly after her finding that the municipality ought to have known of the hazard based on the listed factors. Thus, it is our view that the trial judge did not improperly shift the burden of proof onto the municipality in this case.

la preuve à la municipalité sur cette question. Dès lors qu'elle a conclu qu'il existait sur le chemin Snake Hill une caractéristique permanente présentant un danger pour l'automobiliste moyen, il lui était loisible d'inférer que la municipalité aurait dû être au fait du danger. Dès l'instant où une telle inférence est tirée, elle demeure inchangée à moins que la municipalité ne puisse la réfuter en démontrant qu'elle a pris des mesures raisonnables pour faire cesser le danger. Selon nous, c'est ce que la juge de première instance a fait dans l'extrait précité lorsqu'elle dit : [TRADUCTION] « Je ne suis pas convaincue que la M.R. a établi avoir, dans ces circonstances, pris des mesures raisonnables pour remédier au mauvais état du chemin Snake Hill » (par. 90 (nous soulignons)). L'existence de cette inférence ressort clairement du fait que le passage précité suit immédiatement la conclusion de la juge de première instance selon laquelle, pour les raisons qu'elle énumère, la municipalité aurait dû connaître l'existence du danger. Par conséquent, nous sommes d'avis que la juge de première instance n'a pas fait erreur et transféré le fardeau de la preuve à la municipalité en l'espèce.

67 As well, although the circumstances of the prior accidents in this case do not provide strong evidence that the municipality ought to have known of the hazard, proof of prior accidents is not a necessary condition to a finding of breach of the duty of care under s. 192 of *The Rural Municipality Act, 1989*. If this were so, the first victim of an accident on a negligently maintained road would not be able to recover, whereas subsequent victims in identical circumstances would. Although under s. 192(3) the municipality cannot be held responsible for disrepair of which it could not have known, it is not sufficient for the municipality to wait for an accident to occur before remedying the disrepair, and, in the absence of proof by the plaintiff of prior accidents, claim that it could not have known of the hazard. If this were the case, not only would the first victim of an accident suffer a disproportionate evidentiary burden, but municipalities would also be encouraged not to collect information pertaining to accidents on its roads, as this would make it more difficult for the plaintiff in a motor vehicle accident to prove that the

De même, bien que les accidents survenus antérieurement en l'espèce ne constituent pas une preuve solide que la municipalité aurait dû connaître l'existence du danger, la preuve d'accidents antérieurs n'est pas une condition nécessaire pour qu'un tribunal puisse conclure à la violation de l'obligation de diligence prévue par l'art. 192 de la *Rural Municipality Act, 1989*. Si c'était le cas, la première victime d'un accident sur une route négligemment entretenue ne pourrait obtenir réparation, alors que les victimes subséquentes d'accidents survenant dans des circonstances identiques le pourraient. Bien que, au regard du par. 192(3), la municipalité ne puisse être tenue responsable du mauvais état d'une route dont elle n'aurait pu avoir connaissance, elle ne saurait se contenter d'attendre qu'un accident se produise avant de remédier au mauvais état de la route et, si un demandeur n'apporte pas la preuve de l'existence d'accidents antérieurs, soutenir qu'elle n'aurait pu connaître l'existence du danger. Dans cette hypothèse, non seulement imposerait-on à la première victime d'un accident un fardeau de preuve disproportionné, mais on encouragerait aussi

municipality knew or ought to have known of the disrepair.

Although in this case the trial judge emphasized the prior accidents that the plaintiff did manage to prove, in our view, it is not necessary to rely on these accidents in order to satisfy s. 192(3). For the plaintiff to provide substantial and concrete proof of the municipality's knowledge of the state of disrepair of its roads, is to set an impossibly high burden on the plaintiff. Such information was within the particular sphere of knowledge of the municipality, and in our view, it was reasonable for the trial judge to draw an inference of knowledge from her finding that there was an ongoing state of disrepair.

To summarize our position on this issue, we do not find that the trial judge erred in law either by failing to approach the question from the perspective of a prudent municipal councillor, or by improperly shifting the burden of proof onto the defendant. As such, it would require a palpable and overriding error in order to overturn her finding that the municipality knew or ought to have known of the hazard, and, in our view, no such error was made.

V. Causation

We agree with our colleague's statement at para. 159 that the trial judge's conclusions on the cause of the accident was a finding of fact: *Cork v. Kirby MacLean, Ltd.*, [1952] 2 All E.R. 402 (C.A.), at p. 407, quoted with approval in *Matthews v. MacLaren* (1969), 4 D.L.R. (3d) 557 (Ont. H.C.), at p. 566. Thus, this finding should not be interfered with absent palpable and overriding error.

les municipalités à ne pas recueillir d'informations concernant les accidents survenant sur leurs routes, puisqu'il serait en conséquence plus difficile à la victime d'un accident d'automobile qui intente des poursuites de prouver que la municipalité visée connaissait le mauvais état de la route ou aurait dû le connaître.

68 Bien que, en l'espèce, la juge de première instance ait souligné les accidents antérieurs dont le demandeur a effectivement prouvé l'existence, nous sommes d'avis qu'il n'est pas nécessaire de s'appuyer sur ces accidents pour satisfaire aux exigences du par. 192(3). Exiger du demandeur qu'il fournisse une preuve substantielle et tangible de la connaissance par la municipalité du mauvais état de ses routes revient à lui imposer un fardeau inacceptablement lourd. Il s'agit d'information relevant du domaine de connaissance de la municipalité et, selon nous, il était raisonnable que la juge de première instance infère de sa conclusion relative au mauvais état d'entretien persistant du chemin que la municipalité possédait la connaissance requise.

69 Pour résumer notre position sur cette question, nous ne pouvons conclure que la juge de première instance a commis une erreur de droit soit parce qu'elle aurait omis d'examiner la question du point de vue du conseiller municipal prudent, soit parce qu'elle aurait à tort transféré le fardeau de la preuve à la défenderesse. Par conséquent, il faudrait une erreur manifeste et dominante pour écarter sa conclusion que la municipalité connaissait le danger ou aurait dû le connaître et, selon nous, aucune erreur de cette nature n'a été commise.

V. Lien de causalité

70 Nous faisons nôtres les propos énoncés par notre collègue, au par. 159, selon lesquels la conclusion de la juge de première instance quant à la cause de l'accident était une conclusion de fait : *Cork c. Kirby MacLean, Ltd.*, [1952] 2 All E.R. 402 (C.A.), p. 407; cité et approuvé dans *Matthews c. MacLaren* (1969), 4 D.L.R. (3d) 557 (H.C. Ont.), p. 566. En conséquence, cette conclusion ne doit pas être modifiée en l'absence d'erreur manifeste et dominante.

71 The trial judge based her findings on causation on three points (at para. 101):

> (1) the accident occurred at a dangerous part of the road where a sign warning motorists of the hidden hazard should have been erected;
>
> (2) even if there had been a sign, Mr. Nikolaisen's degree of impairment did increase his risk of not reacting, or reacting inappropriately, to a sign;
>
> (3) even so, Mr. Nikolaisen was not driving recklessly such that one would have expected him to have missed or ignored a warning sign. Moments before, on departing the Thiel residence, he had successfully negotiated a sharp curve which he could see and which was apparent to him.

The trial judge concluded that, on a balance of probabilities, Mr. Nikolaisen would have reacted and possibly avoided an accident, if he had been given advance warning of the curve. However she also found that the accident was partially caused by the conduct of Mr. Nikolaisen, and apportioned fault accordingly, with 50 percent to Mr. Nikolaisen and 35 percent to the Rural Municipality (para. 102).

72 As noted above, this Court has previously held that "an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (*Van de Perre*, *supra*, at para.15). In the present case, it is not clear from the trial judge's reasons which portions of the evidence of Mr. Laughlin, Craig and Toby Thiel and Paul Housen she relied upon, or to what extent. However, as we have already stated, the full evidentiary record was before the trial judge and, absent further proof that the omission in her reasons was due to her misapprehension or neglect, of the evidence, we can presume that she reviewed the evidence in its entirety and based her factual findings

La juge de première instance a fondé ses conclusions au sujet du lien de causalité sur trois éléments (au par. 101) :

> (1) l'accident est survenu à un endroit dangereux du chemin, où un panneau de signalisation aurait dû être installé pour avertir les automobilistes du danger caché;
>
> (2) même s'il y avait eu un panneau de signalisation, le degré d'ébriété de M. Nikolaisen avait accru chez lui le risque qu'il ne réagisse pas du tout ou de façon inappropriée à une signalisation;
>
> (3) malgré cela, M. Nikolaisen ne conduisait pas de façon si téméraire qu'il était à prévoir qu'il ne voit pas un panneau de signalisation ou n'en tienne pas compte. Quelques instants plus tôt, à son départ de la résidence des Thiel, il avait pris avec succès un virage serré qu'il pouvait clairement voir.

La juge de première instance a estimé que, selon la prépondérance des probabilités, M. Nikolaisen aurait réagi et peut-être évité l'accident si on lui avait signalé à l'avance la présence de la courbe. Toutefois, elle a également conclu que l'accident avait été causé en partie par la conduite de M. Nikolaisen, et elle a réparti la responsabilité en conséquence, soit dans une proportion de 50 p. 100 à M. Nikolaisen et de 35 p. 100 à la municipalité rurale (par. 102).

Comme nous l'avons indiqué précédemment, notre Cour a jugé, dans une autre affaire, qu'« une omission ne constitue une erreur importante que si elle donne lieu à la conviction rationnelle que le juge de première instance doit avoir oublié, négligé d'examiner ou mal interprété la preuve de telle manière que sa conclusion en a été affectée » (*Van de Perre*, précité, par. 15). En l'espèce, les motifs de la juge de première instance n'indiquent pas clairement sur quelles parties des témoignages de M. Laughlin, de Craig et Toby Thiel et de Paul Housen elle s'est appuyée, ni dans quelle mesure elle l'a fait. Cependant, comme nous l'avons dit plus tôt, la juge de première instance disposait de l'ensemble de la preuve et, en l'absence d'autre élément

on this review. This presumption, absent sufficient evidence of misapprehension or neglect, is consistent with the high level of error required by the test of "palpable and overriding" error. We reiterate that it is open to the trial judge to prefer the testimony of certain witnesses over others and to place more weight on some parts of the evidence than others, particularly where there is conflicting evidence: *Toneguzzo-Norvell*, *supra*, at pp. 122-23. The mere fact that the trial judge did not discuss a certain point or certain evidence in depth is not sufficient grounds for appellate interference: *Van de Perre*, *supra*, at para. 15.

indiquant que cette omission dans ses motifs résulte du fait qu'elle aurait mal interprété des éléments de la preuve ou négligé d'en examiner certains, nous pouvons présumer qu'elle a examiné l'ensemble de la preuve et que ses conclusions de fait reposaient sur cet examen. En l'absence de preuve établissant de façon suffisante qu'il y a eu mauvaise interprétation d'éléments de preuve ou négligence d'examiner certains de ceux-ci, cette présomption permet de conclure à l'absence d'erreur importante du type de celle requise pour satisfaire au critère de l'erreur « manifeste et dominante ». Nous tenons à rappeler que le juge de première instance peut préférer le témoignage de certains témoins et accorder plus de poids à certaines parties de la preuve qu'à d'autres, particulièrement en présence de preuves contradictoires : *Toneguzzo-Norvell*, précité, p. 122-123. Le simple fait que la juge de première instance n'a pas analysé en profondeur un point donné ou un élément de preuve particulier ne constitue pas un motif suffisant pour justifier l'intervention des tribunaux d'appel : *Van de Perre*, précité, par. 15.

For these reasons, we do not feel it appropriate to review the evidence of Mr. Laughlin and the lay witnesses *de novo*. As we concluded earlier, the trial judge's finding of fact that a hidden hazard existed at the curve should not be interfered with. The finding of a hidden hazard that requires a sign formed part of the basis of her findings concerning causation. As her conclusions on the existence of a hidden hazard had a basis in the evidence, her conclusions on causation grounded in part on the hidden hazard finding also had a basis in the evidence.

73 Pour ces motifs, nous n'estimons pas opportun d'examiner à nouveau les dépositions de M. Laughlin et des témoins ordinaires. Comme nous l'avons affirmé précédemment, il n'y a pas lieu de modifier la conclusion de fait de la juge de première instance selon laquelle la courbe présentait un danger caché. Ses conclusions touchant le lien de causalité reposent en partie sur cette conclusion relative à l'existence d'un danger caché nécessitant l'installation d'un panneau d'avertissement. Tout comme ses conclusions relatives à l'existence d'un danger caché, celles touchant le lien de causalité — fondées en partie sur le danger caché — avaient elles aussi des assises dans la preuve.

As for the silence of the trial judge on the evidence of Mr. Laughlin, we observe only that the evidence of Mr. Laughlin appears to be general in nature and thus of limited utility. Mr. Laughlin admitted that he could only provide general comments on the effects of alcohol on motorists, but could not provide specific expertise on the actual effect of alcohol on an individual driver. This is significant, as the level of tolerance of an individual driver plays a key role in determining the actual effect of alcohol on the

74 Pour ce qui est du silence de la juge de première instance concernant le témoignage de M. Laughlin, signalons simplement que ce témoignage paraît être de nature générale et, partant, d'une utilité limitée. M. Laughlin a reconnu qu'il ne pouvait faire que des observations générales quant aux effets de l'alcool sur les automobilistes, et non apporter une expertise particulière sur l'effet concret de l'alcool sur un conducteur donné. Il s'agit d'un point important, puisque le seuil de tolérance d'un conducteur donné

motorist; an experienced drinker, although dangerous, will probably perform better on the road than an inexperienced drinker. It is noteworthy that the trial judge believed the evidence of Mr. Anderson that Mr. Nikolaisen's vehicle was travelling at the relatively slow speed of between 53 to 65 km/h at the time of impact with the embankment. It was also permissible for the trial judge to rely on the evidence of lay witnesses that Mr. Nikolaisen had successfully negotiated an apparently sharp curve moments before the accident, rather than relying on the evidence of Mr. Laughlin, which was of a hypothetical and unspecific nature. Indeed, the hypothetical nature of Mr. Laughlin's evidence reflects the entire inquiry into whether Mr. Nikolaisen would have seen a sign and reacted, or the precise speed that would be taken by a reasonable driver upon approaching the curve. The abstract nature of such inquiries supports deference to the factual findings of the trial judge, and is consistent with the stringent standard imposed by the phrase "palpable and overriding error".

75 Therefore we conclude that the trial judge's factual findings on causation were reasonable and thus do not reach the level of a palpable and overriding error, and therefore should not have been interfered with by the Court of Appeal.

VI. Common Law Duty of Care

76 As we conclude that the municipality is liable under *The Rural Municipality Act, 1989*, we find it unnecessary to consider the existence of a common law duty in this case.

VII. Disposition

77 As we stated at the outset, there are important reasons and principles for appellate courts not to interfere improperly with trial decisions. Applying

joue un rôle essentiel dans la détermination de l'effet concret de l'alcool sur cet automobiliste; bien que dangereuse, la personne qui a l'habitude de boire se débrouillera probablement mieux sur la route qu'une personne qui n'en a pas l'habitude. Il convient de souligner que la juge de première instance a cru le témoignage de M. Anderson selon lequel le véhicule de M. Nikolaisen roulait à une vitesse relativement faible, soit entre 53 et 65 km/h, au moment de l'impact avec le remblai. Il lui était également permis de retenir les dépositions des témoins ordinaires selon lesquelles M. Nikolaisen avait réussi à prendre un virage apparemment serré quelques instants avant l'accident, plutôt que le témoignage de M. Laughlin, lequel était de nature hypothétique et générale. De fait, la nature hypothétique du témoignage de M. Laughlin est représentative de toute l'analyse de la question de savoir si M. Nikolaisen aurait aperçu un panneau de signalisation et aurait réagi en conséquence, ou à quelle vitesse précise un conducteur raisonnable s'approcherait du virage. Le caractère théorique de ces analyses justifie de faire montre de retenue à l'égard des conclusions factuelles de la juge de première instance et permet d'affirmer qu'on n'a pas satisfait à la norme rigoureuse imposée par l'expression « erreur manifeste et dominante ».

Par conséquent, nous estimons que les constatations factuelles de la juge de première instance concernant la causalité étaient raisonnables, qu'elles ne constituent donc pas une erreur manifeste et dominante et, partant, que la Cour d'appel n'aurait pas dû les modifier.

VI. Obligation de diligence prévue par la common law

Puisque nous concluons à la responsabilité de la municipalité en vertu de la *Rural Municipality Act, 1989*, nous n'estimons pas nécessaire de nous demander s'il existe en l'espèce une obligation de diligence prévue par la common law.

VII. Dispositif

Comme nous l'avons dit au départ, d'importantes raisons et d'importants principes commandent aux tribunaux d'appel de ne pas modifier indûment

these reasons and principles to this case, we would allow the appeal, set aside the judgment of the Saskatchewan Court of Appeal, and restore the judgment of the trial judge, with costs throughout.

The reasons of Gonthier, Bastarache, Binnie and LeBel JJ. were delivered by

BASTARACHE J. (dissenting) —

I. Introduction

This appeal arises out of a single-vehicle accident which occurred on July 18, 1992, on Snake Hill Road, a rural road located in the Municipality of Shellbrook, Saskatchewan. The appellant, Paul Housen, a passenger in the vehicle, was rendered a quadriplegic by the accident. At trial, the judge found that the driver of the vehicle, Douglas Nikolaisen, was negligent in travelling Snake Hill Road at an excessive rate of speed and in operating his vehicle while impaired. The trial judge also found the respondent, the Municipality of Shellbrook, to be at fault for breaching its duty to keep the road in a reasonable state of repair as required by s. 192 of *The Rural Municipality Act, 1989*, S.S. 1989-90, c. R-26.1. The Court of Appeal overturned the trial judge's finding that the respondent municipality was negligent. At issue in this appeal is whether the Court of Appeal had sufficient grounds to intervene in the decision of the lower court. The respondent has also asked this Court to overturn the trial judge's finding that the respondent knew or ought to have known of the alleged disrepair of Snake Hill Road and that the accident was caused in part by the negligence of the respondent. An incidental question is whether a common law duty of care exists alongside the statutory duty imposed on the respondent by s. 192.

les décisions des tribunaux de première instance. Appliquant ces raisons et principes à la présente espèce, nous sommes d'avis d'accueillir le pourvoi, d'infirmer le jugement de la Cour d'appel de la Saskatchewan et de rétablir la décision de la juge de première instance, avec dépens devant toutes les cours.

Version française des motifs des juges Gonthier, Bastarache, Binnie et LeBel rendus par

LE JUGE BASTARACHE (dissident) —

I. Introduction

Le présent pourvoi découle d'un accident impliquant un seul véhicule survenu le 18 juillet 1992 sur le chemin Snake Hill, route rurale située dans la municipalité de Shellbrook, en Saskatchewan. L'appelant, Paul Housen, qui était passager dans le véhicule, est devenu quadriplégique à la suite de cet accident. Au procès, la juge a conclu que le conducteur du véhicule, Douglas Nikolaisen, avait fait preuve de négligence en roulant à une vitesse excessive sur le chemin Snake Hill et en conduisant son véhicule pendant que ses facultés étaient affaiblies. La juge de première instance a également estimé que l'intimée, la municipalité de Shellbrook, avait commis une faute en manquant à l'obligation de tenir le chemin dans un état raisonnable d'entretien comme le lui impose l'art. 192 de la loi intitulée la *Rural Municipality Act, 1989*, S.S. 1989-90, ch. R-26.1. La Cour d'appel a infirmé la décision de la juge de première instance concluant à la négligence de la municipalité intimée. La question en litige dans le présent pourvoi consiste à déterminer si la Cour d'appel avait des motifs suffisants pour modifier la décision du tribunal de première instance. L'intimée demande également à notre Cour d'infirmer les conclusions de la juge de première instance portant que l'intimée connaissait ou aurait dû connaître le mauvais état dans lequel se trouvait, prétend-on, le chemin Snake Hill, et que l'accident a été causé en partie par sa négligence. Il faut également répondre à la question incidente de savoir si une obligation de diligence de common law coexiste avec l'obligation légale imposée à l'intimée par l'art. 192.

79 I conclude that the Court of Appeal was correct to overturn the trial judge's finding that the respondent was negligent. Though I would not interfere with the trial judge's factual findings on this issue, I find that she erred in law by failing to apply the correct standard of care. I would also overturn the trial judge's conclusions with regard to knowledge and causation. In coming to the conclusion that the respondent knew or should have known of the alleged disrepair of Snake Hill Road, the trial judge erred in law by failing to consider the knowledge requirement from the perspective of a prudent municipal councillor and by failing to be attentive to the fact that the onus of proof was on the appellant. In addition, the trial judge drew an unreasonable inference by imputing knowledge to the respondent on the basis of accidents that occurred on other segments of the road while motorists were travelling in the opposite direction. The trial judge also erred with respect to causation. She misapprehended the evidence before her, drew erroneous conclusions from that evidence and ignored relevant evidence. Finally, I would not interfere with the decision of the courts below to reject the appellant's argument that a common law duty existed. It is unnecessary to impose a common law duty of care where a statutory duty exists. Moreover, the application of common law negligence principles would not affect the outcome in these proceedings.

J'estime que la Cour d'appel a eu raison d'infirmer la conclusion de la juge de première instance selon laquelle la municipalité intimée a été négligente. Je ne modifierais pas les conclusions de fait de la juge de première instance sur cette question, mais je suis d'avis qu'elle a commis une erreur de droit en n'appliquant pas la norme de diligence appropriée. J'infirmerais également ses conclusions en ce qui concerne la question de la connaissance et le lien de causalité. En concluant que l'intimée connaissait ou aurait dû connaître le mauvais état dans lequel se trouvait, prétend-on, le chemin Snake Hill, la juge de première instance a commis une erreur de droit en n'appréciant pas l'exigence relative à la connaissance du point de vue du conseiller municipal prudent et en ne tenant pas compte du fait que le fardeau de la preuve incombait à l'appelant. De plus, la juge de première instance a tiré une inférence déraisonnable en prêtant à l'intimée la connaissance requise, en raison d'accidents survenus sur d'autres tronçons du chemin alors que des automobilistes circulaient en sens inverse. La juge de première instance a également commis une erreur relativement au lien de causalité. Elle a mal interprété la preuve qui lui était soumise, elle en a tiré des conclusions erronées et elle n'a pas tenu compte d'éléments de preuve pertinents. Enfin, je ne modifierais pas la décision des juridictions inférieures ayant rejeté l'argument de l'appelant selon lequel il existait une obligation de diligence de common law. Il est inutile d'imposer une obligation de common law lorsqu'il existe une obligation légale. Qui plus est, l'application des principes de la common law en matière de négligence n'aurait aucune incidence sur l'issue de la présente instance.

II. Factual Background

80 The sequence of` events which culminated in this tragic accident began to unfold some 19 hours before its occurrence on the afternoon of July 18, 1992. On July 17, Mr. Nikolaisen attended a barbeque at the residence of Craig and Toby Thiel, located on Snake Hill Road. He arrived in the late afternoon and had his first drink of the day at approximately 6:00 p.m. He consumed four or five drinks before leaving the Thiel residence at approximately

II. Les faits

La suite d'événements ayant abouti au tragique accident a commencé quelque 19 heures avant l'accident lui-même, dans l'après-midi du 18 juillet 1992. Le 17 juillet, M. Nikolaisen a participé à un barbecue à la résidence de Craig et Toby Thiel, sur le chemin Snake Hill. Arrivé en fin d'après-midi, il a pris son premier verre de la journée vers 18 h. Il en a pris quatre ou cinq avant de quitter la résidence des Thiel vers 22 h ou 22 h 30. Après avoir passé

10:00 or 10:30 p.m. After returning home for a few hours, Mr. Nikolaisen proceeded to the Sturgeon Lake Jamboree, where he met up with the appellant. At the jamboree, Mr. Nikolaisen consumed eight or nine double rye drinks and several beers. The appellant was also drinking during this event. The appellant and Mr. Nikolaisen partied on the grounds of the jamboree for several hours. At approximately 4:30 a.m., the appellant left the jamboree with Mr. Nikolaisen. After travelling around the back roads for a period of time, they returned to the Thiel residence. It was approximately 8:00 a.m. The appellant and Mr. Nikolaisen had several more drinks over the course of the morning. Mr. Nikolaisen stopped drinking two or three hours before leaving the Thiel residence with the appellant at approximately 2:00 p.m.

A light rain was falling when the appellant and Mr. Nikolaisen left the Thiel residence, travelling eastbound with Mr. Nikolaisen behind the wheel of a Ford pickup truck. The truck swerved or "fish-tailed" as it turned the corner from the Thiel driveway onto Snake Hill Road. As Mr. Nikolaisen continued on his way over the course of a gentle bend some 300 metres in length, gaining speed to an estimated 65 km/h, the truck again fish-tailed several times. The truck went into a skid as Mr. Nikolaisen approached and entered a sharper right turn. Mr. Nikolaisen steered into the skid but was unable to negotiate the curve. The left rear wheel of the truck contacted an embankment on the left side of the road. The vehicle travelled on the road for approximately 30 metres when the left front wheel contacted and climbed an 18-inch embankment on the left side of the road. This second contact with the embankment caused the truck to enter a 360-degree roll with the passenger side of the roof contacting the ground first.

When the vehicle came to rest, the appellant was unable to feel any sensation. Mr. Nikolaisen climbed out the back window of the vehicle and ran to the Thiel residence for assistance. Police later accompanied Mr. Nikolaisen to the Shellbrook Hospital where a blood sample was taken. Expert testimony estimated Mr. Nikolaisen's blood alcohol level to be

quelques heures chez lui, M. Nikolaisen s'est rendu au jamboree de Sturgeon Lake, où il a rencontré l'appelant. Sur les lieux du jamboree, M. Nikolaisen a consommé huit ou neuf ryes doubles et plusieurs bières. L'appelant buvait lui aussi. L'appelant et M. Nikolaisen ont fait la fête sur les lieux du jamboree pendant plusieurs heures. Vers 4 h 30, l'appelant a quitté le jamboree en compagnie de M. Nikolaisen. Après avoir roulé sur des routes de campagne pendant un certain temps, ils sont retournés à la résidence des Thiel. Il était environ 8 h. L'appelant et M. Nikolaisen ont pris plusieurs autres verres au cours de la matinée. M. Nikolaisen a cessé de boire deux ou trois heures avant de quitter la résidence des Thiel en compagnie de l'appelant vers 14 h.

81 Une faible pluie tombait lorsque l'appelant et M. Nikolaisen ont quitté la résidence des Thiel et pris la route, en direction est, à bord d'une camionnette Ford conduite par M. Nikolaisen. L'arrière de la camionnette a zigzagué lorsque le véhicule a tourné à l'intersection de l'entrée de la résidence des Thiel et du chemin Snake Hill. Alors que M. Nikolaisen prenait un léger virage d'une longueur de quelque 300 mètres, tout en accélérant à 65 km/h environ, l'arrière de sa camionnette a zigzagué à nouveau à plusieurs reprises. La camionnette s'est mise à déraper lorsque M. Nikolaisen a amorcé un virage plus serré vers la droite. Il a donné un coup de volant, mais n'a pas réussi à prendre le virage. La roue arrière gauche de la camionnette a heurté un remblai situé du côté gauche du chemin. Le véhicule a continué sa course sur une distance d'environ 30 mètres, puis sa roue avant gauche est montée sur un remblai de 18 pouces du côté gauche du chemin, après l'avoir heurté. Sous la force du second impact, la camionnette a fait un tonneau complet, le toit du côté du passager touchant le sol en premier.

82 Lorsque le véhicule s'est immobilisé, l'appelant n'éprouvait plus aucune sensation. M. Nikolaisen s'est hissé hors du véhicule par la fenêtre arrière et a couru chez les Thiel pour demander de l'aide. Plus tard, la police a accompagné M. Nikolaisen à l'hôpital de Shellbrook, où un échantillon de sang a été prélevé. Le témoignage d'expert a révélé

between 180 and 210 milligrams in 100 millilitres of blood at the time of the accident, well over the legal limits prescribed in *The Highway Traffic Act*, S.S. 1986, c. H-3.1, and the *Criminal Code*, R.S.C. 1985, c. C-46.

83 Mr. Nikolaisen had travelled on Snake Hill Road three times in the 24 hours preceding the accident, but had not driven it on any earlier occasions. The road was about a mile and three quarters in length and was flanked by highways to the north and to the east. Starting at the north end, it ran south for a short distance, dipped between open fields, then curved to the southeast and descended in a southerly loop down and around Snake Hill, past trees, bush and pasture, to the bottom of the valley. There it curved sharply to the southeast as it passed the Thiels' driveway. Once it passed the driveway, it curved gently to the south east for about 300 metres, then curved more distinctly to the south. It was on this stretch that the accident occurred. From that point on, the road crossed a creek, took another curve, then ascended a steep hill to the east, straightened out, and continued east for just over half a mile, past tree-lined fields and another farm site, to an approach to the highway.

84 Snake Hill Road was established in 1923 and was maintained by the respondent municipality for the primary purpose of providing local farmers access to their fields and pastures. It also served as an access road for the two permanent residences and one veterinary clinic located on it. The road at its northernmost end, coming off the highway, is characterized as a "Type C" local access road under the provincial government's scheme of road classification. This means that it is graded, gravelled and elevated above the surrounding land. The portion of the road east of the Thiel residence, on which the accident occurred, is characterized as "Type B" bladed trail, essentially a prairie trail that has been bladed to remove the ruts and to allow it to be driven on. Bladed trails follow the path of least resistance through the surrounding land and are not elevated or gravelled. The

que, au moment de l'accident, l'alcoolémie de M. Nikolaisen se situait entre 180 et 210 milligrammes par 100 milligrammes, taux largement supérieur à la limite permise par la loi intitulée la *Highway Traffic Act*, S.S. 1986 ch. H-3.1, et par le *Code criminel*, L.R.C. 1985, ch. C-46.

M. Nikolaisen avait emprunté le chemin Snake Hill à trois reprises au cours des 24 heures ayant précédé l'accident, mais il n'y avait jamais circulé auparavant. Ce chemin, flanqué de routes au nord et à l'est, fait environ un mille et trois quarts de longueur. À partir de son extrémité nord, il franchit une courte distance en direction sud, traverse des champs, puis tourne vers le sud-est pour ensuite descendre en lacet vers le sud autour du mont Snake Hill, passant devant des arbres, buissons et pâturages, jusqu'au fond de la vallée. De là, il tourne brusquement vers le sud-est devant l'entrée de la résidence des Thiel. Tout de suite après, il tourne doucement vers le sud-est sur une distance d'environ 300 mètres, puis décrit une courbe plus prononcée vers le sud. C'est à cet endroit que l'accident s'est produit. De là, le chemin traverse un ruisseau, tourne encore, puis monte une pente raide vers l'est, se redresse et continue vers l'est sur une distance d'un peu plus d'un demi mille et passe devant des champs bordés d'arbres et une autre ferme, jusqu'à une voie d'accès à la route.

Construit en 1923, le chemin Snake Hill est entretenu par la municipalité intimée dans le but premier de permettre aux fermiers de la région d'accéder à leurs champs et pâturages. Il sert également de voie d'accès à deux résidences permanentes et à une clinique vétérinaire. Le tronçon nord du chemin, dont l'extrémité part de la route, est considéré comme un chemin d'accès local de « type C » selon le système provincial de classification des routes. Cela signifie qu'il est nivelé, gravelé et possède une chaussée surélevée. Le tronçon du chemin situé à l'est de la résidence des Thiel et sur lequel l'accident s'est produit est considéré comme un chemin nivelé de « type B », c'est-à-dire essentiellement un chemin dont les ornières ont été remplies pour le rendre carrossable. Les chemins nivelés suivent le tracé qui présente le moins d'obstacle à travers le terrain environnant et ne sont ni surélevés ni gravelés. La

province of Saskatchewan has some 45,000 kilometres of bladed trails.

According to the provincial scheme of road classification, both bladed trails and local access roads are "non-designated", meaning that they are not subject to the Saskatchewan Rural Development Sign Policy and Standards. On such roads, the council of the rural municipality makes a decision to post signs if it becomes aware of a hazard or if there are several accidents at one specific spot. Three accidents had occurred on Snake Hill Road between 1978 and 1987. All three accidents occurred to the east of the site of the Nikolaisen rollover, with drivers travelling westbound. A fourth accident occurred on Snake Hill Road in 1990 but there was no evidence as to where it occurred. There was no evidence that topography was a factor in any of these accidents. The respondent municipality had not posted signs on any portion of Snake Hill Road.

III. Relevant Statutory Provisions

The Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1

192(1) Every Council shall keep in a reasonable state of repair all municipal roads, dams and reservoirs and the approaches to them that have been constructed or provided by the municipality or by any person with the permission of the council or that have been constructed or provided by the province, having regard to the character of the municipal road, dam or reservoir and the locality in which it is situated or through which it passes.

. . .

(2) Where the council fails to carry out its duty imposed by subsections (1) and (1.1), the municipality is, subject to *The Contributory Negligence Act*, civilly liable for all damages sustained by any person by reason of the failure.

province de Saskatchewan compte quelque 45 000 kilomètres de chemins nivelés.

85 Selon le système de classification des routes, tant les chemins nivelés que les chemins d'accès local sont [TRADUCTION] « non désignés », c'est-à-dire qu'ils ne sont pas visés par le document intitulé *Saskatchewan Rural Development Sign Policy and Standards* (« Politique et normes de signalisation routière en milieu rural en Saskatchewan »). Le conseil de la municipalité rurale installe des panneaux de signalisation sur ces chemins s'il constate l'existence d'un danger ou si plusieurs accidents se produisent au même endroit. Trois accidents sont survenus sur le chemin Snake Hill de 1978 à 1987. Tous ces accidents se sont produits à l'est de l'endroit où la camionnette de Nikolaisen a fait un tonneau et les véhicules concernés circulaient en direction ouest. Un quatrième accident s'est produit sur le chemin Snake Hill en 1990, mais aucune preuve indiquant l'endroit exact de l'accident n'a été présentée. Rien ne permettait de conclure que la topographie des lieux était à l'origine de l'un ou l'autre de ces accidents. La municipalité intimée n'avait installé aucun panneau signalisateur le long du chemin Snake Hill.

III. Les dispositions législatives pertinentes

86 *The Rural Municipality Act, 1989*, S.S. 1989-90, ch. R-26.1

[TRADUCTION]

192(1) Le conseil tient dans un état raisonnable d'entretien tous les chemins municipaux, barrages et réservoirs, ainsi que les accès à ces ouvrages qui ont été construits ou sont fournis par la municipalité ou par toute autre personne avec la permission du conseil ou qui ont été construits ou sont fournis par le gouvernement de la province, eu égard à la nature de l'ouvrage en question et à la localité où il est situé ou qu'il traverse.

. . .

(2) Lorsque le conseil omet de s'acquitter des obligations qui lui incombent en vertu des paragraphes (1) et (1.1), la municipalité est, sous réserve de la *Contributory Negligence Act* [*Loi sur le partage de la responsabilité*], civilement responsable des dommages subis par toute personne à la suite de ce manquement.

(3) Default under subsections (1) and (1.1) shall not be imputed to a municipality in any action without proof by the plaintiff that the municipality knew or should have known of the disrepair of the municipal road or other thing mentioned in subsections (1) and (1.1).

The Highway Traffic Act, S.S. 1986, c. H-3.1

33(1) Subject to the other provisions of this Act, no person shall drive a vehicle on a highway:

(a) at a speed greater than 80 kilometres per hour; or

(b) at a speed greater than the maximum speed indicated by any signs that are erected on the highway . . . .

(2) No person shall drive a vehicle on a highway at a speed greater than is reasonable and safe in the circumstances.

44(1) No person shall drive a vehicle on a highway without due care and attention.

(3) En cas d'action reprochant un manquement visé aux paragraphes (1) et (1.1) la responsabilité de la municipalité concernée n'est engagée que si le demandeur établit que cette dernière connaissait ou aurait dû connaître le mauvais état du chemin municipal ou autre ouvrage mentionné aux paragraphes (1) et (1.1).

The Highway Traffic Act, S.S. 1986, ch. H-3.1

[TRADUCTION]

33(1) Sous réserve des autres dispositions de la présente loi, il est interdit de conduire sur une voie publique à une vitesse supérieure, selon le cas :

a) à 80 kilomètres à l'heure;

b) à la vitesse maximale indiquée par la signalisation routière le long de la voie publique en question . . .

(2) Il est interdit de conduire un véhicule sur une voie publique à une vitesse supérieure à celle qui est raisonnable et sécuritaire dans les circonstances.

44(1) Il est interdit de conduire un véhicule sur une voie publique sans faire preuve de la prudence et de l'attention nécessaires.

IV. Judicial History

A. *Saskatchewan Court of Queen's Bench*, [1998] 5 W.W.R. 523

87 Wright J. found the respondent negligent in failing to erect a sign to warn motorists of the sharp right curve on Snake Hill Road, which she characterized as a "hidden hazard". She also found Mr. Nikolaisen negligent in travelling Snake Hill Road at an excessive speed and in operating his vehicle while impaired. The appellant was held to be contributorily negligent in accepting a ride with Mr. Nikolaisen. Fifteen percent of the fault was apportioned to the appellant, and the remainder was apportioned jointly and severally 50 percent to Mr. Nikolaisen and 35 percent to the respondent.

88 Wright J. found that s. 192 of *The Rural Municipality Act, 1989* imposed a statutory duty of care on the respondent toward persons travelling on Snake Hill Road. She then considered whether the respondent met the standard of care as delineated in

IV. L'historique des procédures judiciaires

A. *Cour du Banc de la Reine de la Saskatchewan*, [1998] 5 W.W.R. 523

La juge Wright a conclu que l'intimée avait fait preuve de négligence en omettant d'installer un panneau signalant aux automobilistes l'existence du virage à droite serré sur le chemin Snake Hill, virage qu'elle a qualifié de [TRADUCTION] « danger caché ». Elle a également estimé que M. Nikolaisen avait été négligent en roulant à une vitesse excessive sur le chemin Snake Hill et en conduisant son véhicule pendant qu'il avait les facultés affaiblies. L'appelant a été tenu responsable de négligence concourante parce qu'il avait accepté de monter à bord du véhicule de M. Nikolaisen. La responsabilité a été partagée ainsi : 15 p. 100 à l'appelant, le reste étant réparti solidairement entre M. Nikolaisen (50 p. 100) et l'intimée (35 p. 100).

La juge Wright a d'abord conclu que l'art. 192 de la *Rural Municipality Act, 1989* imposait à l'intimée une obligation légale de diligence envers les personnes circulant sur le chemin Snake Hill. Elle s'est ensuite demandée si l'intimée s'était

s. 192 and the jurisprudence interpreting that section. She referred specifically to *Partridge v. Rural Municipality of Langenberg*, [1929] 3 W.W.R. 555 (Sask. C.A.), in which it was stated at p. 558 that "the road must be kept in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety". She also cited *Shupe v. Rural Municipality of Pleasantdale*, [1932] 1 W.W.R. 627 (Sask. C.A.), at p. 630: "[R]egard must be had to the locality . . . the situation of the road therein, whether required to be used by many or by few; . . . to the number of roads to be kept in repair; to the means at the disposal of the council for that purpose, and the requirements of the public who use the road." Relying on *Galbiati v. City of Regina*, [1972] 2 W.W.R. 40 (Sask. Q.B.), Wright J. observed that although the Act does not mention an obligation to erect warning signs, the general duty of repair nevertheless includes the duty to warn motorists of a hidden hazard.

conformée à la norme de diligence énoncée à l'art. 192 et dans la jurisprudence portant sur l'interprétation de cet article. Elle a fait état, en particulier, de l'arrêt *Partridge c. Rural Municipality of Langenberg*, [1929] 3 W.W.R. 555, dans lequel la Cour d'appel de la Saskatchewan a déclaré, à la p. 558, que [TRADUCTION] « le chemin doit être tenu dans un état raisonnable d'entretien, de façon que ceux qui doivent l'emprunter puissent, en prenant des précautions normales, y circuler en sécurité ». Elle a également cité le passage suivant de l'affaire *Shupe c. Rural Municipality of Pleasantdale*, [1932] 1 W.W.R. 627 (C.A. Sask.), p. 630 : [TRADUCTION] « [I]l faut tenir compte de la localité où est situé le chemin, [. . .] de son emplacement dans celle-ci, se demander s'il sera beaucoup ou peu fréquenté; [. . .] du nombre de chemins à entretenir; des ressources budgétaires dont dispose le conseil à cette fin et des besoins du public qui emprunte ce chemin ». Se fondant sur l'affaire *Galbiati c. City of Regina*, [1972] 2 W.W.R. 40 (B.R. Sask.), la juge Wright a fait observer que, bien que la Loi ne mentionne pas explicitement l'obligation d'installer des panneaux d'avertissement, l'obligation générale d'entretien comporte néanmoins celle de signaler aux automobilistes l'existence d'un danger caché.

Having laid out the relevant case law, Wright J. went on to discuss the character of the road. Relying primarily on the evidence of two experts at trial, Mr. Anderson and Mr. Werner, she found that the sharp right turning curve was a hazard that was not readily apparent to the users of the road. From their testimony she concluded (at para. 85):

89

Après avoir fait état de la jurisprudence pertinente, la juge Wright a poursuivi en examinant la nature du chemin. S'appuyant principalement sur les témoignages donnés par deux experts au procès, MM. Anderson et Werner, elle a conclu que le virage à droite serré constituait un danger que les usagers du chemin ne pouvaient voir aisément. De leurs témoignages, elle a tiré la conclusion suivante (au par. 85) :

It is a hidden hazard. The location of the Nikolaisen rollover is the most dangerous segment of Snake Hill Road. Approaching the location of the Nikolaisen rollover, limited sight distance, created by uncleared bush, precludes a motorist from being forewarned of an impending sharp right turn immediately followed by a left turn. While there were differing opinions on the *maximum* speed at which this curve can be negotiated, I am satisfied that when limited sight distance is combined with the tight radius of the curve and lack of superelevation, this curve cannot be *safely* negotiated at speeds greater

[TRADUCTION] Il s'agit d'un danger caché. L'endroit où le véhicule de M. Nikolaisen a fait un tonneau est situé sur le tronçon le plus dangereux du chemin Snake Hill. À l'approche de cet endroit, des broussailles réduisent la distance de visibilité de l'automobiliste et l'empêchent de voir l'imminence d'un virage à droite serré, qui est immédiatement suivi d'un virage à gauche. Bien que des opinions divergentes aient été émises quant à la vitesse *maximale* à laquelle ce virage peut être pris, je suis d'avis que, vu la distance de visibilité réduite, l'existence d'une courbe serrée et l'absence de surélévation du chemin, ce

than 60 kilometres per hour when conditions are favourable, or 50 kilometres per hour when wet. [Emphasis in original.]

virage ne peut être pris en sécurité à une vitesse supérieure à 60 kilomètres à l'heure dans des conditions favorables, ou 50 kilomètres à l'heure sur chaussée humide. [En italique dans l'original.]

Wright J. then noted that, while it would not be reasonable to expect the respondent to construct the road to a higher standard or to clear all of the bush away, it was reasonable to expect the respondent to erect and maintain a warning or regulatory sign "so that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation" (para. 86).

La juge Wright a ensuite précisé que, bien qu'on ne puisse raisonnablement exiger de l'intimée qu'elle construise le chemin selon une norme plus élevée ou qu'elle enlève toutes les broussailles, il était raisonnable de s'attendre à ce qu'elle installe et maintienne un panneau d'avertissement ou de signalisation [TRADUCTION] « afin qu'un automobiliste prenant des précautions normales soit prévenu et puisse réduire sa vitesse et prendre des mesures correctives avant d'arriver à l'endroit dangereux » (par. 86).

90 Wright J. then considered s. 192(3) of the Act, which provides that there is no breach of the statutory standard of care unless the municipality knew or should have known of the danger. Wright J. observed that between 1978 and 1990, there were four accidents on Snake Hill Road, three of which occurred "in the same vicinity" as the Nikolaisen rollover, and two of which were reported to the authorities. On the basis of this information, she held that "[i]f the R.M. [Rural Municipality] did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known" (para. 90). Wright J. also found significant the relatively low volume of traffic on the road, the fact that there were permanent residences on the road, and the fact that the road was frequented by young and perhaps less experienced drivers.

La juge Wright a ensuite analysé le par. 192(3) de la Loi, qui prévoit qu'il n'y a manquement à l'obligation de diligence que si la municipalité connaissait ou aurait dû connaître l'existence du danger. Elle a rappelé que quatre accidents étaient survenus sur le chemin Snake Hill de 1978 à 1990. Trois de ceux-ci se sont produits [TRADUCTION] « aux environs » de l'endroit où le véhicule de M. Nikolaisen a fait un tonneau, et deux ont été signalés aux autorités. Sur la base de cette information, elle a conclu que [TRADUCTION] « [s]i la M.R. [municipalité rurale] ne connaissait pas concrètement le danger intrinsèque que comporte cette portion du chemin Snake Hill, elle aurait dû le connaître » (par. 90). La juge Wright a également accordé de l'importance au débit relativement faible de la circulation sur le chemin, au fait que des résidences permanentes étaient situées en bordure de celui-ci et au fait que le chemin était fréquenté par des conducteurs jeunes et peut-être moins expérimentés.

91 In respect to causation, Wright J. found that it was probable that a warning sign would have enabled Mr. Nikolaisen to take corrective action to maintain control of his vehicle despite the fact of his impairment. She concluded (at para. 101):

En ce qui concerne le lien de causalité, la juge Wright a estimé qu'un panneau de signalisation aurait probablement permis à M. Nikolaisen de prendre des mesures correctives et de conserver la maîtrise de son véhicule, même si ses facultés étaient affaiblies. Elle a aussi tiré la conclusion suivante, au par. 101 :

Mr. Nikolaisen's degree of impairment only served to increase the risk of him not reacting, or reacting inappropriately to a sign. Mr. Nikolaisen was not driving recklessly such that he would have intentionally disregarded

[TRADUCTION] Le degré d'ébriété de M. Nikolaisen n'a fait qu'accroître le risque qu'il ne réagisse pas du tout ou encore de façon inappropriée à une signalisation. M. Nikolaisen ne conduisait pas de façon si téméraire qu'il

a warning or regulatory sign. He had moments earlier, when departing the Thiel residence, successfully negotiated a sharp curve which he could see and which was apparent to him.

Wright J. also addressed the appellant's argument that the municipality was in breach of a common law duty of care which was not qualified or limited by any of the restrictions set out under s. 192. She held that *Just v. British Columbia*, [1989] 2 S.C.R. 1228, and the line of authority both preceding and following that decision did not apply to the case before her given the existence of the statutory duty of care. She also found that any qualifying words in s. 192 of the Act pertained to the standard of care and did not impose limitations on the statutory duty of care.

B. *Saskatchewan Court of Appeal*, [2000] 4 W.W.R. 173, 2000 SKCA 12

On appeal, Cameron J.A., writing for a unanimous court, dealt primarily with the trial judge's finding that the respondent's failure to place a warning sign or regulatory sign at the site of the accident constituted a breach of its statutory duty of road repair. He did not find it necessary to rule on the issue of causation given his conclusion that the trial judge erred in finding the respondent negligent.

Cameron J.A. characterized the trial judge's conclusion that the respondent had breached the statutory duty of care as a matter of mixed fact and law. He noted that an appellate court is not to interfere with a trial judge's findings of fact unless the judge made a "palpable and overriding error" which affected his or her assessment of the facts. With respect to errors of law, however, Cameron J.A. remarked that the ability of an appellate court to overturn the finding of the trial judge is "largely unbounded". Regarding errors of mixed fact and law, Cameron J.A. noted that these are typically subject to the same standard of review as findings

aurait intentionnellement fait abstraction d'un panneau d'avertissement ou de signalisation. Quelques instants plus tôt, au moment de quitter la résidence des Thiel, il avait pris avec succès un virage serré qu'il pouvait clairement voir.

92 La juge Wright s'est également penchée sur l'argument de l'appelant voulant que la municipalité ait manqué à une obligation de diligence de common law qui ne serait pas atténuée ou restreinte par l'une ou l'autre des dispositions de l'art. 192. Elle a estimé que l'arrêt *Just c. Colombie-Britannique*, [1989] 2 R.C.S. 1228, ainsi que la jurisprudence antérieure et postérieure à cette décision ne s'appliquaient pas à l'affaire dont elle était saisie, vu l'existence de l'obligation légale de diligence. Elle a également jugé que les termes restrictifs de l'art. 192 de la Loi visaient la norme de diligence et n'avaient pas pour effet de limiter la portée de l'obligation légale de diligence.

B. *Cour d'appel de la Saskatchewan*, [2000] 4 W.W.R. 173, 2000 SKCA 12

93 En appel, exprimant la décision unanime de la cour, le juge Cameron s'est attaché principalement à la conclusion de la juge de première instance portant que, en omettant d'installer un panneau d'avertissement ou de signalisation à l'endroit de l'accident, l'intimée avait manqué à son obligation légale d'entretien des routes. Il n'a pas jugé nécessaire de se prononcer sur la question du lien de causalité, vu sa conclusion que la juge de première instance avait commis une erreur en déclarant l'intimée responsable de négligence.

94 Le juge Cameron a qualifié la conclusion de la juge de première instance que l'intimée avait manqué à son obligation légale de diligence de conclusion portant sur une question mixte de fait et de droit. Il a souligné qu'une cour d'appel ne doit pas modifier les conclusions de fait du juge de première instance à moins que ce dernier n'ait commis une « erreur manifeste et dominante » ayant faussé son appréciation des faits. Pour ce qui est des erreurs de droit, toutefois, le juge Cameron a fait remarquer que le pouvoir d'une cour d'appel d'infirmer la conclusion du juge de première instance est [TRADUCTION] « presque illimité ». En ce qui concerne les erreurs

of fact. One exception to this, according to Cameron J.A., occurs where the trial judge identifies the correct legal test, yet fails to apply one branch of that test to the facts at hand. As support for this proposition, Cameron J.A. cited (at para. 41) Iacobucci J. in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 39:

> [I]f a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

95 Turning to the applicable law in this case, Cameron J.A. acknowledged that the standard of care set out in the Act and the jurisprudence interpreting it requires municipalities to post warning signs to warn of hazards that prudent drivers, using ordinary care, would be unlikely to appreciate. Based on the jurisprudence, Cameron J.A. set out (at para. 50) an analytical framework to be used in order to assess if a municipality has breached its duty in this regard. This framework requires the judge:

> 1. To determine the character and state of the road at the time of the accident. This, of course, is a matter of fact that entails an assessment of the material features of the road where the accident occurred, as well as those factors going to the maintenance standard, namely the location, class of road, patterns of use, and so on.
>
> 2. To assess the issue of whether persons requiring to use the road, exercising ordinary car[e], could ordinarily travel upon it safely. This is essentially a reasonable person test, one concerned with how a

mixtes de fait et de droit, le juge Cameron a précisé qu'elles sont normalement assujetties à la même norme de contrôle que les conclusions de fait. Selon le juge Cameron, cette règle générale souffre une exception, qui s'applique dans les cas où, bien que le juge du procès ait retenu le bon critère juridique applicable, il omet d'en appliquer un élément aux faits de l'affaire dont il est saisi. Au soutien de cette affirmation, le juge Cameron a cité, au par. 41, les propos suivants du juge Iacobucci dans l'arrêt *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 39 :

> [Si] un décideur dit que, en vertu du critère applicable, il lui faut tenir compte de A, B, C et D, mais que, dans les faits, il ne prend en considération que A, B et C, alors le résultat est le même que s'il avait appliqué une règle de droit lui dictant de ne tenir compte que de A, B et C. Si le bon critère lui commandait de tenir compte aussi de D, il a en fait appliqué la mauvaise règle de droit et commis, de ce fait, une erreur de droit.

Relativement au droit applicable en l'espèce, le juge Cameron a reconnu que la norme de diligence énoncée dans la Loi et dans la jurisprudence portant sur l'interprétation de cette loi exige des municipalités qu'elles installent des panneaux de mise en garde pour signaler les dangers que les conducteurs prudents et prenant des précautions normales ne pourraient vraisemblablement pas mesurer. Se fondant sur la jurisprudence, le juge Cameron a établi, au par. 50, un cadre analytique permettant de déterminer si une municipalité a manqué à son obligation à cet égard. Suivant ce cadre, le juge doit examiner les aspects suivants :

[TRADUCTION]

> 1. Le juge doit déterminer la nature et l'état du chemin au moment de l'accident. Il s'agit, bien sûr, d'une question de fait, qui nécessite une appréciation des caractéristiques physiques du chemin à l'endroit où l'accident s'est produit, ainsi que de tous les facteurs se rapportant à la norme d'entretien, à savoir l'emplacement du chemin, le type de chemin dont il s'agit, les utilisations habituelles de celui-ci, et ainsi de suite.
>
> 2. Il soit se demander si les personnes qui devaient emprunter le chemin pouvaient généralement, en prenant des précautions normales, y circuler en sécurité. Il s'agit essentiellement du critère de la

reasonable driver on that particular road would have conducted himself or herself. It is necessary in taking this step to take account of the various elements noted in the authorities referred to earlier, namely the locality of the road, the character and class of the road, the standard to which the municipality could reasonably have been expected to maintain the road, and so forth. These criteria fall to be balanced in the context of the question: how would a reasonable driver have driven upon this particular road? Since this entails the application of a legal standard to a given set of facts, it constitutes a question of mixed fact and law.

3. To determine either tha[t] the road was in a reasonable state of repair or that it was not, depending upon the assessment made while using the second step. If it is determined that the road was not in a reasonable state of repair, then it becomes necessary to go on to determine whether the municipality knew or should have known of the state of disrepair before imputing liability.

According to Cameron J.A., the trial judge did not err in law by failing to set out the proper legal test. She did, however, make an error in law of the type identified by Iacobucci J. in *Southam*, *supra.* In his view, when applying the law to the facts of the case, the trial judge failed to assess the manner in which a reasonable driver, exercising ordinary care, would ordinarily have driven on the road, and the risk, if any, that the unmarked curve might have posed for the ordinary driver. As noted by Cameron J.A., the trial judge "twice alluded to the matter, but failed to come to grips with it" (para. 57).

Cameron J.A. also found that the trial judge had made a "palpable and overriding" error of fact in determining that the respondent had breached the standard of care. According to Cameron J.A., the trial judge's factual error stemmed from her reliance on the expert testimony of Mr. Werner and Mr. Anderson. Cameron J.A. found that the evidence of both experts was based on the fundamental premise

personne raisonnable, qui sert à déterminer comment se serait comporté un conducteur raisonnable sur ce chemin en particulier. À cette étape, il faut tenir compte des nombreux facteurs énoncés dans la jurisprudence mentionnée précédemment, c'est-à-dire l'emplacement du chemin, la nature et le type du chemin, la norme d'entretien à laquelle on pouvait raisonnablement s'attendre d'une municipalité, et ainsi de suite. Ces facteurs doivent être soupesés dans le contexte de la question suivante : Comment un conducteur raisonnable aurait-il conduit son véhicule sur ce chemin en particulier? Puisque cette question suppose l'application d'une norme juridique à un ensemble donné de faits, elle constitue une question mixte de fait et de droit.

3. Il doit déterminer si le chemin était dans un état raisonnable d'entretien, compte tenu des conclusions tirées à la deuxième étape. S'il est établi que le chemin ne se trouvait pas dans un état raisonnable d'entretien, il faut alors déterminer si la municipalité connaissait ou aurait dû connaître le mauvais état d'entretien avant de conclure à la responsabilité de celle-ci.

96 Selon le juge Cameron, la juge de première instance n'a pas commis d'erreur de droit en ce qui concerne le critère juridique applicable. Elle a cependant commis une erreur de droit du genre de celle exposée par le juge Iacobucci dans l'arrêt *Southam*, précité. À son avis, lorsqu'elle a appliqué le droit aux faits de l'espèce, la juge de première instance a omis, d'une part, de se demander comment un conducteur raisonnable, faisant montre de prudence normale, aurait conduit son véhicule sur ce chemin, et, d'autre part, d'évaluer le risque, s'il en est, que le virage non annoncé aurait pu constituer pour le conducteur moyen. Comme l'a souligné le juge Cameron de la Cour d'appel, la juge de première instance [TRADUCTION] « a évoqué la question à deux reprises, mais elle ne l'a pas abordée » (par. 57).

97 Le juge Cameron a également estimé que la juge de première instance avait commis une erreur de fait « manifeste et dominante » en concluant que l'intimée n'avait pas exercé le degré de diligence requis. Selon le juge Cameron, cette erreur de fait découlait de l'importance accordée par la juge Wright aux témoignages d'experts de MM. Werner et Anderson. À son avis, les témoignages de ces deux experts

that the ordinary driver could be expected to travel the road at a speed of 80 km/h. In his view, this premise was misconceived and unsupported by the evidence.

98 Cameron J.A. concluded that although the trial judge was free to accept the evidence of some witnesses over others, she was not free to accept expert testimony that was based on an erroneous factual premise. According to Cameron J.A., had the trial judge found that a prudent driver, exercising ordinary care for his or her safety, would not ordinarily have driven this section of Snake Hill Road at a speed greater than 60 km/h, then she would have had to conclude that no hidden hazard existed since the curve could be negotiated safely at this speed.

99 Cameron J.A. agreed with the trial judge that a common law duty of care was not applicable in this case. His remarks in this respect are found at para. 44 of his reasons:

> Concerning the duty of care, it might be noted that unlike statutory provisions empowering municipalities to maintain roads, but imposing no duty upon them to do so, the duty in this instance owes its existence to a statute, rather than the neighbourhood principle of the common law: *Just v. British Columbia*, [1989] 2 S.C.R. 1228 (S.C.C.). The duty is readily seen to extend to all who travel upon the roads.

V. Issues

100 A. Did the Court of Appeal properly interfere with the trial judge's finding that the respondent was in breach of its statutory duty of care?

B. Did the trial judge err in finding the respondent knew or should have known of the alleged danger?

C. Did the trial judge err in finding that the accident was caused in part by the respondent's negligence?

reposaient sur la prémisse fondamentale qu'on pouvait s'attendre à ce que le conducteur moyen circule sur le chemin à une vitesse de 80 km/h. Selon lui, cette prémisse était erronée et n'était pas étayée par la preuve.

Le juge Cameron a conclu que, bien qu'il fût loisible à la juge de première instance d'accorder davantage foi à certains témoignages qu'à d'autres, il ne lui était pas loisible de retenir un témoignage d'expert fondé sur une prémisse factuelle erronée. Selon lui, si la juge de première instance avait estimé qu'un conducteur prudent prenant des précautions normales pour assurer sa sécurité n'aurait généralement pas roulé sur cette portion du chemin Snake Hill à plus de 60 km/h, alors elle aurait dû conclure à l'absence de danger caché puisque le virage pouvait être pris en sécurité à cette vitesse.

Le juge Cameron a souscrit à l'opinion de la juge de première instance que l'obligation de diligence de common law ne s'appliquait pas en l'espèce. Il a fait les commentaires suivants à ce sujet, au par. 44 de ses motifs :

> [TRADUCTION] En ce qui concerne l'obligation de diligence, il convient de préciser que, contrairement aux dispositions législatives qui habilitent les municipalités à entretenir les chemins, sans toutefois leur imposer l'obligation de le faire, en l'espèce l'obligation doit son existence à une loi, plutôt qu'au principe de common law fondé sur la proximité : *Just c. Colombie-Britannique*, [1989] 2 R.C.S. 1228. On saisit immédiatement que l'obligation de diligence existe en faveur de tous ceux qui circulent sur les routes.

V. Les questions en litige

A. La Cour d'appel a-t-elle eu raison de modifier la conclusion de la juge de première instance portant que l'intimée avait manqué à son obligation légale de diligence?

B. La juge de première instance a-t-elle commis une erreur en concluant que l'intimée connaissait ou aurait dû connaître le danger allégué?

C. La juge de première instance a-t-elle commis une erreur en concluant que l'accident a été en partie causé par la négligence de l'intimée?

D. Does a common law duty of care coexist alongside the statutory duty of care?

VI. Analysis

A. *Did the Court of Appeal Properly Interfere with the Decision at Trial?*

(1) The Standard of Review

Although the distinctions are not always clear, the issues that confront a trial court fall generally into three categories: questions of law, questions of fact, and questions of mixed law and fact. Put briefly, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests (*Southam*, *supra*, at para. 35).

Of the three categories above, the highest degree of deference is accorded to the trial judge's findings of fact. The Court will not overturn a factual finding unless it is palpably and overridingly, or clearly wrong (*Southam*, *supra*, at para. 60; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at p. 808; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114, at p. 121). This deference is principally grounded in the recognition that only the trial judge enjoys the opportunity to observe witnesses and to hear testimony first-hand, and is therefore better able to choose between competing versions of events (*Schwartz v. Canada*, [1996] 1 S.C.R. 254, at para. 32). It is however important to recognize that the making of a factual finding often involves more than merely determining the who, what, where and when of the case. The trial judge is very often called upon to draw inferences from the facts that are put before the court. For example, in this case, the trial judge inferred from the fact of accidents having occurred on Snake Hill Road

D. Est-ce qu'une obligation de diligence de common law coexiste avec l'obligation légale de diligence?

VI. L'analyse

A. *La Cour d'appel a-t-elle eu raison de modifier la décision de la juge de première instance?*

(1) La norme de contrôle

101 Bien qu'elles ne soient pas toujours faciles à distinguer, les questions auxquelles doit répondre un tribunal de première instance se classent généralement en trois catégories : les questions de droit, les questions de fait et les questions mixtes de fait et de droit. En résumé, les questions de droit concernent la détermination du critère juridique applicable; les questions de fait portent sur ce qui s'est réellement passé entre les parties et les questions mixtes de fait et de droit consistent à déterminer si les faits satisfont au critère juridique (*Southam*, précité, par. 35).

102 De ces trois catégories, ce sont les conclusions de fait du juge de première instance qui commandent le degré le plus élevé de retenue. La Cour ne modifie les conclusions de fait du juge de première instance que si celui-ci a commis une erreur manifeste ou dominante ou si la conclusion est manifestement erronée (*Southam*, précité, par. 60; *Stein c. Le navire « Kathy K »*, [1976] 2 R.C.S. 802, p. 808; *Toneguzzo-Norvell (Tutrice à l'instance de) c. Burnaby Hospital*, [1994] 1 R.C.S. 114, p. 121). Cette retenue repose principalement sur le fait que, puisqu'il est le seul à avoir l'occasion d'observer les témoins et d'entendre les témoignages de vive voix, le juge de première instance est en conséquence plus à même de choisir entre deux versions divergentes d'un même événement (*Schwartz c. Canada*, [1996] 1 R.C.S. 254, par. 32). Cependant, il est important de reconnaître que tirer une conclusion de fait implique souvent davantage que le simple fait de déterminer qui a fait quoi, ainsi que où et quand il l'a fait. Le juge de première instance est très souvent appelé à faire des inférences à partir des faits qui lui sont

that the respondent knew or should have known of the hidden danger.

103 This Court has determined that a trial judge's inferences of fact should be accorded a similar degree of deference as findings of fact (*Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353). In reviewing the making of an inference, the appeal court will verify whether it can reasonably be supported by the findings of fact that the trial judge reached and whether the judge proceeded on proper legal principles. I respectfully disagree with the majority's view that inferences can be rejected only where the inference-drawing process itself is deficient: see *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 45:

> When a court is reviewing a tribunal's findings of fact or the inferences made on the basis of the evidence, it can only intervene "where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact": *Lester (W. W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644, at p. 669 *per* McLachlin J.

An inference can be clearly wrong where the factual basis upon which it relies is deficient or where the legal standard to which the facts are applied is misconstrued. My colleagues recognize themselves that a judge is often called upon to make inferences of mixed law and fact (para. 26). While the standard of review is identical for both findings of fact and inferences of fact, it is nonetheless important to draw an analytical distinction between the two. If the reviewing court were to review only for errors of fact, then the decision of the trial judge would necessarily be upheld in every case where evidence existed to support his or her factual findings. In my view, this Court is entitled to conclude that inferences made by the trial judge were clearly wrong, just as it is entitled to reach this conclusion in respect to findings of fact.

présentés. En l'espèce, par exemple, la juge de première instance a inféré du fait que des accidents s'étaient produits sur le chemin Snake Hill que l'intimée connaissait ou aurait dû connaître l'existence du danger caché.

Notre Cour a jugé qu'il fallait appliquer aux inférences de fait du juge de première instance le même degré de retenue qu'à ses conclusions de fait (*Geffen c. Succession Goodman*, [1991] 2 R.C.S. 353). La cour d'appel qui contrôle la validité d'une inférence se demande si celle-ci peut raisonnablement être étayée par les conclusions de fait tirées par le juge de première instance et si celui-ci a appliqué les principes juridiques appropriés. En toute déférence, je ne partage pas l'opinion de la majorité selon laquelle des inférences ne peuvent être rejetées que dans les cas où le processus qui les a produites est lui-même déficient : voir *Conseil de l'éducation de Toronto (Cité) c. F.E.E.E.S.O., district 15*, [1997] 1 R.C.S. 487, par. 45 :

> Lorsqu'une cour de justice contrôle les conclusions de fait d'un tribunal administratif ou les inférences qu'il a tirées de la preuve, elle ne peut intervenir que « lorsque les éléments de preuve, perçus de façon raisonnable, ne peuvent étayer les conclusions de fait du tribunal » : *Lester (W.W.) (1978) Ltd. c. Association unie des compagnons et apprentis de l'industrie de la plomberie et de la tuyauterie, section locale 740*, [1990] 3 R.C.S. 644, à la p. 669, le juge McLachlin.

Une inférence peut être manifestement erronée si ses assises factuelles présentent des lacunes ou si la norme juridique appliquée aux faits est mal interprétée. Mes collègues eux-mêmes reconnaissent qu'un juge est souvent appelé à tirer des inférences mixtes de fait et droit (par. 26). Bien que la norme de contrôle soit la même et pour les conclusions de fait et pour les inférences de fait, il importe néanmoins de faire une distinction analytique entre les deux. Si le tribunal de révision ne faisait que vérifier s'il y a des erreurs de fait, la décision du juge de première instance serait alors nécessairement confirmée dans tous les cas où il existe des éléments de preuve étayant les conclusions de fait de ce dernier. Selon moi, notre Cour a le droit de conclure que les inférences du juge de première instance étaient manifestement erronées, tout comme elle peut le faire à l'égard des conclusions de fait.

My colleagues take issue with the above statement that an appellate court will verify whether the making of an inference can reasonably be supported by the trial judge's findings of fact, a standard which they believe to be less strict than the "palpable and overriding" standard. I do not agree that a less strict standard is implied. In my view there is no difference between concluding that it was "unreasonable" or "palpably wrong" for a trial judge to draw an inference from the facts as found by him or her and concluding that the inference was not reasonably supported by those facts. The distinction is merely semantic.

104 Mes collègues ne sont pas d'accord avec l'énoncé susmentionné — savoir celui portant que la cour d'appel se demande si une inférence peut raisonnablement être étayée par les conclusions de fait tirées par le juge de première instance — estimant qu'il s'agit d'une norme de contrôle moins exigeante que celle de l'erreur « manifeste et dominante ». Pour ma part, je ne crois pas que cet énoncé implique l'application d'une norme moins exigeante. À mon avis, il n'y a aucune différence entre le fait de conclure qu'il était « déraisonnable » ou « manifestement erroné » pour un juge de tirer une inférence des faits qu'il a constatés, et le fait de conclure que cette inférence n'était pas raisonnablement étayée par ces faits. La distinction est purement sémantique.

By contrast, an appellate court reviews a trial judge's findings on questions of law not merely to determine if they are reasonable, but rather to determine if they are correct; *Moge v. Moge*, [1992] 3 S.C.R. 813, at p. 833; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at p. 647; R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at p. 90. The role of correcting errors of law is a primary function of the appellate court; therefore, that court can and should review the legal determinations of the lower courts for correctness.

105 En revanche, une cour d'appel ne contrôle pas les conclusions tirées par le juge de première instance à l'égard des questions de droit simplement pour déterminer si elles sont raisonnables, mais plutôt pour déterminer si elles sont correctes : *Moge c. Moge*, [1992] 3 R.C.S. 813, p. 833; *R. c. Nova Scotia Pharmaceutical Society*, [1992] 2 R.C.S. 606, p. 647; R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), p. 90. Un des rôles principaux d'une cour d'appel consiste à corriger les erreurs de droit et, par conséquent, cette cour peut et doit vérifier si les conclusions juridiques de la juridiction inférieure sont correctes.

In the law of negligence, the question of whether the conduct of the defendant has met the appropriate standard of care is necessarily a question of mixed fact and law. Once the facts have been established, the determination of whether or not the standard of care was met by the defendant will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care. In many cases, viewing the facts through the legal lens of the standard of care gives rise to a policy-making or law-setting function that is the purview of both the trial and appellate courts. As stated by Kerans, *supra*, at p. 103, "[t]he evaluation of facts as meeting or not meeting a legal test is a process that involves law-making. Moreover, it is probably correct to say that *every* new attempt to apply a legal rule to a set of

106 Dans le contexte du droit relatif à la négligence, la question de savoir si la conduite du défendeur est conforme à la norme de diligence appropriée est forcément une question mixte de fait et de droit. Une fois les faits établis, la décision touchant la question de savoir si le défendeur a respecté ou non la norme de diligence est, dans la plupart des cas, contrôlable selon la norme de la décision correcte, puisque le juge de première instance doit apprécier les faits au regard de la norme de diligence appropriée. Dans bien des cas, l'examen des faits à travers le prisme juridique de la norme de diligence implique l'établissement de politiques d'intérêt général ou la création de règles de droit, rôle qui relève autant des cours de première instance que des cours d'appel. Comme l'a dit Kerans, *op. cit.*, p. 103, [TRADUCTION] « [l]'examen de la

facts involves some measure of interpretation of that rule, and thus more law-making" (emphasis in original).

107 In a negligence case, the trial judge is called on to decide whether the conduct of the defendant was reasonable under all the circumstances. While this determination involves questions of fact, it also requires the trial judge to assess what is reasonable. As stated above, in many cases, this will involve a policy-making or "law-setting" role which an appellate court is better situated to undertake (Kerans, *supra*, at pp. 5-10). For example, in this case, the degree of knowledge that the trial judge should have imputed to the reasonably prudent municipal councillor raised the policy consideration of the type of accident-reporting system that a small rural municipality with limited resources should be expected to maintain. This law-setting role was recognized by the United States Supreme Court in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), at note 17, within the context of an action for defamation:

> A finding of fact in some cases is inseparable from the principles through which it was deduced. At some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment. Where the line is drawn varies according to the nature of the substantive law at issue. Regarding certain largely factual questions in some areas of the law, the stakes — in terms of impact on future cases and future conduct — are too great to entrust them finally to the judgment of the trier of fact.

question de savoir si les faits satisfont ou non à un critère juridique donné est un processus qui implique une fonction créatrice de droit. Qui plus est, il est probablement exact d'affirmer que *chaque* nouvelle tentative d'appliquer une règle de droit à un ensemble de faits emporte une certaine interprétation de cette règle et, partant, l'élaboration de règles de droit additionnelles » (en italique dans l'original).

Dans une affaire de négligence, le juge de première instance est appelé à décider si la conduite du défendeur était raisonnable eu égard à toutes les circonstances. Bien que la prise de cette décision demande l'examen de questions de fait, elle exige également du juge de première instance qu'il établisse ce qui est raisonnable. Comme il a été mentionné plus tôt, dans bien des cas cette décision implique l'établissement de politiques d'intérêt général ou la « création de règles de droit », rôle qu'une cour d'appel est mieux placée pour remplir (Kerans, *op. cit.*, p. 5 à 10). En l'espèce, par exemple, le degré de connaissance que la juge de première instance aurait dû prêter au conseiller municipal raisonnablement prudent soulevait une considération participant d'une politique d'intérêt général, savoir le genre de système d'information sur les accidents qu'une petite municipalité rurale aux ressources budgétaires limitées est censée tenir. Ce rôle créateur de droit a été reconnu par la Cour suprême des États-Unis dans l'arrêt *Bose Corp. c. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), à la note 17, dans le contexte d'une action en diffamation :

> [TRADUCTION] Une conclusion de fait est, dans certains cas, indissociable des principes qui ont été appliqués pour y arriver. À un point donné, le raisonnement menant à la « constatation d'un fait » cesse d'être l'application des principes ordinaires de logique et d'expérience générale, qui est généralement l'apanage du juge de première instance, pour devenir l'application d'une règle de droit, tâche où le tribunal de révision doit exercer son propre jugement. Cette ligne de démarcation se déplace selon la nature de la règle de droit substantiel en litige. Dans quelques branches du droit, certaines questions largement factuelles soulèvent des enjeux — incidence sur d'éventuelles affaires et le comportement futur — qui sont trop importants pour être confiés en premier et dernier ressort au juge de première instance.

My colleagues assert that the question of whether or not the standard of care was met by the defendant in a negligence case is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law (para. 36). I disagree. In many cases, it will not be possible to "extricate" a purely legal question from the standard of care analysis applicable to negligence, which is a question of mixed fact and law. In addition, while some questions of mixed fact and law may not have "any great precedential value" (*Southam*, *supra*, at para. 37), such questions often necessitate a normative analysis that should be reviewable by an appellate court.

108 Mes collègues affirment que la question de savoir si, dans une affaire de négligence, le défendeur a respecté ou non la norme de diligence appropriée est assujettie au critère de l'erreur manifeste et dominante, sauf si le juge de première instance a clairement commis une erreur de principe isolable relativement à la détermination de la norme à appliquer ou à son application, auquel cas l'erreur peut constituer une erreur de droit (par. 36). Je ne suis pas d'accord. Dans bon nombre de cas, il ne sera pas possible d'« isoler » une question de droit pur de l'analyse de la norme de diligence applicable en matière de négligence, qui est une question mixte de fait et de droit. En outre, bien que certaines questions mixtes de fait et de droit puissent ne pas avoir « une grande valeur comme précédents » (*Southam*, précité, par. 37), ces questions impliquent souvent une analyse normative que devrait pouvoir contrôler une cour d'appel.

Consider again the issue of whether the municipality knew or should have known of the alleged danger. As a matter of law, the trial judge must approach the question of whether knowledge should be imputed to the municipality having regard to the duties of the ordinary, reasonable and prudent municipal councillor. If the trial judge applies a different legal standard, such as the reasonable person standard, it is an error of law. Yet even if the trial judge correctly identifies the applicable legal standard, he or she may still err in the process of assessing the facts through the lens of that legal standard. For example, there may exist evidence that an accident had previously occurred on the portion of the road on which the relevant accident occurred. In the course of considering whether or not that fact satisfies the legal test for knowledge the trial judge must make a number of normative assumptions. The trial judge must consider whether the fact that one accident had previously occurred in the same location would alert the ordinary, reasonable and prudent municipal councillor to the existence of a hazard. The trial judge must also consider whether the ordinary, reasonable and prudent councillor would have been alerted to the previous accident by an accident-reporting system. In my view, the question of whether the fact of a previous accident having occurred fulfills the applicable knowledge

109 Revenons maintenant à la question de savoir si la municipalité connaissait ou aurait dû connaître le danger allégué. Sur le plan juridique, le juge de première instance doit se demander s'il y a lieu de prêter cette connaissance à la municipalité eu égard aux obligations qui incombent au conseiller municipal moyen, raisonnable et prudent. Si le juge de première instance applique une autre norme juridique, par exemple celle de la personne raisonnable, il commet une erreur de droit. Cependant, même en supposant que le juge de première instance détermine correctement la norme juridique à appliquer, il lui est encore possible de commettre une erreur lorsqu'il apprécie les faits à la lumière de cette norme juridique. Par exemple, il peut exister une preuve indiquant qu'un accident s'était déjà produit sur le tronçon de chemin en cause. Le juge de première instance qui se demande si ce fait satisfait ou non au critère juridique applicable à la question de la connaissance doit poser un certain nombre d'hypothèses normatives. Il doit se demander si le fait qu'un accident se soit déjà produit au même endroit alerterait le conseiller municipal moyen, raisonnable et prudent de l'existence d'un danger. Il doit également se demander si ce conseiller aurait appris l'existence de l'accident antérieur par un système d'information sur les accidents. Selon moi, la question de savoir si le fait qu'un accident se soit produit antérieurement

requirement is a question of mixed fact and law and it is artificial to characterize it as anything else. As is apparent from the example given, the question may also raise normative issues which should be reviewable by an appellate court on the correctness standard.

110 I agree with my colleagues that it is not possible to state as a general proposition that all matters of mixed fact and law are reviewable according to the standard of correctness: citing *Southam*, *supra*, at para. 37 (para. 28). I disagree, however, that the dicta in *Southam* establishes that a trial judge's conclusions on questions of mixed fact and law in a negligence action should be accorded deference in every case. This Court in *St-Jean v. Mercier*, [2002] 1 S.C.R. 491, 2002 SCC 15, a medical negligence case, distinguished *Southam* on the issue of the standard applicable to questions of mixed fact and law where the tribunal has no particular expertise. Gonthier J., writing for a unanimous Court, stated at paras. 48-49:

> A question "about whether the facts satisfy the legal tests" is one of mixed law and fact. Stated differently, "whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact" (*Southam*, at para. 35).
>
> Generally, such a question, once the facts have been established without overriding and palpable error, is to be reviewed on a standard of correctness since the standard of care is normative and is a question of law within the normal purview of both the trial and appellate courts. Such is the standard for medical negligence. There is no issue of expertise of a specialized tribunal in a particular field which may go to the determination of facts and be pertinent to defining an appropriate standard and thereby call for some measure of deference by a court of general appeal (*Southam*, *supra*, at para. 45; and *Nova Scotia Pharmaceutical Society*, *supra*, at p. 647).

111 I also disagree with my colleagues that *Jaegli Enterprises Ltd. v. Taylor*, [1981] 2 S.C.R. 2, is authority for the proposition that when the question

satisfait à l'exigence de connaissance applicable est une question mixte de fait et de droit, et il serait artificiel de la qualifier autrement. Comme l'indique clairement l'exemple qui précède, cette question peut également soulever des questions normatives que devrait pouvoir contrôler une cour d'appel selon la norme de la décision correcte.

Je partage l'opinion de mes collègues selon laquelle on ne peut poser comme principe général que toutes les questions mixtes de fait et de droit sont assujetties à la norme de la décision correcte : citant *Southam*, précité, par. 37 (par. 28). Cependant, je ne crois pas que l'opinion formulée dans *Southam* signifie que, dans une affaire de négligence, les conclusions du juge de première instance sur des questions mixtes de fait et de droit commandent systématiquement une attitude empreinte de retenue. Dans l'arrêt *St-Jean c. Mercier*, [2002] 1 R.C.S. 491, 2002 CSC 15, affaire de négligence médicale, notre Cour a différencié cette affaire de l'arrêt *Southam* sur la question de la norme de contrôle applicable aux questions mixtes de fait et de droit dans les cas où le tribunal ne possède d'expertise particulière. Exposant la décision unanime de la Cour, le juge Gonthier a dit ceci, aux par. 48 et 49 :

> La question qui consiste « à déterminer si les faits satisfont au critère juridique » est une question mixte de droit et de fait ou en d'autres termes, « la question de savoir si le défendeur a respecté la norme de diligence appropriée est une question de droit et de fait » (*Southam*, par. 35).
>
> Une fois les faits établis sans erreur manifeste et dominante, cette question doit généralement être révisée suivant la norme de la décision correcte puisque la norme de diligence est normative et constitue une question de droit qui relève de la compétence habituelle des tribunaux de première instance et d'appel. C'est la norme applicable à la négligence médicale. Il n'est pas question de l'expertise d'un tribunal spécialisé dans un domaine particulier, pouvant toucher la détermination des faits et avoir une incidence sur la définition de la norme appropriée et exiger de ce fait une certaine déférence de la part d'une cour générale d'appel (*Southam*, par. 45; *Nova Scotia Pharmaceutical Society*, précité, p. 647).

Je ne peux non plus me ranger à l'avis de mes collègues selon lequel l'arrêt *Jaegli Enterprises Ltd. c. Taylor*, [1981] 2 R.C.S. 2, permet d'affirmer

of mixed fact and law at issue is a finding of negligence, that finding should be deferred to by appellate courts. In that case the trial judge found that the conduct of the defendant ski instructor met the standard of care expected of him. Moreover, the trial judge found that the accident would have occurred regardless of what the ski instructor had done (*Taylor v. The Queen in Right of British Columbia* (1978), 95 D.L.R. (3d) 82). Seaton J.A. of the British Columbia Court of Appeal disagreed with the trial judge that the ski instructor had met the applicable standard of care (*Taylor (Guardian ad litem of) v. British Columbia* (1980), 112 D.L.R. (3d) 297). Seaton J.A. recognized nevertheless that the "final question" was whether "the instructor's failure to remain was a cause of the accident" (p. 307). On the issue of causation, a question of fact, Seaton J.A. clearly substituted his opinion for that of the trial judge's without regard to the appropriate standard of review. His concluding remarks on the issue of causation at p. 308 highlight his lack of deference to the trial judge's conclusion on causation:

> On balance, I think that the evidence supports the plaintiffs' claim against the instructor, that his conduct in leaving the plaintiff below the crest was one of the causes of the accident.

This Court, which restored the finding of the trial judge, did not clearly state whether it did so on the basis that the appellate court was wrong to interfere with the trial judge's finding of negligence or whether it did so because the appellate court wrongly interfered with the trial judge's conclusions on causation. The reasons suggest the latter. The only portion of the trial judgment that this Court referred to was the finding on causation. Dickson J. (as he then was) remarks in *Jaegli Enterprises*, *supra*, at p. 4:

> At the end of a nine-day trial Mr. Justice Meredith, the presiding judge, delivered a judgment in which he

que, lorsque la question mixte de fait et de droit en litige est la conclusion de négligence tirée par le juge de première instance, les cours d'appel doivent faire preuve de retenue à l'égard de cette conclusion. Dans cette affaire, le juge de première instance avait conclu que le défendeur, un instructeur de ski, avait respecté la norme de diligence à laquelle il était tenu. Il avait aussi conclu que l'accident serait survenu, indépendamment de la conduite de l'instructeur de ski (*Taylor c. The Queen in Right of British Columbia* (1978), 95 D.L.R. (3d) 82). Le juge Seaton de la Cour d'appel de la Colombie-Britannique a exprimé son désaccord avec la conclusion du juge de première instance que l'instructeur de ski avait respecté la norme de diligence applicable (*Taylor (Guardian ad litem of) c. British Columbia* (1980), 112 D.L.R. (3d) 297). Il a néanmoins reconnu que [TRADUCTION] « l'ultime question » consistait à se demander si « l'omission de l'instructeur de rester près de la demanderesse avait été une cause de l'accident » (p. 307). Sur la question du lien de causalité, qui est une question de fait, le juge Seaton a clairement substitué son opinion à celle du juge de première instance sans tenir compte de la norme de contrôle appropriée. Ses remarques finales sur la question de la causalité, à la p. 308, font ressortir son absence de retenue à l'égard de la conclusion du juge de première instance sur ce point :

> [TRADUCTION] Tout bien considéré, j'estime que la preuve étaye la prétention des demandeurs voulant que la conduite de l'instructeur, qui l'a laissée seule sous la crête de la butte, a été l'une des causes de l'accident.

112 En rétablissant la décision du juge de première instance, notre Cour n'a pas précisé si elle le faisait parce que la cour d'appel avait eu tort de modifier la conclusion de ce dernier sur la négligence ou parce qu'elle avait erronément modifié ses conclusions sur la causalité. Les motifs donnent à penser que la dernière proposition est la bonne. La seule partie du jugement de première instance mentionnée par notre Cour se rapporte à la conclusion sur le lien de causalité. Le juge Dickson (plus tard Juge en chef) a fait les remarques suivantes dans l'arrêt *Jaegli Enterprises*, précité, à la p. 4 :

> À la fin d'un procès de neuf jours, le juge Meredith, qui a présidé le procès, a rendu un jugement dans lequel il a

very carefully considered all of the evidence and concluded that the accident had been caused solely by Larry LaCasse and that the plaintiffs should recover damages, in an amount to be assessed, against LaCasse. The claims against Paul Ankenman, Jaegli Enterprises Limited and the other defendants were dismissed with costs.

113 The Court went on to cite a number of cases, some of which did not involve negligence (see *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78), for the general proposition that "it [is] wrong for an appellate court to set aside a trial judgment where [there is not palpable and overriding error, and] the only point at issue [was] the interpretation of the evidence as a whole" (p. 84). Given that the Court focussed on the issue of causation, a question of fact alone, I do not think that *Jaegli Enterprises* establishes that a finding of negligence by the trial judge should be deferred to by appellate courts. In my view, the Court in *Jaegli Enterprises* merely affirmed the longstanding principle that an appellate court should not interfere with a trial judge's finding of fact absent a palpable and overriding error.

(2) Error of Law in the Reasons of the Court of Queen's Bench

114 The standard of care set out in s. 192 of *The Rural Municipality Act, 1989*, as interpreted within the jurisprudence, required the trial judge to examine whether the portion of Snake Hill Road on which the accident occurred posed a hazard to the reasonable driver exercising ordinary care. Having identified the correct legal test, the trial judge nonetheless failed to ask herself whether a reasonable driver exercising ordinary care would have been able to safely drive the portion of the road on which the accident occurred. To neglect entirely one branch of a legal test when applying the facts to the test is to misconstrue the law (*Southam*, *supra*, at para. 39). The Saskatchewan Court of Appeal was therefore right to characterize this failure as an error of law and to consider the factual findings made by the trial judge in light of the appropriate legal test.

examiné soigneusement toute la preuve et a conclu que l'accident était imputable uniquement à Larry LaCasse et que les demandeurs pouvaient recouvrer de LaCasse des dommages-intérêts pour un montant à déterminer. Les réclamations contre Paul Ankenman, Jaegli Enterprises Limited et les autres défendeurs ont été rejetées avec dépens.

La Cour a ensuite cité quelques décisions, dont certaines ne traitent pas de négligence (voir *Schreiber Brothers Ltd. c. Currie Products Ltd.*, [1980] 2 R.C.S. 78), au soutien de la proposition générale qu'« une cour d'appel ne peut à bon droit infirmer une décision de première instance lorsque la seule question en litige porte sur l'interprétation de l'ensemble de la preuve » (p. 84). Étant donné que la Cour s'est attachée à la question du lien de causalité, question de fait seulement, je ne crois pas que l'arrêt *Jaegli Enterprises* établisse que les cours d'appel doivent faire montre de retenue lorsque le juge de première instance conclut à la négligence. À mon avis, dans l'arrêt *Jaegli Enterprises*, la Cour n'a fait que confirmer le principe bien établi portant qu'une cour d'appel ne doit pas modifier une conclusion de fait du juge de première instance en l'absence d'erreur manifeste et dominante.

(2) L'erreur de droit dans les motifs de la Cour du Banc de la Reine

Suivant la norme de diligence énoncée à l'art. 192 de la *Rural Municipality Act, 1989*, telle qu'elle a été interprétée dans la jurisprudence, la juge de première instance devait se demander si le tronçon du chemin Snake Hill sur lequel s'est produit l'accident constituait un danger pour le conducteur raisonnable prenant des précautions normales. Après avoir déterminé quel était le critère juridique applicable, la juge de première instance a toutefois omis de se demander si un tel conducteur aurait pu rouler en sécurité sur le tronçon en question. Le fait d'omettre entièrement une étape d'un critère juridique, dans l'application de celui-ci aux faits de l'espèce, équivaut à mal interpréter le droit (*Southam*, précité, par. 39). Par conséquent, la Cour d'appel de la Saskatchewan a donc eu raison de qualifier cette omission d'erreur de droit et de contrôler les conclusions de fait tirées par la juge de première instance à la lumière du critère juridique approprié.

The long line of jurisprudence interpreting s. 192 of *The Rural Municipality Act, 1989* and its predecessor provisions clearly establishes that the duty of the municipality is to keep the road "in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety" (*Partridge*, *supra*, at p. 558; *Levey v. Rural Municipality of Rodgers, No. 133*, [1921] 3 W.W.R. 764 (Sask. C.A.), at p. 766; *Diebel Estate v. Pinto Creek No. 75 (Rural Municipality)* (1996), 149 Sask. R. 68 (Q.B.), at pp. 71-72). Legislation in several other provinces establishes a similar duty of care and courts in these provinces have interpreted it in a similar fashion (*R. v. Jennings*, [1966] S.C.R. 532, at p. 537; *County of Parkland No. 31 v. Stetar*, [1975] 2 S.C.R. 884, at p. 892; *Fafard v. City of Quebec* (1917), 39 D.L.R. 717 (S.C.C.), at p. 718). This Court, in *Jennings*, *supra*, interpreting a similar provision under the Ontario *Highway Improvement Act*, R.S.O. 1960, c. 171, remarked at p. 537 that: "[i]t has been repeatedly held in Ontario that where a duty to keep a highway in repair is imposed by statute the body upon which it is imposed must keep the highway in such a condition that travellers using it with ordinary care may do so with safety".

115 La jurisprudence de longue date portant sur l'interprétation de l'art. 192 de la *Rural Municipality Act, 1989* et des dispositions qu'il a remplacées établit clairement que les municipalités ont l'obligation de tenir les chemins [TRADUCTION] « dans un état raisonnable d'entretien de façon que ceux qui doivent l[es] emprunter puissent, en prenant des précautions normales, y circuler en sécurité » (*Partridge*, précité, p. 558; *Levey c. Rural Municipality of Rodgers, No. 133*, [1921] 3 W.W.R. 764 (C.A. Sask.), p. 766; *Diebel Estate c. Pinto Creek No. 75 (Rural Municipality)* (1996), 149 Sask. R. 68 (B.R.), p. 71 et 72). Plusieurs autres provinces ont adopté des lois établissant une obligation de diligence semblable, et les tribunaux de ces provinces ont interprété cette obligation de la même façon (*R. c. Jennings*, [1966] R.C.S. 532, p. 537; *Comté de Parkland nº 31 c. Stetar*, [1975] 2 R.C.S. 884, p. 892; *Fafard c. City of Quebec* (1917), 39 D.L.R. 717 (C.S.C.), p. 718). Interprétant une disposition similaire de la *Highway Improvement Act* de l'Ontario, R.S.O. 1960, ch. 171, notre Cour a indiqué, dans l'arrêt *Jennings*, précité, p. 537, qu'[TRADUCTION] « [i]l a été décidé à maintes reprises en Ontario que, lorsque l'obligation de maintenir une route en bon état d'entretien est légalement imposée à un organisme, celui-ci doit maintenir la route dans un état permettant à ceux qui l'empruntent en prenant des précautions normales d'y circuler en sécurité ».

There is good reason for limiting the municipality's duty to repair to a standard which permits drivers exercising ordinary care to proceed with safety. As stated by this Court in *Fafard*, *supra*, at p. 718: "[a] municipal corporation is not an insurer of travellers using its streets; its duty is to use reasonable care to keep its streets in a reasonably safe condition for ordinary travel by persons exercising ordinary care for their own safety". Correspondingly, appellate courts have long held that it is an error for the trial judge to find a municipality in breach of its duty merely because a danger exists, regardless of whether or not that danger poses a risk to the ordinary user of the road. The type of error to be guarded against was described by Wetmore C.J. in *Williams v.*

116 Il existe de bonnes raisons de limiter l'obligation d'entretien des routes incombant aux municipalités au respect d'une norme suffisante pour permettre aux conducteurs qui prennent des précautions normales d'y circuler en sécurité. Comme l'a dit notre Cour dans l'arrêt *Fafard*, précité, p. 718 : [TRADUCTION] « [l]es municipalités ne sont pas les assureurs des automobilistes qui roulent dans leurs rues; leur obligation consiste à faire preuve de diligence raisonnable et de maintenir leurs rues dans un état raisonnablement sécuritaire pour la circulation normale des personnes qui prennent des précautions normales en vue d'assurer leur propre sécurité ». En conséquence, les cours d'appel estiment depuis longtemps que le juge de première instance commet une erreur s'il conclut qu'une municipalité

Town of North Battleford (1911), 4 Sask. L.R. 75 (*en banc*), at p. 81:

> The question in an action of this sort, whether or not the road is kept in such repair that those requiring to use it may, using ordinary care, pass to and fro upon it in safety, is, it seems to me, largely one of fact . . . I would hesitate about setting aside a finding of fact of the trial Judge if he had found the facts necessary for the determination of the case, but he did not so find. He found that the crossing was a "dangerous spot without a light, and that if the utmost care were used no accident might occur, but it was not in such proper or safe state as to render such accident unlikely to occur." He did not consider the question from the standpoint of whether or not those requiring to use the road might, using ordinary care, pass to and fro upon it in safety. The mere fact of the crossing being dangerous is not sufficient . . . . [Emphasis added.]

117 From the jurisprudence cited above, it is clear that the mere existence of a hazard or danger does not in and of itself give rise to a duty on the part of the municipality to erect a sign. Even if a trial judge concludes on the facts that the conditions of the road do, in fact, present a hazard, he or she must still go on to assess whether that hazard would present a risk to the reasonable driver exercising ordinary care. The ordinary driver is often faced with inherently dangerous driving conditions. Motorists drive in icy or wet conditions. They drive at night on country roads that are not well lit. They are faced with obstacles such as snow ridges and potholes. These obstacles are often not in plain view, but are obscured or "hidden". Common sense dictates that motorists will, however, exercise a degree of caution when faced with dangerous driving conditions. A municipality is expected to provide extra cautionary measures only where the conditions of the road and the surrounding circumstances do not signal to the driver the possibility that a hazard is present. For example, the ordinary driver expects a dirt road to become slippery when wet. By contrast, paved

manque à son obligation du seul fait qu'un danger existe, indépendamment de la question de savoir si ce danger présente ou non un risque pour l'usager ordinaire du chemin. Le genre d'erreur qu'il faut éviter a été décrit ainsi par le juge en chef Wetmore dans l'affaire *Williams c. Town of North Battleford* (1911), 4 Sask. L.R. 75 (*in banco*), p. 81 :

> [TRADUCTION] Il me semble que la question qui se pose dans ce genre d'action — soit celle de savoir si le chemin est tenu dans un état d'entretien tel que ceux qui doivent l'emprunter puissent, en prenant des précautions normales, y circuler en sécurité — est essentiellement une question de fait [. . .] j'hésiterais à écarter une conclusion de fait du juge de première instance s'il avait relevé l'existence des faits nécessaires pour trancher l'affaire, mais il ne l'a pas fait. Il a conclu que l'intersection était « un endroit dangereux non éclairé, et qu'aucun accident ne s'y produirait si on faisait preuve d'une prudence extrême, mais que cet endroit n'était pas tenu dans un état d'entretien propre à rendre improbable un tel accident ». Il n'a pas examiné la question en se demandant si ceux qui doivent emprunter ce chemin peuvent, en prenant des précautions normales, y circuler en sécurité. Le seul fait que l'intersection soit dangereuse n'est pas suffisant . . . [Je souligne.]

Il ressort clairement de la jurisprudence susmentionnée que la simple existence d'un risque ou danger ne fait pas en soi naître pour la municipalité l'obligation d'installer un panneau de signalisation. Même si, à partir des faits, le juge de première instance arrive à la conclusion que l'état du chemin crée effectivement un risque, il doit poursuivre son analyse et se demander si ce risque présente un danger pour le conducteur raisonnable prenant des précautions normales. Le conducteur moyen rencontre souvent des conditions de conduite intrinsèquement dangereuses. Les automobilistes conduisent leur véhicule sur des chaussées glacées ou humides. Ils roulent la nuit sur des chemins de campagne mal éclairés. Ils rencontrent des obstacles comme des bancs de neige et des nids-de-poule. Souvent ces obstacles ne sont pas visibles, car ils sont dissimulés ou « cachés ». Le bon sens suggère que les automobilistes font toutefois preuve d'une certaine prudence en présence de conditions de conduite dangereuses. On n'attend de la municipalité qu'elle prenne des mesures d'avertissement supplémentaires que lorsque l'état du chemin et l'ensemble des

bridge decks on highways are often slick, though they appear completely dry. Consequently, signs will be posted to alert drivers to this unapparent possibility.

autres circonstances ne signalent pas au conducteur la possibilité qu'un danger existe. Par exemple, le conducteur moyen s'attend à ce qu'un chemin de terre devienne glissant lorsqu'il est mouillé. À l'opposé, les tabliers de pont asphaltés qui se trouvent sur les routes sont souvent glissants, bien qu'ils paraissent complètement secs. Par conséquent, des panneaux sont installés pour alerter les conducteurs de cette possibilité non apparente.

The appellant in this case argued, at para. 27 of his factum, that the trial judge did, in fact, assess whether a reasonable driver using ordinary care would find the portion of Snake Hill Road on which the accident occurred to pose a risk. He points in particular to the trial judge's comments at paras. 85-86 that:

> There is a portion of Snake Hill Road that is a hazard to the public. In this regard I accept the evidence of Mr. Anderson and Mr. Werner. Further, it is a hazard that is not readily apparent to users of the road. It is a hidden hazard. . . .
>
> . . . where the existence of . . . bush obstructs the ability of a motorist to be forewarned of a hazard such as that on Snake Hill Road, it is reasonable to expect the R.M. to erect and maintain a warning or regulatory sign so that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation. [Emphasis added.]

118 En l'espèce, l'appelant a plaidé, au par. 27 de son mémoire, que la juge de première instance s'était, en fait, demandé si un conducteur raisonnable prenant des précautions normales considérerait que le tronçon du chemin Snake Hill où s'est produit l'accident constitue un risque. Il souligne en particulier les commentaires suivants de la juge de première instance, aux par. 85 et 86 :

> [TRADUCTION] Il y a, sur le chemin Snake Hill, un tronçon qui présente un danger pour le public. À cet égard, je retiens les témoignages de MM. Anderson et Werner. En outre, il s'agit d'un danger qui n'est pas facilement décelable par les usagers du chemin. Il s'agit d'un danger caché . . .
>
> . . . à l'endroit où la présence des broussailles empêche les automobilistes de voir venir un danger comme celui qui existe sur le chemin Snake Hill, il est raisonnable de s'attendre à ce que la M.R. installe et maintienne un panneau d'avertissement ou de signalisation afin qu'un automobiliste prenant des précautions normales soit prévenu et puisse réduire sa vitesse et prendre des mesures correctives avant d'arriver à l'endroit dangereux. [Je souligne.]

The appellant's argument suggests that the trial judge discharged her duty to apply the facts to the law merely by restating the facts of the case in the language of the legal test. This was not, however, sufficient. Although it is clear from the citation above that the trial judge made a factual finding that the portion of Snake Hill Road on which the accident occurred presented drivers with a hidden hazard, there is nothing in this portion of her reasons to suggest that she considered whether or not that portion of the road would pose a risk to the reasonable driver exercising ordinary care. The finding that a hazard, or even that a hidden hazard, exists does not automatically give rise to the conclusion that the reasonable driver exercising ordinary care could not

119 L'appelant semble prétendre que la juge de première instance s'est acquittée de son devoir d'appliquer le droit aux faits simplement en intégrant les faits de l'espèce à la formulation du critère juridique. Ce n'était toutefois pas suffisant. Bien qu'il ressorte clairement des passages précités que la juge de première instance a, à partir des faits, conclu que la portion du chemin Snake Hill où s'est produit l'accident exposait les conducteurs à un danger caché, il n'y a rien dans cette partie de ses motifs qui indique qu'elle s'est demandé si cette portion du chemin présentait un risque pour le conducteur raisonnable prenant des précautions normales. Le fait de conclure à l'existence d'un danger, même caché, n'implique pas forcément que le conducteur

travel through it safely. A proper application of the test demands that the trial judge ask the question: "How would a reasonable driver have driven on this road?" Whether or not a hazard is "hidden" or a curve is "inherently" dangerous does not dispose of the question. My colleagues state that it was open to the trial judge to draw an inference of knowledge of the hazard simply because the sharp curve was a permanent feature of the road (para. 61). Here again, there is nothing in the reasons of the trial judge to suggest that she drew such an inference or to explain how such an inference accorded with the legal requirements concerning the duty of care.

120 Nor did the trial judge consider the question in any other part of her reasons. Her failure to do so becomes all the more apparent when her analysis (or lack thereof) is compared to that in cases in which the courts applied the appropriate method. The Court of Appeal referred to two such cases by way of example. In *Nelson v. Waverley (Rural Municipality)* (1988), 65 Sask. R. 260 (Q.B.), the plaintiff argued that the defendant municipality should have posted signs warning of a ridge in the middle of the road that resulted from the grading of the road by the municipality. The trial judge concluded that if the driver had exercised ordinary care, he could have travelled along the roadway with safety. Instead, he drove too fast and failed to keep an adequate lookout considering the maintenance that was being performed on the road. In *Diebel Estate*, *supra*, the issue was whether the municipality had a duty under s. 192 to post a sign warning motorists that a rural road ended abruptly in a T-intersection. The question of how a reasonable driver exercising ordinary care would have driven on that road was asked and answered by the trial judge in the following passage at p. 74:

His [the expert's] conclusions as to stopping are, however, mathematically arrived at and never having been on

raisonnable prenant des précautions normales ne peut pas y circuler en sécurité. Pour bien appliquer le critère juridique, le juge de première instance doit se poser la question suivante : « Comment un conducteur raisonnable aurait-il roulé sur ce chemin? » Le fait de conclure qu'il existe ou non un danger « caché » ou qu'une courbe est quelque chose d' « intrinsèquement » dangereux ne vide pas la question. Mes collègues affirment que la juge de première instance pouvait inférer la connaissance du danger du seul fait que la courbe serrée constituait une caractéristique permanente du chemin (par. 61). Ici encore, rien dans les motifs de la juge de première instance n'indique qu'elle a tiré une telle inférence ou n'explique en quoi une telle inférence satisfaisait aux conditions juridiques relatives à l'obligation de diligence.

La juge de première instance n'a pas non plus examiné cette question ailleurs dans ses motifs. Son omission à cet égard devient encore plus évidente lorsqu'on compare son analyse (ou son absence d'analyse) à celle des affaires où les tribunaux ont appliqué la bonne démarche. La Cour d'appel a donné comme exemple deux de ces affaires. Dans *Nelson c. Waverley (Rural Municipality)* (1988), 65 Sask. R. 260 (B.R.), le demandeur prétendait que la municipalité défenderesse aurait dû installer des panneaux signalant la présence, au milieu du chemin, d'un sillon résultant de travaux municipaux de nivellement. Le juge de première instance a estimé que, si le conducteur avait pris des précautions normales, il aurait pu rouler en sécurité sur la chaussée. Au lieu de cela, il a roulé trop vite et manqué de vigilance compte tenu des travaux d'entretien qui étaient effectués sur le chemin. Dans *Diebel Estate*, précité, il s'agissait de déterminer si la municipalité avait, en vertu de l'art. 192, l'obligation d'installer un panneau avertissant les automobilistes qu'une route rurale se terminait de façon abrupte à un croisement en T. Le juge de première instance s'est demandé comment un conducteur raisonnable prenant des précautions normales aurait roulé sur ce chemin, et il a répondu ainsi à cette question, à la p. 74 :

[TRADUCTION] Ses conclusions [celles de l'expert] pour ce qui concerne l'arrêt des automobiles découlent

the road, from what was described in the course of the trial, I would think the intersection could be a danger at night to a complete stranger to the area, depending on one's reaction time and the possibility of being confused by what one saw rather than recognizing the T intersection to be just that. On the other hand I would think a complete stranger in the area would be absolutely reckless to drive down a dirt road of the nature of this particular road at night at 80 kilometres per hour. [Emphasis added; emphasis in original deleted.]

The conclusion that Wright J. erred in failing to apply a required aspect of the legal test does not automatically lead to a rejection of her factual findings. This Court's jurisdiction to review questions of law entitles it, where an error of law has been found, to take the factual findings of the trial judge as they are, and to assess these findings anew in the context of the appropriate legal test.

In my view, neither Wright J.'s factual findings nor any other evidence in the record that she might have considered had she asked the appropriate question, support the conclusion that the respondent was in breach of its duty. The portion of Snake Hill Road on which the accident occurred did not pose a risk to a reasonable driver exercising ordinary care because the conditions of Snake Hill Road in general and the conditions with which motorists were confronted at the exact location of the accident signalled to the reasonable motorist that caution was needed. Motorists who appropriately acknowledged the presence of the several factors which called for caution would have been able to navigate safely the so-called "hidden hazard" without the benefit of a road sign.

The question of how a reasonable driver exercising ordinary care would have driven on Snake Hill Road necessitates a consideration of the nature and locality of the road. A reasonable motorist will not approach a narrow gravel road in the country in the same way that he or she will approach a paved highway. It is reasonable to expect a motorist to drive more slowly and to pay greater attention to the potential presence of hazards when driving on a

toutefois d'opérations mathématiques et bien que je n'aie jamais emprunté le chemin en question, d'après les descriptions faites au procès, je suis d'avis que le croisement pourrait constituer un danger la nuit pour quelqu'un qui ne connaît absolument pas l'endroit, eu égard à la vitesse de réaction de chacun et à la possibilité que quelqu'un confonde le croisement en T avec quelque chose d'autre. Par ailleurs, j'estime que quelqu'un ne connaissant aucunement l'endroit agirait de façon tout à fait téméraire en roulant à 80 kilomètres à l'heure la nuit sur un chemin de terre comme celui qui nous intéresse. [Je souligne; soulignement dans l'original omis.]

121 Le fait de conclure que la juge Wright a commis une erreur de droit en omettant d'appliquer un élément essentiel du critère juridique n'invalide pas forcément ses conclusions de fait. En effet, la compétence de notre Cour en matière d'examen des questions de droit l'autorise, lorsqu'une telle erreur est décelée, à reprendre telles quelles les conclusions de fait du juge de première instance et à les réévaluer au regard du critère juridique approprié.

122 Selon moi, ni les faits retenus par la juge Wright ni aucun autre élément de preuve au dossier qu'elle aurait pu prendre en considération si elle s'était posé la bonne question n'appuient sa conclusion que l'intimée a manqué à son obligation. La portion du chemin Snake Hill où s'est produit l'accident ne présentait pas de risque pour un conducteur raisonnable prenant des précautions normales, car l'état de ce chemin en général et les conditions auxquelles les automobilistes doivent faire face à l'endroit précis de l'accident avertissent l'automobiliste raisonnable que la prudence s'impose. Les automobilistes sachant reconnaître les divers facteurs qui appellent à la prudence auraient pu franchir le soi-disant [TRADUCTION] « danger caché » sans l'aide d'un panneau de signalisation.

123 Pour savoir comment un conducteur raisonnable prenant des précautions normales aurait conduit son véhicule sur le chemin Snake Hill, il faut tenir compte de la nature du chemin et de la configuration des lieux. Un automobiliste raisonnable ne roulera pas sur une étroite route de campagne gravelée de la même façon que sur une route asphaltée. Il est raisonnable de s'attendre à ce qu'un automobiliste conduise moins vite et soit plus attentif à la présence

road that is of a lower standard, particularly when he or she is unfamiliar with it.

124 While the trial judge in this case made some comments regarding the nature of the road, I agree with the Court of Appeal's findings that "[s]he might have addressed the matter more fully, taking into account more broadly the terrain through which the road passed, the class and designation of the road in the scheme of classification, and so on . . . " (para. 55). Instead, the extent of her analysis of the road was limited to the following comments, found at para. 84 of her reasons:

> Snake Hill Road is a low traffic road. It is however maintained by the R.M. so that it is passable year round. There are permanent residences on the road. It is used by farmers for access to their fields and cattle. Young people frequent Snake Hill Road for parties and as such the road is used by those who may not have the same degree of familiarity with it as do residents.

125 In my view, the question of how the reasonable driver would have negotiated Snake Hill Road necessitated a somewhat more in-depth analysis of the character of the road. The trial judge's analysis focussed almost entirely on the use of the road, without considering the sort of conditions it presented to drivers. It is perhaps not surprising that the trial judge did not engage in this fuller analysis, given that she did not turn her mind to the question of how a reasonable driver would have approached the road. Had she considered this question, she likely would have engaged in the type of assessment that was made by the Court of Appeal at para. 13 of its judgment:

> The road, about 20 feet in width, was classed as "a bladed trail," sometimes referred to as "a land access road," a classification just above that of "prairie trail". As such, it was not built up, nor gravelled, except lightly at one end of it, but simply bladed across the terrain following the path of least resistance. Nor was it in any way signed.

de dangers potentiels sur un chemin de catégorie inférieure, particulièrement s'il n'est pas familier avec celui-ci.

Bien que, en l'espèce, la juge de première instance ait fait certains commentaires sur la nature du chemin, je souscris à la conclusion de la Cour d'appel selon laquelle [TRADUCTION] « [e]lle aurait pu examiner la question de manière plus approfondie, en tenant davantage compte du type de terrain que le chemin traversait, de la nature et de la désignation du chemin selon le système de classification des routes et ainsi de suite . . . » (par. 55). Au lieu de cela, son analyse s'est limitée aux commentaires suivants, au par. 84 de ses motifs :

> [TRADUCTION] Le chemin Snake Hill est un chemin à faible débit de circulation. Il est néanmoins entretenu par la M.R. à longueur d'année afin de le garder carrossable. Des résidences permanentes sont situées en bordure de celui-ci. Les fermiers l'utilisent pour accéder à leurs champs et à leur bétail. Des jeunes gens empruntent le chemin Snake Hill pour se rendre à des fêtes, de sorte qu'il est utilisé par des conducteurs qui ne le connaissent pas toujours aussi bien que les résidents de l'endroit.

À mon avis, la question de savoir comment un conducteur raisonnable aurait roulé sur le chemin Snake Hill nécessitait un examen un peu plus approfondi de la nature du chemin. Dans son analyse, la juge de première instance s'est attachée presque exclusivement à l'utilisation qui est faite du chemin, sans prendre en compte le genre de conditions qu'il présente aux conducteurs. Il n'est peut-être pas surprenant qu'elle ne se soit pas livrée à cette analyse approfondie, puisqu'elle ne s'est pas demandé comment un conducteur raisonnable aurait roulé sur ce chemin. Si elle s'était posé cette question, elle aurait vraisemblablement procédé à une évaluation analogue à celle qu'a faite la Cour d'appel au par. 13 de son jugement :

> [TRADUCTION] Le chemin, d'une largeur de 20 pieds environ, a été qualifié de « chemin nivelé », qu'on appelle aussi parfois « chemin d'accès », soit tout juste une catégorie au-dessus d'un « chemin de prairie ». Comme tel, il n'a été ni renforcé ni revêtu de gravier, sauf légèrement à l'une de ses extrémités, il s'agit tout simplement d'un chemin nivelé à même le terrain, suivant le tracé présentant le mois d'obstacles. On n'y a installé aucune signalisation.

Given the fact that Snake Hill Road is a low standard road, in a category only one or two levels above a prairie trail, one can assume that a reasonable driver exercising ordinary care would approach the road with a certain degree of caution.

Comme le chemin Snake Hill est une route de catégorie inférieure, à peine un ou deux niveaux au-dessus d'un chemin de prairie, on peut présumer qu'un conducteur raisonnable prenant des précautions normales y roulerait avec une certaine prudence.

Having considered the character of the road in general, and having concluded that by its very nature it warranted a certain degree of caution, it is nonetheless necessary to consider the material features of the road at the point at which the accident occurred. Even on roads which are of a lower standard, a reasonable driver exercising due caution may be caught unaware by a particularly dangerous segment of the road. That was, in fact, the central argument that the appellant put forward in this case. According to the appellant's "dual nature" theory, at para. 8 of his factum, the fact that the curvy portion of Snake Hill Road where the accident occurred was flanked by straight segments of road created a risk that a motorist would be lulled into thinking that the curves could be taken at speeds greater than that at which they could actually be taken.

126 Après avoir examiné la nature générale du chemin et avoir conclu que, du fait de cette nature même, une certaine prudence s'imposait, il faut néanmoins prendre en considération les caractéristiques physiques du chemin à l'endroit où l'accident s'est produit. Même sur des chemins de catégorie inférieure, un conducteur raisonnable prenant des précautions normales pourrait être pris par surprise sur un tronçon particulièrement dangereux. Il s'agit là, en fait, de l'argument central présenté par l'appelant en l'espèce. Selon sa thèse, dite de la « nature hybride » du chemin, au par. 8 de son mémoire, le fait que la courbe où est survenu l'accident se trouve entre des tronçons en ligne droite risquait d'amener les automobilistes à croire que les virages pouvaient être pris à des vitesses supérieures à celles auxquelles ils pouvaient l'être en réalité.

While it is not clear from her reasons that the trial judge accepted the appellant's "dual nature" theory, it appears that her conclusion that the municipality did not meet the standard of care required by it was based largely on her observation of the material features of the road at the location of the Nikolaisen rollover. Relying on the evidence of two experts, Mr. Anderson and Mr. Werner, she found the portion of the road on which the accident occurred to be a "hazard to the public". In her view, the limited sight distance created by the presence of uncleared bush precluded a motorist from being forewarned of the impending sharp right turn immediately followed by a left turn. Based on expert testimony, she concluded that the curve could not be negotiated at speeds greater than 60 km/h under favourable conditions, or 50 km/h under wet conditions.

127 Bien que les motifs de la juge de première instance n'indiquent pas clairement si elle a retenu la thèse de la « nature hybride » du chemin, il semble que sa conclusion selon laquelle la municipalité a manqué à son obligation d'entretien ait reposé largement sur son examen des caractéristiques physiques du chemin, à l'endroit où le véhicule de M. Nikolaisen a fait un tonneau. S'appuyant sur les témoignages de deux experts, MM. Anderson et Werner, elle a estimé que la portion du chemin où s'est produit l'accident constituait un [TRADUCTION] « danger pour le public ». Selon elle, le fait que la distance de visibilité ait été réduite par la présence de broussailles empêchait les automobilistes de voir l'imminence d'un virage à droite serré, qui est immédiatement suivi d'un virage à gauche. Sur la base des témoignages d'experts, elle a conclu que le virage ne pouvait être pris à une vitesse supérieure à 60 km/h dans des conditions favorables, ou 50 km/h sur chaussée humide.

Again, I would not reject the trial judge's factual finding that the curve presented motorists with an

128 Je ne rejetterais pas, je le répète, la conclusion de fait selon laquelle la courbe présentait un risque

inherent hazard. The evidence does not, however, support a finding that a reasonable driver exercising ordinary care would have been unable to negotiate the curve with safety. As I explained earlier, the municipality's duty to repair is implicated only when an objectively hazardous condition exists, and where it is determined that a reasonable driver arriving at the hazard would be unable to provide for his or her own security due to the features of the hazard.

129 I agree with the trial judge that part of the danger posed by the presence of bushes on the side of the road was that a driver would not be able to predict the radius of the sharp right-turning curve obscured by them. In my view, however, the actual danger inherent in this portion of the road was that the bushes, together with the sharp radius of the curve, prevented an eastbound motorist from being able to see if a vehicle was approaching from the opposite direction. Given this latter situation, it is highly unlikely that any reasonable driver exercising ordinary care would approach the curve at speeds in excess of 50 km/h, a speed which was found by the trial judge to be a safe speed at which to negotiate the curve. Since a reasonable driver would not approach this curve at speeds in excess of which it could safely be taken, I conclude that the curve did not pose a risk to the reasonable driver.

130 One need only refer to the series of photographs of the portion of Snake Hill Road on which the accident occurred to appreciate the extent to which visual clues existed which would alert a driver to approach the curve with caution (Respondent's Record, vol. II, at pp. 373-76). The photographs, which indicate what the driver would have seen on entering the curve, show the presence of bush extending well into the road. From the photographs, it is clear that a motorist approaching the curve would not fail to appreciate the risk presented by the curve, which is simply that it is impossible to see around it and to gauge what may be coming in the opposite direction. In addition, the danger posed

intrinsèque pour les automobilistes. Toutefois, il n'y a rien dans la preuve qui permette de conclure qu'un conducteur raisonnable prenant des précautions normales aurait été incapable de prendre le virage en sécurité. Comme je l'ai expliqué plus tôt, l'obligation d'entretien des municipalités n'est en cause que lorsqu'il existe une situation objectivement dangereuse et qu'il est établi qu'un conducteur raisonnable s'approchant du danger serait incapable d'assurer sa sécurité en raison des caractéristiques de ce danger.

Je partage l'opinion de la juge de première instance selon laquelle une partie du danger créé par les broussailles se trouvant en bordure de la route tenait au fait qu'un conducteur ne pourrait deviner le rayon de courbure prononcé du virage à droite serré qu'elles dissimulaient. À mon sens, toutefois, le véritable danger intrinsèque de ce tronçon du chemin résidait dans le fait que les broussailles, ainsi que le court rayon de courbure du virage, empêchent les automobilistes circulant en direction est de voir si un véhicule s'approche en sens inverse. Par conséquent, il est très peu probable qu'un conducteur raisonnable prenant des précautions normales approcherait de ce virage à une vitesse supérieure à 50 km/h, vitesse à laquelle la juge de première instance a conclu qu'il était possible de le prendre en sécurité. Étant donné qu'un conducteur raisonnable n'approcherait pas de ce virage à une vitesse supérieure à celle lui permettant de le prendre en sécurité, je conclus que le virage ne constituait pas un risque pour le conducteur raisonnable.

Il suffit d'examiner les photos du tronçon du chemin Snake Hill où l'accident est survenu pour constater à quel point il existait des indices visuels propres à inciter les conducteurs à s'approcher du virage avec prudence (dossier de l'intimée, vol. II, p. 373-376). Les photos, qui montrent ce que voit le conducteur sur le point d'amorcer le virage, laissent voir la présence de broussailles s'avançant considérablement au-dessus du chemin. Il ressort clairement de ces photographies qu'un automobiliste approchant du virage ne manquerait pas pressentir le risque que présente celui-ci, savoir qu'il est tout simplement impossible de voir de l'autre côté de la courbe ce qui peut arriver en sens inverse. De plus,

by the inability to see what is approaching in the opposite direction is somewhat heightened by the fact that this road is used by farm operators. At trial, the risk was described in the following terms by Mr. Sparks, an engineer giving expert testimony:

> . . . if you can't, if you can't see far enough down the road to, you know, if there's somebody that's coming around the corner with a tractor and a cultivator and you can't see around the corner, then, you know, drivers would have a fairly strong signal, in my view, that due care and caution would be required.

The expert testimony relied on by the trial judge does not support a finding that the portion of Snake Hill Road on which the accident occurred would pose a risk to a reasonable driver exercising ordinary care. When asked at trial whether motorists, exercising reasonable care, would enter the curve at a slow speed because they could not see what was coming around the corner, Mr. Werner agreed that he, himself, drove the corner "at a slower speed" and that it would be prudent for a driver to slow down given the limited sight distance. Similarly, Mr. Anderson admitted to having taken the curve at 40-45 km/h the first time he drove it because he "didn't want to get into trouble with it". When asked if the reason he approached the curve at that speed was because he could not see around it, he replied in the affirmative: "[t]hat's why I approached it the way I did."

Perhaps most tellingly, Mr. Nikolaisen himself testified that he could not see if a vehicle was coming in the opposite direction as he approached the curve. The following exchange which occurred during counsel's cross-examination of Mr. Nikolaisen at trial is instructive:

> Q. . . . You told my learned friend, Mr. Logue, that your view of the road was quite limited, that is correct? The view ahead on the road is quite limited, is that right?

le danger que constitue l'incapacité de voir ce qui arrive en sens inverse est d'une certaine manière exacerbé par le fait que le chemin est utilisé par des exploitants agricoles. Au procès, ce risque a été décrit ainsi par M. Sparks, ingénieur, qui témoignait à titre d'expert :

> [TRADUCTION] . . . si vous ne pouvez pas voir, si vous ne pouvez pas voir assez loin sur le chemin pour, vous savez, savoir si quelqu'un arrive en sens inverse avec un tracteur tirant une herse et que vous ne pouvez voir, de l'autre côté du virage, alors, vous savez, cela devrait envoyer un message clair aux conducteurs, selon moi, que l'attention et la prudence s'imposent.

131 Le témoignage d'expert retenu par la juge de première instance n'étaye pas sa conclusion que la portion du chemin Snake Hill où s'est produit l'accident présente un risque pour un conducteur raisonnable prenant des précautions normales. Lorsqu'on lui a demandé si un automobiliste prenant des précautions normales amorcerait le virage à vitesse réduite étant donné qu'il ne peut voir ce qui l'attend au détour du chemin, M. Werner a reconnu que lui-même prend le virage [TRADUCTION] « à vitesse réduite » et qu'il serait prudent que les conducteurs ralentissent en raison de la distance de visibilité limitée. De même, M. Anderson a admis avoir pris le virage à 40-45 km/h la première fois qu'il est passé par là, car il [TRADUCTION] « ne voulait pas se placer dans une situation difficile ». Lorsqu'on lui a demandé s'il avait pris le virage à cette vitesse parce qu'il ne pouvait pas voir ce qui l'attendait, il a répondu par l'affirmative : [TRADUCTION] « [c']est la raison pour laquelle je l'ai approché comme je l'ai fait. »

132 Fait encore plus révélateur peut-être, M. Nikolaisen lui-même a témoigné qu'il ne pouvait pas savoir si un véhicule venait en sens inverse lorsqu'il s'approchait du virage. L'échange suivant, durant le contre-interrogatoire de M. Nikolaisen au procès par l'avocat de la partie adverse, est éclairant :

[TRADUCTION]

> Q. . . . Vous avez dit à mon savant collègue, M. Logue, que votre visibilité était plutôt réduite, est-ce exact? La visibilité sur le chemin est plutôt réduite, n'est-ce pas?

A. As in regards to travelling through the curves, yes, that's right, yeah.

Q. Yes. And you did not know what was coming as you approached the curve, that is correct?

A. That's correct, yes.

Q. There might be a vehicle around that curve coming towards you or someone riding a horse on the road, that is correct?

A. Or a tractor or a cultivator or something, that's right.

Q. Or a tractor or a cultivator. You know as a person raised in rural Saskatchewan that all of those things are possibilities, that is right?

A. That's right, yeah, that is correct.

133 Nor do I accept the appellant's submission that the "dual nature" of the road had the effect of lulling drivers into taking the curve at an inappropriate speed. This theory rests on the assumption that the motorists would drive the straight portions of the road at speeds of up to 80 km/h, leaving them unprepared to negotiate suddenly appearing curves. Yet, while the default speed limit on the road was 80 km/h, there was no evidence to suggest that a reasonable driver would have driven any portion of the road at that speed. While Mr. Werner testified that a driver "would be permitted" to drive at a maximum of 80 km/h, since this was the default (not the posted) speed limit, he later acknowledged that bladed trails in the province are not designed to meet 80 km/h design criteria. I agree with the Court of Appeal that the evidence is that "Snake Hill Road was self-evidently a dirt road or bladed trail" and that it "was obviously not designed to accommodate travel at a general speed of 80 kilometres per hour". As I earlier remarked, the locality of the road and its character and class must be considered when determining whether the reasonable driver would be able to navigate it safely.

R. Lorsqu'on se trouve dans les courbes, oui, c'est exact.

Q. Oui. Et vous ne saviez pas ce qui s'en venait lorsque vous approchiez du virage, est-ce exact?

R. C'est exact, oui.

Q. Il aurait pu y avoir un véhicule venant dans votre direction de l'autre côté de la courbe ou quelqu'un se promenant à cheval sur le chemin, est-ce exact?

R. Ou un tracteur, un cultivateur ou autre chose, c'est vrai.

Q. Ou un tracteur ou un cultivateur. Vous savez, puisque vous avez grandi en milieu rural en Saskatchewan, que toutes ces situations sont autant de possibilités, n'est-ce pas?

R. C'est vrai, oui.

Je ne retiens pas non plus l'argument de l'appelant portant que la « nature hybride » du chemin avait pour effet d'amener les conducteurs à prendre le virage à une vitesse inappropriée. Cette théorie repose sur l'hypothèse que les automobilistes roulent sur les portions en ligne droite du chemin à une vitesse pouvant atteindre 80 km/h, et qu'ils se trouvent en conséquence pris de court lorsqu'ils doivent prendre un virage soudain. Pourtant, bien que la vitesse permise sur le chemin soit 80 km/h, rien dans la preuve n'indiquait qu'un conducteur raisonnable aurait roulé à cette vitesse à quelque endroit du chemin. Après avoir témoigné que les conducteurs [TRADUCTION] « étaient autorisés » à rouler à une vitesse maximale de 80 km/h, cette vitesse étant la vitesse permise par défaut (et non la vitesse affichée), M. Werner a reconnu que les chemins nivelés de la province ne sont pas conçus pour permettre la circulation à une vitesse de 80 km/h. À l'instar de la Cour d'appel, je suis d'avis que la preuve établit que [TRADUCTION] « le chemin Snake Hill était manifestement un chemin de terre ou un chemin nivelé » et qu'il « n'était clairement pas conçu pour permettre une vitesse générale de 80 kilomètres à l'heure ». Comme je l'ai souligné précédemment, la configuration du chemin, de même que sa nature et sa catégorie doivent être prises en considération pour décider si le conducteur raisonnable aurait pu y rouler en sécurité.

Furthermore, the evidence at trial did not suggest that drivers were somehow fooled by the so-called "dual nature" of the road. The following exchange between counsel for the respondent and Mr. Werner at trial is illustrative of how motorists would view the road:

Q. Now, Mr. Werner, would you not agree that the change in the character of this road as you proceeded from east to west was quite obvious?

A. It was straight, and then you came to a hill, and you really didn't know what might lie beyond the hill.

Q. That's right. But I mean, the fact that the road went from being straight and level to suddenly there was a hill and you couldn't see -- you could see from the point of the top of the hill that the road didn't continue in a straight line, couldn't you?

A. Yes, you could, from the top of the hill, it's a very abrupt hill, yes.

Q. And as you proceeded down though the hill it became quite obvious, did it not, that the character of the road changed?

A. Yes, it changed, yes.

Q. Now you were faced with something other than a straight road?

A. M'hm. Yes.

Q. Now you were on -- and at some point along there the surface of the road changed, did it not?

A. Yes.

Q. And, of course, the road was no longer, I use the term built-up to refer to a road that has grade and it has some drainage. As you proceeded from west to east, you realized, you could see, it was obvious that this was not longer a built-up road?

A. It was a road essentially that was cut out of the topography and had no ditches, and there was an abutment or shoulder right to the driving surface. It was different than the first part.

Q. Yes. And all those differences were obvious, were they not?

134

En outre, rien dans la preuve présentée au procès n'indiquait que les conducteurs avaient été trompés de quelque façon par la soi-disant « nature hybride » du chemin. L'échange suivant, entre l'avocat de l'intimée et M. Werner, illustre bien la façon dont les automobilistes perçoivent le chemin :

[TRADUCTION]

Q. Maintenant M. Werner, ne seriez-vous pas d'accord pour dire que le changement dans la nature de ce chemin lorsque vous rouliez d'est en ouest était très évident?

R. On roulait en ligne droite, puis on descendait une colline, et on ne savait vraiment pas ce qui pouvait se trouver de l'autre côté de la colline.

Q. C'est vrai. Mais je veux dire, le fait que le chemin suivait d'abord un tracé horizontal et en ligne droite pour soudainement devenir une colline et que vous ne pouviez pas voir -- vous pouviez voir du haut de la colline que le chemin ne continuait pas en ligne droite, n'est-ce pas?

R. Oui, vous pouviez, du haut de la colline, c'est une colline très abrupte, oui.

Q. Et au fur et à mesure que vous descendiez la colline il devenait assez évident, n'est-ce pas, que la nature du chemin changeait?

R. Oui, ça changeait, oui.

Q. Vous vous trouviez alors devant autre chose qu'un chemin en ligne droite?

R. M'hm. Oui.

Q. Vous étiez maintenant sur -- et à un moment donné la surface du chemin changeait, n'est-ce pas?

R. Oui.

Q. Et, évidemment, le chemin n'était plus, j'utilise le terme aménagé pour désigner un chemin possédant une certaine élévation et qui est dans une certaine mesure drainé. Au fur et à mesure que vous rouliez d'ouest en est, vous constatiez, vous pouviez voir, il était évident, qu'il ne s'agissait plus d'un chemin aménagé?

R. Il s'agit essentiellement d'un chemin tracé suivant la topographie des lieux et sans fossés, et il y avait un accotement à droite du conducteur. C'était différent de la portion précédente.

Q. Oui. Et toutes ces différences étaient évidentes, n'est-ce pas?

A. Well, I -- they were clear, satisfactorily clear to me, yes. [Emphasis added.]

135 Although they may be compelling factors in other cases, in this case the "dual nature" of the road, the radius of the curve, the surface of the road, and the lack of superelevation do not support the conclusion of the trial judge. The question of how a reasonable driver exercising ordinary care would approach this road demands common sense. There was no necessity to post a sign in this case for the simple reason that any reasonable driver would have reacted to the presence of natural cues to slow down. The law does not require a municipality to post signs warning motorists of hazards that pose no real risk to a prudent driver. To impose a duty on the municipality to erect a sign in a case such as this is to alter the character of the duty owed by a municipality to drivers. Municipalities are not required to post warnings directed at drunk drivers and thereby deal with their inability to react to the cues that alert the ordinary driver to the presence of a hazard.

136 My colleagues assert that the trial judge properly considered all aspects of the applicable legal test, including whether the curve would pose a risk to the reasonable driver exercising ordinary care. They say that the trial judge did discuss, both explicitly and implicitly, the conduct of an ordinary or reasonable motorist approaching the curve. Secondly, they note that she referred to the evidence of the experts, Mr. Anderson and Mr. Werner, both of whom discussed the conduct of an ordinary motorist in this situation. Thirdly, the fact that the trial judge apportioned negligence to Nikolaisen indicates, in their view, that she assessed his conduct against the standard of the ordinary driver, and thus considered the conduct of the latter (para. 40).

R. Bien, je -- elles étaient évidentes, suffisamment évidentes pour moi, oui. [Je souligne.]

Bien qu'ils puissent constituer des facteurs concluants dans d'autres affaires, la « nature hybride » du chemin, le rayon de courbure du virage, le revêtement du chemin et l'absence d'élévation n'étayent pas en l'espèce la conclusion de la juge de première instance. Pour répondre à la question de savoir comment un conducteur raisonnable prenant des précautions normales roulerait sur ce chemin, il faut faire appel au bon sens. Il n'était pas nécessaire d'installer un panneau de signalisation en l'espèce, et ce pour la simple raison que n'importe quel conducteur raisonnable aurait réagi aux indices naturels l'invitant à ralentir. Le droit n'oblige pas les municipalités à installer des panneaux signalant aux automobilistes des dangers qui ne font pas courir de risque véritable aux conducteurs prudents. Imposer à la municipalité l'obligation d'installer un panneau dans un cas comme celui qui nous occupe équivaut à modifier la nature de l'obligation qu'ont les municipalités envers les conducteurs. Les municipalités ne sont pas tenues d'aménager des panneaux d'avertissement à l'intention des conducteurs en état d'ébriété et, ainsi, de remédier à leur incapacité de réagir aux indices qui alertent le conducteur moyen de la présence d'un danger.

Mes collègues affirment que la juge de première instance a dûment pris en considération tous les aspects du critère juridique applicable, y compris la question de savoir si la courbe présentait un risque pour le conducteur moyen qui prend des précautions normales. Ils disent que la juge de première instance a effectivement examiné, explicitement et implicitement, la conduite de l'automobiliste moyen ou raisonnable qui s'approche du virage. Ils font ensuite remarquer qu'elle a fait état du témoignage des experts MM. Anderson et Werner, qui ont tous deux analysé la conduite de l'automobiliste moyen se trouvant dans cette situation. Enfin, le fait qu'elle ait imputé une partie de la responsabilité à M. Nikolaisen indique, à leur avis, qu'elle a évalué sa conduite au regard à la norme du conducteur moyen, et qu'elle a donc pris en compte la façon dont ce dernier aurait conduit (par. 40).

I respectfully disagree that it is explicit in the trial judge's reasons that she considered whether the portion of the road on which the accident occurred posed a risk to the ordinary driver exercising reasonable care. As I explained above, the fact that the trial judge restated the legal test in the form of a conclusion in no way suggests that she turned her mind to the issue of whether the ordinary driver would have found the curve to be hazardous.

Nor do I agree that a discussion of the conduct of an ordinary motorist in the situation was somehow "implicit" in the trial judge's reasons. In my view, it is highly problematic to presume that a trial judge made factual findings on a particular issue in the absence of any indication in the reasons as to what those findings were. While a trial judge is presumed to know the law, he or she cannot be presumed to have reached a factual conclusion without some indication in the reasons that he or she did in fact come to that conclusion. If the reviewing court is willing to presume that a trial judge made certain findings based on evidence in the record absent any indication in the reasons that the trial judge actually made those findings, then the reviewing court is precluded from finding that the trial judge misapprehended or neglected evidence.

In my view, my colleagues have throughout their reasons improperly presumed that the trial judge reached certain factual findings based on the evidence despite the fact that those findings were not expressed in her reasons. On the issue of whether the curve presented a risk to the ordinary driver, my colleagues note that "in relying on the evidence of Mr. Anderson and Mr. Werner, the trial judge chose not to base her decision on the conflicting evidence of other witnesses" (para. 46). The problem with this statement is that although the trial judge relied on the evidence of Mr. Anderson and Mr. Werner to conclude that the portion of Snake Hill Road on which the accident occurred was a hazard, it is impossible from her reasons to discern what, if

137 En toute déférence, je ne crois pas qu'il ressorte explicitement des motifs de la juge de première instance qu'elle s'est demandé si la portion du chemin où s'est produit l'accident constituait un risque pour le conducteur raisonnable prenant des précautions normales. Comme je l'ai expliqué précédemment, le fait que la juge de première instance ait reformulé le critère juridique sous forme de conclusion n'indique aucunement qu'elle s'est demandé si le conducteur moyen aurait considéré la courbe comme dangereuse.

138 Je n'estime pas non plus que l'examen de la façon de conduire de l'automobiliste moyen dans cette situation ressorte « implicitement » des motifs de la juge de première instance. À mon avis, il est très problématique de présumer qu'un juge de première instance a tiré des conclusions de fait à l'égard d'une question précise alors qu'il n'y a aucune indication dans ses motifs quant à la nature de ces conclusions. Bien que le juge de première instance soit censé connaître le droit, on ne peut présumer qu'il a tiré à une conclusion factuelle en l'absence d'indication dans ses motifs qu'il est effectivement arrivé à cette conclusion. Si le tribunal de révision est prêt à supposer que le juge de première instance a tiré certaines conclusions, sur la foi de la preuve figurant au dossier, bien que rien dans les motifs n'indique qu'il a vraiment tiré ces conclusions, alors le tribunal de révision ne saurait conclure que le juge de première instance a mal interprété des éléments de preuve ou a négligé d'en tenir compte.

139 À mon avis, tout au long de leurs motifs, mes collègues ont à tort présumé que la juge de première instance était arrivée à certaines conclusions de fait fondées sur la preuve, malgré le fait que ces conclusions ne soient pas formulées dans ses motifs. Quant à la question de savoir si le virage présentait un risque pour le conducteur moyen, mes collègues ont fait remarquer qu'« en s'appuyant sur les témoignages de MM. Anderson et Werner, la juge de première instance a choisi de ne pas fonder sa décision sur les témoignages contradictoires rendus par d'autres témoins » (par. 46). Le problème que pose cet énoncé est que, même si la juge de première instance s'est appuyée sur les témoignages de MM. Anderson et Werner

any, evidence she relied on to reach the conclusion that the curve presented a risk to the ordinary driver exercising reasonable care. In the absence of any indication that she considered this issue, I am not willing to presume that she did.

140 My colleagues similarly presume findings of fact when discussing the knowledge of the municipality. On this issue, they reiterate that "it is open for a trial judge to prefer some parts of the evidence over others, and to re-assess the trial judge's weighing of the evidence, is, with respect, not within the province of an appellate court" (para. 62). At para. 64 of their reasons, my colleagues review the findings of the trial judge on the issue of knowledge and conclude that the trial judge "drew the inference that the municipality should have been put on notice and investigated Snake Hill Road, in which case it would have become aware of the hazard in question". I think that it is improper to conclude that the trial judge made a finding that the municipality's system of road inspection was inadequate in the absence of any indication in her reasons that she reached this conclusion. My colleagues further suggest that the trial judge did not impute knowledge to the municipality on the basis of the occurrence of prior accidents on Snake Hill Road (para. 65). They even state that it was not necessary for the trial judge to rely on the accidents in order to satisfy s. 192(3) (para. 67). This, in my view, is a reinterpretation of the trial judge's findings that stands in direct contradiction to the reasons that were provided by her. The trial judge discusses other factors pertaining to knowledge only to heighten the significance that she attributes to the fact that accidents had previously occurred on other portions of the road (at para. 90):

pour conclure que la portion du chemin Snake Hill où s'est produit l'accident constituait un danger, il est impossible, à partir de ses motifs, de dire si elle s'est appuyée sur un témoignage — et, dans l'affirmative, sur lequel de ceux-ci — pour conclure que la courbe présentait un risque pour le conducteur moyen qui prend des précautions raisonnables. En l'absence de toute indication que la juge de première instance s'est penchée sur cette question, je ne suis pas disposé à présumer qu'elle l'a fait.

De même, mes collègues supposent l'existence de conclusions factuelles dans leur examen de la question de la connaissance incombant à la municipalité. Sur ce point, ils réitèrent que « le juge de première instance peut préférer certaines parties de la preuve à d'autres, et, en toute déférence, il n'appartient pas au tribunal d'appel de procéder à nouveau à l'appréciation de la preuve, tâche déjà accomplie par le juge de procès » (par. 62). Au paragraphe 64 de leurs motifs, mes collègues examinent les conclusions de la juge de première instance sur la question de la connaissance et concluent qu'elle « a inféré que la municipalité aurait dû être informée de la situation sur le chemin à Snake Hill et aurait dû faire enquête à cet égard, ce qui lui aurait permis de prendre connaissance de l'existence du danger ». Je ne crois pas qu'on puisse à juste titre conclure que la juge de première instance est arrivée à la conclusion que le système d'inspection routière de la municipalité était inadéquat, alors que rien dans ses motifs n'indique qu'elle a tiré cette conclusion. Mes collègues estiment en outre que la juge de première instance n'a pas prêté à la municipalité la connaissance requise sur la base des accidents survenus antérieurement sur le chemin Snake Hill (par. 65). Ils disent même qu'il n'était pas nécessaire de s'appuyer sur ces accidents pour satisfaire aux exigences du par. 192(3) (par. 67). À mon avis, ils donnent à ces conclusions une nouvelle interprétation, qui contredit directement les motifs qu'elle a exposés. La juge de première instance examine d'autres facteurs qui touchent à la connaissance requise, uniquement pour souligner l'importance qu'elle accorde au fait que des accidents sont survenus antérieurement ailleurs sur le chemin (au par. 90) :

If the R.M. did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known. While four accidents in 12 years may not in itself be significant, it takes on more significance given the close proximity of three of these accidents, the relatively low volume of traffic, the fact that there are permanent residences on the road and the fact that the road is frequented by young and perhaps less experienced drivers. [Emphasis added.]

My colleagues refer to the decision of *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, 2001 SCC 60, in which I stated that "an omission [in the trial judge's reasons] is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (para. 15). This case is however distinguishable from *Van de Perre*. In *Van de Perre*, the appellate court improperly substituted its own findings of fact for the trial judge's clear factual conclusions on the basis that the trial judge had not considered all of the evidence. By contrast, in this case my colleagues assert that this Court should not interfere with the "findings of the trial judge" even where no findings were made and where such findings must be presumed from the evidence. The trial judge's failure in this case to reach any conclusion on whether the ordinary driver would have found the portion of the road on which the accident occurred hazardous, in my view, gives rise to the reasoned belief that she ignored the evidence on the issue in a way that affected her conclusion.

Finally, I do not agree that the trial judge's conclusion that Mr. Nikolaisen was negligent equates to an assessment of whether a motorist exercising ordinary care would have found the curve on which the accident occurred to be hazardous. It is clear from the trial judge's reasons that she made a factual finding that the curve could be driven safely at 60 km/h in dry conditions and 50 km/h in wet conditions and that Mr. Nikolaisen approached the curve at an

[TRADUCTION] Si la M.R. ne connaissait pas concrètement le danger intrinsèque que comporte cette portion du chemin Snake Hill, elle aurait dû le connaître. Le fait que quatre accidents se soient produits en 12 ans n'est peut-être pas significatif en soi, mais il le devient si l'on considère que trois de ces accidents sont survenus à proximité, qu'il s'agit d'une route à débit de circulation relativement faible, que des résidences permanentes sont situées en bordure de celle-ci et que ce chemin est fréquenté par des conducteurs jeunes et peut-être moins expérimentés. [Je souligne.]

141 Mes collègues citent l'arrêt *Van de Perre c. Edwards*, [2001] 2 R.C.S. 1014, 2001 CSC 60, dans lequel j'ai dit, au par. 15, qu'« une omission [dans les motifs du juge de première instance] ne constitue une erreur importante que si elle donne lieu à la conviction rationnelle que le juge de première instance doit avoir oublié, négligé d'examiner ou mal interprété la preuve de telle manière que sa conclusion en a été affectée ». Cependant, le présent pourvoi peut être distingué de l'affaire *Van de Perre*. Dans cette affaire, la Cour d'appel avait irrégulièrement substitué ses propres conclusions de fait aux conclusions factuelles évidentes du juge de première instance, au motif que celui-ci n'avait pas pris en compte tous les éléments de preuve. Par contraste, dans le présent pourvoi, mes collègues affirment que notre Cour ne doit pas modifier les « conclusions de la juge de première instance », même si aucune conclusion n'a été tirée et s'il faut supposer leur existence à partir de la preuve. En l'espèce, je suis d'avis que l'omission de la juge de première instance de tirer quelque conclusion que ce soit quant à la question de savoir si le conducteur moyen aurait considéré comme dangereux le tronçon du chemin où s'est produit l'accident fait naître la conviction rationnelle que, sur ce point, elle a négligé d'examiner la preuve de telle manière que sa conclusion en a été affectée.

142 Enfin, je ne peux souscrire à l'opinion que la conclusion de la juge de première instance selon laquelle M. Nikolaisen a fait preuve de négligence vaut examen de la question de savoir si l'automobiliste moyen prenant des précautions normales aurait estimé que la courbe où s'est produit l'accident était dangereuse. Il ressort clairement des motifs de la juge de première instance qu'elle a tiré les conclusions de fait suivantes : il était possible de prendre

excessive speed. As earlier stated, what she failed to consider was whether the ordinary driver exercising reasonable care would have approached the curve at a speed at which it could be safely negotiated, or, stated differently, whether the curve posed a real danger to the ordinary driver.

B. *Did the Trial Judge Err in Finding that the Respondent Municipality Knew or Should Have Known of the Danger Posed by the Municipal Road?*

143 Pursuant to s. 192(3) of *The Rural Municipality Act, 1989*, fault is not to be imputed to the municipality in the absence of proof by the plaintiff that the municipality "knew or should have known of the disrepair".

144 The trial judge made no finding that the respondent municipality had actual knowledge of the alleged state of disrepair, but rather imputed knowledge to the respondent on the basis that it should have known of the danger. This is apparent in her findings on knowledge at paras. 89-91 of her reasons:

> Breach of the statutory duty of care imposed by section 192 of the *Rural Municipality Act*, *supra*, cannot be imputed to the R.M. unless it knew of or ought to have known of the state of disrepair on Snake Hill Road. Between 1978 and 1990 there were four accidents on Snake Hill Road. Three of these accidents occurred in the same vicinity as the Nikolaisen rollover. The precise location of the fourth accident is unknown. While at least three of these accidents occurred when motorists where travelling in the opposite direction of the Nikolaisen vehicle, they occurred on that portion of Snake Hill Road which is the most dangerous — where the road begins to curve, rather than where it is generally straight and flat. At least two of these accidents were reported to authorities.
>
> If the R.M. did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known. While four accidents in 12 years may not in itself be significant, it takes on more significance

le virage en sécurité à 60 km/h à l'heure sur chaussée sèche et à 50 km/h sur chaussée humide, et M. Nikolaisen s'est approché du virage à une vitesse excessive. Comme je l'ai indiqué plus tôt, elle a omis de se demander si le conducteur moyen qui prend des précautions normales se serait approché du virage à une vitesse qui lui aurait permis de le prendre en sécurité ou, autrement dit, si la courbe présentait un danger réel pour le conducteur moyen.

B. *La juge de première instance a-t-elle commis une erreur en concluant que la municipalité intimée connaissait ou aurait dû connaître le danger que présentait le chemin municipal?*

Conformément au par. 192(3) de la *Rural Municipality Act, 1989*, aucune faute n'est imputée à la municipalité à moins que le demandeur n'établisse que celle-ci « connaissait ou aurait dû connaître le mauvais état du chemin ».

La juge de première instance n'a pas conclu que la municipalité intimée connaissait concrètement le mauvais état dans lequel se trouvait, prétend-on, le chemin, mais elle lui a plutôt prêté cette connaissance pour le motif qu'elle aurait dû connaître l'existence du danger. C'est ce qui ressort de ses conclusions à cet égard, aux par. 89 à 91 de ses motifs :

> [TRADUCTION] On ne peut reprocher à la municipalité rurale d'avoir manqué à l'obligation légale de diligence imposée par l'art. 192 de la loi intitulée la *Rural Municipality Act*, précitée, que si la municipalité connaissait ou aurait dû connaître le mauvais état du chemin Snake Hill. De 1978 à 1990, quatre accidents sont survenus sur ce chemin. Trois de ces accidents ont eu lieu dans le même secteur que celui où le véhicule de Nikolaisen a fait un tonneau. On ne connaît pas le lieu précis du quatrième accident. Bien que, dans au moins trois de ces accidents, les automobilistes aient circulé en sens inverse du véhicule de Nikolaisen, les accidents se sont produits dans la partie la plus dangereuse du chemin Snake Hill — là où commencent les courbes, et non dans la partie où le chemin est généralement droit et plat. Au moins deux de ces accidents ont été signalés aux autorités.
>
> Si la M.R. ne connaissait pas concrètement le danger intrinsèque que comporte cette portion du chemin Snake Hill, elle aurait dû le connaître. Le fait que quatre accidents se soient produits en 12 ans n'est peut-être pas

given the close proximity of three of these accidents, the relatively low volume of traffic, the fact that there are permanent residences on the road and the fact that the road is frequented by young and perhaps less experienced drivers. I am not satisfied that the R.M. has established that in these circumstances it took reasonable steps to prevent this state of disrepair on Snake Hill Road from continuing.

I find that by failing to erect and maintain a warning and regulatory sign on this portion of Snake Hill Road the R.M. has not met the standard of care which is reasonable in the circumstances. Accordingly, it is in breach of its duty of care to motorists generally, and to Mr. Housen in particular. [Emphasis added.]

Whether the municipality should have known of the disrepair (here, the risk posed in the absence of a sign) involves both questions of law and questions of fact. As a matter of law, the trial judge must approach the question of whether knowledge should be imputed to the municipality with regard to the duties of the ordinary, reasonable and prudent municipal councillor (*Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, at para. 28). The question is then answered through the trial judge's assessment of the facts of the case.

I find that the trial judge made both errors of law and palpable and overriding errors of fact in determining that the respondent municipality should have known of the alleged state of disrepair. She erred in law by approaching the question of knowledge from the perspective of an expert rather than from the perspective of a prudent municipal councillor. She also erred in law by failing to appreciate that the onus of proving that the municipality knew or should have known of the alleged disrepair remained on the plaintiff throughout. The trial judge clearly erred in fact by drawing the unreasonable inference that the respondent municipality should have known that the portion of the road on which the accident occurred was dangerous from evidence that accidents had occurred on other parts of Snake Hill Road.

significatif en soi, mais il le devient si l'on considère que trois de ces accidents sont survenus à proximité, qu'il s'agit d'une route à débit de circulation relativement faible, que des résidences permanentes sont situées en bordure de celle-ci et que le chemin est fréquenté par des conducteurs jeunes et peut-être moins expérimentés. Je ne suis pas convaincue que la M.R. a établi avoir, dans ces circonstances, pris des mesures raisonnables pour remédier au mauvais état du chemin Snake Hill.

J'estime que, en omettant d'installer et de maintenir un panneau d'avertissement ou de signalisation dans cette partie du chemin Snake Hill, la M.R. n'a pas satisfait à la norme de diligence qui est raisonnable dans les circonstances. Par conséquent, elle ne s'est pas acquittée de son obligation de diligence à l'égard des automobilistes en général et à l'égard de M. Housen en particulier. [Je souligne.]

145 La question de savoir si la municipalité aurait dû connaître le mauvais état du chemin (en l'occurrence, le risque que présentait l'absence de signalisation) soulève à la fois des questions de droit et des questions de fait. Sur le plan juridique, le juge de première instance doit se demander s'il y a lieu de présumer que la municipalité connaissait ce fait, au regard des obligations qui incombent au conseiller municipal ordinaire, raisonnable et prudent (*Ryan c. Victoria (Ville)*, [1999] 1 R.C.S. 201, par. 28). Le juge de première instance répond ensuite à la question en appréciant les faits de l'espèce dont il est saisi.

146 J'estime que la juge de première instance a commis et des erreurs de droit et des erreurs de fait manifestes et dominantes en statuant que la municipalité intimée aurait dû connaître le mauvais état dans lequel se trouvait, prétend-on, le chemin. Elle a commis une erreur de droit lorsqu'elle a examiné la question de la connaissance du point de vue du spécialiste plutôt que du point de vue du conseiller municipal prudent. Elle a commis une autre erreur de droit en ne reconnaissant pas que le fardeau de prouver que la municipalité connaissait ou aurait dû connaître le mauvais état du chemin ne cessait jamais d'incomber au demandeur. La juge de première instance a clairement commis une erreur de fait en inférant déraisonnablement que la municipalité intimée aurait dû savoir que la partie du chemin où l'accident s'est produit était dangereuse, compte tenu de la preuve que des accidents avaient eu lieu ailleurs sur le chemin Snake Hill.

147 The trial judge's failure to determine whether knowledge should be imputed to the municipality from the perspective of what a prudent municipal councillor should have known is implicit in her reasons. The respondent could not be held, for the purposes of establishing knowledge under the statutory test, to the standard of an expert analysing the curve after the accident. Yet this is precisely what the trial judge did. She relied on the expert evidence of Mr. Anderson and Mr. Werner to reach the conclusion that the curve presented a hidden hazard. She also implicitly accepted that the risk posed by the curve was not one that would be readily apparent to a lay person. This is evident in the portion of her judgment where she accepts as a valid excuse for not filing a timely claim against the respondent the appellant counsel's explanation that he did not believe the respondent to be at fault until expert opinions were obtained. The trial judge stated in this regard: "[i]t was only later when expert opinions were obtained that serious consideration was given to the prospect that the nature of Snake Hill Road might be a factor contributing to the accident" (para. 64). Her failure to consider the risk to the prudent driver is also apparent when one considers that she ignored the evidence concerning the way in which the two experts themselves had approached the dangerous curve (see para. 54 above).

Il ressort implicitement des motifs de la juge de première instance qu'elle n'a pas décidé s'il fallait prêter à la municipalité la connaissance requise en considérant cette question du point de vue du conseiller municipal prudent. Pour trancher la question de la connaissance requise suivant le critère prévu par la loi, l'intimée ne pouvait être tenue aux mêmes normes qu'un spécialiste analysant la courbe après l'accident. Pourtant, c'est exactement ce qu'a fait la juge de première instance. Elle s'est fondée sur les témoignages d'expert donnés par MM. Anderson et Werner pour conclure que la courbe présentait un danger caché. Elle a également reconnu implicitement que le risque visé par la courbe n'était pas un risque facilement décelable par un profane. Cela ressort clairement du passage de son jugement où elle considère comme une excuse valable pour justifier le dépôt tardif de l'action contre l'intimée l'explication de l'avocat de l'appelant selon laquelle il ne croyait pas que l'intimée était dans son tort jusqu'à ce qu'il prenne connaissance des opinions des experts. La juge de première instance a dit ceci à cet égard : [TRADUCTION] « [c]e n'est que plus tard, après avoir obtenu l'opinion des experts, que la possibilité que la nature du chemin Snake Hill puisse avoir été un facteur ayant contribué à l'accident a été sérieusement envisagée » (par. 64). Son omission de s'interroger sur le risque que courrait le conducteur prudent apparaît elle aussi clairement, lorsqu'on considère qu'elle n'a pas tenu compte de la preuve concernant la façon dont les deux experts avaient eux-mêmes pris le virage dangereux (voir le par. 54 qui précède).

148 Had the trial judge considered the question of whether the municipality should have known of the alleged disrepair from the perspective of the prudent municipal councillor, she would necessarily have reached a different conclusion. There was no evidence that the road conditions which existed posed a risk that the respondent should have been aware of. The respondent had no particular reason to inspect that segment of the road for the presence of hazards. It had not received any complaints from motorists respecting the absence of signs on the road, the lack of superelevation on the curves, or the presence of

Si la juge de première instance avait répondu à la question de savoir si la municipalité aurait dû connaître le mauvais état dans lequel se trouvait, prétend-on, le chemin en se plaçant du point de vue du conseiller municipal prudent, elle serait nécessairement arrivée à une conclusion différente. Il n'y avait aucune preuve établissant que le danger existant créait un risque que l'intimée aurait dû connaître. Cette dernière n'avait aucune raison particulière d'aller inspecter cette portion du chemin pour voir s'il y existait des dangers. Elle n'avait reçu aucune plainte d'automobilistes relativement à l'absence de signalisation, à l'absence de surélévation des

trees and vegetation which grew up along the sides of the road.

In addition, the question of the respondent's knowledge is linked inextricably to the standard of care. A municipality can only be expected to have knowledge of those hazards which pose a risk to the reasonable driver exercising ordinary care, since these are the only hazards for which there is a duty to repair. The trial judge should not have expected the respondent in this case to have knowledge of the road conditions that existed at the site of the Nikolaisen rollover since that road condition simply did not pose a risk to the reasonable driver. In addition to the evidence that was discussed above in the context of the standard of care, this conclusion is supported by the testimony of the several lay witnesses that testified at trial. Craig Thiel, a resident on the road, testified that he was not aware that Snake Hill Road had a reputation of being a dangerous road, and that he himself had never experienced difficulty with the portion of the road on which the accident occurred. His wife, Toby, also testified that she had experienced no problems with the road.

The trial judge also clearly erred in fact by imputing knowledge to the municipality on the basis of the four accidents that had previously occurred on Snake Hill Road. While her factual findings regarding the accidents themselves have a sound basis in the evidence, these findings simply do not support her conclusion that a prudent municipal councillor ought to have known that a risk existed for the normal prudent driver. As such, the trial judge erred in drawing an unreasonable inference from the evidence that was before her. As stated above, the standard of review for inferences of fact is, above all, one of reasonableness. This is reflected in the following passage from *Joseph Brant Memorial Hospital v. Koziol*, [1978] 1 S.C.R. 491, at pp. 503-4:

. . . "it is a well-known principle that appellate tribunals should not disturb findings of fact made by a trial judge

courbes ou à la présence d'arbres et de végétation en bordure du chemin.

149 En outre, la question de la connaissance de l'intimée est intimement liée à celle de la norme de diligence. Une municipalité est uniquement censée avoir connaissance des dangers qui présentent un risque pour le conducteur raisonnable prenant des précautions normales, puisqu'il s'agit des seuls dangers à l'égard desquels existe une obligation d'entretien. En l'espèce, la juge de première instance n'aurait pas dû attendre de l'intimée qu'elle connaisse le danger qui existait à l'endroit où le véhicule de M. Nikolaisen a fait un tonneau, puisque ce danger ne présentait tout simplement pas de risque pour le conducteur raisonnable. Outre les éléments de preuve examinés précédemment relativement à la norme de diligence, les témoignages de plusieurs témoins ordinaires qui ont déposé au procès étayent cette conclusion. Craig Thiel, qui habite le long de ce chemin, a témoigné qu'il ne savait pas que le chemin Snake Hill avait la réputation d'être dangereux et qu'il n'avait lui-même jamais éprouvé de difficulté à conduire à l'endroit du chemin où est survenu l'accident. Sa conjointe, Toby, a également dit ne pas avoir connu de problème sur ce chemin.

150 La juge de première instance a clairement commis une autre erreur de fait en présumant, sur la foi des quatre accidents survenus auparavant sur le chemin Snake Hill, que la municipalité connaissait l'existence du danger. Bien que ses conclusions de fait relativement aux accidents eux-mêmes soient solidement étayées par la preuve, elles n'appuient tout simplement pas sa conclusion qu'un conseiller municipal prudent aurait dû savoir qu'il existait un risque pour le conducteur prudent. En conséquence, la juge de première instance a fait erreur en tirant une inférence déraisonnable de la preuve qui lui était soumise. Comme il a été indiqué plus tôt, la norme de contrôle applicable aux inférences de fait est, d'abord et avant tout, celle de la décision raisonnable. Les propos suivants du juge Spence dans l'arrêt *Joseph Brant Memorial Hospital c. Koziol*, [1978] 1 R.C.S. 491, p. 503-504, illustrent bien ce principe :

. . . « c'est un principe bien connu que les tribunaux d'appel ne doivent pas remettre en cause les conclusions

if there were credible evidence before him upon which he could reasonably base his conclusion". [Emphasis added.]

151 As I stated above, there was no evidence to suggest that the respondent had actual knowledge that accidents had previously occurred on Snake Hill Road. To the contrary, Mr. Danger, the administrator of the municipality, testified that the first he heard of the accidents was at the trial.

152 Implicit in the trial judge's reasons, then, was the expectation that the municipality should have known about the accidents through an accident-reporting system**.** The appellant put forward that argument explicitly before this Court, placing significant emphasis on the fact that respondent "has no regularized approach to gathering this information, whether from councillors or otherwise". The argument suggests that, had the municipality established a formal system to find out whether accidents had occurred on a given road, it would have known that accidents had occurred on Snake Hill Road and would have taken the appropriate corrective action to ensure that the road was safe for travellers.

153 I find the above argument to be flawed in two important respects. First, the argument that the other accidents on Snake Hill Road were relevant in this case is based on the assumption that there was an obligation on the respondent municipality to have a "regularized" accident-reporting system, and that the informal system that was in place was somehow deficient. In my view, the appellant did not meet its onus to show that the system relied on by the municipality to discharge its obligations under s. 192 of the *The Rural Municipality Act, 1989* was deficient. The evidence shows that, prior to 1988, there was no formal system of accident reporting in place. There was, nonetheless, an informal system whereby the municipal councillors were responsible for finding out if there were road hazards. Information that hazards existed came to the attention of the councillors via complaints, and from their own familiarity

de fait du juge de première instance, s'il existait des témoignages dignes de foi sur lesquels le juge pouvait raisonnablement fonder ses conclusions ». [Je souligne.]

Comme je l'ai mentionné précédemment, il n'y avait aucune preuve indiquant que l'intimée savait concrètement que d'autres accidents étaient survenus auparavant sur le chemin Snake Hill. Au contraire, M. Danger, l'administrateur de la municipalité, a témoigné qu'il avait entendu parler de ces accidents pour la première fois au procès.

Par conséquent, il ressort implicitement des motifs de la juge de première instance que la municipalité aurait censément dû connaître l'existence des accidents grâce à un système d'information en la matière. L'appelant a expressément plaidé cet argument devant notre Cour, insistant fortement sur le fait que l'intimée [TRADUCTION] « ne dispose pas d'un mécanisme structuré de collecte de cette information, que ce soit par l'entremise des conseillers ou d'autres personnes ». Suivant cet argument, on prétend que, si la municipalité avait établi un système officiel lui permettant de savoir si des accidents sont survenus sur une route donnée, elle aurait su que des accidents s'étaient produits sur le chemin Snake Hill et elle aurait pris les mesures correctives appropriées pour faire en sorte que le chemin soit sécuritaire pour les usagers.

J'estime que l'argument susmentionné présente deux lacunes importantes. Premièrement, l'argument selon lequel les autres accidents survenus sur le chemin Snake Hill étaient pertinents en l'espèce repose sur la présomption que la municipalité intimée avait l'obligation d'avoir un système « structuré » d'information sur les accidents, et que le système informel en place était d'une certaine manière déficient. À mon avis, l'appelant ne s'est pas acquitté du fardeau qui lui incombait de démontrer que le système sur lequel la municipalité se fondait pour remplir ses obligations au titre de l'art. 192 de la *Rural Municipality Act, 1989*, était déficient. La preuve établit que, avant 1988, il n'existait pas de système officiel d'information sur les accidents. Il existait néanmoins, un système informel dans le cadre duquel les conseillers municipaux étaient chargés de s'enquérir de l'existence de dangers

with the roads within the township under their jurisdiction. The trial judge made a palpable error in finding that this informal system was deficient in the absence of any evidence of the practice of other municipalities at the time that the accidents occurred and what might have been a reasonable system, particularly given the fact that the rural municipality in question had only six councillors. There is no evidence that a rural municipality of this type requires the sort of sophisticated information-gathering process that may be required in a city, where accidents occur with greater frequency and where it is less likely that word of mouth will suffice to bring hazards to the attention of the councillors.

sur les routes. Les conseillers étaient informés de l'existence de dangers par suite des plaintes qu'ils recevaient et par leur propre expérience des routes situées dans les cantons qu'ils représentaient. La juge de première instance a commis une erreur manifeste en concluant que ce système informel était déficient, alors qu'aucune preuve n'indiquait quelles étaient les pratiques suivies par d'autres municipalités à cet égard au moment des accidents, ni n'expliquait en quoi aurait consisté un système raisonnable, compte tenu particulièrement du fait que la municipalité rurale concernée ne comptait que six conseillers. Il n'y a aucune preuve indiquant qu'une municipalité rurale de ce genre a besoin du genre de mécanisme élaboré de collecte de renseignements dont peut avoir besoin une grande ville, où les accidents sont plus fréquents et où il est peu probable que le bouche à oreille soit suffisant pour porter les dangers à l'attention des conseillers.

The respondent municipality now has a more formalized system of accident reporting. Since 1988, Saskatchewan Highways and Transportation annually provides the municipalities with a listing of all motor vehicle accidents which occur within the municipality and which are reported to the police. While I agree that this system may provide the municipality with a better chance of locating hazards in some circumstances, I do not accept that the adoption of this system is relevant on the facts of this case. Only one accident, which occurred in 1990, was reported to the respondent under this system. The appellant adduced no evidence to suggest that this accident occurred at the same location as the Nikolaisen rollover, or that this accident occurred as a result of the conditions of the road rather than the negligence of the driver.

154 La municipalité intimée possède maintenant un système plus officiel d'information sur les accidents. Depuis 1988, en effet, le ministère de la Voirie et du Transport de la Saskatchewan communique annuellement à chaque municipalité la liste de tous les accidents d'automobile survenus sur son territoire et signalés aux policiers. Bien que ce système puisse, j'en conviens, permettre aux municipalités de mieux repérer les dangers dans certaines circonstances, je ne crois pas que son adoption soit pertinente eu égard aux faits de l'espèce. Un seul accident, survenu en 1990, a été signalé à l'intimée par le truchement de ce système. L'appelant n'a produit aucun élément de preuve indiquant que cet accident est survenu au même endroit que celui où le véhicule de M. Nikolaisen a fait un tonneau, ou qu'il était attribuable à l'état de la route plutôt qu'à la négligence du conducteur.

Secondly, and perhaps more importantly, it was simply illogical for the trial judge to infer from the fact of the earlier accidents that the respondent should have known that the site of the Nikolaisen rollover posed a risk to prudent drivers. The three accidents, which took place in 1978, 1985, and 1987, occurred on different curves, while the vehicles involved were proceeding in the opposite

155 Deuxièmement, élément peut-être plus important encore, il était tout simplement illogique pour la juge de première instance d'inférer de l'existence des accidents antérieurs que l'intimée aurait dû savoir que l'endroit où le véhicule de M. Nikolaisen a fait un tonneau présentait un risque pour les conducteurs prudents. Les trois accidents — qui sont survenus en 1978, 1985 et 1987

direction. The accidents of 1978 and 1987 occurred on the first right-turning curve in the road with the drivers travelling westbound, at the bottom of the hill. The accident in 1985 took place on the next curve in the road with the driver also travelling westbound, again on a different curve from the one where the Nikolaisen rollover took place. If anything, these accidents signal that the municipality should have been concerned with the curves that were, when travelling westbound, to the east of the site of the Nikolaisen rollover. The evidence disclosed no accidents that had occurred at the precise location of the accident that is the subject of this case.

— se sont produits dans des courbes différentes, et les véhicules concernés circulaient en sens inverse. L'accident de 1978 et celui de 1987 ont eu lieu dans le premier virage à droite au pied de la colline, les automobilistes roulant alors en direction ouest. L'accident de 1985 s'est produit dans la deuxième courbe, toujours en direction ouest, encore une fois dans une courbe différente de celle où le véhicule de M. Nikolaisen a fait un tonneau. Si ces accidents indiquent quoi que ce soit, c'est plutôt que la municipalité aurait dû se préoccuper des courbes qui, pour les véhicules circulant en direction ouest, se trouvent à l'est de l'endroit où le véhicule de M. Nikolaisen a fait un tonneau. La preuve n'a révélé aucun accident qui se serait produit à l'endroit précis où est survenu l'accident qui nous intéresse.

156 Furthermore, the mere occurrence of an accident does not in and of itself indicate a duty to post a sign. In many cases, accidents happen not because of the conditions of the road, but rather because of the negligence of the driver. Illustrative in this regard is Mr. Agrey's accident on Snake Hill Road in 1978. Mr. Agrey testified that, just prior to the accident, he had turned his attention away from the road to talk to one of the passengers in the vehicle. Another passenger shouted to him to "look out", but by the time he was alerted it was too late to properly navigate the turn. Mr. Agrey was charged and fined for his carelessness. As was discussed in the context of the standard of care, a municipality is not obligated to make safe the roads for all drivers, regardless of the care and attention that they are exercising when driving. It need only keep roads in such a state of repair as will allow a reasonable driver exercising ordinary care to drive with safety.

Qui plus est, le simple fait qu'un accident se produise n'emporte pas en soi l'obligation d'installer un panneau signalisateur. Dans bien des cas, les accidents surviennent non pas à cause de l'état de la route, mais plutôt à cause de la négligence du conducteur. Un bon exemple de cela est l'accident dont a été victime M. Agrey sur le chemin Snake Hill en 1978. Ce dernier a témoigné que, juste avant l'accident, il avait quitté des yeux la route pour parler à l'un des passagers du véhicule. Un autre passager lui a crié de faire attention, mais il était déjà trop tard pour bien exécuter le virage. Accusé de conduite imprudente, M. Agrey a été déclaré coupable et condamné à une amende. Comme on l'a vu plus tôt, dans le contexte de la norme de diligence, une municipalité n'a pas l'obligation de rendre les chemins sécuritaires pour tous les conducteurs, indépendamment de la prudence et de l'attention avec lesquelles ils conduisent. Elle est seulement tenue de maintenir les chemins dans un état propre à permettre au conducteur raisonnable qui prend des précautions normales d'y circuler en sécurité.

157 In addition to the substantial errors discussed above, I would also note that, in my view, the trial judge was inattentive to the onus of proof on this issue. When reviewing the evidence pertaining to other accidents on Snake Hill Road, the trial judge remarked, at para. 31: "Cst. Forbes does not recall

Outre les erreurs substantielles examinées précédemment, je tiens également à souligner que, selon moi, la juge de première instance ne s'est pas souciée du fardeau de preuve sur cette question. Lorsqu'elle a examiné la preuve relative aux autres accidents survenus sur le chemin Snake Hill, la juge

any other accident on Snake Hill Road during her time at the Shellbrook RCMP Detachment, from 1987 until 1996. Cpl. Healey had heard of one other accident. Forbes and Healey are only two of nine members of the RCMP Detachment at Shellbrook" (emphasis added). By this comment, the trial judge seems to imply that there may have been more accidents on Snake Hill Road that had been reported and that the respondent should have known about this. With all due respect to the trial judge, if there had been accidents other than the ones that were raised at trial, it was up to the appellant to bring evidence of these accidents forward, either by calling the RCMP members to whom they had been reported, or by calling those who were involved in the accidents, or by any other available means. Furthermore, the significance that the trial judge attributed to the other accidents that occurred on Snake Hill Road was dependent on her assumption that the respondent should have had a formal accident-reporting system in place. The respondent did not bear the onus of demonstrating that it was not obliged to have such a system; there was, rather, a positive onus on the appellant to demonstrate that such a system was required and that the informal reporting system was inadequate.

C. *Did the Trial Judge Err in Finding that the Accident was Caused in Part by the Failure of the Respondent Municipality to Erect a Sign Near the Curve?*

The trial judge's findings on causation are found at para. 101 of her judgment, where she states:

I find that this accident occurred as a result of Mr. Nikolaisen entering the curve on Snake Hill Road at a speed slightly in excess of that which would allow successful negotiation. The accident occurred at the most dangerous segment of Snake Hill Road where a warning or regulatory sign should have been erected and maintained to warn motorists of an impending and hidden hazard. Mr. Nikolaisen's degree of impairment only

de première instance a fait les remarques suivantes au par. 31 : [TRADUCTION] « La gendarme Forbes ne se souvient pas de quelque autre accident sur le chemin Snake Hill durant la période où elle était affectée au détachement de la GRC de Shellbrook, de 1987 à 1996. Le caporal Healey avait entendu parler d'un autre accident. Forbes et Healey ne sont que deux des neuf membres du détachement de la GRC à Shellbrook » (je souligne). Par cette remarque, la juge de première instance semble laisser entendre que d'autres accidents sur le chemin Snake Hill ont pu avoir été signalés et que l'intimée aurait dû le savoir. En toute déférence pour la juge de première instance, s'il y avait eu d'autres accidents que ceux qui ont été mentionnés au procès, il appartenait à l'appelant d'en faire la preuve, soit en faisant témoigner les membres de la GRC à qui les accidents avaient été signalés ou encore les personnes en cause dans ces accidents, soit en utilisant tout autre moyen à sa disposition. En outre, l'importance que la juge de première instance a accordée aux autres accidents survenus sur le chemin Snake Hill dépendait du postulat que l'intimée aurait dû posséder un système officiel d'information sur les accidents. L'intimée n'était pas tenue de prouver qu'elle n'avait pas l'obligation de disposer d'un tel système. Il incombait plutôt à l'appelant d'établir que ce genre de système était nécessaire et que le système informel existant était insuffisant.

C. *La juge de première instance a-t-elle commis une erreur en concluant que l'accident avait été causé, en partie, par le défaut de la municipalité intimée d'installer un panneau de signalisation près de la courbe?*

158 Les conclusions de la juge de première instance au sujet du lien de causalité figurent au par. 101 de son jugement, où elle dit ceci :

[TRADUCTION] J'estime que l'accident s'est produit parce que M. Nikolaisen s'est engagé dans le virage sur le chemin Snake Hill à une vitesse légèrement supérieure à celle qui lui aurait permis de réussir la manœuvre. L'accident est survenu dans la portion la plus dangereuse du chemin Snake Hill, à un endroit où un panneau d'avertissement ou de signalisation aurait dû être installé et maintenu pour avertir les automobilistes de

served to increase the risk of him not reacting, or reacting inappropriately to a sign. Mr. Nikolaisen was not driving recklessly such that he would have intentionally disregarded a warning or regulatory sign. He had moments earlier, when departing the Thiel residence, successfully negotiated a sharp curve which he could see and which was apparent to him. I am satisfied on a balance of probabilities that had Mr. Nikolaisen been forewarned of the curve, he would have reacted and taken appropriate corrective action such that he would not have lost control of his vehicle when entering the curve.

159 The trial judge's above findings in respect to causation represent conclusions on matters of fact. Consequently, this Court will only interfere if it finds that in coming to these conclusions she made a manifest error, ignored conclusive or relevant evidence, misunderstood the evidence, or drew erroneous conclusions from it (*Toneguzzo-Norvell*, *supra*, at p. 121).

160 In coming to her conclusion on causation, the trial judge made several of the types of errors that this Court referred to in *Toneguzzo-Norvell*. To the extent that the trial judge relied on the evidence of Mr. Laughlin, the only expert to have testified on the issue of causation, I find that she either misunderstood his evidence or drew erroneous conclusions from it. The only other testimony in respect to causation was anecdotal evidence pertaining to Mr. Nikolaisen's level of impairment provided by Craig Thiel, Toby Thiel and Paul Housen. Although their testimonies provided some evidence in respect to causation, for reasons I will discuss, it was not evidence on which the trial judge could reasonably rely. Nor do I find that the trial judge was entitled to rely on evidence that Mr. Nikolaisen successfully negotiated the curve from the Thiel driveway onto Snake Hill Road. The inference that the trial judge drew from this fact was unreasonable and ignored evidence that Mr. Nikolaisen swerved even on this curve. In addition, the trial judge clearly erred by ignoring other relevant evidence in respect to causation, in particular the fact that Mr. Nikolaisen had driven on the

l'imminence d'un danger caché. Le degré d'ébriété de M. Nikolaisen n'a fait qu'accroître le risque qu'il ne réagisse pas du tout ou encore de façon inappropriée à une signalisation. M. Nikolaisen ne conduisait pas de façon si téméraire qu'il aurait intentionnellement fait abstraction d'un panneau d'avertissement ou de signalisation. Quelques instants plus tôt, au moment de quitter la résidence des Thiel, il avait pris avec succès un virage serré qu'il pouvait clairement voir. Je suis convaincue, selon la prépondérance des probabilités, que si on avait prévenu M. Nikolaisen de l'existence de la courbe, il aurait réagi et pris des mesures appropriées, qui l'auraient empêché de perdre la maîtrise de son véhicule en s'engageant dans le virage.

Les conclusions susmentionnées de la juge de première instance touchant le lien de causalité sont des conclusions portant sur des questions de fait. Par conséquent, notre Cour n'interviendra que si elle estime que, pour arriver à ses conclusions, la juge a commis une erreur manifeste, n'a pas tenu compte d'un élément de preuve déterminant ou pertinent, a mal compris la preuve ou en a tiré des conclusions erronées (*Toneguzzo-Norvell*, précité, p. 121).

En arrivant à sa conclusion sur le lien de causalité, la juge de première instance a commis plusieurs des erreurs mentionnées par notre Cour dans l'arrêt *Toneguzzo-Norvell*, précité. Dans la mesure où la juge de première instance s'est fondée sur le témoignage de M. Laughlin, le seul expert à avoir témoigné sur la question du lien de causalité, j'estime qu'elle a mal interprété son témoignage ou qu'elle en a tiré des conclusions erronées. Les éléments anecdotiques des témoignages de Craig Thiel, Toby Thiel et Paul Housen concernant le degré d'ébriété de M. Nikolaisen constituent la seule autre preuve testimoniale sur le lien de causalité. Bien que leurs témoignages aient fourni quelques éléments de preuve touchant cette question, il ne s'agit pas, pour des raisons que j'examinerai plus loin, d'éléments sur lesquels la juge de première instance pouvait raisonnablement s'appuyer. Je n'estime pas non plus qu'elle pouvait se fonder sur la preuve que M. Nikolaisen avait réussi à prendre le virage permettant d'accéder au chemin Snake Hill depuis l'entrée des Thiel. L'inférence que la juge de première instance a tirée de ce fait était déraisonnable et faisait abstraction de la preuve selon laquelle

road three times in the 18 to 20 hours preceding the accident.

I cannot agree with the trial judge that the testimony of Mr. Laughlin, a forensic alcohol specialist employed by the RCMP supports the finding that Mr. Nikolaisen would have reacted to a sign forewarning of the impending right-turning curve on which the accident occurred. The preponderance of Mr. Laughlin's testimony establishes that persons at the level of impairment which Mr. Nikolaisen was found to be at when the accident occurred would be unlikely to react to a warning sign. In addition, Mr. Laughlin's testimony points overwhelmingly to the conclusion that alcohol was the causal factor which led to this accident. The trial judge erred by misapprehending one comment in Mr. Laughlin's testimony and ignoring the significance of his testimony when taken as a whole.

Based on blood samples obtained by Constable Forbes approximately three hours after the accident occurred, Mr. Laughlin predicted that Mr. Nikolaisen's blood alcohol level at the time of the accident ranged from 180 to 210 milligrams percent. Mr. Laughlin commented at length on the effect that this level of blood alcohol could be expected to have on a person's ability to drive, testifying:

> Well, My Lady, this alcohol level that I've calculated here is a very high alcohol level. The critical mental faculties [that] are important in operating a motor vehicle will be impaired by the alcohol. And any skill that depends on these mental faculties will be affected. These include anticipation, judgment, attention, concentration, the ability to divide attention among two or more areas of interest. Because these are affected to such a degree, it would be unsafe for anybody to operate a motor vehicle with this level of alcohol in their body.

le véhicule de M. Nikolaisen avait fait une embardée même dans cette courbe. En outre, la juge de première instance a clairement commis une erreur en ne prenant pas en considération d'autres éléments de preuve pertinents concernant le lien de causalité, en particulier le fait que M. Nikolaisen avait roulé à trois reprises sur le chemin en question au cours des 18 à 20 heures ayant précédé l'accident.

161 Je ne partage pas l'avis de la juge de première instance voulant que le témoignage de M. Laughlin, spécialiste judiciaire en matière d'alcool au service de la GRC, étaye la conclusion que M. Nikolaisen aurait réagi à un panneau lui signalant l'imminence du virage droite où s'est produit l'accident. Le témoignage de M. Laughlin établit de façon prépondérante que des personnes dans un état d'ébriété aussi avancé que celui de M. Nikolaisen au moment de l'accident ne réagiraient vraisemblablement pas à un panneau d'avertissement. De plus, le témoignage de M. Laughlin mène irrésistiblement à la conclusion que l'alcool a été le facteur causal de l'accident. La juge de première instance a commis une erreur à cet égard, car elle a mal interprété un élément de la déposition de M. Laughlin et elle a omis de tenir compte de l'importance de son témoignage, considéré globalement.

162 À la lumière des échantillons de sang prélevés par la gendarme Forbes environ trois heures après l'accident, M. Laughlin a estimé que, au moment de l'accident, l'alcoolémie de M. Nikolaisen se situait entre 180 et 210 mg par 100 ml de sang. Dans son témoignage, M. Laughlin a commenté en détail l'incidence d'une telle alcoolémie sur la capacité d'une personne de conduire :

> [TRADUCTION] Bien, Madame, l'alcoolémie que j'ai calculée en l'espèce est très élevée. Les facultés mentales essentielles qui jouent un rôle important dans la conduite d'un véhicule automobile sont affaiblies par l'alcool. Et toute habileté tributaire de ces facultés mentales est affectée, notamment l'anticipation, le jugement, l'attention, la concentration, la capacité de partager son attention entre deux choses ou plus. Et parce qu'elles sont affectées à ce point, il serait risqué pour quiconque possède un tel taux d'alcool dans son sang de conduire un véhicule automobile.

When asked about his knowledge of research pertaining to the effects of alcohol on the risk of being involved in an automobile accident, Mr. Laughlin had this to say:

> At this level the moderate user of alcohol risk of causing crash is tremendously high, probably 100 times that of a sober driver, or even higher. And in some cases at this level, I've seen scientific literature indicating that the risk of causing a fatal crash is 2 to 300 times that of a sober driver. . . . if an impaired person is an experienced drinker there — it won't be that high. However, there will be an increased risk compared to a sober state. . . . But above 100 milligrams percent, regardless of tolerance, a person will be impaired with respect to driving ability.

Interrogé sur l'état des recherches touchant l'incidence de l'alcool sur le risque d'accident automobile, voici ce qu'a dit M. Laughlin :

> [TRADUCTION] À ce taux-là, le risque qu'une personne qui consomme modérément de l'alcool provoque un accident est extrêmement élevé, probablement 100 fois plus élevé que le conducteur à jeun, ou plus encore. Et dans certains cas, à ce taux-là, j'ai lu des textes scientifiques dans lesquels on indiquait que le risque de provoquer un accident mortel est de 200 à 300 fois plus élevé que celui d'un conducteur à jeun. [. . .] [S]i la personne en état d'ébriété est quelqu'un qui a l'habitude de boire, le risque n'est pas aussi élevé. Cependant, il est plus grand que si la personne avait été à jeun. [. . .] Mais au dessus de 100 mg par 100 ml de sang, peu importe le degré de tolérance à l'alcool, une personne a les facultés affaiblies pour ce qui concerne sa capacité de conduire.

Following these comments, Mr. Laughlin discussed the ability of a severely impaired person to react to the presence of a hazard when driving:

> My Lady, I would like to add that the driving task is a demanding one and involves many multi-various tasks occurring at the same time. The hazard for a person under the influence of alcohol is it takes longer to notice a hazard or danger if one should occur; it takes longer to decide what corrective action is appropriate, and it takes longer to execute that decision and the person may tend to make incorrect decisions. So there is increased risk in that process. As well, if the impairment has progressed to the point where the motor skills are affected, the execution of that decision is impaired. So it's not a very graceful attempt at a corrective action. As well, some people tend to make more risks under the influence of alcohol. They do not apply sound reasoning and judgment. They are not able to properly assess the impairment of their driving skills, they are not able to properly assess the risk, not able to properly assess the changing road and weather conditions and adjust for that. But even if they do recognize those as hazards, they may tend to take more risks than a sober driver would.

Après avoir fait ces remarques, M. Laughlin a décrit la capacité d'une personne en état d'ébriété avancé de réagir à la présence d'un danger lorsqu'elle conduit.

> [TRADUCTION] Madame, j'aimerais ajouter que conduire un véhicule est une activité exigeante, qui demande d'accomplir une multiplicité de tâches simultanément. Le danger pour la personne qui conduit en état d'ébriété réside dans le fait qu'il lui faut plus de temps pour déceler la présence d'un risque ou d'un danger; il lui faut plus de temps pour décider quelle mesure corrective est requise, et elle prend plus de temps à mettre cette décision à exécution; de plus, une telle personne peut avoir tendance à prendre de mauvaises décisions. Ce processus accroît donc le risque. Aussi, si l'ébriété est avancée au point où les habiletés motrices sont affaiblies, l'exécution de la décision s'en trouve compromise. Il s'ensuit donc une tentative plutôt malhabile de corriger la situation. De plus, certaines personnes tendent à prendre davantage de risques lorsqu'elles sont en état d'ébriété. Elles ne font pas preuve de discernement et de jugement. Elles sont incapables d'évaluer correctement les changements dans l'état de la route et les conditions météorologiques et d'adapter leur conduite en conséquence. Mais même si elles reconnaissent qu'il s'agit effectivement de dangers, elles peuvent avoir tendance à prendre davantage de risques que le conducteur à jeun.

163 The above comments support the conclusion that the accident occurred as a result of Mr. Nikolaisen's impairment and not as a result of any failure on the part of the respondent. Indeed, when the portions of Mr. Laughlin's testimony that the trial judge relied

Les remarques qui précèdent étayent la conclusion que l'accident s'est produit en raison de l'état d'ébriété de M. Nikolaisen et non de quelque manquement de la part de l'intimée. De fait, lorsque les extraits du témoignage de M. Laughlin sur lesquels

on are considered in their context, they do not support her conclusion that Mr. Nikolaisen would have been able to react to a sign had one been posted. When asked by counsel whether it was possible for an individual with Mr. Nikolaisen's blood alcohol level to perceive and react to a road sign, Mr. Laughlin responded:

> Yes, it's possible that a person will see and react to it and maybe react properly. It's possible that they will react improperly or may miss it altogether. I think what's key here is that at this level of alcohol, it's more likely that the person under this level of alcohol will either miss the sign or not react properly compared to the sober driver. That the driver with this level of alcohol will make more mistakes than will the sober driver. [Emphasis added.]

In the passage above, it is clear that Mr. Laughlin is merely admitting that anything is possible, while solidly expressing the view that drivers at this level of intoxication are more likely to not react to a sign or other warning. This view is also apparent in the following passage, in which Mr. Laughlin expands on the ability of an intoxicated driver to react to signs and other road conditions:

> What happens with respect to perception under the influence of alcohol is a driver tends to concentrate on the central field of vision, and miss certain indicators on the periphery, that's called tunnel vision. As well, drivers tend to concentrate on the lower part of that central field of view and therefore they don't have a very long preview distance in the course of operating a motor vehicle and looking down the road. And so studies indicate that under the influence of alcohol drivers tend to miss more signs, warnings, indicators, especially those in the peripheral field of view or farther down the road. [Emphasis added.]

In argument before this Court, the appellant emphasized that although Mr. Laughlin was the only expert to testify with respect to causation, lay witnesses testified that Mr. Nikolaisen was not visibly impaired prior to leaving the Thiel residence.

s'est fondée la juge de première instance sont examinés dans leur contexte, ils n'appuient pas la conclusion de cette dernière que M. Nikolaisen aurait été capable de réagir à un panneau de signalisation s'il y en avait eu un. Répondant à la question d'un avocat lui demandant s'il était possible qu'une personne ayant l'alcoolémie de M. Nikolaisen voit un panneau de signalisation et y réagisse, M. Laughlin a dit ceci :

> [TRADUCTION] Oui, il est possible qu'une personne le voit et y réagisse et peut-être qu'elle réagisse adéquatement. Il est possible qu'elle ne réagisse pas adéquatement ou qu'elle ne le voit même pas. J'estime que l'élément fondamental à retenir ici est qu'il est probable que la personne ayant atteint cette alcoolémie ne voit pas le panneau, ou ne réagisse pas adéquatement, comparativement au conducteur à jeun. Que le conducteur avec cette alcoolémie commette plus d'erreurs que le conducteur à jeun. [Je souligne.]

Il est clair, dans le passage qui précède, que M. Laughlin reconnaît simplement que tout est possible, tout en avançant avec conviction qu'il y a une plus forte probabilité que les conducteurs ayant atteint ce degré d'ébriété ne réagissent pas à un panneau de signalisation ou à une autre mesure d'avertissement. Cette opinion ressort également clairement de l'extrait suivant, où il donne des précisions supplémentaires sur la capacité d'une personne en état d'ébriété de réagir aux panneaux de signalisation et à d'autres éléments sur les routes :

> [TRADUCTION] Sur le plan de la perception, le conducteur en état d'ébriété a tendance à se concentrer sur son champ visuel central et à manquer certains indices en périphérie, c'est ce qu'on appelle la vision tubulaire. En outre, les conducteurs ont tendance à se concentrer sur la partie inférieure de ce champ visuel central et, en conséquence, ils ne voient pas très loin devant eux sur la route lorsqu'il sont au volant. Et, par conséquent, les recherches indiquent que les conducteurs en état d'ébriété ont tendance à manquer davantage de panneaux de signalisation, d'avertissements, d'indices, particulièrement ceux situés dans leur champ visuel périphérique ou plus loin sur la route. [Je souligne.]

Au cours des plaidoiries devant notre Cour, l'appelant a souligné que, bien que M. Laughlin ait été le seul expert entendu au sujet du lien de causalité, les témoins ordinaires ont attesté que M. Nikolaisen n'avait pas les facultés visiblement

It is not clear from the trial judge's reasons that she relied on testimony to this effect given by Craig Thiel, Toby Thiel and Paul Housen. To the extent that she did rely on such evidence to establish that the accident was caused in part by the respondent's negligence, I find this reliance to be unreasonable. Whereas the lay witnesses in this case were qualified to give their opinion on whether they, as ordinary drivers, could safely negotiate the segment of Snake Hill Road on which the accident occurred, they were not qualified to assess the degree of Mr. Nikolaisen's impairment. The reason for their lack of qualification in this regard was explained by Mr. Laughlin in the following response to counsel's question on whether it is possible to draw a conclusion from the fact that an individual does not exhibit any impairment of their motor skills and speech:

> No, Your Honour, because, My Lady, when you're looking at motor skill impairment or for signs of motor skill impairment, you're looking for signs of intoxication, not impairment. Remember I mentioned that the first components affected by alcohol are cognitive and mental faculties. These are all important in driving. However, it is very difficult when you look at an individual who has been consuming alcohol to tell that they have impaired in attention or divided attention, or concentration, or judgment. So as an indicator of impairment, motor skills are not reliable. And if you think about the *Criminal Code* process, they've been abandoned 30 years ago as a useful indicator of impairment. No longer do we rely on police officers subjective assessment of person's motor skills to determine impairment. [Emphasis added.]

165 It is also clear from the trial judge's reasons that she relied to some extent on evidence that Mr. Nikolaisen successfully negotiated the curve at the point where the driveway to the Thiel residence intersected the road. I agree with the respondent that this fact is simply not relevant. The ability of Mr. Nikolaisen to negotiate this curve does not establish that his driving ability was not impaired. As noted by the respondent, at para. 101 of its factum, he may

affaiblies avant de quitter la résidence des Thiel. Les motifs de la juge de première instance n'indiquent pas clairement si elle s'est appuyée sur les témoignages de Craig Thiel, Toby Thiel et Paul Housen à cet égard. Dans la mesure où elle se serait fondée sur cette preuve pour conclure que l'accident avait été causé en partie par la négligence de l'intimée, j'estime qu'il était déraisonnable de le faire. En l'espèce, bien que compétents pour exprimer leur opinion sur la question de savoir s'ils pourraient, en tant que conducteurs moyens, manœuvrer en toute sécurité sur le tronçon du chemin Snake Hill où l'accident s'est produit, les témoins ordinaires n'étaient pas compétents pour évaluer le degré d'ébriété de M. Nikolaisen. La raison de leur absence de compétence à cet égard a été expliquée en ces termes par M. Laughlin, dans la réponse suivante qu'il a donnée à l'un des avocats qui lui demandait s'il était possible de tirer des conclusions du fait qu'une personne ne démontre ni signe d'affaiblissement de ses habiletés motrices ni problème d'élocution :

> [TRADUCTION] Non, votre Honneur, puisque, Madame, lorsqu'on vérifie s'il y a affaiblissement des habiletés motrices ou des signes de cet affaiblissement, on cherche des indices d'ébriété, et non d'affaiblissement des facultés. Rappelez-vous que j'ai dit que les premières facultés affectées par l'alcool sont les facultés cognitives et mentales. Elles sont toutes importantes lorsqu'il s'agit de conduire un véhicule. Cependant, lorsqu'on examine une personne qui a consommé de l'alcool, il est très difficile de dire si son attention ou sa capacité de diviser son attention, ou si sa concentration ou son jugement sont réduits. En conséquence les habiletés motrices ne sont pas des indices fiables d'affaiblissement des facultés. Et si on pense au processus prévu par le *Code criminel*, on a cessé d'y recourir depuis 30 ans en tant qu'indices utiles de l'affaiblissement des facultés. On ne se fie plus à l'appréciation subjective policier quant aux habiletés motrices d'une personne pour déterminer si les facultés de celle-ci sont affaiblies. [Je souligne.]

Il appert également des motifs de la juge de première instance qu'elle s'est dans une certaine mesure fondée sur la preuve indiquant que M. Nikolaisen avait réussi à prendre le virage à l'intersection de l'entrée de la résidence des Thiel et du chemin Snake Hill. Je partage l'avis de l'intimée selon lequel ce fait n'est tout simplement pas pertinent. La capacité de M. Nikolaisen de prendre ce virage n'établit pas que sa capacité de conduire

have been driving more slowly at this point, or he may simply have been lucky. More importantly, this evidence contributes nothing to the issue of whether or not Mr. Nikolaisen would have reacted to a sign on the curve where the accident occurred, had one been present. There was no sign on the curve one faces upon leaving the driveway, just as there was no sign on the curve where the accident took place.

n'était pas affaiblie. Comme l'a souligné l'intimée, au par. 101 de son mémoire, il a pu réduire sa vitesse à cet endroit, ou simplement avoir eu de la chance. Facteur plus important encore cette preuve n'aide d'aucune façon à déterminer si M. Nikolaisen aurait réagi à un panneau placé à l'approche de la courbe où s'est produit l'accident, si un tel panneau avait existé. Il n'y avait aucun panneau aux abords de la courbe située à la sortie de l'entrée, tout comme il n'y en avait pas aux abords de celle où s'est produit l'accident.

At any rate, the trial judge's reliance on Mr. Nikolaisen's successful negotiation of the curve at the location of the Thiel driveway ignores relevant evidence that he had swerved or "fish-tailed" when leaving the Thiel residence. A reasonable inference to be drawn from this evidence is that while Mr. Nikolaisen was able to negotiate this curve, he did not do so free from difficulty. While this evidence may not be significant in and of itself, it should have been enough to alert the trial judge to the problems inherent in the inference she drew from his ability to navigate this earlier curve.

166 Quoi qu'il en soit, en se fondant sur le fait que M. Nikolaisen avait pris avec succès le virage devant l'entrée des Thiel, la juge de première instance a fait abstraction de l'élément de preuve pertinent indiquant que l'arrière de son véhicule avait zigzagué à son départ de la résidence des Thiel. On peut raisonnablement inférer de cette preuve que, quoique M. Nikolaisen ait été en mesure de prendre ce virage, il n'y est pas parvenu sans difficulté. Bien que cette preuve ne soit pas nécessairement importante en soi, elle aurait dû néanmoins alerter la juge de première instance quant aux problèmes intrinsèques de l'inférence qu'elle tirait de la capacité de M. Nikolaisen de prendre ce premier virage.

In addition to ignoring the relevant evidence of the fish-tail marks, the trial judge failed to consider the relevance of the fact that Mr. Nikolaisen had travelled Snake Hill Road three times in the 18 to 20 hours preceding the accident. In her review of the evidence, she noted at para. 8 of her reasons that: "Mr. Nikolaisen was unfamiliar with Snake Hill Road. While he had in the preceding 24 hours travelled the road three times, only once was in the same direction that he was travelling upon leaving the Thiel residence."

167 En plus de ne pas avoir tenu compte de la preuve pertinente que constituaient les traces des zigzags, la juge de première instance n'a pas considéré pertinent le fait que M. Nikolaisen avait circulé sur le chemin Snake Hill à trois reprises au cours des 18 à 20 heures ayant précédé l'accident. Dans son examen de la preuve, elle a souligné, au par. 8 de ses motifs, que [TRADUCTION] « M. Nikolaisen ne connaissait pas bien le chemin Snake Hill. Bien qu'il ait emprunté ce chemin à trois reprises au cours des 24 heures précédentes, il ne l'a fait qu'une seule fois dans la même direction que celle qu'il a prise en quittant la résidence des Thiel. »

I simply cannot see how the trial judge found accidents which occurred when motorists were travelling in the opposite direction relevant to the issue of the respondent's knowledge of a risk to motorists while at the same time suggesting that the fact that Mr. Nikolaisen had driven the road in the opposite direction twice was irrelevant to the issue of whether

168 Je ne vois tout simplement pas comment la juge de première instance a pu conclure que les accidents qu'ont eu des automobilistes circulant en sens inverse étaient pertinents pour statuer sur la connaissance par l'intimée de l'existence d'un risque d'accident, tout en suggérant du même souffle que le fait que M. Nikolaisen ait roulé à deux reprises

or not he would have recognized that the curve posed a risk or that he would have reacted to a warning sign. This discrepancy aside, I find the fact that Mr. Nikolaisen had travelled Snake Hill Road in the same direction when he left the Thiel residence to go to the Jamboree the evening before the accident highly relevant to the causation issue. The finding that the outcome would have been different had Mr. Nikolaisen been forewarned of the curve ignores the fact that he already knew that the curve was there. I agree with the respondent that the obvious reason Mr. Nikolaisen was unable to safely negotiate the curve on the afternoon of the 18th, despite having negotiated this curve and others without difficulty in the preceding 18 to 20 hours was the combined effect of his drinking, lack of sleep and lack of food.

169 In conclusion on the issue of causation, I wish to clarify that the fact that the trial judge referred to some evidence to support her findings on this issue does not insulate those findings from review by this Court. The standard of review for findings of fact is reasonableness, not absolute deference. Such a standard entitles the appellate court to assess whether or not it was clearly wrong for the trial judge to rely on some evidence when other evidence points overwhelmingly to the opposite conclusion. The logic of this approach was aptly explained by Kerans, *supra*, in the following passage at p. 44:

> The key to the problem is whether the reviewer is to look merely for "evidence to support" the finding. Some evidence might indeed support the finding, but other evidence may point overwhelmingly the other way. A court might be able to say that reliance on the "some" in the face of the "other" was not what the reasonable trier of fact would do; indeed, it might say that, in all the circumstances it was convinced that to rely on the one in the face of the other was quite unreasonable. To say that "some evidence" is enough, then, without regard to that "other

en sens inverse sur le chemin en question n'était pas pertinent pour déterminer s'il aurait reconnu que la courbe présentait un risque ou s'il aurait réagi à un panneau d'avertissement. Indépendamment de cette contradiction, j'estime que le fait que M. Nikolaisen ait roulé dans la même direction sur le chemin Snake Hill après avoir quitté la résidence des Thiel pour se rendre au jamboree, la veille de l'accident, est fort pertinent en ce qui concerne le lien de causalité. La conclusion que le résultat aurait été différent si une signalisation avait prévenu M. Nikolaisen de l'existence de la courbe ne tient pas compte du fait qu'il savait déjà qu'elle existait. Je souscris à l'opinion de l'intimée que la raison évidente pour laquelle M. Nikolaisen n'a pas réussi à prendre le virage en toute sécurité dans l'après-midi du 18, alors qu'il avait déjà pris ce virage et d'autres sans difficulté au cours des 18 à 20 heures précédentes, était l'effet combiné de sa consommation d'alcool, de son manque de sommeil et du fait qu'il n'avait pas mangé.

Pour conclure sur la question du lien de causalité, j'aimerais préciser que le fait que la juge de première instance ait mentionné certains éléments de preuve au soutien de ses conclusions sur ce point n'a pas pour effet de soustraire ces conclusions au pouvoir de contrôle de notre Cour. La norme de contrôle applicable aux conclusions de fait est celle de la décision raisonnable et non celle de la retenue absolue. Cette norme permet au tribunal d'appel de se demander si le juge de première instance a clairement fait erreur en décidant comme il l'a fait sur le fondement de certains éléments de preuve alors que d'autres éléments mènent irrésistiblement à la conclusion inverse. Kerans, *op. cit.*, p. 44, a habilement exposé la logique de cette démarche dans le passage suivant :

> [TRADUCTION] La solution au problème réside dans la réponse à la question de savoir si le tribunal de révision doit simplement se demander s'il existe « des éléments de preuve étayant » la conclusion. Il est possible que certains éléments de preuve étayent effectivement la conclusion alors que d'autres éléments conduisent irrésistiblement à la conclusion inverse. Un tribunal pourrait être en mesure de dire qu'un juge des faits raisonnable ne s'appuierait pas sur « certains » éléments vu l'existence des « autres »; de fait, il pourrait dire que, eu égard à

evidence" is to turn one's back on review for reasonableness.

D. *Did the Courts Below Err in Finding that no Common Law Duty of Care Exists Alongside the Statutory Duty Imposed Under Section 192 of The Rural Municipality Act, 1989?*

The appellant urges this Court to find that a common law duty of care exists alongside the statutory duty of care imposed on the respondent by s. 192 of *The Rural Municipality Act, 1989*. According to the appellant, the application of the common law duty of care would free the Court from the need to focus on how a reasonable driver exercising ordinary care would have navigated the road in question. The appellant submits that the Court would instead apply the "classic reasonableness formulation" which, in its view, would require the Court to take into account the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost of preventing that harm. The appellant argues that the respondent would be held liable under this test.

The courts below rejected the above argument when it was put to them by the appellant. I would not interfere with their ruling on this issue for the reason that it is unnecessary for this Court to impose a common law duty of care where a statutory one clearly exists. In any event, the application of the common law test would not affect the outcome in these proceedings.

I agree with the respondent's submissions that in this case, where the legislature has clearly imposed a statutory duty of care on the respondents, it would be redundant and unnecessary to find that a common law duty of care exists. The two-part test to establish a common law duty of care set out in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, simply has no application where the legislature has defined a statutory duty. As was stated by this Court in *Brown*

l'ensemble des circonstances, il est convaincu qu'il était tout à fait déraisonnable de se fonder sur certains éléments compte tenu des autres. En conséquence, affirmer que « certains éléments de preuve » suffisent, sans égard aux « autres éléments », revient à abandonner l'examen du caractère raisonnable.

D. *Les juridictions inférieures ont-elles commis une erreur en concluant qu'aucune obligation de diligence de common law ne coexiste avec l'obligation légale imposée par l'art. 192 de la Rural Municipality Act, 1989?*

170 L'appelant invite notre Cour à conclure qu'une obligation de diligence de common law coexiste avec l'obligation légale de diligence imposée à l'intimée par l'art. 192 de la *Rural Municipality Act, 1989*. Selon l'appelant, l'application de l'obligation de diligence de common law dispenserait la Cour de la nécessité de se demander comment un conducteur raisonnable prenant des précautions normales aurait roulé sur le chemin en cause. L'appelant soutient que la Cour pourrait plutôt appliquer le [TRADUCTION] « critère classique de la conduite raisonnable », lequel, à son avis, l'obligerait à tenir compte des éléments suivants : la probabilité qu'un préjudice connu ou prévisible survienne, la gravité de ce préjudice et le fardeau ou le coût qu'il faudrait assumer pour le prévenir. L'appelant prétend que, suivant ce critère, l'intimée serait tenue responsable.

171 Les juridictions inférieures ont rejeté l'argument susmentionné de l'appelant. Je ne modifierais pas leur décision sur cette question, car il est inutile que notre Cour impose une obligation de diligence de common law lorsqu'il existe clairement une obligation d'origine législative. Quoi qu'il en soit, l'application du critère prévu par la common law ne modifierait pas l'issue de la présente instance.

172 Je souscris à l'argument de l'intimée selon lequel, en l'espèce, il serait redondant et inutile de conclure qu'elle est assujettie à une obligation de diligence de common law alors que le législateur lui a clairement imposé une obligation légale de diligence. Le critère à deux volets énoncé dans l'arrêt *Kamloops (Ville de) c. Nielsen*, [1984] 2 R.C.S. 2, pour statuer sur l'existence d'une obligation de diligence de common law, ne s'applique tout

v. British Columbia (Minister of Transportation and Highways), [1994] 1 S.C.R. 420, at p. 424:

> . . . if a statutory duty to maintain existed as it does in some provinces, it would be unnecessary to find a private law duty on the basis of the neighbourhood principle in *Anns v. Merton London Borough Council*, [1978] A.C. 728. Moreover, it is only necessary to consider the policy/operational dichotomy in connection with the search for a private law duty of care.

All of the authorities cited by the appellant as support for the imposition of an independent common law duty of care can be distinguished from the case at hand on the basis that no statutory duty of care existed (*Just*, *supra*; *Brown*, *supra*; *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445; *Ryan*, *supra*).

173 In addition, I find that the outcome in this case would not be different if the case were determined according to ordinary negligence principles. First, were the Court to engage in a common law analysis, it would still look to the statutory standard of care as laid out in *The Rural Municipality Act, 1989*, as interpreted by the case law in order to assess the scope of liability owed by the respondent to the appellant. As this Court stated in *Ryan*, *supra*, at para. 29:

> Statutory standards can, however, be highly relevant to the assessment of reasonable conduct in a particular case, and in fact may render reasonable an act or omission which would otherwise appear to be negligent. This allows courts to consider the legislative framework in which people and companies must operate, while at the same time recognizing that one cannot avoid the underlying obligation of reasonable care simply by discharging statutory duties.

174 Moreover, even under the common law analysis, this Court would be called upon to question the type of hazards that the respondent, in this case, ought to have foreseen. Whatever the approach, it is only reasonable

simplement pas lorsque le législateur a prescrit l'obligation dans la loi. Comme l'a indiqué notre Cour dans l'arrêt *Brown c. Colombie-Britannique (Ministre des Transports et de la Voirie)*, [1994] 1 R.C.S. 420, p. 424 :

> . . . s'il existait une obligation d'entretien imposée par la loi comme c'est le cas dans certaines provinces, il serait inutile de rechercher une obligation en droit privé en se fondant sur le principe du prochain établi dans l'arrêt *Anns c. Merton London Borough Council*, [1978] A.C. 728. En outre, il est nécessaire d'examiner la dichotomie politique générale-opérations seulement en ce qui concerne la recherche d'une obligation de diligence en droit privé.

Tous les arrêts invoqués par l'appelant pour justifier sa prétention que la municipalité devrait être assujettie à une obligation indépendante de diligence de common law peuvent être distingués de la présente affaire, étant donné qu'il n'existait aucune obligation légale de diligence dans ces affaires (*Just*, précitée; *Brown*, précitée; *Swinamer c. Nouvelle-Écosse (Procureur général)*, [1994] 1 R.C.S. 445; *Ryan*, précitée).

En outre, j'estime que le résultat serait le même en l'espèce si l'affaire était tranchée d'après les principes ordinaires de la négligence. Tout d'abord, si la Cour faisait l'analyse prévue par la common law, elle appliquerait quand même la norme légale de diligence établie dans la *Rural Municipality Act, 1989*, telle qu'elle a été interprétée par la jurisprudence, pour déterminer l'étendue de la responsabilité de l'intimée envers l'appelant. Comme l'a dit notre Cour dans l'arrêt *Ryan*, précité, par. 29 :

> Cependant, les normes législatives peuvent être hautement pertinentes pour déterminer ce qui constitue une conduite raisonnable dans un cas particulier, et elles peuvent, en fait, rendre raisonnable un acte ou une omission qui, autrement, paraîtrait négligent. En conséquence, les tribunaux peuvent examiner le cadre législatif dans lequel les personnes et les sociétés doivent agir, tout en reconnaissant qu'il est impossible de se soustraire à l'obligation sous-jacente de diligence raisonnable simplement en s'acquittant de ses obligations légales.

De plus, même dans le cadre de l'analyse requise par la common law, notre Cour devrait s'interroger sur le type de dangers que l'intimée aurait dû prévoir en l'espèce. Indépendamment de l'approche choisie,

sonable to expect a municipality to foresee accidents which occur as a result of the conditions of the road, and not, as in this case, as a result of the condition of the driver.

The courts have long restricted the standard of care under the statutory duty to require municipalities to repair only those hazards which would pose a risk to the reasonable driver exercising ordinary care. Compelling reasons exist to maintain this interpretation. The municipalities within the province of Saskatchewan have some 175,000 kilometres of roads under their care and control, 45,000 kilometres of which fall within the "bladed trail" category. These municipalities, for the most part, do not boast large, permanent staffs with extensive time and budgetary resources. To expand the repair obligation of municipalities to require them to take into account the actions of unreasonable or careless drivers when discharging this duty would signify a drastic and unworkable change to the current standard. Accordingly, it is a change that I would not be prepared to make.

VII. Disposition

In the result, the judgment of the Saskatchewan Court of Appeal is affirmed and the appeal is dismissed with costs.

Appeal allowed with costs, GONTHIER, BASTARACHE, BINNIE *and* LEBEL JJ. *dissenting.*

Solicitors for the appellant: Robertson Stromberg, Saskatoon; Quon Ferguson MacKinnon, Saskatoon.

Solicitors for the respondent: Gerrand Rath Johnson, Regina.

il n'est que raisonnable d'attendre d'une municipalité qu'elle prévoit les accidents qui surviennent en raison de l'état du chemin, et non, comme en l'espèce, ceux qui résultent de l'état du conducteur.

175 Depuis longtemps, les tribunaux limitent l'étendue de la norme de diligence découlant de l'existence d'un devoir légal de diligence à l'obligation pour les municipalités d'éliminer seulement les dangers qui présenteraient un risque pour le conducteur raisonnable prenant des précautions normales. Des raisons impérieuses militent en faveur du maintien de cette interprétation. Les municipalités de la province de la Saskatchewan assument l'entretien et la surveillance de quelque 175 000 kilomètres de route, dont 45 000 kilomètres font partie de la catégorie des « chemins nivelés ». La plupart de ces municipalités ne disposent ni d'effectifs permanents considérables ni de ressources importantes en temps et en argent. Élargir l'obligation d'entretien des municipalités en exigeant qu'elles tiennent compte, dans l'exécution de cette obligation, des actes des conducteurs déraisonnables ou imprudents, entraînerait une modification radicale et irréalisable de la norme actuelle. Il s'agit en conséquent d'un changement que je ne serais pas disposé à apporter.

VII. Dispositif

176 En définitive, le jugement de la Cour de l'appel de la Saskatchewan est confirmé et le pourvoi est rejeté avec dépens.

Pourvoi accueilli avec dépens, les juges GONTHIER, BASTARACHE, BINNIE *et* LEBEL *sont dissidents.*

Procureurs de l'appelant : Robertson Stromberg, Saskatoon; Quon Ferguson MacKinnon, Saskatoon.

Procureurs de l'intimée : Gerrand Rath Johnson, Regina.

9

SUPREME COURT OF CANADA

CITATION: Entertainment Software Association *v.* Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 34, [2012] 2 S.C.R. 231

DATE: 20120712
DOCKET: 33921

BETWEEN:

Entertainment Software Association and Entertainment Software Association of Canada

Appellants

and

Society of Composers, Authors and Music Publishers of Canada

Respondent

- and -

CMRRA-SODRAC Inc., Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic and Cineplex Entertainment LP

Interveners

CORAM: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

JOINT REASONS FOR JUDGMENT: (paras. 1 to 44)	Abella and Moldaver JJ. (McLachlin C.J. and Deschamps and Karakatsanis JJ. concurring)
DISSENTING REASONS: (paras. 45 to 128)	Rothstein J. (LeBel, Fish and Cromwell JJ. concurring)

Entertainment Software Association and Entertainment Software Association of Canada *Appellants*

v.

Society of Composers, Authors and Music Publishers of Canada *Respondent*

and

CMRRA-SODRAC Inc., Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic and Cineplex Entertainment LP *Interveners*

Indexed as: Entertainment Software Association *v.* Society of Composers, Authors and Music Publishers of Canada

2012 SCC 34

File No.: 33921.

2011: December 6; 2012: July 12.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Intellectual property — Copyright — Right to communicate a work to the public by telecommunication — Copyright Board certifying tariff for communication rights in copyrighted music contained in video games sold for download on Internet — Whether transmission of musical works contained in a video game through an Internet download is a communication to the public — Copyright Act, R.S.C. 1985, c. C-42, s. 3(1)(f).

The appellants ESA represent a coalition of video game publishers and distributors who enable customers to download copies of video games from the Internet. These copies are identical to copies purchased in stores or shipped to customers by mail. The video games contain copyrighted musical works. The royalties for the reproduction of those musical works are negotiated before the games are sold to the public. The respondent SOCAN, which administers the right to "communicate" musical works on behalf of copyright owners, applied to the Copyright Board for a tariff covering downloads of musical works over the Internet. The Copyright Board concluded that the download of a file containing a musical work is a communication to the public by telecommunication within the meaning of s. 3(1)(*f*) of the *Copyright Act*, entitling SOCAN's members to compensation in accordance with an approved tariff. On judicial review, the Federal Court of Appeal upheld the Copyright Board's decision.

Held (LeBel, Fish, Rothstein and Cromwell JJ. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Deschamps, Abella, Moldaver and Karakatsanis JJ.: The Copyright Board's conclusion that the Internet delivery of a permanent copy of a video game containing musical works amounted to a "communication" under s. 3(1)(*f*) of the *Copyright Act* should be set aside.

The Board's conclusion that a separate, "communication" tariff applies to downloads of musical works violates the principle of technological neutrality. This principle requires that the *Act* apply equally between traditional and more technologically advanced media forms. There is no practical difference between buying a durable copy of the work in a store, receiving a copy in the mail, or downloading an identical copy using the Internet. ESA has already paid reproduction royalties to the copyright owners for the video games. Absent evidence of Parliamentary intent to the contrary, we interpret the *Act* in a way that avoids imposing an additional layer of protections and fees based solely on the method of delivery of the work to the end user. To do otherwise would effectively impose a gratuitous cost for the use of more efficient, Internet-based technologies. The Internet should be seen as a technological taxi that delivers a durable copy of the same work to the end user. The traditional balance in copyright between promoting the public interest in the encouragement and dissemination of works and obtaining a just reward for the creators of those works should be preserved in the digital environment.

The term "communicate" in s. 3(1)(*f*) is not defined in the *Act*, but the legislative history of the *Act* demonstrates that the right to "communicate" is historically connected to the right to perform a work and not the right to reproduce permanent copies of the work. The 1988 amendment in the *Act* from "communicate . . . by radio communication" to "communicate . . . by telecommunication" does not demonstrate Parliament's intent to remove all reference in s. 3(1)(*f*) to conventional performance or broadcasting activities, or to expand the communication right to technologies such as downloading that involve transmitting data in a way that gives end users a permanent copy of the work. Instead, the replacement of the words "radio communication" with "telecommunication" should be understood as merely expanding the *means* of communicating a work — that is, from radio waves to cable and other future technologies. By substituting the word "telecommunication" in 1988, Parliament did not intend to change the fundamental nature of the communication right, which has been concerned with performance-based activities for over 50 years.

Applying the dictionary definition of the word "communicate" has the effect of ignoring a solid line of legislative history connecting the term "communicate" to performance-based activities. The term "communicate" in s. 3(1)(*f*) should not be transformed by the use of the word "telecommunication" in a way that would capture activities that resemble reproduction. Such transformation would result in abandoning the traditional distinction in the *Act* between performance-based rights and rights of reproduction.

Per LeBel, Fish, Rothstein and Cromwell JJ. (dissenting): The creators of works downloaded from the Internet are entitled to both communication and reproduction rights. Copyright is a creature of statute comprised of a bundle of independent statutory rights. Although a technologically neutral copyright law is desirable, the *Act* cannot be interpreted in a manner that divests these rights of their independent content. The right of reproduction continues to apply to copies made through downloads notwithstanding that they are digital copies and the communication right continues to apply to digital communications notwithstanding that they may differ from traditional broadcasting technologies.

The general rules of statutory interpretation require that the words of the *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. The word "communicate" is not defined in the *Act*. Parliament is presumed to use words in their ordinary meaning and dictionary definitions give "communicate" and "transmit" overlapping meanings. Nothing in the context in which the words are used in the *Act* indicates that "communicate" is distinct in meaning from "transmit" or is limited to transmissions of information in a humanly perceptible form for immediate perceiving and listening.

The communication right set out in s. 3(1)(*f*) of the *Act* is a self-standing right that is independent of the performance right set out in the introductory portion of s. 3(1). The rights listed in paragraphs 3(1)(*a*) to 3(1)(*i*) are in addition to the rights

to produce or reproduce, perform or publish. Nor does the legislative history of s. 3(1)(*f*) confine the communication right to being only a variation of the performance right. Although there is an historic relationship between the right of public performance and the right to communicate to the public, the legislation has evolved. By adopting the word "telecommunication", Parliament removed the historic reference to conventional broadcasting and encompassed evolving technologies. The current language of the *Act* does not support a conclusion that s. 3(1)(*f*) only applies to traditional broadcasting technologies.

The application of the communication right does not depend on the purpose of the communication. The fact that the Internet transmission delivers a copy of a video game, which contains a musical work, does not change the fact that there is an Internet communication requiring authorization of the copyright holder.

No policy concern arises because the reproduction right and the communication right are distinct and separate rights. The fact that there are two protected rights does not restrict the protection afforded by each right. To characterize an Internet transmission as a mere "method of delivery" of a work and limit the copyright to reproduction rights would pre-empt the application of the communication right. Inferring limits into the communication right for policy reasons is beyond the function of the courts.

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By Abella and Moldaver JJ.

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By Rothstein J. (dissenting)

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Internet Providers, 2004 SCC 45, [2004] 2 S.C.R. 427; *SOCAN Statement of Royalties, Internet — Other Uses of Music 1996-2006 (Tariffs 22.B-22.G)* (2008), 70 C.P.R. (4th) 81; *Bell Canada v. Society of Composers, Authors and Music Publishers of Canada*, 2010 FCA 220, 409 N.R. 102; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283; *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339; *Canadian Wireless Telecommunications Assn. v. Society of Composers, Authors and Music Publishers of Canada*, 2008 FCA 6, [2008] 3 F.C.R. 539, leave to appeal refused, [2008] 2 S.C.R. vi; *Composers, Authors and Publishers Assoc. of Canada Ltd. v. CTV Television Network Ltd.*, [1968] S.C.R. 676; *Canadian Admiral Corp. v. Rediffusion, Inc.*, [1954] Ex. C.R. 382; *United States v. American Society of Composers, Authors and Publishers*, 627 F.3d 64 (2010), cert. denied (U.S.S.C., October 3, 2011, No. 10-1337); *Robertson v. Thomson Corp.*, 2006 SCC 43, [2006] 2 S.C.R. 363.

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APPEAL from a judgment of the Federal Court of Appeal (Létourneau, Nadon and Pelletier JJ.A.), 2010 FCA 221, 406 N.R. 288, 323 D.L.R. (4th) 62, 86 C.P.R. (4th) 258, 14 Admin. L.R. (5th) 151, [2010] F.C.J. No. 1088 (QL), 2010 CarswellNat 3113, affirming a decision of the Copyright Board, www.cb-cda.gc.ca/decisions/2007/20071018-m-e.pdf, (2007), 61 C.P.R. (4th) 353, [2007]

C.B.D. No. 7 (QL), 2007 CarswellNat 3466. Appeal allowed, LeBel, Fish, Rothstein and Cromwell JJ. dissenting.

Barry B. Sookman and *Daniel G. C. Glover*, for the appellants.

Gilles Daigle, *D. Lynne Watt*, *Paul Spurgeon* and *Henry Brown*, *Q.C.*, for the respondent.

Written submissions only by *Casey M. Chisick*, *Timothy Pinos* and *Jason Beitchman*, for the intervener CMRRA-SODRAC Inc.

Written submissions only by *Jeremy de Beer* and *David Fewer*, for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic.

Written submissions only by *Tim Gilbert*, *Sana Halwani* and *Sundeep Chauhan*, for the intervener Cineplex Entertainment LP.

The judgment of McLachlin C.J. and Deschamps, Abella, Moldaver and Karakatsanis JJ. was delivered by

[1] ABELLA AND MOLDAVER JJ. — In the video game publishing industry, the royalties for the reproduction of any musical works which are incorporated into the games are currently negotiated before the games are packaged for public sale.

Once these rights have been negotiated, the owner of the copyright in the musical work has no further rights when the game is sold. The question in this appeal is whether the rights are nonetheless revived when the work is sold over the Internet instead of in a store. In our view, it makes little sense to distinguish between the two methods of selling the same work.

[2] The Copyright Board concluded that video games containing a musical work, the royalties to which have already been negotiated with the copyright owner, were nonetheless subject to a new fee when sold over the Internet ((2007), 61 C.P.R. (4th) 353). Its decision was upheld by the Federal Court of Appeal (2010 FCA 221, 406 N.R. 288). In our respectful view, the Board's decision misconstrues the provisions at issue in the *Copyright Act*, R.S.C. 1985, c. C-42, ignoring decades of legislative history, and violates the principle of technological neutrality, which requires that the *Act* apply equally notwithstanding the technological diversity of different forms of media.

Analysis

[3] The provision at issue in this appeal is s. 3(1)(*f*) of the *Copyright Act*, which states that copyright owners have the sole right

> in the case of any literary, dramatic, musical or artistic work, to *communicate* the work *to the public by telecommunication* . . . .

[4] The focus of this appeal is on the meaning of the word "communicate" in s. 3(1)(*f*), a term which is not defined in the *Act*. The Society of Composers, Authors and Music Publishers of Canada (SOCAN), which administers the right to "communicate" musical works on behalf of copyright owners, applied to the Board for a tariff under this provision to cover downloads of musical works over the Internet. The Entertainment Software Association and the Entertainment Software Association of Canada (collectively, ESA), which represent a broad coalition of video game publishers and distributors, objected to the tariff, arguing that "downloading" a video game containing musical works did not amount to "communicating" that game to the public by telecommunication under s. 3(1)(*f*). Instead, a "download" is merely an additional, more efficient way to deliver copies of the games to customers. The downloaded copy is identical to copies purchased in stores or shipped to customers by mail, and the game publishers already pay copyright owners reproduction royalties for *all* of these copying activities.

[5] We agree with ESA. In our view, the Board's conclusion that a separate, "communication" tariff applied to downloads of musical works violates the principle of technological neutrality, which requires that the *Copyright Act* apply equally between traditional and more technologically advanced forms of the same media: *Robertson v. Thomson Corp.*, [2006] 2 S.C.R. 363, at para. 49. The principle of technological neutrality is reflected in s. 3(1) of the *Act*, which describes a right to produce or reproduce a work "in any material form whatever". In our view, there is no practical difference between buying a durable copy of the work in a store,

receiving a copy in the mail, or downloading an identical copy using the Internet. The Internet is simply a technological taxi that delivers a durable copy of the same work to the end user.

[6] This argument is echoed by David Vaver in his book, *Intellectual Property Law: Copyright, Patents, Trade-marks* (2nd ed. 2011), where he appears to criticize the Board's decision in this particular case:

> In principle, *substitute delivery systems* should compete on their merits: either both or neither should pay. Copyright law should strive for technological neutrality.
>
> . . .
>
> In the past, whether a customer bought a sound recording or video game physically at a store or ordered it by mail made no difference to the copyright holder: it got nothing extra for the clerk's or courier's handover of the record to the customer. Now, because of the telecommunication right, *copyright holders can and do charge extra for electronic delivery of identical content acquired off websites*. [Emphasis added; pp. 172-73.]

[7] ESA's argument is also consistent with this Court's caution in *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, that the balance in copyright between promoting the public interest in the encouragement and dissemination of works and obtaining a just reward for the creator requires recognizing the "limited nature" of creators' rights:

> The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms *it would be as*

> *inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them*. Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it. [Emphasis added; para. 31.]

[8] The traditional balance between authors and users should be preserved in the digital environment: Carys Craig, "Locking Out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32", in Michael Geist, ed., *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (2010), 177, at p. 192.

[9] SOCAN has never been able to charge royalties for copies of video games stored on cartridges or discs, and bought in a store or shipped by mail. Yet it argues that identical copies of the games sold and delivered over the Internet are subject to *both* a fee for reproducing the work *and* a fee for communicating the work. The principle of technological neutrality requires that, absent evidence of Parliamentary intent to the contrary, we interpret the *Copyright Act* in a way that avoids imposing an additional layer of protections and fees based solely on the *method of delivery* of the work to the end user. To do otherwise would effectively impose a gratuitous cost for the use of more efficient, Internet-based technologies.

[10] The Board's misstep is clear from its definition of "download" as "a file containing data . . . the user is meant to keep as his own" (para. 13). The Board recognized that downloading is a *copying* exercise that creates an exact, durable copy

of the digital file on the user's computer, identical to copies purchased in stores or through the mail. Nevertheless, it concluded that delivering a copy through the Internet was subject to two fees — one for reproduction and one for communication — while delivering a copy through stores or mail was subject only to reproduction fees. In coming to this conclusion, the Board ignored the principle of technological neutrality.

[11] Justice Rothstein argues (at para. 126) that the Board can avoid such "double-dipping" by copyright owners by adjusting the two fees in a way that "divides the pie" between the collective societies administering reproduction rights, on the one hand, and communication rights, on the other. However, this seems to us to undermine Parliament's purpose in creating the collective societies in the first place, namely to efficiently manage and administer different copyrights under the *Act*. This inefficiency harms both end users and copyright owners:

> When a single economic activity implicates more than one type of right and each type is administered by a separate collective, the multiplicity of licences required can lead to inefficiency. . . . The result is that the total price the user has to pay for all complements is too high . . . .
>
> . . .
>
> . . . the fragmentation of licences required for single activities among several monopolist-collectives generates inefficiencies, from which copyright owners as a whole also suffer . . . .
>
> (Ariel Katz, "Commentary: Is Collective Administration of Copyrights Justified by the Economic Literature?", in Marcel Boyer, Michael Trebilcock and David Vaver, eds., *Competition Policy and Intellectual Property* (2009), 449, at pp. 461-63)

[12] In our view, the Board improperly concluded that the Internet delivery of copies of video games containing musical works amounts to "communicating" the works to the public. This view is evidenced by the legislative history of the *Copyright Act*, which demonstrates that the right to "communicate" is historically connected to the right to perform a work and not the right to reproduce permanent copies of the work.

[13] As this Court held in *Bishop v. Stevens*, [1990] 2 S.C.R. 467, at pp. 473-74, the 1921 Canadian *Copyright Act* was based on, and designed to implement, the following provisions of the 1886 *Berne Convention for the Protection of Literary and Artistic Works*, as revised in the 1908 Berlin Revision:

> Article 11
>
> The stipulations of the present Convention shall apply to the *public representation* of dramatic or dramatico-musical works and to the *public performance* of musical works, whether such works be published or not.
>
> . . .
>
> Article 13
>
> The authors of musical works shall have the exclusive right of authorizing (1) the adaptation of those works to instruments which can *reproduce* them mechanically; (2) the *public performance* of the said works by means of these instruments.
>
> . . .
>
> Article 14
>
> Authors of literary, scientific or artistic works shall have *the exclusive right of authorizing the reproduction* and public representation of their works by cinematography.

[14] These articles were reflected in the introductory paragraph to s. 3(1) of the *Copyright Act, 1921*, S.C. 1921, c. 24, which granted

> the sole right to *produce or reproduce* the work or any substantial part thereof in any material form whatsoever, *to perform*, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof; . . .

[15] In the 1921 *Act*, "performance" was defined in s. 2(*q*) as

> any acoustic representation of a work and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument;

[16] The right to perform historically presupposed a live audience that would be present at the site where the performance took place. With the advent of radio broadcasting, however, a debate emerged about how this new technology should be treated under copyright law, reminiscent of the current debate over Internet technologies. The international consensus was that radio broadcasting should be treated as an extension of the existing performance right, in order to cover distant audiences: Paul Goldstein and P. Bernt Hugenholtz, *International Copyright: Principles, Law, and Practice* (2nd ed. 2010), at §9.1.4.3; Pierre-Emmanuel Moyse, *Le droit de distribution: analyse historique et comparative en droit d'auteur* (2007), at pp. 309-10. The Rome Revision (1928) of the *Berne Convention* therefore extended the Article 11 performance right. The new Article 11*bis* conferred on

authors the "exclusive right of authorizing the *communication* of their works to the public *by radiocommunication*".

[17] Canada acceded to the amended *Berne Convention* in 1928, and enacted s. 3(1)(*f*) of the *Copyright Act* in 1931 to incorporate the new Article 11*bis*:

> (*f*) In case of any literary, dramatic, musical or artistic work, to *communicate* such work by *radio communication*.
>
> (*Copyright Amendment Act, 1931,* S.C. 1931, c. 8, s. 3)

[18] At the same time, the 1931 *Copyright Amendment Act* amended the definition of "performance" to accommodate this new concept of performances at a distance:

> "performance" means any acoustic representation of a work . . . including a representation made by means of any mechanical instrument *or by radio communication*. [s. 2(3)]

[19] Like a performance, communicating a work by radio communication (i.e., a radio broadcast) under s. 3(1)(*f*) involved an "acoustic representation" of a work. Also like a performance, communication under s. 3(1)(*f*) did *not* contemplate the delivery of permanent copies of the work, since such a delivery was not possible through the means of Hertzian radio waves.

[20] This interpretation of the original s. 3(1)(*f*) is supported by the legislative debates. In explaining the purpose of this provision to Parliament, the Minister responsible for the amendments, C. H. Cahan, stated that s. 3(1)(*f*) was intended to bring the *Copyright Act* into conformity with the Rome Revision of the *Berne Convention* (*House of Commons Debates*, vol. 1, 2nd Sess., 17th Parl., April 23, 1931, at pp. 899-900), and that "radio communication" was a form of performance:

> In England, *the courts have decided that radio communication comes within the meaning of the word performance*; but in order to make it clear that the author's rights include not only the right of performance by acoustic representation and so forth, but also by radio communication, we have added those words "or by radio communication" to the present definition of performances as contained in the act. . . . I am simply adding the words "or by radio communication" to make it clear that *in respect of radio communication the author has exactly the same rights as he has in relation to other performances of his work*. [Emphasis added.]
>
> (vol. 3, June 8, 1931, at p. 2399)

[21] This was also the interpretation of the original s. 3(1)(*f*) by this Court in *Composers, Authors and Publishers Assoc. of Canada Ltd. v. CTV Television Network Ltd.*, [1968] S.C.R. 676. The Court held that signals transmitted from CTV to its affiliates did not communicate "musical works" — at the time defined as "reduced to writing" — but instead communicated a "performance" of the works. In *obiter*, the Court went on to hold that Article 11*bis* of the *Rome Convention*, on which s. 3(1)(*f*) was based, was intended to cover public performances by radio broadcasting (pp. 680-82). Moreover, it held that "communication" is "apt to include

performances in its meaning" (p. 681). As a result, the Court concluded that s. 3(1)(*f*) must include the exclusive right of public performance by radio broadcasting.

[22] After 1931, there were no changes to s. 3(1)(*f*) until 1988. In 1988, s. 3(1)(*f*) was amended to read as follows:

> (*f*) in the case of any literary, dramatic, musical or artistic work, to communicate the work *to the public* by *telecommunication*. . . .
>
> (*Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988, c. 65, s. 62)

[23] SOCAN argues that the 1988 amendment from "radio communication" to "telecommunication" demonstrates Parliament's intent to remove *all* reference in s. 3(1)(*f*) to conventional performance or broadcasting activities, and to expand the communication right to technologies that involve transmitting data in a way that gives end users a permanent copy of the work.

[24] With respect, we disagree. The 1988 amendments to the *Copyright Act* found at ss. 61 to 65 of the *Canada-United States Free Trade Agreement Implementation Act*, were enacted in order to give effect to Articles 2005 and 2006 of the 1987 *Canada-U.S. Free Trade Agreement* (*CUFTA*): see *Canadian Wireless Telecommunications Assn. v. Society of Composers, Authors and Music Publishers of Canada*, 2008 FCA 6, [2008] 3 F.C.R. 539 (*CWTA v. SOCAN*), at para. 27. Before *CUFTA*, Canadian courts had held that "radio communication" under the former s.

3(1)(*f*) was limited to Hertzian radio waves and did *not* extend to communication by co-axial cables: *Canadian Admiral Corp. v. Rediffusion, Inc.*, [1954] Ex. C.R. 382, at p. 410. *CUFTA*, however, required Canada to compensate copyright owners for the retransmission of television signals that were sent over cable lines. The amendments were therefore designed to ensure that cable companies, and not just radio broadcasters, would also be captured under s. 3(1)(*f*): John S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs* (4th ed. (loose-leaf)), at pp. 21-86, 21-87 and 29-1.

[25] In this context, the replacement of the words "radio communication" with "telecommunication" should be understood as merely expanding the *means of communicating* a work — that is, from radio waves ("by radio communication") to cable and other future technologies ("to the public by telecommunication"). In our view, by substituting the word "telecommunication" in 1988, Parliament did not intend to change the fundamental nature of the communication right, which had for over 50 years been concerned with performance-based activities. Instead, Parliament only changed the *means of transmitting* a communication. The word "communicate" itself was never altered.

[26] Parliament's addition of the phrase "to the public" to s. 3(1)(*f*) also supports this interpretation of the 1988 amendments. Before 1988, there was no doubt that all communications were "to the public", as the nature of a broadcast through radio waves was necessarily public. The term "telecommunication",

however, risked introducing ambiguity into the *Act*, as telecommunication could also include private communications. By adding the phrase "to the public" with the term "telecommunication" in 1988, Parliament clarified its intent to maintain the communication right as a category of performance right.

[27] Therefore, we agree with Rothstein J. (at para. 98) that there is a "historic relationship" between the performance right and the communication right in the *Copyright Act*, but we disagree with his conclusion that Parliament intended to sever this relationship based on the 1988 amendments. In our view, this historical connection between communication and performance still exists today. With respect, the Board ignored this connection when it concluded that transmitting a download of a musical work over the Internet could amount to a "communication".

[28] The Board's conclusion was based in part on its erroneous view that a "download" is indistinguishable from a "stream". Although a download and a stream are both "transmissions" in technical terms (they both use "data packet technology"), they are not both "communications" for purposes of the *Copyright Act*. This is clear from the Board's definition of a stream as "a transmission of data that allows the user to listen or view the content at the time of transmission and that is not meant to be reproduced" (para. 15). Unlike a download, the experience of a stream is much more akin to a broadcast or performance.

[29] The Board also appears to have relied on Binnie J.'s observation in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427 (*SOCAN v. CAIP*), that a work has necessarily been "communicated" when, "[a]t the end of the transmission, the end user has a musical work in his or her possession that was not there before" (at para. 45), and on *CWTA v. SOCAN*, where Sharlow J.A. evoked *SOCAN v. CAIP* to hold that "[t]he word 'communication' connotes the passing of information from one person to another" (paras. 19-20).

[30] As noted by Justice Rothstein, however, the comments in *SOCAN v. CAIP* were *obiter*, as the meaning of "communicate" in s. 3(1)(*f*) was not directly in issue in that case. Neither *SOCAN v. CAIP* nor *CWTA v. SOCAN* examined the legislative history behind the term "communicate" or the connection between communication and performance.

[31] For the same reason, we cannot agree with Justice Rothstein's dependence on the dictionary definition of the word "communicate" to mean *any* transmission of data, including a download which provides the user with a durable copy of the work. Dictionaries, while often offering a useful range of definitional options, are of little assistance in identifying what a word means when it is orphaned from its context: Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 27; see also *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at para. 67 (*per* Gonthier J.). In our view, using dictionary definitions in this

case has the effect of ignoring a solid line of legislative history connecting the term "communicate" to performance-based activities.

[32] The Board's interpretation of s. 3(1)(*f*) also ignores the historic distinction between performance-based rights and reproduction-based rights, improperly extending the term "communicate" to capture the Internet delivery of permanent copies of a work. In our view, this interpretation goes far beyond what the term "communicate" was ever intended to capture.

[33] In enacting s. 3(1), Parliament distinguished between rights of reproduction and performance:

> **3.** (1) For the purposes of this Act, "copyright" means the sole right to *produce or reproduce* the work or any substantial part thereof in any material form whatsoever, *to perform*, or in the case of a lecture to deliver, the work or any substantial part thereof *in public* . . . .
>
> (*Copyright Act, 1921*)

[34] This distinction between reproduction and performance in s. 3(1) has been maintained all the way through to the current version of the *Act*.

[35] Performing a work is fundamentally different than reproducing it. As this Court concluded in *Bishop v. Stevens*, a performance is impermanent in nature, and does not leave the viewer or listener with a durable copy of the work:

> The right to perform (including radio broadcast), and the right to make a recording, are separately enumerated in s. 3(1). They are distinct rights in theory and in practice . . . . [T]he rights to perform and to record a work are considered sufficiently distinct that they are generally assigned separately, and administered by different entities.
>
> . . .
>
> . . . A *performance is by its very nature fleeting, transient, impermanent*. When it is over, only the memory remains. . . . Furthermore, *no imitation of a performance can be a precise copy*. *A recording, on the other hand, is permanent*. *It may be copied easily, privately, and precisely*. *Once a work has been recorded, the recording takes on a life of its own*. . . . Once the composer has made or authorized a recording of his work, he has irrevocably given up much of his control over its presentation to the public. *These are the reasons why the rights to perform and to record are recognized as distinct in the Act, and why in practice a composer may wish to authorize performances but not recordings of his work*. [Emphasis added; pp. 477-79.]

[36] In *Bishop*, the alleged infringer argued that the "right to broadcast" a musical work under s. 3(1)(*f*) included the incidental right to make an ephemeral copy for the sole purpose of facilitating the broadcast. This Court ultimately concluded that the right to perform — including the right to communicate — could not be understood to include the right to reproduce, since performing and communicating are different in nature from making a recording.

[37] Even though *Bishop* interpreted the pre-1988 version of the *Copyright Act* (before the "telecommunication" amendment), the distinction between performance-based and reproduction-based rights established in s. 3(1) is evidenced in the provisions of the current *Act*. For example, in s. 2.2(1), the term "publication" *includes* "making copies", but expressly *excludes* "the performance in public, or the

communication to the public by telecommunication" of a work. Similarly, the educational institutions exception in s. 29.4(2) refers to the right to "reproduce" and the right to "communicate by telecommunication to the public" as distinct rights. The same is true of s. 15(1), which categorizes neighbouring rights under the *Act* into two categories: the right to "communicate" and "perform" a performance, and the right to "reproduce" a fixation of the performance.

[38] The distinction between performance and communication rights on the one hand and reproduction rights on the other is also evident in the collective administration of copyright tariffs under the *Copyright Act*. In 1993, SOCAN — a performing rights society — was put in charge of administering the communication right in s. 3(1)(*f*) in relation to musical works: S.C. 1993, c. 23, s. 3: see McKeown, at pp. 3-12, 27-2 and 27-3. These provisions are contained in a section of the *Act* entitled "Collective Administration of *Performing Rights and of Communication Rights*": ss. 67 to 68.2 (S.C. 1997, c. 24, s. 45): see McKeown, at p. 26-3. Even the Copyright Board itself categorizes its decisions relating to musical works into two categories: "Public Performance of Music" and "Reproduction of Musical Works": http://www.cb-cda.gc.ca/decisions/index-e.html.

[39] Therefore, the term "communicate" in s. 3(1)(*f*), which has historically been linked to the right to perform, should not be transformed by the use of the word "telecommunication" in a way that would capture activities akin to reproduction. Such transformation would result in abandoning the traditional distinction in the *Act*

between performance-based rights and rights of reproduction. There is no evidence either in 1988 or in subsequent amendments to the *Act* that Parliament intended such abandonment.

[40] SOCAN submits that the distinction between reproduction and performance rights in *Bishop* actually supports its view that downloading a musical work over the Internet can attract two tariffs. Since reproduction and performance-based rights are two separate, independent rights, copyright owners should be entitled to a separate fee under each right. This is based on the Court's reliance in *Bishop*, at p. 477, on a quote from *Ash v. Hutchinson & Co. (Publishers), Ltd.*, [1936] 2 All E.R. 1496 (C.A.), at p. 1507, *per* Greene L.J.:

> Under the Copyright Act, 1911 [on which the Canadian *Act* was based], . . . the rights of the owner of copyright are set out. A number of acts are specified, the sole right to do which is conferred on the owner of the copyright. The right to do each of these acts is, in my judgment, a separate statutory right, *and anyone who without the consent of the owner of the copyright does any of these acts commits a tort; if he does two of them, he commits two torts, and so on*. [Emphasis added.]

[41] In our view, the Court in *Bishop* merely used this quote to emphasize that the rights enumerated in s. 3(1) are distinct. *Bishop* does *not* stand for the proposition that a *single* activity (i.e., a download) can violate two separate rights at the same time. This is clear from the quote in *Ash v. Hutchinson*, which refers to "two acts". In *Bishop*, for example, there were two activities: 1) the making of an ephemeral copy of the musical work in order to effect a broadcast, and 2) the actual broadcast of the

work itself. In this case, however, there is only one activity at issue: downloading a copy of a video game containing musical works.

[42] Nor is the communication right in s. 3(1)(*f*) a *sui generis* right in addition to the general rights described in s. 3(1). The introductory paragraph defines what constitutes "copyright". It states that copyright "means" the sole right to produce or reproduce a work in any material form, to perform a work in public, or to publish an unpublished work. This definition of "copyright" is exhaustive, as the term "means" confines its scope. The paragraph concludes by stating that copyright "includes" several other rights, set out in subsections (*a*) through (*i*). As a result, the rights in the introductory paragraph provide the basic structure of copyright. The enumerated rights listed in the subsequent subparagraphs are simply illustrative: Sunny Handa, *Copyright Law in Canada* (2002), at p. 195; see also *Apple Computer Inc. v. Mackintosh Computers Ltd.*, [1987] 1 F.C. 173 (T.D.), at p. 197. The rental rights in s. 3(1)(*i*) referred to by Justice Rothstein, for example, can fit comfortably into the general category of reproduction rights.

[43] In our view, therefore, the Board's conclusion that the Internet delivery of a permanent copy of a video game containing musical works amounted to a "communication" under s. 3(1)(*f*) should be set aside.

[44] We would therefore allow the appeal with costs.

The reasons of LeBel, Fish, Rothstein and Cromwell JJ. were delivered by

[45] ROTHSTEIN J. (dissenting) — Under the *Copyright Act*, R.S.C. 1985, c. C-42 (the "Act"), s. 3(1)(*f*), a copyright holder has the sole right to "communicate [his or her] work to the public by telecommunication" and to authorize any such communication. The question in this case is whether a musical work is "communicate[d] . . . by telecommunication" when a file containing the musical work is downloaded from the Internet.

[46] When files containing copyright protected works are downloaded, copyright holders are entitled to compensation for the reproduction of their works. This appeal concerns musical works contained in video games which may be downloaded from the Internet. The appellants, the Entertainment Software Association and the Entertainment Software Association of Canada (collectively, the "ESA"), argue that works transmitted over the Internet by downloading should not give rise to further compensation under s. 3(1)(*f*). The respondent, Society of Composers, Authors and Music Publishers of Canada ("SOCAN"), says that reproduction and communication are different and independent rights under the Act and that copyright holders are entitled to remuneration for the communication of their works through Internet downloading.

[47] My colleagues Abella and Moldaver JJ. part company with me on some fundamental principles of copyright law. In my view, precedents of this Court have

established the principles that must govern the analysis in this appeal. Copyright is a creature of statute (*Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336, at para. 5; *Compo Co. v. Blue Crest Music Inc.*, [1980] 1 S.C.R. 357, at p. 373; *Bishop v. Stevens*, [1990] 2 S.C.R. 467, at p. 477). Copyright is comprised of a bundle of independent statutory rights (*Bishop v. Stevens*, at p. 477; *Compo Co. v. Blue Crest Music Inc.*, at p. 373). Courts must give effect to these independent rights as provided by Parliament. While courts must bear in mind that the *Copyright Act* "is . . . a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator", which balance requires "not only . . . recognizing the creator's rights but in giving due weight to their limited nature" (*Théberge*, at paras. 30-31), courts must still respect the language chosen by Parliament — not override it.

[48] In my respectful opinion, my colleagues' approach sweeps away these well-established principles. They start from the proposition that once the reproduction rights in the musical work contained in a video game are negotiated, "the owner of the copyright in the musical work has no further rights when the game is sold" (Abella and Moldaver JJ., at para. 1). They support their argument by reference to the principle of technological neutrality: because the production and sale of a *hard copy* of the video game would only engage the right to reproduce the musical works it contains, the sale of a *digital copy* of the game, by transmission over the Internet, must also not trigger protected rights other than the right to reproduce. For my colleagues, the "Internet is simply a technological taxi that delivers a durable

copy of the same work to the end user" (para. 5). They say that the question in this appeal is "whether the rights are nonetheless revived when the work is sold over the Internet instead of in a store" (para. 1).

[49] Generally, a technologically neutral copyright law is desirable. However, technological neutrality is not a statutory requirement capable of overriding the language of the Act and barring the application of the different protected rights provided by Parliament. My colleagues' basic propositions pre-empt the application of other rights of the copyright holder to this set of facts and divest these rights of their independent content. There is no need to revive rights that have never been exhausted.

[50] In many respects, the Internet may well be described as a technological taxi; but taxis need not give free rides.

I. Facts and Procedural History

[51] On judicial review, the Federal Court of Appeal ("FCA") upheld the determination by the Copyright Board that the download of a file containing a musical work is a "communicat[ion] . . . to the public by telecommunication" within the meaning of s. 3(1)(*f*) of the Act, entitling SOCAN members to compensation in accordance with an approved tariff. The ESA appeals to this Court from the decision of the FCA.

[52] The ESA is a coalition of video game publishers and distributors. Video games are entertainment software consisting of millions of lines of software code. When installed and run on a computer, the software generates audiovisual effects in response to commands by the user. The audio component may include musical works as part of the game's soundtrack.

[53] Video games can be sold over the Internet. Customers navigate to the website of an online game provider where the video game program is offered for sale, pay the purchase price and download the program. The site transmits a permanent copy of the software to the customer's hard drive. This mode of delivery of the purchased program competes with the traditional model, where the video game is stored on a CD or in a cartridge, requiring the customer to buy it at a store.

[54] The customer must then install the program, either downloaded from the Internet or contained on the CD, on his or her computer. Only after the installation is complete may the customer run the game, at which point, the audio and the visual effects of the software become perceptible. The game and its audio and visual effects are not perceptible during the transmission of the file from the vendor to the video game user, a fact that is said to be of crucial significance in this case.

[55] It is standard practice within the video game publishing industry to negotiate clearance of copyright for the *reproduction* of the musical works incorporated in the games prior to their publication. There is no dispute that once

reproduction rights are cleared, the owner of copyright in the musical work would have no further rights when the video game is sold to a customer at a bricks-and-mortar store or if a CD containing the game is shipped through regular mail.

[56] SOCAN is a collective society of composers, authors and publishers of music. It administers the right to perform in public and the right to communicate to the public by telecommunication the works covered by its members' copyrights. It files proposed tariffs with the Board and collects royalties, as set by the Board, on behalf of its members.

[57] These proceedings involve proposed tariffs first filed by SOCAN in 1995 for various uses of musical works constituting, in SOCAN's view, copyright protected communication of musical works to the public over the Internet. There were objections to the filed proposals. In 1996, the Board decided to deal with legal issues separately from the determination of the actual tariffs. The first step was to "determine which activities on the Internet, if any, constitute a protected use [of SOCAN's repertoire of music] targeted in the tariff" (*SOCAN Statement of Royalties, Public Performance of Musical Works 1996, 1997, 1998 (Tariff 22, Internet) (Re)* (1999), 1 C.P.R. (4th) 417 ("Tariff 22 decision"), at p. 424).

[58] On October 27, 1999 (the Tariff 22 decision), the Board issued what it termed its Phase I decision, dealing with legal and jurisdictional issues. The Tariff 22 decision was ultimately appealed to this Court, but not on the issue of communication

to the public by telecommunication now before this Court. However, in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427 ("*SOCAN v. CAIP*"), at para. 30, Binnie J. noted the Board's conclusion that "an Internet communication occurs at the time the work is transmitted from the host server to the computer of the end user, regardless of whether it is played or viewed at that time, or later, or never" (see Tariff 22 decision, at p. 450). He found that this particular issue was "no longer contested".

[59] In 2005, SOCAN modified its proposed Tariff to divide it into seven categories, each dealing with a different Internet-based activity. The sixth category applies to "Game Sites" and covers "communications of musical works as part of games, including gambling, from Sites or Services that consist predominantly of games . . ." (*Statement of Proposed Royalties to Be Collected by SOCAN for the Public Performance or the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-Musical Works* (2005), 139 Can. Gaz. I (Supp.), at p. 18). When the Board proceeded to Phase II of the process to establish a tariff for the communication of musical works over the Internet for the years 1996 to 2006, the ESA argued that since the users can neither see, nor hear game software while it is being downloaded, "[t]he transmission solely involves a distribution of a copy of a work that is identical to copies available on discs in stores. The transmission [is] thus not a 'communication to the public'" (A.F., at para. 20 (emphasis in original)).

[60] The Board's Phase II determination was rendered in two decisions. In the first, issued on October 18, 2007 (61 C.P.R. (4th) 353) (the "Tariff 22.A decision"), the Board rejected the ESA's argument and confirmed its prior conclusion that a download is a "communication". While the Tariff 22.A decision dealt with the details of the tariffs applicable to uses of music by online music services that offer catalogues of songs for downloading upon payment of the purchase price, the Board held that the legal principles established in that decision would also apply to other uses of music on the Internet. The Board's second Phase II decision, issued on October 24, 2008, *SOCAN Statement of Royalties, Internet — Other Uses of Music, 1996-2006 (Tariffs 22.B-22.G)* (2008), 70 C.P.R. (4th) 81 (the "Tariff 22.B-G decision"), established the details of the tariffs applicable to other uses of music on the Internet, including use by game sites at issue in this appeal (Tariff 22.G).

[61] A number of objectors applied to the FCA for judicial review on different issues, which the FCA dealt with in separate decisions. *Bell Canada v. Society of Composers, Authors and Music Publishers of Canada*, 2010 FCA 220, 409 N.R. 102 ("*Bell Canada*"), was an appeal by online music services contesting the Board's determination in the Tariff 22.A decision that a download of a music file from the online music service's website by the end consumer is a "communication to the public". The FCA held that the Board's determination was a reasonable interpretation of s. 3(1)(*f*) of the Act. The FCA considered that *SOCAN v. CAIP* had fully answered the question of what constitutes a "communication" and accordingly confirmed that a download is a communication (para. 5).

[62] As stated above, the ESA's application for judicial review of the Tariff 22.B-G decision was dismissed by the FCA. On the issue of whether downloads of video games are communications to the public of the musical works they contain, the FCA referred to its reasons in *Bell Canada*, that is, that a download of a file containing a musical work is a communication to the public by telecommunication (2010 FCA 221, 406 N.R. 288, at para. 13).

II. Issue

[63] The issue in this appeal is whether the transmission of a video game through an Internet download is a "communication" to the public within the meaning of s. 3(1)(*f*) of the Act. If it is, SOCAN is entitled to royalties for the communication of the included musical works.

III. Analysis

A. *Overview*

[64] The ESA submits that on reading s. 3(1)(*f*) in its entirety, considering it in the context of the entire Act and in light of its legislative history, the provision "creates an exclusive right of public performance (or representation for works that are not publicly performed) delivered by means of telecommunication". They say that to "communicate" must mean "to cause information in humanly perceivable form to be

imparted to another person for immediate listening or viewing" (A.F., at para. 33 (emphasis added)). The communication right was never meant to cover situations where durable copies of the copyrighted works are made available, which are already covered by the *reproduction right* and for which copyright holders are already compensated. Since the users can *neither see nor hear* game software while it is being downloaded, the transmission from the online game provider to the user does not constitute a communication to the public. The ESA further argues that the Act uses both the terms "communicate" and "transmit" and that the two cannot have the same meaning. In their submission, the act of a game being downloaded by a user constitutes a transmission and not a communication. The ESA also relies on American jurisprudence and raises some "unintended consequences" of the decisions below.

[65] In this appeal, the ESA does not advance arguments on whether, should the transmissions be found to be "communications" within the meaning of s. 3(1)(*f*), such transmissions would be communications "*to the public*"; this issue is dealt with in the companion case *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283.

[66] SOCAN says that the decisions of the Board and of the FCA were correctly decided. In SOCAN's view, to communicate means simply "to transmit, impart, make known or convey information" (R.F., at para. 32 (emphasis deleted)) and the ESA's submissions would artificially restrict the ordinary meaning of the

word. Further, SOCAN says that the ESA's argument ignores the basic principle of copyright law that the copyrights granted in s. 3(1) for reproduction, performance and communication of a work are separate and distinct rights (R.F., at para. 9).

B. *Standard of Review*

[67] For the reasons explained in *Rogers*, at paras. 10-16, the applicable standard of review is correctness.

C. *Whether Transmitting Musical Works Through Downloads Over the Internet Is "Communicating"*

(1) Section 3(1)(*f*) and Section 2

[68] This appeal requires defining the right to "communicate . . . by telecommunication" in the *Copyright Act*. The ESA urges a definition of "communicate . . . by telecommunication" as "to cause information in humanly perceivable form to be imparted to another person for immediate listening or viewing" (A.F., at para. 33 (emphasis added)).

[69] The exclusive right of the copyright holder to "communicate . . . to the public by telecommunication" is provided in s. 3(1)(*f*) of the Act:

> **3.** (1) For the purposes of this Act, "copyright", in relation to a work, means the sole right to produce or reproduce the work or any

> substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right
>
> . . .
>
> (*f*) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,
>
> . . .
>
> and to authorize any such acts.

[70] Section 2 of the Act defines "telecommunication":

> "telecommunication" means any transmission of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system;

It is not disputed that transmissions in the digital environment are "telecommunications".

(2) The Approach to Statutory Interpretation

[71] The *Copyright Act* must be interpreted in accordance with the general rules of statutory interpretation: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, at para. 9, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87).

(3) The Precedents

[72] The word "communicate" is not defined in the Act. I therefore start with the dictionary meaning of the word. The *Oxford English Dictionary* (online) defines the verb "communicate" as "[t]o impart (information, knowledge, or the like) . . .; to impart the knowledge or idea of (something), to inform a person of; to convey, express; to give an impression of, put across". The *Shorter Oxford English Dictionary on Historical Principles* (6th ed. 2007), vol. 1, at p. 466, includes the following definition: to "[i]mpart, transmit". The *Merriam-Webster's Collegiate Dictionary* entry is defined as "to convey knowledge of or information about: make known" ((11th ed. 2003), at p. 251). There is no suggestion in these definitions that "to communicate" cannot mean "to transmit", and indeed, the *Shorter Oxford English Dictionary* expressly includes in the definition of "communicate", "transmit".

[73] Although the question was not directly in issue in that case (see para. 30), Binnie J. in *SOCAN v. CAIP* endorsed the ordinary definition of "communicate" as the appropriate interpretation of the word in s. 3(1)(*f*) of the *Copyright Act*:

> The Board ruled that a telecommunication occurs when the music is transmitted from the host server to the end user. I agree with this.
>
> . . .
>
> The word "communicate" is an ordinary English word that means to "impart" or "transmit" (*Shorter Oxford English Dictionary on Historical Principles* (5th ed. 2002), vol. 1, at p. 463). [paras. 42 and 46]

[74] Since *SOCAN v. CAIP*, the FCA has had the occasion to deal directly with the meaning of the right to "communicate" under s. 3(1)(*f*) in *Canadian Wireless Telecommunications Assn. v. Society of Composers, Authors and Music Publishers of Canada*, 2008 FCA 6, [2008] 3 F.C.R. 539, leave to appeal refused, [2008] 2 S.C.R. vi ("*CWTA*"). The question in that case, answered in the affirmative, was whether a person communicates to the public the musical works contained in ringtones when members of the public download the ringtones for their mobile phones. Sharlow J.A. rejected the argument that a transmission is not the same thing as a communication because "'communication' must be understood to include only a transmission that is intended to be heard or perceived by the recipient simultaneously with or immediately upon the transmission" (para. 18). She wrote:

> In my view, the applicants are proposing a meaning of the word "communication" that is too narrow. The word "communication" connotes the passing of information from one person to another. A musical ringtone is information in the form of a digital audio file that is capable of being communicated. The normal mode of communicating a digital audio file is to transmit it. The wireless transmission of a musical ringtone to a cellphone is a communication, whether the owner of the cellphone accesses it immediately in order to hear the music, or at some later time. The fact that the technology used for the transmission does not permit the cellphone owner to listen to the music during the transmission does not mean that there is no communication. In my view, in the context of a wireless transmission, it is the receipt of the transmission that completes the communication.
>
> This conclusion accords with the [*SOCAN v. CAIP*] case (cited above). In that case Justice Binnie, writing for the majority, said that the transmission of information over the Internet is a communication once the information is received (see paragraph 45). . . . [I]t is undoubtedly a true statement. [Emphasis added; paras. 19-20.]

(4) The ESA's Arguments for Not Following *SOCAN v. CAIP* and *CWTA*

[75] The ESA argues that *SOCAN v. CAIP* (to the extent that it addressed the issue) and *CWTA* should not be followed.

(a) *"Communicate" and "Transmit"*

[76] The ESA first argues that there must be some difference between the words "communicate" and "transmit". The two words are not used interchangeably in the Act and if Parliament used both words, it intended them to have different meanings. On this basis, the ESA submits that to "communicate to the public" means "more than the [mere] transmission of a file from one point to another point without that file being seen or heard" (A.F., at para. 73). Therefore, a download is not a communication within the meaning of s. 3(1)(*f*), but a mere transmission.

[77] I do not find this argument compelling. Parliament is presumed to use words in their ordinary meaning: R. Sullivan, *Statutory Interpretation* (2nd ed. 2007), at p. 49. As noted above, to "communicate" means to "impart" or "transmit". The *Oxford English Dictionary* (online) defines "transmit" as: "[t]o cause (a thing) to pass, go, or be conveyed to another person, place, or thing; to send across an intervening space; to convey, transfer; . . . [t]o convey or communicate (usually something immaterial) *to* another or others" (emphasis added); and, in a more technical sense: "[t]o send out electric signals or electromagnetic waves

corresponding to (an image, a programme, etc.)." The definitions of "transmit" in the *Merriam-Webster's Collegiate Dictionary* are:

> to send or convey from one person or place to another . . .
>
> to send out (a signal) either by radio waves or over a wire.

I see no reason why, having regard to context, the meaning of both words cannot overlap.

[78] As set out above, s. 2 of the Act defines "telecommunication" as "any transmission of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system". This definition equates the term "telecommunication" with the transmission of certain subject matter by electromagnetic system. The prefix "tele" simply means "to a distance". So, "telecommunication" means communicating to a distance by the means specified in the Act. It would seem odd that "telecommunication" and transmission by electromagnetic system are interchangeable in the Act but that "to communicate" and "to transmit" would not be. The more obvious interpretation would be that for the purposes of s. 3(1)(*f*) of the Act, the exclusive right of the copyright holder to communicate works to the public by telecommunication is simply to transmit those works to the public by electromagnetic system, including the Internet.

[79] The above definitions of "communicate" and "transmit" and the context in which the words are used in the Act do not support the ESA's conclusion that to "communicate" in s. 3(1)(*f*) must necessarily mean to transmit information in a humanly perceptible form for *immediate* perceiving and listening. Even accepting that to communicate means to impart an idea, there is no requirement that the idea be perceived and heard *immediately*.

[80] The ESA supports its argument that the words "transmit" and "communicate" must have different meanings primarily by reference to s. 2.4(1)(*c*). Section 2.4(1)(*c*) provides:

> **2.4** (1) For the purposes of communication to the public by telecommunication,
>
> . . .
>
> (*c*) where a person, as part of
>
> (i) a network, within the meaning of the *Broadcasting Act*, whose operations result in the communication of works or other subject-matter to the public, or
>
> (ii) any programming undertaking whose operations result in the communication of works or other subject-matter to the public,
>
> transmits by telecommunication a work or other subject-matter that is communicated to the public by another person who is not a retransmitter of a signal within the meaning of subsection 31(1), the transmission and communication of that work or other subject-matter by those persons constitute a single communication to the public for which those persons are jointly and severally liable.

[81] The ESA argues that the words "transmit" and "transmission" appear twice and the word "communicate" five times, and that this means that they must have different meanings. It says that transmitting is merely delivery or receipt of information or data being conveyed; that the term "communicate" pertains to what happens after transmission; and that this implies that the difference is that a transmission is not the conveyance of information in a humanly perceivable form. As a result, a transmission does not implicate s. 3(1)(*f*), because s. 3(1)(*f*) uses the term communicate which, by contrast, does imply conveyance in humanly perceivable form. Therefore, since the communication only occurs after the transmission, a download does not give rise to any entitlement under s. 3(1)(*f*).

[82] This argument ignores the context and purpose of s. 2.4(1)(*c*). This section was introduced in 1988 in order to reverse the holding in *Composers, Authors and Publishers Assoc. of Canada Ltd. v. CTV Television Network Ltd.*, [1968] S.C.R. 676 ("*CAPAC*"), that CTV's transmissions of programs to its affiliated stations, for further broadcasting to the public by the affiliated stations, did not engage the right to communicate to the public in s. 3(1)(*f*), because such transmissions remained within the private realm (see J. S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs* (4th ed. (loose-leaf)), at p. 21-90). In the context of s. 2.4(1)(*c*), a "transmission" describes conveying works within a network or programming undertaking before the work is conveyed to the public, while a "communication" is the conveyance of the work "to the public" by another actor within the network or programming undertaking. Without s. 2.4(1)(*c*), only the latter act — the

communication to the public — would engage s. 3(1)(*f*); but a private transmission between affiliates would remain outside of copyright protection. The effect of s. 2.4(1)(*c*), where it applies, is to make the transmission and the communication a single act of communication to the public, so that both the person who transmits the work and the person who communicates the work to the public are jointly and severally liable for the act of communication to the public.

[83] All that can be teased out of s. 2.4(1)(*c*) is that "communication to the public" is the phrase used to designate instances where copyright protection is engaged, and not that "communication" means a conveyance of information in a humanly perceivable form. On the other hand, "transmit" or "transmission" are terms designating situations that do not engage copyright protection under s. 3(1)(*f*). I agree with the ESA that s. 2.4(1)(*c*) suggests that under the Act, the words "communicate" and "transmit" are not used interchangeably. But the provision does not suggest that the words refer to different types of conveyances. Rather, the distinction is that the words are used in conjunction with different types of recipient and different legal significance. Unless the transmission is combined with a communication to the public, s. 3(1)(*f*) would not attach to the transmission. When the transmission is ultimately a communication to the public, s. 2.4(1)(*c*) provides that the transmission and the communication to the public are a single communication to the public which does attract copyright under s. 3(1)(*f*). Indeed, the word "communicate" is consistently used in conjunction with the words "to the public" throughout the Act. The ESA's separating the word "communicate" from the words "to the public" to

give it an independent meaning different from that of "transmit" is not supported by Parliament's intention in enacting s. 2.4(1)(*c*). The words of s. 2.4(1)(*c*), when read in context, do not support the distinction argued by the ESA.

(b) *The CAPAC Decision*

[84] The ESA relies on this Court's decision in *CAPAC* for the proposition that to communicate means disseminating performances to the public for immediate listening and not merely sending signals that may be perceived later. However, this jurisprudence is of little avail to the ESA.

[85] As noted above, in *CAPAC*, this Court was asked to determine whether the transmission of television programs containing musical works by CTV to its affiliated stations, for broadcasting to the public by the affiliates, constituted "communicating the same by radio communication" (at p. 679), an act protected under s. 3(1)(*f*) as it read at that time.

[86] It should first be noted that *CAPAC* interpreted provisions of the Act that have since been amended in a way relevant to the scope of s. 3(1)(*f*), as will be discussed later. In any event, in *CAPAC*, the *ratio* of the Court's decision was that CTV's transmissions of recorded TV programs containing music to its affiliates were not communications of musical *works* by radio-communication. Rather, as CTV was transmitting *performances* of musical works (e.g., in an ordinary TV program) and

not the musical works themselves (e.g., the sheet of music), s. 3(1)(*f*), which did not apply to performances of musical works, was not engaged. It is important to note that this distinction arose from the definition of "musical work" in the Act as it read at the time and is no longer applicable.

[87] Nonetheless, the ESA relies on some comments of Pigeon J., at pp. 681-82 of *CAPAC*, involving an analysis of Article 11*bis* of the *Berne Convention for the Protection of Literacy and Artistic Works*, 828 U.N.T.S. 221, on which s. 3(1)(*f*) was based. The ESA says that this analysis demonstrates that a communication is more than sending signals, which is all that occurs when works are downloaded as in the case now before the Court. Rather, the ESA says that Article 11*bis* contemplates public performances by broadcasting, in other words, communications in humanly perceptible form. Therefore, a "communicat[ion]" within the meaning of s. 3(1)(*f*) must also be a conveyance of information in humanly perceptible form.

[88] However, the passages of Pigeon J.'s judgment note that "'communication' does not usually mean 'a performance' [but that] it is apt to include performances" (p. 681 (emphasis added)). The necessary implication of these words is that "communication" is a broader term than "performance". Therefore, Pigeon J.'s analysis does not support the ESA's contention that a communication is *necessarily* a performance or *necessarily* more than sending signals.

(5) Whether "Communicating" is "Performing" a Work at a Distance

[89] The ESA further argues, based on the legislative history of s. 3(1)(*f*), that the communication right is only a variation of the performance right, being the right to perform a work to a *distant* audience. Because a performance, in the ESA's submission, is, by nature, a transient event that cannot result in the transmission of a durable copy of the work to the audience, downloads cannot be performances and, therefore, cannot be communications.

[90] I digress briefly to point out that the structure of s. 3(1) implies that the communication right in paragraph (*f*) is a self-standing right independent of the performance right in the introduction of the section. The first lines of the English version of s. 3(1) provide that

> "copyright" . . . means the sole right to produce or reproduce the work . . ., to perform the work . . . in public or . . . to publish the work . . . and includes the sole right . . .

There then follow specific rights listed as paragraphs (*a*) to (*i*). Paragraph (*f*) provides for the sole right to "communicate the work to the public by telecommunication".

[91] While the use of the word "includes" could indicate that the rights listed in paragraphs (*a*) to (*i*) are instances of one of the rights in the opening words of s. 3(1), the context indicates otherwise. Several of the listed rights are clearly outside of the right to produce or reproduce, perform or publish. For example, paragraph (*i*)

provides for the right to rent out a sound recording embodying a musical work. It is difficult to see how this right fits within the right to produce or reproduce, perform or publish the work. Indeed, it would be contrary to *Théberge*, in particular at paras. 42 and 45, where the majority of this Court held that a "reproduction" within the meaning of the Act requires a *multiplication* of copies. All the prerogatives of the copyright holder in s. 3(1) are better considered as separate and distinct rights (*Bishop v. Stevens*, at p. 477, *per* McLachlin J.; *Compo Co. v. Blue Crest Music Inc.*, at p. 373, *per* Estey J.).

[92] This interpretation of the English version of s. 3(1) is consistent with the French version of the text, which states that "*[l]e droit d'auteur sur l'œuvre comporte le droit exclusif de produire ou reproduire . . . l'œuvre, [de la représenter ou de la publier]; ce droit comporte, en outre, [les droits énumérés aux al. a) à i)]*." The use of the phrase "*en outre*" — in addition — indicates paras. (*a*) to (*i*) are in addition to those in the opening words.

[93] Nonetheless, the ESA relies on legislative history in order to confine the scope of the right to communicate to the public to performing a work to a public in a distant place, in a humanly perceptible form, as distinct from a download.

[94] The Canadian Act was based on the *Berne Convention* of 1886, as revised in Berlin in 1908 (see *Bishop v. Stevens*, at p. 473). The revised *Berne Convention* comprised certain public performance rights in certain types of works. However, the

advent of the radio warranted another revision of the Convention. In 1928, Article 11*bis* was added to the text, which guaranteed that:

Article 11*bis*

> (1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the communication of their works to the public by radiocommunication.

[95] In 1931, Canada implemented the revision through the then s. 3(1)(*f*), which provided for a right, "[i]n case of any literary, dramatic, musical or artistic work, to communicate such work by radio communication" (*Copyright Amendment Act, 1931*, S.C. 1931, c. 8) (see *CAPAC*, at pp. 680-81).

[96] Section 3(1)(*f*) was again amended in 1988. According to *Canadian Admiral Corp. v. Rediffusion, Inc.*, [1954] Ex. C.R. 382, the radiocommunication right extended to radio and traditional over-the-air television broadcasting, leaving transmissions by *cable* outside of copyright protection. This technology-specific communication right was amended to the technologically *neutral* right to "communicate . . . to the public by telecommunication" to reflect the obligations entered into by Canada under the *North American Free Trade Agreement*, Can. T.S. 1994 No. 2 (*Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988, c. 65, ss. 61 and 62). The change from radiocommunication to telecommunication and further amendments in 1993 meant that Canadian cable

companies which previously avoided any payment of royalties under the "radiocommunication" right, and other users, were now caught by the Act: S. Handa, *Copyright Law in Canada* (2002), at p. 320; D. Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks* (2nd ed. 2011), at p. 90.

[97] The ESA argues that from the outset, s. 3(1)(*f*), as well as its Berne progenitor Article 11*bis*, were meant to provide *broadcasting* rights the nature of which is "to deliver content [i.e. performances of works] to a public audience for immediate listening or viewing" (A.F., at para. 40). In the ESA's submission, the 1988 amendment from "radiocommunication" to "telecommunication" did not change the fundamental nature of the communication right, that is, that it was concerned with *broadcasting*. The word "communicate" in the English version was not amended, although the means by which the communication may be made were expanded (A.F., at para. 52). The verb "*transmettre*", used in the French version of s. 3(1)(*f*) prior to the 1988 amendments, was replaced by "*communiquer*".

[98] There is little doubt that a historic relationship between the right of public performance and the right to communicate to the public did exist:

> . . . as performance before a live audience was one of the first forms of exploitation to be covered by copyright, it made sense to create a right to provide protection when the performance took place at a distance through the use of Hertzian (radio) waves and the other types of communication technologies invented since then (television, cable, satellite and the internet).

(E. F. Judge and D. J. Gervais, *Intellectual Property: The Law in Canada* (2nd. ed. 2011), at pp. 166-67)

[99] The legislation has evolved to recognize the evolution of technologies. In 1988, the relevance of including transmissions by cable within the communication right had become obvious due to the prevalence of that mode of telecommunication.

[100] Even though the advent of cable may have been the catalyzing force for the 1988 amendment, the amendment did not only cover cable communications, in addition to radiocommunications, but adopted neutral language to encompass evolving but then unknown technological advances. In adopting the neutral language of "telecommunication", Parliament removed all reference to conventional broadcasting. The fact that in 1988 Parliament did not foresee, or could not have foreseen, the way in which modern technologies would evolve should not serve to limit the scope of the communication right when it is applied to one such new technology.

[101] On this basis, the historic relationship of s. 3(1)(*f*) with broadcasting-type industries does not support reading into the Act restrictions which are not apparent from and are even inconsistent with the current language of the Act. In particular, the historic relationship does not support adopting the ESA's proposition to read into the language of the Act the significant restriction that the transmission must be in a "humanly perceivable form for immediate viewing or listening" (A.F., at para. 74). While the rationale for the 1988 change from radio to "telecommunication" was

concerned with the technical *means* by which the communication to the public was made, nothing supports concluding that s. 3(1)(*f*) could not also apply to new technologies which operate in a manner different from traditional broadcasting. This includes a communication occurring in a manner which also provides durable copies of the works that the users may view at a later time. When transmitted over the Internet, whether works are perceptible immediately or at a later moment or whether or not the technology used involves producing temporary copies, as in the case of streams, or permanent copies of the work is irrelevant to whether a communication has occurred and the work will, or has the potential to be, viewed or listened to by the receiver. As stated at para. 45 of *SOCAN v. CAIP*:

> At the end of the transmission, the end user has a musical work in his or her possession that was not there before. The work has necessarily been communicated . . . . To hold otherwise would . . . fly in the face of the ordinary use of language . . . .

(6) American Jurisprudence

[102] The ESA relies on the decision of the United States Court of Appeals for the Second Circuit in *United States v. American Society of Composers, Authors and Publishers*, 627 F.3d 64 (2010) ("*U.S. v. ASCAP*"), *certiorari* denied (U.S.S.C., Octobre 3, 2011, No. 10-1337), where the Court of Appeals for the Second Circuit decided that the download of a copy of a work did not come within the scope of the right to perform in public, as defined in the U.S. *Copyright Act*, 17 U.S.C. §§ 101 and 106(4).

[103] This decision is of no avail to the ESA. The United States copyright law does not include an exclusive right in the copyright holder to communicate to the public. Rather, it recognizes a right of public performance (17 U.S.C. § 106(4)), which has been understood to include situations such as radio or television broadcasting where performances are made available to a distant public. This is a fundamental difference with the right to communicate a work by telecommunication in s. 3(1)(*f*) of the Canadian Act, as explained above. The two cannot be equated.

[104] This Court has recognized in the past important differences both in wording and in policy between Canadian and American copyright legislation. It has cautioned that "United States court decisions, even where the factual situations are similar, must be scrutinized very carefully" (see *Compo Co. v. Blue Crest Music Inc.*, at p. 367). The difference in statutory wording between the provisions of the American legislation and of the Canadian *Copyright Act* is sufficient to render the U.S. decisions of no assistance in the interpretive exercise engaged here. Indeed, following the American jurisprudence in interpreting Canada's copyright legislation would, in this case, amount to rewriting the Canadian Act.

(7) The Application of Section 3(1)(*f*) Does not Depend on the Purpose of the Communication

[105] The ESA's argument that the sole purpose of the transmissions in the case of downloads is just to *deliver copies* to the customers is not an answer to the fact that

a transmission by telecommunication to the public, and therefore, a communication within the meaning of s. 3(1)(*f*), effectively occurs.

[106] A similar argument was made in *Bishop v. Stevens*. That case dealt with whether a TV station that had paid the appropriate royalties for the right to broadcast a performance of a musical work had also acquired the right to make an "ephemeral" recording of the performance *for the sole purpose of facilitating the broadcast*. It was held that the right to perform did not include the right to make a recording, albeit an "ephemeral" one made only for technical reasons. McLachlin J. held that "s. 3(1)(*d*) contains no mention of purpose" (p. 479):

> Interpretation of a statute must always begin with the ordinary meaning of the words used, and nothing in this section restricts its application to recordings made for the purpose of reproduction and sale. A recording may be made for any purpose, even one not prejudicial to the copyright holder, but if it is not authorized by the copyright holder then it is an infringement of his rights. [p. 480]

[107] Similarly, the fact that the work is transmitted over the Internet, and therefore, "communicate[d] . . . by telecommunication" within the ordinary meaning of the words, for the purpose of delivering a copy of the video game containing the musical work to the user, does not change the fact that there *is* an Internet communication requiring authorization of the copyright holder.

(8) Unintended Consequences

[108] The ESA raises a number of "unintended consequences" that would flow from accepting that downloads are communications within s. 3(1)(*f*) of the Act.

[109] The ESA first refers to s. 2.2(1) of the Act, which defines the concept of "publication" for the purposes of the Act. Section 2.2(1) provides:

> **2.2** (1) For the purposes of this Act, "publication" means
>
> (*a*) in relation to works,
>
> (i) making copies of a work available to the public,
>
> . . .
>
> but does not include
>
> (*c*) the performance in public, or the communication to the public by telecommunication, of a literary, dramatic, musical or artistic work or a sound recording, or . . .

[110] The ESA argues that adopting the "broad interpretation of 'communicate to the public' to include distribution of durable copies over networks" would mean that where copies of works are "distributed" over the Internet, these works would not be considered as "published", because publication, as defined by s. 2.2(1) of the Act, excludes works communicated to the public by telecommunication (A.F., at paras. 102-10).

[111] In my opinion, no conclusion concerning the scope of the right to communicate to the public by telecommunication in s. 3(1)(*f*) can be drawn on the basis of s. 2.2(1). Section 2.2(1) is only relevant in understanding the scope of

publication, in those sections where it appears in the Act. Where that word is used, the definition in s. 2.2(1) provides that it means "making copies of a work available to the public", but does not include the communication of a work to the public by telecommunication. On the other hand, s. 2.2(1) does *not* provide a comprehensive definition for all purposes of the Act whereby "making copies of a work available to the public" can never occur in connection with communication to the public by telecommunication. It cannot be inferred that the independent right of communication to the public by telecommunication in s. 3(1)(*f*) cannot be engaged where, at the same time, copies of a work are made available.

[112] As for the ESA's argument that this may render publication technologically non-neutral, as works distributed *only* by making them available for download on the Internet would not be considered as published, whether this is the inescapable conclusion about the meaning of s. 2.2(1) remains to be seen in a case where the issue arises. Indeed, there is some authority suggesting that "[w]ork available online or sitting in a public database may therefore be considered 'published'", and this notwithstanding the fact that a work conveyed over the Internet constitutes a communication to the public by telecommunication (Vaver, at pp. 157 and 172-73).

[113] ESA also argues that extending the s. 3(1)(*f*) right to include "digital delivery of copies of a work" would make the secondary infringement provisions in s. 27(2) "largely redundant" in the electronic environment (A.F., at para. 117). It says

there would be little need for the secondary infringement provisions related to the electronic distribution of copies of works. I would note that this argument assumes that communication is equivalent to distribution under the Act without any supporting justification on the point. While it appears that such a redundancy point is a policy argument that should be addressed by Parliament if there is a view that any alleged overlap in the provisions is considered undesirable, I will deal with it briefly.

[114] The basic difference between primary and secondary infringement is that primary infringement under s. 3(1) may occur without the infringer knowing that infringement is occurring while secondary infringement only applies where the person has actual or constructive knowledge that what is being distributed constitutes an infringing copy of a work. Section 27(2) provides in relevant part for purposes of this case:

> It is an infringement of copyright for any person to
>
> . . .
>
> (*b*) distribute to such an extent as to affect prejudicially the owner of the copyright,
>
> . . .
>
> a copy of a work . . . that the person knows or should have known infringes copyright . . . .

[115] A secondary infringer may be the same person as the primary infringer, but need not be. The purpose of s. 27(2) is to widen the net for copyright

infringement beyond those who engage in primary infringement to those who, with knowledge or constructive knowledge, distribute to such an extent as to prejudicially affect the owner of the copyright, a copy of a work that already infringes copyright. A distributor who knows or should know that he is distributing an infringing copy of a work, for example because it was reproduced without authority of the copyright holder, may be liable for infringement even though he did not engage in the primary infringement. However, a distributor who distributes an authorized copy of the work will not be found liable under s. 27(2)(*b*).

[116] According to the evidence in this case, it is standard practice in the video game publishing industry to negotiate clearance of copyright for the reproduction of the musical works incorporated in the games prior to their publication. In the possession of the video game vendor and before the vendor takes any action with respect to communicating the game, there is no infringement of copyright because reproduction rights have been cleared. Unless authorized by the holder of the rights under s. 3(1)(*f*), however, the communication of the game will violate s. 3(1)(*f*) of the Act. But s. 27(2) will not be engaged.

[117] ESA has structured its examples in support of its redundancy argument carefully. However, they do not cover the facts of this case. Here the communication or distribution is of prior authorized copies, not infringing copies. Only s. 3(1)(*f*) is engaged, not s. 27(2).

(9) Policy Considerations

[118] The policy concern raised by the ESA is that a copyright holder should not be entitled to both a reproduction and a communication right in the context of Internet downloads.

[119] The answer to this concern is straightforward: the rights of copyright holders under s. 3(1) are distinct and separate rights. *Bishop v. Stevens* re-affirmed (at p. 477) the holding in *Compo Co. v. Blue Crest Music Inc.*, at p. 373, *per* Estey J., that the rights listed in s. 3(1) are distinct and separate rights:

> It is clear from an examination of s. 3(1) that it lists a number of distinct rights belonging to the copyright holder. As stated in *Ash v. Hutchinson & Co. (Publishers), Ltd.*, [1936] 2 All E.R. 1496 (C.A.), at p. 1507, *per* Greene L.J.:
>
> Under the Copyright Act, 1911 [on which the Canadian Act was based], s. 1(2), the rights of the owner of copyright are set out. A number of acts are specified, the sole right to do which is conferred on the owner of the copyright. The right to do each of these acts is, in my judgment, a separate statutory right, and anyone who without the consent of the owner of the copyright does any of these acts commits a tort; if he does two of them, he commits two torts, and so on. [Emphasis added.]

[120] The occurrence of one infringement therefore does not preclude the finding of another. As "[i]nfringement is the single act of doing something which 'only the owner of the copyright has the right to do'" (*Compo Co. v. Blue Crest Music Inc.*, at p. 375), if two protected acts occur without authorization of the copyright

holder, there are two infringements. The fact that there are two protected rights does not restrict the protection afforded by each right.

[121] I cannot agree with my colleagues that the "principle of technological neutrality requires that … we interpret the *Copyright Act* in a way that avoids imposing an additional layer of protections and fees based solely on the *method of delivery* of the work to the end user" (para. 9 (emphasis in original)). Characterizing the Internet transmission as a mere "method of delivery" of the work pre-empts the application of the right to communicate by telecommunication in s. 3(1)(*f*). Further, the proposition is inconsistent with the approach to media neutrality as described by the majority of this Court in *Robertson v. Thomson Corp.*, 2006 SCC 43, [2006] 2 S.C.R. 363, at para. 49, *per* LeBel and Fish JJ.:

> Media neutrality means that the *Copyright Act* should continue to apply in different media, including more technologically advanced ones. But it does not mean that once a work is converted into electronic data anything can then be done with it. . . . Media neutrality is not a licence to override the rights of authors — it exists to protect the rights of authors and others as technology evolves.

[122] A media neutral application of the Act to the facts of this case would mean that the right of reproduction continues to apply to copies made through downloads, notwithstanding the fact that they are *digital* copies. It would also support the proposition that the communication right must continue to apply to digital communications, notwithstanding that they may differ from traditional broadcasting technologies. A media neutral application of the Act, however, does *not* imply that a

court can depart from the ordinary meaning of the words of the Act in order to achieve the level of protection for copyright holders that the court considers is adequate.

[123] Any concerns arising from the independent protected rights in the digital context are concerns of policy, which are properly within the domain of Parliament in defining the scope of copyright. "The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator" (*Théberge*, at para. 30). While the "courts should strive to maintain an appropriate balance between these two goals" (*CCH Canadian Ltd.*, at para. 10), inferring limits into the communication right in the present case would be beyond the function of the courts. "In Canada, copyright [remains] a creature of statute . . ." (*SOCAN v. CAIP*, at para. 82). See also *CCH*, at para. 9; *Théberge*, at para. 5; *Bishop v. Stevens*, at p. 477; *Compo Co. v. Blue Crest Music Inc.*, at p. 373.

[124] Indeed, it would be hazardous for the courts to delimit the scope of broadly defined rights in the digital environment without the benefit of a global picture of the implications for all the parties involved. Binnie J. wrote in *SOCAN v. CAIP*, at para. 40:

> The capacity of the Internet to disseminate "works of the arts and intellect" is one of the great innovations of the information age. Its use should be facilitated rather than discouraged, but this should not be done

> unfairly at the expense of those who created the works of arts and intellect in the first place.

[125] In light of these considerations, providing exceptions to the right to communicate by telecommunication is properly left to Parliament. History has shown that Parliament will indeed legislate when it considers copyright protection to be improperly balanced (for example, it introduced the ephemeral recordings exception in s. 30.8(1), following the ruling in *Bishop* (S.C. 1997, c. 24, s. 18); McKeown, at pp. 21-82 to 21-83).

[126] In addition, it should be borne in mind that SOCAN merely proposes tariffs, which must then be authorized by the Board. In doing so, it is within the power of the Board to adjust proposed royalty rates in a manner that it considers appropriate for a particular use. Specifically, when the same activity engages two protected rights, the Board is in a position to consider each of these rights in light of the type of use that causes users to engage in the activity. This is consistent with the core of the Board's mandate as an economic regulatory agency, which consists of "working out . . . the details of an appropriate royalty tariff" (*SOCAN v. CAIP*, at para. 49) based on the economic value of the different ways in which copyrighted works may be used. The Board's authority to determine royalty rates in factual circumstances addresses concerns about the relative value of services as between online game providers and bricks and mortar stores, and the overlapping of rights and alleged "double-dipping" by copyright holders.

IV. Conclusion — Meaning of "Communicate" in Section 3(1)(*f*)

[127] Communicating works to the public by telecommunication is an independent and distinct right from other rights in s. 3(1) that are included within copyright. It is complete when the communication is received, in this case, when the file is downloaded to the user's computer, even though it can be perceived only after the transmission, or whether or not it is ever perceived. As put by Professor Vaver, "[s]ending works by radio, television, cable, fax, modem, satellite, or microwave involves telecommunication"; if, in addition, the communication is "to the public", it will attract liability (p. 172).

[128] I would dismiss the appeal with costs.

Appeal allowed with costs, LEBEL, FISH, ROTHSTEIN *and* CROMWELL JJ. *dissenting.*

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Solicitors for the respondent: Gowling Lafleur Henderson, Ottawa.

Solicitors for the intervener CMRRA-SODRAC Inc.: Cassels Brock & Blackwell, Toronto.

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A-475-15
2016 FCA 269

Alexander College Corp. (*Appellant*)

v.

Her Majesty the Queen (*Respondent*)

Indexed as: Alexander College Corp. v. Canada

Federal Court of Appeal, Gauthier, Stratas and Gleason JJ.A.—Vancouver, September 21; Ottawa, November 8, 2016.

Customs and Excise — Appeal from Tax Court of Canada decision confirming assessment for unpaid GST/HST on student fees appellant charging in 2010 — Tax Court finding that appellant required to collect, remit GST/HST since not falling within applicable exemption set out in Excise Tax Act (Act), Schedule V, Part III, s. 7 — Appellant private for-profit college — Schedule V of Act setting out long list of exemptions from requirement to charge, remit GST/HST — Only portion of exemption potentially applicable to appellant was term "university" defined in Act, s. 123(1) — Tax Court holding that to come within scope of definition of "university", institution needing to be recognized as university by relevant provincial authorities, also needing to grant degrees at least at baccalaureate level — Because appellant meeting neither criterion, Tax Court finding, inter alia, that appellant not meeting traditional definition of "university" — Whether Tax Court of Canada erring in statutory interpretation — Relevant provisions at issue unambiguous — S. 7 exemption applying to "universities"; term conclusively defined in Act, s. 123(1) since Parliament using word "means" in setting out definition thereof — Given differences in French, English versions of definition of "university", shared meaning rule applied; meaning of English version of definition governing in present case — Contrary to what Tax Court holding, would constitute impermissible reading-in of additional elements to limit "university" definition to only those institutions recognized as such under provincial law or to those empowered to grant baccalaureate degrees or higher — In absence of definition of "degree" in Act, regard should be given to how term defined in provincial legislation — In British Columbia, relevant legislation providing for associate degrees which may be granted both by universities, certain colleges — Thus to come within definition of "university" for purposes of Act, institution must be empowered by relevant authority to grant degrees — Because appellant authorized to grant degrees by province of British Columbia, appellant falling within scope of exemption in s. 7 — In conclusion, Tax Court incorrectly interpreting Act — Appeal allowed.

A-475-15
2016 CAF 269

Alexander College Corp. (*appelante*)

c.

Sa Majesté la Reine (*intimée*)

Répertorié : Alexander College Corp. c. Canada

Cour d'appel fédérale, juges Gauthier, Stratas et Gleason, J.C.A.—Vancouver, 21 septembre; Ottawa, 8 novembre 2016.

Douanes et Accise — Appel interjeté à l'encontre d'une décision de la Cour canadienne de l'impôt qui a confirmé une cotisation établie à l'égard de la TPS/TVH impayée sur les frais de scolarité facturés par l'appelante en 2010 — La Cour de l'impôt a conclu que l'appelante devait percevoir et verser la TPS/TVH parce qu'elle n'était pas visée par l'exonération prévue à l'art. 7 de la partie III de l'annexe V de la Loi sur la taxe d'accise (la Loi) — L'appelante est un collège privé à but lucratif — L'annexe V de la Loi dresse une longue liste d'exonérations à l'obligation de percevoir et de verser la TPS/TVH — La seule partie de l'exonération susmentionnée qui pouvait s'appliquer à l'appelante était le terme « université » défini à l'art. 123(1) de la Loi — La Cour de l'impôt a conclu que, pour relever de la définition d'« université », l'institution devait être reconnue à titre d'université par les autorités provinciales compétentes et décerner des diplômes sanctionnant des études de premier cycle au moins — Étant donné que l'appelante ne remplissait aucun de ces critères, la Cour de l'impôt a conclu, entre autres, que l'appelante ne satisfaisait pas à la définition traditionnelle d'une « université » — Il s'agissait de savoir si la Cour de l'impôt a commis une erreur dans son interprétation de la Loi — Les dispositions pertinentes en l'espèce étaient sans ambiguïté — L'exonération prévue à l'art. 7 s'applique aux « universités »; ce terme est défini de manière définitive à l'art. 123(1) de la Loi puisque le législateur a utilisé le mot « means » (« s'entend de ») dans la version anglaise de la Loi lorsqu'il a défini le terme « university » (« université ») — Compte tenu des divergences entre les versions anglaise et française dans la définition du terme « université », la Cour a eu recours à la règle du sens commun; le sens de la définition anglaise l'a emporté en l'espèce — Contrairement à la conclusion de la Cour de l'impôt, il s'agirait d'une interprétation large inadmissible de la teneur de la Loi ayant pour effet de limiter la définition d'une « université » aux seules institutions qui sont reconnues comme telles par une loi provinciale, ou à celles qui sont habilitées à décerner des diplômes de baccalauréat ou de cycle supérieur — En l'absence d'une définition du terme « diplôme » dans la

Loi, il convient de tenir compte de la définition que lui donnent les lois provinciales — En Colombie-Britannique, les lois applicables prévoient les diplômes d'associé, qui peuvent être décernés par les universités et certains collèges — Ainsi, pour être visée par la définition d'« université » aux fins de la Loi, l'institution doit être habilitée à décerner des diplômes — Étant donné que l'appelante a été autorisée à décerner des diplômes par la province de la Colombie-Britannique, elle est visée par l'exonération prévue à l'art. 7 — En conclusion, la Cour de l'impôt a mal interprété la Loi — Appel accueilli.

This was an appeal from a Tax Court of Canada decision confirming an assessment for unpaid GST/HST on student fees charged by the appellant in 2010. The Tax Court found that the appellant was required to collect and remit GST/HST since it did not fall within the applicable exemption set out in section 7 of Part III, Schedule V of the *Excise Tax Act*.

Il s'agissait d'un appel interjeté à l'encontre d'une décision de la Cour canadienne de l'impôt qui a confirmé une cotisation établie à l'égard de la TPS/TVH impayée sur les frais de scolarité facturés par l'appelante en 2010. La Cour de l'impôt a conclu que l'appelante devait percevoir et verser la TPS/TVH parce qu'elle n'était pas visée par l'exonération prévue à l'article 7 de la partie III de l'annexe V de la *Loi sur la taxe d'accise*.

Schedule V of the Act sets out a long list of exemptions from the requirement to charge and remit GST/HST and the relevant exemption in this case was section 7, which covers certain types of educational services. It was common ground between the parties that the only portion of the foregoing exemption that might be applicable to the appellant was the term "university" since the appellant is a private for-profit college. The term "university" is defined in subsection 123(1), Part IX of the Act. The appellant argued, *inter alia*, that it was a "university" within the meaning of that definition because it is authorized to grant two-year associate degrees under provincial legislation, namely in British Columbia. However, the Tax Court rejected this assertion and held that to come within the scope of the definition of "university", an institution needed to be recognized as a university by the relevant provincial authorities and also needed to grant degrees at least at the baccalaureate level. Because the appellant met neither criterion, the Tax Court found it did not fall within the applicable exemption. The Tax Court reached this conclusion for a number of reasons, in particular, because it held that the wording used to define "university" in subsection 123(1) of the Act suggests a distinction between an "institution" and colleges or research bodies associated with such an "institution". Given this, it concluded that an "institution" must refer only to a "university". Thus, the appellant would qualify for the exemption only if it were a traditional degree-granting university. The Tax Court found that the appellant did not fit the traditional definition of a "university" because it is subject to constant third-party monitoring for the purposes of maintaining its capacity to grant associate degrees unlike traditional universities that self-monitor.

L'annexe V de la Loi dresse une longue liste d'exonérations à l'obligation de percevoir et de verser la TPS/TVH et l'exonération visée en l'espèce est prévue à l'article 7, qui s'applique à certains types de services d'enseignement. Les parties ont convenu que la seule partie de l'exonération susmentionnée qui pourrait s'appliquer à l'appelante était le terme « université », puisque l'appelante est un collège privé à but lucratif. Le terme « université » est défini au paragraphe 123(1) de la partie IX de la Loi. L'appelante a fait valoir, entre autres, qu'elle est une « université » au sens de cette définition puisqu'elle est habilitée à décerner des diplômes d'associé sanctionnant des études de deux ans en vertu de la loi provinciale, soit en Colombie-Britannique. Cependant, la Cour de l'impôt a réfuté cette prétention et a conclu que, pour relever de la définition d'« université », une institution devait être reconnue à titre d'université par les autorités provinciales compétentes et décerner des diplômes sanctionnant des études de premier cycle au moins. Étant donné que l'appelante ne remplissait aucun de ces critères, la Cour de l'impôt a jugé qu'elle n'était pas visée par l'exonération en question. La Cour de l'impôt a tiré cette conclusion pour un certain nombre de raisons, plus particulièrement, parce qu'elle a jugé que la formulation employée pour définir le mot « université » au paragraphe 123(1) de la Loi laisse entendre qu'il existe une distinction entre une « institution » et les collèges ou instituts de recherche associés à une telle institution. Compte tenu de ce qui précède, elle a conclu que le terme « institution » ne devait viser qu'une « université ». Ainsi, l'appelante serait admissible à l'exonération seulement si elle était une université traditionnelle qui décernait des diplômes. La Cour de l'impôt a conclu que l'appelante ne satisfaisait pas à la définition traditionnelle d'une « université » puisqu'elle est assujettie à une surveillance constante d'un tiers afin de pouvoir continuer à décerner des diplômes d'associé, au contraire des universités traditionnelles qui se contrôlent elles-mêmes.

The issue was whether the Tax Court of Canada erred in its statutory interpretation.

Held, the appeal should be allowed.

It had to be determined whether the relevant provisions of the Act were ambiguous in that they were open to more than one reasonable interpretation. This question was answered in the negative since the relevant provisions were unambiguous and had to be interpreted in the way the appellant submitted. More specifically, the section 7 exemption applies to "universities". That term is conclusively defined in subsection 123(1) of the Act as Parliament used the word "means" in setting out the definition of "university" for the purposes of the Act and the use of this word in a statutory definition reflects Parliament's intention that the definition be exhaustive. Thus, for the purposes of the Act, what is determinative is whether an institution falls within the statutory definition in the Act, which provides in relevant part that a university means a "recognized degree-granting institution" or an organization that operates a "college affiliated with … such an institution."

On its face, the English version of the first portion of the definition of a "university" in the Act requires that an institution merely be recognized as one that is empowered to grant degrees to qualify as a university. The argument that the French version might be read in the same way or could be read as providing that it is the institution as opposed to its degree-granting status that must be recognized was rejected and the interpretation that the appellant urged was adopted. Given the differences in the French and English versions herein, the shared meaning rule was applied whereby the meaning that is shared by the English and French versions is presumed to be the meaning intended by the legislature. The singular meaning of the English version of the definition, which states that a qualifying institution need merely be recognized as one that is empowered to grant degrees, is encompassed in the French definition if it is equivocal. Applying the first step of the shared meaning rule, the meaning of the English definition had to govern. As well, the shared meaning was also consistent with the broader scheme of the Act and Parliament's intent. Thus, contrary to what the Tax Court held, it would constitute an impermissible reading-in of additional elements to limit the "university" definition to only those institutions that are recognized as such under provincial law or to those that are empowered to grant baccalaureate degrees or higher.

Il s'agissait de savoir si la Cour canadienne de l'impôt a commis une erreur dans son interprétation de la Loi.

Arrêt : l'appel doit être accueilli.

La Cour devait se demander si les dispositions pertinentes de la Loi étaient ambiguës, parce qu'elles étaient sujettes à plus d'une interprétation raisonnable. La Cour a répondu à cette question par la négative puisque les dispositions pertinentes étaient sans ambiguïté et devaient être interprétées de la manière proposée par l'appelante. Plus précisément, l'exonération prévue à l'article 7 s'applique aux « universités ». Ce terme est défini de manière définitive au paragraphe 123(1) de la Loi puisque le législateur a utilisé le mot « *means* » (« s'entend de ») dans la version anglaise de la Loi lorsqu'il a défini le terme « *university* » (« université ») aux fins de cette dernière et l'utilisation de ce mot dans une définition traduit l'intention du législateur de donner une définition exhaustive d'un terme. Par conséquent, aux fins de la Loi, l'essentiel est de déterminer si la définition législative donnée dans la Loi s'applique à une institution en particulier, dont la disposition pertinente donne la définition suivante du mot « université » : « [i]nstitution reconnue qui décerne des diplômes » ou organisation qui administre une « école affiliée […] d'une telle institution ».

Selon son libellé, la version anglaise de la première partie de la définition du terme « *university* » donnée dans la Loi exige qu'une institution soit simplement reconnue comme étant habilitée à décerner des diplômes pour être considérée comme une université. L'argument voulant que la version française soit lue de la même façon ou puisse être lue comme prévoyant que c'est l'institution et non sa capacité à décerner des diplômes qui doit être reconnue a été rejeté et l'interprétation que l'appelante préconisait a été adoptée. Compte tenu des divergences entre les versions anglaise et française en l'espèce, la Cour a eu recours à la règle du sens commun, selon laquelle le sens qui est commun aux versions française et anglaise sera présumé être celui correspondant à l'intention du législateur. En cas d'ambiguïté, le sens unique de la version anglaise de la définition, qui prévoit simplement qu'une institution est admissible si elle est reconnue comme étant autorisée à décerner des diplômes, est englobé dans la définition française. Si la première étape de la règle du sens commun est appliquée, le sens de la définition anglaise devait l'emporter. De plus, ce sens commun respectait en outre l'économie générale de la Loi et l'intention du législateur. Contrairement à la conclusion de la Cour canadienne de l'impôt, il s'agirait d'une interprétation large inadmissible de la teneur de la Loi ayant pour effet de limiter la définition d'une « université » aux seules institutions qui sont reconnues comme telles par une loi provinciale, ou à celles qui sont habilitées à décerner des diplômes de baccalauréat ou de cycle supérieur.

In the absence of a definition of "degree" in the Act, regard should be given to how the term is defined in provincial legislation since the provinces determine what degrees may be granted by which institutions through their jurisdiction over education. In British Columbia, the relevant legislation provides for associate degrees which may be granted both by universities and certain colleges. Thus to come within the definition of a "university" for purposes of the Act, the institution must be empowered to grant degrees as the same are defined in the relevant provincial legislation. However, the definition of a "university" for purposes of the Act cannot also be tied to how that term is defined in provincial legislation since the Act defines the term "university". Based on this analysis, the appellant is authorized to grant degrees by a relevant authority (province of British Columbia) and it therefore followed that it fell within the scope of the exemption in section 7 of Part III, Schedule V of the Act. Resort to a contextual and purposive analysis to discern the meaning of "university" for purposes of these provisions in the Act led to the same result for several reasons, which were discussed.

In conclusion, the Tax Court incorrectly interpreted the Act and the appellant fell within the section 7 exemption.

STATUTES AND REGULATIONS CITED

College and Institute Act, R.S.B.C. 1996, c. 52.
Degree Authorization Act, S.B.C. 2002, c. 24.
Excise Tax Act, R.S.C., 1985, c. E-15, Part VI, Part VII, s. 68.26(a), Part IX, ss. 123(1) "public college", "public institution", "school authority", "university", 149, Sch. V, Part III, ss. 1 "vocational school", 6, 7, 8.
Income Tax Act, R.S.C., 1985 (5th Supp.), c. 1, ss. 118.5(1)(a)(i),(b),(c)(i), 118.6(1)(b),(c).
University Act, R.S.B.C. 1996, c. 468.

CASES CITED

APPLIED:

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, (1998), 36 O.R. (3d) 418; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency)*, 2007 SCC 42, [2007] 3 S.C.R. 217; *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715; *R. v. Daoust*, 2004 SCC 6, [2004] 1 S.C.R. 217.

En l'absence d'une définition du terme « diplôme » dans la Loi, il convient de tenir compte de la définition que lui donnent les lois provinciales, car la compétence en matière d'éducation appartient aux provinces et ce sont elles qui déterminent les diplômes qu'une institution est habilitée à décerner. En Colombie-Britannique, les lois applicables prévoient les diplômes d'associé, qui peuvent être décernés par les universités et certains collèges. Ainsi, pour être visée par la définition d'« université » aux fins de la Loi, l'institution doit être habilitée à décerner des diplômes tel que définis dans les lois provinciales applicables. Cependant, étant donné que la Loi contient une définition du terme « université », on ne peut pas faire de lien entre la définition de ce terme aux fins de l'application de la Loi et sa définition dans une loi provinciale. D'après cette analyse, l'appelante est autorisée à décerner des diplômes par une autorité compétente (la province de la Colombie-Britannique) et par conséquent, il s'ensuivait qu'elle est visée par l'exonération prévue à l'article 7 de la partie III de l'annexe V de la Loi. Recourir à une analyse contextuelle et téléologique pour discerner le sens du terme « université » aux fins de ces dispositions de la Loi a donné le même résultat, pour plusieurs raisons, lesquelles ont été discutées.

En conclusion, la Cour de l'impôt a mal interprété la Loi et l'appelante était visée par l'exonération prévue à l'article 7.

LOIS ET RÈGLEMENTS CITÉS

College and Institute Act, R.S.B.C. 1996, ch. 52.
Degree Authorization Act, S.B.C. 2002, ch. 24.
Loi de l'impôt sur le revenu, L.R.C. (1985) (5e suppl.), ch. 1, art. 118.5(1)a)(i),b),c)(i), 118.6(1)b),c).
Loi sur la taxe d'accise, L.R.C. (1985), ch. E-15, partie VI, partie VII, art. 68.26a), partie IX, art. 123(1) « administration scolaire », « collège public », « institution publique », « université », 149, ann. V, partie III, art. 1 « école de formation professionnelle », 6, 7, 8.
University Act, R.S.B.C. 1996, ch. 468.

JURISPRUDENCE CITÉE

DÉCISIONS APPLIQUÉES :

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 R.C.S. 27; *Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559; *A.Y.S.A. Amateur Youth Soccer Association c. Canada (Agence du revenu)*, 2007 CSC 42, [2007] 3 R.C.S. 217; *Placer Dome Canada Ltd. c. Ontario (Ministre des Finances)*, 2006 CSC 20, [2006] 1 R.C.S. 715; *R. c. Daoust*, 2004 CSC 6, [2004] 1 R.C.S. 217.

DISTINGUISHED:

Klassen v. Canada, 2007 FCA 339, [2008] 2 C.T.C. 16; *Zailo v. The Queen*, 2014 TCC 60, 2014 D.T.C. 1087.

REFERRED TO:

Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235; *Redeemer Foundation v. M.N.R.*, 2006 FCA 325, [2007] 3 F.C.R. 40, affd 2008 SCC 46, [2008] 2 S.C.R. 643; *Bozzer v. Canada*, 2011 FCA 186, 333 D.L.R. (4th) 385; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601; *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231; *Yellow Cab Ltd. v. Board of Industrial Relations et al.*, [1980] 2 S.C.R. 761, (1980), 24 A.R. 275; *Sheldon Inwentash and Lynn Factor Charitable Foundation v. Canada*, 2012 FCA 136, 2012 D.T.C. 5090; *R. v. Compagnie Immobilière BCN Ltée*, [1979] 1 S.C.R. 865, [1979] C.T.C. 71; *Canada (Attorney General) v. Frye*, 2005 FCA 264, 338 N.R. 382.

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Sullivan, Ruth. *Statutory Interpretation*, 3rd ed. Toronto: Irwin Law Inc., 2016.

APPEAL from a Tax Court of Canada decision (2015 TCC 238, [2015] G.S.T.C. 118), which confirmed an assessment for unpaid GST/HST on student fees charged by the appellant in 2010. Appeal allowed.

APPEARANCES

Terry Barnett and *S. Natasha Reid* for appellant.
Jasmine Sidhu and *Whitney Dunn* for respondent.

SOLICITORS OF RECORD

Thorsteinssons LLP, Vancouver, for appellant.
Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment rendered in English by

[1] GLEASON J.A.: The appellant, Alexander College Corp., seeks to set aside the October 2, 2015 judgment

DÉCISIONS DIFFÉRENCIÉES :

Klassen c. Canada, 2007 CAF 339; *Zailo c. La Reine*, 2014 CCI 60.

DÉCISIONS CITÉES :

Housen c. Nikolaisen, 2002 CSC 33, [2002] 2 R.C.S. 235; *Redeemer Foundation c. M.R.N.*, 2006 CAF 325, [2007] 3 R.C.F. 40, conf. par 2008 CSC 46, [2008] 2 R.C.S. 643; *Bozzer c. Canada*, 2011 CAF 186; *Hypothèques Trustco Canada c. Canada*, 2005 CSC 54, [2005] 2 R.C.S. 601; *Entertainment Software Association c. Société canadienne des auteurs, compositeurs et éditeurs de musique*, 2012 CSC 34, [2012] 2 R.C.S. 231; *Yellow Cab Ltd. c. Board of Industrial Relations et autres*, [1980] 2 R.C.S. 761; *Sheldon Inwentash and Lynn Factor Charitable Foundation c. Canada*, 2012 CAF 136; *R. c. Compagnie Immobilière BCN Ltée*, [1979] 1 R.C.S. 865; *Canada (Procureur général) c. Frye*, 2005 CAF 264.

DOCTRINE CITÉE

Canada. Parlement. *Débats de la Chambre des communes*, 34e lég., 2e sess., vol. 8 (11mai 1990).
Sullivan, Ruth. *Statutory Interpretation*, 3e éd. Toronto : Irwin Law Inc., 2016.

APPEL interjeté à l'encontre d'une décision de la Cour canadienne de l'impôt (2015 CCI 238), qui a confirmé une cotisation établie à l'égard de la TPS/TVH impayée sur les frais de scolarité facturés par l'appelante en 2010. Appel accueilli.

ONT COMPARU

Terry Barnett et *S. Natasha Reid* pour l'appelante.
Jasmine Sidhu et *Whitney Dunn* pour l'intimée.

AVOCATS INSCRITS AU DOSSIER

Thorsteinssons LLP, Vancouver, pour l'appelante.
Le sous-procureur général du Canada pour l'intimée.

Ce qui suit est la version française des motifs du jugement rendus par

[1] LA JUGE GLEASON, J.C.A. : L'appelante, Alexander College Corp., demande l'annulation du jugement du

of the Tax Court of Canada [Tax Court] in *Alexander College Corp. v. The Queen*, 2015 TCC 238, [2015] G.S.T.C. 118 (*Alexander College*), which confirmed an assessment for unpaid GST/HST on student fees charged by the College in 2010. The Tax Court found that Alexander College was required to collect and remit GST/HST as it did not fall within the applicable exemption set out in section 7 of Part III, Schedule V of the *Excise Tax Act*, R.S.C., 1985, c. E-15 (the ETA). For the reasons that follow, I believe that the Tax Court incorrectly interpreted the ETA and that Alexander College falls within the section 7 exemption. I would accordingly allow this appeal, with costs.

I. The Decision of the Tax Court in *Alexander College*

[2] Schedule V of the ETA sets out a long list of exemptions from the requirement to charge and remit GST/HST. The relevant exemption in the present case is in section 7 of Part III, Schedule V and covers certain types of educational services. It exempts:

> **7** A supply made by a school authority, public college or university of a service of instructing individuals in, or administering examinations in respect of, courses for which credit may be obtained toward a diploma or degree.

[3] It was common ground between the parties before the Tax Court and remains undisputed before this Court that the only portion of the foregoing exemption that might be applicable to Alexander College is the term "university" as the appellant is a private for-profit college. The term "university" is defined in subsection 123(1), Part IX of the ETA as follows:

> **123 (1)** …
>
> ***university*** means a recognized degree-granting institution or an organization that operates a college affiliated with, or a research body of, such an institution; (*université*)

2 octobre 2015 prononcé par la Cour canadienne de l'impôt dans la décision *Alexander College Corp. c. La Reine*, 2015 CCI 238 (décision *Alexander College*), qui confirmait une cotisation établie à l'égard de la TPS/TVH impayée sur les frais de scolarité facturés par le collège en 2010. La Cour canadienne de l'impôt a conclu que l'appelante, Alexander College, devait percevoir et verser la TPS/TVH parce qu'elle n'est pas visée par l'exonération prévue à l'article 7 de la partie III de l'annexe V de la *Loi sur la taxe d'accise*, L.R.C. (1985), ch. E-15 (la LTA). Pour les motifs exposés ci-dessous, j'estime que la Cour canadienne de l'impôt a mal interprété la LTA et que Alexander College est bel et bien visée par l'exonération prévue à l'article 7. En conséquence, j'accueillerais l'appel avec dépens.

I. La décision *Alexander College* de la Cour canadienne de l'impôt

[2] L'annexe V de la LTA dresse une longue liste d'exonérations à l'obligation de percevoir et de verser la TPS/TVH. L'exonération visée en l'espèce est prévue à l'article 7 de la partie III de l'annexe V et s'applique à certains types de services d'enseignement. L'exonération vise :

> **7** La fourniture, effectuée par une administration scolaire, un collège public ou une université, d'un service consistant à donner à des particuliers des cours ou des examens qui mènent à un diplôme.

[3] Les parties ont convenu devant la Cour canadienne de l'impôt, et cela demeure incontesté devant la Cour, que la seule partie de l'exonération susmentionnée qui pourrait s'appliquer à Alexander College est le terme « université », puisque l'appelante est un collège privé à but lucratif. Le terme « université » est défini comme suit au paragraphe 123(1) de la partie IX de la LTA :

> **123 (1)** […]
>
> ***université*** Institution reconnue qui décerne des diplômes, y compris l'organisation qui administre une école affiliée à une telle institution ou l'institut de recherche d'une telle institution. (*university*)

[4] Alexander College argues that it is a "university", within the meaning of the foregoing definition, because it is authorized to grant two-year associate degrees under provincial legislation, namely British Columbia's *Degree Authorization Act*, S.B.C. 2002, c. 24 (the *Degree Authorization Act*). It also notes (and it is undisputed) that in British Columbia at least some traditional universities grant identical associate degrees and recognize Alexander College's courses for credit towards a four-year baccalaureate degree. Alexander College further underscores that in British Columbia there are both public and privately-funded universities as well as public and privately-funded colleges and vocational schools (as is contemplated by the *Degree Authorization Act*; British Columbia's *University Act*, R.S.B.C. 1996, c. 468; British Columbia's *College and Institute Act*, R.S.B.C. 1996, c. 52 and several statutes applicable to particular institutions, namely, Royal Roads University, Thompson Rivers University, Trinity Western University and Sea to Sky University [now called Quest University]).

[4] L'appelante Alexander College fait valoir qu'elle est une « université » au sens de la définition qui précède puisqu'elle est habilitée à décerner des diplômes d'associé sanctionnant des études de deux ans en vertu de la loi provinciale, à savoir la loi de la Colombie-Britannique intitulée *Degree Authorization Act* (Loi sur les diplômes), S.B.C. 2002, ch. 24 (la *Degree Authorization Act*). L'appelante ajoute qu'en Colombie-Britannique, ce que nul ne conteste, certaines universités traditionnelles décernent les mêmes diplômes d'associé et accordent des crédits pour les cours suivis à Alexander College aux fins de l'obtention d'un diplôme de baccalauréat de quatre ans. Alexander College souligne de plus qu'il existe en Colombie-Britannique des universités qui sont financées par des fonds publics et d'autres par des fonds privés, ainsi que des collèges et des écoles de formation professionnelle qui sont financés par le public et le privé (conformément à la *Degree Authorization Act* et à l'*University Act* (Loi sur l'université), R.S.B.C. 1996, ch. 468, et à la *College and Institute Act* (Loi sur les collèges et les instituts) de la Colombie-Britannique, R.S.B.C. 1996, ch. 52, ainsi que plusieurs autres lois applicables à des établissements particuliers, soit la Royal Roads University, la Thompson Rivers University, la Trinity Western University et la Sea to Sky University [maintenant appelée Quest University]).

[5] The Tax Court rejected Alexander College's assertion that it fell within the scope of the definition of a "university" for purposes of the ETA and held that to come within the scope of that definition an institution needed to be recognized as a university by the relevant provincial authorities and also needed to grant degrees at least at the baccalaureate level. Because Alexander College met neither criterion, the Tax Court found it did not fall within the applicable exemption and was therefore required to collect and remit the disputed GST/HST. The Tax Court offered several reasons in support of this conclusion.

[5] Réfutant la prétention de Alexander College selon laquelle elle entrait dans la définition d'« université » au sens de la LTA, la Cour canadienne de l'impôt a conclu que cette définition s'appliquait seulement aux institutions qui sont reconnues à titre d'université par les autorités provinciales compétentes et qui décernent des diplômes sanctionnant des études de premier cycle au moins. Étant donné que Alexander College ne remplit aucun de ces critères, la Cour canadienne de l'impôt a jugé que l'appelante n'était pas visée par l'exonération en question et qu'elle était par conséquent tenue de percevoir et de verser la TPS/TVH contestée. La Cour canadienne de l'impôt fonde sa conclusion sur plusieurs motifs.

[6] First, the Tax Court held that the wording used to define "university" in subsection 123(1) of the ETA suggests a distinction between an "institution" and

[6] Premièrement, la Cour canadienne de l'impôt soutient que la formulation employée pour définir le mot « université » au paragraphe 123(1) de la LTA laisse

colleges or research bodies associated with such an "institution". Given this, the Tax Court concluded that an "institution" must refer only to a "university". Consequently, Alexander College would qualify for the exemption only if it were a traditional degree-granting university. The Tax Court found that Alexander College does not fit the traditional definition of a "university" because it is subject to constant third-party monitoring for the purposes of maintaining its capacity to grant associate degrees, unlike traditional universities, which self-monitor (*Alexander College*, at paragraphs 51, 53, 62).

[7] Second, the Tax Court reviewed the holdings of this Court in *Klassen v. Canada*, 2007 FCA 339, [2008] 2 C.T.C. 16 (*Klassen*) and of the Tax Court in *Zailo v. The Queen*, 2014 TCC 60, 2014 D.T.C. 1087 (*Zailo*), which determined that the distinguishing feature between a university and a foreign college was the level of degree awarded. In both cases, a university—for the purposes of the *Income Tax Act*, R.S.C., 1985 (5th Supp.), c. 1 (the ITA)—was deemed to be an institution that grants at least baccalaureate degrees. The Tax Court applied this reasoning to Alexander College and held that only institutions offering baccalaureate degrees or higher qualify as "recognized degree-granting institution[s]", within the scope of the definition of "university" contained in subsection 123(1) of the ETA (*Alexander College*, at paragraphs 65–68).

[8] Third, the Tax Court reasoned that including private colleges within the definition of "university" would be illogical given the wording and structure of the provisions in the ETA. More specifically, the Tax Court held that the "college affiliated with" option under the definition of "university" in subsection 123(1) of the ETA would be redundant and absurd if the affiliated institution could be another college as it makes no sense to speak of a college being affiliated with another college. The Tax Court further held that the interpretation

entendre qu'il existe une distinction entre une « institution » et les collèges ou instituts de recherche associés à une telle institution. Compte tenu de ce qui précède, la Cour canadienne de l'impôt a conclu que le terme « institution » ne devait viser qu'une « université ». En conséquence, Alexander College serait admissible à l'exonération seulement si elle était une université traditionnelle qui décernait des diplômes. La Cour canadienne de l'impôt a conclu que Alexander College ne satisfaisait pas à la définition traditionnelle d'une « université » puisqu'elle est assujettie à une surveillance constante d'un tiers afin de pouvoir continuer à décerner des diplômes d'associé, au contraire des universités traditionnelles qui se contrôlent elles-mêmes (décision *Alexander College*, aux paragraphes 51, 53 et 62).

[7] Deuxièmement, la Cour canadienne de l'impôt a examiné les conclusions formulées par la Cour dans l'arrêt *Klassen c. Canada*, 2007 CAF 339 (arrêt *Klassen*), ainsi que celles de la Cour canadienne de l'impôt dans la décision *Zailo c. La Reine*, 2014 CCI 60 (décision *Zailo*), selon lesquelles la caractéristique distinctive entre une université et un collège étranger est le niveau des diplômes décernés. Dans les deux cas, une université — au sens de la *Loi de l'impôt sur le revenu*, L.R.C. (1985) (5e suppl.), ch. 1 (la LIR) — était réputée être un établissement qui décerne au moins des diplômes de baccalauréat. La Cour canadienne de l'impôt a appliqué ce raisonnement à Alexander College et a conclu que seules les institutions qui décernent des diplômes de baccalauréat ou de cycle supérieur peuvent être considérées comme une « institution reconnue qui décerne des diplômes » au sens de la définition d'« université » prévue au paragraphe 123(1) de la LTA (décision *Alexander College*, aux paragraphes 65 à 68).

[8] Troisièmement, la Cour canadienne de l'impôt a soutenu qu'il serait illogique d'inclure les collèges privés dans la définition d'« université », au vu du libellé et de la structure des dispositions de la LTA. Plus précisément, la Cour canadienne de l'impôt a conclu qu'il serait redondant et absurde d'inclure l'expression « école affiliée à » dans la définition d'« université » au paragraphe 123(1) de la LTA si l'institution affiliée pouvait être un autre collège, car c'est un non-sens de dire qu'un collège est affilié à un autre collège. La Cour

urged by Alexander College would result in the section 7 exemption offending the presumption against tautology. It reasoned that such a reading would mean that private colleges would be subsumed within "university", whereas public colleges would be segregated out. The Tax Court held that such a reading would render Parliament's choice to identify "public college[s]" within the provision superfluous (*Alexander College*, at paragraphs 70–74).

[9] Finally, the Tax Court offered in a footnote to its reasons the suggestion that the interpretation advanced by Alexander College would offend the scheme of the ETA as it would result in the College being exempt in terms of its supplies but not entitled to claim either input tax credits or the public service body rebate. The Tax Court noted that "[t]his result seems contrary to the scheme of the *ETA* which is structured so that an entity making taxable supplies is entitled to claim input tax credits and an entity making exempt supplies such as a university is entitled to a rebate" (*Alexander College*, at footnote 22).

II. Analysis

[10] This appeal raises a single question of statutory interpretation. On a question of law like statutory interpretation in the tax appeals context, the standard of review is correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paragraphs 8 and 9; *Redeemer Foundation v. M.N.R.*, 2006 FCA 325, [2007] 3 F.C.R. 40, at paragraph 24 (affirmed without comment on this point in 2008 SCC 46, [2008] 2 S.C.R. 643); *Bozzer v. Canada*, 2011 FCA 186, 333 D.L.R. (4th) 385, at paragraph 3.

[11] The appropriate methodology for statutory interpretation is well-known; courts must read the words of an Act "in their entire context and in their grammatical

canadienne de l'impôt a en outre jugé que l'interprétation que préconisait Alexander College conduirait l'exonération prévue à l'article 7 à nuire à la présomption d'absence de tautologie. Selon la Cour canadienne de l'impôt, une telle interprétation signifierait que les collèges privés seraient inclus dans la définition d'« université », alors que les collèges publics en seraient exclus. La Cour canadienne de l'impôt a jugé qu'une telle interprétation rendrait superflu le choix du législateur d'inclure l'expression « collège public » dans la disposition (décision *Alexander College*, aux paragraphes 70 à 74).

[9] Enfin, dans une note au bas de ses motifs, la Cour canadienne de l'impôt a indiqué que l'interprétation proposée par Alexander College irait à l'encontre de l'économie générale de la LTA puisque ses fournitures seraient exonérées, mais elle ne pourrait pas demander un crédit de taxe sur les intrants ni un remboursement pour les organismes de services publics. Selon la Cour canadienne de l'impôt, [TRADUCTION] « [c]e résultat semble contraire au régime établi par la LTA, qui est structuré de telle façon qu'une entité effectuant des fournitures taxables a droit à des crédits de taxe sur les intrants et qu'une entité effectuant des fournitures exonérées, comme une université, a droit à un remboursement » (décision *Alexander College*, note de bas de page 22).

II. Analyse

[10] Le présent appel soulève une seule question d'interprétation législative. Dans le cadre d'un appel en matière fiscale, les questions d'interprétation législative sont assujetties à la norme de contrôle de la décision correcte : arrêt *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, aux paragraphes 8 et 9; arrêt *Redeemer Foundation c. M.R.N.*, 2006 CAF 325, [2007] 3 R.C.F. 40, au paragraphe 24 (confirmé sans remarque sur ce point par l'arrêt 2008 CSC 46, [2008] 2 R.C.S. 643); arrêt *Bozzer c. Canada*, 2011 CAF 186, au paragraphe 3.

[11] La méthode appropriée en matière d'interprétation législative est bien connue : les tribunaux doivent lire les termes d'une loi « dans leur contexte global en

and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paragraph 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at paragraph 26. This approach requires courts to consider the text, context and purpose of the statutory provision.

[12] While the foregoing approach applies to the interpretation of tax statutes, the Supreme Court of Canada has indicated that it is often appropriate to place greater emphasis on a textual interpretation when interpreting a taxation provision given the "degree of precision and detailed characteristics of many tax provisions": *A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency)*, 2007 SCC 42, [2007] 3 S.C.R. 217, at paragraph 16; *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715 (*Placer Dome*), at paragraph 23; and *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 (*Canada Trustco*), at paragraph 11. The Supreme Court of Canada further instructs that if the text of a taxation provision gives rise to "more than one reasonable interpretation", recourse to a contextual and purposive analysis should be employed to resolve ambiguities (*Placer Dome*, at paragraph 23; *Canada Trustco*, at paragraph 10). However, where a taxation provision "admits of no ambiguity in its meaning or in its application to the facts, [the provision] must simply be applied" (*Placer Dome*, at paragraph 23).

[13] Under the foregoing analytical framework, one must ask whether the relevant provisions are ambiguous in that they are open to more than one reasonable interpretation. In my view, this question must be answered in the negative in the present appeal as the relevant provisions are unambiguous and must be interpreted in the way Alexander College submits.

[14] More specifically, the section 7 exemption applies to "universities". That term is conclusively defined in subsection 123(1) of the ETA as Parliament used the word "means" in setting out the definition of "university" for the purposes of the ETA. As Alexander College

suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur » (arrêt *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, au paragraphe 21; arrêt *Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559, au paragraphe 26). Cette méthode oblige les tribunaux à examiner le texte, le contexte et l'objet de la disposition législative.

[12] Bien que la méthode qui précède s'applique à l'interprétation des lois fiscales, la Cour suprême du Canada a indiqué qu'il est souvent approprié d'insister sur l'interprétation textuelle lorsqu'il faut interpréter une disposition fiscale étant donné le « degré de précision et [les] caractéristiques particulières de nombreuses dispositions fiscales » : arrêt *A.Y.S.A. Amateur Youth Soccer Association c. Canada (Agence du revenu)*, 2007 CSC 42, [2007] 3 R.C.S. 217, au paragraphe 16; arrêt *Placer Dome Canada Ltd. c. Ontario (Ministre des Finances)*, 2006 CSC 20, [2006] 1 R.C.S. 715 (arrêt *Placer Dome*), au paragraphe 23; et arrêt *Hypothèques Trustco Canada c. Canada*, 2005 CSC 54, [2005] 2 R.C.S. 601 (arrêt *Hypothèques Trustco*), au paragraphe 11. La Cour suprême précise que, si le libellé de la disposition fiscale peut « recevoir plus d'une interprétation raisonnable », une analyse contextuelle et téléologique s'impose pour lever toute ambiguïté (arrêt *Placer Dome*, au paragraphe 23; arrêt *Hypothèques Trustco*, au paragraphe 10). Toutefois, « [l]orsque le sens d'une […] disposition [fiscale] ou son application aux faits ne présente aucune ambiguïté, il suffit de l'appliquer » (arrêt *Placer Dome*, au paragraphe 23).

[13] Selon le cadre analytique exposé précédemment, il faut se demander si les dispositions pertinentes sont ambiguës, parce qu'elles sont sujettes à plus d'une interprétation raisonnable. À mon avis, je dois répondre à cette question par la négative dans le présent appel puisque les dispositions pertinentes sont sans ambiguïté et doivent être interprétées de la manière proposée par Alexander College.

[14] Plus précisément, l'exonération prévue à l'article 7 s'applique aux « universités ». Ce terme est défini de manière définitive au paragraphe 123(1) de la LTA puisque le législateur a utilisé le mot « *means* » (« s'entend de ») dans la version anglaise de la Loi

correctly notes, it is a well-accepted principle of statutory interpretation that the use of the word "means" in a statutory definition reflects Parliament's intention that the definition be exhaustive and therefore may well displace the ordinary meaning for a defined term: Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law Inc., 2016) (Sullivan), at pages 79 and 80; *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231, at paragraph 42; *Yellow Cab Ltd. v. Board of Industrial Relations et al.*, [1980] 2 S.C.R. 761, at page 768; *Sheldon Inwentash and Lynn Factor Charitable Foundation v. Canada*, 2012 FCA 136, 2012 D.T.C. 5090, at paragraph 28.

[15] Thus, for the purposes of the ETA, it matters neither how an ordinary person might understand the term "university" nor how that term might be defined in provincial legislation. Rather, what is determinative is whether an institution falls within the statutory definition in the ETA. That definition provides in relevant part that a university means a "recognized degree-granting institution" or an organization that operates a "college affiliated with … such an institution".

[16] On its face, the English version of the first portion of the definition of a "university" in the ETA requires that an institution merely be recognized as one that is empowered to grant degrees to qualify as a university.

[17] The respondent argues that the French version might be read in the same way or could be read as providing that it is the institution as opposed to its degree-granting status that must be recognized as the French version of the definition provides that a university means "[*i*]*nstitution reconnue qui décerne des diplômes, y compris l'organisation qui administre une école affiliée à une telle institution*". I disagree as it is not clear for what the institution would be recognized other than for its capacity to grant degrees in the French version of the provision; if Parliament meant to convey the idea that what is required is that the institution be

lorsqu'il a défini le terme « *university* » (« université ») aux fins de cette dernière. Or, comme le souligne à juste titre Alexander College, il existe un principe bien établi en matière d'interprétation législative selon lequel l'utilisation du mot « *means* » dans une définition traduit l'intention du législateur de donner une définition exhaustive d'un terme, qui peut supplanter son sens ordinaire : Ruth Sullivan, *Statutory Interpretation*, 3e éd., Toronto : Irwin Law Inc., 2016 (Sullivan), aux pages 79 et 80; arrêt *Entertainment Software Association c. Société canadienne des auteurs, compositeurs et éditeurs de musique*, 2012 CSC 34, [2012] 2 R.C.S. 231, au paragraphe 42; arrêt *Yellow Cab Ltd. c. Board of Industrial Relations et autres*, [1980] 2 R.C.S. 761, à la page 768; arrêt *Sheldon Inwentash and Lynn Factor Charitable Foundation c. Canada*, 2012 CAF 136, au paragraphe 28.

[15] Par conséquent, aux fins de la LTA, ce qui compte n'est pas de savoir comment une personne ordinaire comprendrait le terme « université » ni comment il serait défini dans la législation provinciale. L'essentiel est de déterminer si la définition législative donnée dans la LTA s'applique à une institution en particulier. La disposition pertinente donne la définition suivante du mot « université » : « [i]nstitution reconnue qui décerne des diplômes » ou organisation qui administre une « école affiliée […] d'une telle institution ».

[16] Selon son libellé, la version anglaise de la première partie de la définition du terme « *university* » donnée dans la LTA exige qu'une institution soit simplement reconnue comme étant habilitée à décerner des diplômes pour être considérée comme une université.

[17] L'intimée soutient que la version française peut être lue de la même façon ou pourrait être lue comme prévoyant que c'est l'institution et non sa capacité à décerner des diplômes qui doit être reconnue, étant donné que la version française de la définition dispose qu'une université s'entend d'une « institution reconnue qui décerne des diplômes, y compris l'organisation qui administre une école affiliée à une telle institution ». Je ne suis pas d'accord, car la version française de la disposition ne dit pas clairement à quel titre une institution serait reconnue autre qu'en sa capacité à décerner des diplômes. Si le législateur avait voulu dire que

recognized as a university, additional words would have been required in the French text to add an expression like "*comme telle*" after the word "*reconnue*".

[18] However, even if I were to assume that the French text may also be read as suggested, the meaning that Alexander College urges still must be adopted. When interpreting statutory provisions that appear to differ in their French and English versions, courts often employ the shared meaning rule. Under this rule "the meaning that is shared by the French and English versions is presumed to be the meaning intended by the legislature" (Sullivan, at page 98). The Supreme Court of Canada in *R. v. Daoust*, 2004 SCC 6, [2004] 1 S.C.R. 217 (*Daoust*) explained that applying the rule involves two steps. The first step is to determine if there is a shared meaning between the two versions. The Court stated that where one version is clear and the other might be ambiguous, as the respondent argues is the case here, the shared meaning is the version that is "plain and not ambiguous" (*Daoust*, at paragraph 28). Once a common meaning is identified, the second step is to identify whether that meaning is, "according to the ordinary rules of statutory interpretation, consistent with Parliament's intent" (*Daoust*, at paragraph 30). For example, a reviewing court should consider the scheme of the legislation to determine if the shared meaning actually expresses the intention of Parliament as reflected elsewhere in the statute: *R. v. Compagnie Immobilière BCN Ltée*, [1979] 1 S.C.R. 865, at pages 872–874; *Canada (Attorney General) v. Frye*, 2005 FCA 264, 338 N.R. 382, at paragraph 28.

[19] The singular meaning of the English version of the definition, which states that a qualifying institution need merely be recognized as one that is empowered to grant degrees, is encompassed in the French definition, if it is equivocal. Therefore, applying the first step of the shared meaning rule as per *Daoust*, the meaning of the English definition must govern. I believe that this shared meaning is also consistent with the broader scheme of the ETA and the intent of Parliament, which I discuss in detail below.

l'institution devait être reconnue à titre d'université, il aurait fallu ajouter une expression du genre « comme telle » après « reconnue » dans la version française.

[18] Même si j'admettais que la définition française peut aussi s'interpréter de la manière proposée, la signification que Alexander College préconise doit cependant être adoptée. Lorsqu'ils sont appelés à interpréter des dispositions législatives dont les versions anglaise et française semblent diverger, les tribunaux recourent souvent à la règle du sens commun. Suivant cette règle, [TRADUCTION] « le sens qui est commun aux versions française et anglaise sera présumé être celui correspondant à l'intention du législateur » (Sullivan, à la page 98). Dans l'arrêt *R. c. Daoust*, 2004 CSC 6, [2004] 1 R.C.S. 217 (arrêt *Daoust*), la Cour suprême du Canada a expliqué que la règle en question s'applique en deux étapes. La première étape consiste à établir s'il existe un sens commun aux deux versions. La Cour a déclaré que, s'il y a ambiguïté dans une version et pas dans l'autre, comme c'est le cas en l'espèce d'après l'intimée, le sens commun favorisera la version qui n'est pas « ambiguë, la version qui est claire » (arrêt *Daoust*, au paragraphe 28). Une fois que le sens commun a été trouvé, la deuxième étape consiste à vérifier si celui-ci est « conforme à l'intention législative suivant les règles ordinaires d'interprétation » (arrêt *Daoust*, au paragraphe 30). Ainsi, une cour de révision doit tenir compte de l'économie générale de la loi afin de déterminer si le sens commun traduit réellement l'intention du législateur, telle qu'elle est énoncée ailleurs dans la loi : arrêt *R. c. Compagnie Immobilière BCN Ltée*, [1979] 1 R.C.S. 865, aux pages 872 à 874; arrêt *Canada (Procureur général) c. Frye*, 2005 CAF 264, au paragraphe 28.

[19] En cas d'ambiguïté, le sens unique de la version anglaise de la définition, qui prévoit simplement qu'une institution est admissible si elle est reconnue comme étant autorisée à décerner des diplômes, est englobé dans la définition française. Donc, si la première étape de la règle du sens commun est appliquée conformément à l'arrêt *Daoust*, le sens de la définition anglaise doit l'emporter. J'estime que ce sens commun respecte en outre l'économie générale de la LTA et l'intention du législateur, que j'examinerai en détail ci-après.

[20] Thus, contrary to what the Tax Court held, I believe it would constitute an impermissible reading-in of additional elements to limit the "university" definition to only those institutions that are recognized as such under provincial law or to those that are empowered to grant baccalaureate degrees or higher.

[21] Indeed, the respondent did not rely on the latter argument before this Court and, in my view, was well-advised to abandon it as the argument stems from the decisions in *Klassen* and *Zailo*, which are wholly inapplicable to the ETA. As noted, both cases arose under the ITA. The provisions in the ITA that were at issue in *Klassen* and *Zailo* are fundamentally different from those in the ETA.

[22] *Klassen* and *Zailo* dealt with the income deduction for tuition fees and the education credit provided for in paragraphs 118.5(1)(b) and 118.6(1)(b) of the ITA, which apply to claims concerning "universit[ies] outside Canada". However, unlike the ETA, the ITA contains no definition of "university". Moreover, the ITA casts the comparable deduction and credit for Canadian institutions in sub-paragraphs 118.5(1)(a)(i), 118.5(1)(c)(i) and paragraph 118.6(1)(c) more broadly and makes them applicable not only to universities, but also to "college[s] or other educational institution[s] providing courses at a post-secondary school level". Based on this distinction, this Court and the Tax Court found that a foreign university means an institution granting degrees at the baccalaureate level or higher. Given the entirely different statutory context, this holding is inapplicable under the ETA.

[23] Thus, there is no reason to interpret the term "degree" in subsection 123(1) of the ETA as being limited to baccalaureate degrees or higher. In the absence of a definition of "degree" in the ETA, regard should be given to how the term is defined in provincial legislation as the provinces determine what degrees may be granted by which institutions through their jurisdiction over education. As noted, in British Columbia, the relevant legislation provides for associate degrees, which

[20] Contrairement à la conclusion de la Cour canadienne de l'impôt, j'estime qu'il s'agirait d'une interprétation large inadmissible de la teneur de la LTA de limiter la définition d'une « université » aux seules institutions qui sont reconnues comme telles par une loi provinciale, ou à celles qui sont habilitées à décerner des diplômes de baccalauréat ou de cycle supérieur.

[21] L'intimée n'a en effet pas invoqué cet argument devant la Cour et, à mon avis, elle a bien fait d'y renoncer puisqu'il découle de l'arrêt *Klassen* et de la décision *Zailo*, qui ne s'appliquent pas du tout à la LTA. Comme il a été mentionné, les deux affaires se rapportaient à la LIR. Les dispositions de la LIR qui étaient en cause dans l'arrêt *Klassen* et dans la décision *Zailo* sont fondamentalement différentes de celles de la LTA.

[22] L'arrêt *Klassen* et la décision *Zailo* portaient sur la déduction de frais de scolarité du revenu et sur le crédit d'impôt pour études prévus aux alinéas 118.5(1)b) et 118.6(1)b) de la LIR, applicables aux demandes relatives à une « université située à l'étranger ». Or, contrairement à la LTA, le terme « université » n'est pas défini dans la LIR. Qui plus est, la LIR donne un sens plus large à la déduction et au crédit comparables qui sont prévus pour les institutions canadiennes aux sous-alinéas 118.5(1)a)(i) et 118.5(1)c)(i), ainsi qu'à l'alinéa 118.6(1)c), lesquels s'appliquent aux frais de scolarité d'une université, mais aussi à ceux d'un « établissement d'enseignement — […] collège ou autre — offrant des cours de niveau postsecondaire ». Se fondant sur cette distinction, la Cour et la Cour canadienne de l'impôt ont conclu qu'une université étrangère est une institution qui décerne des diplômes de premier cycle ou de cycle supérieur. Étant donné le contexte législatif complètement différent, cette conclusion ne saurait s'appliquer sous le régime de la LTA.

[23] Il n'y a aucune raison d'interpréter le terme « diplôme » utilisé au paragraphe 123(1) de la LTA comme se limitant aux diplômes de premier cycle ou de cycle supérieur. En l'absence d'une définition du terme « diplôme » dans la LTA, il convient de tenir compte de la définition que lui donnent les lois provinciales, car la compétence en matière d'éducation appartient aux provinces et ce sont elles qui déterminent les diplômes qu'une institution est habilitée à décerner.

may be granted both by universities and certain colleges. Thus, to come within the definition of a "university" for purposes of the ETA, the institution must be empowered to grant degrees as the same are defined in the relevant provincial legislation.

[24] However, one cannot go on to also tie the definition of a "university" for purposes of the ETA to how that term is defined in provincial legislation as the ETA defines the term "university". Had Parliament wished to define a "university" for the purposes of the ETA to mean only those institutions which are granted such status under provincial law, it would have been easy for it to have so defined the term or to have left it undefined. Parliament chose not to do this but rather elected to tie the definition of a "university" to an institution's recognized ability to grant degrees.

[25] Thus, to come within the definition of "university" within the meaning of subsection 123(1), Part IX of the ETA all that is required is that the institution be empowered to grant degrees by a relevant authority such as the province of British Columbia. Alexander College is so authorized. It therefore follows that Alexander College falls within the scope of the exemption in section 7 of Part III, Schedule V of the ETA.

[26] Resort to a contextual and purposive analysis to discern the meaning of "university" for purposes of these provisions in the ETA leads to the same result for several reasons.

[27] In the first place, as both parties concur, the final reason offered by the Tax Court in footnote 22 to its reasons is without merit as private universities—which are several in number in British Columbia—find themselves in precisely the same position that Alexander College would be in if it were found to be a "university" within the meaning of subsection 123(1) of the ETA. More specifically, these private universities are exempt in terms of enumerated supplies but are not entitled to claim either input tax credits or the public service body rebate. Thus, a similar result in the case of private

Comme il a été mentionné, en Colombie-Britannique, les lois applicables prévoient les diplômes d'associé, qui peuvent être décernés par les universités et certains collèges. Ainsi, pour être visée par la définition d'« université » aux fins de la LTA, l'institution doit être habilitée à décerner des diplômes tel que définis dans les lois provinciales applicables.

[24] Cependant, étant donné que la LTA contient une définition du terme « université », il n'est pas loisible de faire un lien entre la définition de ce terme aux fins de l'application de la LTA et sa définition dans une loi provinciale. Si, aux fins de l'application de la LTA, le législateur avait voulu définir le terme « université » pour ne désigner que les institutions qui ont ce statut aux termes d'une loi provinciale, il lui aurait été facile de lui donner une telle définition ou de ne pas le définir. Le législateur a choisi de ne pas suivre cette voie et a plutôt décidé de lier la définition d'« université » à la capacité reconnue d'une institution de décerner des diplômes.

[25] Ainsi, pour être visée par la définition d'« université » au sens du paragraphe 123(1) de la partie IX de la LTA, il suffit que l'institution soit habilitée à décerner des diplômes par une autorité compétente comme la province de la Colombie-Britannique. C'est le cas de Alexander College. Il s'ensuit donc que Alexander College est visée par l'exonération prévue à l'article 7 de la partie III de l'annexe V de la LTA.

[26] Recourir à une analyse contextuelle et téléologique pour discerner le sens du terme « université » aux fins de ces dispositions de la LTA donne le même résultat, pour plusieurs raisons.

[27] En premier lieu, comme en conviennent les deux parties, le dernier motif exposé par la Cour canadienne de l'impôt dans la note de bas de page 22 de ses motifs est sans fondement puisque les universités privées — il y en a plusieurs en Colombie-Britannique — se trouvent dans la même situation que Alexander College si elle était considérée comme une « université » au sens du paragraphe 123(1) de la LTA. Plus précisément, ces universités privées sont exonérées au titre des fournitures énumérées, mais elles ne peuvent pas demander de crédit de taxe sur les intrants ni un remboursement

colleges like Alexander College cannot be said to be contrary to the scheme of the ETA.

[28] Secondly, contrary to what the Tax Court found, there is no reason to view the second portion of the definition of "university" that incorporates affiliated colleges and research bodies as circumscribing the term "institution" to only mean universities as so recognized under provincial legislation. There is nothing necessarily anomalous in a college being affiliated with another college, and there was no evidence before the Tax Court to indicate whether such affiliations have actually occurred. There is accordingly nothing absurd in understanding a "university" to include a degree-granting college because it is possible that such a college might well be affiliated with another college.

[29] Moreover, the term "institution" is used broadly elsewhere in the ETA and thus conflicts with the narrowing of the term in the "university" definition adopted by the Tax Court.

[30] For example, the word "institution" is often used in relation to a "financial institution" in Part IX of the ETA, which is defined in section 149 to include virtually any person engaged in a financial services business. Similarly, a "public institution" is defined in subsection 123(1), Part IX of the ETA as follows:

> **123 (1)** …
>
> ***public institution*** means a registered charity (within the meaning assigned by subsection 248(1) of the *Income Tax Act*) that is a school authority, a public college, a university, a hospital authority or a local authority determined under paragraph (b) of the definition municipality to be a ***municipality***; (*institution publique*)

This definition includes much more than a single type of institution. Likewise, paragraph 68.26(a) of the ETA provides for a partial rebate of Part VI tax to "a school, university or other similar educational institution". Once

à titre d'organismes de services publics. La même conclusion appliquée aux collèges privés tels que Alexander College ne pourrait donc être jugée incompatible avec l'économie générale de la LTA.

[28] En deuxième lieu, contrairement à la conclusion de la Cour canadienne de l'impôt, il n'y a pas lieu de considérer la deuxième partie de la définition d'« université », qui inclut les écoles affiliées et les instituts de recherche, comme limitant le terme « institution » exclusivement aux universités reconnues comme telles sous le régime d'une loi provinciale. En soi, l'affiliation de deux collèges n'a rien d'anormal, et la Cour canadienne de l'impôt ne disposait d'aucun élément de preuve indiquant la véritable existence d'une telle affiliation. Par conséquent, la compréhension du terme « université » comme englobant un collège qui décerne des diplômes n'a rien d'absurde s'il est possible que ledit collège soit affilié à un autre collège.

[29] De plus, le terme « institution » est utilisé de façon générale ailleurs dans la LTA et entre en conflit avec le sens étroit du terme dans la définition d'« université » adoptée par la Cour canadienne de l'impôt.

[30] Par exemple, le terme « institution » est souvent employé relativement à une « institution financière » dans la partie IX de la LTA, que l'article 149 définit comme englobant pratiquement toutes les personnes qui exercent des activités liées aux services financiers. De même, le terme « institution publique » est défini comme suit au paragraphe 123(1) de la partie IX de la LTA :

> **123 (1)** […]
>
> ***institution publique*** Organisme de bienfaisance enregistré, au sens du paragraphe 248(1) de la *Loi de l'impôt sur le revenu*, qui est une administration scolaire, un collège public, une université, une administration hospitalière ou une administration locale qui a le statut de municipalité aux termes de l'alinéa b) de la définition de ***municipalité***. (*public institution*)

La définition comprend bien plus qu'un seul type d'institution. Il en va de même de l'alinéa 68.26a) de la LTA, qui prévoit un remboursement partiel de la taxe payée en vertu de la partie VI par « une école, une université

again, the term "institution" is used broadly in this context to mean any type of organization.

[31] Given the broad way the term "institution" is used elsewhere in the ETA, there is no reason to circumscribe it in the definition of "university" in subsection 123(1).

[32] Thirdly, contrary to what the Tax Court found, reading the "university" definition as including a private degree-granting college does not render the listing of a public college in section 7 of Part III, Schedule V of the ETA superfluous and thus the interpretation of Alexander College does not offend the presumption against tautology. There is considerable overlap between the various educational suppliers who are covered by the exemptions in Part III, Schedule V of the ETA and, therefore, nothing tautological about a supplier coming within more than one definition in the Schedule.

[33] Indeed, this overlap is apparent in the definition of a university, itself. Encompassed within the definition, as noted, are affiliated colleges. These colleges may well be publicly-funded and, if so, are twice mentioned in the provisions—once in the section 7 exemption as a "public college" and again as coming within the definition of "university" in subsection 123(1) of the ETA as an affiliated college.

[34] Another example of a similar overlap arises out of the definitions for "public college" and "vocational school" [in section 1 of Part III, Schedule V of the ETA]. They are defined as follows:

Part IX

Goods and Services Tax

ou une autre semblable institution d'enseignement ». Une fois de plus, dans ce contexte, le terme « institution » est employé dans son sens large pour désigner un type quelconque d'organisme.

[31] En raison de l'emploi du terme « institution » dans son sens large ailleurs dans la LTA, il n'y a pas lieu de le circonscrire dans la définition d'« université » prévue au paragraphe 123(1).

[32] En troisième lieu, contrairement à la conclusion de la Cour canadienne de l'impôt, interpréter la définition d'« université » comme incluant un collège privé qui décerne des diplômes ne rend pas superflue la mention de collège privé à l'article 7 de la partie III de l'annexe V de la LTA et, par conséquent, l'interprétation de Alexander College n'est pas contraire à la présomption d'absence de tautologie. Comme il existe un recoupement important entre les divers fournisseurs de services d'enseignement visés par les exonérations prévues dans la partie III de l'annexe V de la LTA, la possibilité qu'un fournisseur corresponde à plus d'une définition donnée dans l'annexe n'a donc rien de tautologique.

[33] En effet, ce recoupement est manifeste dans la définition même d'université. Comme il a été mentionné, la définition comprend les écoles affiliées (ou « *affiliated colleges* » dans la version anglaise). Ces écoles (« *colleges* » dans la version anglaise) peuvent bien être financées par des fonds publics, auquel cas elles sont mentionnées deux fois dans les dispositions, c'est-à-dire une fois à titre de « collège public » visé par l'exonération prévue à l'article 7, et une autre fois à titre d'école affiliée (« *affiliated college* » en anglais) entrant dans la définition d'« université » au sens du paragraphe 123(1) de la LTA.

[34] Un autre exemple d'un recoupement analogue découle des définitions des termes « collège public » et « école de formation professionnelle » [à l'article 1 de la partie III de l'annexe V de la LTA]. Ils sont définis comme suit :

Partie IX

Taxe sur les produits et services

…

Division I

Definitions

123(1) In section 121, this Part and Schedules V to X,

…

public college means an organization that operates a post-secondary college or post-secondary technical institute

(a) that receives from a government or a municipality funds that are paid for the purpose of assisting the organization in the ongoing provision of educational services to the general public, and

(b) the primary purpose of which is to provide programs of instruction in one or more fields of vocational, technical or general education; (*collège public*)

…

Schedule V

Exempt Supplies

…

PART III

Educational Services

1 In this Part,

…

vocational school means an organization that is established and operated primarily to provide students with correspondence courses, or instruction in courses, that develop or enhance students' occupational skills.

[35] Both "public college[s]" and "vocational school[s]" are listed separately in the exemptions in Part III of Schedule V to the ETA. For example, section 8 provides:

8 A supply, other than a zero-rated supply, made by a government, a school authority, a vocational school, a public college or a university of a service of instructing individuals in, or administering examinations in respect

[…]

Section I

Définitions

123 (1) Les définitions qui suivent s'appliquent à l'article 121, à la présente partie et aux annexes V à X.

[…]

collège public Institution qui administre un collège d'enseignement postsecondaire ou un institut technique d'enseignement postsecondaire qui, à la fois :

a) reçoit d'un gouvernement ou d'une municipalité des fonds destinés à l'aider à offrir des services d'enseignement au public de façon continue;

b) a pour principal objet d'offrir des programmes de formation professionnelle, technique ou générale. (*public college*)

[…]

Annexe V

Fournitures exonérées

[…]

Partie III

Services d'enseignement

1 Les définitions qui suivent s'appliquent à la présente partie.

école de formation professionnelle Institution établie et administrée principalement pour offrir des cours par correspondance ou des cours de formation qui permettent à l'étudiant d'acquérir ou d'améliorer une compétence professionnelle.

[35] Tant les « collège[s] public[s] » que les « école[s] de formation professionnelle » sont mentionnés séparément dans les exonérations de la partie III de l'annexe V de la LTA. Notamment, l'article 8 est libellé ainsi :

8 La fourniture, sauf une fourniture détaxée, effectuée par un gouvernement, une administration scolaire, une école de formation professionnelle, un collège public ou une université, d'un service consistant à donner à des

of, courses leading to certificates, diplomas, licences or similar documents, or classes or ratings in respect of licences, that attest to the competence of individuals to practise or perform a trade or vocation, except where the supplier has made an election under this section in prescribed form containing prescribed information.

particuliers des cours ou des examens qui mènent à des certificats, diplômes, permis ou documents semblables, ou à des classes ou des grades conférés par un permis, attestant la compétence de particuliers dans l'exercice d'un métier, sauf si le fournisseur a fait un choix en application du présent article en la forme déterminée par le ministre et contenant les renseignements requis par celui-ci.

[36] An institution that receives public funding and operates primarily to provide vocational programming at the post-secondary level would qualify as both a public college and a vocational school.

[36] Une institution qui reçoit des fonds publics et qui est administrée principalement pour offrir des programmes de formation professionnelle de niveau postsecondaire pourrait être considérée autant comme un collège public que comme une école de formation professionnelle.

[37] There is thus no absurdity in the overlap of educational suppliers and no impermissible redundancy in understanding the term "university" in subsection 123(1) of the ETA to include a college merely because a "public college" is separately listed in section 7 of Part III, Schedule V to the ETA.

[37] Par conséquent, les recoupements entre les fournisseurs de services d'enseignement n'ont rien d'absurde, et aucune redondance inacceptable ne découle d'une interprétation du terme « université » employé au paragraphe 123(1) de la LTA comme incluant un collège tout simplement parce que l'article 7 de la partie III de l'annexe V de la LTA mentionne séparément les « collège[s] public[s] ».

[38] Fourthly, the exemptions, which cover school authorities, public colleges, universities and vocational schools, demonstrate an intent to exempt all forms of education from the requirement to charge and remit GST/HST if there is some governmental input into the quality of the programs offered. The definitions of "school authority" and "university" in subsection 123(1), Part IX of the ETA build in the requirement to provide instruction to a provincially-regulated standard. The former provides:

[38] En quatrième lieu, les exonérations visant les administrations scolaires, les collèges publics, les universités et les écoles de formation professionnelle dénotent une intention d'exonérer toutes les formes d'enseignement de l'obligation de percevoir et de verser la TPS/TVH si le gouvernement joue un rôle quelconque en ce qui concerne la qualité des programmes offerts. Les définitions d'« administration scolaire » et d'« université » au paragraphe 123(1) de la partie IX de la LTA incorporent l'obligation de fournir des services d'enseignement conformes aux normes provinciales. Voici la définition d'une administration scolaire :

123 (1) …

school authority means an organization that operates an elementary or secondary school in which it provides instruction that meets the standards of educational instruction established by the government of the province in which the school is operated; (*administration scolaire*)

123 (1) […]

administration scolaire Institution qui administre une école primaire ou secondaire dont le programme d'études est conforme aux normes en matière d'enseignement établies par le gouvernement de la province où l'école est administrée. (*school authority*)

Similarly, the university definition requires recognition of the degree-granting status of the institution.

[39] In the case of public colleges, governmental oversight over the quality of the programming is accomplished through the requirement that the institutions receive public funding. Finally, the exemptions relating to vocational schools outlined in sections 6 and 8 of Part III of Schedule V contain within them the requirement that the courses offered lead to recognized accreditations. In addition to section 8, reproduced above, section 6 exempts:

> **6** A supply of
>
> **(a)** a service of instructing individuals in courses leading to, or for the purpose of maintaining or upgrading, a professional or trade accreditation or designation recognized by a regulatory body, or
>
> **(b)** a certificate, or a service of administering an examination, in respect of a course, or in respect of an accreditation or designation described in paragraph (a),
>
> where the supply is made by a professional or trade association, government, vocational school, university or public college or by the regulatory body, except where the supplier has made an election under this section in prescribed form containing prescribed information.

[40] This intent is reflected in what the Minister of Finance stated when the provisions were being debated before Parliament. Schedule V to the ETA was adopted in 1990 along with other amendments. In respect of the suite of amendments that concerned the taxation of educational services, the Minister of Finance stated as follows (*House of Commons Debates*, 34th Parl., 2nd Sess., Vol. 8 (11 May 1990), at page 1271 (Hon. Michael Wilson, Minister of Finance)):

De même, la définition d'université exige que l'institution soit reconnue comme étant habilitée à décerner des diplômes.

[39] Dans le cas des collèges publics, la supervision de la qualité des programmes par le gouvernement est assurée par la voie d'une exigence liée à l'octroi d'une aide publique. En dernier lieu, pour qu'une école de formation professionnelle puisse se prévaloir d'une exonération prévue aux articles 6 et 8 de la partie III de l'annexe V, elle doit offrir des cours menant à une accréditation reconnue. Outre l'article 8, reproduit ci-dessus, l'article 6 prévoit l'exonération des fournitures suivantes :

> **6** La fourniture, effectuée par une association professionnelle, un gouvernement, une école de formation professionnelle, une université, un collège public ou un organisme de réglementation, des services ou certificats suivants, sauf si le fournisseur fait un choix en application du présent article, en la forme déterminée par le ministre et contenant les renseignements requis par celui-ci :
>
> **a)** un service consistant à donner à des particuliers des cours qui mènent à une accréditation ou à un titre professionnel reconnus par l'organisme ou qui permettent de conserver ou d'améliorer une telle accréditation ou un tel titre;
>
> **b)** un certificat, ou un service consistant à donner un examen, concernant un cours, une accréditation ou un titre mentionné à l'alinéa a).

[40] Cette intention ressort des arguments invoqués par le ministre des Finances lorsque les dispositions ont été débattues devant le Parlement. L'annexe V de la LTA a été adoptée en 1990, de concert avec d'autres modifications. Relativement à la série de modifications touchant l'imposition des services d'enseignement, le ministre des Finances a déclaré ce qui suit (*Débats de la Chambre des communes*, 34e lég., 2e sess., vol. 8 (11 mai 1990), à la page 1258 (l'hon. Michael Wilson, ministre des Finances)) :

> … Madam Speaker, there is no tax on education. There is no GST on educational services. That is a simple part of the legislation.

[41] It is consistent with this purpose that private colleges like Alexander College be exempt from the requirement to collect and remit GST/HST.

[42] Finally, as Alexander College convincingly argues, the interpretation offered by the Tax Court leads to an absurd result. Students taking the same courses at a British Columbia university and Alexander College or pursuing associate degrees at the two institutions would be subject to different tax treatment. Under the Tax Court's interpretation, students would not have to pay GST/HST on their course fees in the former case while in the latter they would. There is no principled basis for such differentiation and, for the reasons discussed above, such a result is not required under a textual, contextual or purposive reading of the relevant provisions. Rather, when properly read, the provisions in issue lead to the conclusion that Alexander College falls within the exemption in section 7 of Part III, Schedule V of the ETA.

III. Proposed Disposition

[43] It therefore follows that I would allow this appeal with costs, set aside the judgment of the Tax Court, and, making the decision that the Tax Court ought to have made, would allow the appeal in 2012-3854(GST)G with costs and vacate the assessment dated July 4, 2011 for the reporting period from July 1, 2010 to September 30, 2010.

GAUTHIER J.A.: I agree.

STRATAS J.A.: I agree.

> […] Madame la Présidente, il n'y a pas de taxe sur l'éducation. La TPS ne s'applique pas aux services d'enseignement. C'est clairement indiqué dans le projet de loi.

[41] C'est conforme à l'objectif voulant que les collèges privés comme Alexander College soient exonérés de l'obligation de percevoir et de verser la TPS/TVH.

[42] Finalement, comme Alexander College l'a fait valoir de manière convaincante, l'interprétation proposée par la Cour canadienne de l'impôt aboutit à un résultat absurde. Les étudiants qui suivent les mêmes cours dans une université de la Colombie-Britannique et à Alexander College, ou qui étudient pour obtenir un diplôme d'associé des deux institutions seraient assujettis à des traitements fiscaux différents. À en croire l'interprétation de la Cour canadienne de l'impôt, les étudiants du premier groupe ne seraient pas tenus de payer la TPS/TVH sur leurs frais de scolarité, alors que ceux du deuxième groupe le seraient. Aucun principe établi ne justifie une telle différence et, pour les motifs précités, une analyse textuelle, contextuelle ou téléologique des dispositions en cause ne conduit pas à une telle issue. Au contraire, lorsqu'elles sont interprétées correctement, les dispositions en cause emportent la conclusion que Alexander College est visée par l'exonération prévue à l'article 7 de la partie III de l'annexe V de la LTA.

III. Décision proposée

[43] Il s'ensuit donc que j'accueillerais l'appel avec dépens, j'annulerais la décision de la Cour canadienne de l'impôt et, rendant la décision que la Cour canadienne de l'impôt aurait dû rendre, j'accueillerais l'appel dans le dossier 2012-3854(GST)G avec dépens et j'annulerais la cotisation établie le 4 juillet 2011 pour la période de déclaration comprise entre le 1er juillet et le 30 septembre 2010.

LA JUGE GAUTHIER, J.C.A. : Je suis d'accord.

LE JUGE STRATAS, J.C.A. : Je suis d'accord.

11

Noble v. Principal Consultants Ltd. (Bankrupt), 2000 ABCA 133

Date: 20000510
Docket: 18436

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MADAM JUSTICE PICARD
THE HONOURABLE MR. JUSTICE BERGER
THE HONOURABLE MR. JUSTICE WITTMANN

BETWEEN:

WALLACE H. NOBLE

Appellant

- and-

KPMG INC. AS TRUSTEES IN BANKRUPTCY
OF PRINCIPAL CONSULTANTS LTD.

Respondent

APPEAL FROM THE JUDGMENT OF THE
HONOURABLE MR. JUSTICE R.P. FRASER
DATED AUGUST 5, 1999

REASONS FOR JUDGMENT RESERVED

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE PICARD
CONCURRED IN BY THE HONOURABLE MR. JUSTICE WITTMANN

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE BERGER

DISSENTING IN PART

COUNSEL:

W.S. McKall
For the Appellant

L. Robinson
For the Respondent

REASONS FOR JUDGMENT OF THE
HONOURABLE MADAM JUSTICE PICARD

Introduction

[1] This appeal raises the issue of whether the bankruptcy of an employer, after it has wrongfully terminated an employment contract with an employee, affects the quantum of damages to which the employee is entitled.

[2] The appellant, Noble, was employed by Principal Consultants Ltd. (Principal) for over 18 years. At the time of his termination, in August of 1987, he was Senior Vice-President, Finance, Prairie Region. He was terminated without cause and without notice or compensation. In October of 1987, Principal made an assignment in bankruptcy. KPMG Inc., (KPMG) became the trustee in bankruptcy and is the respondent in this action.

[3] There was an agreed statement of facts which included the following:

> (a) the appellant was entitled at common law to 18 months' notice of termination, or payment in lieu thereof;
>
> (b) the appellant's salary was based on the following formula:
>
> > (i) base salary of $5,000 per month,
> > (ii) bonuses calculated on the basis of increased sales in his region.

[4] KPMG takes the position that a bankruptcy limits the quantum of common law damages because, upon that event, Noble would no longer have been employed by Principal. That is, KPMG says that the notice period is reduced to 2 months and 6 days. In support, it refers to the results in cases where employees have become disabled or died after being unlawfully dismissed and to statements in *Dunlop* v. *British Columbia Hydro and Power Authority*, [1988] 32 B.C.L.R. 334 (2d) (B.C.C.A.) and *Rizzo and Rizzo Shoes (Re),* [1998] 1 S.C.R. 27.

[5] Noble argues that upon Principal unlawfully dismissing him, Principal breached its contract with him and he became entitled, at common law, to damages equivalent to 18 months' compensation. Noble says Principal's bankruptcy is not an event that reduces that quantum, that the proper quantification of his common law damages against the bankrupt is compensation based on 18 months' notice, and that he has the right to file a claim for those damages as an unsecured creditor of Principal. Noble distinguishes the disabled/death cases and says the analysis in *Dunlop* and statements in *Rizzo* support his case.

[6] The chambers judge agreed with KPMG. While he distinguished the disabled/death cases, he found support for his conclusion in both the *Dunlop* and *Rizzo* cases.

The Law

[7] Upon a breach of contract, the injured party is entitled to damages to place him, so far as possible, in the same position he would have been if the contract had been performed. *Wertheim* v. *Chicoutimi Pulp Co.*, [1911] A.C. 301.

[8] In an employment contract, there is an implied term that an employer will give an employee reasonable notice of termination. The employee may be given the opportunity to work until the end of the period of notice (working notice) or, he may be given damages in lieu of notice if dismissed summarily without just cause (unlawful dismissal). In the latter case, the dismissed employee has the responsibility of mitigating the loss. *Bardal* v. *Globe & Mail Ltd.*, [1960] O.W.N. 253 (Ont. H.C.)

[9] The general rule regarding damages for breach of contract is that damages are assessed at the date of breach. Fridman, *The Law of Contract*, 3rd ed. (Scarborough, Ontario: Carswell, 1994), at p. 754. Over the years qualifications have been made to this rule, for example, in cases involving the sale of goods or land where specific performance may be in issue and price fluctuations could greatly affect damages. See, *Johnson* v. *Agnew*, [1980] A.C. 367 (H.L.); *Asamera Oil Corp. Ltd.* v. *Sea Oil and General Corp*, [1979] 1 S.C.R. 633. No factors justifying a qualification are present in this case, thus the general rule would apply.

[10] When assessing damages for breach of contract, two distinct issues arise, remoteness and quantification. See Fridman, at p.711. Remoteness is a question of whether the damage suffered is properly recoverable in an action for breach of contract. The test for remoteness is founded in *Hadley* v. *Baxendale*, (1854) 156 E.R. 145 (Ex.) which says that damages for breach of contract are limited to the ordinary natural consequences of a breach or for consequences that might reasonably have been in the contemplation of both parties when they made the contract. See Fridman, p. 712. In the case of the breach of a contract of employment, damages in lieu of notice are not too remote.

[11] Quantifying damages often presents a challenge because of a myriad of factors and forces, including the intention of the parties and events subsequent to the contract. In this case, KPMG raises the bankruptcy of the employer as a basis for terminating the common law notice period as of the date of the bankruptcy. KPMG also seeks to reduce the quantum of the award by challenging the bonus portion of the salary payment that is based on sales.

[12] It appears that there are no reported cases considering the effect of a subsequent bankruptcy of the employer on common law damages for unlawful dismissal.

[13] In the *Dunlop* case, after being terminated without cause and without notice, the employee suffered an injury that disabled him for 12 months. The trial judge found that reasonable notice was 20 months but deducted 12 months on the basis that the employer would

not have paid him for that period, had he been in its employment on a working notice basis. (It appears that the employee would have been paid during that time by a disability plan.) Writing for the British Columbia Court of Appeal, Justice Lambert reversed that decision on the basis that the employee's disability did not have any effect on the period of reasonable notice. He found it was not a factor that should reduce the quantum of the claim, which was based on compensation equivalent to 20 months' salary.

[14] In a contract of employment, there is an implied term that each party must give reasonable notice to the other. There is **not** an implied term that the employer may pay damages in lieu of notice. The employee is entitled to damages because the employer is liable to the employee for breaching the implied term that it must give reasonable notice. The employer cannot characterize such a payment as compliance with an implied term that it can breach the contract so long as it pays because there is no such implied term.

[15] The issue in *Dunlop* was the effect to be given to an event that occurred after the dismissal and that would have prevented the dismissed employee from earning income if he had remained as an employee serving out a working notice. Justice Lambert's statements about the effect to be given to such subsequent events were relied on by the chambers judge in this case.

[16] Justice Lambert said in *Dunlop*, at p.339;

> ...in considering the significance of events following the dismissal, the proper principle, in my opinion, is that *an event* which occurs after a wrongful dismissal and before trial, or before the end of the notice period, whichever comes first, *may be considered in assessing damages actually suffered* by the dismissed employee. The legal significance to be attached to the event will depend on the nature of the event and on other relevant factors in the case. *But, to the extent that the damages are derived from a determination of the proper notice period, that notice period is determinable once and for all at the time of the breach of the contract and is not, itself, affected by subsequent events.*
>
> (emphasis supplied)

[17] In applying his test, Justice Lambert concluded that the employee's disability did not have any effect on the period of reasonable notice because the employer, who had breached the contract, could not rely on the employee's disability to diminish or deny his claim. Specifically, Justice Lambert refused to apply the "working notice" model to the breach situation. He found that after the breach of contract, the subsequent events were of no consequence. He said that when the employer broke the contract it lost its right to rely on the provision in the contract that no salary would be paid with respect to a period of disability.

[18] In summary, Justice Lambert held that the notice period is to be determined at the time of the breach and is not affected by subsequent events. He left the door open for the consideration of an event in assessing *damages actually suffered* in so far as they are not derived from a notice period. In the case before him, however, he did not accept the employer's argument that, because it would not have had to pay the employee during a period that he was disabled had he been given working notice, it did not have to pay him for the equivalent period as part of the damages based on the period of reasonable notice.

[19] In *Sylvester* v *British Columbia*, [1997] 2 S.C.R. 315, a case dealing with an employee terminated during a period when he was receiving disability benefits, Justice Major stated the following as a general principle of law, at p. 320:

> ...an employee who is wrongfully dismissed without adequate notice of termination is entitled to damages consisting of the salary the employee would have earned had the employee worked during the notice period. The fact that an employee could not have worked during the notice period is irrelevant to the assessment of these damages. They are based on the premise that the employee would have worked during the notice period.

[20] Both parties to this appeal find comfort in the *Rizzo* decision. The Supreme Court of Canada interpreted the *Employment Standards Act* (ESA) of Ontario and determined the rights it gave employees terminated by the bankruptcy of their employer. The liability of an employer to an employee under common law was not in issue. The *ratio* of the case is that an employee who is terminated as a consequence of the bankruptcy of his employer is entitled to the minimal award as provided in the legislation. In the course of arriving at his decision, Justice Iacobucci discussed the policy behind such legislation and used an analogy in which he compared the situation of two employees: one dismissed just before, and one as a consequence of, the bankruptcy. Noble refers to the discussion of policy to support his position that employees' rights are paramount while the KPMG seeks an interpretation of the analogy that would restrict compensation of the employee dismissed before a bankruptcy.

[21] Justice Iacobucci's judgment is replete with policy considerations that support the protection of the interests of employees. He referred to an earlier decision, *Machtinger* v. *HOJ Industries Ltd.,* [1992] 1 S.C.R. 986, where the Court recognized the importance that our society accords to employment and the fundamental role it has assumed in the life of the individual. He noted that, in *Wallace* v. *United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, the Court said that the manner in which employment can be terminated was equally important. He used these principles in giving the ESA a broad interpretation.

[22] His observations about the objective of termination and severance pay apply equally to those terminated at common law. He said one of the primary purposes of notice is to provide employees with an opportunity to take preparatory measures and seek alternate employment. He

characterized termination pay in lieu of notice as a “cushion” for employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternate employment. (Christie, England, Cotter, *Employment Law in Canada* (2nd 3e. 1993) at p. 572-81)

[23] Justice Iacobucci quoted with approval the statements of other courts that severance pay recognizes an employee’s investment in his employer’s business, the extent of which is directly related to years of service and seniority. It follows that long-serving employees suffer special losses when their employment terminates.

The Decision

[24] The chambers judge agreed with the submissions of the KPMG. He held that the bankruptcy limited Noble’s right to common law damages. He found that Noble was entitled to damages for lost wages after the date of the bankruptcy but only for the time period and only in the amount permitted by the *Employment Standards Code*, S.A. 1996, c.E-10.3. As for the period from the date of termination by the employer to the date of the bankruptcy, he found that Noble was entitled to damages for the amount of his base salary plus the bonuses. However, he held that Noble was not entitled to damages for “theoretical sales or profitability which did not occur”.

Analysis

[25] The chambers judge fell into error in two ways. Firstly, he characterized the bankruptcy as an event that reduced the notice period and, using the model of working notice, found it reduced the time Noble might have been employed by Principal. Secondly, he determined that, upon the bankruptcy, the status of Noble changed from that of a person unlawfully terminated by his employer months before, to that of a person terminated by the bankruptcy. He arrived at this determination from a misinterpretation of the analogy used by Justice Iacobucci in *Rizzo.*

[26] The chambers judge accepted the general statement of the law as to the assessment of damages for breach of contract including that an employee must be placed in the same position as he would have been in if the contract had been performed. This statement is the basis for the quantification of damages after a breach. However, the chambers judge accepted KPMG’s argument that it means that the employee should be placed in the same position he would have been in had he worked during the period of notice, which opportunity to work would have been terminated by the bankruptcy. Such an interpretation confuses termination by dismissal and termination by working notice. Since Noble was terminated by dismissal, which was a breach of contract by the employer, he had the right to damages at that date. It is true that, in quantifying those damages, the court should look at the loss from the perspective of the contract having been performed. However, such an analysis does not support shifting the legal position of the

employee who has been unlawfully dismissed without notice to that of a person who has been given working notice. To do so is to err in law.

[27] The chambers judge cited with approval the statements of Justice Lambert in *Dunlop*. In applying them, he found that the bankruptcy was an event that should be considered, and that its effect was to reduce Noble's right to common law damages from the agreed notice period of 18 months to two months. But a close analysis of the statement of Justice Lambert, set out in paragraph 16 of these reasons, does not support this view. The notice period is determinable once and for all at the time of the breach of the employment contract.

[28] Even assuming that the bankruptcy could be considered an event that affected the actual damages suffered by Noble, it is clear that the bankruptcy of Principal not only did not reduce the damages suffered by Noble but also, to the extent that, as an unsecured creditor, his recovery will be less than the full amount awarded, it exacerbated them. The "cushion" will be smaller and therefore the means to recuperate from a dislocation will be less. This case is not similar to those reviewed by the chambers judge where damages actually suffered were reduced by the subsequent event of the payment of benefits or death. Thus, the chambers judge erred in characterizing the bankruptcy in this case as an event that could reduce the period of notice and, even if looked at through the perspective of the effect it had on Noble's damages, it provides no basis to reduce them.

[29] The chambers judge was correct when, in commenting on the *Rizzo* case, he said, at paragraph 27 of his memorandum of judgment;

> The decision of the Supreme Court of Canada in *Rizzo* was that liability for the wage claims of the employees existed under the *Employment Standards Act*, R.S.O. 1980, c.137. No liability was attributed under the common law either by the Ontario Court of Appeal or the Supreme Court of Canada.

[30] But he erred when he went on to conclude:

> The decision therefore provides support for the argument of the trustee that liability for the losses of Mr. Noble at common law ceased at the date of bankruptcy.

[31] The chambers judge arrived at that conclusion because of a misinterpretation of comments by Justice Iacobucci about consistent treatment of employees. The chambers judge concluded that the claims of all dismissed employees, even those with common law rights, must be restricted to that available under the ESA.

[32] Justice Iacobucci said, at paragraph 28:

> ...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.

Justice Iacobucci said such a result would be absurd.

[33] In other words, to require that the dismissal be employer-initiated before the ESA would apply would be unfair. The statement cannot be tortured to say that an employee who might have a common law claim, having been dismissed before the bankruptcy by the employer, loses it because of the bankruptcy. It does say that such an employee would be entitled to make a claim under the ESA.

[34] Concluding comments by Justice Iacobucci, at paragraph 41 are helpful.

> 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 the 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.

[35] This statement was not meant to limit the quantification of the claim of an employee with entitlement to common law damages because of a prior breach of the employment contract but to establish the entitlement of the employee, whose employment contract was breached by the event of the bankruptcy, to ESA benefits. It would be a strange result indeed if Justice Iacobucci's decision were used to restrict the protection given to a long-term employee terminated without cause and without notice or compensation.

[36] There can be no argument that the recovery by the employee entitled to common law damages be based on his status as an unsecured creditor in the bankruptcy, while that of the employee entitled to damages because of the event of the bankruptcy be based in the provisions of the ESA.

[37] Thus, the chambers judge erred in law in finding that Noble's entitlement to common law damages was limited by the bankruptcy. The appeal must be allowed so that Noble is entitled to make a claim for damages based on 18 months' notice.

Damages

[38] Damages were acknowledged to be the equivalent of 18 months' salary, which had two components: a base amount of $5,000 per month and bonuses based on increased sales. There is an issue as to whether Noble is entitled to the bonus monies. KPMG argues that he is not because the increases upon which they would have been based never occurred. The chambers judge found that no damages could be claimed with respect to what he called "theoretical sales or profitability".

[39] The evidence before the court was limited to an agreed statement of facts and an affidavit of the trustee. The following facts emerge from those sources. Noble agreed to compensation that had two parts: one certain, the base salary, and one to be determined, the bonuses. These terms were in an employment contract of June of 1986, approximately 14 months before the termination. By that time, Noble had been employed by Principal for 17 years and was a Senior Vice-President of Finance for the prairie region. Noble himself sold securities and investments to the public and supervised others' doing so.

[40] One bonus was calculated on the basis of increased monthly sales compared to those of the previous year. The other was based on new salespersons reaching certain quotas. Although the term "bonus" was used to describe the payment Noble would receive flowing from all sales, in reality it was payment for incentive-based performance.

[41] Applying the basic principles of law set out earlier, Noble is entitled to compensation for lost bonus monies that were part of his income and therefore, upon his unlawful dismissal, became damages to which he was entitled based on the premise that he would have received them had the contract been performed. The probability is that, during the notice period, had the contract been performed, the incentive compensation would have been earned. In the absence of evidence to the contrary, it is an implied term of the employment contract that an employer will carry on its business in its normal course. In this case, the parties have agreed on the quantum of damages for the bonus component of Noble's salary for the notice period being: 18 x $7261.62 = $129,899.16. There is no evidence as to the basis for the monthly bonus amount used in that calculation. It must be assumed that it was based on sales records prior to the bankruptcy.

[42] Case law cited by the parties indicates that some courts have approved of using past performance in the calculation of bonuses and have awarded bonuses even where the fortunes of the employer company have diminished. *Rosscup* v. *Westfair Foods Ltd.*, [1999] A.J. No. 944 (Alta. Q.B.); *Beach* v. *Ikon Office Solutions Inc.*, [1999] B.C.J. No. 1574 (S.C.); see also, England, Christie and Christie, *Employment Law in Canada* (3rd Ed., Toronto: Butterworths, 1999) at 16.27.

[43] Returning to the judgment of Justice Iacobucci in *Rizzo*, it is important to remember that the objective of termination pay is to provide a "cushion" against dislocation and to recognize the special losses suffered by long-term employees.

[44] It is agreed that in 1988 Noble commenced his own business and earned a net income of $11,658.61 and that in 1989 his net income from the business was $42,429.98. The parties agree that those figures must be taken into account in the final calculations as mitigation of the loss. It would appear that Noble's experience and ability permitted him to shoulder the responsibility of mitigating his loss in a fairly timely and effective manner.

Conclusion

[45] The appeal is allowed. Noble is entitled to damages for breach of contract equivalent to 18 months' notice to include base salary and bonus payments. The parties have agreed that these amounts are $90,000 and $129,899.16, respectively. Appropriate adjustments are to be made for the unpaid wages and mitigation of loss. The parties advise they have agreed on interest. The final figure arrived at after the necessary adjustments is a valid claim in the bankruptcy of Principal.

APPEAL HEARD ON JANUARY 14, 2000

REASONS FILED at CALGARY, Alberta,
this 10th day of May, 2000

_____
PICARD J.A.

I concur: _____
WITTMANN J.A.

REASONS FOR JUDGMENT OF
THE HONOURABLE MR. JUSTICE BERGER

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[46] I have had the advantage of reading in draft form the Reasons for Judgment of my colleague, Picard, J.A. The first and rather narrow issue in this appeal is whether the bankruptcy of an employer deprives an earlier dismissed employee of the damages to which he or she would otherwise be entitled for wrongful dismissal. While I agree with the conclusion reached by my colleague on that issue, I approach the matter in a somewhat different fashion.

[47] The second issue pertains to the Appellant's claim that he is entitled to damages that include a "bonus". In that regard, I respectfully disagree with the opinion of the majority.

[48] The legal analysis is premised on facts that are not in dispute. They are adequately set out in the Reasons for Judgment of my colleague and need not be repeated.

[49] The nature of the implied term in a contract of employment informs the issues at bar. The implied term compels each party to give reasonable notice of termination to the other. Payment of salary or wages in lieu of notice is not an implied term. ***Dunlop v. British Columbia Hydro and Power Authority*** [1988] B.C.J. No. 1963 (B.C.C.A.).

[50] A breach of the implied term occurs on the day of summary termination. The failure to provide notice, in other words, is a breach of the employment contract entitling the employee to damages. The question to be decided is whether those damages crystalize on the day of termination such that an assessment of those damages made after bankruptcy is not affected by that bankruptcy.

[51] What then is the significance, if any, of events following summary dismissal? Damages are derived from a determination of the proper notice period. The proper notice period is determinable once and for all at the time of the breach of contract and is not, itself, affected by subsequent events. ***Dunlop v. British Columbia Hydro and Power Authority***, ***supra***, (at para 17).

[52] That having being said, it is vital to distinguish between the determination of the notice period and the assessment of damages actually suffered by the dismissed employee. I respectfully agree with the following statement of Lambert, J.A. in ***Dunlop*** (at para. 17):

> "I add that, in considering the significant of events following the dismissal, the proper principle, in my opinion, is that an event which occurs after a wrongful dismissal and before trial, or before

> the end of the notice period, whichever comes first, may be considered in assessing the damages actually suffered by the dismissed employee. The legal significance to be attached to the event will depend on the nature of the event and on the other relevant factors in the case."

[53] It follows that in ***Dunlop***, the Court was of the view that the employer could not avail itself of the disability of its employee which arose after the contract had been broken. Breach of contract made that event "inconsequential". As Lambert, J.A. put it "When *B.C. Hydro* broke the contract of employment it lost its right to rely on the provision in that contract that no salary would be paid with respect to a period of disability."

[54] This is precisely the interpretation of ***Dunlop***, ***supra***, given by other courts. By way of illustration, McKeown, J. in ***Card Estate v. John A. Robertson Mechanical Contractors (1985) Ltd***., [1989] O.J. No. 1129 S.C. Ont. - High Court of Justice said this:

> "The sole issue before the B.C. Court of Appeal was whether actual events which occurred after the dismissal and would have prevented the employee from earning income had he served out the notice period would prevent him from being compensated for his wrongful dismissal. The court held that **events which might have occurred had the employer given reasonable notice**, but which hadn't actually happened, could not determine the quantum of damage arising from the dismissal. The employer was not entitled to raise hypothetical alternatives which might have arisen but for its breach of contract."
>
> [Emphasis added]

See also ***Woodlock v. Novacorp International Consulting Inc***., [1990] 6 W.W.R. 454, 72 D.L.R. (4th) 347 (B.C.C.A.), ***McGarry v. Bosco Homes Edmonton***, [1992] A.J. No. 1202.

[55] The Respondent argues that the Supreme Court of Canada's decision in ***Rizzo v. Rizzo Shoes Ltd. (Re)***, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2 places employees terminated before bankruptcy in the same position as those "terminated" by the act of bankruptcy. The Respondent submits that in ***Rizzo***, the Court was motivated by the unfairness that would result if employees whose termination resulted from a bankruptcy were treated differently than those whose employment had been terminated for some other reason. The Respondent says that the corollary must also be the case. Counsel for the Respondent argues that it would be equally "arbitrary and inequitable", to use the words of Iacobucci, J. at para. 41 of ***Rizzo,*** to give the Appellant a much larger claim in the bankruptcy than those employees who are terminated as a result of the bankruptcy simply because the Appellant's termination occurred a short time prior to the bankruptcy.

[56] I do not read ***Rizzo*** in quite that way. The issue there was entitlement to statutory benefits under the ***Employment Standards Act***. In my view, the case is authority for the proposition that "**any** distinction" that would deprive some employees of **minimum protections** will not be countenanced. That is not the situation in the case at bar. Giving the Appellant his full common law damages will not deprive other employees of their minimum protections under the ***Employment Standards Act***. The Appellant, it is true, will fare better than other employees who remained employed to the date of bankruptcy. But that is precisely what the legal framework contemplates. The principle that emerges from ***Rizzo*** is not that all employees will be treated alike. It is only authority for the proposition that all employees must be accorded their minimum statutory protections. It follows that the Appellant is entitled to 18 months salary in lieu of notice of termination having regard to the length of employment and other factors recited in the agreed statement of facts.

[57] As to the Appellant's claim for a "bonus", reference must first be made to the contract of employment. For purposes of analysis, but without deciding the point, I am prepared to assume that the bonus awarded in prior years forms an integral part of the Appellant's salary.

[58] In the case at bar, the employment contract (as evidenced by letter dated June 12, 1986) sets out a formula for calculating the bonus:

> "Bonuses will be based upon sales improvements within your [the Appellant's] Region:
>
> > a) You will receive $36 for each percentage point increase per month, this month's 3MMA sales volume over last year this month's 3MMA sales volume.
> >
> > i.e. July 1986 3MMA volume in the Prairie region is $15,000,000.
> > July 1985 3MMA volume in the Prairie region is $10,000,000.
> >
> > $15,000,000/10,000,000 equals a 50% increase in volume;
> > therefore, 50 x $36 = $1,800 would be the bonus for July 1986.
> >
> > b) You will receive $500 for each new salesman, in your region, that reaches the qualified consultant status of 500 QPR career volume during the first year of employment."

[59] At the time of this letter agreement, the Appellant had been employed with Principal Consultants Ltd. for a period in excess of 17 years. The record makes clear that the Appellant knew his employer and its business very well. He must be taken to have appreciated that the sales of securities and investments to the public was a business with some considerable risk to it.

Fortunes are made and lost in that financial world. The Appellant's fortunes were tied to his performance, the performance of the sales people under his supervision, and that of the company. He knew full well that the marketplace and its exigencies would play an important role.

[60] Accordingly, it makes sense that the formula for the calculation of bonus would be based on the sales and performance of the company on a monthly basis. On the facts of this case, if that formula were used, the Appellant would receive a bonus for the months following his termination but prior to the assignment in bankruptcy (assuming there was an increase in sales for that period). For the period following bankruptcy, the Appellant would not receive any bonus as the company ceased to have any sales.

[61] Ellen Mole in her text, *Wrongful Dismissal Practice Manual*, Loose Leaf ed. (Butterworths: Vancouver, 1999), says this (at 9.81):

> "Where a bonus during the notice period was unlikely or nonexistent due to the employer's lack of profits, financial situation or general business conditions, no damages will be awarded unless the bonus has been 'guaranteed' or otherwise made part of the employee's basic compensation. Similarly, the fact that the employer did well financially, leading to higher bonuses for other employees, has been considered in assessing damages."

[62] The learned author refers to a number of authorities including ***Weldon v. Com Cor Chemical Ltd.*** (1993), T.L.W. 1244-021 (B.C.S.C.), where payment of bonus was dependent on profits and there was no evidence of profits; ***Ashdown v. Jumbo Video Inc***. (1993), R.L.W. 1309-010 (Ont. Gen. Div.), where bonus payment was dependent on the company receiving its target and there was no evidence that it did; ***Ryshpan v. Burns Fry Ltd.*** (1995), 10 C.C.E.L. (2d) 235 (Ont. Gen. Div.), aff'd 20 C.C.E.L. (2d) 104 (Ont. C.A.), where the court considered the employer's improved financial situation in assessing the amount of the bonus; and ***Knox v. Interprovincial Engineering Ltd***. (1993), 120 N.S.R. (2d) 288, where the evidence established that bonuses related to the financial success of the company and the court award was so premised. In an earlier Alberta decision, ***Stadler v. Terrace Corp. (Construction) Ltd. et al.*** (1983), 41 A.R. 587 (Q.B.), the employee was denied a bonus where there was a provision for a bonus if the hotel or Lake Eden Resort realized a profit and there was no evidence that either did.

[63] The Appellant cites yet another principle in support of the claim for a bonus. On the authority of ***Sylvester v. British Columbia***, [1997] 2 S.C.R. 315, he argues that damages should be awarded on the basis that the employee would have worked during the notice period. In particular, reference is made to the comments of Major, J. in ***Sylvester*** at para. 9:

> "**The fact that an employee could not have worked during the notice period is irrelevant to the assessment of these damages.**

> **They are based on the premise that the employee would have worked during the notice period**. Therefore, an employee who is wrongfully dismissed while working and an employee who is wrongfully dismissed while receiving disability benefits are both **entitled** to damages consisting of the salary the employee would have earned had the employee worked during the notice period."
>
> [Emphasis added]

[64] This passage would, at first blush, tend to support the proposition that a court should not look to events following the date of breach to assess the damages. It will be remembered, however, that in ***Sylvester*** the Court looked to post-breach events to quantify the damages. The issue on appeal was whether the disability benefits received by the Respondent during the notice period should be deducted from the salary he would have earned during the notice period. Major, J. held that the question of deductibility turns on the terms of the employment contract and the intention of the parties. He found that based on the employment contract, the payments were deductible as the parties did not intend the employee to receive both disability payments and damages. It follows that Major J.'s statement in ***Sylvester*** regarding "assessment of damages" refers, in fact, to the employee's **entitlement** to damages, rather than the **quantification** of damages.

[65] The same contract-based approach to **quantify** damages must be used in the case at bar. The relevant inquiry is: what did the parties intend in respect of the bonus payment?

[66] In my view, a plain reading of the contract makes clear that the parties intended a bonus to be paid only where there was an actual increase of sales by the company. This would make sense. Suppose the employer had managed to stay afloat for another 18 months, but earned no profits. Had that occurred, the formula agreed upon would not have generated a bonus for the Appellant.

[67] This approach is consistent with the principle that an employee who is wrongfully dismissed without adequate notice of termination is **entitled** to damages consisting of the salary that the employee would have earned had the employee worked during the notice period. In the case at bar, had the Appellant worked during that period, he would not have received a bonus for the period following bankruptcy. To ignore the bankruptcy and to award a bonus is to place the Appellant in a better situation than if the company had not gone bankrupt but had made no sales. This Court ought not to re-write the contractual arrangement between the parties to achieve such a result.

[68] For these reasons, I would allow the appeal and award the Appellant damages in lieu of notice premised upon 18 months salary together with a bonus for the period following dismissal, but prior to bankruptcy, to be calculated in accordance with the letter agreement of June 12, 1986.

[69] This judgment is styled "Reasons for Judgment Reserved". The label "Reserved" no longer has the significance it once had. The Court's policy set out in ***Hutterian Brethren Church of Starland v. Starland No. 47 (Municipal District)***, (1993) 9 Alta.L.R. (3d) 1, at 15 and ***R. v. Bonneteau*** (1995), 24 Alta.L.R. (3d) 153, at 158 was abolished on September 1, 1999.

[70] The effect of the new policy, which still permits circulation of draft reasons to members of the Court off the panel (for comment only), was stated as follows by Hetherington, J.A. in ***R. v. Fash*** [1999] A.J. No. 1086:

> "In the past this court has said that, so far as statements of law or principle are concerned, a reserved judgment which is not a dissenting judgment sets out views accepted by a majority of the members of the court. (See *Hutterian Brethren Church of Starland v. Starland No. 47 (Municipal District)* (1993), 9 Alta. L.R. (3d) 1, at 15, and *R. v. Bonneteau* (1994), 24 Alta. L.R. (3d) 153, at 158.) However, this is no longer the case. The practices of the court have changed. Now so far as statements of law or principle are concerned, a reserved judgment which is not a dissenting judgment sets out the views of a majority of the panel which heard the appeal. It can not be inferred that a majority of the members of the court share those views."

APPEAL HEARD on JANUARY 14, 2000

REASONS FILED at CALGARY, Alberta,
this 10th day of MAY, 2000

_____

BERGER, J.A.

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CITATION: Sino-Forest Corporation (Re), 2012 ONSC 4377
COURT FILE NO.: CV-12-9667-00CL
DATE: 20120727

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION, Applicant

BEFORE: **MORAWETZ J.**

COUNSEL: **Robert W. Staley and Jonathan Bell, for the Applicant**

Jennifer Stam, for the Monitor

Kenneth Dekker, for BDO Limited

Peter Griffin and Peter Osborne, for Ernst & Young LLP

Benjamin Zarnett, Robert Chadwick and Brendan O'Neill, for the Ad Hoc Committee of Noteholders

James Grout, for the Ontario Securities Commission

Emily Cole and Joseph Marin, for Allen Chan

Simon Bieber, for David Horsley

David Bish, John Fabello and Adam Slavens, for the Underwriters Named in the Class Action

Max Starnino and Kirk Baert, for the Ontario Plaintiffs

Larry Lowenstein, for the Board of Directors

HEARD: **June 26, 2012**

ENDORSEMENT

Overview

[1] Sino-Forest Corporation ("SFC" or the "Applicant") seeks an order directing that claims against SFC, which result from the ownership, purchase or sale of an equity interest in SFC, are "equity claims" as defined in section 2 of the *Companies' Creditors Arrangement Act* ("CCAA") including, without limitation: (i) the claims by or on behalf of current or former shareholders asserted in the proceedings listed in Schedule "A" (collectively, the "Shareholder Claims"); and (ii) any indemnification claims against SFC related to or arising from the Shareholder Claims, including, without limitation, those by or on behalf of any of the other defendants to the proceedings listed in Schedule "A" (the "Related Indemnity Claims").

[2] SFC takes the position that the Shareholder Claims are "equity claims" as defined in the CCAA as they are claims in respect of a monetary loss resulting from the ownership, purchase or sale of an equity interest in SFC and, therefore, come within the definition. SFC also takes the position that the Related Indemnity Claims are "equity claims" as defined in the CCAA as they are claims for contribution or indemnity in respect of a claim that is an equity claim and, therefore, also come within the definition.

[3] On March 30, 2012, the court granted the Initial Order providing for the CCAA stay against SFC and certain of its subsidiaries. FTI Consulting Canada Inc. was appointed as Monitor.

[4] On the same day, the Sales Process Order was granted, approving Sales Process procedures and authorizing and directing SFC, the Monitor and Houlihan Lokey to carry out the Sales Process.

[5] On May 14, 2012, the court issued a Claims Procedure Order, which established June 20, 2012 as the Claims Bar Date.

[6] The stay of proceedings has since been extended to September 28, 2012.

[7] Since the outset of the proceedings, SFC has taken the position that it is important for these proceedings to be completed as soon as possible in order to, among other things, (i) enable the business operated in the Peoples Republic of China ("PRC") to be separated from SFC and put under new ownership; (ii) enable the restructured business to participate in the Q4 sales season in the PRC market; and (iii) maintain the confidence of stakeholders in the PRC (including local and national governmental bodies, PRC lenders and other stakeholders) that the business in the PRC can be successfully separated from SFC and operate in the ordinary course in the near future.

[8] SFC has negotiated a Support Agreement with the Ad Hoc Committee of Noteholders and intends to file a plan of compromise or arrangement (the "Plan") under the CCAA by no later than August 27, 2012, based on the deadline set out in the Support Agreement and what

they submit is the commercial reality that SFC must complete its restructuring as soon as possible.

[9] Noteholders holding in excess of $1.296 billion, or approximately 72% of the approximately $1.8 billion of SFC's noteholders' debt, have executed written support agreements to support the SFC CCAA Plan as of March 30, 2012.

Shareholder Claims Asserted Against SFC

(i) Ontario

[10] By Fresh as Amended Statement of Claim dated April 26, 2012 (the "Ontario Statement of Claim"), the Trustees of the Labourers' Pension Fund of Central and Eastern Canada and other plaintiffs asserted various claims in a class proceeding (the "Ontario Class Proceedings") against SFC, certain of its current and former officers and directors, Ernst & Young LLP ("E&Y"), BDO Limited ("BDO"), Poyry (Beijing) Consulting Company Limited ("Poyry") and SFC's underwriters (collectively, the "Underwriters").

[11] Section 1(m) of the Ontario Statement of Claim defines "class" and "class members" as:

> All persons and entities, wherever they may reside who acquired Sino's Securities during the Class Period by distribution in Canada or on the Toronto Stock Exchange or other secondary market in Canada, which securities include those acquired over the counter, and all persons and entities who acquired Sino's Securities during the Class Period who are resident of Canada or were resident of Canada at the time of acquisition and who acquired Sino's Securities outside of Canada, except the Excluded Persons.

[12] The term "Securities" is defined as "Sino's common shares, notes and other securities, as defined in the OSA". The term "Class Period" is defined as the period from and including March 19, 2007 up to and including June 2, 2011.

[13] The Ontario Class Proceedings seek damages in the amount of approximately $9.2 billion against SFC and the other defendants.

[14] The thrust of the complaint in the Ontario Class Proceedings is that the class members are alleged to have purchased securities at "inflated prices during the Class Period" and that absent the alleged misconduct, sales of such securities "would have occurred at prices that reflected the true value" of the securities. It is further alleged that "the price of Sino's Securities was directly affected during the Class Period by the issuance of the Impugned Documents".

(ii) Quebec

[15] By action filed in Quebec on June 9, 2011, Guining Liu commenced an action (the "Quebec Class Proceedings") against SFC, certain of its current and former officers and directors, E&Y and Poyry. The Quebec Class Proceedings do not name BDO or the

Underwriters as defendants. The Quebec Class Proceedings also do not specify the quantum of damages sought, but rather reference "damages in an amount equal to the losses that it and the other members of the group suffered as a result of purchasing or acquiring securities of Sino at inflated prices during the Class Period".

[16] The complaints in the Quebec Class Proceedings centre on the effect of alleged misrepresentations on the share price. The duty allegedly owed to the class members is said to be based in "law and other provisions of the *Securities Act*", to ensure the prompt dissemination of truthful, complete and accurate statements regarding SFC's business and affairs and to correct any previously-issued materially inaccurate statements.

(iii) Saskatchewan

[17] By Statement of Claim dated December 1, 2011 (the "Saskatchewan Statement of Claim"), Mr. Allan Haigh commenced an action (the "Saskatchewan Class Proceedings") against SFC, Allen Chan and David Horsley.

[18] The Saskatchewan Statement of Claim does not specify the quantum of damages sought, but instead states in more general terms that the plaintiff seeks "aggravated and compensatory damages against the defendants in an amount to be determined at trial".

[19] The Saskatchewan Class Proceedings focus on the effect of the alleged wrongful acts upon the trading price of SFC's securities:

> The price of Sino's securities was directly affected during the Class Period by the issuance of the Impugned Documents. The defendants were aware at all material times that the effect of Sino's disclosure documents upon the price of its Sino's [sic] securities.

(iv) New York

[20] By Verified Class Action Complaint dated January 27, 2012, (the "New York Complaint"), Mr. David Leapard and IMF Finance SA commenced a class proceeding against SFC, Mr. Allen Chan, Mr. David Horsley, Mr. Kai Kit Poon, a subset of the Underwriters, E&Y, and Ernst & Young Global Limited (the "New York Class Proceedings").

[21] SFC contends that the New York Class Proceedings focus on the effect of the alleged wrongful acts upon the trading price of SFC's securities.

[22] The plaintiffs in the various class actions have named parties other than SFC as defendants, notably, the Underwriters and the auditors, E&Y, and BDO, as summarized in the table below. The positions of those parties are detailed later in these reasons.

	Ontario	Quebec	Saskatchewan	New York

E&Y LLP	X	X	-	X
E&Y Global	-	-	-	X
BDO	X	-	-	-
Poyry	X	X	-	-
Underwriters	11	-	-	2

Legal Framework

[23] Even before the 2009 amendments to the CCAA dealing with equity claims, courts recognized that there is a fundamental difference between shareholder equity claims as they relate to an insolvent entity versus creditor claims. Essentially, shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditor claims are not being paid in full. Simply put, shareholders have no economic interest in an insolvent enterprise: *Blue Range Resource Corp. (Re)*, (2004) 4 W.W.R. 738 (Alta. Q.B.) [*Blue Range Resources*]; *Stelco Inc. (Re)*, (2006) CanLII 1773 (Ont. S.C.J.) [*Stelco*]; *Royal Bank of Canada v. Central Capital Corp*. (1996), 27 O.R. (3d) 494 (C.A.).

[24] The basis for the differentiation flows from the fundamentally different nature of debt and equity investments. Shareholders have unlimited upside potential when purchasing shares. Creditors have no corresponding upside potential: *Nelson Financial Group Limited (Re)*, 2010 ONSC 6229 [*Nelson Financial*].

[25] As a result, courts subordinated equity claims and denied such claims a vote in plans of arrangement: *Blue Range Resource*, *supra*; *Stelco*, *supra*; *EarthFirst Canada Inc. (Re)* (2009), 56 C.B.R. (5th) 102 (Alta. Q.B.) [*EarthFirst Canada*]; and *Nelson Financial*, *supra*.

[26] In 2009, significant amendments were made to the CCAA. Specific amendments were made with the intention of clarifying that equity claims are subordinated to other claims.

[27] The 2009 amendments define an "equity claim" and an "equity interest". Section 2 of the CCAA includes the following definitions:

> "Equity Claim" means a claim that is in respect of an equity interest, including a claim for, among others, (…)
>
> > (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 company other than an income trust, a share in the company – or a warrant or option or another right to acquire a share in the company – other than one that is derived from a convertible debt,

[28] Section 6(8) of the CCAA prohibits a distribution to equity claimants prior to payment in full of all non-equity claims.

[29] Section 22(1) of the CCAA provides that equity claimants are prohibited from voting on a plan unless the court orders otherwise.

Position of Ernst & Young

[30] E&Y opposes the relief sought, at least as against E&Y, since the E&Y proof of claim evidence demonstrates in its view that E&Y's claim:

(a) is not an equity claim;

(b) does not derive from or depend upon an equity claim (in whole or in part);

(c) represents discreet and independent causes of action as against SFC and its directors and officers arising from E&Y's direct contractual relationship with such parties (or certain of such parties) and/or the tortious conduct of SFC and/or its directors and officers for which they are in law responsible to E&Y; and

(d) can succeed independently of whether or not the claims of the plaintiffs in the class actions succeed.

[31] In its factum, counsel to E&Y acknowledges that during the periods relevant to the Class Action Proceedings, E&Y was retained as SFC's auditor and acted as such from 2007 until it resigned on April 5, 2012.

[32] On June 2, 2011, Muddy Waters LLC ("Muddy Waters") issued a report which purported to reveal fraud at SFC. In the wake of that report, SFC's share price plummeted and Muddy Waters profited from its short position.

[33] E&Y was served with a multitude of class action claims in numerous jurisdictions.

[34] The plaintiffs in the Ontario Class Proceedings claim damages in the aggregate, as against all defendants, of $9.2 billion on behalf of resident and non-resident shareholders and noteholders. The causes of action alleged are both statutory, under the *Securities Act (Ontario)* and at common law, in negligence and negligent misrepresentation.

[35] In its factum, counsel to E&Y acknowledges that the central claim in the class actions is that SFC made a series of misrepresentations in respect of its timber assets. The claims against E&Y and the other third party defendants are that they failed to detect these misrepresentations and note in particular that E&Y's audit did not comply with Canadian generally accepted accounting standards. Similar claims are advanced in Quebec and the U.S.

[36] Counsel to E&Y notes that on May 14, 2012 the court granted a Claims Procedure Order which, among other things, requires proofs of claim to be filed no later than June 20, 2012. E&Y takes issue with the fact that this motion was then brought notwithstanding that proofs of claim and D&O proofs of claim had not yet been filed.

[37] E&Y has filed with the Monitor, in accordance with the Claims Procedure Order, a proof of claim against SFC and a proof of claim against the directors and officers of SFC.

[38] E&Y takes the position that it has contractual claims of indemnification against SFC and its subsidiaries and has statutory and common law claims of contribution and/or indemnity against SFC and its subsidiaries for all relevant years. E&Y contends that it has stand-alone claims for breach of contract and negligent and/or fraudulent misrepresentation against the company and its directors and officers.

[39] Counsel submits that E&Y's claims against Sino-Forest and the SFC subsidiaries are:

(a) creditor claims;

(b) derived from E&Y retainers by and/or on behalf of Sino-Forest and the SFC subsidiaries and E&Y's relationship with such parties, all of which are wholly independent and conceptually different from the claims advanced by the class action plaintiffs;

(c) claims that include the cost of defending and responding to various proceedings, both pre- and post-filing; and

(d) not equity claims in the sense contemplated by the CCAA. E&Y's submission is that equity holders of Sino-Forest have not advanced, and could not advance, any claims against SFC's subsidiaries.

[40] Counsel further contends that E&Y's claim is distinct from any and all potential and actual claims by the plaintiffs in the class actions against Sino-Forest and that E&Y's claim for contribution and/or indemnity is not based on the claims against Sino-Forest advanced in the class actions but rather only in part on those claims, as any success of the plaintiffs in the class actions against E&Y would not necessarily lead to success against Sino-Forest, and vice versa. Counsel contends that E&Y has a distinct claim against Sino-Forest independent of that of the plaintiffs in the class actions. The success of E&Y's claims against Sino-Forest and the SFC subsidiaries, and the success of the claims advanced by the class action plaintiffs, are not co-dependent. Consequently, counsel contends that E&Y's claim is that of an unsecured creditor.

[41] From a policy standpoint, counsel to E&Y contends that the nature of the relationship between a shareholder, who may be in a position to assert an equity claim (in addition to other claims) is fundamentally different from the relationship existing between a corporation and its auditors.

Position of BDO Limited

[42] BDO was auditor of Sino-Forest Corporation between 2005 and 2007, when it was replaced by E&Y.

[43] BDO has a filed a proof of claim against Sino-Forest pursuant to the Claims Procedure Order.

[44] BDO's claim against Sino-Forest is primarily for breach of contract.

[45] BDO takes the position that its indemnity claims, similar to those advanced by E&Y and the Underwriters, are not equity claims within the meaning of s. 2 of the CCAA.

[46] BDO adopts the submissions of E&Y which, for the purposes of this endorsement, are not repeated.

Position of the Underwriters

[47] The Underwriters take the position that the court should not decide the equity claims motion at this time because it is premature or, alternatively, if the court decides the equity claims motion, the equity claims order should not be granted because the Related Indemnity Claims are not "equity claims" as defined in s. 2 of the CCAA.

[48] The Underwriters are among the defendants named in some of the class actions. In connection with the offerings, certain Underwriters entered into agreements with Sino-Forest and certain of its subsidiaries providing that Sino-Forest and, with respect to certain offerings, the Sino-Forest subsidiary companies, agree to indemnify and hold harmless the Underwriters in connection with an array of matters that could arise from the offerings.

[49] The Underwriters raise the following issues:

(i) Should this court decide the equity claims motion at this time?

(ii) If this court decides the equity claims motion at this time, should the equity claims order be granted?

[50] On the first issue, counsel to the Underwriters takes the position that the issue is not yet ripe for determination.

[51] Counsel submits that, by seeking the equity claims order at this time, Sino-Forest is attempting to pre-empt the Claims Procedure Order, which already provides a process for the

determination of claims. Until such time as the claims procedure in respect of the Related Indemnity Claims is completed, and those claims are determined pursuant to that process, counsel contends the subject of the equity claims motion raises a merely hypothetical question as the court is being asked to determine the proper interpretation of s. 2 of the CCAA before it has the benefit of an actual claim in dispute before it.

[52] Counsel further contends that by asking the court to render judgment on the proper interpretation of s. 2 of the CCAA in the hypothetical, Sino-Forest has put the court in a position where its judgment will not be made in the context of particular facts or with a full and complete evidentiary record.

[53] Even if the court determines that it can decide this motion at this time, the Underwriters submit that the relief requested should not be granted.

Position of the Applicant

[54] The Applicant submits that the amendments to the CCAA relating to equity claims closely parallel existing U.S. law on the subject and that Canadian courts have looked to U.S. courts for guidance on the issue of equity claims as the subordination of equity claims has long been codified there: see e.g. *Blue Range Resources, supra*, and *Nelson Financial, supra*.

[55] The Applicant takes the position that based on the plain language of the CCAA, the Shareholder Claims are "equity claims" as defined in s. 2 as they are claims in respect of a "monetary loss resulting from the ownership, purchase or sale of an equity interest".

[56] The Applicant also submits the following:

(a) the Ontario, Quebec, Saskatchewan and New York Class Actions (collectively, the "Class Actions") all advance claims on behalf of shareholders.

(b) the Class Actions also allege wrongful conduct that affected the trading price of the shares, in that the alleged misrepresentation "artificially inflated" the share price; and

(c) the Class Actions seek damages relating to the trading price of SFC shares and, as such, allege a "monetary loss" that resulted from the ownership, purchase or sale of shares, as defined in s. 2 of the CCAA.

[57] Counsel further submits that, as the Shareholder Claims are "equity claims", they are expressly subordinated to creditor claims and are prohibited from voting on the plan of arrangement.

[58] Counsel to the Applicant also submits that the definition of "equity claims" in s. 2 of the CCAA expressly includes indemnity claims that relate to other equity claims. As such, the Related Indemnity Claims are equity claims within the meaning of s. 2.

[59] Counsel further submits that there is no distinction in the CCAA between the source of any claim for contribution or indemnity; whether by statute, common law, contractual or otherwise. Further, and to the contrary, counsel submits that the legal characterization of a contribution or indemnity claim depends solely on the characterization of the primary claim upon which contribution or indemnity is sought.

[60] Counsel points out that in *Return on Innovation Capital v. Gandi Innovations Limited*, 2011 ONSC 5018, leave to appeal denied, 2012 ONCA 10 [*Return on Innovation*] this court characterized the contractual indemnification claims of directors and officers in respect of an equity claim as "equity claims".

[61] Counsel also submits that guidance on the treatment of underwriter and auditor indemnification claims can be obtained from the U.S. experience. In the U.S., courts have held that the indemnification claims of underwriters for liability or defence costs constitute equity claims that are subordinated to the claims of general creditors. Counsel submits that insofar as the primary source of liability is characterized as an equity claim, so too is any claim for contribution and indemnity based on that equity claim.

[62] In this case, counsel contends, the Related Indemnity Claims are clearly claims for "contribution and indemnity" based on the Shareholder Claims.

Position of the Ad Hoc Noteholders

[63] Counsel to the Ad Hoc Noteholders submits that the Shareholder Claims are "equity claims" as they are claims in respect of an equity interest and are claims for "a monetary loss resulting from the ownership, purchase or sale of an equity interest" per subsection (d) of the definition of "equity claims" in the CCAA.

[64] Counsel further submits that the Related Indemnity Claims are also "equity claims" as they fall within the "clear and unambiguous" language used in the definition of "equity claim" in the CCAA. Subsection (e) of the definition refers expressly and without qualification to claims for "contribution or indemnity" in respect of claims such as the Shareholder Claims.

[65] Counsel further submits that had the legislature intended to qualify the reference to "contribution or indemnity" in order to exempt the claims of certain parties, it could have done so, but it did not.

[66] Counsel also submits that, if the plain language of subsection (e) is not upheld, shareholders of SFC could potentially create claims to receive indirectly what they could not receive directly (*i.e.*, payment in respect of equity claims through the Related Indemnity Claims) – a result that could not have been intended by the legislature as it would be inconsistent with the purposes of the CCAA.

[67] Counsel to the Ad Hoc Noteholders also submits that, before the CCAA amendments in 2009 (the "CCAA Amendments"), courts subordinated claims on the basis of:

(a) the general expectations of creditors and shareholders with respect to priority and assumption of risks; and

(b) the equitable principles and considerations set out in certain U.S. cases: see e.g. *Blue Range Resources, supra*.

[68] Counsel further submits that, before the CCAA Amendments took effect, courts had expanded the types of claims characterized as equity claims; first to claims for damages of defrauded shareholders and then to contractual indemnity claims of shareholders: see *Blue Range Resources, supra* and *EarthFirst Canada, supra*.

[69] Counsel for the Ad Hoc Noteholders also submits that indemnity claims of underwriters have been treated as equity claims in the United States, pursuant to section 510(b) of the U.S. Bankruptcy Code. This submission is detailed at paragraphs 20-25 of their factum which reads as follows:

> 20. The desire to more closely align the Canadian approach to equity claims with the U.S. approach was among the considerations that gave rise to the codification of the treatment of equity claims. Canadian courts have also looked to the U.S. law for guidance on the issue of equity claims where codification of the subordination of equity claims has been long-standing.
>
> Janis Sarra at p. 209, Ad Hoc Committee's Book of Authorities, Tab 10.
>
> Report of the Standing Senate Committee on Banking, Trade and Commerce, "Debtors and Creditors Sharing the Burden: A Review of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement act*" (2003) at 158, [...]
>
> *Blue Range* [*Resources*] at paras. 41-57 [...]
>
> 21. Pursuant to § 510(b) of the *U.S. Bankruptcy Code*, all creditors must be paid in full before shareholders are entitled to receive any distribution. § 510(b) of the *U.S. Bankruptcy Code* and the relevant portion of § 502, which is referenced in § 510(b), provide as follows:
>
> § 510. Subordination
>
> (b) For the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such a security, or for reimbursement or contribution allowed under 502 on account of such a claim, shall be subordinated to all claims or interests that

> are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock.
>
> § 502. Allowance of claims or interests
>
> (e) (1) Notwithstanding subsections (a), (b) and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that
>
> ...
>
> > (B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution; or
>
> ...
>
> (2) A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) of this section, the same as if such claim had become fixed before the date of the filing of the petition.

22. U.S. appellate courts have interpreted the statutory language in § 510(b) broadly to subordinate the claims of shareholders that have a nexus or causal relationship to the purchase or sale of securities, including damages arising from alleged illegality in the sale or purchase of securities or from corporate misconduct whether predicated on pre or post-issuance conduct.

> *Re Telegroup Inc.* (2002), 281 F. 3d 133 (3rd Cir. U.S. Court of Appeals) [...]
>
> *American Broadcasting Systems Inc. v. Nugent*, U.S. Court of Appeals for the Ninth Circuit, Case Number 98-17133 (24 January 2001) [...]

23. Further, U.S. courts have held that indemnification claims of underwriters against the corporation for liability or defence costs when shareholders or former shareholders have sued underwriters constitute equity claims in the insolvency of the corporation that are subordinated to the claims of general creditors based on: (a) the plain language of § 510(b), which references claims for "reimbursement or contribution" and (b) risk allocation as between general creditors and those parties that play a role in the purchase and sale of securities that give rise to the shareholder claims (i.e., directors, officers and underwriters).

> *In re Mid-American Waste Sys.*, 228 B.R. 816, 1999 Bankr. LEXIS 27 (Bankr. D. Del. 1999) [*Mid-American*] [...]
>
> *In re Jacom Computer Servs.*, 280 B.R. 570, 2002 Bankr. LEXIS 758 (Bankr. S.D.N.Y. 2002) [...]

24. In *Mid-American*, the Court stated the following with respect to the "plain language" of § 510(b), its origins and the inclusion of "reimbursement or contribution" claims in that section:

> *... I find that the plain language of § 510(b), its legislative history, and applicable case law clearly show that § 510(b) intends to subordinate the indemnification claims of officers, directors, and underwriters for both liability and expenses incurred in connection with the pursuit of claims for rescission or damages by purchasers or sellers of the debtor's securities*. The meaning of amended § 510(b), specifically the language "for reimbursement or contribution . . . on account of [a claim arising from rescission or damages arising from the purchase or sale of a security]," can be discerned by a plain reading of its language.
>
> ... it is readily apparent that the rationale for section 510(b) is not limited to preventing shareholder claimants from improving their position vis-a-vis general creditors; *Congress also made the decision to subordinate based on risk allocation. Consequently, when Congress amended § 510(b) to add reimbursement and contribution claims, it was not radically departing from an equityholder claimant treatment provision, as NatWest suggests; it simply added to the subordination treatment new classes of persons and entities involved with the securities transactions giving rise to the rescission and damage claims*. The 1984 amendment to § 510(b) is a logical extension of one of the rationales for the original section — *because Congress intended the holders of securities law claims to be subordinated, why not also subordinate claims of other parties (e.g., officers and directors and underwriters) who play a role in the purchase and sale transactions which give rise to the securities law claims?* As I view it, in 1984 Congress made a legislative judgment that claims emanating from tainted securities law transactions should not have the same priority as the claims of general creditors of the estate. [emphasis added]
>
> [...]

25. Further, the U.S. courts have held that the degree of culpability of the respective parties is a non-issue in the disallowance of claims for indemnification of underwriters; the equities are meant to benefit the debtor's direct creditors, not secondarily liable creditors with contingent claims.

> *In re Drexel Burnham Lambert Group*, 148 B.R. 982, 1992 Bankr. LEXIS 2023 (Bankr. S.D.N.Y. 1992) [...]

[70] Counsel submits that there is no principled basis for treating indemnification claims of auditors differently than those of underwriters.

Analysis

Is it Premature to Determine the Issue?

[71] The class action litigation was commenced prior to the CCAA Proceedings. It is clear that the claims of shareholders as set out in the class action claims against SFC are "equity claims" within the meaning of the CCAA.

[72] In my view, this issue is not premature for determination, as is submitted by the Underwriters.

[73] The Class Action Proceedings preceded the CCAA Proceedings. It has been clear since the outset of the CCAA Proceedings that this issue – namely, whether the claims of E&Y, BDO and the Underwriters as against SFC, would be considered "equity claims" – would have to be determined.

[74] It has also been clear from the outset of the CCAA Proceedings, that a Sales Process would be undertaken and the expected proceeds arising from the Sales Process would generate proceeds insufficient to satisfy the claims of creditors.

[75] The Claims Procedure is in place but, it seems to me that the issue that has been placed before the court on this motion can be determined independently of the Claims Procedure. I do not accept that any party can be said to be prejudiced if this threshold issue is determined at this time. The threshold issue does not depend upon a determination of quantification of any claim. Rather, its effect will be to establish whether the claims of E&Y, BDO and the Underwriters will be subordinated pursuant to the provisions of the CCAA. This is independent from a determination as to the validity of any claim and the quantification thereof.

Should the Equity Claims Order be Granted?

[76] I am in agreement with the submission of counsel for the Ad Hoc Noteholders to the effect that the characterization of claims for indemnity turns on the characterization of the underlying primary claims.

[77] In my view, the claims advanced in the Shareholder Claims are clearly equity claims. The Shareholder Claims underlie the Related Indemnity Claims.

[78] In my view, the CCAA Amendments have codified the treatment of claims addressed in pre-amendment cases and have further broadened the scope of equity claims.

[79] The plain language in the definition of "equity claim" does not focus on the identity of the claimant. Rather, it focuses on the nature of the claim. In this case, it seems clear that the Shareholder Claims led to the Related Indemnity Claims. Put another way, the inescapable conclusion is that the Related Indemnity Claims are being used to recover an equity investment.

[80] The plain language of the CCAA dictates the outcome, namely, that the Shareholder Claims and the Related Indemnity Claims constitute "equity claims" within the meaning of the CCAA. This conclusion is consistent with the trend towards an expansive interpretation of the definition of "equity claims" to achieve the purpose of the CCAA.

[81] In *Return on Innovation*, Newbould J. characterized the contractual indemnification claims of directors and officers as "equity claims". The Court of Appeal denied leave to appeal. The analysis in *Return on Innovation* leads to the conclusion that the Related Indemnity Claims are also equity claims under the CCAA.

[82] It would be totally inconsistent to arrive at a conclusion that would enable either the auditors or the Underwriters, through a claim for indemnification, to be treated as creditors when the underlying actions of the shareholders cannot achieve the same status. To hold otherwise would indeed provide an indirect remedy where a direct remedy is not available.

[83] Further, on the issue of whether the claims of E&Y, BDO and the Underwriters fall within the definition of equity claims, there are, in my view, two aspects of these claims and it is necessary to keep them conceptually separate.

[84] The first and most significant aspect of the claims of E&Y, BDO and the Underwriters constitutes an "equity claim" within the meaning of the CCAA. Simply put, but for the Class Action Proceedings, it is inconceivable that claims of this magnitude would have been launched by E&Y, BDO and the Underwriters as against SFC. The class action plaintiffs have launched their actions against SFC, the auditors and the Underwriters. In turn, E&Y, BDO and the Underwriters have launched actions against SFC and its subsidiaries. The claims of the shareholders are clearly "equity claims" and a plain reading of s. 2(1)(e) of the CCAA leads to the same conclusion with respect to the claims of E&Y, BDO and the Underwriters. To hold otherwise, would, as stated above, lead to a result that is inconsistent with the principles of the CCAA. It would potentially put the shareholders in a position to achieve creditor status through their claim against E&Y, BDO and the Underwriters even though a direct claim against SFC would rank as an "equity claim".

[85] I also recognize that the legal construction of the claims of the auditors and the Underwriters as against SFC is different than the claims of the shareholders against SFC. However, that distinction is not, in my view, reflected in the language of the CCAA which makes no distinction based on the status of the party but rather focuses on the substance of the claim.

[86] Critical to my analysis of this issue is the statutory language and the fact that the CCAA Amendments came into force after the cases relied upon by the Underwriters and the auditors.

[87] It has been argued that the amendments did nothing more than codify pre-existing common law. In many respects, I accept this submission. However, I am unable to accept this submission when considering s. 2(1) of the CCAA, which provides clear and specific language directing that "equity claim" means a claim that is in respect of an equity interest, including a claim for, among other things, "(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d)".

[88] Given that a shareholder claim falls within s. 2(1)(d), the plain words of subsections (d) and (e) lead to the conclusions that I have set out above.

[89] I fail to see how the very clear words of subsection (e) can be seen to be a codification of existing law. To arrive at the conclusion put forth by E&Y, BDO and the Underwriters would require me to ignore the specific words that Parliament has recently enacted.

[90] I cannot agree with the position put forth by the Underwriters or by the auditors on this point. The plain wording of the statute has persuaded me that it does not matter whether an indemnity claim is seeking no more than allocation of fault and contribution at common law, or whether there is a free-standing contribution and indemnity claim based on contracts.

[91] However, that is not to say that the full amount of the claim by the auditors and Underwriters can be characterized, at this time, as an "equity claim".

[92] The second aspect to the claims of the auditors and underwriters can be illustrated by the following hypothetical: if the claim of the shareholders does not succeed against the class action defendants, E&Y, BDO and the Underwriters will not be liable to the class action plaintiffs. However, these parties may be in a position to demonstrate that they do have a claim against SFC for the costs of defending those actions, which claim does not arise as a result of "contribution or indemnity in respect of an equity claim".

[93] It could very well be that each of E&Y, BDO and the Underwriters have expended significant amounts in defending the claims brought by the class action plaintiffs which, in turn, could give rise to contractual claims as against SFC. If there is no successful equity claim brought by the class action plaintiffs, it is arguable that any claim of E&Y, BDO and the Underwriters may legitimately be characterized as a claim for contribution or indemnity but not necessarily in respect of an equity claim. If so, there is no principled basis for subordinating this portion of the claim. At this point in time, the quantification of such a claim cannot be determined. This must be determined in accordance with the Claims Procedure.

[94] However, it must be recognized that, by far the most significant part of the claim, is an "equity claim".

[95] In arriving at this determination, I have taken into account the arguments set forth by E&Y, BDO and the Underwriters. My conclusions recognize the separate aspects of the Related Indemnity Claims as submitted by counsel to the Underwriters at paragraph 40 of their factum which reads:

> …it must be recognized that there are, in fact, at least two different kinds of Related Indemnity Claims:
>
> (a) indemnity claims against SFC in respect of Shareholder Claims against the auditors and the Underwriters; and
>
> (b) indemnity claims against SFC in respect of the defence costs of the auditors and the Underwriters in connection with defending themselves against Shareholder Claims.

Disposition

[96] In the result, an order shall issue that the claims against SFC resulting from the ownership, purchase or sale of equity interests in SFC, including, without limitation, the claims by or on behalf of current or former shareholders asserted in the proceedings listed in Schedule "A" are "equity claims" as defined in s. 2 of the CCAA, being claims in respect of monetary losses resulting from the ownership, purchase or sale of an equity interest. It is noted that counsel for the class action plaintiffs did not contest this issue.

[97] In addition, an order shall also issue that any indemnification claim against SFC related to or arising from the Shareholders Claims, including, without limitation, by or on behalf of any of the other defendants to the proceedings listed in Schedule "A" are "equity claims" under the CCAA, being claims for contribution or indemnity in respect of a claim that is an equity claim. However, I feel it is premature to determine whether this order extends to the aspect of the Related Indemnity Claims that corresponds to the defence costs of the Underwriters and the auditors in connection with defending themselves against the Shareholder Claims.

[98] A direction shall also issue that these orders are made without prejudice to SFC's rights to apply for a similar order with respect to (i) any claims in the statement of claim that are in respect of securities other than shares and (ii) any indemnification claims against SFC related thereto.

MORAWETZ J.

Date: July 27, 2012

SCHEDULE "A" – SHAREHOLDER CLAIMS

1. *Trustees of the Labourers' Pension Fund of Central and Eastern Canada et al. v. Sino-Forest Corporation et al.* (Ontario Superior Court of Justice, Court File No. CV-11-431153-00CP)

2. *Guining Liu v. Sino-Forest Corporation et al.* (Quebec Superior Court, Court File No.: 200-06-000132-111)

3. *Allan Haigh v. Sino-Forest Corporation et al.* (Saskatchewan Court of Queen's Bench, Court File No. 2288 of 2011)

4. *David Leapard et al. v. Allen T.Y. Chan et al.* (District court of the Southern District of New York, Court File No. 650258/2012)

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *All Canadian Investment Corporation (Re),* 2019 BCSC 1488

Date: 20190904
Docket: S1710393
Registry: Vancouver

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

And

In the Matter of the *Business Corporations Act*, S.B.C., c. 57, as amended

And

In the Matter of the *Canada Business Corporations Act*, R.S.C. 1985, C. c-44, as amended

And

In the Matter of a Plan of Compromise and Arrangement of All Canadian Investment Corporation

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

Counsel for the Petitioner:	J. West
Counsel for the Redeeming Shareholders:	J. Whyte
Counsel for the Non-Redeeming Shareholders:	M. Davies
Counsel for the creditors, James Hancock and 1083163 Alberta Ltd.:	V. Tickle
Counsel for the Monitor:	D.B. Hyndeman
Place and Dates of Hearing:	Vancouver, B.C. June 18-20, 2019
Place and Date of Judgment:	Vancouver, B.C. September 4, 2019

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Introduction

[1] The petitioner in this insolvency proceeding, All Canadian Investment Corporation ("ACIC"), seeks to determine competing priority claims amongst its preferred shareholders. Its application is brought under the statute governing this proceeding, the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*].

[2] ACIC is incorporated pursuant to the *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*].

[3] Prior to its insolvency, ACIC carried on business as a registered mortgage investment corporation ("MIC") since 1998. Its business was to loan funds to third party owners of commercial and residential property, mostly to be secured by mortgages, from a pool of funds it received from time to time from individuals and corporations who invested in ACIC by purchasing preferred shares.

[4] Some of ACIC's preferred shareholders delivered redemption notices to the company prior to the commencement of this proceeding in an effort to be paid an amount equal in value to their original share subscription price. Some, but not all of them, are before the Court on this application. I refer to those who are as the "redeeming preferred shareholders", claim to be creditors of ACIC. They assert that all of ACIC's other shareholders, both preferred and common, rank lower in priority since they are equity claimants.

[5] For ease of identification, I collectively refer to to the preferred shareholders who did not deliver redemption notices or did not deliver them prior to the commencement of this proceeding, as the "non-redeeming preferred shareholders".

[6] The core issue on this application is whether the redeeming preferred shareholders are creditors of ACIC as opposed to equity claimants, so as to share rateably in the distribution of proceeds paid under any court-approved plan of arrangement with the company's other creditors, and in priority to the non-redeeming preferred shareholders and ACIC's common shareholders.

[7] The redeeming preferred shareholders' claim is opposed by ACIC, two of its creditors, and the non-redeeming preferred shareholders. The common shareholders did not appear on the application.

[8] ACIC agreed to take the lead in seeking a determination of the priority issue and brought this application seeking declaratory relief.

[9] The priority claim advanced by the redeeming preferred shareholders must be determined before a suitable plan of arrangement, which would include a claims process and plan for distribution of ACIC's assets, can be submitted for court approval.

[10] It will serve no purpose in these reasons to comment on the length of time it has taken to get to this point in the proceeding. It will suffice to say that at this juncture, all stakeholders are anxious to have a plan presented to the court for approval in this liquidating *CCAA*.

[11] The facts set out in these reasons are my findings of fact.

Positions of the Parties

[12] The redeeming preferred shareholders' position on this application is that they were never equity investors. They assert that when the nature of ACIC's business as a MIC is considered, they are properly characterized as lenders from the outset who are debt claimants because their funds were pooled by ACIC and then loaned out to borrowers. They argue that their individual redemption requests should be viewed as akin to demands on a promissory note. In their submissions, they distinguish themselves from the non-redeeming preferred shareholders on the basis of the redemption notices they delivered to ACIC prior to the commencement of this *CCAA* proceeding.

[13] They also advance an alternative position if they are characterized as equity investors when they purchased their preferred shares. They submit that they later became creditors of ACIC. They rely on what they characterize as the purported contractual effect of various communications from ACIC, including its promotional

materials, to potential and existing investors, in an attempt to establish that the nature of their relationship with ACIC changed.The redeeming preferred shareholders acknowledge that ACIC's Articles and various offering memoranda concerning potential subscriptions for preferred shares ("Offering Memoranda") clearly state that ACIC's obligation to honour redemption requests from preferred shareholders is wholly discretionary, resting with ACIC's directors, which throughout was only one, Mr. Donald Bergman. However, they maintain that those communications altered their contractual relationship with ACIC so as to provide for contractually enforceable guaranteed redemption rights that ACIC was obliged to honour at specific points in time. As a result, they say that ACIC can no longer rely on the discretionary provisions in the Articles and the Offering Memoranda and that ACIC contractually bound itself to pay those redemptions as debts. In the result, the redeeming preferred shareholders submit that their relationship with ACIC changed to become creditors.

[14] In the further alternative, those redeeming preferred shareholders whose redemption requests were partially paid before this proceeding was commenced submit that if they were equity claimants at the outset and if ACIC's communications do not constitute an enforceable contractual right to redemption sufficient to change their relationship with ACIC, then the status of their particular claims has changed, such that any redemption amounts owing are debts owed by ACIC.

[15] The redeeming preferred shareholders concede that the right of each of them to recover as a debt claimant depends on ACIC's financial circumstances at the time their individual redemption notices were delivered since a redemption right is unenforceable per s. 79(1) of the *BCA*, if it means that redemption would render ACIC insolvent:

> 79 (1) A company must not make a payment or provide any other consideration to redeem any of its shares if there are reasonable grounds for believing that
>
> (a) the company is insolvent, or
>
> (b) making the payment or providing the consideration would render the company insolvent.

[16] Language mirroring s. 79 is found in the Offering Memoranda.

[17] The redeeming preferred shareholders acknowledge that at this juncture it is not known which redemption notices were delivered to ACIC at a time when reasonable grounds did not exist to believe that either ACIC was insolvent at the time of the request or that honouring the request would cause it to become insolvent.

[18] Consequently, the redeeming preferred shareholders submit that if they succeed in their claim to be creditors, a further, highly specific and lengthy factual inquiry, involving Mr. Bergman's knowledge when each redemption notice was delivered to ACIC, will have to be made to determine whether s. 79 of the *BCA* is engaged.

[19] The non-redeeming preferred shareholders disagree that the redeeming preferred shareholders are debt claimants. Their position is that all preferred shareholders are equity claimants from the outset and that nothing has changed to alter their status.

[20] Included within the non-redeeming preferred shareholders' submissions is the argument that mirroring the common law, the *BCA* establishes a presumption of equality amongst all shareholders. Each share of a class of shares (in this case, preferred shares) "must have attached to it the same special rights or restrictions as are attached to every other share": ss. 59(4); see also ss. 59(3), 61. Rights related to a share attach to the share, and not to the shareholder: Gower's *Principles of Modern Company Law*, 4th ed. (London: Stevens and Sons, 1979), at 403; *Bowater Canadian Ltd. v. R.L. Crain Inc.* (1987), 46 D.L.R. (4th) 161 at 16 (Ont. C.A.). The presumption is even stronger, they argue, in a *CCAA* proceeding given the broad and flexible authority conferred on the supervising judge to determine a fair and efficient resolution of competing claims in circumstances where there are insufficient financial resources to meet all of them: *CCAA*, s. 11.

[21] In addition, and relying on *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras. 13-15 and *Bul River Mineral Corporation (Re)*, 2014 BCSC 1732, at paras. 100-101, the non-redeeming preferred shareholders

submit that if the redeeming preferred shareholders' position is correct, the inquiry called for would be unduly protracted and further delay this *CCAA* proceeding, so as to impede any realistic prospect to achieve the statutory objective of an efficient resolution of competing claims.

[22] The non-redeeming preferred shareholders also say that they will be significantly prejudiced because they will recover little to nothing if the redeeming preferred shareholders' claim to be debt claimants prevails.

[23] Some of ACIC's creditors attended the hearing of the application and opposed the redeeming preferred shareholders' claim as well, since there are insufficient assets to pay them out in full if the latter are treated as debt claimants.

[24] ACIC's position on this application is that regardless of any redemption requests, whether paid or unpaid in whole or in part, all preferred shareholders are equity claimants within the meaning of s. 2(1) of the *CCAA*. ACIC seeks a declaration to that effect plus ancillary relief.

[25] For the reasons that follow, I reject the claim advanced by the redeeming preferred shareholders. I have determined that they, along with all of ACIC's preferred shareholders, are equity claimants.

Background Facts

[26] ACIC's shareholders are divided into two groups: common voting shareholders and preferred shareholders. There are currently outstanding four issued common shares and approximately 37,277 preferred shareholders and 15,647 warrants attached to the preferred shares. The preferred shares are stated to be non-voting, "unless otherwise provided for" (and none was).

[27] ACIC issued preferred shares and attached warrants between 1998 and 2015, all in accordance with its articles in force throughout the material time ("Articles").

[28] Draft subscription agreements for the purchase of preferred shares are contained in the various Offering Memoranda issued by ACIC over the years.

[29] Each preferred shareholder acquired units comprised of one preferred share and one warrant (referred to by ACIC by the singular term, “Unit”) by signing a subscription agreement. I refer to them collectively as “Subscription Agreements”. The subscription price for each Unit was fixed at $1,000. Each warrant granted a preferred shareholder a non-transferable option to acquire additional preferred shares for the same price. The total capital value for all issued Units is approximately $37,277,000.

[30] ACIC’s preferred shares contain numerous rights, including a right of redemption (also known as a right of retraction) to receive a return of the purchase price paid for shares, as well as the right to receive dividends so long as an investing subscriber remains a preferred shareholder.

[31] Preferred shareholders were paid dividends from time to time. Between 2005 and 2014, ACIC issued dividends with annual returns ranging between 6.25% and 8%. The return on dividends reduced in 2015 to approximately 2.5%, and to 1% in 2016. ACIC has not issued dividends since 2016.

[32] The redeeming preferred shareholders advise that the earliest redemption requests in issue on the application date back to 2013.

[33] Approximately 540 of ACIC’s preferred shareholders, comprising 27,587 preferred shares with a capital value of $27,587,000, issued redemption notices to ACIC before this *CCAA* proceeding was commenced. As mentioned, not all of those who did are before the Court on this application.

[34] Some redeeming preferred shareholders requested redemption of all of their shares prior to the commencement of this *CCAA* proceeding, while others only requested partial redemptions. Some of those who delivered redemption notices were paid in full, others only in part, and some were not paid at all.

[35] According to ACIC, preferred shares to the value of $1,380,500 were redeemed and paid out prior to the initial order in this proceeding, issued by Madam

Justice Adair on November 10, 2017, leaving a balance of unsatisfied share redemptions of $26,207,000.

[36] Sadly, many of ACIC's preferred shareholders are elderly individuals who invested most if not all of their life's savings with ACIC.

[37] Due to defaults on loans it made to certain third parties, ACIC was unable to pay all of the redemption notices it received from preferred shareholders. It sought protection under the *CCAA*.

[38] In addition to the claims asserted by the redeeming preferred shareholders, when ACIC commenced this proceeding on November 8, 2017, it faced approximately $1.785 million in secured claims and $3.96 million in unsecured claims.

[39] It is now evident that this proceeding is in effect a liquidating *CCAA* as there is no reasonable prospect that ACIC's business can be saved. Its primary asset is its loans portfolio. ACIC maintains an office in this province in Salmon Arm, with two staff members. It is also evident that at the moment, ACIC's creditors and shareholders are better off under the *CCAA* as opposed to a bankruptcy under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*].

[40] Although ACIC has yet to submit a plan of arrangement, the Monitor has been actively engaged in pursuing loan recoveries and operating ACIC's business as per court appointed powers akin to those of a super monitor. Although the Monitor expects to recover a substantial amount of ACIC's loan portfolio, possibly to a maximum of approximately $37.277 million, the Monitor advises that there will be insufficient funds to pay the amounts owed to ACIC's creditors and to return the capital invested by its preferred shareholders.

Overview: Equity vs. Debt Claimants

[41] In a proposed plan of arrangement or compromise submitted for court approval under the *CCAA*, a debtor company may divide its creditors into different

classes. Equity claimants are treated as a single class, unless otherwise ordered: ss. 22(1), 22.1. They rank behind creditors.

[42] Historically, in insolvency matters debt claimants have taken priority to equity claimants. The reasoning behind this approach was explained by Justice Morawetz (as he then was) in *Sino-Forest Corporation (Re)*, 2012 ONSC 4377 at paras. 23-25, aff'd 2012 ONCA 816:

> 23 … Essentially, shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditor claims are not being paid in full. Simply put, shareholders have no economic interest in an insolvent enterprise… [citations omitted]
>
> 24 The basis for the differentiation flows from the fundamentally different nature of debt and equity investments. Shareholders have unlimited upside potential when purchasing shares. Creditors have no corresponding upside potential… [citations omitted]
>
> 25 As a result, courts subordinated equity claims and denied such claims a vote in plans of arrangement… [citations omitted]

[43] Because of the superior position of debt claimants over equity claimants, it has become necessary for courts to distinguish between the two. The general approach for determining whether a party was a debt or equity claimant was set out in *Canadian Deposit Insurance Corp. v. Canadian Commercial* Bank, [1992] 3 S.C.R. 558 [*CDIC*], which was helpfully summarized by Madam Justice Fitzpatrick in *Bul River* at para. 69:

> … In [*CDIC*], the issue was whether money advanced to the debtor bank was in the nature of a loan or a capital investment for the purpose of determining whether the creditors advancing the funds ranked *pari passu* with other unsecured creditors in a winding-up proceeding. Mr. Justice Iacobucci stated that the approach was to determine the "substance" or "true nature" of the transaction (563, 588). His oft quoted statements are found at 590-91, the relevant principles of which can be summarized as follows:
>
> a) the fact that a transaction contains both debt and equity features does not, in itself, determine its characterization as either debt or equity;
>
> b) the characterization of a transaction under review requires the determination of the intention of the parties;
>
> c) it does not follow that each and every aspect of a "hybrid" debt and equity transaction must be given the exact same weight when addressing a characterization issue; and

> d) a court should not too easily be distracted by aspects of a transaction which are, in reality, only incidental or secondary in nature to the main thrust of the agreement.

[44] The reference to a "hybrid" debt and equity transaction in the above noted excerpt includes preferred shares, which are one form of investment that has proven particularly challenging for courts to categorize. Preferred shares are regarded in the case authorities as hybrid instruments that may contain rights and conditions attributable to both equity and debt: *Royal Bank of Canada v. Central Capital Corp.* [1996] O.J. (3d) No. 359 at para. 127 (C.A.).

[45] The Ontario Court of Appeal said in *Sino-Forest*, at para. 53, that the 2009 amendments to the *CCAA* significantly expanded the definition of equity claims in a manner that "altered" common law. The Court of Appeal determined that the definition extends beyond a holder of an equity interest, and now includes persons that might not otherwise be within its plain meaning (such as advancing claims for contribution or indemnity against the company).

[46] In *Sino-Forest*, shareholders made claims within the *CCAA* proceeding against the company's auditors who in turn sought indemnity from the company. Even though the auditors were never shareholders, their indemnity claim was characterized as an equity claim. I have excerpted what I consider to be guiding language in the Court of Appeal's reasons:

> [1] In 2009, the [*CCAA*] was amended to expressly provide that general creditors are to be paid in full before an equity claim is paid.
>
> [2] This appeal considers the definition of "equity claim" in s. 2(1) of the CCAA. More particularly, the central issue is whether claims by auditors and underwriters against the respondent debtor, Sino-Forest Corporation ("Sino-Forest"), for contribution and indemnity fall within that definition. The claims arise out of proposed shareholder class actions for misrepresentation.
>
> …
>
> [37] We agree with the supervising judge that the definition of equity claim focuses on the nature of the claim, and not the identity of the claimant. In our view, the appellants' claims for contribution and indemnity are clearly equity claims.
>
> …
>
> [39] The definition [of equity claim] incorporates two expansive terms.

> [40] First, Parliament employed the phrase "in respect of" twice in defining equity claim: in the opening portion of the definition, it refers to an equity claim as a "claim that is in respect of an equity interest", and in para. (e) it refers to "contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d)"…
>
> [41] The Supreme Court of Canada has repeatedly held that the words "in respect of" are "of the widest possible scope", conveying some link or connection between two related subjects. …
>
> …
>
> [46] "Equity claim" is not confined by its definition, or by the definition of "claim", to a claim advanced by the holder of an equity interest. Parliament could have, but did not, include language in para. (e) restricting claims for contribution or indemnity to those made by shareholders.
>
> …
>
> [53] In our view, the definition of "equity claim" is sufficiently clear to alter the pre-existing common law…

[47] Taking the same approach as the Court of Appeal and Mr. Justice Morawitz (as he then was) in the court below (at paras. 86-90) in *Sino-Forest*, Fitzpatrick J. noted in *Bul River*, following a most helpful and thorough discussion of case authorities and the relevant 2009 amendments to the *CCAA*, that in one sense, the amendments codified previous case law concerning equity claims, but also provided for a broader yet more concrete definition of equity claims.

[48] Relying on the reasons of Laskin J.A. in *Central Capital*, Fitzpatrick J. also pointed out that in the context of a *CCAA* proceeding, particularly in light of the 2009 amendments, the mere existence of redemption rights does not equate preferred shareholders as creditors:

> [105] In the same manner, the new equity provisions in the *CCAA* reinforce that it remains an important policy objective that equity claims be subordinated to debt claims. In *Sino-Forest Corporation*, the Court of Appeal focused on the purpose of the 2009 amendments and stated:
>
> > [56] In our view, in enacting s. 6(8) of the *CCAA*, Parliament intended that a monetary loss suffered by a shareholder (or other holder of an equity interest) in respect of his or her equity interest not diminish the assets of the debtor available to general creditors in a restructuring. If a shareholder sues auditors and underwriters in respect of his or her loss, in addition to the debtor, and the auditors or underwriters assert claims of contribution or indemnity against the debtor, the assets of the debtor available to general creditors would be

> diminished by the amount of the claims for contribution and indemnity.
>
> [106] This same recognition of the sound policy objectives of insolvency legislation was noted by Laskin J.A. in *Central Capital* (ONCA). He commented at 546 that "[p]ermitting preferred shareholders to be turned into creditors by endowing their shares with retraction rights runs contrary to this policy of creditor protection."
>
> [107] I see no principled basis upon which a different approach should be taken in respect of an equity claimant who has had the foresight, energy or just plain luck to seek and obtain a judgment prior to the filing date.
>
> [Emphasis added.]

[49] Accordingly, while the 2009 amendments did represent in part a codification of the previous case law concerning equity claims, they also represent a more concrete definition of "equity claims" and by such definition a broadening and more expansive definition of such claims: *Sino-Forest* (ONCA) at paras. 24, 34-60. Parliament has now clearly cast the net widely in terms of the broad definition of equity claims such that claims that might previously escaped such characterization will now by caught by the *CCAA*.

CCAA

Introductory Remarks

[50] The provisions of the *CCAA* greatly assist in the analysis. The expanded definition of equity claim and the definition of equity interest clearly suggest that ACIC's preferred shares, which include rights of redemption and to receive dividends, constitute equity interests and provide strong support for the position taken by ACIC and the non-redeeming shareholders that all preferred shareholders in this *CCAA* proceeding must be treated as equity claimants.

[51] An appropriate starting point in the analysis is with a brief discussion of the key provisions and objectives of the *CCAA*, particulary in light of ACIC's submission that the priority issue is easily resolved in favour of its position on the application from the broad definition of "equity clamant" and "equity interest" in the statute without the need for a detailed analysis of the underlying transaction documents.

Statutory Definition of Equity Claim

[52] As a result of the 2009 amendments to the *CCAA*, an "equity claim" is defined in s. 2(1) and includes redemption claims:

> 2(1)
>
> …
>
> **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)…
>
> [Emphasis added.]

[53] An "equity interest" is also defined, and includes a share in the company and a warrant to acquire additional shares:

> **2(1) equity interest** means
>
> **(a)** in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — 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;

No Statutory Definition of Creditor

[54] Unlike the *BIA*, there is no definition of creditor in the *CCAA*. In the *BIA*, a creditor is defined in s. 2 as "a person having a claim provable as a claim".

[55] The *CCAA* contains a broad definition of "claim" in s. 2, which incorporates the definition in the *BIA*:

> **claim** means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the [*BIA*].

[56] A "provable claim" is defined in s. 2 of the *BIA* as follows:

> **claim provable in bankruptcy, provable claim** or **claim provable** includes any claim or liability provable in proceedings under this Act by a creditor.

[57] Section 121 of the *BIA* speaks to the meaning of a "provable claim". It provides that all debts and liabilities, including those payable at a future date, to which the bankrupt is subject on the date of bankruptcy by reason of an obligation incurred before bankruptcy.

[58] In *Bul River*, Madam Justice Fitzpatrick points out, at para. 39, that the definition of "claim" found in s. 2 of both statutes "represents a point of convergence consistent with the harmonization of certain aspects of insolvency law under both the *CCAA* and *BIA*: *Century Services* at para. 24.

[59] In the past, the claims and rights of shareholders have not been treated as provable claims and ranked behind creditors of an insolvent corporation in liquidation: *Nelson Financial Group Ltd.*, 2010 ONSC 6229 at para. 25. That remains the case under the current *CCAA*. No plan or arrangement may be sanctioned by the court where equity claimants have priority to creditors. Section 6(8) of the *CCAA* states:

> **Compromises to be sanctioned by court**
>
> **6** …
>
> **Payment — equity claims**
>
> **(8)** 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.

[60] The rationale is that equity claimants (commonly thought of as investors) are considered to take a higher degree of risk in a company's economic fortunes than creditors who do not share in any upside in the profits or value of the company and the risk of failure.

[61] The following excerpt from *Nelson Financial* aptly describes the distinction between debt and equity claimants:

> [25] … As noted by Laskin J.A. in *Re Central Capital Corporation*, on the insolvency of a company, the claims of creditors have always ranked ahead

> of the claims of the 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.

[62] Creditors' claims, including repayment terms and any rates of interest are typically governed by specific, fixed terms: *Bul River* at paras. 65-66; *Nelson Financial* at para. 25; *Sino-Forest* (ONCA) at para. 30.

[63] Although not a *CCAA* case, the Court of Appeal's discussion of the nature of a debt relationship in *Coast Capital Savings Credit Union v. British Columbia (Attorney General)*, 2011 BCCA 20 provides guidance for the issues in this case, particularly in the absence of a statutory definition. At para. 57, Madam Justice Newbury adopted the following definition, which she noted was also found in numerous Canadian and English authorities:

> A debt is defined to be a sum of money which is certainly, and at all events, payable without regard to the fact whether it be payable now or at a future time.

[64] At para. 23, Newbury J.A. also referred to a definition of debt in a case authority cited by the chambers judge in that case - *A. Valin Petroleums Ltd. v. Imperial Oil Ltd.*, 2007 ABQB 134 at paras. 39-40:

> 39 The word "equity" is not ambiguous. It is a word of ordinary use, particularly in the commercial context….
>
> 40 Debt and equity are distinct concepts. Debt is a claim on the assets of the corporation and is created when money is borrowed. With it arises an obligation on the corporation to repay that money. Corporate equity, however, is comprised of the corporation's total assets unencumbered by debt or other liabilities. It is the "residual economic interest in the corporation's assets, after all outstanding debts have been satisfied." See C. Nicholls, *Corporate Finance and Canadian Law* (Toronto: Carswell, 2000 at page 9).
>
> [Emphasis added.]

[65] Similar definitions, drawn from *Black's Law Dictionary*, *Jowitt's Dictionary of the English Language*, and *The Shorter Oxford Dictionary*, are referred to by the

Ontario Court of Appeal in *Central Capital* at 508, which again involved a *CCAA* proceeding.

[66] There is some conflict in the case authorities as to whether a claim can be considered a debt claim where it is unenforceable: see, e.g. *Bul River* at para. 40; *Central Capital* at 531-534. However, I do not need to decide that issue in order to determine the status of the redeeming preferred shareholders' claims.

Further Analysis is Required

[67] As I said at the outset of this section, the *CCAA* provides considerable guidance in determining the claim of the redeeming preferred shareholders. I agree with ACIC that the 2009 amendments show Parliament's intention to broaden the scope of equity claimants to include shareholders with redemption claims.

[68] However, redeemable preferred shares are viewed in the case law to be "somewhat different than conventional equity capital": *Central Capital* at para. 128; *Coast Capital* at para. 49. In *Central Capital,* Mr. Justice Laskin, in his reasons (concurring with Madam Justice Weiler in the majority), described preferred shares as "compromise securities" and "financial mongrels" with rights analogous to rights of creditors:

> 127 Preferred shares have been called "compromise securities" and even "financial mongrels: Grover and Ross, *Materials and Corporate Finance* (1975), at p. 49. Invariably the conditions attaching to preferred shares contain attributes of equity and, at least in an economic sense, attributes of debt. Over the years financiers and corporate lawyers have blurred the distinction between equity and debt by endowing preferred shareholders with rights analogous to the rights of creditors. One example is the right of redemption -- the right of the corporation to compel preferred shareholders to sell their shares back to the corporation. Another example, and it is the case before us, is the right of retraction -- the right of shareholders to compel the corporation to buy back their shares on a specific date for a specific price.
>
> 128 I acknowledge, therefore, that redeemable or retractable preferred shares are somewhat different from conventional equity capital. What makes the appeals before us difficult is that although the appellants appear to hold equity, their right of retraction appears to be a basic characteristic of a debtor-creditor relationship: see Grover and Ross, supra, at pp. 47-49; Buckley, Gillen and Yalden, *Corporations: Principles and Policies*, 3d ed. (1995), at pp. 938-40.

[69] The fact that a hybrid instrument contains elements of both equity and debt is not an obstacle to determining its true nature: *CDIC* at 590. In *Central Capital*, Laskin J.A. described the nature of the inquiry in this way:

> 129 If the certificate or instrument contains features of both equity and debt – in other words if it is hybrid in character - then the court must determine the "substance" of the relationship between the holder of the certificate and the company. …
>
> 130 In determining the substance of the relationship, as in any other case of contract interpretation, the court looks to what the parties intended. In *CDIC v. CCB*, *supra*, Iacobucci J. put this proposition as follows at p. 588:
>
> > As in any case involving contractual interpretation, the characterization issue facing this Court must be decided by determining the intention of the parties to the support agreements. This task, perplexing as it sometimes proves to be, depends primarily on the meaning of the words chosen by the parties to reflect their intention. When the words alone are insufficient to reach a conclusion as to the true nature of the agreement, or when outside support for a particular characterization is required, a consideration of admissible surrounding circumstances may be appropriate.

[70] Consequently, the focus of the inquiry is to determine whether in substance the redeeming preferred shareholders' claims are debt or equity. They cannot be both.

Determining the Substance of the Relationship

Overview

[71] The inquiry focuses on the transaction documents at the time the relationship was created. It is, generally speaking, informed by the words chosen by the parties to reflect their intentions in conjunction with the principles underpinning insolvency legislation, which in this case includes the remedial purposes of the *CCAA*. Where the words are insufficient to determine the true nature of the agreement, admissible evidence of surrounding circumstances may be considered: *CDIC* at 588, 590; *Central Capital* at paras. 38, 67, 126, 129-130, 135-136.

[72] Section 2(1) of the *CCAA* is clear that in the context of a *CCAA* proceeding, a redemption claim is not indicative of a debt relationship. As well, redemption rights on their own do not create a debtor-creditor relationship. They are to be considered, along with risk-taking, profit sharing, and the right to participate in the assets of the company on liquidation after creditors are paid, as "hallmarks" of a shareholder relationship and an equity interest. To establish a debt relationship, either or both the company's articles or the transaction documents must make it clear that a shareholder's redemption is repayment of a loan: *Central Capital* at paras. 70, 97, 135-136; *Bul River* at para. 109; *Dexior Financial Inc. (Re)*, 2011 BCSC 348 at paras. 12-13,16.

[73] As Weiler J.A. explained in *Central Capital*, language consistent with a debt obligation upon redemption must be reflected in the transaction documents:

> 97 Looked at another way, after the retraction date and at the time of the reorganization, the common features of a debtor-creditor relationship are not in evidence in Central Capital's articles. The agreements between the parties contain no express provision that the redemption of the shares is in repayment of a loan. The corporation was not obliged to create any fund or debt instrument to ensure that it could redeem the shares on the retraction date. There is no indemnity in the event that the money is not repaid on the retraction date. There is no provision for the payment of any interest after the retraction date in the event that the money is not repaid on the retraction date. There is no provision that after the retraction date and in the event of insolvency, the appellants would have the right to have the company wound up. (See *R v. Imperial General Properties Ltd.*, [1985] 2 S.C.R. 288, 21 D.L.R (4th) 741, for a case where the articles of the company contained this right.) There is no provision that upon a winding-up or insolvency the parties are entitled to rank pari passu with the creditors as was the case in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank, supra*.

[74] In *Central Capital*, the parties' intention was (according to the two concurring reasons in the majority) reflected "mainly" in the share purchase agreements, conditions attaching to the shares, the company's articles, and the manner in which Central Capital recorded the shares in its financial statements. They did not establish a debt obligation on the part of the company: see, e.g., para. 131.

[75] Incidental or secondary aspects of a transaction, such as mechanisms for enforcement, should not distract the inquiry: *CDIC* at paras. 46-54; *Earthfirst Canada Inc. (Re)*, ABQB at para. 5.

Examples

[76] Useful guidance for the inquiry into the true nature or substance of the relationship between preferred shareholders and ACIC can also be drawn from some of the cases cited by the parties in submissions.

[77] In *Bul River*, Fitzpatrick J. rejected the claim of certain preferred shareholders that their equity claims converted into debt claims simply because they had obtained (default) judgment for their redemptions against one of the insolvent companies: paras. 85-98, 103-117.

[78] In *Return on Innovations Capital Ltd. v. Gandi Innovations Ltd.*, 2011 ONSC 5018, it did not matter that a claim by a shareholder seeking recovery of share purchase proceeds in the amount USD $50 million was founded on breach of contract and fraud. The legal basis for the claim was not the “deciding factor”. Nor were the “legal tools” used by the claimant, because, Mr. Justice Newbould said, at para. 59, they were being used to recover an equity investment.

[79] In *Nelson Financial*, which was a *CCAA* proceeding, Madam Justice Pepall (as she then was) disagreed that the preferred shareholders were debt claimants. In that case, the company raised money by two different means: from lenders to whom it issued promissory notes with an annual rate of return of 12% and from investors to whom it issued non-voting preferred shares with an annual dividend of 10%. The company’s articles provided the company with unilateral redemption rights on payment of the purchase price plus accrued dividends. At least one investor negotiated a right of redemption and two redemption requests were outstanding as of the *CCAA* filing date. The company’s financial statements also treated the shareholders as equity investors and distinguished them from its creditors.

[80] After referring to the distinction between debt and equity claimants, Pepall J. discussed the broad scope ascribed to the meaning of an equity claim or interest:

> [26] This treatment also has been held to encompass fraudulent misrepresentation claims advanced by a shareholder seeking to recover his investment: *Re Blue Range Resource Corp.* In that case, Romaine J. held that the alleged loss derived from and was inextricably intertwined with the shareholder interest. … *National Bank of Canada v. Merit Energy Ltd*. and *Earthfirst Canada Inc.* 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.

[81] In addition to reviewing the articles of the company and the share certificates, Pepall J. considered the following evidence of surrounding circumstances at para. 31:

(a) investors' right to receive dividends (said to be "a well recognized right of a shareholder");

(b) investors were given the option of investing in promissory notes or preference shares and opted for the latter;

(c) on liquidation, dissolution, or winding up, preferred shareholders ranked ahead of common shareholders; and

(d) shares were treated as equity in the company's financial statements and in its books and records.

[82] In the result, and although she found characteristics of both debt and equity claims in the relationship, she concluded that the substance of the relationship between the preferred shareholders and the company was equity, not debt: paras. 31-32.

[83] In the *CCAA* case of *JED Oil Inc. (Re),* 2010 ABQB 295, the analysis focused on the relationship at the time the shares were issued when considering the true nature of the claims of preferred shareholders for unpaid dividends. Madam Justice Kent rejected the shareholders' claim as creditors of debt claims. There was no language in the share certificates to establish that dividends were declared and

owing on the date the shares were issued. She found that the substance of the relationship at the time the shares were purchased was not creditor-debtor. The shareholders, she said at para. 16, "are risk-takers, not creditors. For them to become creditors from the time they are issued the shares would require more explicit wording than is contained in these shares."

[84] Lastly, in *Dexior Financial*, which involved a *BIA* proceeding, the fact that a redemption notice was issued prior to bankruptcy "does not change the original intention or substance of the claim": para. 16.

Summary

[85] To summarize, courts take into account a number of factors when determining the substance of the relationship when assessing the status of preferred shareholders. Examples include:

(a) The specific language contained in the company's articles and the transaction documents.

(b) The right of a shareholder to redeem their shares. The absence of this right is inconsistent with a creditor relationship. A right of redemption is particularly compelling as an *indicia* of a creditor relationship where the articles or transaction documents expressly provide that the redemption is for the repayment of a loan.

(c) Whether the shareholder had upside potential in the return of their investment, which indicates an equity relationship and also shared in the downside risk of a lower return.

(d) Whether the shareholder had the right to receive dividends, which is a strong *indicia* of an equity relationship.

(e) Treatment on liquidation, dissolution, or winding up.

(f) Whether the shares are treated as equity or debt in the financial statements of the corporation.

[86] The mechanism used to enforce redemption rights is irrelevant. The legal basis for any claim brought to collect on a redemption request is as well.

The Relationship between ACIC and Its Preferred Shareholders

Overview

[87] As mentioned at the outset of these reasons, I reject the redeeming preferred shareholders' claim that they are debt creditors of ACIC. None of ACIC's preferred shareholders are debt claimants. The redeeming preferred shareholders were not lenders *ab initio* as opposed to investors. They are equity claimants and rank together with all other preferred shareholders and are to be treated as such in the same class in this *CCAA* proceeding.

[88] The relationship between ACIC and its preferred shareholders is comprised of the Articles, the various Subscription Agreements, Offering Memoranda, and applicable legislation such as the *BCA*. The inquiry in this particular case is also governed by the *CCAA*. From them those sources, the substance of the relationship between ACIC and its preferred shareholders, including those who have delivered redemption requests, can be readily ascertained.

[89] The Articles, Offering Memoranda, and Subscription Agreements are clear that the relationship between ACIC and its preferred shareholders is an equity relationship. The preferred shareholders are clearly identified as investors who purchased non-voting preferred shares with rights to receive dividends at various rates dependent on ACIC's financial performance and with redemption rights which throughout may or may not be honoured as determined by ACIC's directors in their sole discretion.

[90] There is no language in the Articles suggesting, directly or indirectly, that a share redemption is in respect of a repayment of a debt. There is also no language, direct or indirect, in the Articles suggesting that preferred shareholders are lenders or that their investment is secured by a promissory note or something akin to it. Article 27.1 defines preferred shares as "without par value in the capital of the Company".

[91] Prefered shareholders took the advantages of the potential upside in ACIC's earnings obtained from increasing lending rates as well as the risk of loss of their entire investment.

[92] The risks of the investment are clearly outlined to potential investors. The Offering Memoranda characterized the "investment" as both "risky" and "speculative". Each Offering Memoranda contains a detailed discussion (including warnings) of numerous risk factors associated with an investment with ACIC, including its speculative nature, the absence of a market to transfer or assign shares and warrants, and no guarantee that dividends would be declared or paid. The Offering Memoranda also advise that their contents had not been reviewed by any regulatory authority.

[93] The Offering Memoranda also describe the purchase of preferred shares as a speculative risk that should be considered only by subscribers who are able to withstand the loss of their total investment:

> ***Item 8 Risk Factors***
>
> The purchase of Units involves a number of significant risk factors. **Any or all of these risks, or other as yet unidentified risks, may have a material adverse effect on the Company's business, the value of the Preferred Shares and/or the return to Preferred Shareholders.**
>
> (a) **Investment Risk**
>
> **(i) Speculative Nature of Investment**
>
> **This is a speculative offering. The purchase of Units involves a number of significant risk factors and is suitable only for Subscribers who are aware of the risks inherent in mortgage investments and the real estate industry and who have the ability and willingness to accept the risk of the total loss of their invested capital and who have no immediate need for liquidity.**
>
> [All emphasis in original.]

[94] In some of the Offering Memoranda, ACIC's capital structure is described and shown to be comprised of common and preferred shares and is specifically distinguished from debt.

[95] The Subscription Agreements also contain language making it clear that each subscriber for preferred shares is making an investment, e.g.:

> **2. REPRESENTATIONS, ACKNOWLEDGMENTS AND CONVENANTS**
>
> 2.1. The Subscriber acknowledges represents and covenants that:
>
> …
>
> (j) the Subscriber is purchasing the Units as principal for investment only and not with the view to the resale or distribution thereof;
>
> [Bold in original]

[96] A subscriber for preferred shares is required to sign a Form 20A per the *Securities Act*, R.S.B.C. 1996 c. 418 confirming, *inter alia*:

> 4. I acknowledge that:
>
> …
>
> (c) I may lose all of my investment; …

[97] There is no language in the Subscription Agreements suggesting that a subscriber for preferred shares is a lender or creditor through any other capacity.

[98] I disagree with the redeeming preferred shareholders' submission that a key *indicia* of an equity investor is defined in part by the word "unlimited" in respect of the opportunity to participate in the financial upside of the company if "unlimited" signifies there can be no possible limit on the rate of return.

[99] They rely on a reading of the reasons in *Sino-Forest* (ONSC) at para. 30 and argue that given the exigencies of the mortgage lending market, it was never possible for them to participate in an "unlimited financial upside" of ACIC. They point to what they characterize as a cap on their highest rate of return for dividends and say that in effect, their relationship with ACIC was akin to creditor and debtor.

[100] In my opinion, "unlimited upside" refers to the possibility of enjoying the benefits of ongoing and potentially increasing profits of the company.

[101] For ACIC, the rates of return, and hence its revenues and profits, depended on market conditions and were not fixed to any maximum. Preferred shareholders always retained the opportunity to share in higher rates of return if market conditions changed to allow for higher lending rates. Conversely, they also took the risk of lower rates of return resulting from potential adverse market conditions and

impediments to ACIC's ability to collect on its loan portfolio (both of which have occurred). I agree with the submission of the creditors who appeared on the application that the investment made by the preferred shareholders is akin to an investment in a fluctuating commodity.

[102] I also disagree with the redeeming preferred shareholders that the fact that ACIC pooled investors' funds indicates a debt relationship or establishes the preferred shareholders as lenders. Pooling from investors is the means by which a MIC such as ACIC is able to carry on business to lend funds to third party borrowers.

[103] I will conclude this section with this observation. If the redeeming preferred shareholders' position that the nature of their relationship from the outset is one of creditor is correct, then it would defeat their claim to be contrasted from the non-redeeming preferred shareholders since all of ACIC's preferred shareholders would be debt as opposed to equity claimants and rank alongside ACIC's other creditors.

Redemption Rights Do Not Affect the Outcome

[104] The redeeming preferred shareholders place significant reliance on their redemption rights (to seek the return of their principal investment amount) as *indicia* of a debt relationship.

[105] In this case, when considered in context, the mere presence of redemption rights do not establish a debt relationship. The intention of ACIC and the preferred shareholders expressed in the Articles and the transaction documents does not establish a debt relationship. There is no language in the Articles, the various Offering Memoranda, and the Subscription Agreements that indicates that the redemption is in repayment of a debt. Furthermore, preferred shareholders were advised throughout that their redemption rights were not guaranteed.

[106] The redemption provisions do not state or suggest that subscribers for preferred shares are lenders. Nor do they state or suggest that preferred shares are given as security akin to a promissory note. Unlike a promissory note, which typically contains a promise to pay by a certain date or the happening of a certain event(s), ACIC's obligation to honour redemption requests was always in the sole discretion of

its directors, who may also clarify or establish terms and conditions for redemption should they consent to a request.

[107] The *BCA* requires that all rights attached to shares be set out in a company's articles: ss. 11(h), 12(2)(b), 48. The Articles state that redemption is in the sole discretion of ACIC's directors. As noted in the previous section, the redemption provisions in the Articles are found in article 27.4. According to Mr. Bergman, ACIC's sole director throughout, ACIC's redemption policy remained unchanged since it began issuing preferred shares in 1998.

[108] Article 27.4 specifically deals with redemption requests from preferred shareholders. Mr. Bergman's sole discretion to consent to or reject redemption requests is clear:

> **27.4 Redemption of Preferred Shares**
>
> A Preferred Share will be redeemed by the Company if and only if:
>
> (a) the Company has received written notice from the registered holder of the Preferred Share that he wishes the Company to redeem the Preferred Share;
>
> (b) the Directors, in their sole discretion, consent to the redemption by the Company of the Preferred Share pursuant to terms and conditions set by the Directors in their sole discretion; and
>
> (c) the Preferred Shareholder who requested that his Preferred Share be redeemed, accepts the terms and conditions of redemption set by the Directors.
>
> The Directors will not be obligated to provide any reasons for not consenting to a Preferred Shareholder's request to have his Preferred Shares redeemed by the Company.
>
> [Bold in original.]

[109] Further, and in contrast to *Nelson Financial*, there are no provisions in the Articles or transaction documents obliging ACIC to buy back shares. To the contrary, Article 8.2 provides that if ACIC proposes at its option to redeem some but not all of the shares of any class or series, then it is in the discretion of its directors subject to special rights and restrictions attached to each share. ACIC's directors are given the discretion whether to decide the manner in which the shares to be redeemed are selected and whether the redemption is *pro rata*.

[110] Turning to the Offering Memoranda, those documents contain detailed information concerning the redemption process and restrictions on redemption requests. Mr. Bergman's discretion to consent or refuse to honour redemption requests is a pervasive theme in the various Offering Memoranda.

[111] For example, ACIC's first Offering Memoranda issued in 1998 warns potential subscribers that redemptions are not guaranteed and may never be honoured:

> **Redemption of Preferred Shares:** The Director of the Company has adopted a Policy regarding the redemption of Preferred Shares. A copy of such policy is available from the Company upon request.
>
> **Pursuant to such policy, a Preferred Share will be redeemable by the Company in certain circumstances. Although the Company will use its best commercial efforts to ensure that all requestsfor redemption are fulfilled, depending on such circumstances the Company cannot guarantee that any or all of the Preferred Shares in respect of which requests for redemption are received will be redeemed in any fiscal year. See Item 8 – "Risk Factors" – Limited Redemption Rights**.
>
> …
>
> The Company will no redeem any Preferred Shares if at the time of such redemption the Company is insolvent or if such redemption will render the Company insolvent, if such redemption will reduce the Company's cash reserves below a level which the Directors determine, in their sole discretion, to be prudent, or if such redemption will cause the Company to breach the requirement that at least 50% of the cost amount of its property must consist of bank deposits or mortgage loans made in respect of residential properties.
>
> [All emphasis in original.]

[112] In addition to the the sole discretion to honour a redemption request vesting with the director, the Offering Memoranda spell out other limitations on redemptions, e.g., adverse financial circumstances including liquidity issues:

> **No Guaranteed Dividends**
>
> The dividends in which the Preferred Shareholders are entitled to participate are **not** cumulative and will not be paid unless such dividends have been declared by the Directors. The Directors have the sole discretion as to whether or not any such dividends are declared. Therefore, there is no guarantee that dividends payable to Preferred Shareholders will be declared.
>
> [All emphasis in original.]

[113] The Offering Memoranda issued in 2001 and 2002 provide another example. They are clear that redemption depends on the consent of the directors in their "sole

discretion" pursuant to "terms and conditions set by the Directors". Subscribers are advised that the "Directors will not be obliged to provide any reasons for not consenting to a Preferred Shareholders' request to have their Preferred Shares redeemed by the Company".

[114] Commencing in 2003, the Offering Memoranda referred to a redemption policy and included a summary making it clear that redemption remained in the discretion of its directors to amend or cancel it, adopt an alternative policy, or refuse to consent to a redemption.

[115] This example is taken from the 2003-2006 and 2015 Offering Memoranda:

> **Redemption of Preferred Shares**: The Company has adopted a policy regarding the redemption of Preferred Shares. A copy of such policy is available from the Company upon request.
>
> **Pursuant to such policy, a Preferred Shareholder will be redeemable by the Company in certain circumstances. Although the Company will use its best commercial efforts to ensure that all requests for redemption are fulfilled, depending on such circumstances the Company cannot guarantee that any or all of the Preferred Shares in respect of which requests for redemption are received will be redeemed in any given fiscal year**. …
>
> …
>
> The Company will not redeem any Preferred Shares if at the time of such redemption the Company is insolvent or if such redemption will render the Company insolvent, if such redemption will reduce the Company's cash reserves below a level which the Company's directors (the "**Directors**") determine, in their sole discretion, to be prudent, or if such redemption will cause the Company to breach the requirement that at least 50% of the cost amount of its property must consist of bank deposits or mortgage loans made in respect of residential properties.
>
> Further, in any calendar quarter, the Company will not redeem any more than that number of Preferred Shares which is equal to 2 1/2 % of the outstanding Preferred Shares at the end of the immediately preceding calendar quarter. ...
>
> …
>
> **The adoption of its policy regarding the redemption of Preferred Shares does not fetter the discretion of the Directors of the Company from time to time to amend or cancel such policy in whole or in part or to adopt an alternative policy with respect to the redemption of Preferred shares, or to refuse to consent to a Requesting Shareholder's request to have their Preferred Shares redeemed by the Company.**
>
> [All emphasis in original.]

[116] Nothing in ACIC's redemption policies removed or otherwise constrained Mr. Bergman's unfettered discretion to consent or refuse to honour redemption requests.

[117] The redemption policy that ACIC adopted (in accordance with s. 27.4 of the Articles) on December 1, 2006 serves as a useful example of its ongoing retention of discretion to honour redemption requests. The policy language is clear that ACIC's new policy did not fetter the discretion of its director from time to time to amend or cancel it in whole or in part or refuse to consent to a redemption request:

> B. Pursuant to Section 27.4 of the Articles of the Company, Preferred Shares are redeemable by the holder provided that:
>
> …
>
> 2. The Company's Director, in his sole discretion consents to such redemption pursuant to terms and conditions set by the Director in his sole discretion; and
>
> 3. The holder accepts the terms and conditions of redemption set by the Director.
>
> The Director is not required to provide any reasons for not consenting to a request for redemption of Preferred Shares.
>
> …
>
> 7. The adoption of this Preferred Share Redemption Policy does not fetter the discretion of the Director from time to time to amend or cancel this policy in whole or in part or to adopt an alternative policy with respect to the redemption of Preferred Shares, or to refuse to consent to a Requesting Shareholder's request to have their Preferred Shares redeemed by the Company.

[118] Another redemption policy (undated) in evidence from Mr. Bergman, attached as Exhibit "D" to his affidavit sworn November 7, 2017, is to a similar effect, making it clear that redemptions may not be honoured:

> **Redemption of Preferred Shares:**
>
> The Company has adopted a policy regarding the redemption of Preferred Shares. A copy of such policy is available from the Company upon request. Pursuant to such policy, a Preferred Share will be redeemable by the Company in certain circumstances. **Although the Company will use its best commercial efforts to ensure that all requests for redemption are fulfilled, depending on such circumstances the Company cannot guarantee that any or all of the Preferred Shares in respect of which requests for redemption are received will be redeemed in any given fiscal year.**

…

> The adoption of its policy regarding the redemption of Preferred Shares does not fetter the discretion of the Directors of the Company from time to time to amend or cancel such policy in whole or in part or to adopt an alternative policy with respect to the redemption of Preferred shares, or to refuse to consent to a Requesting Shareholder's request to have their Preferred Shares redeemed by the Company.
>
> **There are times when redemption requests may not be processed in a timely manner and shareholders may have to wait longer than expected to receive their redemption request. The source of funds used to process redemptions may be from new capital raised and/or loans being repaid. There is no guarantee that funds will be available to meet all redemption requests.**
>
> [All emphasis in original.]

Unsatisfied Redemption Requests Are Not Debt

[119] The redeeming preferred shareholders place great importance on the decision of the Court of Appeal in *Re East Chilliwack Agricultural Cooperative* (1989), 74 C.B.R. (N.S.) (B.C.C.A.), to support their claim to be debt claimants when they delivered their redemption notices. The decision in that case has been the subject of adverse comment or distinguished in other case authorities in this province and others. However, it is sufficient for my determination to note that the facts of that case are clearly distinguishable from the instant proceeding.

[120] In that case, farmers who owned shares in an agricultural cooperative gave notice to the co-op of their intention to have their shares redeemed. Thereafter, and before they were paid, the Superintendent of Co-operatives suspended the right of the co-op to redeem its shares due to liquidity issues. Mr. Justice Hutcheon, writing for the majority, determined that they were entitled to be treated as creditors. However, as is noted at the outset of his reasons, the effect of the Superintendent's order was not argued on the appeal. More importantly for the issues raised on the present application, by virtue of the Cooperative's constating documents, the claimant shareholders in *East Chilliwack*, ceased to be shareholders when they served their redemption notices.

[121] As previously discussed, in the case at bar, redeeming preferred shareholders whose redemption requests were not honoured, either in whole or in

part, retained their rights and privileges as shareholders. They continued to receive a share of the profits of ACIC from dividend payments through to 2016. Also unlike *East Chilliwack*, ACIC's obligation to honour the redemption notices and to buy back shares remained discretionary throughout. In the present case, ACIC's obligation to redeem was always premised, at a minimum, on a best efforts basis and dependent on its liquidity.

[122] Thus, the decision in *East Chilliwack* is not authority for a general proposition that unpaid redemption requests are *indicia* of debt. Unsatisfied redemption requests do not of themselves change the substance of the relationship from an equity interest to a debt claim. In *Central Capital*, the preferred shareholders' claim that they were debt claimants on the basis of their unsatisfied rights of redemption was rejected by the majority: paras. 97, 135-136.

[123] In some instances, ACIC made partial payment of a redemption request and indicated in documents provided to certain redeeming preferred shareholders that the remaining unpaid redemption amounts were "o/s", or outstanding. During oral submissions, the possibility was raised that this advice from ACIC might reflect a change in the relationship between those particular redeeming shareholders and the company. In my opinion, it does not. In *Bul River*, the fact that redeeming shareholders had gone one step further and obtained judgment to recover unpaid redemption amounts was insufficient to convert their equity interest to a debt claim.

Winding-Up Provisions Do Not Affect the Result

[124] The redeeming preferred shareholders rely on the decision in *Coast Capital*, which treated similar winding up language in the Articles as *indicia* of a debt relationship, to support their position that they are debt claimants.

[125] I disagree that the reasons in *Coast Capital* support the position articulated by the redeeming preferred shareholders.

[126] At issue in that case was the tax treatment of shares issued by the credit union labelled "non-equity shares". The case involved statutory interpretation of provisions in the *Corporation Capital Tax Act*, R.S.B.C. 1996, c. 73, the *Financial*

Institutions Act, R.S.B.C. 1966, c. 141 [*FIA*], and the *Credit Union Incorporation Act*, R.S.B.C. 1996, c. 82, as well as the certain provisions of the rules promulgated by Coast Capital respecting the impugned shares (described as "non-equity" shares). Disimilar to the case at bar, the *FIA* defines a non-equity share (in s. 1(1)) issued by a credit union as one evidencing indebtedness of the credit union to the holder of the share that does not represent an equity interest in the credit union.

[127] The outcome in *Coast Capital* turned on its own facts, which are significantly different and thus distinguishable from the case at bar. For example, and unlike the case at bar, the shares in issue in *Coast Capital* were restricted to a 6% non-cumulative dividend in addition to the amount paid on winding up or dissolution. In addition, the credit union was required to redeem those shares on a fixed date. The Court of Appeal engaged in an analysis of the legal substance of those shares and determined that they reflected a debt interest.

[128] The statutory objectives and considerations in that case also differ from those concerning the *CCAA*. In her reasons in *Coast Capital*, Newbury J.A. observed that the case before the Court of Appeal did not concern bankruptcy of insolvency law: paras. 7, 53-56.

[129] In the case at bar, and unlike *CDIC*, there is no provision in the Articles or Offering Memoranda stating or even suggesting that upon a winding-up or insolvency, ACIC's preferred shareholders, let alone any who have sought redemption, are entitled to rank *pari passu* with its creditors: *CDIC* at 563; *Central Capital* at para. 132.

[130] Section 27.5 of the Articles provides a procedure for distribution of ACIC's assets upon winding up or liquidation. ACIC's assets will be distributed to the Preferred Shareholders in priority to the Common Shareholders as follows:

> Upon the winding up or dissolution or liquidation of the Company, the Company's assets will be distributed to the Preferred Shareholders in priority to the Common Shareholders as follows:
>
> - first to the Preferred Shareholders on a pro rata basis among the Preferred Shareholders until each Preferred Shareholder has received the lesser of: (i) the original subscription price for each Preferred

> Share for which the Preferred Shareholder is the registered holder and all dividends that have been declared but for which the Preferred Shareholder has yet to be paid; and (ii) the book value of the Preferred Shares, for which the Preferred Shareholder is the registered holder, as determined in the upcoming year-end audited financial statements; and
>
> - the balance to the Common Shareholders on a pro rata basis among the Common Shareholders, to the exclusion of the Preferred Shareholders.

[131] In *Central Capital*, Weiler J.A. pointed out that winding up and liquidation are other forms of insolvency. Both, she said, are "methods for secured creditors to enforce their claims by seizing the assets in which they hold security interests": para. 99. In the same paragraph, however, she said that in light of s. 173 of the governing statute in that case - the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44 - whose provisions are similar to those found in Part 9 of the *BCA*, the interests of preferred shareholders with redemption rights are subordinated to creditors.

[132] Laskin J.A. took a similar view. As is the case in the instant proceeding, he found that even after redemption rights are exercised, preferred shareholders continue to be entitled to dividends until their shares are in fact redeemed. On a liquidation, shareholders rank as equity claimants and not as creditors (even though in that case, and unlike the facts of this case, their redemption rights allowed shareholders to compel the company to redeem so long as it was solvent). Redemption, Laskin J.A. explained, is a return of capital not a repayment of a loan: paras. 134-135.

[133] The same view was taken in *Nelson Financial* at para. 31(c).

No Alteration to Establish a Contractual Right to Compel Redemption Exists

[134] In their alternative argument, the redeeming preferred shareholders submit that if they were equity claimants at the outset, then their contractual relationship with ACIC changed as a result of its later redemption policies and certain communications that ACIC published or delivered to potential and existing

shareholders. They submit that ACIC's redemption policies moved away from a discretionary right held by Mr. Bergman and became an enforceable contractual right held by each preferred shareholder to compel redemption during specific windows of time and upon certain conditions being met.

[135] I disagree. The redeeming preferred shareholders have not established that their contractual relationship with ACIC changed so as to become debt creditors.

[136] The redemption policies that ACIC issued starting in 2006 did not provide an unconditional promise that redemption notices would be honoured. Those policies were clear that ACIC's right to honour a redemption request was always at the discretion of its directors.

[137] The communcations from ACIC also do not alter the contractual relationship. The examples provided by the redeeming preferred shareholders consist, for the most part, of marketing materials, executive summaries, and standard form answers to "FAQs" (frequently asked questions). Many of the impugned communications appear on their face to be intended to induce investment in ACIC through subscriptions of Units.

[138] ACIC's communications do not convey an intention to enter into a binding agreement: *Aubrey v. Teck Highland Valley Copper Partnership*, 2017 BCCA 144 at paras. 47- 48.

[139] As I have found, ACIC's communications with its preferred shareholders concerning redemptions and redemption policies and terms were clearly stated throughout to be subject to the sole discretion of its directors. ACIC continued to make it clear to its preferred shareholders throughout that in addition to its right to refuse to honour a redemption request, it retained the right to alter, amend, or cancel its redemption policy at any time. In some communications, ACIC advised that its ability to honour a redemption request depends on the company's liquidity.

[140] Each preferred shareholder was required to sign a Subscription Agreement in order to purchase Units. They contained language confirming the subscriber's

decision to purchase Units was based solely upon the information contained in the Offering Memoranda and any agreements or documents incorporated in them. There is no room to incorporate into the Subscription Agreements any representations that might have been made and relied upon by the redeeming preferred shareholders either at the time of subscription or afterward.

[141] ACIC's redemption policies and communications cannot purport to change the rights attached to shares, such as redemption rights, as set out in the Articles, which is a foundation document governing the contractual rights of preferred shareholders. The Articles can only be amended by special resolution and in strict compliance with the *BCA*, which did not occur in this case: *BCA*, ss. 2(2)(b), 54(3), 58(2), 61. For example, s. 61 of the *BCA* provides that special rights and restrictions attached to a share are not varied or deleted until a company's articles have been altered to reflect the variation or deletion:

> 61. A right or special right attached to issued shares must not be prejudiced or interfered with under this Act or under the memorandum, notice of articles or articles unless the shareholders holding shares of the class or series of shares to which the right or special right is attached consent by a special separate resolution of those shareholders.

[142] Further, based on the evidence adduced on this application, mass communications sent from or given by ACIC to potential and existing preferred shareholders do not establish a change in the relationship.

[143] In any event, even if it could be said that there was an elimination of unfettered and at will discretion to redeem on the part of ACIC's director, the substance of the relationship between ACIC and its preferred shareholders did not change from equity to debt as a result.

[144] Lastly, it is not an issue on this application whether the redeeming preferred shareholders can look beyond the four corners of their Subscription Agreements, such as to advance a claim for inducement to purchase shares or any delay in requesting a redemption through a representation(s) made by on or behalf of ACIC. The answer to that question also has no bearing on the characterization of the

nature of the redeeming preferred shareholders' status in this *CCAA* insolvency proceeding.

[145] For these reasons, I do not need to consider the redeeming preferred shareholders' submission, based on *Rosas v. Toca*, 2018 BCCA 191, that no consideration is necessary to support the alleged change in their contractual relationship with ACIC.

Treatment in Financial Records

[146] Since surrounding circumstances are referred to by the redeeming preferred shareholders, it is useful to refer to the manner in which ACIC treated its preferred shareholders in its financial records. Reference to treatment in financial records was considered in some of the case authorities I have cited (e.g., *Central Capital*). In considering this evidence, I am mindful of the caution in *CDIC* (at para. 61) that a company's treatment in its financial records is to be accorded limited weight.

[147] ACIC's financial records describe the preferred shares as "Share Capital" and not as debt. There are separate, specific line items for short term and long term debt and debentures, which do not include the monies paid by subscribers for their Units. For example, the 2015 financial statements state that there is "No Long Term Debt". Capital from share subscriptions is described as "Shareholders' equity" in financial statements prepared by ACIC's third party accounting firm, BDO Dunwoody, under a line item entitled, "Liabilities and Shareholders' Equity".

Conclusion

[148] The preferred shareholders' investment in ACIC was in respect of an equity interest. Their claims are not debt claims. They are claims that only a shareholder can make. The redemption rights attached to ACIC's preferred shares are in substance rights to the return of a capital invested in a MIC with significant risks.

[149] ACIC's deteriorating financial position led to its inability to honour the outstanding redemption requests delivered by certain preferred shareholders. It is a

risk that all preferred shareholders were clearly informed of before purchasing their shares.

[150] A declaration shall issue that the claims of all of its preferred shareholders fall within the ambit of equity claims as defined in s. 2 of the *CCAA*.

"Walker J."

_____

The Honourable Mr. Justice Walker

14

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bul River Mineral Corporation (Re),* 2014 BCSC 1732

Date: 20140915
Docket: S113459
Registry: Vancouver

In the Matter of the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended

And

In the Matter of the *Business Corporations Act,* S.B.C. 2002, c. 57 and the *Business Corporations Act*, R.S.A. 2000, c. B-9

And

In the Matter of Bul River Mineral Corporation, Big Bear Metal Mining Corporation, Earth's Vital Extractors Limited, Fort Steele Mineral Corporation, Fort Steele Metals Corporation, Fused Heat Ltd., Gallowai Metal Mining Corporation, Giant Steeples Mineral Corporation, Grand Mineral Corporation, International Feldspar Ltd., Jao Mine Developers Ltd., Kutteni Diamonds Ltd., Stanfield Mining Group of Canada Ltd., Sullibin Mineral Corporation, Sullibin Multi Metal Corporation, Super Feldspars Corporation, White Cat Metal Mining Corporation, Zeus Metal Mining Corporation, Zeus Metals Corporation and Zeus Mineral Corporation

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners:	Colin D. Brousson
Counsel for CuVeras, LLC:	William C. Kaplan, Q.C. Peter Bychawski
Counsel for Eldon Clarence Stafford	J. Roger Webber, Q.C.
Counsel for Gordon Preston and Carol Preston	Robert M. Curtis, Q.C.

Counsel for the Monitor, Deloitte Restructuring Inc.	Tevia R.M. Jeffries
Place and Date of Hearing:	Vancouver, B.C. September 3 and 5, 2014
Place and Date of Judgment:	Vancouver, B.C. September 15, 2014

Introduction

[1] These are longstanding proceedings under the *Companies' Creditors Arrangement A*ct, R.S.C., 1985, c. C-36 (the "*CCAA*"), having been commenced some three and a half years ago in May 2011. Since that time, the petitioners have made slow and steady progress toward the goal of presenting a plan of arrangement to their creditors and certain equity participants.

[2] The principal petitioners, being Bul River Mineral Corporation ("Bul River") and Gallowai Metal Mining Corporation ("Gallowai"), are the owners of certain mining properties and related assets in the Kootenay region of British Columbia. As a result of these proceedings, Bul River and Gallowai now have some indication that the mine is viable. This has been accomplished mainly due to the participation of CuVeras, LLC ("CuVeras") who has, since late 2011, provided interim financing which allowed this further development work to continue to this point in time.

[3] Some years ago, Bul River and Gallowai completed a claims process to identify not only trade creditors but also claims of its common and preferred shareholders. Now that Bul River and Gallowai, with the assistance and sponsorship of CuVeras, are on the cusp of preparing a plan of arrangement for consideration by the stakeholders, those claims have become of central importance.

[4] Some of the claims that were advanced through the claims process were not critically considered by either the petitioners or the court-appointed monitor, Deloitte Restructuring Inc. (the "Monitor"). However, at this late date, the characterization of certain claims and the validity of certain claims have been put in issue and will have a profound impact on the manner in which these restructuring proceedings go forward.

[5] At present, the general intention is that the restructuring will take place along the lines of a Letter of Agreement between the petitioners and CuVeras dated May 23, 2014. By that agreement, a newly formed British Columbia entity ("Newco") will be created and the shares in Newco will be distributed to CuVeras and other related parties and also to non-voting preferred shareholders. Trade creditors will also

participate in Newco. This Letter of Agreement is the product of some history, sometimes contentious, between the petitioners and CuVeras which was discussed in the court's earlier reasons: *Bul River Mineral Corporation (Re)*, 2014 BCSC 645.

[6] One of the claims is that advanced by Gordon and Carol Preston (the "Preston Claim"), which CuVeras contends is an equity claim as opposed to a debt claim. Another claim is that advanced by Eldon Stafford (the "Stafford Claim"), which CuVeras contends is not a valid claim against Bul River or Gallowai. The substance of the issue before the court therefore is two-fold: (a) the proper categorization of the Preston Claim and (b) whether the Stafford Claim is a valid claim against the petitioners.

[7] As will become apparent from the discussion below, the resolution of these issues will significantly impact how any restructuring plan can be crafted and will also impact all stakeholders in terms of how the Newco shares will be distributed between the various stakeholders. There is some urgency in resolving these last issues before the restructuring can proceed. All involved, including the Monitor, state that it is necessary for the petitioners to exit this *CCAA* proceeding as quickly as possible. At this time, a plan of arrangement sponsored by CuVeras is the only option available to the petitioners so as to avoid a liquidation and bankruptcy.

Background

[8] The petitioners are also known as the Stanfield Mining Group (the "Group"). The Group carried on the business of developing a mining property situated near the Bull River just outside of Fernie, British Columbia. It is effectively controlled by the estate of Ross Stanfield ("Stanfield") which holds 100% and 99.9% of the voting common shares in the parent companies, Zeus Mineral Corporation and Fort Steele Mineral Corporation, respectively. As stated above, the two principal companies involved in the development and operation of the mine within the Group are Bul River and Gallowai.

[9] The mine, known as the Gallowai Bul River Mine, is not currently in production. There has been significant underground development to this point such

that the petitioners and CuVeras consider that with a relatively modest further investment the mine could be placed into production.

[10] Bul River and Gallowai were incorporated in the 1980s. Commencing in the mid-1990s, Stanfield began raising funds for the development of the mine. The marketing program focused on "sophisticated investors" which are, through securities regulation statutes, defined as persons with a net worth in excess of $1 million willing to invest a minimum of $100,000 in a given venture. The persons targeted by Stanfield's marketing campaign were farmers in Alberta, particularly around Edmonton, Red Deer and Medicine Hat, as well as farmers from the area around Regina, Saskatchewan.

[11] Until 2010, Stanfield engaged in a sophisticated marketing program to sell redeemable preferred non-voting shares to these investors. Over that period of time, approximately $229 million was invested in consideration of which preferred shares in Bul River and Gallowai were issued.

[12] The marketing program involved repeated representations as to the ore content of the mine. Stanfield continually referred to the mine as an "elephant" mine, meaning that the mineral resources were enormous. Over the years, the program included visits to the mine site and presentations to potential investors by Stanfield. Those presentations referred to the history of the mine and the future prospects of the mine, including development plans and the levels of ore content (copper, gold and platinum). The presentations also involved discussion as to when production would commence and typically production was forecast to commence within a foreseeable period of time, be it one or two years from the date of the meeting.

[13] The same representations were also made in written materials, including a report from Phillip De Souza ("De Souza"), a professional engineer.

[14] Some potential investors executed subscription agreements for shares during those visits to the mine or immediately thereafter. Some returned to the mine for

subsequent tours and subsequent purchases. In some instances, Stanfield recruited current investors to further market the preferred shares to other investors.

[15] These representations by Stanfield were made in the face of contemporaneous reports which questioned the value of the resources announced by the Group. These included papers published by the British Columbia Ministry of Energy and Mines in 2000 in which it was reported that they were unable to confirm the gold grades reported by the Group. In 2006, a professional conduct hearing in Alberta was held arising from charges that De Souza's report was "deficient and misleading". The panel issued reasons which were published in January 2008 in which it concluded that De Souza's conduct constituted unskilled practice and unprofessional conduct.

[16] Eventually, Stanfield's activities caught the attention of various provincial securities regulators. In May 2010, the British Columbia Securities Commission (the "Commission") issued a Notice of Hearing against Stanfield, Bul River and Gallowai seeking to order them to produce an independently prepared technical report fully compliant with NI 43-101 (Standards of Disclosure for Mineral Projects) that would include an estimate of the mineral resources available at the mine.

[17] Ross Stanfield died on August 3, 2010.

[18] By the fall of 2010, in addition to being faced with the Commission proceedings, certain preferred shareholders had taken legal action against the Group in light of the failure to comply with redemption obligations arising in respect of the preferred shares. Stanfield's grandson, George Hewison, is the sole beneficiary of Stanfield's estate. He stepped in to continue the work of the Group as best he could. In late 2010 or early 2011, undertakings were given to the securities regulators in British Columbia and Alberta by which the petitioners agreed not to issue any new securities without their consent.

[19] The evidence would later establish that the representations made by Stanfield regarding the mine resources were false. A technical report was later prepared by

Rosco Postle and Associates Inc. ("RPA") in March 2011 that provided some review of the available mineral resources at the mine. Both the RPA report and a later report prepared by Snowden Mining Industry Consultants in March 2013 would indicate that while there is valuable ore in the mine, the quantity of the resources is markedly less than what was indicated in the representations made to investors.

[20] On May 26, 2011, the Group sought and obtained creditor protection pursuant to the *CCAA* and an Initial Order was granted at that time.

[21] At the time of the *CCAA* filing, the Class A common voting shares in Bul River and Gallowai were held by the Stanfield estate. Other Class B and Class E common non-voting shares were held by investors.

[22] As of the date of filing, the petitioners had no secured creditors. The petition referenced debt obligations of $904,000 to trade suppliers and two unsecured judgments totalling $386,135. Various preferred non-voting shares were held by investors in Classes C, D and F. The petition materials indicated that amounts owing for "redeemable shares" (i.e., the preferred shares) were approximately $137,718,557. The holders of both common and preferred shares comprise some 3,500 individual investors.

[23] The subscription agreements for the preferred shares provided that the shares were redeemable at the end of five years from the date of the subscription together with a "preferred cumulative annual dividend" of 12.75%. There is no evidence of any significant redemption of the preferred shares. Rather, as redemption dates arose, preferred shareholders were approached to execute extension agreements extending their redemption rights from a given date to a date defined by the commencement of production from the mine. Many preferred shareholders signed those extension agreements, some did not. For those who did not, some of them demanded redemption of their shares. For the most part, those investors were told that there was no money to redeem the shares.

[24] Accordingly, the largest liability faced by the petitioners is that arising from the preferred shares. The preferred shareholders appear to have certain claims arising from their holdings. Firstly, they have a claim for payment of the redemption amount plus the accumulated dividend. Secondly, they may have a claim for misrepresentation against the Group, giving rise to potential remedies of rescission of their subscription agreements, damages, or both.

The Claims Process

[25] In August 2011, the Group prepared a list of creditors (the "Creditor List") in support of seeking a claims process order. The list actually included not only trade claims but also shareholder claims. Not surprisingly, the purpose of the claims process was to assist the Group in developing its restructuring plan.

[26] On August 19, 2011, the court approved a Claims Process Order, which authorized the petitioners to conduct a claims process for the determination of any and all claims against them (the "Claims Process"). The Claims Process Order defined "claims" that were to be determined in the Claims Process as follows:

> … indebtedness, liability or obligation (including an equity obligations arising from the ownership of equity shares) …
>
> … all obligations of or ownership interests in the Petitioners or any of them arising from or relating to the holding of a Share.

[27] Under the Claims Process Order, all "Known Creditors" (defined in the Claims Process Order as all creditors shown on the books and records of the petitioners as having a claim in excess of $250), including holders of shares, were to receive a claims package from the petitioners that included an instruction letter, a Notice of Dispute, a Proof of Claim, and a copy of the Claims Process Order (the "Claims Package"). The Claims Process was also advertised in certain publications. The Creditor List indicating such Known Creditors was posted on the Monitor's website, as was noted in the Claims Package, such that both creditors and shareholders were able to view it. The process of determining claims was as follows:

a) all creditors and shareholders were given the opportunity to review the Creditor List;

b) in the event a creditor or shareholder agreed with the "Claim Particulars" listed in the Creditor List (which included the number and class of shares), the creditor or shareholder did not need to file a Proof of Claim with the petitioners. In that event, the Claim Particulars in the Creditor List would be deemed to be the creditor or shareholder's proven claim for voting and distribution purposes under any restructuring plan subsequently filed by the petitioners;

c) in the event a creditor or shareholder objected to the Claim Particulars in the Creditor List, or wished to advance another claim, the creditor or shareholder had to, on or before October 17, 2011 (the "Claims Bar Date"), deliver to the petitioners, with a copy to the Monitor, a notice of such objection in the form of a Notice of Dispute, together with a Proof of Claim and supporting documentation;

d) in the event a Notice of Dispute was not submitted on or before the Claims Bar Date, the creditor or shareholder was deemed to have accepted the amount owing and all other Claim Particulars set out in the Creditor List, and was forever barred from advancing any other claim against the petitioners or participating in any plan subsequently filed by the petitioners;

e) where a Notice of Dispute and/or Proof of Claim was filed by a creditor or shareholder, the petitioners were deemed to have accepted it unless they delivered to the creditor or shareholder a Notice of Disallowance on or before October 31, 2011 (later extended to November 15, 2011); and

f) in the event of the petitioners delivering a Notice of Disallowance, a creditor or shareholder had 21 days to seek a determination from the court of the validity and value of and particulars of the claim by filing and serving

> the petitioners and the Monitor with application materials. A creditor or shareholder who failed to file and serve such materials by the deadline was deemed to have accepted the particulars of its claim set out in the Notice of Disallowance.

[28] The Claims Process Order did not contemplate the appointment of a claims officer or the participation of the Monitor in the process of assessing the validity of the Proofs of Claim and/or Notices of Dispute submitted to the petitioners through the Claims Process. Nor did the Claims Process allow any independent review of claims submitted by other creditors of the petitioners or by CuVeras as the interim financier.

(i) Jurisdiction of the Court

[29] Before turning to claims process orders specifically, it is important to keep in mind the broad remedial objectives of the *CCAA* to facilitate a restructuring rather than a liquidation of assets: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras. 15-18, 56. As the Supreme Court of Canada has noted, it is now well recognized that a supervising judge of a *CCAA* proceeding has a "broad and flexible authority" or statutory jurisdiction to makes such orders as are necessary to achieve those objectives: *Century Services* at paras. 19, 57-66.

[30] The discretionary authority of the court is confirmed by s. 11 of the *CCAA* which provides that the court may make any order that it considers "appropriate in the circumstances". As Madam Justice Deschamps observed in *Century Services*, whether an order will be appropriate is driven by the policy objectives of the *CCAA*:

> [70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for

> successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[31] Claims process orders are an important step in most restructuring proceedings. In *Timminco Limited (Re)*, 2014 ONSC 3393, Mr. Justice Morawetz reviewed the "first principles" relating to claims process orders and their purpose within *CCAA* proceedings:

> [41] It is also necessary to return to first principles with respect to claims-bar orders. The CCAA is intended to facilitate a compromise or arrangement between a debtor company and its creditors and shareholders. For a debtor company engaged in restructuring under the CCAA, which may include a liquidation of its assets, it is of fundamental importance to determine the quantum of liabilities to which the debtor and, in certain circumstances, third parties are subject. It is this desire for certainty that led to the development of the practice by which debtors apply to court for orders which establish a deadline for filing claims.
>
> [42] Adherence to the claims-bar date becomes even more important when distributions are being made (in this case, to secured creditors), or when a plan is being presented to creditors and a creditors' meeting is called to consider the plan of compromise. These objectives are recognized by s. 12 of the CCAA, in particular the references to "voting" and "distribution".
>
> [43] In such circumstances, stakeholders are entitled to know the implications of their actions. The claims-bar order can assist in this process. By establishing a claims-bar date, the debtor can determine the universe of claims and the potential distribution to creditors, and creditors are in a position to make an informed choice as to the alternatives presented to them. If distributions are being made or a plan is presented to creditors and voted upon, stakeholders should be able to place a degree of reliance in the claims bar process.

[32] The overall objective of achieving certainty within the restructuring proceedings - for both debtor and creditor - is what drives this process. In this vein, counsel makes an effort to draft a claims process order to achieve these objectives. A claims bar date is typically set. The process is typically designed with some idea of the issues that either have arisen or might arise in the restructuring. My comments in *Steels Industrial Products Ltd. (Re)*, 2012 BCSC 1501 are apposite:

> [38] Similar issues often arise in *CCAA* proceedings where counsel and the Court must be mindful of issues that may arise in relation to the determination of claims in that proceeding. There are no set rules, but care must be taken in the drafting of the claims process order to ensure that the process by which claims are determined is fair and reasonable to all

> stakeholders, including those who will be directly affected by the acceptance of other claims. In *Winalta Inc. (Re)*, 2011 ABQB 399, Madam Justice Topolniski stated that "[p]ublic confidence in the insolvency system is dependent on it being fair, just and accessible".
>
> [39] Many *CCAA* proceedings provide for an independently run claims process (for example, by the monitor), the cost of which again would be borne by the general body of creditors: see for example, *Pine Valley Mining Corp. (Re)*, 2008 BCSC 356. To this extent, the statutory procedure under the *BIA* and the claims process under the *CCAA* will have similar features, which is understandable since the overriding intention under both is to conduct a proper claims process: see *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras. 24 and 47.

[33] Nevertheless, issues can and do arise that no one is able to foresee at the time of the claims process order. In that event, the court retains its discretion to address the application of the claims process order: *Timminco* at para. 38. In that case, the claims process order specifically allowed the court to order a further claims bar date. No such provision is found in the Claims Process Order but I do not consider that its absence is sufficient to oust the statutory jurisdiction of the court in appropriate circumstances.

[34] This, of course, is a different issue in that by the failure of the petitioners to deliver a Notice of Disallowance in respect of the claims in issue, they were deemed to have been accepted by the petitioners. This is not a case where a creditor is seeking to avoid the consequences of not filing materials by the time of the Claims Bar Date. Nevertheless, in my view, the court still retains the statutory jurisdiction to consider the validity of claims that might otherwise, by the Claims Process Order, be deemed to have been accepted.

[35] The Prestons and Mr. Stafford do not suggest that the court lacks the jurisdiction to reconsider the issues that arise in relation to their claims. The Prestons do, however, contend that it is not appropriate that any reconsideration take place at this time.

(ii) Review of the Claims

[36] The stated purpose of the *CCAA* is to facilitate compromises and arrangements between companies and their creditors (see also s. 6 of the *CCAA*). In

accordance with that fundamental objective or purpose, it is axiomatic that it is necessary to determine what are the true claims of the creditors as might be compromised or arranged.

[37] A "creditor" is not defined in the *CCAA*, unlike the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 (the "*BIA*") where it is defined as meaning "a person having a claim provable as a claim" under that *Act* (s. 2). Both the *CCAA* and the *BIA* define "claim" by reference to liabilities "provable" under the *BIA*. Specifically, s. 2(1) of the *CCAA* defines "claim" as meaning:

> 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*.

Section 2 of the *BIA* defines a "claim provable in bankruptcy" as "any claim or liability provable in proceedings under this Act by a creditor".

[38] Section 121(1) of the *BIA* addresses which claims are "provable claims":

> 121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

[39] In substance, this same statutory definition is applied in the *CCAA* and represents a point of convergence consistent with the harmonization of certain aspects of insolvency law under both the *CCAA* and *BIA*: *Century Services* at para. 24. In addition, as noted by CuVeras, this definition is essentially used in the Claims Process Order by its definition of "Claim".

[40] Various authorities establish that a "provable debt" must be due either at law, or in equity, by the bankrupt to the person seeking to prove a claim and must be recoverable by legal process: *Excelsior Electric Dairy Machinery Ltd. (Re)*, [1923] 2 C.B.R. 599 (Ont. S.C.), 3 D.L.R. 1176; *Farm Credit Corporation v. Dunwoody Limited,* [1988] 68 C.B.R. (N.S.) 255 (Alta. C.A.), 51 D.L.R. (4th) 501, leave to appeal to S.C.C. refused, 73 C.B.R. (N.S.) xxvii (note), 100 60 D.L.R. (4th) vii (note);

Central Capital Corp. (Re), [1995] 29 C.B.R. (3d) 33 (Ont. Gen. Div.), O.J. No. 19 ("*Central Capital*"), aff'd [1996] 27 O.R. (3d) 494 (C.A.), 38 C.B.R. (3d) 1 ("*Central Capital* (ONCA)"); *Negus v. Oakley's General Contracting* (1996), 40 C.B.R. (3d) 270 (N.S.S.C.), 152 N.S.R. (2d) 172.

[41] In a *CCAA* proceeding, a claims process order is the means by which the "claims" of the creditors are determined. By reason of that process, the debtor is able to determine the nature and extent of its debts and liabilities so as to enable it to formulate a plan of arrangement. There are no rules as to when a claims process may be implemented although it is usually early in the process in anticipation of a plan and distributions to creditors. In that respect, a debtor company will be seeking some certainty regarding the determination of claims for that purpose.

[42] In *Timminco*, the Court, prior to citing relevant authorities at para. 52, outlined many of the factors that might be considered by the court in relation to deciding whether to allow claims to be advanced after the claims bar date:

> [51] Counsel to Mr. Walsh submit that courts have historically considered the following factors in determining whether to exercise their discretion to consider claims after the claims-bar date: (a) was the delay caused by inadvertence and, if so, did the claimant act in good faith? (b) what is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay[?] (c) if relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing? and (d) if relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

[43] As I have stated above, the broad jurisdiction of the court under s. 11 of the *CCAA* allows the court to make such orders as are "appropriate". While the above factors have been considered in the past, there is no finite list that detracts from a consideration of all relevant circumstances. Nevertheless, the general considerations of delay and prejudice typically arise, just as they do in this case.

[44] I return to the factual circumstances relating to the Claims Process and the Claims Process Order. The petitioners were themselves responsible for reviewing the Proofs of Claim and/or Notices of Dispute submitted in the Claims Process. The

principal individual involved in the review was Mr. Hewison who did so with the assistance of counsel. It is apparent that the only factors considered in his review included whether a claim related to a trade debt or whether it related to an equity interest in the petitioners.

[45] The Prestons argue that the Claims Process was well known to everyone and that its purpose was to establish the amount and nature of all claims. This is clearly self-evident, but back in late 2011, it was the case that the course of the restructuring proceedings was anything but certain. In fact, the ability of the petitioners to continue the proceedings was tenuous and they were scrambling to find interim financing which they eventually secured with CuVeras in November 2011. By that time, the Claims Process was essentially completed. Even so, understandably, the parties were concerned to proceed as quickly as possible to obtain further technical reports on the proven or inferred mine resources in order to determine whether a viable mine even existed. They did receive those later reports, which included a further RPA report and the Snowden report. In these circumstances, Mr. Hewison did not undertake any substantive review of the claims.

[46] The Prestons further say that, since they faithfully complied with the Claims Process Order, it would be patently unfair to now revisit the characterization of their claim. While they raise the matter of the three year plus delay, no elements of prejudice have been alleged. In my view, the delay, while relevant, will have little effect on the ability of the parties to address the substance of the matter. Nor have any rights been extinguished or compromised by reason of any delay. Accordingly, the objective of certainty has less force in this case where the plan of arrangement has yet to be formulated and the claimants have yet to consider that plan and vote on it. I note that similar considerations were at play in *Timminco* where it was apparent that no plan would ever be put to the creditors.

[47] Finally, the Prestons argue that the Claims Process Order constituted the sole form of adjudication of the validity and nature of the claims submitted. It is true, of course, that the petitioners had an opportunity to consider these claims.

[48] As discussed below, the petitioners did not forward any Notice of Disallowance in respect of the Proofs of Claim later filed by the Prestons and Mr. Stafford. Mr. Hewison considered that the Stafford Claim should be categorized as an "investment" in the mine. Further, with respect to the Preston Claim, he was not aware of the significance of the distinction between an equity claim and a debt claim. In retrospect, and now knowing what type of plan of arrangement is possible, Mr. Hewison recognizes that this was in error. It appears that a combination of factors - including Mr. Hewison's lack of familiarity with the past transactions, inadequate record keeping, lack of resources and distraction in terms of larger issues more relevant to the survival of the mine - all contributed to a less rigorous review and analysis of these claims.

[49] It is the case, however, that the petitioners were acting in good faith, albeit without a full appreciation of the issues arising in respect of these claims and the also the consequences of their inaction.

[50] More importantly, aside from the petitioners, other stakeholders have a significant interest in whether a claim is valid or not and that any claim be properly characterized. Based on the anticipated form of the restructuring plan, the inclusion of the Stafford Claim and characterization of the Preston Claim will impact the recovery of these stakeholders. These other creditors or stakeholders of the petitioners did not have any opportunity up to this point in time to review the claims. I would again note that the Claims Process Order did not contemplate any review of the claims by these other stakeholders, such as was the case in *Steels Products* (see paras. 13-15).

[51] Nor has the Monitor participated in any review of these claims. I do not say this as any criticism of the Monitor as the Claims Process Order did not expressly provide for any such independent review. Nor does the Claims Process Order contemplate that any other independent review of the claims be completed which might have highlighted the issues. The Monitor did report on the Claims Process from time to time (particularly, its report from June 2012 and January 2013),

however, no such issues were identified. As such, the Monitor did not conduct a critical review of the claims, similar to what a trustee in bankruptcy might have done under s. 135 of the *BIA*.

[52] In these circumstances, and in retrospect, the Claims Process lacked procedural safeguards that might have avoided this problem: *Steels Products* at paras. 38-39.

[53] In these circumstances, I disagree with the Prestons that the Claims Process Order constitutes an adjudication of these issues by which CuVeras or any other stakeholder is estopped in bringing these issues forward. It is clear that to this point, no such adjudication has occurred.

[54] As I have indicated above, a Claims Process Order is intended to be a fair, reasonable and transparent method of determining and resolving claims against the estate. In certain circumstances, these objectives fail to be achieved through no fault of the participants. That does not preclude the court from considering the issues on their merits so as to achieve the fundamental objective under the *CCAA* to facilitate a restructuring based on valid claims. This would also include a consideration of the proper characterization of the Preston's claim: *Steels Products* at para. 42.

[55] Simply put, if the Claims Process results in a claim being advanced which is not truly a debt of the petitioners or results in a claim being improperly characterized, the fairness and transparency of these proceedings are inevitably compromised such that the objectives of the *CCAA* will not be fulfilled.

[56] My comments in *Steels Products* apply equally here:

> [46] In conclusion, an independent review of these claims is necessary in the circumstances. An adequate review of these related party claims has not been made. The consequences of a successful challenge to some or all of these claims would have significant financial repercussions to the Disputing Creditors and other unsecured creditors who have also proved their claims. To deny an independent review at this time would be to deny any creditor the fair, reasonable and transparent process that is expected in insolvency proceedings in determining claims before any distribution of estate assets is made.

[57] Even at this late stage in the proceedings, and considering the ongoing supervisory role of the court, I consider that it is appropriate to address the issues relating to both the Preston Claim and the Stafford Claim on their merits. This is particularly so given the significant repercussions to other stakeholders and the lack of any prejudice to the Prestons and Mr. Stafford.

Discussion

(a) The Preston Claim

[58] The Preston Claim is advanced as a debt claim in these proceedings, a position that is disputed by CuVeras who contends that in fact, it is an equity claim as defined in the *CCAA*.

(i) The Proof of Claim

[59] The Creditor List referenced the Prestons as holding various Class E (2,102) and Class F (2,400) preferred shares.

[60] In October 2011, the Prestons, through their counsel, submitted a Proof of Claim and Notice of Dispute.

[61] The genesis of the claim was as described in a Statement of Claim filed in the Alberta Court of Queen's Bench against Gallowai on May 27, 2010. The claim was as follows: in October 2004, the Prestons subscribed for 2,400 Class F preferred shares in Gallowai in consideration of the payment to Gallowai of $120,000; Gallowai is alleged to have covenanted to redeem the preferred shares at the expiry of five years after the allotment date; the Prestons demanded redemption of the shares and the payment of dividends which was to be by way of issuance of Class E shares; Gallowai refused to respond to their demands; and the Prestons claimed the right to redeem the Class F preferred shares for $120,000 plus either dividends in the form of Class E common shares or, alternatively, cash payment of dividends at 12.75% per annum.

[62] On November 19, 2010, default judgment was granted in favour of the Prestons for the claimed amount of $120,000 plus the cash dividend interest rate for

a total judgment of $214,527.10 including court ordered costs. The Prestons attempted to register their judgment in British Columbia in June 2011 after the court ordered a stay arising under the Initial Order, but nothing turns on that step.

[63] The Proof of Claim indicates that the Prestons were advancing both a trade claim for the judgment amount and also a claim for non-voting shares arising from the allegation that they continue to hold the 2,102 Class E shares noted on the Creditor List.

(ii) Historical Approach to Equity Claims

[64] Before I turn to the current statutory regime arising from amendments to the *CCAA* and *BIA* in 2009, I will review the authorities which applied before these amendments were enacted.

[65] Historically, equity and debt claims have been treated differently in an insolvency proceeding given the fundamental difference in the nature of such claims. That different treatment resulted in the subordination of equity to debt claims. The basis for this judicially developed principle was that equity investors are understood to be higher risk participants. Creditors, on the other hand, have been held by the courts to have chosen a lower level of risk exposure that should generally result in priority over equity investors in an insolvency context.

[66] In *Sino-Forest Corporation*, 2012 ONCA 816, affirming 2012 ONSC 4377, the Court of Appeal commented with approval on the analysis of Morawetz J. in the court below:

> [30] Even before the 2009 amendments to the CCAA codified the treatment of equity claims, the courts subordinated shareholder equity claims to general creditors' claims in an insolvency. As the supervising judge described [at paras. 23-25]:
>
> > Essentially, shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditor claims are not being paid in full. Simply put, shareholders have no economic interest in an insolvent enterprise.
> >
> > The basis for the differentiation flows from the fundamentally different nature of debt and equity investments. Shareholders have unlimited

> upside potential when purchasing shares. Creditors have no corresponding upside potential.
>
> As a result, courts subordinated equity claims and denied such claims a vote in plans of arrangement [citations omitted].

[67] See also *Central Capital* at paras. 41-42; *Central Capital* (ONCA) at 510-11, 519.

[68] In light of that key distinction, courts in the past have embarked upon a consideration as to the true characterization of certain claims in an insolvency context. There is considerable authority that in making that determination, the court will consider the true substantive nature or character of the claim, rather than the form of the claim.

[69] The leading case is the Supreme Court of Canada's decision in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558 ("*CDIC*"). In that case, the issue was whether money advanced to the debtor bank was in the nature of a loan or a capital investment for the purpose of determining whether the creditors advancing the funds ranked *pari passu* with other unsecured creditors in a winding-up proceeding. Mr. Justice Iacobucci stated that the approach was to determine the "substance" or "true nature" of the transaction (563, 588). His oft quoted statements are found at 590-91, the relevant principles of which can be summarized as follows:

a) the fact that a transaction contains both debt and equity features does not, in itself, determine its characterization as either debt or equity;

b) the characterization of a transaction under review requires the determination of the intention of the parties;

c) it does not follow that each and every aspect of a "hybrid" debt and equity transaction must be given the exact same weight when addressing a characterization issue; and

d) a court should not too easily be distracted by aspects of a transaction which are, in reality, only incidental or secondary in nature to the main thrust of the agreement.

[70] One type of financial instrument that typically has elements of both equity and debt are preferred shares, where arguably rights of redemption and rights to payment of dividends evidence debt characteristics.

[71] The issue of the characterization of preferred shareholder claims in an insolvency context was addressed in *Central Capital* (ONCA). In that case, the court had to characterize a claim arising from the right of retraction in respect of certain preferred shares. Although differing in the result, the majority opinions and the dissenting opinion at the appellate court level were consistent in an approach toward determining the *substance* of the claim in terms of whether it was a "provable debt". In dissent, Finlayson J.A. stated:

> … I do not think that describing the documents as preferred shares is conclusive as to what instrument the parties thought they were creating. In the second place, it is not what the parties call the documents that is determinative of their identity, but rather it is what the facts require the court to call them. The character of the instrument is revealed by the language creating it and the circumstances of its creation.
>
> (at 509).
>
> ...
>
> Thus, in looking at the substance of the transaction that led to the issuance of the preference shares, it appears to me that the retraction clauses were promises by Central Capital to pay fixed amounts on definite dates to the appellants. They evidenced a debt to the appellants.
>
> (at 512).

Justice Laskin specifically addressed the "substance of the relationship" at 535-36. In addition, Weiler J.A. focused on the "true nature" of the transaction or relationship:

> In order to decide whether the obligation of Central Capital to redeem the preferred shares of the appellants is a claim provable in bankruptcy, it is necessary to characterize the true nature of the transaction. The 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 by the company: *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3

> S.C.R. 558, 97 D.L.R. (4th) 385. In this case, the decision is not an easy one. Where, as here, the agreements between the parties are reflected in the articles of the corporation, it is necessary to examine them carefully to characterize the true relationship. It is not disputed that if the true nature of the relationship is that of a shareholder-equity relationship after the retraction date and at the time of the reorganization, then the appellants do not have a claim provable in bankruptcy. Consequently, they will not have a claim under the CCAA.
>
> (at 519).

[72] In *Blue Range Resource Corp. (Re)*, 2000 ABQB 4, Madam Justice Romaine found that a shareholder's claim for alleged share loss, transaction costs and cash share purchase damages was in substance an equity claim or a claim by the shareholder for a return of its investment. See also *EarthFirst Canada Inc. (Re)*, 2009 ABQB 316.

[73] In *Return on Innovation v. Gandi Innovations* , 2011 ONSC 5018, leave to appeal refused, 2012 ONCA 10, the Court was characterizing indemnity claims advanced by certain individual directors and officers against the debtor, the Gandi Group. That indemnity claim arose by reason of a claim by TA Associates Inc. against them for damages for claims relating in part to TA's US$50 million equity investment in the Gandi Group. Mr. Justice Newbould at the Ontario Superior Court concluded that TA's claim was an equity claim and that therefore, the indemnity claim was also, in substance, an equity claim.

[74] I have also been referred to *Dexior Financial Inc. (Re)*, 2011 BCSC 348. Mr. Justice Masuhara there found the claim to be an equity claim even though the shareholder had given notice of an intention to seek retraction of the shares prior to the filing. Citing *CDIC* and *Central Capital* (ONCA), the Court found that the notice did not change the original intention or substance of the claim.

(iii) The New Statutory Approach

[75] In September 2009, Parliament enacted substantial amendments to the *BIA* and *CCAA* in relation to the treatment of claims arising from equity in an insolvency proceeding.

[76] One of the principle amendments was the prohibition that the court may not sanction a plan of arrangement unless all debt claims are to be paid in full before payment of any "equity claims". Section 6(8) of the *CCAA* provides:

> (8) 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.

[77] The definitions of "equity claim" and "equity interest" are found in the *CCAA*, s. 2(1):

> "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 company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt[.]

[78] Section 22.1 further restricts the right of creditors having equity claims from voting on a plan of arrangement:

> 22.1 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.

[79] Substantially these same amendments were made to the *BIA* in respect of proposal proceedings under that *Act* in ss. 2, 54(2)(d) and 60(1.7).

[80] The effect of the amendments was considered by Pepall J. (as she then was) in *Nelson Financial Group Ltd. (Re)*, 2010 ONSC 6229. In that case, the court had

no difficulty in finding that the claims of preferred shareholders for declared but unpaid dividends and requests for redemption were equity claims within the above definition. In addition, the approach of the courts in the past in looking at the substance or true nature of the claim was applied in finding that related claims for compensatory damages or amounts due on rescission were caught by the definition of "equity claim": paras. 32-34. As such, all the claims were not provable debts under the *CCAA*.

[81] The court in *Nelson Financial Group* noted that the introduction of section 6(8) in the *CCAA* provided greater certainty in the treatment to be accorded equity claims and lessened the "judicial flexibility" that previously prevailed in characterizing such claims.

[82] Accordingly, while the 2009 amendments did represent in part a codification of the previous case law concerning equity claims, it also represented a more concrete definition of "equity claims" and by such definition a broadening and more expansive definition of such claims: *Sino-Forest Corporation* (ONCA) at paras. 24, 34-60. Parliament has now clearly cast the net widely in terms of the broad definition of equity claims such that claims that might have previously escaped such characterization will now be caught by the *CCAA*.

[83] The claim of the Prestons is set out in their Statement of Claim. The claim is for the return of their capital investment under the redemption rights of the preferred shares. Their claim also included a claim to unpaid dividends, whether by cash payment or the issuance of other shares, being Class E common shares. It is clear that their claims, as evidenced by the Statement of Claim, fall within the definition of "equity claim" in subparas. (a)-(c).

[84] The Prestons do not dispute that their claim, as described and but for one qualification, would fall within the definition. They contend, however, that by reason of their obtaining default judgment against Gallowai, they have transformed their equity claim into a debt claim that is a provable claim in the *CCAA* proceeding.

(iv) The Effect of the Judgment

[85] The 2009 amendments have not affected the ability of the court to continue to analyze the *substance* of the claims, albeit in the context of the expanded definition of "equity claim". This is evident from the approach of the court in *Nelson Financial Group* at paras. 28 and 34.

[86] In *Sino-Forest Corporation*, the court found that certain Shareholder Claims for damages claimed in a class action lawsuit clearly fell within the definition of "equity claims": ONSC at para. 84. Further, certain Related Indemnity Claims were also advanced against the estate by the auditors who were named in the class action lawsuit. These auditors also faced claims for damages relating to their role in what were said to be misrepresentations in the financial statements that led to the loss of equity by the class members. Again, consistent with the historical approach of the courts, Morawetz J. focused on the "substance" of the claim: para. 85. He stated:

> [79] The plain language in the definition of "equity claim" does not focus on the identity of the claimant. Rather, it focuses on the nature of the claim. In this case, it seems clear that the Shareholder Claims led to the Related Indemnity Claims. Put another way, the inescapable conclusion is that the Related Indemnity Claims are being used to recover an equity investment.
>
> [80] The plain language of the CCAA dictates the outcome, namely, that the Shareholder Claims and the Related Indemnity Claims constitute "equity claims" within the meaning of the CCAA. This conclusion is consistent with the trend towards an expansive interpretation of the definition of "equity claims" to achieve the purpose of the CCAA.
>
> …
>
> [82] It would be totally inconsistent to arrive at a conclusion that would enable either the auditors or the Underwriters, through a claim for indemnification, to be treated as creditors when the underlying actions of the shareholders cannot achieve the same status. To hold otherwise would indeed provide an indirect remedy where a direct remedy is not available.

The Court of Appeal upheld this approach: *Sino-Forest Corporation* (ONCA) at paras. 37, 58.

[87] I would note in this regard that the Claims Process Order expressly provided:

> THIS COURT ORDERS that the categorization of Claims into Trade Claims, non-voting Shares, and Voting Shares does not in any way set classes or categories for the purposes of priority or voting on a restructuring plan issued by the Creditors and shall not prejudice any party or the Petitioners from applying at a later date to set such classes or priorities in connection with voting on a plan;

[88] The Prestons argue that their obtaining of a judgment against Gallowai has resulted in a replacement or transformation of their equity claim with a debt claim.

[89] The Prestons place considerable reliance on the decision in *I. Waxman & Sons Ltd. (Re)*, [2008] 89 O.R. (3d) 427 (S.C.), 40 C.B.R. (5th) 307, which was decided prior to the 2009 amendments to the *CCAA*. In that case, Morris sued I. Waxman & Sons Limited ("IWS") for lost profits, profit diversions and improper distributions for bonuses paid. He obtained judgment against IWS and asserted that claim in the later bankruptcy proceedings.

[90] The court began by noting that Morris' claim was not for his share of his current equity in IWS, but was, in substance, a claim related to dividends and diverted profits by way of bonuses. Justice Pepall found that the judgment was a debt claim:

> [24] There is support in the case law for the proposition that equity may become debt. For example, declared dividends are treated as constituting a debt that is provable in bankruptcy. As Laskin J.A. stated in *Central Capital Corp. (Re)*, "It seems to me that these appellants must be either shareholders or creditors. Except for declared dividends, they cannot be both." And later, "Moreover, as Justice Finlayson points out in his reasons, courts have always accepted the proposition that when a dividend is declared, it is a debt on which each shareholder can sue the corporation." Similarly, in that same decision, Weiler J.A. stated, "As I understand it, counsel does not question that when a dividend has been lawfully declared by a corporation, it is a debt of the corporation and each shareholder is entitled to sue the corporation for his [portion]: see *Fraser and Stewart*, supra, at p. 220 for a list of authorities." In *East Chilliwack Fruit Growers Co-operative (Re)*, the B.C. Court of Appeal held that an agricultural co-operative member who had exercised a right of redemption and remained only to be paid was an unsecured creditor with a provable debt. Declared bonuses may also sometimes constitute debt: *Stuart v. Hamilton Jockey Club* [footnotes omitted].
>
> [25] Secondly, the claims advanced by Morris are judgment debts. As stated by Weiler J.A. in *Central Capital*, ". . . in order to be a provable claim within the meaning of s.121 of the BIA, the claim must be one recoverable by legal process: *Farm Credit Corp. v. Holowach (Trustee of)*." Clearly a

> judgment constitutes a claim recoverable by legal process. By virtue of the judgment, the money award becomes debt and it is properly the subject of a proof of claim in bankruptcy. In this regard, the facts in this case are unlike those in *Re Blue Range Resource Corp. (Re),* or *National Bank of Canada v. Merit Energy Ltd.* Those cases involved causes of action that had been asserted in court proceedings, but in neither case had judgment been rendered [footnotes omitted].

[91] In my view, *Waxman* is of little assistance to the Prestons.

[92] Firstly, the facts are distinguishable by reason of the fact that the Preston Claim is for recovery of their capital or equity, rather than simply a return on capital as was the case in *Waxman*. I would note that the Preston default judgment obtained in 2010 does include the dividend interest on the preferred shares. What is somewhat anomalous is that this was claimed in the alternative to the issuance of the Class E common shares. Even so, the Prestons in their Statement of Claim did advance a claim for 2,102 Class E common shares and continue to do so by their Proof of Claim, all consistent with what the petitioners had ascribed to them in the Creditor List. It is not clear to me how they can advance both claims.

[93] Secondly, in para. 24 of *Waxman*, the Court focused on the prevailing authority at the time prior to the amendments by which declared dividends were considered debt as opposed to equity. At present, the 2009 amendments make clear that this type of claim now clearly falls within the definition of “equity claim” in subpara. (a): *CCAA*, s.2(1).

[94] With respect to the comments of the Court in *Waxman*, para. 25, I agree with CuVeras that the Court was simply observing that a judgment debt will normally satisfy the requirements of the claim being recoverable by legal process, one of the requirements of a “provable claim”, as noted above. These comments do nothing more than note the obvious - that in ordinary circumstances, a judgment is a claim recoverable by legal process. I do not interpret these comments as obviating an analysis of the true nature of a claim, whether represented by a judgment or not.

[95] Accordingly, I do not view *Waxman* as standing for the proposition advanced by the Prestons, namely that a judgment transforms an equity claim into a debt claim

such that no further analysis or characterization by the court is necessary. This would have applied even before the enactment of the 2009 amendments, but certainly is more evident now given the expansive definition now contained in the *CCAA*.

[96] Indeed, the later comments of Justice Pepall in *Nelson Financial Group* suggest that she only decided in *Waxman* that by reason of a judgment, an equity claim *may* become debt:

> [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.* 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 [footnotes omitted].

[97] The Court in *Dexior Financial* at para. 16 commented on *Waxman* but those comments were clearly *obiter* as no judgment had been obtained in that case. See also *EarthFirst Canada* at para. 4.

[98] At its core, the issue before the court is a narrow one - namely, whether a shareholder, having an equity claim but who obtains a judgment before the filing, has become a debt claimant rather than an equity claimant for the purposes of the insolvency proceeding? In my view, they do not, for the reasons below.

[99] In light of the dearth of authority on the issue, I consider that the court must start from first principles.

[100] I return to the comments in *Century Services* regarding the remedial purposes of the *CCAA* and the broad and flexible authority of this court to facilitate a restructuring that is fair, reasonable and equitable in accordance with either the express will of Parliament, as specifically dictated in the *CCAA*, or as might be reasonably interpreted as falling within those broad purposes.

[101] At its core, the policy objectives of the *CCAA* are a fair and efficient resolution of competing claims in a situation (insolvency) where all obligations or expectations cannot be fulfilled. What is "fair" is a flexible or uncertain concept and needless to say, what is fair will likely be differently interpreted depending on which stakeholder you ask. Nevertheless, Parliament has clearly signalled that the policy objectives continue to be that equity will take a back seat in terms of any recovery where there are outstanding debt claims. This was so before September 2009 and is even more decidedly so now, given the express and expansive statutory treatment of equity claims that now applies.

[102] In my view, the characterization of claims by the court continues to have an important role in fulfilling that purpose. I have already outlined the considerable authority from Canadian courts in respect of such claims, both pre- and post-amendments. Particularly, the court continues to have a role in applying these new equity claims provisions by considering the true nature or substance of those claims. In many cases, the matter is now considerably clearer given the definition of "equity claims". What is most important, however, is that form will still not trump substance in the consideration of this issue.

[103] As was noted by counsel for CuVeras, the obtaining of a judgment does not necessarily mean that it will be recognized as a debt for the purpose of an insolvency proceeding. There are many provisions of the *BIA* and *CCAA* which allow for the challenge of certain pre-filing transactions or events that may be the basis for supposed rights in the proceeding. For example, the payment of a dividend and redemption of shares may be attacked (*BIA*, s. 101). Another example is that either the granting of a judgment against the debtor or payment of monies such as redemption amounts that resulted in a preference being obtained may be challenged (*BIA*, s. 95). Both of these provisions apply in a *CCAA* proceeding: *CCAA*, s 36.1.

[104] These types of provisions reflect the policy choices of Parliament in terms of allowing for the recovery of assets transferred away from the debtor even before the filing so that those assets are brought back into the estate for the benefit of the

entire stakeholder group to be distributed in accordance with the legislation. Similarly, some established rights may be challenged in certain circumstances (such as by way of the preference provisions).

[105] In the same manner, the new equity provisions in the *CCAA* reinforce that it remains an important policy objective that equity claims be subordinated to debt claims. In *Sino-Forest Corporation*, the Court of Appeal focused on the purpose of the 2009 amendments and stated:

> [56] In our view, in enacting s. 6(8) of the CCAA, Parliament intended that a monetary loss suffered by a shareholder (or other holder of an equity interest) in respect of his or her equity interest not diminish the assets of the debtor available to general creditors in a restructuring. If a shareholder sues auditors and underwriters in respect of his or her loss, in addition to the debtor, and the auditors or underwriters assert claims of contribution or indemnity against the debtor, the assets of the debtor available to general creditors would be diminished by the amount of the claims for contribution and indemnity.

[106] This same recognition of the sound policy objectives of insolvency legislation was noted by Laskin J.A. in *Central Capital* (ONCA). He commented at 546 that "[p]ermitting preferred shareholders to be turned into creditors by endowing their shares with retraction rights runs contrary to this policy of creditor protection."

[107] I see no principled basis upon which a different approach should be taken in respect of an equity claimant who has had the foresight, energy or just plain luck to seek and obtain a judgment prior to the filing date.

[108] Some arguments were advanced by CuVeras and the Prestons as to the timing of the judgment. Indeed, the Preston judgment was obtained well in advance of the filing, by some six months. The Prestons cite *Blue Range* at para. 38 in respect of the importance of timing. However, the timing issue there was the filing of the insolvency proceeding, not the granting of a judgment. I agree that the filing of the proceeding is a significant crystallizing event, however, what is important in this case is the ability of the court to analyze the true nature of the claim. Further, whether a judgment is obtained on the eve of the filing or even years before, I consider that it is a distinction without a difference in terms of the court's role in

ensuring that a proper characterizing of the claim has taken place in accordance with the *CCAA*.

[109] The fact remains that there are thousands of other preferred shareholders holding shares in Bul River and Gallowai whose claims are in essence the same - namely, for a return of their capital and the promised return on that capital (and perhaps other damage claims). The evidence indicates that many of them had also made demand for a return of their preferred share investments and their return on capital well before the filing date. Those claims are clearly equity claims. From the perspective of the policy objective of treating similar claims in a similar fashion (i.e., fairness), it makes little sense to me that a similarly situated preferred shareholder without a judgment should be treated differently than one who does.

[110] Nor does it accord with the policy objectives particularly identified in s. 6(8) of the *CCAA* that by the simple mechanism of obtaining a judgment an equity claimant should be elevated to a debt claimant which would inevitably diminish the recovery of other "true" debt claimants.

[111] The Prestons argue that this will open the floodgates to an endless analysis of claims reduced to judgments resulting in increased cost and inefficiencies in these types of proceedings. I see no merit in this submission given that this decision relates to only equity claims and by no stretch of the imagination has the previous litigation on the point overwhelmed the court system across Canada. In any event, if that is the will of Parliament, then there is little ability in this court to take a different approach.

[112] The courts have not been hesitant in preventing claimants from recharacterizing their claims such that an equity claim is indirectly advanced where no direct claim could be made: *Sino-Forest Corporation*, ONSC at para. 84 (although the Court of Appeal preferred to express the same sentiment in terms of the purpose of the *CCAA*). In *Return on Innovation*, Newbould J. stated, consistent with the "substance over form" approach that the court's decision will not be driven by the form of the legal action:

> [59] The Claimants assert that the claim for US $50 million by TA Associates cannot be an equity claim because it is based on breaches of contract, torts and equity. I do not see that as being the deciding factor. TA Associates seeks the return of its US $50 million equity investment because of various wrongdoings alleged against the Claimants and the fact that the claim is based on these causes of action does not make it any less a claim in equity. The legal tools that are used [are] not the important thing. It is the fact that they are being used to recover an equity investment that is important.

[113] Similarly, in addition to the "legal tools" not being determinative, neither are the legal *forms* of recovery determinative, such as the obtaining of a judgment.

[114] In summary, the *CCAA* policy objectives in relation to equity claims are clear. In my view, those objectives are best achieved by the continued approach of the court, both pre- and post-*CCAA* amendments, to consider the substance or true nature of the claim. This accords with the ongoing supervisory jurisdiction of the court to exercise its statutory discretion to achieve the purposes of the *CCAA*. In particular, the court's fundamental role is to facilitate a restructuring that is fair and reasonable to all stakeholders in accordance with the now very clearly stated objective of allowing recovery to debt claimants before any recovery of equity claims. Section 6(8) reflects that the court has no ability to proceed otherwise.

[115] Within those broad objectives, in my view, it is of no importance that prior to the court filing, a claimant with an equity claim has obtained a judgment. That judgment still, in substance, reflects a recovery of that equity claim and therefore, the claim comes within the broad and expansive definition in the *CCAA*. Accordingly, for the purposes of the *CCAA*, that claim or judgment must still, of necessity, bear that characterization in terms of any recovery sought within this proceeding. I conclude that any contrary interpretation, such as advanced by the Prestons, would result in the clear policy objectives under the *CCAA* being defeated.

[116] Nor I do not accept that, as argued by the Prestons, applying this characterization amounts to a collateral attack or an "undoing" of the judgment from the Alberta court. As noted by CuVeras, the obtaining of a judgment by a creditor does not mean that insolvency laws do not apply to it. Judgments are affected by insolvency proceedings all the time. Recoveries of judgments are stayed by such

proceedings and as stated above, they can be attacked as fraudulent preferences. All that results from my conclusions is that notwithstanding the granting of the judgment, within these *CCAA* proceedings, the judgment is to be characterized in accordance with the true nature of the underlying claim, which is an equity claim.

[117] For the above reasons, I conclude that the Preston Claim is an equity claim within the meaning of the *CCAA*.

(b) The Stafford Claim

[118] The Stafford Claim is advanced as a debt claim in these proceedings. That position is disputed by CuVeras who contends that, in fact, it is a claim owed by Stanfield personally and not by either Bul River or Gallowai such that it cannot be advanced in this *CCAA* proceeding.

(i) The Proof of Claim

[119] The Creditor List referenced Mr. Stafford as holding Class B common shares (3,340), Class D preferred shares (4,200) and Class E preferred shares (17,548). He therefore received a Claims Package from the petitioners.

[120] Mr. Stafford took no issue with the shareholdings alleged to be held by him in accordance with the Creditor List. However, on October 14, 2011, a Notice of Dispute and Proof of Claim were submitted on behalf of Mr. Stafford. This was done by Carol Morrison, who was exercising a power of attorney for Mr. Stafford by reason of his mental and physical incapacity that occurred at least as early as November 2010.

[121] The Notice of Dispute refers to “claim not listed” as the “reason for dispute”. The Proof of Claim submitted by Mr. Stafford notes the “type of claim” as “other – loan and accrued interest 50% Bul River Mineral Corp. and 50% Gallowai Metal Mining Corp.” The Stafford Claim submitted is for outstanding principal and interest under a loan in the total amount of $2,587,174.

[122] The supporting documentation submitted for Mr. Stafford includes a copy of a loan agreement between Stanfield in his personal capacity, as borrower, and Mr. Stafford, as lender, dated June 12, 1990, 21 years before the CCAA filing (the "Stafford Loan Agreement"). The Stafford Loan Agreement references a loan in the principal amount of $150,000, accruing interest in the amount of 20% per annum "on the Principal", calculated yearly and not in advance.

[123] Pursuant to the terms of the Stafford Loan Agreement, Stanfield borrowed these funds for the purpose of "investing the funds in the costs of the ongoing research and development of a Process" with "Process" being defined as a "new improved method or process for extracting precious metals from ore". Paragraphs 6 and 8 of the Stafford Loan Agreement provided for a bonus payable to Mr. Stafford equal to the amount of the Principal, if the "Process" proved successful (as declared by an independent metallurgical consultant). As CuVeras submits, on its face, this was not a loan directly related to the mine or the petitioners.

(ii) Dealings in Respect of the Stafford Loan Agreement

[124] For obvious reasons, the death of Ross Stanfield and the incapacity of Mr. Stafford result in a situation where no individual is in a position to shed light on the intentions of the parties in relation to this loan. Mr. Hewison is similarly unable to provide any evidence about the loan, save for referring to such documents as have been found in relation to this loan. Those documents do provide some indication as to the how Stanfield, Bul River and Gallowai addressed this loan up to the time of the *CCAA* filing.

[125] There are two resolutions of the directors of Bul River, dated October 1994 and February 1996 respectively, that are essentially the same. Both refer to the "need of major amounts of additional financing" and authorize Stanfield to negotiate, on behalf of Bul River, potential sources of debt or equity financing, to settle the terms of the financing, and to sign, seal and deliver any agreements necessary to secure funding required by the company. I agree that these resolutions on their face clearly do not authorize Stanfield to act as an agent for Bul River. They merely

authorize him to act directly in the name of the company with the company as principal in respect to those transactions. These resolutions also do not reference any loan by Mr. Stafford to Stanfield made years before in June 1990.

[126] Bul River also appears to have prepared a schedule of loan payments as of December 31, 2006. That schedule shows payment of interest to Mr. Stafford by Stanfield personally from June 1995 to September 1998 totalling approximately $183,000. In 1999 and 2000, Gallowai appears to have made interest payments of $40,000 and from that time forward, some person (unidentified) made interest payments of $25,000 for 2001 and 2002. From 2004 to 2006, it appears that Bul River made interest payments of $22,500 and principal payments of $26,000 to Mr. Stafford. Mr. Stafford's own calculations show further payments of interest from 2007 to 2009 totalling $58,000.

[127] Accordingly, in respect of his $150,000 loan, as of 2009, Mr. Stafford had received $328,100 in interest payments and $26,000 in principal payments for a total recovery of $354,100.

[128] Leaving aside the interest and principal payments referred to above, the involvement of Bul River and Gallowai in respect of the Stafford Loan Agreement arose, from a corporate perspective, in 2003. At that time, various resolutions were passed by the directors of Bul River. Mr. Stafford places great reliance on these resolutions and as will become apparent from the discussion below, the issue largely turns on the legal effect of these resolutions. As such, I will describe the resolutions in some detail.

[129] The first resolution is dated May 13, 2003. It provides:

> WHEREAS:
>
> A. Loans, loan repayments and principal and interest payments which were property for the benefit of, or were the responsibility of, the Company have for some years been done, as a matter of convenience, in the name of the Company's President, [Stanfield] - and as a result debit and credit entries have improperly been posted to Stanfield's Shareholder Loan Account.
>
> B. Stanfield has requested that the situation described above be corrected…

> C. The Companies' accountant has examined the financial records and has verified that the said situation has occurred with respect to the Company as well as Gallowai…
>
> D. Management has proposed, based on professional advice, that for convenience and simplicity the various Loan Accounts involving Stanfield, the Company and the Other Companies be consolidated in the books of the Company.
>
> …
>
> NOW THEREFORE, IT IS RESOLVED:
>
> 1. THAT the Loan Accounts and payments referred to above be recognized as solely the responsibility of the Company and it be confirmed that Stanfield was, in being named in the transactions, acting solely on behalf of the Company and that he had no personal, legal or beneficial interest in, or any liabilities as a result of, any of the transactions.
>
> 2. THAT the Agreement dated this May 13, 2003 between the Company, Stanfield and the Other Companies be approved and that Stanfield or any other officer or director of the Company be authorized to sign and deliver it on behalf of the Company.
>
> 3. THAT the Company assume the obligations of the Other Companies to Stanfield pursuant to the shareholder account in their records, to be offset by inter-company accounts whereby each of the Other Companies will be indebted to the Company for the amount of shareholders accounts assumed by the Company.

[130] The second resolution of Bul River is dated October 20, 2003 and relates to the May 2003 resolution. The resolution references that Stanfield is having difficulty providing full documentary verification and back-up for his expenditures for which he was requesting reimbursement. In addition, the preamble to the resolution states in part:

> D. Acceptance of liability to Stanfield at this date poses some special problems due to the fact that some of the disbursements that he has requested to be reimbursed for precede the last date that the financial statements of the company were audited – and such statements did not include the expenditures.

Concern was expressed whether or not the acceptance of these responsibilities would be acceptable to Bul River's auditors. The resolution authorizes the engagement of the auditors for the purpose of conducting a special audit of the expenditures made by Stanfield. There is no evidence as to the result of that special audit or if it even took place.

[131] The third resolution of Bul River is dated November 30, 2003 and is of particular significance. It reads as follows:

> WHEREAS:
>
> A. Ross Stanfield …has submitted various claims for recognition of corporate liabilities to third parties ... as shareholder's loans for transactions undertaken as agent on behalf of the Company, Gallowai … to finance the exploration of the British Columbia properties owned by the Companies ("Properties").
>
> B. Stanfield and the Companies signed an Agreement dated May 13, 2003 recognizing the fact that Stanfield has acted as agent on behalf of the Companies since 1972 and had personally undertaken a variety of transactions as agent for the Companies to finance the exploration of the Properties.
>
> C. Stanfield has submitted the following claims pursuant to the Agreement for the Director's consideration and approval.
>
> 1. Exploration Loans
>
> These loans were negotiated between 1983 and 2002 personally by Stanfield, as the agent of the Company, and all funds were advanced to the Companies as shareholders loans from him. Payments were made on the loans with his own personal funds or shareholdings. The Directors were provided with a summary of individual loans and accrued interest for review. Files have been prepared for corporate record keeping purposes that include the documentation and amortization schedules supporting each loan.
>
> Balances as at December 31, 2002
>
> | | |
> |---|---|
> | Loan principal | $1,886,413 |
> | Accrued interest | $6,281,004 |
>
> …
>
> **NOW THEREFORE**, the undersigned acting as a group excluding … [Stanfield], RESOLVE:
>
> 1. THAT the loans, accrued interest and share subscriptions detailed in paragraph C.1 above, negotiated by Stanfield as agent on behalf of the Companies, be accepted as liabilities of the Companies.
>
> …
>
> 3. THAT the resolution passed by the full Board dated May 13, 2003 that the Company accept all of the above described liabilities on behalf of the other Companies – to be offset by inter-company accounts whereby each of the other Companies will be indebted to the Company for the amounts assumed by the Company – be further approved and ratified.

[132] It should be noted that the agreement between Stanfield and Bul River (and perhaps others) dated May 13, 2003 has not been located. Nor have any similar resolutions from the directors of Gallowai been found.

[133] In addition, no one has been able to locate a copy of the summary of the loans as of December 2002 referred to in paragraph C.1 of the November 2003 resolution. Mr. Hewison refers in his evidence to a spreadsheet in the name of Bul River referencing "Mine Development Loans" for the year ended December 2003 which indicates a loan from Mr. Stafford of $150,000 with accrued interest of $899,236.39. The total interest figure for all loans is slightly different (lower) than the interest amount referenced in the November 2003 resolution which was as of December 31, 2002. In any event, CuVeras does not dispute that Mr. Stafford would likely have been on the list referred to in the November 2003 resolution.

[134] No audited financial statements have been produced pre-2003, as might have been amended arising from the special audit authorized in October 2003.

[135] Also in evidence are various letters from Bul River to Mr. Stafford concerning these loans.

[136] On April 23, 2007, a letter was sent to Mr. Stafford's accountant enclosing various amended 2006 T5 (Statement of Investment Income) forms or slips that were apparently issued to Mr. Stafford by Gallowai and Bul River, each as to 50% of interest paid or payable pursuant to the Stafford Loan Agreement. The letter indicates that as of 2006, the amount of such interest was just over $1.5 million (which included the $150,000 bonus amount supposedly due pursuant to the Stafford Loan Agreement).

[137] On March 6, 2008, Mr. Stafford received correspondence from Bul River's controller concerning the 2006 T5s slips from Bul River and Gallowai. Later letters from the controller dated April 2, 2008, February 12, 2009 and January 19, 2010 refer to T5 slips being issued by Bul River and Gallowai for 2007, 2008 and 2009 relating to accrued interest on the Stafford Loan Agreement. Finally, T5 slips for 2010 appear to have been issued by Bul River and Gallowai for that taxation year.

[138] There is no evidence that Mr. Stafford knew anything about the 2003 resolutions by Bul River. It does appear to be the case that he began receiving

interest payments from Gallowai in 1999 and these would continue together with the payment of some principal by either Gallowai or Bul River to 2009. Bul River would also later send Mr. Stafford, commencing in 2007 and continuing to 2010, certain details or statements relating to the loan and the T5 slips.

(iii) Legal Basis for the Stafford Claim

[139] For the reasons set out below, CuVeras submits that the Stafford Claim is not a debt claim against Bul River and Gallowai and ought to be expunged from the Creditor List. CuVeras argues that Mr. Stafford cannot satisfy the onus placed upon him to prove his claim against those petitioners.

[140] At the outset, it is clear that Mr. Stafford advanced his loan to Stanfield personally, and not to either Bul River or Gallowai. The 2003 resolutions confirm that such was the case and, indeed, the amounts were noted in the books of Bul River and Gallowai as shareholder loans owing to Stanfield personally in that respect.

[141] CuVeras made substantial arguments on the later involvement of Bul River and Gallowai in terms of whether those petitioners became the principal obligants under the Stafford Loan Agreement. These arguments related to whether or not there had been a valid assignment of the Stafford Loan Agreement from Stanfield to Bul River and Gallowai. While Mr. Stafford agreed with these submissions, it is helpful to set out these issues and arguments in order to put in focus the later arguments of Mr. Stafford (which are contested by CuVeras).

[142] I agree that there is no basis upon which Mr. Stafford can contend that Stanfield assigned the Stafford Loan Agreement to Bul River and Gallowai. There is no evidence that Gallowai agreed to anything, since the resolutions were only that of Bul River's directors.

[143] Even assuming that the November 2003 resolution was intended to effect a valid assignment of the obligations under the Stafford Loan Agreement from Stanfield to Bul River and Gallowai, it is of no legal effect in that it purports to assign the burden of Stanfield's obligations to Bul River and Gallowai. It is trite law that

neither the common law nor equity has ever permitted a debtor to unilaterally assign the burdens or obligations (as opposed to the benefits) of a contract to a third party without the consent of the creditor. Rather, in that case a novation is required: *Mills v. Triple Five Corp.* 1992 CanLII 6204 (Alta. Q. B.) at paras. 13-14, [1992] 136 A.R. 67.

[144] Novation involves the substitution of a new contract or obligation for an old one which is thereby extinguished: *Royal Bank of Canada v. Netupsky*, 1999 BCCA 561. In *Netupsky* at paras. 11-13, the court set out the essential elements that must be established to satisfy the test to establish novation:

> 1. the new debtor must assume complete liability for the debt;
>
> 2. the creditor must accept the new debtor as a principal debtor, and not merely as an agent or guarantor; and
>
> 3. the creditor must accept the new contract in full satisfaction and substitution for the old contract.

[145] Mr. Stafford bears the burden of proving novation which the Court in *Netupsky* described as a "heavy onus". Further, while the courts may look at the surrounding circumstances, including the conduct of the parties, they will not infer that a novation has occurred in the face of ambiguous evidence as to the parties' intention to effect a new agreement with the substituted party.

[146] As is noted by CuVeras, it is somewhat ironic to suppose that Mr. Stafford might have advanced this issue since he is the creditor and as noted in *Netupsky*, it is usually the "unwilling creditor" who is objecting to any suggestion of a novation. In any event, in this case there is no evidence to suggest that:

a) Mr. Stafford had any knowledge of the 2003 resolutions or was in any other way even advised by Stanfield, Bul River or Gallowai that it was intended that Bul River and Gallowai would assume the obligations under the Stafford Loan Agreement in place of Stanfield; and

b) Stanfield, Bul River, Gallowai and Mr. Stafford reached a consensus with respect to the terms upon which any purported new or substituted agreement would operate.

[147] Accordingly, it is clear, as agreed by CuVeras and Mr. Stafford, that novation did not occur such that Bul River and Gallowai assumed the obligations of Stanfield under the Stafford Loan Agreement with the consensus of Mr. Stafford. In addition, no privity of contract arose simply by reason of later payments to Mr. Stafford or issuance of T5 slips by Bul River and Gallowai. That Mr. Stafford was not directly involved in any such new contractual arrangements and that he only later "assumed" that Bul River and Gallowai were involved is made evident by his own loan summary attached to his Proof of Claim:

> Commencing in 2006, T5 slips were issued by Bul River Mineral Corporation and Gallowai Metal Mining Corporation (50% each). Assumption is therefore that ½ of Grand Total is receivable from each.
>
> [Emphasis added].

[148] Nor is there any suggestion that Bul River or Gallowai provided a guarantee of the Stafford Loan Agreement to Mr. Stafford. Finally, Mr. Stafford does not argue that Bul River and Gallowai are somehow estopped from denying that they are debtors of Mr. Stafford, particularly by reason of the interest and principal payments made by them and the T5 slips prepared by them which were then forwarded to Mr. Stafford.

[149] Having confirmed the agreement of CuVeras and Mr. Stafford on the above issues, I turn to Mr. Stafford's position, which is solely rooted in agency:

> The corporate minutes of Bul River Mineral Corporation confirm that the actions of Ross Hale Stanfield were as agent for the company and associated companies and confirmed by resolution to accept liability of agreements signed by Stanfield as legitimate debts of a company and acted on it accordingly[.]

[150] Essentially, Mr. Stafford's argument is that Stanfield was retroactively appointed as the agent of Bul River and Gallowai by reason of the November 2003 resolution such that he had the express or implied authority to bind Bul River and

Gallowai at the time of the loan. He relies in particular on s. 193(2) and (4) of the *Business Corporations Act*, S.B.C. 2002, c. 57:

> 193 (2) A contract that, if made between individuals, would, by law, be required to be in writing and signed by the parties to be charged, may be made for a company in writing signed by a person acting under the express or implied authority of the company and may, in the same manner, be varied or discharged.
>
> …
>
> (4) A contract made according to this section is effectual in law and binds the company and all other parties to it.

[151] It seems to be common ground that Stanfield was not acting as the agent of Bul River and Gallowai in 1990 when the loan was made. The Stafford Loan Agreement does not reference Stanfield acting as an agent and the Proof of Claim does not allege an agency relationship at the time of the Stafford Loan Agreement. Nor was Stanfield acting as the agent of Bul River and Gallowai during the ensuing 13 years when the loan was being administered. The allegation is that changes only occurred in 2003 when Stanfield decided he wanted to be reimbursed by Bul River and Gallowai for certain loans he had earlier made.

[152] I was referred to only one authority on the agency issue by CuVeras, being *Spidell v. LaHave Equipment Ltd.*, 2014 NSSC 255.

[153] In *Spidell*, LaHave Equipment Ltd. was a dealer for Case Canada Limited. The plaintiff Spidell purchased a Case Canada excavator from LeHave which was financed by Case Credit Limited. Spidell alleged that employees of LaHave made representations to him about the performance of the equipment. Spidell believed LaHave was a representative or agent or dealer for Case Canada. Spidell did not make the required payments to Case Credit and the equipment was repossessed. Spidell sued LaHave claiming damages for alleged misrepresentations. LaHave defended the action but subsequently went into bankruptcy. Only then did Spidell amend his pleading to add Case Credit and Case Canada as defendants, claiming LaHave was their agent. The issue on the summary trial was whether LaHave was in fact the agent of the Case companies.

[154] Mr. Justice Coughlan reviewed the law of agency, as follows:

> [21] In *Halsbury's Laws of Canada First Edition,* "Agency" paragraph HAY-2 the three essential ingredients of an agency relationship are:
>
> "1. The consent of both the principal and the agent.
>
> 2. Authority given to the agent by the principal, allowing the former to affect the latter's legal position.
>
> 3. The principal's control of the agent's actions."
>
> And at Agency paragraph HAY -11 the manner in which an agency relationship may be created are set out:
>
> "1. the express or implied consent of principal and agent,
>
> 2. by implication of law from the conduct or situation of the parties or from the necessities of the case,
>
> 3. by subsequent ratification by the principal of the agent's act done on the principal's behalf, whether the person doing the act was an agent exceeding his authority or was a person having no authority to act for the principal at all,
>
> 4. by estoppel, or
>
> 5. by operation of the principles of law."
>
> [Emphasis added].

[155] Mr. Stafford relies in particular on the creation of agency by ratification as referred to above. Justice Coughlan said this about agency by ratification:

> [25] The conditions for an agency by ratification to be established were set out in *Halsbury's Laws of Canada, supra*, at Agency HAY-22 as follows:
>
> "**Three Conditions**. Actions by a principal after the agent has purported to act on the principal's behalf may amount to creation of agency by ratification. For this to occur, three conditions must be satisfied. First, the agent whose act is sought to be ratified must have purported to act for the principal; second, at the time the act was done the agent must have had a competent principal; and third, at the time of the ratification the principal must be legally capable of doing the act himself.["]

[156] The key consideration from the above quote is the first requirement. In this case, there is no evidence that Stanfield "purported to act" for Bul River and Gallowai as principals in 1990 when he entered into the Stafford Loan Agreement. In fact, the evidence is to the contrary in that he acted in his personal capacity and not as agent.

[157] I agree with CuVeras that agency by ratification assumes that there exists a relationship (even though perhaps mistaken) between the principal and agent at the time of the transaction which must later be ratified. One example is as noted in the *Halsbury's* quote above, namely where the agent exceeded his or his authority but later the unauthorized transaction is ratified or adopted by the principal. That is not what occurred in this case. Ratification of an agent's actions in that case cannot occur when no agency relationship existed in the first place. The second example of ratification described in *Halsbury's* (where the person had no authority to act but their actions were later ratified) still requires that the actions be done by the agent "on the principal's behalf" in purported furtherance of an agency relationship.

[158] Accordingly, the concept of ratification by Bul River and Gallowai of Stanfield's actions concerning the Stafford Loan Agreement as their agent has no application in this case.

[159] What occurred in this case is that many years later, in 2003, Stanfield, Bul River and Gallowai agreed that the companies would take over responsibility for payment of the Stafford Loan Agreement in place of Stanfield. But those arrangements were only between Bul River, Gallowai and Stanfield and not Mr. Stafford.

[160] Accordingly, we start from the proposition that there was no agency relationship between Stanfield and Bul River and Gallowai in 1990. The only parties to the Stafford Loan Agreement are Stanfield and Mr. Stafford.

[161] The only evidence suggesting any link between Mr. Stafford and Bul River and Gallowai arise from the fact that, commencing in April 2007, Mr. Stafford began to receive T5 slips from them. Payments were also made by Bul River and Gallowai commencing in 1999. Mr. Stafford argues that by reason of such actions, Bul River and Gallowai treated the Stafford Loan Agreement as their debt since they could not have issued T5 slips for someone else's debt. The 2003 resolutions are, of course, an internal document of Bul River but do indicate that Bul River at least intended to accept the Stafford Loan Agreement as its obligation. The basis upon which Bul

River was able to accept this obligation on behalf of Gallowai is unclear and not substantiated.

[162] Mr. Stafford argues that these events confirm that Bul River and Gallowai had assumed the obligations of Stanfield. But this argument brings us back to the legal bases for any liability on the part of Bul River and Gallowai that CuVeras raised and I discussed above (assignment, novation, guarantee and estoppel) and which arguments Mr. Stafford agreed did not apply.

[163] I agree with the submissions of CuVeras that these later actions of Bul River and Gallowai evidence an intention on the part of Bul River (and perhaps Gallowai) to take over or assume payment of the obligations of Stanfield under the Stafford Loan Agreement. In that sense, and without a novation, in substance these arrangements amount to Bul River and Gallowai agreeing to indemnify Stanfield in respect of his obligations to pay the Stafford Loan Agreement amounts and nothing more.

[164] I conclude that Mr. Stafford has not met the onus of proving that the amounts under the Stafford Loan Agreement are obligations or "provable debts" of Bul River and Gallowai.

[165] Both CuVeras and Mr. Stafford made submissions concerning the issue as to whether the Stafford Loan Agreement provided for compound interest or not. In light of my conclusions above, it is not necessary to address that issue.

Conclusion

[166] In accordance with the above reasons, the Court declares that:

a) the Preston Claim is an equity claim for the purposes of this *CCAA* proceeding; and

b) the Stafford Claim is not a debt claim as against Bul River and Gallowai. It follows that the Creditor List should be amended accordingly and that

> Mr. Stafford is not entitled to vote on or receive any distribution under any plan of arrangement as may subsequently be filed by those petitioners.

[167] If any party is seeking costs, then written submissions should be delivered to the court and the party against whom costs are sought within 30 days of delivery of these reasons. Any response shall be delivered within 15 days and any reply to that response shall be delivered with seven days of that date.

"Fitzpatrick J."

15

CITATION: Return on Innovation v. Gandi Innovations, 2011 ONSC 5018
COURT FILE NO.: 09-CL-8172
DATE: 20110825

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

RETURN ON INNOVATION CAPITAL LTD. as agent for ROI FUND INC, ROI SCEPTRE CANADIAN RETIREMENT FUND, ROI GLOBAL RETIREMENT FUND and ROI HIGH YIELD PRIVATE PLACEMENT FUND and ANY OTHER FUND MANAGED BY ROI from time to time

Applicants

-and-

GANDI INNOVATIONS LIMITED, GANDI INNOVATIONS HOLDINGS LLC, GANDI INNOVATIONS LLC, GANDI INNOVATIONS HOLD CO AND GANDI SPECIAL HOLDINGS LLC.

Respondents

BEFORE: Justice Newbould

COUNSEL: Harvey Chaiton and Maya Poliak, for the Monitor, BDO Canada Limited

Mathew Halpin and Evan Cobb, for TA Associates Inc.

Christopher J. Cosgriffe, for Harry Gandy, James Gandy and Trent Garmoe

DATE HEARD: August 18, 2011

E N D O R S E M E N T

[1] This is a motion brought by BDO Canada Limited in its capacity as the Court-appointed Monitor of Gandi Innovations Limited, Gandi Innovations Holdings LLC, Gandi Innovations LLC, Gandi Innovations Hold Co, and Gandi Special Holdings LLC (the "Gandi Group") for advice and directions, and particularly to determine preliminary issues in connection with the

indemnity claims made by Hary Gandy, James Gandy and Trent Garmoe (the “Claimants”) against all of the Gandi Group.

[2] The Gandi Group is under CCAA protection. The Monitor was appointed in the Initial Order on May 8, 2009.

[3] The business and assets of the Gandi Group have been sold with court approval. The proceeds from the sale are being held by the Monitor for eventual distribution to unsecured creditors pursuant to a plan of compromise and arrangement.

Arbitration proceedings and indemnity claims

[4] Gandi Innovations Holdings LLC ("Gandi Holdings") was incorporated pursuant to the laws of the State of Delaware on August 24, 2007. On September 12, 2007, the Gandi Group re-organized their business structure so that Gandi Holdings became the direct or indirect parent of the other various entities comprising the Gandi Group.

[5] TA Associates Inc. is a general partner for a number of TA partners. In conjunction with the reorganization of Gandi Holdings, it advanced approximately US $75 million on September 12, 2007 by way of debt and equity to the Gandi Group. The advance consisted of:

> (i) an equity investment in the amount of US $50 million made pursuant to the terms of a Membership Interest Purchase Agreement in respect of Gandi Holdings dated as of September 12, 2007 made between, among others, Gandi Holdings, TA Associates and the Claimants in their personal capacities; and
>
> (ii) an unsecured loan in the amount of US $25 million which amount was guaranteed by other members of the Gandi Group.

[6] In January 2009, TA Associates commenced an arbitration proceeding against the Claimants. In the arbitration TA Associates claim damages against the Claimants in an amount of US $75 million with interest, being the total amount of TA Associates’ investment in the Gandi Group. The arbitration has not yet been heard on its merits.

[7] On December 20, 2010, the Monitor received proofs of claim of Hary Gandy and James Gandy against the Gandi Group in the approximate amount of $76 million and a proof of claim of Trent Garmoe against the Gandi Group in an approximate amount of $88 million. The Claimants assert an entitlement to indemnification by the Gandi Group in respect of any award of damages which may be made against them in the arbitration together with all legal fees incurred by the Claimants in defending the arbitration.

[8] The proofs of claim filed by the Claimants rely on indemnity provisions set out in the Amended and Restated Limited Liability Company Agreement of Gandi Holdings and a separate Indemnification Agreement made by Gandi Holdings entered into in connection with the Membership Agreement made at the time of the TA Associates investment with Gandi Holdings. Gandi Holdings is the only Gandi entity that is a party to these indemnity agreements.

[9] On March 11, 2011 the Monitor disallowed the indemnity claims and advised the Claimants that based on the evidence filed in support of the indemnity claims, any indemnity claim would be solely against Gandi Holdings.

[10] The Claimants have served notices of dispute and have provided to the Monitor a memorandum of articles of Association of Gandi Canada which provides an indemnity in favour of directors and officers of Gandi Canada in certain circumstances.

[11] There is also an indemnity of Gandi Innovations Hold Co ("Gandi Hold Co"). At the relevant times James Gandy was the sole director of the company.

[12] There has been an extensive search for corporate documents. The Monitor made inquiries of Jaffe Raitt Heuer & Weiss Inc., former corporate counsel of the Gandi Group, and learned that all of corporate governance documents of the Gandi Group, at Hary Gandy’s request, had been sent to Stikeman Elliot LLP, insolvency counsel for the Gandi Group, following the CCAA filing date. Counsel for the Monitor attended at the offices of Stikeman Elliott and reviewed the corporate governance documents in its possession.

[13] In addition the Monitor contacted counsel for Agfa, the purchaser of the assets of the Gandi Group, to inquire if it has in its possession copies of the Gandi Group's corporate governance records. The Monitor was advised by counsel for Agfa that Agfa was not able to find any corporate governance documents of the Gandi Group entities.

[14] The Monitor also reviewed the books and records of the Gandi Group in storage. In addition, the Monitor advised the Claimants that should they wish to undertake a review of the Gandi Group's records in storage, the Claimants were invited to contact the Monitor and arrange for such review. The review was arranged and conducted by the Claimants on June 3, 2011.

[15] It is a fact that there are not in existence documents that support the Claimants all being entitled to indemnities from each corporate entity in the Gaudi Group.

Issues

[16] Whether the Claimants will ever be with held liable in the arbitration is not yet known. However, whether the Claimants have rights to indemnification against all of the Gandi Group or against only Gandi Holdings and Gandi Hold Co will assist the Monitor in determining whether to proceed with a consolidated plan of arrangement or file an alternative plan excluding Gandi Holdings and/or Gandi Hold Co which would enable the Monitor to make a meaningful distribution to unsecured creditors prior to the completion of the arbitration.

[17] There is another preliminary issue. In the arbitration, TA Associates seeks to recover against the Claimants their equity investment of US $50 million, for which the Claimants in turn have sought indemnification from the Gandi Group. The Monitor seeks a preliminary determination as to whether these claims for indemnification relating to the claim by TA Associates for its equity investment constitute "equity claims" under the CCAA. A determination of this issue will assist the Monitor in determining the maximum amount which can be claimed by the Claimants and may facilitate an earlier distribution of funds available to unsecured creditors.

Discussion

(a) Indemnity agreements

[18] An Amended and Restated Limited Liability Company Agreement of Gandi Holdings dated September 12, 2007 provides for an indemnity by Gandi Holdings in section 6.8(a) for board members and officers. There is no dispute that the Claimants were officers and board members of Gandi Holdings. It also contains in section 7.6 an indemnity for Members as follows:

> (a) Without limitation of any other provision of this Agreement executed in connection herewith, the Company agrees to defend, indemnify and hold each Member, its affiliates and their respective direct and indirect partners (including partners of partners and stockholders and members of partners), members, stockholders, directors, officers, employees and agents and each person who controls any of them…

[19] Superwide Limited Partnership is a Member and the Claimants are partners of Superwide. Thus the Claimants are indemnified by Gandi Holdings by that provision as well.

[20] There is a form on indemnity agreement made between Gandi Holdings and indemnitees. The form in the record is an unsigned copy dated September 11, 2007. Neither the monitor nor any of the parties have been able to locate any of these agreements signed in favour of the Claimants. Hary Gandi, who swore an affidavit for the Claimants, said that a copy of this agreement was signed between Gandi Holdings and each of the Claimants on September 12, 2007. It contains the following:

> WHEREAS, the Company desires to provide Indemnitee with specific contractual assurance of Indemnitee's rights to full indemnification against litigation risks and related expenses (regardless, among other things, of any amendment to or revocation of the Company's LLC Agreement or any change in the ownership of the Company or the composition of its Board of Managers) . . .
> …
> 3. Agreement to indemnify… if Indemnitee was or is a party or is threatened to be made a party to any Proceeding by reason of Indemnitee's Corporate Status, Indemnitee shall be indemnified by the Company against all Expenses and Liabilities incurred . . . ."

[21] Assuming that this form of indemnity agreement was signed by Gandi Holdings and the Claimants, they would be covered by it.

[22] The Claimants contend that each of the corporate entities in the Gandi Group signed an indemnity in favour of each of them. This is based on a statement in the affidavit of Hary Gandy that Gandi Holdings and the other CCAA Respondents provided additional indemnities to him, James Gandy and Trent Garmoe dated September 12, 2007. He attached to his affidavit a form of the indemnification agreement to be signed by Gandi Holdings. No affidavit was filed from James Gandy or Trent Garmoe.

[23] There is no form of indemnity agreement in existence which names an indemnifier other than Gandi Holdings.

[24] The date of September 12, 2007, said to be the date that all of the entities in the Gandi Group signed indemnities in favour of each of the claimants, was the date of the investment by TA Associates in which it purchased a membership interest in Gandi Holdings only. Representatives of TA Associates received identical indemnities from Gandi Holdings. There is no evidence that any indemnities from any of the other Gandi Group entities were made at that time. To the contrary, the Membership Interest Purchase Agreement under which TA Associates purchased its membership interest in Gandi Holdings contained as a condition to closing a requirement that Gandi Holdings sign an indemnification agreement. The indemnification was only to be given by Gandi Holdings. There was no requirement for an indemnity to be given by any other entity in the Gandi Group,.

[25] I do not accept the bald statement of Hary Gandy that all of the entities in the Gandi Group gave indemnities at the time. The only indemnities that were given were by Gaudi Holdings.

.

(b) Memorandum and articles of Gandi Hold Co

[26] In the course of its investigation, the Monitor did locate an indemnity granted by Gandi Hold Co in its Memorandum and Articles in favour of its directors and officers. Those articles contain an indemnity in the same terms as the indemnity in the Gandi Innovations Limited articles, as discussed below. As the Monitor does not seek a determination regarding indemnities

given by Gandi Hold Co, I need not discuss whether one or more of the Claimants is entitled to be indemnified by these articles.

(c) Articles of Association of Gandi Innovations Limited (Gandi Canada)

[27] The articles of this company contain an indemnity as follows:

> Every director or officer, former director or officer, or person who acts or acted at the Company's request**,** as a director or officer of the Company, a body corporate, partnership or other association of which the Company is or was a shareholder, partner, member or creditor and the heirs and legal representatives of such person, in absence of any dishonesty on the part of such persons shall be indemnified by the Company…in respect of any claim made against such person … by reason of being or having been a director or officer of the Company. [emphasis added]

[28] The corporate records sent to the Monitor by the corporate solicitors who incorporated the company name James Gandy as the president, treasurer and secretary and as the sole director. Hary Gandy stated at the outset of his affidavit filed on behalf of the claimants that he was the president and chief executive officer and chairman of the board of the companies that made up the Gandi Group. There are no corporate records that support that assertion and on his cross-examination he acknowledged he had no documents, including board resolutions, contracts or appointment letters to show that he was ever a director or officer of Gandi Innovations Limited. He said that he was directing the business of all of the entities. On his cross-examination, he said that as far as he was concerned, James Handy and Trent Garmoe were directors and officers of the company.

[29] James Gandy did not file any affidavit to say that he was not the president, treasurer and secretary of the company, as shown in the corporate records. Trent Garmoe did not file any affidavit. I think it fair to draw an adverse inference that their evidence would not have been helpful to their case.

[30] The affidavit of Bruce Johnston filed on behalf of TA Associates states that Hary Gandy and Trent Garmoe were not directors or officers of Gandi Innovations Limited and that a document printed from the Nova Scotia Registry of Joint Stock Companies which was included

in the closing documents for TA Associates' investment showed that James Gandy was the only director and officer of Gandi Innovations Limited.

[31] There has been an extensive search for corporate documents but none have been found that would support Hary Gundy or Trent Garmoe as being an officer or director of Gandi Innovations Limited.

[32] It is argued that the indemnity in the articles of Gandi Innovations Limited is in favour not only of officers and directors, but also "persons who acted at the Company's request as a director or officer of the Company", and that Hary Gandy and Trent Garmoe acted as directors and officers at the Company's request. There is certainly no documentary evidence of that. Presumably the request would have had to come from James Gandy, who is the sole officer and director according to the corporate records. There is no evidence from any of the Claimants that any request was made to Hary Gandy or Trent Garmoe to act as an officer or director of Gandi Innovations Limited, which one would have expected if the assertion was to be made.

[33] It is also argued that the board of managers (the Delaware concept of a board of directors) of Gandi Holdings operated the subsidiaries as if they were officers and directors of the subsidiaries. Again, there is no documentary evidence of that and no evidence from any of the Claimants to support the assertion. While Hary Gandy may have operated the business in a functional sense, that does not mean that he was acting as an officer or director of any subsidiary in the corporate sense. This is not mere semantics. TA Associates made a large investment, and one of the corporate documents provided on closing was the Nova Scotia Registry of Joint Stock Companies that showed only James Gandy as an officer and director. If all of the Claimants are entitled to be indemnified by Gandi Innovations Limited, it will impact the claim of TA Associates in the CCAA proceedings.

[34] In the circumstances, I find that the only person entitled to indemnification from Gandi Innovations Limited is James Gandy.

[35] However, in connection with the financing provided by TA Associates, James Gandy executed a Subordination Agreement dated as of September, 12, 2007 under which he agreed

that any liability or obligations of Gandi Canada to him, present or in the future, would be deferred, postponed and subordinated in all respects to the repayment in full by Gandi Innovations of all indebtedness, liabilities and obligations owing to TA Associates in connection with the purchase by TA Associates of US $25million in notes. Until that obligation to pay the notes in full with interest has been fulfilled, any claim by James Gandy under the indemnity from Gandi Innovations Limited is subordinated to the claim of TA Associates.

[36] The debt claim of TA Associates of $46,733,145 has been accepted by the Monitor. Assuming that the purchase price on the sale of the assets to Agfa is received in full, the monitor expects a distribution to unsecured creditors of approximately 27% of the value of their claims. In such circumstances, James Gundy will have no right to receive any payment from Gandi Innovations Limited in respect of his indemnity claim.

(d) Other Gaudi Group entities

[37] It was asserted by the Claimants that because the Gandi companies operated essentially as one integrated company, it should be inferred that the constating documents of the other entities in the Gandi Group contained the same indemnity as contained in the bylaws of Gandi Innovations Limited and Gandi Hold Co. I do not agree.

[38] Gandi Innovations LLC is a Texas company. Its Amended and Restated Operating Agreement contains the types of things normally contained in a general bylaw of an Ontario corporation. It contains no provision for indemnities. It was argued that as no articles were obtained from Texas, it could be assumed that the articles contained an indemnity provision similar to that contained in the bylaws of Gandi Innovations Limited and Gandi Hold Co. I asked counsel to obtain whatever documentation was available in Texas, and subsequently the Monitor received from its US counsel, Vinson & Elkins LLP, a copy of articles of organization for Gandi Innovations LLC dated August 2, 2004. There is nothing in these articles dealing with indemnities. Vinson & Elkins LLP advised that these articles, together with amending articles already in the possession of the Monitor, are the only corporate governance documents on file with the State of Texas.

[39] Gandi Special Holdings LLC is a Delaware corporation. The Limited Liability Company Agreement of Gandi Special Holdings LLC, like the Texas company, contains the types of things normally contained in a general bylaw of an Ontario corporation. It contains no provision for indemnities. Following the hearing, the Monitor obtained through Vinson & Elkins LLP a Delaware Certificate of Formation of Gandi Special Holdings LLC. This document contains no provision for indemnities. A certificate of the Secretary of State of Delaware confirms that there were no other relevant documents on file and this was confirmed by Vinson & Elkins LLP.

[40] I find that there is no indemnity in favour of the Claimants in the corporate documentation of Gandi Innovations LLC and Gandi Special Holdings LLC.

[41] It is also argued on behalf of the Claimants that the Gandi Group have acknowledged an obligation to indemnify the Claimants and it is said that this arises from a meeting of the board of Gandi Holdings. It is argued that the Gandi Group through the Monitor is thus estopped from denying an indemnity for all of the Gandi Group companies. A document said to be minutes of a meeting of the board of managers of Gandi Holdings held on March 4, 2009 is relied on. That document contains the following paragraph:

> The next item on the agenda was the indemnification of the officers. It was generally agreed that all parties would follow the Purchase Agreement between Gandi Innovations and TA Resources dated September 12, 2007: Counsel for TA had previously expressed the opinion that indemnification was not allowed under the purchase agreement. Counsel for James Gandy, Hary Gandy and Trent Garmoe together with the Corporate Counsel, Matthew Murphy had previously expressed verbal opinions that the indemnification of the officers was permitted under the Purchase Agreement. Lydia Garay, as the only member not involved in the dispute between TA and the key holders, voted to follow the advice of Corporate Counsel, Matthew Murphy. To avoid any misunderstanding, Corporate Counsel would be requested to express that opinion in writing.

[42] I do not see this paragraph in the informal minutes as assisting the Claimants. It is a meeting of the board of Gandi Holdings. It says that it was generally agreed that all parties would follow the purchase agreement between Gandi Holdings and TA resources dated September 12, 2007. That purchase agreement provides for an indemnity by only Gandi Holdings. Assuming that the minutes reflect a desire of some board members to indemnify officers of subsidiary

corporations, and assuming that the Claimants thought they were officers of all of the subsidiary corporations, it is quite clear from the paragraph that there was a difference of view. The minute states that counsel for TA Associates had previously expressed the opinion that indemnification was not allowed under the purchase agreement and that counsel for the Claimants together with corporate counsel, Matthew Murphy, expressed the opposite opinion. The minute states that Lydia Garay, the only member not involved in the dispute between TA Associates and the key holders, voted to follow the advice of Corporate Counsel Terry Murphy and to avoid any misunderstanding, corporate counsel would be requested to express that opinion in writing.

[43] The affidavit of Bruce Johnston on behalf of TA Associates, who attended that meeting of the board of managers of Gandi Holdings swears that the Claimants voted to place Lydia Garay, a longtime employee and officer of Gandi Holdings, on the board despite a verbal agreement that he had with the Claimants to leave that board seat vacant and to work with him to appoint an outside independent board member. He stated Ms. Garay was completely reliant on the Gandy family for her job security and compensation.

[44] Mr. Johnston also states in his affidavit that the indemnification of the Claimants was discussed and that he and Mr. Taylor took the position that indemnification was not permitted. He said the Claimants took the position that indemnification was permitted, despite the language of the purchase agreement, and took the position that corporate counsel for Gandi Holdings had previously given a verbal opinion that indemnification was permitted under the purchase agreement. After hearing that, and during the meeting, Mr. Johnston sent an e-mail to Mr. Murphy who two minutes later responded that he had not advised on the question of an indemnity under the purchase agreement. Mr. Johnson states that he then read that e-mail at the meeting. I accept his evidence on this.

[45] Whether or not Ms. Garay was a disinterested or proper member of the board of management of Gandi Holdings, the minute states that she voted to follow the advice of corporate counsel. At the next board meeting on May 4, 2009, Ms. Garay said that she had sought the written opinion of corporate counsel but had not received it. To date no opinion from Mr. Murphy has surfaced. On the face of those minutes from March 4, 2009, there has been no

approval of any indemnities in favour of the Claimants for other corporations. I cannot find on the evidence that there was any agreement that the Claimants would be indemnified by subsidiary corporations, nor is there any evidence that any subsidiary corporation ever enacted any documentation of any kind to provide such indemnities. The opposite is the case, as has been discussed.

[46] Finally, the Claimants allege that the Gandi Group has previously acknowledged their liability to indemnify the Claimants for any damage, award or legal costs incurred by the following actions:

(i) certain Gandi entities made payments of defence costs in connection with the arbitration both pre-and post the CCAA filing; and
(ii) the Monitor allegedly approved payment of post-filing defence costs.

[47] Until the sale of the Gandi Group to Agfa was completed, this CCAA proceeding was a debtor in possession restructuring with the business and affairs of the Gandi Group being managed by their officers and directors, specifically Hary Gundy and Trent Garmoe. Payments of legal fees to Langley and Banack Inc., U.S. lawyers for the Gandi Group and the Claimants, were made by or on authorization of Trent Garmoe.

[48] Pursuant to the terms of the Initial Order, the Monitor was required to approve all expenditures over $10,000 before payment was made. The Monitor approved payment of legal fees to counsel for the Gandi Group on the general understanding that such fees were incurred by the Gandi Group in connection with the Gandi Group's insolvency proceeding and for general corporate work for the Gandi Group.

[49] I accept the statement of the Monitor that it did not knowingly approve the payment of the Claimants' defence costs in connection with the arbitration.

[50] Subsequent to the completion of the sale to Agfa, the Monitor learned that a nominal amount of the legal fees approved by the Monitor was subsequently allocated to cover the costs of the arbitration. I accept the statement of the Monitor that it had no input, knowledge or control

over such allocation, and had it been consulted, would have been opposed to such allocation as it did not involve any member of the Gandi Group.

[51] In the circumstances there is no basis for the assertion that the Monitor is somehow estopped by reason of the payment of legal fees from denying that there are other indemnities in favour of the Claimants.

(e) Are the Claimants claims debt or equity claims?

[52] This involves the application of provisions of the CCAA to the claims asserted by TA Associates in the arbitration.

[53] Section 6(8) of the CCAA provides:

> 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.

[54] In s. 2(1) of the CCAA, equity claims are defined as follows:

> "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);

[55] This definition of equity claim came into force on September 18, 2009. Although this provision does not apply to the Gandi Group's CCAA proceedings which commenced shortly prior to the legislative amendments, courts have noted that the amendments codified existing

case law relating to the treatment of equity claims in insolvency proceedings. In *Re Nelson Financial Group Lrd*., (2010) 75 B.L.R. (4th) 302, Pepall J. stated:

> 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.
>
> ,

[56] If the claims in the arbitration commenced by TA Associates against the Claimants are equity claims, the claims by the Claimants in the CCAA process for contribution or indemnity in respect of those claims would be equity claims. The Claimants contend that the claims in the arbitration are not equity claims.

[57] The claims in the arbitration by TA Associates against the creditors include claims for various breaches of contract, fraud, rescission, or in the alternative, recissory damages, negligent misrepresentation, breach of fiduciary duty and tortious interference with advantageous business relationships and prospective economic advantage.

[58] In the arbitration TA Associates seeks to recover the investment that it made in Gandi Holdings, including the US $25 million debt secured by promissory notes and the US $50 million equity investment made by way of a membership subscription in Gandi Holdings.

[59] The Claimants assert that the claim for US $50 million by TA Associates cannot be an equity claim because it is based on breaches of contract, torts and equity. I do not see that as being the deciding factor. TA Associates seeks the return of its US $50 million equity investment because of various wrongdoings alleged against the Claimants and the fact that the claim is based on these causes of action does not make it any less a claim in equity. The legal tools that are used is not the important thing. It is the fact that they are being used to recover an equity investment that is important.

[60] In *Re Nelson Financial Group Lrd.*, *supra*, at Peppall J. stated that historically, the claims and rights of shareholders were not treated as provable claims and ranked after creditors of an insolvent corporation in a liquidation. She also stated:

> This treatment also has been held to encompass fraudulent misrepresentation claims advanced by a shareholder seeking to recover his investment: *Re Blue Range Resource Corp.*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 *Re Stirling Homex Corp*. concluded that shareholders, including those who had allegedly been defrauded, were subordinate to the general creditors when the company was insolvent.

[61] As the amendments to the CCAA incorporated the historical treatment of equity claims, in my view the claims of TA Associates in the arbitration to be compensated for the loss of its equity interest of US $50 million is to be treated as an equity claim and that the claims of the Claimants for indemnity against that claim is also to be treated as an equity claim in this CCAA proceeding.

Order

[62] An order in the form of a declaration shall go in accordance with these reasons.

._____

Newbould J.

DATE: August 25, 2011

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *0731431 B.C. Ltd. v. Panorama Parkview Homes Ltd.,* 2021 BCSC 607

Date: 20210401
Docket: S142529
Registry: Vancouver

Between:

0731431 B.C. Ltd., Daljit Singh Mattu, 0892995 B.C. Ltd., Rajpreet Singh Sangha, Grewal Management Ltd., and Jasprit Singh Grewal

Plaintiffs

And

Panorama Parkview Homes Ltd., 690174 B.C. Ltd., Jaswant Singh Sangha, Parmjit Kaur Sangha, Ranjit Singh Sangha, Svender Singh Sangha, Douglas William Wills and Balbir Kaur Dale, Crowe MacKay & Company Ltd. in its capacity as Trustee in Bankruptcy of Jaswant Singh Sangha, Panorama Parkview Homes Ltd. and 690174 B.C. Ltd.

Defendants

Docket: S151275
Registry: Vancouver

Between:

Daljit Singh Garcha and Jaswinder Kaur Garcha

Plaintiffs

And

690174 B.C. Ltd., Panorama Parkview Homes Ltd., Jaswant Singh Sangha, Parmjit Kaur Sangha, Raveen Sangha, Ranjit Singh Sangha, Svender Singh Sangha, Douglas William Wills, Balbir Kaur Dale, Grewal Management Ltd., Jasprit Singh Grewal and Crowe MacKay & Company Ltd. in its capacity as Trustee in Bankruptcy of Jaswant Singh Sangha, Panorama Parkview Homes Ltd. and 690174 B.C. Ltd.

Defendants

Docket: B150826
Registry: Vancouver

In the Matter of the Bankruptcy of Jaswant Singh Sangha

Docket: B160405
Registry: Vancouver

In the Matter of the Bankruptcy of Panorama Parkview Homes Ltd.

Docket: B160406
Registry: Vancouver

In the Matter of the Bankruptcy of 690174 B.C. Ltd

Before: The Honourable Mr. Justice Sewell

Reasons for Judgment

Counsel for 0731431 B.C. Ltd., Daljit Singh Mattu, Grewal Management Ltd., and Jasprit Singh Grewal:	D. Taylor L. Marriner
Counsel for Daljit Singh Garcha and Jaswinder Kaur Garcha:	G. A. Phillips D. Kang – Articled Student
Appearing on his own behalf and on behalf of 0892995 B.C. Ltd.:	Rajpreet Singh Sangha
Counsel for Crowe MacKay & Company Ltd. in its capacity as Trustee in Bankruptcy of 690174 B.C. Ltd., and Panorama Parkview Homes Ltd.:	R. Millar F. McDonnell
Counsel for Raveen Sangha and Parmjit Kaur Sangha:	D. Magnus J. Heller – Articled Student
Counsel for Ranjit Singh Sangha and Svender Singh Sangha:	R. Argue
Appearing on his own behalf:	Jaswant Singh Sangha
Appearing on their own behalf:	Douglas William Wills and Balbir Kaur Dale

No other appearances

Place and Date of Trial:	Vancouver, B.C. April 8 - 12, 15 - 18, 23 - 26, 29, 30, 2019, May 1-3, 2019, September 4 - 6, 9 - 13, 6-20, 23-27, 30, 2019, October 1-2, 2019, November 4,2019, December 2 - 6, 2019, January 13-17, 20 - 24, 27 - 31, 2020, February 3 - 7, 11, 2020, June 15-19, 22 - 26, 29, 30, 2020 and July 2 - 3, 2020
Place and Date of Judgment:	Vancouver, B.C. April 1, 2021

Table of Contents

Introduction

[1] These reasons address two civil actions (the "Civil Actions") and three appeals of notices of disallowance of bankruptcy claims (the "Bankruptcy Appeals") involving the parties to a successful subdivision project at the corner of 130th Street and 60th Avenue in Surrey, British Columbia (the "Project"). The ultimate question to be resolved is how the proceeds from the Project should be divided among the parties to these proceedings.

[2] Several of the parties have the last name "Sangha". To distinguish among them, I will refer to them by their first names after I have identified them. I intend no disrespect to any of them by so doing.

[3] The Project was conceived and managed by Jaswant Sangha ("Jaswant"), who is (i) a defendant in the Civil Actions; (ii) the bankrupt in one of the Bankruptcy Appeals; and (iii) the sole shareholder and director of two companies, 690174 B.C. Ltd. ("690174") and Panorama Parkview Homes Ltd. ("Panorama"), both of which are defendants in the Civil Actions as well as being the bankrupt companies in the other two Bankruptcy Appeals.

[4] Beginning in the 1990s, Jaswant became involved in acquiring, subdividing and selling properties located mostly in Surrey and other jurisdictions in the Fraser Valley. Jaswant usually involved other persons in the ownership of these projects. The evidence as to how the earlier projects were structured is incomplete. Some of the projects were profitable. Jaswant used the profits and the contacts he had made as a result of the earlier subdivisions to promote and pursue the Project.

[5] Jaswant began pursuing the Project in 2006. Ultimately, the Project produced a very significant profit. Despite this, Jaswant, 690174, and Panorama (the "Bankrupts") all ended up in bankruptcy (the "Bankruptcies"), in large part because of other businesses in which they were engaged.

[6] The legal and factual issues that must be addressed to determine the ultimate question of the rights of the parties to the Project's proceeds are complex and hotly disputed. The key underlying legal issues involve the nature of the relationships

created to develop the Project and the effect of the Bankruptcies on those relationships.

The Proceedings

[7] The proceedings before me are:

1. Vancouver Registry No. S151275 (the "Garcha Action"), in which Daljit Singh Garcha and Jaswinder Kaur Garcha (the "Garchas") are plaintiffs and Jaswant, 690174, Panorama, Parmjit Sangha ("Parmjit"), Raveen Sangha ("Raveen"), Ranjit Singh Sangha ("Ranjit"), Svender Singh Sangha ("Svender"), Douglas William Wills and Balbir Kaur Dale ("Wills and Dale"), Grewal Management Ltd. ("Grewal Management"), Jasprit Singh Grewal ("Mr. Grewal"), and Crowe MacKay & Company Ltd. in its capacity as Trustee in Bankruptcy of Jaswant Singh Sangha, Panorama Parkview Homes Ltd. and 690174 B.C. Ltd. (the "Trustee") are defendants;

2. Vancouver Registry No. S142529 (the "Grewal Action"), in which 0731431 B.C. Ltd. ("0731431"), Daljit Singh Mattu ("Mr. Mattu"), 0892995 B.C. Ltd. ("0892995"), Rajpreet Singh Sangha ("Rajpreet"), Grewal Management, and Mr. Grewal are plaintiffs and Panorama, 690174, Jaswant, Parmjit, Ranjit, Svender and the Trustee are defendants;

3. Vancouver Registry No. B150826 in the Matter of the Bankruptcy of Jaswant Singh Sangha (the "Jaswant Bankruptcy"), being appeals of notices of disallowance of proofs of claim filed by the plaintiffs in the Civil Actions in that bankruptcy;

4. Vancouver Registry No. B160406 in the Matter of the Bankruptcy of 690174 B.C. Ltd. (the "690174 Bankruptcy"), being appeals of notices of disallowance of proofs of claim filed in that bankruptcy by the same plaintiffs; and

5. Vancouver Registry No. B160405 in the Matter of the Bankruptcy of Panorama Parkview Holdings Ltd. (the "Panorama Bankruptcy"), being appeals of notices of disallowance of proofs of claim filed by the same

plaintiffs in that bankruptcy (proceedings 3 to 5 are referred to collectively as the "Bankruptcy Appeals").

The Joint Ventures

[8] The Project involved the acquisition of five contiguous lots, referred to in the evidence as Lots 1 to 5 (the "Lots"). The Lots were acquired over a period of several years and developed through a series of joint ventures, some of which were formalized through the execution of a corresponding written joint venture agreement ("JVA").

The written joint venture agreements

[9] The relevant written joint venture agreements are:

1. **2007 JVA** – an agreement dated October 5, 2007, between the Garchas, Onkar Malli and Manmeet Malli (the "Mallis"), Joginder Chahal, Malkait Bains, Harjinder Bassi, Gurcharan Singh Sandhu, Sarbjit Kaur Basraon and Balraj Basraon, Gurmit Singh and Manisha Sidhu, Sumit Sidhu, and 690174 (the "2007 Joint Venturers") to acquire and subdivide Lot 1 and to sell the subdivided lots created by that subdivision (the "2007 Joint Venture"). The 2007 JVA was amended in January 2010 to correct what appears to have been a clerical error in the original document.

2. **October 2010 JVA** – an agreement dated October 20, 2010, between 0892995 (a company owned by Rajpreet), 0731431 (a company owned by Mr. Mattu), and Panorama (the "October 2010 Joint Venturers") to acquire, build homes on, and sell lots created by the Project (the "October 2010 Joint Venture"). Although the numbered companies were the nominal parties to the October 2010 JVA, I find that the parties made no distinction between their personal dealings and dealings through their private companies with respect to the Project.

3. **November 2010 JVA** – an agreement dated November 15, 2010, to subdivide Lots 1 to 5 and sell the subdivided lots (the "November 2010 Joint Venture"). The parties to the November 2010 JVA were 690174,

Panorama, Jaswant, Wills and Dale, Parmjit, Ranjit, and Svender (the "November 2010 Joint Venturers").

4. **2011 JVA** – an agreement dated June 30, 2011, replacing the November 2010 JVA, whereby Grewal Management was added as a joint venturer to the November 2010 JVA (Grewal Management and the other parties to this agreement will be referred to as the "2011 Joint Venturers") to pursue the objects of the November 2010 Joint Venture (the **"**2011 Joint Venture").

The alleged oral joint venture agreements

[10] In addition to the written joint venture agreements, Grewal Management, Mr. Mattu, and Rajpreet allege that they entered into oral joint venture agreements with Jaswant pursuant to which they invested in the Project. Their position is that these oral joint venture agreements modified or superseded the terms of the written joint venture agreements.

The Parties

[11] Jaswant is the central figure in all of the matters before me. He was born and educated in India but has lived in Canada for many years. He is obviously astute in business. As the Trustee observed in his testimony, Jaswant had the ability to identify and develop properties that could be profitably subdivided.

[12] Jaswant is married to Parmjit. They have a daughter, Raveen. Raveen is the registered owner of the home in which Jaswant and Parmjit have lived for a number of years. Parmjit is a defendant in the Grewal Action and both Parmjit and Raveen are defendants in the Garcha Action.

[13] The Garchas are long-term residents of Surrey who got to know Jaswant and Parmjit through attending community events.

[14] Ranjit and Svender are Jaswant's brother and nephew.

[15] Wills and Dale are a married couple who were long-time family friends of Jaswant and Parmjit. Wills and Dale became involved in real estate projects being managed by Jaswant in the 1990s. They allege that they invested in those projects and that the proceeds of those previous investments were invested in the November 2010 Joint Venture.

[16] Mr. Grewal is the sole shareholder and director of Grewal Management. Although it is a member of the 2011 Joint Venture, Grewal Management alleges that its investment in the Project was made pursuant to an oral joint venture agreement made in June 2011 that entitled it to a greater share of the proceeds from the Project than is allocated to it in the 2011 JVA.

[17] Mr. Mattu was a long-time acquaintance of Jaswant's. He alleges that he invested in the Project through an oral joint venture agreement with Jaswant and his companies.

[18] Rajpreet was introduced to Jaswant by Mr. Mattu. He invested in the October 2010 Joint Venture through 0892995 and alleges he later agreed with Jaswant that this investment and an additional $600,000 he provided to Jaswant would be invested in the Project pursuant to an oral agreement similar to the one alleged by Mr. Mattu. He was initially represented by the same counsel as Mr. Grewal and Mr. Mattu. However, he filed a notice of intention to act in person in July 2019 and represented himself and 0892995 at trial thereafter.

[19] The Trustee is the Trustee in Bankruptcy of Jaswant, 690174, and Panorama, who has conducted a defence of the Garcha and Grewal Actions on their behalf.

Positions of the Parties

[20] In the Garcha Action, the Garchas seek an order that they are entitled to share in the proceeds from the Project by virtue of being the beneficial owners of an undivided 7/22 interest in Lot 1. The Garchas frame this claim both as a direct beneficial proprietary interest pursuant to the 2007 JVA and as a remedy for alleged breaches of fiduciary duty on the part of Jaswant and 690174 as managers of the 2007 Joint Venture's affairs. The Garchas' position is that the 2007 JVA is binding

and that it provides the basis for granting them a proprietary remedy against the proceeds of the Project. The Garchas also claim against the members of the 2011 Joint Venture based on knowing assistance of 690174's breaches of fiduciary duty and knowing receipt of property obtained from these breaches.

[21] The Trustee's position is that the 2007 JVA is binding and that 690174 initially held title to Lot 1 as bare trustee for the 2007 Joint Venturers, but that the trust came to an end due to subsequent events. The Trustee therefore argues that the rights of the 2007 Joint Venturers to receive profits from the 2007 Joint Venture are purely contractual.

[22] The Grewal plaintiffs conceded at trial that the 2007 JVA was binding, but took the position that it did not create any trust in favour of the Garchas over the proceeds of the Project.

[23] In the Grewal Action, Mr. Grewal, Mr. Mattu, Rajpreet, and their respective companies seek orders that they are entitled to constructive trusts over the net proceeds of sale of the subdivided lots created by the Project. They allege that they made direct financial contributions to the costs of the Project pursuant to oral joint venture agreements with Jaswant stipulating that their financial contributions would entitle them to a proprietary interest the Project.

[24] Rajpreet also bases his claim to a constructive trust on alleged breaches of fiduciary duty by Jaswant and Panorama with respect to funds Rajpreet and 0892995 provided to them pursuant to the October 2010 JVA.

[25] In the Bankruptcy Appeals, the plaintiffs in the Civil Actions seek to set aside the Trustee's disallowances of the claims they filed in the Bankruptcies. They rely on the same grounds advanced in the Civil Actions, arguing that their interests in the Project do not form part of the bankrupt estates' assets divisible among their creditors and that they are not equity claims. Their position is that the issues raised in the Bankruptcy Appeals should be decided *de novo* in these proceedings.

[26] In all proceedings, the Trustee takes the position that the claims of the plaintiffs are equity claims as defined in the *Bankruptcy and Insolvency Act*, R.S.C.

1985, c. B-3 [*BIA*], and are therefore postponed to the claims of all other creditors of the Bankrupts pursuant to s. 140.1 of the *BIA*. The Trustee says there are insufficient funds remaining in the bankrupt estates to satisfy prior ranking claims and that any claims that the plaintiffs can establish are therefore moot.

[27] In all proceedings, the defendants take the position that the plaintiffs have not established any claim to equitable relief by way of a constructive trust or otherwise, and that the net proceeds of the Project should be distributed in accordance with the terms of the 2011 JVA.

[28] For the reasons that follow I have decided that the plaintiffs' claims are not equity claims as defined in the *BIA*, and that the Garchas, Mr. Mattu, Rajpreet, and their companies are entitled to equitable remedies with respect to the proceeds of sale of the subdivided lots. However, I find that the claim of Mr. Grewal and Grewal Management must be dismissed except insofar as Grewal Management is entitled to its share of the net proceeds of the 2011 Joint Venture.

[29] In these reasons I will first deal with a number of procedural issues. I will then address the credibility of the witnesses and make findings of fact, following which I will consider the claims advanced by the plaintiffs.

Procedural History

[30] This trial results from four orders of Justice Bowden, who was previously the case management judge in all of these proceedings. Two of the orders are dated November 15, 2017, while the other two are dated January 29, 2018, and June 26, 2018. The reasons for each of these orders were published and are indexed as 2017 BCSC 2064, 2017 BCSC 2071, 2018 BCSC 137, and 2018 BCSC 1049, respectively.

[31] In the reasons indexed as 2017 BCSC 2064, Justice Bowden addressed the Grewal plaintiffs' application for a declaration that the automatic stay of proceedings against 690714 and Panorama as bankrupts provided for in the *BIA* no longer applied to the Grewal Action. Justice Bowden reviewed the procedural history of this matter up to that date and noted that on April 8, 2016, Justice Kirkpatrick of the

Court of Appeal had ordered, by consent, that the stay of proceedings against Jaswant pursuant to his bankruptcy be lifted on certain terms. Justice Bowden found as a fact that the Trustee had, at that time, also consented to an order lifting the automatic stay of proceedings against 690174 and Panorama to permit the Grewal plaintiffs to proceed with the Grewal Action.

[32] The Trustee did not deny that he had made such an agreement. However, he argued that by the end of July 2016 he had determined that the Garcha and Grewal claims were equity claims, and that the inspectors of the bankrupt corporations had authorized him to take steps to maintain the stay of proceedings in the actions against those corporations.

[33] Justice Bowden did not accept the Trustee's submissions and made a declaration pursuant to s. 69.4 of the *BIA* that the stay of proceedings no longer applied to the Grewal Action, subject to a requirement that if judgment was obtained against either corporation, no steps to enforce the judgment could be taken without leave of the Court. In addition, he confirmed the authority of the Trustee to defend the action, as authorized by a resolution of the inspectors of the Bankrupts dated September 1, 2016.

[34] In the reasons indexed as 2017 BCSC 2071, Justice Bowden granted a declaration that the automatic stay of proceedings no longer applied to the Garcha Action. Because there was no express agreement on the part of the Trustee to the lifting of the stay of the Garcha Action, Justice Bowden applied the factors set out in *Re Advocate Mines Ltd.* (1984), 52 C.B.R. (N.S.) 277 (Ont. S.C.J.), and determined that the Garchas had met the applicable test for lifting the stay of their action.

[35] In the reasons indexed as 2018 BCSC 137, Justice Bowden addressed the procedural issues that arose from the fact that the Grewal and Garcha plaintiffs had also filed proofs of claim with the Trustee, which the Trustee had disallowed or ruled were equity claims. He permitted the Bankruptcy Appeals to continue with respect to the claims of creditors other than the Garcha and Grewal plaintiffs and gave leave to the Trustee to apply for a distribution of funds held in trust on the completion of those appeals. He also permitted the Civil Actions to proceed and directed that they

be heard at the same time as the Bankruptcy Appeals. Finally, he directed that the procedures set out in the *Supreme Court Civil Rules,* B.C. Reg. 168/2009 [*SCCR*], would apply to the contemporaneous hearings of the trials in the Civil Actions and the Bankruptcy Appeals.

[36] In the reasons indexed as 2018 BCSC 1049, Justice Bowden gave the Trustee leave to participate in the Civil Actions by being added as a defendant. He ordered the Grewal and Garcha plaintiffs to amend their notices of civil claim to add the Trustee and gave leave to the Trustee to file responses for Jaswant, 690174, and Panorama. In addition, he reiterated that the Civil Actions and the Bankruptcy Appeals should be heard at the same time and be subject to the *SCCR.* Justice Bowden also ordered that the issues raised in the Civil Actions must be decided *de novo*, and that to the extent that those decisions are inconsistent with the Trustee's decisions in the notices of disallowance, the Court's decisions will prevail.

[37] Based on the foregoing, I am satisfied that Justice Bowden decided that all issues raised in the Civil Actions and the Bankruptcy Appeals should be decided *de novo* pursuant to the procedures for actions set out in the *SCCR.*

[38] No appeal was taken from Justice Bowden's orders.

[39] I have also independently concluded that these proceedings fall into that category of bankruptcy cases in which the interests of justice require that the issues be determined by a trial before the court. Although the general rule is that appeals from a Trustee's disallowance of claims are true appeals, the direct conflict in the evidence of the parties and the difficult and complicated legal issues raised in the proceedings require that the court determine the issues *de novo* on the basis of evidence presented at trial.

[40] In *Credifinance Securities Limited v. DSLC Capital Corp.,* 2011 ONCA 160, the Ontario Court of Appeal recognized that there will be cases that are simply not suitable to be decided pursuant to the summary provisions of the *BIA* and that on appeal the court has jurisdiction to determine the issues *de novo* if required in the interests of justice. In my view this is one of those cases. I note that the issues

raised in these proceedings raise complex factual and legal issues and require credibility findings with respect to conflicts in the evidence. As such, they were not suitable for summary disposition.

[41] As indicated, the Trustee filed responses to civil claim in the Civil Actions and fully participated as an adverse party in the actions and throughout the trial. I also note that counsel for the Trustee indicated in argument that the Trustee was seeking a resolution of all issues before me.

[42] In these circumstances I conclude that it would be unfair to the Garcha and Grewal plaintiffs to give deference to the Trustee's factual conclusions on these issues. I am also satisfied that the Trustee has made legal errors that would have led to the allowance of the Bankruptcy Appeals on a true appeal.

[43] I will therefore proceed to determine the issues raised in the Civil Actions *de novo* on the record before me and apply those determinations to decide the outcome of the Bankruptcy Appeals. This will make it unnecessary for me to consider the Bankruptcy Appeals separately.

Credibility

[44] I do not find it necessary to determine all of the credibility issues raised by the parties in their submissions. However, there are a number of credibility findings that I must make at the outset to determine the relevant facts.

[45] The considerations to be taken into account in assessing credibility were reviewed in *Bradshaw v. Stenner*, 2010 BCSC 1398:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202

> (Ont.H.C.); *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.),* 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).
>
> [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd. (1993)*, 1993 CanLII 7140 (AB QB), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.

[46] The most important credibility issue in these proceedings is the extent to which I can rely on Jaswant's oral evidence.

[47] In carrying out his analysis of the Project, the Trustee placed considerable reliance on the information and explanations that Jaswant provided to him. This led the Trustee to conclude that Jaswant was a generally honest debtor whose financial difficulties arose from being undercapitalized and from the general economic conditions created by the 2008 financial crisis.

[48] However, I have come to a different conclusion. I found Jaswant to be a most unsatisfactory witness. His evidence was self-serving, lacked candour, and was in many instances self-contradictory. He also tended to be argumentative rather than answering questions directly. At times he professed to have no memory of events relating to the Project. However, at other times he emphatically testified to events that favoured his position. I also note that he repeatedly testified while being cross-examined by parties adverse to his interests he had no independent memory of events and was almost entirely reliant on documents to answer questions put to him. However, his memory was better when he was cross-examined by counsel for his wife and counsel for the Trustee, who were aligned with him at trial but were entitled to cross-examine him because he was called to testify as an adverse party pursuant to Rule 12-5(20) of the *SCCR*.

[49] In addition, on more than one occasion Jaswant contradicted his previous evidence or the evidence he had given in examination for discovery. As was the case with many of the defendants, when confronted with the inconsistencies in his evidence Jaswant testified that he had been under a lot of stress and was taking medications when he gave his previous evidence. However, he made no attempt to correct any answers given on his previous examinations until confronted with the contradictions at trial, and he did not provide any medical evidence supporting his assertion that his memory had been affected by medications.

[50] In assessing Jaswant's credibility, I also take into account some of his conduct during the Project and in the course of the Bankruptcies that casts doubt on his trustworthiness.

[51] In cross-examination, Jaswant acknowledged as accurate the contents of a letter dated March 12, 2012, addressed to him from Royal Morton, a lawyer at Buckley Hogan. Mr. Morton represented Jaswant in an action brought by Hardeep Singh Gill ("Hardeep Gill") against 690174 with respect to a failed real estate transaction, which I will describe later. Jaswant and 690174 waived solicitor-client privilege over the contents of this letter, and it was admitted into evidence at trial.

[52] In this letter, Mr. Morton confirmed that Jaswant did not wish the other 2007 Joint Venturers to be informed of his post-2007 dealings with Hardeep Gill. Hardeep Gill had obtained a large judgment (the "Gill Judgment") against 690174 in the aforementioned action and registered the judgment against Lot 1, the subject of the 2007 JVA, in the New Westminster Land Title Office.

[53] Jaswant expressed concerns to Mr. Morton about disclosing this fact and other aspects of his financial and legal affairs to the 2007 Joint Venturers. He said that he would look bad within his community if Mr. Morton approached them to obtain affidavits to support Jaswant's evidence that 690174 beneficially owned only 1/23 of the proposed lots to be subdivided from Lot 1 and that the balance of the lots was beneficially owned by the other 2007 Joint Venturers.

[54] This conduct revealed a marked lack of candour on Jaswant's part. It also put the beneficial ownership interests of the 2007 Joint Venturers in Lot 1 at risk by denying them the opportunity to intervene to protect their position with respect to the Gill Judgment.

[55] In addition, Jaswant admitted that he prepared what he knew to be fabricated promissory notes which were certified to be true by Raveen and Parmjit in proofs of claim they filed in the Bankruptcies.

[56] In the 690174 Bankruptcy, Parmjit filed a claim as an ordinary creditor in the amount of $699,590.08, which she certified was based on promissory notes purportedly made on March 31, 2009, for $132,000, and January 1, 2010, for $319,338.55. Both notes provided for interest at 7% per month, which I accept was meant to be 7% per annum. Jaswant executed the notes on behalf of 690174. However, in cross-examination at trial, Jaswant and Parmjit admitted that Jaswant had prepared these notes after 690174 was assigned into bankruptcy on April 21, 2016, and backdated them.

[57] In the Jaswant Bankruptcy, Parmjit swore an affidavit stating that she had contributed one-third of the amount advanced from a joint account in the names of Jaswant, Parmjit, and Raveen as a loan to 690174, and that Jaswant had agreed to guarantee that loan.

[58] However, Parmjit and Jaswant's evidence at trial was that Parmjit had invested these sums in the Project on her own behalf. When cross-examined on this discrepancy and on the dates of the promissory notes, Parmjit described the promissory notes as having been prepared by mistake and stated that she no longer relied on them.

[59] Jaswant prepared similar promissory notes payable by 690174 to Raveen's company, 688350 B.C. Ltd. ("688350"), purportedly dated March 31, 2009, and December 30, 2006. 688350 filed a proof of claim in the 690174 Bankruptcy for principal and interest on those notes to the date of bankruptcy. At trial, Raveen and

Jaswant admitted that these notes had not been prepared until after 690174 had been assigned into bankruptcy.

[60] In my view these documents were an attempt to defraud the creditors of the bankrupt estates. I do not accept the explanations given by Parmjit and Raveen for the creation of these documents. In effect, they testified that they did not understand the process of making a claim in bankruptcy and did not understand the documents that they certified or affirmed. I find that this explanation lacks credibility.

[61] I therefore do not find Jaswant, Parmjit, or Raveen to be witnesses whose evidence I can accept without corroboration.

[62] I found the evidence of the plaintiffs and other defendants generally to be credible, unless I indicate otherwise in the course of these reasons. However, I do recognize that the reliability of all of the oral evidence in this case is affected by the long period of time that has elapsed between the time of the events testified to and the trial. Most of the critical events in this case occurred eight to 15 years before the trial. In addition, I suspect that at times all witnesses were filling in gaps in their memories and were in some instances influenced by what they wanted to remember rather than their actual recollections.

[63] These concerns require me to rely principally on the documentary evidence and on inferences from established facts in making the findings of fact necessary to resolve the issues before me.

Findings of Fact and Chronology of Events

[64] The parties filed an Agreed Statement of Facts at trial. It is neither necessary nor possible to incorporate all of its details in these reasons. Because there is considerable disagreement about the nature of the relationships between the parties and the agreements they made, I will make additional findings of fact necessary to decide those issues in the following chronology of events.

Purchase of Lot 1 and the 2007 JVA

[65] In the 2000s, Jaswant promoted the three land assembly and subdivision developments that are most relevant to these proceedings. Two of the developments were referred to in the evidence as Sangha Groups 1 and 2, and involved the assembly and subdivision of residential lots in Surrey, B.C. The Project was the third development. Jaswant began to pursue the Project at the same time as Sangha Group 2, in or about 2006.

[66] On April 14, 2006, 688350 entered into an agreement with the owners of 13020 60th Ave. to purchase that property, which is referred to throughout these reasons as Lot 1, for $2,700,000. The purchase price was increased to $2,725,000 in subsequent agreements that extended the closing date for its purchase.

[67] Around this time, Jaswant had discussions with the plaintiff Daljit Singh Garcha about investing in real estate. The evidence of Mr. Garcha and Jaswant about the content of these discussions is to some extent contradictory. Mr. Garcha testified that Jaswant told him that he was working to acquire and subdivide Lot 1, and that if he and his wife Jaswinder Kaur Garcha were willing to invest, they could obtain title to seven of the lots to be created from the subdivision of Lot 1 for an investment of approximately $50,000 to $60,000 per lot. It was unclear whether these amounts were in addition to the initial contribution made by the Garchas.

[68] Jaswant's evidence is that he told Mr. Garcha that Lot 1 was to be part of a larger land assembly and subdivision and that the Garchas would receive a proportionate share of the net profits from the sale of the lots to be subdivided from Lot 1. Mr. Garcha denies that Jaswant told him this. I prefer Mr. Garcha's evidence on the issue of whether he was told that Lot 1 was to be part of a larger land assembly. I note that Jaswant's evidence on this issue is inconsistent with his desire expressed to Mr. Morton not to inform the members of the 2007 Joint Venture of his dealings with respect to Lot 1. However, I have concluded that these discussions did not determine the nature of the legal relationship that would pursue the object of subdividing Lot 1. I conclude that in these discussions Mr. Garcha and Jaswant were discussing the general business terms of Jaswant's proposal, but that it was

understood there would be a written document executed that set out their agreement.

[69] As a result of these discussions, the Garchas advanced $150,000 to 688350 on December 28, 2006, and $242,000 to 690174 on March 30, 2007. I find that these funds were used to provide part of the amount due on closing of the purchase of Lot 1 and that Jaswant gave instructions to the Garchas to pay the $150,000 to 688350, telling them that the funds would be used to help pay for the purchase of Lot 1. I also find that the funds the Garchas provided to 690714 and 688350 were provided for the express purpose of acquiring Lot 1.

[70] In addition, it is agreed that other members of what became the 2007 Joint Venture contributed to the purchase of Lot 1. The Mallis advanced $392,000 to 690174 through their company, Joginder Chahal advanced $100,000, and Malkait Bains advanced $56,000. Other members of the 2007 Joint Venture contributed lesser amounts.

[71] 688350 assigned its interest pursuant to the agreement to purchase Lot 1 to 690174, which completed the purchase on April 2, 2007, thereby becoming the registered owner of that lot. I find that 688350 acted as 690174's agent in all respects with regard to the acquisition of Lot 1.

[72] There was considerable evidence led with respect to the amount that 690174 paid to 688350 to obtain the assignment of the agreement to purchase Lot 1. The assignment agreement contemplated that 690174 would pay 688350 an assignment fee of $292,000 in addition to the amount that 688350 was required to pay for Lot 1. 690174 did pay $292,000 to 688350, but almost immediately thereafter 688350 transferred $300,000 to 690174. In the result, these amounts netted out. I find that 688350 did not in fact receive any assignment fee. It is likely that the purpose of the assignment fee was to increase the apparent amount that was paid to acquire Lot 1 to assist in maximizing mortgage financing in aid of the purchase.

[73] By April 2, 2007, the investors in Lot 1 had provided all of the payments outlined above. The funds necessary to purchase Lot 1 were provided by: (i) the

deposit; (ii) a payment from 690174's solicitors, Buckley Hogan, in the amount of $895,724.05; (iii) an official cheque for $25,000; and (iv) mortgage proceeds from a mortgage in favour of IMOR Capital of $1,607,037.96 (the "IMOR Mortgage"). The cash portion of the purchase price was less than the total of the amount received from the persons who became members of the 2007 Joint Venture.

[74] On October 5, 2007, the Garchas, the Mallis, Joginder Chahal, Malkait Bains, Harjinder Bassi, Gurcharan Singh Sandhu, Sarbjit Kaur Basraon and Balraj Basraon, Gurmit Singh and Manisha Sidhu, Sumit Sidhu, and 690174 executed the 2007 JVA.

[75] The effect and scope of the 2007 JVA is very much in dispute in these proceedings. I will address its interpretation later in these reasons.

[76] The following provisions of the 2007 JVA are relevant:

1. Recital B states that the parties have agreed to form the 2007 Joint Venture for the purpose of investing in Lot 1, subdividing it into approximately 22 RF-9 residential lots, and selling the lots.

2. Recital C states that 690174 shall hold legal title to Lot 1 and develop it as bare trustee on behalf of the 2007 Joint Venture.

3. Paragraph 2.2 provides that 690174 acknowledges and agrees that it is holding 20 lots in trust for the 2007 Joint Venturers as bare trustee and that the 2007 Joint Venturers are each beneficial owners of those lots in the ratio of their proportionate shares. The reference to 20 lots appears to have been an error that was corrected to 22 lots in a later amendment executed for that purpose.

4. Paragraph 4.2 provides that the 2007 Joint Venturers each own as tenants in common, as their separate property, an undivided beneficial interest in the Project (defined as the development of Lot 1) and the 2007 Joint Venture assets in the ratio of their respective proportionate shares. To avoid confusion with the Project as defined in paragraph 1 of these

reasons, I will refer to the Project defined in the 2007 JVA as the Lot 1 Project.

5. Paragraph 6.2 provides that Jaswant Sangha be engaged as manager of the Lot 1 Project on terms acceptable to the management committee.

6. Paragraph 8.1 provides for the distribution of all revenue received relating to the Lot 1 Project, firstly to pay secured creditors of the Lot 1 Project, secondly to pay all unsecured claims against the Lot 1 Project, and thirdly to distribute the net proceeds to the 2007 Joint Venturers in accordance with their proportionate shares.

[77] The agreement also contained detailed provisions for funding of Lot 1 Project expenses and remedies on default.

[78] I find that although the 2007 JVA was dated six months after the acquisition of Lot 1, it was at all times agreed that the terms under which Lot 1 would be acquired and developed would be set out in a written agreement and that the rights and obligations of the parties with respect to Lot 1 would be and are governed by the terms of the 2007 JVA.

[79] I find that Jaswant and 690174 undertook responsibility for the management of the Lot 1 Project. From the outset, Jaswant made all decisions with respect to the development of Lot 1 without consulting with the other 2007 Joint Venturers or obtaining any prior approval for his decisions, even though the terms of the 2007 JVA required authorizations to make major decisions about the Lot 1 Project.

[80] The IMOR Mortgage required payment of interest at a high rate. Jaswant negotiated two further mortgages over Lot 1 to replace the IMOR financing. The first replacement mortgage was registered on November 1, 2007, in favour of Pacific Coast Mortgage Investment Corporation (“PMIC”). The Garchas executed this mortgage as covenantors on or about October 3, 2007. This mortgage was also secured by what would become known as Lot 2, one of the other lots assembled for the Project, and by a mortgage granted by the Mallis over their home.

[81] This mortgage was in turn replaced by a mortgage to PMIC registered on July 7, 2009, which was also secured by Lot 2, a half interest in the Mallis' home, and the home in which Jaswant and Parmjit lived. Although she did not live there, Raveen was the registered owner of the property on which Jaswant and Parmjit resided, and she was accordingly required to execute that mortgage. The Garchas executed this mortgage as covenantors, thereby assuming personal responsibility for its repayment, as they had with the two previous mortgages.

[82] Paragraph 2.2 of the 2007 JVA was amended in January 2010 to make it clear that the Joint Venture participants other than 690174 were entitled to a proportionate share of 22 lots, not 20 lots as previously stated. The 2010 amendment, which was executed by 690174, repeated that 690174 held legal title to Lot 1 as bare trustee on behalf of the 2007 Joint Venturers.

Purchase of Lots 2 to 4 and the November 2010 JVA

[83] Jaswant arranged the purchase of 3 additional lots (Lots 2 to 4) between 2007 and 2010.

[84] On August 22, 2006, 688350 contracted to purchase what became Lot 2 for $1,250,000. The agreement required a deposit of $150,000 within 48 hours of subject removal and was to complete on March 31, 2007. This deposit was paid by 688350 on or about December 6, 2006.

[85] On April 27, 2007, 690174 transferred $300,000 into the account of Parkwood Developments, an entity apparently associated with the defendant Ranjit. On April 30, 2007, 690174 advanced $27,886.96 to its solicitors, Buckley Hogan, and Ranjit advanced $345,000 from the Parkwood Developments account to Buckley Hogan to acquire Lot 2. The balance of the purchase price was paid from the proceeds of a mortgage in favour of TD Canada Trust in the amount of $750,000.

[86] The purchase of Lot 2 closed on April 30, 2007, when a transfer of one undivided half interest to Jaswant and Parmjit as joint tenants and the other half interest to Ranjit and Svender as joint tenants was registered. No documentation was put in evidence with respect to the transfer of the purchase agreement from

688350 to the ultimate purchasers. As with Lot 1, I am satisfied that 688350 acted on behalf of and at the direction of Jaswant in all of its dealings with Lot 2.

[87] On August 4, 2007, 690174 made an agreement to purchase what came to be known as Lot 3 for $1,350,000. 690174 paid the required deposit of $225,000 in four installments between August 7, 2007, and March 7, 2008. On March 12, 2008, 690174 assigned the purchase contract to Jaswant. On June 23, 2008, 690174 advanced a total of $211,490.70 to Buckley Hogan towards the purchase of the lot.

[88] The purchase of Lot 3 completed on June 23, 2008, when title was transferred into the names of Jaswant and Parmjit as joint tenants. The funds necessary to pay the purchase price came from the advances made by 690174 described in the preceding paragraph and from the proceeds of a mortgage in favour of the Royal Bank of Canada in the principal amount of $945,000.

[89] On March 11, 2008, Jaswant made an agreement to purchase what became known as Lot 4 for $1,445,000. 690174 paid the required deposit of $100,000 by an official cheque that had been issued on February 16, 2008. On August 4, 2008, 690174 advanced $388,227.53 to Buckley Hogan to pay part of the purchase price for the lot. On August 8, 2008, title to Lot 4 was transferred into the names of Wills and Dale as joint tenants as to a half interest and Jaswant as to the other half interest. The balance of the purchase price above the funds provided by 690174 came from the proceeds of a mortgage in favour of Gulf & Fraser Fisherman’s Credit Union in the amount of $994,196.25. Wills and Dale gave their covenants to pay this mortgage, which of course charged their registered interest in Lot 4.

[90] By 2010, Jaswant had organized the acquisition of Lots 1 to 4 and had reached an agreement with the owner of an additional lot (Lot 5), Satgur Investments Ltd. (“Satgur”), to contribute that lot to the Project and participate in the Project as a joint venturer. At some point, a draft joint venture agreement was prepared which included Satgur as a participant, but later, probably in the summer of 2010, Satgur decided not to participate.

[91] On November 15, 2010, 690174, Panorama, Jaswant, Wills and Dale, Parmjit, Ranjit, and Svender executed the November 2010 JVA.

[92] The terms of the November 2010 JVA were very similar to those of the 2007 JVA. Paragraph 4.1 sets out the proportionate shares of the November 2010 Joint Venturers in the Project. By the express terms of the November 2010 JVA, each November 2010 Joint Venturer became the beneficial owner of its proportionate share of all of the Lots involved in the Project. Paragraph 4.2 of the November 2010 JVA is identical to paragraph 4.2 of the 2007 JVA, reading as follows:

> 4.2 The Joint Venturers each own as tenants-in-common, as their separate property, an undivided beneficial interest in the Project and the Joint Venture Assets in the ratio of their respective Proportionate Shares.

[93] I will refer to the mortgages taken out to purchase Lots 1 to 5 as each of the "Acquisition Mortgages". Lots 1 and 5 were each approximately twice as large as the other three lots. Accordingly, they were considerably more expensive to acquire.

Project financing

[94] It is quite clear from the evidence that the Project was undercapitalized from the outset and that Jaswant needed investors to pursue it. This problem continued throughout the Project, but arose most frequently when Jaswant needed funds to close on the purchase of each of the 5 Lots, and later when charges were registered in the New Westminster Land Title Office against title to some of the Lots.

[95] In the preceding paragraphs I outlined how funds flowed to purchase Lots 1 to 4. However, the evidence with respect to the actual source of the funding, with the exception of Lot 1, is incomplete and confusing. The Trustee prepared a number of schedules with respect to the financing of the acquisition of Lots 2 to 4. Unfortunately, those schedules are of limited utility because they do not show the source of the funds used by the purchasers of the Lots. For example, the Trustee stated that 690174 contributed all of the funds for the down payment required to purchase Lots 3 and 4 because they were paid out of 690174's bank account. However, a significant portion of these funds were said to be profits from Sangha Groups 1 and 2, and there is evidence, which I will refer to later, indicating that

$500,000 of the proceeds from Sangha Group 2 had previously been assigned to Mr. Mattu as an investment in the Project.

[96] Similarly, in Schedule 1 to the Trustee's Ninth Report, prepared at my request, the Trustee credited Panorama with contributing $729,936.70 to the acquisition of Lot 5, consisting of the $300,000 deposit paid on the purchase price and $428,936.70 provided at closing. However, the evidence is clear that $200,000 of the deposit came from funds provided by 0892995 and the balance came from deposits paid directly to Panorama from purchasers of lots to be created from the ultimate subdivision of the Project. Panorama had no right to use those deposits for its own benefit because they were by that time the property of the November 2010 Joint Venture. I have no difficulty in finding that Panorama contributed at most $100,000 of its own funds to the purchase of Lot 5.

[97] In addition, it is difficult to reconcile the amounts that the Trustee credited to 690174 as contributions to the Project with the Trustee's conclusion in his Preliminary Report that the net amount, after repayments, of Sangha family contributions to 690174 and Panorama from the Sangha family joint account was only $63,365. While this calculation does not take into account contributions from Sangha Groups 1 and 2, there still remains great uncertainty as to the actual net amount of Sangha family contributions to the Project.

Acquisition of Lot 5 and the 2011 JVA

[98] As stated above, it was originally contemplated that Satgur would participate in the Project by contributing Lot 5, which it owned, in exchange for a 28.5% proportionate share. However, at some point in 2010 Satgur withdrew from the Project.

[99] This meant that the Project required additional funds to remain viable and, in particular, to purchase Lot 5 from Satgur. Although scant attention was paid to Satgur's withdrawal in the evidence, it obviously put further financial pressure on the Project. Lot 5 was one of the two larger Lots and was of vital importance to the

Project. Instead of Satgur providing Lot 5 as its contribution to the Project, Jaswant was forced to find additional capital to purchase it.

[100] The November 2010 JVA contemplated Panorama's acquisition of Lot 5 and its utilization in the Project. However, I find that from 2010 to 2011, Jaswant and Panorama lacked the funds necessary to complete its purchase.

[101] On August 20, 2010, Panorama entered into an agreement with Satgur to purchase Lot 5 for $3,300,000. Although it was not expressly set out in the evidence, it appears that Panorama was incorporated to purchase Lot 5. The purchase agreement required Panorama to provide a deposit of $300,000 by August 30, 2010. I find that Jaswant did not have sufficient funds to pay the deposit on that date. However, he was able to extend the payment date to November 17, 2010.

[102] Panorama's lack of funds also resulted in extensions of the closing date for the purchase of Lot 5. On April 5, 2011, Satgur and Panorama agreed to extend the completion date to June 30, 2011.

[103] In or before June 2010, Jaswant began to sell and receive deposits from persons who signed agreements to purchase lots that were to be subdivided from the Project. Most of these agreements showed Panorama as the seller. Instead of holding the deposits in trust, Panorama used them as part of the funds required to complete the purchase of Lot 5. By June 30, 2011, Panorama had deposited $516,000 in presale deposits into its Coast Capital Savings Account, which it provided to Buckley Hogan to partially fund the purchase.

[104] In June 2011, Jaswant asked Mr. Mattu to assist him in finding the additional funds necessary to complete the purchase of Lot 5. Mr. Mattu then introduced Jaswant to the plaintiff Jasprit Grewal.

[105] After some discussion, Mr. Grewal agreed to invest in the Project, utilizing his company, Grewal Management. Mr. Grewal's counsel summarized his evidence about his discussions with Jaswant as follows:

> Mr. Grewal described the meeting at Lot 1, at which Mr. Sangha indicated the neighboring lot, Lot 5, had to be purchased for the Project and that he and his

> companies had purchased the other four lots. They exchanged telephone numbers, and Mr. Grewal left to think about the proposal. In a subsequent phone call, Mr. Sangha told Mr. Grewal that Mr. Grewal's $1.6 million contribution to the purchase of Lot 5 would be considered an investment in the Project, that Mr. Sangha would arrange for the paperwork to get ready for subdivision, Mr. Sangha would keep accounting records, Mr. Sangha and his companies would get the lands subdivided and bring fully-serviced lots to market, after which Mr. Grewal would receive a share proportionate to his financial contribution to the Project.

[106] This is an accurate summary of Mr. Grewal's evidence, which I accept to be true.

[107] Mr. Grewal testified that in a discussion a day or so later, Jaswant repeated this description of the proposal and confirmed that he would be responsible for completing the subdivision and selling lots. Mr. Grewal also stated that Jaswant assured him that he would keep accurate records of all expenses and that when the Project was completed there would be an accounting with the profits, after payment of all Project expenses, divided according to proven contributions to the Project.

[108] In these discussions, Jaswant was seeking Mr. Grewal's agreement to provide one half of the money needed to close the purchase of Lot 5. Jaswant told Mr. Grewal that he would provide the other half of the necessary funds. These discussions all occurred a short time before the completion date of June 30, 2011.

[109] On or about June 29, 2011, Panorama assigned a 50% interest in the contract to purchase Lot 5 to Grewal Management.

[110] At that time, Mr. Grewal's understanding was that Lot 5 was to be purchased for cash without obtaining any mortgage financing. However, shortly before the completion, Mr. Grewal learned that Panorama would be financing its half of the purchase through a mortgage from Manjeet Kaur Samra, Aman Mander, Azad Mander, and Ravinder Mander (the "Mander Mortgage"), to be secured against a 100% interest in Lot 5. On closing, title to Lot 5 was transferred to Panorama and Grewal Management, with each company having a 50% registered interest as tenants in common. Grewal Management was named as a mortgagor on the Mander Mortgage.

[111] The purchase of Lot 5 completed on June 30, 2011. On that date Grewal Management advanced $1,687,556.50 and Buckley Hogan provided $428,936.70 to pay part of the purchase price for Lot 5. The balance of the funds required to pay the purchase price came from the deposit and the proceeds of the Mander Mortgage in the principal amount of $1,000,000.

[112] Based on the evidence before me it therefore appears that, with the possible exception of $100,000, Panorama did not provide any of its own funds or any funds provided by Jaswant or other companies he owned for the purchase of Lot 5. Panorama's contribution to the amount necessary to complete the purchase of Lot 5 came from the proceeds of the Mander Mortgage, the deposits from purchasers referred to above, and the initial deposit of $300,000, $200,000 of which came from the funds 0892995 had provided to the October 2010 Joint Venture.

[113] On or about June 30, 2011, Grewal Management and the November 2010 Joint Venturers executed the 2011 JVA.

[114] The 2011 JVA divided Panorama's 28.5% proportionate share in the November 2010 Joint Venture in half, resulting in Panorama's and Grewal Management's respective shares being 14.25%. It also provided that all of the terms of the November 2010 JVA not expressly amended remained in full force and effect.

[115] Counsel has accurately summarized Mr. Grewal's evidence that Jaswant made the following statements to him in June 2011, some of which I have already discussed and some which I will address later in these reasons:

1. Jaswant reassured Mr. Grewal that the same terms in their oral agreement were applicable and Mr. Grewal understood that the registered owners would hold the land in trust;

2. Jaswant did not inform Mr. Grewal about the 2007 JVA or the Garchas' interest in the Project;

3. Jaswant told Mr. Grewal that he had paid the deposit for Lot 5; and

4. Jaswant told Mr. Grewal that Lots 1 to 4 in the Project had been purchased by him and his companies.

[116] I accept that Jaswant made the above statements to Mr. Grewal. I also accept that Jaswant did not inform Mr. Grewal about the Gill Judgment or Ms. Johl's certificate of pending litigation (both discussed below), each registered on certain Project lands.

[117] Mr. Grewal also testified that he had not seen the November 2010 JVA when he signed the 2011 JVA. While I accept his evidence to this effect, I do note that the 2011 JVA makes express reference to the November 2010 JVA and that there is no evidence that Mr. Grewal asked to see that document.

Mr. Mattu's investment

[118] Mr. Mattu invested in the Project before the execution of the November 2010 JVA and before Rajpreet became an investor. In or about 2007, Jaswant requested that Mr. Mattu advance him $400,000 as a loan, in consideration of which Jaswant would pay $500,000 to Mr. Mattu from the profits from Sangha Group 2. Later, Jaswant and Mr. Mattu agreed that rather than paying him $500,000, Jaswant would convert that amount into an investment by Mr. Mattu in the Project. Jaswant acknowledged in cross-examination that he and Mr. Mattu had agreed that the $500,000 would be converted into an investment in the Project, albeit on different terms than alleged by Mr. Mattu.

[119] Mr. Mattu made a number of advances in addition to the $500,000 of Sangha Group 2 proceeds. He testified that, with the exception of some funds advanced to Jaswant for the rebuilding of a house that had been damaged by fire, all of his further advances were made as an investment in the Project. However, Jaswant testified that at a certain point he and Mr. Mattu agreed that Mr. Mattu would become his "silent partner" in all of his real estate investments.

[120] In cross-examination, Jaswant admitted to agreeing with Mr. Mattu that $500,000 of the net proceeds from Sangha Group 2 was to be invested on

Mr. Mattu's behalf in the Project. I accept his evidence on this point, quoted from Mr. Mattu's counsel's argument:

> Q. Mr Sangha, I just want to clarify this: in the responses you just gave, am I correct that what you're testifying is this, when there funds flowing to 690 from the Sangha Group 2 subdivision, $500,000 of that money that came out of Sangha Group 2 subdivision was invested in the 60th Avenue subdivision on behalf of Mr. Mattu?
>
> A. Yes, that's correct.

[121] I am satisfied that the arrangements made with respect to obtaining Mr. Mattu's $500,000 investment and a further $488,791.45 advance on February 15, 2008, materially assisted in the acquisition and carrying costs of the Lots that went into the Project. On a balance of probabilities, given the proximity between the date of the further advance and the dates of June 23 and August 8, 2008, when 690174 advanced $211,490 and $388,227.53 to Buckley Hogan for the purchase of Lots 3 and 4, I find that most of Mr. Mattu's 2008 advance was used to pay the cash due on closing of those Lots. I also conclude that a number of further advances made by Mr. Mattu were used by 690174 or Jaswant to pay interest and other Project expenses.

[122] Jaswant's evidence about when the partnership he alleges with Mr. Mattu was formed is somewhat confusing. He denies that Mr. Mattu was his partner in Sangha Group 1 or 2. The thrust of his evidence appears to be that the partnership came into existence at or about the time that Jaswant became involved in another deal with Hardeep Singh Gill to have 690174 purchase land in Maple Ridge from Mr. Gill.

[123] Mr. Mattu testified that no such agreement was made. Except where I expressly state otherwise, I prefer the evidence of Mr. Mattu when it conflicts with that of Jaswant on this issue.

[124] The Trustee submits that Mr. Mattu admitted he was Jaswant's silent partner to Jaswant's lawyer, Sean Hogan. I accept that Mr. Mattu described himself as a silent partner in a telephone conversation with Mr. Hogan on or about February 21, 2014. This conversation occurred in the context of the preparation of mortgage

documents over the phase 1 lots created by the Project in favour of the 2011 Joint Venturers.

[125] My conclusion, based on the evidence and the inherent unreliability of Jaswant's testimony, is that his testimony that Mr. Mattu was his silent partner in all of his dealings was not true. There is no written partnership agreement between Jaswant and Mr. Mattu. Jaswant did not communicate the existence of any such partnership with Mr. Mattu to anyone prior to this litigation. In particular, Jaswant did not disclose the existence of this partnership to the Trustee or in his statement of affairs in his bankruptcy. If such a partnership existed, it was Jaswant's legal duty to disclose it to the Trustee at the outset of his bankruptcy. He did not.

[126] Mr. Hogan prepared a memorandum of his dealing with respect to the mortgage described in para. 124. In that memorandum he recorded that his assistant had received instructions from Mr. Grewal and Ranjit to add Mr. Mattu as a mortgagee on the mortgage that was being prepared.

[127] Mr. Hogan was called as a witness by the defendants who introduced the memorandum into evidence. In my view the memorandum gives some insight into the nature of Mr. Mattu's involvement in the Project. While Mr. Hogan's assistant was not called as a witness, I am satisfied that the memorandum does accurately record the events leading up to its preparation.

[128] The memorandum states that it was Mr. Grewal and Ranjit Sangha who had first described Mr. Mattu as a silent partner. The context in which this statement was made makes it obvious that they were referring to Mr. Mattu as a silent partner in the Project. It is also apparent that by the time this memorandum was prepared in February 2014, there were financial pressures being put on the Project and that Mr. Mattu was attempting to document and protect his investment.

[129] I am satisfied that when Mr. Mattu referred to himself as Jaswant's silent partner in his phone call with Mr. Hogan he was referring to his investment in the Project and his attempt to be added to the mortgage over the subdivided lots. That conclusion is consistent with the subject matter of the discussion, because it

appears that Mr. Mattu was attempting to obtain the same security for his advances to the Project that the registered members of the 2011 JVA were pursuing.

[130] There is no doubt that Mr. Mattu became heavily involved in the affairs of the Project as time went on. However, in my view, that involvement was consistent with his evidence that he agreed to become involved in the pursuit of the Project and that he had advanced a considerable amount of money to the Project by 2014.

[131] Mr. Mattu's investment was not a loan. There was no evidence that Jaswant or any of his companies assumed any obligation to repay Mr. Mattu's advances, nor was there evidence of any of the usual terms of a loan, such as the rate of interest.

[132] For reasons I will set out later, I have concluded that the agreement made between Mr. Mattu and Jaswant had all of the essential elements of a joint venture agreement pursuant to which Mr. Mattu acquired a beneficial interest in the Project.

[133] There is some dispute between Mr. Mattu and the Trustee over the actual amount Mr. Mattu advanced to the Project. Mr. Mattu submits that the net amount advanced on his behalf, after taking into account funds he received back, was $1,280,350.20. The Trustee's submission is that the net amount of Project-related advances was $894,991.25. The parties are in agreement on the amount of payments back to Mr. Mattu. However, they do not agree that all amounts advanced by Mr. Mattu were advanced for the benefit of the Project.

[134] In 2008, Mr. Mattu raised $488,791 to invest in the Project by mortgaging a property he owned. I agree with the Trustee's submission that the expenses incurred by Mr. Mattu in obtaining that mortgage should not be considered to be an investment in the Project. Mr. Mattu's key allegation is that he invested pursuant to an agreement that the investment would entitle him to an interest in the Project. In my view, the costs associated with raising the funds to be invested should be for Mr. Mattu's account and not treated as a Project investment.

[135] I therefore agree with the Trustee that the following expenses should be deducted from Mr. Mattu's investment:

1.	July 10, 2009: Cunningham and Rivard Appraisal	$870
2.	September 3, 2009: further appraisal fee	$1500
3.	September 9, 2009: Cheque to Hashmi relating to refinancing	$108,000
4.	September 29, 2009: Cunningham and Rivard	$1,938.75

[136] In addition, I agree with the Trustee that the advances on October 25, 2007, of $80,000 and December 5, 2007, of $26,000 have not been shown to relate to the Project and should not be allowed.

[137] I accept Mr. Mattu's evidence that the balance of the amounts he lists were advanced as an investment in the Project. I therefore find that Mr. Mattu's investment, net of repayments, was $1,062,041.45.

[138] On the evidence, it is clear that the funds advanced by Mr. Mattu made a material contribution to the acquisition of Lots 2 to 4 and to the successful completion of the Project.

Rajpreet Sangha's investment

[139] I accept Rajpreet's evidence with respect to his investment in the Project.

[140] In September or October 2010, Mr. Mattu asked Rajpreet if he would be interested in investing in a real estate project. Mr. Mattu knew Rajpreet because he had made deliveries to Rajpreet's convenience store. When Rajpreet expressed interest, Mr. Mattu introduced him to Jaswant.

[141] Jaswant came to Rajpreet's house and told him that he had the right to acquire lots in a subdivision project. Jaswant described the Project and proposed that Rajpreet, Mr. Mattu, and himself each put up $800,000 to acquire 7 lots each from the subdivided lots to be created by the Project. Rajpreet went to view another

project that Jaswant was involved in at 50th Ave. and Number 10 Highway and decided to invest in Jaswant's proposal. Rajpreet asked Jaswant how to do so and Jaswant advised him to set up a company to make the investment. Rajpreet then incorporated 0892995. Jaswant told him that he would arrange for an agreement to be drawn up and would be responsible for taking all necessary steps to complete the proposed agreement.

[142] Jaswant arranged a meeting at Buckley Hogan in October 2010 where the October 2010 JVA was signed by 0892995, 0731431 (Mr. Mattu's company), and Panorama. Rajpreet testified that Mr. Mattu and Jaswant agreed to contribute $800,000 to the October 2010 Joint Venture. This evidence is consistent with the terms of the October 2010 JVA.

[143] The October 2010 JVA stated that it was formed for the purpose of acquiring certain subdivided lots in the Project, building homes on those lots, and selling them. The Preamble to the agreement stated that Panorama had the beneficial right to acquire those lots. Each party agreed to advance a minimum of $800,000 to be used for the purpose of pursuing the objects of the joint venture.

[144] The October 2010 JVA contained terms relevant to the issues in these proceedings, including:

1. In paragraphs 4.1 and 4.2, the October 2010 Joint Venturers agreed that each owned as tenants in common as their separate property an undivided beneficial one-third interest in the in the assets of the October 2010 Joint Venture.

2. Paragraph 9.4 provided that all receipts and disbursements with respect to the October 2010 Joint Venture would be made to a separate bank account maintained solely for that purpose.

[145] A few days after the October 2010 JVA was signed, Jaswant asked Rajpreet for $200,000. On or about October 25, 2010, 0892995 provided Panorama with a bank draft for $200,000. I find that these funds were provided pursuant to the terms of the October 2010 JVA. However, Jaswant did not use them for that purpose. It is

not disputed that all of those funds were instead used as part of the deposit paid for the purchase of Lot 5. I find that Jaswant did not seek or obtain Rajpreet's consent to use the funds for that purpose.

[146] In December 2010, Jaswant told Rajpreet that lots in another project in which he was involved were not selling and that he could not come up with his contribution to the October 2010 Joint Venture. Mr. Mattu said that he would not contribute his $800,000 if Jaswant did not provide his funds. However, Jaswant said he had a new proposal for Rajpreet. He proposed that instead of investing in the October 2010 Joint Venture, Rajpreet should invest in the Project.

[147] Jaswant's proposal was that the funds that 0892995 has already provided, together with an additional $600,000, would be invested in the Project and that the profits from the Project would be divided in accordance with the contributions of each investor. Rajpreet agreed to proceed on that basis, providing Panorama with a bank draft for $300,000 and sometime later with $300,000 in cash.

[148] I find that Rajpreet provided these funds as an investment in the Project. I also infer that it was understood that the funds would be invested on the same terms as the October 2010 JVA; that is, that Rajpreet's investment would entitle him to a beneficial ownership interest in the Project based on his contribution.

[149] On November 17, 2010, Panorama paid a deposit of $300,000 on account of the purchase price for Lot 5. It is clear that $200,000 of that amount came from funds advanced by 0892995 pursuant to the October 2010 JVA.

[150] Schedule 6 of Exhibit 175, the Trustee's Summaries, indicates that $50,000 was transferred from Best Quality Homes Ltd. to Panorama on May 2, 2011, and that $10,000 was transferred on April 14, 2011. The Trustee attributes these transfers to funds provided by Rajpreet. Thus, even using the first in, first out ("FIFO") method of accounting used by the Trustee, which for reasons I will set out below I do not agree with, some $260,000 of funds provided by Rajpreet have been shown to have been used to acquire Lot 5.

[151] Jaswant may have used some of the funds advanced by 0892995 for purposes other than the Project. The evidence before me does not disclose what exactly Panorama used those funds for. However, I infer that most of the funds he provided were used to finance expenses related to the Project.

[152] By the time that Rajpreet made his last advance of $300,000, the November 2010 JVA had been executed. Therefore, the only means by which he could participate in the Project was by acquiring an interest in the November 2010 Joint Venture.

[153] I accept Rajpreet's evidence that he was not aware of the terms of the November 2010 JVA. However, I find that he had a reasonable expectation, based on Jaswant's proposal, that he would participate in the Project through having a proprietary interest in its assets.

[154] Jaswant admits to receiving $800,000 from Rajpreet and 0892995 but denies that he agreed that the advances were an investment in the Project. However, Jaswant was unable to give any other explanation as to the basis on which he obtained Rajpreet's funds.

[155] I am satisfied on the evidence that Jaswant was in need of funds to acquire Lot 5 when he made the agreements with Rajpreet and obtained his investment. I am also satisfied that a substantial portion of the funds advanced by Rajpreet made a direct contribution that was vital to the success of the Project, including paying the deposit for the purchase of Lot 5 and a substantial portion of the development costs for that Lot.

[156] By the time the November 2010 JVA was executed, 690174 had already acknowledged that it held title to Lot 1 as bare trustee for the participants in the October 2007 JVA. In addition, Panorama had also agreed that it would hold title to certain lots that it would receive from the subdivision of the 5 Lots as bare trustee for the participants in the October 2010 JVA. Jaswant and Mr. Mattu had also made the agreement whereby Mr. Mattu had invested more than $1,000,000 in the Project.

[157] Notwithstanding these previous agreements, in the November 2010 JVA 690174 covenanted that it was the beneficial owner of Lot 1 and Panorama covenanted that it had the right to become the beneficial owner of Lot 5. On the evidence before me the covenant with respect to Lot 1 was demonstrably untrue and the covenant with respect to Lot 5 was misleading because Panorama lacked the funds necessary to purchase Lot 5.

[158] In the result, by June 30, 2011, Jaswant and his companies had entered into a number of agreements with respect to the Project that conflicted with each other. This litigation arises as a direct consequence of those actions.

The Gill Judgment and Johl claim against 690174

[159] The Gill Judgment and the Johl Certificate of Pending Litigation are of fundamental importance to these proceedings. I will therefore describe them in some detail.

[160] 690714 appears to have been Jaswant's main operating company before he became involved in the Project. Notwithstanding the fact that 690174 agreed to hold legal title to Lot 1 in trust for the October 2007 Joint Venturers, Jaswant continued to carry on business unrelated to the Lot 1 Project in that company. He also failed to take any steps to insulate Lot 1 from 690174's other business activities, such as, for example, transferring the legal title to Lot 1 to another single-purpose legal entity.

[161] On or about November 19, 2007, one month after the 2007 JVA was executed, Jaswant caused 690174 to enter into an agreement with Hardeep Singh Gill to purchase property from him for development purposes. For reasons that were not put into evidence, 690174 did not complete its contract to purchase that property. As a result, Mr. Gill commenced an action against 690174 in this Court on May 12, 2009, alleging that 690174 had breached its contract to purchase the property and seeking specific performance or damages in lieu thereof for the breach.

[162] 690174 filed a statement of defence in the action on June 9, 2009, but on November 27, 2009, Mr. Gill obtained a judgment against it in the amount of approximately $750,000, plus costs.

[163] On December 1, 2009, Mr. Gill registered the Gill Judgment against Lot 1 in the Land Title Office. I find that Jaswant was fully aware of this action and of the 2009 registration of the judgment. Pursuant to s. 89(2) of the *Court Order Enforcement Act,* R.S.B.C. 1996, c. 78, the Registrar of Land Titles must send a notice of the registration of a certificate of judgment together with a copy of the certificate of judgment to the registered owner of the property against which it has been registered. I therefore infer that Jaswant was aware of the registration of the Gill Judgment in January 2010, when he had the 2007 Joint Venturers execute the amendment to the 2007 JVA. I find that Jaswant did not inform the other 2007 Joint Venturers of the registration of the Gill Judgment at that time or thereafter.

[164] On October 14, 2010, Sarabpaul Kaur Johl commenced an action against 690174 and Jaswant seeking an order for specific performance or damages in lieu thereof in respect of an agreement she alleged she had made to purchase a lot that was to be subdivided from Lots 1 and 2 of the Project. Pursuant to this action, Ms. Johl filed a Certificate of Pending Litigation against Lots 1 and 2 in the Land Title Office on October 27, 2010 (the “Johl CPL”). I note that this was very close in time to the October 2010 JVA.

[165] It is common ground that the registration of the Gill Judgment and the filing of the Johl CPL prevented the registration of any subdivision plan as long as they remained registered. It is also clear that no institutional financing could have been obtained on the security of lands registered in the name of 690174 or the registered owners of Lot 2 as long as these charges remained on title to the Project lands.

[166] I find that Jaswant did not disclose the Gill Judgment or the Johl CPL to the Garchas, Mr. Grewal, or Rajpreet prior to June 2011. However, it is probable that Mr. Mattu was aware of them because of his involvement in the Project.

The Virk Mortgage

[167] Despite the registration of the Gill Judgment and the Johl CPL, Jaswant continued with efforts to complete the subdivision of Lots 1 to 5. However, it was critical that these charges be removed from title before the subdivision could be

completed. To that end, in the fall of 2011 Jaswant arranged a loan from Jatinder Virk, Mr. Grewal's sister-in-law, in the amount of $900,000 to provide security for the discharge of the Gill Judgment and Johl CPL.

[168] A number of complex steps were taken to provide security for the loan from Ms. Virk without the registration of a mortgage against Lots 1 to 5. The loan was structured as a loan to Mr. Mattu, his wife, and Raveen, secured by a mortgage over two properties owned by the Mattus and the property registered in Raveen's name on which Jaswant and Parmjit resided. Mr. Mattu and his wife were named as co-borrowers on this mortgage. This mortgage was registered in the New Westminster Land Title Office on October 14, 2011.

[169] As further security for her loan, Ms. Virk was granted two unregistered mortgages over a number of properties, including Lot 1, Lot 3, the undivided half interest in Lot 5 registered in Panorama's name, Jaswant's interest in Lot 4, and Jaswant and Parmjit's interest in Lot 2.

[170] The unregistered mortgages were executed on October 13, 2011, and were held in escrow by a law firm in Surrey subject to conditions for release to the mortgagee on certain events of default.

[171] The proceeds of the Virk mortgage were used to provide security to discharge the Gill Judgment and the Johl CPL from title to the affected properties, thus permitting the Project to move forward. However, the success of the Project thereby depended on its completion and sale before the Virk mortgage became enforceable. In addition, the Virk Mortgage added over $1,000,000 in debt secured by some of the Project lands, including Lot 1.

[172] In these proceedings Jaswant has acknowledged that the Virk Mortgage was his responsibility because it was taken out to satisfy an obligation that was unrelated to the Project and for his sole benefit.

[173] I take Jaswant's statements to be an acknowledgement that he was using Lot 1 for an improper purpose. I find that he was aware of the impropriety of his actions at the time he undertook them.

[174] The arrangements made with Ms. Virk did however permit mortgage financing to be obtained and allowed the subdivision to proceed.

The Ludu Mortgage

[175] On December 9, 2011, Jaswant and Parmjit granted a mortgage of Lot 3 to Rattan Singh Ludu, securing the principal amount of $270,250 with an annual interest rate of 25% (the “Ludu Mortgage”).

[176] The Ludu Mortgage was granted after the execution of the joint venture agreements and, in particular, after Jaswant and Parmjit had agreed that their legal title to Lot 3 was held beneficially for all of the members of the 2011 Joint Venture.

[177] The proceeds of the Ludu Mortgage were paid to Jaswant and Parmjit. There is no evidence that the proceeds of the Ludu Mortgage were used in the Project. In his Preliminary Report, the Trustee stated that little is known about this mortgage. However, in the Agreed Statement of Facts the parties agreed that on December 12, 2011, the solicitors who acted on behalf of the mortgagee issued a cheque for $250,000 to Jaswant and Parmjit. I find that this cheque was the net amount advanced under the Ludu Mortgage and that Jaswant and Parmjit have not shown that these funds were used in the Project.

The WSCU mortgages

[178] On February 10, 2012, Westminster Savings Credit Union (“WSCU”) issued a commitment letter to 690174 and the other 2011 Joint Venturers granting approval of development financing to complete the Project. Mr. Grewal and his wife Gurmeet Grewal (the “Grewal Guarantors”) agreed to guarantee the WSCU financing. The commitment letter provided for a first advance to discharge all Acquisition Mortgages. It also provided for subsequent advances pursuant to a development mortgage.

[179] On March 19, 2012, WSCU advanced the sum of $6,603,604.65 pursuant to its mortgage. This advance paid out the outstanding balances on all of the Acquisition Mortgages.

[180] The following table sets out the amount advanced under each of the Acquisition Mortgages and the amounts advanced to pay out the outstanding balances owing, as set out in the Agreed Statement of Facts:

Acquisition Mortgage or Replacement	**Original Balance**	**Paid March 2012 (to nearest dollar)**
1. PCMIC Mortgage Lot 1	$1,750,000	$1,948,596
2. TD Canada Lot 2	$750,000	$668,951
3. RBC Lot 3	$945,000	$845,029
4. G&F Credit Union Lot 4	$994,196	$927,041
5. Mander Mortgage Lot 5	$1,000,000	$1,115,974

[181] In addition, $740,498 was paid to Grewal Management, $322,206 was used to repay the Ludu Mortgage, and $34,905 was paid to the City of Surrey for taxes from the proceeds of the WSCU Mortgage.

[182] On June 13, 2012, the 2011 Joint Venturers executed a further mortgage in favour of WSCU to provide construction financing of up to $6,082,500 for the Project. In connection with this mortgage, the 2011 Joint Venturers also executed a construction loan agreement setting out the terms on which funds would be advanced. As part of the financing arrangements with WSCU, a Project chequing account was established at WSCU. Cheques drawn on this account required the signatures of any two of Jaswant, Ranjit, and Mr. Grewal. While it is not expressly set out in the evidence, it appears that Project expenses from that date forward were paid from this account.

The Land Swap Agreement and subdivision

[183] As part of the Project, Jaswant negotiated a land swap agreement (the “Land Swap Agreement”) with the Anglican Diocese of New Westminster, whereby a portion of Lot 1 was exchanged for a portion of a large lot owned by the Diocese

adjacent to Lot 1. This swap increased the number of subdivided lots that could be created from the Project.

[184] The Land Swap Agreement was dated June 1, 2011, but was actually executed on or about January 3, 2012. It contemplated 690174 acting as a developer and registering certain subdivision plans to give effect to the agreement. As part of that process the 2011 Joint Venturers and the Synod of the Diocese of New Westminster conveyed their interests in the Project lands and the Diocese lands to Raveen in trust for purposes of subdivision.

[185] On November 29, 2012, Raveen consolidated and subdivided Lots 1 to 5 and the Diocese Lands into 30 lots, one of which was conveyed to the Diocese (the "Church Lot").

Subdivision of Lots

[186] After the Land Swap Agreement was completed and the Church Lot was conveyed to the Diocese of New Westminster, two further subdivisions were effected, resulting in the creation of 81 subdivided lots in total.

[187] The steps taken to effect the subdivisions are set out in paragraphs 120 to 136 of the Agreed Statement of Facts and I need not repeat them here. The registered titles to the subdivided lots varied from the proportionate ownership interests of the parties set out in the 2011 JVA. However, the 2011 JVA provided that the registered interest in each lot was held by the registered owner or owners of that lot in trust for all of the members of the 2011 Joint Venture in accordance with their proportionate shares set out in that agreement.

[188] Beginning in 2010, although there was no evidence before me to indicate that proper regulatory approval had been obtained to do so, Jaswant began entering into agreements to sell lots in the Project. Once the subdivision plans had been registered, lot sales began to be completed. The first receipts for these lots were paid to WSCU to pay down the amount secured by its mortgages.

Further legal proceedings

[189] On March 14, 2014, Jatinder Virk commenced foreclosure proceedings against Lot 3. On September 2, 2014, she amended her petition to seek a declaration of a prior mortgage affecting the lots created by the Project and filed a certificate of pending litigation against those lots in the New Westminster Land Title Office. These steps temporarily prevented completion of the sale of further lots in the Project.

[190] The Grewal Action was commenced on April 2, 2014. In general terms, it alleged that the Grewal plaintiffs had the right to share in the proceeds of sale of the subdivided lots based on contributions to the Project made pursuant to oral agreements with Jaswant, 690174, and Panorama.

[191] On or about July 17, 2014, Jaswant provided a demand promissory note from 690174 payable to Mr. Garcha as lender in the amount of $484,252 (the “Promissory Note”). The Promissory Note stated that the lender agreed that this amount represented the amount paid to 690174 as the lender’s contribution to the 2007 Joint Venture. However, the note was not signed by Mr. Garcha.

[192] On October 7, 2014, WSCU began foreclosure proceedings to enforce its mortgage security over the subdivided lots and filed certificates of pending litigation in respect of its mortgage against all of the subdivided lots.

[193] The Garcha Action was commenced on February 16, 2015, asserting that the Garchas had rights pursuant to the 2007 JVA. In it, Mr. Garcha also sought judgment on the Promissory Note.

[194] 690174 did not defend the Garcha Action, and on March 17, 2015, Mr. Garcha took default judgment on the Promissory Note in its amount together with costs and Court Order Interest.

[195] On May 19, 2015, Justice Harvey granted an order *nisi* of foreclosure in the Jatinder Virk foreclosure proceedings (the “Harvey Order”). The Trustee places considerable reliance on this order, because in it the Court declared that the Virk

mortgage ranked in priority to the interests of the respondents and those claiming by, through, or under them. The Garchas were named as respondents in this foreclosure proceeding, although it appears that their counsel did not attend at the hearing.

[196] One week later, on May 26, 2015, Justice Masuhara made an order in petition S-153116, commenced by other members of the 2007 Joint Venture, converting that petition to an action and setting out a sales procedure for the remaining unsold subdivided lots. This order expressly reserved the rights of all parties.

[197] On August 24, 2015, Jaswant made a voluntary assignment in bankruptcy, and Crowe Mackay & Company was appointed as his Trustee.

[198] On April 18, 2016, the Trustee obtained leave of the Court to assign 690174 and Panorama into bankruptcy. Those companies were assigned into bankruptcy on April 21, 2016, with Crowe Mackay being appointed Trustee in both bankruptcies.

[199] On May 11, 2016, the Court made a sales process order in these proceedings which resulted in all proceeds from the sale of lots, after payment of the WSCU Mortgage, being placed in trust with the Trustee's counsel for the 2011 Joint Venturers. The proceeds were placed in separate trust accounts depending upon which 2011 Joint Venturer was the registered owner of the lot from which the proceeds were derived (the "Vendor Trust Accounts"). However, the Trustee recognizes that the amounts attributed to each party must be adjusted to reflect their proportionate interests set out in the 2011 JVA.

[200] By October 28, 2016, all lots had been sold and the net proceeds deposited with the Trustee's solicitors in the Vendor Trust Accounts.

[201] The net proceeds of sale after satisfaction of the amounts owed to WSCU were $15,441,090.52. From those proceeds, $1,602,942.51 was paid to satisfy the Virk Mortgage. In addition, builders liens of $410,734.62 and $37,110.34 were paid from the funds held in trust.

[202] In the course of the administration of the Bankruptcies, the plaintiffs in the Grewal and Garcha Actions filed proofs of claim against the Bankrupts. I need not detail them because, as I have already decided, the rights of the parties will be decided *de novo* in these reasons. It is sufficient to say that the Trustee either disallowed the claims or decided that they were equity claims that were postponed to the claims of all other creditors pursuant to s. 140.1 of the *BIA.*

Issues Raised in the Proceedings

[203] I outlined the orders that have led to this trial in the course of dealing with the procedural issues earlier in these reasons.

[204] The parties raise a multitude of issues. However, in my view, many of the arguments and submissions seek the same result by relying on different theories of liability or defence.

[205] The cornerstone of the Trustee's position is that the claims of the Garcha and Grewal plaintiffs' claims are equity claims, as that term is defined in the *BIA,* and are therefore postponed to the claims of other creditors of the Bankrupts. However, in order to determine that issue I must first consider the nature of the relationships between the plaintiffs and the defendants as well as the nature of the plaintiffs' interests in the Project. I will therefore first determine the rights of the parties without reference to the *BIA*, then consider how the Bankruptcies have affected those rights.

Issues in the Garcha Action

[206] The following issues arise in the Garcha Action:

1. What was the nature of the relationship between the Garchas and 690174 created by the 2007 JVA? Was it a binding agreement and did it create a trust?

2. Did Jaswant and 690174 owe fiduciary duties to the Garchas, and if so, what was the extent of those duties?

3. Did 690174 and Jaswant breach any fiduciary duties they owed to the Garchas?

4. If Jaswant and 690174 breached their fiduciary duties to the Garchas, are any of the other defendants liable to the Garchas on the basis of knowing assistance or knowing receipt?

5. Are the Garchas entitled to a remedy against the lots created by the Project?

6. By taking judgment on the Promissory Note did Mr. Garcha elect a remedy that precludes the Garchas from pursuing their claims to an interest in the subdivided lots?

7. Are any defences raised by the defendants a bar to the remedies sought by the Garchas?

Issues in the Grewal Action

[207] I will deal with the claim of Rajpreet Sangha as part of the Grewal Action even though he represented himself at trial.

[208] The issues raised in the Grewal Action are:

1. What was the nature of the various Grewal plaintiffs' involvement in the Project? In particular, were any binding oral joint venture agreements made between any of the Grewal plaintiffs and the defendants? If there were any such agreements, what were their terms?

2. What is the relevance of the October 2010 JVA?

3. Are the November 2010 and 2011 JVAs valid and binding agreements in accordance with their terms, and if so, what is the relationship between them and the oral agreements alleged by the Grewal plaintiffs? To what extent are the defendants other than Jaswant, 690174, and Panorama bound by those alleged oral agreements?

4. Did Jaswant have the authority to bind the members of the November 2010 Joint Venture to any agreements made with Grewal Management, Mr. Mattu, and Rajpreet?

5. If the alleged oral agreements are established, what remedies are appropriate?

6. Did the Bankrupts owe fiduciary duties to the Grewal plaintiffs, and if so, did they breach those duties? What remedies are appropriate?

7. Do any of the Grewal plaintiffs have a claim in unjust enrichment against the defendants?

Issues in the Bankruptcy Appeals

[209] The following issues arise in the Bankruptcy Appeals:

1. Are the remedies sought by the Garcha plaintiffs and Grewal plaintiffs against the Bankrupts equity claims subordinated to the claims of all other creditors pursuant to s. 140.1 of the *BIA*?

2. What effect do the Bankruptcies have on remedies that might otherwise have been available to the plaintiffs and, in particular, on the granting of constructive trusts over the proceeds of sale of the Project?

Discussion of Garcha Claims

Did the 2007 JVA create a trust of which the Garchas were beneficiaries?

[210] The Garchas' claim is based on their status as signatories to the 2007 JVA. I set out some of the terms of that agreement earlier in these reasons at para. 76.

[211] The Garchas' position is that 690174 and Jaswant owed fiduciary duties pursuant to the 2007 JVA that prevented them from taking any benefit from 691074's legal title to Lot 1, other than 690174's contingent right to the revenue received if Lot 1 was subdivided into more than 22 lots. The Garchas submit that the 2007 JVA

created a trust of which they and the other 2007 Joint Venturers were the beneficiaries that can be traced into the subdivided lots and revenue they generated.

[212] In his evidence, Mr. Garcha testified that his understanding of the 2007 JVA was that in consideration of contributing between $50,000 and $60,000 per lot, he and his wife would receive seven lots once the subdivision of Lot 1 was completed. He testified that Jaswant had described the investment to him this way, and that this was his expectation when he contributed funds to the Project.

[213] Although they initially took a different position, in their final arguments the defendants and the Grewal parties conceded that the 2007 JVA is a valid and binding agreement. However, their position is that it does not create a beneficial interest for the 2007 Joint Ventures in the subdivided lots created by the Project. They say that the elements necessary to create an enforceable trust with respect to those lots are absent in this case.

[214] The Trustee and the Grewal plaintiffs concede that 690174 acquired and held Lot 1 in trust for the 2007 Joint Venturers. However, the Trustee, supported by all of the defendants, takes the position that that trust was extinguished by the development process and that the 2007 Joint Venturers have only a contractual right against 690174 to share in its profits from the Project.

[215] In addition, the defendants submit that if there was an agreement that the Garchas were entitled to receive specific lots created from the subdivision of Lot 1, that agreement did not create a valid trust because it lacked the three certainties required to establish a trust: (i) certainty of intention, (ii) certainty of object, and (iii) certainty of subject matter.

[216] While the Grewal parties do not oppose the Garchas sharing in the proceeds of the Project, they support the defendants' position that the 2007 JVA did not create a valid trust in the subdivided lots because there was no certainty as to the subject matter of the trust. They submit that certainty was lacking because the agreement did not specify which lots each 2007 Joint Venturer would receive on subdivision and provided no mechanism pursuant to which the court could determine that issue.

[217] I do not accept this submission. I find that the subject matter of the trust was Lot 1 and all other assets of the 2007 Venture. I am also of the view that the 2007 JVA adequately describes the rights of the members of the joint venture on the subdivision of Lot 1. It provides a formula for division of the net proceeds of the subdivision, based on the number of subdivided lots created by the subdivision process. In my view the existence of such a formula meets the requirement for certainty of subject matter. In Donovan W.M. Waters et al., *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Thomson Reuters Canada Limited, 2012) at 163, the principle is stated as follows:

> When the courts say 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". This latter form of certainty more often occurs with fixing the quantum of beneficiaries' interests, but it can occur with the whole trust property.

[218] I agree that the 2007 JVA did not give the Garchas the right to take title to specific lots created by the subdivision. It may be that Mr. Garcha's subjective understanding of the transaction was that he and Ms. Garcha would receive title to seven lots on subdivision, subject to payment of costs of $50,000 to $60,000 per lot. However, subject to certain exceptions that are not present in this case, his subjective understanding is not admissible to vary or alter the express terms of the 2007 JVA.

[219] The Trustee submits that the object and purpose of the 2007 JVA was the subdivision of Lot 1 into residential lots, the sale of those lots, and the division of the net profits after expenses among the 2007 Joint Venturers. His position is that the 2007 JVA is a commercial agreement that limits the rights of the 2007 Joint Venturers to a contractual right to a share of the net profits from the sale of subdivided lots. The Trustee also argues that the commercial nature of the 2007 JVA negates any fiduciary obligations except those that arose out of the bare trust over Lot 1.

[220] The Trustee made extensive written submissions on the principles of contractual interpretation in support of his argument that 690174 owed no fiduciary

duties and that the members of the 2007 Joint Venture had no proprietary interest in the proceeds of sale of lots subdivided out of Lot 1.

[221] I find these submissions to be without merit.

[222] The principles of contractual interpretation are well settled. They were restated by Justice Rothstein in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [*Sattva*] at para. 47:

> Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, per LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, per Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed... . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
> >
> > (*Reardon Smith Line*, at p. 574, per Lord Wilberforce)

[223] As a general rule the subjective intention or understanding of a party to a contract is irrelevant to its proper interpretation. The object of the interpretation of a contract is to determine what the parties using the words in the relevant circumstances would reasonably have been understood to mean.

[224] I find that the only reasonable interpretation of the 2007 JVA is that each 2007 Joint Venturer is the beneficial owner of their proportionate share of all of the assets of the 2007 Joint Venture. This is made clear by paragraph 4.2, which I have set out above, but will repeat here:

> The Joint Venturers each own as tenants in-common, as their separate property, an undivided beneficial interest in the Project and the Joint Venture Assets in the ratio of their respective Proportionate Shares.

[225] Any doubt about the meaning of this provision is removed by the definition of Joint Venture Assets found at paragraph 1.1(d):

> "Joint Venture Assets" means all property and assets of the Joint Venture, both real and personal, tangible and intangible, including, without limitation, goodwill, interests in contracts, money and bank accounts"

[226] Preambles B and C of the 2007 JVA provide:

> B. The parties have agreed to form a joint venture (the Joint Venture) for the purpose of investing in the Lands for the purpose of developing, subdividing same into approximately 22 RF-9 residential lots and the reselling of the aforesaid lots;
>
> C. The Company (690174) shall hold legal title to the Lands and develop it as bare trustee on behalf of the Joint Venturers;

[227] Paragraph 3.2 of the agreement gives effect to this intention:

> The Joint Venturers hereby associate themselves into and as a joint venture for the purpose of:
>
> a) combining their skills, experience and resources to develop and subdivide the Lands into approximately 22 RF-9 residential lots and resell the aforesaid lots;
>
> b) doing all things incidental thereto;
>
> (together, the "Project")

[228] These provisions clearly spell out that each of the 2007 Joint Venturers is the beneficial owner of an undivided proportionate interest in the assets of the 2007 Joint Venture. At the time the 2007 JVA was executed, title to Lot 1 had already been acquired, utilizing in large part funds contributed by the 2007 Joint Venturers other than 690174. The express purpose of the 2007 Joint Venture was to develop that lot on behalf of all of the 2007 Joint Venturers. From the outset, each of the 2007 Joint Venturers was a beneficial owner of a proportionate share of all of the assets of the 2007 Joint Venture, including Lot 1.

[229] In his written submissions, the Trustee also takes the position that the purpose of the bare trust was "spent" and came to an end upon the subdivision of

Lot 1. In this regard he repeats his submission that as of that date the sole right of the 2007 Joint Venturers was a contractual right to share in the net proceeds after payment of expenses. The Trustee further submits that 690174 had the right and authority to convey legal and equitable title to the subdivided lots to purchasers of those lots, subject only to the contractual obligation to share the profits with the other 2007 Joint Venturers.

[230] These submissions are unsupportable in view of the express terms of the 2007 JVA and the law relating to fiduciary duties that arise in the context of a joint venture.

[231] The rights and obligations arising under a joint venture agreement are of fundamental importance in determining the position of the parties both before and after bankruptcy. The characteristics of a joint venture were addressed by Justice Goldie of the British Columbia Court of Appeal in *Canlan Investment Corp. v. Gettling*, [1997] B.C.J. No. 1647:

> 30 Counsel reviewed for us many authorities on the subject of joint ventures. The chambers judge laid some emphasis on the fact that from the outset it was intended the two venturers would own shares in a company owning and operating the ice facility, rather than having a direct property interest in that facility. Thus, the relationship of the two would be governed not by a joint venture agreement but by company law applied to a shareholders' agreement. He was influenced by the judgment of the *Nova Scotia Supreme Court in Central Mortgage & Housing Corp. v. Graham* (1973), 43 D.L.R. (3d) 686 where Mr. Justice Jones canvassed the existing authorities with particular reference to *Williston on Contracts*, 3d Ed., (N.Y.,1959).
>
> 31 I refer, as did Mr. Justice Jones, to pp. 563-5 of this text, and in particular to p.563:
>
> > Besides the requirement that a joint venture must have a contractual basis, the courts have laid down certain additional requisites deemed essential for the existence of a joint venture. Although its existence depends on the facts and circumstances of each particular case, and while no definite rules have been promulgated which will apply generally to all situations, the decisions are in substantial agreement that the following factors must be present:
> >
> > (a) A contribution by the parties of money, property, effort, knowledge, skill or other asset to a common undertaking;
> >
> > (b) A joint property interest in the subject matter of the venture;
> >
> > (c) A right of mutual control or management of the enterprise;

> (d) Expectation of profit, or the presence of "adventure," as it is sometimes called;
>
> (e) A right to participate in the profits;
>
> (f) Most usually, limitation of the objective to a single undertaking or ad hoc enterprise.
>
> [Emphasis added by Justice Goldie]
>
> 32 While the "decisions" referred to are mainly from jurisdictions in the United States, I regard the foregoing when read with the 1993 supplement as a reasonable and compendious statement of the characteristics of a joint venture.

[232] *Canlan* was cited by Justice Wedge in *Blue Line Hockey Acquisition Co., Inc. v. Orca Bay Hockey Limited Partnership*, 2008 BCSC 27, which has in turn been cited in a number of subsequent decisions of this Court.

[233] The above quotation recognizes that the members of a joint venture have a joint property interest in the subject matter of the joint venture. Unlike a partnership, a joint venture does not own the property that is the subject matter of the joint venture. Instead, the persons forming the joint venture own the property in their proportionate shares, unless the parties make an agreement to the contrary.

[234] The rights, including the property rights, of the 2007 Joint Venturers must be determined by the terms of the 2007 JVA. In my view those terms make it clear that each 2007 Joint Venturer is the beneficial owner of its proportionate share of the assets of the 2007 Joint Venture. It is that beneficial ownership that entitles them to share in the net proceeds of the 2007 Joint Venture. This right is not derived through 690174, as the Trustee seems to have assumed.

[235] The nature of the ownership of property that is the subject matter of a joint venture was considered by the Alberta Law Reform Institute's 2012 publication *Joint Ventures, Final Report 99* at page 18:

> If joint ventures are allowed to declare themselves not to be partnerships, questions may arise as to ownership of property owned by the non-partnership joint venturers respectively and committed to the joint venture, and as to the ownership of property acquired in the course of the joint venture. If the joint venture contract provides for the ownership of the property, its provisions will prevail. If the joint venture contract is silent on the question, in the absence of any legislative provision, property committed by a joint venturer for the use of the joint venture will presumably remain the

> property of the joint venturer, while property acquired in the course of the joint venture will presumably be co-owned by the joint venturers.

[236] I also conclude that the beneficial ownership interests of the 2007 Joint Venturers are traceable into 690174's proportionate share of the 2011 Joint Venture and do not form part of the assets of 690174 divisible among its creditors.

690174 and Jaswant owed fiduciary duties to the 2007 Joint Venturers

[237] I find that 690174 and Jaswant owed a fiduciary duty to the 2007 Joint Venturers by virtue of the terms of the 2007 JVA and Jaswant's *de facto* control of its affairs.

[238] The preponderance of authority establishes that the members of a joint venture owe fiduciary duties to the joint venture and to one another when they are dealing with the property or enterprise that is the subject of the joint venture. Those duties are restricted to the objects of the joint venture and may be altered by agreement or by the particular circumstances of a case. In this regard, the members of a joint venture are not generally restricted from carrying on other activities that they might be precluded from pursuing if they were in a partnership.

[239] I adopt the analysis of the circumstances in which fiduciary duties in a joint venture arise set out by Justice Butler, when he was a member of this court, in *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2014 BCSC 1688. In my view, the following paragraphs from *Smithies Holdings* apply to the duties owed by 690174 pursuant to the 2007 JVA:

> 73 The finding that a disclosure obligation may arise by implication from the terms of the JV Agreement does not preclude a finding that the Joint Venturers are in a fiduciary relationship. The fact the obligation arises between them in relation to the management of the JV is important. Messrs. Hong, Smithies and Vandekerkhove, as officers and directors of Spearpoint, were placed in the position of fiduciaries with regard to the management of that company. Of course, the management tasks of the company are restricted to the business of the JV. The Lands, the primary asset of the JV, are held in trust by Spearpoint, and pursuant to Article 6 of the JV Agreement, the Board of Directors of Spearpoint is responsible for the "overall management and control of the Joint Venture". Given this structure, it is difficult to see how the obligation of honesty and good faith owed by the individuals as directors and officers of Spearpoint, does not also apply to the Joint Venturers in relation to their dealings with the business of the JV. Of

> course, as directors and officers of Spearpoint the individuals are in a per se fiduciary relationship with one another. As Joint Venturers, they cannot escape the nature of that relationship just because the business of Spearpoint is one step removed from the JV.
>
> 74 In addition, it is difficult to see how the terms of the JV Agreement which permit the Joint Venturers to compete in other land transactions could eliminate the existence of the obligation of full disclosure in relation to this common venture. In other words, while the nature of the obligations owed may be reduced or narrowed by the terms of the JV Agreement, the Joint Venturers remain in a common venture and there is no principled reason why they should not continue to owe the duties of full disclosure and a duty not to make a secret profit in relation to this common venture. I conclude the parties were in a per se fiduciary relationship.

[240] In *Zynik Capital Corp. v. Faris*, 2007 BCSC 527, Justice Tysoe emphasized that fiduciary duties are not owed between parties who are negotiating for a joint venture but do arise after they have entered into one:

> 131 Counsel for Mr. Faris (whose submission in this regard was adopted by counsel for Intergulf) submits that no concurrent fiduciary duties were owed because Intergulf and Zynik were sophisticated commercial entities dealing at arm's length with no power imbalance between them. In my view, a distinction must be made between negotiations for the creation of a joint venture and dealings after the joint venture has been formed. I accept that parties who are negotiating with each other at arm's length to form a joint venture will not owe fiduciary duties to each other. However, the situation changes once the joint venture is formed. For example, in the context of this case, I think it is clear that, during the subsistence of the joint venture, both Zynik and Intergulf owed each other the fiduciary duty not to acquire the opportunity for themself to the exclusion of the other.

[241] In this case 690174 held title to Lot 1 in trust for the 2007 Joint Venturers. 690174 agreed that as bare trustee of Lot 1 it was responsible for applying for all necessary permits required for the development and subdivision of Lot 1. The development and subdivision of Lot 1 was the very object of the 2007 Joint Venture. In addition, Jaswant was personally appointed manager of the 2007 Joint Venture project and was the sole director and directing mind of 690174. In my view this gave rise to a *per se* fiduciary duty on 690174 and Jaswant.

[242] I am also satisfied that the circumstances of this case imposed an *ad hoc* fiduciary duty on 690174 and Jaswant. Given the terms of the 2007 JVA and the fact that it was clear that Jaswant assumed full control over the affairs of the 2007 Joint Venture, I find that the 2007 Joint Venturers had the right to expect that 690174

and Jaswant would act in the mutual interests of the parties to the 2007 JVA to the exclusion of their several interests: *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 407.

[243] The Trustee relied on the fact that 690174 was a bare trustee of Lot 1 and cited a number of cases in support of the proposition that a bare trustee owes only a limited fiduciary duty to the beneficiaries of the trust. However, those cases do not stand for the proposition that the bare trustee may treat the subject matter of the trust as its own property. As pointed out in one of the Trustee's authorities, *Scoretz v. Kensam Enterprises Inc.*, 2018 BCCA 66 at paras. 21-30, at a minimum a bare trustee has the obligation to transfer legal title to the beneficiaries of the trust upon request.

[244] Despite arguing that 690174 owed only limited fiduciary duties as a bare trustee, the Trustee argues that 690174 had full authority to subdivide Lot 1 and transfer title to the subdivided lots to purchasers. These submissions are inconsistent. More importantly, they ignore the fact that 690174 used its registered title to take steps that profoundly affected the beneficial ownership rights of the 2007 Joint Venturers.

[245] 690174 not only held title to Lot 1 in trust but also undertook the responsibility to apply for all necessary permits required for the development and subdivision of Lot 1. It is clear that by virtue of holding legal title to Lot 1, 690174 had the ability to affect the rights of all of the 2007 Joint Venturers. This made them vulnerable to the actions of 690174. The elements necessary to establish both an *ad hoc* fiduciary duty (as set out in more detail at para. 474 of these reasons) and a *per se* fiduciary duty on 690174 were therefore present in this case.

[246] The fiduciary duties owed by 690174 and Jaswant extended to all dealings with Lot 1 that could have affected the 2007 Joint Venturers' beneficial ownership of that lot. They also extended to all steps taken to pursue the commercial objective of the 2007 JVA, which was to subdivide Lot 1 for the benefit of the 2007 Joint Venturers.

Breaches of duty by 690174 and Jaswant

[247] As fiduciaries, 690174 and Jaswant were required to act honestly, in good faith, and in the best interests of the 2007 Joint Venture when exercising the powers they held by virtue of their position. This duty extended to avoiding any action that resulted in an unauthorized benefit to themselves and to obtaining the fully informed consent of the members of the 2007 Joint Venture prior to the taking of any action pursuant to those powers that could adversely affect them.

[248] I find that 690174 and Jaswant undertook a number of actions that breached those duties, including the following:

1. Permitting financial charges that arose from 690174's outside dealings to be registered against Lot 1.

2. Registering other financial charges against Lot 1 to provide security for obligations incurred by 690174 in pursuit of its separate business interests.

3. Purporting to transfer the beneficial ownership of Lot 1 to the members of the November 2010 and 2011 Joint Ventures.

4. Entering into the Land Swap Agreement, which transferred a significant portion of Lot 1 to the Anglican Diocese of New Westminster in exchange for land that was utilized for the benefit of the 2011 Joint Venturers without obtaining the informed consent of the 2007 Joint Venturers.

5. Executing a mortgage over Lot 1 to secure the WSCU financing that was used to finance the Project for the exclusive benefit of the 2011 Joint Venturers.

[249] The result of 690174's actions was to put the beneficial ownership of Lot 1 at risk and to receive benefits for themselves from Lot 1 that they had no right to obtain.

[250] 690174 could only have taken these steps if it had first obtained the informed consent of the 2007 Joint Venturers or undertaken them for the benefit of the 2007

Joint Venture. There is no evidence that 690174 obtained the necessary consent or that it was acting on behalf of the 2007 Joint Venture in carrying out the actions described above. To the contrary, Jaswant sought to justify his actions by testifying that Mr. Garcha had told him that he wanted nothing further to do with the 2007 Joint Venture, an issue I will deal with in the discussion of other defences to the Garcha Action.

[251] The record is also devoid of any evidence that, in their dealings with Lot 1, Jaswant or 690174 considered that they owed any duty whatsoever to the 2007 Joint Venturers. The evidence all suggests the opposite. Jaswant personally and through his companies acted solely in his own interests without any regard for the impact of his actions on the rights of the 2007 Joint Venturers.

[252] I am satisfied that these breaches were dishonest. As stated in *Air Canada v. M & L Travel Ltd.,* [1993] 3 S.C.R. 787 at 825-826*,* set out below at para. 289 of these reasons, any action by a fiduciary that exposes the beneficiary to a risk that the fiduciary is not entitled to take is a dishonest breach of duty.

Discussion of breaches by Jaswant and 690174

The Gill Judgment

[253] I have set out the circumstances that led to the registration of the Gill Judgment in paras. 159-166 above.

[254] 690174's duty as a trustee was to protect the title to Lot 1 and to utilize its own resources to clear charges registered against it arising out of its separate business activities. However, Jaswant concealed the registration of the Gill Judgment from the 2007 Joint Venturers and prevented them from taking steps to protect their beneficial ownership of Lot 1.

The Virk Mortgage

[255] I will deal with the Virk Mortgage here even though it occurred later than some of the other breaches I will address below. I do so because it is directly related to the Gill Judgment. I find that 690174 and Jaswant breached their fiduciary duties

by entering into the Virk Mortgage and charging Lot 1 as security for the separate obligations of 690174.

[256] Encumbering Lot 1 with the Virk Mortgage was both a breach of the express terms of the 2007 JVA and breach of the fiduciary duties owed to the 2007 Joint Venturers. It was a dishonest breach because it subjected Lot 1 to a risk that 690174 was not entitled to expose it to. While it provided Jaswant and 690174 with the opportunity to pursue the objects of the 2011 Joint Venture, it was of no benefit to the 2007 Joint Venturers who had been excluded from participation in the Project by the terms of the November 2010 and 2011 JVAs.

[257] I find that Jaswant wished to conceal his actions with respect to the Project and Lot 1 from the members of the 2007 Joint Venture because he was aware that he had granted security over Lot 1 for a debt that 690174 used to meet its separate obligations. I also infer from his actions that he was aware that he had not taken the steps necessary to protect the position of the 2007 Joint Venturers as beneficial owners of Lot 1.

[258] The subsequent release of funds provided by the Virk Mortgage to settle Mr. Gill's judgment allowed 690174 to proceed with subdivision of Lots 1 to 5 and to complete the financing for the Project from WSCU. However, it also burdened the beneficial owners of Lot 1 with a mortgage of approximately $1,000,000 which increased to more than $1,600,000 by the time it was paid. There can be no question that the granting this mortgage over Lot 1 was a dishonest breach of fiduciary duty on the part of Jaswant and 690174.

The November 2010 and 2011 JVAs

[259] 690174 and Jaswant also breached their fiduciary duties by entering into the November 2010 JVA and the 2011 JVA. Pursuant to para. 2.2 of the November 2010 JVA, Jaswant and 690174 agreed that Lot 1 would henceforth become part of the assets of that joint venture and would thereafter be beneficially owned by the November 2010 Joint Venturers according to their proportionate shares.

[260] In para. 3.3 of the November 2010 JVA, 690174 and Jaswant agreed that the net revenue from the November 2010 Joint Venture would be divided proportionately among the November 2010 Joint Venturers without making any provision to protect the 2007 Joint Venturers' beneficial ownership of Lot 1.

[261] In para 4.2, 690174 and Jaswant agreed that each of the November 2010 Joint Venturers owned, as their separate property, an undivided beneficial interest in Lots 1 to 5 in the ratio of its proportionate share. By executing the November 2010 JVA, 690174 had therefore purported to convey a beneficial interest in Lot 1 to each of the other November 2010 Joint Venturers. However, 690174 was not the beneficial owner of Lot 1.

[262] These provisions continued in force after the execution of the 2011 JVA.

The Land Swap Agreement

[263] The Land Swap Agreement was executed by the 2011 Joint Venturers on or about January 1, 2012. It clearly benefitted the members of that joint venture by facilitating a more profitable subdivision plan. By that time, it is clear that Jaswant and 690174 no longer considered themselves bound by the terms of the 2007 JVA.

[264] It is obvious that the execution of the Land Swap Agreement was a "Major Decision" affecting the members of the 2007 Joint Venture, as that term is defined in the 2007 JVA, because it resulted in the alienation of a significant portion of Lot 1. Despite this, Jaswant made no effort to obtain any consent from any 2007 Joint Venturer. I find that the execution of the Land Swap Agreement was one of the things that Jaswant had in mind when he told Mr. Morton that he did not want to disclose his legal affairs to the members of the 2007 Joint Venture.

[265] The Trustee submits that the Land Swap Agreement did not cause any loss to the 2007 Joint Venturers because it was a prudent step in the process of achieving a subdivision in all of the Lots in the Project.

[266] I do not accept this submission. The execution of the Land Swap Agreement without the informed consent of the 2007 Joint Venturers deprived them of the

opportunity to take any steps to protect their position in the Project. I have no doubt that a fully informed 2007 Joint Venturer who received legal advice regarding the Project in January 2012 would have insisted that their position be protected either by becoming a registered owner of a proportionate interest in the Project or by some other effective means.

[267] In any event, the law is clear that it is no answer for a fiduciary who has benefited from a breach of fiduciary duty to say that its actions caused no damage to the beneficiary. The obtaining of an unauthorized benefit is sufficient to establish liability in such circumstances.

The WSCU Financing

[268] 690174 and Jaswant also breached their duties by negotiating the terms of, and charging Lot 1 with, the WSCU mortgage charges. The first advance under the WSCU financing was used to pay off the outstanding balances on all of the Acquisition Mortgages. While those mortgages included the mortgage on Lot 1, they also included mortgages on all of the other Lots. As with the other breaches I have identified, the WSCU Mortgage required the informed consent of the 2007 Joint Venturers to affect their rights. Paragraph 7.3 of the 2007 JVA expressly states that the acceptance of a financing commitment required the prior written approval of all 2007 Joint Venturers. 690174 made no attempt to obtain such approval. The failure of 690174 and Jaswant to seek approval of the WSCU financing deprived the 2007 Joint Venturers of another opportunity to protect their rights under the 2007 JVA.

The subdivision

[269] Upon registration of the Land Swap Agreement and the subdivision plans, title to all of the subdivided lots was registered in the name of one or more of the 2011 Joint Venturers.

[270] The subdivision of Lots 1 to 5 and registration of the titles of those lots in the names of the 2011 Joint Venturers was a further breach of fiduciary duty because it permitted the Project to be completed for the sole benefit of the 2011 Joint Venturers. In this regard it is significant that the Trustee based his conclusion that

the 2007 Joint Venturers were equity creditors at least in part on the fact that they had no registered interest in the subdivided lots. While I do not agree that the Trustee was correct in so doing, there can be no doubt that the state of the registered title to the Project Lands caused actual harm to the 2007 Joint Venturers. Even on the Trustee's view of this matter, they would have been entitled to share in the proceeds of sale if their beneficial interest had been registered in the Land Title Office. That was the basis on which the Trustee decided that the 2011 Joint Venturers were not equity claimants.

Cumulative assessment of the breaches

[271] The cumulative effect of the numerous breaches of fiduciary duty was that the 2007 Joint Venturers were deprived of their beneficial ownership of Lot 1 and that the 2011 Joint Venturers have appropriated that benefit. As I will address later in the remedy section of these reasons, that is a result that a court of equity cannot permit.

[272] The Trustee has not been able to articulate any legal basis justifying 690174's actions in appropriating Lot 1 for its own benefit. In simple terms, 690174 did not own Lot 1. It had no right to transfer title to Lot 1 except at the direction of the 2007 Joint Venturers.

[273] The circumstances of these proceedings raise issues similar to those considered by the House of Lords in *Foskett v. McKeown,* [2000] 3 All E.R. 97, which addressed the nature of persons' interests in property they beneficially own but to which they have entrusted a Trustee or agent with legal title.

[274] In *Foskett*, an individual named Murphy promoted a plan to sell plots of land in Portugal. The purchase monies paid by purchasers were held in trust by Mr. Murphy pending the completion of the lots. Two years after the purchasers paid their money, it was learned that Mr. Murphy had dissipated it, in part by paying premiums on a life insurance policy of £1,000,000, of which his children were the beneficiaries. After the fraud was discovered Mr. Murphy committed suicide and, because the policy had been in force long enough to become payable in such an event, the beneficiaries were entitled to the death benefit.

[275] A dispute arose as to how the death benefit should be distributed. The precise question was whether the purchasers whose money was used to pay the premiums were entitled to share the death benefit pro rata with the children based on the relative amounts paid by Murphy out of his own funds and from the purchaser's money, or the purchasers were restricted to having a lien on the death benefit for repayment of the money of which they had been defrauded. A majority of the Law Lords held that the death benefit should be divided proportionately based on the respective contribution to the premiums from Murphy's own money and the purchasers' money.

[276] What makes *Foskett* relevant to the Garchas' claim is the analysis of the majority that concluded that the purchasers' claim was not based on unjust enrichment but on the right they had to follow their own property into the death benefit.

[277] This principle is explained in the reasons of Lord Browne Wilkinson in *Foskett* at 101-102:

> The crucial factor in this case is to appreciate that the purchasers are claiming a proprietary interest in the policy moneys and that such proprietary interest is not dependent on any discretion vested in the court. Nor is the purchasers claim based on unjust enrichment. It is based on the assertion by the purchasers of their equitable proprietary interest in identified property.
>
> The first step is to identify the interest of the purchasers: it is their absolute equitable interest in the moneys originally held … on the express trusts of the purchasers trust deed. This case does not involve any question of resulting or constructive trusts. The only trusts at issue are the express trusts of the purchasers trust deed. Under those express trusts the purchasers were entitled to equitable interests in the original moneys paid … by the purchasers. Like any other equitable proprietary interest, those equitable proprietary interests under the purchasers trust deed which originally existed in the moneys paid … now exist in any other property which, in law, now represents the original trust assets. If, as a result of tracing, it can be said that certain of the policy moneys are what now represent part of the assets subject to the trusts of the purchasers trust deed, then as a matter of English property law the purchasers have an absolute interest in such moneys. There is no discretion vested in the court. There is no room for any consideration whether, in the circumstances of this particular case, it is in a moral sense "equitable" for the purchasers to be so entitled. The rules establishing equitable proprietary interests and their enforceability against certain parties have been developed over the centuries and are an integral part of the property law of England. It is a fundamental error to think that, because certain property rights are equitable rather than legal, such rights are in some

> way discretionary. This case does not depend on whether it is fair, just and reasonable to give the purchasers an interest as a result of which the court in its discretion provides a remedy. It is a case of hard-nosed property rights.

[278] In my view, the above comments apply equally to the 2007 Joint Venturers. They were at all times the beneficial owners of Lot 1 and are entitled to trace their property into the proceeds of sale of the subdivided lots that are attributable to the contribution of Lot 1 to the Project.

[279] Thus, I find that the 28.5% share of the 2011 Joint Venture obtained by 690174 is beneficially owned by the 2007 Joint Venturers. There is a direct and clear path from the ownership of Lot 1 into 690174's 28.5% share of the 2011 Joint Venture. No other person acquired any interest in that share of the 2011 Joint Venture.

[280] This means that it is unnecessary for the Garchas to establish unjust enrichment or any other discretionary remedy. Their remedy is the right to recover their own property, which they have never lost.

[281] The Trustee made a number of submissions to the effect that Jaswant's pursuit of the Project did not cause any damage to the 2007 Joint Venture. Rather, the Trustee says that Jaswant's actions enhanced the value of Lot 1. However, the issue is who should have received the benefit of any such enhancement. In my view there can be only one answer to that question. The beneficial owners of Lot 1 were exclusively entitled to the benefit of its development. However, as a result of Jaswant's and 690174's actions they have been excluded entirely from receiving any benefit from Lot 1. It is difficult to conceive of a clearer example of a breach of fiduciary duty than the acts of Jaswant and 690174 in this case.

[282] In the above paragraphs I have made frequent references to the lack of informed consent on the part of the 2007 Joint Venturers to various steps taken by Jaswant and 690174. In so doing I have not overlooked the evidence that some of the 2007 Joint Venturers were aware that Lot 1 would be incorporated into a larger subdivision. However, there is simply no evidence that the Garchas or indeed any other 2007 Joint Venturer, gave their fully informed consent to the actions of 690174

and Jaswant that I have outlined above. The onus of establishing such consent is on 690174 and Jaswant. Even if one accepts Jaswant's evidence about Mr. Garcha's statements, which I do not, these defendants have failed to establish that they had the informed consent of the 2007 Joint Venturers to their actions.

Knowing Assistance and Knowing Receipt

[283] The Garchas submit that all of the members of the November 2010 Joint Venture hold their interests subject to a constructive trust in favour of the 2007 Joint Venturers based on knowingly assisting or knowingly receiving a benefit from 690174's and Jaswant's breaches of fiduciary duty.

[284] I have concluded that the appropriate remedy to be granted to the Garchas is their proportionate share of 690174's 28.5% share of the net revenue from the Project. In one sense this makes it unnecessary to consider the claims of knowing assistance and knowing receipt.

[285] However, I will address these claims for two reasons. The first is that if I am in error in concluding that the Garcha's claims are not equity claims postponed to the claims of all other creditors, the Garchas would still have a claim against the non-bankrupt defendants to satisfy their claims.

[286] Secondly, a finding of knowing assistance or knowing receipt would make the other defendants jointly and severally liable for the Garchas' claim. Thus, even if the Garchas' claim is not an equity claim, an issue will arise with respect to how the burden of their remedy should be borne as between the defendants who are found to be liable.

[287] Knowing assistance in, and knowing receipt of the benefit of, a breach of trust or fiduciary duty are related but distinct causes of action. I will therefore address them separately.

Knowing assistance

[288] A person who assists another in a breach of fiduciary duty may become liable to the beneficiary to the same extent as the person who committed the actual

breach. For a person to be liable for knowing assistance, they must have actual knowledge of the wrongful conduct of the defaulting fiduciary and knowingly assist in it. Imposition of liability requires that the wrongdoer's breach of fiduciary must be dishonest. A person can be liable for knowing assistance without receiving any benefit from its actions: *Air Canada* at 812.

[289] The issue in *Air Canada* was whether the directors of the defendant M & L Travel were liable for that company's breach of trust by putting funds which were held in trust for Air Canada into its general bank account, where they were subject to seizure by a bank. The Court held that by so doing M & L Travel took an impermissible risk that prejudiced the rights of the beneficiary, Air Canada, and therefore committed a dishonest breach of trust. At 825-826, Justice Iacobucci articulated the nature of the breach required in knowing assistance cases:

> 59 Where the trustee is a corporation, rather than an individual, the inquiry as to whether the breach of trust was dishonest and fraudulent may be more difficult to conceptualize, because the corporation can only act through human agents who are often the strangers to the trust whose liability is in issue. Regardless of the type of trustee, in my view, the standard adopted by Peter Gibson J. in the *Baden, Delvaux* case, following the decision of the English Court of Appeal in Belmont Finance, supra, is a helpful one. I would therefore "take as a relevant description of fraud 'the taking of a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take'." In my opinion, this standard best accords with the basic rationale for the imposition of personal liability on a stranger to a trust which was enunciated in *In re Montagu's Settlement Trusts*, supra, namely, whether the stranger's conscience is sufficiently affected to justify the imposition of personal liability. In that respect, the taking of a knowingly wrongful risk resulting in prejudice to the beneficiary is sufficient to ground personal liability. This approach is consistent with both lines of authority previously discussed.

[290] Justice Iacobucci also referred to the decision of Justice Wilson of this court in *Scott v. Riehl* (1958), 15 D.L.R. (2d.) 67 (B.C. S.C.). In *Scott,* Justice Wilson held the directors of a small, closely-held company, who had used funds which were subject to a trust under the *Mechanics Lien Act*, *1956*, S.B.C. 1956, c. 27, for unauthorized purposes were equally liable with the company because they knew that all the monies that were deposited were subject to the trust and because they operated the account, drawing their salaries from it.

[291] In this case, the breaches I have found consist of dealing with Lot 1 in a manner that failed to recognize that the 2007 Joint Venturers were the beneficial owners of that lot. In my view the existence of the trust in favour of the 2007 Joint Venturers would have been obvious to anyone who read the 2007 JVA.

[292] All of the November 2010 and 2011 Joint Venturers participated in at least some the breaches I have identified by being parties to the agreements by which those breaches were brought about. None of these steps could have been taken without their participation and assistance.

[293] The real question therefore is which of the November 2010 and 2011 Joint Venturers, if any, had the requisite knowledge to be found liable on the basis of knowing assistance? When the wrongful act arises from the breach of a duty imposed under an agreement, the question of the assisters' knowledge will depend on the extent and familiarity they had with the agreement, although willful blindness may substitute for actual knowledge. Thus, to have the requisite knowledge, a November 2010 or 2011 Joint Venturer must be found to have had actual knowledge of the terms of the 2007 JVA or have been wilfully blind as to their existence.

[294] I have concluded that Panorama, Parmjit, Ranjit, and by extension Svender had actual notice of the terms of the 2007 JVA or were wilfully blind to its terms and are therefore liable for knowing assistance of Jaswant's and 690174's breaches.

[295] Panorama must have had actual knowledge of Jaswant's and 690174's breaches because Jaswant was the sole director and shareholder of Panorama and was its directing mind, as were the directors that Justice Wilson refers to in *Scott*. Panorama is therefore equally liable with 690174 and Jaswant based on knowing assistance.

[296] I find that Ranjit had actual notice of the terms of the 2007 JVA. Ranjit admitted that he saw the 2007 JVA in 2007. However, his counsel submits that there was no evidence that he was aware of the terms on which 690174 held title to Lot 1. I do not accept this submission. Ranjit was obviously an intelligent person with some experience in land development. His evidence at his examination for discovery was

that one of the two lots allocated to his close friend Joginder Chahal in the 2007 JVA was acquired on his behalf. He advanced money to Mr. Chahal on the basis of that arrangement. It is not credible to suggest that he would have entered into such a transaction without reading the underlying agreement that gave rise to that interest. I therefore find that Ranjit had the requisite knowledge or he was, at a minimum, wilfully blind to the terms of the 2007 JVA. Svender's counsel has conceded that he is equally liable with his father for any findings in this case. I therefore also find him liable for knowing assistance.

[297] I have already stated that I found Parmjit to be an unsatisfactory witness. I do not accept her evidence that she had virtually no knowledge of the details of her husband's business affairs even though she was a member of Sangha Groups 1 and 2 and of the November 2010 and 2011 JVAs. There is sufficient evidence to allow me to infer that Parmjit was very familiar with Jaswant's business and with the affairs of the various joint ventures in issue in these proceedings, including the terms of the 2007 JVA.

[298] I accept Jaswinder Garcha's evidence that in 2004 Parmjit asked her if she and her husband wished to invest in property development with Jaswant. Jaswant confirmed that this was the case in his evidence despite Parmjit's denial that any such discussion took place.

[299] Despite Parmjit's evidence that she looked after the home while her husband looked after the business, she signed numerous documents relating to Lot 1, including the first and second PMIC mortgages securing the refinancing of the IMOR mortgage on Lot 1. She gave her covenant for repayment of these mortgages and mortgaged her interest in Lot 2 to secure them. The Garchas were named parties to these mortgages. In addition, her sister was one of the 2007 Joint Venturers. Parmjit also struck me as a shrewd person. I do not find her evidence that she was unaware of the 2007 JVA to be credible. I find that she had actual knowledge of the terms of the 2007 JVA which stipulated that 690174 held legal title to Lot 1 in trust for the 2007 Joint Venturers, or at a minimum was wilfully blind to that fact.

[300] I also accept the submission of the Garchas' counsel that Parmjit is equally liable with Jaswant and 690174 on the principle referred to by Justice Southin in *Osborne v. Pavlick*, 2000 BCCA 120. *Osborne* was a case involving joint tortfeasors. A wife owned a business which was operated on a property owned jointly by herself and her husband, which they decided to sell as a package. The wife induced the plaintiffs to purchase the property by making fraudulent representations to them about the state of the business. The purchasers sued in fraud. At trial both the wife and husband were found liable on the basis that the wife was acting as the husband's agent in making the fraudulent representation.

[301] On appeal, Justice Southin concluded that it was not open to the trial judge to find that the wife was acting as the husband's agent in making the misrepresentation because no misrepresentation had been alleged against him. She did however find that the husband was liable as a joint tortfeasor with the wife, because they had embarked on a joint enterprise. She found that when two people engage in a joint enterprise and one commits a tort in carrying out the enterprise, both are liable for the tort.

[302] While *Osborne* was a tort case, the principle that persons involved in a joint enterprise can be found jointly liable for the wrongful acts of another was applied in a breach of fiduciary duty case: *Ruwenzori Enterprises Ltd. v. Walji et al.*, 2004 BCSC 741, *aff'd* 2006 BCCA 448. I can see no principled reason why it should not also apply in this case.

[303] I have no hesitation in finding that Parmjit and Jaswant were engaged in a joint enterprise, as explained in *Osborne*, with respect to the Project. Parmjit participated in Sangha Groups 1 and 2 and, according to her evidence, rolled her capital and profits from them into the Project. Parmjit became a member of the November 2010 and 2011 Joint Ventures. In all of these matters she was content to allow Jaswant to make all decisions with respect to the business and to benefit from those decisions.

[304] I also note that Parmjit alleged that she had advanced money to 690174 when she filed proofs of claims in that company's bankruptcy. This is a further

indication of Parmjit's close involvement in Jaswant's and 690174's business activities.

[305] The more difficult question is whether Wills and Dale are liable to the Garchas based on knowing assistance.

[306] Ms. Dale and Mr. Wills have not been shown to have actual knowledge of the terms of the 2007 JVA or any facts that suggested that 690174 was not the beneficial owner of Lot 1 at any material time. I accept their evidence that they did not know of the terms of the 2007 JVA and find no evidence from which I could draw a contrary inference. They are therefore not liable for knowingly assisting in Jaswant's and 690174's breaches of fiduciary duty.

[307] However, I have concluded that Wills and Dale are holding their interest in the 2011 Joint Venture as a nominee for Jaswant or 690174. With the possible exception of $25,000 advanced by them to 690174 on August 17, 2007, there is no documentary evidence showing that Wills or Dale contributed any funds to the Project or to the acquisition of Lots 1 to 5. The Trustee has concluded that the $25,000 advance was used to contribute to the deposit for the purchase of Lot 3. However, Wills and Dale's registered interest is in Lot 4. They therefore have made no contribution to the purchase of the Lot that constitutes their capital contribution to the 2011 Joint Venture.

[308] Ms. Dale and Mr. Wills testified that they began to invest in real estate projects being managed by Jaswant in the 1990s, and that the profits they had earned in earlier projects were rolled into the Project, ending with their acquisition of a half interest in Lot 4. However, they were unable to identify any specific projects in which they had invested. They could not say how much they invested or provide any proof of advances they made to any such project. They could produce no documents relating to any such investments. Jaswant's evidence was that Mr. Wills and Ms. Dale had been paid everything that they were entitled to from past projects and therefore had invested nothing in the Project.

[309] Wills and Dale also admitted that they had never declared any income from those previous projects on their tax returns. Their explanation for this was that they never actually received any funds from the projects. However, they produced no records or documents corroborating their evidence that they had earned any profits from them. They described themselves as being executives in multi-million-dollar enterprises. I find it difficult to accept that, as such, they were not aware of their obligation to disclose accrued income from these projects on their income tax returns.

[310] Ms. Dale did produce some handwritten notes showing receipt of net proceeds from the sale of three properties registered in her name in 2010. Two of these properties were sold to Ranjit and Joginder Chahal. It was not clear from the records who purchased the third property. Ms. Dale's notes record the receipt of the following net proceeds:

1. Lot 59	$62,814.97
2. Lot 60	$62,833.65
3. 58 Ave	$403,863.33

[311] The notes also indicate that a cheque of $403,690.62 was transferred to Jaswant's Coast Capital Account on an indecipherable date, probably in 2010. Ms. Dale also produced copies of a $25,000 bank draft to Jaswant which appears to be dated April 7, 2010, a $20,000 cheque to Jaswant dated May 5, 2010, and a $411,420.86 bank draft to Best Quality Homes Ltd. on July 29, 2011.

[312] However, the evidence shows that Best Quality Homes Ltd. provided the funds to purchase these properties and that the net proceeds of sale were paid to that company or to Jaswant. I conclude that Wills and Dale held title to those properties as a nominee for Best Quality Homes Ltd. or Jaswant.

[313] I also find that Jaswant had agreed that some consideration would be provided to Wills and Dale for providing their covenants on the financing for Lot 4 but that the amount of that consideration was never determined.

[314] As I understand the answers Jaswant gave under cross-examination, his evidence was that 690174 had provided all of the funds used to acquire Lot 4 and that he intended to recover those amounts from the profits earned from the Project before Wills and Dale were entitled to receive anything. I do not agree with Mr. Taylor that Jaswant's evidence was that all of the profits from Wills and Dale's proportionate interest would be paid to 690174. However, there was no evidence as to how much they would receive from the Project. What is clear is that Jaswant considered that he had the unilateral right to decide how much they would receive.

[315] According to the Ninth Report of the Trustee, 690174 advanced $488,227.53 towards the acquisition of Lot 4. The most recent information contained in Exhibit 175 showed a balance of $1,832,266.24 in the Vendor Trust Account set up in the name of Jaswant, Wills, and Dale, of which Wills and Dale are notionally entitled to a 50% interest. This means that they are asserting the right to receive over $900,000 from an investment of at most $25,000.

[316] Based on all of the forgoing I have concluded that Wills and Dale held their interest in Lot 4 as a nominee for 690174 or Jaswant. I find that they provided their covenants on the Acquisition Mortgage for Lot 4 to assist Jaswant to obtain that financing but that they did not have a beneficial ownership interest in that Lot. I find that there was an understanding that Wills and Dale would receive some compensation for giving their covenants for payment but that they had not agreed with Jaswant on the amount of that compensation by the time of his bankruptcy.

[317] Therefore, Wills and Dale are in the position of volunteers with respect to their interest in the Project and hold their interest subject to the Garchas' proprietary claim. However, they are not jointly liable with 690174 and Jaswant on the basis of knowing assistance.

[318] I have also concluded that Grewal Management did not have the required knowledge of the 2007 JVA to be liable for knowing assistance of 690174's breaches fiduciary duty, some of which occurred before Grewal Management became a joint venturer. Grewal Management did not become an investor in the

Project until 2011. There is no evidence that Mr. Grewal had actual knowledge of the terms of the 2007 JVA at any material time.

[319] Similarly, I am unable to find a sufficient evidentiary basis for finding that Raveen had actual knowledge of the terms of the 2007 JVA or was willfully blind with respect to it. While I did not find Raveen to be a credible witness, I am unable to draw any inference that she had the requisite state of knowledge to make her liable for knowing assistance of Jaswant's and 690174's breaches.

[320] I am also of the view that the circumstances in which the assignment fee from 690174 to 688350 was handled did not result in any receipt of a benefit by 688350 or Raveen. I find that the assignment fee was paid to inflate the apparent purchase price paid for Lot 1 in order to maximize the amount of mortgage financing that could be obtained to purchase it. These circumstances do no credit to Jaswant or Raveen. However, they do not constitute any actionable wrong at the instance of the Garchas.

Knowing receipt

[321] The Garchas also claim against the 2011 Joint Venturers on the basis of knowing receipt.

[322] Knowing receipt is the receipt of property that is known to be subject to a trust or obtained through a breach of fiduciary duty. A person therefore cannot be liable for knowing receipt without actually having received some benefit obtained from the breach. However, unlike liability for knowing assistance, a person may be liable for knowing receipt on the basis of constructive notice of the fiduciary obligation.

[323] The requisite state of knowledge for knowing receipt is set out by Justice La Forest in *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805 at 836-837:

> 48 Given the fundamental distinction between the nature of liability in assistance and receipt cases, it makes sense to require a different threshold of knowledge for each category of liability. In "knowing assistance" cases, which are concerned with the furtherance of fraud, there is a higher threshold of knowledge required of the stranger to the trust. Constructive knowledge is excluded as the basis for liability in "knowing assistance" cases; see *Air*

> *Canada v. M & L Travel Ltd., National Westminster Bank Ltd.*, supra, at pp. 811-13. However, in "knowing receipt" cases, which are concerned with the receipt of trust property for one's own benefit, there should be a lower threshold of knowledge required of the stranger to the trust. More is expected of the recipient, who, unlike the accessory, is necessarily enriched at the plaintiff's expense. Because the recipient is held to this higher standard, constructive knowledge (that is, knowledge of facts sufficient to put a reasonable person on notice or inquiry) will suffice as the basis for restitutionary liability. Iacobucci J. reaches the same conclusion in *Gold v National Westminster Bank Ltd.*, supra, where he finds, at para. 46, that a stranger in receipt of trust property "need not have actual knowledge of the equity [in favour of the plaintiff]; notice will suffice".

[324] In this case it is clear that Panorama, through Jaswant, had actual knowledge of Jaswant's and 690174's breaches and, as set out above, received a benefit from the incorporation of Lot 1 into the Project. It is therefore also liable for knowing receipt of a benefit obtained by a breach of trust.

[325] As Ranjit benefited from 690174's breaches and had actual knowledge of the terms of the 2007 JVA, he is liable as a person in knowing receipt of a benefit. Even if he did not have actual knowledge, I am of the view that Ranjit's knowledge of and participation in the 2007 Joint Venture were sufficient to put him on notice and under a duty to make inquiries about the 2007 JVA. Ranjit admits that he had knowledge of the 2007 JVA. It is inconceivable that he did not know that the purpose of the 2007 JVA was to develop Lot 1 and that others had invested in it. The combination of receipt of property subject to a trust and being put on notice of facts requiring further inquiry is sufficient to impose liability on Ranjit for knowing receipt.

[326] As I have already stated, counsel for Ranjit and Svender conceded that Svender is bound by any finding made against his father. I therefore find Svender liable for knowing receipt as well.

[327] I find that at a minimum Parmjit was aware of sufficient facts to impose on her a duty to make further inquiries before taking a benefit from Lot 1. It is simply not credible for her to deny that she was not aware of the existence of the 2007 JVA. At a minimum, she must have known that Jaswant had entered into a joint venture agreement with other persons with respect to Lot 1. She was also aware that no reference was made to any of those persons in Jaswant and 690174's dealing with

Lot 1. These circumstances were sufficient to put her on inquiry before accepting an interest in Lot 1. Her failure to do so makes her liable for knowing receipt of property obtained by a breach of fiduciary duty.

[328] My findings with respect to Parmjit's liability for knowing assistance by virtue of being engaged in a joint enterprise with Jaswant apply equally to her liability for knowing receipt.

[329] Raveen certainly played an active role in relation to the Land Swap and subdivision of the 5 Lots. However, there is no evidence that she received any benefit from her involvement in these actions.

[330] I also find that the Garchas have not established that Raveen is liable to them as a *trustee de son tort.* A person may be found liable as a *trustee de son tort* if they assume trust duties over property even though they have not been appointed to the office of a trustee. The Garchas submit that when Raveen became the trustee of Lots 1 to 5 in connection with the Land Swap, she became a *trustee de son tort* to them. However, as I read the authorities, a person does not become a trustee of another person unless they are aware that the property over which they have control is held in trust for that person. In this case, I am not satisfied that Raveen knew that Lot 1 was being held in trust for the members of the 2007 JVA. Her duty was to the persons who appointed her as trustee, that is, the 2011 Joint Venturers. In the absence of actual knowledge of the trust on Raveen's part or of the receipt of any benefit from the trust property, Raveen cannot be liable as a *trustee de son tort.*

[331] Accordingly, I find that the Garchas have not established any claim against Raveen in these proceedings.

[332] Because I am of the view that the appropriate remedy for the Garchas is to declare that they are entitled to their proportionate share of 690174's 28.5% interest in the 2011 Joint Venture it is not necessary for me to make any award against the other 2011 Joint Venturers whom I have found liable for knowing assistance or knowing receipt.

[333] I therefore simply make a declaration that those joint venturers knowingly assisted 690174's breaches and knowingly received a benefit from the breaches.

[334] At trial, 690174 made no submissions with respect to how any award made in favour of the plaintiffs should be allocated among the defendants. No defendant advanced any claim for indemnity or contribution against any other with respect to any such award. The position taken by the defendants was that the plaintiffs' claims were without merit and ought to be dismissed, or, in the case of the Trustee, that any claims were equity claims that were subordinated to the claims of all other creditors of the Bankrupts. Given these positions, I am unable to grant any relief in favour of any defendant against any other defendant at this time.

[335] However, I am prepared to receive submissions on this question once the defendants have had the opportunity to assess their positions in view of the findings I have made in favour of the plaintiffs. Such submissions should be made at the same time as the Accounting Hearing referred to at para. 618.

Affirmative Defences Raised by Defendants in the Garcha Action

The defence of election

[336] The Trustee, Raveen, and Parmjit submit that the Garchas have elected a remedy inconsistent with the claims they advance for equitable relief and are thereby precluded from obtaining that relief.

[337] In their notice of civil claim, the Garchas advanced the claim for equitable remedies flowing from the breaches of fiduciary duty that I have addressed above. However, Mr. Garcha also claimed judgment against 690174 as the maker of the Promissory Note. Although this claim was contained in the notice of civil claim, it was made separately by Mr. Garcha and not as an alternative to the claims based on breach of equitable duties.

[338] In the Promissory Note, 690174 promised to pay Mr. Garcha the principal amount of $484,252 without interest. The Promissory Note recited that Mr. Garcha agreed and acknowledged that the principal amount represents Mr. Garcha's 2007 Joint Venture contribution paid to 690174 pursuant to the 2007 JVA and stated that

690174 was entitled to prepay any portion of the amount owing without notice, bonus, or penalty.

[339] 690174 did not deliver a response to the notice of civil claim, and on March 17, 2015, Mr. Garcha obtained a default judgment for the amount of the Promissory Note. Mr. Garcha then attempted to register that judgment against the interest of 690174 in the Project. Any enforcement proceedings on the judgment were of course stayed upon 690174's bankruptcy.

[340] On November 9, 2018 the Trustee filed a response to the Garchas' notice of civil claim, pursuant to the order of Justice Bowden dated June 26, 2018, that granted it leave to defend this action on behalf of the Bankrupts.

[341] The Trustee did not plead that the Garcha's right to pursue the action was barred by the doctrine of election or the principles of issue estoppel in his original response to civil claim. He did however plead that the acceptance of the Promissory Note amounted to what was in effect an accord and satisfaction of the Garchas' claims.

[342] In their amended response to civil claim filed January 17, 2019, Parmjit and Raveen did not raise the defence of election or merger, but they pleaded that the Garchas' claims "have been limited by the promissory note given 690174 BC Ltd and taken by the Plaintiffs". This plea remained unchanged in the amended response to civil claim dated February 21, 2020, in response to the Garchas' amended notice of civil claim, filed by leave of the court on January 28, 2020. To the extent that this is a good pleading, I find that it also was a plea of accord and satisfaction.

[343] The Trustee did, however, raise what could be characterized as the defence of merger in para. 1 of Part 3 of its February 24, 2020, amended response to civil claim, which also responded to the Garchas' amended notice of civil claim. That pleading states "having taken the default judgment, the Plaintiffs are barred from suing further as against 690174 as any other cause of action they had as against 690174 was merged in the default judgment".

[344] I note that this pleading was contained in a pleading filed in response to the Garchas' amended notice of civil claim. The Trustee did not apply for leave to amend, but was entitled to amend to meet the new matters raised in the Garchas' amendment pursuant to Rule 6-1(5)(a) of the *SCCR*. However, this portion of the Trustee's amendment did not respond to any new matter raised by the Garchas' amendment. It would therefore appear that this pleading was not authorized under the *SCCR*.

[345] The Garchas have not raised any objection to the defence of election being relied upon by the defendants. While I have some doubt about whether it was open to Parmjit and Raveen to rely on the doctrine of election or for the Trustee to raise this defence for the first time in its amended response to civil claim, I will nevertheless address that defense in these reasons.

[346] The Trustee argued that the taking of a default judgment constituted an irrevocable election by Mr. Garcha to recover his investment through the personal judgment on the Promissory Note to the exclusion of any other remedy. The Trustee relies on *Ladner v. Ladner*, 2004 BCCA 366, and *H.Y. Louie Co. Limited v. Bowick*, 2015 BCCA 256, for the proposition that a party who elects to take one remedy for a cause of action is precluded from seeking an alternative remedy at a later time.

[347] There is no question that a party who pursues alternative remedies for the same cause of action must at some point elect which remedy it seeks from the court. The law is equally clear that such an election need not be made before judgment. However, a party may obtain concurrent remedies at different times or in separate proceedings.

[348] A plaintiff who takes judgment for an alternative remedy is precluded from pursuing the other remedy by virtue of the doctrine of election unless the dictates of fairness and justice require a second action: *Ladner* at para. 47. Recent jurisprudence also suggests that the doctrines of merger and election are closely related to the principles of *res judicata*, issue estoppel, and cause of action estoppel, and that the underlying rationale for all of these doctrines is preventing abuse of the court's process.

[349] Election applies only when the plaintiff is seeking to enforce the same cause of action. A cause of action is a factual situation giving rise to a claim or remedy: *Ladner* at para. 49; *Letang v. Cooper*, [1965] 1 Q.B. 232 (Eng. C.A.) at 242-3. Therefore, the threshold question is whether the Garchas are seeking to enforce the same cause of action on which Mr. Garcha took default judgment.

[350] In this case I am not satisfied that the Garchas are seeking a remedy for the same cause of action. Their claim for breach of trust and fiduciary duty is based on the manner in which 690174 and Jaswant discharged their trust and fiduciary duties to the members of the 2007 Joint Venture. Mr. Garcha's judgment is based on the Promissory Note, which was made well after the breaches of fiduciary duty. There is clearly a connection between the two claims. However, it is also clear that either claim could have been advanced independently of the other, that is, without relying on any of the facts giving rise to the other claim. This is so because a promissory note creates a cause of action independent of any underlying obligation.

[351] Subject to the issue of election and merger, the acceptance of the Promissory Note and the obtaining of judgment on it would bar any further claim for breaches of equitable duty only if the Promissory Note was given and accepted in satisfaction of the Garchas' claims for relief arising out of those claims. Whether that occurred is a question of fact. In this case there was no evidence that the Promissory Note was given or accepted in full satisfaction of the Garchas' claims. Neither Jaswant nor Mr. Garcha testified that that was the case. The Promissory Note does not clearly state that the note was intended to be a full settlement of the Garchas' claims.

[352] In addition, the circumstances under which Mr. Garcha took judgment on the Promissory Note are inconsistent with his having accepted it in full satisfaction of his claim. The Garchas continued to pursue equitable relief after Mr. Garcha received the Promissory Note and after Mr. Garcha took judgment.

[353] I therefore conclude that the defendants have not established that the Garchas have elected to accept the Promissory Note in satisfaction of their claims.

[354] The alternate question is whether the doctrine of election applies to preclude the Garchas from seeking to claim a property interest in the Project. This in turn depends on whether the remedies sought by the Garchas are alternative or cumulative. If they are alternative, any further claim may be barred by the doctrine of election, while if they are cumulative they are not. However, I am also satisfied that even if they are alternative, I am required to consider whether allowing the action to continue would be an abuse of the court's process or whether it is in the interests of justice to allow it to proceed.

[355] If the default judgment is viewed as a remedy for 690174's breaches of trust and fiduciary duty, it is clearly a personal or *in personam* remedy. The question is whether such a personal remedy against a defaulting fiduciary is inconsistent with continuing to seek an equitable remedy through a charge on the assets that it has misappropriated.

[356] In *Bronson v. Tompkins Ranching Ltd.*, 2012 BCSC 770, Justice Gropper succinctly summarized the principle that a wronged person alleging a breach of fiduciary duty may pursue personal remedies against the wrongdoer and seek a charge against the proceeds of the wrongdoing because these remedies are cumulative.

> 93 The two remedies in the case at bar are: (a) an *in personam* remedy against the trustee; and (b) an in rem remedy against the misappropriated trust property. Ultimately, the conclusion as to whether these remedies are alternative or cumulative is critical. If alternative, the plaintiffs are precluded from bringing the Second Action because they elected between the two remedies at the time of judgment in the First Action. If cumulative, the plaintiffs can bring the Second Action as they have not yet elected between the two remedies because they have not received full satisfaction for their loss.
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> 94 Framing the question differently, are the two remedies "inconsistent"? If yes, they are alternative. If no, they are cumulative. Other than the fact that the plaintiffs cannot have both remedies (as this would offend the rule against double satisfaction), there is no inconsistency between the two remedies.
>
> 95 There is English authority which states that an *in personam* claim against a defaulting trustee advanced in a first action may be supplemented in a later action by a claim to enforce an equitable charge or lien over the proceeds in which the misappropriated assets have been mixed. This is permitted because these remedies are cumulative: see *Serious Fraud Office v. Lexi Holdings Plc*, [2008] EWCA Crim 1443 (Eng. C.A.), at para. 39-40

> [*Serious Fraud Office*]. I note the Court in that case relied on *Tang Man Sit* to arrive at this conclusion. It seems to me that if pursuing an *in personam* claim against a defaulting trustee and pursuing an equitable charge over the misappropriated property are cumulative remedies, then it can equally be said that pursuing an *in personam* claim against a trustee for breach of trust and an in rem claim against the third party who has knowingly assisted in the breach of trust are cumulative remedies. Indeed, the latter is a remedy that could be characterized as one "in aid of" the remedy against the trustee: *Serious Fraud Office*, at para. 40.

[357] These considerations apply in this case. I find that the remedies sought by the Garchas are cumulative and that the doctrine of election therefore has no application.

[358] A somewhat similar situation arose in *Citadel General Insurance Co. v. Lloyd's Bank of Canada*, [1993] A.J. No. 680 (Alta. Q.B.). In that case the plaintiff insurance company alleged that the defendant bank was liable to it for knowing receipt of funds that its customer held in trust for the plaintiff. The funds in question were insurance premiums had been collected in trust for the plaintiff by the bank's customer. The customer was in financial difficulty and defaulted in paying over the premiums to the plaintiff after the defendant bank debited its bank account to cover overdrafts owing to it.

[359] When the customer defaulted in remitting the premiums, the plaintiff obtained a promissory note from it for the amount that it owed. The customer made some payments on the note but ultimately defaulted. The plaintiff sued on the note for the balance owing to it but was unable to collect anything in the action. From para. 11 of the reasons it appears that the plaintiff did take judgment on the note because that was the only way it could enforce it.

[360] The defendant bank argued that by accepting the note the plaintiff had revoked the trust or acquiesced in the use of the funds by the customer. The court rejected that argument and held that the plaintiff had merely asked for the note as confirmation of the amount owing to it. In the Supreme Court of Canada's 2007 decision in *Citadel General Insurance*, the Court agreed with the trial decision on this point.

[361] I find that the cases relied upon by the defendants are distinguishable.

[362] In *Ladner,* Justice Huddart recognized that the court has the discretion to allow a claim otherwise subject to the doctrine of election to proceed if it is in the interests of justice to do so:

> 50 This appeal comes, I think, to the question of whether, by entering judgment for damages, the appellant elected to forego her claim for an equitable remedy, and whether, if she did, there is reason in the record to allow the claim to proceed in any event, as there was in *Hoque v. Montreal Trust of Canada* (1997), 162 N.S.R. (2d) 321 (C.A.), leave to appeal to S.C.C. refused, [1997] S.C.C.A. No. 656.

[363] The facts of this case can usefully be compared to the facts in *Ladner*, as outlined in Justice Huddart's reasons:

> 51 Although not pleaded before Parrett J. and the Court of Appeal, the appellant sought to establish a constructive trust over the Canadian Bar Association policies. That claim was properly rejected. The appellant abandoned her claim for specific performance of the separation agreement, and sought no other equitable remedy over the three policies with which this appeal is concerned or any of the other estate assets. When she learned of the estate's alleged insolvency, the appellant did not seek to amend her pleadings, to allege a "good conscience" trust. Nor did she seek an adjournment of the hearing to assess damages so she might reconsider her position or attempt to lead new evidence. Scarth J. assessed damages; his order was entered and not appealed. After the order was interpreted in a manner unfavourable to her, the appellant did not apply to extend the time for appeal. No new material facts have since come to light.

[364] In *Ladner* there was an express finding that the appellant knowingly had foregone her claim to equitable relief. In this case, it is clear to me that the Garchas did not intend to forego their claim for equitable relief over the property of which they have been wrongfully deprived.

[365] In *H. Y. Louie*, the issue was the proper characterization of a judgment obtained against a defendant prior to the defendant's bankruptcy. The plaintiff alleged that it was entitled to pursue the defendant after bankruptcy because its claim against the defendant was for obtaining property by false pretenses. The majority of the British Columbia Court of Appeal held that the judgment had been obtained for breach of contract because it was the pleadings that determined the nature of the plaintiff's claim. In that case there was no issue about whether the

claims were concurrent or alternative. There had been only one claim made against the defendant. The plaintiff had consented to the judgment on that basis even though it was aware there was a possible claim for false pretenses

[366] As the above quotation from *Bronson* makes clear, the Garchas are not entitled to recover twice for the defendants' wrongdoing. Thus, if Mr. Garcha had recovered anything under the judgment, that amount would have to be taken into account in determining his remedy based on the rule against double recovery. However, that issue does not arise in this case because Mr. Garcha has not collected anything on the judgment.

[367] In addition, Jaswinder Kaur Garcha was not a party to the Promissory Note and did not take judgment on it. No question of election can therefore arise in respect of her claim.

[368] I have also concluded that I have the jurisdiction to allow the Garchas' claims for breach of trust and breach of fiduciary duty to be determined on the merits if it is in the interests of justice to do so.

[369] In *Tang Man Sit v. Capacious Investments Ltd*, [1995] UKPC 54, the Privy Council held that the doctrine of election was part of a general and overriding principle that legal proceedings should be conducted in a manner that strikes a fair and reasonable balance between the interests of the parties, having regard to the wider public interest in the conduct and finality of court proceedings. *Tang Man Sit* was cited with approval by Justice Gropper in *Bronson*.

[370] In *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, Justice Binnie commented on the principle of issue estoppel that "the Court should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice, considering the procedural and equitable issues at stake": at para. 80.

[371] In *Danyluk,* Justice Binnie also referred to the reasons of Justice Finch, as he then was, in *British Columbia (Ministry of Forests) v. Bugbusters Pest Management Inc.* (1998), 159 D.L.R. (4th) 50 (B.C. C.A.) at para. 32:

> It must always be remembered that although the three requirements for issue estoppel must be satisfied before it can apply, the fact that they may be satisfied does not automatically give rise to its application. Issue estoppel is an equitable doctrine, and as can be seen from the cases, is closely related to abuse of process. The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case.

[372] Justice Binnie's closing comments on the nature of the court's discretion in applying issue estoppel are also relevant to this case:

> 66 In my view it was an error of principle not to address the factors for and against the exercise of the discretion which the court clearly possessed. This is not a situation where this Court is being asked by an appellant to substitute its opinion for that of the motions judge or the Court of Appeal. The appellant is entitled at some stage to appropriate consideration of the discretionary factors and to date this has not happened.
>
> 67 The list of factors is open. They include many of the same factors listed in *Maybrun* in connection with the rule against collateral attack. A similarly helpful list was proposed by Laskin J.A. in *Minott*, *supra*. The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case. …

[373] In *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.), Justice Laskin stated the proposition as follows at paras. 49-50:

> Even had the three requirements been met, however, in my view the court has always retained discretion to refuse to apply issue estoppel when to do so would cause unfairness or work an injustice. As Lord Upjohn observed in *Carl Zeiss Stiftung v. Rayner Keeler Ltd.*, [1967] 1 A.C. 853 at p. 947, [1966] 2 All E.R. 536, "[a]ll estoppels are not odious but must be applied so as to work justice and not injustice, and I think the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind."
>
> Issue estoppel is a rule of public policy and, as a rule of public policy, it seeks to balance the public interest in the finality of litigation with the private interest in achieving justice between litigants. Sometimes these two interests will be in conflict, or at least there will be tension between them. Judicial discretion is required to achieve practical justice without undermining the principles on which issue estoppel is founded. Issue estoppel should be applied flexibly where an unyielding application of it would be unfair to a party who is precluded from relitigating an issue.

[374] I am aware that many of these cases involve decisions of tribunals and that the issue before the Court was whether the doctrine of issue estoppel barred a

further action. However, the English authorities referred to by Justice Gropper in *Bronson* have held that there is a general rule that the overriding question is whether pursuing a claim after judgment arising out of the same facts constitutes an abuse of process.

[375] I conclude that the interests of justice require that the court permit the Garchas' claim for equitable relief to continue even if the elements of election applied to Mr. Garcha. From the outset of these proceedings the Garchas have asserted a beneficial interest in the proceeds of the sale of Lot 1. I find that it would be unfair to deny them a remedy because Mr. Garcha took default judgment on the Promissory Note.

[376] The evidence at trial shows that 690174 and Jaswant have benefitted to a considerable degree from their wrongful acts. They have had the opportunity to dispute their liability and through the Trustee have done so.

[377] I also rely on the fact that 690174 stood in the position of a fiduciary to the Garchas at the time that Jaswant presented the Promissory Note to Mr. Garcha. As a fiduciary, 690174 owed a duty to make full disclosure of all relevant circumstances concerning the note to Mr. Garcha. There is no evidence that Jaswant informed Mr. Garcha that it was unlikely that 690174 was or would be in a position to honour the Promissory Note if it was presented for payment. In particular, 690174 presented the note after Ms. Virk commenced foreclosure proceedings against the Project and after the Grewal Action had been commenced. By that time, it was unlikely that 690174 could honour the Promissory Note.

[378] In addition, at the time the Mr. Garcha's counsel took default judgment, the facts relating to Jaswant's conduct, the degree to which funds had been mixed by Jaswant, and the numerous inconsistent agreements that the Jaswant-controlled parties had entered into had not been fully explored.

[379] Finally, if the plea of election is given effect, Mr. Garcha will be deprived of the beneficial interest he owns in Lot 1 despite having contributed a significant amount to its acquisition.

[380] The last part of the relevant analysis considers whether allowing the Garcha claim to continue would be to permit an abuse of the process of the Court. In my view it would not. On the contrary, it is my view that the consequences of applying the doctrine of election to preclude the Garchas obtaining the relief to which I have found they are otherwise entitled would result in an injustice.

[381] I therefore conclude that the default judgment is not a bar to the claims pursued by the Garchas at trial.

Defence of non-compliance with subdivision requirements of the *LTA*

[382] Parmjit and Raveen submit that the version of the oral agreement that Mr. Garcha testified to, one in which the Garchas would receive seven subdivided lots, offends s. 73 of the *Land Title Act*, R.S.B.C. 1996, c. 250 [*LTA*], because it amounts to a subdivision of Lot 1 without complying with the requirements of the *LTA* for subdivision. In *International Paper Industries Ltd. v. Top Line Industries Inc.* (1996), 20 B.C.L.R. (3d) 41 (B.C. C.A.), the Court of Appeal held that an agreement to lease a portion of un-subdivided land to a tenant without complying with the subdivision requirements of the *LTA* was void and unenforceable. Parmjit and Raveen say that this decision precludes the Garchas from asserting any claim to have lots transferred to them.

[383] As I understand it, this argument does not assert that the express terms of the 2007 JVA violate s. 73. Rather, it is directed to Mr. Garcha's subjective understanding of the agreement he made with Jaswant as set out in the Garchas' further amended notice of civil claim. However, I have already decided that the Garchas are bound by the terms of the written 2007 JVA and that their rights must be determined on that basis, without regard to their subjective understanding of the agreement.

[384] Therefore, I find that s. 73 of the *LTA* has no application to the enforceability of the 2007 JVA, which clearly contemplates that any subdivision will be carried out in accordance with all applicable legislative requirements.

Repudiation or fundamental breach of 2007 JVA by the Garchas

[385] The Trustee and Parmjit argue that the Garchas "walked away" from the 2007 Joint Venture and that this justified Jaswant's actions in dealing with Lot 1 without regard to their interests.

[386] It is not clear whether this argument asserts that the Garchas repudiated the 2007 JVA or that they were in fundamental breach of their obligations under it, although these terms are sometimes used interchangeably. These concepts apply only to executory contracts. The Garcha's claims are based on their beneficial ownership of their proportionate share of Lot 1. It is therefore questionable whether they apply in this case. In any event, the evidence does not establish either ground for 690174 failing to carry out its obligations under the 2007 JVA.

[387] A party repudiates a contract when it communicates an unequivocal intention to no longer be bound by it. A party can therefore repudiate a contract without actually breaching any performance obligation up to the time of repudiation. Fundamental breach occurs when a party breaches a contract in such a way as to deprive the innocent party of any benefit from the contract.

[388] The law is well-settled that a party alleging that a contract has come to an end by virtue of a repudiation must demonstrate that the conduct of the other party evinced an unequivocal intention not to be bound by the terms of the agreement, and that the innocent party had accepted and communicated an acceptance of the repudiation to the party in breach: G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Thomson Reuters Canada, 2011) at 585-6 [Fridman]; *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. Canada*, 2007 BCCA 88.

[389] The elements necessary to establish a fundamental breach were set out by Justice Wilson in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 at 499-500:

> 148 The formulation that I prefer is that given by Lord Diplock in *Photo Production Ltd. v. Securicor Tpt. Ltd.*, [1980] A.C. 827, [1980] 2 W.L.R. 283, [1980] 1 All E.R. 556 (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) (emphasis added). 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 of 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.

[390] I do not agree that the Garchas “walked away” from their investment. The evidence relied upon by the Trustee in support of this argument consists of Jaswant’s testimony that Mr. Garcha told him he could “let it burn” when he asked Mr. Garcha for more contributions to the expenses of the 2007 Joint Venture and on the failure of the Garchas to make further contributions to the 2007 Joint Venture after October 2009.

[391] The evidence about the statement comes from Jaswant. Mr. Garcha denies making that statement. When Jaswant’s evidence conflicts with that of Mr. Garcha, I prefer Mr. Garcha’s evidence.

[392] In addition, I find that by October 2009, Jaswant had ceased to pursue the purposes of the 2007 Joint Venture, which contemplated the subdivision of only Lot 1. At that point, 690174 had no further right to ask for funds from the 2007 Joint Venturers without obtaining their informed consent to the incorporation of Lot 1 into the Project.

[393] While the Trustee argues that the 2007 Joint Venture was not incompatible with a larger subdivision, it clearly was incompatible with the manner in which the November 2010 JVA purported to divide up the beneficial ownership of the lands being subdivided.

[394] Apart from the evidence of Jaswant that I have rejected, there is no evidence that the Garchas ever refused to meet their obligations under the 2007 JVA. In any event, even if Jaswant’s evidence is accepted, it amounts to no more than an assertion that the Garchas refused to make further financial contributions to the

2007 Joint Venture. It is clear that Jaswant and 690174 did not comply with the procedures for raising funds set out in the 2007 JVA, and accordingly the Garchas were under no obligation to comply with his requests for further financial contributions.

[395] In this case, 690174 has continued to enjoy the principal benefit that it obtained from the 2007 JVA: the ability to utilize Lot 1 in the Project. It therefore has also failed to establish the elements necessary to establish fundamental breach.

[396] At worst, a failure to advance funds, assuming that the request was made in accordance with the parties' agreement, would constitute a default on the part of the party refusing to do so. The appropriate remedy for any such default would have been to take it into account upon division of the 2007 Joint Venture's proceeds. It might have also led to a claim for damages: *307527 B.C. Ltd. v. Cambridge*, 2003 BCSC 1027 at paras. 253-258.

[397] There is therefore no basis for concluding that the Garchas are precluded from a remedy on these grounds.

Effect of the order of Justice Harvey of May 19, 2015

[398] While it is not entirely clear, the Trustee's argument seems to be that the Harvey Order somehow extinguished the property rights of the 2007 Joint Venturers in Lot 1.

[399] The Trustee submits that the Garchas are bound by the Harvey Order because they are persons claiming by, through, or under 690174 and therefore are bound by the priority established in para. 8 of that order.

[400] However, I find that the Trustee has misapprehended the effect of the Harvey Order. That order was an order *nisi* of foreclosure declaring that the Virk Mortgage was a valid charge ranking in priority to the respondents in the property charged by the Virk Mortgage.

[401] There is no question that Ms. Virk was entitled by virtue of the priorities set out in the *LTA* to rely on the registered state of title to the lands charged by her

mortgage, including Lot 1, and to treat 690174 as the owner of Lot 1 for the purposes of establishing its priority.

[402] However, the Harvey Order merely established that the Virk Mortgage ranked in priority to the Garchas' interest in Lot 1. It did not in any way determine the validity of that interest, nor did it extinguish it or determine the rights of the parties to these proceedings against each other. To the contrary, an order *nisi* of foreclosure as a matter of law recognizes the right of persons whose interests rank behind the foreclosing mortgagee to redeem its mortgage.

[403] The Harvey Order is therefore irrelevant to the issues in this case, apart from being a step in a process that put the Garchas' beneficial ownership rights in Lot 1 at risk.

Effect of registration of an interest in the Land Title Office

[404] Wills and Dale rely upon on s. 23 of the *LTA*, arguing that it protected their registered title.

[405] Section 23 of the *LTA* provides as follows:

> 23 (1) In this section, "court" includes a person or statutory body having, by law or consent of parties, authority to hear, receive and examine evidence.
>
> (2) An indefeasible title, as long as it remains in force and uncancelled, 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, subject to the following:
>
> > (a) the subsisting conditions, provisos, restrictions, exceptions and reservations, including royalties, contained in the original grant or contained in any other grant or disposition from the Crown;
> >
> > (b) a federal or Provincial tax, rate or assessment at the date of the application for registration imposed or made a lien or that may after that date be imposed or made a lien on the land;
> >
> > (c) a municipal charge, rate or assessment at the date of the application for registration imposed or that may after that date be imposed on the land, or which had before that date been imposed for local improvements or otherwise and that was not then due and payable, including a charge, rate or assessment imposed by a public body having taxing powers over an area in which the land is located;

> (d) a lease or agreement for lease for a term not exceeding 3 years if there is actual occupation under the lease or agreement;
>
> (e) a highway or public right of way, watercourse, right of water or other public easement;
>
> (f) a right of expropriation or to an escheat under an Act;
>
> (g) a caution, caveat, charge, claim of builder's lien, condition, entry, exception, judgment, notice, pending court proceeding, reservation, right of entry, transfer or other matter noted or endorsed on the title or that may be noted or endorsed after the date of the registration of the title;
>
> (h) the right of a person to show that all or a portion of the land is, by wrong description of boundaries or parcels, improperly included in the title;
>
> (i) the right of a person deprived of land to show fraud, including forgery, in which the registered owner has participated in any degree;
>
> (j) a restrictive condition, right of reverter, or obligation imposed on the land by the Forest Act, that is endorsed on the title.

[406] In my view, s. 23 of the *LTA* does not assist the defendants in these proceedings.

[407] The law is well settled that the *LTA* does not oust the jurisdiction of a court of equity to grant a remedy against a person found to be subject to an equitable obligation, including one based on unjust enrichment. In *Tolley v. Guerin*, [1926] S.C.R. 566, the Supreme Court held that the provisions of a Land Title Act employing a Torrens System of title do not oust the equitable jurisdiction of the Court (see also *Bainville v. White*, 2002 BCCA 239).

[408] In these proceedings, the claim against the registered owners of the subdivided lots is based on allegations that they either committed a wrongful act, are legally responsible for the wrongful acts of Jaswant and his companies, or have been unjustly enriched at the expense of the plaintiffs. None of these claims are affected by the existence of a registered interest.

[409] In *Ng v. Ng,* 2012 BCCA 195, the case relied upon by Wills and Dale, the Court of Appeal upheld the decision of the trial judge, Justice Cullen, that a certain property was not held in trust by the plaintiff for one of the defendants who had

counter-claimed for that relief. I can see no support in that decision for the proposition that an equitable claim against a registered owner of property is defeated by registration of the defendant's title to the property in issue in the Land Title Office. I also note that at para. 29 of *Ng,* the Court referred to a number of authorities in which equitable relief had been granted against a defendant who had registered title to the land in dispute.

[410] In this case any remedy I have granted against the defendants has been based on establishing a cause of action against them. The fact that they have a registered interest in the Project lands does not prevent them from being answerable for their conduct. Section 23 of the *LTA* protects the title acquired by persons in accordance with its provisions. It does not provide any defence to an action against persons who have acquired property in circumstances in which they are required to account for it.

[411] I therefore find that s. 23 of the *LTA* does not assist the defendants.

The Garchas' Other Claims

Unjust enrichment

[412] Because I am satisfied that my findings on breach of trust and breach of fiduciary duty are sufficient to grant appropriate relief to the Garchas, I do not find it necessary to deal with their claims for unjust enrichment.

[413] The essence of the Garchas' claim is to follow their own property into the proceeds of sale of the subdivided lots. I have found that they have established that claim. They therefore are not required to establish the elements of unjust enrichment to be entitled to relief.

Conspiracy

[414] In the course of final submissions, counsel for the Garchas abandoned this claim.

Punitive damages

[415] The Garchas seek an award of punitive damages in the amount of $500,000 against all defendants except the Trustee. However, they did not address the requirements for such an award set out by the Supreme Court in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, and *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19.

[416] In those cases, the Supreme Court of Canada held that an award of punitive damages should be restricted to cases in which the defendant's conduct represents a marked departure from ordinary standards of human behaviour. In addition, there must be a rational basis for the award of punitive damages, and that basis will only exist if a compensatory award is insufficient to serve the purposes of denunciation and deterrence. In para. 87 of *Performance Industries*, Justice Binnie stated the principle as follows:

> 87 O'Connor's fraud was, of course, reprehensible. Indeed, fraud is generally reprehensible, but only in exceptional cases does it attract punitive damages. In this case, the trial judge, at para. 109, thought punishment above and beyond the payment of generous compensatory damages was required for two reasons, namely that O'Connor's actions (1) "demand an award which will stand as an example to others" and (2) "at the same time assure that O'Connor does not unduly profit from his conduct." These are both legitimate objectives for the award of punitive damages (*Whiten*, supra, at paras. 43, 111). However, it must be kept in mind that an award of punitive damages is rational "if, but only if" compensatory damages do not adequately achieve the objectives of retribution, deterrence and denunciation.

[417] In this case Jaswant and 690174 are the only defendants whose conduct may be said to have constituted a marked departure from ordinary standards of human behaviour. However, the award I have made against them requires them to disgorge any benefit they obtained from their wrongful conduct regardless of any actual loss suffered by the Garchas. I conclude that this award adequately achieves the objectives set out by Justice Binnie.

[418] The claim for punitive damages is accordingly dismissed.

The Grewal Parties' Claims

[419] Each of the Grewal plaintiffs alleges that he, or his wholly owned company on his behalf, entered into an oral agreement with Jaswant to participate in the Project on terms that differed significantly from any of the written agreements put into evidence.

[420] In addition, each alleges that the agreements they made with Jaswant are binding on the members in the 2011 Joint Venture and that they compel the members of the 2011 Joint Venture to share the profits of the Project with them based on the amount that each participant in the Project contributed to the capital necessary to carry it out.

[421] There is however an important difference between Grewal Management's claim and the claims of Mr. Mattu and Rajpreet. Grewal Management entered into a written agreement purporting to govern the terms on which it invested in the Project. Neither Rajpreet nor Mr. Mattu entered into a written agreement with respect to their investments.

Grewal Management's claim

[422] I have set out my findings with respect to Grewal Management becoming involved in the Project at paras. 104-117 of these reasons.

[423] Grewal Management's position is that it invested in the Project pursuant to the oral agreement I described in those paragraphs and that the oral agreement supersedes the written agreement set out in the 2011 JVA.

[424] Mr. Grewal testified that he and Jaswant agreed that there would be an accounting when the Project was completed with all lots sold and expenses paid that would calculate how the profits would be divided based on relative contributions to the Project. While Mr. Grewal did not expressly say so, it is clear that when he referred to contributions, he meant monetary contributions.

[425] The defendants' position is that the whole of the net profits from the Project should be divided in accordance with the proportionate shares of each of the 2011

Joint Venturers. This would result in Grewal Management being entitled to 14.25% of the net profits.

[426] The actual contribution to Project expenses made by Grewal Management is not in dispute. In June 2011, Grewal Management contributed $1,687,886.50 to Buckley Hogan to be used to pay part of the purchase price for Lot 5. On March 19, 2012, it received $740,498.38 from the proceeds of the WSCU mortgage that paid out the Acquisition Mortgages on Lots 1 to 5. As in the case of the other 2011 Joint Venturers, I regard this receipt as an advance distribution of proceeds from the Project.

[427] The issue is whether the agreement pursuant to which Grewal Management participated in the Project was wholly reduced to writing or whether the oral agreement alleged by Mr. Grewal supersedes or modifies the written agreement set out in the 2011 JVA.

[428] I have concluded that Grewal Management is bound by the terms of the 2011 JVA, which explicitly set out the proportionate interest of each 2011 Joint Venturer in the Project.

[429] An oral agreement can in some circumstances constitute a collateral agreement that explains or expands upon a written agreement. However, an oral agreement that contradicts the express terms of a written agreement is of no effect: Fridman at 517.

[430] The oral agreement alleged by Grewal Management contradicts the written agreement it executed. It is therefore of no effect and Grewal Management is bound by the terms of the written agreement it executed pursuant to the parol evidence rule.

[431] The parol evidence rule was succinctly described in *Sattva*:

> 59 It is necessary to say a word about consideration of the surrounding circumstances and the parol evidence rule. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing (*King*, at para. 35; and Hall, at p. 53). To this end, the rule

> precludes, among other things, evidence of the subjective intentions of the parties (Hall, at pp. 64-65; and *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 (S.C.C.), at paras. 54-59, per Iacobucci J.). The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract (*C.J.A., Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 (S.C.C.), at pp. 341-42, per Sopinka J.).

[432] In addition, in this case the entire agreement clause in the November 2010 JVA expressly stated that the written agreement superseded all agreements with respect to the Project. While Mr. Grewal did not read the November 2010 JVA, the 2011 JVA expressly incorporated its terms by reference and Grewal Management must be taken to have agreed to be bound by it, including the entire agreement clause found at para. 13.1.

[433] A further difficulty I have with Mr. Grewal's submission is that it does not satisfactorily explain why he executed the 2011 JVA within days after the alleged oral agreement. There is no evidence that Mr. Grewal communicated any concern about Grewal Management's rights as set out in the 2011 JVA to anyone at the time it was executed.

[434] I find that the terms of the 2011 JVA were clear and capable of only one reasonable interpretation: that the profits from the 2011 Joint Venture would be distributed in accordance with the agreed proportionate interests set out in that agreement. I am reinforced in my interpretation by the fact that the sole purpose of the 2011 JVA was to admit Grewal Management into the joint venture and to adjust the proportionate interests of the parties accordingly.

[435] I therefore conclude that Grewal Management is bound by the terms of the 2011 JVA, which limit it to receiving 14.25% of the net proceeds of the Project.

Jaswant's fiduciary duties to Grewal Management

[436] Mr. Grewal's position is that Jaswant owed a fiduciary duty to Grewal Management with respect to the Project. His counsel submitted that this fiduciary duty arose from the *de facto* control that Jaswant exercised over all aspects of the

Project and from the representations that Jaswant made with respect to how the proceeds of the Project would be divided.

[437] I am not satisfied that Jaswant owed a fiduciary duty to Grewal Management or Mr. Grewal with respect to the negotiation of the terms on which Grewal Management became a member of the 2011 JVA or invested in the Project. As I have indicated above in the discussion of *Zynik Capital Corp.*, parties who are merely negotiating the terms of a joint venture do not generally owe fiduciary duties to one another.

[438] I am satisfied that Jaswant owed a fiduciary duty to Grewal Management with respect to the affairs of the 2011 Joint Venture. However, I do not find that Jaswant breached those fiduciary duties. All of the funds he invested were used in the Project. Mr. Grewal was involved in the negotiation of the Virk Mortgage, the Land Swap, and the subdivision of the Project. Jaswant carried out those steps with the informed consent of the 2011 Joint Venturers including Grewal Management, all of whom benefitted from them.

Rajpreet Sangha's claim

[439] I have already made a finding that Rajpreet advanced $800,000 to Panorama and Jaswant in connection with the Project. The first $200,000 was initially advanced as a contribution to the October 2010 Joint Venture by 0892995. Panorama owed a fiduciary duty to 0892995 to use that advance solely for the purposes of the October 2010 Joint Venture. Because that joint venture did not proceed, the $200,000 should have been kept segregated and returned to 0892995. However, Panorama used those funds to make up part of the deposit for the purchase of Lot 5. 0892995 therefore had a right to trace those funds into Lot 5 and ultimately Panorama's interest in the 2011 Joint Venture.

[440] I also find that the subsequent agreement made between Rajpreet, Jaswant, and their respective companies had all of the essential elements of a joint venture, set out at para. 231 of these reasons. Rajpreet agreed to combine his contributions with those of others into the Project. There is no suggestion that any of the funds

advanced by Rajpreet or 0892995 were advanced as loans. I find that they were advanced as contributions to a joint venture, the object of which was to acquire and subdivide Lots 1 to 5 and sell those lots; in other words, the Project. I also find that this joint venture agreement contained a formula for determining each party's share of the proceeds.

[441] I therefore conclude that the agreement made between Jaswant and Rajpreet in 2010, pursuant to which Rajpreet made his investment, was a joint venture agreement pursuant to which Rajpreet obtained a beneficial ownership interest in the Project.

[442] The agreement between Rajpreet and Jaswant was made after the execution of the November 2010 JVA, which purported to fully allocate the ownership of the Project. The question this raises is the extent to which the interests of any November 2010 Joint Venturer, apart from Jaswant and the two companies he wholly owned and controlled, could be affected by the agreement between Rajpreet and Jaswant.

[443] All of the members of the November 2010 Joint Venture testified that they never authorized Jaswant to bind them to make any agreements altering their rights under that agreement. They also rely on the terms of the November 2010 JVA that limit the authority of any joint venture to bind the others.

[444] There are circumstances in which a person may be bound by an agreement made by another person. This most commonly arises in an agency relationship.

[445] A person may bind another if they have actual authority or ostensible authority to do so.

[446] Ostensible authority requires some communication from the principal to the third party that would cause the third party reasonably to believe that the agent had authority to bind the principal. In this case I cannot find sufficient evidence that the November 2010 Joint Venturers held out Jaswant as their agent in his dealings with Rajpreet to establish ostensible authority. There is virtually no evidence of any

communications between Rajpreet and the November 2010 Joint Venturers or that Rajpreet was even aware of the November 2010 Joint Venture.

[447] For Rajpreet to affect the rights of the other November 2010 Joint Venturers he must therefore establish that Jaswant had actual authority to bind them.

[448] The existence of actual authority is a question of fact that must be determined on a review of the evidence. The principles relating to a finding of actual authority were set out in *Grosvenor Canada Limited v. South Coast British Columbia Transportation Authority*, 2015 BCSC 177:

> 58 The parties agree the essential elements of an agency relationship are (a) the principal's control of the agent's action, (b) the consent of both the agent and the principal, and (c) the authority of the agent to affect the principal's legal position. Professor Fridman in *Canadian Agency Law* 2nd Ed. (Toronto: LexisNexis Canada Inc., 2012) defines agency at common law as follows (at p. 4):
>
> > Agency is a relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to the affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property.
>
> 59 The existence of an agency relationship is a question of fact and it may arise between parties who have another legal relationship. In the context of trustees acting as agents, see *Advanced Glazing v. Multimetro et al.*, 2000 BCSC 804. It is irrelevant that the parties have used the term agency in describing their relationship (Fridman, *Canadian Agency Law* at p. 6). No express agreement is necessary to establish an agency relationship, and therefore it can be implied from the circumstances: *Trident Holdings Ltd. v. Danand Investments Ltd.* (1988), 64 O.R. (2d) 65 (C.A.).

[449] I have no difficulty in finding that Jaswant had actual authority to bind his companies, 690174 and Panorama. He was their directing mind and was acting on their behalf in the Project. I have already found that he had actual authority to bind Parmjit and that they were in fact engaged in a joint enterprise with respect to the Project. I also have found that Wills and Dale held their interest in the November 2010 Joint Venture as nominees for Jaswant, and that he therefore had the authority to deal with their interests in the Project to complete it successfully.

[450] The totality of the circumstances under which the Project was formed and pursued have convinced me that Jaswant had the actual authority to take the steps necessary to complete the Project, including by bringing in additional investors to provide funds to meet the expenses necessary to bring it to fruition.

[451] The evidence shows that in fact Jaswant made almost all of the decisions with respect to the Project without consulting with the other members of the November 2010 Joint Venture. There is no evidence of any November 2010 Joint Venturer ever challenging any decision Jaswant made. Remarkably, there is no evidence of any negotiations about the proportionate interests of the parties to the November 2010 JVA. On the contrary, it appears that Jaswant unilaterally decided what those interests would be.

[452] There is also no evidence that any of the November 2010 Joint Venturers except Ranjit played any role in the acquisition of Lots 2 to 4. Ranjit was involved in the acquisition of Lot 2, but his evidence was that he was not aware that Lot 2 was going to be consolidated and subdivided when he purchased a half interest in it. His belief was that Lot 2 was to be held for investment purposes. Although he signed the November 2010 JVA, there is no evidence that Ranjit participated in its negotiation or in the determination of the proportionate interests of the November 2010 Joint Ventures. Wills and Dale played no role in the acquisition of Lot 4 apart from executing the Lot 4 Acquisition Mortgage, and neither Mr. Wills nor Ms. Dale knew what they would receive from the completed Project.

[453] I find that Jaswant had the actual authority of the members of the November 2010 Joint Venture to do what was necessary to raise the funds required to complete the Project, including the agreement he made with Rajpreet.

[454] Because Rajpreet was not a party to the November 2010 JVA and was not aware of it, he is not bound by any of the contractual provisions in it restricting collateral agreements.

[455] The result is that Rajpreet has established a joint venture agreement with Jaswant that must be taken into account in determining the distribution of the proceeds of the Project.

Daljit Singh Mattu's claim

[456] Mr. Mattu invested $1,062,041.45 in the Project. As with Rajpreet, the critical issue with relation to his claim is how this amount should be characterized.

[457] Jaswant agrees that he borrowed $400,000 from Mr. Mattu and used those funds to invest in Sangha Group 2. The documentary evidence indicates that from November 2006 to February 2007, Mr. Mattu advanced approximately $400,000 to Jaswant, which he used to fund land acquisitions for Sangha Group 2.

[458] As I have earlier stated, Jaswant agrees that those funds were advanced as a loan and that he agreed to repay $500,000 to Mr. Mattu once Sangha Group 2 was completed.

[459] When Mr. Mattu inquired about the $500,000.00 repayment in 2007, Jaswant told him he needed to wait a little longer to be paid. In October 2007, after Mr. Mattu again asked for the repayment, Jaswant told him about the Project and gave him the option of taking the $500,000.00 repayment or investing it in the Project. Mr. Mattu visited the site and decided to invest.

[460] Mr. Mattu testified that Jaswant told him that the subdivision was his and that more properties would be acquired. He denies having knowledge of the involvement of other parties at that time.

[461] Jaswant acknowledged that he agreed the $500,000.00 due to Mr. Mattu would be invested in the Project, and that he invested the $500,000.00 in the Project on Mr. Mattu's behalf. However, as I described earlier in these reasons, his position is that he used the funds because Mr. Mattu was his silent partner in all his business activities. I need not repeat my reasons for rejecting that evidence.

[462] I have also accepted Mr. Mattu's evidence that most of his further advances to Jaswant were made pursuant to the same agreement. The bulk of Mr. Mattu's

advances to Jaswant were made in 2007 and 2008, the period during which Lots 2 to 4 were being acquired.

[463] I find that the agreement between Jaswant and Mr. Mattu has all of the necessary characteristics of a joint venture.

[464] Mr. Mattu did not use the term joint venture in his evidence. However, I find his agreement was summarized accurately in his counsel's argument:

> a. funds Mr. Mattu advanced to Mr. Sangha or his companies would be used by Mr. Sangha only to acquire properties for the Project or to pay costs associated with the Project;
>
> b. Mr. Sangha would involve other investors, and keep records to keep track of amounts advanced by other investors;
>
> c. Mr. Sangha would keep records of all of the bills for the Project, which investors could access;
>
> d. Mr. Sangha would be "in charge" of the Project and hire people for the Project;
>
> e. after the Project was complete and lots sold, and all costs and any legitimate creditors directly associated with the Project, including bank and contractors, had been paid, the remaining proceeds would be divided proportionately among investors according to their proven investments in the Project.

[465] Arguably the only element of a joint venture lacking in this description, as set out in *Gettling,* is a right of mutual control. It is clear that Jaswant exercised a great deal of control over the Project. However, this does not mean that Mr. Mattu had no right to control aspects of the Project.

[466] Mr. Mattu was clearly actively involved in the financial management of the Project from 2010 onwards. He introduced Rajpreet and later Jasprit Grewal to Jaswant. He raised funds needed to move the Project forward. He provided security for the Virk Mortgage, which was necessary for the Project to proceed. He clearly had control over all of these activities.

[467] Surrounding circumstances also support the conclusion that there was a joint venture between Jaswant and Mr. Mattu with respect to the Project:

1. Jaswant had historically structured projects relating to land developments in which investors were involved as joint ventures.

2. Jaswant adopted a joint venture structure to arrange for the involvement of the participants in the 2007, October 2010, November 2010, and 2011 JVAs.

3. All of the written joint venture agreements provided that the joint venturers owned a share of the joint venture assets as their separate property.

[468] I therefore find that Mr. Mattu entered into a joint venture with Jaswant pursuant to which Mr. Mattu acquired a beneficial interest in the Project by providing funds and assisting in its completion. The only rational basis for Mr. Mattu providing security for the Virk Mortgage was to carry out the objectives of the Project. He had no reason to put his property at risk unless he was a participant in the Project.

[469] I find that Mr. Mattu must have been aware of the existence of the November 2010 JVA by no later than June 2011. He introduced Mr. Grewal to the Project. Mr. Mattu witnessed the signatures of many of the 2011 Joint Venturers to the 2011 JVA. Even if he did so before some of the 2011 Joint Venturers had executed it, he must have been aware of the 2011 JVA by then. There is no evidence that Mr. Mattu communicated any objection to the terms of the November 2010 or 2011 JVAs at that time. This however is also consistent with him being a participant in Jaswant's interest in the Project.

[470] As set out above, there is ample evidence that Mr. Mattu was involved in the management of the Project, particularly with respect to finding investors and assisting in executing documentation. The only question is whether Mr. Mattu was participating in the Project because he was Jaswant's partner in all of the business activities carried out by Jaswant and his companies, or whether his activities and investment were restricted to the Project. I repeat my finding that Mr. Mattu was not a participant in any of Jaswant's business activities apart from the Project. I find that he became an investor in the Project in 2007 when Jaswant invested $500,000 from Sangha Group 2 on his behalf into the Project and that from that time forward was

engaged in the joint venture that developed the Project. I am satisfied that the funds he advanced, either directly or through his agreement with respect to the $500,000 from Sangha Group 2, were investments in the capital required to complete the Project.

[471] I also find that the November 2010 and 2011 Joint Venturers became aware of his involvement in the Project by 2011 at the latest.

[472] The memorandum prepared by Sean Hogan, which I described at paras. 126-128, supports the conclusion that the 2011 Joint Venturers were aware of Mr. Mattu's investment and recognized that he was a participant in the Project. They must have been aware of the reasons for Mr. Mattu's involvement in obtaining the Virk Mortgage. I also consider it significant that it was Ranjit and Mr. Grewal who first described Mr. Mattu as a silent partner and instructed Buckley Hogan to include him in the mortgage of the phase 1 lots. It is clear to me that their reference to Mr. Mattu being a silent partner referred to his interest in the Project. From this I conclude that they were aware of his involvement and did not object to it. This reinforces my conclusion that the 2011 Joint Venturers were aware that Mr. Mattu would share in the revenue from the Project.

Jaswant owed a fiduciary duty to Mr. Mattu and Rajpreet

[473] It is trite to say that both contractual and fiduciary duties can arise out of the same relationship. I am of the view that Jaswant obtained the use of Mr. Mattu's and Rajpreet's funds in circumstances which imposed an *ad hoc* fiduciary duty on him to use them for the specific purposes of securing them an interest in the Project.

[474] The existence of an *ad hoc* fiduciary duty is dependent on the specific circumstances of a relationship. The circumstances giving rise to an *ad hoc* fiduciary duty were reviewed in *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24:

> 30 First, the evidence must show that the alleged fiduciary gave an undertaking of responsibility to act in the best interests of a beneficiary: *Galambos*, at paras. 66, 71 and 77-78; and Hodgkinson, per La Forest J., at pp. 409-10. As Cromwell J. wrote in *Galambos*, at para. 75: "what is required in all cases is an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed on him or her."

> 31 The existence and character of the undertaking is informed by the norms relating to the particular relationship: *Galambos*, at para. 77. The party asserting the duty must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake.
>
> 32 The undertaking may be found in the relationship between the parties, in an imposition of responsibility by statute, or under an express agreement to act as trustee of the beneficiary's interests. . . .
>
> 33 Second, the duty must be owed to a defined person or class of persons who must be vulnerable to the fiduciary in the sense that the fiduciary has a discretionary power over them. Fiduciary duties do not exist at large; they are confined to specific relationships between particular parties. Per se, historically recognized, fiduciary relationships exist as a matter of course within the traditional categories of trustee-cestui qui trust, executor-beneficiary, solicitor-client, agent-principal, director-corporation and guardian-ward or parent-child. By contrast, ad hoc fiduciary relationships must be established on a case-by-case basis.
>
> 34 Finally, to establish a fiduciary duty, the claimant must show that the alleged fiduciary's power may affect the legal or substantial practical interests of the beneficiary: *Frame*, per Wilson J., at p. 142.
>
> [Emphasis added]

[475] I do not understand the reference in *Elder Advocates* to a requirement that the alleged fiduciary act exclusively in the interest of the beneficiary to preclude finding a fiduciary duty to act in the mutual interests of the fiduciary and beneficiary. This situation will often arise when, as in this case, the parties are jointly pursuing a business opportunity, such as a joint venture.

[476] The circumstances of Mr. Mattu’s and Rajpreet’s investments in the Project that gave rise to an *ad hoc* fiduciary duty with respect to their investments were as follows:

1. Jaswant had undertaken to use the funds contributed by them for the purposes of completing the Project.

2. Jaswant had control of the funds invested by them and discretion as to how to use them.

3. The manner in which Jaswant used the funds clearly could affect their legal and practical interest in the Project.

4. The only recourse that they had to recover their investment was to obtain a share of the net proceeds of the Project.

[477] With respect to the “vulnerability” requirement, it is important to note that vulnerability must be assessed after the relationship in question has been entered into. This principle was addressed by Justice Cromwell in *Galambos v. Perez*, 2009 SCC 48:

> 68 . . . fiduciary law is more concerned with the position of the parties that results from the relationship which gives rise to the fiduciary duty than with the respective positions of the parties before they enter into the relationship. La Forest J. in *Hodgkinson*, at p. 406, made this clear by approving these words of Professor Ernest J. Weinrib: "It cannot be the *sine qua non* of a fiduciary obligation that the parties have disparate bargaining strength. . . . In contrast to notions of conscionability, the fiduciary relation looks to the relative position of the parties that results from the agreement rather than the relative position that precedes the agreement" ("The Fiduciary Obligation" (1975), 25 U.T.L.J. 1, at p. 6). Thus, while vulnerability in the broad sense resulting from factors external to the relationship is a relevant consideration, a more important one is the extent to which vulnerability arises from the relationship: *Hodgkinson*, at p. 406.

[478] I am therefore satisfied that Rajpreet and Mr. Mattu became vulnerable to Jaswant when they provided him with their investments in the Project, and that all of the elements necessary to establish an *ad hoc* fiduciary duty were present.

Are Rajpreet and Mr. Mattu entitled to a constructive trust over the proceeds of lot sales?

[479] A critical issue with respect to Rajpreet’s and Mr. Mattu’s claims is whether they are entitled to a constructive trust over the subdivided lots, and if so, when the trust took effect.

[480] A constructive trust may be imposed if the alleged trustee has engaged in wrongful conduct or has been unjustly enriched.

[481] The leading case on the circumstances necessary to impose a remedial constructive trust for wrongful conduct is *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217. In *Re Redstone Investment Corp.* 2015 ONSC 533, Justice Morawetz, as he then was, summarized the test set out in *Soulos*:

> 68 The test for finding a constructive trust based on wrongful conduct was set out by the Supreme Court of Canada in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.). The following criteria is to be considered in determining the availability of the remedial constructive trust:
>
> > 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.

[482] I adopt this analysis of *Soulos*. However, subsequent to *Redstone* the Supreme Court has held that the equitable obligation referred to in the preceding passage need not be of a fiduciary nature, and that a breach of any obligation that a Court would enforce may be sufficient: *Moore v. Sweet*, 2018 SCC 52.

[483] A constructive trust may also be imposed against a party pursuant to the equitable doctrine of unjust enrichment if, as per *Garland v. Consumers' Gas Co.,* 2004 SCC 25 at para. 30, there exists:

1. An enrichment of that party;

2. A corresponding deprivation of the plaintiff; and

3. An absence of a juristic reason for the enrichment.

[484] In this case I am satisfied that Rajpreet and Mr. Mattu are entitled to the remedy of a constructive trust on both of the above grounds.

A constructive trust is available based on wrongful conduct

[485] I find that the elements necessary to establish a constructive trust against the interests of the Bankrupts and Parmjit in the Project are present in this case. All of these defendants knew that Rajpreet and Mr. Mattu had invested in the Project

based on Jaswant's agreement that they would participate in it. I have included Parmjit in this category because of my finding that she and Jaswant were engaged in a joint enterprise in pursuing the Project. I am satisfied that by obtaining Rajpreet's and Mr. Mattu's investments on the basis that they would be participants in the Project, Jaswant was under an obligation to them that a Court of Equity would have enforced. The defendants referred to in this paragraph knew and profited from Jaswant's breach of that obligation. For the reasons I have set and out in paras. 562-568 below I find that the constructive trust came into existence prior to the Bankruptcies.

[486] On the facts I have found Jaswant and Parmjit could not in good conscience have retained the benefit of Rajpreet's and Mr. Mattu's investments without ensuring that they participated in the Project. The good conscience basis for imposing a constructive trust was expressly approved in *Soulos*:

> 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)*, [1969] 2 Ch. 276 (C.A.), at p. 301. Cardozo J. similarly endorsed the unifying theme of good conscience in *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378 (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.

[487] I repeat that the contributions of Rajpreet and Mr. Mattu made a material contribution to the acquisition of Lots 2 to 4 and to the payment of Project expenses.

[488] I also find that there is a legitimate reason for these plaintiffs to seek a proprietary remedy in this case. The obtaining of a proprietary interest in the subdivided lots is the only effective remedy available to them. Given the insolvency of the bankrupt defendants, a personal remedy would clearly be inadequate.

[489] Finally, there is no other factor that would make the imposition of a proprietary remedy unjust in the circumstances. While the Trustee maintains that a constructive

trust should not be imposed to the prejudice of the creditors of the bankrupt estates, I find that it would be unjust for the creditors to obtain the benefit of the plaintiffs' investment in the circumstances I have outlined above.

[490] As pointed out by Justice Morawetz in *Redstone,* the interests of the general body of creditors in a bankruptcy is not a factor that will render the imposition of a constructive trust unjust if the property over which the trust is imposed would not have been available to the creditors without the wrongful acts of the insolvent defendant. In such a case it would be unjust to permit the general body of creditors to benefit from the wrongful acts of that defendant.

A constructive trust is available based on unjust enrichment

[491] If I am wrong in finding that Jaswant owed a fiduciary duty with respect to Rajpreet and Mr. Mattu, he nevertheless had a contractual obligation to ensure their participation in the Project. This raises the question of whether a breach of that contractual obligation is sufficient to warrant the imposition of a constructive trust in their favour based on unjust enrichment.

[492] The traditional view was that in order to establish a claim in unjust enrichment against an innocent third party the claimant must show a breach of an equitable duty on the part of the wrongdoer. However, in *Moore*, the majority imposed a constructive trust which arose from the deprivation of a contractual right. Justice Coté stated this principle as follows:

> 49 My view is that it is not useful, in the context of unjust enrichment, to distinguish between expectations based on a contractual obligation and expectations where there was a breach of an equitable duty (see my colleagues' reasons, at para. 104). Rather, a robust approach to the corresponding deprivation element focuses simply on what the plaintiff actually lost — that is, property that was in his or her possession or that would have accrued for his or her benefit — and on whether that loss corresponds to the defendant's enrichment, such that we can say that the latter was enriched *at the expense* of the former. As was observed by Professors Maddaugh and McCamus in *The Law of Restitution*, one source of difficulty in these kinds of disappointed beneficiary cases is
>
> > a rigid application of the "corresponding deprivation" or "expense" element as if it requires that the benefit in the defendant's hands must have been transferred from, or constitute an out-of-pocket expense of, the plaintiff. . . .

> > [R]estitution of benefits received from third parties may well provide a basis for recovery. In this particular context, the benefit received can, in any event, normally be described as having been received at the plaintiff's expense in the sense that, but for the mistaken failure to implement the arrangements in question, the benefit would have been received by the plaintiff. [Emphasis added; p. 35-21.]
>
> I agree. In this case, given the fact that Michelle held up her end of the bargain, kept the policy alive by paying the premiums, did not predecease Lawrence, and still did not get what she actually contracted for, it seems artificial to suggest that her loss was anything less than the right to receive the entirety of the insurance proceeds.

[493] The facts of *Moore* were different from those of these proceedings. However, the legal analysis of the majority decision is in my view applicable to the facts before me.

[494] The claimant in *Moore* was the first wife of a deceased person who had been named as sole beneficiary in the deceased's life insurance policy. The premiums on the policy were initially paid from the couple's joint account. When the marriage broke down, the applicant and the deceased made an oral agreement that the applicant would pay the premiums from her own funds and would continue to be the designated beneficiary of the policy. Thereafter, the claimant made all of the premium payments.

[495] After divorce, the deceased entered into a relationship with the respondent. At some later date he revoked the claimant's designation as beneficiary and instead designated the respondent as an irrevocable beneficiary as permitted by the applicable Ontario insurance legislation. When the deceased died, the claimant was denied payment under the policy. She then brought proceedings for an order that she was entitled to the death benefit. She succeeded at first instance, but that decision was reversed by the Ontario Court of Appeal.

[496] The Supreme Court of Canada reversed the Court of Appeal and held that the applicant was entitled to the death benefit. Notwithstanding the fact that her claim was based on a breach of contract, the majority of the Court found that the applicant was entitled to a constructive trust over the proceeds of the policy based on unjust enrichment. In so doing, the Court found that the applicant had been unjustly

deprived of the whole of the death benefit and not just the premiums she had paid on the policy.

[497] Justice Coté emphasized that the underlying principle of unjust enrichment was the notion of restoration of a benefit which justice did not permit another person to retain:

> 38 This principled approach to unjust enrichment is a flexible one that allows courts to identify circumstances where justice and fairness require one party to restore a benefit to another. Recovery is therefore not restricted to cases that fit within the categories under which the retention of a conferred benefit was traditionally considered unjust (*Kerr*, at para. 32). As observed by McLachlin J. in *Peel (Regional Municipality)* (at p. 788):
>
> > The tri-partite principle of general application which this Court has recognized as the basis of the cause of action for unjust enrichment is thus seen to have grown out of the traditional categories of recovery. It is informed by them. It is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice.

[498] In *Moore*, the Court also reiterated the two-step analysis of the issue of whether there was a juristic reason for the deprivation and enrichment. The analysis places the initial onus on the plaintiff to show that the established categories of juristic reasons (such as contract, statutory provision, or gift) do not apply. Once the plaintiff establishes that those categories do not apply the onus shifts to the defendant to establish a juristic reason for the enrichment.

[499] Justice Coté held that a claimant is not required to prove that the benefit was bestowed directly on the defendant, and that the amount of the deprivation can be based on the amount of a gain of which the claimant had been deprived. Thus, the claimant was entitled to receive the whole of the death benefit and not just the amount she paid in premiums.

[500] In this case, Jaspreet and Mr. Mattu have clearly been deprived of a benefit: the right to share in the profits of the Project. The 2011 Joint Venturers have collectively received a corresponding benefit.

[501] However, Rajpreet, Parmjit, and Wills and Dale submit that they are *bona fide* purchasers for value of their interests in the November 2010 and 2011 Joint

Ventures without notice of the claims of Mr. Mattu and Rajpreet, and that this is a juristic reason for their enrichment.

[502] I have concluded that this defence is not available to the defendants. I have already found that Parmjit was content to let Jaswant act on her behalf in the Project. In my view the finding that Parmjit and Jaswant were engaged in a joint enterprise makes Parmjit responsible for Jaswant's wrongful acts with respect to Rajpreet and Mr. Mattu.

[503] I also am satisfied that Ranjit was aware of Mr. Mattu's involvement in the Project from an early point in its development and that Ranjit was, at the very least, in possession of sufficient facts to put him on inquiry with respect to Mr. Mattu's involvement. It follows from the concession made by counsel that Svender is also to be taken to have had notice of Mr. Mattu's interest in the Project.

[504] I have already concluded that Wills and Dale hold their interest in the Project as nominees for Jaswant. Given this fact, they are not *bona fide* purchasers for value with respect to that interest. As neither the Trustee nor any of the other members of the 2011 Joint Venture, other than Grewal Management, have sought any remedy against Wills and Dale, they continue to be entitled to share in the profits of the 2011 Joint Venture, subject to the established claims of Rajpreet and Mr. Mattu.

[505] In addition, as I have already indicated, I am satisfied that Jaswant had the actual authority to do what was necessary to finance the Project. The fact that the 2011 Joint Venturers are parties to a contract pursuant to which they are entitled to certain rights does not insulate them from a claim based on unjust enrichment. None of them contributed their proportionate share of the expenses incurred to complete the Project. Many of those expenses were paid from funds provided by Rajpreet and Mr. Mattu. There is therefore a direct link between their enrichment and Mr. Mattu's deprivation.

[506] I therefore find that the defence of being *bona fide* purchasers for value has not been made out by the 2011 Joint Venturers.

[507] With respect to the Trustee, as I have outlined elsewhere in these reasons, the funds that the Trustee says should be distributed to the creditors of the bankrupt estates would not have been available without the funds invested by Mr. Mattu and Rajpreet. Therefore, the analysis of Justice Morawetz in *Redstone* applies to the bankrupt estates.

[508] I am therefore satisfied that Rajpreet and Mr. Mattu are entitled to the remedy of a constructive trust over the net proceeds of the Project.

[509] I will quantify the extent of the constructive trust when I deal with the remedies awarded to the successful plaintiffs.

Are the Garcha, Mattu and Rajpreet Claims Equity Claims?

[510] The Trustee submits that the plaintiffs' claims in the Civil Actions are equity claims, as that term is defined in the *BIA*, and are therefore postponed to the claims of all other creditors of the Bankrupts to the funds held in the Vendor Trust Accounts set up for the Bankrupts. If this position is correct there will be nothing payable to the plaintiffs because there are insufficient assets in the bankrupt estates to pay the unsecured claims in full.

[511] The Trustee's counsel set out his position on this issue in his written submissions in the Grewal Action as follows:

> 85. Ignoring for the moment the written agreements, of importance to the classification of the Grewal Group's Equity Claims, were the allegations in their first NOCC as to the existence of a joint venture and investment agreement's terms that constituted what the Trustee viewed as a classic definition of what an Equity Claim was. An investment was alleged to contribute capital, share profit, accepting the risk of loss or profit, requiring the return of capital and a dividend or similar payment based upon a share of profit, if any. There was no allegation or suggestion by the Grewal Group that the investment monies were a loan repayable with interest or other form of debt or credit agreement.
>
> 86. The Grewal Group never once suggested in any way in evidence at trial that they were entitled to the repayment of a debt or loan or an obligation under a credit agreement.

[512] In my view the Trustee's submissions on this issue are based on the incorrect assumption that the Garchas' and Grewal plaintiffs' claims are claims to participate in the division of the property of the Bankrupts that is divisible among their creditors.

[513] This assumption is incorrect because the plaintiffs' claims are to receive their proportionate share of the profits of the joint ventures, all of which were pursuing the business of completing the Project. The property of the Bankrupts in the Project is limited to their proportionate share of the capital of the joint ventures remaining after all creditors of the Project have been paid. The proportionate shares of the non-bankrupt joint venturers are not property of the Bankrupts.

[514] The joint venturers have not made any contribution to the capital of the Bankrupts and have no right to share in the profits the Bankrupts received from the Project. The joint venturers provided capital to the joint ventures in which they participated, not to the Bankrupts. Similarly, the separate creditors of the Bankrupts have no right to claim against the proportionate shares of the non-bankrupt joint venturers.

[515] The Trustee has also failed to address the interaction between ss. 67(1) and 140.1 of the *BIA*. Section 67(1) excludes property held in trust from the property of a bankrupt divisible among its creditors. Section 140.1 applies only to the property of a bankrupt that is distributable among its creditors. The express terms of the 2007 JVA provide that 690174 held title to the assets of the 2007 Joint Venture in trust for the 2007 Joint Venturers. Apart from the 1/23 interest held by 690174, all of the property of that joint venture was beneficially owned by the 2007 Joint Venturers and is therefore not distributable among 690174's creditors.

[516] Section 140.1 provides as follows:

> **140.1** A creditor is not entitled to a dividend in respect of an equity claim until all claims that are not equity claims have been satisfied.

[517] An equity claim is defined as follows:

> *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); (*réclamation relative à des capitaux propres*)

[518] An equity interest is described as follows:

> *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, …

[519] Section 67(1)(a) of the *BIA* provides as follows:

> 67(1) The property of a bankrupt divisible among his creditors shall not comprise
>
> > (a) property held by the bankrupt in trust for any other person;

[520] The modern approach to statutory interpretation requires a consideration of the words of a statue in the context of the scheme of the act in which they are found; in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at 40-41:

> 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.

[521] In my view neither the ordinary meaning of the words contained in ss. 140.1 and 67(1)(a) nor the scheme of the *BIA* support the Trustee's position with respect to the Garchas' claim.

[522] The Trustee relied on a number of recent decisions that considered s. 140.1. In *Re Bul River Mineral Corp.*, 2014 BCSC 1732, Justice Fitzpatrick reviewed the law relating to the proper interpretation of s. 140.1 and decided that it had expanded the scope of claims that should be considered to be equity claims to include claims that were derived from equity holdings of the claimant. She also agreed with other cases that claims formerly considered to be debt claims, such as claims for dividends that had been declared but not paid before bankruptcy, should now be classified as equity claims. Justice Fitzpatrick also found that a judgment obtained on such a claim before bankruptcy continued to be an equity claim.

[523] While it is not entirely clear, it appears that the Trustee interpreted *Re Bul River* and other cases that reached similar conclusions as authority for the proposition that any claim arising out of an agreement that calls for the sharing of profits with a bankrupt should be regarded as an equity claim.

[524] However, none of the cases relied upon by the Trustee dealt with the issue raised in this case, which is whether non-bankrupt joint venturers were equity creditors of a bankrupt joint venturer who held legal title to property that was beneficially owned by all the joint venturers.

[525] The scheme of the *BIA* requires the Trustee to make a determination of the property of the bankrupt that is divisible among its creditors. In making that determination the Trustee must comply with the provisions of s. 67(1)(a), which excludes property held in trust for another person from being distributable.

[526] Section 140.1 is found in the Scheme of Distribution Portion of Part V of the *BIA*. The Scheme of Distribution set out in the *BIA* applies only to claims against the property of a bankrupt that is divisible among its creditors. It does not convert property that is not divisible into property that is, or otherwise affect entitlement to that property.

[527] The inability of the Trustee to divide property held in trust for another person among the creditors of a bankrupt under the *BIA* was recognized in *Royal Bank of Canada v. North American Life Assurance Co.*, [1996] 1 S.C.R. 325 at 357:

> 62 However, the trustee is barred from dividing two categories of property among creditors: property held by the bankrupt in trust for another person (s. 67(1)(a)), and property rendered exempt from execution or seizure under provincial legislation (s. 67(1)(b)). While such property becomes part of the bankrupt's estate in the possession of the trustee, the trustee may not exercise his or her estate distribution powers over it by reason of s. 67.

[528] Section 140.1 therefore has no application to such property.

[529] This however does not mean that the common law rule that precludes the payment of the capital of a business until all creditors of the business have been paid does not apply to joint ventures. The question is how it should properly be applied.

Applicable common law rule

[530] The long-standing common law rule was that all of the creditors of an insolvent business must be paid before any capital could be recovered. In these reasons I have referred to the rule as a common law rule even though it is an equitable rule, which originated in the Chancery Division.

[531] Before 2009, persons holding capital in a bankrupt business had no right to file any claim in a bankruptcy. Section 140.1 allowed equity holders to make a claim but maintained the rule that such a claim was postponed to the claims of creditors.

[532] Despite this change I am of the view that the common law rule against distribution of capital until all creditors claims are paid remains in force.

[533] I reach this conclusion for two reasons. First, the 2009 amendments do not contain a complete definition of an equity creditor, stating only that an equity creditor is a person who makes a claim in respect of an equity interest. The definition of equity interest referred to above applies only to corporations. There is a similar definition of an equity interest in an income trust. There is however no statutory

definition in the *BIA* of an equity claim that arises out of other business arrangements.

[534] In addition, a statute should be presumed to have modified the pre-existing common law only if it does so in clear language: *Glenko Enterprises Ltd. v. Keller*, 2007 MBCA 7 at para. 47; *Jackson v. Canadian National Railway*, 2013 ABCA 440 at para. 37. I therefore conclude that Parliament intended that the existing rule would remain in force in situations to which s. 140.1 is not applicable.

[535] The common law rule is described in *Sukloff v. A.H. Rushforth & Co. Estate*, [1964] S.C.R. 459. A person who contributes to the capital of a business carried on for their joint benefit has no right to receive any return of its capital until all of the creditors of the business have been paid in full. For this principle, Justice Ritchie quoted *Halsbury's Laws of England*, 3rd ed., vol. 2 (London: Butterworths, 1964) at 495:

> If a person advances money to another not by way of loan but as a contribution to the capital of a business carried on for their joint benefit, the person who has made the advance, even though he is not a partner in the business and has received no share of the profits as such, is debarred from proving in the bankruptcy of the recipient of the money in competition with the creditors of the business.

[536] The principle set out in *Halsbury's* and applied by Justice Ritchie is derived from the English Court of Appeal decisions of *In Re Meade*, [1951] Ch. 774, and *In Re Beale* (1876), 4 Ch. D. 246. *In Re Meade* involved a couple that entered into a horse-riding academy business together. The wife provided her husband with funds to buy the academy and necessary equipment with the understanding that the couple would live on the grounds they had purchased, operate the academy, and live off its proceeds. It was ruled that this contribution could not be considered a loan, but rather a contribution to the capital of a business enterprise in which she had an interest. As such, the wife was "no more entitled, as against the ordinary creditors of the business, to prove in respect of her contribution than the proprietor is entitled to prove in respect of his" [emphasis added].

[537] This principle was also applied in *Laronge Realty Ltd v. Golconda Investments Ltd.* (1986), 7 B.C.L.R. (2d) 90 (B.C. C.A.), and accurately summarized in the headnote as follows:

> If the advances were not loans the case would not be within s. 110 (now s. 139) but would be governed by the common law rule that if a person advances money to another as a contribution to the capital of a business carried on for their joint benefit, the person who has made the advance, even though he is not a partner in the business and has received no share of the profits as such, is debarred from proving in the bankruptcy of the recipient of the money in competition with the creditors of the business.

[538] The only businesses that can be said to have been carried on by the plaintiffs and the Bankrupts for their joint benefit are the joint ventures – not the Bankrupts themselves. I am satisfied that, as joint venturers, the plaintiffs' capital contributions at issue in this litigation were to the joint ventures (and their businesses, the Project) and *not* to the Bankrupts. Thus, they are not equity creditors pursuant to the common law rule described above.

[539] I reviewed the terms of the JVAs in detail earlier in these reasons. The parties to all of the written joint venture agreements in issue agreed that each joint venturer owned a proportionate share of the assets acquired for the joint venture as its separate property. That agreement meant that the interest of the Bankrupts pursuant to those agreements was limited to the Bankrupts' proportionate share as set out in each joint venture agreement. In the case of 690174 that interest is limited by the terms of the 2007 JVA.

[540] The Bankrupts acquired no further divisible interest by virtue of other joint venturers' contributions or by holding the property of the joint venture in trust. While they managed the business of completing the Project, they were not themselves the business.

[541] The position of the joint venturers in the case at bar can usefully be compared to that of partners, in spite of significant differences between partnerships and joint ventures. If a partner in a partnership becomes bankrupt, only that partner's interest in the partnership is subject to division among its creditors. The property of the partnership ceases to be held jointly and becomes held as tenants in common. In

L.W. Houlden & C.H. Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th ed. (Toronto: Thomson Reuters Canada) G§162(10) [Houlden & Morawetz], the editors state the proposition as follows:

> If only one member of a partnership becomes bankrupt, the trustee becomes tenant in common with the solvent partner in of the assets of the firm: *Ex parte Stoveld* (1823), 1 Gl. & J. 303.

[542] In a partnership, the property of the partnership is owned by the partnership. Unlike a partnership, a joint venture cannot own property. The property employed in the joint venture is owned in the manner specified in the joint venture agreement. As stated in *Canlan,* the property is usually owned jointly by the joint venturers in accordance with their proportional interests, as in the case at bar. Similar to a partnership, it is only the interest of the bankrupt joint venturer that vests in its trustee. To the extent that the bankrupt holds legal title to assets of the joint venture in trust for nor bankrupt joint venturers, s. 67(1)(a) precludes that property from being divided among the creditors of the bankrupt joint venturer.

[543] *Re Abacus Cities Ltd.* (1984), 50 C.B.R. (n.s.) 289 (Alta. Q.B.), was the only authority referred to by counsel for the Trustee in support of his submission that solvent joint venturers are equity creditors of a bankrupt joint venturer. The Trustee's case book included a quotation from Houlden & Morawetz suggesting that the advances made in that case were contributions of equity. However, the case does not support that proposition.

[544] *Re Abacus Cities* arose out of the bankruptcy of a real estate developer that syndicated properties through the use of joint venture agreements. The applicants, who had purchased units from Abacus Cities, sought a declaration that payments they had made to Abacus were received subject to a trust in their favour. The Court held that the amounts received were not subject to a trust and that no debtor-creditor relationship existed with regard to most of their claims. However, the reason for that finding was that the Court found the amounts claimed had been advanced to Abacus for services to be rendered, which it had in fact provided. Therefore, nothing was owing in respect of those payments. This is made clear at para. 13:

> 13 In *Thorne Riddell Inc. v. Rolfe* (1982), 44 C.B.R. (N.S.) 219, 22 Alta L.R. (2d) 76, 19 B.L.R. 98, 44 A.R. 161 (Q.B.), the court dealt with a similar enterprise of Abacus based on a set of similar agreements. The issue in that case was whether the developer/clients were personally responsible to trade creditors for obligations made by Abacus. It was held that Abacus was best classified as an independent contractor. In reasons for judgment I stated it was not subject to control as to the details of the work to be performed. It was not engaged in a master and servant relationship. I see little difference between the position of Abacus and that of a house builder who is employed "merely to accomplish certain results and is not otherwise subject to his employer's control in the manner of performance". I follow that decision in this case. The relationship between Abacus and the developer/client is governed by the extensive agreements into which they entered.

[545] It is to be noted that in *Re Abacus Cities,* the Court did find that a small amount from the advances had not been earned by Abacus Cities and allowed the applicants to prove as unsecured creditors for that amount. There is no suggestion that the Court considered those claims to be equity claims. The decision therefore does not support the Trustee's submission.

The Garchas' claim

[546] The Garchas' rights are set out in the 2007 JVA, which expressly recognizes their beneficial ownership of a proportionate share of the assets of the 2007 JVA.

[547] I repeat that the Trustee wrongly assumes that the Garchas are seeking to share in the property of 690174 that is divisible among its creditors. That is not the case. As I stated earlier in these reasons, the Garchas are seeking to recover their own property by tracing it into the proceeds of sale of the subdivided lots. The property they are seeking does not and never did belong to 690174.

[548] The fact that the Garchas' interest was beneficial rather than legal does not change their ownership of it: *Foskett*, quoted at para. 277. I find that the property they seek to recover falls squarely within s. 67(1)(a) and is therefore not divisible among 690174's creditors. Section 140.1 therefore does not apply to it.

[549] It is also relevant to note that a trustee has no better claim to property than the bankrupt had before bankruptcy except in certain circumstances such as deemed trusts created by provincial statutes, or legislation requiring registration of security interests such as conditional sales agreements.

[550] This principle was reiterated in *Lefebvre v. Tremblay (Trustee of)*, 2004 SCC 63. Although *Lefebvre* dealt with an issue arising out of the *Civil Code of Quebec*, S.Q. 1991, c. 64, Justice Lebel described the underlying principle as applicable to both the *Civil Code* and common law:

> 37 When the trustee takes control or becomes seised civil law of the universality of property defined in s. 67 *B.I.A*., his or her seisin is limited to the property in the debtor's patrimony. Apart from the special powers accorded by law to the trustee, as representative of the creditors, to restore the patrimony to be liquidated in its entirety, the trustee has no more rights with respect to the debtor's property than did the debtor, of whom the trustee remains the successor in this regard. This principle is well established in relation to the application of s. 67 *B.I.A*. It was laid down by Judson J. in *Flintoft v. Royal Bank*, [1964] S.C.R. 631 (S.C.C.), at p. 634. More recently, Iacobucci J. confirmed the validity of the principle in *Giffen*. In my view, the trustee has no greater interest in the property under his or her responsibility than that of the bankrupt, unless otherwise provided for by legislation (*Giffen*, at para. 50).

[551] The passage from *Flintoft v. Royal Bank of Canada*, [1964] S.C.R. 631 at 634, referred to in *Lefebvre* states as follows:

> 7 We are not concerned here with the rights of a purchaser for value without notice of the proceeds of the sale of the bank's security. It is true that s. 63 of the *Bankruptcy Act* avoids in favour of the trustee the assignment of book debts held by the bank because of defective registration. Subject to this, the trustee has no higher rights than the bankrupt and he takes the property of the bankrupt merely as a successor in interest and not as an innocent purchaser for value without notice. He takes the property of the bankrupt subject to the express trust created by the agreement noted above, which, in my opinion, cannot be characterized as an assignment of book debts in another form. When these debts, the proceeds of the sale of the s. 88 security, come into existence they are subject to the agreement between bank and customer. As between these two the customer has nothing to assign to the bank. The actual assignment of book debts which was signed does no more than facilitate collection. Any other assignment, whether general or specific, of these debts by the customer to a third party would fail unless the third party was an innocent purchaser for value without notice.
>
> [Emphasis added]

[552] The Garchas' were not participating in 690174's profits from the 2007 Joint Venture. The profits to which they were entitled arose out of their own proportionate beneficial ownership interests in the 2007 Joint Venture and not from the property of 690174.

[553] I therefore find that the Garchas' claims are not equity claims but, as explained in *Foskett,* are simply claims to recover their own property.

Rajpreet and Mr. Mattu's claims

[554] The claims advanced by Rajpreet and Mr. Mattu are distinguishable from the Garchas' claims because they are based on oral joint venture agreements that do not contain the express statement of beneficial ownership found in the 2007 JVA.

[555] The Trustee submits that the claims of Mr. Mattu and Rajpreet fall under s. 140.1 of the *BIA* because the relationship they allege is one in which they were to share profits with the Bankrupts.

[556] In my view this submission is based on the misunderstanding of the nature of an equity investment that similarly afflicts the Trustee's argument regarding the Garcha claim. If Mr. Mattu and Rajpreet had contributed capital to the Bankrupts their claims to that capital would have been postponed to other claims against the Bankrupts. However, the business to which they contributed capital was the Project, which was being pursued by the November 2010 and 2011 Joint Ventures. It is the creditors of *that business*, not of the Bankrupts, that must be paid in full before any of the joint venturers, including the Bankrupts, are entitled to any return of capital.

[557] The Trustee appears to have conflated the concepts addressed by ss. 139 and 140.1 of the *BIA* by emphasizing the concept of sharing profits and overlooking the critical question of whether Mr. Mattu and Rajpreet can be said to have contributed to the capital of the Bankrupts' business. Section 139 postpones the claims of creditors who advance money to a borrower under a contract which provides for the lender to share in the profits of a business being carried on by the bankrupt. However, the Trustee does not rely on s.139, nor could he, because the advances made by Rajpreet and Mr. Mattu were not loans.

[558] Thus, I find that Rajpreet and Mr. Mattu have not advanced equity claims to the property of the Bankrupts. Rather, their claims relate to the property of the Project over which I have granted a remedial constructive trust.

[559] Another troubling implication of the Trustee's analysis is it would mean that anyone who enters into a joint venture with a company that subsequently becomes bankrupt would have its right to the capital and profits of the joint venture postponed to the claims of all of the creditors of the bankrupt joint venturer. The Trustee has cited no authority for such a result. The critical error that the Trustee has made is the same as the one described by Justice Blair in *Lester & Orpen Dennys Limited v. Canadian Broadcasting Corporation*, [1991] O.J. No. 1399 (Ont. C.J.). In that case, the Trustee made precisely the same argument being made by the Trustee in this case; that is that the CBC, which had entered into a joint venture with the bankrupt should have its claim against the bankrupt postponed because the joint venture called for a sharing of profits. Justice Blair succinctly disposed of the argument as follows:

> 6 . . . . What is being claimed here is a share of the profits of a joint-venture agreement that arises through a written contract between Lester & Orpen Dennys Limited and CBC, not the share of profits of Lester & Orpen Dennys Limited itself. This fact distinguishes the circumstances from those which existed in the Meade case and the *Sukloff* case . . .
>
> [Emphasis added]

[560] The terms of the joint venture under consideration in *Re Orpen Dennys* were not specified in the decision. It appears that the appellant in that case was entitled to a share of the royalties from a publication rather than a proportionate share of the assets. Nevertheless, Justice Blair had no difficulty in finding that the appellant was not seeking any share of the bankrupt's profits.

[561] I therefore find that the claims of Mr. Mattu and Rajpreet are not equity claims and that 140.1 has no application to those claims.

Property of the Bankrupts subject to a constructive trust is not divisible among its creditors

[562] On the facts I have found, Mr. Mattu and Rajpreet are each entitled to a constructive trust over the proceeds of the Project on the basis of the Bankrupts' breach of fiduciary duty with respect to the funds they advanced to Jaswant and on the principles of unjust enrichment.

[563] Property which has been found to be subject to a constructive trust may be property held in trust for the purposes of s. 67(1)(a) of the *BIA*, depending upon when the constructive trusts came into existence.

[564] In *Ellingsen (Trustee of) v. Hallmark Ford Sales Ltd.,* 2000 BCCA 458, Justice Donald, writing for the majority, held that in a bankruptcy the court has the discretion to impose a constructive trust effective prior to the bankruptcy:

> [38] I turn to consider the issue of timing: can the constructive trust be imposed prior to the bankruptcy? In order for the remedy to have any practical effect, it must be imposed before the bankruptcy, otherwise s. 67(1)(a) of the *BIA* could not operate. Support for the proposed timing can be found in *Rawluk v. Rawluk*, 1 [1990] S.C.R. 70 at 91:
>
> > It is important in this respect to keep in mind that a property interest arising under a constructive trust can be recognized as having come into existence not when the trust is judicially declared but from the time when the unjust enrichment first arose. As Professors Oosterhoff and Gillese state, "the date at which a constructive trust arises…is now generally accepted to be the date upon which a duty to make restitution occurs" (Oosterhoff and Gillese, *A.H. Oosterhoff: Text, Commentary and Cases on Trusts* (3rd ed. 1987), at p. 579). Professor Scott has stated in *Law of Trusts*, op. cit., at pp. 323-4, that:
> >
> > > The beneficial interest in the property is from the beginning in the person who has been wronged. The constructive trust arises from the situation in which he is entitled to the remedy of restitution, and it arises as soon as that situation is created. … It would seem that there is no foundation whatever for the notion that a constructive trust does not arise until it is decreed by a court. It arises when the duty to make restitution arises, not when that duty is subsequently enforced.

[565] In *BNSF Railway Company v. Teck Metals Ltd.*, 2016 BCCA 350 at para. 76, Justice Newbury also held that the court has discretion to determine whether the trust arises at the time of judgment or some earlier date, such as when the act that gave rise to the trust occurred.

[566] I note that in the passage from *Rawluk* referred to in both cases, Justice Cory, writing for the majority, stated that he agreed completely with the statements of the authors of the texts quoted by him that the trust arises at the time when the duty to make restitution arises and not when declared by the court.

[567] In this case, I also find that the constructive trusts arose prior to the Bankruptcies. The trust in favour of Rajpreet arose at the latest when the 2011 Joint Venture was formed without expressly providing him with an interest in it. With respect to the first $200,000 that 0892995 provided to Panorama, it arose when Panorama and Jaswant used those funds as part of the deposit for the purchase of Lot 5.

[568] Similarly, the remedial constructive trust in favour of Mr. Mattu arose when Jaswant used the funds he received from Mr. Mattu without ensuring that Mr. Mattu's proprietary interest in the Project was protected, or at the latest when the November 2010 JVA was executed without protecting Mr. Mattu's rights under his oral joint venture agreement with Jaswant.

[569] However, the Trustee submits that in a bankruptcy context, a remedial constructive trust is only available over property that would otherwise form part of the bankrupt's estate in cases where it is necessary to do so to remedy debtor misconduct. In this regard he relies on *Credifinance Securities*.

[570] This argument has no merit with respect to the Garchas' claim for the reasons I have already given. The remedy the Garchas have been granted is the right to trace their own property into the lots created by the Project. As set out in *Foskett*, the remedy they have been granted is not based on an exercise of the court's discretion to order a remedial constructive trust but on a recognition of their property rights.

[571] The remedy granted to Mr. Mattu and Rajpreet was discretionary, with the imposition of a remedial constructive trust based both upon the need to remedy wrongful conduct and unjust enrichment.

[572] However, in my view, *Credifinance Securities* does not assist the Trustee. In that case, the issue before the court was whether a claimant who had been defrauded by the bankrupt could assert a constructive trust over funds that had been frozen in civil proceedings commenced prior to the bankruptcy. A judge of the Ontario Superior Court of Justice ordered that the claimant was entitled to assert a trust claim over the funds.

[573] On appeal, Justice Laforme set out what the court considered to be the relevant test:

> 33 There is no question that the remedy of constructive trust is expressly recognized in bankruptcy proceedings. Both the case law and authors of texts make this clear, although the test for proving the existence of a constructive trust in a bankruptcy setting is high: L.W. Houlden & Geoffrey Morawetz, *Houlden and Morawetz Bankruptcy and Insolvency Analysis* (Toronto: WL Can, 2011) at F§5(1). The authors add this at F§5(8): "A constructive trust will ordinarily be imposed on property in the hands of a wrongdoer to prevent him or her from being unjustly enriched by profiting from his or her wrongful conduct" (citations omitted).
>
> 34 *Ascent*, a case decided by an Ontario Registrar in Bankruptcy, is a case that demonstrates the type of circumstances that can make a case extraordinary. I found this case to be very instructive.
>
> The Registrar in *Ascent* held that in its role as the arbiter of commercial morality, the Bankruptcy Court can rely on equitable principles, "even at the expense of the formulaic aspects of the *BIA* scheme of distribution": para. 17.
>
> 36 An example of commercial immorality is described in *Ascent* as being where a bankrupt and its creditors benefit from misconduct by the bankrupt which was the basis upon which the property was obtained. The Registrar held that to permit an estate to retain the property in such circumstances amounts to an unjust enrichment, and the court can impose a constructive trust on an estate's assets to remedy the injustice. Furthermore, "it matters not which assets are consumed to remedy this": para. 18.
>
> 37 Thus, a constructive trust in bankruptcy proceedings can be ordered to remedy an injustice; for example, where permitting the creditors access to the bankrupt's property would result in them being unjustly enriched. The prerequisite is that the bankrupt obtained the property through misconduct. The added necessary feature is that it would be unjust to permit the bankrupt and creditors to benefit from the misconduct.

[574] I have some difficulty in reconciling the above comments with the clear statements of the Supreme Court of Canada in *Lefebvre* and *Flintoft* that a Trustee in Bankruptcy has no better claim to property than the bankrupt, unless the *BIA* expressly provides otherwise.

[575] However, in any event, the remedy I have granted to Mr. Mattu and Rajpreet is based on Jaswant’s misconduct. Refusing to impose a constructive trust would result in the creditors benefitting from Jaswant’s wrongful acts. The facts before me therefore fall clearly within the circumstances described above. The funds Mr. Mattu and Rajpreet provided made a material contribution to the successful completion of

the Project. Jaswant agreed that the funds they provided to him entitled them to an interest in the Project.

[576] In this case, I find that depriving Mr. Mattu and Rajpreet of their beneficial rights in the Project would result in an unjust enrichment of the general body of creditors, whose recovery in the bankruptcy comes almost entirely from the success of the Project: *Redstone* at para. 71.

[577] I therefore see no reason why s. 67(1)(a) of the *BIA* should not apply to the remedial constructive trusts imposed by this judgment. The property over which a constructive trust has been ordered is property held in trust and is therefore not divisible among the creditors of the Bankrupts.

[578] Some of the confusion that has arisen in these proceedings may have originated from the nature of the proofs of claim filed by the plaintiffs. I agree with the Trustee that those claims ought to have been filed pursuant to s. 81(1) of the *BIA.* However, the Trustee has acknowledged that he understood the basic nature of the claims and his counsel has indicated that the Trustee is content to have this issue decided in these proceedings.

[579] I am also satisfied that even if the plaintiffs had filed such claims pursuant to s. 81(1), the Trustee would have disputed them pursuant to that section of the *BIA.*

[580] In summary I find that the claims of the Garchas, Mr. Mattu, and Rajpreet are not postponed to the claims of the general body of creditors of the Bankrupts and that it is only the proportionate beneficial interests of the Bankrupts in the 2007 and 2011 Joint Ventures that form part of the assets divisible among the general body of creditors.

[581] However, in accordance with *In Re Meade,* all direct creditors of the Project must be paid in full before any proceeds are distributed to the joint venturers, Rajpreet, and Mr. Mattu.

[582] If I am wrong in concluding that Rajpreet and Mr. Mattu are entitled to a constructive trust or have entered into a joint venture agreement with the Bankrupts,

this does not mean that they are equity creditors. Following *Re Orpen Dennys*, in such a case they would be entitled to rank as unsecured creditors because they did not contribute any capital to the Bankrupts. The Trustee therefore erred in law in disallowing their claims on that ground in any event.

Remedies

Garcha remedies

[583] The Garchas seek an order that they receive a proportionate share of the gross proceeds of sale of the subdivided lots. As I understand their submission there are two aspects to their claim.

[584] Firstly, they seek a proportionate share of the gross proceeds from the Project that are attributable to Lot 1. Their position is that the only permissible deduction from those gross proceeds should be their pro rata share of $1,750,000, the principal amount of the second PMIC mortgage. They calculate that share to be 7/22 of that amount, or $556,818. They submit that they should not be responsible for any share of Project development costs because they were not given the opportunity to approve those costs and because the Trustee has refused to provide an accounting of them.

[585] Secondly, on the theory that a rogue trustee should be deprived of any benefit obtained from a breach of fiduciary duty, they also seek a share of the gross proceeds from the Project arising out of the lots attributable to Lots 2 to 5 which would otherwise be payable to the other 2011 Joint Venturers, whom they allege are liable for knowing assistance or knowing receipt.

[586] In my view these claims are overreaching and exceed the remedy to which the Garchas are entitled and which would compensate them adequately.

[587] I find that the Garchas are entitled to their proportionate share of the net proceeds of the Project that are attributable to Lot 1, as determined by the 2007 JVA. Pursuant to those terms the Garchas are entitled to 7/22 of the proceeds from 22 lots subdivided from Lot 1.

[588] The Project resulted in the creation of 81 saleable lots. 690174's 28.5% interest in the 2011 Joint Venture equates to 23 of those lots. The 2007 JVA entitles 690174 to the proceeds of sale of the extra lot. The Garchas' entitlement is therefore 7/23 of 28.5% of the net proceeds of the Project.

[589] 690174 is entitled to 1/23 of that 28.5% interest, which will of course form a part of its estate. There is also evidence that 690174 acquired the interest of one of the other joint venturers. If that is the case 690174 is entitled to the proceeds attributed to that interest.

[590] An assessment of the amount to which the Garchas are entitled can only be made after adjustments to the net revenue for unpaid project expenses and a determination of responsibility for specific amounts previously paid by the Trustee, which include the amount paid to satisfy the Virk Mortgage.

[591] Counsel for the Garchas argued that this case called for a remedy that has a prophylactic purpose, as discussed in *Wang v. Wang*, 2020 BCCA 15 at paras. 56-59. Counsel argues that 690174 and the persons who knowingly assisted its breaches of fiduciary duty should be deprived of any benefit from those breaches to deter fiduciary faithlessness and preserve the integrity of the fiduciary relationship. He submits that Jaswant acted dishonestly and that dishonesty warrants the more draconian remedy of full disgorgement of any benefits he or those who are also responsible for his actions have obtained.

[592] I have concluded that awarding this remedy would be unfair to the other parties who have contributed to the success of the Project and would in effect unjustly enrich the Garchas. On this aspect of the case I do think that the interests of the creditors of the Bankrupts should be taken into account.

[593] A fiduciary that breaches its duty must account for what it acquired in consequence of its breach. However, in *3464920 Canada Inc. v. Strother*, 2007 SCC 24, Justice Binnie cautioned against making harsh awards out of all proportion to the actual behaviour of the wrongdoer:

> 88 The Court of Appeal, despite its observation that the accounting remedy itself should not become "an instrument of injustice" (*BCCA #1*, at para. 52), nevertheless concluded that the "accounting period" should be open-ended:
>
> > After much anxious consideration, I have therefore concluded that Mr. Strother must be required to account for and disgorge to Monarch all benefits, profits, interests and advantages he has received or which he may hereafter be entitled to receive, directly or indirectly (i.e., through a corporation, trust, or other vehicle), from or through any of the Sentinel Hill Entities.
> >
> > (*BCCA #1*, at para. 61, per Newbury J.A.)
>
> An accounting of profits is an equitable remedy and, as La Forest J. noted in a different context:
>
> > ... equity is not so rigid as to be susceptible to being used as a vehicle for punishing defendants with harsh damage awards out of all proportion to their actual behaviour.
> >
> > (*Hodgkinson v. Simms*, at p. 444)
>
> 89 To the same effect, the High Court of Australia noted in *Warman International Ltd. v. Dwyer* (1995), 128 A.L.R. 201 (Australia H.C.), at pp. 211-12:
>
> > ... the stringent rule requiring a fiduciary to account for profits can be carried to extremes and ... in cases outside the realm of specific assets, the liability of the fiduciary should not be transformed into a vehicle for the unjust enrichment of the plaintiff.
>
> In *Warman* itself, the Court found that two years was the appropriate period for which defendants should be ordered to account. From the profits so determined, an allowance for the expenses, skill, expertise, effort and resources contributed by the defendants was to be deducted.

[594] In addition, the general rule is that the reasonable and necessary expenses incurred to earn the benefit are deductible from the amount that must be accounted for: *Strother* at para. 97. The method of assessment sought by the Garchas is contrary to this rule.

[595] In addition to the above claims, the Garchas seek to recover their proportionate share of what they allege was the secret profit of $300,000 obtained by 690174 in relation to the assignment fee paid to 688350. As I am satisfied that there was in fact no secret profit obtained from this payment, no relief is granted in respect of this claim.

[596] The Trustee submits that the Garchas' entitlement should be adjusted to account for their under-contribution to the carrying costs of the Lot 1 Acquisition

Mortgage. The Trustee has calculated that shortfall as $174,962.49, based on the Garchas being responsible for 7/23 the carrying costs.

[597] I have some difficulties with this submission. The Garchas' entitlement is approximately 8% of the net proceeds of the Project, for which they have already contributed approximately $475,261. Given the unsatisfactory state of the accounts kept for the Project, I am not satisfied that the Garchas have not paid their share of the costs of the Lot 1 Acquisition Mortgage.

[598] The Garchas' contribution can usefully be compared to the confirmed contribution of Ranjit and Svender of less than $400,000, which resulted in them being entitled to 7.17% of the net proceeds. The Trustee has also allocated the same percentage to Wills and Dale, who contributed only $25,000 to Project costs.

[599] I therefore find that the 7/23 of 690174's share of the net proceeds of the Project are beneficially owned by the Garchas, and that they are entitled to be paid that amount from the funds held in trust.

[600] I have not addressed the entitlement of the non-party 2007 Joint Venturers in these reasons. During the trial, counsel for the Trustee indicated that some form of accommodation has been reached with some or all of those 2007 Joint Venturers. I however am not in a position to determine whether they are entitled to the same remedy as the Garchas, principally because I do not know the extent to which they gave their informed consent to 690174's actions.

[601] However, to the extent that other 2007 Joint Venturers are entitled to benefit from this judgment, I consider it just and equitable that the Garchas be entitled to indemnification for a proportionate share of their legal expenses, on a solicitor-client basis, from such recoveries. I give the Garchas leave to pursue this claim at the hearing to be held to consider costs issues generally. If the Garchas intend to pursue such an order, they must give notice to the non-party 2007 Joint Venturers.

Mattu and Rajpreet remedies

[602] While I am satisfied that Rajpreet and Mr. Mattu are entitled to the remedy of a constructive trust, the more difficult question is how to determine its amount.

[603] Mr. Mattu submits that I should find all of the members of the November 2010 JVA to be bound by Jaswant's agreement with him; that is, that he should receive a share of the proceeds based on his relative contributions to the Project. He argues that his agreement with Jaswant predates the November 2010 JVA and, in any event, that Jaswant had the actual authority to amend its terms to further the development of the Project by making an accommodation for him in it.

[604] However, there are formidable practical difficulties in determining the actual amounts contributed to the Project by the various parties. This is mainly attributable to the chaotic state of the Project accounting. It is however also attributable to the informality of the dealings between Rajpreet, Mr. Mattu, and Jaswant.

[605] Unfortunately, I found the Trustee's spreadsheets of limited utility in determining the amounts actually contributed by the parties. One of my major difficulties arises out of the methodology used by the Trustee in analyzing the flow of funds. The Trustee used the accounting principle of first in first out, known as FIFO. The legal equivalent of FIFO is the Rule in Clayton's Case. That case created a legal presumption that funds withdrawn from an account are deemed to be drawn from the first funds paid into the account.

[606] However, in cases involving a breach of fiduciary duty, the operative legal rule is the Rule in Hallett's Case arising from the decision in *Re Hallett's Estate*, (1880) 13 Ch. D. 696 (Eng. C.A.), which held that when a trustee mixes its own funds with those of its beneficiaries, it is deemed to use its own funds for non-trust related expenses and the trust funds for the purpose for which it received them.

[607] This principle was applied by Justice Grauer in *Re 0409725 B.C. Ltd.*, 2015 BCSC 1221:

> 20 But trusts do not evaporate because the trust property disappears. It is here, then, that the breaches of trust come to the fore. As noted in my second Reasons, there can be no doubt that all of the monies paid by the

> owners of the various projects at issue were funds that, prior to the bankruptcy, were impressed with trusts by section 10(1) of the *BLA*. Those trusts remained until the beneficiaries were paid. The problem is that any attempt after the bankruptcy to assess what remains in trust on a project-by-project basis is frustrated by Odenza's breaches (paying sub trade claims of one job with funds received from other jobs). On a FIFO approach, the effect would be to limit the trusts to the last few standing — last in, still there.
>
> 21 But the law is quite clear that FIFO is the wrong approach to the distribution of mingled trust funds where the trust claims exceed the amount available. The correct approach is to distribute the funds pro rata: *Law Society of Upper Canada v. Toronto Dominion Bank (1998)*, 42 O.R. (3d) 257 (Ont. C.A.) and *Ontario (Securities Commission) v. Greymac Credit Corp*. (1986), 55 O.R. (2d) 673 (Ont. C.A.), upheld [1988] 2 S.C.R. 172 (S.C.C.).
>
> 22 The law also provides that where a trustee acts in breach of trust in the mingling and spending of trust and non-trust funds, he is deemed to have spent his own money first, and trust money last: *Hallett's Estate, Re (1880)*, 13 Ch. D. 696 (Eng. C.A.).

[608] This principle is important in this case because equity presumes that Jaswant used Rajpreet's and Mr. Mattu's funds in the Project and his own funds for purposes not related to it.

[609] An additional consideration is that dividing the revenue strictly on the basis of financial contributions would make no provision for the considerable contribution that Jaswant's abilities and efforts as a developer have made to the success of the Project.

[610] I have therefore concluded that the appropriate remedy in this case is one that permits Rajpreet and Mr. Mattu to obtain a fair share of the proceeds of the Project but does not completely replace the existing legal interests set out in the 2011 JVA.

[611] A defining feature of equitable remedies is their responsiveness to the facts of a particular case. As stated in *Kerr v. Baranow*, 2011 SCC 10 at para. 71, "[t]he 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". Given that equitable remedies are so dependent on the facts, significant judicial discretion is permitted (indeed, required) in fashioning them. Such discretion encompasses "the full gamut of available remedies": *Cadbury Schweppes Inc. v. FBI*

Foods Ltd., [1999] 1 S.C.R. 142 (S.C.C.) at 179-180. Imposition of a constructive trust is recognized as one of such remedies: *Soulos* at 236.

[612] Any method of determining an appropriate remedy for Rajpreet and Mr. Mattu will be to a certain extent arbitrary. Given the deplorable state of the Project accounts (which have made it virtually impossible to determine the amount most parties contributed to the total Project costs), the inconsistency between the various agreements that Jaswant made, the recognition that Jaswant's efforts did bring the Project to a successful completion, and the failure of Mr. Mattu and Rajpreet to document their agreements with Jaswant, I have concluded that the fairest way to compensate them is to impose a constructive trust in their favour over a portion of the net proceeds of the Project.

[613] I originally considered awarding Rajpreet and Mr. Mattu an amount equal to their investment plus a reasonable rate of return on it. However, I have concluded that such a division would not reflect the risks that they would have known they were taking by investing in the Project. Taking all of the above factors into account, I have concluded that the most appropriate way to compensate Rajpreet and Mr. Mattu is to adjust the proportionate shares of the parties to the 2011 Joint Venture to reflect their investment.

[614] The best comparable to use to determine a fair share for Rajpreet and Mr. Mattu is the amount that Grewal Management paid to acquire its 14.25% interest in the Project. My view is that the appropriate amount to use is the initial amount that Grewal Management paid to acquire its interest in Lot 5, which was approximately $1,690,000. Rajpreet's investment was $800,000, which is 47% of that investment. I have determined Mr. Mattu's investment to be $1,062,000, which is approximately 62.3% of Grewal Management's investment. Applying these percentages to the 14.25% of the profits obtained by Grewal Management results in granting Mr. Mattu 9% and Rajpreet 6.8% of the net revenue from the Project.

[615] I find that it is appropriate to charge that amount pro rata among the members of the 2011 Joint Venture, including the 28.5% interest of 690174. The evidence in this case demonstrates that the members of the 2011 Joint Venture did not

contribute sufficient funds to finance the acquisition and development costs of the Project. That deficiency was made up in large part by the funds contributed by Mr. Mattu and Rajpreet. All of the 2011 Joint Venturers have therefore benefitted from Mr. Mattu and Rajpreet's contributions.

Project Accounting Issues

[616] The final determination of the amounts to which the parties are entitled requires decisions on a number of the accounting issues. Some of these issues were raised by the Trustee in his Ninth Report to the Court and his Submission Re Adjustments and Reallocations. Some arise from the findings I have made.

[617] In Exhibit 175, the Trustee estimated total project recoveries of $15,441,090.52. After deduction of amounts disbursed by the Trustee, the balance held in trust as of February 28, 2018, was $10,118,804.25. These deductions included approximately $2,775,000 in Trustee's fees and legal expenses (the "Trustee Costs"). The amount of the Trustee Costs has increased significantly since February 2018. In Schedule 2 of Summary 1, the Trustee estimated $3,500,000 in Trustee Costs to the completion of the file.

[618] The parties are agreed that the there will be a further hearing to address the issues of costs and how the Trustee Costs should be allocated. For convenience I will refer to this hearing as the "Accounting Hearing"

[619] I also wish to emphasize that I regard the Vendor Trust Accounts as having been set up for convenience only and that they are of no assistance in determining the final entitlements of the Parties. I will however decide certain allocation issues in these reasons.

The Virk Mortgage

[620] In Exhibit 175, the Trustee allocated the full amount paid to satisfy the Virk Mortgage to 690174's Vendor Trust Account. It is obvious from my decision that 690174 holds all but a 1/23 interest in the Project in trust for the 2007 Joint Venturers and that it is therefore inappropriate to use 690174's share of the proceeds to pay the Virk Mortgage. Jaswant acknowledged at all times that the Virk

Mortgage was his responsibility. I have also found that Jaswant and Parmjit were engaged in a joint enterprise with respect to the Project. It follows from this finding that Parmjit must also bear responsibility for the Virk Mortgage. Panorama should also bear a proportionate share of the amount of this payment based on Jaswant's complete control of its affairs. The proportionate shares chargeable should be based on the relative share of the proceeds payable to these parties under the 2011 JVA. However, no portion should be charged to Ranjit and Svender's or Grewal Management's share of the proceeds.

[621] In addition, my finding that Wills and Dale hold their interest as nominees for Jaswant implies that they are responsible for their proportionate share of this cost. However, it would not be fair to charge Wills and Dale's share of the proceeds with a portion of the Virk Mortgage payout because that issue was not raised during the trial. I give the parties leave to make submissions on that issue at the Accounting Hearing.

Payout of Acquisition Mortgages

[622] During the course of the trial I expressed concern about the discrepancy between the amounts contributed to the Project by the 2011 Joint Venturers and their proportionate entitlements set out in the 2011 JVA. I need not repeat those concerns. The Trustee's explanation for the discrepancy was that the proportionate interests set out in the 2011 JVA were based on the size of the Lots contributed to the Project by the 2011 Joint Venturers. He reasoned that because the Lots were acquired by the persons contributing them at different times and in different market conditions, it made sense to determine the proportionate interest from the size of the contributed Lots rather than the amount paid for them.

[623] However, this analysis overlooks a crucial consideration. Each of the Lots contributed was encumbered by an Acquisition Mortgage which was paid out from the proceeds of the first WSCU Mortgage, which itself was ultimately paid proportionately by the 2011 Joint Venturers from lot sales.

[624] This resulted, for example, in Panorama receiving 14.25% of the Project in exchange for contributing a share of a Lot that it had purchased from the proceeds of an Acquisition Mortgage which was paid off by all of the 2011 Joint Venturers based on their proportionate shares in the 2011 Joint Venture. In contrast, Grewal Management paid cash for its share of Lot 5 and received only a partial refund of that price, almost as an afterthought, when the order to pay the WSCU Mortgage was signed. Yet, Grewal Management obtained an identical 14.25% interest in the Project.

[625] I have concluded that this result is inconsistent with the terms of the 2011 JVA, which clearly contemplated that expenses should be borne in accordance with the proportionate interests of the 2011 Joint Venturers. To address this issue, I find that the amounts paid in March 2012 to pay out the Acquisition Mortgages, as well as the cash payment to Grewal Management and the amount paid to discharge the Ludu Mortgage, should be regarded as an advance payment of Project profits to the 2011 Joint Venturers who benefitted from them. This will require an adjustment to the final amount distributable to take those benefits into account. For clarity, the amount paid to retire the Ludu Mortgage should be regarded as an advance distribution to Jaswant and Parmjit. I have also concluded that the amounts paid to pay the Virk Mortgage should be regarded as an advance distribution of profits to Jaswant, Parmjit, and Panorama.

[626] It seems to me that these adjustments may notionally increase the profits from the Project by an amount equal to the March 2012 payouts, but I will leave it to the Trustee to make this adjustment.

[627] In addition, the accounts will have to be adjusted to take into account the remedies I have granted to Rajpreet and Mr. Mattu. This means that the amount available for distribution to the signatories to the 2011 JVA will be 84.2% of the net Project proceeds. It would seem that this will result in a pro rata reduction of the share of the proceeds payable to each of the 2011 Joint Venturers. However, the parties may make submissions at the Accounting Hearing on this issue.

Other adjustments with respect to specific payments

[628] I agree with the manner in which the Trustee has allocated the payments or credits (all as set out in Schedule 2 to Summary 2 of Exhibit 175) to the B & B Contracting liability of $410,734.62; the PTT Lien of $37,110.34; the direct Project creditors of $113,981.43; the May 16, 2012, deposit to 690174's WSCU account on May 16, 2013; and the Buckley Hogan payment to the City of Surrey and Project completion costs.

[629] I do note that the direct Project creditors amount was increased to $115,583.15 in the Trustee's Submission Re Adjustments and Reallocations, delivered after the close of the evidence. The correct figure should be used for this adjustment.

[630] I do not agree that any adjustment is appropriate for carrying costs from November 15, 2010, to the date of payout of the Acquisition Mortgages. Even though the beneficial ownership of the Lots may have changed on November 15, 2010 I find that the parties who contributed the Lots remained responsible for their carrying costs on the capital that they provided to the Project. They should not be regarded as Project costs.

[631] It may be that some joint venturers made payments on Acquisition Mortgages that were not their responsibility. If that is the case an adjustment as between the venturer who paid and the venturer who was responsible may have been appropriate. However, that is an adjustment that falls outside of the Project accounting and the scope of these proceedings.

Indirect Project creditors

[632] The Trustee also suggests that what he referred to as indirect Project creditors should share directly in the distribution of Project profits. These appear to refer to amounts borrowed by the Bankrupts that were in turn used by the Bankrupts to make three categories of payments relating to the Project as set out in Summary 5 of Exhibit 175:

1. Project mortgage payments

2. Project land purchases

3. Project costs

[633] Project mortgage payments appear to be payments made on the Acquisition Mortgages, which I have already found are not Project costs. I have made the same finding with respect to Lot acquisition costs, referred to above as Project land purchases.

[634] The third category is difficult to identify because Summary 5 does not provide the dates on which the payments were made or specifics regarding what they were made for. For example, page 2 of Summary 5 shows that the Trustee allowed a claim of $322,227.50 from Manjit Bains as an unsecured creditor of Jaswant. Of this amount, $48,954.26 was allocated to Project costs. $46,000 of that amount was paid to Buckley Hogan, Jaswant's lawyers. No other details are provided.

[635] Despite this concern, I am prepared to credit the Bankrupt estates with payments made for Project costs, apart from land acquisition and carrying costs, after November 15, 2010, from funds borrowed from their creditors to the extent that such payments can be proven on a balance of probabilities. Any such payments should be credited to the Bankrupt that made them and not the entity from whom they were borrowed. The persons who provided that credit did not provide it to the Project but to the Bankrupts. If the parties cannot agree on the amounts of such payments they may make further submissions at the Accounting Hearing.

[636] I am also of the view that the amounts shown as an advance from Raveen to 690174 must be closely scrutinized because I do not recall Raveen ever having testified to making any such advance. However, if 690174 can demonstrate that it made a payment to B & B Contracting of $199,098.49 for Project costs from funds it borrowed, it is entitled to the appropriate credit for that payment, taking into account its obligation to bear a proportionate share of that expense.

Accounting Process

[637] It is difficult to conceptualize the most useful method of determining the combined issues of Project accounting and allocation of Trustee Costs.

[638] After much consideration I have concluded that the accounting should follow the following process:

1. The Trustee should prepare an initial accounting of the Project incorporating the directions and decisions I have made without deducting anything for legal costs or Trustee Costs. This accounting should show the amounts that each of the parties is entitled to from the Project based on my reasons and the terms of the 2011 JVA.

2. The Trustee will also update Exhibit 175 to include all Trustee Costs to the present, including charges that have not yet been presented for approval

3. The parties will then make submissions on how the Trustee Costs should be satisfied, including on the issue of the extent to which the interests of the non-bankrupt parties should be used to pay the Trustee Costs.

Summary of Orders

[639] In summary, I make the following orders:

1. Each 2007 Joint Venturer is the beneficial owner of its proportionate share of the assets of the 2007 Joint Venture.

2. Jaswant and 690174 breached their fiduciary duties to the 2007 Joint Venturers by:

    i. Permitting financial charges that arose from 690174’s outside dealings to be registered against Lot 1.

    ii. Registering other financial charges against Lot 1 to provide security for obligations incurred by 690174 in pursuit of its separate business interests.

iii. Purporting to transfer the beneficial ownership of Lot 1 to the members of the November 2010 and 2011 Joint Ventures.

iv. Entering into the Land Swap Agreement, which transferred a significant portion of Lot 1 to the Anglican Diocese of New Westminster in exchange for land that was utilized for the benefit of the 2011 Joint Venturers without obtaining the informed consent of the 2007 Joint Venturers.

v. Executing a mortgage over Lot 1 to secure the WSCU financing that was used to finance the Project for the exclusive benefit of the 2011 Joint Venturers.

3. Panorama, Parmjit, Ranjit, and Svender are liable to the 2007 Joint Venturers in knowing assistance and knowing receipt.

4. The Garchas' claim for punitive damages is dismissed.

5. Jaswant breached an *ad hoc* fiduciary duty to Rajpreet and Mr. Mattu regarding the funds they advanced towards the Project.

6. The Vendor Trust Accounts are to be consolidated into one trust account to be disbursed in accordance with these reasons and the directions made on the accounting.

7. 22/23 of the 28.5% share of the net proceeds of the Project allocated to 690174 in the 2011 JVA is held in trust for the members of the 2007 JVA and 7/22 of that share is held in trust for the Garchas.

8. Grewal Management's claim is dismissed.

9. 9% of the net proceeds of the Project are subject to a constructive trust in favour of Mr. Mattu and 6.8% are subject to a constructive trust in favour of Rajpreet. The parties may make submissions at the Accounting Hearing as to how these trusts should affect their entitlement to the remaining 84.2% of Project proceeds.

10. The amount paid to satisfy the Virk Mortgage is to be borne proportionately by the Bankrupts and Parmjit.

11. The appeals of the disallowances of the claims are allowed, and the claims of the appellants are disposed of by the orders I have made in the trials of their claims.

12. There will be a declaration that the claims of the plaintiffs are not equity claims.

13. There will be an Accounting Hearing to address the issues identified in these reasons as requiring further submissions and to determine the costs of these proceedings.

Sewell J.

17

In the Matter of a Plan of Compromise or Arrangement of
Sino-Forest Corporation

[Indexed as: Sino-Forest Corp. (Re)]

114 O.R. (3d) 304

2012 ONCA 816

Court of Appeal for Ontario,
Goudge, Hoy and Pepall JJ.A.
November 23, 2012

Debtor and creditor -- Arrangements -- Shareholders of company commencing class actions against company, underwriters and auditors for misrepresentation -- Plaintiffs alleging that misrepresentations artificially inflated price of company's shares -- Company successfully seeking protection under Companies' Creditors Arrangement Act ("CCAA") -- Underwriters and auditors filing proofs of claim against company seeking contribution and indemnity for any amounts they might be ordered to pay as damages in class actions -- Supervising judge not erring in finding that those claims were equity claims within meaning of s. 2(1) of CCAA despite fact that underwriters and auditors were not holders of an equity interest -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 2(1).

The appellant underwriters provided underwriting services in connection with three S Co. equity offerings and four S Co. note offerings. The appellant auditors served as S Co.'s auditors at the relevant time. Shareholders of S Co. brought

proposed class actions against S Co. and, among others, the underwriters and auditors, alleging that S Co. repeatedly misrepresented its assets and financial situation and its compliance with generally accepted accounting principles in its public disclosure, that the auditors and underwriters failed to detect those misrepresentations, and that the auditors misrepresented that their audit reports [page305] were prepared in accordance with generally accepted auditing standards. They claimed that the misrepresentations artificially inflated the price of S Co.'s shares and that proposed class members suffered damages when the shares fell after the truth was revealed. S Co. successfully sought protection pursuant to the provisions of the Companies' Creditors Arrangement Act ("CCAA"). The auditors and underwriters filed proofs of claim seeking contribution and indemnity for, among other things, any amounts that they were ordered to pay as damages to the plaintiffs in the class actions. S Co. applied for an order that the claims against it arising from the ownership, purchase or sale of an equity interest in the company, including shareholder claims, and any indemnification claim against it related to or arising from the shareholder claims, including the claims for contribution or indemnity, were equity claims under the CCAA. The application was granted. The underwriters and auditors appealed.

Held, the appeal should be dismissed.

The definition of equity claim in s. 2(1) of the CCAA focuses on the nature of the claim, and not the identity of the claimant. The appellants' claims for contribution and indemnity were clearly equity claims, despite the fact that the appellants did not have an equity interest in S Co. Parliament adopted expansive language in defining "equity claim". Parliament employed the phrase "in respect of" twice in defining equity claim: in the opening portion of the definition, it refers to an equity claim as a "claim that is in respect of an equity interest", and in para. (e) it refers to "contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d)". The Supreme Court of Canada has repeatedly held that the words "in respect of" are of the widest possible scope, conveying some link or connection

between two related subjects. It was conceded that the shareholder claims against S Co. were claims for "a monetary loss resulting from the ownership, purchase or sale of an equity interest", within the meaning of para. (d) of the definition of "equity claim". There was an obvious link between the appellants' claims against S Co. for contribution and indemnity and the shareholders' claims against S Co. Parliament also defined equity claim as "including a claim for, among others", the claims described in paras. (a) to (e). The Supreme Court has held that the phrase "including" indicates that the preceding words -- "a claim that is in respect of an equity interest" -- should be given an expansive interpretation, and include matters which might not otherwise be within the meaning of the term. Accordingly, the appellants' claims, which clearly fell within para. (e), were included within the meaning of the phrase "claim that is in respect of an equity interest". Parliament chose not to include language in s. 2(1) restricting claims for contribution or indemnity to those made by shareholders. If only a person with an equity interest could assert an equity claim, para. (e) would be rendered meaningless. No legislative provision should be interpreted so as to render it mere surplusage. Looking at s. 2(1) as a whole, it appeared that the remedies available to shareholders were all addressed by s. 2(1)(a) to (d). The logic of s. 2(1)(a) to (e) therefore also supported the notion that para. (e) referred to claims for contribution and indemnity not by shareholders, but by others. The definition of "equity claim" was sufficiently clear to alter the pre-existing common law.

Cases referred to

Blue Range Resource Corp. (Re), [2000] A.J. No. 14, 2000 ABQB 4, [2000] 4 W.W.R. 738, 76 Alta. L.R. (3d) 338, 259 A.R. 30, 15 C.B.R. (4th) 169, 94 A.C.W.S. (3d) 223; CanadianOxy Chemicals Ltd. v. Canada (Attorney General), [1999] 1 S.C.R. 743, [1998] S.C.J. No. 87, 171 D.L.R. (4th) 733, 237 N.R. 373, J.E. 99-861, 122 B.C.A.C. 1, 133 C.C.C. (3d) 426, 29 C.E.L.R. (N.S.) 1, 23 C.R. (5th) 259, 41 W.C.B. (2d) 411; [page306] Central Capital Corp. (Re) (1996), 27 O.R. (3d) 494, [1996] O.J. No. 359, 132 D.L.R. (4th) 223, 88 O.A.C. 161, 26 B.L.R. (2d) 88, 38 C.B.R. (3d) 1, 61 A.C.W.S. (3d) 18 (C.A.); EarthFirst Canada Inc. (Re), [2009] A.J. No. 749, 2009 ABQB 316, 56 C.B.R. (5th) 102; Goodyear Tire & Rubber

Co. of Canada v. T. Eaton Co., [1956] S.C.R. 610, [1956] S.C.J. No. 37, 4 D.L.R. (2d) 1, 28 C.P.R. 25, 56 D.T.C. 1060; In Re: Mid-American Waste Systems, Inc., 228 B.R. 816 (Bankr. Del. 1999); Markevich v. Canada, [2003] 1 S.C.R. 94, [2003] S.C.J. No. 8, 2003 SCC 9, 239 F.T.R. 159, 223 D.L.R. (4th) 17, 300 N.R. 321, J.E. 2003-506, 2003 D.T.C. 5185, 120 A.C.W.S. (3d) 532; National Bank of Canada v. Merit Energy Ltd., [2002] A.J. No. 6, 2002 ABCA 5, [2002] 3 W.W.R. 215, 317 A.R. 319, affg [2001] A.J. No. 918, 2001 ABQB 583, [2001] 10 W.W.R. 305, 95 Alta. L.R. (3d) 166, 294 A.R. 15, 28 C.B.R. (4th) 228, 107 A.C.W.S. (3d) 182 (Q.B.); National Bank of Greece (Canada) v. Katsikonouris, [1990] 2 S.C.R. 1029, [1990] S.C.J. No. 95, 74 D.L.R. (4th) 197, 115 N.R. 42, J.E. 90-1410, 32 Q.A.C. 250, 50 C.C.L.I. 1, [1990] I.L.R. 1-2663 at 10478, 23 A.C.W.S. (3d) 74; Nelson Financial Group Ltd. (Re), [2010] O.J. No. 4903, 2010 ONSC 6229, 75 B.L.R. (4th) 302, 71 C.B.R. (5th) 153 (S.C.J.); Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324, [2003] 2 S.C.R. 157, [2003] S.C.J. No. 42, 2003 SCC 42, 230 D.L.R. (4th) 257, 308 N.R. 271, 177 O.A.C. 235, J.E. 2003-1790, 7 Admin. L.R. (4th) 177, 31 C.C.E.L. (3d) 1, [2003] CLLC 220-062, 125 A.C.W.S. (3d) 85; R. v. Nowegijick, [1983] 1 S.C.R. 29, [1983] S.C.J. No. 5, 144 D.L.R. (3d) 193, 46 N.R. 41, [1983] 2 C.N.L.R. 89, [1983] C.T.C. 20, 83 D.T.C. 5041, 18 A.C.W.S. (2d) 2; R. v. Proulx, [2000] 1 S.C.R. 61, [2000] S.C.J. No. 6, 2000 SCC 5, 182 D.L.R. (4th) 1, 249 N.R. 201, [2000] 4 W.W.R. 21, J.E. 2000-264, 142 Man. R. (2d) 161, 140 C.C.C. (3d) 449, 30 C.R. (5th) 1, 49 M.V.R. (3d) 163, 44 W.C.B. (2d) 479; Return on Innovation Capital Ltd. v. Gandi Innovations Ltd., [2011] O.J. No. 3827, 2011 ONSC 5018, 83 C.B.R. (5th) 123, 206 A.C.W.S. (3d) 464 (S.C.J.) [Leave to appeal refused [2012] O.J. No. 31, 2012 ONCA 10, 90 C.B.R. (5th) 141, 211 A.C.W.S. (3d) 264]; Stelco Inc. (Re), [2006] O.J. No. 276, 14 B.L.R. (4th) 260, 17 C.B.R. (5th) 78, 145 A.C.W.S. (3d) 194 (S.C.J.)

Statutes referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 2 [as am.], 121 [as am.]

Bankruptcy Code, 11 U.S.C.S. 502(e)(1)(B)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 [as

am.], ss. 2(1) [as am], (a)-(e), 6(8), 22.1 [as am.]
Negligence Act, R.S.O. 1990, c. N.1 [as am.], s. 2
Securities Act, R.S.A. 2000, c. S-4, s. 203(1) [as am.], (10)
Securities Act, R.S.B.C. 1996, c. 418, s. 131(1) [as am.], (11)
Securities Act, R.S.N.L. 1990, c. S-13, s. 130(1), (8)
Securities Act, R.S.N.S. 1989, c. 418, s. 137(1), (8)
Securities Act, R.S.O. 1990, c. S.5, s. 130(1) [as am.], (8)
Securities Act, R.S.P.E.I. 1988, c. S-3.1, s. 111(1), (12)
Securities Act, R.S.Q., c. V-1.1, ss. 218 [as am.], 219, 221 [as am.]
Securities Act, S.N.B. 2004, c. S-5.5, s. 149(1), (9)
Securities Act, S.N.W.T. 2008, c. 10, s. 111(1), (12)
Securities Act, S.Nu. 2008, c. 12, s. 111(1), (12)
Securities Act, S.Y. 2007, c. 16, s. 111(1), (13)
The Securities Act, C.C.S.M. c. S50, s. 141(1), (11)
The Securities Act, 1988, S.S. 1988-89, c. S-42.2, s. 137(1), (9)
Authorities referred to
Driedger, Elmer A., Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) [page307]

APPEAL from the order of Morawetz J., [2012] O.J. No. 3627, 2012 ONSC 4377 (S.C.J.) declaring that the appellants' claims were equity claims within the meaning of the Companies' Creditors Arrangement Act.

Peter H. Griffin, Peter J. Osborne and Shara Roy, for appellant Ernst & Young LLP.

Sheila Block and David Bish, for appellants Credit Suisse Securities (Canada) Inc., TD Securities Inc., Dundee Securities Corporation (now known as DWM Securities Inc.), RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd. (now known as Canaccord Genuity Corp.), Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated, successor by merger to Banc of America Securities LLC.

Kenneth Dekker, for appellant BDO Limited.

Robert W. Staley, Derek J. Bell and Jonathan Bell, for respondent Sino-Forest Corporation.

Benjamin Zarnett, Robert Chadwick and Julie Rosenthal, for respondent Ad Hoc Committee of Noteholders.

Clifton Prophet, for monitor FTI Consulting Canada Inc.

Kirk M. Baert, A. Dimitri Lascaris and Massimo Starnino, for respondent Ad Hoc Committee of Purchasers.

Emily Cole, for respondent Allen Chan.

Erin Pleet, for respondent David Horsley.

David Gadsden, for respondent Pyry (Beijing).

Larry Lowenstein and Edward A. Sellers, for respondent board of directors.

BY THE COURT: --

I Overview

[1] In 2009, the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended ("CCAA"), was amended to expressly provide that general creditors are to be paid in full before an equity claim is paid.

[2] This appeal considers the definition of "equity claim" in s. 2(1) of the CCAA. More particularly, the central issue is whether claims by auditors and underwriters against the respondent debtor, Sino-Forest Corporation ("Sino-Forest"), for contribution and indemnity fall within that definition. The claims arise out of proposed shareholder class actions for misrepresentation. [page308]

[3] The appellants argue that the supervising judge erred in concluding that the claims at issue are equity claims within

the meaning of the CCAA and in determining the issue before the claims procedure established in Sino-Forest's CCAA proceeding had been completed.

[4] For the reasons that follow, we conclude that the supervising judge did not err and accordingly dismiss this appeal.

II The Background

(a) The parties

[5] Sino-Forest is a Canadian public holding company that holds the shares of numerous subsidiaries, which in turn own, directly or indirectly, forestry assets located principally in the People's Republic of China. Its common shares are listed on the Toronto Stock Exchange. Sino-Forest also issued approximately $1.8 billion of unsecured notes, in four series. Trading in Sino-Forest shares ceased on August 26, 2011, as a result of a cease-trade order made by the Ontario Securities Commission.

[6] The appellant underwriters [See Note 1 below] provided underwriting services in connection with three separate Sino-Forest equity offerings in June 2007, June 2009 and December 2009, and four separate Sino-Forest note offerings in July 2008, June 2009, December 2009 and October 2010. Certain underwriters entered into agreements with Sino-Forest in which Sino-Forest agreed to indemnify the underwriters in connection with an array of matters that could arise from their participation in these offerings.

[7] The appellant BDO Limited ("BDO") is a Hong Kong-based accounting firm that served as Sino-Forest's auditor between 2005 and August 2007, and audited its annual financial statements for the years ended December 31, 2005 and December 31, 2006.

[8] The engagement agreements governing BDO's audits of Sino-Forest provided that the company's management bore the primary responsibility for preparing its financial statements in accordance with generally accepted accounting principles ("GAAP") [page309] and implementing internal controls to

prevent and detect fraud and error in relation to its financial reporting.

[9] BDO's audit report for 2006 was incorporated by reference into a June 2007 prospectus issued by Sino-Forest regarding the offering of its shares to the public. This use by Sino-Forest was governed by an engagement agreement dated May 23, 2007 in which Sino-Forest agreed to indemnify BDO in respect of any claims by the underwriters or any third party that arose as a result of the further steps taken by BDO in relation to the issuance of the June 2007 prospectus.

[10] The appellant Ernst & Young LLP ("E&Y") served as Sino-Forest's auditor for the years 2007 to 2012, and delivered auditors' reports with respect to the consolidated financial statements of Sino-Forest for fiscal years ended December 31, 2007 to 2010, inclusive. In each year for which it prepared a report, E&Y entered into an audit engagement letter with Sino-Forest in which Sino-Forest undertook to prepare its financial statements in accordance with GAAP, design and implement internal controls to prevent and detect fraud and error, and provide E&Y with its complete financial records and related information. Some of these letters contained an indemnity in favour of E&Y.

[11] The respondent Ad Hoc Committee of Noteholders consists of noteholders owning approximately one-half of Sino-Forest's total noteholder debt. [See Note 2 below] They are creditors who have debt claims against Sino-Forest; they are not equity claimants.

[12] Sino-Forest has insufficient assets to satisfy all the claims against it. To the extent that the appellants' claims are accepted and are treated as debt claims rather than equity claims, the noteholders' recovery will be diminished.

(b) The class actions

[13] In 2011 and January of 2012, proposed class actions were commenced in Ontario, Quebec, Saskatchewan and New York State against, amongst others, Sino-Forest, certain of its officers, directors and employees, BDO, E&Y and the underwriters. Sino-

Forest is sued in all actions. [See Note 3 below] [page310]

[14] The proposed representative plaintiffs in the class actions are shareholders of Sino-Forest. They allege that Sino-Forest repeatedly misrepresented its assets and financial situation and its compliance with GAAP in its public disclosure; the appellant auditors and underwriters failed to detect these misrepresentations; and the appellant auditors misrepresented that their audit reports were prepared in accordance with generally accepted auditing standards ("GAAS"). The representative plaintiffs claim that these misrepresentations artificially inflated the price of Sino-Forest's shares and that proposed class members suffered damages when the shares fell after the truth was revealed in 2011.

[15] The representative plaintiffs in the Ontario class action seek approximately $9.2 billion in damages. The Quebec, Saskatchewan and New York class actions do not specify the quantum of damages sought.

[16] To date, none of the proposed class actions has been certified.

(c) CCAA protection and proofs of claim

[17] On March 30, 2012, Sino-Forest sought protection pursuant to the provisions of the CCAA. Morawetz J. granted the initial order which, among other things, appointed FTI Consulting Canada Inc. as the monitor and stayed the class actions as against Sino-Forest. Since that time, Morawetz J. has been the supervising judge of the CCAA proceedings. The initial stay of the class actions was extended and broadened by order dated May 8, 2012.

[18] On May 14, 2012, the supervising judge granted an unopposed claims procedure order which established a procedure to file and determine claims against Sino-Forest.

[19] Thereafter, all of the appellants filed individual proofs of claim against Sino-Forest seeking contribution and indemnity for, among other things, any amounts that they are

ordered to pay as damages to the plaintiffs in the class actions. Their proofs of claim advance several different legal bases for Sino-Forest's alleged obligation of contribution and indemnity, including breach of contract, contractual terms of indemnity, negligent and fraudulent misrepresentation in tort, and the provisions of the Negligence Act, R.S.O. 1990, c. N.1.

(d) Order under appeal

[20] Sino-Forest then applied for an order that the following claims are equity claims under the CCAA: claims against Sino-Forest arising from the ownership, purchase or sale of an equity [page311] interest in the company, including shareholder claims ("shareholder claims"); and any indemnification claims against Sino-Forest related to or arising from the shareholder claims, including the appellants' claims for contribution or indemnity ("related indemnity claims").

[21] The motion was supported by the Ad Hoc Committee of Noteholders.

[22] On July 27, 2012, the supervising judge granted the order sought by Sino-Forest and released a comprehensive endorsement.

[23] He concluded that it was not premature to determine the equity claims issue. It had been clear from the outset of Sino-Forest's CCAA proceedings that this issue would have to be decided and that the expected proceeds arising from any sales process would be insufficient to satisfy the claims of creditors. Furthermore, the issue could be determined independently of the claims procedure and without prejudice being suffered by any party.

[24] He also concluded that both the shareholder claims and the related indemnity claims should be characterized as equity claims. In summary, he reasoned that

-- the characterization of claims for indemnity turns on the characterization of the underlying primary claims. The shareholder claims are clearly equity claims and they led to and underlie the related indemnity claims;
-- the plain language of the CCAA, which focuses on the nature

of the claim rather than the identity of the claimant, dictates that both shareholder claims and related indemnity claims constitute equity claims;

-- the definition of "equity claim" added to the CCAA in 2009 broadened the scope of equity claims established by pre-amendment jurisprudence;

-- this holding is consistent with the analysis in Return on Innovation Capital Ltd. v. Gandi Innovations Ltd., [2011] O.J. No. 3827, 2011 ONSC 5018, 83 C.B.R. (5th) 123 (S.C.J.), which dealt with contractual indemnification claims of officers and directors. Leave to appeal was denied by this court, [2012] O.J. No. 31, 2012 ONCA 10, 90 C.B.R. (5th) 141; and

-- "[i]t would be totally inconsistent to arrive at a conclusion that would enable either the auditors or the underwriters, through a claim for indemnification, to be treated as creditors [page312] when the underlying actions of shareholders cannot achieve the same status" (para. 82). To hold otherwise would run counter to the scheme established by the CCAA and would permit an indirect remedy to the shareholders when a direct remedy is unavailable.

[25] The supervising judge did not characterize the full amount of the claims of the auditors and underwriters as equity claims. He excluded the claims for defence costs on the basis that while it was arguable that they constituted claims for indemnity, they were not necessarily in respect of an equity claim. That determination is not appealed.

III Interpretation of "Equity Claim"

(a) Relevant statutory provisions

[26] As part of a broad reform of Canadian insolvency legislation, various amendments to the CCAA were proclaimed in force as of September 18, 2009.

[27] They included the addition of s. 6(8):

> 6(8) 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, which provides that creditors with equity claims may not vote at any meeting unless the court orders otherwise, was also added.

[28] Related definitions of "claim", "equity claim" and "equity interest" were added to s. 2(1) of the CCAA:

> 2(1) 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, [page313]
>
> (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 company other than an income trust, a share in the company -- or a warrant or option or another right to acquire a share in the company -- 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[.]

(Emphasis added)

[29] Section 2 of the Bankruptcy and Insolvency Act, R.S.C.

1985, c. B-3 ("BIA") defines a "claim provable in bankruptcy". Section 121 of the BIA in turn specifies that claims provable in bankruptcy are those to which the bankrupt is subject.

> 2. "claim provable in bankruptcy", "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a creditor;
>
> . . . . .
>
> 121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

(Emphasis added)

(b) The legal framework before the 2009 amendments

[30] Even before the 2009 amendments to the CCAA codified the treatment of equity claims, the courts subordinated shareholder equity claims to general creditors' claims in an insolvency. As the supervising judge described [at paras. 23-25]:

> Essentially, shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditor claims are not being paid in full. Simply put, shareholders have no economic interest in an insolvent enterprise.
>
> The basis for the differentiation flows from the fundamentally different nature of debt and equity investments. Shareholders have unlimited upside potential when purchasing shares. Creditors have no corresponding upside potential. [page314]
>
> As a result, courts subordinated equity claims and denied such claims a vote in plans of arrangement.

(Citations omitted) [See Note 4 below]

(c) The appellants' submissions

[31] The appellants essentially advance three arguments.

[32] First, they argue that on a plain reading of s. 2(1), their claims are excluded. They focus on the opening words of the definition of "equity claim" and argue that their claims against Sino-Forest are not claims that are "in respect of an equity interest" because they do not have an equity interest in Sino-Forest. Their relationships with Sino-Forest were purely contractual and they were arm's-length creditors, not shareholders with the risks and rewards attendant to that position. The policy rationale behind ranking shareholders below creditors is not furthered by characterizing the appellants' claims as equity claims. They were service providers with a contractual right to an indemnity from Sino-Forest.

[33] Second, the appellants focus on the term "claim" in para. (e) of the definition of "equity claim", and argue that the claims in respect of which they seek contribution and indemnity are the shareholders' claims against them in court proceedings for damages, which are not "claims" against Sino-Forest provable within the meaning of the BIA and, therefore, not "claims" within s. 2(1). They submit that the supervising judge erred in focusing on the characterization of the underlying primary claims.

[34] Third, the appellants submit that the definition of "equity claim" is not sufficiently clear to have changed the existing law. It is assumed that the legislature does not intend to change the common law without "expressing its intentions to do so with irresistible clearness": Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324, [2003] 2 S.C.R. 157, [2003] S.C.J. No. 42, 2003 SCC 42, at para. 39, citing Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co., [1956] S.C.R. 610, [1956] S.C.J. No. 37, at p. 614 S.C.R. The appellants argue that the supervising judge's interpretation of "equity claim" dramatically alters the common [page315] law as reflected in National Bank of Canada v. Merit Energy Ltd., [2001] A.J. No. 918, 2001 ABQB 583, 294 A.R. 15, affd [2002] A.J. No. 6, 2002 ABCA 5, 317 A.R. 319. There, the court

determined that in an insolvency, claims of auditors and underwriters for indemnification are not to be treated in the same manner as claims by shareholders. Furthermore, the Senate debates that preceded the enactment of the amendments did not specifically comment on the effect of the amendments on claims by auditors and underwriters. The amendments should be interpreted as codifying the pre-existing common law as reflected in National Bank of Canada v. Merit Energy Ltd.

[35] The appellants argue that the decision of Return on Innovation Capital Ltd. v. Gandi Innovations Ltd. is distinguishable because it dealt with the characterization of claims for damages by an equity investor against officers and directors, and it predated the 2009 amendments. In any event, this court confirmed that its decision denying leave to appeal should not be read as a judicial precedent for the interpretation of the meaning of "equity claim" in s. 2(1) of the CCAA.

(d) Analysis

(i) Introduction

[36] The exercise before this court is one of statutory interpretation. We are therefore guided by the following oft-cited principle from Elmer A. Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983), at p. 87:

> [T]he 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.

[37] We agree with the supervising judge that the definition of equity claim focuses on the nature of the claim, and not the identity of the claimant. In our view, the appellants' claims for contribution and indemnity are clearly equity claims.

[38] The appellants' arguments do not give effect to the expansive language adopted by Parliament in defining "equity claim" and read in language not incorporated by Parliament. Their interpretation would render para. (e) of the definition meaningless and defies the logic of the section.

(ii) The expansive language used

[39] The definition incorporates two expansive terms.

[40] First, Parliament employed the phrase "in respect of" twice in defining equity claim: in the opening portion of the definition, it refers to an equity claim as a "claim that is in respect of [page316] an equity interest", and in para. (e) it refers to "contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d)" (emphasis added).

[41] The Supreme Court of Canada has repeatedly held that the words "in respect of" are "of the widest possible scope", conveying some link or connection between two related subjects. In CanadianOxy Chemicals Ltd. v. Canada (Attorney General), [1999] 1 S.C.R. 743, [1998] S.C.J. No. 87, at para. 16, citing R. v. Nowegijick, [1983] 1 S.C.R. 29, [1983] S.C.J. No. 5, at p. 39 S.C.R., the Supreme Court held as follows:

> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.

(Emphasis added in CanadianOxy)

That court also stated as follows in Markevich v. Canada, [2003] 1 S.C.R. 94, [2003] S.C.J. No. 8, 2003 SCC 9, at para. 26:

> The words "in respect of" have been held by this Court to be words of the broadest scope that convey some link between two subject matters.

(Citations omitted)

[42] It is conceded that the shareholder claims against Sino-Forest are claims for "a monetary loss resulting from the ownership, purchase or sale of an equity interest", within the meaning of para. (d) of the definition of "equity claim". There is an obvious link between the appellants' claims against Sino-Forest for contribution and indemnity and the shareholders'

claims against Sino-Forest. The legal proceedings brought by the shareholders asserted their claims against Sino-Forest together with their claims against the appellants, which gave rise to these claims for contribution and indemnity. The causes of action asserted depend largely on common facts and seek recovery of the same loss.

[43] The appellants' claims for contribution or indemnity against Sino-Forest are therefore clearly connected to or "in respect of" a claim referred to in para. (d), namely, the shareholders' claims against Sino-Forest. They are claims in respect of equity claims by shareholders and are provable in bankruptcy against Sino-Forest.

[44] Second, Parliament also defined equity claim as "including a claim for, among others", the claims described in paras. (a) to (e). The Supreme Court has held that this phrase "including" indicates that the preceding words -- "a claim that is in respect of an equity interest" -- should be given an expansive [page317] interpretation, and include matters which might not otherwise be within the meaning of the term, as stated in National Bank of Greece (Canada) v. Katsikonouris, [1990] 2 S.C.R. 1029, [1990] S.C.J. No. 95, at p. 1041 S.C.R.:

> [T]hese words are terms of extension, designed to enlarge the meaning of preceding words, and not to limit them.
>
> [T]he natural inference is that the drafter will provide a specific illustration of a subset of a given category of things in order to make it clear that that category extends to things that might otherwise be expected to fall outside it.

[45] Accordingly, the appellants' claims, which clearly fall within para. (e), are included within the meaning of the phrase a "claim that is in respect of an equity interest".

(iii) What Parliament did not say

[46] "Equity claim" is not confined by its definition, or by the definition of "claim", to a claim advanced by the holder of

an equity interest. Parliament could have, but did not, include language in para. (e) restricting claims for contribution or indemnity to those made by shareholders.

(iv) An interpretation that avoids surplusage

[47] A claim for contribution arises when the claimant for contribution has been sued. Section 2 of the Negligence Act provides that a tortfeasor may recover contribution or indemnity from any other tortfeasor who is, or would if sued have been, liable in respect of the damage to any person suffering damage as a result of a tort. The securities legislation of the various provinces provides that an issuer, its underwriters and, if they consented to the disclosure of information in the prospectus, its auditors, among others, are jointly and severally liable for a misrepresentation in the prospectus, and provides for rights of contribution. [See Note 5 below] [page318]

[48] Counsel for the appellants were unable to provide a satisfactory example of when a holder of an equity interest in a debtor company would seek contribution under para. (e) against the debtor in respect of a claim referred to in any of paras. (a) to (d). In our view, this indicates that para. (e) was drafted with claims for contribution or indemnity by non-shareholders rather than shareholders in mind.

[49] If the appellants' interpretation prevailed, and only a person with an equity interest could assert such a claim, para. (e) would be rendered meaningless, and as Lamer C.J.C. wrote in R. v. Proulx, [2000] 1 S.C.R. 61, [2000] S.C.J. No. 6, 2000 SCC 5, at para. 28:

> It is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage.

(v) The scheme and logic of the section

[50] Moreover, looking at s. 2(1) as a whole, it would appear that the remedies available to shareholders are all addressed by s. 2(1)(a) to (d). The logic of s. 2(1)(a) to (e) therefore also supports the notion that para. (e) refers to claims for

contribution or indemnity not by shareholders, but by others.

(vi) The legislative history of the 2009 amendments

[51] The appellants and the respondents each argue that the legislative history of the amendments supports their respective interpretation of the term "equity claim". We have carefully considered the legislative history. The limited commentary is brief and imprecise. The clause-by-clause analysis of Bill C-12 comments that "[a]n equity claim is defined to include any claim that is related to an equity interest". [See Note 6 below] While, as the appellants submit, there was no specific reference to the position of auditors and underwriters, the desirability of greater conformity with United States insolvency law to avoid forum shopping by debtors was highlighted in 2003, some four years before the definition of "equity claim" was included in Bill C-12.

[52] In this instance, the legislative history ultimately provided very little insight into the intended meaning of the amendments. We have been guided by the plain words used by Parliament in reaching our conclusion. [page319]

(vii) Intent to change the common law

[53] In our view, the definition of "equity claim" is sufficiently clear to alter the pre-existing common law. National Bank of Canada v. Merit Energy Ltd., an Alberta decision, was the single case referred to by the appellants that addressed the treatment of auditors' and underwriters' claims for contribution and indemnity in an insolvency before the definition was enacted. As the supervising judge noted, in a more recent decision, Return on Innovation Capital Ltd. v. Gandi Innovations Ltd., the courts of this province adopted a more expansive approach, holding that contractual indemnification claims of directors and officers were equity claims.

[54] We are not persuaded that the practical effect of the change to the law implemented by the enactment of the definition of "equity claim" is as dramatic as the appellants suggest. The operations of many auditors and underwriters extend to the United States, where contingent claims for

reimbursement or contribution by entities "liable with the debtor" are disallowed pursuant to 502(e)(1)(B) of the U.S. Bankruptcy Code, 11 U.S.C.S. [See Note 7 below]

(viii) The purpose of the legislation

[55] The supervising judge indicated that if the claims of auditors and underwriters for contribution and indemnity were not included within the meaning of "equity claim", the CCAA would permit an indirect remedy to the shareholders when a direct remedy is not available. We would express this concept differently.

[56] In our view, in enacting s. 6(8) of the CCAA, Parliament intended that a monetary loss suffered by a shareholder (or other holder of an equity interest) in respect of his or her equity interest not diminish the assets of the debtor available to general creditors in a restructuring. If a shareholder sues auditors and underwriters in respect of his or her loss, in addition to the debtor, and the auditors or underwriters assert claims of contribution or indemnity against the debtor, the assets of the debtor available to general creditors would be diminished by the amount of the claims for contribution and indemnity. [page320]

IV Prematurity

[57] We are not persuaded that the supervising judge erred by determining that the appellants' claims were equity claims before the claims procedure established in Sino-Forest's CCAA proceeding had been completed.

[58] The supervising judge noted, at para. 7 of his endorsement, that from the outset, Sino-Forest, supported by the monitor, had taken the position that it was important that these proceedings be completed as soon as possible. The need to address the characterization of the appellants' claims had also been clear from the outset. The appellants have not identified any prejudice that arises from the determination of the issue at this stage. There was no additional information that the appellants have identified that was not before the supervising judge. The monitor, a court-appointed officer, supported the motion procedure. The supervising judge was well positioned to

determine whether the procedure proposed was premature and, in our view, there is no basis on which to interfere with the exercise of his discretion.

V Summary

[59] In conclusion, we agree with the supervising judge that the appellants' claims for contribution or indemnity are equity claims within s. 2(1)(e) of the CCAA.

[60] We reach this conclusion because of what we have said about the expansive language used by Parliament, the language Parliament did not use, the avoidance of surplusage, the logic of the section and what, from the foregoing, we conclude is the purpose of the 2009 amendments as they relate to these proceedings.

[61] We see no basis to interfere with the supervising judge's decision to consider whether the appellants' claims were equity claims before the completion of the claims procedure.

VI Disposition

[62] This appeal is accordingly dismissed. As agreed, there will be no costs.

Appeal dismissed.

Notes

Note 1: Credit Suisse Securities (Canada) Inc., TD Securities Inc., Dundee Securities Corporation (now known as DWM Securities Inc.), RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd. (now known as Canaccord Genuity Corp.), Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated, successor by merger to Banc of America Securities LLC.

Note 2: Noteholders holding in excess of $1.296 billion, or 72 per cent, of Sino-Forest's approximately $1.8 billion in noteholders' debt have executed written support agreements in favour of the Sino-Forest CCAA plan as of March 30, 2012. These include noteholders represented by the Ad Hoc Committee of Noteholders.

Note 3: None of the appellants are sued in Saskatchewan and all are sued in Ontario. E&Y is also sued in Quebec and New York and the appellant underwriters are also sued in New York.

Note 4: The supervising judge cited the following cases as authority for these propositions: Blue Range Resource Corp., (Re), [2000] A.J. No. 14, 2000 ABQB 4, 259 A.R. 30; Stelco Inc. (Re), [2006] O.J. No. 276, 17 C.B.R. (5th) 78 (S.C.J.); Central Capital Corp. (Re) (1996), 27 O.R. (3d) 494, [1996] O.J. No. 359 (C.A.); Nelson Financial Group Ltd. (Re), [2010] O.J. No. 4903, 2010 ONSC 6229, 71 C.B.R. (5th) 153 (S.C.J.); EarthFirst Canada Inc. (Re), [2009] A.J. No. 749, 2009 ABQB 316, 56 C.B.R. (5th) 102.

Note 5: Securities Act, R.S.O. 1990, c. S.5, s. 130(1), (8); Securities Act, R.S.A. 2000, c. S-4, s. 203(1), (10); Securities Act, R.S.B.C. 1996, c. 418, s. 131(1), (11); The Securities Act, C.C.S.M. c. S50, s. 141(1), (11); Securities Act, S.N.B. 2004, c. S-5.5, s. 149(1), (9); Securities Act, R.S.N.L. 1990, c. S-13, s. 130(1), (8); Securities Act, R.S.N.S. 1989, c. 418, s. 137(1), (8); Securities Act, S.Nu. 2008, c. 12, s. 111(1), (12); Securities Act, S.N.W.T. 2008, c. 10, s. 111(1), (12); Securities Act, R.S.P.E.I. 1988, c. S-3.1, s. 111(1), (12); Securities Act, R.S.Q., c. V-1.1, ss. 218, 219, 221; The Securities Act, 1988, S.S. 1988-89, c. S-42.2, s. 137(1), (9); Securities Act, S.Y. 2007, c. 16, s. 111(1), (13).

Note 6: We understand that this analysis was before the Standing Senate Committee on Banking, Trade and Commerce in 2007.

Note 7: The United States Bankruptcy Court for the District of Delaware in In Re: Mid-American Waste Systems, Inc., 228 B.R. 816 (Bankr. Del. 1999) indicated that this provision

applies to underwriters' claims, and reflects the policy rationale that such stakeholders are in a better position to evaluate the risks associated with the issuance of stock than are general creditors.

18

CITATION: Nelson Financial Group Ltd., 2010 ONSC 6229
COURT FILE NO.: 10-8630-00CL
DATE: 20101116

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OFA PLAN OF COMPROMISE OR ARRANGEMENT OF NELSON FINANCIAL GROUP LTD.

COUNSEL: *Richard B. Jones and Douglas Turner, Q.C.* Representative Counsel for Noteholders/Moving Party
J.H. Grout and S. Aggarwal for the Monitor
Pamela Foy for the Ontario Securities Commission
Frank Lamie for Nelson Financial Group Ltd.
Robert Benjamin Mills and Harold Van Winssen for Clifford Styles, Jackie Styles and Play Investments Ltd., Respondents
Michael Beardsley, Self Represented Respondent
Clifford Holland, Self Represented Respondent
Arnold Bolliger, Self Represented Respondent
John McVey, Self Represented Respondent
Joan Frederick, Self Represented Respondent
Rakesh Sharma, Self Represented Respondent
Larry Debono, Self Represented Respondent
Keith McClear, Self Represented Respondent

REASONS FOR DECISION

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.

[1] The Monitor is aware of six preferred shareholders with dividends that ranged from 10.5% to 13.75% per annum.

(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 non-compliance 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 *Re Central Capital Corporation*[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

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[2] (1996), 38 C.B.R. (3d) 1 (Ont. C.A.).

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: *Re Blue Range Resource Corp.*[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 *Re 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.*[6] both treated claims relating to agreements that were collateral to equity claims as equity claims. These cases dealt

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[3] 2000, 15 C.B.R. (4th) 169.

[4] (1978) 579 F. 2d 206 (2nd Cir. Ct. of App.).

[5] (2001), 2001 CarswellAlta. 913, aff'd 2002 CarswellAlta 23 (Alta C.A.).

[6] (2009) 2009 CarswellAlta 1069.

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 *Re Central Capital Corporation*[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

[7] Supra, note 2.

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*, 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.*[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

[8] (2008), 2008 CarswellOnt 1245.

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

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[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.

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.

Pepall J.

Released: November 16, 2010

CITATION: Nelson Financial Group Ltd., 2010 ONSC 6229
COURT FILE NO.: 10-8630-00CL
DATE: 20101116

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

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

AND IN THE MATTER OFA PLAN OF COMPROMISE OR ARRANGEMENT OF NELSON FINANCIAL GROUP LTD.

REASONS FOR JUDGMENT

Pepall J.

Released: November 16, 2010

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CITATION: U.S. Steel Canada Inc. (Re), 2016 ONSC 569
COURT FILE NO.: CV-14-10695-00CL
DATE: 20160229

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO U.S. STEEL CANADA INC.

BEFORE: Mr. Justice H. Wilton-Siegel

COUNSEL: *Michael E. Barrack, Robert Thornton, Jeff Galway, Kiran Patel* and *Max Shapiro,* for United States Steel Corporation

Alan Mark, Peter Ruby, Tamryn Jacobson, Logan Willis and *Jesse-Ross Cohen,* for the Province of Ontario

Gordon Capern, Kris Borg-Olivier and Denise Cooney for USW and Locals 1005 and 8782

Andrew Hatnay, Barbara Walancik and *Adrian Scotchmer,* Representative Counsel for the non-unionized active employees and retirees

Sharon Kour, for the Applicant U.S. Steel Canada Inc.

Robert Staley, Jonathan Bell and William Bortolin, for the Monitor Ernst & Young Inc.

HEARD: January 14, 15, 20, 21, 22, 25, 26 and 27, 2016

ENDORSEMENT

[1] In this proceeding, United States Steel Corporation ("USS") seeks a determination of 14 Proofs of Claim (the "USS Claims") filed in these proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") regarding U.S. Steel Canada Inc. ("USSC").

[2] Objections to the treatment of certain of these Claims as debt rather than as "equity claims" for the purposes of the CCAA, and to the enforceability of the security asserted in respect of certain of these Claims, have been filed by each of: (1) the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (the "USW") on its own behalf and on behalf of USW Local 1005 and USW Local 8782 (collectively, the "Union"); (2) Her Majesty the Queen in Right of Ontario and the Superintendent of Financial Services (Ontario) in his capacity as administrator of the Pension

Benefits Guarantee Fund (collectively, the "Province"); and (3) Representative Counsel to all non-USW active employees and retirees of USSC (collectively, the "Objecting Parties").

[3] This motion principally addresses the objections filed by the Objecting Parties (the "Objections"). The following are the USS Claims in respect of which Objections have been made:

Claim Reference #	Description of Claim	Amount of Claim
9	Unsecured Term Loan	$1,847,169,934
10	Unsecured Revolver Loan	U.S. $120,150,928
11	Secured Revolver Loan	U.S. $72,938,390
11(a)	Secured Cliffs LRD Transaction	U.S. $14,538,463
11(b)	Secured Credit Support Payments	U.S. $3,742,479
11(c)	Secured Intercompany Trade	U.S. $31,252,193

The Claim numbers above, and amounts reflected in this table, are taken from the Third Supplementary Seventh Report of the Monitor dated July 29, 2015 (the "Third Supplementary Monitor's Report") at para. 11.

[4] In these Reasons, Claims #9 and #10 are referred to as the "USS Unsecured Claims" and Claims #9, #10 and #11 are referred to collectively as the "USS Debt Claims". In addition, Claims #11, #11(a), #11(b) and #11(c) are referred to as the "USS Secured Claims", and Claims #11(a), #11(b) and #11(c) are referred to as the "USS Remaining Secured Claims".

Background

[5] The following is a brief summary of the background to this proceeding. Further detail regarding the relationship between USS and USSC and the USS Claims that have given rise to the Objections is set out below.

USSC

[6] USSC is an integrated steel manufacturer that conducts most of its business from two large steel plants located in Ontario: the Hamilton Works located in Hamilton, Ontario and the Lake Erie Works located in Nanticoke, Ontario.

[7] USSC is an indirect wholly-owned subsidiary of USS. Prior to its acquisition by USS in 2007, USSC was known as Stelco Inc. ("Stelco").

[8] As a result of its financial difficulties, USSC applied for relief under the CCAA and was granted CCAA protection pursuant to an Initial Order dated September 16, 2014 (the "Filing Date") (as amended and restated from time to time, the "Initial Order").

The USS Parties

[9] USS is an integrated steel producer with major operations in North America and Central Europe. USS is a publicly-traded, Delaware corporation and its shares are listed for trading on the New York Stock Exchange.

[10] 1344973 Alberta ULC ("ABULC") was an Alberta corporation incorporated on August 22, 2007 to be the acquisition vehicle for the purposes of the USS acquisition of Stelco.

[11] U.S. Steel Canada Limited Partnership ("Canada LP") is a limited partnership formed under the laws of Alberta. Canada LP is an indirect wholly-owned subsidiary of USS. At the time of the USS acquisition of Stelco, Canada LP owned all the outstanding shares of ABULC and was, therefore, ABULC's direct parent. As a result of the amalgamation of ABULC and USSC on December 31, 2007 described below, Canada LP has become the direct parent of USSC.

[12] United States Steel Credit Corporation ("Credit Corp") was a Delaware corporation that was a wholly-owned subsidiary of USS. Credit Corp was merged into another wholly-owned subsidiary of USS on December 20, 2013.

[13] U.S. Steel Kosice s.r.o. ("USS Kosice") is a Slovakian corporation that is an indirect wholly-owned subsidiary of USS.

The USS Acquisition of Stelco Inc. in 2007

[14] On August 26, 2007, the USS board of directors approved the USS acquisition of Stelco, and USS, Stelco and ABULC entered into an arrangement agreement giving effect to the proposed transaction. The plan of arrangement by which the acquisition was implemented was subsequently approved by the Ontario Superior Court of Justice on October 30, 2007, and the acquisition transaction closed on October 31, 2007 (the "Acquisition").

Financing the Acquisition and the Flow of Funds

[15] The total amount spent by USS in connection with the Stelco acquisition was approximately $1.939 billion, or U.S. $2.056 billion at then prevailing exchange rates. The relevant corporate structure and the flow of funds are shown on the Funds Flow Chart attached as Schedule A to these Reasons. In these Reasons, all dollar amounts are denominated in Canadian dollars unless otherwise specifically indicated.

[16] ABULC was the acquisition vehicle that directly acquired Stelco. ABULC was financed by the following loans and capital contributions:

(a) Canada LP loaned ABULC $700 million pursuant to a loan agreement dated October 29, 2007 described below (the "Term Loan");

(b) Canada LP provided ABULC with equity in the amount of $600 million; and

(c) Credit Corp loaned ABULC approximately U.S. $744 million pursuant to a loan agreement dated October 29, 2007 described below (the "Credit Corp Loan").

[17] ABULC used the funds received from Canada LP and Credit Corp as follows: (1) ABULC used $1.046 billion to purchase the outstanding shares of Stelco; (2) ABULC loaned Stelco approximately $741 million, which Stelco used to pay out its third party debt (other than a loan from the Province of Ontario); (3) ABULC loaned Stelco approximately $59 million, which Stelco used to pay out its option holders; (4) ABULC loaned Stelco approximately $61 million, which Stelco used to pay out its warrant holders; (5) ABULC loaned Stelco $32.5 million, which Stelco used to make a payment to its four main pension plans; and (6) ABULC loaned Stelco $40 million to fund Stelco's working capital.

[18] The funds used to acquire Stelco were derived from multiple sources. First, USS obtained new debt financing in the principal amount of U.S. $900 million in the form of facilities provided by a banking syndicate led by J.P. Morgan Chase Bank, N.A. These facilities comprised an unsecured three-year term loan in the principal amount of U.S. $500 million and an unsecured one-year term loan in the amount of U.S. $400 million. The one-year term loan was subsequently refinanced by USS as part of a larger offering of ten-year bonds in the public market. Second, USS obtained approximately U.S. $400 million by drawing on an existing receivables purchase facility. Third, USS utilized approximately U.S. $153 million of cash on hand at the USS level and €434,415,519.56, or $597,860,287.50, of cash on hand in USS Kosice.

[19] The source of the financing for the Acquisition, the structure of the Acquisition and the flow of funds to ABULC for such purposes was developed by USS between the date of the Arrangement Agreement and the date of the Acquisition. The principal consideration in the development of this structure was tax-efficiency from the perspective of USS. With respect to ABULC, the amounts received by it as debt and equity were driven by the "thin capitalization" rules under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). In addition, the amount of the funding reflected a USS policy of avoiding any secured third party indebtedness at the level of any subsidiary. As a result, it was necessary to fund Stelco with the amount necessary to repay all outstanding third party debt at the date of the Acquisition, other than a loan from the Province.

Post-Acquisition Corporate Reorganization & Refinancing

[20] On November 1, 2007, immediately following the Acquisition, Stelco was renamed U.S. Steel Canada Inc.

[21] Between October 31, 2007 and the year-end, the Credit Corp Loan was repaid in full. Certain of the repayments were made from additional advances under the Term Loan which are described in greater detail below.

[22] Following such additional advances by Canada LP to ABULC under the Term Loan in 2007, the outstanding principal amount outstanding under the Term Loan on December 31, 2007 was $1,227,363,149.82. The total amount outstanding on that date including accrued interest was $1,240,009,143.

[23] ABULC and USSC amalgamated on December 31, 2007 to continue as USSC (the "Amalgamation"). As a result of the Amalgamation, the obligations of ABULC under the Term Loan became obligations of the amalgamated entity, USSC.

The History of the Credit Corp Loan

[24] As described above, pursuant to the Credit Corp Loan, Credit Corp advanced U.S. $744,463,605 to ABULC on or about October 31, 2007. The funds provided by the Credit Corp Loan were notionally intended to fund Stelco's third party debt at the date of acquisition that was denominated in U.S. dollars. USS intended the facility to be a short-term facility that would be repaid within two months. Larry Brockway, the Senior Vice-President, Chief Financial Officer and Chief Risk Officer of USS ("Brockway"), testified that the "purpose of the agreement was to help stair-step the structure into a more permanent structure as part of the ultimate steps between the acquisition and year end".

[25] Consistent with this objective, the Credit Corp Loan was repaid by means of: (1) a repayment of approximately U.S. $26 million in November 2007; (2) a repayment of approximately U.S. $41 million on December 4, 2007, which was funded by an advance to ABULC under the Term Loan on the same day described below; (3) a U.S. $87 million repayment by ABULC on December 21, 2007, comprised of U.S. $10 million presumably funded out of a U.S. $20 million equity injection from Credit Corp to ABULC on the same day and application of U.S. $77 million out of the $470 Million Advance described below; and (4) a reduction in the amount of approximately U.S. $595 million pursuant to the SHC Transaction described below.

The SHC Transaction

[26] The following summarizes the description of the SHC Transaction set out in the Third Supplementary Monitor's Report.

[27] At the time of the Acquisition, Stelco indirectly owned all of the outstanding shares of Stelco Holding Company ("SHC"), a corporation incorporated under the laws of Delaware. SHC's principal assets were interests in two mining joint ventures – Hibbing Taconite Company ("Hibbing") and Tilden Mining Company ("Tilden").

[28] At the time of the Acquisition, SHC had a liability to Stelco in the amount of approximately U.S. $393 million. This amount principally represented the excess of the amount owing by Stelco to SHC for iron-ore pellets produced by Hibbing and Tilden and shipped to Stelco, representing SHC's *pro rata* share of such production, less the amount of annual cash calls on SHC in respect of Hibbing and Tilden, which were paid by Stelco on behalf of SHC. This liability was booked as an advance from SHC to Stelco, and had increased in each year prior to 2007. The liability also included legacy liabilities of Stelco to certain other subsidiaries of SHC that were dormant. Stelco had not repaid any amount on account of these advances, and had no intention of doing so prior to the Acquisition, due to the adverse tax consequences of dividending the amount of any such payment back to Canada.

[29] The Acquisition presented an issue of tax inefficiency for USS, referred to as a "tax sandwich", that would result if distributions from SHC (as dividends or interest) were made to USSC in Canada and, in turn, distributed to USS in the United States. To address this issue, USS caused ABULC, USSC and SHC to enter into certain transactions which were effected by book entries in the financial accounts of the relevant corporations pursuant to a payment direction

agreement dated December 21, 2007 (the "Payment Direction") (collectively, the "SHC Transaction").

[30] The SHC Transaction involved the following steps:

(1) ABULC loaned USSC the amount of U.S. $393 million out of the $470 Million Advance (defined below);

(2) USSC repaid the outstanding advance to SHC in the same amount;

(3) USSC sold its equity interest in SHC to USS for consideration in the form of a promissory note dated December 31, 2007 in the principal amount of U.S. $595 million payable to the wholly-owned subsidiary of USSC that owned the shares of SHC. The face amount of the promissory note of U.S. $595 million represented USS' estimation of the fair market value of SHC at the time of the sale; and

(4) The promissory note was distributed by such wholly-owned subsidiary to USSC on December 31, 2007 which, in turn, assigned the note to Credit Corp in reduction of the remaining principal amount outstanding under the Credit Corp Loan, which was slightly less than U.S. $593 million.

[31] The effect of the SHC Transaction was to transfer ownership of SHC from USSC to USS by way of satisfaction of the remaining amount outstanding under the Credit Corp Loan as of December 31, 2007.

The Term Loan

[32] The following summarizes the provisions of the Term Loan that are relevant for the issues in this proceeding and the history of draws and accrued interest under the Term Loan resulting in the USS claim in respect of the Term Loan.

The Relevant Provisions of the Term Loan

[33] The Term Loan is an unsecured loan facility having a term of 30 years repayable by USSC at any time without premium or penalty. The full amount of the outstanding principal is therefore due on October 31, 2037, to the extent it is not repaid before that date. USS says that it selected a 30-year term for the Term Loan because it viewed its investment in Stelco as a long-term one. The 30-year term was also the maximum term countenanced for U.S. tax purposes.

[34] Interest on the Term Loan accrued daily and compounded semi-annually at an interest rate of 9.03% per annum. USS obtained and relied upon advice from an independent, third-party consultant regarding an acceptable interest rate for a company with a similarly rated risk for 30-year debt. Interest is payable on the last business day of the year on the second anniversary after the year in which it accrues. As a result, interest under the Term Loan was payable from 24 to 36 months after the date it began to accrue.

[35] The Term Loan was denominated in Canadian dollars. The Term Loan originally allowed for a maximum borrowing of $1 billion. The maximum availability under the Term Loan was increased from $1 billion to $1.5 billion on December 21, 2007. As mentioned, the

amount of $700 million was initially advanced on October 31, 2007. The Term Loan provided that further advances could be obtained "with prior written notice … pursuant to a request for advance" set out in a form similar to a scheduled document to the Term Loan.

[36] The loan agreement contains certain representations and covenants of ABULC/USSC and events of default. The events of default include an event of default if the borrower is "unable to meet debts". Upon the occurrence of an event of default, the maturity date is accelerated and Canada LP has the right to demand repayment.

History of Advances and Repayments under the Term Loan

[37] As mentioned above, Canada LP advanced $700 million to ABULC on October 31, 2007 in connection with the Acquisition. This amount became a direct obligation of USSC after the Amalgamation. In addition, during the period from the Acquisition to the Amalgamation, ABULC recorded three additional advances. On December 4, 2007, ABULC recorded two advances totaling approximately U.S. $61 million, of which U.S. $41 million was applied to reduce the Credit Corp Loan and the balance was advanced to USSC for working capital purposes. On December 22, 2007, ABULC recorded an advance of U.S. $470 million under the Term Loan pursuant to the Payment Direction (the "$470 Million Advance"). The foregoing advances under the Term Loan are collectively referred to as the "initial advances".

[38] During 2008, USSC made interest payments to Canada LP under the Term Loan totalling approximately $113 million. Of this amount, $99,940,908 was paid in October and November 2008. Such payments were made in advance of their due date under the Term Loan Agreement, which provided that such interest was not payable until December 31, 2010. In addition, USSC made a principal repayment of $19 million in January 2008. The only additional funding provided to USSC by USS or any of its affiliates in 2008 was an equity injection of approximately $55 million in October 2008.

[39] In 2009, USSC received additional advances from Canada LP under the Term Loan totalling $211.2 million. These advances were made during the months of February, June, September, November and December 2009. No interest or principal was paid during 2009. In addition, as set out in the table above, USS provided equity injections totalling $61 million during 2009. These capital contributions were made in February, July and October 2009.

[40] There were no further advances under the Term Loan after 2009. At the end of 2010, USS decided to waive the remaining interest that was due under the Term Loan in respect of interest accrued during 2008. Since there had been substantial interest payments made in 2008, the accrued interest that was waived in December 2010 was only $10.5 million. USS says that, given USSC's other funding needs at the time, the interest payment could only have been made if USSC received additional funding. Further, due to taxation on interest payments, it did not make economic sense to fund USSC with additional debt or equity in order to enable USSC to repay interest on the Term Loan. USS says that this was the first time that USS considered waiving interest due under the Term Loan. In other words, it asserts that it did not have such expectation at the time that it entered into the Term Loan.

[41] USS continued the practice of waiving interest in each year after 2010. Accordingly, in each of the years 2010 to 2013, USS waived approximately one-half of the accrued and unpaid

interest due in that year. In total, USS has waived interest obligations of USSC totaling approximately $428 million and has accrued interest under the Term Loan in approximately the same amount.

[42] As of the Filing Date, the total amount outstanding under the Term Loan, including accrued interest, was $1,847,169,934.

The Revolver Loan

[43] Pursuant to an agreement dated May 11, 2010 between USSC and Credit Corp (as amended from time to time, the "Revolver Loan Agreement"), Credit Corp established a Revolver Loan to provide working capital to USSC to support its operating activities. The Revolver Loan Agreement was subsequently amended successively by an agreement dated July 31, 2012 (the "First Revolver Amendment"), an agreement dated January 28, 2013 (the "Second Revolver Amendment") and an agreement dated October 30, 2013 (the "Third Revolver Amendment") in the circumstances described below. In these Reasons, the loan outstanding under the Revolver Loan Agreement, as so amended from time to time, is herein referred to as the "Revolver Loan" and the Term Loan and the Revolver Loan are collectively referred to as the "Loans" and individually are referred to as a "Loan".

[44] USS has filed two proofs of claim in respected of the Revolver Loan. The first claim is an unsecured claim (being Claim #10) in the amount of U.S. $120,150,928, representing the outstanding loan on October 30, 2013, together with accrued interest since that date. The second claim is a secured claim (being Claim #11) in the amount of U.S. $72,938,390, representing the loan advances since October 30, 2013 plus accrued interest. The following sets out the principal terms of the Revolver Loan, including the related security, and the history of advances and payments in respect of the Revolver Loan.

Terms of the Revolver Loan

[45] The Revolver Loan was originally an unsecured loan having a fifteen-year term. Accordingly, all outstanding advances are due on May 11, 2025. As mentioned, the Revolver Loan originally provided for a maximum availability of U.S. $350 million.

[46] Advances under the Revolver Loan accrued interest at the applicable federal interest rate for the month in which the advance was drawn and compounded interest semi-annually. The applicable interest rate as of the date of the Revolver Loan was 4.42% per annum.

[47] The loan agreement contains certain representations and covenants of USSC, including originally, a solvency representation, and events of default. The events of default include an event of default in the event that the borrower is "unable to meet debts". Upon the occurrence of an event of default, the maturity date is accelerated and Credit Corp had the right to demand repayment. The loan agreement is governed by the laws of the Commonwealth of Pennsylvania.

The History of Advances and Repayments Under the Revolver Loan

[48] Credit Corp advanced a total of U.S. $120 million under the Revolver Loan from its establishment in May 2010 through the third quarter of 2011. Of this amount, U.S. $75 million

was advanced in May 2010, U.S. $25 million was provided in two advances in August 2010, and a further U.S. $20 million was advanced in June 2011.

[49] In the period from November 2011 to April 2012, USSC had somewhat more stable cash flows. Credit Corp advanced approximately U.S. $136 million under the Revolver Loan during this period. During the same period, USSC made interest payments totaling almost U.S. $9 million and principal repayments of approximately U.S. $61.8 million under the Revolver Loan. Thereafter, the outstanding balance began to grow with additional advances in each month in 2012, other than October.

[50] By July 31, 2012, the outstanding principal balance of the Revolver Loan was, however, approaching the cap of U.S. $350 million. On that date, Credit Corp and USSC executed the First Revolver Amendment, which increased the maximum availability under the Revolver Loan to U.S. $500 million. Apart from removal of the solvency representation of USSC, the First Revolver Amendment did not otherwise amend the provisions of the Revolver Loan Agreement, including the events of default. The solvency representation of USSC was removed at the request of USSC's management, which had a concern about USSC's solvency given its recent losses and the level of its debt. The circumstances pertaining to this action are addressed further below.

[51] By January 28, 2013, however, after additional advances to USSC under the Revolver Loan, the outstanding principal balance of the Revolver Loan had again reached the maximum availability. USSC's business plan for 2013 indicated that it would need substantial additional financing during that year in order to finance its operations. Accordingly, on that date Credit Corp and USSC executed the Second Revolver Amendment, which increased the maximum availability under the Revolver Loan from U.S. $500 million to U.S. $600 million, on the condition that USSC grant a security interest in favour of USS in respect of its inventory of iron ore pellets sold to it by SHC. The Second Revolver Amendment did not otherwise amend the provisions of the Revolver Loan Agreement as it existed on January 28, 2013, including the events of default and consequences of a default.

[52] In furtherance of the provisions of the Second Revolver Amendment, USSC granted a security interest in favour of Credit Corp over all of its inventory of iron ore pellets sold to USSC by SHC, and related proceeds, pursuant to a security agreement dated January 28, 2013 executed by USSC and USS (the "Security Agreement").

[53] In February 2013, USS determined that the foreign currency exchange fluctuations on the Revolver Loan, which was a U.S. dollar-denominated loan, had become unacceptable as a result of the volatility of USSC's revenues, and accordingly of its quarterly earnings, due to fluctuations in the Canadian dollar. Over a period of several months thereafter, Canada LP injected significant amounts of equity into USSC to provide for USSC's working capital funding needs and to allow USSC to pay down the Revolver Loan.

[54] Between February and September 2013, as set out above, equity injections provided to USSC totaled over $680 million. Payments of principal and interest on the Revolver Loan over the same period totaled over U.S. $390 million. As of October 30, 2013, the amount outstanding under the Revolver Loan had been reduced to $116,969,996.

[55] On October 30, 2013, Credit Corp and USSC executed the Third Revolver Amendment. The Third Revolver Amendment contains a recital to the effect that the parties wish to amend and restate the Revolver Loan "in order to permit the Borrower to access the remainder of the [Revolver] Loan." The Third Revolver Amendment continued the availability under the Revolver Loan in the amount of U.S. $600 million. However, it divided borrowings under the facility into two tranches: (1) the "First Tranche Indebtedness", being the outstanding amount of $116,969,996, which was entitled to the security interest over iron-ore pellets constituted by the Security Agreement; and (2) the "Second Tranche Indebtedness", being any advances after October 30, 2013, which were entitled to the general security interest constituted by the October Security Agreement (as defined below). The Third Revolver Amendment did not otherwise amend the provisions of the Revolver Loan as it existed on October 30, 2013, including the events of default and consequences of a default.

[56] Concurrently with the execution of the Third Revolver Amendment, USSC and Credit Corp executed an amendment and restatement of the Security Agreement pursuant to an agreement also dated October 30, 2013 (the "October Amendment"). Pursuant to the October Amendment, USSC granted a general security interest over all of its personal property in favour of Credit Corp. The October Amendment contained a recital to the effect that Credit Corp "is willing to continue to provide Loans pursuant to [the Revolver Loan], only if [USSC] enters into this Amendment". The General Security Agreement, as amended by the October Amendment, is herein referred to as the "October Security Agreement". Apart from broadening the security interest granted in favour of Credit Corp, the October Amendment did not otherwise amend the provisions of the Security Agreement as it existed as of October 30, 2013.

[57] USS has acknowledged that, as of October 30, 2013, although USSC was meeting its obligations as they fell due, the total liabilities of USSC exceeded the market value of its assets and, accordingly, USSC was otherwise "insolvent", including for the purposes of section 95 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA").

[58] After the execution of the Third Revolver Amendment and the October Security Agreement, Credit Corp advanced loans to USSC under the Revolver Loan totaling U.S. $71 million. These loans were outstanding at the Filing Date. USSC did not make any payments of either principal or interest after October 30, 2013 in respect of the First Tranche Indebtedness under the Revolver Loan outstanding as of October 30, 2013.

[59] Accordingly, at the Filing Date, the total amount outstanding under the Revolver Loan, including accrued interest, was U.S. $193,089,318. The portion of this balance attributable to advances made prior to October 30, 2013, i.e., to the First Tranche Indebtedness plus accrued and unpaid interest thereon since that date, was U.S. $120,150,928. This is the amount of the USS unsecured claim in respect of the Revolver Loan. The portion attributable to advances made after October 30, 2013, i.e., to the Second Tranche Indebtedness, was U.S. $72,938,390, representing U.S. $71 million of advances plus interest. This is the amount of the USS secured claim in respect of the Revolver Loan.

Internal Procedure for Additional Draws and Equity Capital Contributions

[60] In order to request funding under the Term Loan after December 31, 2007 and under the Revolver Loan, USSC would prepare and submit to USS a cash flow forecast setting out its

anticipated cash requirements for the following 13-week period. The submission of these weekly cash flow forecasts, and the related correspondence and discussions between USS and USSC, constituted USSC's formal request for funding.

[61] USS would review the forecast and determine whether funds would be advanced, and if so whether they would be advanced as debt under the Loans or as an equity injection. Typically the funds would be advanced as debt unless additional debt would cause USSC to go offside the "thin capitalization" tax rules under the *Income Tax Act*.

[62] There is no dispute that all advances made under the Term Loan were documented and recorded by both Canada LP and USSC as debt and that all advances made under the Revolver Loan were similarly documented and recorded by both Credit Corp and USSC as debt. It is also not disputed that all contributions to equity by Canada LP were recorded by both Canada LP and USSC as equity. In this regard, the Monitor has noted that USSC's books and records relating to these intercompany transactions are well organized and documented, including with respect to each specific advance of cash in the form of equity or debt.

[63] The following table summarizes the equity capital injections by USS into USSC between October 31, 2007 and the Filing Date:

Equity Contributions (CAD $Millions)

Period	Original Contribution	Equity Advances	Total
Oct 31, 2007	600		600
Nov 30, 2007	-	-	600
Dec 31, 2007	-	20	620
2008	-	55	675
2009	-	61	736
2010	-	612	1,347
2011	-	213	1,561
2012	-	-	1,561
2013	-	764	2,325
Sept 15, 2014	-	-	2,325
Total	**600**	**1,725**	**2,325**

Source: USSC Share Consideration Registry

[64] The Remaining USS Secured Claims USS has asserted the following three Claims, which it says are secured pursuant to the November Security Agreement (as defined below):

Claim	Amount (USD)	Claim Reference #
Secured Cliffs Transaction	$14,538,462.95	11(a)
Secured Credit Support Payments	$3,742,478.78	11(b)
Secured Intercompany Goods & Services	$31,252,193.05	11(c)

As mentioned, these Claims are collectively referred to as the "USS Remaining Secured Claims". It is my understanding that the Objecting Parties do not challenge the quantum of these

Claims but assert that the security for these Claims is unenforceable on the grounds described later in these Reasons.

Secured Cliffs Transaction (Claim #11(a))

[65] USS filed a secured claim for U.S. $14,538,462.95 with respect to the amount of a payment made by USS to Cliffs Natural Resources and Cliffs Sales Company (collectively, "Cliffs") for certain iron ore delivered by Cliffs to USSC, which iron ore was, in turn, resold by USS to USSC under the following circumstances.

[66] Cliffs and USS are parties to an agreement dated January 1, 2008 for the supply of iron ore (the "Cliffs Agreement"). The iron ore delivered by Cliffs to USSC was sourced by the USS Procurement Department as part of the raw materials services arrangement between USS and USSC that was provided for in the "Limited Risk Distributor Agreement" referred to below.

[67] The Claim relates to four shipments of iron ore, and associated screening charges, totaling U.S. $14.1 million, which were delivered by Cliffs to USSC in August 2014, prior to the Filing Date and outstanding obligations in the amount of U.S. $0.4 million for screening charges incurred in January and May 2014 for which Cliffs had not previously issued invoices.

[68] On September 16, 2014, pursuant to an agreement between USS and USSC (the "Iron Ore Agreement"), in order to avoid an interruption of the supply of a critical raw material under the Cliffs Agreement, USS agreed to make the payment to Cliffs and to transfer title of the iron ore pellets to USSC provided that USSC confirmed the corresponding obligation of USSC to USS in payment of such iron ore would be secured under the November Security Agreement.

[69] The Monitor has confirmed that USSC received delivery of the iron ore prior to the Filing Date and that USS made the payment of $14.1 million to Cliffs on October 2014. The Monitor has also confirmed that, under the Cliffs Agreement, title to the iron ore did not pass to USS until USS paid for the iron ore after the Filing Date. At that time, USS effectively took title to the iron ore and re-sold it to USSC pursuant to the Limited Risk Distributor Agreement described below.

[70] Accordingly, this Claim is a claim of USS for the payment of goods sold by USS to USSC after the Filing Date pursuant to arrangements set out in the Iron Ore Agreement that were entered into prior to the commencement of these proceedings under the CCAA.

Secured Credit Support Payments - Claim #11(b)

[71] USS filed a secured Claim for U.S. $3,703,450 for contribution and indemnity as guarantor of certain USSC obligations as follows:

Vendor	Amount (USD)
Independent Electricity System Operator ("IESO")	$2,616,156.27
Union Gas Limited ("Union Gas")	$669,109.87
Norfolk Southern Corporation ("Norfolk")	$457,212.64

[72] USS received demands subsequent to the Filing Date from IESO, Union Gas and Norfolk pursuant to existing guarantee agreements between USS in favour of each of such parties in respect of goods and services supplied to USSC prior to the Filing Date. USS made payments to these vendors pursuant to these guarantees subsequent to the Filing Date. This Claim is therefore an aggregation of USS' rights of subrogation which arose on payment of these three obligations of USSC after the Filing Date pursuant to the USS guarantees in favour of the third parties.

Secured Intercompany Goods & Services - Claim #11(c)

[73] In the ordinary course of business, the USS Affiliates provided raw materials and other goods as well as various services to USSC both informally and under several intercompany agreements. Invoices relating to the intercompany goods and services received by USSC in a calendar month were typically paid on a gross basis on or about the 15th day of the following month as part of a normal reconciliation process between USSC and USS.

[74] USS filed a secured claim totaling U.S. $31,252,193.05 in respect of the sale of goods and the provision of services on an intercompany basis after the date of the November Security Agreement.

[75] As stated above, the sale of goods and the provision of services by USS to USSC took place both informally and under several intercompany agreements. The relevant intercompany agreements include the following: (1) two Marketing, Distributorship and Supply Agreements, dated March 1, 2009 and December 1, 2008, which governed cross-border sales within the USS group, i.e., the sale of steel produced in the U.S. or Canada and sold to a customer in the other country; (2) a Limited Risk Distributor Agreement, dated February 1, 2008, between USS and USSC under which USSC purchased significant quantities of raw material on an as-needed basis from USS; (3) an ERP Cost Sharing Agreement, amended January 1, 2011, that governed the costs of an enterprise-wide financial and operational software solution known as "Oracle"; (4) a Corporate Services Agreement, dated November 1, 2007, pursuant to which USS provided, among other things, financial and accounting, corporate strategic planning, tax planning and audit services to USSC; and (5) a Business Services Agreement, dated January 1, 2014, among USS, USSC and USS Kosice that related to certain IT and financial transaction processing services.

[76] The claims that are aggregated as Claim #11(c) are therefore contractual claims of USS for payment of the goods and services provided pursuant to these agreements prior to the Filing Date.

Procedural History of this Proceeding

[77] Pursuant to a claims process order of the Court in these CCAA proceedings dated November 13, 2014 (the "Claims Process Order"), creditors of USSC were required to file Proofs of Claim (as defined in the Claims Process Order) in respect of affected Claims with the Monitor by December 22, 2014.

Actions of the Monitor under the Claims Process Order

[78] With respect to any claims filed by USS, U.S. Steel Holdings, Inc., Canada LP or any affiliates of USS (other than USSC or any of USSC's subsidiaries), paragraph 28 of the Claims Process Order ordered:

(a) the Monitor to prepare a report to be served on the Service List and filed with the Court, detailing its review of all USS claims and recommendations it has, if any, with respect to the determination of such claims;

(b) the Monitor to seek a scheduling appointment before the Court, on notice to the Service List, to schedule a hearing of a motion to determine the USS claims; and

(c) that the USS claims shall not be accepted or determined as Proven Claims without approval of this Court.

[79] USS and its subsidiaries and affiliates filed 14 Proofs of Claim with the Monitor, being the "USS Claims".

[80] On March 10, 2015, the Monitor issued its Seventh Report in these CCAA proceedings dated March 9, 2015 (the "Monitor's Seventh Report").

[81] As described at paragraph 8 of Monitor's Seventh Report, the USS Claims may be summarized and aggregated into the following three categories:

(a) non-contingent Secured Claims (as defined in the Claims Process Order), which total U.S. $122,432,496.11 (being the "USS Secured Claims");

(b) unsecured Claims, which total U.S. $127,805,815.36 (being Claims #1 to 8, #10 and an unsecured portion of Claim #11) and $1,847,169,934.04 (being Claim #9); and

(c) contingent Secured Claims, which total $78,761,395.00 (which are not addressed in these Reasons).

[82] The review process undertaken by the Monitor (and in certain cases by the Monitor's counsel) of the USS Claims is described at paragraphs 36-40 of the Monitor's Seventh Report. Based on its review of the USS Claims, the Monitor recommended to the Court that:

(a) USS bring a motion to approve the USS Secured Claims and the USS Unsecured Claims; and

(b) the USS Secured Claims and the USS Unsecured Claims be found to be Proven Claims in their entirety as filed by USS.

[83] Based on the Monitor's recommendations to the Court, USS commenced this proceeding by a notice of motion dated March 13, 2015. Pursuant to this motion, USS seeks to have the USS Secured Claims and the USS Unsecured Claims approved by the Court as Proven Claims pursuant to the Claims Process Order.

The Objections of the Province, the Union and Representative Counsel

[84] The following briefly summarizes the claims set out in the Objections of the Objecting Parties that have given rise to this trial. In addition, an objection was filed by Robert and Sharon Milbourne (collectively, the "Milbournes"). However, the Milbournes chose not to participate in the hearing of this motion. The Court has therefore treated their objection as withdrawn.

The Objection of the Province of Ontario

[85] On April 14, 2015, an Objection was filed on behalf of the Province.

[86] The Province submitted that the facts of this case raise significant issues with respect to the validity and enforceability of the security interests underlying the secured portions of the USS Claims as well as the proper characterization of the USS Claims. It argued that, in light of these issues, there was an insufficient basis on which to accept the USS Claims as Proven Claims. It argued that a hearing was required to evaluate these issues, which evaluation should include a consideration of whether the security claimed by USS was valid and enforceable given, among other matters, that the adequacy of consideration received by USSC in exchange for the grant of security has not been established. The Province also submitted that the Court should consider whether the USS Claims constitute *bona fide* indebtedness, or whether they are properly characterized as equity contributions from a controlling parent company.

[87] The Objection of the Province was supplemented by a clarification dated August 21, 2015, which set out in greater detail the bases upon which the Province asserts that the Term Loan and the Revolver Loan should be re-characterized as "equity claims" and that the security for the USS Secured Claims should be declared to be a fraudulent preference or otherwise unenforceable. As these arguments are addressed below in the Court's analysis, I do not propose to repeat them in this section.

The Objection of the Union

[88] On April 14, 2015, an Objection was filed by the Union. By way of overview, the Union submitted that USS, as the shareholder of USSC, directed the operations of USSC in a manner that has caused USSC to significantly underperform, thereby incurring substantial losses and requiring it to incur significant debt. In addition, the Union submitted that such actions undermined the ability of USSC to meet its on-going funding obligations to the USW pension plans of USSC. The Union argued that, as a result, USS has diluted the potential recoveries of the Union members and the USW pension plan beneficiaries in this CCAA proceeding.

[89] The Union broadly categorized its objections as follows:

(a) an objection to the granting of security interests on the assets of USSC;

(b) an objection to the characterization of most of the USS Claims as debt when they are properly characterized as equity; and

(c) an objection grounded in USS' conduct in relation to its Canadian plants, unionized pensioners, pension plan members and beneficiaries, which gives rise to claims of oppression and breaches of fiduciary duty.

[90] With respect to the objection in (a), the Union submitted that USS' secured claim is based on security interests effectively granted by USS to itself, at a time when there was no independent board of directors or advisors, for insufficient consideration, and in a manner which amounted to an improper preference and/or fraudulent conveyance. With respect to the objection in (b), the Union submitted that a significant portion of USS' debt is really in the nature of equity and should be re-characterized as such based on, among other factors, the fact that (i) much of the debt was incurred to acquire Stelco; (ii) USS completely controlled USSC; (iii) USS was the sole source of USSC's financing; (iv) USS provided commercially unreasonable interest and repayment terms; (v) USS had no reasonable expectation of repayment on the purported loans; and (vi) USSC was significantly undercapitalized throughout the years following its acquisition by USS.

[91] The first two claims of the Union overlap significantly, if not completely, with the arguments raised by the Province in its Objection. The remaining claims are not being addressed on this motion. The process for addressing such claims was the subject of an earlier hearing and the Court's endorsement that was released as *U.S. Steel Canada Inc. (Re)*, 2015 ONSC 5103.

The Objection of Representative Counsel

[92] On April 14, 2015, an Objection was filed also filed by Representative Counsel for all non-USW active employees and retirees of USSC. In its Objection and at the trial in this proceeding, Representative Counsel adopted the particulars of the Objections filed by the Province and the Union as applicable to the non-USW active employees and retirees of USSC.

The Disputed USS Claims

[93] For completeness, the Objections that were made in respect of Claims #1-5 in the Monitor's Seventh Report, which are unsecured claims in the aggregate amount of U.S. $3,085,746, have now been withdrawn by the Objecting Parties. Further, no Objections have been made in respect of Claims #6-8 in such Report, which are unsecured claims in the aggregate amount of U.S. $338,169. Therefore, based on the Monitor's Seventh Report, Claims #1-8 inclusive should be confirmed as Proven Claims. The USS Claims which are the subject of this motion, and in respect of which the Objections are maintained, are the following:

Claim Reference #	Description of Claim	Amount of Claim
9	Unsecured Term Loan	$1,847,169,934
10	Unsecured Revolver Loan	U.S. $120,150,928
11	Secured Revolver Loan	U.S. $72,938,390
11(a)	Secured Cliffs LRD Transaction	U.S. $14,538,463
11(b)	Secured Credit Support Payments	U.S. $3,742,479
11(c)	Secured Intercompany Trade	U.S. $31,252,193

[94] For clarity, none of the parties object to the quantum of the USS Claims which are the subject of the present motion.

[95] The USS motion and the Objections were addressed collectively at a trial conducted over eight days. The evidence adduced at the trial consisted of affidavit evidence and oral testimony, the relevant portions of which are described below.

Applicable Statutory Law

[96] The following provisions of the CCAA are relevant for the Objections that the USS Claims should be re-characterized as "Equity Claims" for the purposes of these CCAA proceedings:

> 2. 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;
>
> 6. (8) 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.
>
> 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.

[97] The following provisions of the CCAA are relevant to the Objections that the security for the secured USS Claims, being the general security interest granted by USSC in favour of Credit Corp in the October Security Agreement and in favour of USS, United States Steel International, Inc. and SHC in the November Security Agreement, should be invalidated on the grounds of a fraudulent preference:

> 36.1 (1) Sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.
>
> (2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*
>
> (*a*) to *"date of the bankruptcy"* is to be read as a reference to *"day on which proceedings commence under this Act"*;
>
> (*b*) to *"trustee"* is to be read as a reference to *"monitor"*; and
>
> (*c*) to *"bankrupt"*, *"insolvent person"* or *"debtor"* is to be read as a reference to *"debtor company"*.

[98] Section 95 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") provides as follows:

> (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person
>
> > (a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and
> >
> > (b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.
>
> (2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

The Issues for Determination in This Proceeding

[99] There are two principal categories of Objections addressed in this proceeding: (1) that the USS Debt Claims are, in substance, "equity claims" for the purposes of the CCAA; and (2) that the security for the USS Secured Claims is either unenforceable for lack of consideration or void as a fraudulent preference under section 95 of the BIA, as incorporated into these proceedings by virtue of section 36.1 of the CCAA. These two issues will be addressed in order after first describing certain expert evidence adduced at trial by the parties.

Expert Financial Evidence

[100] The Province and USS introduced expert evidence from three financial experts who testified at trial. The following briefly summarizes the principal issues addressed in the reports and testimony of these experts. The significance of such evidence is considered below in the Court's analysis of the characterization of the Term Loan and the Revolver Loan.

The Finnerty Report

[101] The Province introduced into evidence a report dated August 21, 2015 of Dr. John Finnerty (the "Finnerty Report"). Dr. Finnerty was qualified as an expert in financial economics. Among other things, the Finnerty Report analyzed the Term Loan and the Revolver Loan against fifteen factors, described later in these Reasons and referred to as the "*AutoStyle* factors", that are used in American courts in debt re-characterization cases. It was Dr. Finnerty's opinion that, from the perspective of financial economics, the terms of the Term Loan and the Revolver Loan, and the manner in which they were implemented, are suggestive of equity rather than debt.

[102] The Finnerty Report concluded that, in respect of the Term Loan, eight of the *AutoStyle* factors are more consistent, from a financial economics perspective, with a characterization of equity, one, being the maturity date provisions and the schedule of debt service payments, is more consistent with a characterization of debt, and the remaining six factors are "indeterminate" from a financial economics perspective.

[103] The eight factors identified in the Finnerty Report as being more consistent with an equity characterization of the Term Loan are the following: (1) the interest rate provisions and the history of interest payments; (2) the inadequacy of capitalization of ABULC at the date of the acquisition; (3) the absence of security for the advances; (4) the inability of USSC to obtain similar financing from outside institutions, based upon the Hall Report described below; (5) the extent to which advances under the Term Loan were effectively subordinated to claims of outside creditors; (6) the absence of a sinking fund to provide debt repayments; (7) the "hollow" right of USS to enforce principal and interest obligations; and (8) the failure of USSC to repay the Term Loan on the due date or to seek a postponement thereof.

[104] The Finnerty Report reached a similar opinion in respect of the Revolver Loan. The Finnerty Report concludes that ten of the *AutoStyle Plastics* factors are more consistent with equity. These are the eight factors enumerated above as being more consistent with equity in respect of the Term Loan, plus: (9) the source of the debt repayments; and (10) the lengthy fixed maturity date and the schedule of debt service payments. The Finnerty Report concludes that the extent to which the advances under the Revolver Loan were used for working capital, rather than to acquire capital assets, is more consistent with a debt characterization and the remaining two factors are "indeterminate".

The Hall Report

[105] The Province also introduced into evidence a report dated August 21, 2014 of Brad Hall (the "Hall Report"), a director of Alix Partners LLC, who was qualified as an expert in institutional lending.

[106] The Hall Report concludes that a third-party lender in an arm's length transaction would not have provided financing to ABULC/USSC in the amounts and on the terms provided by USS pursuant to the Term Loan and pursuant to the Revolver Loan. The Hall Report was incorporated into, and relied upon, by Dr. Finnerty in the preparation of the Finnerty Report.

[107] These conclusions in the Hall Report are based on an assessment of the terms of the Term Loan and the Revolver Loan against the standard of a bank or other institutional lender

offering unsecured term loans and unsecured revolving loans (herein referred to as a "third-party lender").

[108] In the opinion of Mr. Hall, a third-party lender would have based any term loan granted to USSC in 2007 on the historical financial performance of Stelco, rather than on the projections relied upon by USS for the purposes of the Acquisition, and would have disregarded any of the synergies projected by USS. In addition, a third-party lender would not have granted a term loan on an unsecured basis, nor would it have been prepared to accept the provisions of the Term Loan in respect of the maturity date, principal repayments or interest payments.

[109] Similarly, Mr. Hall was of the view that a third-party lender would not have granted an unsecured loan in the amount of the Revolver Loan in 2010 nor would it have accepted the provisions of the Revolver Loan respecting the maturity date or interest payments. In addition, the Hall Report addresses the financial performance covenants that a third-party lender would typically require, principally debt/equity, Debt/EBITDA and EBITDA/interest tests, and observed that, given USSC's financial performance after 2008, USSC would not have complied with the latter two tests as typically applied at the time of advances under the Revolver Loan.

[110] The Hall Report also concluded that the terms of the Term Loan were not comparable with the loans provided by the prior arm's length lenders to Stelco or by the arm's length lenders that provided financing at or about the same time to USS. I do not find these opinions of assistance with respect to the issues in this proceeding.

The Austin Smith Report

[111] USS introduced into evidence a report dated September 4, 2015 of Yvette R. Austin Smith (the "Austin Smith Report"), a principal of the Brattle Group, which addressed certain features of the Finnerty Report and the Hall Report. For present purposes, the Austin Smith Report reached three principal conclusions, aspects of which are relevant for the determinations below in these Reasons.

[112] First, the Austin Smith Report says that the conclusions in the Finnerty Report — that, from a financial economics perspective, the terms of the Term Loan and the Revolver Loan, and the manner of their administration, are strongly suggestive of an equity investment — relies too heavily on hindsight to be credible. The Report suggests that, as a result, the application of the *AutoStyle* factors does not assist in establishing the substance of these transactions or the intent of the parties at the time of the establishment of the Loans.

[113] Second, the Austin Smith Report concludes that the opinion in the Hall Report that USSC could not have financed the Term Loan and the Revolver Loan "in the amounts and on the terms as provided by USS" relies on a flawed credit analysis of USSC that, therefore, does not address USSC's debt capacity after the Acquisition.

[114] Third, the Austin Smith Report suggests that the opinions in the Hall Report, and therefore in the Finnerty Report, ignore the reality of diverse corporate debt markets in their concentration on the third-party lender market.

Observations Regarding the Expert Financial Evidence

[115] I do not propose to make any finding regarding the differences of opinion expressed in the Finnerty Report and in the Austin Smith Report on the particular issues raised in the latter as it is not necessary to do so for the purposes of the determinations herein. However, the following three observations regarding the matters addressed in the expert evidence relied upon by the Objecting Parties are relevant to the approach set out below in these Reasons.

[116] First, in respect of most of the *AutoStyle* factors to which Dr. Finnerty refers as suggestive of equity rather than debt, Dr. Finnerty expressly or implicitly measures the Term Loan and the Revolver Loan against the standard of a bank or other institutional lender offering unsecured term loans and unsecured revolving loans, that is, against the standard of a third-party lender offering such loans.

[117] At the risk of some oversimplification, Dr. Finnerty's logic is as follows. The Term Loan and the Revolver Loan purport on their face to be an unsecured term loan and an unsecured revolver loan. The market for such loans is the third-party lender market. However, the terms and conditions of the Term Loan and the Revolver Loan are not terms and conditions that would be acceptable to a third-party lender nor were the Loans administered in certain respects in the manner that would be expected of a third-party lender. Therefore, from the perspective of financial economics, the Loans must be equity. It is the validity of the last proposition in this chain that is at issue in this proceeding. The conclusions of Dr. Finnerty are more or less relevant in this proceeding depending upon whether a third-party lender standard is appropriate in addressing financial arrangements between a parent corporation and its wholly-owned subsidiary. This issue is addressed below.

[118] Second, as Dr. Finnerty testified, of the fifteen *AutoStyle* factors, three principal factors inform his conclusions that the Loans are more suggestive of equity rather than debt. These factors are: (1) the absence of available financing from third-party lenders on the terms and in the amount of the Term Loan and the Revolver Loan; (2) the waiver of interest payments under the Term Loan in 2010 and thereafter; and (3) the "fungibility of debt and equity", which refers to the payment of interest and repayment of principal by USSC out of equity injections received from USS, principally in respect of the Revolver Loan. It is therefore appropriate to focus on the evidentiary value of these three considerations, rather than on the larger list which effectively repeats the same considerations.

[119] Lastly, I would observe that, while Dr. Finnerty was qualified as an expert in financial economics, substantially all of his expert evidence related to his view of third-party lender behaviour in various circumstances, rather than to any more formal analysis that was informed by the analytical framework of financial analysis.

Expert Legal Evidence

[120] USS and the Province also introduced expert legal evidence from two lawyers who testified at trial regarding a specific issue of Pennsylvania law. The following briefly summarizes the issue of law and the testimony of these experts. The issue is significant for the analysis of the validity of the security for the USS Secured Claims.

The Issue

[121] The Revolver Loan Agreement contained an event of default in section 11c as follows: "Borrower consents to the appointment of a receiver, trustee or liquidator of all or substantially all of its assets, is unable to meet debts, or files bankruptcy". The same event of default was continued after each of the First Revolver Amendment, which removed the solvency representation, the Second Revolver Amendment and the Third Revolver Amendment.

[122] The expert testimony addressed the meaning of the phrase "unable to meet debts" as a matter of contractual interpretation under the laws of Pennsylvania. Both experts testified that the principles of contractual interpretation under Pennsylvania law are substantially similar to the principles under Ontario law with, based on USS' expert, a tendency toward somewhat greater emphasis on the strict construction of contracts.

[123] I would observe that, while the expert testimony was tendered in respect of this provision in the Revolver Loan Agreement, the same event of default appears in section 13(c) of the Term Loan Agreement which is governed by the laws of Alberta.

The McMichael Report

[124] USS introduced into evidence a report dated August 21, 2015 of Lawrence McMichael (the "McMichael Report"). It was Mr. McMichael's opinion that the phrase "unable to meet debts" connoted a balance sheet solvency test which, under Pennsylvania law, would be performed on a market value basis. Accordingly, Mr. McMichael was of the opinion that the contractual interpretation of clause 11c of the Revolver Loan Agreement resulted in an event of default in the circumstances in which the aggregate liabilities of USSC exceeded the fair market value of its assets.

The Di Massa Report

[125] The Province introduced into evidence a report dated September 4, 2014 of Rudolf Di Massa, Jr. (the "Di Massa Report"). It was Mr. Di Massa's opinion that the phrase "unable to meet debts" did not connote an insolvency test as such, whether on a balance sheet basis or on a going concern basis. Mr. Di Massa was of the view that the correct statutory interpretation of this phrase meant "unable to satisfy or manage its obligations relating to operating activities on an on-going basis given its financial resources from all available sources". He described this event of default as essentially a direction from USS to USSC to manage its financial obligations by obtaining credit from all available sources, including from trade creditors through an extension of payment terms and from USS itself by drawing up to the maximum availability under the Revolver Loan Agreement.

[126] An important feature of Mr. Di Massa's interpretation is his view of the operation of the Revolver Loan Agreement, which is significant in three respects. Mr. Di Massa's opinion implies that an event of default would not arise unless and until USSC had drawn the maximum availability under the Revolver Loan Agreement and was unable to foresee obtaining credit from any other possible sources on a prospective basis. It also implies that, under the Revolver Loan Agreement, USS was obligated to continue to advance funds until such maximum availability was reached, subject to the occurrence of one of the other events of default in the Agreement.

Lastly, as the phrase "unable to meet debts" is the only event of default that appears to address the state of insolvency, and, as Mr. Di Massa is of the view that this phrase does not serve as an insolvency event of default, his interpretation has the result that the Revolver Loan Agreement lacks an express insolvency event of default.

The Findings of the Court

[127] The Court finds that, under the laws of Pennsylvania, the words "unable to meet debts" in the Revolver Loan Agreement mean that the fair market value of the assets of USSC are less than the total of its liabilities, that is, that the words connote a balance sheet solvency test. I reach this conclusion for the following four reasons.

[128] First, this interpretation is more consistent with the plain meaning of the words "unable to meet debts" than the interpretation proposed by Mr. Di Massa. In particular, it recognizes the absence of the additional words "when due", or words to a similar effect. Such words appear in the events of default in sections 11a and 11b of the Revolver Loan Agreement. If they had been incorporated into the "unable to meet debts" event of default, I think it is clear that they would have indicated an intention to apply an event of default in the event of an inability to meet USSC's obligations as they fell due, i.e. a going concern event of default. Their absence indicates an intention that the event of default would relate to the alternative definition of insolvency under the laws of Pennsylvania, being the extent of assets relative to liabilities. For this reason, while it is true that the parties could have used more specific language if they had intended a balance sheet insolvency event of default, instead of the rather archaic phrase that appears, I do not think that such words connote a going concern event of default or the approach proposed in the Di Massa Report.

[129] Second, as a related matter, the interpretation proposed in the Di Massa Report requires reading in language that is neither present nor customary. Such an interpretation should be rejected in favour of an interpretation that gives effect to the plain meaning of the language of the event of default.

[130] Third, even assuming an ambiguity in the language of the event of default, the Di Massa Report relies heavily on an inference based on the removal of the solvency representation from the Revolver Loan agreement by the First Revolver Agreement. The solvency representation spoke to both balance sheet solvency and solvency on a going concern basis. It is suggested that it would have been illogical for USS and USSC to have removed the solvency representation and maintained a balance sheet event of default. It is also suggested that interpretation of the event of default as a balance sheet solvency event of default would have resulted in a continuing state of default under the Revolver Loan Agreement, with automatic acceleration of the Revolver Loan, which could not have been intended.

[131] As discussed later in these Reasons, I do not think that any conclusion can be drawn regarding the intention of the parties in respect of the removal of the solvency representation. In particular, I do not think that there is any evidence regarding the surrounding circumstances in which the First Revolver Amendment was negotiated and executed that bears on the interpretation of the event of default.

[132] Fourth, an important principle of contractual interpretation is that, in the case of ambiguity, a court should prefer the more commercially reasonable interpretation. In my view, for the following reasons, the interpretation proposed by Mr. Di Massa results in an unreasonable result from a commercial perspective.

[133] In this case, while the interpretation in the McMichael Report may have had the result that USSC was in default as of the execution of the Third Revolver Amendment, if not before, I do not see a particular difficulty in this. Unlike a third-party lender, there is no evidence that USS had a particular concern with the occurrence of a balance sheet event of default under the Revolver Loan. It could always choose to waive any event of default and advance further funds notwithstanding the occurrence of an event of default. In this respect, the evidence of Mr. Di Massa that a commercial lender would not engage in such behaviour is not a relevant consideration.

[134] On the other hand, USS would have had a significant concern with any renunciation of its ability to control the extent, if any, of future advances of funds. As Mr. McMichael testified, lenders, including parents of wholly-owned subsidiaries, do not intend to be bound to lend money that they do not believe will be repaid. This is particularly important with respect to the operation of the Revolver Loan Agreement in October 2013 given the amount of the undrawn facility — being approximately U.S. $383 million — and the cash burn of USSC in 2013, including the anticipated cash burn for the rest of the year. In addition, USS would not have intended the availability under the Revolver Loan to extend beyond what was absolutely necessary, having just completed a significant de-leveraging exercise for other reasons.

[135] Further, as noted above, the interpretation in the Di Massa Report has the result that there is no balance sheet event of default in the Revolver Loan Agreement. As a parent corporation controls the advance of funds to a subsidiary, and thereby its ability to meets its obligations on an on-going basis, a parent corporation would not necessarily need an event of default for a failure to meet on-going obligations. It would, however, require a balance sheet event of default for protection against third parties in the event of an insolvency of its subsidiary.

[136] Given the foregoing considerations, I consider that the interpretation proposed by Mr. Di Massa produces a commercial unreasonable result while the interpretation of Mr. McMichael results in a commercially viable loan arrangement.

The Debt Re-Characterization Claims

[137] I propose to address the debt re-characterization claims of the Objecting Parties in the following order. First, I will deal with two threshold issues. Next, I will address the test to be applied by the Court in the analysis of the characterization of both the Term Loan and the Revolver Loan. I will then address the debt characterization claims of the Objecting Parties in two parts. The first part addresses certain general considerations raised by the Objecting Parties that are common to both the Term Loan and the Revolver Loan. The second part sets out my analysis of each of the Term Loan and the Revolver Loan in turn in light of the Court's determinations regarding these general considerations.

Threshold Issues

[138] The two threshold questions to be addressed are: (1) the onus of proof; and (2) the test to be applied in the evaluation of the debt re-characterization claims respecting the USS Debt Claims. I will address each issue in turn.

The Onus of Proof

[139] As would be expected, USS argues that the burden of proof lies with the Objecting Parties and the Objecting Parties argue that it lies with USS. I will deal separately with the burden of proof pertaining to the debt re-characterization claims of the Objecting Parties and the claims that the security for the USS Secured Claims is invalid or otherwise unenforceable.

[140] The issue of the burden of proof in respect of the debt re-characterization claims appears to be a matter of first impression as the parties have been unable to find any case law on this issue. I conclude that the Objecting Parties have the burden of proof that the USS Debt Claims are properly characterized as "equity claims" under the CCAA for the following three reasons.

[141] First, in a claims process under the CCAA, a creditor bears the onus of proving the validity and amount of its debt claim. It is not required to go further and prove the negative. In other words, it does not have to demonstrate that a claim is not an "equity claim". If another creditor chooses to assert such an argument, I think it must bear the onus of proving that an otherwise proven debt claim is more properly characterized in substance as an "equity claim".

[142] Second, put in procedural terms, the motion of the creditor, in this case USS, is limited to a determination of the validity and amount of its debt claim in order to establish a "Proven Claim" under the Claims Process Order. The objection of any other creditor, in this case the Objecting Parties, is in substance a cross-motion for a declaration that the debt claim, if accepted, constitutes in substance an "equity claim" for the purposes of the CCAA. I do not agree with the Objecting Parties that the motion of the objecting creditor should be regarded as the substantive equivalent of a statement of defence which must be addressed to establish the validity and amount of a moving party's debt claim.

[143] Lastly, an important consideration is that the debt re-characterization claims of the Objecting Parties are based on the underlying substantive reality of the Term Loan and the Revolver Loan. These are factual matters, rather than matters based on allegations of inequitable behavior on the part of USS. I accept that there may be an argument for a reversal of the onus of proof in the circumstances of a *bona fide* allegation of bad faith or inequitable conduct on the part of an insider or a controlling shareholder of a debtor company that could engage an equitable remedy in favour of the injured party or an analogous statutory remedy. However, as mentioned, that is not the basis of the claims of the Objecting Parties on this motion.

[144] The Objecting Parties' argument that the security for the USS Secured Claims is invalid or, in the alternative, unenforceable raises two issues, although I conclude that the Objecting Parties bear the onus of proof in either case.

[145] With respect to the claim that the October Security Agreement and the November Security Agreement are unenforceable for lack of consideration, I think the same principles govern the issue of onus as apply with respect to the issue of onus regarding the treatment of the USS Debt Claims as "equity claims". A creditor asserting a Secured Claim must move for a determination that the security is valid. To such end, the creditor must establish that the security was delivered by the debtor company, that the security is expressed to cover the creditor's claim, and that any necessary registrations were effected under applicable legislation. An objection of any other creditor that such security is invalid or otherwise unenforceable on any other basis would involve a cross-motion by such objecting creditor seeking a declaration to such effect.

[146] With respect to the claim that the October Security Agreement and the November Security Agreement constitute fraudulent preferences for purposes of section 95 of the BIA, the Objecting Parties acknowledge that the case law establishes that they bear the onus of proof.

The Test to Be Applied

[147] The more difficult threshold issue is identification of the test to be applied to determine whether the USS Debt Claims are debt obligations or "equity claims".

[148] The Term Loan and the Revolver Loan are, on their own terms, loans rather than equity contributions. The terms and conditions of the Term Loan Agreement and the Revolver Loan Agreement unequivocally evidence loan agreements. The Term Loan and Revolver Loan are both documented as loans in contracts entitled "Loan Agreement" in which the parties are described as lender and borrower. Each loan agreement prescribes a term and an interest rate, requires repayment, and has no terms expressly tying any payments to the financial performance of USSC. USS and USSC also had very different processes for approval and transmission of loan advances and equity contributions. The financial accounts of Canada LP or Credit Corp, as applicable, and USSC accurately recorded the loan advances separately from equity contributions.

[149] The form of the documentation for the Loans, and the foregoing actions, are the point of departure. USS says it intended the outstanding advances under the Term Loan and the Revolver Loan to be loans rather than capital contributions. Accordingly, USS says that the USS Debt Claims are in respect of loans and are not "equity claims". The issue for the Court on this motion is, therefore, whether the foregoing actions and documentation are determinative. USS argues that there is no further issue for the Court for two alternative reasons based, respectively, in the language of the CCAA and in the pre-2009 Canadian case law. I will address these two arguments in turn.

The Provisions of the CCAA

[150] USS argues that the most recent amendments to the CCAA, which introduced the definition of "equity claims", comprehensively codified the treatment of "equity claims" with the result that the issue of whether a particular claim is to be treated as debt or equity is solely a matter of statutory interpretation. It relies on *Re Sino-Forest Corp*., 2012 ONCA 816, 114 O.R. (3d) 304, at paras. 30 and 36, for this proposition.

[151] In the circumstances of this case, USS argues that the USS Debt Claims are not claims in respect of a share of USSC, or a warrant or option or another right to acquire a share of USSC. It submits that, accordingly, the USS Debt Claims are not claims in respect of an "equity interest" and, therefore, are not "equity claims". USS says that, as a result, the USS Debt Claims are claims in respect of loans.

[152] I agree that the issue of whether a particular claim is to be treated as debt or equity is a matter of statutory interpretation. I also agree that the USS Debt Claims do not fall within paragraph (d) of the definition of "equity claim" which refers to "a monetary loss resulting from the ownership, purchase or sale of an equity interest". This provision addresses the circumstances of shareholders pursuing securities misrepresentation or oppression actions against a debtor company. It prevents recovery of claims by such shareholders for the value paid for their shares prior to the satisfaction of claims of debt-holders of the debtor company: see *Re Sino-Forest Corp*., 2012 ONSC 4377 (Commercial List), at paras. 71, 80, 96, aff'd 2012 ONCA 816, 114 O.R. (3d) 304.

[153] However, I do not read the definitions of "equity claim" and "equity interest" as narrowly as USS. The USS argument relies implicitly on the need for the demonstration of the issuance of shares as a requirement of an "equity claim". In doing so, USS ignores the reality of a sole shareholder situation and reaches an unreasonable conclusion.

[154] In the circumstances of a sole shareholder, there is no practical difference for present purposes between a shareholding of a single share and a shareholding of multiple shares. Accordingly, for the purposes of the definition of an "equity claim", there should be no difference between a payment to a debtor company on account of the issuance of new shares and a payment to a debtor company by way of a contribution to capital in respect of the existing shares.

[155] On this basis, I conclude that, as a matter of statutory interpretation, the definition of an "equity claim" must extend to a contribution to capital by a sole shareholder unaccompanied by a further issue of shares. Put another way, I conclude that a payment by a sole shareholder of a debtor company on account of a capital contribution constitutes a payment in respect of a share of the debtor company. Such a payment would therefore constitute an "equity interest" and a claim in respect of such payment in a CCAA proceeding would be a claim for a return of such capital and therefore an "equity claim".

[156] Further, I conclude that there is no reason why the reference to "a return of capital" in paragraph (b) of the definition of "equity claim" should be limited a claim in respect of an express contribution to capital by a shareholder. A transaction can be a contribution to capital in substance even if it expressed to be otherwise.

[157] Accordingly, I conclude that the issue for the Court in this proceeding is whether the USS Debt Claims constitute claims for a return of capital in respect of the shares in USSC owned by USS. In order to decide that issue, the Court must decide whether the advances made under the Term Loan and the Revolver Loan constituted loans to USSC or contributions to the capital of USSC in respect of the outstanding shares of USSC owned by USS. To the extent any of such advances constituted a contribution to capital, any claim for such amounts as Proven Claims in

these CCAA proceedings would constitute a claim for a return of capital and, therefore, an "equity claim".

Pre-2009 Canadian Case Law

[158] USS makes an alternative submission in the event the Court finds that the definition of "equity claim" does not preclude a determination of whether the USS Debt Claims are be treated as debt or equity. USS says that the applicable Canadian case law regarding debt re-characterization issues, which pre-dates the recent amendments to the CCAA, requires that a court have regard solely to the intention of the parties as a matter of the contractual interpretation of the relevant documentation in determining whether any transaction gave rise to an "equity interest".

[159] In this case, as mentioned above, USS says that the relevant documentation consists of the Term Loan Agreement, the Revolver Loan Agreement and the documentation pertaining to the advances and payments thereunder. USS submits that the intention of both parties at the time of execution of the Term Loan Agreement and the Revolver Loan Agreement, and at the time of all advances thereunder, is manifest on the face of such documents. It submits that, as a matter of contractual interpretation, it is clear that USS and USSC intended that such transactions would constitute debt obligations of USSC rather than capital contributions by USS to USSC. USS says that Canadian case law provides no basis for going beyond the exercise of contractual interpretation to evaluate whether the USS Debt Claims should be characterized as "equity claims" on some other basis.

[160] In making this argument, USS relies, in particular, on the decision of the Supreme Court in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558. In that decision, the issue was whether certain monies provided to the Canadian Commercial Bank (the "CCB") had been provided by way of a loan or a capital investment. At paragraph 51, the Court approached the issue before it as a matter of contractual interpretation as follows:

> As in any case involving contractual interpretation, the characterization issue facing this Court must be decided by determining the intention of the parties to the support agreements. This task, perplexing as it sometimes proves to be, depends primarily on the meaning of the words chosen by the parties to reflect their intention. When the words alone are insufficient to reach a conclusion as to the true nature of the agreement, or when outside support for a particular characterization is required, a consideration of admissible surrounding circumstances may be appropriate.

[161] The Supreme Court concluded that the transaction in that case was a loan, noting that: (1) there was nothing in the express terms of the agreements in question which supported a conclusion that the money was advanced as an investment; and (2) there were express provisions supporting a characterization of the advance as a loan, including provisions for repayment, for an indemnity should full repayment not be made from the sources contemplated, and for equal ranking with the ordinary creditors of CCB: see *Canada Commercial Bank*, supra at para. 63.

[162] In *(Re) Bul River Mineral Corporation*, 2014 BCSC 1732, 16 C.B.R. (6th) 173, Fitzpatrick J. summarized the principles in *Canadian Commercial Bank* in the following manner, which I find helpful in the present case:

> (a) the fact that a transaction contains both debt and equity features does not, in itself, determine its characterization as either debt or equity;
>
> (b) the characterization of a transaction under review requires the determination of the intention of the parties;
>
> (c) it does not follow that each and every aspect of a "hybrid" debt and equity transaction must be given the exact same weight when addressing a characterization issue; and
>
> (d) a court should not too easily be distracted by aspects of a transaction which are, in reality, only incidental or secondary in nature to the main thrust of the agreement.

This summary demonstrates that the issue before the court in *Canadian Commercial Bank* was the characterization of an instrument that had characteristics of both debt and equity.

[163] I do not find the decision of *Canadian Commercial Bank* helpful in the present circumstances for the reason that the present circumstances differ in two important respects.

[164] First, the subject-matter in *Canadian Commercial Bank* was, as mentioned, a hybrid security, i.e., a security having characteristics of both debt and equity. Therefore the issue was whether the security in question should be characterized as a debt obligation or a capital investment. The present proceeding does not involve a hybrid security. As mentioned above, the relevant documentation unequivocally evidences loan transactions on their face.

[165] Second, the parties to the transaction in *Canadian Commercial Bank* were at arm's length and the transaction documentation represented the outcome of arm's length negotiations between the parties. The parties to the Term Loan Agreement and the Revolver Loan Agreement were not at arm's length. As a result, the form of the documentation, including the characterization of the transaction as debt rather than equity, was determined by USS in its sole discretion, subject only to satisfaction of any applicable Canadian legal considerations raised by USSC.

[166] In such circumstances, the task of a court is qualitatively different from that in *Canadian Commercial Bank*. In that decision, given the hybrid nature of the security under consideration, the issue was whether the parties intended that the institutions providing financial support to the CCB were making a capital investment in the bank or were making a loan to it. In other words, the intentions of the parties were unclear without a contractual analysis to determine the substance of the transaction that had been agreed upon. At the same time, given the arm's length relationship between the parties, the language of the agreements could be relied upon as an accurate reflection of the intentions of the parties regarding the substantive reality of the transaction.

[167] Where, however, as in the present circumstances, the parties are not at arm's length, the issue is not what the parties say they intended regarding the substance of the transaction as a

matter of contractual interpretation. The expressed intention of the parties is clear. However, given the absence of any arm's length relationship, there can be no certainty that the language of the agreements reflects the underlying substantive reality of the transaction. Accordingly, the issue for a court is whether, as actually implemented, the substance of the transaction is, in fact, different from what the parties expressed it be in the transaction documentation.

[168] In other words, the task of a court is to determine whether the transaction in substance constituted a contribution to capital notwithstanding the expressed intentions of the parties that the transaction be treated as a loan. It is therefore not appropriate to limit the inquiry into the intentions of the parties to a review of the form of the transaction documentation. Such an exercise reduces to a "rubber stamping" of the determination of a single party to the transaction, i.e., the sole shareholder, and it does not address the substance of the transaction as it was actually implemented. In such circumstances, the determination of whether a particular claim is to be treated as debt or equity must address not just the expressed intentions of the parties as reflected in the transaction documentation but also the manner in which the transaction was implemented and the economic reality of the surrounding circumstances.

[169] USS also refers to the decision of the Court of Appeal in *Metropolitan Toronto Police Widows and Orphans Fund v. Telus Communications Inc.*, [2005] O.J. No. 2309 (C.A.), leave to appeal to S.C.C. denied, [2005] S.C.C.A. No. 379, at paras. 38-40. In these paragraphs, the Court of Appeal stated that: (1) the determination of the legal character of a transaction is not a simple mechanical exercise of assessing and tallying up a list of factors and then deciding whether they net out to one or the other; and (2) that a court must give legal effect to the intention of the parties as expressed in the language of an agreement. In that case, the Court of Appeal also recognized that the respective needs of the parties to an agreement are an indication of their intention and that parties are entitled to structure their contractual relationships as they see fit, absent a sham or public policy considerations dictating otherwise.

[170] I do not find this decision to be helpful in the present circumstances for the same reasons as the decision in *Canadian Commercial Bank* does not address the issues in the present proceeding. *Metropolitan Toronto Police Widows and Orphans Fund* involved the characterization of a securitization transaction as either a sale or a loan. In that context, the issue before the Court of Appeal was a matter of contractual interpretation. The transaction was an arm's length commercial transaction. Accordingly, the documentation before the court in that case could be relied upon to accurately reflect the intentions of the parties regarding the underlying economic reality of the transaction. I do agree, however, with the statement of the Court of Appeal in that decision that determination of the substantive nature of a transaction is not conducted by means of a simple "scorecard" of factors.

[171] I would observe, however, that in large measure the difference between the parties in this proceeding – which appears to reduce to the significance to be attached to the manner in which the Loans were administered – is perhaps more semantic than real. The Objecting Parties proposed, and USS accepted, that a useful summary of the appropriate approach to be taken in the present proceeding was set out in a non-binding, American decision, *In re Fedders North America, Inc.*, 405 B.R. 527 (2009), U.S. Bankruptcy Court, D. Delaware, at para. 59, as follows:

> The law regarding recharacterization is well-settled in this jurisdiction. The Third Circuit has held that the overarching inquiry with respect to recharacterizing debt

> as equity is whether the parties to the transaction in question intended the loan to be a disguised equity contribution. *In re SubMicron Systems Corp.*, 432 F.3d 448, 455-56 (3d Cir.2006). This intent may be inferred from what the parties say in a contract, from what they do through their actions, and from the economic reality of the surrounding circumstances. *Id.* at 456. Recharacterization has nothing to do with inequitable conduct, however. *See In re AutoStyle Plastics, Inc.*, 269 F.3d 726 at 748-49 (6th Cir. 2001) (discussing the differences between equitable subordination and recharacterization)

[172] On this basis, the parties do not dispute the process so much as the result. They have fundamentally different views on the intentions of USS and USSC regarding the substance of the transaction which I think can be summarized as follows.

[173] The Objecting Parties say that the Term Loan Agreement and the Revolving Loan Agreement reflect arrangements under which USS intended, at all times, on the one hand, to return excess cash to USS when it became available, and, on the other hand, to write off the principal or interest to the extent that payments of either were due and sufficient cash was not available.

[174] USS acknowledges that the Term Loan and subsequently the Revolver Loan were established with the intention of constituting the principal vehicles by which cash would be advanced to USSC, initially for the purposes of the Acquisition and subsequently for working capital purposes, and by which excess cash in USSC from any source would be repatriated to USS. USS says, however, that, at all times, it extended advances and made payments under the Term Loan and the Revolver Loan in accordance with their terms. USS argues that nothing in the manner in which it established or operated the Term Loan and the Revolver Loan reflected, in substance, a contribution to the capital of USSC, and that the only contributions to capital were made outside the loan arrangements in the form of the equity injections set out in Exhibit "O" to the Monitor's Seventh Report.

[175] These two competing views of the substance of the Term Loan and the Revolver Loan frame the debt re-characterization issues addressed in these Reasons.

The American Multi-Factor Analysis

[176] Given these competing views of the Term Loan and the Revolver Loan, it is necessary to determine an appropriate test for the determination of whether the USS Debt Claims are in substance claims in respect of loans or are "equity claims". The Objecting Parties urge the Court to adopt the multi-factor analysis prevailing in American courts under which courts evaluate a long list of factors drawing conclusions about what factors are most determinative in any given fact scenario.

[177] As referenced above, a leading case in this area is *In re AutoStyle Plastics, Inc.*, 269 F.3d at 749-50 (6th Cir., 2001), in which the court articulated the following eleven factors:

> (1) the names given to the instruments, if any, evidencing the indebtedness; (2) the presence or absence of a fixed maturity date and schedule of payments; (3) the presence or absence of a fixed rate of interest and interest payments; (4) the

> source of repayments; (5) the adequacy or inadequacy of capitalization; (6) the identity of interest between the creditor and the stockholder; (7) the security, if any, for the advances; (8) the corporation's ability to obtain financing from outside lending institutions; (9) the extent to which the advances were subordinated to the claims of outside creditors; (10) the extent to which the advances were used to acquire capital assets; and (11) the presence or absence of a sinking fund to provide repayments.

In addition, courts in other American circuits have considered the following additional factors: (1) the right to enforce payment of principal and interest; (2) participation in management flowing as a result; (3) the failure of the debtor to repay on the due date or to seek a repayment postponement; and (4) the intent of the parties: see *In re Submicron Systems Corporation*, 432 F.3d (3rd Cir., 2006), at 455-456. In the interest of simplicity, in these Reasons I refer to the fifteen factors enumerated in this paragraph as the "*AutoStyle* factors", although I acknowledge this is technically inaccurate.

[178] The Objecting Parties refer to the following description of the multi-factor analysis from *In re Submicron Systems Corporation*, at 455-456, which appears to restate the approach set out above in *Re Fedders*:

> In defining the re-characterization inquiry, courts have adopted a variety of multi-factor tests borrowed from non-bankruptcy case law. While these tests undoubtedly include pertinent factors, they devolve to an overarching inquiry: the characterization as debt or equity is a court's attempt to discern whether the parties called an instrument one thing when in fact they intended it as something else. That intent may be inferred from what the parties say in their contracts, from what they do through their actions, and from the economic reality of the surrounding circumstances. Answers lie in facts that confer context case-by-case.

[179] There does not appear to be any reported Canadian or Commonwealth cases in which courts have purported to apply the multi-factor, re-characterization tests relied upon by the Objecting Parties prevailing in American courts. The Objecting Parties urge the Court to formally adopt the foregoing eleven or fifteen factors in making a determination in this proceeding.

[180] American courts find authority for this approach in the general equitable powers granted to a bankruptcy court under the provisions of section 105(a) of the United States *Bankruptcy Code*, 11 U.S.C 1982, which is the equivalent of section 11 of the CCAA. USS says the Court lacks similar authority under the CCAA on the basis that the recent amendments to the CCAA in this area have limited the scope of a court's authority under section 11. USS relies on the earlier decision of the Court in *U.S. Steel Canada Inc. (Re)*, 2015 ONSC 5103, at para. 51, as follows:

> … I consider that the language of the definition of an 'Equity Claim" and of the provisions of section 36.1 operates as a "restriction set out in the Act" for the purposes of section 11 of the CCAA which has the effect of limiting the authority of the Court in any determination regarding an "Equity Claim" or in any proceedings brought under section 36.1.

However, that decision does not address the extent of the Court's authority under the CCAA in the evaluation of whether a security or a transaction expressed to be a debt claim is, in substance, an "equity interest". At a minimum, any such evaluation requires consideration of a number of the factors considered by American courts in the multi-factor analysis and by Canadian courts in evaluating the underlying substance of a transaction.

[181] The more immediate, and more important, issue for the Court is a framework for identification of the specific considerations or factors to be applied in the context of the present proceeding. The American cases evidence the obvious reality that, in any given situation, different factors or considerations will be more or less persuasive. Insofar as the American cases suggest a "scorecard" approach, however, I have rejected such an approach in favour of an evaluation of the substantive reality of the USS Debt Claims. In the end, in this proceeding, the *AutoStyle* factors constituted no more than the starting point, in the form of a list of factors upon which the parties drew to support their characterization of the USS Debt Claims. In short, it is not necessary to adopt the American, multi-factor analysis as a formal matter in the determination of the issues before the Court, and I therefore decline to do so.

The Approach of the Court

[182] As a first step in the identification of the specific considerations that should inform the determination of the substance of the USS Debt Claims, I propose to start with a conceptual understanding of the dividing line between debt and equity.

[183] An appropriate starting point is the definition of debt and equity for financial purposes set out in paragraphs 32 and 34 of the Finnerty Report:

> At its heart, the difference between equity and debt lies in the fundamental nature of their respective claims on the assets and cash flow of the company. Debt involves borrowing funds subject to a legal commitment to repay the borrowed money with interest at an agreed rate by a stated maturity date. This commitment is embodied in a contract, and this contract is implemented by the borrower. Lenders receive a contractually agreed set of cash flows, typically through periodic interest payments and one or more principal repayments, the last of which occur on the maturity date. … In contrast to debt, an equity claim entitles the holder to a share of the company's profits and residual cash flows after the company has made all the contractually required debt service payments. That is, the debt ranks senior to the equity with respect to the company's cash flows. Similarly, the debt ranks senior to the equity in the event the company must be liquidated and its assets sold to repay its debt obligations. The equityholders get what is left after the holders of the debt have been paid in full; if the debtholders can't get paid in full, then the equityholders get nothing.

[184] With this definition in mind, the Province suggests that the Court should address the substance of the Term Loan and the Revolver Loan from the perspective of whether the evidence is more consistent with an intention and a practice of repayment of principal plus interest under these Loans, or the payment of the residual cash flow and assets of USSC. I think this is a helpful approach, even if at a general level.

[185] Therefore, in the context of a parent-subsidiary relationship, the fundamental consideration in assessing whether a transaction is a loan is whether a holder of the instrument expects at the outset to be repaid the principal amount of the loan with interest out of cash flows of the company. The definition above implies a belief on the part of a lender that its debtor has the financial capacity to generate cash flow sufficient to pay interest and repay principal over the term of the loan, regardless of the profitability of the debtor from time to time in the course of that term.

[186] This approach suggests that the issue of whether the Term Loan and the Revolver Loan should be characterized as debt or equity can best be addressed by considering two issues: (1) the expectation of USS regarding repayment of principal with interest of the Term Loan and the Revolver Loan out of cash flows of USSC over the term of these Loans; and (2) the reasonableness of such expectation.

[187] The first of these questions addresses a subjective issue – the expectations of USS. Obviously, if, at the time of making advances under a Loan, USS had no expectation that USSC would honour any payment obligation under the Loan when due in the absence of available cash at such time and, for example, intended from the outset to waive all interest as it became payable and to forgive the principal indebtedness when it became due, the Court would disregard the form of the documentation as, in effect, a sham.

[188] The second question addresses a more objective issue assuming the existence of an expectation of repayment with interest of the Loan – the reasonableness of such expectation. This question engages, among other issues, the adequacy of capitalization of a wholly-owned subsidiary and the debt capacity of the subsidiary. If USSC were only nominally capitalized, this might be relatively easy to disprove. In this proceeding, as in most cases, however, this issue will involve, among other things, expert evidence regarding the availability of financing in capital markets generally.

[189] It is important for present purposes to note that, given that the burden of proof rests with the party asserting that a purported loan is, in substance, a capital contribution, the onus lies on the Objecting Parties, as the parties seeking to re-characterize the Loans as equity, to demonstrate that there was no reasonable basis for USS's expectations. There are good policy reasons for such a standard.

[190] Any determination of the reasonableness of a lender's expectations at the time of the making of a loan, or an advance under a loan, is prospective in nature and therefore highly speculative. It necessarily involves consideration of a borrower's financial capacity under a variety of possible future economic scenarios. A court should be cautious in reaching a conclusion that there was no reasonable expectation in the absence of a detailed consideration of such scenarios and compelling evidence that there was no basis for the lender's expectations under any of such scenarios. In addition, a determination that a lender acting in good faith nevertheless had no reasonable basis for believing that its subsidiary had the financial capacity to generate cash flow sufficient to pay interest and repay principal over the term of the loan will inevitably rely heavily on the opinion of financial experts. Any expert opinion on such an issue, however, is at least as much a matter of judgment as it is of fact, except perhaps in exceptional circumstances. Accordingly, a court must have a very high degree of confidence in any such expert financial evidence before it finds that a lender acting in good faith nevertheless had no

reasonable basis for believing that its subsidiary had the financial capacity to generate cash flow sufficient to pay interest and repay principal over the term of the loan.

[191] Given the foregoing considerations, I conclude that, in order to find that the USS Debt Claims are "equity claims", the Court must be satisfied that either: (1) at the time of making an advance under the Term Loan or the Revolver Loan, USS did not believe that USSC would be able to repay such advance with interest out of USSC's cash flows over the term of the Term Loan or the Revolver Loan, as applicable; or (2) that, at the time of such advance, there was no reasonable basis on which USS could have expected USSC to generate cash flow sufficient to pay interest on, and repay the principal of, such advance over the term of the Term Loan and the Revolver Loan, as the case may be.

[192] Three related principles are also important for the analysis of the character of the USS Debt Claims.

[193] First, while the Term Loan and later the Revolver Loan constituted a significant part of USS' investment in USSC, the Loans do not represent all of that investment. As described above, USS has also made a significant investment that has been expressly treated as equity. This distinction is important. In this proceeding, the issue is limited to the characterization of the debt component of that investment. Clearly, the return on the equity portion of USS' investment will be dependent on the residual cash flow from USSC after payment of trade creditors as well as repayment with interest of the Term Loan and the Revolver Loan. However, the fact that these Loans form part of USS' total investment in USSC does not automatically mean that USS' expectation of repayment of these Loans is the same as its expectation of receiving a return on its equity investment.

[194] A parent corporation is able to divide its investment in an acquired corporation between debt and equity as it chooses. Such allocation of its investment is not determinative for the reasons discussed above. However, equally, such allocation must be respected unless it is demonstrated that the parent corporation did not have a reasonable expectation of repayment with interest of the portion of the investment which has been treated as debt when the loan was advanced. There is no basis in the CCAA for an automatic re-characterization into equity of a portion of an investment that has been structured as debt merely because the entire investment is, in a general sense, dependent for a return on the success of the investment. Put another way, a parent corporation can loan money to a wholly-owned subsidiary without that loan being treated automatically as part of the parent corporation's equity investment in the subsidiary.

[195] Second, the characterization of the USS Debt Claims must be analysed as of the date of the advances under each of the Term Loan and the Revolver Loan. Subsequent behaviour of either or both of the parties to the Term Loan Agreement or the Revolver Loan Agreement may be relevant, but only to the extent that such behaviour illuminates the intentions of the parties regarding the Term Loan or the Revolver Loan as of the date of the advances thereunder. Behaviour subsequent to any advance cannot, on its own, justify a re-characterization of such advance.

[196] Third, the characterization of the advances under each of the Term Loan and the Revolver Loan cannot be viewed in isolation from the economic circumstances in which the advances were made.

[197] In this respect, the economic backdrop to the advances under the Term Loan and the Revolver Loan during the period 2008 to 2013 can be summarized as follows. The advances under the Term Loan between October 31, 2007 and December 31, 2007 were made in the context of a buoyant steel market. Economic conditions changed dramatically in the autumn of 2008 after the collapse of Lehman Brothers and the onset of the financial crisis in that year. Worsening conditions prevailed throughout 2009 and into early 2010. Thereafter, in each of 2010, 2011 and 2012, USS and USSC experienced mini-cycles consisting of one or two encouraging quarters succeeded by a weak performance for the remainder of these years. In 2013, USS and USSC experienced a weak market throughout the year with the result that matters reached a critical stage. Under a new chief executive officer and a new chief financial officer, who assumed their offices effective September 1, 2013, USS commenced a review of its operations which revealed, among other difficulties, that while USSC represented 10% of USS' revenues, it contributed 50% of its operating losses.

General Considerations Regarding Determination of the Debt Re-characterization Issues

[198] Although the exercise of evaluation of the character of the Term Loan and the Revolver Loan ultimately requires a consideration of each of the advances individually, the issue is best addressed initially on a collective basis. As the Objecting Parties suggested, consideration of the characterization of the Term Loan and the Revolver Loan together recognizes, or perhaps more appropriately starts, from the position that the Term Loan and the Revolver Loan were used and administered by USS in the same manner and that the difference in their terms principally reflected tax and accounting considerations rather than any significant substantive difference in function. In this section, I propose to consider the probative value of the factors upon which the Objecting Parties principally rely as evidence that the Term Loan and the Revolver Loan were, in substance, equity contributions by USS to USSC.

[199] The Objecting Parties identified the following principal considerations or factors which, in their view, demonstrated that advances under the Term Loan and the Revolver Loan were equity contributions rather than loans for USSC: (1) the absence of any arm's length negotiation regarding the terms and conditions of the Loans; (2) the deferred interest payment dates and the long maturity dates of both the Term Loan and the Revolver Loan; (3) the history of interest payments and waivers under the Term Loan; (4) the absence of any security; (5) the extent of USS' control over the business, operations and financial performance of USSC; (6) the fact, as acknowledged by USS, that USSC would not have been able to obtain financing from a third-party bank or institutional lender in the amount and on the terms and conditions of either of the Term Loan or the Revolver Loan; and (7) their view that payments on account of the Term Loan and the Revolver Loan were effectively subordinated to payment of trade creditors.

[200] The Objecting Parties argue that, collectively, these considerations establish that USS had no expectation of repayment with interest of the advances under the Term Loan and the Revolver Loan out of cash flow from USSC. They say these factors demonstrate that, in substance, the Term Loan and the Revolver Loan were financial instruments under which USS was intended to receive the residual cash flow and assets of USSC as, and to the extent, available without an expectation of repayment with interest of either Loan, and were therefore capital contributions.

[201] Significantly, the Objecting Parties argue that each of the foregoing factors has probative value when measured against the standard of behavior that would be expected of a third-party lender. As mentioned above, this position reflects the approach in the Finnerty Report. USS argues that such a standard is inappropriate and, accordingly, that the factors upon which the Objecting Parties rely are not indicative of "equity interests".

[202] I propose to assess the submissions of the Objecting Parties respecting these general considerations in the following order. First, I will address in greater detail my understanding of the purposes and the administration of the Term Loan and the Revolver Loan. Then, I propose to address the issue of the significance of third-party lender behaviour in the context of a wholly-owned subsidiary relationship. Lastly, I will consider the probative value of the principal considerations relied upon by the Objecting Parties in light of the conclusions regarding the third-party lender standard.

The Purposes and Administration of the Term Loan and the Revolver Loan and the Differing Perspectives of the Parties

[203] As mentioned, USS established the Term Loan, and subsequently the Revolver Loan, with the intention that they would be the principal vehicles by which cash flows could be moved between USS and USSC and, in particular, surplus cash in USSC could be repatriated to USS. Additional equity injections were also made from time to time by USS, but only to the extent that USSC required additional capital to stay onside the "thin capitalization" rules under the *Income Tax Act* and for the purposes of the "de-leveraging" exercise described above.

[204] The initial advances of the Term Loan were directed to ABULC for the purpose of the Acquisition. Subsequent advances prior to and including December 31, 2007 were used by USS to repay the Credit Corp Loan, repay USSC's liabilities to SHC and, in a lesser amount, for working capital purposes. The advances in 2009 totaling $211.2 million were also used for working capital purposes. A substantial portion of the interest under the Term Loan in 2008 was paid in that year, two years before its due date. Such interest was paid out of surplus cash on hand as a result of the strong financial performance of USSC in 2008 prior to the slowdown that began in the fourth quarter of that year.

[205] USS then established the Revolver Loan in 2010 as a more tax-efficient means of moving cash between USS and USSC after withholding tax was eliminated on interest payments from USSC to USS, permitting tax-free interest payments from USSC to Credit Corp, which was an American corporation. For that reason, the Revolver Loan was denominated in U.S. dollars. Prior to the "de-leveraging" exercise in 2013, the outstanding balance under the Revolver Loan slightly exceeded the maximum availability of U.S. $500 million. In 2013, payments of principal and interest totaling approximately U.S. $390 million, that were funded out of equity injections aggregating over U.S. $680 million, reduced the outstanding balance to the amount of the First Tranche Indebtedness.

[206] In order to maximize its flexibility for such cash management purposes, USS structured both the Term Loan and the Revolver Loan to provide for the most generous maturity dates and interest payment dates possible given constraints imposed by tax legislation. Further, both the Term Loan Agreement and the Revolver Loan Agreement contained minimal representations and warranties and very basic events of default. In addition, until the Second Revolver Amendment,

both the Term Loan and the Revolver Loan were unsecured facilities. The Second Revolver Amendment in January 2013 provided for security on iron-ore pellets pursuant to the Security Agreement for the principal, if not the sole, purpose of maintaining the intended tax treatment for payments in respect of the Revolver Loan, given the interest waivers granted under the Term Loan in 2010, 2011 and 2012. As mentioned, with the arrival of a new chief financial officer effective as of September 1, 2013, USS began to evaluate its investment in USSC more closely. As of the end of October 2013, USS determined that it would only advance funds to USSC that it believed USSC would be able to repay. As a result, all subsequent advances were secured under the October Security Agreement and the November Security Agreement.

[207] There is, however, no suggestion that USS and USSC disregarded the debt character of the Term Loan and the Revolver Loan in moving cash between USSC and USS. Accordingly, all advances under the Term Loan and the Revolver Loan were documented as such and were distinguished, both in terms of documentation and accounting, from equity injections. All interest payments on the Loans were similarly documented by both parties and treated accordingly for tax and accounting purposes. Principal payments were similarly documented by both parties. There is no evidence that the payments made in respect of the Term Loan or the Revolver Loan failed to satisfy the requirements under Canadian and American tax legislation for treatment as debt and, in particular, that any payments were deemed to be dividends.

[208] On the other hand, there is no doubt that the Term Loan and the Revolver Loan were provided by USS to USSC on terms and conditions that USSC could not have obtained from third party banks and other non-bank institutional providers of term financing and operating credit facilities. In particular, the payment provisions respecting interest and principal, and the absence of security, would not have been available to USSC.

[209] USS says that both the documentation and the manner of administration of the Loans reflect debt obligations. USS says that there is nothing in the cash management arrangements described above between a parent and a wholly-owned subsidiary that can justify re-characterization of the Loans as capital contributions for the purposes of the CCAA. In particular, USS argues that nothing in these financing arrangements suggests that it did not expect to receive repayment with interest of the funds advanced under the Loans. It also says that the fact that the Term Loan and the Revolver Loan were provided to USSC on terms that were not available to USSC from third parties is irrelevant.

[210] The Objecting Parties argue that USS established and administered the Term Loan and the Revolver Loan in the manner of, and using its rights as, a shareholder rather than a lender. They say that USS' actions are collectively more consistent with an intention to receive the residual cash flow and assets of USSC, as and when available, without any expectation of repayment with interest of the advances under the Loans. A more precise expression of their position is that the Term Loan Agreement and the Revolving Loan Agreement reflect arrangements under which USS intended at all times to return excess cash to USS when available and to write off the principal or interest in respect of the Loans to the extent that payments were due and sufficient cash was not available. I have excerpted below certain passages from the written submissions of the Union and the Province that I think capture the essential approach of these parties and which also assist in clarifying the positions of these parties.

The Relevance of the Third-Party Lender Standard

[211] Clearly, a significant fact in this proceeding is that, at all relevant times, ABULC and USSC, as applicable, were wholly-owned subsidiaries of USS. In addition, unlike many parent-subsidiary relationships in which the subsidiary carries on a business independently of the parent, USSC was very closely integrated into the business of USS. After the Acquisition, all management and operational functions previously conducted by Stelco were effectively centralized within USS. USSC became a part of the North American flat-rolled steel division of USS. This relationship is significant in two related respects.

[212] The Objecting Parties argue that the USS control of USSC is an important factor in assessing whether, in substance, the Term Loan and the Revolver Loan were debt instruments or contributions to capital. They say that USS had a significant ability to influence the profitability of USSC through such control. They say that such control is, in some way, an indication of an equity contribution. I will address this below in the next section.

[213] The issue of control is also significant for present purposes as a gateway to the related issue of the relevance of a third-party lender standard as a basis for evaluation of the terms and conditions, as well as the administration, of the Term Loan and the Revolver Loan. As mentioned, USS provided financing to USSC that would not have been available to USSC from banks and other institutional lenders. The Objecting Parties place great weight on this factor as demonstrating that the Term Loan and the Revolver Loan were not real loan transactions, but rather were disguised equity contributions. Equally important, most, if not all, of the *AutoStyle* factors identified above upon which the Objecting Parties rely are informed, in whole, or in part, by a comparison of USS' actions against a standard of a typical third-party lender.

[214] The Objecting Parties suggest the Court should look to a third-party lender standard in two principal respects – in order to assess the terms and conditions of the Term Loan and the Revolver Loan and in order to assess the actions of USS and USSC in the administration of these Loans including payments thereunder. As these are significant factors in the analysis proposed by the Objecting Parties, I propose to address these two issues in some detail.

[215] It is important to recognize at the outset that there is no necessary reason why a parent corporation would act in the same manner as a third-party lender in the provision of financing facilities to its wholly-owned subsidiary. In particular, the terms and conditions of lending arrangements between a wholly-owned subsidiary and its parent will, in many if not most cases, depart from typical lending arrangements between a third-party lender and a borrower.

[216] As a practical matter, compliance with tax regulations in order to ensure favourable tax treatment will be a significant, if not the main, driver regarding these matters. In this case, USS determined the relative amounts of loans and equity injections based principally on tax considerations to the USS group of companies considered as a whole. Generally, these considerations dictated maximization of debt to obtain interest deductibility under the United States *Internal Revenue Code*, 26 U.S.C., subject to compliance with the "thin capitalization" rules under the *Income Tax Act*, which established a maximum debt/equity structure.

[217] In addition, in a wholly-owned subsidiary relationship, there is no need for extensive documentation, nor is there a need for the types of contractual protections typically found in

commercial loan agreements. Given the parent's ability to control the subsidiary's actions as its sole shareholder, there is also no need for a strict schedule of repayment of principal. Further, there is no reason why a parent corporation would enforce any rights of default that may arise in the course of a loan so long as the parent corporation believes that the subsidiary has value. Such rights are asserted only as required to protect the parent corporation in the event that a third party asserts its rights as a creditor against the subsidiary or to terminate the parent corporation's support of the subsidiary. Similarly, it is not realistic to expect that a wholly-owned subsidiary will conduct its affairs pursuant to a corporate governance structure that includes independent directors until such time as the interests of the parent corporation and the subsidiary diverge.

[218] There is nothing improper in any of the foregoing arrangements. To be clear, the Objecting Parties do not suggest that there is. They submit that a parent corporation can choose to structure its arrangements however it chooses for tax and other purposes. However, they say that such arrangements should not govern the determination of whether such loans give rise to "equity claims" for the purposes of the CCAA. On their approach, the determination of the treatment of such claims under the CCAA should be made on the basis of a different test than that which satisfied tax and other regulatory rules and regulations prior to an insolvency.

[219] The dispute between the parties, and a principal issue on this motion, is therefore whether there are any consequences, in the context of CCAA proceedings, to a parent corporation that has structured its investment in a wholly-owned subsidiary in the manner of the Loans, that is, in a manner that complies with all applicable tax and other regulations but is not consistent with how a third-party lender would have structured any loan facilities in favour of USSC and how any such lender would have acted in the circumstances of USSC's subsequent financial performance.

[220] A comparison of the relationship between USS and USSC against a notional relationship between USSC and a third-party lender provides a helpful clarification of certain factors that are relevant for present purposes, as is discussed below. However, I find that a comparison between the behavior of USS and the behavior of a notional third-party lender is not an appropriate test in the evaluation of whether the advances under the Term Loan and the Revolver Loan were capital contributions to USSC. I reach this conclusion for the following reasons.

[221] First, the Loans were structured, and excess cash was moved between USSC and USS, in the manner described above for legitimate business reasons and in accordance with all applicable legal requirements. There is no express authority in the CCAA for disregarding these arrangements in such an evaluation apart from the very general language in the definition of "equity claim" referring to a return of capital. In particular, there is no express authority for disregarding the business purpose of financing arrangements in the evaluation of whether loan instruments are, in substance, "equity interests" giving rise to "equity claims".

[222] Second, the Objecting Parties assert that the USS Debt Claims constitute claims for a return of capital. In the absence of any statutory definition of capital, or guidance regarding the determination of capital, for the purposes of the definition of an "equity claim", considerable weight should be given to the accounting and tax determination of capital of the debtor company in any CCAA proceedings. In this case, there is no suggestion that the Term Loan or the Revolver Loan were treated as capital for such purposes.

[223] Third, the Objecting Parties submit, as an operating principle, that the less the Term Loan and the Revolver Loan resembled financing available from a third-party lender, and the less the actions of USS in the administration of the Loans resembled those that would have been expected of a third-party lender, the more the advances under the Loans resemble equity contributions. I do not accept this principle for the reason that I do not see a necessary connection between a failure to adhere to the third-party lender standard and an absence of an expectation of repayment with interest of a loan in the circumstances where the departure from the third-party lender standard reflects a valid business purpose.

[224] I accept that there may be circumstances where the departure from a third-party lender standard may not serve any valid business purpose related to a parent-subsidiary relationship. In such circumstances, it may well be that such actions would suggest an equity contribution, that is, that the only explanation for the parent corporation's actions is that the loan transaction was in fact a capital contribution. However, that is not the case in the present circumstances. As mentioned above, the interest payment terms, the maturity dates of the Loans and the absence of a schedule for principal repayments provided USS and USSC with a certain amount of flexibility to align the payment of interest and the repayment of principal with the economic performance of USSC against the backdrop of a highly cyclical industry. In particular, it provided USSC with the ability to defer payments of interest and principal for a period of time in the event of adverse economic performance without triggering default provisions or a reversal of income expense for tax purposes.

[225] Fourth, as a related matter, the third-party lender standard ignores the very real business purposes that a parent corporation could have for departing from a third-party lender standard in the administration of financing established in favour of a wholly-owned subsidiary.

[226] The Objecting Parties submit that the less a parent corporation acts to enforce its rights in an insolvent situation in the manner that would be expected of a third-party lender, the more it demonstrates that the financing arrangements between the parent corporation and the subsidiary are in fact equity contributions rather than loans. This submission ignores the reality that a parent corporation which believes that there is value remaining in a subsidiary, even if the subsidiary is technically insolvent, will not act to enforce its security in the manner that would be expected of a third-party lender whose objective is necessarily limited to maximizing the prospects for the immediate recovery of its principal and interest. Nor would a parent corporation seek to negotiate some further benefit such as fees or additional equity in such circumstances. The subsidiary has no additional benefit to give when the parent already owns 100% of the benefit of its enterprise. Given such considerations, the actions of a parent corporation in departing from a third-party lender standard do not evidence the absence of an expectation of repayment with interest of a loan to its subsidiary when the loan was made. Moreover, in this respect, the position of the Objecting Parties contradicts the purposes of the CCAA, which should encourage efforts that seek to continue the operations of a distressed subsidiary.

[227] Fifth, more generally, the premise underlying the position of the Objecting Parties, as is demonstrated by the foregoing discussion, is that a parent corporation is acting as a shareholder to the extent that it fails to act in a manner that would be expected of a third-party lender. They express this argument by saying that, to the extent a parent corporation is not looking at a loan to its subsidiary through the lens of a third-party lender, it must be looking at the loan from the

perspective of a shareholder and, as such, in reality, the loan must be equity. In short, a parent corporation cannot wear two hats at the same time.

[228] I do not think this is correct. A parent corporation lending to its wholly-owned subsidiary can have regard to the existence of its rights as a shareholder in structuring and administering a loan to its subsidiary without ceasing to be a lender. The issue to be considered is whether the actions of the parent corporation demonstrate that it had no expectation of repayment with interest of the loan. There is no necessary connection between a parent corporation lending to a subsidiary on a basis that departs from a third-party lender standard and the absence of such an expectation.

[229] Sixth, there is also a significant issue with the definition of a third-party lender proposed as the standard by the Objecting Parties. The Objecting Parties propose the standard of a bank or an institutional lender providing unsecured term or operating facilities on the basis of their expert financial evidence regarding an appropriate proxy for the Term Loan and the Revolver Loan. This is an unduly restrictive standard given the purpose of the test for an "equity claim", which is to assist in determining whether USS had a reasonable expectation of repayment with interest at the time it extended advances under the Term Loan and the Revolver Loans. While the willingness of a third-party to lend on the terms provided by a parent corporation could support such a conclusion, the absence of third-party lender financing is not sufficient to establish that no other financing would have been available to the subsidiary on a viable basis. Where a party seeks to disprove the alleged reasonableness of an expectation of repayment of a loan with interest, or the absence of any debt capacity of a borrower, it is necessary to canvas the availability of viable financing across capital markets more broadly.

[230] Lastly, the Objecting Parties acknowledge that the standard that they propose would apply solely for purposes of proceedings under the CCAA and, perhaps, the BIA. There are three difficulties with this result.

[231] First, as mentioned, a court should give considerable weight to the characterization of payments to the extent that third parties, such as the Canadian and American tax authorities, have accepted the treatment of such payments in the past in the absence of any express authority in the CCAA to do otherwise. In this case, there is a history of characterization of payments consistent with loan transactions that includes not only the loan documentation but also interest payments, principal repayments and interest waivers under the Term Loan. There is no evidence that either the Canadian or the American tax authorities have raised any issue with the treatment of any such payments for tax purposes.

[232] Second, while tax treatment cannot be determinative, these tax regimes represent another third-party standard that has some independent validity in evaluating the substantive reality of loan instruments.

[233] Third, as a policy matter, I see no policy benefit in having separate rules in the tax and accounting domain, on the one hand, and in the CCAA domain on the other. It is important for stakeholders in a corporation to have rules that yield reasonable certainty for planning purposes. A consequence of the approach proposed by the Objecting Parties would be that a parent corporation seeking such certainty in respect of the treatment of a loan to its subsidiary would have to limit its financing arrangements to those which an independent consultant considers to be

comparable to financing facilities that would be provided by a notional third-party lender. There are a number of difficulties with this approach from a policy perspective for which there is no obvious corresponding benefit. The principal difficulty is the overriding of valid business purposes by the imposition of a restrictive standard for the purposes of any future CCAA proceedings. In addition, there would be additional costs associated with such a policy, a need for updates as advances are made over time in changing market conditions, and a potentially inefficient limitation of financing options from a financial perspective.

[234] Based on the foregoing considerations, I am not persuaded that the third-party lender standard proposed by the Objecting Parties, and which underlies many of the specific factors upon which the Objecting Parties rely, is appropriate in the present context for determining whether the Loans were, in substance, capital contributions. This conclusion has the following implications in respect of the manner in which the factors identified above are to be applied in the evaluation of the Term Loan and the Revolver Loan as debt obligations or capital contributions.

[235] First, with respect to factors (1) to (4), such factors are relevant to the issue of the expectations of USS at the time of advances under the Loans. However, these considerations must be evaluated in terms of what they indicate about the expectations of USS without regard to any comparison with any notional third-party lender. In other words, it is not a relevant consideration in determining whether USS had an expectation of repayment with interest that a notional third-party lender would not have provided financing arrangements to USSC having these features.

[236] Second, the fact that a notional third-party lender would not have extended financing facilities to USSC on the terms and conditions of the Term Loan and the Revolver Loan is also not determinative of whether USSC had the debt capacity to service the advances under the Term Loan and under the Revolver Loan when they were made. It is therefore not determinative of the reasonableness of USS' expectation of repayment with interest of the Loan.

[237] The foregoing conclusion does not, however, foreclose entirely the relevance of the availability of financing from independent sources. As discussed above, I accept that a test based on the availability of financing from an external source of financing, not limited to a third-party lender, could be a means of evaluating the debt capacity of a wholly-owned subsidiary. Framed in such terms, such a test would bear on the reasonableness of a parent corporation's expectations of repayment of the principal with interest of a particular loan or advance based on the debt-capacity of the subsidiary. However, there is no reason to narrow consideration of such debt capacity to the availability of third-party lender financing, unless the evidence clearly establishes that no other financing facilities would have been available to the subsidiary had it sought external financing.

[238] Third, in the analysis below, I do not accord any significant weight to the test suggested by the Objecting Parties – that the less the Term Loan and the Revolver Loan reflect the characteristics of a third party loan from a bank or other institutional lender, the more such Loans resemble equity. In my opinion, to the extent that such Loans depart from the third-party lender standard for reasons that have a legitimate business purpose that is related to the wholly-owned subsidiary relationship or its business, the Court cannot disregard the legitimacy of such arrangements in its analysis. Given a legitimate business purpose for departing from the

standard of behavior of a third-party lender, there is no necessary reason why a parent corporation could not also have had an expectation of repayment with interest of any loan advance at the time of such advance notwithstanding that it did not act in the same manner as a third-party lender. As discussed above, there is no necessary reason why a parent corporation cannot be both a lender and a shareholder even if, as a lender, it does not conform in all respects to the standard of a third-party lender.

Analysis of the Principal Considerations Relied Upon by the Objecting Parties

[239] I turn then to a consideration of the probative value of the general factors relied upon by the Objecting Parties in the analyses below of the Term Loan and the Revolver Loan. As set out above, the Objecting Parties say that the Term Loan Agreement and the Revolver Loan Agreement reflect arrangements under which USS intended at all times to return excess cash to USS when available and to write off the principal or interest in respect of the Loans to the extent that payments of either were due and sufficient cash was not available.

[240] In this section, I will address, in order, the extent to which the seven principal factors relied upon by the Objecting Parties are of assistance in the analysis of the Term Loan and the Revolver Loan in light of the conclusions reached above. The seven principal factors are the following: (1) the absence of any arm's length negotiation regarding the terms and conditions of the Term Loan or the Revolver Loan; (2) the deferred interest payment dates and the long maturity dates of both the Term Loan and the Revolver Loan; (3) the history of interest payments and waivers under the Term Loan; (4) the absence of any security; (5) the extent of USS' control over the business operations and financial performance of USSC; (6) the fact, as acknowledged by USS, that USSC would not have been able to obtain financing from a third-party bank or institutional lender in the amount and on the terms and conditions of either the Term Loan or the Revolver Loan; and (7) the view of the Objecting Parties that payments on account of the Term Loan and the Revolver Loan were effectively subordinated to payment of trade creditors.

[241] First, the Objecting Parties suggest that the lack of any negotiation between USS and ABULC regarding the Term Loan, and the absence of any substantive negotiations between USS and USSC regarding the Revolver Loan, suggest that the advances under the Loans were in the nature of equity injections rather than *bona fide* debt. I do not consider these circumstances to be of any value in addressing the issues on this motion. The limited negotiations between these parties is a reflection of the wholly-owned subsidiary relationship that is the starting point for such issues, but it is a neutral fact that does not bear in any way on the reasonableness of the expectations of USS regarding repayment with interest of the advances under the Term Loan and the Revolver Loan.

[242] Second, the Objecting Parties submit that the two-year interest payment provision in the Term Loan and the Revolver Loan, and the lengthy maturity dates for the Loans, suggest these arrangements were capital contributions. However, the terms and conditions of the Term Loan and the Revolver Loan make express provision for the payment of interest on fixed dates and the repayment of principal by a fixed maturity date. While these terms were acknowledged to be generous, the fact remains that each Loan fixed the maximum amount payable thereunder as interest and principal and provided fixed dates for the payment of accruing interest and the repayment of the principal amount of the Loans. In particular, the interest payment dates were time-limited. Setting aside any comparison with the terms expected in third-party lender

arrangements for the reasons set out above, there is nothing in the terms of the Loans, on their own, that would support an inference that USS did not expect to receive repayment with interest of all advances made under the Loans. In particular, the existence of a long maturity date and the absence of a schedule of repayments is not a basis for inferring that USS did not expect USSC to repay the Term Loan. The Term Loan did not prevent earlier repayment of principal. In addition, USS was in a position to require USSC to repay principal without a contractual schedule of repayments.

[243] Accordingly, on their face, neither the Term Loan nor the Revolver Loan is more consistent with receipt of the residual cash flow and assets of USSC as the Objecting Parties suggest. Any such inference must be based on the actions of USS and USSC in the administration of the Loans.

[244] Third, accordingly, the Objecting Parties argue that the Court should infer from the manner in which interest payments were treated under the Term Loan that the Loans were intended to be capital contributions rather than debt, i.e., that there was never any expectation of repayment with interest of the Loans. There are two aspects of the interest payment history in respect of the Term Loan that will be addressed separately – the accelerated payment of interest in 2008 and the interest waivers commencing in 2010.

[245] The Objecting Parties argue that the acceleration of the interest payments under the Term Loan in 2008 evidences an intention to treat the Term Loan as a capital contribution. In making this argument, the Objecting Parties rely on the testimony of Dr. Finnerty who suggested that the payment of interest under the Term Loan in 2008 ahead of the due date in 2010 exhibited behavior that was more characteristic of the payment of dividends rather than interest.

[246] I accept that it is possible that the payment of interest could resemble a dividend in circumstances in which there is no reasonable explanation for the timing or amount of payments made outside the provisions of a loan agreement, for example, a payment in excess of accrued interest by way of an alleged pre-payment of interest. However, where the timing of interest payments is consistent with a legitimate business purpose and in accordance with the provisions of a loan agreement, the Court cannot disregard such circumstances in assessing the expectations of the parent corporation regarding the loan.

[247] In this case, the Term Loan permitted, but did not require, a deferral of interest payments for a period of time. The argument based on Dr. Finnerty's evidence proceeds on the unrealistic premise that, given such a provision in a loan agreement, a subsidiary would not pay interest to its parent corporation until the end of the permitted interest deferral period even if an earlier payment would be more efficient financially. In other words, the argument relies on a third-party lender standard which is rejected for the reasons discussed above. More generally, where there is a legitimate business reason for the flexibility provided in the loan agreement, I do not see any necessary connection between the availment of that flexibility and either the characterization of the payment as a dividend or the expectation of the parent corporation regarding repayment of the loan with interest.

[248] In the present circumstances, the accelerated interest payments reflected very favourable financial results of USSC during the first three quarters of 2008. There was no legitimate reason for USSC to defer payment of interest, which was compounding while outstanding, to the

interest payment date if it had cash available for such purpose. The Term Loan Agreement permitted a deferral of interest payments for a period of time to accommodate an adverse financial performance from time to time. However, it did not require such a deferral in the event of a favourable economic performance. The presence of this provision does not evidence an intention of USS and USSC that USSC would hold on to excess cash at its own cost in such circumstances.

[249] Accordingly, I am not persuaded that the acceleration of interest payments in 2008 is indicative of an intention on the part of USS to treat the Term Loan as a capital contribution rather than as a debt obligation.

[250] The Objecting Parties also argue that the interest payment waivers granted in favour of USSC commencing in 2010 evidence the absence of any expectation of repayment with interest of the Term Loan. Insofar as the Objecting Parties urge the Court to draw such an inference from the existence of the interest waivers without having regard to a third-party lender standard, this issue is addressed later in these Reasons.

[251] I note, however, that Dr. Finnerty's opinion was based on a somewhat different approach. He suggested that, from the perspective of financial economics, USS' actions in respect of the interest waivers reflected the behavior of a shareholder rather than a lender. The position of Dr. Finnerty and the Objecting Parties is that, in the circumstances of non-payment of interest, third-party lenders will obtain some value in negotiations with borrowers as a condition of granting such waivers. As evidence of an equity interest, they point to the absence of any enforcement proceedings on the part of USS to protect its interest as a lender, and of any negotiations to obtain a *quid pro quo* for, in particular, the grant of such waivers of interest.

[252] Given the finding above regarding the appropriateness of the third-party lender standard, the Court does not draw any inference from the absence of any enforcement proceedings or other actions on the part of USS in respect of the interest waivers. In this case, the application of such a standard also reflects an unrealistic premise upon which the argument for equity treatment is based. As mentioned above, in wholly-owned situations, enforcement proceedings are counter-productive so long as the parent corporation believes the subsidiary still has value. It is also axiomatic that the subsidiary cannot give the parent any additional value as a *quid pro quo* for obtaining a waiver of its interest obligations since the parent already owns all of the subsidiary's equity value. The probative value of the interest waivers is discussed further below.

[253] Fourth, the Objecting Parties submit that the absence of security for the Term Loan or the First Tranche Indebtedness is probative of the expectations of USS at the time it extended advances under the Loans. This argument also relies implicitly on a comparison with a third-party lender standard. If such a comparison is disregarded, I conclude that the absence of security is not indicative of a capital contribution for the following reasons.

[254] As discussed above, and as the history of the Revolver Loan demonstrates, as the sole shareholder of USSC, USS had no need to require security for its loans to USSC until it became concerned about the ability of USSC to repay any funds advanced to it. As such, the fact that USS required security for advances made after October 2013 is more significant as evidence of the expectations of USS in October 2013 than the absence of any security for advances made

prior to that date. In short, the Objecting Parties have not demonstrated a necessary connection between an absence of security for the Term Loan or the First Tranche Indebtedness and an absence of any expectation of repayment with interest of the Term Loan or the First Tranche Indebtedness.

[255] Moreover, the implication of the position of the Objecting Parties is that, to protect itself in possible insolvency proceedings, a sole shareholder must lend on an asset-backed basis, i.e., take security on the assets of the enterprise, to avoid characterization of its loan as equity. This cannot have been the intention of the definition of "equity claims" under the CCAA insofar as such an implication would, among other things, encourage a parent corporation to take a priority over claims of trade creditors and thereby make a restructuring of an enterprise in an insolvency situation more difficult.

[256] Fifth, for the following reasons, I am not persuaded that the extent of USS' control of USSC is a factor to be taken into account in assessing whether the Term Loan and the Revolver Loan were, in substance, equity contributions by USS.

[257] As a polar case, I accept that there may be circumstances in which a parent corporation's expectation from the outset is that it will sacrifice a subsidiary's profitability over the long-term for the benefit of the consolidated enterprise. In such circumstances, a court could find that the parent corporation had no intention of causing the subsidiary to repay with interest any financing extended to the subsidiary or, more precisely, no expectation that the subsidiary would generate sufficient cash flow to enable it to make such payments based on the parent's anticipated business plan for it. In such circumstances, a court could also find that the entire amount of the financing extended by the parent corporation to the subsidiary was, in reality, an equity contribution.

[258] However, the Objecting Parties have expressly advised the Court that they do not take that position in this proceeding. In any event, the evidence is not sufficient to justify such a conclusion in the present circumstances. In particular, among other considerations, the history of the Term Loan and the Revolver Loan is too short, and the impact on the entire USS business of the recessionary environment after late 2008 was too significant, to enable the Court to draw such a conclusion.

[259] This leaves the question of whether control of a wholly-owned subsidiary that does not go so far as to render the profitability of the subsidiary a matter entirely in the sole discretion of the parent corporation can constitute a consideration to be taken into account in the analysis of whether loans made by the parent corporation are debt or are, instead, equity contributions. I accept that such control requires a court to take a "good hard look" at the substantive reality of any such loans, in this case being the advances under the Term Loan and the Revolver Loan. Beyond that, however, in this case, I think that USS' control is the point of departure, rather than an independent factor, for the following reasons.

[260] First, and foremost, as mentioned, there is no overriding authority in the CCAA to disregard entirely the manner in which parties, including related parties, have structured their affairs. As set out above, I think a court must give effect to such structure unless and until, in the case of a loan from a parent corporation to a subsidiary, there is other evidence establishing that the parent did not reasonably expect to receive repayment of the loan with interest at the time of

the making of the loan. In other words, the existence of control is not a basis for such an inference on its own.

[261] Second, the submission of the Objecting Parties that USS' control is an independent factor demonstrating an equity contribution proceeds on the basis of a distinction between a lender's rights and a shareholder's rights that is untenable in the present circumstances. The Objecting Parties argue, in effect, that USS acted in its capacity as a shareholder, rather than as a lender, in causing USSC to repay monies to it and, therefore, such payments should be treated as dividends.

[262] This argument is based on a false dichotomy. No lender has a right to compel the repayment of principal or the payment of interest. The lender's rights are restricted to enforcement in the event of non-payment. The debtor alone decides whether to pay principal or interest. The implication of this argument is that a parent corporation must renounce its rights as a shareholder to cause payments under a loan agreement. This is not only unrealistic but also counter to the conclusion that a parent corporation can have regard to its rights as a shareholder while acting as a lender. Accordingly, the fact that USS instructed USSC with respect to the payments to be made cannot on that account result in a characterization of such payments as dividends, or of the Loans as capital contributions.

[263] Sixth, for the reasons set out above, I conclude that the fact that USSC could not have obtained financing from a third-party lender on the terms and in the amounts of the Loans is not an independent factor that assists in evaluating USS' expectations regarding repayment with interest of the advances under these Loans at the time that they were made.

[264] Seventh, the remaining consideration is the view of the Objecting Parties that USS effectively subordinated its position to the other creditors of USS by paying interest on the Term Loan and the Revolver Loan only after such other creditors were satisfied on an on-going basis. In doing so, the Objecting Parties say USS acted like a shareholder rather than a lender, thereby evidencing the absence of any expectation of repayment with interest of the Loans.

[265] As a factual matter, it is correct that USSC paid interest on the Term Loan and the Revolver Loan only after its arm's length creditors were satisfied on an on-going basis. From 2007 until shortly prior to the Filing Date, USS funded USSC with debt or equity in order to permit USSC to pay its trade creditors on an ongoing basis. Moreover, as mentioned, USS waived a significant amount of interest that accrued and became due under the Term Loan and made no interest payments on the remaining accrued interest.

[266] This raises the question of whether such evidence demonstrates that USS intended that the Term Loan and the Revolver Loan would be subordinated to payment of USSC's other obligations and, if so, whether such arrangements demonstrate that USS did not expect to receive repayment with interest of the Loans. There are a number of issues bound up in this argument that need to be separated.

[267] First, it is important to note that there is no suggestion that USS intended a legal subordination of its claims in respect of either the Term Loan or the Revolver Loan to claims of third party creditors of USSC. Indeed, after October 2013, all fresh advances under the Revolver Loan were secured and, therefore, ranked ahead of the trade creditors of USSC.

[268] Second, in any event, subordinated debt is not synonymous with a capital contribution. For present purposes, subordinated debt remains debt, subject to demonstration that a borrower could not have obtained subordinated debt on any basis from external sources, that is, did not have the debt capacity to obtain external financing in the amount of the Term Loan or the amount of the First Tranche Indebtedness. In such event, such evidence would cast serious doubt on a parent corporation's expectation with respect to repayment with interest of the alleged subordinated debt. As discussed below, however, there is no such evidence in the present case.

[269] Third, I am not persuaded that the actions of USS and USSC described above are properly characterized as subordination for present purposes. In the face of a significantly changed economic and financial environment described above, USS chose to defer rather than subordinate the repayment of the principal of the Loans and the payment of interest, except to the extent of the waived interest. However, USS left its options open regarding the treatment of amounts outstanding under the Term Loan in the future.

[270] Fourth, and most important, there is no evidentiary connection between the factual circumstances which the Objecting Parties describe as effective subordination of the Term Loan and the Revolver Loan and the expectation of USS regarding repayment with interest of the Loans at the time the advances were made thereunder. As described elsewhere in these Reasons, the economic circumstances commencing in 2008 established a reason for the actions that USS and USSC took subsequently which the Objecting Parties say constituted effective subordination of the Loans. There is, however, no evidence of an intention to implement such actions or, more generally, to implement a principle of effective subordination, at the time of the advances under the Loans.

[271] Accordingly, I am not persuaded that the argument of alleged effective subordination of the Term Loan and the Revolver Loan supports the position of the Objecting Parties that USS did not expect to receive repayment with interest of advances under the Term Loan or the Revolver Loan.

Analysis and Conclusions Regarding the Re-characterization Claim in Respect of the Term Loan

[272] I propose to set out my analysis of the debt re-characterization claim of the Objecting Parties with respect to the Term Loan after first setting out the position of the Objecting Parties in their written submissions. I would note that, at the trial, the Objecting Parties concentrated on a subset of these considerations which are addressed in these Reasons.

Positions of the Parties

The Union

[273] The essence of the position of the Union with respect to both the Term Loan and the Revolver Loan is captured by the two paragraphs below which are taken from the supplementary written submissions of the Union:

> Critically, USS always expected and intended that USSC's repayment of amounts owing under both the Term Loan and the Revolver Loan was contingent on USSC's performance.

> The evidence is clear that USS only expected to receive payments on account of interest and principal if and when USSC was able to make them, and not in accordance with the terms of the agreements. On discovery, Mr. Brockway's evidence was that USS "anticipated that the ability to repay that portion of the debt would be dependent on the success of Stelco's business going forward."

[274] The Objecting Parties do not merely assert that USS expected to disregard the timing requirements of the Term Loan Agreement and the Revolver Loan Agreement with respect to the movement of available cash from USSC to USS. Rather, they say that, from the outset of each of the Term Loan and the Revolver Loan, USS did not expect USSC to be able to repay the advances under such Loans, and the interest on such advances, and therefore expected to write off a significant portion of such obligations as they fell due.

[275] In its factum, the Union argues that the Term Loan should be re-characterized as equity based principally on the following seven *AutoStyle* factors: (1) the ability of USSC to obtain similar financing from outside lending institutions; (2) the source of repayments of the Term Loan; (3) the presence or absence of a fixed maturity date and schedule of payments; (4) the absence of security for advances under the Term Loan; (5) the absence of a sinking fund to provide for repayments; (6) the extent to which the advances under the Term Loan were effectively subordinated to the claims of outside creditors; and (7) the inadequacy of capitalization of ABULC at the date of the initial advance under the Term Loan.

[276] The Union also says that the lack of negotiation between USS and USSC regarding the Term Loan and the fact that the principal purpose of the initial advances under the Term Loan was the acquisition by USS of capital assets also support a finding of a contribution to capital rather than debt.

The Province

[277] The general approach of the Province with respect to both the Term Loan and the Revolver Loan is set out in the following excerpts from its factum:

> The context of the Term Loan is crucial for the characterization exercise. … Essentially, USSC operated as a division of the USS organization. This same context also applies to the Revolver….
>
> USS' attitude to the financing of USSC reflected what its attitude would be in funding one of its operating divisions – the money went where and when needed. There was no consideration or expectation that the funds would be treated other than equity – the investment would yield returns if, and only if, the business prospered. Advances were motivated by whether the global business would benefit from the allocation of resources to the facility, and not based upon any analysis of the profitability or credit-worthiness of the business unit….
>
> USS' loose approach to interest from USSC is understandable in the context of the complete control of USSC by USS discussed above. Whether USSC had the wherewithal at any point in time to pay interest was utterly dependent on the production USS assigned to it, the intercompany allocation of raw materials (and

> their cost) and USSC's personnel – all controlled by USS. Presumably, USS believed sending the money to USSC on a non-interest bearing basis allowed USS to earn a better return elsewhere in the global business.

[278] In its factum, the Province argues that the Term Loan should be re-characterized as equity based principally on the following three allegations: (i) there was no expectation that USSC would pay interest on the Term Loan advances; (ii) there was no expectation that USSC would repay the principal of the Term Loan advances; and (iii) the Term Loan was not provided by, nor available from, a third-party lender on commercial terms. I note that the first two considerations are not actually referred to in *AutoStyle*, although, as discussed above, I think that they are fundamental issues in respect of the re-characterization issue.

[279] The Province also suggested that the following four attributes of the Term Loan, which reflect factors referred to in *AutoStyle* and are included in the considerations upon which the Union relies, also demonstrate that it is, in substance, equity rather than debt: (1) the initial advances under the Term Loan were used to acquire a capital asset, being the outstanding shares of Stelco; (2) ABULC's capital structure was thinly or inadequately capitalised at the date of the Acquisition when the initial advances were made under the Term Loan, especially in light of Stelco's historical operating performance; (3) the failure to provide for security for the Term Loan; and (4) the failure to establish a sinking fund for repayment, particularly in view of the 30-year term of the Term Loan.

USS

[280] USS submits that a number of the *AutoStyle* factors considered by American courts refute, rather than support, the Objecting Parties' re-characterization argument, including: (1) the documents entered into between USS and USSC regarding the Term Loan on their face purport to evidence indebtedness and are titled "Loan Agreements"; (2) the parties intended to enter into a loan transaction; (3) the Term Loan has a fixed maturity date; (4) the Term Loan provides for a specified applicable interest rate; (5) under the Term Loan, USS has the right to enforce payment of interest and principal; (6) USS did not acquire any management control rights in exchange for the funds advanced under the Term Loan; (7) USS did not subordinate any amounts owing under the Term Loan to USSC's other creditors as a matter of law; and (8) a substantial portion of the funds advanced under the Term Loan were used to finance USSC's ongoing operations. In addition, USS relies on statements in a recent American decision, *In re Alternate Fuels Inc*., 789 F.3d 1139 (10th Cir. 2015), to the effect that the identity of interest between USS and USSC and any undercapitalization of ABULC should not be material considerations in the context of a loan from a parent to a wholly-owned subsidiary.

Analysis and Conclusions

[281] As set out above, the claim of the Objecting Parties that the Term Loan should be characterized as an "equity claim" requires addressing two matters: (1) the expectation of USS regarding repayment of principal and interest on the Term Loan out of cash flows of USSC over the term of the Term Loan; and (2) the reasonableness of such expectations. I note that, while these are discrete issues, the evidence referred to below that is relevant to the expectation of USS at the time of any particular advance can also be relevant to the reasonableness of such expectation.

[282] As described above, most of the Term Loan advances were advanced to ABULC between October 31, 2007 and December 31, 2007. However, further advances in the aggregate principal amount of $211.2 million were made in 2009. It is therefore necessary to address the characterization of the Term Loan advances in these two periods of time separately. In each case, I will address the application of the general considerations discussed above to the USS expectation regarding repayment of the Term Loan with interest and will then consider certain additional arguments of the Objecting Parties specific to the Term Loan that have not already been addressed above.

Term Loan Advances at the Time of the Acquisition

[283] The advances made to USSC in respect of the Acquisition between October 31, 2007 and December 31, 2007 have been set out above. USS says that it expected to be repaid the principal of the Term Loan outstanding at December 31, 2007 with interest over the course of the Loan, even if it could not anticipate the timing of such payments given the cyclical nature of the steel industry.

[284] USS relies principally on the evidence of Brockway with respect to the facts pertaining to its expectations at the time of the Acquisition and the initial advances under the Term Loan. Brockway testified that USS based its decision to acquire Stelco on a financial model which was created by USS internally, but was reviewed by its financial advisor in the transaction and was relied upon by the USS board of directors in connection with their decision to make the Acquisition.

[285] The financial model contemplated stable sales of flat-rolled steel that would rise 1%-2% annually, which would generate earnings before interest, taxes and depreciation ("EBITDA") estimated to be U.S. $368 million in 2008 and projected to gradually rise over the next seven years. Brockway testified that, based on this financial model, USS anticipated that the Acquisition would generate sufficient free cash flow in USSC to pay the interest provided for under the Term Loan and to repay the principal over the 30-year term of the Term Loan. The financial model also included a discounted cash flow analysis. The extent to which this analysis is also supportive of the USS expectation is unclear. However, there is no evidence regarding this financial model that contradicts USS's expectation of repayment of the Term Loan with interest.

[286] The Objecting Parties do not dispute that USS made its decision to acquire USSC based on the financial model described above. However, the Objecting Parties argue that the constellation of factors described above pertaining to the terms of the Term Loan Agreement, and the manner in which USS administered the Term Loan, demonstrate that USS did not expect to be repaid the principal with interest of the initial advances under the Term Loan.

Did USS Expect to be Repaid the Term Loan With Interest?

[287] I do not propose to revisit the considerations that have been excluded for the reasons set out in the preceding section, including, in particular, the considerations that rely on a comparison with a third-party lender standard. Setting those considerations aside, the position of the Objecting Parties is based primarily on the following remaining factors which will be evaluated without regard to a third-party lender standard: (1) the terms of the Term Loan Agreement, in

particular the deferred interest payment dates and the length of the term of the Term Loan; (2) the acceleration of interest payments in 2008; (3) the waivers of interest commencing in 2010; and (4) the view of the Objecting Parties that USS effectively subordinated payments on the Term Loan to payment of USSC's trade creditors. The Objecting Parties argue that, even considered without regard to the third-party lender standard, these factors, particularly the actions of USS after the advances were made, evidence the fact that USS did not expect to receive repayment of the principal with interest of the Term Loan. I will address each of these factors in turn and will then address the probative value of these factors considered collectively.

[288] First, as mentioned, the Term Loan Agreement provided USSC and USS with considerable latitude regarding the timing of both the payment of interest and the repayment of principal. There was a legitimate business reason for these terms of the Loans. They provided USS with some, but not complete, flexibility to align the payment of interest with the receipt of excess cash flow in a highly cyclical industry. They also provided a lengthy period of time over which to repay the Loans for the same reason. These terms were permissible under applicable tax legislation without losing the tax treatment for debt. For the reasons set out above, I do not think that the terms of the Term Loan Agreement, by themselves, are more consistent with a re-characterization of the Term Loan as a capital contribution. The mere existence of provisions providing flexibility in the timing of payment of interest and repayment of principal is not a basis for inferring that USS did not expect to receive repayment with interest of the Term Loan without further evidence at the time of the initial advances. There is no such evidence in this case. In particular, as noted above, there is no evidence regarding the financial model that establishes, on a balance of probabilities, that repayment of the Term Loan was not a realistic possibility over the life of the Loan.

[289] Second, the Objecting Parties suggest that the acceleration of interest payments in 2008 supports a finding that the payments were, in substance, dividend payments. For the reasons set out in the preceding section, I do not think that the two interest payments made in late 2008 are more properly characterized as dividends based on a third-party lender standard. I also do not think that the action of causing such payments in advance of their respective payment dates is, on its own, indicative of treatment of the Term Loan as a capital contribution. More generally, in the absence of any documentary or other evidence at the time of the payments suggesting otherwise, the fact that the payments were characterized as interest payments, that the payments did not exceed the amount of the accrued interest at the time, that the payments were permitted under the Term Loan Agreement, and that there was a legitimate business purpose for making interest payments in advance of their due date should be determinative.

[290] Third, the Objecting Parties' reliance on the interest waivers and failure to repay any interest in the seven years between the initial advances under the Term Loan and the Filing Date is understandable. It raises a legitimate question of whether USS ever intended USSC to pay principal or interest on the Term Loan, that is, whether it ever expected to be paid interest and/or repaid principal.

[291] There is some force to this argument in one respect. Insofar as USS waived, rather than continued to accrue, unpaid interest, it appears to have acted as a shareholder rather than a lender. The evidence before the Court established that it was not economic for USS to "round-trip" the payment of interest by USSC under the Term Loan. This explains why USS did not fund USSC to enable it to pay the accrued interest. However, it does not explain why it was

appropriate to write off the interest that was waived in each of the relevant years, much less why only a portion of the interest was written off. Moreover, based on an internal email dated March 29, 2011 of USS, it is possible that, in or about late 2010 or early 2011, USS decided on a policy of waiving at least some interest at the end of each year to the extent USS was not in a position to pay the accrued interest payable in such year.

[292] However, the Objecting Parties suggest that the Court should infer from the interest waivers that USS did not expect to receive repayment with interest of the Term Loan at the time of the initial advances under the Term Loan. In the preceding section, I addressed the argument of Dr. Finnerty that the Court should draw such an inference from USS' failure to assert its rights as a lender in respect of the interest payment defaults that gave rise to the interest waivers. In this section, I address the alternative argument of the Objecting Parties that the granting of the interest waivers by themselves is sufficient to support the inference that USS never expected to receive repayment of the Term Loan with interest at the time that the initial advances were extended thereunder.

[293] I do not think a court can reasonably draw such inferences for a number of reasons. First, and most important, there is no other evidence supporting such an expectation at the time of the establishment of the Term Loan and the making of the initial advances under the Loan. Second, the payment of interest under the Term Loan in 2008 is inconsistent with an absence of any expectation of payment of interest from the outset of the Term Loan. Third, the intervening economic events are sufficient to establish radically different economic conditions which support the USS position of altered expectations. There is no evidence that USS contemplated the possibility of a recession of the depth and length experienced in the steel market since 2008 even though it put in place flexibility regarding interest payments and a long maturity date as discussed above. Fourth, notwithstanding the waivers in 2011, 2012 and 2013, there is no evidence that such repeated waivers of interest reflected a long-term policy of USS that existed from the outset of the Term Loan.

[294] Accordingly, the significant facts for this purpose are the lengthy period after the initial advances before the initial decision was made to waive interest coupled with the intervening occurrence of significantly adverse market conditions. These factors, together with the absence of any documentation or other evidence to the contrary at the time of the initial advances under the Term Loan, exclude an intention at the time of such advances to waive interest as and when it became payable under the terms of the Term Loan Agreement.

[295] Lastly, with respect to the argument of subordination, I have concluded for the reasons set out above that the evidence regarding the alleged effective subordination of the Loan does not evidence the absence of an expectation of USS of repayment with interest of the Term Loan or the Revolver Loan, except to the extent of the waived interest which has been addressed above. I would add that I do not consider that the evidence of Brockway, discussed below, constitutes evidence that USS implemented a policy of subordination of the Term Loan to trade creditors from the time of the initial advances as the Objecting Parties suggest.

[296] The Objecting Parties have raised one further argument that should be addressed pertaining to the use of the initial advances under the Term Loan. They suggest that both the use of the advances under the Term Loan to acquire capital assets, being the Stelco shares and other Stelco securities, and the circumstances surrounding the SHC Transaction, argue for a finding

that the Term Loan constituted, in substance, a contribution to capital. I do not accept either submission for the following reasons.

[297] With respect to the significance of the acquisition of the Stelco shares and other securities, the Objecting Parties say that such use of the initial advances under the Term Loan demonstrates that the primary intention of USS was the acquisition of Stelco rather than the establishment of a debtor-creditor relationship between Canada LP and ABULC.

[298] This argument presumes that the purpose of debt is the provision of working capital and that the purpose of equity is the acquisition of capital assets. That is too narrow an approach. Term loans are regularly used to acquire capital assets and, indeed, are often secured on such capital assets in the case of third-party lenders. There is no necessary reason why the fact that advances under a term loan were used for the purpose of acquiring assets should be a consideration that demonstrates a capital contribution. In addition, as discussed above, there is no general principle that prevented USS from structuring a portion of its investment in USSC as a loan. Moreover, as described below, the portion of the Term Loan that reduced the Credit Corp Loan was effectively used to retire the third party debt of Stelco at the time of the Acquisition.

[299] With respect to the SHC Transaction, the Union argues that the fact that advances under the Term Loan were used to satisfy the Credit Corp Loan, which was incurred to refinance the Stelco debt at the USS level, is indicative of a view of the Term Loan as an equity contribution. I do not see the connection suggested by the Union.

[300] The SHC Transaction has been described above. The principal effect of the SHC Transaction was to effect a sale of SHC at its apparent fair market value by USSC and a reduction of the Credit Corp Loan in a like amount. If the SHC Transaction had not occurred, the Credit Corp Loan would have remained outstanding as of the Filing Date in the amount of such reduction and the amount of the Term Loan would have been correspondingly lower. From the point of view of the aggregate amount of outstanding debt of USSC, the SHC Transaction was therefore neutral. Moreover, the Credit Corp Loan was made for the purpose of repaying third-party debt of Stelco. To the extent that advances under the Term Loan in connection with the SHC Transaction were applied to reduce the Credit Corp Loan, such advances were therefore indirectly used to repay such third-party debt. I do not see any further significance to the SHC Transaction.

[301] It is therefore necessary to address the argument of the Objecting Parties that, while none of the foregoing factors or considerations may be sufficient on its own to support a conclusion that the Term Loan was, in substance, a capital contribution, the combination of factors should support such a conclusion. This argument effectively brings together all of the factors set out and discussed above and asserts that collectively they establish that it is more probable that USS did not expect to receive repayment with interest of the Term Loan than that USS had such an expectation.

[302] In considering this argument, I have looked more generally at which of the two scenarios proposed by the parties is more probable – the USS position that it expected to be repaid the principal with interest of the Term Loan at the time of the advances in 2007 or the Objecting Parties' position that, at the time of such advances, USS expected to receive only such cash flow and assets as were available after satisfaction of the obligations to third party creditors

and to write off the principal or interest in respect of the Term Loan when cash was not available and such obligations fell due.

[303] In addition to the factors described above, the Objecting Parties rely on the evidence of Brockway referred to above and the evidence more particularly described in certain excerpts of Brockway's discovery in these proceedings set out at pages 8 and 9 of the Union's Compendium of Key Read-in Evidence. The Union submits that these excerpts establish that USS' expectation of repayment was "contingent on USSC's performance" or was "dependent on the success of Stelco's business going forward" and that "[USS] only expected to receive interest payments if USSC was successful." I note that this argument is similar to, but separate from, the argument that USS effectively subordinated repayment of the Term Loan, and payment of interest thereon, to the payment of USSC's third party creditors.

[304] I do not think that this submission accurately captures the evidence of Brockway and, accordingly, I think that the Objecting Parties rely on an interpretation of his evidence which it was not intended to carry.

[305] There is a difference between the investment risks of USS' investment in Stelco, considered as a whole, and the risk of repayment of the portion of the investment that was structured as debt of USSC. Reading the entirety of Brockway's evidence, I am satisfied that Brockway's statement was intended to acknowledge no more than that there could be no certainty that the aggregate investment in Stelco would be profitable. Brockway acknowledged no more than that the Acquisition entailed normal investment risks and that, to the extent that USS made a bad investment, there was a risk that it had made such a bad investment that USSC would be unable to repay not only its equity investment but also the Term Loan with interest. His evidence does not, however, constitute an acknowledgement that USS believed it had made an unprofitable investment in acquiring Stelco, much less an acknowledgement that USS therefore expected that USSC would be unable to repay the Term Loan with interest.

[306] The foregoing discussion highlights the fact that, at times, the position of the Objecting Parties approaches the issue of repayment of the Term Loan as part of the larger issue of the profitability of the entire investment of USS in USSC. This is reflected in the position of the Union, as excerpted above, which proceeds on the basis that USS treated both the Loans and the equity component as a single investment. In so doing, the Objecting Parties disregard the reality that the Term Loan was expressly structured and documented separately from the equity injections in order to function in the manner described above. I do not think that the separate existence of the Term Loan can be simply ignored in the absence of an explanation or reason for treating the USS investment on an aggregate basis. In doing so, this approach conflates the issues of repayment of the Term Loan and the profitability of USS' acquisition of Stelco, which are very different. The Court is only concerned with USS' expectation of repayment with interest of the Term Loan. Even an unsuccessful investment may nevertheless repay with interest the portion of the investment structured as a loan.

[307] Further, to the extent that Brockway was also acknowledging the existence of lending risks with respect to repayment of the Term Loan, the mere existence of lending risks is not a basis for an inference that there was no expectation of repayment of the debt portion of the USS' investment in USSC. The statement that USSC would not be able to repay the Term Loan with interest unless it was profitable is, on its own, a neutral statement. There is a considerable

distance between an acknowledgement of the existence of normal lending risks and an acknowledgement that USS did not expect USSC to be able to repay the Term Loan with interest. I do not read Brockways' testimony as going to the latter statement.

[308] It is also necessary to address the position of the Province as excerpted above. The Province argues, in effect, that, having made the decision to acquire Stelco and to integrate it into the USS business as an operating division, USS paid no attention to the ability of USSC to repay the Term Loan over the thirty-year life of the Loan. It says that such action demonstrates that the Term Loan was, in effect, equity. By way of explanation for this approach, the Province suggests that USS considered the investment from a business-wide perspective. The Province suggests that USS was not concerned specifically with the profitability of USSC, and its ability to repay the Term Loan, given that USS considered that an increased profitability of other companies within the USS group would more than compensate for any losses in USSC.

[309] At the time of the initial advances under the Term Loan, USS undoubtedly intended to integrate Stelco into its business as an operating division. That fact alone, however, does not support the conclusion that USS had no expectation that USSC would be unable to repay with interest the portion of the acquisition cost that was provided to it in the form of the Term Loan. More importantly, the evidence does not support the conclusion that USS paid no attention to the ability of USSC to repay the Term Loan in the manner suggested by the Province for the following reasons.

[310] First, as Brockway noted, it is incorrect to suggest that USS made no credit analysis of USSC in connection with the initial advances under the Term Loan. The financial model, upon which the decision to acquire Stelco was based, served the function of a credit analysis even if the principal purpose of the model was to address the financial impact of the entire investment. In its projections of cash flows of the post-acquisition Stelco, the financial model provided the basis for a conclusion regarding USSC's ability to service the Term Loan. As set out below, the evidence before the Court with respect to this financial model does not demonstrate that USS did not expect to receive repayment with interest of the initial advances under the Term Loan over the life of the Loan.

[311] Second, while the financial model did anticipate the realization of substantial synergies outside of USSC, it is not suggested that the quantum of such synergies was such that they would compensate for anticipated losses in USSC. More generally, there is no evidence that USS did not anticipate recovery of the majority of its investment in the form of profits from USSC, including the portion represented by the initial advances under the Term Loan which for this purpose is notionally senior to USS' equity investment.

[312] The Brockway evidence therefore does not constitute an acknowledgement or admission of USS that it had no expectation of repayment with interest of the initial advances under the Term Loan when they were made. For the reasons set out above, I am also not persuaded by the Province's argument that USS allocated its investment in Stelco between debt and equity with no regard to USSC's ability to repay the initial advances under the Term Loan. The probative value of the other considerations upon which the Objecting Parties rely has been discussed above. The element of USS' actions which most strongly raises a doubt regarding its expectation regarding repayment of the Term Loan is the experience of the interest waivers. The Objecting Parties also rely, among other considerations, on the long maturity date, the absence of

a schedule of repayments, and the alleged effective subordination. For the reasons set out above, however, none of this evidence is sufficient on its own to support a characterization of the Term Loan advances as equity. I am also not persuaded, for the reasons discussed above, that the experience of the interest waivers, together with the other considerations upon which the Objecting Parties rely, collectively demonstrate that USS did not expect to be repaid the initial advances under the Term Loan with interest as of the time such advances were made in 2007.

[313] Accordingly, I find, on a balance of probabilities, that, at the time of the advances under the Term Loan in 2007, USS expected that USSC would repay interest on the Term Loan in accordance with the terms of the Term Loan Agreement and would repay principal on or prior to the maturity date of the Term Loan.

Was the USS Expectation Reasonable?

[314] This raises the issue of the reasonableness of the USS expectation.

[315] The Objecting Parties rely heavily on two factors which might suggest that such an expectation was unreasonable: (1) third party financing was not available to USSC on terms substantially similar to the terms of the financing provided by USS; and (2) the view of the Objecting Parties that ABULC was inadequately capitalized. I will address these issues in turn.

[316] As mentioned, the Province introduced the Hall Report as expert evidence demonstrating that a third party lender would not have provided ABULC/USSC with financing in the amount and on the terms of the Term Loan provided by USS.

[317] There is no actual dispute regarding this opinion in the Hall Report. However, for the reasons set out above, the standard addressed in the Hall Report — i.e., whether USSC could have obtained financing on the terms and in the amount of the Term Loan from a bank or other institutional lender — is too limited to establish that the USS expectation of repayment of the Term Loan was unreasonable. In this regard, it is noteworthy that both Mr. Hall and Dr. Finnerty, who relied on the Hall Report for the purpose of the opinion in the Finnerty Report on this issue, acknowledged that they were not expressing any opinion on the ability of USSC to have obtained financing other than from a third-party lender.

[318] The question remains whether the evidence regarding the ability of USSC to raise debt on a viable basis as of December 31, 2007 contradicts the reasonableness of the USS expectation. If the Objecting Parties were able to demonstrate, on a balance of probabilities, that USSC could not have obtained external financing in the amount of the Term Loan on any viable basis, I think a court could conclude that at least the excess of the Term Loan over the amount of financing that was obtainable from external sources represented an equity contribution.

[319] However, in the present circumstances, the evidence is not sufficient to establish that USSC lacked the capacity to raise an amount of debt equal to the outstanding amount of the Term Loan as of December 31, 2007, that is, that external financing would not have been available to USSC on a viable basis, although admittedly on a fully secured basis. Accordingly, the Objecting Parties cannot establish that the USS expectation in 2007 of repayment with interest of the Term Loan was unreasonable. In this regard, the following considerations are relevant.

[320] First, Stelco had total debt approximating $1.16 billion at the time of the Acquisition. As the Austin Smith Report suggests and Mr. Hall acknowledged, this would appear to put a floor on the debt capacity of USSC at the time of the Acquisition.

[321] Second, the historical financial results for Stelco (EBITDA and EBIT) prior to the Acquisition, when adjusted to remove non-recurring items, reflected an improving trend from 2006 to 2007 on a quarter-over-quarter comparison by year.

[322] Third, the outstanding balance of the Term Loan at December 31, 2007, being approximately $1.4 million including the outstanding loan from the Province, was not significantly higher than the amount of the Stelco debt prior to the Acquisition. This level of debt represented approximately 70% of the total acquisition cost to USS of Stelco. It is not inconsistent with Brockway's testimony that USS believed that the Term Loan could be repaid over the 30-year life of the Loan as Brockway suggested. It is true that the investment failed to generate the results contemplated by the USS financial model. By any estimation, in hindsight, the investment was a significant failure. However, there is no basis for retrospectively fixing USS with such knowledge at the time of the initial advances under the Term Loan.

[323] Fourth, the Hall Report bases its conclusions entirely on the historical performance of Stelco rather than on an analysis of the projected cash flow of USSC at the time of the Acquisition. However, as the Province's financial advisor in respect of the Acquisition, Ernst & Young Inc., recognized in a report dated August 22, 2007 to the Province, the Acquisition was likely to improve the financial strength of USSC relative to Stelco. The report identified a number of factors for consideration by the Province regarding the Acquisition. Purely from a cash-flow perspective, these factors would have been expected to result in an increased and more stable cash flow, other economic factors being equal. There is, therefore, a reasonable basis for concluding that the Acquisition increased USSC's debt capacity relative to Stelco's pre-Acquisition debt capacity. The fact that a third-party lender might not have been prepared to rely on USS' cash flow projections is not determinative of whether lenders in other capital markets were prepared to do so.

[324] Fifth, the limited metrics in evidence do not suggest that USSC lacked the ability to incur such external financing. As noted by Brockway, in 2007, Stelco incurred slightly less than $60 million in interest expense for the nine months ended September 30, 2007, or slightly less than $80 million on an annualized basis. The Term Loan interest for 2008 approximated $100 million, which was well within the estimated EBITDA for that year.

[325] Sixth, while the Acquisition was not a leveraged buyout transaction as that term is generally understood, USS, as a strategic purchaser, approached the purchase of Stelco with a similar philosophy and approach to capitalization, as the Austin Smith Report notes. In this regard, the financial metrics pertaining to aggregate debt and interest coverage, on a prospective basis, are consistent with leveraged buyout financing transactions in 2007 and are, therefore, suggestive of the availability of financing in the high-yield market.

[326] Given these factors, the evidence suggests a reasonable possibility of obtaining third-party financing in other capital markets, beyond the third-party lender market addressed in the Hall Report and the Finnerty Report, in particular, in the high-yield market. For the reasons discussed above, it is not relevant for present purposes that any such financing would have been

on different terms and conditions from the Term Loan. The second issue raised by the Union in its Factum is the allegedly inadequate capitalization of ABULC/USSC at the time of the initial advances under the Term Loan.

[327] Insofar as the Union says that ABULC was inadequately capitalized, I think the issue is misdirected. While it is correct that ABULC had no prior operating performance and no revenues or profits of its own, that is irrelevant. At all times, ABULC was the direct parent corporation of USSC. Its financial performance on a consolidated basis was that of USSC. Accordingly, the extent to which ABULC was or was not undercapitalized was directly dependent on the extent to which USSC was or was not undercapitalized.

[328] Insofar as the Objecting Parties say that post-Acquisition USSC was inadequately capitalized, I think this issue engages the same issue as the preceding discussion of the availability of external financing. To the extent that the evidence fails to establish that USSC could not have obtained external financing on a viable basis in the amount of the Term Loan, it cannot reasonably be argued that USSC was inadequately capitalized.

[329] Based on the foregoing, I find that the Objecting Parties have not satisfied the onus of demonstrating that the USS expectation of repayment with interest of the principal of the Term Loan as of December 31, 2007 was unreasonable.

Term Loan Advances in 2009

[330] As mentioned, in 2009, USSC received additional advances totalling $211.2 million under the Term Loan from Canada LP. No interest or principal was paid during 2009. In addition, as set out in the table above, USS provided equity injections in the amount of $61 million during 2009.

[331] The Objecting Parties do not raise any arguments regarding these advances under the Term Loan in addition to those addressed above. The relevant facts are essentially the circumstances as of December 31, 2007 carried forward, subject to the interest payments in 2008 and the occurrence of the recession in 2009. Given the history of the steel market in the period 2004 to 2008, USS had a reasonable expectation that markets would improve that justified supporting USSC in 2009 with additional working capital advances. I note as well that the first interest waiver under the Term Loan occurred subsequent to the advances in 2009.

[332] Accordingly, I see no basis for reaching a different conclusion respecting the expectation of USS regarding repayment of these advances from the conclusion reached above regarding repayment of the initial advances under the Term Loan. The evidence before the Court establishes that USS expected that USSC would repay these advances with interest for the reasons set out above. Hindsight is always 20/20. There is, however, no evidence that, as of 2009 when such advances were made, USS or USSC anticipated the negative financial performance of USSC in the period 2009 to 2013 and therefore expected that USSC would be unable to repay these advances with interest. There is also no evidence before the Court that would demonstrate that the expectation of repayment with interest of these advances under the Term Loan was unreasonable.

Conclusion Regarding Characterization of the Term Loan

[333] Based on the foregoing, I conclude that the outstanding Term Loan, being Claim #9, constitutes a debt claim rather than an "equity claim" for the purposes of this CCAA proceeding.

Analysis and Conclusions Regarding the Re-characterization Claim in Respect of the Revolver Loan

[334] I propose to set out my analysis of the debt re-characterization claim of the Objecting Parties with respect to the Revolver Loan after first setting out the position of the Objecting Parties in their written submissions. As in the case of the Term Loan, the Objecting Parties concentrated on a subset of these considerations at the trial, which are addressed in these Reasons.

Positions of the Parties

The Union

[335] The approach of the Union, as excerpted above from its written submissions, applies equally to the Term Loan and the Revolver Loan and therefore will not be repeated here. In its factum, the Union argues that the Revolver Loan should be re-characterized as equity based principally on the following seven *AutoStyle* factors: (1) the inability of USSC to obtain similar financing from outside lending institutions; (2) the source of repayments of the Revolver Loan; (3) the presence or absence of a fixed maturity date and schedule of payments; (4) the absence of security for advances under the Revolver Loan; (5) the absence of a sinking fund to provide for repayments; (6) the extent to which the advances under the Revolver Loan were effectively subordinated to the claims of outside creditors; and (7) the financial position of USSC, including an inadequate capitalization, at the date that the Revolver Loan was first put in place.

The Province

[336] The Province's approach, as excerpted above from its factum, also applies equally to the Term Loan and the Revolver Loan and therefore will not be repeated here. In its written submissions, the Province argues that the Revolver Loan should be re-characterized as equity based principally on two assertions also made in respect of the Term Loan, namely: (i) there was no expectation that USSC would repay the principal of the Revolver Loan advances; and (ii) the Revolver Loan was not provided by, nor available from, a third-party lender on commercial terms. The Province also suggests that the following three attributes of the Revolver Loan further demonstrate that it is, in substance, equity rather than debt: (1) the arrangements pertaining to interest including, in particular, determination of the interest rate based on tax requirements, the timing of interest payments in the loan agreements, and the reliance on equity injections to make interest payments under the Revolver Loan; (2) thin or inadequate capitalization of USSC at the date of the Revolver Loan Agreement and USSC's operating performance at the time; and (3) the failure to establish a sinking fund for repayment.

USS

[337] USS submits that the same *AutoStyle* factors upon which it relies in respect of the Term Loan also refute the Objecting Parties' re-characterization claim in respect of the Revolver Loan. Accordingly, I will not repeat them here.

Analysis and Conclusions

[338] The claim of the Objecting Parties that the Revolver Loan should be characterized as an "equity claim" also requires addressing the two matters discussed above: (1) the expectation of USS regarding repayment of principal with interest on the Revolver Loan out of cash flows of USS over the term of the Revolver Loan; and (2) the reasonableness of such expectation. In the case of the Revolver Loan, it is necessary to address these issues separately in respect of each of the First Tranche Indebtedness and the Second Tranche Indebtedness. Accordingly, I will deal with each Tranche in order.

The First Tranche Indebtedness

Background

[339] As set out above, the amount of the First Tranche Indebtedness outstanding as of October 31, 2013 was U.S. $116,969,996. It is understood that no payments of either principal or interest were made in respect of the First Tranche Indebtedness after October 30, 2013. The history of advances and payments under the Revolver Loan to this date is important for the determinations herein. The Monitor's Seventh Report sets out all such advances and repayments in Exhibit "O" thereto, which is briefly summarized as follows.

[340] During 2010, USSC drew a total of U.S. $100,000,000 under the Revolver Loan and made no interest payments. In 2011, USSC drew U.S. $20,000,000 in June, repaid U.S. $18,339,563 in November and drew U.S. $25,223,983 in December. In the same year, USSC paid U.S. $6,660,437 of interest in November and U.S. $223,983 of interest in December. As of December 31, 2011, the amount outstanding under the Revolver Loan was U.S. $127,155,598.

[341] In 2012, USSC obtained advances totaling U.S. $307,366,090. Advances were made in each month, other than March and April when it repaid U.S. $33,866,386 and U.S. $9,568,279, respectively, and October when there was no activity. In addition, small amounts of interest were paid in each of January, March and April, being U.S. $366,090, U.S. $1,133,614 and U.S. $431,721, respectively. At the end of December 2012, the outstanding balance of the Revolver Loan was U.S. $496,702,434, which amount was increased by a draw of U.S. $10,000,000 in early January 2013 to bring the outstanding amount to U.S. $507,750,128.

[342] As Dr. Finnerty observed, with the qualification that money is fungible, it can be argued that the payments on account of principal and interest in the aggregate amount of U.S. $25,000,000 in November 2011, and a further interest payment of U.S. $223,983 in December 2011, were funded by an equity injection in October 2011. It can also be argued that the payments on account of principal and interest in March and April 2012 were funded by an advance under the Revolver Loan in February 2012.

[343] In 2013, as described above, USS implemented a decision to "de-lever" USSC by reducing the Revolver Loan. Accordingly, principal and interest payments totaling $383,845,848 and $11,154,152, respectively, were made in each of the months of February to July 2013 inclusive. By this means, the balance outstanding at October 31, 2013, prior to the execution of the Third Revolver Amendment and the October Security Agreement, had been reduced to the level set out above, being the amount of the First Tranche Indebtedness. Applying advances and

repayments on a first-in, first-out basis, the advances outstanding under the First Tranche Indebtedness at the Filing Date were advances made in the course of 2012.

[344] It is necessary to overlay the economic performance of USS and USSC during these years. As described above, the evidence establishes that market conditions improved in the second quarter of 2010 and then weakened again in the second half of 2010. Similarly, market conditions improved in the second quarter and third quarter of each of 2011 and 2012 before weakening again in the fourth quarter of each year. Essentially, the evidence is that USS thought that the improvement in the markets in the first half of 2010 signalled the start of an improving market whereas, in retrospect, it heralded the beginning of several years of "mini-cycles" in each of 2010, 2011 and 2012. The evidence also indicates that a similar improvement did not occur in the first half of 2013.

[345] Exhibit "O" to the Monitor's Seventh Report sets out the equity injections made by USS during the period 2010 to October 2013 on a monthly basis, which is briefly summarized as follows. In 2010, USS made equity injections in each of June, July, September, October and December totaling $611,754,000. In 2011, USS made equity contributions in each of January, February, July, August, September and October totaling approximately U.S. $213 million. There were no equity injections in 2012. In 2013, as described above, in connection with its "de-leveraging" decision, USS contributed a total of $682,758,200 through equity injections in each month from February to and including September. It is not disputed that a significant portion of these equity injections in 2013 was used to pay interest owing, and to repay principal outstanding, on the Revolver Loan in connection with the "de-leveraging" exercise. A further $57,040,500 was injected in October 2013 prior to execution of the Third Revolver Amendment prompting a moratorium on further cash payments to USSC imposed by the new chief financial officer until security was provided.

Analysis and Conclusions

[346] The evidence indicates that USS established the Revolver Loan in May 2010 during a period of improvement in market conditions after the significant slowdown in business activity during the second half of 2008 and 2009. The funding under the Revolver Loan provided additional working capital required to respond to the recovery of the steel market that was anticipated at that time. As mentioned, the advances comprising the First Tranche Indebtedness were made in 2012 based on a first-in, first-out approach to advances and repayments under the Revolver Loan. Accordingly, such advances must be considered in the context of the economic environment in which they were made in 2012.

[347] USS says that it expected to be repaid all advances, with interest, when they were made under the Revolver Loan over the course of the Loan. As set out above, the principal argument of the Objecting Parties is that the terms of the Revolver Loan, as well as the manner in which the Loan was administered by USS, are more consistent with receipt of the residual cash flow and assets of the USSC, without any expectation of repayment with interest of the advances under the Revolver Loan.

[348] The Objecting Parties rely largely on the general considerations that were addressed in respect of characterization of the Term Loan. This is consistent with the fact that the Revolver Loan performed the same cash management function as the Term Loan. They also rely on certain

other considerations that are specific to the circumstances in which the First Tranche Indebtedness was advanced. These include the following matters: (1) the losses of USSC since 2009; (2) the failure of USSC to pay any interest on the Term Loan after 2009; (3) the negative equity of USSC in 2012; (4) the removal of the solvency representation from the Revolver Loan; and (5) the use of equity injections to fund repayment of the Revolver Loan pursuant to the "de-leveraging" exercise described above in 2013.

[349] I will first address the application of the general considerations that the Objecting Parties suggest demonstrate the equity character of both the Term Loan and the Revolver Loan and then the additional considerations which they raise that are specific to the Revolver Loan.

[350] As mentioned, in the period from 2010 to 2012, that is, prior to the "de-leveraging" exercise discussed below, USS administered the Revolver Loan in the same manner as it had administered the Term Loan with the exception that: (1) in each of 2011 and 2012, USSC repaid some principal and paid some accruing interest out of available cash; and (2) USSC did not waive any interest that became payable during this period. There are no additional facts in respect of the administration of the Revolver Loan that render the combined effect of the general considerations upon which the Objecting Parties rely more compelling in the context of the Revolver Loan than the Term Loan.

[351] I therefore do not think that the terms of the Revolver Loan Agreement and the manner in which USS administered the Revolver Loan are sufficient to constitute the Revolver Loan, in substance, an equity contribution. There is nothing in these circumstances, considered on their own or collectively, that casts any doubt on the evidence that USS expected USSC to repay the principal with interest of the First Tranche Indebtedness over the life of the Loan.

[352] The next issue is therefore whether the financial status of USSC in 2012, when the advances comprising the First Tranche Indebtedness were made, affects this conclusion. The Objecting Parties say that the Court should infer from the four considerations set out above, which pertain to the financial state of USSC in the latter half of 2012, that USS did not expect to receive repayment with interest of the Revolver Loan. These factors raise a legitimate issue regarding both the expectation of USS and the reasonableness of that expectation at that time. I propose to address the issue of the removal of the solvency representation first and then the remaining considerations pertaining to USSC's financial state.

[353] The Objecting Parties place considerable reliance on the agreement of USS to remove the solvency representation from the Revolver Loan Agreement in 2012 as evidence that USS could not have expected USSC to be able to repay any advances under the Revolver Loan. The solvency representation was removed by the First Revolver Amendment in July 2012 at the request of Michael McQuade, the chief financial officer of USSC at the time ("McQuade").

[354] McQuade states in his affidavit sworn September 4, 2014 that, at the time of the execution of the First Revolver Amendment, he had a concern about USSC's solvency given its losses since 2009 and its reliance on USS for on-going liquidity and solvency. He testified at the hearing of this motion that he had a concern that USSC might become insolvent at some point over the remaining thirteen-year term of the Revolver Loan.

[355] The Objecting Parties suggest the Court should draw the inference that USS was aware that USSC was insolvent in July 2012 and, from that inference, find that USS had no expectation of repayment with interest of the advances made in 2012 under the Revolver Loan. I do not think the evidence justifies such an inference or finding for the following reasons.

[356] First, there is no evidence regarding the intentions of either USS or USSC in removing the insolvency representation that supports such a finding. McQuade requested its removal. His evidence at the trial was that he approached the solvency representation as a continuing representation. McQuade's concern was prospective rather than immediate. He was concerned that USSC might breach the representation at some point in the future rather than that USSC was insolvent in July 2012. In addition, McQuade also testified that he believed that USSC had a continuing right under the Revolver Loan Agreement to draw funds as needed up to the maximum availability. It is not clear how he integrated these two apparently contradictory considerations. McQuade's view of the operation of the Revolver Loan Agreement does, however, reinforce the prospective nature of his concern. In addition, there is no evidence regarding why USS agreed to remove the solvency representation at the time.

[357] Second, it is not possible to draw any conclusion regarding the knowledge of USS and USSC from the terms of the Revolver Loan Agreement for the following reasons. As described elsewhere in these Reasons, I consider that the proper interpretation of the Revolver Loan Agreement is that a balance sheet solvency test remained in the form of the "unable to meet debts" event of default. In addition, a similar event of default remained in the Term Loan Agreement. I do not see any inconsistency in the removal of the solvency representation and the retention of a balance sheet event of default. Moreover, it is not clear whether the solvency representation was a continuing representation given at the time of each advance. Even if it was, which may be more likely, the net effect of the amendment was to remove the solvency test based on meeting liabilities as they fell due. As discussed above, there was no need for such an event of default in the context of a wholly-owned subsidiary relationship. It is therefore questionable whether the removal of the insolvency representation had any real practical significance from which it would be possible to draw an inference.

[358] Third, while USSC may not have been solvent on a book value basis in July 2012, there is no evidence to suggest that USS considered that USSC was insolvent on a market value basis at that time, which is the relevant issue both as a practical matter as well as a legal matter.

[359] I turn then to the remaining financial performance considerations upon which the Objecting Parties say that the Court should infer an absence of an expectation of repayment of the Revolver Loan on the part of USS in 2012. With hindsight, these considerations point in the direction of continuing financial problems of USSC which were identified in the autumn of 2013. With the benefit of that hindsight, it is also clear that USS had very lax controls over the provision of additional cash to USSC from 2010 until late October 2013 and perhaps poor planning processes. In practice, USSC's requests, as set out in its rolling thirteen-week cash forecasts, appear to have been satisfied on a regular basis without close scrutiny by the USS treasury department.

[360] However, such evidence, considered collectively with the other considerations relied upon by the Objecting Parties, is not sufficient to establish that USS actually expected that USSC would be unable to repay with interest the advances in 2012. The evidence is more consistent

with a USS expectation that funding additional working capital in 2012 was appropriate given an anticipated improvement in the steel market, with a concomitant ability of USSC to repay such advances under the Revolver Loan as USSC returned to profitability.

[361] The advances under the Revolver Loan funded USSC with a view to increasing its working capital to take advantage of more favourable steel markets that were expected at the time. As described above, there were mini-cycles in each of 2010, 2011 and 2012. In each case, USS misread these mini-cycles as the start of a more broad-based improvement that did not occur. In the case of these advances, the evidence indicates a misplaced belief that the performance of USSC would improve in 2012 and 2013. There is, however, no evidence before the Court which suggests that USS did not hold these views. Nor is there any evidence that such views were unreasonable at the time.

[362] The Objecting Parties also raise the issue that the outstanding principal amount of the Revolver Loan was reduced from slightly in excess of U.S. $500,000,000 to the amount of U.S. $116,969,996 during 2013 pursuant to the "de-leveraging" exercise that was funded by equity injections from USS. They suggest that the source of funds is a factor indicating that the Revolver Loan was, in fact, an equity injection. There are three difficulties with this argument.

[363] First, USS had a legitimate business purpose in reducing the outstanding amount of the Revolver Loan that was not connected in any way to its expectation regarding the ability of USSC to repay the Revolver Loan. The "de-leveraging" exercise was undertaken to remove foreign currency fluctuations from the USSC financial statements and, thereby, to address an unnecessary complication in the USS consolidated financial statements.

[364] Second, in any event, I do not see any necessary connection between the use of the equity injections to reduce the outstanding balance of the Revolver Loan and the characterization of the remaining outstanding balance of the Loan. It may be that the use of equity injections reflected the fact that, in the course of 2013, USS concluded that USSC was no longer likely to be able to repay an amount of the Revolver Loan equal to the amount repaid by the equity injections. However, any determination to that effect would require evidence regarding the options available to USS to address the currency fluctuation issue, including the feasibility of conversion of such advances into another debt instrument rather than equity. Such evidence was not before the Court. In addition and in any event, the issue for the Court is whether USS expected repayment of an amount of the Revolver Loan equal to the remaining balance, being the First Tranche Indebtedness. The "de-leveraging" exercise does not demonstrate that USS also concluded that USSC would not be able to repay the amount of the Revolver Loan that it determined to leave outstanding.

[365] Third, there is a significant element of hindsight to this particular argument. The advances comprising the First Tranche Indebtedness were fully advanced before a decision to undertake the "de-leveraging" exercise was taken. In the absence of any documentary evidence of USS' decision-making in 2012, it is not possible to establish that the USS decision to convert a portion of the Revolver Loan to equity in 2013 reflected a determination made earlier in 2012 at the time of the advances under the Loan regarding the ability of USSC to repay such advances. More generally, there is no evidence that demonstrates that the use of equity injections to repay a portion or all of the Revolver Loan was contemplated at any time prior to late January 2013.

[366] Accordingly, I do not see any demonstrable connection between the use of the equity injections to pay down the Revolver Loan and the expectation of USS regarding repayment with interest of the Loan when the Revolver Loan was established or when the advances comprising the First Tranche Indebtedness were made in 2012.

[367] Lastly, as mentioned, the Province argues that, in respect of the Revolver Loan, USS advanced monies to USSC as an operating division based on anticipated benefits to the overall USS business and without any expectation of the payment of interest or the repayment of principal of the advances. On this view, USS provided monies to USSC that would not earn interest or be repaid because it would earn sufficient additional profits elsewhere in the organization to justify the increased equity investment in USSC.

[368] While such a possibility cannot be wholly discounted, the evidence for such a conclusion is lacking, apart from the absence of any credit analysis by USS before establishing the Revolver Loan in 2010, upon which the Province relies. There is no evidence that the losses that USSC generated were compensated for by profits elsewhere within the USS companies between 2010 and 2012. Moreover, there also is no evidence that, by 2010, the synergies envisaged at the time of the Acquisition outside of USSC were being realized within the USS business. As discussed above, the evidence only goes as far as demonstrating lax controls and perhaps a poor planning process. Such evidence is insufficient to demonstrate an absence of an expectation of repayment with interest of the advances under the Term Loan.

[369] Based on the foregoing, I therefore find that the evidence demonstrates, on a balance of probabilities, that USS had an expectation of repayment with interest of the advances comprising the First Tranche Indebtedness at the time such advances were made.

[370] I turn then to the evidence regarding the reasonableness of such expectation.

[371] In this regard, the principal argument of the Objecting Parties is that USSC could not have obtained an operating loan from a third-party lender on the terms and conditions of the Revolver Loan. They argue that this fact demonstrates that the First Tranche Indebtedness was in substance an equity injection.

[372] There is no doubt that a third-party lender would not have made an operating line of credit available on the terms and conditions of the Revolver Loan. The Hall Report opines that a third-party lender would not have granted an unsecured credit facility in 2010 given the circumstances that USSC was unprofitable, was experiencing negative EBITDA, had a net worth deficit on a book value basis, and had an outstanding balance under the Term Loan of approximately $1.6 billion. On the other hand, there is no evidence before the Court that would support a conclusion that secured financing would not have been available on viable terms from an external source other than a third-party lender. Neither Mr. Hall nor Mr. Finnerty expressed any opinion on this matter.

[373] The more difficult question is whether any external financing would have been available given the amount outstanding under the Term Loan in 2012, that is, whether the total debt capacity of USSC would have been exceeded by the addition of a secured operating line. If it could be demonstrated that such financing would not have been available, a court could find

that it was unreasonable to expect repayment of the advances of the First Tranche Indebtedness, being Claim #10, when they were made.

[374] However, there is no capital markets evidence before the Court that addresses this issue directly.

[375] The limited financial evidence referred to above is not sufficient to support any inference regarding the debt capacity of USSC at such time as it is limited to the availability of an unsecured revolver loan from a third-party lender. As the Objecting Parties bear the onus of proof, there is, therefore, no basis for a conclusion that USS' expectation of repayment was unreasonable on the basis that USSC lacked the aggregate debt capacity in 2012 to establish a revolving loan facility in the amount of the Revolver Loan.

[376] Based on the foregoing, I conclude that USS had a reasonable expectation of repayment with interest of the advances constituting the First Tranche Indebtedness at the time such advances were made. I therefore also conclude that the unsecured Claim in respect of the Term Loan, being Claim #10, constitutes a debt claim rather than an "equity claim" for the purpose of this CCAA proceeding.

The Second Tranche Indebtedness

[377] As set out above, Credit Corp advanced loans to USSC under the Revolver Loan totaling U.S. $71 million after the execution of the Third Revolver Amendment and the October Security Agreement on or about October 30, 2013. These advances were outstanding at the Filing Date. USS did not make any equity injection after October 30, 2013. As noted above, USSC acknowledges that USSC was insolvent on a balance sheet basis as of October 31, 2013, by which it is understood that USSC's liabilities exceeded the fair market value of its assets as of that date. The Objecting Parties argue that the Second Tranche Indebtedness was also an equity contribution.

[378] For clarity, I have approached the issue of characterization of the Second Tranche Indebtedness on the basis that such Indebtedness is secured by the security constituted by the October Security Agreement. Because USS required such security before advancing the Second Tranche Indebtedness, it is not realistic to address the characterization of such Indebtedness independently of such security. Accordingly, no conclusion is reached in these Reasons on the characterization of such Indebtedness to the extent that such security may be held to be void or unenforceable.

[379] I find the evidence supports the conclusion that USS expected to be repaid the Second Tranche Indebtedness as advanced under the Revolver Loan for the following reasons.

[380] First, there can be little doubt that USS expected to be repaid the advances made after October 30, 2013 with interest given the security over all the assets of USSC provided by the October Security Agreement. The existence of security for the Second Tranche Indebtedness overwhelms any argument that could be made for an absence of any expectation of repayment with interest based on the general considerations relied upon to seek to characterize the Term Loan and the First Tranche Indebtedness as capital contributions. The existence of security also

precludes an argument based on the financial status of USSC at the time the advances comprising the Second Tranche Indebtedness were made.

[381] Second, the principal argument of the Objecting Parties is that USS was legally and practically obligated to continue funding USSC. The Objecting Parties say that, if USS had not funded through the Revolver Loan, it would have had to fund the same amounts by equity injections. They argue that therefore the Revolver Loan was effectively an equity contribution. There are two difficulties with this argument.

[382] First, I find that USS was not legally obligated to continue funding USSC under the Revolver Loan Agreement for the following reasons.

[383] The Objecting Parties submit that, as of October 31, 2013, USS was legally obligated to continue to make all advances requested by USSC up to the limit of the availability under the Revolver Loan Agreement, being U.S. $600 million. This position is based on the contractual interpretation set out in the Di Massa Report of the "unable to meet debts" event of default in section 11c of the Revolver Loan Agreement as of October 30, 2007.

[384] However, I have concluded above that the "unable to meet debts" event of default constituted a balance sheet insolvency event of default in the Revolver Loan Agreement. There is no dispute that USSC was insolvent on a balance sheet basis in October 2013. Accordingly, on this interpretation of the Revolver Loan Agreement, an event of default had occurred under the "unable to meet debts" event of default in the Agreement entitling USS to refuse to advance further funds to USSC thereunder.

[385] In addition, even assuming that USS was obligated practically to ensure financing for USSC, I do not think it is correct to say that USS was obligated to provide that financing by equity injections. This argument assumes that secured financing was not available from external sources on a viable basis in the amount of the Second Tranche Indebtedness. However, there is no reason to think that a revolving loan on a secured basis in the amount advanced during the remainder of 2013, being approximately $71 million, would not have been available to USS, although admittedly on terms and conditions which would have differed from those of the Revolver Loan.

[386] I note that the Objecting Parties acknowledged at the trial that, but for the foregoing argument, they would have no compelling argument for characterization of the Second Tranche Indebtedness as a capital contribution. In particular, they do not raise any argument to the effect that any expectation of USS of repayment of the Second Tranche Indebtedness as secured debt was unreasonable. The principal issue raised by the Objecting Parties in respect of the Second Tranche Indebtedness is the validity or enforceability of the security for such Indebtedness constituted by the October Security Agreement, which is discussed below.

[387] Based on the foregoing, I conclude that USS had a reasonable expectation of repayment with interest of the advances comprising the Second Tranche Indebtedness at the time such advances were made.

The Validity of the Security for the Second Tranche Indebtedness

[388] The Objecting Parties submit that the security for the USS Secured Claims (being, collectively, Claims # 11, 11(a), 11(b), and 11(c)) should be invalidated. They make two principal arguments: (1) that the October Security Agreement and the November Security Agreement are unenforceable for lack of consideration at the time that they were executed and delivered by USSC; and (2) that the October Security Agreement and the November Security Agreement are void as constituting a fraudulent preference for the purposes of section 95(1)(b) of the BIA.

[389] In this section, I will address these issues in respect of the security for the Second Tranche Indebtedness, being the October Security Agreement. The security for the Remaining USS Secured Claims will be addressed in the last section of these Reasons.

Alleged Unenforceability of the October Security Agreement

[390] The Province and the Union argue that the October Security Agreement is unenforceable due to a lack of consideration at the time that it was executed and delivered by USSC and submit that, accordingly, the security constituted by such Agreement is invalid. On this basis, they argue that USS Claim #11, being the Second Tranche Indebtedness, should be declared to be an unsecured claim.

[391] USS says consideration was given for the October Security Agreement in the form of further advances under the Revolver Loan which would not have been granted without the provision of security for such advances, as referenced in the recital in the October Security Agreement cited above.

[392] The position of the Objecting Parties raises the following issues pertaining to the validity of security:

1. Is consideration for the October Security Agreement necessary for an enforceable security interest?

2. If so, did USS give consideration for the October Security Agreement in the form of an agreement to advance further funds under the Revolver Loan?

3. Alternatively, did USS give consideration for the October Security Agreement in the form of a forbearance or a waiver in respect of USS' rights to declare a default or take enforcement proceedings pursuant to the Revolver Loan Agreement or otherwise?

[393] I do not accept the position of the Objecting Parties that the October Security Agreement is unenforceable for want of consideration for the following reasons, which address each of these questions in turn.

[394] First, I do not think consideration is required for a grant of a security interest to be effective, although it will not be enforceable until such time as an obligation arises in favour of the grantee that is secured by the security interest. This result is a consequence of the fact that security is essentially a proprietary right. Consideration is not required to effect a pledge, or a

charge on property. While a security interest is a statutory creation, I see nothing in the *Personal Property Security Act*, R.S.O. 1990, c. P.10 (the "PPSA") that imposes a requirement for consideration as a condition of the effectiveness of a grant of a security interest.

[395] The Objecting Parties say that a requirement for consideration is found in the statutory provisions of the PPSA that require a security agreement between the parties. Given that any agreement requires consideration in favour of a party to the agreement to be enforceable against such party, the Objecting Parties say it necessarily follows that consideration is required for a party to enforce the grant of a security interest in its favour in a security agreement. I acknowledge that, in the absence of consideration, the other covenants in favour of a grantee of a security interest in a security agreement may not be enforceable. That is, however, a different issue. In such event, the rights of the grantee would be limited to its statutory rights under the PPSA, but the grant of the security interest would still be effective.

[396] Consistent with this approach, the PPSA expressly distinguishes between a security agreement and a security interest. A "security agreement" is defined in section 1(1) of the PPSA as "an agreement that creates or provides for a security interest and includes a document evidencing a security interest". I see no reason why a "document evidencing a security interest" cannot include a document or instrument containing a unilateral grant of a security interest by a grantor in favour of a grantee. Such a grant would be effective as between the parties regardless of whether consideration was given, provided the grantee could demonstrate that the grantor intended it to be delivered. It would also be effective in respect of the rights of third parties, subject to the other requirements of the PPSA regarding rights in the collateral and attachment. It is the extension of credit, and thereby the creation of an obligation in favour of the grantee that is secured by the security interest, that makes the security interest enforceable.

[397] Second, if consideration is required for the security interest granted in the October Security Agreement to be effective, I think this requirement was satisfied in three separate ways.

[398] First, the October Security Agreement recites that consideration was given, the receipt and sufficiency of which is acknowledged by both parties to the Agreement. It is an elementary principle that courts will not enter into an inquiry as to the adequacy of consideration: see John D. McCamus, *The Law of Contracts*, (Toronto: Irwin Law, 2005), at p. 222.

[399] Second, as a related matter, as stated above, the third recital to the October Security Agreement recites, in effect, that Credit Corp required the provision of security as a condition of continued advances under the Revolver Loan Agreement. This recital is consistent with the Court's conclusion above that an event of default had occurred under the Revolver Loan Agreement entitling Credit Corp to refuse to advance further monies under the Revolver Loan. On this basis, USS was therefore in a position to provide consideration in the form of a commitment to advance further funds under the Revolver Loan Agreement. Accordingly, the commitment to advance further funds on the part of Credit Corp referred to in the third recital accurately reflected the existence of consideration for the purposes of the October Security Agreement.

[400] Third, I am also of the opinion that any lack of consideration for the October Security Agreement was cured by the actual advances of monies under the Revolver Loan Agreement comprising the Second Tranche Indebtedness. If the execution of the October Security

Agreement and the advance of monies had occurred concurrently, there would have been no issue regarding a lack of consideration. The advance of monies itself would have satisfied any requirement for consideration under the October Security Agreement. In other words, under such circumstances, it would have been unreasonable, and unnecessary, to require demonstration of an intermediate commitment to advance further funds. The result should not change merely because there was a period of time between the execution of the October Security Agreement and the subsequent advance of monies under the Revolver Loan. The significance of the lapse of time is that the security interest was not enforceable, in the sense that the security interest did not secure any outstanding obligation and therefore could be enforced, until such time as an advance occurred under the Revolver Loan. It did not, however, render the October Security Agreement void for lack of consideration.

[401] The Objecting Parties raise three arguments to the effect that USS did not give any consideration, even if an event of default had arisen under the Revolver Loan Agreement which would otherwise have permitted USS to refuse to advance further funds under the Revolver Loan Agreement.

[402] First, the Objecting Parties say that, notwithstanding the occurrence of an event of default, USS had waived its right to assert such an event of default by advancing funds prior to January 2013. They say this course of conduct constituted a waiver of USS' right to assert such an event of default in October 2013 or of USS' right to use the event of default to deny further advances under the Revolver Loan at that time.

[403] This argument is rejected for three reasons. First, as a practical matter, the last advance which could have given rise to such a waiver took place in early January 2013. There is no evidence that USS knew that USSC was insolvent, and therefore that an event of default had occurred, at or prior to the time of any such advances. Second, as a legal matter, the language of the Revolver Loan Agreement excluded the operation of a waiver in October 2013 based on previous conduct on two grounds. The provisions of section 7 of the Revolver Loan Agreement require that, to be effective, any waiver must be in writing, which would exclude entirely the possibility of an unwritten waiver based on a course of conduct. In addition, section 7 expressly negates the operation of a waiver based on the granting of a previous waiver. Third, in any event, as a practical matter, there can be no doubt that, as between USS and USSC, USSC would have understood that no course of conduct by USS could have given rise to a waiver of USS' rights to determine the availability of funding under the Revolver Loan Agreement, as described above.

[404] Second, the Objecting Parties submit that USSC did not, in fact, provide consideration in the form of a commitment to advance further funds under the Revolver Loan. They base this argument on the fact that McQuade testified that he was never expressly advised by any USS representative that USS would refrain from advancing funds unless the October Security Agreement was signed. They also rely upon the fact that USS did not declare an event of default in October 2013.

[405] I do not accept this argument for the following reasons. By acceding to USS' position with full knowledge that USS was taking the position that it was entitled to withhold future advances, USSC must be taken to have accepted USS' legal position. In this regard, it is clear that McQuade understood that execution of the October Security Agreement was a condition of the further advance of funds to USSC at the time he signed the Third Revolver Amendment and

the October Security Agreement, notwithstanding the absence of any direct conversation on the matter with any USS representative. Further, McQuade's determination that execution of the October Security Agreement was in the best interests of USSC was expressly made on the basis of his understanding that USSC needed the advances to continue to meet its obligations and that USSC would only receive the further advances if it consented to the security.

[406] Accordingly, while McQuade says he believed that USS was obligated to fund under the Revolver Loan Agreement up to the limit of availability, he also knew that USS was taking the position that it was entitled to withhold funding under the Agreement until it received security for any further advances. McQuade did not challenge this legal position on behalf of USSC. Instead, USSC agreed to provide the security. In these circumstances, it was not necessary for USS to declare an event of default as a formal matter to assert its legal position. More importantly, in the absence of a determination at the time regarding the right of USS to withhold further advances, the decision of USSC to provide security must constitute acceptance of such legal right of USS.

[407] Lastly, the Objecting Parties say that, as a practical matter, USS was never going to stop advancing funds in October 2013 for reasons relating to the operational impact on USS and USSC as well as the potential triggering of cross-default provisions on the USS public debt. Whether or not this is true, I do not think it demonstrates an absence of legal consideration for the following reasons. First, the absence of a legal obligation to advance further funds is by itself sufficient to give rise to consideration. Second, the grant of security by USSC forecloses this argument as it become entirely speculative. The position of the Objecting Parties requires the Court to make a determination that, in the hypothetical situation in which USSC refused to provide the required security, USS would necessarily have advanced the monies comprising the Second Tranche Indebtedness. I do not think the Court could make such a determination on the limited evidence before it. Among other things, in order to make such a determination, the Court would need to address the other options that would have been available to USS in such circumstances, including a filing under the CCAA and DIP financing, which was raised at the time by the financial advisors to USS.Based on the foregoing, I do not accept the position of the Objecting Parties that the security constituted by the October Security Agreement is unenforceable for lack of consideration.

[408] For completeness, USS also argues that it gave consideration in the form of a forbearance from declaring a default, accelerating the Revolver Loan or instituting insolvency proceedings. These arguments also turn, at least in part, on the Court's acceptance of the contractual interpretation of the "unable to meet debts" event of default proposed in the Di Massa Report. Given the determination herein regarding consideration for the October Security Agreement, it is not necessary to address these potential additional sources of consideration, and I therefore decline to make a finding on these issues.

Alleged Fraudulent Preference

[409] In the alternative, if the October Security Agreement is held to be enforceable, the Objecting Parties submit that the Agreement constituted a fraudulent preference for the purpose of section 95(1)(b) of the BIA, as incorporated into the CCAA by the provisions of section 36.1 thereof. It is not disputed that the Objecting Parties bear the onus of proof in respect of this Objection.

[410] The provisions of section 95 of the BIA have been set out above. To succeed in this proceeding, the Objecting Parties must demonstrate: (1) a non-arm's length relationship between USSC and USS at the time of entering into the October Security Agreement; (2) that USSC was insolvent at the time of entering into the October Security Agreement; (3) that the October Security Agreement was entered into within twelve months of the Filing Date; and (4) that the October Security Agreement had the effect of giving USS, or more particularly Credit Corp as the lender under the Revolver Loan, a preference over other unsecured creditors at the date of delivery of October Security Agreement. There is no dispute that Credit Corp was not dealing at arm's length with USSC, that USSC was insolvent on and after October 30, 2013, and that the grant of security in favour of Credit Corp occurred less than one year prior to the Filing Date.

[411] USS argues, however, that the granting of security in the October Security Agreement did not give rise to a preference over another creditor entitling the Objecting Parties to relief under section 95 of the BIA. It bases this argument on the fact that the security in favour of Credit Corp is only being asserted in respect of advances made under the Revolver Loan after October 30, 2013, that is, in respect of the Second Tranche Indebtedness. USS bases its argument on the principle that there is no preference under section 95 if, and to the extent that, security is granted by a debtor company in respect of fresh advances which are used in the ongoing operations of the debtor company: see *McAsphault Industries Ltd. v. Six Paws Investments Ltd.*, [1995] O.J. No. 2450 (C.A.), at para. 19.

[412] The Objecting Parties make two submissions.

[413] The principal submission of the Objecting Parties is that the October Security Agreement constituted a fraudulent preference because Credit Corp obtained security in circumstances in which it was obligated to advance monies under the Revolver Loan Agreement. They say that, if Credit Corp had an unqualified obligation to advance monies under the Revolver Loan as and when requested by USSC up to such limit, delivery of the October Security Agreement would have constituted a fraudulent preference on the basis that delivery of security in such circumstances would be similar to providing security for past debts. This argument turns on the question of the extent to which Credit Corp was legally obligated to advance funds to USSC up to the limit of availability under the Revolver Loan Agreement as and when requested by USSC. It is a novel argument that could only arise, as a practical matter, in a non-arm's length situation.

[414] I have reservations regarding the merits of this argument as a matter of law. However, it is not necessary to determine the issue the alleged fraudulent preference on this basis. I have concluded above, in the context of the determination that USS provided consideration for the grant of the October Security Agreement, that Credit Corp was not obligated to advance further funds under the Revolver Loan Agreement. On this basis, this argument of the Objecting Parties cannot succeed.

[415] The alternative argument of the Objecting Parties is that the security in favour of Credit Corp under the October Security Agreement must fail in its entirety to the extent that the October Security Agreement purports to secure a pre-existing debt. They rely on *Re Fulton* (No. 2), [1926] O.J. No. 115 (C.A.), at para. 7, for this proposition.

[416] I accept that the granting of security for existing or past indebtedness constitutes a preference for the purpose of section 95 of the BIA. However, USS is not asserting a secured claim in respect of any such obligations in this proceeding, notwithstanding that the definition of "Secured Obligations" in the October Security Agreement extends to pre-existing indebtedness.

[417] In such circumstances, the Court of Appeal made it clear in *McAsphault*, at para. 19, that "a security may be bad in respect to some advances, but enforceable in respect to others, thus protecting payments made by an insolvent company which would otherwise be preferential." In that case, the evidence indicated that the fresh advances at issue were used in the on-going operations of the company. On that basis, the Court of Appeal held that the repayment of the advances did not constitute a fraudulent preference.

[418] In my opinion, the same principle operates in the present circumstances. There is no dispute that the advances comprising the Second Tranche Indebtedness were used in the on-going operations of USSC's business. The advances under the Revolver Loan after October 30, 2013 therefore benefitted the unsecured creditors as of the date of such advances. This factual context is sufficient under the case law to exclude a finding of a fraudulent preference under section 36.1 of the CCAA and section 95 of the BIA.

[419] The decision in *Fulton* does not assist the Objecting Parties for the reason that the circumstances in *Fulton* were qualitatively different from the present circumstances. *Fulton* involved advances under a chattel mortgage totaling $3,800, of which $2,200 represented a new advance after the date of the chattel mortgage. The mortgage purported to secure the existing obligation as well as the new advance. The security was declared invalid in respect of both advances. However, there was a significant issue with the new advance that explains the result in that decision. The Court of Appeal expressly held that there was "no doubt that the $2,200 did not in fact increase the assets of the estate in any tangible way." In fact, the court concluded that there was no evidence regarding what became of the $2,200. Accordingly, the security failed in its entirety because the new advance could not be demonstrated to have been used in the operations of the debtor, not because the mortgage also purported to secure a past advance.

[420] Based on the foregoing, I conclude that there is no basis for a finding that the delivery of the October Security Agreement constituted the grant of a fraudulent preference by USSC in favour of Credit Corp insofar as the security constituted thereby secured the Second Tranche Indebtedness.

Conclusion Regarding the Second Tranche Indebtedness

[421] Based on the foregoing, I conclude that Claim #11, being the claim in respect of the Second Tranche Indebtedness under the Revolver Loan, constitutes a debt claim, rather than an "equity claim", which is a Secured Claim for the purpose of this CCAA proceeding.

Remaining USS Secured Claims

[422] As mentioned, the Objecting Parties also submit that the security for the Remaining USS Claims (being Claims #11(a), 11(b) and 11(c)), should be invalidated on the grounds that the security for such Claims, being the November Security Agreement, is either unenforceable as a matter of contract law for lack of consideration at the time it was executed and delivered by USSC or void as constituting a fraudulent preference for the purposes of section 95(1)(b) of the

BIA. The Objecting Parties do not dispute the quantum of any of these three Claims nor do they suggest that these Claims are "equity claims". For completeness, the Objecting Parties also submitted that the November Security Agreement cannot be an enforceable obligation to the extent that the Court were to find that the October Security Agreement was unenforceable. Given the determination above, it is not necessary to address this submission.

[423] I propose to address the issues pertaining to the Remaining USS Secured Claims in the following order. First, I will describe the nature of the November Security Agreement. Then I will address the issues pertaining to Claim #11(c) (Intercompany Goods & Services), which relates to the provision of goods and services by USS to USSC prior to the Initial Order. Lastly, I will address the issues pertaining to Claim #11(a) (the Cliffs Transaction) and Claim #11(b) (Credit Support Payments), which involve different considerations, as these claims arose after the Filing Date.

The November Security Agreement

[424] On November 12, 2013, Credit Corp, USSC, USS, United States Steel International, Inc. and SHC executed a further amendment and restatement of the October Security Agreement that provided security to each of USS, United States Steel International, Inc. and SHC (collectively, the "USS Affiliates") in respect of the provision of intercompany goods and services on credit by any of them to USSC (as so amended, the "November Security Agreement") in addition to, and alongside, the security already provided to Credit Corp in respect of advances under the Revolver Loan pursuant to the October Security Agreement.

[425] The November Security Agreement contains recitals to the effect that each USS Affiliate sells "Goods" to USSC pursuant to arrangements and agreements, defined for such purposes as the "Sales Agreements", as between the USS Affiliates and USSC, that the USS Affiliates have determined that, in light of USSC's financial position and credit worthiness, they "no longer wish to sell Goods to the Debtor on terms other than cash in advance or cash on delivery, unless the Debtor provides acceptable financial accommodations" and that, "upon the Debtor's request, the [USS Affiliates] are willing to continue to sell Goods to the Debtor on credit…provided that the Debtor secures its obligations to pay for such Goods pursuant to the terms of the [November Security Agreement]". I would note that the definition of "Goods" for purposes of the November Security Agreement is "materials, goods and other products (including inventory and raw materials)".

[426] The extension of security to the USS Affiliates was implemented by adding the USS Affiliates as parties to the October Security Agreement, providing that such parties were "Secured Parties" for purposes of such Agreement, and amending the definition of "Secured Obligations" to read as follows:

> …all obligations, duties, indebtedness and liabilities of the Debtor from time to time owing by the Debtor to any Secured Party including, without limitation, obligations, duties, indebtedness and liabilities arising under, or in connection with: (i) the Loan Agreement; (ii) any amendment or restatement of the Loan Agreement, including any such amendment or restatement which increases or decreases the maximum amount of Loans and other obligations that may be made by Secured Party to Debtor thereunder; (iii) this Agreement; (iv) all obligations

> arising out of, in connection with or relating to the Sales Agreements or the sale of Goods by any USS Seller to the Debtor at any time and from time to time; and (v) any other document made, delivered or given in connection with any of the foregoing; in each case whether now existing or hereafter arising, whether evidenced by a note or other writing, whether allowed in any bankruptcy, insolvency, receivership or other similar proceedings, whether arising from an extension of credit, issuance of a letter of credit, acceptance, loan, guarantee, indemnification or otherwise, and whether direct or indirect, absolute or contingent, due or to become due, primary or secondary, or joint or several.

[427] By virtue of the definition of "Secured Obligations", therefore, all obligations owing by USSC to Credit Corp under the Revolver Loan Agreement, or to any of the USS Affiliates in respect of the sale of Goods, were entitled to the benefit of the general security interest granted by USSC in the Security Agreement, as amended and restated by the October Agreement and the November Security Agreement.

[428] I would also note that the first advance comprising the Second Tranche Indebtedness was made at the time that the October Security Agreement was in force and that the two later advances were apparently made after the November Security Agreement came into force. However, it is not disputed that the same security interest was continued under the November Security Agreement. I would also note that the parties addressed the validity of the security for the Second Tranche Indebtedness, and the existence of a fraudulent preference in respect of the granting of security for the Second Tranche Indebtedness, in the context of the October Security Agreement rather than the November Security Agreement. As the Objecting Parties have not raised any additional issues in respect of the Second Tranche Indebtedness pertaining to the November Security Agreement, I have proceeded on the basis that such Indebtedness is secured thereunder the extent that the security for the Second Tranche Indebtedness under the October Security Agreement is not invalidated for one of the reasons discussed above.

The Intercompany Trade Claim - Claim #11 (c)

[429] As mentioned, the Objecting Parties argue that the security for this Claim is either unenforceable for want of consideration from the USS Affiliates with respect to the November Security Agreement or void on the basis that the grant of the November Security Agreement constituted a fraudulent preference. I will address each issue in turn. I note that there is no issue regarding the fair market value of the goods and services relating to this Claim.

Alleged Unenforceability of the November Security Agreement

[430] The principles regarding the requirement for consideration in respect of the grant of a security interest in a security agreement have been addressed above in respect of the October Security Agreement. I do not propose to repeat that discussion in this section. As applied to the November Security Agreement, I reach the following conclusions.

[431] First, for the reasons set out above, I do not think that consideration is required for the grant of the security interest in the November Security Agreement.

[432] Further, to the extent that consideration is required to enforce the security constituted by the November Security Agreement, I find that consideration was given for the November

Security Agreement, as verified in the recitals in the Agreement and acknowledged by all the parties. In particular, the recitals to the November Security Agreement reflect the grant of consideration from the USS Affiliates in the form of a commitment to continue to provide the goods and services that are the subject of this Claim. The position of the USS Affiliates was made clear to McQuade before he executed the November Security Agreement on behalf of USSC. There is no evidence before the Court that would indicate that the USS Affiliates lacked the legal right to refuse to provide such goods and services if USSC had refused to provide the security. Insofar as the Objecting Parties suggest that the USS Affiliates were not going to stop providing these services, as a practical matter, I consider that the reasoning and conclusions reached in respect of the comparable argument made regarding the security for the Second Tranche Indebtedness is equally applicable in this context.

[433] In addition, any lack of consideration was cured by the delivery and provision by the USS Affiliates of the goods and services in respect of Claim #11(c). I note that such delivery is the substantive equivalent of an advance of funds to be used in the operations of USSC to acquire such goods and services. If USS had advanced the purchase price of such goods and services to USSC under the Revolver Loan for the purpose of payment of such obligations, such advances would have been secured pursuant to the October Security Agreement based on the conclusion reached above. There is no principled reason why the result would differ because the USS Affiliates provided goods and services rather than advanced funds for such purposes.

[434] Accordingly, I conclude that the November Security Agreement is not unenforceable in respect of the amounts constituting Claim #11(c) for lack of consideration from the USS Affiliates to USSC.

Alleged Fraudulent Preference

[435] The principles regarding the operation of section 95(1)(b) of the BIA have also been set out above. As discussed above, there is no evidence before the Court that the USS Affiliates were legally obligated to continue to provide the goods and services that are the basis for this Claim. The security constituted by the November Security Agreement was given in respect of a the provision of additional goods and services that would not otherwise have been provided to USSC. Accordingly, for the reasons set out above, I conclude that the grant of the security under by the November Security Agreement in favour of the USS Affiliates did not constitute a fraudulent preference in their favour for the purposes of section 95.

[436] Further, as stated above, the delivery and provision of the goods and services in respect of Claim #11(c) represents the substantive equivalent of a fresh advance of funds to USSC to be used in the operation of its business. On this basis, the grant of security in respect of the delivery and provision of such goods and services did not prejudice the unsecured creditors of USSC as of the date of delivery of the November Security Agreement or the date of the delivery or provision of such goods and services and does not constitute a fraudulent preference.

[437] Based on the foregoing, I conclude there is no basis for a finding that the delivery of the November Security Agreement by the USS Affiliates in respect of Claim #11(c) constituted the grant of a fraudulent preference by USSC in favour of such parties.

The Cliffs Transaction Claim and the Credit Support Payments Claim – Claims #11(a) and #(b)

[438] The claims for the Cliffs transaction and the credit support payments each arose after the Filing Date in the following circumstances.

[439] USSC took delivery from Cliffs of the iron ore that is the subject of the Cliffs transaction prior to the Filing Date. However, USS was not in a position to sell the iron ore to USSC until it had paid Cliffs. Because USS did not pay for the iron ore until after the Filing Date, its claim against USSC for payment of the iron ore arose after the Filing Date.

[440] USSC incurred the third-party obligations that are the basis of the credit support payments claim prior to the Filing Date but had not paid them as of that date. Because USS paid such claims pursuant to its guarantees in favour of such third parties after the Filing Date, its claim against USSC in respect of these payments also arose after the Filing Date.

[441] I will address each of these claims in turn.

The Cliffs Transaction – Claim #11(a)

[442] The Objecting Parties argue that the security for this Claim constituted by the November Security Agreement is either unenforceable or void as a fraudulent preference on the same grounds upon which they rely in respect of Claim #11(c). In addition, they argue that this claim is a pre-filing claim that is no different from all other trade creditor claims outstanding on the Filing Date. They argue that the effect of the November Security Agreement is to elevate improperly an unsecured pre-filing claim into a secured claim.

[443] This Claim involves the sale of goods by USS to USSC and is therefore similar as a factual matter to the circumstances in Claim #11(c). I conclude that the principles that governed the determinations with respect to Claim #11(c) regarding the issues of consideration for the November Security Agreement and the alleged fraudulent preference are equally applicable in the present situation, with the following additional consideration which reinforces the conclusions therein.

[444] In the case of this Claim, the Iron Ore Agreement specifically evidences fresh consideration for the grant of security pursuant to the November Security Agreement. While it is correct that USS was obligated to pay Cliffs under its agreement with Cliffs, as the Objecting Parties say, there is no evidence that USS was legally obligated to sell the iron ore to USSC once it acquired title to the ore. USS could have required that USSC deliver up possession of the iron ore to it. Instead, USS and USSC entered into a fresh agreement regarding the purchase by USSC of the iron ore at a time when USSC was independently represented. The Iron Ore Agreement provided that USSC's obligation to pay for such iron ore, when it arose, would be a "Secured Obligation" for purposes of the November Security Agreement, in return for USS' agreement effectively to sell USSC its interest in the iron ore and to pay Cliffs the purchase price of the ore on behalf of USSC.

[445] Such circumstances are sufficient to satisfy any requirement for the demonstration of consideration for the grant of security pursuant to the November Security Agreement in respect of the purchase price obligation of USSC and to negate any fraudulent preference upon the grant of such security for such obligation.

[446] I would add that, in the case of this claim, USSC expressly agreed to the secured treatment of the purchase price obligation prior to such obligation coming into existence. As such, the circumstances do not involve the transformation of a pre-filing unsecured claim into a post-filing secured claim.

The Credit Support Payments Claim – Claim #11(b)

[447] As discussed above, USS paid these obligations pursuant to guarantees established in favour of the third-party creditors. It asserts Claim #11(b) against USSC pursuant to its rights of subrogation. USS submits that such rights of subrogation constitute "Secured Obligations" for the purposes of the November Security Agreement and, accordingly, rank ahead of all other trade creditors. If these credit support payments are secured, a consequence would be that the unsecured, pre-filing claims of the third party-creditors have become secured, post-filing claims of USS without any involvement of the Monitor or the Court pursuant to the provisions of section 10 of the Initial Order, which would otherwise govern the payment of pre-filing obligations.

[448] The Objecting Parties argue that the security for this Claim constituted by the November Security Agreement is either unenforceable or void as a fraudulent preference on the same grounds upon which they rely in respect of Claims #11(a) and #11(c).

[449] After a review of the documentation pertaining to this Claim, I think there is a threshold issue of whether the USS subrogation rights at issue qualify as "Secured Obligations" under the November Security Agreement. This issue was not, however, raised directly in the submissions of the parties. The parties should therefore be given an opportunity to make submissions regarding this threshold issue to the extent they wish to do so.

[450] Accordingly, I do not propose to address the determination of the issues pertaining to this Claim at this time. If the parties are unable to agree on a schedule for submissions on the threshold issue, they should contact the Court to arrange a telephone case conference at their convenience.

Conclusions

[451] he USS Claims referenced as Claims #1-8 inclusive in the Monitor's Third Report are not disputed in this proceeding and are therefore confirmed as unsecured Claims under the Claims Process Order. Based on the foregoing, the USS Claims referenced in such Report as Claims #9 and #10 are also confirmed as unsecured Claims under the Claims Process Order and Claims #11, #11(a) and #11(c) are confirmed as Secured Claims. The USS Claim referenced in the Report as Claim #11(b) remains to be determined.

Wilton-Siegel J.

Date: February 29, 2016

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COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-029728-219
(700-11-020320-216)

DATE: October 11, 2022

CORAM: THE HONOURABLE MARTIN VAUCLAIR, J.A.
GENEVIÈVE MARCOTTE, J.A.
BENOÎT MOORE, J.A.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF AZOXCO CRYOGÉNIQUE INC.:

ALAIN MASSE, in his capacity as trustee of FIDUCIE FAMILIALE ALAIN MASSE
VALÉRIE LACOMBE, in her capacity as trustee of FIDUCIE FAMILIALE ALAIN MASSE
APPELLANTS – Creditors

v.

AZOXCO CRYOGÉNIQUE INC.
RESPONDENT – Debtor

JUDGMENT

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[1] The appellants appeal against a judgment rendered by the Superior Court on October 1, 2021 (the Honourable Madam Justice Danielle Turcotte),[1] which annulled the decision of the respondent's trustee to allow their proof of claim as unsecured creditors, characterized said claim as an equity claim under s. 2 of the *Bankruptcy and Insolvency*

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1 *Avis d'intention de Azoxco Cryogénique inc.*, 2021 QCCS 4100 [judgment under appeal].

Act[2] ("*BIA*") and declared that the appellants are not entitled to vote on the respondent's proposal.

[2] The facts are as follows. On June 28, 2019, the appellants, who were shareholders of Azoxco Cryogénique Inc. ("Pre-amalgamation Azoxco") at the time, sold all of their shares to 9397-5530 Québec Inc. ("Québec Inc."). An amount of $2,535,000 was paid, with a balance payable at a later date.

[3] That same day, and as provided for in section 0.01.06 of the contract for the sale of shares, Québec Inc. and Pre-amalgamation Azoxco carried out a short-form amalgamation through which the first entity absorbed the second. The amalgamated corporation adopted the name Azoxco Cryogénique. The amalgamated corporation is the respondent, which therefore became the debtor for the balance of the share sale price.

[4] On August 25, 2020, the appellants, who had still not been paid, claimed from the respondent an amount of $1,952,817, representing the balance of the selling price. The respondent presented a defence and filed a cross-application, alleging fraud and misrepresentation by the appellants.

[5] In February 2021, the respondent filed a notice of intention to make a proposal to its creditors, which led to a stay of the appellants' proceedings. The stay was subsequently lifted.

[6] On February 2, 2021, the appellants filed a proof of claim as unsecured creditors.

[7] On July 8, 2021, the meeting of creditors was adjourned for the purpose of obtaining a legal opinion on the admissibility of the appellants' claim.

[8] On August 6, 2021, the trustee announced that it was accepting the appellants' claim.

[9] The effect of this decision would be to cause the respondent's bankruptcy because the appellants held the deciding vote and, unlike the other creditors, intended to vote against the proposal. The respondent therefore challenged the trustee's decision under s. 37 *BIA*. This is the issue that was adjudicated in the judgment under appeal.

[10] Based on s. 286 of the *Business Corporations Act*[3] ("*BCA*"), the judge concluded that the amalgamation had not changed the nature of the claim, as the rights and obligations of the amalgamating corporations had become those of the amalgamated corporation. The judge also noted that, in their pleadings, the appellants themselves

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2 R.S.C. (1985), c. B-3

3 CQLR, c. S-31.1.

had alleged that the claim was in respect of the balance of the selling price of the Pre-amalgamation Azoxco shares.

[11] Applying the principles developed by the Ontario Court of Appeal in *Sino-Forest*,[4] pursuant to which the notion of equity claim must be given an expansive interpretation and the analysis must focus on the nature of the claim rather than the identity of the claimant, the judge found that the appellants' claim was in respect of equity. Although the judge did not state it explicitly, she linked the claim to "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" set out in paragraph (d) of the definition.

* * *

[12] It will be helpful to reproduce certain provisions of the *BIA*:

2. […]	**2.** […]
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; (*intérêt relatif à des capitaux propres*)	***intérêt relatif à des capitaux propres*** • **a)** S'agissant d'une personne morale autre qu'une fiducie de revenu, action de celle-ci ou bon de souscription, option ou autre droit permettant d'acquérir une telle action et ne provenant pas de la conversion d'une dette convertible; • **b)** s'agissant d'une fiducie de revenu, part de celle-ci ou bon de souscription, option ou autre droit permettant d'acquérir une telle part et ne provenant pas de la conversion d'une dette convertible. (*equity interest*)
[…]	[…]
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,	***réclamation relative à des capitaux propres*** Réclamation portant sur un intérêt relatif à des capitaux propres et visant notamment : • **a)** un dividende ou un paiement similaire;

[4] *Sino-Forest Corporation (Re)*, 2012 ONCA 816 [*Sino-Forest*].

- **(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); (*réclamation relative à des capitaux propres*)

- **b)** un remboursement de capital;
- **c)** tout droit de rachat d'actions au gré de l'actionnaire ou de remboursement anticipé d'actions au gré de l'émetteur;
- **d)** des pertes pécuniaires associées à la propriété, à l'achat ou à la vente d'un intérêt relatif à des capitaux propres ou à l'annulation de cet achat ou de cette vente;
- **e)** une contribution ou une indemnité relative à toute réclamation visée à l'un des alinéas a) à d). (*equity claim*)

[…]

54.1 Despite paragraphs 54(2)(a) and (b), 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.

[…]

54.1 Malgré les alinéas 54(2)a) et b), les créanciers qui ont des réclamations relatives à des capitaux propres font partie d'une même catégorie de créanciers relativement à ces réclamations, sauf ordonnance contraire du tribunal, et ne peuvent à ce titre voter à aucune assemblée, sauf ordonnance contraire du tribunal.

[13] It will also be helpful to reproduce s. 286 *BCA*:

286. A certificate of amalgamation, issued by the enterprise registrar in accordance with Chapter XVIII, attests the amalgamation of the corporations as of the date and, if applicable, the time shown on the certificate.

As of that time, the amalgamating corporations are continued as one corporation and, as of that time, their patrimonies are joined together to form the patrimony of the amalgamated corporation. The rights and obligations of the amalgamating corporations become

286. Le certificat de fusion, délivré par le registraire des entreprises conformément aux dispositions du chapitre XVIII, atteste de la fusion des sociétés à la date et, le cas échéant, à l'heure figurant sur ce certificat.

À compter de ce moment, les sociétés fusionnantes continuent leur existence dans la société issue de la fusion et leurs patrimoines n'en forment alors qu'un seul qui est celui de la société issue de la fusion. Les droits et les obligations des

rights and obligations of the amalgamated corporation and the latter becomes a party to any judicial or administrative proceeding to which the amalgamating corporations were parties.	sociétés fusionnantes deviennent ceux de la société issue de la fusion et celle-ci devient partie à toute procédure judiciaire ou administrative à laquelle étaient parties les sociétés fusionnantes.

[14] It is necessary to clearly identify what is at issue in this appeal.

[15] A corporation's equity constitutes the shareholders' assets. It consists, in particular, of the issued and paid-up share capital or the retained earnings.[5]

[16] The rule set out in s. 54.1 *BIA*, which prohibits holders of equity claims from voting on a proposal, is intended, on the one hand, to prevent such holders from controlling the outcome of the vote and, on the other hand, to prioritize the protection of creditors who, unlike shareholders and other equity holders, have not participated in a speculative adventure.[6] Insolvency is a risk associated with the investment made by shareholders and, indeed, that risk justifies their potential profits. Author Frank Bennet has the following to say on this point:[7]

> **EQUITY CLAIMS**
>
> Claims against a company that result from ownership, purchase or sale of an equity interest in the debtor company and related indemnity claims are considered equity claims. Such claims as shareholders' claims can result in significant upside while creditors who supply goods and services do not share in the same upside. Consequently, there can be no distribution to holders of equity claims unless non-equity claimants are paid in full. Shareholders cannot expect to receive a dividend until all the creditors are satisfied. Shareholders do not have any financial interest in the debtor company until that happens.
>
> [Reference omitted]

[17] The definition of "equity claim" in s. 2 *BIA* includes, *among others*, a dividend, a redemption obligation, or a monetary loss resulting from the ownership, purchase or sale of an equity interest. The issue in the matter at hand, therefore, is whether the appellants' claim falls within this list, which, through the use of the words "among others", indicates that the list is not exhaustive.

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5 See: Raymonde Crête and Stéphane Rousseau, *Droit des sociétés par actions*, 4th ed., Montreal, Les Éditions Thémis, 2018, nos. 495 and 496.

6 *Royal Bank of Canada v. Central Capital Corp.*, 38 C.B.R. (3d) 1, 1996 CanLII 1521 (ON CA), para. 149.

7 Frank Bennett, *Bennett on Bankruptcy*, 24th ed., Toronto, LexisNexis, 2022, p. 1371. His comments pertain to the definition of "equity claim" under s. 2 of the *Companies' Creditors Arrangement Act*, R.S.C. (1985), c. C-36, which is identical to the definition in s. 2 *BIA*.

[18] The uniqueness of this case can be summarized as follows. Upon the sale of the shares, the appellants' claim against Québec Inc. was in respect of shares – thus equity – of Pre-amalgamation Azoxco, which was a third party to the contract. This means that, as between the parties to the contract, and pursuant to the *BIA*, the appellants had an unsecured claim against Québec Inc. It also means that at this point, if Pre-amalgamation Azoxco had become bankrupt, the appellants would not have had a claim or held equity with respect to it. The shares of Pre-amalgamation Azoxco held by Québec Inc. were an asset of Québec Inc.

[19] However, as a result of the amalgamation, the respondent, as the continuation of Québec Inc.'s juridical personality, assumed the debt owed by Québec Inc., and the shares of Pre-amalgamation Azoxco held by Québec Inc. were cancelled. Consequently, the issue is whether the claim, insofar as it is in respect of equity of one of the entities that resulted in the creation of the respondent, is a claim in respect of equity, within the meaning of s. 2 *BIA*, of the respondent. If it is, then, pursuant to s. 54.1 *BIA*, the appellants cannot vote on the proposal. If it is not, they can indeed vote.

[20] The appellants submit that the judge erred when, taking into account the amalgamation, she changed the nature of their claim against Québec Inc. – which was merely an unsecured claim – into an equity claim. In their view, the amalgamation could not have had that effect, because under s. 286 *BCA*, the amalgamation merely transferred Québec Inc.'s debt to the respondent, but did not modify that debt. It was an unsecured claim – which is not contested – and remained so.

[21] The appellants further argue that in order for their claim to be characterized as an equity claim, it was necessary that, at the time of the notice of intention, they hold a share in the respondent, or a warrant, an option or other analogous right. That said, not only was that not the case, but s. 282 *BCA* provides that the shares of Pre-amalgamation Azoxco, which the appellants sold, no longer existed and were not replaced by shares in the respondent. Therefore, the appellants were never shareholders of the respondent.

[22] As for the respondent, it argues that our Court owes great deference to the trial judge, both because she was seized of a question of mixed law and fact and because s. 37 *BIA* confers broad discretion on her. It further argues that the judge was correct in applying the analytical framework set out in *Sino-Forest*, in which the Ontario Court of Appeal established that the important factor is the nature of the claim, not the status of the claimant – that is, whether or not it is a shareholder.[8] In the respondent's view, applying the appellants' interpretation would depart from that principle by requiring that, at the moment the notice of intention is filed, the claimant hold a share or other type of equity interest. It would also indirectly achieve what s. 54.1 of the *BIA* seeks to proscribe, by allowing the appellants to vote on the proposal.

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[8] *Sino-Forest, supra,* note 4, para. 46.

[23] Before this Court, the parties both contend, as the trial judge did, that the amalgamation did not change the nature of the appellants' claim, but they draw contrary conclusions. The respondent, however, had argued the opposite in its motion appealing the trustee's decision. Upon reflection, and as explained below, whether or not the amalgamation changed the nature of the claim ultimately depends on the angle from which one analyzes the case.

[24] As stated above, at the time of the sale of the shares, the nature of the appellants' claim against their debtor, Québec Inc., was not in respect of the latter's equity, but rather the equity of a third party, namely Pre-amalgamation Azoxco. This means that if Québec Inc. had become bankrupt, the appellants could have filed a claim as unsecured creditors. This perspective supports the appellants' argument to the effect that by characterizing their claim as an "equity claim" after the amalgamation, the judge altered the nature of the initial claim and, in so doing, the appellants' insolvency risk.

[25] Conversely, the nature of the debt can also be viewed from the perspective of what was sold. In the present case, the appellants sold all the shares of Pre-amalgamation Azoxco, and a balance of sale was owed to them by Québec Inc. Their claim pertained to shares of Pre-amalgamation Azoxco and, consequently, it pertained to an equity interest in that corporation. Following the sale, Pre-amalgamation Azoxco and Québec Inc. carried out a short-form amalgamation and became the respondent. In reality, this type of amalgamation is but a reorganization of the amalgamating corporations' share capital.[9] As Professor Paul Martel points out, the amalgamated corporation is not a different entity from the amalgamating corporations, but rather their continuation, such that the amalgamated corporation holds all the property, rights and obligations of the original entities, without third-party rights having been affected by the amalgamation.[10] This is the essence of what is set out in the second paragraph of s. 286 *BCA*. The respondent, therefore, found itself with all the assets and liabilities of Pre-amalgamation Azoxco and Québec Inc. As for Pre-amalgamation Azoxco's equity, it was cancelled and, given the facts, converted into a debt owed by the respondent. The respondent was therefore now obliged to pay a debt related to equity of one of the amalgamating entities whose juridical personality it continued.

[26] How should the matter be resolved?

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9 André Morisset and Jean Turgeon, *Droit des sociétés par actions*, vol. 2, Toronto, LexisNexis, 1991 (loose-leaf sheets, update no. 248, June 2022), pp. 1620 and 1623.

10 Paul Martel, *La société par actions au Québec : les aspects juridiques*, Montreal, Wilson & Lafleur, 2021, nos. 33-129 and 33-130. See also, *Banque Royale du Canada c. Banque Canadienne Impériale de Commerce*, J.E. 2000-1041, 2000 CanLII 8607 (C.A.), paras. 27-28, citing *R. v. Black & Decker Manufacturing Co*., [1975] 1 S.C.R. 411, p. 417 and *Lebeuf c. Groupe SNC-Lavalin inc*., [1999] RJQ 385, 1999 CanLII 13644 (C.A.), pp. 23-24.

[27] In the case at bar, the Court does indeed owe great deference to the trial judge's findings, because she exercised a power under s. 37 *BIA*, which gave her wide discretion.[11]

[28] In addition to this first reason for deference, there is the nature of the issue the trial judge had before her. Contrary to the appellants' contention, this was not a pure question of law, but rather a mixed question. Indeed, the judge's characterization of the nature of the claim was not a purely technical exercise; it required her to consider the circumstances of the matter at hand in order to seek out the true nature of the transaction.[12] In the present case, the sale of the shares was inextricably linked to the amalgamation. Not only was the amalgamation provided for in the contract, but it occurred in its wake. This concomitance and the integration of the steps that took place provide a genuine indication of the nature of the transaction and the interests at stake. This approach is all the more necessary as it has been noted that distinguishing equity from unsecured claims may be difficult at times because corporations are finding new mechanisms that can narrow the gap between these two categories.[13]

[29] Let us look at the issue differently and assume that the shares the appellants held in Pre-amalgamation Azoxco had been repurchased by Pre-amalgamation Azoxco itself (rather than through Québec Inc.). Logically, and in accordance with a broad interpretation of the definition of equity claim,[14] such a transaction should have been characterized as a transaction under paragraph (d) of the definition, since the unpaid balance indeed constituted a loss resulting from "the ownership, purchase or sale of an equity interest […]". Accepting the appellants' position would circumvent the application of s. 54.1 *BIA* by allowing them to vote on the proposal, which would be directly contrary to the legislature's intent to subordinate the interests of holders of equity interests to those of creditors.

[30] Lastly, the Court cannot accept the appellants' argument that the definition of "equity claim" presupposes that, at the time of the notice of intention, they had to hold a share in the respondent, or a warrant, an option or other such right. Not only would adding such a condition run counter to the broad and liberal interpretation of this definition and depart from the legislature's intent to subordinate the protection of holders of an equity interest to that of creditors – as already discussed above – but the very wording of the definition does not suggest it. Indeed, paragraph (d) of the definition

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11 *Medcap Real Estate Holdings Inc. (Re)*, 2022 ONCA 318, para. 25; Lloyd W. Houlden, Geoffry B. Morawetz and Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., Toronto, Thomson Reuters, 2009 (loose-leaf, updated August 2022), no. 2:128, pp. 2-183 and 2-184.

12 *Trakopolis SaaS Corp (2007996 Alberta Ltd) (Re)*, 2020 ABQB 643, para. 65.

13 INSOL International, *Update on Shareholder and Equity – Related Claims in Insolvency Proceedings*, October 2013, Technical Series Issue No. 28, p. 6.

14 *Sino-Forest, supra,* note 4, paras. 40-41, citing the Supreme Court on the use of the expression "in respect of": *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, para. 16.

refers to a monetary loss resulting from, among other things, the *sale* of an equity interest. Consequently, once such equity has been sold, the seller is, by definition, no longer its owner. Nonetheless, its claim can still be characterized as an equity claim under paragraph (d) of the definition. There is no reason to conclude otherwise because the matter at hand involves a balance of sale.

[31] This was also the conclusion of the Ontario Court of Appeal in *Sino-Forest*. In that case, the shareholders had sued the accountants, who had failed to detect inaccuracies in the financial information provided by the corporation. The Ontario Court of Appeal, upholding the decision of Morawetz, J., concluded that this claim was included in the definition of "equity claim" even if the claimant did not hold, and had never held, such equity. That case, admittedly, is not identical to the one before us, because, ultimately, the beneficiaries of the claim were equity holders. Nevertheless, in both cases, an analysis of the nature of the claim rather than the nature of the claimant indicates that the claim is in respect of an equity interest.

[32] Absent a palpable and overriding error committed by the trial judge in characterizing the genuine nature of the claim, the appeal must be dismissed.

FOR THESE REASONS, THE COURT:

[33] **DISMISSES** the appeal, with legal costs.

MARTIN VAUCLAIR, J.A.

GENEVIÈVE MARCOTTE, J.A.

BENOÎT MOORE, J.A.

Mtre Bernard Gravel
Mtre Guillaume Hébert
SOCIÉTÉ D'AVOCATS DEXAR
For the appellants

Mtre François D. Gagnon
Mtre Kevin Mailloux
BORDEN LADNER GERVAIS
For the respondent

Date of hearing: September 22, 2022

21

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-030055-222
(500-11-045951-148)

DATE: March 20, 2023

CORAM: THE HONOURABLE MARK SCHRAGER, J.A.
GUY COURNOYER, J.A.
SOPHIE LAVALLÉE, J.A.

IN THE MATTER OF THE BANKRUPTCY OF:
SOCIÉTÉ DE VÉLO EN LIBRE SERVICE/PUBLIC BIKE SYSTEM COMPANY
BANKRUPT – Debtor
and
ARTHUR BLUMER & ASSOCIÉS INC., in continuance of suit for Litwin Boyadjian Inc.
APPELLANT – Trustee
v.

VILLE DE MONTRÉAL
RESPONDENT – Creditor/Petitioner

JUDGMENT

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[1] On appeal from a judgment rendered on May 5, 2022 by the Superior Court, Commercial Division, District of Montreal (the Honourable Justice Martin Castonguay), dismissing in part the Appellant's disallowance of the Respondent's proof of claim in the bankruptcy of Société de vélo en libre-service/Public Bike System Company.

[2] For the reasons of Schrager, J.A., with which Cournoyer and Lavallée, JJ.A. agree, **THE COURT:**

[3] **DECLARES** that the Appellant has an appeal as of right, such that leave is not required, and **DISMISSES** the Appellant's *De Bene Esse* Application for Leave to Appeal a Judgment Rendered in the Course of Bankruptcy Proceedings, without costs;

[4] **ALLOWS** the appeal;

[5] **SETS ASIDE** the judgment of the Superior Court, Commercial Division, District of Montreal (the Honourable Justice Martin Castonguay) rendered on May 5, 2022;

[6] **DISMISSES** the Respondent's appeal from the Trustee's Notice of Disallowance of proof of claim dated December 15, 2020;

[7] **TAKES COGNIZANCE** of the withdrawal of the Notice of Disallowance dated December 15, 2020, issued by the Appellant to the Respondent, solely with respect to the disallowance of the portion of the re-amended Proof of Claim related to the suretyship agreement dated June 1, 2011, entered into between National Bank of Canada (the "Bank") and the Respondent, the payment by the Respondent to the Bank made on April 30, 2014, in an amount of $6,489,081.12, the *Modalités relatives au paiement des sommes dues par Société de vélo en libre-service à Banque Nationale du Canada*, being Schedule "A" to the re-amended Proof of Claim, and the payment by the Respondent to the Bank made on June 10, 2014, in an amount of $1,702,600.00;

[8] **THE WHOLE** with costs against the Respondent in first instance and in appeal.

MARK SCHRAGER, J.A.

GUY COURNOYER, J.A.

SOPHIE LAVALLÉE, J.A.

Mtre Alain Tardif
Mtre Gabriel Faure
Mtre Marc-Étienne Boucher
MCCARTHY TÉTRAULT
For the Appellant

Mtre Se-Line Duong
Mtre Eleni Yiannakis
Mtre François Goyer
IMK
For the Respondent

Date of hearing: February 9, 2023

REASONS OF SCHRAGER, J.A.

[9] This is an appeal from the judgment rendered on May 5, 2022 by the Superior Court, Commercial Division, District of Montreal (the Honourable Martin Castonguay).[1]

[10] The judgment sets aside, in part, the disallowance by the Appellant-Trustee[2] of the Respondent's proof of claim in the bankruptcy of Public Bike System Company ("**Bixi**") and declares that the Respondent[3] is an unsecured creditor for an amount of $31,746,757 ranking *pari passu* with the other unsecured creditors.

[11] For the reasons which follow, I propose that the Court allow the appeal, overturn the judgment under appeal and dismiss the Respondent's appeal from the Trustee's notice of disallowance of its proof of claim.

I. FACTS

[12] The partial disallowance of the Respondent's claim pertains to the following sums of money:

- $8,191,681.12 due by Bixi to the Respondent and arising from payments by the Respondent to Bixi's banker pursuant to a guarantee signed by the Respondent;

- $31,746,575 due by Bixi to the Respondent for a direct loan that was declared null by the Court in a previous judgment.[4]

[13] The text of the disallowance reads in part as follows:

> 2. With respect to Ville de Montreal's entire claim in the amount of $39,938,256.12:
>
> • Ville de Montreal was not dealing at arm's length with the debtor when it entered into the various transactions at the basis of its claim, as held by the Court of Appeal at paragraphs 67 and following of its judgement in *Ville de Montreal c. Litwin Boyadjian inc*. (*Syndic de Société de vélo en libre-service*), 2019 QCCA 794. In the Trustee's opinion, these transactions

1 *Syndic de Société de vélo en libre service*, 2022 QCCS 1638 [Judgment under appeal].
2 Herein the "Trustee" or the "Appellant".
3 Herein the "Respondent" or the "City".
4 *Ville de Montréal v. Litwin Boyadjian inc. (Syndic de Société de vélo en libre-service)*, 2019 QCCA 794, leave to appeal to the Supreme Court of Canada refused 2020 CanLII 13146 (SCC) [*2019 Judgment*].

> cannot be deemed "proper" within the meaning of section 137(1) of the Act, as they were entered into in violation of the Municipal Aid Act, a legislation of public order intended to protect taxpayers against municipal mismanagement of public funds. The City's claim must thus be postponed pursuant to section 137(1) of the Act.
>
> • Alternatively, Ville de Montréal's claim must be characterized as an equity claim and postponed accordingly pursuant to section 140.1 of the Act. Pursuant to the recharacterization doctrine, the Trustee must consider the manner in which the underlying transactions were implemented and the economic reality of the surrounding circumstances. The record shows *inter alia* that Ville de Montréal intervened to regularize the Bankrupt's financial situation at a time when the latter could not find other sources of financing in order to uphold the Debtor's bike-sharing services for the benefit of its citizens. Moreover, the Convention de prêt dated May 27, 2011 was mostly used to reimburse the Bankrupt's starting capital (initially itself lent by Société en commandite Stationnement de Montréal). In short, the transactions at the basis of Ville de Montréal's claim must be recharacterized as capital contributions.

[14] It is common ground that the Respondent's claim, if not postponed, would seriously dilute the distribution to the unsecured creditors of Bixi from the approximate amount of $21,000,000 held by the Trustee for such purpose. If the claim is postponed, the Respondent will not receive any dividend.

[15] The Court's *2019 Judgment* referred to above[5] declared that the loan advanced by the Respondent to Bixi and the hypothec granted to secure it were null as they offended a provision of public order prohibiting municipalities from offering financial assistance to commercial establishments.[6] However, the judgment went on to declare that the Respondent was nevertheless a creditor of Bixi (in an amount of $31,746,575) since the nullity of the loan agreement gave rise to the obligation of restitution between the parties, such that Bixi should return the loan proceeds received from the Respondent. However, since the bankruptcy of Bixi made it impossible for Bixi to pay the monies to the Respondent, the Court modified the manner of making restitution and recognized that the Respondent could file a proof of claim in the bankruptcy.

[16] As set forth above, the Trustee disallowed the Respondent's proof of claim and the claims were postponed. The Respondent's appeal from the Trustee's disallowance was allowed in part by the Superior Court. The judge overruled the Trustee's postponement regarding the portion of $31,746,575 only. He accepted the Respondent's argument that the *2019 Judgment* created a new "legal reality" between the parties such that the source

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5 *2019 Judgment*, *supra*, note 4.

6 *Municipal Aid Prohibition Act*, CQLR, c. I-15.

of the Respondent's claim was not the loan contract that had been declared null but rather the obligation to make restitution. Accordingly, s. 137 of the *Bankruptcy and Insolvency Act*[7] ("***BIA***") invoked by the Trustee to justify the postponement did not apply. Such provision allows for the postponement of claims arising from contracts that are entered into between a bankrupt and non-arm's-length parties and are not proper. The judge added that the Respondent did deal at arm's length with Bixi since they were not related according to the definitions found in ss. 4(2) and 4(3) *BIA*. The judge also made short shrift of the Trustee's reliance on s. 140.1 *BIA* to contend that the claim represented equity and not debt. The judge stated that the proof in the record indicates the Respondent's intention to be reimbursed the advances made to Bixi, so that the money advanced was a loan and not a contribution to capital.

[17] As stated above, I believe the appeal should be allowed as the judgment is tainted by both errors of law and errors of mixed fact and law.

II. ISSUES

[18] The parties' respective positions give rise to four issues for resolution on appeal:

1.- Does the Appellant have an appeal as of right or does it require leave and, if so, should leave be granted pursuant to the *De Bene Esse* application for such leave referred to this panel?

2.- Did the judge err in concluding that the Court already decided in the *2019 Judgment* that the Respondent's claim as an unsecured creditor should be allowed by the Trustee?

3.- Did the judge err in the interpretation and application of s. 137 *BIA*?

4.- Did the judge err in concluding that the Trustee's determination that the Respondent's claim was an "equity claim" was unreasonable?

III. ANALYSIS

1.- Does the Appellant have an appeal as of right or does it require leave and, if so, should leave be granted pursuant to the *De Bene Esse* application for such leave referred to this panel?

[19] The Appellant's notice of appeal relies upon paragraph (a) – the point at issue involves future rights – and paragraph (c) – the property involved in the appeal exceeds in value $10,000 – of s. 193 *BIA*.

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[7] R.S.C. (1985), c. B-3.

[20] The Appellant has also applied for leave to appeal under s. 193 (e) *BIA* in the event the Court rules that it has no appeal as of right. That application was referred to the Court by one of our colleagues.[8]

[21] Given that the question of the postponement of the Respondent's proof of claim would mean that the Respondent would not share in any dividend in the Bixi bankruptcy, the Appellant contends that the value of the property involved in the appeal exceeds $10,000.[9] I believe this to be the case. Moreover, there is abundant case law confirming that where the amount at issue in a proof of claim exceeds $10,000, a right of appeal under s. 193 (c) *BIA* exists. Ultimately, if the issue is the loss or gain resulting from the disallowance or acceptance of a proof of claim for more than $10,000, s. 193 (c) *BIA* permits an appeal.[10]

[22] However, the Respondent argues, based primarily on the decision of Brown, J.A., sitting as chamber's judge, in *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*,[11] that s. 193 (c) *BIA* should be read restrictively and not apply to "(i) orders that are procedural in nature; (ii) orders that do not bring into play the value of the debtor's property; or (iii) orders that do not result in a loss".[12]

[23] To put the decision in context, *Bending Lake* involved an appeal from a judgment approving a sale agreement and ordering the vesting of the debtor's property. The value of the property was not in issue. Rather, the grounds of appeal were "process-related", regarding such things as disclosure of information about the sale agreement to the debtor by the receiver, the negotiation process for the sale and the adequacy of notice given to Aboriginal communities.[13]

[24] In *Hillmount Capital inc. v. Pizale*,[14] Brown, J.A. revisited s. 193 (c) *BIA* and agreed with the Saskatchewan Court of Appeal in *MNP Ltd. v Wilkes*[15] that merely because the question raised in appeal is procedural, this does not mean there is not property involved that exceeds $10,000. Thus, the Court should scrutinize the grounds of appeal to examine the effect of the order sought.[16]

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8 *Syndic de Société de vélo en libre-service*, 2022 QCCA 853 (Cournoyer, J.A.).

9 Property is defined in s. 2 *BIA* as including "money".

10 See, for example, *Trimor Mortgage Investment Corporation v. Fox*, 2015 ABCA 44, paras. 7-10; *Roman Catholic Episcopal Corporation of St. George's v. John Doe - 49 - GBS*, 2007 NLCA 17, paras. 22-27; *Temple Consulting Group Ltd. v. Abakhan & Associates Inc*., 2011 BCCA 540, paras. 5-8; *EnerNorth Industries Inc. (Re)*, 2009 ONCA 536, para. 34.

11 *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225 [*Bending Lake*].

12 *Bending Lake*, *supra*, note 11, para. 53; but, see also *Orpen v. Roberts*, [1925] S.C.R. 364, p. 367: Pecuniary loss is the determinant of whether a monetary threshold has been crossed.

13 *Bending Lake*, *supra*, note 11, para. 58.

14 *Hillmount Capital Inc. v. Pizale*, 2021 ONCA 364 [*Hillmount Capital*].

15 *MNP Ltd. v Wilkes*, 2020 SKCA 66.

16 *Hillmount Capital*, *supra*, note 14, paras. 41-42.

[25] In the present case, the value of the Respondent's claim is inextricably the issue as it is common ground that if it is postponed, it will be worthless in a distribution and will result in a loss for the Respondent exceeding $30,000,000. Moreover, if not postponed, the claim will cause considerable dilution, exceeding in the aggregate $10,000, of the payment to all other creditors. This appeal clearly involves a potential loss either to the Respondent or to the mass of creditors exceeding the threshold amount; it is not restricted to procedural issues.

[26] Accordingly, I would conclude that the Appellant has a right of appeal under s. 193 (c) *BIA*.

[27] If I doubted the existence of an appeal as of right, I would not hesitate to grant leave as requested by the Appellant because the criteria for the granting of such leave are easily satisfied.[17]

[28] The appeal is, at the very least, *prima facie* meritorious, its resolution is important for this bankruptcy estate, and the issues raised bear on the law in the area. No undue delay in the administration of the bankrupt estate is caused at this point in time by the appeal.

[29] However, I propose to dismiss the application for leave, without costs, as being unnecessary given my opinion that there is a right of appeal under s. 193 (c) *BIA*.

2.- Did the judge err in concluding that the Court already decided in the *2019 Judgment* that the Respondent's claim as an unsecured creditor should be allowed by the Trustee?

[30] The conclusions of the *2019 Judgment* state simply:

> [76] **ACCUEILLE** partiellement l'appel, avec les frais de justice, à seule fin d'ajouter une conclusion déclaratoire :
>
> > **DÉCLARE** que la Ville est créancière pour le solde dû à la date de la prise en paiement, soit 31 746 575 $, et peut présenter une réclamation au syndic de faillite;

Though the doctrine of *res judicata* can extend beyond the conclusions (in French "*dispositif*") of a judgment to the reasons, the latter must be intrinsically tied to such

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[17] *CHU de Québec - Université Laval v. Busrel inc*., 2022 QCCA 562.

conclusions.[18] In principle, it is the conclusions which are operative.[19]

[31] As stated above, the Court examined the validity of the loan made by the Respondent to Bixi and the security, in light of the legal prohibition against such financial assistance.[20] The Court found that the nullity gives rise to the obligation of restitution pursuant to art. 1422 *C.C.Q.* and then added the following:

> [62] La faillite subséquente de Bixi l'empêche de remettre le prêt obtenu. Par ailleurs, ordonner à la Ville seule de restituer les prestations créerait un déséquilibre et avantage injustifié pour Bixi. La solution adéquate est de modifier les modalités de la restitution en reconnaissant que la Ville est créancière de Bixi pour le solde du prêt et qu'elle peut présenter une réclamation dans la faillite[27], en application du deuxième alinéa de l'article 1699 *C.c.Q.* Cette créance est sujette aux règles de droit régissant la faillite (art. 69.3 LFI). Sa créance sera traitée *pari passu* avec les autres créanciers de la faillite. Le prêt et l'hypothèque sont nuls, mais l'obligation pour Bixi de restituer l'argent reçu existe en application du principe de restitution des prestations.
>
> [63] À la lecture du jugement, il est impossible de savoir si le juge estime que Bixi n'a pas à rembourser le prêt ou s'il a tenu pour acquis que la Ville possède une créance et va déposer une réclamation dans la faillite. Il convient d'ajouter une conclusion à cet effet.
>
> (Emphasis added)

[32] The Court's language is permissive – i.e. the City "peut présenter une réclamation dans la faillite" and any such proof of claim will be subject to the legal rules governing the bankruptcy.

[33] No such proof of claim had been filed at the time of the *2019 Judgment*. As such, the Court cannot be taken to have ruled on the validity or propriety of such claim. Nevertheless, the Respondent submits that the use of the term "*pari passu*" in paragraph 62 refers to how such claim should be treated or collocated in the bankruptcy. The judge evidently agreed:

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18 *Ellard v. Millar*, 1929 CanLII 55 (SCC), [1930] S.C.R. 319, 326, Rinfret, J.; *Contrôle technique appliqué ltée v. Québec (Procureur général)*, 1994 CanLII 5595 (C.A.), [1994] R.J.Q. 939, pp. 943 and 944, cited in *Jean-Paul Beaudry ltée v. 4013964 Canada inc*., 2013 QCCA 792, para. 37 – see also para. 39 citing Jean-Claude Royer and Sophie Lavallée, *La preuve civile*, 4th ed., Cowansville, Les Éditions Yvon Blais inc., 2008, pp. 690-691: "L'autorité de la chose jugée peut également s'étendre à des motifs étroitement reliés au dispositif du jugement".

19 *Compagnie d'assurances générales Co-Operators v. Coop fédérée*, 2019 QCCA 1678, paras. 112-113; *Syndic de Mekenthiram*, 2022 QCCA 197, para. 3.

20 *2019 Judgment*, *supra*, note 4, para. 8.

> [35] De fait, le Syndic, en ajournant la preuve de réclamation de la créance de la Ville telle qu'établi par la Cour d'appel, fait comme si cet arrêt n'existait tout simplement pas ou encore que la décision de la Cour supérieure maintenue par la Cour d'appel, n'avait aucun impact sur le pouvoir par le Syndic, d'analyser le bien-fondé d'une preuve de réclamation sous le prisme de l'article 137(1) L.F.I.
>
> [36] C'est l'existence même de l'arrêt et en particulier son paragraphe 62 lequel doit être lu en conjonction avec tous ceux de la section « La restitution par Bixi » qui fait en sorte que la position du Syndic est non seulement déraisonnable, mais frôle la témérité.

[34] The Respondent and the judge read into the *2019 Judgment* what is not there. As stated, the Court was not examining a proof of claim but merely the City's right to file a proof of claim and thereby become a creditor in the bankruptcy.[21] In the brief the Respondent had filed in that case, it had indeed sought to have its claim (as opposed to its right to file a proof of claim) recognized, but that is not what the Court did.

[35] Counsel for the Respondent points to the second paragraph of Article 1699 *C.C.Q.*:

1699. (…)	**1699.** […]
The court may, exceptionally, refuse restitution where it would have the effect of according an undue advantage to one party, whether the debtor or the creditor, unless it considers it sufficient, in that case, to modify the scope or modalities of the restitution instead.	Le tribunal peut, exceptionnellement, refuser la restitution lorsqu'elle aurait pour effet d'accorder à l'une des parties, débiteur ou créancier, un avantage indu, à moins qu'il ne juge suffisant, dans ce cas, de modifier plutôt l'étendue ou les modalités de la restitution.

Thus, the Respondent argues that it was open to the Court in the *2019 Judgment* to subordinate the City's claim if it obtained an undue advantage. Given that the Court did not do this, counsel reasons that the Court did not believe the City obtained an undue advantage, such that the Trustee is bound to consider the 2011 transaction a proper one and not invoke s. 137 to subordinate the Respondent's claim. Again, counsel reads into the *2019 Judgment* what is not there. There is no indication that this was considered. It is not for this panel to add to what the Court wrote in paragraph 62 of the *2019 Judgment* quoted above.

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[21] Section 124 *BIA*.

[36] Nowhere did the Court put aside or even refer to the Trustee's duty "to examine every proof of claim (…) and the grounds therefor" and to make a determination, as required by s. 135 (1) *BIA*. This duty is a fundamental obligation of a bankruptcy trustee.[22]

[37] The expression "*pari passu*" in paragraph 62 of the *2019 Judgment* refers to the right of the Respondent, like other creditors, to file a proof of claim, not to its eventual treatment or collocation by the Trustee. The Court did not say that the claim would be paid rateably (in French "*au prorata*"), which is the general rule, set out in s. 141 *BIA*, for dealing with claims; the Court merely stated that the claim would be treated as all the other claims. This includes the examination by the Trustee pursuant to s. 135.

[38] The reference in paragraph 75 of the *2019 Judgment* to such proof of claim as "*chirographaire*" or ordinary or unsecured, in the context of the *2019 Judgment*, clearly refers to the fact that the loan and the accessory hypothec were null but that the legal institution of restitution would give rise to the City's right to claim the monies advanced to Bixi, albeit not as a secured creditor.

[39] Moreover, the postponement of the Respondent's claim pursuant to the Trustee's notice of disallowance does not *per se* contradict that the Respondent is an unsecured ("*chirographaire*") creditor. The disallowance maintains such qualification but postpones the claim, or in the wording of ss. 137 and 140.1 *BIA*, the Respondent is not entitled to receive a dividend in the bankruptcy until the other unsecured creditors are fully paid.

[40] The Respondent points to comments from one member of the panel and exchanges with counsel to bolster its position that the Court decided in the *2019 Judgment* that the proof of claim was valid. However, comments from the panel are not binding and do not form any part of a judgment.[23]

[41] I believe that the foregoing analysis indicates that the conclusions of the *2019 Judgment*, taken alone or in conjunction with the reasons, disclose a decision providing for the Respondent's right to file a claim as an unsecured creditor in the bankruptcy of Bixi in the amount stated. Neither the conclusions nor the reasons address the eventual treatment of that claim by the Trustee in the exercise of its duties under s. 137 *BIA*. In deciding otherwise, the judge committed a reviewable error, which merits intervention by the Court.

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22 *Sellathamby (Re)*, 2020 BCSC 1567, para. 35; *Royal Bank of Canada v. Insley*, 2010 SKQB 17, paras. 23-24; *Huphman (Re)*, 2019 NSSC 280, para. 18; *Constructions d'Argenson inc. (Proposition de)*, 2000 CanLII 19269 (QC CS), para. 15.

23 *M.R. v. Hall*, 2021 QCCA 826, para. 26.

3.- Did the judge err in the interpretation and application of s. 137 *BIA*?

[42] The judge concluded that the Trustee was wrong to postpone the Respondent's claim pursuant to s. 137(1) *BIA*. It provides as follows:

137 (1) A creditor who, at any time before the bankruptcy of a debtor, entered into a transaction with the debtor and who was not at arm's length with the debtor at that time is not entitled to claim a dividend in respect of a claim arising out of that transaction until all claims of the other creditors have been satisfied, unless the transaction was in the opinion of the trustee or of the court a proper transaction.	**137 (1)** Le créancier qui, avant la faillite du débiteur, a conclu une transaction avec celui-ci alors qu'il existait un lien de dépendance entre eux n'a pas droit de réclamer un dividende relativement à une réclamation née de cette transaction jusqu'à ce que toutes les réclamations des autres créanciers aient été satisfaites, sauf si la transaction était, de l'avis du syndic ou du tribunal, une transaction régulière.

[43] The judge held that s. 137 *BIA* did not apply because the Respondent and Bixi did deal at arm's length. He reasoned that since they were not related within the meaning of ss. 4 (2) and 4 (3) *BIA*, then in virtue of s. 4 (5) they could not be deemed not to deal at arm's length. This is an error of law as the judge failed to consider s. 4 (4) *BIA* which provides as follows:

4 (4) It is a question of fact whether persons not related to one another were at a particular time dealing with each other at arm's length.	**4 (4)** La question de savoir si des personnes non liées entre elles n'avaient pas de lien de dépendance, à tel ou tel moment, est une question de fait.

[44] Thus, even though the Respondent and Bixi might not have been related parties within the definition of s. 4 *BIA* (and I express no opinion on such finding), the judge should have pursued his analysis to see if the facts indicated that they were or were not arm's length parties. The factual matrix is compelling: (i) Bixi was executing the Respondent's bicycle sharing project on its behalf as the Court observed in the *2019 Judgment*;[24] (ii) Bixi's project was conceived by Mr. André Lavallée, an elected official of the Respondent; (iii) the Respondent's treasurer was also a member of the board of directors of Bixi from 2001 to 2013 and was extensively involved in the financing referred to above, as the Court observed in the *2019 Judgment*;[25] and (iv) the Respondent's consolidated financial statements included those of Bixi together with other entities under the Respondent's control.

[45] Moreover, the judge did not consider the scope of the agreement entered into between the Respondent and Bixi in 2011, whereby Bixi effectively gave the Respondent

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[24] 2019 Judgment, *supra*, note 4, paras. 4-5.

[25] 2019 Judgment, *supra*, note 4, para. 40 (referring to para. 110 of the trial judgment on appeal to the Court in that case).

de jure control over it. Pursuant to such agreement, *inter alia*: (i) the members and the chairman of Bixi's board of directors and its managing director were appointed on the recommendation of the Respondent; (ii) Bixi was obliged to submit to the Respondent, for approval, its budgets and three-year plans on such dates and in such form and substance as the Respondent indicated; (iii) Bixi was obliged to inform the Respondent of any major change to its approved budget; (iv) Bixi was obliged to remit to the Respondent yearly audited financial statements, quarterly interim financial statements, and quarterly detailed reports of its operations and orientations ("*reddition de compte complète […] de ses activités et de ses orientations*"); (v) Bixi granted the Respondent unfettered access to its books, records and premises; (vi) Bixi undertook to abide by the rules governing the awarding of contracts under the *Cities and Towns Act*; and (vii) Bixi undertook not to contract debt financing, modify its corporate structure, merge with any entity, modify its letters patent or seek its dissolution without the prior approval of the Respondent. These elements are not addressed in the judgment.

[46] In view of the above, it is not surprising that in the *2019 Judgment*, the Court, in applying s. 95 (1) (b) *BIA* to the transaction between the Respondent and Bixi, underlines the following passage of the provision:[26]

> (…) a creditor who is not dealing at arm's length with the insolvent person (…)

[47] Lastly, during argument before the judge, counsel for the Respondent conceded that his client was related to Bixi: "*C'est pas contesté que la Ville est une personne liée à Bixi, c'était notre conclusion à l'époque, ça été la conclusion de la Cour d'appel, c'est pas un fait qui est contesté*".

[48] Accordingly, in deciding that s. 137 (1) *BIA* was not applicable, the judge erred both in law and in fact.

[49] However, the Respondent asserts (and the judge agreed) that the effect of the *2019 Judgment* providing for restitution creates a new "legal reality" between the parties – i.e. the restitution obligation to return the funds received is the source of the obligation, such that the propriety of the transaction between the Respondent and Bixi in 2011 was not to be considered in examining the Respondent's proof of claim.

[50] I believe this argument is wrong in law for the reasons that follow.

[51] That the concept of restitution allowed the Respondent to file a proof of claim regarding proceeds of a loan declared null does not mean that logically or legally the Appellant in the performance of its trustee's duty to examine that claim "and the grounds therefor",[27] should not look beyond the obligation of the bankrupt to make restitution and

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[26] 2019 Judgment, *supra*, note 4, para. 67.

[27] Section 135 (1) *BIA*.

consider the circumstances giving rise to the claim. Such consideration would include the elements giving rise to the nullity of the contract as examined by the Court in the *2019 Judgment*. That judgment has the effect of setting aside the obligation generated by the contract of loan but does not somehow erase the historical fact of that loan transaction so that a trustee should close its eyes to it, pretending that it never existed. As a majority of the Supreme Court observed recently in dealing with a municipal contract declared a nullity:

> (…) it will then be deemed never to have existed (arts. 1416 and 1422 *C.C.Q.*; Cumyn, at No. 224; Lluelles and Moore, at No. 1087; Baudouin and Jobin, at No. 377; Gaudet, at p. 332). But this does not mean that the contract never actually existed. Logically, a contract must exist before it can be annulled: if a contract did not become a legal reality, it cannot be deemed never to have existed, because it does not in fact exist. (…)[28]

[52] In the words of s. 137 *BIA*, the Respondent's claim "aris[es] out of [the] transaction" that was entered into between it and Bixi and was declared a nullity by the Court. Indeed, the Court's conclusion quoted above declares that the City may file a proof of claim in the amount of the balance due to it at the date of the taking in payment and not the balance due when the loan was declared a nullity.

[53] I conclude that it is an error of law to only consider the obligation of restitution and not the underlying transaction of 2011 in analyzing the Respondent's proof of claim.

[54] Given his view of the law, the judge did not consider whether the 2011 transaction was a proper transaction within the meaning of s. 137 *BIA*.

[55] The standard of review on appeal from a trustee's disallowance is correctness on questions of law and reasonableness (or palpable error) on questions of fact or mixed fact and law.[29] The parties had stipulated before the Superior Court that the only issue was the reasonableness of the Trustee's decision. That being said, the onus was on the Respondent in the lower court to demonstrate that the Trustee's decision was not reasonable.[30]

[56] As seen above, the Trustee found that the 2011 loan transaction was not proper because it was entered into in violation of a statutory provision of public order to protect taxpayers against misuse of public funds by municipalities. The Court agreed in the *2019 Judgment* and declared the loan agreement a nullity. Thus, it cannot be said that the Trustee's determination that the transaction was not proper was an unreasonable

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28 *Montréal (City) v. Octane Stratégie inc.*, 2019 SCC 57, [2019] 4 S.C.R. 138, para. 62.

29 *Sols Sportica inc. (Syndic de)*, 2016 QCCS 2109, paras. 26, 33, 39, Paquette J, aff'd, 2018 QCCA 504, leave to appeal to the SCC refused, 2019 CanLII 6031 (SCC). See also *Galaxy Sports Inc. (Re)*, 2004 BCCA 284, paras. 27-42.

30 *Alberta Energy Regulator v Lexin Resources Ltd*, 2018 ABQB 590, para. 72 [*Alberta Energy*].

conclusion. I would thus propose that the Court intervene to set aside the judgment and dismiss the appeal from the disallowance of the proof of claim.

4.- Did the judge err in concluding that the Trustee's determination that the Respondent's claim was an "equity claim" was unreasonable?

[57] Though not strictly necessary, given my opinion that the Trustee could postpone the Respondent's claim upon the application of s. 137 *BIA*, I propose to briefly examine the other ground in the disallowance, based on s. 140.1 *BIA,* to the effect that the "loan" was really a contribution to capital.

[58] The judge devoted two paragraphs to dismiss the Trustee's position in this regard:

> [37] Tout aussi téméraire l'argument subsidiaire que la créance devrait être également ajournée ne vertu de l'article 140.1 L.F.I. puisque la Ville serait un « Equity Partner » dans l'aventure commerciale de Vélo, puisqu'il fait fi des motifs développés tant par la Cour supérieure que par la Cour d'appel quant à l'aspect commercial de Vélo, limité à la seule aventure internationale et non pas quant au réseau strictement montréalais.
>
> [38] Cet argument ne tient pas compte non plus de l'ensemble de la preuve administrée devant la Cour supérieure alors que celle-ci constate que les gestes posés par la Ville ne visaient qu'à se faire rembourser les avances consenties par Société en commandite Stationnement de Montréal (SCSM) à Vélo, pour qu'elles lui soient versées à titre de redevances. En aucun temps il ne fut question d'une quelconque recherche de profits par la Ville.

[59] I reiterate that the standard of review of a trustee's disallowance is one of reasonableness.

[60] Equity claim is defined in s. 2 of the *BIA* as follows:

equity claim means a claim that is in respect of an equity interest, including a claim for, among others,	**réclamation relative à des capitaux propres** Réclamation portant sur un intérêt relatif à des capitaux propres et visant notamment :
(a) a dividend or similar payment,	a) un dividende ou un paiement similaire;
(b) a return of capital,	b) un remboursement de capital;
(c) a redemption or retraction obligation,	c) tout droit de rachat d'actions au gré de l'actionnaire ou de remboursement anticipé d'actions au gré de l'émetteur;

(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	d) des pertes pécuniaires associées à la propriété, à l'achat ou à la vente d'un intérêt relatif à des capitaux propres ou à l'annulation de cet achat ou de cette vente;
(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d); (réclamation relative à des capitaux propres)	e) une contribution ou une indemnité relative à toute réclamation visée à l'un des alinéas a) à d). (equity claim)

[61] Was the 2011 loan a contribution by the Respondent to Bixi's capital?

[62] Judges sitting in bankruptcy matters have identified various indicia relevant to the examination:

> [41] ***U.S. Steel*** sets out a helpful two-part test in to be followed in situations involving parent-subsidiary relationships at paras 186-190:
>
> > (a) subjectively, did the alleged lender actually expect to be repaid the principle (sic) amount of the loan with interest out of the cashflows of the alleged borrower; and
> >
> > (b) objectively, was the expectation reasonable under the circumstances?
>
> [42] The Court in ***U.S. Steel*** referred to various factors used by American courts to aid in determining appropriate characterization, including the following:
>
> > (a) the names given to the instruments, if any, evidencing the indebtedness;
> >
> > (b) the presence or absence of a fixed maturity date and schedule of payments. The American cases suggest that the absence of a fixed maturity date and a fixed obligation to repay is an indication that the advances were capital contributions and not loans;
> >
> > (c) the presence or absence of a fixed rate of interest and interest payments. Again, it is suggested that the absence of a fixed rate of interest and interest payments is a strong indication that the advances were capital contributions rather than loans;
> >
> > (d) the source of repayments. If the expectation of repayment depends solely on the success of the borrower's business, the cases suggest that the transaction has the appearance of a capital contribution;
> >
> > (e) the adequacy or inadequacy of capitalization. Thin or inadequate capitalization is strong evidence that the advances are capital contributions rather than loans;

> (f) the identity of interest between the creditor and the shareholder. If shareholders make advances in proportion to their respective stock ownership, an equity contribution is indicated;
>
> (g) the security, if any, for advances;
>
> (h) the corporation's ability to obtain financing from outside lending institutions. When there is no evidence of other outside financing, some cases indicate that the fact no reasonable creditor would have acted in the same manner is strong evidence that the advances were capital contributions rather than loans;
>
> (i) the extent to which the advances were subordinated to the claims of outside creditors;
>
> (j) the extent to which the advances were used to acquire capital assets. The use of the advance to meet the daily operating needs for the corporation, rather than to purchase capital assets, is arguably indicative of bona fide indebtedness; and
>
> (k) the presence or absence of a sinking fund to provide repayments.[31]
>
> (Emphasis added)

[63] In *U.S. Steel*, Justice Wilton-Siegel underlined that in determining whether a transaction is a contribution to capital rather than a loan, the surrounding circumstances of the loan and the real intent of the parties rather than an adherence to the literal wording of a contract should be the focal point, particularly where the parties do not deal at arm's length.[32]

[64] The factual elements relied on by the Trustee and in evidence before the judge indicate the reasonableness of the Trustee's conclusion. The judge made no reference to these elements of proof in considering the application of s. 140.1 *BIA*.

[65] In 2011, Bixi was in a dire financial situation. Indeed, it was insolvent, having an operating deficit and no reasonable outlook for making up its deficit. The Respondent had no expectation that Bixi could ever repay the $31,000,000 in direct advance nor the $8,000,000 of the guaranteed loan. Without the Respondent's guarantee of that loan, Bixi could not find an operating lender and would be forced to cease its activities. The Respondent wanted Bixi to be able to continue to offer its bike sharing service to Montrealers. These are facts testified to by the CEO of Bixi as well as the Respondent's treasurer.

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31 *Alberta Energy*, *supra*, note 30, paras. 41-42.

32 *U.S. Steel Canada Inc. (Re)*, 2016 ONSC 569, para. 168.

[66] Under the 2011 agreement entered into by Bixi and the Respondent, the latter has all the hallmarks of a sole shareholder if not an *alter ego*, as described above in paragraph [45].

[67] I accept that the mere fact that a sole shareholder[33] (or group of shareholders)[34] advances funds to its company does not constitute *per se* a contribution to capital. However, the surrounding circumstances described above, taken together, make it such that the Trustee's determination that the loans were, in substance, contributions to capital was a reasonable determination. The judge erred by not considering the aforementioned facts and by not applying the appropriate standard of review in considering the Trustee's disallowance of the Respondent's proof of claim. This is a further ground justifying the Court's intervention.

* * *

[68] Accordingly, and for all the foregoing reasons, I would dismiss the application for leave to appeal without costs as it is not necessary given the right to appeal under s. 193 (c) *BIA*. I would then grant the appeal to set aside the judgment of the Superior Court and dismiss the Respondent's appeal from the Trustee's notice of disallowance, with legal costs before both courts.

[69] The Appellant also asks the Court to take cognizance that it has withdrawn its notice of disallowance regarding the sums of $6,489,081.12 and $1,702,600 representing the sums paid by the Respondent to National Bank of Canada pursuant to the guarantee for Bixi's liability to such bank. These amounts (totalling $8,191,681.12) are included in the total postponed amount of $39,938,256.12. The judge makes no mention that this alternative disallowance is overturned, but the Trustee, in its written pleadings in first instance, had withdrawn the disallowance of this portion of the claim in order that National Bank of Canada not continue to be a party to the proceedings. I propose to add such a conclusion to the Court's judgment.

MARK SCHRAGER, J.A.

[33] *Installations Doorcorp inc./Doorcorp Installations Inc. (Syndic d')*, 2012 QCCA 702, para. 55.
[34] *Provost Shoe Shops Ltd. (Re)*, 1993 CanLII 4591, 21 C.B.R. (3d) 108 (NS SC).

22

Bank of America Canada *Appellant*

v.

Clarica Trust Company *Respondent*

Indexed as: Bank of America Canada *v.* Mutual Trust Co.

Neutral citation: 2002 SCC 43.

File No.: 27898.

2001: December 11; 2002: April 26.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contracts — Breach of contract — Damages — Pre-judgment and post-judgment interest — Availability of compound interest on damages award — Whether trial judge was correct in awarding pre- and post-judgment compound interest — Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 128, 129, 130.

Courts — Jurisdiction — Interest — Pre-judgment and post-judgment interest — Interest payable by another right — Breach of contract — Whether trial judge had jurisdiction to award pre- and post-judgment compound interest — Whether language of ss. 128(4)(g) and 129(5) of Courts of Justice Act encompasses right to receive compound interest in equity and at common law — Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 128, 129, 130.

In 1987, Reemark Sterling I Ltd., planning to build a residential condominium project, entered into a Takeout Mortgage Commitment ("TOC") agreement with the respondent trust company under which the respondent would pay Reemark most of the price of the units and receive mortgage loan payments from investors at compound interest rates. Reemark and the appellant bank entered into a construction loan agreement under which the appellant would lend Reemark $33 million at compound interest rates for the project. Reemark, the appellant and the respondent also entered into a TOC assignment under which Reemark assigned its rights to receive payments from the respondent under the TOC to

Banque d'Amérique du Canada *Appelante*

c.

Société de Fiducie Clarica *Intimée*

Répertorié : Banque d'Amérique du Canada *c.* Société de Fiducie Mutuelle

Référence neutre : 2002 CSC 43.

N° du greffe : 27898.

2001 : 11 décembre; 2002 : 26 avril.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Contrats — Inexécution — Dommages-intérêts — Intérêts antérieurs et postérieurs au jugement — Possibilité d'obtenir des intérêts composés sur les dommages-intérêts — Le juge de première instance a-t-il eu raison d'accorder les intérêts antérieurs et postérieurs au jugement à taux composé? — Loi sur les tribunaux judiciaires, L.R.O. 1990, ch. C.43, art. 128, 129, 130.

Tribunaux — Compétence — Intérêt — Intérêts antérieurs et postérieurs au jugement — Intérêt qui a sa source ailleurs — Inexécution — Le juge de première instance avait-il compétence pour accorder les intérêts antérieurs et postérieurs au jugement à taux composé? — Le libellé de l'art. 128(4)g) et de l'art. 129(5) de la Loi sur les tribunaux judiciaires englobe-t-il le droit de recevoir des intérêts composés en common law et en equity? — Loi sur les tribunaux judiciaires, L.R.O. 1990, ch. C.43, art. 128, 129, 130.

En 1987, Reemark Sterling I Ltd., projetant la construction d'un immeuble en copropriété, a conclu un Engagement de prêt hypothécaire postconstruction (« EPP ») avec la société de fiducie intimée, en vertu duquel l'intimée devait verser à Reemark la quasi-totalité du prix des unités et toucher de la part des investisseurs les versements hypothécaires portant intérêt à un taux composé. Reemark et la banque appelante ont passé une convention de prêt à la construction selon laquelle l'appelante devait prêter à Reemark 33 millions de dollars à un taux d'intérêt composé aux fins du projet. Reemark, l'appelante et l'intimée ont aussi signé un acte de cession de l'EPP par lequel Reemark cédait à l'appelante son droit

the appellant until the construction loan had been repaid. In 1991, with a collapsing real estate market, the respondent refused to advance the funds to the appellant under the TOC assignment or a subsequent agreement between the parties. The appellant appointed a receiver and sold the project for $22.5 million, substantially less than the appellant was owed under the loan agreement and TOC assignment. In an action against the respondent for breach of contract, the trial judge awarded the appellant damages equal to the shortfall plus interest at the compound rate set out in the loan agreement both before and after the judgment. The Court of Appeal dismissed the appeal except for the question of interest where it substituted an order for simple interest as provided in s. 128 of the *Courts of Justice Act* ("*CJA*").

Held: The appeal should be allowed and the trial judgment restored.

Although both simple interest and compound interest measure the time value of the initial sum of money, the principal, compound interest reflects the time-value component to interest payments while simple interest does not. Simple interest makes an artificial distinction between money owed as principal and money owed as interest while compound interest treats a dollar as a dollar and is therefore a more precise measure of the value of possessing money for a period of time. Compound interest is the norm in the banking and financial systems and is the standard practice of the appellant and the respondent, which were both in the business of lending.

Contract damages are determined in one of two ways. Expectation damages, focussing on the value which the plaintiff would have received had the contract been performed, and restitution damages, focussing on the advantage gained by the defendant as a result of his or her breach of contract. When awarding damages to the plaintiff, the court must first determine the dollar value of the promise to the plaintiff at the time the obligation was to have been performed and then apply the appropriate interest rate and method of calculation to account for the time during which the plaintiff was not paid. In Ontario, pre-judgment and post-judgment interest are governed by ss. 128 to 130 *CJA*. Sections 128(4)(g), 129(5) and 130 *CJA*, each of which allows the judge to award interest other than as specifically set out in ss. 128 and 129, clearly indicate that the rates and calculation methods of interest provided in ss. 128 and 129 are applicable in the absence of more appropriate rates and methods of

aux sommes que devait lui verser l'intimée en exécution de l'EPP jusqu'au remboursement du prêt à la construction. En 1991, lors de l'effondrement du marché immobilier, l'intimée a refusé d'avancer à l'appelante les fonds prévus dans la cession de l'EPP ou dans une convention subséquente conclue par les parties. L'appelante a mis l'immeuble sous séquestre et l'a vendu pour la somme de 22,5 millions de dollars, bien inférieure au montant qui lui était dû suivant la convention de prêt et la cession de l'EPP. Dans une action intentée contre l'appelante pour inexécution de contrat, le juge de première instance a accordé à l'appelante des dommages-intérêts équivalant à la perte subie plus l'intérêt au taux composé prévu dans la convention de prêt pour les périodes antérieure et postérieure au jugement. La Cour d'appel a rejeté l'appel, sauf en ce qui concerne l'intérêt composé, qu'elle a remplacé par l'intérêt simple prévu à l'art. 128 de la *Loi sur les tribunaux judiciaires* (la « *LTJ* »).

Arrêt : Le pourvoi est accueilli et le jugement de première instance est rétabli.

L'intérêt simple et l'intérêt composé traduisent chacun la valeur temporelle de la somme d'argent initiale, le capital; cependant, contrairement à l'intérêt simple, l'intérêt composé tient compte de la valeur temporelle des versements d'intérêts. L'intérêt simple crée une distinction artificielle entre la somme exigible à titre de capital et celle payable à titre d'intérêt, alors que dans le calcul de l'intérêt composé, chaque dollar est considéré comme un dollar, de sorte que ce type d'intérêt traduit plus précisément la valeur de la possession d'une somme pendant une période donnée. L'intérêt composé est la norme dans les systèmes bancaires et financiers et tant l'appelante que l'intimée, dont les activités consistent à prêter de l'argent, en exigent couramment le paiement.

Il existe deux méthodes pour fixer le montant des dommages-intérêts contractuels : l'indemnisation de la perte du profit escompté, calculée en fonction de la valeur que le demandeur aurait reçue si le contrat avait été exécuté, et la restitution de l'avantage obtenu, calculée en fonction de l'avantage que le défendeur tire de l'inexécution du contrat. Pour accorder des dommages-intérêts au demandeur, la cour doit tout d'abord déterminer la valeur financière de la promesse faite au demandeur au moment où l'obligation aurait dû être exécutée, puis appliquer le taux d'intérêt et le mode de calcul appropriés pour tenir compte de la période pendant laquelle le demandeur a été privé de son dû. En Ontario, les intérêts antérieurs et postérieurs au jugement sont régis par les art. 128 à 130 *LTJ*. Il ressort clairement de l'al. 128(4)g), du par. 129(5) et de l'art. 130 *LTJ*, qui permettent tous au tribunal d'accorder d'autres intérêts que ceux expressément prévus aux art. 128 et 129, que les taux et les méthodes de calcul

calculation. Section 130 allows a court, where it considers it just, to vary the interest rate or the time for which interest may be awarded, while ss. 128(4)(g) and 129(5) allow a court to award interest where interest is "payable by a right other than under this section". The court's common law power to award damages flows from the application of contract law. The language of ss. 128(4)(g) and 129(5) provides statutory authority to award compound pre- and post-judgment interest according to this common law power. It also provides statutory authority to award compound post-judgment interest according to the court's jurisdiction in equity. Absent exceptional circumstances, the interest rate which had governed a loan prior to breach would be the appropriate rate to govern the post-breach loan. The application of simple interest on the breach of a loan which itself bore compound interest would not adequately award the plaintiff the value he or she would have received had the contract been performed and would provide incentives to breach contracts. This analysis applies equally to pre-judgment interest and post-judgment interest.

In this case, the trial judge was correct in awarding compound pre- and post-judgment interest. His award yields a satisfactory result with respect to both expectation damages and restitution damages. Any lesser amount would fail to award the appellant the agreed-upon time-value of its money. Moreover, this is not a case of efficient breach. An award of compound interest will prevent the respondent from profiting by its breach at the expense of the appellant.

Cases Cited

Referred to: *Hungerfords v. Walker* (1989), 171 C.L.R. 125; *Haack v. Martin*, [1927] S.C.R. 413; *Costello v. Calgary (City)* (1997), 152 D.L.R. (4th) 453; *Rowan v. Toronto R.W. Co.* (1918), 43 O.L.R. 164; *Brock v. Cole* (1983), 142 D.L.R. (3d) 461; *Claiborne Industries Ltd. v. National Bank of Canada* (1989), 59 D.L.R. (4th) 533; *Confederation Life Insurance Co. v. Shepherd* (1996), 88 O.A.C. 398; *Oceanic Exploration Co. v. Denison Mines Ltd.*, Ont. Ct. (Gen. Div.), May 8, 1998; *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581; *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council*, [1996] 2 All E.R. 961; *Friedmann Equity Developments Inc. v. Final Note Ltd.*,

prescrits par ces articles s'appliquent en l'absence de taux et de méthodes de calcul plus appropriés. L'article 130 permet au tribunal, s'il l'estime juste, de modifier le taux d'intérêt ou la période pour laquelle l'intérêt est accordé, alors que l'al. 128(4)g) et le par. 129(5) lui permettent d'accorder des intérêts lorsque le droit aux intérêts « a sa source ailleurs que dans le présent article ». Le pouvoir que la common law confère au tribunal d'accorder des dommages-intérêts découle de l'application du droit des contrats. Le libellé de l'al. 128(4)g) et du par. 129(5) lui confèrent le pouvoir légal d'accorder des intérêts antérieurs et postérieurs au jugement à taux composé conformément à ce pouvoir de common law. Il leur confère aussi le pouvoir légal d'accorder des intérêts postérieurs au jugement à taux composé dans l'exercice de leur compétence en equity. Sauf circonstances exceptionnelles, le taux d'intérêt applicable à l'emprunt avant l'inexécution devrait s'appliquer également après celle-ci. En accordant l'intérêt simple pour l'inexécution d'un contrat de prêt stipulant lui-même un intérêt composé, le tribunal n'octroierait pas au demandeur un dédommagement convenable équivalant à ce qu'il aurait touché si le contrat avait été dûment exécuté et encouragerait les parties à se soustraire à leurs obligations contractuelles. Ces principes valent aussi bien pour les intérêts antérieurs au jugement que pour les intérêts postérieurs au jugement.

En l'espèce, le juge de première instance a eu raison d'accorder les intérêts antérieurs et postérieurs au jugement à taux composé. Son jugement donne un résultat satisfaisant en ce qui concerne tant l'indemnisation de la perte du profit escompté que la restitution de l'avantage obtenu du fait de l'inexécution. Toute somme inférieure versée à l'appelante ne tiendrait pas compte de la valeur temporelle de l'argent dont les parties étaient convenues. De plus, on ne peut parler en l'espèce d'inexécution rentable. L'octroi d'intérêts composés empêchera l'intimée de tirer avantage de son inexécution aux dépens de l'appelante.

Jurisprudence

Arrêts mentionnés : *Hungerfords c. Walker* (1989), 171 C.L.R. 125; *Haack c. Martin*, [1927] R.C.S. 413; *Costello c. Calgary (City)* (1997), 152 D.L.R. (4th) 453; *Rowan c. Toronto R.W. Co.* (1918), 43 O.L.R. 164; *Brock c. Cole* (1983), 142 D.L.R. (3d) 461; *Claiborne Industries Ltd. c. National Bank of Canada* (1989), 59 D.L.R. (4th) 533; *Confederation Life Insurance Co. c. Shepherd* (1996), 88 O.A.C. 398; *Oceanic Exploration Co. c. Denison Mines Ltd.*, C. Ont. (Div. gén.), 8 mai 1998; *Air Canada c. Ontario (Régie des alcools)*, [1997] 2 R.C.S. 581; *Westdeutsche Landesbank Girozentrale c. Islington London Borough Council*, [1996] 2 All E.R. 961; *Friedmann Equity Developments Inc. c. Final*

[2000] 1 S.C.R. 842, 2000 SCC 34; *Hadley v. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145.

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APPEAL from a judgment of the Ontario Court of Appeal (2000), 184 D.L.R. (4th) 1, 130 O.A.C. 149, 30 R.P.R. (3d) 167, [2000] O.J. No. 704 (QL), affirming in part a decision from the Ontario Court (General Division) (1998), 18 R.P.R. (3d) 213, [1998] O.J. No. 1525 (QL). Appeal allowed.

Frank J. C. Newbould, *Q.C.*, *Benjamin T. Glustein*, and *Aaron A. Blumenfeld*, for the appellant.

Earl A. Cherniak, Q.C., and *Kirk F. Stevens*, for the respondent.

The judgment of the Court was delivered by

MAJOR J. —

I. Introduction

1 Whether a court has jurisdiction to award compound interest on an award for damages has been the subject of debate. That question, renewed in this appeal, is: can the court order the payment of compound pre- and post-judgment interest? The

Note Ltd., [2000] 1 R.C.S. 842, 2000 CSC 34; *Hadley c. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145.

Lois et règlements cités

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Administration of Justice Act, 1884, S.O. 1884, ch. 10.

Judicature Act, R.S.O. 1887, ch. 44, art. 88.

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Sorter, George H., Monroe J. Ingberman, and Hillel M. Maximon. *Financial Accounting : An Events and Cash Flow Approach*. New York : McGraw-Hill, 1990.

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Frank J. C. Newbould, *c.r.*, *Benjamin T. Glustein* et *Aaron A. Blumenfeld*, pour l'appelante.

Earl A. Cherniak, *c.r.*, et *Kirk F. Stevens*, pour l'intimée.

Version française du jugement de la Cour rendu par

LE JUGE MAJOR —

I. Introduction

La question de savoir si une cour de justice a compétence pour accorder l'intérêt à taux composé sur les dommages-intérêts est controversée. Elle se pose à nouveau dans le cadre du présent pourvoi, dans les termes suivants : la cour peut-elle ordonner

trial judge in the Ontario Court (General Division) said yes but was reversed by the Ontario Court of Appeal.

Sections 128 and 129 of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"), prescribe interest rates and methods of calculation before and after judgment and also permit a court to award other rates and methods of calculation in accordance with those sections.

Is the appellant entitled, on a breach of contract claim, to compound interest both before and after judgment? I conclude that it is and, as a result, the appeal is allowed.

II. Facts

In 1987, Reemark Sterling I Ltd. ("Reemark") planned to build a 300-unit residential condominium project in Scarborough, Ontario. Reemark intended to sell the units to investors. On November 12, 1987, Reemark entered into an agreement with the respondent, Mutual Trust Company (now Clarica Trust Company), under which the respondent trust company agreed to provide mortgage financing to investors to allow them to purchase the units from Reemark. This agreement was the Takeout Mortgage Commitment (the "TOC"). Under this arrangement, the respondent trust company would be entitled to interest on the loans compounded semi-annually. The aggregate amount available under the TOC was $36.5 million.

Reemark would not receive funds pursuant to the TOC until units had been sold and the mortgages were arranged. In the meantime, Reemark needed money to start construction of the project. On December 1, 1988, Reemark and the appellant bank entered into a construction loan agreement (the "Loan Agreement") under which the appellant bank agreed to provide Reemark with a construction loan of $33 million for the project. The Loan Agreement

le paiement d'intérêts composés antérieurs et postérieurs au jugement? Le juge de première instance de la Cour de l'Ontario (Division générale) a répondu par l'affirmative, mais la Cour d'appel de l'Ontario a infirmé cette décision.

2 Les articles 128 et 129 de la *Loi sur les tribunaux judiciaires* de l'Ontario, L.S.O. 1990, ch. C.43 (la « *LTJ* »), prescrivent les taux et les méthodes de calcul des intérêts antérieurs et postérieurs au jugement. Ils autorisent également le tribunal à utiliser d'autres taux et méthodes de calcul conformément à leurs dispositions.

3 L'appelante, qui invoque l'inexécution d'un contrat, a-t-elle droit à des intérêts composés antérieurs et postérieurs au jugement? J'estime qu'elle y a droit et, par conséquent, l'appel est accueilli.

II. Les faits

4 En 1987, Reemark Sterling I Ltd. (« Reemark ») projetait la construction à Scarborough, en Ontario, d'un immeuble en copropriété comprenant 300 unités résidentielles qu'elle comptait vendre à des investisseurs. Le 12 novembre 1987, Reemark a conclu, avec la Société de fiducie Mutuelle intimée (maintenant la Société de fiducie Clarica), une convention suivant laquelle la société de fiducie intimée s'engageait à consentir aux investisseurs le financement hypothécaire nécessaire pour acheter les unités de Reemark. Cette convention prenait la forme d'un Engagement de prêt hypothécaire post-construction (l'« EPP »). Selon les stipulations de l'engagement, l'intérêt payable à la société de fiducie intimée sur les prêts hypothécaires était composé semestriellement. Le montant global du financement offert dans l'engagement s'élevait à 36,5 millions de dollars.

5 Reemark ne devait toucher les fonds qu'une fois les unités vendues et les hypothèques constituées. Dans l'intervalle, elle avait besoin de fonds pour entreprendre la construction de l'immeuble. Le 1er décembre 1988, la banque appelante et Reemark ont passé une convention de prêt à la construction (la « Convention de prêt »), dans laquelle la banque acceptait de consentir un prêt de 33 millions de dollars à Reemark. Selon la Convention de prêt,

required Reemark to repay the loan with interest equal to the appellant bank's prime lending rate plus one percent compounded monthly.

6 On December 16, 1988, the appellant bank, Reemark and the respondent trust company executed an Assignment of Takeout Financing Commitment ("TOC Assignment") by which the respondent trust company would pay the proceeds of the TOC to the appellant bank rather than Reemark until the construction loan was repaid.

7 On July 31, 1991, against the background of the collapsing real estate market of the early 1990s, the respondent trust company refused to advance funds under the TOC and declared that it would do so only if additional conditions were met. Following negotiations, the respondent trust company, the appellant bank and Reemark executed a further agreement on December 18, 1991, called the Amended Takeout Mortgage Commitment ("ATOC"). It provided a renegotiated basis upon which the respondent was to advance the long-term mortgage financing to the appellant. The respondent again refused to advance funds to the appellant. The appellant appointed a receiver of the project and sold the building for $22.5 million, which left a significant shortfall of principal and accrued compound interest.

8 The appellant brought an action against the respondents for breach of contract. At trial, Farley J. found that the respondent had breached the TOC, the TOC Assignment, and the ATOC. He awarded damages to the appellant with compound interest at the rate specified in the Loan Agreement as referenced in the TOC Assignment both before and after the judgment. The Ontario Court of Appeal dismissed the appeal except for the question of interest where it substituted an order for simple interest as provided in s. 128 *CJA*. The difference between compound and simple interest on the damages awarded is approximately $5 million or more.

l'emprunt que Reemark devait rembourser portait intérêt au taux préférentiel de la banque appelante majoré de un pour cent et composé mensuellement.

Le 16 décembre 1988, la banque appelante, Reemark et la société de fiducie intimée ont signé un acte de cession de l'EPP (la « cession de l'EPP ») par lequel la société de fiducie intimée convenait de verser le produit de l'EPP à la banque appelante plutôt qu'à Reemark, jusqu'au remboursement du prêt à la construction.

Le 31 juillet 1991, dans le contexte de l'effondrement du marché immobilier du début des années quatre-vingt-dix, la société de fiducie intimée a refusé d'avancer les fonds prévus par l'EPP et a déclaré qu'elle ne les verserait qu'une fois de nouvelles conditions remplies. Le 18 décembre 1991, à l'issue de négociations, la société de fiducie intimée, la banque appelante et Reemark ont signé une nouvelle convention, l'Engagement de prêt hypothécaire postconstruction modifié (l'« EPPM »). L'EPPM stipulait les nouvelles conditions auxquelles la société de fiducie intimée devait verser à l'appelante le produit du financement hypothécaire à long terme. L'intimée a de nouveau refusé d'avancer des fonds à l'appelante. Après avoir nommé un séquestre à l'égard de l'immeuble, l'appelante l'a vendu au prix de 22,5 millions de dollars, somme bien inférieure au capital et aux intérêts composés courus.

L'appelante a poursuivi l'intimée pour inexécution de contrat. En première instance, le juge Farley a conclu que l'intimée avait manqué aux obligations que lui imposaient l'EPP, la cession de l'EPP et l'EPPM. Il a accordé à l'appelante des dommages-intérêts avec intérêt composé pour les périodes antérieure et postérieure au jugement au taux prévu dans la Convention de prêt intégrée par renvoi à la cession de l'EPP. La Cour d'appel de l'Ontario a confirmé le jugement, sauf en ce qui concerne l'intérêt composé, qu'elle a remplacé par l'intérêt simple prévu à l'art. 128 *LTJ*. La différence entre l'intérêt composé et l'intérêt simple sur les dommages-intérêts accordés s'élève à environ 5 millions de dollars, voire davantage.

III. Relevant Statutory Provisions

Courts of Justice Act, R.S.O. 1990, c. C.43

128.—(1) A person who is entitled to an order for the payment of money is entitled to claim and have included in the order an award of interest thereon at the prejudgment interest rate, calculated from the date the cause of action arose to the date of the order.

. . .

(4) Interest shall not be awarded under subsection (1),

. . .

(b) on interest accruing under this section;

. . .

(g) where interest is payable by a right other than under this section.

129.—(1) Money owing under an order, including costs to be assessed or costs fixed by the court, bears interest at the postjudgment interest rate, calculated from the date of the order.

. . .

(5) Interest shall not be awarded under this section where interest is payable by a right other than under this section.

130.—(1) The court may, where it considers it just to do so, in respect of the whole or any part of the amount on which interest is payable under section 128 or 129,

(a) disallow interest under either section;

(b) allow interest at a rate higher or lower than that provided in either section;

(c) allow interest for a period other than that provided in either section.

(2) For the purpose of subsection (1), the court shall take into account,

III. Dispositions législatives applicables

Loi sur les tribunaux judiciaires, L.R.O. 1990, ch. C.43

128 (1) La personne qui a droit à une ordonnance de paiement d'une somme d'argent a le droit de demander que l'ordonnance lui accorde des intérêts sur cette somme, calculés au taux d'intérêt antérieur au jugement, depuis la date à laquelle la cause d'action a pris naissance jusqu'à la date de l'ordonnance.

. . .

(4) Il n'est pas accordé d'intérêts aux termes du paragraphe (1) :

. . .

b) sur les intérêts accumulés aux termes du présent article;

. . .

g) si le droit aux intérêts a sa source ailleurs que dans le présent article.

129 (1) La somme d'argent due aux termes d'une ordonnance, y compris les dépens devant être liquidés ou ceux fixés par le tribunal, porte intérêt au taux d'intérêt postérieur au jugement, à compter de la date de l'ordonnance.

. . .

(5) Il ne doit pas être accordé d'intérêts aux termes du présent article si un droit aux intérêts existe en vertu d'un autre article.

130 (1) Le tribunal peut, à l'égard de la totalité ou d'une partie de la somme qui porte intérêt aux termes de l'article 128 ou 129, s'il l'estime juste :

a) refuser les intérêts prévus à l'un ou l'autre article;

b) accorder des intérêts à un taux supérieur ou inférieur à celui qui est prévu à l'un ou l'autre article;

c) accorder des intérêts pour une période différente de celle qui est prévue à l'un ou l'autre article.

(2) Pour l'application du paragraphe (1), le tribunal tient compte :

(a) changes in market interest rates;

(b) the circumstances of the case;

(c) the fact that an advance payment was made;

(d) the circumstances of medical disclosure by the plaintiff;

(e) the amount claimed and the amount recovered in the proceeding;

(f) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding; and

(g) any other relevant consideration.

IV. Judicial History

A. *Ontario Court (General Division)* (1998), 18 R.P.R. (3d) 213

10 The trial judge found the respondent in breach of contract for a number of reasons, namely it breached its takeout financing commitment and acted in bad faith on its agreement by refusing to fund the TOC in 1991 and the ATOC in 1992; by causing unreasonable delay in replacing its counsel; by sending out invalid requisitions when it knew or ought to have known that they were invalid and only used for "negotiating purposes"; and, finally, "by taking a position at the end of February 1992 that it was relieved of its obligations to provide takeout financing as of March 1, 1992".

11 The trial judge held that under the TOC, the appellant would have received $36.5 million less $400,000 legal fees and disbursements and less a $182,500 commitment fee payable on closing of the individual mortgages for a net amount of $35,917,500. The appellant received proceeds from the sale of the building. Subtracting this amount from amounts owing on the construction loan, at the end of May 1993, meant that $11,045,200.79 of principal and $4,473,665.01 of interest (as per the Loan Agreement, calculated at the BAC prime rate plus one percent per annum compounded monthly) remained outstanding for a total of $15,518,865.80. From this amount, the trial judge deducted $600,000

a) de la fluctuation des taux d'intérêt du marché;

b) des circonstances de l'espèce;

c) du fait qu'un paiement anticipé a été effectué;

d) des faits relatifs à la divulgation de renseignements médicaux par le demandeur;

e) du montant demandé et du montant recouvré dans le cadre de l'instance;

f) du comportement de l'une ou l'autre partie, qui aurait eu pour effet d'abréger ou de prolonger indûment la durée de l'instance;

g) de tout autre facteur pertinent.

IV. Historique des procédures judiciaires

A. *La Cour de l'Ontario (Division générale)* (1998), 18 R.P.R. (3d) 213

Le juge de première instance a conclu qu'il y avait eu inexécution de contrat de la part de l'intimée pour plusieurs raisons : elle avait manqué à ses obligations de financement hypothécaire postconstruction et avait agi de mauvaise foi en refusant d'avancer les fonds prévus par l'EPP en 1991 et par l'EPPM en 1992, en retenant les services de nouveaux avocats et en causant ainsi un retard déraisonnable, en présentant des réquisitions qu'elle savait ou aurait dû savoir injustifiées et formulées uniquement à des [TRADUCTION] « fins de négociation » et, enfin, [TRADUCTION] « en prétendant, à la fin du mois de février 1992, être déchargée de l'obligation d'assurer le financement hypothécaire postconstruction à partir du 1er mars 1992 ».

Le juge de première instance a statué que, suivant l'EPP, l'appelante aurait touché 36,5 millions de dollars, représentant un montant net de 35 917 500 $ déduction faite d'un montant de 400 000 $ au titre des honoraires d'avocat et des débours et d'une commission d'engagement de 182 500 $ payable à la clôture des hypothèques individuelles. L'appelante a touché le produit de la vente de l'immeuble. Si l'on soustrait ce produit des sommes dues en application de la Convention de prêt à la fin du mois de mai 1993, un capital de 11 045 200,79 $ et des intérêts de 4 473 665,01 $ (calculés au taux préférentiel de la banque appelante majoré de un pour cent par année et composés

representing the higher than expected vacancy rate for a total of $14,918,865.80 owed by the respondent to the appellant as of June 1, 1993. The trial judge adjusted this figure by adding monthly compounded interest at the BAC prime rate plus one percent per annum compounded monthly, the rate provided for in the Loan Agreement.

In deciding the appropriate measure of pre-judgment and post-judgment interest, the trial judge agreed with the appellant that it should be awarded the interest rate provided for in the Loan Agreement because, although it only intended to be an interim lender, the breach by the respondent resulted in the appellant becoming a long term lender which resulted in the appellant missing other investment opportunities as the money due to it was not paid and not available for other loans. The appellant also submitted that awarding simple interest would result in a windfall for the respondent as it would lend the money it owed to the appellant to customers at its usual compound interest rates.

The respondent opposed the award of compound interest for three reasons. First, the appellant's statement of claim did not plead compound interest. Second, the appellant did not miss investment opportunities for lack of funds because it could have obtained funds from its parent corporation or other lenders. Finally, the interest rate in the Loan Agreement should not apply to the respondent as it was not a party to the contract.

The trial judge rejected these arguments. He confirmed that the statement of claim could be amended at any stage of the proceeding and that the respondent was not prejudiced in this case by the appellant raising the issue of compound interest at trial as the respondent was fully aware of the issue. He decided that financial institutions could not borrow money without cost and that the respondent was not a stranger to the Loan Agreement but was, in effect,

mensuellement, conformément à la Convention de prêt) demeuraient impayés, soit un solde de 15 518 865,80 $ au total. De cette somme, le juge de première instance a déduit 600 000 $ pour tenir compte du taux d'inoccupation plus élevé que prévu, de sorte que l'intimée devait à l'appelante la somme de 14 918 865,80 $ le 1er juin 1993. Il a rajusté ce montant en y ajoutant l'intérêt composé mensuellement au taux préférentiel de la banque appelante majoré de un pour cent par année, soit le taux stipulé dans la Convention de prêt.

12 Pour déterminer le juste montant des intérêts antérieurs et postérieurs au jugement, le juge de première instance a convenu que l'appelante devait obtenir le taux d'intérêt prévu dans la Convention de prêt. Bien que l'appelante n'ait voulu fournir qu'un prêt-relais, l'inexécution de l'intimée avait transformé ce prêt en prêt à long terme, de sorte qu'elle n'avait pu saisir d'autres occasions de placement, n'ayant pas reçu les sommes qui lui étaient dues et ne pouvant les utiliser pour consentir d'autres prêts. L'appelante a également soutenu que le paiement de l'intérêt simple serait indûment avantageux pour l'intimée, celle-ci pouvant, dans l'intervalle, prêter les sommes impayées à ses taux d'intérêt composés habituels.

13 L'intimée s'est opposée au paiement de l'intérêt composé pour trois motifs. Premièrement, l'appelante n'avait pas formulé de demande en ce sens dans sa déclaration. Deuxièmement, le non-paiement des sommes en cause ne l'a pas empêchée de saisir des occasions de placement, car elle aurait pu obtenir des fonds de sa société mère ou d'autres prêteurs. Enfin, le taux d'intérêt fixé dans la Convention de prêt ne devait pas s'appliquer à l'intimée, puisqu'elle n'était pas partie à ce contrat.

14 Le juge de première instance a écarté ces arguments. Il a confirmé que la déclaration pouvait être modifiée à toute étape de l'instance et que l'appelante, en soulevant à l'audience la question de l'intérêt composé, n'avait causé aucun préjudice à l'intimée, celle-ci étant parfaitement au courant de la question. Selon lui, une institution financière ne pouvait emprunter des fonds sans engager de frais et l'intimée n'était pas étrangère à la Convention de

to step into the place of the appellant, as lender to Reemark.

15 Farley J. considered ss. 128 and 129 *CJA*, but relied on s. 130 to exercise his discretion in varying the award of interest. The trial judge referred to Mason C.J. and Wilson J. in *Hungerfords v. Walker* (1989), 171 C.L.R. 125 (Aust. H.C.), at pp. 145-46 and at pp. 149-50, and concluded that this case involved a breach of financing with the attendant deprivation to the plaintiff from receiving the funds on a timely basis in accordance with the contract and the reciprocal benefit to the defendant in retaining and investing funds it should have paid. This led him to conclude that there should be a compounding provision for the pre- and post-judgment interest particularly when, as here, the plaintiff and the defendants are financial institutions whose business is lending money regularly at compound rates.

16 It is part of the record that each of the relevant agreements, the Loan Agreement, the TOC and the TOC Assignment, involved compound interest. The respondent agreed that was so but claimed that compound interest ceased upon its breach of the contract.

17 In summary, the trial judge determined that in 1987, Reemark began plans to build the condominium project. On November 12, 1987, Reemark and the respondent trust company entered into the TOC under which the respondent would pay Reemark most of the price of a unit and receive mortgage loan payments from investors at compound interest rates. On December 1, 1988, Reemark and the appellant bank entered into the Loan Agreement under which the appellant loaned Reemark $33 million at compound interest rates. On December 16, 1988, Reemark, the appellant and the respondent entered into the TOC Assignment under which Reemark assigned its rights to receive payments from the respondent under the TOC to the appellant until the construction loan had been repaid. Upon learning that the respondent would not perform its obligations pursuant to the TOC Assignment or

prêt, mais devait en fait se substituer à l'appelante comme bailleur de fonds de Reemark.

Après avoir examiné les art. 128 et 129 *LTJ*, le juge Farley a exercé le pouvoir discrétionnaire que lui conférait l'art. 130 de recourir à une autre méthode de calcul. Il a cité le juge en chef Mason et le juge Wilson dans *Hungerfords c. Walker* (1989), 171 C.L.R. 125 (H.C. Austr.), p. 145-146 et 149-150, puis il a conclu qu'il s'agissait en l'espèce de l'inexécution d'un contrat de financement qui avait empêché la demanderesse de toucher des fonds au moment prévu conformément au contrat et permis par la même occasion à la défenderesse de conserver et de placer les sommes qu'elle aurait dû verser. Il est donc arrivé à la conclusion que les intérêts antérieurs et postérieurs au jugement devaient être composés, d'autant plus que la demanderesse et les défenderesses étaient, comme en l'espèce, des institutions financières dont les activités consistent à prêter régulièrement de l'argent à des taux d'intérêt composés.

Le dossier révèle que le taux d'intérêt stipulé dans chacune des conventions en cause, soit la Convention de prêt, l'EPP et la cession de l'EPP, était composé. L'intimée en a convenu, mais elle a opposé que l'intérêt composé avait cessé d'être exigible dès l'inexécution du contrat.

En résumé, le juge de première instance a déterminé que, en 1987, Reemark avait commencé à établir des plans en vue de la construction de l'immeuble en copropriété. Le 12 novembre 1987, Reemark et la société de fiducie intimée avaient conclu l'EPP suivant lequel l'intimée devait verser à Reemark la quasi-totalité du prix d'une unité et toucher de la part des investisseurs les versements hypothécaires portant intérêt à un taux composé. Le 1er décembre 1988, Reemark et la banque appelante ont conclu la Convention de prêt par laquelle l'appelante prêtait à Reemark 33 millions de dollars à un taux d'intérêt composé. Le 16 décembre 1988, Reemark, l'appelante et l'intimée ont conclu la cession de l'EPP, Reemark cédant à l'appelante son droit aux sommes que devait lui verser l'intimée en exécution de l'EPP, jusqu'au remboursement du prêt à la construction. Ayant appris que l'intimée

a subsequent agreement between the parties, the appellant appointed a receiver of the project and sold the project for $22.5 million, substantially less than the appellant was owed under the Loan Agreement and TOC Assignment. The trial judge awarded the appellant damages equal to the shortfall plus interest at the compound rate set out in the Loan Agreement.

ne s'acquitterait pas des obligations contractées dans la cession de l'EPP ou dans une convention subséquente conclue par les parties, l'appelante a mis l'immeuble sous séquestre et l'a vendu pour la somme de 22,5 millions de dollars, bien inférieure au montant qui lui était dû suivant la Convention de prêt et la cession de l'EPP. Le juge de première instance a accordé à l'appelante des dommages-intérêts équivalant à la perte subie plus l'intérêt au taux composé prévu dans la Convention de prêt.

B. *Ontario Court of Appeal* (2000), 184 D.L.R. (4th) 1

B. *La Cour d'appel de l'Ontario* (2000), 184 D.L.R. (4th) 1

The Ontario Court of Appeal affirmed the trial judgment other than the award of compound interest. Goudge J.A. stated that the court cannot presume that simply because the appellant was engaged in the lending business that it lost profits equal to the interest rate it was entitled to under the Loan Agreement. He concluded that lost profits must be proved.

18 La Cour d'appel de l'Ontario a confirmé le jugement de première instance, sauf en ce qui a trait à l'intérêt composé. Le juge Goudge a dit que la cour ne pouvait présumer que l'appelante, du seul fait que son activité consistait à consentir des prêts, avait subi une perte de profits équivalant au taux d'intérêt auquel elle avait droit suivant la Convention de prêt. Selon lui, l'appelante devait prouver sa perte de profits.

As well, Goudge J.A. held that the discretion granted to the court under s. 130 *CJA* to vary an interest award from what is prescribed under ss. 128 and 129 does not include the authority to award compound interest. He found that the court's jurisdiction to award compound interest stems from the court's general equitable jurisdiction. If the principles of equity warrant an award of compound interest, it is, in the language of ss. 128(4)(g) and 129(5), "payable by a right other than under this section". As a result, this being in his view a simple breach of contract, equitable principles did not warrant damages at compound interest rates.

19 De même, le juge Goudge a statué que l'art. 130 *LTJ*, qui confère à la cour le pouvoir discrétionnaire d'accorder des intérêts différents de ceux prescrits aux art. 128 et 129, ne permettait pas d'ordonner le paiement d'intérêts composés. À son avis, le pouvoir d'accorder des intérêts composés découle de la compétence générale de la cour en equity. Si les principes de l'equity justifient le versement d'intérêts composés, le droit à ces intérêts, suivant l'al. 128(4)g) et le par. 129(5), « a sa source ailleurs que dans le présent article » ou « existe en vertu d'un autre article ». Or, selon lui, il s'agissait en l'espèce d'une simple inexécution de contrat, de sorte que les principes de l'equity ne justifiaient pas que les dommages-intérêts accordés portent intérêt à un taux composé.

V. Issue

V. La question en litige

Did the trial judge have the jurisdiction to award compound pre-judgment and post-judgment interest and, if so, was he correct in doing so?

20 Le juge de première instance avait-il compétence pour accorder des intérêts composés pour les périodes antérieure et postérieure au jugement et, dans l'affirmative, a-t-il eu raison de le faire?

VI. Analysis

A. *Jurisdiction*

(1) The Time-Value of Money

21 The value of money decreases with the passage of time. A dollar today is worth more than the same dollar tomorrow. Three factors account for the depreciation of the value of money: (i) opportunity cost (ii) risk, and (iii) inflation.

22 The first factor, opportunity cost, reflects the uses of the dollar which are foregone while waiting for it. The value of the dollar is reduced because the opportunity to use it is absent. The second factor, risk, reflects the uncertainty inherent in delaying possession. Possession of a dollar today is certain but the expectation of the same dollar in the future involves uncertainty. Perhaps the future dollar will never be paid. The third factor, inflation, reflects the fluctuation in price levels. With inflation, a dollar will not buy as much goods or services tomorrow as it does today (G. H. Sorter, M. J. Ingberman and H. M. Maximon, *Financial Accounting: An Events and Cash Flow Approach* (1990), at p. 14). The time-value of money is common knowledge and is one of the cornerstones of all banking and financial systems.

23 Simple interest and compound interest each measure the time value of the initial sum of money, the principal. The difference is that compound interest reflects the time-value component to interest payments while simple interest does not. Interest owed today but paid in the future will have decreased in value in the interim just as the dollar example described in paras. 21-22. Compound interest compensates a lender for the decrease in value of all money which is due but as yet unpaid because unpaid interest is treated as unpaid principal.

24 Simple interest makes an artificial distinction between money owed as principal and money owed as interest. Compound interest treats a dollar as a dollar and is therefore a more precise measure of

VI. Analyse

A. *Compétence*

(1) La valeur temporelle de l'argent

La valeur de l'argent diminue avec le temps. Un dollar vaut davantage aujourd'hui que demain. La dépréciation de l'argent est imputable à trois facteurs : (i) le coût de renonciation, (ii) le risque et (iii) l'inflation.

Le premier facteur, le coût de renonciation, correspond aux occasions manquées d'utiliser la somme dont on attend le versement. La valeur de la somme diminue à cause de l'impossibilité de l'utiliser. Le deuxième facteur, le risque, traduit l'incertitude inhérente au report de la possession de la somme. La possession d'une somme aujourd'hui est certaine, mais son versement ultérieur ne l'est pas. La somme dont on prévoit le versement ultérieur pourrait ne jamais être touchée. Le troisième facteur, l'inflation, reflète la fluctuation des prix. À cause de l'inflation, un dollar permet d'acheter plus de biens ou de services aujourd'hui que demain (G. H. Sorter, M. J. Ingberman et H. M. Maximon, *Financial Accounting : An Events and Cash Flow Approach* (1990), p. 14). La valeur temporelle de l'argent est un fait notoire et constitue l'une des pierres angulaires de tous les systèmes bancaires et financiers.

L'intérêt simple et l'intérêt composé traduisent chacun la valeur temporelle de la somme d'argent initiale, le capital. La différence entre les deux réside dans le fait que, contrairement à l'intérêt simple, l'intérêt composé tient compte de la valeur temporelle des versements d'intérêts. Comme dans l'exemple du dollar cité aux par. 21 et 22, l'intérêt exigible aujourd'hui, mais payé plus tard, voit sa valeur diminuer dans l'intervalle. L'intérêt composé indemnise le prêteur de la dépréciation de tout l'argent qui lui est dû et qui demeure impayé, l'intérêt en souffrance étant assimilé au capital dû.

L'intérêt simple crée une distinction artificielle entre la somme exigible à titre de capital et celle payable à titre d'intérêt. Dans le calcul de l'intérêt composé, chaque dollar est considéré comme un

the value of possessing money for a period of time. Compound interest is the norm in the banking and financial systems in Canada and the western world and is the standard practice of both the appellant and respondent.

(2) Contract Damages

Contract damages are determined in one of two ways. Expectation damages, the usual measure of contract damages, focus on the value which the plaintiff would have received if the contract had been performed. Restitution damages, which are infrequently employed, focus on the advantage gained by the defendant as a result of his or her breach of contract.

(a) *Expectation Damages*

Generally, courts employ expectation damages where, if breach is proved, the plaintiff will be entitled to the value of the promised performance (S. M. Waddams, *The Law of Damages* (3rd ed. 1997), at p. 267).

See *Haack v. Martin*, [1927] S.C.R. 413, *per* Rinfret J., at p. 416:

The case is governed by the general rule applicable to all breaches of contract, and laid down as follows by Parke B. in *Robinson* v. *Harman* (1848) [1 Ex. 850, at p. 855].

> The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

Since the value of money decreases with the passage of time, an award, at trial, to a plaintiff of the dollar amount he or she expected to receive had the contract been performed on time would not put the plaintiff in the same position as if the contract had been performed. The party would receive less than his or her expectation damages because of the

dollar; ce type d'intérêt traduit donc plus précisément la valeur de la possession d'une somme pendant une période donnée. L'intérêt composé est la norme dans les systèmes bancaires et financiers au Canada et dans le monde occidental, et tant l'appelante que l'intimée en exigent couramment le paiement.

(2) Dommages-intérêts contractuels

25 Il existe deux méthodes pour fixer le montant des dommages-intérêts contractuels. La première, ordinairement utilisée, est l'indemnisation de la perte du profit escompté, calculée en fonction de la valeur que le demandeur aurait reçue si le contrat avait été exécuté. La deuxième, utilisée plus rarement, est la restitution de l'avantage obtenu, calculée en fonction de l'avantage que le défendeur tire de l'inexécution du contrat.

(a) *L'indemnisation de la perte du profit escompté*

26 En général, les tribunaux fixent le montant des dommages-intérêts en fonction de la perte du profit escompté lorsque la preuve de l'inexécution donne au demandeur le droit de recevoir la valeur de l'exécution promise (S. M. Waddams, *The Law of Damages* (3e éd. 1997), p. 267).

27 Dans l'arrêt *Haack c. Martin*, [1927] R.C.S. 413, le juge Rinfret dit ceci, à la p. 416 :

[TRADUCTION] La règle générale applicable à toute inexécution de contrat, énoncée comme suit par le baron Parke dans *Robinson* c. *Harman*, (1848) [1 Ex. 850, p. 855], s'applique en l'espèce :

> Suivant la common law, lorsqu'une partie subit une perte par suite de l'inexécution d'un contrat, les dommages-intérêts doivent, dans la mesure où une indemnité financière le permet, la placer dans la situation où elle se serait trouvée si le contrat avait été exécuté.

28 Comme la valeur de l'argent diminue avec le temps, l'octroi au demandeur, lors du procès, de la somme qu'il s'attendait à toucher si le contrat avait été exécuté au moment prévu ne le place pas dans la situation où il se serait trouvé si le contrat avait été dûment exécuté. Le demandeur obtient une somme inférieure à la perte du profit escompté, en raison

(i) opportunity cost, (ii) risk and (iii) inflation. The plaintiff would fail to receive the benefit of the bargain.

29 To award the plaintiff damages equal to the value of the contract as if it had been performed on time, the court must first determine the dollar value of the promise to the plaintiff at the time the obligation was to have been performed, and then apply the appropriate interest rate and method of calculation to account for the time during which the plaintiff was not paid what was rightfully due.

(b) *Restitution Damages*

30 The other side of the coin is to examine the effect of the breach on the defendant. In contract, restitution damages can be invoked when a defendant has, as a result of his or her own breach, profited in excess of his or her expected profit had the contract been performed but the plaintiff's loss is less than the defendant's gain. So the plaintiff can be fully paid his damages with a surplus left in the hands of the defendant. This occurs with what has been described as an efficient breach of contract. In some but not all cases, the defendant may be required to pay such profits to the plaintiff as restitution damages (Waddams, *supra*, at p. 474).

31 Courts generally avoid this measure of damages so as not to discourage efficient breach (i.e., where the plaintiff is fully compensated and the defendant is better off than if he or she had performed the contract) (Waddams, *supra*, at p. 473). Efficient breach is what economists describe as a Pareto optimal outcome where one party may be better off but no one is worse off, or expressed differently, nobody loses. Efficient breach should not be discouraged by the courts. This lack of disapproval emphasizes that a court will usually award money damages for breach of contract equal to the value of the bargain to the plaintiff.

(i) du coût de renonciation, (ii) du risque et (iii) de l'inflation. Il est privé de l'avantage que devait lui conférer le marché.

Pour accorder au demandeur des dommages-intérêts équivalant à la valeur qu'aurait eue le contrat s'il avait été exécuté dans le délai prévu, la cour doit tout d'abord déterminer la valeur financière de la promesse faite au demandeur au moment où l'obligation aurait dû être exécutée, puis appliquer le taux d'intérêt et le mode de calcul appropriés pour tenir compte de la période pendant laquelle le demandeur a été privé de son dû.

(b) *La restitution de l'avantage obtenu du fait de l'inexécution*

L'autre façon de considérer la question est d'examiner l'effet de l'inexécution sur le défendeur. En matière contractuelle, il peut y avoir restitution lorsque le défendeur a réalisé, du fait de sa propre inexécution, un gain supérieur à celui qu'il pouvait escompter si le contrat avait été exécuté, et que la perte du demandeur est inférieure au gain du défendeur. Ainsi, le défendeur peut réaliser un gain même après avoir indemnisé pleinement le demandeur de son préjudice. L'inexécution contractuelle est alors qualifiée de rentable. Dans certains cas seulement, le tribunal peut ordonner au défendeur de restituer ce profit au demandeur (Waddams, *op. cit.*, p. 474).

Les tribunaux évitent généralement de recourir à cette méthode de calcul des dommages-intérêts afin de ne pas décourager l'inexécution rentable (c.-à-d. lorsque le demandeur est entièrement dédommagé et que la situation du défendeur est plus avantageuse que s'il avait respecté le contrat) (Waddams, *op. cit.*, p. 473). L'inexécution rentable correspond à ce que les économistes décrivent comme l'optimum de Pareto : une partie peut être avantagée sans qu'aucune autre ne soit désavantagée; en d'autres termes, personne n'y perd. Les tribunaux ne devraient pas décourager l'inexécution rentable. Cette absence de désapprobation rappelle que les dommages-intérêts pour inexécution contractuelle accordés par les tribunaux équivalent habituellement à la valeur du marché pour le demandeur.

However, where a sum of money is required to be paid as of a certain date, the benefit to the defendant of the money during the interval between when the money is owed and when the money is paid is, all other things being equal, exactly the same as the detriment to the plaintiff of not having that money during the same interval. This is not a Pareto optimal outcome, but, rather, a zero-sum outcome. The defendant's gain is the plaintiff's loss, the value of which, but for the defendant's breach, would have belonged to the plaintiff.

To prevent defendants from exploiting the time-value of money to their advantage, by delaying payment of damages so as to capitalize on the time-value of money in the interim, courts must be able to award damages which include an interest component that returns the value acquired by a defendant between breach and payment to the plaintiff.

(3) Judgment Interest in Canada

The history of interest at law was identified in *Costello v. Calgary (City)* (1997), 152 D.L.R. (4th) 453 (Alta. C.A.), by Picard J.A., at pp. 492-94:

> The history of interest at law is long and miserly. Traditionally, pre-judgment interest generally was denied because it was thought usurious and the case against compound interest was considered particularly strong because of the (supposed) difficulty of calculation: M.A. Waldron, *The Law of Interest in Canada* (Scarborough, Ont.: Carswell, 1992) at pp. 1-10, 142. In time, at least the former rationale was abandoned and the harshness of the law's position was recognized. The legislative response, however, initially was limited. Section 28 of the *Civil Procedure Act, 1833* (U.K.), 3 & 4 Will. 4, c. 42 (better known as Lord Tenterden's Act), merely provided for the availability of interest upon "Debts or Sums certain". . . .
>
> Of course, that is not to say that non-statutory, pre-judgment interest was entirely foreign to the common law. Exceptions have always existed. Most obviously, interest has long been granted when provided for by

Cependant, toutes choses étant égales par ailleurs, lorsqu'une somme doit être payée à une date déterminée, l'avantage que le défendeur tire de la possession de cette somme entre le moment de son exigibilité et celui de son paiement correspond exactement au préjudice que subit le demandeur du fait qu'il est privé de cette somme pendant le même intervalle. Ce résultat ne peut être assimilé à l'optimum de Pareto. Il s'agit plutôt d'une situation gagnant-perdant. Le gain du défendeur correspond à la perte du demandeur, dont la valeur, n'eût été l'inexécution du défendeur, aurait échu au demandeur. 32

Afin d'éviter qu'un défendeur n'exploite à son avantage la valeur temporelle de l'argent en différant le paiement des dommages-intérêts et en capitalisant la valeur temporelle de cette somme dans l'intervalle, les tribunaux doivent pouvoir inclure, dans les dommages-intérêts accordés, des intérêts qui permettent au demandeur de récupérer la valeur acquise par le défendeur entre l'inexécution et le paiement des dommages-intérêts. 33

(3) L'intérêt sur les jugements au Canada

Dans *Costello c. Calgary (City)* (1997), 152 D.L.R. (4th) 453 (C.A. Alb.), le juge Picard a tracé l'historique de l'intérêt en common law (aux p. 492-493) : 34

> [TRADUCTION] Il a fallu attendre longtemps pour que soit reconnu, parcimonieusement, le droit aux intérêts en common law. Traditionnellement, les tribunaux refusaient d'accorder de façon générale les intérêts antérieurs au jugement parce qu'ils les estimaient usuraires, et les arguments en défaveur des intérêts composés leur paraissaient particulièrement convaincants à cause des (prétendues) difficultés de calcul : M.A. Waldron, *The Law of Interest in Canada* (Scarborough, Ont. : Carswell, 1992), p. 1 à 10 et 142. Avec le temps, on a abandonné à tout le moins le premier motif de refus et admis la sévérité de la common law. Les mesures législatives prises en conséquence avaient toutefois une portée limitée, à l'origine. L'article 28 de la *Civil Procedure Act, 1833* (R.-U.), 3 & 4 Will. 4, ch. 42 (mesure législative attribuée à lord Tenterden) ne permettait d'ordonner le paiement des intérêts que sur les créances ou sommes déterminées . . .
>
> Cela ne signifie évidemment pas que la common law ignorait totalement les intérêts antérieurs au jugement non prévus par une disposition législative. Il y a toujours eu des exceptions. De toute évidence, des intérêts sont

agreement of the parties or when implied by usage of trade: *Page v. Newman* (1829), 9 B. & C. 378, 109 E.R. 140.

35 Judgment interest in Canada has had statutory authorization since 1837 with the passage of *An Act for the further amendment of the Law, and the better advancement of Justice*, 7 Wm. 4, c. 3 (U.C.). See *Rowan v. Toronto R.W. Co.* (1918), 43 O.L.R. 164 (C.A.), at p. 173. The first statute which provided for interest on judgments for debt or sum certain in Upper Canada was the *Act to amend the Common Law Procedure Act of Upper Canada*, S. Prov. C. 1866, 29 & 30 Vict., c. 42. *The Administration of Justice Act, 1884*, S.O. 1884, c. 10, provided for post-judgment interest in certain cases in tort and the first provision generally allowing post-judgment interest appeared in *The Judicature Act*, R.S.O. 1887, c. 44 s. 88. Today in Ontario, each of pre-judgment and post-judgment interest is governed by ss. 128 to 130 *CJA*.

(4) Interest as Compensation

36 In *The Law of Interest in Canada* (1992), at pp. 127-28, M. A. Waldron explained that the initial theory underpinning an award of judgment interest was that the defendant's conduct was such that he or she deserved additional punishment. The modern theory is that judgment interest is more appropriately used to compensate rather than punish. At pp. 127-28, she wrote:

> Compensation is one of the chief aims of the law of damages, but a plaintiff who is successful in his action and is awarded a sum for damages assessed perhaps years before but now payable in less valuable dollars finds it quite obvious that he has been shortchanged. Equally obviously, payment of interest on his damage award from some relevant date is one way of redressing this problem.

The overwhelming opinion today of Law Reform Commissions and the academic community is that

depuis longtemps accordés lorsque les parties l'ont prévu dans leur contrat ou que tel est l'usage du commerce : *Page c. Newman* (1829), 9 B. & C. 378, 109 E.R. 140.

Au Canada, les intérêts sur le montant d'un jugement peuvent être accordés depuis l'adoption, en 1837, de la loi intitulée *An Act for the further amendment of the Law, and the better advancement of Justice*, 7 Wm. 4, ch. 3 (H.-C.). Voir *Rowan c. Toronto R.W. Co.* (1918), 43 O.L.R. 164 (C.A.), p. 173. La première loi prévoyant l'octroi par jugement des intérêts sur le montant d'une créance ou d'une somme certaine au Haut-Canada est la loi intitulée *Acte pour amender l'acte concernant la procédure du droit commun du Haut Canada*, S. Prov. C. 1866, 29 & 30 Vict., ch. 42. La loi intitulée *The Administration of Justice Act, 1884*, S.O. 1884, ch. 10, prévoyait le versement des intérêts postérieurs au jugement dans certaines affaires de responsabilité délictuelle. La loi intitulée *The Judicature Act*, R.S.O. 1887, ch. 44, art. 88, a été la première loi à renfermer une disposition autorisant les intérêts postérieurs au jugement de façon générale. De nos jours, en Ontario, les intérêts antérieurs et postérieurs au jugement sont régis par les art. 128 à 130 *LTJ*.

(4) Les intérêts compensatoires

Dans son ouvrage intitulé *The Law of Interest in Canada* (1992), p. 127-128, M. A. Waldron explique que la théorie justifiant l'octroi des intérêts sur le montant du jugement était, initialement, que le comportement du défendeur était tel qu'une sanction supplémentaire s'imposait. De nos jours, les intérêts sur le montant d'un jugement jouent, à plus juste titre, un rôle compensatoire plutôt que punitif. Voici ce qu'elle écrit aux p. 127-128 :

> [TRADUCTION] L'indemnisation est l'un des principaux objectifs du droit en matière de dommages-intérêts. Or le demandeur qui a gain de cause et qui obtient à titre de dommages-intérêts une somme établie il y a peut-être plusieurs années, payable aujourd'hui en dollars dépréciés, est convaincu de se faire rouler. Il est en outre évident que l'un des moyens de remédier à cette situation consiste à ordonner le paiement des intérêts sur le montant des dommages-intérêts accordés à partir d'une date pertinente donnée.

De nos jours, l'opinion largement prédominante parmi les commissions de réforme du droit et les théoriciens est

interest on a claim prior to judgment is properly part of the compensatory process. [Citations omitted.]

After acknowledging that historically compound interest was not available at common law, Waddams, *supra*, at p. 437, concludes that an award of compound interest should be available to courts so as to allow them to award full compensation to a plaintiff.

[T]here seems in principle no reason why compound interest should not be awarded. Had prompt recompense been made at the date of the wrong the plaintiff would have had a capital sum to invest; the plaintiff would have received interest on it at regular intervals and would have invested those sums also. By the same token the defendant will have had the benefit of compound interest.

Although not historically available, compound interest is well suited to compensate a plaintiff for the interval between when damages initially arise and when they are finally paid.

(5) Sections 128 to 130 of the *Courts of Justice Act*

Sections 128 to 130 *CJA* entitle a person with an award for damages to interest on the damages for the period between the date that the cause of action arose and the judgment ("pre-judgment interest") as well as for the period between the judgment and the time when payment is made in full ("post-judgment interest"). The legislation recognizes the unfairness of awarding a plaintiff damages, at trial, in the amount to which he or she was entitled as of the date that the cause of action arose, and no more for the period in between which is frequently years. Sections 128 and 129 *CJA*, therefore, contain interest rates and methods of calculation to serve for pre-judgment and post-judgment interest, respectively, in those cases for which there is no evidence of a more appropriate interest rate and/or method of calculation.

Sections 128(4)(g), 129(5) and 130 *CJA*, each of which allows the judge to award interest other than as specifically set out in ss. 128 and 129, clearly

que les intérêts antérieurs au jugement font à bon droit partie du processus d'indemnisation. [Citations omises.]

37 Après avoir reconnu que, historiquement, la common law ne permettait pas d'octroyer des intérêts composés, Waddams, *op. cit.*, conclut, à la p. 437, que les tribunaux devraient pouvoir ordonner le versement d'intérêts composés pour assurer l'indemnisation complète du demandeur.

[TRADUCTION] [A]ucun principe ne paraît justifier qu'un tribunal ne puisse accorder des intérêts composés. S'il avait été indemnisé le jour où il a subi le préjudice, le demandeur aurait disposé d'un capital à placer; il aurait périodiquement touché de l'intérêt sur ce capital, qu'il aurait également placé. Le défendeur a quant à lui bénéficié des intérêts composés.

38 Malgré l'impossibilité historique d'octroyer des intérêts composés, il s'agit d'un bon moyen d'indemniser le demandeur du délai écoulé entre le moment où le droit aux dommages-intérêts a pris naissance et le moment où ils sont enfin payés.

(5) Les articles 128 à 130 de la *Loi sur les tribunaux judiciaires*

39 Suivant les art. 128 à 130 *LTJ*, la personne qui se voit octroyer une somme à titre de dommages-intérêts a le droit de toucher les intérêts sur cette somme entre le moment où la cause d'action prend naissance et celui où le jugement est rendu (les « intérêts antérieurs au jugement »), de même que pour la période comprise entre la date du jugement et celle du paiement intégral de la somme accordée (les « intérêts postérieurs au jugement »). La loi reconnaît qu'il est injuste que le demandeur obtienne au procès des dommages-intérêts équivalant à ce qu'il aurait dû toucher le jour où la cause d'action a pris naissance, mais n'obtienne rien de plus pour le temps écoulé depuis, qui représente souvent plusieurs années. Les articles 128 et 129 *LTJ* prescrivent donc des taux d'intérêt et des méthodes de calcul applicables respectivement aux intérêts antérieurs au jugement et aux intérêts postérieurs au jugement, en l'absence de preuve de l'opportunité de recourir à autre méthode de calcul ou à un taux d'intérêt différent.

40 Il ressort clairement de l'al. 128(4)g), du par. 129(5) et de l'art. 130 *LTJ*, qui permettent tous au tribunal d'accorder d'autres intérêts que ceux

indicate that the rates and calculation methods of interest provided in ss. 128 and 129 are applicable in the absence of more appropriate rates and methods of calculation. Section 130 allows a court, where it considers it just, to vary the interest rate or the time for which interest may be awarded. Sections 128(4)(g) and 129(5) allow a court to award pre-judgment and post-judgment interest, respectively, where interest is payable by another right.

(6) Interest Payable by Another Right

41 Equity has been recognized as one right by which interest may be awarded other than as specifically stated in ss. 128 and 129 *CJA*, including an award of compound interest. (See *Brock v. Cole* (1983), 142 D.L.R. (3d) 461 (Ont. C.A.); *Claiborne Industries Ltd. v. National Bank of Canada* (1989), 59 D.L.R. (4th) 533 (Ont. C.A.); *Confederation Life Insurance Co. v. Shepherd* (1996), 88 O.A.C. 398 (C.A.); *Oceanic Exploration Co. v. Denison Mines Ltd.*, Ont. Ct. (Gen. Div.), May 8, 1998.) It is of some interest that in *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581, at para. 85, approving *Brock*, *supra*, Iacobucci J. emphasized that in equity the awarding of compound interest is a discretionary matter. Simple breach of contract does not require moral sanction and is usually governed by common law, not equity.

42 In this case, the Court of Appeal recognized that the court has the jurisdiction to award compound interest under the court's general equitable jurisdiction and that an award of compound interest grounded in equity is, in the language of ss. 128(4)(g) and 129(5) "payable by a right other than under this section". The Court of Appeal found that equity did not apply and therefore the court had no jurisdiction to award compound interest. Implicit in their holding was that the only "right other than under this section" was the right to receive compound interest in equity. This is not so, as a common law right of interest can be an "other right".

expressément prévus aux art. 128 et 129, que les taux et les méthodes de calcul prescrits par ces articles s'appliquent en l'absence de taux et de méthodes de calcul plus appropriés. L'article 130 permet au tribunal, s'il l'estime juste, de modifier le taux d'intérêt ou la période pour laquelle l'intérêt est accordé. L'alinéa 128(4)g) lui permet d'accorder des intérêts antérieurs au jugement, et le par. 129(5) des intérêts postérieurs au jugement, lorsque le droit aux intérêts a sa source ailleurs que dans ces dispositions.

(6) Le droit aux intérêts qui a sa source ailleurs

Les tribunaux ont reconnu que l'equity pouvait conférer un autre droit aux intérêts, y compris à l'intérêt composé, que celui expressément prévu aux art. 128 et 129 *LTJ*. (Voir *Brock c. Cole* (1983), 142 D.L.R. (3d) 461 (C.A. Ont.); *Claiborne Industries Ltd. c. National Bank of Canada* (1989), 59 D.L.R. (4th) 533 (C.A. Ont.); *Confederation Life Insurance Co. c. Shepherd* (1996), 88 O.A.C. 398 (C.A.); *Oceanic Exploration Co. c. Denison Mines Ltd.*, C. Ont. (Div. gén.), 8 mai 1998.) Il convient de signaler que dans *Air Canada c. Ontario (Régie des alcools)*, [1997] 2 R.C.S. 581, par. 85, où notre Cour approuve *Brock*, précité, le juge Iacobucci insiste sur le fait que, selon l'equity, l'attribution d'intérêts composés est discrétionnaire. La simple inexécution de contrat n'exige pas de réprobation morale et elle ressortit habituellement à la common law, et non à l'equity.

En l'espèce, la Cour d'appel a reconnu que le tribunal pouvait accorder de l'intérêt composé dans l'exercice de sa compétence générale en equity et que, pour reprendre le libellé de l'al. 128(4)g) et du par. 129(5), le droit à l'intérêt composé fondé sur l'equity « a sa source ailleurs que dans le présent article » ou « existe en vertu d'un autre article ». Elle a conclu que l'equity ne s'appliquait pas et que le tribunal n'avait donc pas le pouvoir d'accorder de l'intérêt composé. Cette conclusion signifiait implicitement que le seul droit aux intérêts qui « a sa source ailleurs » est le droit à l'intérêt composé conféré par l'equity. Or tel n'est pas le cas, car un droit aux intérêts conféré par la common law peut constituer un droit aux intérêts qui « a sa source ailleurs ».

The common law right in contract law to be awarded expectation damages is another such other right. As noted in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council*, [1996] 2 All E.R. 961 (H.L.), at p. 969, the power to award compound interest was not traditionally available at common law, although it is now. This is so because, as our jurisprudence demonstrates, the common law has been able to grow and adapt to changing conditions. In *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842, 2000 SCC 34, at para. 42, this Court outlined the following conditions where the rules of common law may be changed if necessary:

(1) to keep the common law in step with the evolution of society,

(2) to clarify a legal principle, or

(3) to resolve an inconsistency.

It warned that the changes should be incremental, and their consequences capable of assessment.

Compound interest is no longer commonly thought to be, in the language quoted in *Costello*, *supra*, at pp. 492-93, usurious or to involve prohibitively complex calculations. Compound interest is now commonplace. Mortgages are calculated using compound interest, as are most other loans, including such worthy endeavours as student loans. The growth of a company or a country's gross domestic product over a period of years is often stated in terms of an annually compounded rate. The bank rate, which garners much attention as an indicator of the health and direction of the economy, is a compound interest rate. It is for reasons such as these that the common law now incorporates the economic reality of compound interest. The restrictions of the past should not be used today to separate the legal system from the world at large.

If the court was unable to award compound interest on the breach of a loan which itself bore

43 Le droit contractuel à l'indemnisation de la perte du profit escompté, reconnu en common law, constitue également une autre source du droit aux intérêts. Dans *Westdeutsche Landesbank Girozentrale c. Islington London Borough Council*, [1996] 2 All E.R. 961 (H.L.), p. 969, la cour a signalé que, par le passé, la common law ne permettait pas aux tribunaux d'accorder des intérêts composés, mais qu'elle les y autorise désormais. Comme le montre la jurisprudence de notre Cour, il en est ainsi parce que la common law a pu évoluer et s'adapter à la société. Dans *Friedmann Equity Developments Inc. c. Final Note Ltd.*, [2000] 1 R.C.S. 842, 2000 CSC 34, par. 42, notre Cour a statué que la common law pouvait être modifiée au besoin :

(1) pour lui permettre de suivre l'évolution de la société,

(2) pour préciser un principe de droit ou

(3) pour éliminer une contradiction.

Notre Cour a précisé que la modification devait être graduelle et que ses conséquences devaient pouvoir être évaluées.

44 Pour reprendre la terminologie employée dans *Costello*, précité, p. 492-493, on ne considère généralement plus que l'intérêt composé est usuraire et exige des calculs trop complexes. Il est désormais courant. Il s'applique aux prêts hypothécaires, comme à la plupart des autres prêts, y compris aux initiatives aussi méritoires que les prêts étudiants. La croissance d'une entreprise ou du produit intérieur brut d'un pays pendant un certain nombre d'années est souvent exprimée sous forme de taux composé annuellement. Le taux bancaire, que bon nombre de gens voient comme un indicateur de la santé et de l'orientation de l'économie, est un taux d'intérêt composé. C'est pour de telles raisons que la common law s'est adaptée à la réalité économique et permet de nos jours l'octroi d'intérêts composés. Les restrictions du passé ne devraient pas servir aujourd'hui à isoler le système juridique du reste du monde.

45 Si un tribunal ne pouvait accorder de l'intérêt composé pour l'inexécution d'un contrat de prêt

compound interest, it would be unable to adequately award the plaintiff the value he or she would have received had the contract been performed. To keep the common law current with the evolution of society and to resolve the inconsistency between awarding expectation damages and the courts' past unwillingness to award compound interest, that unwillingness should be discarded in cases requiring that remedy for the plaintiff to realize the benefit of his or her contract.

46 A contrary rule would lead to inequity and provide incentives to breach contracts. If courts were restricted to simple interest in assessing damages for breach of contract, an apparent abuse could occur in the following way. Money lent at compound interest would accrue compound interest until there was a breach of contract by the borrower. The lender would then sue and only be entitled to simple interest on the judgment. This would encourage borrowers not to repay loans. Contract law is not the enemy of parties to an agreement but, rather, their servant. It should not frustrate their mutually agreed intentions but, instead, absent overriding policy concerns, should permit those parties to obtain the benefit of their intended agreement.

47 I find support for these conclusions in *Hadley v. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145. In *Hadley* the Court of Exchequer was confronted with the issue of the proper measure of damages for a breach of contract. In that case, the plaintiffs, who owned a flour mill in Gloucester, sent a broken shaft, without which the mill was inoperable, to the Gloucester office of the defendants, who were common carriers. The shaft was to be taken to Greenwich to serve as a model to make a new one. The plaintiffs sued the defendants for failing to deliver the shaft to Greenwich within a reasonable time. Plaintiffs sought profits which were lost because the mill was inoperable. At p. 151,

stipulant lui-même un intérêt composé, il ne pourrait octroyer au demandeur un dédommagement convenable équivalant à ce qu'il aurait touché si le contrat avait été dûment exécuté. Afin que la common law suive l'évolution de la société et que disparaisse la discordance entre l'indemnisation de la perte du profit escompté et la réticence antérieure des tribunaux à accorder de l'intérêt composé, cette réticence doit céder le pas lorsqu'une telle mesure est nécessaire pour accorder au demandeur l'avantage que le contrat devait lui conférer.

Toute démarche contraire serait source d'injustice et encouragerait les parties à se soustraire à leurs obligations contractuelles. Si les tribunaux devaient s'en tenir à l'intérêt simple lorsqu'ils fixent le montant des dommages-intérêts pour inexécution du contrat, il pourrait en résulter un abus manifeste. En effet, l'argent prêté à un taux d'intérêt composé porterait intérêt à ce taux jusqu'à l'inexécution du contrat par l'emprunteur. Le prêteur intenterait ensuite une action et n'aurait droit qu'à l'intérêt simple sur le montant du jugement. L'emprunteur serait encouragé à ne pas rembourser son emprunt. Le droit contractuel existe non pas pour contrecarrer la volonté des parties à une convention, mais pour servir leurs intérêts. Il ne doit pas faire échec à leur intention commune, mais permettre aux parties, en l'absence de considérations de principe supérieures, d'obtenir l'avantage que devait leur conférer l'entente intervenue.

Je m'appuie à cet égard sur la décision *Hadley c. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145, où la Cour de l'Échiquier était appelée à déterminer le montant qu'il convenait d'accorder à titre de dommages-intérêts par suite de l'inexécution d'un contrat. Dans cette affaire, les propriétaires d'une minoterie de Gloucester avaient fait parvenir au bureau de Gloucester des défendeurs, qui étaient des transporteurs publics, un arbre brisé sans lequel la minoterie ne pouvait fonctionner. L'arbre devait être acheminé à Greenwich afin d'y servir de modèle pour la fabrication d'un nouvel arbre. Les demandeurs ont poursuivi les défendeurs pour omission d'acheminer la pièce à Greenwich dans

Alderson B. explained the general rule of contract damages:

"There are certain established rules," this Court says, in *Alder* v. *Keighley* (15 M. & W. 117), "according to which the jury ought to find." And the Court, in that case, adds: "and here there is a clear rule, that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken."

Now we think the proper rule in such a case as the present is this: — Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

The court held that the unreasonable delay of delivery of the shaft to the engineer would not necessarily lead to the cessation of operations of the mill. The plaintiffs might have had a substitute shaft which could have been used in the interim. The court found for the defendants, holding that the stoppage of milling did not naturally arise from the delay in delivery nor was this result and the concomitant cost to the plaintiff in the contemplation of both parties at the time they made the contract.

With respect to the failure to repay the loan in this appeal when due, it cannot be said that the cost of such delay was not in the contemplation of both parties at the time they made the contract, particularly as both parties were in the business of lending. A loan agreement with a specified interest rate is an agreement between parties on the cost of borrowing money over a period of time. Absent exceptional circumstances, the interest rate which had governed the loan prior to breach would be the

un délai raisonnable. Ils ont demandé un dédommagement pour le manque à gagner occasionné par le fait que la minoterie ne pouvait être exploitée. À la p. 151, le baron Alderson explique la règle générale régissant l'octroi de dommages-intérêts en matière contractuelle :

[TRADUCTION] Dans *Alder* c. *Keighley* (15 M. & W. 117), la cour a dit « que le jury doit appliquer certaines règles établies pour se prononcer ». Elle a ajouté : « et en l'espèce, une règle claire veut que le montant des dommages-intérêts pour inexécution contractuelle soit établi en fonction du montant qui aurait été touché si le contrat avait été exécuté ».

Nous pensons que la règle qu'il convient d'appliquer dans une affaire comme celle dont nous sommes saisis est la suivante. Lorsque deux parties ont conclu un contrat et que l'une d'elles manque à ses obligations, les dommages-intérêts que l'autre partie devrait recevoir pour l'inexécution du contrat correspondent à ceux que l'on peut justement et raisonnablement considérer soit comme ceux découlant naturellement, c.-à-d. selon le cours normal des choses, de l'inexécution du contrat, soit comme ceux que les parties pouvaient raisonnablement envisager, lors de la conclusion du contrat, comme conséquence probable de son inexécution.

48 La cour a conclu qu'il n'était pas certain que le retard déraisonnable dans l'acheminement de la pièce au technicien entraînerait l'interruption des activités de la minoterie. Les demandeurs auraient pu disposer d'une pièce de remplacement et l'utiliser dans l'intervalle. La cour a tranché en faveur des défendeurs, estimant que l'interruption des activités de la minoterie n'avait pas résulté naturellement du retard d'acheminement et que, lors de la conclusion du contrat, les parties n'avaient envisagé ni ce résultat ni le coût concomitant pour les demandeurs.

49 Pour ce qui est de l'omission, en l'espèce, de rembourser l'emprunt à l'échéance, on ne saurait dire que les parties n'ont pas envisagé le coût de ce retard lors de la conclusion de la Convention, d'autant plus qu'elles évoluaient toutes deux dans le secteur du crédit. Une convention de prêt stipulant un taux d'intérêt précis constitue un accord entre les parties sur le coût de l'emprunt d'une somme pendant une période donnée. Sauf circonstances exceptionnelles, le taux d'intérêt applicable à l'emprunt

appropriate rate to govern the post-breach loan. The application of a lower interest rate would be unjust to the lender.

50 This analysis applies equally to pre-judgment interest and post-judgment interest. Pre-judgment interest is necessary to compensate a plaintiff for the period from when the money was initially owed until the date of the judgment. Contract law principles may require such interest to be compounded so as to award the plaintiff the benefit of the bargain. Damage awards, however, are not necessarily paid at the date judgment is rendered. Contract law entitles the plaintiff to the full value of the benefit of the bargain at the time payment is finally made. Where the parties have earlier agreed on a compound rate of interest, or there are circumstances warranting it, it seems fair that a court have the power to award compound post-judgment interest as damages to enable the plaintiff to be fully compensated when the award is finally paid.

51 Additionally, it would be illogical and unfair to the plaintiff to change to a simple rate of interest charged upon the judgment at the post-judgment phase. This would delay but not eliminate the period when the defendant gains a benefit that belongs to the plaintiff by not paying compound interest. It would encourage the defendant to delay paying the judgment award. As noted above, equity is another jurisdiction under which compound interest may be ordered in accordance with s. 129(5) *CJA*. In light of the illogical and inequitable result that would be occasioned by refusing to extend an award of compound interest to the post-judgment phase, in addition to common law remedies, it may be appropriate to extend that award on equitable grounds where it has been already determined that compound interest was part of the damages for breach in the pre-judgment phase.

52 The court's common law power to award damages flows from the application of contract law. In addition, ss. 128(4)(g) and 129(5) *CJA*, pro-

avant l'inexécution devrait s'appliquer également après celle-ci. La réduction de ce taux serait injuste envers le prêteur.

Ces principes valent aussi bien pour les intérêts antérieurs au jugement que pour les intérêts postérieurs au jugement. Les intérêts antérieurs au jugement indemnisent le demandeur pour la période comprise entre la date d'échéance initiale et celle du jugement. Le droit des contrats peut exiger que ces intérêts soit composés afin que le demandeur obtienne l'avantage que devait lui conférer le marché. Toutefois, les dommages-intérêts accordés ne sont pas nécessairement versés le jour où le jugement est rendu. Suivant le droit des contrats, le demandeur a droit, lorsque la somme lui est enfin versée, à la pleine valeur de l'avantage prévu. Lorsque les parties ont déjà convenu d'un taux d'intérêt composé ou que les circonstances le justifient, il paraît équitable que le tribunal ait le pouvoir d'accorder des intérêts composés postérieurs au jugement, à titre de dommages-intérêts, afin que le demandeur soit entièrement dédommagé le jour où il touchera enfin la somme qui lui est due.

De plus, il serait illogique et injuste pour le demandeur que la somme accordée ne porte plus intérêt qu'à un taux simple après le jugement. Cela ne ferait que reporter, sans la supprimer, la période pendant laquelle le défendeur, en ne payant pas d'intérêts composés, bénéficierait d'un avantage qui devrait échoir au demandeur. Le défendeur serait encouragé à différer le paiement du montant du jugement. Je le rappelle, pour l'application du par. 129(5) *LTJ*, l'equity constitue une autre source du pouvoir d'accorder de l'intérêt composé. Étant donné qu'il serait injuste et illogique de refuser d'accorder également l'intérêt composé pour la période postérieure au jugement, en sus des réparations prévues par la common law, le tribunal pourrait exercer à bon droit sa compétence en equity pour l'accorder lorsqu'il a déjà été déterminé que les dommages-intérêts pour inexécution contractuelle incluent l'intérêt composé pour la période antérieure au jugement.

Le pouvoir que la common law confère au tribunal d'accorder des dommages-intérêts découle de l'application du droit des contrats. De plus,

vide statutory authority to award compound pre-judgment and post-judgment interest according to this common law power. The court also has an equitable power to award compound interest, as has traditionally been done in cases of, *inter alia*, wrongful retention of funds and s. 129(5) *CJA* provides statutory authority to award compound post-judgment interest according to this equitable power.

l'al. 128(4)g) et le par. 129(5) *LTJ* lui confèrent le pouvoir légal d'accorder des intérêts antérieurs et postérieurs au jugement à taux composé conformément à ce pouvoir de common law. Les tribunaux peuvent également exercer le pouvoir que leur confère l'equity d'attribuer de l'intérêt composé comme ils le font habituellement dans les affaires, notamment, de rétention fautive de fonds, et c'est le par. 129(5) *LTJ* qui leur confère le pouvoir légal d'accorder des intérêts postérieurs au jugement à taux composé dans l'exercice de cette compétence en equity.

B. *Was the Court Below Correct to Award Compound Interest?*

B. *Le tribunal de première instance a-t-il eu raison d'accorder l'intérêt composé?*

At trial, Farley J. found that the respondent had breached the TOC and the TOC Assignment. Under the TOC Assignment, the parties agreed that the respondent would pay to the appellant money owed under the TOC by the respondent to Reemark until the construction loan from the appellant to Reemark had been repaid. The Loan Agreement was incorporated by reference in the TOC Assignment, including the compound interest rate.

53 En première instance, le juge Farley a conclu à l'inexécution de l'EPP et de la cession de l'EPP par l'intimée. Dans la cession de l'EPP, les parties ont convenu que l'intimée verserait à l'appelante les sommes que l'intimée devait verser à Reemark en application de l'EPP, jusqu'au remboursement du prêt à la construction consenti par l'appelante à Reemark. La Convention de prêt, y compris le taux d'intérêt composé, a été incorporée par renvoi à la cession de l'EPP.

The respondent submitted that the appellant had not pleaded damages at compound interest, this was raised at the trial where the trial judge determined that there was no prejudice to the respondent by raising that issue as the appellant at the time had the ability if requested by the respondent to call evidence on the question of what the interest component of the damages should be. The manner in which a trial should proceed is properly left to the discretion of the trial judge, and, absent prejudice or error, an appellate court should not lightly interfere.

54 L'intimée a fait valoir que l'appelante n'avait pas allégué son droit à l'intérêt composé sur les dommages-intérêts. Cette question a été soulevée à l'instruction, où le juge de première instance a conclu que l'intimé n'avait subi aucun préjudice de ce fait puisque, si l'intimée l'exigeait, l'appelante pouvait alors présenter des éléments de preuve relativement à la question de savoir quels devraient être les intérêts intégrés aux dommages-intérêts. La façon de procéder à cet égard à l'instruction relève à juste titre du pouvoir discrétionnaire du juge de première instance et, sauf préjudice ou erreur, la cour d'appel ne doit pas intervenir à la légère.

An award of compound pre- and post-judgment interest will generally be limited to breach of contract cases where there is evidence that the parties agreed, knew, or should have known, that the money which is the subject of the dispute would bear compound interest as damages. It may be awarded as consequential damages in other cases

55 Règle générale, le tribunal n'accordera des intérêts antérieurs et postérieurs au jugement à taux composé que dans les affaires d'inexécution contractuelle où il est prouvé que les parties ont convenu, savaient ou auraient dû savoir que la somme faisant l'objet du litige porterait intérêt à un taux composé à titre de dommages-intérêts. Dans les

but there would be the usual requirement of proving that damage component.

56 The award by the trial judge considered both the expectation and restitution aspects of damages.

(1) Expectation Damages

57 From the date of the TOC Assignment until the repayment of the construction loan, the funds to be paid by the respondent accrued interest at the interest rate set forth in the Loan Agreement which was the appellant's prime lending rate plus one percent compounded monthly. This was included by reference in the TOC Assignment. This was the cost of that loan.

58 The respondent breached the TOC Assignment by failing to repay the construction loan. This breach caused the outstanding balance of the loan to increase at the compound interest rate specified in the Loan Agreement. Had that loan been paid in accordance with the TOC Assignment, the appellant would have received the initial principal amount of the loan plus interest at the appellant's prime lending rate plus one percent over the entire period from the date interest first accrued until the date of payment in full compounded monthly. Any lesser amount would fail to award the appellant the agreed-upon time-value of its money.

(2) Restitution Damages

59 The respondent is a financial institution whose business is to make loans at compound interest. At the hearing, it was clear that loans made by the respondent since the time of the breach of contract would have been made at compound interest. The trial judge found that as the real estate market

autres affaires, des intérêts composés peuvent être accordés à titre de dommages-intérêts indirects, mais il faut alors satisfaire à l'exigence habituelle de prouver cet élément du préjudice.

Les dommages-intérêts accordés par le juge de première instance tenaient compte à la fois de l'indemnisation de la perte du profit escompté et de la restitution de l'avantage obtenu du fait de l'inexécution.

(1) L'indemnisation de la perte du profit escompté

Entre la date de la cession de l'EPP et le remboursement du prêt à la construction, les sommes payables par l'intimée portaient intérêt au taux prévu dans la Convention de prêt, c'est-à-dire au taux préférentiel de la banque appelante majoré de un pour cent et composé mensuellement. Ces modalités étaient intégrées par renvoi à la cession de l'EPP. Il s'agissait du coût de l'emprunt.

L'intimée a manqué aux obligations qui lui incombaient en vertu de la cession de l'EPP en omettant de rembourser le prêt à la construction. Cette inexécution a eu pour effet d'augmenter le solde impayé du prêt au taux composé stipulé dans la Convention de prêt. Si cet emprunt avait été remboursé conformément à la cession de l'EPP, l'appelante aurait touché le capital initial plus l'intérêt composé mensuellement au taux préférentiel de l'appelante majoré de un pour cent, pour toute la période comprise entre la date à laquelle les intérêts ont commencé à courir et la date du règlement intégral. Toute somme inférieure versée à l'appelante ne tiendrait pas compte de la valeur temporelle de l'argent dont les parties étaient convenues.

(2) La restitution de l'avantage obtenu du fait de l'inexécution

L'intimée est une institution financière dont les activités consistent à consentir des prêts à des taux composés. À l'audience, il est apparu clairement que les prêts consentis par l'intimée depuis l'inexécution du contrat auraient été consentis à des taux composés. Le juge de première instance a conclu

collapsed, the respondent was under pressure from each of the Office of the Superintendent of Financial Institutions and the Office of the Ministry of Financial Institutions at a time when the respondent needed the approval of these regulatory bodies to increase its multiplier and avoid any reduction of its capital base by the removal from it of any deemed "troubled" loans. Having fallen below the required ratio of capital to loans, it is reasonable to conclude that the money which should have been paid to the appellant was used by the respondent to support loans already made at compound interest rates.

If required to pay damages at only simple interest, the respondent would have earned compound interest on the appellant's money while paying only simple interest. By breaching the contract, the respondent would have conferred on itself a profit which the contract envisaged for the appellant.

This is not a case of efficient breach. The respondent's gains have come at the appellant's expense. An award of compound interest will prevent the respondent from profiting by its breach at the expense of the appellant. The award of the trial judge yields a satisfactory result with respect to both expectation damages and restitution damages.

VII. Conclusion

The courts have the jurisdiction to award pre-judgment and post-judgment interest at both common law and equity. Sections 128(4)(g) and 129(5) *CJA* allow courts to award interest by means of these powers as a substitute for the interest prescribed by those sections. This is such a case. As a result, the order of the Court of Appeal is set aside and the trial judgment restored. Accordingly, the appeal is allowed. The appellant is entitled to costs throughout.

que, par suite de l'effondrement du marché immobilier, l'intimée avait été l'objet de pressions de la part du Bureau du surintendant des institutions financières et du ministère des Institutions financières, au moment où elle devait obtenir l'approbation de ces organismes de réglementation pour augmenter son multiplicateur et éviter toute réduction de son capital de base résultant de la déduction du montant de prêts jugés « douteux ». Le ratio capital/prêts de l'intimée étant devenu inférieur à celui exigé, il est raisonnable de conclure qu'elle a utilisé les fonds qu'elle devait à l'appelante pour soutenir des prêts déjà consentis à des taux d'intérêt composés.

60 Si elle avait été tenue de payer seulement l'intérêt simple relativement aux dommages-intérêts, l'intimée aurait touché l'intérêt composé sur les sommes dues à l'appelante tout en ne versant elle-même que l'intérêt simple. En manquant à ses obligations contractuelles, l'intimée se serait approprié le profit qui, selon le contrat, devait revenir à l'appelante.

61 On ne peut parler en l'espèce d'inexécution rentable. Le gain de l'intimée est réalisé aux dépens de l'appelante. L'octroi d'intérêts composés empêchera l'intimée de tirer avantage de son inexécution aux dépens de l'appelante. Le jugement de première instance donne un résultat satisfaisant en ce qui concerne tant l'indemnisation de la perte du profit escompté que la restitution de l'avantage obtenu du fait de l'inexécution.

VII. Conclusion

62 Les tribunaux ont compétence pour accorder des intérêts antérieurs et postérieurs au jugement tant en common law qu'en equity. L'alinéa 128(4)g) et le par. 129(5) *LTJ* leur permettent d'exercer ces pouvoirs plutôt que d'accorder les intérêts prescrits par ces dispositions. Le tribunal s'est prévalu de cette possibilité en l'espèce. En conséquence, l'ordonnance de la Cour d'appel est annulée et le jugement de première instance est rétabli. En conséquence, le pourvoi est accueilli. L'appelante a droit aux dépens devant toutes les cours.

Appeal allowed with costs.

Solicitors for the appellant: Borden Ladner Gervais, Toronto.

Solicitors for the respondent: Lerner & Associates, Toronto.

Pourvoi accueilli avec dépens.

Procureurs de l'appelante : Borden Ladner Gervais, Toronto.

Procureurs de l'intimée : Lerner & Associates, Toronto.

23

Sun Life Assurance Company of Canada *Appellant*

v.

Connie Fidler *Respondent*

Indexed as: Fidler *v.* Sun Life Assurance Co. of Canada

Neutral citation: 2006 SCC 30.

File No.: 30464.

2005: December 6; 2006: June 29.

Present: McLachlin C.J. and Major,* Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Damages — Compensatory damages — Damages for mental distress — Breach of contract — Insurer wrongly terminating insured's long-term disability benefits for more than five years — Whether insured entitled to damages for mental distress.

Damages — Punitive damages — Breach of contract — Insurer wrongly terminating insured's long-term disability benefits for more than five years — Whether insured entitled to punitive damages.

Insurance — Breach of contract — Damages — Insurer wrongly terminating insured's long-term disability benefits for more than five years — Whether insured entitled to damages for mental distress and punitive damages.

Contracts — Commercial contracts — Insurer in breach of disability insurance contract — Whether insured entitled to damages for mental distress.

F worked as a bank receptionist and was covered by a group policy that included long-term disability benefits. At the age of 36, she became ill, was eventually

* Major J. took no part in the judgment.

Sun Life du Canada, compagnie d'assurance-vie *Appelante*

c.

Connie Fidler *Intimée*

Répertorié : Fidler *c.* Sun Life du Canada, compagnie d'assurance-vie

Référence neutre : 2006 CSC 30.

N° du greffe : 30464.

2005 : 6 décembre; 2006 : 29 juin.

Présents : La juge en chef McLachlin et les juges Major*, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella et Charron.

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

Dommages-intérêts — Dommages-intérêts compensatoires — Dommages-intérêts pour souffrance morale — Violation de contrat — Assureur cessant à tort de verser à l'assurée les prestations d'invalidité de longue durée pendant plus de cinq ans — L'assurée a-t-elle droit à des dommages-intérêts pour souffrance morale?

Dommages-intérêts — Dommages-intérêts punitifs — Violation de contrat — Assureur cessant à tort de verser à l'assurée les prestations d'invalidité de longue durée pendant plus de cinq ans — L'assurée a-t-elle droit à des dommages-intérêts punitifs?

Assurance — Violation de contrat — Dommages-intérêts — Assureur cessant à tort de verser à l'assurée les prestations d'invalidité de longue durée pendant plus de cinq ans — L'assurée a-t-elle droit à des dommages-intérêts pour souffrance morale et des dommages-intérêts punitifs?

Contrats — Contrats commerciaux — Violation du contrat d'assurance-invalidité par l'assureur — L'assurée a-t-elle droit à des dommages-intérêts pour souffrance morale?

F travaillait comme réceptionniste dans une banque et elle était couverte par une police d'assurance collective comportant un régime d'assurance-invalidité de

* Le juge Major n'a pas pris part au jugement.

diagnosed with chronic fatigue syndrome and fibromyalgia, and began receiving long-term disability benefits in January 1991. Under the terms of the policy, she was only entitled to continued benefits after two years if she was unable to do any job. In May 1997, the insurer informed F that her benefit payments would be terminated. According to the insurer, its video surveillance detailed activities inconsistent with F's claim that she was incapable of performing light or sedentary work. The insurer's denial of benefits was followed by almost two years of correspondence with F and medical professionals. Despite the medical evidence in its possession to the effect that F was not yet capable of doing any work, the insurer, relying on its own consultants and experts, confirmed its decision to terminate benefits in December 1998. F commenced an action and, in April 2002, one week before the trial was scheduled to start, the insurer offered to reinstate her benefits and to pay all arrears with interest. As a result, the only issue at trial was F's entitlement to damages. The trial judge awarded her $20,000 in aggravated damages for mental distress but, concluding that the insurer had not acted in bad faith, dismissed her claim for punitive damages. The Court of Appeal unanimously upheld the award for mental distress, and a majority of the court awarded F an additional $100,000 in punitive damages, finding palpable and overriding error on the question of bad faith.

Held: The appeal should be allowed in part.

Damages for mental distress for breach of contract may be recovered where they are established on the evidence and shown to have been within the reasonable contemplation of the parties at the time the contract was made. There is no requirement for an independent actionable wrong. In order to be successful, a plaintiff must prove his or her loss and the court must be satisfied that the degree of mental suffering caused by the breach was of a degree sufficient to warrant compensation. These questions require sensitivity to the particular facts of each case. Here, given the nature of a disability insurance contract, it would have been within the reasonable contemplation of the parties at the time the contract was made that mental distress would likely flow from a failure to pay the required benefits. An unwarranted delay in receiving the bargained for protection can be extremely stressful. The

longue durée. Elle est tombée malade alors qu'elle était âgée de 36 ans. Un diagnostic de syndrome de fatigue chronique et de fibromyalgie a finalement été établi et elle a commencé à recevoir des prestations d'invalidité de longue durée au mois de janvier 1991. Aux termes de la police, elle n'avait droit au maintien du versement des prestations après deux ans que si elle était incapable d'exercer tout emploi. Au mois de mai 1997, l'assureur a informé F qu'il cessait de lui verser les prestations. Selon l'assureur, la vidéo de surveillance montrait des activités incompatibles avec l'affirmation de F selon laquelle elle était incapable d'accomplir un travail léger ou sédentaire. Le refus de l'assureur de verser des prestations a été suivi d'un échange de lettres avec F et des professionnels de la santé qui a duré presque deux ans. Malgré la preuve médicale qu'elle possédait établissant que F n'était pas encore en mesure d'effectuer le moindre travail, l'assureur, sur la foi de ses propres consultants et spécialistes, a confirmé en décembre 1998 sa décision de cesser de verser les prestations. F a intenté une action et, en avril 2002, une semaine avant le début de l'instruction, l'assureur lui a offert de rétablir les prestations et de payer tous les arrérages avec intérêts. Par conséquent, il n'a été question au procès que du droit de F à des dommages-intérêts. Le juge de première instance lui a accordé 20 000 $ en dommages-intérêts majorés pour souffrance morale mais, concluant que l'assureur n'avait pas agi de mauvaise foi, il a rejeté la demande de dommages-intérêts punitifs. La Cour d'appel à l'unanimité a maintenu l'attribution de dommages-intérêts pour souffrance morale et les juges majoritaires ont accordé à F une somme additionnelle de 100 000 $ en dommages-intérêts punitifs, estimant qu'il y avait eu erreur manifeste et dominante sur la question de la mauvaise foi.

Arrêt : Le pourvoi est accueilli en partie.

Des dommages-intérêts peuvent être recouvrés pour la souffrance morale causée par la violation de contrat lorsqu'ils sont établis par la preuve et qu'il est démontré qu'ils étaient raisonnablement prévisibles pour les parties lors de la conclusion du contrat. Une faute indépendante donnant ouverture à action n'est pas requise. Pour avoir gain de cause, le demandeur doit prouver sa perte et le tribunal doit être convaincu que la souffrance morale causée par la violation du contrat était suffisamment intense pour justifier une indemnisation. Ces points exigent une attention spéciale aux faits particuliers à chaque cas. En l'espèce, compte tenu de la nature du contrat d'assurance-invalidité, les parties pouvaient raisonnablement envisager au moment de la conclusion du contrat que le refus de payer les prestations requises entraînerait une souffrance morale. Il peut être extrêmement stressant de recevoir en retard la protection

mental distress at issue here was of a degree sufficient to warrant compensation. The trial judge concluded, based on extensive medical evidence documenting the stress and anxiety that F experienced, that merely paying the arrears and interest did not compensate for the years that F was without her benefits. His award of $20,000 seeks to compensate her for the psychological consequences of the insurer's breach. [44-45] [47] [56-59]

The Court of Appeal's award of punitive damages must be set aside. Punitive damages are not compensatory. They are designed to address the purposes of retribution, deterrence and denunciation. However, an insurer will not necessarily be liable for such damages by incorrectly denying a claim that is eventually conceded, or judicially determined, to be legitimate. The question in each case is whether the denial was the result of the overwhelmingly inadequate handling of the claim, or the introduction of improper considerations into the claims process. Ultimately, each case revolves around its own facts. Here, after a thorough review of the relevant evidence, the trial judge found that the insurer had not acted in bad faith. He considered every salient aspect of how the insurer handled the claim and concluded that its denial of benefits was the product of a real, albeit incorrect, doubt as to whether F was incapable of performing any work. The termination of benefits relating to an unobservable disability in the absence of any medical evidence indicating an ability to return to work represents conduct that is troubling, but not sufficiently so as to justify interfering with the trial judge's conclusion that there was no bad faith. [61] [71-75]

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Applied: *Hadley v. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145; **approved:** *702535 Ontario Inc. v. Lloyd's London, Non-Marine Underwriters* (2000), 184 D.L.R. (4th) 687; **referred to:** *Warrington v. Great-West Life Assurance Co.* (1996), 139 D.L.R. (4th) 18; *Hobbs v. London and South Western Rail. Co.* (1875), L.R. 10 Q.B. 111; *Hamlin v. Great Northern Railway Co.* (1856), 1 H. & N. 408, 156 E.R. 1261; *Addis v. Gramophone Co.*, [1909] A.C. 488; *Eastwood v. Magnox Electric plc*, [2004] 3 All E.R. 991, [2004] UKHL 35; *Malik v. Bank of Credit and Commerce International S.A.*, [1998] A.C. 20; *Wallace v. United Grain Growers Ltd.*, [1995]

convenue. La souffrance morale en l'espèce était suffisamment intense pour justifier qu'une indemnité soit accordée. En se fondant sur une preuve médicale volumineuse attestant le stress et l'inquiétude qui ont affligé F, le juge de première instance a conclu que le simple versement des arrérages et de l'intérêt ne compensait pas F pour les années où elle avait été privée de ses prestations. En lui accordant 20 000 $, il a voulu l'indemniser des conséquences psychologiques découlant de la violation du contrat par l'assureur. [44-45] [47] [56-59]

L'attribution de dommages-intérêts punitifs par la Cour d'appel doit être annulée. Les dommages-intérêts punitifs ne sont pas des dommages-intérêts compensatoires. Ils ont pour objet le châtiment, la dissuasion et la dénonciation. Cependant, un assureur n'est pas nécessairement tenu de payer ces dommages-intérêts lorsqu'il refuse à tort une réclamation qu'il reconnaît ensuite comme légitime ou qui est déclarée telle par un tribunal. Il faut se demander dans chaque cas si le refus découlait d'une analyse terriblement bâclée de la réclamation ou de l'application de considérations malhonnêtes dans le processus de règlement. En bout de ligne, l'issue de chaque affaire dépend des faits qui lui sont propres. En l'espèce, à l'issue d'un examen exhaustif de la preuve pertinente, le juge de première instance a conclu que l'assureur n'avait pas agi de mauvaise foi. Il a examiné tous les points saillants du traitement de la réclamation par l'assureur et a conclu que son refus de verser les prestations reposait sur un doute qui, pour mal fondé qu'il fût, n'en était pas moins réel sur la question de savoir si F était incapable d'exercer tout emploi. La cessation du versement des prestations relatives à une invalidité impossible à observer, en l'absence de toute preuve médicale indiquant que l'assurée était apte à reprendre le travail, révèle une conduite troublante, mais pas au point qu'il soit justifié d'infirmer la conclusion du juge de première instance sur l'absence de mauvaise foi. [61] [71-75]

Jurisprudence

Arrêt appliqué : *Hadley c. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145; **arrêt approuvé :** *702535 Ontario Inc. c. Lloyd's London, Non-Marine Underwriters* (2000), 184 D.L.R. (4th) 687; **arrêts mentionnés :** *Warrington c. Great-West Life Assurance Co.* (1996), 139 D.L.R. (4th) 18; *Hobbs c. London and South Western Rail. Co.* (1875), L.R. 10 Q.B. 111; *Hamlin c. Great Northern Railway Co.* (1856), 1 H. & N. 408, 156 E.R. 1261; *Addis c. Gramophone Co.*, [1909] A.C. 488; *Eastwood c. Magnox Electric plc*, [2004] 3 All E.R. 991, [2004] UKHL 35; *Malik c. Bank of Credit and Commerce International S.A.*, [1998] A.C.

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2209 (QL), 2002 BCSC 1336. Appeal allowed in part.

Avon M. Mersey, *William Westeringh* and *Michael Sobkin*, for the appellant.

Joseph J. Arvay, *Q.C.*, and *Faith E. Hayman*, for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE AND ABELLA J. — For more than five years, Sun Life Assurance Company of Canada denied Connie Fidler the long-term disability benefits to which she was entitled. The trial judge found that, while there was no bad faith on the part of the insurer justifying an award of punitive damages, the denial caused Ms. Fidler significant mental distress. Sun Life was found liable to pay Ms. Fidler $20,000 in damages for mental distress resulting from Sun Life's breach of a group disability insurance contract. In the Court of Appeal for British Columbia, that award was upheld. In addition, a majority of the Court of Appeal found that, in reaching the conclusion that there was no bad faith, the trial judge had made a palpable and overriding error and awarded $100,000 in punitive damages to Ms. Fidler.

Since mental distress of the kind experienced by Ms. Fidler was reasonably within the contemplation of the parties when they entered into the contract of disability insurance, we see no reason to deny her compensation for the damages for mental distress directly flowing from the breach. However, the trial judge's finding that Sun Life did not act in bad faith should not be interfered with and precludes an award of punitive damages. Accordingly, we reverse the Court of Appeal's order as to punitive damages and restore the award made by the trial judge.

B.C.J. No. 2209 (QL), 2002 BCSC 1336. Pourvoi accueilli en partie.

Avon M. Mersey, *William Westeringh* et *Michael Sobkin*, pour l'appelante.

Joseph J. Arvay, *c.r.*, et *Faith E. Hayman*, pour l'intimée.

Version française du jugement de la Cour rendu par

LA JUGE EN CHEF ET LA JUGE ABELLA — Pendant plus de cinq ans, Sun Life du Canada, compagnie d'assurance-vie a refusé de verser à Connie Fidler les prestations d'invalidité de longue durée auxquelles elle avait droit. Le juge de première instance a conclu que même s'il n'y avait pas de mauvaise foi de l'assureur justifiant que des dommages-intérêts punitifs soient accordés, ce refus avait causé à M^me^ Fidler une souffrance morale importante. Il a condamné Sun Life à lui verser 20 000 $ à titre de dommages-intérêts pour la souffrance morale causée par la violation du contrat d'assurance-invalidité collective. La Cour d'appel de la Colombie-Britannique a maintenu l'attribution de ces dommages-intérêts. De plus, les juges majoritaires ont estimé que le juge de première instance avait commis une erreur manifeste et dominante en concluant à l'absence de mauvaise foi et ils ont accordé à M^me^ Fidler des dommages-intérêts punitifs de 100 000 $.

Puisque le type de souffrance morale éprouvée par M^me^ Fidler était raisonnablement prévisible au moment de la conclusion du contrat d'assurance-invalidité, nous ne voyons aucune raison de lui refuser une indemnité pour la souffrance morale découlant directement de la violation du contrat. Toutefois, la conclusion du juge de première instance selon laquelle Sun Life n'a pas agi de mauvaise foi ne devrait pas être modifiée et elle empêche que des dommages-intérêts punitifs soient accordés. Par conséquent, nous infirmons l'ordonnance de la Cour d'appel quant aux dommages-intérêts punitifs et nous rétablissons les dommages-intérêts accordés par le juge de première instance.

I. Background

3 Connie Fidler worked as a receptionist at a branch of the Royal Bank of Canada in Burnaby, British Columbia. Like other employees of the bank, Ms. Fidler was covered by a group policy which included long-term disability benefits. The insurer was Sun Life Company of Canada.

4 In 1990, at the age of 36, Ms. Fidler became ill with pyelonephritis, an acute kidney infection, resulting in her hospitalization for several days. Even when the infection ended, however, Ms. Fidler continued to suffer from fatigue. She was eventually diagnosed with chronic fatigue syndrome and fibromyalgia.

5 Under the terms of her policy with Sun Life, Ms. Fidler was eligible to receive long-term disability benefits six months after becoming totally disabled. It was a precondition of entitlement to long-term disability benefits that the insured fit within the definition of "Totally Disabled". The policy defines "Totally Disabled" as follows:

> An Employee is Totally Disabled if he is in a continuous state of incapacity due to Illness which
>
> 1. while it continues throughout the Elimination Period and during the following 24 months . . . of incapacity prevents him from performing the essential duties of his own job at the onset of disability,
>
> 2. while it continues after such period, prevents him from engaging in any occupation for which he is or may become reasonably qualified by education, training or experience. [Emphasis added.]

6 Under the first clause, Ms. Fidler was entitled to receive long-term disability benefits for two years, if she was unable to do her *own job*; after two years, according to the second clause, she was only entitled to continued benefits if she was unable to do *any* job.

7 Despite some initial disputes between Ms. Fidler and Sun Life about whether she was in fact totally

I. Contexte

Connie Fidler travaillait comme réceptionniste dans une succursale de la Banque Royale du Canada à Burnaby en Colombie-Britannique. Comme les autres employés de la banque, elle était couverte par une police d'assurance collective comportant un régime d'assurance-invalidité de longue durée. Sun Life du Canada, compagnie d'assurance-vie était l'assureur.

En 1990, alors qu'elle était âgée de 36 ans, M^me^ Fidler a dû être hospitalisée pendant plusieurs jours pour une pyélonéphrite, une infection rénale aiguë. Remise de l'infection, elle a continué malgré tout à souffrir de fatigue. Un diagnostic de syndrome de fatigue chronique et de fibromyalgie a finalement été établi.

Aux termes de la police d'assurance émise par Sun Life, M^me^ Fidler devenait admissible à des prestations d'invalidité de longue durée six mois après qu'elle soit devenue totalement invalide. Pour que l'assurée ait droit à ces prestations, son état de santé devait correspondre à la définition d'« invalidité totale » formulée comme suit dans la police :

> [TRADUCTION] Invalidité totale d'un employé est un état d'incapacité continue causé par la maladie, qui :
>
> 1. perdure pendant le délai de carence et les 24 mois suivants [. . .] et l'empêche d'accomplir les fonctions principales de l'emploi qu'il occupe au moment où commence l'invalidité;
>
> 2. continue après cette période et l'empêche d'exercer tout emploi pour lequel il est ou peut devenir raisonnablement qualifié en raison de son instruction, de sa formation ou de son expérience. [Nous soulignons.]

Suivant la première clause de cette définition, M^me^ Fidler avait le droit de toucher des prestations d'invalidité de longue durée pendant deux ans si elle était incapable d'exercer son *propre emploi*; après deux ans, aux termes de la seconde clause, elle n'avait droit aux prestations que si elle était incapable d'exercer *tout* emploi.

Bien qu'un différend sur l'existence d'une invalidité totale ait d'abord opposé M^me^ Fidler et Sun

disabled, Ms. Fidler eventually received long-term disability benefits starting January 4, 1991.

Her benefits continued until, in a letter dated May 12, 1997, Sun Life informed Ms. Fidler that "as a result of a non medical investigation revealing that your activities are incompatible with your alleged disability", benefit payments would be terminated, effective April 30, 1997. At the time Sun Life terminated Ms. Fidler's benefits, it had no medical evidence indicating that she was now capable of working.

The "non medical investigation" consisted of video surveillance conducted in August and September 1996 by private investigators hired by Sun Life, along with a "Lifestyle Questionnaire" Ms. Fidler had completed at Sun Life's request in January 1996. In her answers to the questionnaire, Ms. Fidler described her activities as "rarely go shopping . . . no hobbies . . . no entertaining . . . recreation limited to occasional camping". She expressed a preference not to drive "because of fatigue and pain". Her condition, she said, had "not much hope for change".

The surveillance video, which was the basis for Sun Life's conclusion that Ms. Fidler was not entitled to continued benefits, showed Ms. Fidler getting in and out of her vehicle, driving, shopping, and climbing into the rear of her vehicle, among other things. An internal Sun Life memorandum about the surveillance stated that Ms. Fidler was "active for 5 FULL DAYS!" The surveillance was in fact conducted for about five hours on each of three days, and for one hour on a fourth day. According to Sun Life, its surveillance impugned Ms. Fidler's credibility, leading it to doubt her assertion that she was incapable of doing *any* work.

Life, l'assurée a finalement commencé à recevoir des prestations d'invalidité de longue durée le 4 janvier 1991.

8 M^me^ Fidler a continué à toucher des prestations jusqu'à ce qu'à ce qu'une lettre de Sun Life en date du 12 mai 1997 l'informe que les versements prendraient fin le 30 avril 1997 [TRADUCTION] « par suite d'une enquête non médicale révélant que vos activités sont incompatibles avec votre prétendue invalidité ». Au moment où Sun Life a cessé de verser des prestations, elle ne disposait d'aucune preuve médicale indiquant que M^me^ Fidler était alors capable de travailler.

9 L'« enquête non médicale » consistait en une surveillance vidéo effectuée aux mois d'août et septembre 1996 par des détectives privés engagés par Sun Life, ainsi qu'en un « questionnaire sur le mode de vie », auquel M^me^ Fidler avait répondu au mois de janvier 1996 à la demande de Sun Life. Dans ses réponses aux questions, M^me^ Fidler décrivait ainsi ses activités : [TRADUCTION] « fais rarement les courses [. . .] aucun passe-temps [. . .] ne reçois pas [. . .] loisirs limités à quelques sorties de camping ». Elle indiquait qu'elle préférait ne pas conduire [TRADUCTION] « à cause de la fatigue et de la douleur » et qu'elle [TRADUCTION] « n'avait pas grand espoir que son état change ».

10 La vidéo réalisée pendant la surveillance, sur laquelle Sun Life s'est fondée pour conclure que M^me^ Fidler n'avait plus droit aux prestations, montrait notamment cette dernière alors qu'elle montait dans son véhicule et en sortait, qu'elle conduisait, faisait les courses et grimpait dans l'habitacle arrière du véhicule. Une note de service interne de Sun Life au sujet de la surveillance indiquait que M^me^ Fidler avait été [TRADUCTION] « active 5 JOURS COMPLETS! » En fait, la surveillance s'est effectuée à raison d'environ cinq heures par jour pendant trois jours et pendant une heure lors d'une quatrième journée. Selon Sun Life, la vidéo avait mis à mal la crédibilité de M^me^ Fidler et lui avait fait douter de la véracité de son affirmation selon laquelle elle était incapable d'accomplir *toute* tâche.

11 Ms. Fidler asserted that what the surveillance video showed was consistent with the information she supplied in a Supplementary Statement to Sun Life on August 5, 1996, a month before the surveillance, when she said: "I feel I am doing well to take care of myself and my daily business — i.e. paying bills, shopping, etc. and as this seems like a full time effort for me I cannot imagine trying to hold a job."

Selon M^me^ Fidler, la vidéo concordait avec les renseignements qu'elle avait fournis dans une déclaration supplémentaire à Sun Life le 5 août 1996, un mois avant la surveillance. Elle y affirmait : [TRADUCTION] « Je pense que je vais assez bien pour prendre soin de moi et vaquer à mes occupations quotidiennes — c.-à-d. payer mes comptes, faire des courses, etc., mais cela me demande un effort constant et je ne peux concevoir de tenter d'exercer un emploi. »

12 Sun Life's denial of benefits, effective April 30, 1997, was followed by almost two years of correspondence with Ms. Fidler, involving medical professionals, investigators, and claims examiners. The correspondence began with a letter from Ms. Fidler to Sun Life dated May 30, 1997, in which Ms. Fidler requested a copy of the surveillance video and any other evidence Sun Life had used as the basis for its decision. On June 21, 1997, Sun Life replied, through its claims administrator, that it was not prepared to disclose its investigative report (including the video), and detailed the activities it concluded were inconsistent with Ms. Fidler's claim that she was incapable of performing light or sedentary work.

Le refus de Sun Life de verser des prestations à compter du 30 avril 1997 a été suivi d'un échange de lettres avec M^me^ Fidler qui a duré presque deux ans et a fait intervenir des professionnels de la santé, des enquêteurs et des rédacteurs-sinistres. La correspondance a débuté par une lettre à Sun Life en date du 30 mai 1997 dans laquelle M^me^ Fidler demandait une copie de la vidéo de surveillance et de tout autre élément de preuve sur lequel Sun Life s'était fondée pour prendre sa décision. Le 21 juin suivant, un gestionnaire des demandes de règlement de Sun Life lui a répondu que Sun Life n'était pas disposée à communiquer son rapport d'enquête (y compris la vidéo) et lui a donné des précisions sur les activités jugées incompatibles avec l'affirmation de M^me^ Fidler selon laquelle elle était incapable d'accomplir un travail léger ou sédentaire.

13 In January 1998, Dr. Wilkinson, Ms. Fidler's doctor again confirmed the existence of Ms. Fidler's total disability and reiterated that she was not fit to return to work. An independent medical examination was recommended on March 5, 1998 by both Sun Life's claims administrator and Dr. Wilkinson. Ms. Fidler agreed to the examination readily.

Au mois de janvier 1998, le médecin traitant de M^me^ Fidler, le Dr Wilkinson, a encore une fois confirmé l'invalidité totale de sa patiente et a répété que celle-ci n'était pas apte à retourner au travail. Le 5 mars 1998, le gestionnaire des demandes de règlement et le docteur Wilkinson ont recommandé un examen médical indépendant. M^me^ Fidler y a consenti sans difficulté.

14 The independent examination was conducted by Dr. John Wade on September 29, 1998. His conclusions are relied on by both Sun Life and Ms. Fidler:

> It would be my opinion that Connie Fidler is increasingly able to consider returning to work on a graduated basis. Prior to this being successful, she should embark upon a graduated training program to improve her level of physical fitness.

Le Dr John Wade a procédé à l'examen indépendant le 29 septembre 1998. Tant Sun Life que M^me^ Fidler se sont appuyées sur ses conclusions :

> [TRADUCTION] Je suis d'avis que Connie Fidler est de plus en plus en mesure d'envisager un retour au travail graduel. Pour que le retour au travail réussisse, elle devrait préalablement suivre un programme de mise en forme progressif pour améliorer son aptitude physique.

Sun Life took from this diagnosis that Ms. Fidler was "increasingly able to consider returning to work"; Ms. Fidler, for her part, emphasized the words "[p]rior to this being successful", which she said indicated that a return to work was premature and conditional on a training program.

Sun Life did not pursue Dr. Wade's suggestion that Ms. Fidler "embark upon a graduated training program". Sun Life's internal medical consultant, who did not see or communicate with Ms. Fidler, did not share Dr. Wade's hesitation. Based on a review of the video surveillance and Dr. Wade's assessment, on November 13, 1998, the medical consultant reached a conclusion notwithstanding the opinions of both Dr. Wade and Dr. Wilkinson:

> All in all there is no medical and non-medical evidence to support that this lady cannot perform at a light physical, clerical or sedentary job on a regular basis since, at least, Sept. 96. [Emphasis added.]

This contradicted the medical evidence Sun Life had in its possession to the effect that Ms. Fidler was not yet capable of doing any work. Nonetheless, in a letter dated December 14, 1998 to Ms. Fidler, Sun Life confirmed its decision to terminate benefits. A year and a half had elapsed since its initial decision to terminate them.

On February 2, 1999, Ms. Fidler commenced this action.

In April 2002, a week before the trial was scheduled to start, Sun Life offered to reinstate Ms. Fidler's benefits and to pay all outstanding amounts along with pre-judgment interest. The total, as of April 22, 2002, was $52,516.10. The trial, as a result, dealt only with Ms. Fidler's entitlement to aggravated and punitive damages.

The trial judge, Ralph J., awarded Ms. Fidler $20,000 in what he termed aggravated damages ((2002), 6 B.C.L.R. (4th) 390, 2002 BCSC 1336).

Sun Life a retenu de ce diagnostic que M^me^ Fidler était « de plus en plus en mesure d'envisager un retour au travail »; pour sa part, M^me^ Fidler a mis l'accent sur les mots « [p]our que le retour au travail réussisse » qui, selon elle, indiquaient qu'un retour au travail était prématuré et qu'il était subordonné à un programme de mise en forme. 15

Sun Life n'a pas donné suite à la recommandation du Dr Wade préconisant que M^me^ Fidler suive « un programme de mise en forme progressif ». Le médecin consultant de Sun Life, qui n'avait pas vu M^me^ Fidler ni communiqué avec elle, ne partageait pas l'hésitation du Dr Wade. S'appuyant sur la vidéo de surveillance et l'évaluation faite par le Dr Wade, il a formulé, le 13 novembre 1998, la conclusion suivante en dépit des opinions des Drs Wade et Wilkinson : 16

> [TRADUCTION] Tout bien considéré, aucune preuve, médicale ou non médicale, ne permet d'affirmer que cette dame ne peut, sur une base régulière, exercer un emploi de bureau, un emploi sédentaire ou un emploi peu exigeant au plan physique, et ce, depuis le mois de septembre 1996 au moins. [Nous soulignons.]

Cette conclusion contredisait la preuve médicale que possédait Sun Life établissant que M^me^ Fidler n'était pas encore en mesure d'effectuer le moindre travail. Néanmoins, dans une lettre en date du 14 décembre 1998 adressée à M^me^ Fidler, Sun Life a confirmé sa décision de cesser de verser les prestations. Un an et demi s'étaient écoulés depuis la décision initiale de mettre fin aux prestations. 17

Le 2 février 1999, M^me^ Fidler a intenté cette action. 18

Au mois d'avril 2002, une semaine avant le début de l'instruction, Sun Life a offert de rétablir les prestations de M^me^ Fidler et de payer tous les arrérages, avec intérêts avant jugement. Le 22 avril 2002, la somme totale était de 52 516,10 $. Par conséquent, il n'a été question au procès que des dommages-intérêts majorés et punitifs. 19

En première instance, le juge Ralph a accordé 20 000 $ à M^me^ Fidler pour ce qu'il a appelé des dommages-intérêts majorés ((2002), 6 B.C.L.R. 20

He applied the B.C. Court of Appeal's decision in *Warrington v. Great-West Life Assurance Co.* (1996), 139 D.L.R. (4th) 18, which held that aggravated damages can be awarded without separately actionable conduct if the contract is one for "peace of mind". In his view, a long-term disability insurance contract is such a contract.

21 On the evidence before him, including that of Ms. Fidler as well as the corroborating evidence of Dr. Wade, the trial judge was satisfied that Ms. Fidler "genuinely suffered significant additional distress and discomfort arising out of the loss of the disability coverage" (para. 30). Given the five-year duration of the cessation of payments, in his view it was appropriate to award $20,000 in aggravated damages in order to compensate Ms. Fidler for Sun Life's breach.

22 On the other hand, the trial judge concluded that, while its conduct with respect to Ms. Fidler's claim was at times "rather zealous" (para. 38), Sun Life had not acted in bad faith. As a result, he dismissed Ms. Fidler's claim for punitive damages.

23 Sun Life appealed the aggravated damages award and Ms. Fidler cross-appealed the denial of punitive damages. The Court of Appeal noted the "general principle" that damages for mental distress resulting from a breach of contract are not recoverable unless it is a peace of mind contract ((2004), 27 B.C.L.R. (4th) 199, 2004 BCCA 273). Concluding that the insurance contract in this case is such a contract, the Court of Appeal, affirming *Warrington*, held that "aggravated damages are available as additional compensation if the insured establishes that a breach of that [peace of mind] contract caused her mental distress" (para. 39) and unanimously declined to interfere with the trial judge's award of aggravated damages.

(4th) 390, 2002 BCSC 1336). Il a appliqué l'arrêt *Warrington c. Great-West Life Assurance Co.* (1996), 139 D.L.R. (4th) 18, de la Cour d'appel de la Colombie-Britannique, qui statuait que des dommages-intérêts majorés peuvent être accordés sans qu'existe une conduite distincte donnant ouverture à action si le contrat vise à assurer la [TRADUCTION] « tranquillité d'esprit », ce qui, à son avis, était le cas d'un contrat d'assurance-invalidité de longue durée.

Compte tenu de la preuve qui lui avait été soumise, dont le témoignage de M^me^ Fidler et le témoignage corroborant du Dr Wade, le juge de première instance s'est dit convaincu que [TRADUCTION] « la perte des prestations d'invalidité a véritablement causé une souffrance et un inconfort supplémentaires importants » (par. 30) à M^me^ Fidler. Comme les prestations avaient été suspendues pendant cinq ans, il a estimé qu'il y avait lieu d'accorder à M^me^ Fidler 20 000 $ en dommages-intérêts majorés à titre d'indemnisation pour la violation du contrat.

Le juge de première instance a cependant conclu que si Sun Life avait parfois manifesté [TRADUCTION] « beaucoup de zèle » dans le dossier de M^me^ Fidler, elle n'avait pas agi de mauvaise foi. Il a donc rejeté la demande de dommages-intérêts punitifs de M^me^ Fidler.

Sun Life a interjeté appel de l'attribution de dommages-intérêts majorés et, M^me^ Fidler, du rejet de sa demande de dommages-intérêts punitifs. La Cour d'appel a rappelé le [TRADUCTION] « principe général » selon lequel la souffrance morale découlant d'une violation de contrat n'est susceptible d'indemnisation que si le contrat a pour objet la tranquillité d'esprit ((2004), 27 B.C.L.R. (4th) 199, 2004 BCCA 273). Concluant qu'il s'agissait d'un tel contrat en l'espèce, la Cour d'appel a statué, confirmant l'arrêt *Warrington*, que [TRADUCTION] « des dommages-intérêts majorés peuvent s'ajouter à l'indemnité si l'assurée établit qu'une violation de ce contrat [pour la tranquillité d'esprit] lui a causé une souffrance morale » (par. 39), et elle a refusé à l'unanimité de modifier la décision du juge de première instance d'accorder des dommages-intérêts majorés.

The Court of Appeal divided, however, on whether Sun Life's conduct in dealing with Ms. Fidler's benefits rose to the level of bad faith. Writing for the majority, Finch C.J.B.C. concluded that Sun Life's conduct fell short of the duty of utmost good faith "by a very wide margin" (para. 71). He held that Sun Life's "arbitrary denial of long-term disability benefits to a vulnerable insured for over five years" (para. 74) required denunciation and deterrence. Punitive damages in the amount of $100,000 were, in his view, a rational and proportionate response to Sun Life's conduct.

Ryan J.A. dissented on the issue of punitive damages. She interpreted the trial judge's reasons as "conclud[ing] that Sun Life had behaved badly, but not . . . maliciously" (para. 102), and that Sun Life's conduct "did not reach the depths of bad faith required for an award of punitive damages" (para. 101). In Ryan J.A.'s view, Ms. Fidler had not shown that these conclusions were palpably and overridingly wrong.

Sun Life's appeal seeks to have the awards for both aggravated and punitive damages set aside.

II. Analysis

(a) *Damages for Mental Distress for Breach of Contract*

Damages for breach of contract should, as far as money can do it, place the plaintiff in the same position as if the contract had been performed. However, at least since the 1854 decision of the Court of Exchequer Chamber in *Hadley v. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145, at p. 151, it has been the law that these damages must be "such as may fairly and reasonably be considered either arising naturally . . . from such breach

24 Sur la question de savoir si le traitement du dossier de M^me^ Fidler par Sun Life était entaché de mauvaise foi, toutefois, la Cour a rendu une décision partagée. Rendant jugement pour la majorité, le juge en chef Finch a conclu que Sun Life s'était écartée [TRADUCTION] « considérablement » (par. 71) de son obligation d'agir avec la plus entière bonne foi. Il a déclaré que [TRADUCTION] « le refus arbitraire [de Sun Life] de verser des prestations d'invalidité de longue durée à une assurée vulnérable, pendant plus de cinq ans » (par. 74) nécessitait dénonciation et dissuasion. Il a donc estimé que l'attribution d'une somme de 100 000 $ en dommages-intérêts punitifs constituait une réponse rationnelle et proportionnée à la conduite de Sun Life.

25 La juge Ryan a exprimé sa dissidence sur la question des dommages-intérêts punitifs. Selon elle, les motifs du juge de première instance indiquaient qu'il avait [TRADUCTION] « conclu que Sun Life avait mal agi mais qu'elle n'avait pas fait preuve de malveillance » (par. 102) et que sa conduite [TRADUCTION] « n'atteignait pas le degré de mauvaise foi nécessaire pour donner droit à des dommages-intérêts punitifs » (par. 101). Selon la juge Ryan, M^me^ Fidler n'avait pas démontré que ces conclusions procédaient d'une erreur manifeste et dominante.

26 Par son pourvoi, Sun Life nous demande d'annuler l'attribution de dommages-intérêts majorés et de dommages-intérêts punitifs.

II. Analyse

a) *Les dommages-intérêts pour souffrance morale par suite de violation de contrat*

27 Les dommages-intérêts pour violation de contrat servent à rétablir le demandeur dans la situation où il se serait trouvé si le contrat avait été exécuté, dans la mesure où une réparation pécuniaire peut le faire. Toutefois, il est établi en droit, au moins depuis 1854 et l'arrêt de la Cour de l'Échiquier *Hadley c. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145, p. 151, que cette réparation doit être [TRADUCTION] « celle qu'on peut considérer justement et raisonnablement

of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties".

28 Until now, damages for mental distress have not been welcome in the family of remedies spawned by this principle. The issue in this appeal is whether that remedial ostracization continues to be warranted.

29 In *Hadley v. Baxendale*, the court explained the principle of reasonable expectation as follows:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. [Emphasis added; p. 151.]

30 *Hadley v. Baxendale* makes no distinction between the types of loss that are recoverable for breach of contract. The principle of reasonable expectation is stated as a general principle. Nevertheless, subsequent cases purported to rule out damages for mental distress for breach of contract except in certain defined situations.

31 While courts have always accepted that some non-pecuniary losses arising from breach of

soit comme celle qui découle naturellement [. . .] de cette rupture du contrat, soit comme celle que les deux parties pouvaient raisonnablement et probablement envisager ».

Jusqu'à présent, les dommages-intérêts pour souffrance morale n'ont pas été bien accueillis dans le groupe des mesures de réparation engendrées par ce principe. Il s'agit en l'espèce de déterminer si cet ostracisme demeure justifié.

Dans *Hadley c. Baxendale*, le tribunal a expliqué ainsi le principe de la prévisibilité raisonnable :

> [TRADUCTION] Lorsque deux parties ont passé un contrat que l'une d'elles a rompu, la réparation que l'autre partie doit recevoir pour cette rupture doit être celle qu'on peut considérer justement et raisonnablement soit comme celle qui découle naturellement, c'est-à-dire selon le cours normal des choses, de cette rupture du contrat, soit comme celle que les deux parties pouvaient raisonnablement et probablement envisager, lors de la passation du contrat, comme conséquence probable de sa rupture. Cependant, si les demandeurs avaient porté à la connaissance des défendeurs les circonstances spéciales dans lesquelles le contrat avait été conclu et qu'elles aient été connues des deux parties, les dommages-intérêts exigibles par suite de la rupture du contrat et envisagés par les deux parties seraient donc fondés sur le préjudice découlant normalement d'une rupture de contrat dans les circonstances particulières telles qu'elles étaient connues et avaient été révélées. Mais d'un autre côté, si ces circonstances spéciales étaient totalement inconnues de la partie qui rompt le contrat, tout au plus pourrait-on considérer qu'elle avait en vue le préjudice qui découlerait généralement et dans la majorité des cas, abstraction faite de toutes circonstances particulières, à la suite d'une rupture de contrat. [Nous soulignons; p. 151.]

L'arrêt *Hadley c. Baxendale* n'établit aucune distinction entre les types de pertes susceptibles de recouvrement par suite d'une violation de contrat. Le principe de la prévisibilité raisonnable est énoncé comme un principe général. Néanmoins, des arrêts subséquents ont déclaré que la souffrance morale causée par la violation de contrat ne donnait pas lieu à une réparation, sauf dans certaines situations bien précises.

Bien que les tribunaux aient toujours reconnu que certaines pertes non pécuniaires découlant

contract are compensable, including physical inconvenience and discomfort, they have traditionally shied away from awarding damages for mental suffering caused by the contract breach.

This tradition of refusing to award damages for mental distress was launched in *Hobbs v. London and South Western Rail. Co.* (1875), L.R. 10 Q.B. 111, and *Hamlin v. Great Northern Railway Co.* (1856), 1 H. & N. 408, 156 E.R. 1261 (Ex.). In 1909, in the case of *Addis v. Gramophone Co.*, [1909] A.C. 488, the House of Lords "cast a long shadow over the common law" when it rejected a claim for mental distress because the conduct said to cause the distress was not actionable: *Eastwood v. Magnox Electric plc*, [2004] 3 All E.R. 991, [2004] UKHL 35, at para. 1.

To this day, *Addis* is cited for the proposition that mental distress damages are not generally recoverable for breach of contract: see *Malik v. Bank of Credit and Commerce International S.A.*, [1998] A.C. 20 (H.L.), *per* Lord Nicholls, at p. 38; *Wallace v. United Grain Growers Ltd.*, [1995] 9 W.W.R. 153 (Man. C.A.), at para. 81, var'd [1997] 3 S.C.R. 701; *Morberg v. Klassen* (1991), 49 C.L.R. 124 (B.C.S.C.); *Taylor v. Gill*, [1991] 3 W.W.R. 727 (Alta. Q.B.); *Chitty on Contracts* (29th ed. 2004), vol. II, at p. 1468; and see S. M. Waddams, *The Law of Damages* (4th ed. 2004), at p. 222.

In short, the foundational concepts of reasonable expectations had a ceiling: mental distress. As Bingham L.J. said in *Watts v. Morrow*, [1991] 1 W.L.R. 1421 (C.A.), at p. 1445:

> A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy. [Emphasis added.]

de la violation de contrat donnent lieu à une indemnisation, notamment les inconvénients et l'inconfort physiques, ils ont traditionnellement pris leur distance à l'égard des dommages-intérêts pour souffrance morale.

32 Ce sont les décisions *Hobbs c. London and South Western Rail. Co.* (1875), L.R. 10 Q.B. 111, et *Hamlin c. Great Northern Railway Co.* (1856), 1 H. & N. 408, 156 E.R. 1261 (Ex.), qui sont à l'origine de cette tradition. En 1909, dans l'arrêt *Addis c. Gramophone Co.*, [1909] A.C. 488, la Chambre des lords [TRADUCTION] « a jeté une ombre sur la common law » lorsqu'elle a rejeté une demande de dommages-intérêts pour souffrance morale au motif que la conduite censément à l'origine de la souffrance ne conférait pas un droit d'action : *Eastwood c. Magnox Electric plc*, [2004] 3 All E.R. 991, [2004] UKHL 35, par. 1.

33 Encore maintenant, l'arrêt *Addis* est invoqué à l'appui de l'argument voulant que la souffrance morale causée par une violation de contrat n'est généralement pas indemnisable : voir *Malik c. Bank of Credit and Commerce International S.A.*, [1998] A.C. 20 (H.L.), lord Nicholls, p. 38; *Wallace c. United Grain Growers Ltd.*, [1995] 9 W.W.R. 153 (C.A. Man.), par. 81, mod. par [1997] 3 R.C.S. 701; *Morberg c. Klassen* (1991), 49 C.L.R. 124 (C.S.C.-B.); *Taylor c. Gill*, [1991] 3 W.W.R. 727 (B.R. Alb.); *Chitty on Contracts* (29e éd. 2004), vol. II, p. 1468; et voir S. M. Waddams, *The Law of Damages* (4e éd. 2004), p. 222.

34 En résumé, les fondements de la prévisibilité raisonnable avaient une limite : la souffrance morale. Comme le lord juge Bingham l'a indiqué dans *Watts c. Morrow*, [1991] 1 W.L.R. 1421 (C.A.), p. 1445 :

> [TRADUCTION] Celui qui rompt un contrat n'assume généralement pas de responsabilité pour l'affliction, la frustration, l'angoisse, les désagréments, la contrariété, la tension ou l'exaspération que la rupture peut causer au cocontractant innocent. Selon moi, cette règle ne repose pas sur le postulat que de telles réactions ne sont pas prévisibles, ce qu'elles sont ou peuvent être à coup sûr, mais sur des considérations de principe. [Nous soulignons.]

35 A number of policy considerations have been cited in support of this restriction. One is the perceived minimal nature of mental suffering:

> [A]s a matter of ordinary experience, it is evident that, while the innocent party to a contract will generally be disappointed if the defendant does not perform the contract, the innocent party's disappointment and distress are seldom so significant as to attract an award of damages on that score.

(*Baltic Shipping Co. v. Dillon* (1993), 176 C.L.R. 344 (Austl. H.C.), at p. 365, *per* Mason C.J.)

36 Others have suggested that a "stiff upper lip" expectation in commercial life is the source of the prohibition. In *McGregor on Damages* (17th ed. 2003), the author explains:

> The reason for the general rule is that contracts normally concern commercial matters and that mental suffering on breach is not in the contemplation of the parties as part of the business risk of the transaction. [p. 63]

This resonated in *Johnson v. Gore Wood & Co.*, [2001] 2 W.L.R. 72 (H.L.), at p. 108, where Lord Cooke observed: "Contract-breaking is treated as an incident of commercial life which players in the game are expected to meet with mental fortitude."

37 This Court's jurisprudence has followed the restrictive interpretation of *Addis*, generally requiring that a claim for compensation for mental distress be grounded in independently actionable conduct. The general rule that damages for mental distress should not be awarded for breach of contract was thus preserved: *Peso Silver Mines Ltd. (N.P.L.) v. Cropper*, [1966] S.C.R. 673.

38 Without resiling from the general rule that damages for mental suffering could not be awarded at contract, the courts in the 1970s acknowledged that the reasons of principle and policy for the rule did not always apply, and began to award such damages

Au nombre des considérations de principe énumérées à l'appui de cette restriction figure le caractère apparemment négligeable de la souffrance morale :

> [TRADUCTION] [L]'expérience courante démontre que, bien que l'inexécution du contrat cause généralement de la déception chez le cocontractant innocent, le degré de déception et d'angoisse est rarement assez élevé pour donner lieu à l'attribution de dommages-intérêts.

(*Baltic Shipping Co. c. Dillon* (1993), 176 C.L.R. 344 (H.C. Austr.), p. 365, le juge en chef Mason)

On a également fait découler cette interdiction du « stoïcisme » que l'on attend des commerçants. Dans *McGregor on Damages* (17e éd. 2003), l'auteur explique ce qui suit :

> [TRADUCTION] La raison d'être de cette règle générale tient à ce que les contrats relèvent généralement du commerce et que la souffrance morale ne fait pas partie de ce que les parties envisagent comme risque commercial lié à l'opération. [p. 63]

Dans l'arrêt *Johnson c. Gore Wood & Co.*, [2001] 2 W.L.R. 72 (H.L.), p. 108, lord Cooke fait écho à cette conception lorsqu'il fait remarquer ce qui suit : [TRADUCTION] « Les violations de contrat sont considérées comme des incidents du commerce et l'on attend de ceux qui prennent part à la vie commerciale qu'ils y opposent fermeté d'âme. »

Dans ses décisions, notre Cour a suivi l'interprétation restrictive de l'arrêt *Addis* en exigeant de façon générale que les demandes de dommages-intérêts pour souffrance morale soient fondées sur une conduite donnant par elle-même ouverture à action. C'est ainsi qu'elle a maintenu la règle générale selon laquelle la souffrance morale découlant d'une violation de contrat ne devrait pas donner lieu à des dommages-intérêts : *Peso Silver Mines Ltd. (N.P.L.) c. Cropper*, [1966] R.C.S. 673.

Dans les années 1970, les tribunaux ont reconnu, sans pour autant s'écarter de la règle générale de la non-indemnisation de la souffrance morale en matière contractuelle, que les raisons de principe fondant cette règle ne s'appliquaient pas toujours,

where the contract was one for pleasure, relaxation or peace of mind. The charge was led, as so many were, by Lord Denning. In *Jarvis v. Swans Tours Ltd.*, [1973] 1 All E.R. 71 (C.A.), the plaintiff had contracted with the defendant to arrange a holiday. The defendant breached the contract by providing a terrible vacation. Acknowledging but declining to follow what he referred to as the "out of date" decisions in *Hamlin* and *Hobbs*, which had sired *Addis*, Lord Denning held that mental distress damages could be recovered for certain kinds of contracts:

> In a proper case damages for mental distress can be recovered in contract, just as damages for shock can be recovered in tort. One such case is a contract for a holiday, or any other contract to provide entertainment and enjoyment. If the contracting party breaks his contract, damages can be given for the disappointment, the distress, the upset and frustration caused by the breach. [p. 74]

This holding in *Jarvis* emerged from the common law chrysalis as the "peace of mind exception" to the general rule against recovery for mental distress in contract breaches. This exception was confined to contracts which had as their object the peace of mind of a contracting party. Bingham L.J. in *Watts v. Morrow* stated: "Where the very object of [the] contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded" (p. 1445).

More recently, the House of Lords in *Farley v. Skinner*, [2001] 4 All E.R. 801, [2001] UKHL 49, loosened the peace of mind exception so as to permit recovery of mental distress not only when pleasure, relaxation, or peace of mind is the "very object of the contract", but also when it is a "major or important object of the contract" (para. 24).

et ils ont commencé à accorder des dommages-intérêts sous ce chef lorsque le contrat avait pour objet le plaisir, la détente ou la tranquillité d'esprit. C'est lord Denning qui, comme tant d'autres fois, a mené la charge. Dans l'affaire *Jarvis c. Swans Tours Ltd.*, [1973] 1 All E.R. 71 (C.A.), le demandeur avait confié par contrat à la défenderesse l'organisation de ses vacances. En fournissant des vacances exécrables, la défenderesse avait violé le contrat. Lord Denning a évoqué les décisions *Hamlin* et *Hobbs*, dont procédait l'arrêt *Addis*, mais a refusé de les suivre, les qualifiant de [TRADUCTION] « dépassées », et a statué que dans le cas de certains types de contrats, des dommages-intérêts pouvaient être accordés pour souffrance morale :

> [TRADUCTION] Dans les cas qui s'y prêtent, la souffrance morale peut donner lieu à indemnisation en matière contractuelle de la même manière que l'on peut indemniser pour traumatisme en responsabilité civile délictuelle. Un contrat concernant des vacances est un de ces cas, tout comme le seraient des contrats visant le divertissement et l'agrément. En cas d'inexécution du contrat, la déception, les tracas, les ennuis et la frustration causés par la violation peuvent ouvrir droit à des dommages-intérêts. [p. 74]

39 Cette décision rendue dans *Jarvis* a émergé du cocon de la common law comme « l'exception de la tranquillité d'esprit » à la règle générale interdisant l'indemnisation pour souffrance morale en matière contractuelle. Cette exception a été limitée aux contrats visant à assurer la tranquillité d'esprit à l'un des contractants. Le lord juge Bingham a déclaré ce qui suit dans *Watts c. Morrow* : [TRADUCTION] « Si l'objet même du contrat est le plaisir, la détente, la tranquillité d'esprit ou l'absence de tracas, l'indemnisation est permise » (p. 1445).

40 Plus récemment, dans l'arrêt *Farley c. Skinner*, [2001] 4 All E.R. 801, [2001] UKHL 49, la Chambre des lords a élargi l'exception de la tranquillité d'esprit pour permettre l'indemnisation de la souffrance morale non seulement lorsque « l'objet même du contrat » est le plaisir, la détente ou la tranquillité d'esprit, mais également lorsque ces éléments constituent [TRADUCTION] « un objet substantiel ou important du contrat » (par. 24).

41 The right to obtain damages for mental distress for breach of contracts that promise pleasure, relaxation or peace of mind has found wide acceptance in Canada. Mental distress damages have been awarded not only for breach of vacation contracts, but also for breaches of contracts for wedding services (*Wilson v. Sooter Studios Ltd.* (1988), 33 B.C.L.R. (2d) 241 (C.A.)), and for luxury chattels (*Wharton v. Tom Harris Chevrolet Oldsmobile Cadillac Ltd.* (2002), 97 B.C.L.R. (3d) 307, 2002 BCCA 78). Some courts have included disability insurance contracts: see *Warrington* and *Thompson v. Zurich Insurance Co.* (1984), 7 D.L.R. (4th) 664 (Ont. H.C.J.). The Ontario Court of Appeal has endorsed contractual damages for mental distress where peace of mind is the "very essence" of the promise: see *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3d) 474, at para. 34.

Le droit d'obtenir des dommages-intérêts pour souffrance morale par suite de la violation d'un contrat conclu en vue du plaisir, de la détente ou de la tranquillité d'esprit a reçu un large accueil au Canada. Les tribunaux ont accordé de tels dommages-intérêts non seulement pour la violation de contrats relatifs à des vacances, mais également pour violation de contrats visant des services relatifs à un mariage (*Wilson c. Sooter Studios Ltd.* (1988), 33 B.C.L.R. (2d) 241 (C.A.)) et des biens personnels de luxe (*Wharton c. Tom Harris Chevrolet Oldsmobile Cadillac Ltd.* (2002), 97 B.C.L.R. (3d) 307, 2002 BCCA 78). Des tribunaux ont inclu dans cette catégorie les contrats d'assurance-invalidité : voir *Warrington* et *Thompson c. Zurich Insurance Co.* (1984), 7 D.L.R. (4th) 664 (H.C.J. Ont.). La Cour d'appel de l'Ontario a accepté l'indemnisation pour souffrance morale en matière contractuelle lorsque la tranquillité d'esprit constitue [TRADUCTION] « l'essence même » de la promesse : voir *Prinzo c. Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3d) 474, par. 34.

42 In *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085, this Court described the line of cases awarding mental distress damages as standing for the proposition that "in some contracts the parties may well have contemplated at the time of the contract that a breach in certain circumstances would cause a plaintiff mental distress" (p. 1102). It is thus clear that an independent actionable wrong has not always been required, contrary to Sun Life's arguments before us.

Dans l'arrêt *Vorvis c. Insurance Corp. of British Columbia*, [1989] 1 R.C.S. 1085, cette Cour a expliqué que la suite d'arrêts accordant des dommages-intérêts pour souffrance morale portent que « dans certains contrats, les parties peuvent fort bien avoir prévu, au moment de la passation du contrat, que sa violation dans certaines circonstances causerait au demandeur un préjudice moral » (p. 1102). Ainsi, il est clair qu'une faute indépendante donnant ouverture à action n'a pas toujours été requise, contrairement à l'argument que nous a présenté Sun Life.

43 The view taken by this Court in *Vorvis* that damages for mental distress in "peace of mind" contracts should be seen as an expression of the general principle of compensatory damages of *Hadley v. Baxendale*, rather than as an exception to that principle, is shared by others. In *Baltic Shipping*, Mason C.J. of the High Court of Australia questioned whether one should confine mental distress claims for breach of contract to particular categories, noting:

D'autres partagent le point de vue retenu par cette Cour dans *Vorvis* selon lequel il faudrait voir dans l'indemnisation de la souffrance morale dans le cas de contrats visant la « tranquillité d'esprit » une expression du principe général des dommages-intérêts compensatoires exposé dans *Hadley c. Baxendale* plutôt qu'une exception à ce principe. Dans *Baltic Shipping*, le juge en chef Mason de la Haute Cour de l'Australie s'est demandé s'il convenait de restreindre à certaines catégories les demandes d'indemnisation pour souffrance morale découlant de violations de contrat, et il a fait remarquer ce qui suit :

. . . the fundamental principle on which damages are awarded at common law is that the injured party is to be restored to the position (not merely the financial position) in which the party would have been had the actionable wrong not taken place. Add to that the fact that anxiety and injured feelings are recognized as heads of compensable damage, at least outside the realm of the law of contract. Add as well the circumstance that the general rule has been undermined by the exceptions which have been engrafted upon it. We are then left with a rule which rests on flimsy policy foundations and conceptually is at odds with the fundamental principle governing the recovery of damages, the more so now that the approaches in tort and contract are converging. [p. 362]

Similarly, Professor J. D. McCamus argues, in *The Law of Contracts* (2005), at p. 877, that once peace of mind is understood as a reflection of, or "proxy" for the reasonable contemplation of the contracting parties, "there is no compelling reason not to simply apply the foreseeability test itself". At this point, the apparent inconsistency between the general rule in *Hadley v. Baxendale* and the exception vanishes. See also: S. K. O'Byrne, "Damages for Mental Distress and Other Intangible Loss in a Breach of Contract Action" (2005), 28 *Dal. L.J.* 311, at pp. 346-47, and R. Cohen and S. O'Byrne, "Cry Me a River: Recovery of Mental Distress Damages in a Breach of Contract Action — A North American Perspective" (2005), 42 *Am. Bus. L.J.* 97.

[TRADUCTION] . . . le principe fondamental présidant à l'indemnisation en common law est celui du rétablissement de la partie lésée dans la situation (pas uniquement financière) où elle se serait trouvée si la faute donnant ouverture à action n'avait pas été commise. Si l'on ajoute à cela le fait que l'angoisse et l'humiliation sont des chefs de dommages-intérêts reconnus, du moins hors du domaine contractuel, et le fait que les exceptions qui ont été apportées à la règle générale l'ont affaiblie, nous nous trouvons devant une règle reposant sur de fragiles considérations de principe et qui, sur le plan conceptuel, va à l'encontre du principe fondamental régissant l'indemnisation, surtout maintenant que le droit de la responsabilité civile et le droit des contrats tendent à converger. [p. 362]

Pareillement, le professeur J. D. McCamus affirme, dans *The Law of Contracts* (2005), p. 877, que lorsqu'on voit la tranquillité d'esprit comme une manifestation ou une représentation de ce que les cocontractants pouvaient raisonnablement envisager, [TRADUCTION] « aucune raison impérieuse n'empêche d'appliquer simplement le critère de la prévisibilité lui-même ». La contradiction qui semble exister entre la règle générale formulée dans *Hadley c. Baxendale* et l'exception disparaît alors. Voir aussi : S. K. O'Byrne, « Damages for Mental Distress and Other Intangible Loss in a Breach of Contract Action » (2005), 28 *Dal. L.J.* 311, p. 346-347, et R. Cohen et S. O'Byrne, « Cry Me a River : Recovery of Mental Distress Damages in a Breach of Contract Action — A North American Perspective » (2005), 42 *Am. Bus. L.J.* 97.

We conclude that damages for mental distress for breach of contract may, in appropriate cases, be awarded as an application of the principle in *Hadley v. Baxendale*: see *Vorvis*. The court should ask "what did the contract promise?" and provide compensation for those promises. The aim of compensatory damages is to restore the wronged party to the position he or she would have been in had the contract not been broken. As the Privy Council stated in *Wertheim v. Chicoutimi Pulp Co.*, [1911] A.C. 301, at p. 307: "the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed". The measure of these damages is, of course, subject to

44

Nous concluons que l'indemnisation de la souffrance morale causée par la violation de contrat peut, dans les cas appropriés, être accordée en application du principe de l'arrêt *Hadley c. Baxendale* : voir *Vorvis*. Le tribunal devrait se poser la question suivante : « qu'était-il promis au contrat? » et accorder une indemnisation pour manquement à ces promesses. Les dommages-intérêts compensatoires visent à rétablir la partie lésée dans la situation où elle se serait trouvée s'il n'y avait pas eu violation de contrat. Comme l'a affirmé le Conseil privé dans *Wertheim c. Chicoutimi Pulp Co.*, [1911] A.C. 301, p. 307 : [TRADUCTION] « le plaignant devrait, dans la mesure où une réparation pécuniaire peut le faire, être rétabli dans la situation où il se serait trouvé si

remoteness principles. There is no reason why this should not include damages for mental distress, where such damages were in the reasonable contemplation of the parties at the time the contract was made. This conclusion follows from the basic principle of compensatory contractual damages: that the parties are to be restored to the position they contracted for, whether tangible or intangible. The law's task is simply to provide the benefits contracted for, whatever their nature, if they were in the reasonable contemplation of the parties.

45 It does not follow, however, that all mental distress associated with a breach of contract is compensable. In normal commercial contracts, the likelihood of a breach of contract causing mental distress is not ordinarily within the reasonable contemplation of the parties. It is not unusual that a breach of contract will leave the wronged party feeling frustrated or angry. The law does not award damages for such incidental frustration. The matter is otherwise, however, when the parties enter into a contract, an object of which is to secure a particular psychological benefit. In such a case, damages arising from such mental distress should in principle be recoverable where they are established on the evidence and shown to have been within the reasonable contemplation of the parties at the time the contract was made. The basic principles of contract damages do not cease to operate merely because what is promised is an intangible, like mental security.

46 This conclusion is supported by the policy considerations that have led the law to eschew damages for mental suffering in commercial contracts. As discussed above, this reluctance rests on two policy considerations — the minimal nature of the mental suffering and the fact that in commercial matters, mental suffering on breach is "not in the contemplation of the parties as part of the business risk of the transaction": *McGregor on Damages*, at p. 63.

le contrat avait été respecté ». L'importance de l'indemnisation accordée est évidemment fonction de l'application des règles d'exclusion des dommages indirects. Rien ne justifie de ne pas y inclure des dommages-intérêts pour souffrance morale lorsque ces dommages-intérêts étaient raisonnablement prévisibles pour les parties lors de la conclusion du contrat. Cette conclusion découle du principe fondamental de l'indemnisation en matière contractuelle : le rétablissement des parties dans la situation envisagée dans le contrat, qu'elle soit matérielle ou non. Le rôle du droit consiste simplement à assurer aux parties les avantages prévus au contrat, quelle qu'en soit la nature, s'ils étaient raisonnablement prévisibles.

Il ne s'ensuit pas cependant que toute souffrance morale associée à la violation d'un contrat peut donner lieu à indemnisation. Dans le cas des contrats commerciaux usuels, la possibilité d'une violation de contrat causant une souffrance morale n'entre généralement pas dans ce qui est raisonnablement prévisible. Il n'est pas inhabituel qu'une personne lésée par la violation d'un contrat ressente de la frustration ou de la colère. Le droit n'accorde pas de dommages-intérêts pour la frustration dans un tel cas. Il en va autrement toutefois lorsque les parties concluent un contrat dont un des objets est d'assurer un avantage psychologique particulier. Dans un tel cas, la partie lésée devrait en principe pouvoir être indemnisée de ces souffrances si elles sont établies en preuve et s'il est démontré qu'elles étaient raisonnablement prévisibles par les parties au moment de la conclusion du contrat. Les principes fondamentaux des dommages-intérêts en matière contractuelle ne cessent pas de s'appliquer du simple fait que l'objet promis, la sécurité d'esprit par exemple, est intangible.

Les considérations de principe pour lesquelles le droit répugne à indemniser la souffrance morale en matière contractuelle commerciale étayent cette conclusion. Comme on l'a vu, deux raisons de principe fondent cette hésitation : le caractère négligeable de la souffrance morale et le fait qu'en matière commerciale, la souffrance morale découlant d'une violation de contrat [TRADUCTION] « ne fait pas partie de ce que les parties envisagent comme

Neither applies to contracts where promised mental security or satisfaction is part of the risk for which the parties contracted.

This does not obviate the requirement that a plaintiff prove his or her loss. The court must be satisfied: (1) that an object of the contract was to secure a psychological benefit that brings mental distress upon breach within the reasonable contemplation of the parties; and (2) that the degree of mental suffering caused by the breach was of a degree sufficient to warrant compensation. These questions require sensitivity to the particular facts of each case.

While the mental distress as a consequence of breach must reasonably be contemplated by the parties to attract damages, we see no basis for requiring it to be the dominant aspect or the "very essence" of the bargain. As the House of Lords noted in *Farley*, the law of contract protects all significant parts of the bargain, not merely those that are "dominant" or "essential". Lord Steyn rejected this kind of distinction as "a matter of form and not substance" (para. 24). Lord Hutton added:

> I can see no reason in principle why, if a plaintiff who has suffered no financial loss can recover damages in some cases if there has been a breach of the principal obligation of the contract, he should be denied damages for breach of an obligation which, whilst not the principal obligation of the contract, is nevertheless one which he has made clear to the other party is of importance to him. [para. 51]

Principle suggests that as long as the promise in relation to state of mind is a part of the bargain in the reasonable contemplation of the contracting parties, mental distress damages arising from its breach are recoverable. This is to state neither more nor less than the rule in *Hadley v. Baxendale*.

We conclude that the "peace of mind" class of cases should not be viewed as an exception to the

risque commercial lié à l'opération » : *McGregor on Damages*, p. 63. Aucune de ces raisons ne s'applique aux contrats lorsque la sécurité d'esprit ou la satisfaction promises font partie du risque envisagé par les parties.

47 Cela ne dégage pas le demandeur de l'obligation de prouver sa perte. Le tribunal doit être convaincu : (1) que le contrat visait notamment à assurer un avantage psychologique et que la violation du contrat a causé une souffrance morale raisonnablement prévisible par les parties; et (2) que la souffrance morale causée était suffisamment intense pour justifier une indemnisation. Ces deux points exigent une attention spéciale aux faits particuliers à chaque cas.

48 Bien que pour donner lieu à indemnisation, la souffrance morale consécutive à une violation contractuelle doive raisonnablement être prévisible pour les parties, il n'existe à notre avis aucune raison d'exiger qu'elle constitue l'aspect dominant ou « l'essence même » du marché. Comme la Chambre des lords l'a fait remarquer dans l'arrêt *Farley*, le droit des contrats protège tous les éléments importants du marché, non simplement les éléments « dominants » ou « essentiels ». Lord Steyn a rejeté les distinctions de ce genre qui, d'après lui, relèvent [TRADUCTION] « de la forme et non du fond » (par. 24). Lord Hutton a ajouté ce qui suit :

> [TRADUCTION] Si un demandeur qui n'a subi aucune perte financière peut recouvrer des dommages-intérêts dans certains cas si l'obligation principale du contrat n'a pas été respectée, je ne vois aucune raison de principe pouvant justifier de refuser d'indemniser un demandeur pour l'inexécution d'une obligation qui, bien qu'elle ne soit pas la principale obligation du contrat, n'en a pas moins été signalée au cocontractant comme obligation importante. [par. 51]

Le principe sous-entend que si la promesse se rapportant à l'état d'esprit fait partie du marché raisonnablement envisagé par les parties, la souffrance morale causée par le manquement à cette promesse peut donner lieu à des dommages-intérêts. Cela n'est ni plus ni moins que la règle formulée dans *Hadley c. Baxendale*.

49 Nous concluons qu'il ne faut pas voir les affaires de « tranquillité d'esprit » comme une exception à

general rule of the non-availability of damages for mental distress in contract law, but rather as an application of the reasonable contemplation or foreseeability principle that applies generally to determine the availability of damages for breach of contract.

50 One further point should be added.

51 It may be useful to clarify the use of the term "aggravated damages" in the context of damages for mental distress arising from breach of contract. "Aggravated damages", as defined by Waddams (*The Law of Damages* (1983), at pp. 562-63), and adopted in *Vorvis*, at p. 1099,

> describ[e] an award that aims at compensation, but takes full account of the intangible injuries, such as distress and humiliation, that may have been caused by the defendant's insulting behaviour.

As many writers have observed, the term is used ambiguously. The cases speak of two different types of "aggravated" damages.

52 The first are true aggravated damages, which arise out of aggravating circumstances. They are not awarded under the general principle of *Hadley v. Baxendale*, but rest on a separate cause of action — usually in tort — like defamation, oppression or fraud. The idea that damages for mental distress for breach of contract may be awarded where an object of a contract was to secure a particular psychological benefit has no effect on the availability of such damages. If a plaintiff can establish mental distress as a result of the breach of an independent cause of action, then he or she may be able to recover accordingly. The award of damages in such a case arises from the separate cause of action. It does not arise out of the contractual breach itself, and it has nothing to do with contractual damages under the rule in *Hadley v. Baxendale*.

la règle générale interdisant l'indemnisation de la souffrance morale en matière contractuelle, mais plutôt comme des cas d'application du principe de la prévisibilité raisonnable qui régit généralement l'attribution de dommages-intérêts pour violation de contrat.

Il convient d'ajouter un autre point.

Il peut être utile de préciser l'emploi de l'expression « dommages-intérêts majorés » dans le contexte de l'indemnisation pour souffrance morale causée par une violation de contrat. Selon la définition qu'en donne Waddams (*The Law of Damages* (1983), p. 562-563) et retenue dans *Vorvis*, p. 1099, les « dommages-intérêts majorés »

> désignent des dommages-intérêts qui visent à indemniser, mais qui tiennent compte pleinement du préjudice moral, comme l'anxiété et l'humiliation, que le comportement injurieux du défendeur a pu causer.

Comme l'ont fait remarquer de nombreux auteurs, l'emploi de l'expression est ambigu. La jurisprudence reconnaît deux catégories distinctes de dommages-intérêts « majorés ».

La première catégorie concerne les dommages-intérêts majorés proprement dits, qui résultent de circonstances aggravantes. Ils ne sont pas accordés en vertu du principe général établi dans *Hadley c. Baxendale* mais reposent sur une cause d'action distincte — généralement la responsabilité délictuelle — comme la diffamation, l'oppression ou la fraude. L'idée que des dommages-intérêts pour souffrance morale causée par la violation d'un contrat puissent être accordés lorsque le contrat avait notamment pour objet d'assurer un avantage psychologique particulier n'a aucun effet sur la possibilité que le demandeur obtienne ces dommages-intérêts. Si un demandeur peut établir la souffrance morale résultant de la violation d'une cause d'action indépendante, alors il peut recouvrer des dommages-intérêts en conséquence. Dans un tel cas, l'attribution de dommages-intérêts découle de la cause d'action distincte. Elle ne découle pas de la violation du contrat elle-même, et elle n'a rien à voir avec les dommages-intérêts en matière contractuelle en vertu de la règle établie dans *Hadley c. Baxendale*.

The second are mental distress damages which do arise out of the contractual breach itself. These are awarded under the principles of *Hadley v. Baxendale*, as discussed above. They exist independent of any aggravating circumstances and are based completely on the parties' expectations at the time of contract formation. With respect to this category of damages, the term "aggravated damages" becomes unnecessary and, indeed, a source of possible confusion.

53 La seconde catégorie concerne les dommages-intérêts pour la souffrance morale causée par la violation du contrat elle-même. Ceux-ci sont accordés en vertu de la règle établie dans *Hadley c. Baxendale*, comme nous l'avons vu précédemment. Ils sont indépendants de toute circonstance aggravante et reposent entièrement sur les attentes qu'avaient les cocontractants au moment de la formation du contrat. Relativement à cette catégorie de dommages-intérêts, l'expression « dommages-intérêts majorés » devient inutile et constitue de fait une source de confusion possible.

It follows that there is only one rule by which compensatory damages *for breach of contract* should be assessed: the rule in *Hadley v. Baxendale*. The *Hadley* test unites all forms of contractual damages under a single principle. It explains why damages may be awarded where an object of the contract is to secure a psychological benefit, just as they may be awarded where an object of the contract is to secure a material one. It also explains why an extended period of notice may have been awarded upon wrongful dismissal in employment law: see *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701. In all cases, these results are based on what was in the reasonable contemplation of the parties at the time of contract formation. They are not true aggravated damages awards.

54 Il s'ensuit qu'une seule règle permet que des dommages-intérêts compensatoires soient accordés *pour violation d'un contrat* : la règle de l'arrêt *Hadley c. Baxendale*. Le critère de cet arrêt réunit en un principe unique toutes les formes de dommages-intérêts en matière contractuelle. Ce qui explique pourquoi des dommages-intérêts peuvent être accordés lorsque le contrat a notamment pour objet d'assurer un avantage psychologique, tout comme ils peuvent être accordés lorsque le contrat a notamment pour objet d'assurer un avantage matériel. Cela explique aussi qu'une prolongation de la période de préavis ait pu être accordée dans un cas de congédiement injustifié en droit de l'emploi : voir *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701. Dans tous les cas, ces résultats sont fondés sur ce que les parties pouvaient raisonnablement envisager au moment de la formation du contrat. Il ne s'agit pas de dommages-intérêts majorés proprement dits.

The recognition that *Hadley v. Baxendale* is the single and controlling test for compensatory damages in cases of breach of contract therefore refutes any argument that an "independent actionable wrong" is a prerequisite for the recovery of mental distress damages. Where losses arise from the breach of contract itself, damages will be determined according to what was in the reasonable contemplation of the parties at the time of contract formation. An independent cause of action will only need to be proved where damages are of a different sort entirely: where they are being sought on the basis of aggravating circumstances that extend

55 Le fait de reconnaître que l'arrêt *Hadley c. Baxendale* énonce le critère unique et déterminant en matière de dommages-intérêts compensatoires dans les cas de violation de contrat réfute par conséquent tout argument voulant que l'existence d'une faute indépendante donnant ouverture à une action est une condition préalable à l'obtention de dommages-intérêts pour souffrance morale. Lorsqu'une perte résulte de la violation du contrat elle-même, les dommages-intérêts seront déterminés en fonction de ce que les parties pouvaient raisonnablement envisager au moment de la formation du contrat. Il ne sera nécessaire de prouver

beyond what the parties expected when they concluded the contract.

56 Turning to the case before us, the first question is whether an object of this disability insurance contract was to secure a psychological benefit that brought the prospect of mental distress upon breach within the reasonable contemplation of the parties at the time the contract was made? In our view it was. The bargain was that in return for the payment of premiums, the insurer would pay the plaintiff benefits in the case of disability. This is not a mere commercial contract. It is rather a contract for benefits that are both tangible, such as payments, and intangible, such as knowledge of income security in the event of disability. If disability occurs and the insurer does not pay when it ought to have done so in accordance with the terms of the policy, the insurer has breached this reasonable expectation of security.

57 Mental distress is an effect which parties to a disability insurance contract may reasonably contemplate may flow from a failure to pay the required benefits. The intangible benefit provided by such a contract is the prospect of continued financial security when a person's disability makes working, and therefore receiving an income, no longer possible. If benefits are unfairly denied, it may not be possible to meet ordinary living expenses. This financial pressure, on top of the loss of work and the existence of a disability, is likely to heighten an insured's anxiety and stress. Moreover, once disabled, an insured faces the difficulty of finding an economic substitute for the loss of income caused by the denial of benefits. See D. Tartaglio, "The Expectation of Peace of Mind: A Basis for Recovery of Damages for Mental Suffering Resulting from the Breach of First Party Insurance Contracts" (1983), 56 *S. Cal. L. Rev.* 1345, at pp. 1365-66.

58 People enter into disability insurance contracts to protect themselves from this very financial and emotional stress and insecurity. An unwarranted delay in receiving this protection can be extremely

une cause d'action indépendante que si les dommages-intérêts sont d'une toute autre nature : s'ils sont réclamés en raison de circonstances aggravantes qui vont au-delà de ce que les parties escomptaient lors de la conclusion du contrat.

En l'espèce, la première question est de savoir si le contrat d'assurance-invalidité visait notamment à procurer un avantage psychologique faisant en sorte que, au moment de la conclusion du contrat, les parties pouvaient raisonnablement prévoir que la violation du contrat leur causerait une souffrance morale. Nous estimons que oui. Le marché conclu stipulait qu'en contrepartie du paiement des primes, l'assureur verserait des prestations à la demanderesse en cas d'invalidité. Il ne s'agit pas d'un simple contrat commercial. Il s'agit plutôt d'un contrat procurant des avantages matériels, comme des paiements, et des avantages immatériels, comme l'assurance d'une sécurité de revenu en cas d'invalidité. Si l'assuré devient invalide et l'assureur fait défaut de verser les prestations prévues par la police, ce dernier porte atteinte à cette expectative raisonnable de sécurité.

La souffrance morale est une conséquence que les parties au contrat d'assurance-invalidité peuvent raisonnablement prévoir advenant un défaut de versement des prestations prévues. L'avantage immatériel que procure un tel contrat est la perspective pour une personne de continuer à jouir d'une sécurité financière lorsque l'invalidité l'empêche de travailler et, donc, de gagner un revenu. Si l'assuré se fait injustement refuser les prestations, il peut se trouver dans l'impossibilité de subvenir à ses besoins. Cette pression financière s'ajoutant à la perte de son travail et à l'invalidité va vraisemblablement accroître l'angoisse et le stress de l'assuré. De plus, l'assuré invalide est confronté à la difficile tâche de pallier la perte de revenu causée par le refus de l'assureur de verser les prestations. Voir D. Tartaglio, « The Expectation of Peace of Mind : A Basis for Recovery of Damages for Mental Suffering Resulting from the Breach of First Party Insurance Contracts » (1983), 56 *S. Cal. L. Rev.* 1345, p. 1365-1366.

C'est précisément pour se protéger contre cette insécurité et ce stress financiers et émotionnels que les gens souscrivent des polices d'assurance-invalidité. Retarder sans justification le bénéfice de cette

stressful. Ms. Fidler's damages for mental distress flowed from Sun Life's breach of contract. To accept Sun Life's argument that an independent actionable wrong is a precondition would be to sanction the "conceptual incongruity of asking a plaintiff to show *more* than just that mental distress damages were a reasonably foreseeable consequence of breach" (O'Byrne, at p. 334 (emphasis in original)).

protection peut causer un stress énorme. Les dommages-intérêts accordés à M^me^ Fidler pour la souffrance morale découlaient de la violation du contrat par Sun Life. Accepter l'argument de cette dernière selon lequel l'indemnisation de ce préjudice était assujettie à l'existence d'une faute indépendante donnant ouverture à action équivaudrait à entériner [TRADUCTION] « l'incohérence conceptuelle consistant à obliger un demandeur à démontrer *plus* que le simple fait que la souffrance morale était une conséquence raisonnablement prévisible de la violation » (O'Byrne, p. 334 (en italique dans l'original)).

The second question is whether the mental distress here at issue was of a degree sufficient to warrant compensation. Again, we conclude that the answer is yes. The trial judge found that Sun Life's breach caused Ms. Fidler a substantial loss which she suffered over a five-year period. He found as a fact that Ms. Fidler "genuinely suffered significant additional distress and discomfort arising out of the loss of the disability coverage" (para. 30 (emphasis added)). This finding was amply supported in the evidence, which included extensive medical evidence documenting the stress and anxiety that Ms. Fidler experienced. He concluded that merely paying the arrears and interest did not compensate for the years Ms. Fidler was without her benefits. His award of $20,000 seeks to compensate her for the psychological consequences of Sun Life's breach, consequences which are reasonably in the contemplation of parties to a contract for personal services and benefits such as this one. We agree with the Court of Appeal's decision not to disturb it.

59 La deuxième question est de savoir si l'intensité de la souffrance morale en l'espèce justifiait qu'une indemnité soit accordée. Là encore, à notre avis, la réponse est oui. Le juge de première instance a conclu que la violation du contrat par Sun Life a causé à M^me^ Fidler une perte substantielle qu'elle a subie pendant cinq ans. Il a conclu en fait que [TRADUCTION] « la perte des prestations d'invalidité a véritablement causé [à M^me^ Fidler] une détresse et un inconfort additionnels substantiels » (par. 30 (nous soulignons)). La preuve, notamment une preuve médicale volumineuse attestant le stress et l'inquiétude qui ont affligé M^me^ Fidler, étayait amplement cette conclusion. Le juge a estimé que le simple versement des arrérages et de l'intérêt ne compensait pas M^me^ Fidler pour les années où elle avait été privée de prestations. En lui accordant 20 000 $, il a voulu l'indemniser des conséquences psychologiques découlant de la violation du contrat par Sun Life, conséquences que les parties à un contrat de services et d'avantages personnels comme celui qui nous occupe peuvent raisonnablement prévoir. Nous souscrivons à la décision de la Cour d'appel de ne pas intervenir à cet égard.

(b) *Punitive Damages*

Ms. Fidler also seeks punitive damages. The trial judge declined to award them, citing no bad faith, but the Court of Appeal reversed this aspect of his judgment and awarded Ms. Fidler an additional $100,000 as punitive damages.

b) *Les dommages-intérêts punitifs*

60 M^me^ Fidler a également demandé des dommages-intérêts punitifs. Signalant qu'il n'y avait pas eu mauvaise foi, le juge de première instance a refusé de les accorder, mais la Cour d'appel a infirmé cette partie de son jugement et a accordé à M^me^ Fidler un montant additionnel de 100 000 $ à titre de dommages-intérêts punitifs.

61 While compensatory damages are awarded primarily for the purpose of compensating a plaintiff for pecuniary and non-pecuniary losses suffered as a result of a defendant's conduct, punitive damages are designed to address the purposes of retribution, deterrence and denunciation: *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18, at para. 43.

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.

63 In *Whiten*, this Court set out the principles that govern the award of punitive damages and affirmed that in breach of contract cases, in addition to the requirement that the conduct constitute a marked departure from ordinary standards of decency, it must be independently actionable. Where the breach in question is a denial of insurance benefits, a breach by the insurer of the contractual duty to act in good faith will meet this requirement. The threshold issue that arises, therefore, is whether the appellant breached not only its contractual obligation to pay the long-term disability benefit, but also the independent contractual obligation to deal with the respondent's claim in good faith. On this threshold issue, the legal standard to which Sun Life and other insurers are held is correctly described by O'Connor J.A. in *702535 Ontario Inc. v. Lloyd's*

Alors que les dommages-intérêts compensatoires visent principalement à compenser les pertes, pécuniaires ou non, occasionnées au demandeur par la conduite du défendeur, les dommages-intérêts punitifs ont pour objet le châtiment, la dissuasion et la dénonciation : *Whiten c. Pilot Insurance Co.*, [2002] 1 R.C.S. 595, 2002 CSC 18, par. 43.

De par sa nature, la violation de contrat doit parfois être réprimée. Mais pour entraîner la condamnation à des dommages-intérêts punitifs, la conduite reprochée doit s'écarter de façon marquée des normes de conduite acceptées; c'est le cas exceptionnel d'une conduite que l'on peut qualifier de si malveillante, opprimante ou abusive qu'elle choque le sens de la dignité de la cour : *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130, par. 196; *Whiten*, par. 36. L'inconduite doit être d'une nature propre à provoquer davantage que la réprobation entourant l'inexécution d'un contrat. Selon l'arrêt *Whiten* au par. 36, « les dommages-intérêts punitifs chevauchent la frontière entre le droit civil (indemnisation) et le droit criminel (punition) ». Le droit criminel et les régimes de réglementation en matière quasi criminelle sont reconnus comme les principaux moyens de châtiment. Il importe que les tribunaux n'aient recours aux dommages-intérêts punitifs que dans les cas exceptionnels, et encore, avec retenue.

Dans *Whiten*, notre Cour a énoncé les principes régissant l'attribution de dommages-intérêts punitifs et a affirmé que dans les cas de violation de contrat, la conduite doit non seulement s'écarter des normes ordinaires de bonne conduite mais doit en plus donner elle-même ouverture à action. Si la violation en question consiste en un refus de verser les prestations d'assurance, cette exigence sera respectée du fait que l'assureur a violé l'obligation contractuelle d'agir de bonne foi. La question préliminaire qui se pose est donc de savoir si l'appelante a violé non seulement l'obligation contractuelle de verser les prestations d'invalidité de longue durée, mais aussi l'obligation contractuelle indépendante de traiter de bonne foi la réclamation de l'intimée. Relativement à cette question préliminaire, la norme juridique à laquelle les assureurs, dont

London, Non-Marine Underwriters (2000), 184 D.L.R. (4th) 687 (Ont. C.A.), at para. 29:

> The duty of good faith also requires an insurer to deal with its insured's claim fairly. The duty to act fairly applies both to the manner in which the insurer investigates and assesses the claim and to the decision whether or not to pay the claim. In making a decision whether to refuse payment of a claim from its insured, an insurer must assess the merits of the claim in a balanced and reasonable manner. It must not deny coverage or delay payment in order to take advantage of the insured's economic vulnerability or to gain bargaining leverage in negotiating a settlement. A decision by an insurer to refuse payment should be based on a reasonable interpretation of its obligations under the policy. This duty of fairness, however, does not require that an insurer necessarily be correct in making a decision to dispute its obligation to pay a claim. Mere denial of a claim that ultimately succeeds is not, in itself, an act of bad faith.

The proper characterization of Sun Life's conduct on the "good faith" issue requires a careful consideration of the evidence. The trial judge concluded that Sun Life did not act in bad faith. He heard the evidence over nine days. He had an opportunity to observe the witnesses, who included James Craig, a representative of Sun Life's disability management unit, and Ms. Fidler herself. Bearing in mind the subjective element of the duty of good faith, the trial judge's assessment of Mr. Craig's credibility in particular takes on some significance in determining whether Sun Life acted with an improper purpose in denying Ms. Fidler's claim.

Having heard and considered the evidence, the trial judge rejected Ms. Fidler's punitive damages claim. In his reasons, the trial judge noted the following evidence: Sun Life's surveillance recorded activities that were not inconsistent with Ms. Fidler's self-reporting; an internal memorandum exaggerated the nature of Ms. Fidler's activities; a claims administrator with Sun Life had written a

Sun Life, sont astreints a été correctement décrite par le juge O'Connor dans l'arrêt *702535 Ontario Inc. c. Lloyd's London, Non-Marine Underwriters* (2000), 184 D.L.R. (4th) 687 (C.A. Ont.), par. 29 :

> [TRADUCTION] L'obligation d'agir de bonne foi oblige aussi l'assureur à traiter équitablement la réclamation de son assuré. L'obligation d'agir équitablement s'applique aussi bien à la manière dont l'assureur fait enquête et évalue la réclamation qu'à la décision de payer ou non la demande. Pour décider s'il doit refuser de payer une demande présentée par son assuré, l'assureur doit évaluer le bien-fondé de cette demande de façon impartiale et raisonnable. Il ne doit pas refuser ou retarder le paiement afin de tirer profit de la vulnérabilité financière de l'assuré ou de se ménager une position de force dans la négociation du règlement. La décision de l'assureur de refuser le paiement devrait être fondée sur une interprétation raisonnable des obligations que lui impose la police. Toutefois, cette obligation d'agir équitablement ne signifie pas pour autant que l'assureur doit nécessairement avoir raison lorsqu'il décide de contester son obligation d'indemniser un assuré. Le simple rejet d'une demande qui finira par être reconnue comme valable ne constitue pas en soi un acte de mauvaise foi.

64 L'appréciation de la conduite de Sun Life par rapport à la question de la « bonne foi » nécessite un examen minutieux de la preuve. Le juge de première instance a conclu que l'assureur n'avait pas fait preuve de mauvaise foi. L'audition de la preuve a duré neuf jours. Le juge a pu observer les témoins, au nombre desquels figuraient James Craig, qui représentait le service de gestion des régimes d'invalidité de Sun Life, ainsi que M^me^ Fidler elle-même. Si l'on tient compte de l'élément subjectif de l'obligation d'agir de bonne foi, l'appréciation que le juge a faite de la crédibilité de M. Craig, en particulier, revêt de l'importance dans l'examen de la question de savoir si Sun Life poursuivait un but inapproprié lorsqu'elle a refusé la réclamation de M^me^ Fidler.

65 Après l'audition et l'examen de la preuve, le juge de première instance a rejeté la demande de dommages-intérêts punitifs de M^me^ Fidler. Il a signalé les éléments de preuve suivants dans ses motifs : la surveillance effectuée par Sun Life a permis d'enregistrer des activités qui n'étaient pas incompatibles avec les déclarations de M^me^ Fidler; une note de service interne avait exagéré la nature des

memorandum contemplating the successful denial of Ms. Fidler's claim in the event of litigation; and Sun Life's medical consultant was wrong in concluding that there was no medical or non-medical evidence that Ms. Fidler could not perform light work.

66 On the other hand, he took into consideration that the medical reports about Ms. Fidler's condition were inconclusive; that Sun Life acted in reliance on its own consultants and experts; that Ms. Fidler's condition was contracted at a young age; and that her previous experience was in sedentary work. He summarized his considerations and conclusions as follows:

> I must recognize, however, that after two years of benefits had been paid to Ms. Fidler, the test for continued coverage was whether Ms. Fidler could perform any work at all. Given the fact that the nature of Ms. Fidler's illness is of a type that is not demonstrated by indicators such as an x-ray or MRI, I do not think that Sun Life's conduct should be characterized as an act of bad faith. I say this even though Sun Life carried out what would appear to be at times a rather zealous approach to refuting Ms. Fidler's entitlement to the long term disability benefits despite strong medical evidence that she continued to be disabled. [para. 38]

67 The majority of the Court of Appeal, *per* Finch C.J.B.C., found palpable and overriding error on the question of bad faith. Finch C.J.B.C. relied in particular on three aspects of the record: first, the absence of medical evidence to justify a denial of Ms. Fidler's claim; second, Sun Life's internal memoranda exaggerating the surveillance results and indicating an intention to avoid looking "bad" in the event of litigation; and third, Sun Life's failure to disclose to Ms. Fidler the surveillance video on which it relied in denying her claim.

68 The surveillance team's observations were, arguably, consistent with the information provided by Ms. Fidler in her supplementary answers to the questionnaire. Moreover, Sun Life's internal

activités de M^me^ Fidler; un gestionnaire de règlement de Sun Life avait indiqué dans une note de service que Sun Life pourrait avoir gain de cause dans l'éventualité d'un litige se rapportant au refus de la réclamation de M^me^ Fidler; et le médecin consultant de Sun Life avait conclu à tort à l'absence de preuve médicale ou non médicale établissant que M^me^ Fidler ne pouvait effectuer un travail léger.

D'autre part, il a pris en considération le fait que les rapports médicaux concernant l'état de M^me^ Fidler n'étaient pas concluants, que Sun Life avait agi sur la foi de ses propres consultants et spécialistes, que M^me^ Fidler avait contracté sa maladie à un jeune âge et que son expérience de travail antérieure se rapportait à du travail sédentaire. Il a résumé ainsi son raisonnement et ses conclusions :

> [TRADUCTION] Je dois reconnaître, toutefois, que la poursuite du versement des prestations à M^me^ Fidler au-delà de deux ans dépendait de la question de savoir si elle pouvait accomplir quelque travail que ce soit. Étant donné que la maladie de M^me^ Fidler est de celles dont le diagnostic ne s'établit pas par radiographie ou résonnance magnétique, je ne crois pas que l'on puisse dire que Sun Life a agi de mauvaise foi et cela, même si cette dernière semble avoir parfois mis beaucoup de zèle à réfuter le droit de M^me^ Fidler à des prestations d'invalidité de longue durée en dépit d'une preuve médicale solide indiquant qu'elle était toujours invalide. [par. 38]

Le juge en chef Finch, au nom de la majorité de la Cour d'appel, a jugé qu'il y avait eu erreur manifeste et dominante sur la question de la mauvaise foi. Il s'est appuyé en particulier sur trois éléments du dossier : d'abord, l'absence de preuve médicale justifiant le refus de la réclamation de M^me^ Fidler; ensuite, les notes de service internes de Sun Life exagérant les résultats de la surveillance et indiquant la volonté d'éviter une image négative dans l'éventualité d'un litige; et enfin, le défaut de Sun Life de communiquer à M^me^ Fidler la vidéo de surveillance sur laquelle elle se fondait pour refuser la réclamation.

On peut soutenir que les observations de l'équipe de surveillance concordaient avec les renseignements fournis par M^me^ Fidler dans les réponses supplémentaires qu'elle a données au questionnaire. De

memoranda, such as the surveillance summary and the medical consultant's report, reveal bald factual misstatements that weigh against a finding that Sun Life fairly and carefully considered the insured's claim.

On the other hand, the fact that Ms. Fidler's behaviour in the course of the surveillance seemed to demonstrate an ability to engage in some activities, taken with the ambiguity of the IME assessment, helps reduce the force of a conclusion that Sun Life had an improper purpose in denying Ms. Fidler's claim.

Except for the matter of disclosure, this evidence was expressly considered by the trial judge. And the disclosure issue is significantly tempered by the fact that Sun Life set out in a letter to Ms. Fidler the specific activities observed in the surveillance and the conclusions Sun Life drew as a consequence.

We share Finch C.J.B.C.'s concerns about Sun Life's decision to terminate benefits relating to an unobservable disability in the absence of any medical evidence indicating an ability to return to work. And we appreciate that the facts in this case represent conduct that is extremely troubling — the five-year denial by Sun Life of disability benefits without medical support for the denial is, to say the least, inappropriate. But an insurer will not necessarily be in breach of the duty of good faith by incorrectly denying a claim that is eventually conceded, or judicially determined, to be legitimate. In this respect, we respectfully part company with Finch C.J.B.C. who, in awarding punitive damages, characterized Sun Life's concession that Ms. Fidler was entitled to benefits as "the civil equivalent of [a] 'guilty plea'" (para. 78). The question instead is whether the denial was the result of the overwhelmingly inadequate handling of the claim, or the introduction of improper considerations into the claims process.

plus, les documents internes de Sun Life, comme le rapport de surveillance et le rapport du médecin consultant, renferment des affirmations de fait laconiques et inexactes qui empêchent de conclure que Sun Life a examiné la réclamation de l'assurée avec soin et impartialité.

69 D'autre part, le fait que la conduite de M^me^ Fidler pendant la surveillance semblait démontrer qu'elle pouvait se livrer à quelques activités, combiné aux conclusions ambiguës de l'examen médical indépendant, contribue à affaiblir la conclusion que Sun Life poursuivait un but inapproprié en refusant la réclamation de M^me^ Fidler.

70 Sauf pour ce qui est de la non-communication de la vidéo, le juge de première instance a expressément pris en considération ces éléments de preuve. Et la question de la non-communication perd beaucoup d'importance du fait que Sun Life a décrit dans une lettre envoyée à M^me^ Fidler les activités précises observées pendant la surveillance et les conclusions qu'elle en a tiré.

71 Comme le juge en chef Finch, nous trouvons préoccupant que Sun Life ait décidé, en l'absence de toute preuve médicale indiquant que l'assurée était apte à reprendre le travail, de mettre fin au versement de prestations relatives à une invalidité impossible à observer. Et nous sommes conscientes que les faits révèlent une conduite extrêmement troublante — il est pour le moins inapproprié que Sun Life ait refusé pendant cinq ans de verser des prestations d'invalidité sans preuve médicale à l'appui. Mais un assureur ne manque pas nécessairement à son obligation d'agir de bonne foi lorsqu'il refuse à tort une réclamation qu'il reconnaît ensuite comme légitime ou qui est déclarée telle par un tribunal. Sur ce point, nous divergeons d'avis avec le juge en chef Finch qui, en accordant des dommages-intérêts punitifs, a considéré que l'admission par Sun Life que M^me^ Fidler avait droit à des prestations était [TRADUCTION] « l'équivalent au civil d'[un] plaidoyer de culpabilité » (par. 78). Il convient plutôt de se demander si le refus découle d'une analyse terriblement bâclée de la réclamation ou de l'application de considérations malhonnêtes dans le processus de règlement.

72 Ultimately, each case revolves around its own facts. As O'Connor J.A. stated in *702535 Ontario*:

> What constitutes bad faith will depend on the circumstances in each case. A court considering whether the duty has been breached will look at the conduct of the insurer throughout the claims process to determine whether in light of the circumstances, as they then existed, the insurer acted fairly and promptly in responding to the claim. [para. 30]

73 The trial judge's conclusion that Sun Life did not act in bad faith was the product of a thorough review of the relevant evidence, and depended heavily on his appreciation of the basis on which Sun Life denied Ms. Fidler's claim. He considered every salient aspect of how Sun Life handled Ms. Fidler's claim, including those features that might be relied upon to suggest that Sun Life approached the claim obstructively or dismissively, but made no such finding.

74 Nor did the trial judge find an improper purpose on the part of Sun Life. The trial judge's reliance, in particular, on the difficulty Sun Life had in ascertaining whether Ms. Fidler was actually disabled supported his conclusion that Sun Life did not act in bad faith and that, instead, its denial of benefits was the product of a real, albeit incorrect, doubt as to whether Ms. Fidler was incapable of performing *any* work, as required under the terms of the policy.

75 Sun Life's conduct was troubling, but not sufficiently so as to justify interfering with the trial judge's conclusion that there was no bad faith. The trial judge's reasons disclose no error of law, and his eventual conclusion that Sun Life did not act in bad faith is inextricable from his findings of fact and his consideration of the evidence. As Ryan J.A. concluded in dissent:

> The trial judge saw and heard the witnesses. He examined the written material filed as exhibits. It was for him to assess the evidence and to determine its weight

En bout de ligne, l'issue de chaque affaire dépend des faits qui lui sont propres. Comme le juge O'Connor l'a affirmé dans l'arrêt *702535 Ontario* :

> [TRADUCTION] Ce qui constitue de la mauvaise foi dépend des circonstances de chaque espèce. Pour établir s'il y a eu manquement à l'obligation, le tribunal examinera la conduite de l'assureur dans tout le processus de traitement des réclamations pour déterminer si, compte tenu des circonstances existant alors, l'assureur a promptement et impartialement donné suite à la réclamation. [par. 30]

La conclusion du juge de première instance que Sun Life n'avait pas agi de mauvaise foi procédait d'un examen exhaustif de la preuve pertinente et elle était solidement appuyée sur son évaluation des motifs pour lesquels Sun Life avait rejeté la réclamation de M^me^ Fidler. Il a examiné tous les points saillants du traitement de la réclamation par Sun Life, y compris les aspects susceptibles d'indiquer que l'assureur s'était livré à de l'obstruction ou n'avait pas accordé l'importance voulue à la réclamation, mais il n'a pas conclu en ce sens.

Le juge de première instance n'a pas considéré non plus que Sun Life avait poursuivi un but inapproprié. Sur le fondement des difficultés rencontrées par Sun Life pour s'assurer de l'invalidité de M^me^ Fidler, en particulier, il a conclu que Sun Life n'avait pas agi de mauvaise foi et que son refus de verser les prestations reposait plutôt sur un doute qui, pour mal fondé qu'il fût, n'en était pas moins réel sur la question de savoir si M^me^ Fidler était incapable d'exercer *tout* emploi, comme l'exigeait la police.

La conduite de Sun Life était troublante, mais pas au point qu'il soit justifié d'infirmer la conclusion du juge de première instance sur l'absence de mauvaise foi. Les motifs du juge ne révèlent aucune erreur de droit, et sa conclusion que Sun Life n'avait pas agi de mauvaise foi est indissociable de ses conclusions de fait et de son examen de la preuve. Comme la juge Ryan de la Cour d'appel l'a indiqué dans sa dissidence :

> [TRADUCTION] Le juge de première instance a vu et entendu les témoins. Il a examiné les pièces déposées en preuve. Il lui appartenait d'apprécier la preuve

and effect. In my view Ms. Fidler has not been able to demonstrate that the conclusions of the trial judge were unreasonable or palpably wrong. [para. 104]

The award of punitive damages, of course, does not depend exclusively on the existence of an actionable wrong. In *Whiten*, the Court clearly established the relevant factors to consider in determining whether or not an award of punitive damages is warranted. Absent bad faith in this case, however, there is no need to go further.

Ms. Fidler is entitled to $20,000 for mental distress, but her claim for punitive damages is dismissed. Accordingly, we would allow the appeal in part, set aside the Court of Appeal's award of punitive damages and restore the order of Ralph J., with costs to Ms. Fidler throughout.

Appeal allowed in part, with costs to the respondent.

Solicitors for the appellant: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the respondent: Faith Hayman Law Corporation, Vancouver.

et d'en déterminer l'importance et l'effet. À mon avis, M^me^ Fidler n'a pas été en mesure de démontrer que les conclusions du juge étaient déraisonnables ou entachées d'une erreur manifeste. [par. 104]

Certes, l'attribution de dommages-intérêts punitifs ne dépend pas exclusivement de l'existence d'une faute donnant ouverture à action. Dans *Whiten*, cette Cour a énoncé les facteurs qu'il faut prendre en compte pour déterminer si l'attribution de dommages-intérêts punitifs est justifiée. Cependant, en l'absence de mauvaise foi en l'espèce, il n'est pas nécessaire de poursuivre l'analyse.

M^me^ Fidler a droit à 20 000 $ pour souffrance morale, mais sa demande de dommages-intérêts punitifs est rejetée. Par conséquent, nous sommes d'avis d'accueillir le pourvoi en partie, d'annuler l'attribution de dommages-intérêts punitifs par la Cour d'appel et de rétablir l'ordonnance du juge Ralph, avec dépens en faveur de M^me^ Fidler devant toutes les cours. 76

Pourvoi accueilli en partie, avec dépens en faveur de l'intimée.

Procureurs de l'appelante : Fasken Martineau DuMoulin, Vancouver.

Procureurs de l'intimée : Faith Hayman Law Corporation, Vancouver.

24

Atlantic Lottery Corporation Inc. *Appellant*

v.

Douglas Babstock and Fred Small *Respondents*

- and -

VLC, Inc., IGT-Canada Inc., International Game Technology, Spielo International Canada ULC and Tech Link International Entertainment Limited *Appellants*

v.

Douglas Babstock and Fred Small *Respondents*

and

Attorney General of Ontario, Attorney General of Manitoba, Attorney General of Saskatchewan, Bally Gaming Canada Ltd., Bally Gaming Inc., Western Canada Lottery Corporation, Alberta Gaming, Liquor and Cannabis Commission, Canadian Gaming Association, Canadian Chamber of Commerce and British Columbia Lottery Corporation *Interveners*

Société des loteries de l'Atlantique *Appelante*

c.

Douglas Babstock et Fred Small *Intimés*

- et -

VLC, Inc., IGT-Canada Inc., International Game Technology, Spielo International Canada ULC et Tech Link International Entertainment Limited *Appelantes*

c.

Douglas Babstock et Fred Small *Intimés*

et

Procureur général de l'Ontario, procureur général du Manitoba, procureur général de la Saskatchewan, Bally Gaming Canada Ltd., Bally Gaming Inc., Western Canada Lottery Corporation, Alberta Gaming, Liquor and Cannabis Commission, Canadian Gaming Association, Chambre de commerce du Canada et British Columbia Lottery Corporation *Intervenants*

INDEXED AS: ATLANTIC LOTTERY CORP. INC. *v.* BABSTOCK

2020 SCC 19

File No.: 38521.

2019: December 3; 2020: July 24.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

RÉPERTORIÉ : SOCIÉTÉ DES LOTERIES DE L'ATLANTIQUE *c.* BABSTOCK

2020 CSC 19

N° du greffe : 38521.

2019 : 3 décembre; 2020 : 24 juillet.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin et Kasirer.

ON APPEAL FROM THE COURT OF APPEAL FOR NEWFOUNDLAND AND LABRADOR

Civil procedure — Class actions — Certification — Pleadings — Causes of action — Plaintiffs alleging defendants profited from dangerous and deceptive video lottery terminals — Plaintiffs relying on waiver of tort, breach of contract and unjust enrichment as causes of action and seeking gain-based award — Plaintiffs' action certified as class proceeding — Whether plaintiffs' claims disclose reasonable cause of action.

ALC, constituted by the governments of the four Atlantic provinces, is empowered to approve the operation of video lottery terminal games ("VLTs") in Newfoundland and Labrador. The plaintiffs applied for certification of a class action against ALC, on behalf of any natural person resident in Newfoundland and Labrador who paid to play VLTs in that province in the six years preceding the class action. The plaintiffs claim that VLTs are inherently dangerous and deceptive. Relying on three causes of action (waiver of tort, breach of contract and unjust enrichment), the plaintiffs seek a gain-based award, quantified by the profit ALC earned by licensing VLTs.

ALC applied to strike the plaintiffs' claim on the basis that it disclosed no reasonable cause of action, and the plaintiffs applied for certification of their claim as a class action. The certification judge dismissed ALC's application, and further held that the plaintiffs had satisfied the requirements necessary for certification. The Court of Appeal substantially upheld the certification judge's conclusions, and allowed the plaintiffs' claims in waiver of tort, breach of contract and unjust enrichment to proceed to trial.

Held (Wagner C.J. and Karakatsanis, Martin and Kasirer JJ. dissenting in part): The appeals should be allowed, the certification order set aside and the plaintiffs' statement of claim struck in its entirety.

Per Abella, Moldaver, Côté, Brown and Rowe JJ.: Each claim that the plaintiffs have pleaded is bound to fail because it discloses no reasonable cause of action.

EN APPEL DE LA COUR D'APPEL DE TERRE-NEUVE-ET-LABRADOR

Procédure civile — Recours collectifs — Autorisation d'exercer un recours collectif — Actes de procédure — Causes d'action — Demandeurs alléguant que les défendeurs ont tiré profit d'appareils de loterie vidéo dangereux et trompeurs — Demandeurs invoquant les causes d'action de renonciation au recours délictuel, violation de contrat et enrichissement sans cause et cherchant à obtenir une réparation fondée sur les gains réalisés — Action des demandeurs autorisée en tant que recours collectif — Les demandes présentées par les demandeurs révèlent-elles une cause d'action raisonnable?

La SLA, constituée par les gouvernements des quatre provinces de l'Atlantique, a le pouvoir d'approuver l'exploitation des appareils de loterie vidéo (« ALV ») à Terre-Neuve-et-Labrador. Les demandeurs ont présenté une demande d'autorisation d'un recours collectif contre la SLA, au nom de toute personne physique résidant à Terre-Neuve-et-Labrador ayant payé pour jouer sur des ALV dans cette province au cours des six années précédant l'introduction du recours collectif. Les demandeurs font valoir que les ALV sont intrinsèquement dangereux et trompeurs. S'appuyant sur trois causes d'action (renonciation au recours délictuel, violation de contrat et enrichissement sans cause), les demandeurs sollicitent une réparation fondée sur les gains réalisés, calculée en fonction des profits que la SLA a touchés en accordant des licences d'utilisation des ALV.

La SLA a présenté une demande visant à faire radier l'action des demandeurs au motif qu'elle ne révélait aucune cause d'action raisonnable, et les demandeurs ont demandé l'autorisation d'exercer leur action à titre de recours collectif. Le juge d'autorisation a rejeté la demande de la SLA, concluant en outre que les demandeurs avaient satisfait aux conditions nécessaires à l'autorisation. La Cour d'appel a confirmé en grande partie les conclusions du juge d'autorisation et a permis l'instruction des demandes fondées sur la renonciation au recours délictuel, la violation de contrat et l'enrichissement sans cause présentées par les demandeurs.

Arrêt (le juge en chef Wagner et les juges Karakatsanis, Martin et Kasirer dissidents en partie) : Les pourvois sont accueillis, l'ordonnance autorisant l'exercice du recours collectif est annulée et la déclaration des demandeurs est radiée en entier.

Les juges Abella, Moldaver, Côté, Brown et Rowe : Toutes les demandes présentées par les demandeurs sont vouées à l'échec parce qu'elles ne révèlent aucune cause d'action raisonnable.

The plaintiffs cannot rely on the doctrine of waiver of tort as an independent cause of action for disgorgement. This novel cause of action does not exist in Canadian law and has no reasonable chance of succeeding at trial. In addition, the term "waiver of tort" is apt to generate confusion and should be abandoned. Despite its early acceptance, this term is a misnomer. Rather than forgiving or waiving the wrongfulness of the defendant's conduct, plaintiffs relying on the doctrine are simply electing to pursue an alternative, gain-based, remedy.

Restitution for unjust enrichment and disgorgement for wrongdoing are two types of gain-based remedies. What the plaintiffs seek in this case is disgorgement, which does not require proof of deprivation to the plaintiff, and requires only that the defendant gained a benefit. Restitution is awarded in response to the causative event of unjust enrichment, where there is correspondence between the defendant's gain and the plaintiff's deprivation. Disgorgement should be viewed as an alternative remedy for certain forms of wrongful conduct, not as an independent cause of action. In order to make out a claim for disgorgement, a plaintiff must first establish actionable misconduct. By pleading disgorgement as an independent cause of action, however, the plaintiffs in this case seek to establish an entirely new category of wrongful conduct — one that is akin to negligence but does not require proof of damage. Although disgorgement is available for some forms of wrongdoing without proof of damage (for example, breach of fiduciary duty), it is a far leap to find that disgorgement without proof of damage is available as a general proposition in response to a defendant's negligent conduct. Granting disgorgement for negligence without proof of damage would result in a remedy arising out of legal nothingness, and would be a radical and uncharted development. This is not the type of incremental change that falls within the remit of courts applying the common law.

The plaintiffs' claim that VLTs are "similar to" three-card monte within the meaning of s. 206 of the *Criminal Code* and that their operation is therefore prohibited also has no reasonable chance of success. Statutory interpretation requires discerning legislative intent by examining statutory text in its entire context and in its grammatical

Les demandeurs ne peuvent invoquer la renonciation au recours délictuel en tant que cause d'action indépendante en restitution des gains illicites. Cette nouvelle cause d'action n'existe pas en droit canadien et n'a aucune chance raisonnable d'être accueillie au procès. De plus, le terme « renonciation au recours délictuel » prête à confusion et devrait donc être abandonné. Bien qu'il soit accepté depuis longtemps, ce terme est inexact. Plutôt que de pardonner au défendeur sa conduite fautive ou de fermer les yeux sur le caractère fautif de celle-ci, le demandeur qui invoque la doctrine choisit simplement de demander une réparation subsidiaire, fondée sur les gains réalisés.

La restitution pour enrichissement sans cause et la restitution des gains illicites pour cause d'acte fautif sont deux types de réparations fondées sur les gains réalisés. En l'espèce, les demandeurs sollicitent la restitution des gains illicites, qui ne nécessite pas de prouver que le demandeur a subi un appauvrissement, mais seulement que le défendeur a obtenu un avantage. La restitution est accordée en réponse à l'élément causal d'un enrichissement sans cause, lorsque le gain réalisé par le défendeur correspond à l'appauvrissement subi par le demandeur. La restitution des gains illicites devrait être considérée comme une réparation subsidiaire pour certaines formes de conduite fautive, non comme une cause d'action indépendante. Pour établir le bien-fondé d'une demande en restitution des gains illicites, le demandeur doit d'abord établir l'inconduite donnant ouverture à l'action. En plaidant la restitution des gains illicites en tant que cause d'action indépendante, cependant, les demandeurs en l'espèce cherchent à créer une toute nouvelle catégorie de comportement fautif — qui s'apparente à la négligence mais qui n'exige pas de preuve de l'existence d'un préjudice. Bien que la restitution des gains illicites soit possible pour certaines formes d'actes fautifs sans qu'il soit nécessaire de prouver le préjudice (par exemple, en cas de manquement à une obligation fiduciaire), il est cependant difficile de conclure que la restitution des gains illicites sans preuve de préjudice est disponible de façon générale en cas de conduite négligente du défendeur. Accorder la restitution des gains illicites pour cause de négligence sans preuve de préjudice donnerait lieu à une réparation issue d'un néant juridique, et serait un changement radical tout à fait nouveau. Ce n'est pas le type de changement progressif qui relève de la compétence des tribunaux appliquant la common law.

L'allégation des demandeurs selon laquelle les ALV sont « analogues » au jeu de bonneteau au sens indiqué à l'art. 206 du *Code criminel* et que leur exploitation est donc interdite n'a aucune chance raisonnable d'être accueillie. L'interprétation des lois exige de dégager l'intention du législateur en lisant le texte législatif dans son

and ordinary sense, in harmony with the statute's scheme and objects. In determining what games can be considered "similar to" three-card monte, it must be kept in mind that courts cannot create common law crimes through an act of judicial interpretation. Furthermore, while expert evidence may assist in deciding whether the defined elements of an offence are made out on the facts of a particular charge, expert evidence cannot purport to define the elements of an offence. The text of the provision and its surrounding context suggest that the prohibition of games similar to three-card monte was directed towards the game's concrete attributes and not towards the abstract feature of deception. Had Parliament sought to prohibit broadly deceptive games, it would have straightforwardly done so. Games "similar to" three-card monte must therefore involve, at a minimum, a player betting on the location of an object after a series of a manipulations. Nothing in the pleadings describes VLTs as operating in this manner.

The plaintiffs' breach of contract claim is also doomed to fail. Whether this claim discloses a reasonable cause of action should be considered in light of the remedies the plaintiffs actually seek — that is, disgorgement and punitive damages — and the question of whether these remedies are available to the plaintiffs, assuming the truth of their pleadings. The ordinary form of monetary relief for breach of contract is an award of damages, measured according to the position which the plaintiff would have occupied had the contract been performed. Disgorgement for breach of contract may be appropriate in exceptional circumstances, but only where, at a minimum, other remedies are inadequate and only where the circumstances warrant such an award. As to those circumstances, courts should in particular consider whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity. The key to developing principles for gain-based recovery in breach of contract is to consider what legitimate interest a gain-based award serves to vindicate. A coherent approach that reconciles the relief awarded with the structure of breach of contract as a cause of action should be preferred. While the circumstances in which a gain-based award will be appropriate cannot be clearly delineated in advance, one would expect future legitimate interests protected by a gain-based award to resemble those interests that have been protected in the past. Courts have, in some exceptional circumstances, long awarded monetary amounts departing from the ordinary measure of expectation damages. An award that appears to be measured by a defendant's gain might serve a compensatory purpose that distinguishes it from disgorgement and which therefore tends to support recovery. Where, as

contexte global, selon le sens ordinaire et grammatical qui s'harmonise avec l'économie et les objets de la loi. Lorsqu'il s'agit de déterminer quels jeux peuvent être considérés « analogues » au bonneteau, il faut garder à l'esprit que les tribunaux ne peuvent créer de crimes de common law en procédant par interprétation. De plus, bien qu'elle puisse aider la cour à décider si les éléments constitutifs d'une infraction sont établis pour une accusation en particulier, la preuve d'expert ne peut servir à définir les éléments d'une infraction. Le libellé de la disposition et son contexte tendent à indiquer que l'interdiction visant les jeux analogues au bonneteau était dirigée vers les attributs réels du jeu et non vers la caractéristique abstraite de la tromperie. Si le législateur avait voulu interdire les jeux de hasard trompeurs en général, il l'aurait fait sans détour. Les jeux « analogues » au bonneteau supposent donc nécessairement, à tout le moins, qu'un joueur parie sur l'endroit où se trouve un objet après une série de manipulations. Rien dans les actes de procédure ne décrit les ALV comme fonctionnant de cette manière.

La demande fondée sur la violation de contrat introduite par les demandeurs est aussi vouée à l'échec. La question de savoir si cette demande révèle une cause d'action raisonnable devrait être examinée à la lumière des réparations que les demandeurs cherchent à obtenir — c'est-à-dire la restitution des gains illicites et les dommages punitifs — et la question de savoir si les demandeurs ont droit à ces réparations, en tenant les faits allégués pour avérés. La réparation pécuniaire habituelle pour violation de contrat est l'octroi de dommages-intérêts, calculés en fonction de la situation dans laquelle le demandeur se serait trouvé si le contrat avait été exécuté. La restitution des gains illicites pour violation de contrat peut convenir dans certaines circonstances exceptionnelles, mais seulement dans la mesure où, à tout le moins, les autres réparations ne conviennent pas et les circonstances justifient d'accorder cette réparation. Pour ce qui est de ces circonstances, les tribunaux devraient en particulier établir si le demandeur avait un intérêt légitime à empêcher le défendeur d'exercer ses activités lucratives. L'élément essentiel pour élaborer les principes d'une indemnisation fondée sur les gains réalisés en cas de violation de contrat consiste à se demander quel intérêt légitime une telle mesure vise à défendre. Une approche cohérente qui concilierait la réparation accordée et la structure de la violation de contrat en tant que cause d'action devrait être privilégiée. Il est vrai que les circonstances dans lesquelles il conviendra d'accorder une réparation fondée sur les gains réalisés ne peuvent pas être clairement définies à l'avance, mais on peut penser qu'à l'avenir, les intérêts légitimes protégés par une telle réparation ressembleront à ceux qui ont été protégés par le passé. Les tribunaux ont longtemps accordé, dans certaines

here, the argument is that the quantum of loss is equal to the defendant's gain, but the plaintiff would simply rather pursue disgorgement, a gain-based remedy is not appropriate. Further, there is nothing exceptional about the breach of contract the plaintiffs allege: once the allegations of criminal conduct are put aside, the plaintiffs' claim is simply that they paid to play a gambling game and did not get exactly what they paid for. The plaintiffs cannot be said to have a legitimate interest in ALC's profit-making activity, and their claim has no reasonable chance of achieving disgorgement damages for breach of contract.

Punitive damage awards for breach of contract are also exceptional, but will be awarded where the alleged breach of contract is an independent actionable wrong. The actionable wrong need not be tortious: punitive damages may also be awarded where the defendant breaches a contractual obligation. Not every contract, however, imposes actionable good faith obligations on contracting parties: while good faith is an organizing principle of Canadian contract law, it manifests itself in specific circumstances and its application is generally confined to existing categories of contracts and obligations. The alleged contract between ALC and the plaintiffs does not fit within any of the established good faith categories; accordingly, their claim for punitive damages has no reasonable chance of success.

Finally, the plaintiffs' unjust enrichment claim has no reasonable chance of success. The principled unjust enrichment framework requires establishing that ALC was enriched, that the plaintiffs suffered a corresponding deprivation, and that the enrichment and corresponding deprivation occurred in the absence of any juristic reason therefor. The juristic reason element proceeds in two stages: first, the plaintiff must demonstrate that the defendant's enrichment cannot be justified by any of the established categories of juristic reason; and second, the defendant can rebut the plaintiff's case by showing that there is a residual reason to deny recovery. In the present

circonstances exceptionnelles, des réparations pécuniaires s'écartant de l'évaluation ordinaire de l'indemnisation pour la perte du profit escompté. Un montant octroyé qui serait calculé en fonction du gain réalisé par le défendeur pourrait servir un objectif compensatoire qui le distingue de la restitution des gains illicites et qui tend donc à fonder le recouvrement. Lorsque, comme en l'espèce, le demandeur soutient que le montant de la perte équivaut aux gains réalisés par le défendeur, mais qu'il intente simplement un recours en restitution des gains illicites, la réparation fondée sur les gains réalisés ne convient pas. De plus, la violation de contrat qu'allèguent les demandeurs n'a rien d'exceptionnel : une fois les allégations de conduite criminelle écartées, les demandeurs prétendent simplement qu'ils ont payé pour jouer à un jeu de hasard et qu'ils n'ont pas obtenu exactement ce pour quoi ils ont payé. On ne peut affirmer que les demandeurs ont un intérêt légitime dans les activités lucratives de la SLA, et les demandeurs n'ont aucune chance raisonnable d'obtenir la restitution des gains illicites pour violation de contrat.

L'octroi de dommages-intérêts punitifs pour violation de contrat est aussi une mesure exceptionnelle, mais elle sera accordée si la violation alléguée du contrat équivaut à une faute indépendante donnant ouverture à l'action. Il n'est pas nécessaire que la faute donnant ouverture à action soit d'ordre délictuel : des dommages-intérêts punitifs peuvent aussi être accordés lorsque le défendeur contrevient à une obligation contractuelle. Toutefois, ce ne sont pas tous les contrats qui imposent aux parties contractantes des obligations d'agir de bonne foi donnant ouverture à action : bien que la bonne foi soit un principe directeur du droit canadien des contrats, c'est un principe qui se manifeste dans des situations précises et son application se limite généralement aux catégories existantes de contrats et d'obligations. Le contrat qui unirait la SLA et les demandeurs n'entre dans aucune des catégories de bonne foi établies; par conséquent, leur demande de dommages-intérêts punitifs n'a aucune chance raisonnable d'être accueillie.

Enfin, la demande pour enrichissement sans cause présentée par les demandeurs n'a aucune chance raisonnable d'être accueillie. Le cadre d'analyse de l'enrichissement sans cause requiert qu'ils établissent que la SLA s'est enrichie, qu'ils ont subi un appauvrissement correspondant et que l'enrichissement et l'appauvrissement correspondant ont eu lieu en l'absence d'un motif juridique. L'élément de motif juridique comporte deux étapes : premièrement, le demandeur doit démontrer qu'aucune des catégories établies de motifs juridiques ne peut justifier l'enrichissement du défendeur; et deuxièmement, le défendeur peut réfuter la preuve du demandeur en démontrant qu'il existe

case, there is no need to go beyond the first stage. The plaintiffs' own pleadings allege that there was a contract between ALC and the plaintiffs under which the plaintiffs paid to play VLTs, and nothing in the pleadings could serve to vitiate the alleged contract. A defendant that acquires a benefit pursuant to a valid contract is justified in retaining that benefit.

Per Wagner C.J. and Karakatsanis, Martin and Kasirer JJ. (dissenting in part): The appeal should be allowed in part. There is agreement with the majority that a mere breach of a duty of care, in the absence of loss, cannot ground a claim for disgorgement. There is also agreement that VLTs cannot constitute "three-card monte" as defined in the *Criminal Code*, and that the plaintiffs' claim in unjust enrichment must be struck. However, there is disagreement with whether the plaintiffs' claim in breach of contract is a reasonable cause of action, as well as the conclusion that there are no available remedies for that breach. The plaintiffs' claim should be certified as a class action on the common issues of breach of contract, punitive damages and the appropriateness of a disgorgement remedy.

The elements of a cause of action for breach of contract are the existence of a contract and the breach of a term of that contract. Loss is not an essential element. The plaintiffs have pleaded the nature of the contract, the terms they say are implied, and the manner in which ALC breached the contract between them. The first implied term pleaded is a warranty that the VLTs were not inherently dangerous. In the alternative, the plaintiffs plead that ALC breached an implied term requiring ALC to warn the plaintiff class of any inherent danger in the consumption of the games and to satisfy itself of their safety. Finally, the plaintiffs allege that ALC breached an implied term of good faith. It is not plain and obvious that implying these terms would improperly touch on or fetter ALC's authority as a public regulator of VLTs.

The claim for breach of contract should not be struck on the basis that it is plain and obvious that there are no available remedies. There are several remedies that are open to the plaintiffs on their pleadings, including nominal

un autre motif de refuser le recouvrement. En l'espèce, il n'est pas nécessaire d'aller au-delà de la première étape. Les demandeurs allèguent dans leurs propres actes de procédure qu'il y avait un contrat entre eux et la SLA, en vertu duquel ils devaient payer pour jouer sur les ALV, et rien dans les actes de procédure ne pourrait entacher la validité du contrat qui serait intervenu entre les demandeurs et la SLA. Un défendeur qui tire un avantage dans le cadre d'un contrat valide est justifié de conserver cet avantage.

Le juge en chef Wagner et les juges Karakatsanis, Martin et Kasirer (dissidents en partie) : Le pourvoi devrait être accueilli en partie. Il y a accord avec les juges majoritaires pour dire qu'un simple manquement à une obligation de diligence, en l'absence de perte, ne peut fonder une demande de restitution des gains illicites. Il y a également accord pour dire que les ALV ne peuvent constituer un jeu de « bonneteau » au sens donné à ce terme dans le *Code criminel*, et que la demande fondée sur l'enrichissement sans cause présentée par les demandeurs doit être radiée. Toutefois, il y a désaccord avec l'analyse de la question de savoir si la demande fondée sur la violation de contrat présentée par les demandeurs est une cause d'action raisonnable, et avec la conclusion selon laquelle il n'y a aucune réparation possible pour cette violation. L'action des demandeurs devrait être autorisée en tant que recours collectif portant sur les questions communes relatives à la violation de contrat, aux dommages-intérêts punitifs et au caractère approprié de la réparation de restitution des gains illicites.

Les éléments d'une cause d'action pour violation de contrat sont l'existence d'un contrat et la violation d'une condition de celui-ci. La perte n'est pas un élément essentiel. Les demandeurs ont invoqué la nature du contrat, les conditions qu'ils affirment être implicites et la manière dont la SLA aurait violé le contrat conclu entre eux. La première condition implicite invoquée est une garantie que les ALV n'étaient pas intrinsèquement dangereux. Subsidiairement, les demandeurs soutiennent que la SLA a violé une condition implicite par laquelle la SLA était tenue de mettre en garde le groupe de demandeurs contre tout danger inhérent à la consommation des jeux et de s'assurer de la sécurité de ceux-ci. Enfin, les demandeurs soutiennent que la SLA aurait violé une condition implicite d'agir de bonne foi. Il n'est pas évident et manifeste que l'incorporation de ces conditions implicites toucherait ou entraverait indûment le pouvoir de la SLA en tant qu'organisme de réglementation public des ALV.

La demande fondée sur la violation de contrat ne devrait pas être radiée du fait qu'il est évident et manifeste qu'il n'y a aucune réparation possible. Plusieurs réparations pourraient être accordées aux demandeurs au vu de leurs

damages, declaratory relief, disgorgement, and punitive damages.

A court finding breach of contract may make binding declarations of right, whether or not any consequential relief is or could be claimed. Nominal damages are always available for causes of action, like breach of contract, that do not require proof of loss. This alone precludes striking the claim.

Whether disgorgement is an appropriate remedy for breach of contract in this case is a matter for trial that cannot be resolved on the pleadings alone. While the customary remedy for a breach of contract is compensation measured in the form of expectation damages, in some cases, disgorgement of a defendant's profits can be an appropriate remedy for breach of contract. Disgorgement is an exceptional remedy, available where a plaintiff has shown that the ordinary remedies of contract law are inadequate to protect and vindicate their contractual right. Although compensatory damages will often help to achieve deterrence of wrongful conduct, they will not always be adequate or appropriate in the circumstances of the breach. The measure of a disgorgement award implicitly effects deterrence and is dictated by the minimum amount necessary to make the wrong unprofitable.

Disgorgement awards are not limited to situations in which they serve a compensatory purpose. A self-interested and deliberate breach; the impracticability of calculating loss; and the plaintiff's legitimate interest in preventing the defendant's profit-making activity, including where the defendant had a quasi-fiduciary duty to the plaintiff, weigh in favour of a disgorgement remedy. No single factor is necessarily crucial or dispositive. The plaintiffs' pleadings in this case correspond with several factors that, if established at trial, may point to a disgorgement remedy, including that the plaintiffs were vulnerable to ALC's abuse of its power and that ALC's breach was self-interested, deliberate, and in bad faith. A trial judge may also find that ascertaining the actual amount lost is impracticable since VLTs are designed not to create records of who uses them and how much money they have lost.

actes de procédure, notamment des dommages-intérêts symboliques, un jugement déclaratoire, la restitution des gains illicites et les dommages-intérêts punitifs.

Un tribunal qui conclut à la violation de contrat pourra faire des déclarations de droit obligatoires, qu'un redressement en conséquence soit ou puisse être demandé ou non. Les dommages-intérêts symboliques peuvent toujours être accordés pour des causes d'action, comme la violation de contrat, qui ne nécessitent pas une preuve de perte. Ce fait à lui seul exclut la radiation de la demande.

La question de savoir si la restitution des gains illicites est une réparation appropriée pour la violation de contrat en l'espèce doit être tranchée au procès et ne peut l'être au vu des actes de procédure à eux seuls. Même si la réparation habituelle pour violation de contrat est l'indemnisation évaluée sous forme de dommages-intérêts en fonction de la perte de profit escompté, dans certaines situations, la restitution des gains illicites du défendeur peut être une réparation appropriée en cas de violation de contrat. La restitution des gains illicites est une réparation exceptionnelle, qui peut être accordée lorsqu'un demandeur démontre que les réparations ordinaires du droit des contrats sont inadéquates pour protéger et défendre son droit contractuel. Bien que les dommages-intérêts compensatoires aident souvent à créer un effet dissuasif à l'égard de la conduite fautive, ils ne seront pas toujours adéquats ou appropriés eu égard aux circonstances de la violation. La portée de la réparation de restitution des gains illicites a implicitement un effet de dissuasion et est dictée par le montant minimal nécessaire pour rendre la faute non profitable.

Les réparations de restitution des gains illicites ne se limitent pas aux situations où elles servent une fin compensatoire. Une violation intéressée et délibérée; l'impossibilité pratique de calculer la perte; et l'intérêt légitime du demandeur à empêcher les activités lucratives du défendeur, y compris le cas où le défendeur a une obligation quasi-fiduciaire envers le demandeur, militent en faveur d'une réparation de restitution des gains illicites. Aucun facteur à lui seul n'est forcément décisif ou déterminant. Les prétentions que formulent les demandeurs dans leurs actes de procédure en l'espèce correspondent à plusieurs facteurs qui, s'ils sont établis au procès, pourraient donner lieu à une réparation de restitution des gains illicites, notamment le fait que les demandeurs étaient vulnérables à l'abus de pouvoir de la SLA et que la violation qu'a commise la SLA était intéressée, délibérée et de mauvaise foi. Le juge du procès pourrait aussi conclure qu'il est impossible en pratique de fixer le montant réellement perdu, puisque les ALV ne sont pas conçus pour créer des relevés identifiant les utilisateurs et les montants d'argent qu'ils ont perdu.

The plaintiffs have also pleaded a sufficient basis to support a claim for punitive damages. The focus of punitive damages is on the defendant's misconduct, not the plaintiff's loss, and injury to the plaintiff is not a condition precedent to an award of punitive damages. The plaintiffs have pleaded a breach of the duty of honest performance, which can constitute an actionable wrong to ground a claim for punitive damages.

With regard to certification, the class representative must show that there is some "basis in fact" that there is an identifiable class of two or more persons, that there is at least one common issue, and that the class action is the preferable procedure. This standard ensures that there is an evidentiary foundation to support the certification order.

The proposed class definition uses objective criteria that will allow for identification of those who can attest to playing the games, and there is a basis to believe that at least two persons will be able to establish that they paid ALC to gamble on VLT games during the proposed class period.

An issue is common where its resolution is necessary to the resolution of each class member's claim. The issues relating to breach of contract, disgorgement, and punitive damages are appropriate common issues, but the issue relating to aggregate monetary relief is not. On breach of contract, the pleadings assert a civil wrong that is common to each member of the class: whether the terms alleged by the plaintiffs are in fact implied, and whether the functioning of the VLTs routinely violates those terms, would be the same for every consumer. On disgorgement, determining whether the circumstances of this case are exceptional, such that other contractual remedies are inadequate, is a substantial ingredient of each member's claim and will benefit all members of the class. For punitive damages, ALC's conduct and the alleged breach of the duty of good faith would be common to all class members.

But there is no basis in fact to certify aggregate monetary relief as a common issue. Before making an award of disgorgement, the court must be satisfied that the breach of contract is causally connected to the gain to be

Les demandeurs ont en outre plaidé un fondement suffisant au soutien d'une demande de dommages-intérêts punitifs. Les dommages-intérêts punitifs se rattachent à la conduite répréhensible du défendeur, et non à la perte du demandeur, et il n'est pas nécessaire que le demandeur ait subi un préjudice pour que des dommages-intérêts punitifs soient accordés. Les demandeurs ont plaidé un manquement à l'obligation d'exécution honnête, qui peut constituer une faute donnant ouverture à action susceptible de fonder une demande de dommages-intérêts punitifs.

À l'égard de l'autorisation, le représentant du groupe doit établir l'existence d'un certain « fondement factuel » selon lequel il existe un groupe identifiable d'au moins deux personnes, il y a au moins une question commune, et le recours collectif est le meilleur moyen de régler les questions. Cette norme assure qu'il existe une preuve sur laquelle peut reposer l'ordonnance d'autorisation.

La définition du groupe proposée s'appuie sur des critères objectifs qui permettront l'identification des personnes qui peuvent attester avoir pris part aux jeux, et il existe des motifs de croire qu'au moins deux personnes seront capables d'établir qu'ils ont payé la SLA pour jouer à des jeux de hasard sur un ALV durant la période visée par le recours collectif.

Une question est commune lorsque sa résolution est nécessaire pour le règlement des demandes de chaque membre du groupe. Les questions relatives à la violation de contrat, à la restitution des gains illicites et aux dommages-intérêts punitifs sont des questions communes appropriées, mais la question relative aux mesures de redressement pécuniaire global ne l'est pas. Pour ce qui est de la violation de contrat, les actes de procédure invoquent une faute civile qui est commune à tous les membres du groupe : la question de savoir si les conditions qu'allèguent les demandeurs sont effectivement implicites, et celle de savoir si le fonctionnement des ALV viole systématiquement ces conditions, seront les mêmes pour chaque consommateur. Quant à la restitution des gains illicites, le fait d'établir si les circonstances de la présente affaire sont exceptionnelles, de sorte que les autres réparations contractuelles sont inadéquates, est un élément important de la demande de chaque membre et profitera à tous les membres du groupe. En ce qui a trait aux dommages-intérêts punitifs, la conduite de la SLA et le manquement allégué à l'obligation d'agir de bonne foi seraient des questions communes à tous les membres du groupe.

Toutefois, il n'y a pas de fondement factuel permettant de certifier le redressement pécuniaire global comme question commune. Avant d'accorder une réparation de restitution des gains illicites, le tribunal doit être convaincu

disgorged. To ensure that ALC's total liability is limited to that flowing from the breach, some plausible methodology is needed to estimate ALC's liability from its breach of contract, including what its profits might have been had it not breached its contractual obligations. No methodology has been suggested.

Finally, with regard to preferability, the keystone of the plaintiffs' action is a deception common to each member of the class. Determining the content of a contract entered into by each member, and whether that contract was systematically breached, does not require individualized assessments and is more practical and efficient than individual actions. A class action has the potential to acknowledge, vindicate and protect individual players' contractual interest in a safe and fair game.

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By Brown J.

Applied: *Attorney General v. Blake*, [2001] 1 A.C. 268; **considered:** *Nunavut Tunngavik Inc. v. Canada (Attorney General)*, 2014 NUCA 2, 580 A.R. 75; **referred to:** *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477; *Moore v. Sweet*, 2018 SCC 52, [2018] 3 S.C.R. 303; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *Das v. George Weston Ltd.*, 2018 ONCA 1053, 43 E.T.R. (4th) 173; *R. v. Salituro*, [1991] 3 S.C.R. 654; *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261; *Andersen v. St. Jude Medical, Inc.*, 2012 ONSC 3660; *Serhan (Estate Trustee) v. Johnson & Johnson* (2004), 72 O.R. (3d) 296; *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187, 25 B.C.L.R. (6th) 268; *Authentic T-Shirt Co. ULC v. King*, 2016 BCCA 59; *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601; *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762; *United Australia, Ltd. v. Barclays Bank Ltd.*, [1941] A.C. 1; *Arrow Transfer Co. Ltd. v. Royal Bank of Canada*, [1972] S.C.R. 845; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181; *The Queen v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205; *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402; *R. v. Levkovic*, 2013 SCC 25, [2013] 2 S.C.R. 204;

que la violation du contrat a un lien de causalité avec le gain à restituer. Pour faire en sorte que la responsabilité totale de la SLA se limite à celle découlant de la violation, il faut une méthode plausible pour estimer la responsabilité financière de la SLA au titre de sa violation de contrat, y compris ce qu'auraient été ses profits si elle n'avait pas violé ses obligations contractuelles. Or, aucune méthode n'a été proposée.

Enfin, eu égard à la question du meilleur moyen, la clé de voûte de l'action des demandeurs est une tromperie commune à tous les membres du groupe. Il est plus pratique et efficace de déterminer le contenu d'un contrat auquel est partie chaque membre et d'établir si le contrat a été systématiquement violé, que d'intenter des actions à titre individuel, et cette façon de faire n'exige pas d'évaluations individuelles. Un recours collectif a la possibilité de reconnaître, de défendre et de protéger l'intérêt contractuel de chaque joueur à jouer à un jeu sûr et juste.

Jurisprudence

Citée par le juge Brown

Arrêt appliqué : *Attorney General c. Blake*, [2001] 1 A.C. 268; **arrêt examiné :** *Nunavut Tunngavik Inc. c. Canada (Attorney General)*, 2014 NUCA 2, 580 A.R. 75; **arrêts mentionnés :** *R. c. Imperial Tobacco Canada Ltée*, 2011 CSC 42, [2011] 3 R.C.S. 45; *Pro-Sys Consultants Ltd. c. Microsoft Corporation*, 2013 CSC 57, [2013] 3 R.C.S. 477; *Moore c. Sweet*, 2018 CSC 52, [2018] 3 R.C.S. 303; *Hryniak c. Mauldin*, 2014 CSC 7, [2014] 1 R.C.S. 87; *Das c. George Weston Ltd.*, 2018 ONCA 1053, 43 E.T.R. (4th) 173; *R. c. Salituro*, [1991] 3 R.C.S. 654; *Syl Apps Secure Treatment Centre c. B.D.*, 2007 CSC 38, [2007] 3 R.C.S. 83; *Cooper c. Hobart*, 2001 CSC 79, [2001] 3 R.C.S. 537; *Alberta c. Elder Advocates of Alberta Society*, 2011 CSC 24, [2011] 2 R.C.S. 261; *Andersen c. St. Jude Medical, Inc.*, 2012 ONSC 3660; *Serhan (Estate Trustee) c. Johnson & Johnson* (2004), 72 O.R. (3d) 296; *Ewert c. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187, 25 B.C.L.R. (6th) 268; *Authentic T-Shirt Co. ULC c. King*, 2016 BCCA 59; *Banque d'Amérique du Canada c. Société de Fiducie Mutuelle*, 2002 CSC 43, [2002] 2 R.C.S. 601; *Kingstreet Investments Ltd. c. Nouveau-Brunswick (Finances)*, 2007 CSC 1, [2007] 1 R.C.S. 3; *Peel (Municipalité régionale) c. Canada*, [1992] 3 R.C.S. 762; *United Australia, Ltd. c. Barclays Bank Ltd.*, [1941] A.C. 1; *Arrow Transfer Co. Ltd. c. Banque royale du Canada*, [1972] R.C.S. 845; *Nation Haïda c. Colombie-Britannique (Ministre des Forêts)*, 2004 CSC 73, [2004] 3 R.C.S. 511; *Clements c. Clements*, 2012 CSC 32, [2012] 2 R.C.S. 181; *La Reine c. Saskatchewan Wheat Pool*, [1983] 1 R.C.S. 205; *R. c. D.L.W.*, 2016 CSC 22, [2016] 1 R.C.S.

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POURVOIS contre un arrêt de la Cour d'appel de Terre-Neuve-et-Labrador (les juges Green, Welsh et Harrington), 2018 NLCA 71, 29 C.P.C. (8th) 1, 53

53 C.C.L.T. (4th) 12, [2018] N.J. No. 383 (QL), 2018 CarswellNlfd 470 (WL Can.), affirming in part decisions of Faour J., 2016 NLTD(G) 216, 93 C.P.C. (7th) 307, [2016] N.J. No. 443 (QL), 2016 CarswellNfld 532 (WL Can.), and 2014 NLTD(G) 114, 356 Nfld. & P.E.I.R. 293, 1108 A.P.R. 293, [2014] N.J. No. 288 (QL), 2014 CarswellNfld 281 (WL Can.). Appeals allowed, Wagner C.J. and Karakatsanis, Martin and Kasirer JJ. dissenting in part.

Julie Rosenthal, *Mike Eizenga*, *Sarah Stothart* and *Jonathan G. Bell*, for the appellant the Atlantic Lottery Corporation Inc.

Ian F. Kelly, *Q.C.*, and *Daniel M. Glover*, for the appellants VLC, Inc., IGT-Canada Inc. and International Game Technology.

Colm St. R. Seviour, *Q.C.*, and *Koren A. Thomson*, for the appellant Spielo International Canada ULC.

Jorge P. Segovia, for the appellant Tech Link International Entertainment Limited.

Kirk M. Baert and *Celeste Poltak*, for the respondents.

Brent Kettles and *Tom McKinlay*, for the intervener the Attorney General of Ontario.

Denis Guénette and *Tom Dobson*, for the intervener the Attorney General of Manitoba.

Jared G. Biden, for the intervener the Attorney General of Saskatchewan.

Paul D. Dicks, *Q.C.*, *Michael D. Lipton*, *Q.C.*, and *Kevin J. Weber*, for the interveners Bally Gaming Canada Ltd. and Bally Gaming Inc.

Keith Kilback, *Q.C.*, and *Alexander Shalashniy*, for the intervener the Western Canada Lottery Corporation.

C.C.L.T. (4th) 12, [2018] N.J. No. 383 (QL), 2018 CarswellNlfd 470 (WL Can.), qui a confirmé en partie des décisions du juge Faour, 2016 NLTD(G) 216, 93 C.P.C. (7th) 307, [2016] N.J. No. 443 (QL), 2016 CarswellNfld 532 (WL Can.), et 2014 NLTD(G) 114, 356 Nfld. & P.E.I.R. 293, 1108 A.P.R. 293, [2014] N.J. No. 288 (QL), 2014 CarswellNfld 281 (WL Can.). Pourvois accueillis, le juge en chef Wagner et les juges Karakatsanis, Martin et Kasirer sont dissidents en partie.

Julie Rosenthal, *Mike Eizenga*, *Sarah Stothart* et *Jonathan G. Bell*, pour l'appelante la Société des loteries de l'Atlantique.

Ian F. Kelly, *c.r.*, et *Daniel M. Glover*, pour les appelantes VLC, Inc., IGT-Canada Inc. et International Game Technology.

Colm St. R. Seviour, *c.r.*, et *Koren A. Thomson*, pour l'appelante Spielo International Canada ULC.

Jorge P. Segovia, pour l'appelante Tech Link International Entertainment Limited.

Kirk M. Baert et *Celeste Poltak*, pour les intimés.

Brent Kettles et *Tom McKinlay*, pour l'intervenant le procureur général de l'Ontario.

Denis Guénette et *Tom Dobson*, pour l'intervenant le procureur général du Manitoba.

Jared G. Biden, pour l'intervenant le procureur général de la Saskatchewan.

Paul D. Dicks, *c.r.*, *Michael D. Lipton*, *c.r.*, et *Kevin J. Weber*, pour les intervenantes Bally Gaming Canada Ltd. et Bally Gaming Inc.

Keith Kilback, *c.r.*, et *Alexander Shalashniy*, pour l'intervenante Western Canada Lottery Corporation.

Mandy L. England and *Michael Sobkin*, for the intervener the Alberta Gaming, Liquor and Cannabis Commission.

Brandon Kain, *Gillian P. Kerr* and *Adam Goldenberg*, for the intervener the Canadian Gaming Association.

Matthew Milne-Smith, for the intervener the Canadian Chamber of Commerce.

K. Michael Stephens, *Shannon Ramsay* and *Aubin Calvert*, for the intervener the British Columbia Lottery Corporation.

The judgment of Abella, Moldaver, Côté, Brown and Rowe JJ. was delivered by

Brown J. —

I. Introduction

[1] The appellant Atlantic Lottery Corporation Inc. ("ALC"), constituted by the governments of the four Atlantic provinces, is empowered to approve the operation of video lottery terminal games ("VLTs") in Newfoundland and Labrador by the *Video Lottery Regulations*, C.N.L.R. 760/96. The respondents Douglas Babstock and Fred Small ("the plaintiffs") applied for certification of a class action against ALC, on behalf of any natural person resident in Newfoundland and Labrador who paid to play VLTs in that province in the six years preceding the class action, or on behalf of the estate of any such person. The other appellants are suppliers of VLTs that ALC has added to the action as third-party defendants.

[2] The plaintiffs' essential claim is that VLTs are inherently dangerous and deceptive. Indeed, they say that VLTs are so deceptive that they contravene the *Criminal Code*'s prohibition of games similar to "three-card monte" (*Criminal Code*, R.S.C. 1985, c. C-46, s. 206). Relying on three causes of action ("waiver of tort", breach of contract and unjust

Mandy L. England et *Michael Sobkin*, pour l'intervenante Alberta Gaming, Liquor and Cannabis Commission.

Brandon Kain, *Gillian P. Kerr* et *Adam Goldenberg*, pour l'intervenante Canadian Gaming Association.

Matthew Milne-Smith, pour l'intervenante la Chambre de commerce du Canada.

K. Michael Stephens, *Shannon Ramsay* et *Aubin Calvert*, pour l'intervenante British Columbia Lottery Corporation.

Version française du jugement des juges Abella, Moldaver, Côté, Brown et Rowe rendu par

Le juge Brown —

I. Introduction

[1] L'appelante la Société des loteries de l'Atlantique Inc. (« SLA »), constituée par les gouvernements des quatre provinces de l'Atlantique, a le pouvoir d'approuver l'exploitation des appareils de loterie vidéo (« ALV ») à Terre-Neuve-et-Labrador en vertu du règlement intitulé *Video Lottery Regulations*, C.N.L.R. 760/96. Les intimés, Douglas Babstock et Fred Small (« les demandeurs »), ont présenté une demande d'autorisation d'un recours collectif contre la SLA, au nom de toute personne physique résidant à Terre-Neuve-et-Labrador ayant payé pour jouer sur des ALV dans cette province au cours des six années précédant l'introduction du recours collectif, ou pour le compte de la succession de telles personnes. Les autres appelantes sont des sociétés qui fournissent des ALV, que la SLA a désignées comme tierces parties défenderesses.

[2] Les demandeurs font valoir essentiellement que les ALV sont intrinsèquement dangereux et trompeurs. De fait, ils affirment que les ALV sont à ce point trompeurs qu'ils contreviennent aux dispositions du *Code criminel* interdisant les jeux analogues au jeu de « bonneteau » (*Code criminel*, L.R.C. 1985, c. C-46, art. 206). S'appuyant sur trois causes

enrichment), the plaintiffs seek a gain-based award, quantified by the profit ALC earned by licensing VLTs.[1]

[3] More particularly, and as to waiver of tort, the plaintiffs allege that ALC breached a duty to warn of the inherent dangers associated with VLTs, including the risk of addiction and suicidal ideation. This, they say, supports their claim in waiver of tort, which they also say is an independent cause of action that allows for a gain-based remedy to "be determined at trial of common issues without the involvement of any individual class member" (A.R., vol. II, at p. 104).

[4] As to the claim for breach of contract, the plaintiffs allege a contract arising from ALC's offer of VLTs to the public, and the plaintiffs' corresponding acceptance by paying to play. As an implied term of this contract, they say that ALC was required to provide safe games that were fit for use and of merchantable quality, to use reasonable skill and care in its provision of VLT gaming, and to act in good faith. ALC breached these terms, they say, by supplying deceptive VLTs.

[5] Finally, the plaintiffs say that ALC has been unjustly enriched at their expense.

[6] The plaintiffs succeeded in obtaining certification at the Supreme Court of Newfoundland and Labrador, and that result was substantially affirmed by the Newfoundland and Labrador Court of Appeal. In my respectful view, however, none of these claims

[1] While the pleadings advance other causes of action, those claims were struck by the Newfoundland and Labrador Court of Appeal, and the plaintiffs have not cross-appealed that decision.

d'action (« renonciation au recours délictuel », violation de contrat et enrichissement sans cause), les demandeurs sollicitent une réparation fondée sur les gains réalisés, calculée en fonction des profits que la SLA a touchés en accordant des licences d'utilisation des ALV[1].

[3] Plus particulièrement, et pour ce qui est de la renonciation au recours délictuel, les demandeurs soutiennent que la SLA a manqué à son obligation de mise en garde contre les dangers inhérents aux ALV, notamment le risque de dépendance et d'idées suicidaires. C'est sur ce manquement, affirment-ils, que repose leur demande fondée sur la renonciation au recours délictuel qui, ajoutent-ils, est une cause d'action indépendante ouvrant droit à une réparation fondée sur les gains réalisés [TRADUCTION] « qui sera établie lors de l'instruction des questions communes sans la participation des membres du groupe » (d.a., vol. II, p. 104).

[4] Quant à la demande fondée sur la violation de contrat, les demandeurs affirment que le contrat en question existe du fait que la SLA offre des ALV au public et que les demandeurs acceptent en payant pour jouer. Selon eux, il découle implicitement de ce contrat que la SLA doit offrir des jeux sécuritaires qui sont propres à être utilisés et de qualité marchande, faire preuve d'une compétence et d'une diligence raisonnables lorsqu'elle fournit des jeux sur ALV, et agir de bonne foi. Ils soutiennent que la SLA a manqué à ces obligations en fournissant des ALV trompeurs.

[5] Enfin, les demandeurs affirment que la SLA s'est enrichie sans cause à leurs dépens.

[6] Les demandeurs ont réussi à obtenir l'autorisation devant la Cour suprême de Terre-Neuve-et-Labrador, et cette décision a été confirmée pour l'essentiel par la Cour d'appel de Terre-Neuve-et-Labrador. À mon humble avis, cependant, aucune

[1] Bien que les actes de procédure fassent état d'autres causes d'action, celles-ci ont été radiées par la Cour d'appel de Terre-Neuve-et-Labrador, et les demandeurs n'ont pas formé d'appel incident de cette décision.

have any reasonable chance of success. I would therefore allow the appeals, set aside the certification order, and strike the plaintiffs' claims against ALC.

II. Overview of Proceedings

A. *Supreme Court of Newfoundland and Labrador — 2014 NLTD(G) 114, 356 Nfld. & P.E.I.R. 293; 2016 NLTD(G) 216, 93 C.P.C. (7th) 307*

[7] The matter came before the certification judge in the form of two applications: (1) ALC's application, made under r. 14.24(1)(a) of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D (2014 NLTD(G) 114, 356 Nfld. & P.E.I.R. 293), to strike the plaintiffs' claim on the basis that it disclosed no reasonable cause of action, and (2) the plaintiffs' application for certification of their claim as a class action under the *Class Actions Act*, S.N.L. 2001, c. C-18.1. The parties agreed that the certification judge's decision on ALC's application would also determine whether the plaintiffs had satisfied the first criterion for certification in s. 5 of the *Class Actions Act* — that "the pleadings disclose a cause of action".

[8] The certification judge dismissed ALC's application, and further held that the plaintiffs had satisfied the requirements necessary for certification. In particular and because the plaintiffs intended to pursue a collective remedy (calculated on the basis of ALC's profits) without proving individual damage, he concluded that there were common issues among the class that would be better addressed through a class action.

B. *Newfoundland and Labrador Court of Appeal — 2018 NLCA 71, 29 C.P.C. (8th) 1*

[9] ALC appealed the certification judge's decisions on both applications. Writing for the majority,

de ces demandes n'a de chance raisonnable d'être accueillie. Je serais donc d'avis d'accueillir les pourvois, d'annuler l'ordonnance autorisant l'exercice du recours collectif et de radier les demandes introduites à l'encontre de la SLA.

II. Aperçu des décisions des instances inférieures

A. *Cour suprême de Terre-Neuve-et-Labrador — 2014 NLTD(G) 114, 356 Nfld. & P.E.I.R. 293; 2016 NLTD(G) 216, 93 C.P.C. (7th) 307*

[7] L'affaire a été soumise au juge d'autorisation sous la forme de deux demandes : (1) la demande de la SLA, fondée sur l'al. 14.24(1)(a) des *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, ann. D (2014 NLTD(G) 114, 356 Nfld. & P.E.I.R. 293), visant à faire radier l'action des demandeurs au motif qu'elle ne révélait aucune cause d'action raisonnable, et (2) la demande présentée par les demandeurs visant l'autorisation d'exercer leur action à titre de recours collectif en vertu de la *Class Actions Act*, S.N.L. 2001, c. C-18.1. Les parties ont convenu que la décision rendue par le juge d'autorisation saisi de la demande de la SLA permettrait aussi d'établir si les demandeurs avaient satisfait au premier critère d'autorisation prévu à l'art. 5 de la *Class Actions Act* — soit que [TRADUCTION] « les actes de procédure révèlent une cause d'action ».

[8] Le juge a rejeté la demande de la SLA, concluant en outre que les demandeurs avaient satisfait aux conditions nécessaires à l'autorisation. Plus particulièrement, et parce que les demandeurs entendaient solliciter une réparation collective (calculée en fonction des profits réalisés par la SLA) sans prouver l'existence d'un préjudice individuel, il a conclu qu'il était préférable que certaines des questions communes aux membres du groupe soient tranchées dans le cadre d'un recours collectif.

B. *Cour d'appel de Terre-Neuve-et-Labrador — 2018 NLCA 71, 29 C.P.C. (8th) 1*

[9] La SLA a interjeté appel des décisions rendues sur les deux demandes par le juge saisi de la demande

Green J.A. substantially upheld the certification judge's conclusions, and allowed the plaintiffs' claims in waiver of tort, breach of contract and unjust enrichment to proceed to trial.

[10] Regarding waiver of tort, the majority concluded that the doctrine could operate as an independent cause of action for disgorgement, where it would serve the purpose of deterring wrongful conduct. Further, according to the majority, plaintiffs alleging negligence need not prove damage to establish an entitlement to disgorgement. All this led the majority to conclude that the plaintiffs' claim for waiver of tort — that is, for disgorgement as a remedy for negligence in the absence of demonstrated damage — disclosed a reasonable cause of action (paras. 185 and 189).

[11] Addressing the plaintiffs' allegations of criminal conduct, the majority concluded that expert evidence would be required to conclude whether VLTs are similar to three-card monte and therefore prohibited by s. 206 of the *Criminal Code*. Such claims, said the majority, would have to be determined at trial.

[12] Finally, the majority held that the pleaded facts, particularly considering the allegations of criminal conduct, could reasonably support a claim for disgorgement as a remedy for breach of contract. In view of its conclusion on waiver of tort as an independent cause of action, the majority found it unnecessary to address "issues raised in argument under the heading of unjust enrichment *simpliciter*, i.e. whether the pleading discloses a cause of action in unjust enrichment, calling for the application of the traditional three-part test set out in such cases

d'autorisation. S'exprimant au nom des juges majoritaires, le juge Green a confirmé en grande partie les conclusions du juge d'autorisation et il a permis l'instruction des demandes fondées sur la renonciation au recours délictuel, la violation de contrat et l'enrichissement sans cause présentées par les demandeurs.

[10] En ce qui concerne la renonciation au recours délictuel, les juges majoritaires ont conclu que la doctrine pouvait constituer une cause d'action indépendante en restitution des gains illicites, dans la mesure où elle contribuerait à l'atteinte de l'objectif de dissuasion des comportements fautifs. En outre, selon les juges majoritaires, il n'est pas nécessaire que les demandeurs alléguant la négligence prouvent l'existence d'un préjudice pour avoir droit à la restitution des gains illicites. Tout cela a amené les juges majoritaires à conclure que l'action pour renonciation au recours délictuel — c'est-à-dire, pour restitution des gains illicites à titre de réparation pour négligence en l'absence de preuve démontrant un préjudice — révélait une cause d'action raisonnable (par. 185 et 189).

[11] Répondant aux allégations de conduite criminelle formulées par les demandeurs, les juges majoritaires ont conclu qu'une preuve d'expert serait nécessaire pour établir si les ALV sont analogues au jeu de bonneteau et s'ils sont donc interdits par l'art. 206 du *Code criminel*. Ces allégations, selon les juges majoritaires, devraient être tranchées lors du procès.

[12] Enfin, les juges majoritaires ont conclu que les faits allégués, particulièrement compte tenu des allégations de conduite criminelle, pouvaient raisonnablement étayer une demande de restitution des gains illicites à titre de réparation pour violation de contrat. Étant donné leur conclusion selon laquelle la renonciation à un recours délictuel constituait une cause d'action indépendante, les juges majoritaires ont jugé inutile de se prononcer sur [TRADUCTION] « les questions soulevées lors de l'argumentation portant sur l'enrichissement sans cause *simpliciter*,

as [*Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629]" (para. 230).

[13] In dissent, Welsh J.A. would have allowed ALC's appeal and struck all the claims. In her view, the claims in contract and tort did not have a reasonable chance of success given that the plaintiffs did not plead damage to individual plaintiffs; it was plain and obvious that VLTs were not similar to three-card monte; and, there was a juristic reason for ALC's enrichment at the expense of the plaintiffs.

III. Analysis

[14] ALC's application to strike relies on r. 14.24(1) of the *Rules of the Supreme Court*, which allows the court to strike any portion of a statement of claim that discloses no reasonable cause of action. The parties agree that determining whether any reasonable cause of action is disclosed in the plaintiffs' statement of claim will also satisfy the first requirement of the plaintiffs' application for certification. The test to be applied under both applications, therefore, is whether it is plain and obvious, assuming the facts pleaded to be true, that each of the plaintiffs' pleaded claims disclose no reasonable cause of action. Simply stated, if a claim has no reasonable prospect of success it should not be allowed to proceed to trial (*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 17).

[15] A central issue in this case arises from the plaintiffs' reliance on the doctrine of waiver of tort. The plaintiffs say that a claim relying on waiver of tort as an independent cause of action for disgorgement has at least a reasonable chance of succeeding at trial. Before the Court of Appeal's decision in this case, however, no Canadian authority had recognized such a cause of action, although the plaintiffs rely on a line of class action certification decisions in

c.-à-d. à savoir si l'acte de procédure révèle une cause d'action fondée sur l'enrichissement sans cause, commandant l'application du critère traditionnel à trois volets énoncé dans des décisions comme [*Garland c. Consumers' Gas Co.*, 2004 CSC 25, [2004] 1 R.C.S. 629] » (par. 230).

[13] Dissidente, la juge Welsh aurait accueilli l'appel de la SLA et radié toutes les demandes. À son avis, les demandes en responsabilité contractuelle et délictuelle n'avaient aucune chance raisonnable d'être accueillies étant donné que les demandeurs n'avaient pas fait valoir que, individuellement, ils avaient subi un préjudice; qu'il était évident et manifeste que les ALV n'étaient pas analogues au jeu de bonneteau; et qu'il y avait une cause juridique à l'enrichissement de la SLA aux dépens des demandeurs.

III. Analyse

[14] La requête en radiation présentée par la SLA est fondée sur le par. 14.24(1) des *Rules of the Supreme Court*, qui permet à la cour de radier toute partie d'une déclaration qui ne révèle aucune cause d'action raisonnable. Les parties conviennent que le fait d'établir si la déclaration des demandeurs révèle une cause d'action raisonnable satisfera aussi à la première condition de la demande d'autorisation des demandeurs. Le critère devant être appliqué dans le cas des deux demandes est donc celui de savoir s'il est évident et manifeste, dans l'hypothèse où les faits allégués seraient avérés, que chacune des demandes formulées par les demandeurs ne révèle aucune cause d'action raisonnable. En termes simples, si une demande n'a aucune possibilité raisonnable d'être accueillie, elle ne devrait pas pouvoir suivre son cours (*R. c. Imperial Tobacco Canada Ltée*, 2011 CSC 42, [2011] 3 R.C.S. 45, par. 17).

[15] L'une des principales questions dans la présente affaire découle du recours par les demandeurs à la doctrine de la renonciation au recours délictuel. Ceux-ci affirment qu'une demande fondée sur la renonciation au recours délictuel en tant que cause d'action indépendante en restitution des gains illicites a au moins une chance raisonnable d'être accueillie au procès. Avant que la Cour d'appel ne rende sa décision en l'espèce, cependant, aucune

which courts have *refrained* from finding that it is plain and obvious that such an action *does not* exist. The plaintiffs place significant emphasis on *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477 ("*Microsoft*"), where this Court, citing conflicting authorities on this point, declined to resolve it (para. 97).

[16] In my view, developments since *Microsoft*, and distinguishing features of this case, allow us to definitively resolve whether the novel cause of action proposed by the plaintiffs exists in Canadian law. I say so for four reasons.

[17] First, the argument in favour of recognizing the plaintiffs' novel cause of action relies on the relationship between the concept of waiver of tort and the broader law of restitution (or, as it is now more commonly referred to in Canada, the law of unjust enrichment). This area of our law has developed rapidly in recent years in ways that have deepened our understanding of unjust enrichment (see e.g. *Moore v. Sweet*, 2018 SCC 52, [2018] 3 S.C.R. 303; M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014), at pp. vii-ix; J. D. McCamus, "Waiver of Tort: Is There a Limiting Principle?" (2014), 55 *Can. Bus. L.J.* 333, at p. 334; A. Burrows, *The Law of Restitution* (3rd ed. 2011), at pp. 3-9). More particularly, several commentators have, since *Microsoft*, made helpful contributions by specifically commenting on waiver of tort as an independent cause of action (see e.g. G. Weber, "Waiver of Tort: Disgorgement *Ex Nihilo*" (2014), 40 *Queen's L.J.* 389; S. Barton, M. Hines and S. Therien, "Neither Cause of Action nor Remedy: Doing Away with Waiver of Tort", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation, 2015* (2015); E. M. Iacobucci and M. J. Trebilcock, "An Economic Analysis of Waiver of Tort in Negligence Actions" (2016), 66 *U.T.L.J.* 173). What was once seen as a state of legal

autorité canadienne n'avait reconnu une telle cause d'action, bien que les demandeurs aient invoqué une série de décisions en matière d'autorisation de recours collectifs dans lesquelles les tribunaux se sont *abstenus* de conclure qu'il est évident et manifeste qu'une telle cause d'action n'existe *pas*. Les demandeurs accordent une importance considérable à l'arrêt *Pro-Sys Consultants Ltd. c. Microsoft Corporation*, 2013 CSC 57, [2013] 3 R.C.S. 477 (« *Microsoft* »), dans lequel la Cour, citant des décisions contradictoires sur le sujet, a refusé de trancher la question (par. 97).

[16] À mon avis, les changements survenus depuis l'arrêt *Microsoft* et les particularités de la présente affaire nous permettent de trancher définitivement la question de savoir si la nouvelle cause d'action proposée par les demandeurs existe en droit canadien. Quatre raisons justifient cette affirmation.

[17] Premièrement, l'argument en faveur de la reconnaissance de la nouvelle cause d'action invoquée par les demandeurs repose sur le lien entre le concept de renonciation au recours délictuel et le droit plus général en matière de restitution (ou, comme on l'appelle maintenant communément au Canada, le droit relatif à l'enrichissement sans cause). Ce domaine de notre droit a rapidement évolué au cours des dernières années de manière à ce que nous ayons maintenant une compréhension plus approfondie de l'enrichissement sans cause (voir, p. ex., *Moore c. Sweet*, 2018 CSC 52, [2018] 3 R.C.S. 303; M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014), p. vii-ix; J. D. McCamus, « Waiver of Tort : Is There a Limiting Principle? » (2014), 55 *Rev. can. dr. comm.* 333, p. 334; A. Burrows, *The Law of Restitution* (3e éd. 2011), p. 3-9). Plus particulièrement, plusieurs auteurs ont, depuis l'arrêt *Microsoft*, apporté des contributions utiles en s'exprimant expressément sur le sujet de la renonciation au recours délictuel en tant que cause d'action indépendante (voir, p. ex., G. Weber, « Waiver of Tort : Disgorgement *Ex Nihilo* » (2014), 40 *Queen's L.J.* 389; S. Barton, M. Hines et S. Therien, « Neither Cause of Action nor Remedy : Doing Away with Waiver of Tort », dans T. L. Archibald et R. S. Echlin, dir., *Annual Review*

uncertainty at the time *Microsoft* was decided has been made clearer.

[18] Secondly, and since *Microsoft* was decided, this Court has recognized in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, the need for a culture shift to promote "timely and affordable access to the civil justice system" (para. 2). Where possible, therefore, courts should resolve legal disputes promptly, rather than referring them to a full trial (paras. 24-25 and 32). This includes resolving questions of law by striking claims that have no reasonable chance of success (S. G. A. Pitel and M. B. Lerner, "Resolving Questions of Law: A Modern Approach to Rule 21" (2014), 43 *Advocates' Q.* 344, at pp. 351-52). Indeed, the power to strike hopeless claims is "a valuable housekeeping measure essential to effective and fair litigation" (*Imperial Tobacco*, at para. 19).

[19] Of course, it is not determinative on a motion to strike that the law has not yet recognized the particular claim. The law is not static, and novel claims that might represent an incremental development in the law should be allowed to proceed to trial (*Imperial Tobacco*, at para. 21; *Das v. George Weston Ltd.*, 2018 ONCA 1053, 43 E.T.R. (4th) 173, at para. 73; see also *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 670). That said, a claim will not survive an application to strike simply because it is novel. It is beneficial, and indeed critical to the viability of civil justice and public access thereto that claims, *including novel claims*, which are doomed to fail be disposed of at an early stage in the proceedings. This is because such claims present "no legal justification for a protracted and expensive trial" (*Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83, at para. 19). If a court would not recognize a novel claim when the facts as pleaded are taken to be true, the claim is plainly doomed to fail and should be struck. In making this determination, it is not uncommon for courts to resolve complex questions of

of Civil Litigation, 2015 (2015); E. M. Iacobucci et M. J. Trebilcock, « An Economic Analysis of Waiver of Tort in Negligence Actions » (2016), 66 *U.T.L.J.* 173). Ce qui était considéré comme un état d'incertitude juridique à l'époque où l'arrêt *Microsoft* a été rendu est maintenant beaucoup plus clair.

[18] Deuxièmement, et depuis qu'elle a rendu l'arrêt *Microsoft,* la Cour a reconnu, dans l'arrêt *Hryniak c. Mauldin*, 2014 CSC 7, [2014] 1 R.C.S. 87, qu'un virage culturel s'imposait afin de favoriser « l'accès expéditif et abordable au système de justice civile » (par. 2). Dans la mesure du possible, les tribunaux doivent donc veiller au règlement rapide des litiges plutôt que les renvoyer pour instruction d'un procès complet (par. 24-25 et 32); cela comprend le fait de résoudre des questions de droit en radiant les demandes qui ne présentent aucune chance raisonnable d'être accueillies (S. G. A. Pitel et M. B. Lerner, « Resolving Questions of Law : A Modern Approach to Rule 21 » (2014), 43 *Advocates' Q.* 344, p. 351-352). De fait, le pouvoir de radier les demandes vaines constitue « une importante mesure de gouverne judiciaire essentielle à l'efficacité et à l'équité des procès » (*Imperial Tobacco*, par. 19).

[19] Bien sûr, le fait qu'une action en particulier n'a pas encore été reconnue en droit n'est pas déterminant pour une requête en radiation. Le droit n'est pas immuable, et les demandes inédites qui pourraient représenter une évolution graduelle du droit devraient pouvoir être instruites (*Imperial Tobacco*, par. 21; *Das c. George Weston Ltd.*, 2018 ONCA 1053, 43 E.T.R. (4th) 173, par. 73; voir aussi *R. c. Salituro*, [1991] 3 R.C.S. 654, p. 670). Cela dit, une demande ne pourra survivre à une requête en radiation simplement parce qu'elle est inédite. Il est bénéfique, et même essentiel à la viabilité de la justice civile et à l'accès du public à celle-ci que les demandes, *y compris les demandes inédites*, qui sont vouées à l'échec soient tranchées tôt dans l'instance. Il en est ainsi parce que de telles demandes ne présentent pas « matière à un procès long et coûteux » (*Syl Apps Secure Treatment Centre c. B.D.*, 2007 CSC 38, [2007] 3 R.C.S. 83, par. 19). Si un tribunal ne reconnaît pas une demande inédite dans le cas où les faits allégués sont tenus pour avérés, la demande est manifestement vouée à l'échec et doit être radiée.

law and policy (see e.g. *Imperial Tobacco*; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537; *Syl Apps*; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261).

[20] Lax J.'s observations in *Andersen v. St. Jude Medical, Inc.*, 2012 ONSC 3660, are particularly apposite, as she heard arguments on the scope of waiver of tort after a 138-day trial. The circumstances did not require her to resolve the issue, but Lax J. observed that the parties "did not rely on any evidence . . . to support or oppose extending the waiver of tort doctrine to a negligence case", nor did the plaintiffs "lead any policy evidence to explain why waiver of tort should be available" (para. 585 (CanLII)). She concluded that "deciding the waiver of tort issue does not necessarily require a trial and that it may be possible to resolve the debate in some other way" (para. 587).

[21] Thirdly, failing to address whether an independent cause of action for waiver of tort exists will perpetuate an undesirable state of uncertainty. As Greg Weber writes, "[w]aiver of tort has become a hollow and internally inconsistent doctrine, leaving judges and litigants confused about how and when a cause of action might support disgorgement" (p. 392). Uncertainty about whether an action lies for disgorgement without proof of damage has significant ramifications, which are most apparent in the context of class actions. For 16 years since *Serhan (Estate Trustee) v. Johnson & Johnson* (2004), 72 O.R. (3d) 296 (S.C.), such claims have been commonly advanced but never fully tried. In the meantime, certification judges have had "little alternative but to affirm that the question of the doctrine's availability is indeed a live issue for trial, which can and does result in certification to the detriment of the defendant, who is then practically compelled to pay a settlement to the plaintiff" (J. M. Martin, "Waiver of Tort: An Historical and Practical Survey" (2012), 52 *Can. Bus. L.J.* 473, at p. 476 (footnote omitted);

Il n'est pas rare qu'en rendant de telles décisions, les tribunaux règlent des questions complexes de droit et de principe (voir, p. ex., *Imperial Tobacco*; *Cooper c. Hobart*, 2001 CSC 79, [2001] 3 R.C.S. 537; *Syl Apps*; *Alberta c. Elder Advocates of Alberta Society*, 2011 CSC 24, [2011] 2 R.C.S. 261).

[20] Les observations de la juge Lax dans la décision *Andersen c. St. Jude Medical, Inc.*, 2012 ONSC 3660, sont particulièrement pertinentes, puisqu'elle a entendu les arguments sur la portée de la renonciation au recours délictuel après un procès de 138 jours. Dans les circonstances, elle n'avait pas à trancher la question, mais la juge Lax a noté que les parties [TRADUCTION] « n'avaient invoqué aucun élément de preuve [. . .] pour étayer ou contester l'élargissement de la doctrine de la renonciation au recours délictuel à un cas de négligence », et les demandeurs n'avaient pas non plus « présenté de preuve de principe pour expliquer pourquoi la renonciation au recours délictuel devrait être possible » (par. 585 (CanLII)). Elle a conclu que « trancher la question de la renonciation au recours délictuel n'exige pas nécessairement un procès et qu'il pourrait être possible de régler le débat d'une autre façon » (par. 587).

[21] Troisièmement, le fait de ne pas se prononcer sur l'existence d'une cause d'action indépendante pour renonciation au recours délictuel perpétuera un état d'incertitude non souhaitable. Comme l'écrit Greg Weber : [TRADUCTION] « [l]a renonciation au recours délictuel est devenue une doctrine vide de sens et intrinsèquement contradictoire, à tel point que les juges et les parties ne savent ni comment ni quand une cause d'action peut ouvrir droit à la restitution des gains illicites » (p. 392). L'incertitude quant à savoir si une action en restitution des gains illicites peut être intentée en l'absence de preuve de préjudice a des conséquences importantes, qui ressortent davantage dans le contexte des recours collectifs. Au cours des 16 années qui ont suivi la décision *Serhan (Estate Trustee) c. Johnson & Johnson* (2004), 72 O.R. (3d) 296 (C.S.), de telles demandes ont souvent été introduites, mais n'ont jamais été instruites au fond. Pendant ce temps, les juges saisis d'une demande d'autorisation n'avaient [TRADUCTION] « d'autres choix que de dire que la question du recours à la doctrine est effectivement une question devant être

see also H. M. Rosenberg, "Waiving Goodbye: The Rise and Imminent Fall of Waiver of Tort in Class Proceedings" (2010), 6 *Can. Class Action Rev.* 37, at p. 38). Indeed, this Court's decision to refrain from striking the waiver of tort claim in *Microsoft* has been taken as an affirmative statement that such claims are viable (see e.g. C.A. Reasons, at para. 182; *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187, 25 B.C.L.R. (6th) 268, at para. 73; *Authentic T-Shirt Co. ULC v. King*, 2016 BCCA 59, at paras. 41-42 (CanLII)). Nothing is gained, and much court time and considerable litigant resources are lost, by leaving this issue unresolved.

[22] Finally, while waiver of tort as a novel cause of action was not a central issue in *Microsoft*, it is in the present appeals. The Court of Appeal accordingly canvassed the law comprehensively, and concluded not only that the plaintiffs' claim should proceed to trial, but that waiver of tort should be definitively recognized as an independent cause of action. On appeal to this Court, the parties and interveners have similarly devoted substantial attention to the issue. The question is therefore ripe for decision, and these appeals presents an appropriate vehicle for deciding it.

A. *Disgorgement for Tortious Wrongdoing*

(1) Disgorgement As a Novel Cause of Action

[23] As I discuss below, the term "waiver of tort" is confusing, and should be abandoned. The concern is not for consistent terminology for its own sake, but rather for clarity of meaning: cases dealing with

tranchée à l'issue d'un procès, qui peut donner lieu, et qui donne effectivement lieu, à une autorisation au détriment du défendeur, qui est alors à toutes fins pratiques contraint de verser une somme à titre de règlement au demandeur » (J. M. Martin, « Waiver of Tort : An Historical and Practical Survey » (2012), 52 *Rev. can. dr. comm.* 473, p. 476 (note en bas de page omise); voir aussi H. M. Rosenberg, « Waiving Goodbye : The Rise and Imminent Fall of Waiver of Tort in Class Proceedings » (2010), 6 *Rev. Can. R. C.* 37, p. 38). De fait, la décision de la Cour de s'abstenir de radier la demande relative à la renonciation au recours délictuel dans l'arrêt *Microsoft* a été considérée comme une confirmation de la viabilité de telles demandes (voir, p. ex., les motifs de la C.A., par. 182; *Ewert c. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187, 25 B.C.L.R. (6th) 268, par. 73; *Authentic T-Shirt Co. ULC c. King*, 2016 BCCA 59, par. 41-42 (CanLII)). Laisser cette question en suspens fait perdre beaucoup de temps aux tribunaux ainsi que des ressources importantes aux parties en litige, et il n'y a là rien à gagner.

[22] Enfin, même si la renonciation au recours délictuel à titre de nouvelle cause d'action n'était pas une question centrale dans l'arrêt *Microsoft*, elle l'est dans les présents pourvois. En conséquence, la Cour d'appel a examiné de manière exhaustive le droit applicable et a conclu non seulement que l'action des demandeurs devait faire l'objet d'une instruction, mais aussi que la renonciation au recours délictuel devrait être définitivement reconnue à titre de cause d'action indépendante. En appel devant la Cour, les parties et les intervenants ont de la même façon accordé beaucoup d'attention à la question. Celle-ci est donc mûre pour une décision, et les présents pourvois offrent l'occasion de la trancher.

A. *Restitution des gains illicites pour faute délictueuse*

(1) Restitution des gains illicites en tant que nouvelle cause d'action

[23] Comme je l'expliquerai ci-après, le terme « renonciation au recours délictuel » porte à confusion et devrait être abandonné. La préoccupation ne se rapporte pas à l'uniformité de la terminologie en

gain-based remedies tend to employ inconsistent nomenclature that leads to confused and confusing results. Even the term "restitution" has been applied inconsistently, sometimes referring to the causative event of unjust enrichment and sometimes referring to a measure of relief (McInnes (2014), at pp. 10-11). In my view, *restitution* properly describes the latter — meaning, restitution is the law's remedial answer to circumstances in which a benefit moves from the plaintiff to the defendant, and the defendant is compelled to restore that benefit. Further, restitution stands in contrast to another measure of relief, *disgorgement*, which refers to awards that are calculated exclusively by reference to the defendant's wrongful gain, irrespective of whether it corresponds to damage suffered by the plaintiff and, indeed, irrespective of whether the plaintiff suffered damage at all (McInnes (2014), at p. 11-12; see also L. D. Smith, "The Province of the Law of Restitution" (1992), 71 *Can. Bar Rev.* 672; J. Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (2002), at pp. 65-93). While this Court's decisions have occasionally referred to disgorgement variously as "restitution damages" or "restitution for wrongdoing", the ambiguity inherent in such terminology calls for greater precision (see e.g. *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601, at para. 25; *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, at para. 33).

[24] In sum, then, restitution for unjust enrichment and disgorgement for wrongdoing are two types of gain-based remedies (McInnes (2014), at pp. 144-49; L. D. Smith, "Disgorgement of the Profits of Breach of Contract: Property, Contract, and 'Efficient Breach'" (1995), 24 *Can. Bus. L. J.* 121, at pp. 121-23; G. Virgo, *The Principles of the Law of Restitution* (3rd ed. 2015), at pp. 415-17; Burrows, at pp. 9-12). Each is distinct from the other: *disgorgement* requires only that the defendant gained a benefit (with no proof of deprivation to the plaintiff

tant que fin en soi, mais plutôt à la clarté du sens : les affaires portant sur des réparations fondées sur les gains réalisés tendent à employer une terminologie incohérente, ce qui crée de la confusion. Même le terme « restitution » n'est pas employé de manière uniforme, référant parfois à l'élément causal de l'enrichissement sans cause et parfois à une mesure de réparation (McInnes (2014), p. 10-11). À mon avis, la *restitution* correspond à cette dernière définition — c'est-à-dire que la restitution est la mesure réparatrice applicable en droit lorsque l'avantage qu'avait le demandeur passe au défendeur, et que ce dernier est tenu de remettre cet avantage. Par ailleurs, la restitution se distingue d'une autre mesure de réparation, la *restitution des gains illicites*, qui s'entend d'une somme octroyée calculée exclusivement en fonction du gain illicite du défendeur, qu'elle corresponde ou non au préjudice subi par le demandeur et, de fait, que le demandeur ait même subi un préjudice ou non (McInnes (2014), p. 11-12; voir aussi L. D. Smith, « The Province of the Law of Restitution » (1992), 71 *Can. Bar Rev.* 672; J. Edelman, *Gain-Based Damages : Contract, Tort, Equity and Intellectual Property* (2002), p. 65-93). Bien que dans les décisions de la Cour, la restitution des gains illicites soit parfois appelée « restitution de l'avantage obtenu » ou « restitution consécutive à un acte fautif », l'ambiguïté inhérente à cette terminologie commande une plus grande précision (voir, p. ex., *Banque d'Amérique du Canada c. Société de Fiducie Mutuelle*, 2002 CSC 43, [2002] 2 R.C.S. 601, par. 25; *Kingstreet Investments Ltd. c. Nouveau-Brunswick (Finances)*, 2007 CSC 1, [2007] 1 R.C.S. 3, par. 33).

[24] En résumé, donc, la restitution pour enrichissement sans cause et la restitution des gains illicites pour cause d'acte fautif sont deux types de réparations fondées sur les gains réalisés (McInnes (2014), p. 144-149; L. D. Smith, « Disgorgement of the Profits of Breach of Contract : Property, Contract, and "Efficient Breach" » (1995), 24 *Rev. can. dr. comm.* 121, p. 121-123; G. Virgo, *The Principles of the Law of Restitution* (3e éd. 2015), p. 415-417; Burrows, p. 9-12). Chaque notion est distincte de l'autre : la *restitution des gains illicites* exige

required), while *restitution* is awarded in response to the causative event of unjust enrichment (most recently discussed by this Court in *Moore*), where there is correspondence between the defendant's gain and the plaintiff's deprivation (Edelman, at pp. 80-86).

[25] Here, the plaintiffs seek *disgorgement*, not restitution: they say that they are entitled to a remedy quantified solely on the basis of ALC's gain, without reference to damage that any of them may have suffered. There are two schools of thought on where disgorgement fits in the overall legal structure of private obligations. The prevailing view is consistent with that which I have just stated. Disgorgement, as a gain-based remedy, is precisely that: a *remedy*, awarded in certain circumstances upon the plaintiff satisfying all the constituent elements of one or more of various causes of action (specifically, breach of a duty in tort, contract, or equity).

[26] Some scholars, however, see disgorgement as an independent cause of action, which addresses unjust enrichment but does not operate on the same basis as the principled unjust enrichment framework adopted by this Court (P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (loose-leaf), vol. 1, at pp. 3-4 to 3-7; see also J. Beatson, "The Nature of Waiver of Tort" (1978-1979), 17 *U.W.O. L. Rev.* 1; D. Friedmann, "Restitution for Wrongs: The Basis of Liability", in W. R. Cornish et al., eds., *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones* (1998), 133). And a handful of them have suggested that it should be possible to pursue a remedy of disgorgement in cases that are akin to negligence, but where the plaintiff cannot prove — or chooses not to prove — resulting damage (McCamus; C. Jones, "Panacea or Pandemic: Comparing 'Equitable Waiver of Tort' to 'Aggregate Liability' in Cases of Mass Torts with Indeterminate Causation" (2016), 2 *Can. J. of Compar. & Contemp.*

seulement que le défendeur ait obtenu un avantage (sans qu'il soit nécessaire de prouver que le demandeur a subi un appauvrissement), alors que la *restitution* est accordée en réponse à l'élément causal d'un enrichissement sans cause (analysé récemment par la Cour dans l'arrêt *Moore*), lorsque le gain réalisé par le défendeur correspond à l'appauvrissement subi par le demandeur (Edelman, p. 80-86).

[25] En l'espèce, les demandeurs sollicitent la *restitution des gains illicites*, non la restitution : ils affirment avoir droit à une réparation calculée exclusivement en fonction des gains réalisés par la SLA, sans égard au préjudice que l'un ou l'autre d'entre eux a pu subir. Il existe deux écoles de pensée quant à la place qu'occupe la restitution des gains illicites dans la structure juridique globale des obligations privées. L'opinion dominante correspond à ce que je viens tout juste d'énoncer. La restitution des gains illicites, à titre de réparation fondée sur les gains réalisés, est exactement cela : une *réparation*, accordée dans certaines circonstances lorsque le demandeur satisfait à tous les éléments constitutifs d'une ou de plusieurs causes d'action différentes (plus précisément, la violation d'une obligation en responsabilité délictuelle ou contractuelle ou en equity).

[26] Certains auteurs voient cependant la restitution des gains illicites comme une cause d'action indépendante qui permet de remédier à l'enrichissement sans cause mais qui n'a pas le même fondement que le cadre d'analyse adopté en ce domaine par la Cour (P. D. Maddaugh et J. D. McCamus, *The Law of Restitution* (feuilles mobiles), vol. 1, p. 3-4 à 3-7; voir aussi J. Beatson, « The Nature of Waiver of Tort » (1978-1979), 17 *U.W.O. L. Rev.* 1; D. Friedmann, « Restitution for Wrongs : The Basis of Liability », dans W. R. Cornish et autres, dir., *Restitution : Past, Present and Future : Essays in Honour of Gareth Jones* (1998), 133). De plus, quelques-uns d'entre eux ont suggéré qu'il devrait être possible de demander la restitution des gains illicites dans les affaires qui s'apparentent à de la négligence, mais où le demandeur ne peut prouver — ou choisit de ne pas prouver — qu'il a subi un préjudice (McCamus; C. Jones, « Panacea or Pandemic : Comparing "Equitable Waiver of Tort"

L. 301). The plaintiffs' waiver of tort claim relies on this latter proposition.

[27] As I will explain, disgorgement should be viewed as an alternative remedy for certain forms of wrongful conduct, not as an independent cause of action. This view follows naturally from the historical origins of unjust enrichment and gain-based remedies more generally.

[28] The modern law of unjust enrichment originated in the writ of *assumpsit* (*Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at pp. 786-88). Use of *assumpsit* allowed plaintiffs to avoid the limits imposed by other forms of action, which might have prevented their claim from advancing (McInnes (2014), at p. 34; Martin, at pp. 482-84). While the writ was premised upon the defendant having undertaken to pay a sum of money to the plaintiff and having broken that promise, the specialized form of *indebitatus assumpsit* allowed plaintiffs to acquire the benefits of *assumpsit* where no such undertaking actually existed. It created the legal fiction of an implied contract, allowing plaintiffs to sue in *assumpsit*, "even where the imputation of a promise to pay was nonsensical, as when the defendant acquired a benefit through the commission of a tort." (McInnes (2014), at pp. 34-35; see also Martin, at pp. 489-96).

[29] Where a tort was made out but the plaintiff chose to pursue a claim in *assumpsit* to recover the defendant's ill-gotten gains, the plaintiff was said to "waive the tort" (Edelman, at pp. 121-22). Despite its early acceptance, however, the term waiver of tort was a misnomer. Rather than forgiving or waiving the wrongfulness of the defendant's conduct, plaintiffs relying on the doctrine were simply electing to pursue an alternative, gain-based, remedy (Edelman, at p. 122; see also *United Australia, Ltd. v. Barclays*

to "Aggregate Liability" in Cases of Mass Torts with Indeterminate Causation » (2016), 2 *Can. J. of Compar. & Contemp. L.* 301). La demande fondée sur la renonciation au recours délictuel présentée par les demandeurs s'appuie sur cette dernière proposition.

[27] Comme je vais l'expliquer, la restitution des gains illicites devrait être considérée comme une réparation subsidiaire pour certaines formes de conduite fautive, non comme une cause d'action indépendante. Ce point de vue découle naturellement des origines historiques de l'enrichissement sans cause et plus généralement des réparations fondées sur les gains réalisés.

[28] Le droit moderne en matière d'enrichissement sans cause tire son origine du bref d'*assumpsit* (*Peel (Municipalité régionale) c. Canada*, [1992] 3 R.C.S. 762, p. 786-788). Le recours au bref d'*assumpsit* permettait aux demandeurs d'échapper aux restrictions imposées par les autres formes d'action, qui auraient pu empêcher leur action de suivre son cours (McInnes (2014), p. 34; Martin, p. 482-484). Même si le bref reposait sur la prémisse que le défendeur s'était engagé à verser une somme d'argent au demandeur et qu'il n'avait pas respecté sa promesse, le recours spécial *indebitatus assumpsit* permettait aux demandeurs de profiter des avantages de l'*assumpsit* alors qu'un tel engagement n'existait pas vraiment. Il créait la fiction juridique d'un contrat implicite, qui permettait aux demandeurs d'intenter une action en *assumpsit*, [TRADUCTION] « même lorsque l'imputation d'une promesse de payer était absurde, comme lorsque le défendeur a tiré un avantage de la perpétration d'un délit » (McInnes (2014), p. 34-35; voir aussi Martin, p. 489-496).

[29] Lorsque le délit avait été établi mais que le demandeur avait choisi de recourir au bref d'*assumpsit* pour recouvrer les gains illicites réalisés par le défendeur, il était réputé avoir [TRADUCTION] « renoncé au recours délictuel » (Edelman, p. 121-122). Bien qu'il soit accepté depuis longtemps, le terme renonciation au recours délictuel est inexact. Plutôt que de pardonner au défendeur sa conduite fautive ou de fermer les yeux sur le caractère fautif de celle-ci, le demandeur qui invoquait la doctrine choisissait simplement de

Bank Ltd., [1941] A.C. 1 (H.L.), at pp. 13 and 18). The doctrine always operated as "nothing more than a choice between possible remedies", and *not* as an independent cause of action (*United Australia*, at p. 13; Martin, at pp. 504-5). That this is so is apparent from decisions of this Court, including *Arrow Transfer Co. Ltd. v. Royal Bank of Canada*, [1972] S.C.R. 845, where Laskin J. (as he then was), for the majority on this point, held that the plaintiff's claim for a gain-based remedy was dependent on the tort of conversion having been completed (p. 877).

[30] Two points follow from this. First, and as this case demonstrates, the term waiver of tort is apt to generate confusion and should therefore be abandoned (Edelman, at p. 122). Secondly, and relatedly, in order to make out a claim for disgorgement, a plaintiff *must* first establish actionable misconduct.

[31] Recognizing that disgorgement is simply a remedy for certain forms of wrongful conduct places the central issue in this case in context. By pleading disgorgement as an independent cause of action, the plaintiffs seek to establish an entirely new category of wrongful conduct — one that is akin to negligence but does not require proof of damage. Supporters of this type of claim assert that "there is simply no reason in principle why the rules for compensatory damages need to be identical to the rules for disgorgement" (McCamus, at p. 359) and that, given that the purpose of granting disgorgement is to deter wrongful conduct rather than to provide compensation, there is no reason to require proof of damage (p. 354).

[32] I acknowledge that disgorgement is available for some forms of wrongdoing without proof of damage (for example, breach of fiduciary duty).

demander une réparation subsidiaire, fondée sur les gains réalisés (Edelman, p. 122; voir aussi *United Australia, Ltd. c. Barclays Bank Ltd.*, [1941] A.C. 1 (H.L.), p. 13 et 18). La doctrine s'est toujours appliquée comme [TRADUCTION] « un simple choix entre des réparations possibles », et *non* comme une cause d'action indépendante (*United Australia*, p. 13; Martin, p. 504-505). C'est ce qui ressort des décisions de la Cour, dont l'arrêt *Arrow Transfer Co. Ltd. c. Banque Royale du Canada*, [1972] R.C.S. 845, où le juge Laskin (plus tard juge en chef), s'exprimant au nom des juges majoritaires sur ce point, a conclu que l'action du demandeur visant une réparation fondée sur les gains réalisés reposait sur la perpétration du délit de détournement (p. 877).

[30] Deux éléments se dégagent de ce qui précède. D'abord, comme le démontre la présente affaire, le terme renonciation au recours délictuel prête à confusion et devrait donc être abandonné (Edelman, p. 122). Ensuite, et dans le même ordre d'idées, pour établir le bien-fondé d'une demande en restitution des gains illicites, le demandeur *doit* d'abord établir l'inconduite donnant ouverture à l'action.

[31] Reconnaître que la restitution des gains illicites est simplement une réparation pour certaines formes de comportement fautif met en contexte la question se trouvant au cœur de la présente affaire. En plaidant la restitution des gains illicites en tant que cause d'action indépendante, les demandeurs cherchent à créer une toute nouvelle catégorie de comportement fautif — qui s'apparente à la négligence mais qui n'exige pas de preuve de l'existence d'un préjudice. Les tenants de ce type d'action affirment [TRADUCTION] « [qu']il n'y a tout simplement aucune raison de principe pour laquelle les règles applicables à l'octroi de dommages-intérêts compensatoires devraient être identiques à celles de la restitution des gains illicites » (McCamus, p. 359) et que, étant donné que la restitution des gains illicites vise à décourager les comportements fautifs plutôt qu'à fournir une indemnisation, il n'y a aucune raison d'exiger une preuve de préjudice (p. 354).

[32] Je reconnais que la restitution des gains illicites est possible pour certaines formes d'actes fautifs sans qu'il soit nécessaire de prouver le préjudice

But it is a far leap to find that disgorgement without proof of damage is available as a general proposition in response to a defendant's negligent conduct. Determining the appropriate remedy for negligence, where liability for negligence has not already been established, is futile and even nonsensical since doing so allows "the remedy tail [to] wag the liability dog" (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 55). This observation applies with no less force to the plaintiff who seeks disgorgement, since the availability of gain-based relief lies in "aligning the remedy with the injustice it corrects" (E. J. Weinrib, "Restitutionary Damages as Corrective Justice" (2000), 1 *Theor. Inq. L.* 1, at p. 23 (emphasis added)).

[33] It is therefore important to consider what it is that makes a defendant's negligent conduct wrongful. As this Court has maintained, "[a] defendant in an action in negligence is not a wrongdoer at large: he is a wrongdoer only in respect of the damage which he actually causes to the plaintiff" (*Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at para. 16). There is no right to be free from the *prospect* of damage; there is only a right not to *suffer* damage that results from exposure to unreasonable risk (E. J. Weinrib, *The Idea of Private Law* (rev. ed. 2012), at pp. 153 and 157-58; R. Stevens, *Torts and Rights* (2007), at pp. 44-45 and 99). In other words, negligence "in the air" — the mere creation of risk — is not wrongful conduct. Granting disgorgement for negligence without proof of damage would result in a remedy "arising out of legal nothingness" (Weber, at p. 424). It would be a radical and uncharted development, "[giving] birth to a new tort over night" (Barton, Hines and Therien, at p. 147).

[34] The difficulty is not just normative, although it is at least that. The practical difficulty associated with recognizing an action in negligence without

(par exemple, en cas de manquement à une obligation fiduciaire). Il est cependant difficile de conclure que la restitution des gains illicites sans preuve de préjudice est disponible de façon générale en cas de conduite négligente du défendeur. Déterminer la réparation qui convient en cas de négligence, lorsque la responsabilité pour négligence n'a pas déjà été établie, est futile et même insensé car cela permet de « mettre la charrue (la réparation) devant les bœufs (la responsabilité) » (*Nation Haïda c. Colombie-Britannique (Ministre des forêts)*, 2004 CSC 73, [2004] 3 R.C.S. 511, par. 55). Cette observation s'applique tout autant au demandeur qui cherche à obtenir la restitution des gains illicites, car la disponibilité de la réparation fondée sur les gains réalisés tient au fait que [TRADUCTION] « la réparation doit être en adéquation avec l'injustice qu'elle corrige » (E. J. Weinrib, « Restitutionary Damages as Corrective Justice » (2000), 1 *Theor. Inq. L.* 1, p. 23 (je souligne)).

[33] Par conséquent, il est important de se demander ce qui fait que la conduite négligente d'un défendeur est fautive. Comme l'a dit la Cour : « [l]e défendeur à une action en négligence n'est pas l'auteur d'un tort en général; il est uniquement l'auteur du préjudice qu'il cause réellement au demandeur » (*Clements c. Clements*, 2012 CSC 32, [2012] 2 R.C.S. 181, par. 16). Le droit d'être à l'abri de l'*éventualité* d'un préjudice n'existe pas; il existe seulement un droit de ne pas *subir* de préjudice découlant de l'exposition à un risque déraisonnable (E. J. Weinrib, *The Idea of Private Law* (éd. rév. 2012), p. 153 et 157-158; R. Stevens, *Torts and Rights* (2007), p. 44-45 et 99). En d'autres mots, de « simples rumeurs » de négligence — la simple création d'un risque — ne constituent pas un comportement fautif. Accorder la restitution des gains illicites pour cause de négligence sans preuve de préjudice donnerait lieu à une réparation [TRADUCTION] « issue d'un néant juridique » (Weber, p. 424). Ce serait là un changement radical tout à fait nouveau, [TRADUCTION] « [donnant] naissance du jour au lendemain à un nouveau délit » (Barton, Hines et Therien, p. 147).

[34] La difficulté est à tout le moins normative, mais elle n'est pas que ça. La difficulté pratique que pose la reconnaissance d'une action en négligence

proof of damage becomes apparent in considering how such a claim would operate. As the Court of Appeal recognized, a claim for disgorgement available to any plaintiff placed within the ambit of risk generated by the defendant would entitle *any one* plaintiff to *the full gain* realized by the defendant. No answer is given as to why any particular plaintiff is entitled to recover the whole of the defendant's gain. Yet, corrective justice, the basis for recovery in tort, demands *just that*: an explanation as to why *the plaintiff* is *the* party entitled to a remedy (*Clements*, at para. 7; Weinrib (2000), at pp. 1-7). Tort law does not treat plaintiffs "merely as a convenient conduit of social consequences" but rather as "someone to whom damages are owed to correct the wrong suffered" (Weinrib (2000), at p. 6). A cause of action that promotes a race to recover by awarding a windfall to the first plaintiff who arrives at the courthouse steps undermines this foundational principle of tort law.

sans preuve de préjudice devient apparente lorsqu'on s'attarde au fonctionnement d'une telle action. Comme l'a reconnu la Cour d'appel, la possibilité pour tout demandeur exposé au risque généré par le défendeur de demander la restitution des gains illicites permettrait à *tout* demandeur d'avoir droit à *tous les gains* réalisés par le défendeur. Aucune réponse n'est donnée à la question de savoir pourquoi un demandeur précis est autorisé à recouvrer l'ensemble des gains réalisés par le défendeur. Pourtant, la justice réparatrice, le fondement de l'indemnisation en matière délictuelle, exige *précisément cela* : une explication quant aux raisons pour lesquelles *le demandeur* est *la* partie qui a droit à la réparation (*Clements*, par. 7; Weinrib (2000), p. 1-7). En droit de la responsabilité délictuelle, les demandeurs ne sont pas considérés comme de [TRADUCTION] « simples intermédiaires pratiques de conséquences sociales », mais plutôt comme « des personnes à qui des dommages-intérêts sont dus pour réparer le tort causé » (Weinrib (2000), p. 6). Une cause d'action qui favorise une course au recouvrement, en accordant un gain fortuit au premier demandeur qui se présente en cour, mine ce principe fondamental du droit de la responsabilité délictuelle.

[35] This is not the type of incremental change that falls within the remit of courts applying the common law (*Salituro*, at p. 670). It follows that the novel cause of action proposed by the plaintiffs has no reasonable chance of succeeding at trial.

[35] Ce n'est pas le type de changement progressif qui relève de la compétence des tribunaux appliquant la common law (*Salituro*, p. 670). Il s'ensuit que la nouvelle cause d'action proposée par les demandeurs n'a aucune chance raisonnable d'être accueillie au procès.

(2) Disgorgement for the Completed Tort of Negligence

(2) Restitution des gains illicites pour délit complet de négligence

[36] The Court of Appeal majority concluded that, even if disgorgement for wrongdoing is not an independent cause of action, the plaintiffs have adequately pleaded the elements of the tort of negligence, and may therefore seek disgorgement for tortious wrongdoing on that basis. While disgorgement for tortious wrongdoing was initially applied only in the context of proprietary torts, including conversion, deceit, and trespass, it found broader application in the late 20th century (Martin, at pp. 505-6). It has even been suggested that disgorgement may be available for negligence in certain circumstances, and the

[36] Les juges majoritaires de la Cour d'appel ont conclu que, même si la restitution des gains illicites pour acte fautif n'est pas une cause d'action indépendante, les demandeurs ont valablement plaidé les éléments du délit de négligence, et peuvent donc solliciter la restitution des gains illicites pour faute délictueuse pour cette raison. Bien que la restitution des gains illicites pour faute délictueuse ait d'abord été appliquée seulement dans le contexte des délits de nature propriétale, dont le détournement, le dol et l'intrusion, son application s'est élargie à la fin du 20e siècle (Martin, p. 505-506). Certains ont même

issue remains unsettled (Edelman, at pp. 129-30; C.-M. O'Hagan, "Remedies", in L. N. Klar et al., eds., *Remedies in Tort* (loose-leaf), vol. 4, at §200). While that may have to be decided in an appropriate case, as I will explain the plaintiffs have not adequately pleaded a claim in negligence, and it is unnecessary to resolve the question here.

[37] Causation of damage is a required element of the tort of negligence. As I have explained, the conduct of a defendant in negligence is wrongful only to the extent that it *causes* damage (*Clements*, at para. 16). While the plaintiffs allege that ALC had a duty to warn of the inherent dangers associated with VLTs, including the risk of addiction and suicide, those dangers are not alleged to have materialized. The plaintiffs do not allege that proper warnings would have caused them to spend less money playing VLTs or to avoid them altogether.

[38] It follows that I respectfully disagree with Court of Appeal's conclusion that the plaintiffs would not be "precluded from leading evidence that the breach of duty (assuming it can be proven) led to some form of injury" (para. 186). Again, causation of damage is a required element of the cause of action of negligence, and it must be pleaded. Here, not only have the plaintiffs *not* pleaded causation, their pleadings expressly disclaim any intention of doing so. The absence of a pleading of causation, they acknowledge, arises from an intentional litigation strategy to increase the likelihood of obtaining certification of their action as a class action by avoiding having to prove individual damage. This particular claim also has no reasonable chance of success.

laissé entendre que la restitution des gains illicites pourrait être disponible en cas de négligence dans certaines circonstances, et la question n'a pas encore été réglée (Edelman, p. 129-130; C.-M. O'Hagan, « Remedies », dans L. N. Klar et autres, dir., *Remedies in Tort* (feuilles mobiles), vol. 4, §200). Bien que cette question puisse devoir être tranchée dans le cadre d'une affaire qui s'y prête, comme je vais l'expliquer, les demandeurs n'ont pas valablement plaidé la négligence, et il est inutile de trancher la question en l'espèce.

[37] Le fait de causer un préjudice est un élément requis du délit de négligence. Comme je l'ai expliqué, la conduite du défendeur à une action en négligence n'est fautive que dans la mesure où elle *cause* un préjudice (*Clements*, par. 16). Bien que les demandeurs soutiennent que la SLA avait une obligation de mise en garde contre les dangers inhérents aux ALV, notamment le risque de dépendance et de suicide, il n'est pas allégué que ces dangers se sont concrétisés. Les demandeurs ne font pas valoir que, grâce à une mise en garde adéquate, ils auraient dépensé moins d'argent en jouant sur des ALV ou encore qu'ils les auraient complètement évités.

[38] Par conséquent, je ne peux souscrire à la conclusion de la Cour d'appel portant que [TRADUCTION] « rien n'empêcherait [les demandeurs] de présenter des éléments de preuve montrant que le manquement à l'obligation (à supposer qu'il puisse être prouvé) a causé un certain préjudice » (par. 186). Je répète que le fait de causer un préjudice est un élément requis de la cause d'action en négligence, et qu'il doit être invoqué. En l'espèce, non seulement les demandeurs n'ont *pas* allégué avoir subi un préjudice, mais leurs actes de procédure mentionnent expressément qu'ils n'ont pas l'intention de le faire. Ils reconnaissent que l'absence d'allégation de préjudice découle d'une stratégie intentionnelle visant à accroître la probabilité d'obtenir l'autorisation d'exercer leur action en tant que recours collectif en évitant d'avoir à prouver le préjudice individuel. Cette demande n'a pas non plus de chance raisonnable d'être accueillie.

B. *Alleged Criminal Conduct*

[39] The plaintiffs further allege that the *Criminal Code* prohibits the operation of VLTs. While breach of statute is not a recognized cause of action (*R. in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, at p. 225), the allegations of criminal conduct are intended to serve two purposes. First, the plaintiffs say that the presence of criminal conduct warrants exceptional relief for breach of contract, specifically disgorgement or punitive damages. Secondly, the plaintiffs argue that, if ALC's conduct is criminal, there is no juristic reason for ALC's enrichment at the plaintiffs' expense, which grounds their claim in unjust enrichment.

[40] The plaintiffs' argument is that VLTs are so inherently deceptive that they should be considered a game "similar to" three-card monte within the meaning of s. 206 of the *Criminal Code*, which states in part:

206 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years . . . who

. . .

(g) induces any person to stake or hazard any money or other valuable property or thing on the result of any dice game, three-card monte, punch board, coin table or on the operation of a wheel of fortune;

. . .

(2) In this section, ***three-card monte*** means the game commonly known as three-card monte and includes any other game that is similar to it, whether or not the game is played with cards and notwithstanding the number of cards or other things that are used for the purpose of playing.

While s. 207(1)(a) of the *Criminal Code* exempts provincial lottery schemes from most gaming and betting prohibitions, that exemption does not extend

B. *Allégation de conduite criminelle*

[39] Les demandeurs affirment par ailleurs que le *Code criminel* interdit l'exploitation des ALV. Bien que la violation d'une loi ne soit pas une cause d'action reconnue (*R. du chef du Canada c. Saskatchewan Wheat Pool*, [1983] 1 R.C.S. 205, p. 225), les allégations de conduite criminelle visent un double objectif. Premièrement, les demandeurs affirment que l'existence d'une conduite criminelle justifie l'octroi de réparations exceptionnelles en cas de violation de contrat, plus précisément la restitution des gains illicites ou les dommages-intérêts punitifs. Deuxièmement, les demandeurs soutiennent que si le comportement de la SLA est criminel, il n'y a aucun motif juridique pour l'enrichissement de la SLA au détriment des demandeurs, ce qui est le fondement de leur action pour enrichissement sans cause.

[40] Les demandeurs font valoir que les ALV sont intrinsèquement trompeurs au point où ils devraient être considérés comme un jeu « analogue » au jeu de bonneteau au sens indiqué à l'art. 206 du *Code criminel*, qui prévoit en partie ce qui suit :

206 (1) Est coupable d'un acte criminel passible d'un emprisonnement maximal de deux ans [. . .] quiconque, selon le cas :

. . .

g) décide une personne à risquer ou hasarder de l'argent ou quelque autre bien ou chose de valeur sur le résultat d'un jeu de dés, d'un jeu de bonneteau, d'une planchette à poinçonner, d'une table à monnaie, ou sur le fonctionnement d'une roue de fortune;

. . .

(2) Au présent article, ***bonneteau*** s'entend du jeu communément appelé « *three-card monte* »; y est assimilé tout autre jeu analogue, qu'il soit joué avec des cartes ou non et nonobstant le nombre de cartes ou autres choses utilisées dans le dessein de jouer.

Bien que l'al. 207(1)a) du *Code criminel* fasse bénéficier d'une exception les systèmes de loterie provinciaux relativement à la plupart des interdictions

to three-card monte (s. 207(4)(a)). Thus, the argument goes, if VLTs are games similar to three-card monte, their operation would be unlawful, even through a provincial lottery scheme.

[41] It is well-settled that statutory interpretation requires discerning legislative intent by examining statutory text in its entire context and in its grammatical and ordinary sense, in harmony with the statute's scheme and objects. In determining what games can be considered "similar to" three-card monte, I also bear in mind that courts cannot create common law crimes through an act of judicial interpretation (*R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 3).

[42] The Court of Appeal concluded that expert evidence is required to determine the essence of three-card monte, which would then be used to evaluate whether VLTs share three-card monte's essential features (para. 208). I find myself in respectful disagreement with that conclusion. While expert evidence may assist in deciding whether the defined elements of an offence are made out on the facts of a particular charge, expert evidence cannot purport to define the elements of an offence (*R. v. Levkovic*, 2013 SCC 25, [2013] 2 S.C.R. 204, at para. 73). While permissible expert evidence might therefore describe the *features* of VLTs for the purpose of establishing similarity, it is a court's role, and only a court's role, to discern Parliament's intention in prohibiting games "similar to" three-card monte.

[43] Beginning with the text of the prohibition, I observe that s. 206(2) refers to "the game commonly known as three-card monte". The *Canadian Oxford Dictionary* (2nd ed. 2004) defines "three-card monte" as a game played with three cards where "players bet on which of three cards lying face down is the queen." Similarly, and shortly before Parliament enacted this *Criminal Code* prohibition, the Quebec Court of Appeal described three-card monte as "a game played with three cards . . . shuffled or manipulated by the dealer and placed face down and the opponent backs his ability to spot the

en matière de jeux et de paris, cette exception ne s'applique pas au jeu de bonneteau (al. 207(4)a)). Ainsi, selon cet argument, si les ALV sont des jeux analogues au jeu de bonneteau, leur exploitation serait illégale, même si elle relève d'un système de loterie provincial.

[41] Il est bien établi que l'interprétation des lois exige de dégager l'intention du législateur en lisant le texte législatif dans son contexte global, selon le sens ordinaire et grammatical qui s'harmonise avec l'économie et les objets de la loi. Lorsqu'il s'agit de déterminer quels jeux peuvent être considérés « analogues » au bonneteau, je garde aussi à l'esprit que les tribunaux ne peuvent créer de crimes de common law en procédant par interprétation (*R. c. D.L.W.*, 2016 CSC 22, [2016] 1 R.C.S. 402, par. 3).

[42] La Cour d'appel a conclu qu'une preuve d'expert est nécessaire pour savoir ce qui constitue l'essence du jeu de bonneteau, pour pouvoir ensuite évaluer si les ALV partagent les mêmes caractéristiques essentielles que celui-ci (par. 208). En toute déférence, je ne suis pas de cet avis. Bien qu'elle puisse aider la cour à décider si les éléments constitutifs d'une infraction sont établis pour une accusation en particulier, la preuve d'expert ne peut servir à définir les éléments d'une infraction (*R. c. Levkovic*, 2013 CSC 25, [2013] 2 R.C.S. 204, par. 73). Même si la preuve d'expert admissible peut en conséquence décrire les *caractéristiques* des ALV en vue d'établir les similarités avec le jeu de bonneteau, il appartient à la cour, et seulement à celle-ci, de dégager l'intention qu'avait le législateur en interdisant les jeux « analogues » au bonneteau.

[43] Si je commence par le libellé de l'interdiction, je constate que le par. 206(2) renvoie au « jeu communément appelé "*three-card monte*" ». Le *Canadian Oxford Dictionary* (2e éd. 2004) définit le « *three-card monte* » comme un jeu qui se joue avec trois cartes [TRADUCTION] « où les joueurs parient sur une des trois cartes placées face cachée qu'ils croient être la reine ». De même, et peu avant que le Parlement ait adopté cette interdiction du *Code criminel*, la Cour d'appel du Québec a décrit le bonneteau comme [TRADUCTION] « un jeu qui se joue avec trois cartes [. . .] brassées ou manipulées par le

position of a particular card" (*The King v. Rosen and Lavoie* (1920), 61 D.L.R. 500 (Que. C.A.), at pp. 502-3).

[44] Section 206(2)'s text has a wider reach, however, capturing "similar" games, "whether or not the game is played with cards and notwithstanding the number of cards or other things that are used for the purpose of playing". The plaintiffs contend that this expanded definition is meant to capture all games of a broadly deceptive nature. In my view, however, it is apparent from the historical background, from statements indicating why the provision was introduced, and from the text of the provision itself, viewed in its surrounding context that this prohibition does not reach so far.

[45] The state of the law prior to this provision's enactment lends important insight into its purpose. In *Rosen and Lavoie*, the Quebec Court of Appeal held that three-card monte did not constitute a contravention of the *Criminal Code*'s cheating at play offence (s. 209). Shortly thereafter, the Member of Parliament for Jacques Cartier introduced a private member's bill to outlaw three-card monte specifically. He stated during second reading that the proposed changes were a direct response to *Rosen and Lavoie* targeting the specific game of three-card monte (*House of Commons Debates*, vol. 2, 5th Sess., 13th Parl., April 11, 1921, at p. 1858). As to why it was necessary to further prohibit games *similar* to three-card monte, he explained:

> If we made it a crime for people to play with three cards, they might play with four cards or they might play with other instruments than cards, and that is why we thought it proper to enlarge the clause so as to endeavour to cover other cases.

The Minister of Justice adopted the member's statements and opted to include the new provisions in broader Bill of proposed amendments to the *Criminal Code* (*House of Commons Debates*, vol. 2,

donneur et placées face cachée, et où le joueur mise sur son aptitude à repérer une carte en particulier » (*The King c. Rosen and Lavoie* (1920), 61 D.L.R. 500 (C.A. Qc), p. 502-503).

[44] Cependant, le libellé du par. 206(2) a une portée plus large, car il englobe tout jeu « analogue, qu'il soit joué avec des cartes ou non et nonobstant le nombre de cartes ou autres choses utilisées dans le dessein de jouer ». Les demandeurs soutiennent que cette définition élargie vise à englober tous les jeux de nature trompeuse en général. À mon avis, il ressort toutefois du contexte historique, des énoncés expliquant pourquoi la disposition a été adoptée et du libellé de la disposition même, considéré dans son contexte, que cette interdiction n'a pas une portée aussi large.

[45] L'état du droit avant l'adoption de cette disposition nous éclaire de manière importante sur son objet. Dans l'arrêt *Rosen and Lavoie*, la Cour d'appel du Québec a conclu que le bonneteau ne contrevenait pas à l'infraction prévue dans le *Code criminel* qui consiste à tricher au jeu (art. 209). Peu après, le député de Jacques-Cartier a présenté un projet de loi d'initiative parlementaire visant à interdire particulièrement le bonneteau. Lors de la deuxième lecture, il a déclaré que les modifications proposées répondaient directement à l'arrêt *Rosen and Lavoie* et ciblaient précisément le jeu de bonneteau (*Débats de la Chambre des communes*, vol. 2, 5e sess., 13e lég., 11 avril 1921, p. 1899). Quant à savoir pourquoi il était nécessaire d'aller plus loin en interdisant les jeux *analogues* au bonneteau, il a expliqué ce qui suit :

> Si nous défendions de jouer avec trois cartes on jouerait peut-être avec quatre ou avec d'autres instruments que des cartes. Voilà pourquoi nous avons cru devoir étendre la portée de l'article de manière à comprendre les autres cas.

Le ministre de la Justice a fait siennes les déclarations du député et a décidé d'inclure les nouvelles dispositions dans un projet de loi général proposant des modifications au *Code criminel* (*Débat de la*

at p. 1857; see also *House of Commons Debates*, vol. 4, 5th Sess., 13th Parl., May 6, 1921, at p. 3006).

[46] While this Court has recognized that the statements of particular Members of Parliament cannot necessarily be taken as expressing the intention of Parliament as a whole (*R. v. Heywood*, [1994] 3 S.C.R. 761, at pp. 788-89), the statements recounted here were made by those directly responsible for introducing the three-card monte prohibition, and as such provide relevant evidence of legislative purpose. They indicate that the phrase "similar to" was included in s. 206(2) to capture games that involve betting on the location of a particular object after a series of movements, regardless of whether the game is played with three playing cards.

[47] The text of the provision and its surrounding context further suggest that the prohibition of games *similar to* three-card monte was directed towards the game's concrete attributes and not towards the abstract feature of deception. One would expect that, had Parliament sought to prohibit broadly deceptive gambling games, it would have straightforwardly done so (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 207-8). It defies logic that Parliament would choose to create such an offence by prohibiting three-card monte. Moreover, three-card monte is listed alongside other types of gambling games that are defined by their physical characteristics (punch boards, coin tables, and wheels of fortune). It would be anomalous to interpret the inclusion of three-card monte in this list as an intention to prohibit all deceptive games (Sullivan, at pp. 230-34).

[48] All this leads me to conclude that games "similar to" three-card monte involve, at a minimum, a player betting on the location of an object after a series of manipulations. Nothing in the pleadings describes VLTs as operating in this manner. Thus, the claim that VLTs are similar to three-card monte has no reasonable chance of success.

Chambre des communes, vol. 2, p. 1898; voir aussi *Débats de la Chambre des communes*, vol. 4, 5e sess., 13e lég., 6 mai 1921, p. 3058-3059).

[46] Bien que la Cour ait reconnu que les déclarations de certains députés ne reflètent pas nécessairement l'intention générale du législateur (*R. c. Heywood*, [1994] 3 R.C.S. 761, p. 788-789), les propos rapportés ici ont été tenus par ceux qui étaient directement responsables de l'adoption de la disposition prohibant le bonneteau, et constituent à ce titre une preuve pertinente de l'intention du législateur. On y voit que le terme « analogue » a été inclus au par. 206(2) afin d'englober les jeux consistant à parier sur l'endroit où se trouve un objet en particulier après une série de mouvements, que le jeu soit joué avec trois cartes ou autrement.

[47] Le libellé de la disposition et son contexte tendent aussi à indiquer que l'interdiction visant les jeux *analogues* au bonneteau était dirigée vers les attributs réels du jeu et non vers la caractéristique abstraite de la tromperie. Il est permis de présumer que, si le législateur avait voulu interdire les jeux de hasard trompeurs en général, il l'aurait fait sans détour (R. Sullivan, *Sullivan on the Construction of Statutes* (6e éd. 2014), p. 207-208). Il n'est pas logique que le législateur ait choisi de créer une telle infraction en interdisant le jeu de bonneteau. Qui plus est, le bonneteau fait partie d'une liste de plusieurs autres types de jeux de hasard définis selon leurs caractéristiques physiques (planchette à poinçonner, table à monnaie et roue de fortune). Il serait anormal d'interpréter l'inclusion du jeu de bonneteau dans cette liste comme témoignant d'une intention d'interdire tous les jeux trompeurs (Sullivan, p. 230-234).

[48] Tout cela m'amène à conclure que les jeux « analogues » au bonneteau supposent, à tout le moins, qu'un joueur parie sur l'endroit où se trouve un objet après une série de manipulations. Rien dans les actes de procédure ne décrit les ALV comme fonctionnant de cette manière. Ainsi, l'allégation selon laquelle les ALV sont analogues au jeu de bonneteau n'a aucune chance raisonnable d'être accueillie.

C. *Breach of Contract*

[49] At first glance, the plaintiffs' breach of contract claim might merit different treatment than their claim in tort, since breach of contract — unlike the tort of negligence — does not require proof of loss as an element of the cause of action (*Rogers & Rogers Inc. v. Pinehurst Woodworking Co.* (2005), 14 B.L.R. (4th) 142 (Ont. S.C.), at para. 91). But that is of no moment here, since the plaintiffs have made it clear — both in their pleadings and at every level of court — that they seek only *non-compensatory* remedies for breach of contract, namely disgorgement and punitive damages. Whether the plaintiffs' breach of contract claim discloses a *reasonable* cause of action should be considered in light of the remedies the plaintiffs actually seek. The question to be decided here, then, is whether these remedies are available to the plaintiffs, assuming the truth of their pleadings.

(1) Disgorgement for Breach of Contract

[50] The ordinary form of monetary relief for breach of contract is an award of damages, measured according to the position which the plaintiff would have occupied had the contract been performed (*Bank of America*, at para. 25). Correspondingly, the orthodox position maintained that disgorgement of the defendant's profits was not an available remedy for breach of contract (H. D. Pitch and R. M. Snyder, *Damages for Breach of Contract* (2nd ed. (looseleaf)), at pp. 1-36 to 1-39; S. Watterson, "Gain-Based Remedies for Civil Wrongs in England and Wales", in E. Hondius and A. Janssen, eds., *Disgorgement of Profits: Gain-Based Remedies throughout the World* (2015), 29, at p. 55; see also *Asamera Oil Corp. Ltd. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633, at p. 673).

C. *Violation de contrat*

[49] À première vue, la demande fondée sur la violation de contrat introduite par les demandeurs pourrait recevoir un traitement différent que leur demande fondée sur la responsabilité délictuelle, puisque la violation de contrat — à la différence du délit de négligence — n'exige pas la preuve d'une perte comme élément de la cause d'action (*Rogers & Rogers Inc. c. Pinehurst Woodworking Co.* (2005), 14 B.L.R. (4th) 142 (C.S. Ont.), par. 91). Or, cela n'est pas pertinent en l'espèce, puisque les demandeurs ont indiqué clairement — dans leurs actes de procédure et devant chaque juridiction — qu'ils sollicitaient seulement des réparations de nature *non compensatoire* pour la violation de contrat, soit la restitution des gains illicites et des dommages-intérêts punitifs. La question de savoir si la demande fondée sur la violation de contrat introduite par les demandeurs révèle une cause d'action *raisonnable* devrait être examinée à la lumière des réparations qu'ils cherchent à obtenir. La question que nous sommes ici appelés à trancher, en conséquence, est celle de savoir si les demandeurs ont droit à ces réparations, en tenant les faits allégués pour avérés.

(1) Restitution des gains illicites pour violation de contrat

[50] La réparation pécuniaire habituelle pour violation de contrat est l'octroi de dommages-intérêts, calculés en fonction de la situation dans laquelle le demandeur se serait trouvé si le contrat avait été exécuté (*Banque d'Amérique*, par. 25). En conséquence, les tenants de l'opinion traditionnelle soutiennent que la restitution des gains illicites réalisés par le défendeur n'est pas une réparation à laquelle donne droit la violation de contrat (H. D. Pitch et R. M. Snyder, *Damages for Breach of Contract* (2e éd. (feuilles mobiles)), p. 1-36 à 1-39; S. Watterson, « Gain-Based Remedies for Civil Wrongs in England and Wales », dans E. Hondius et A. Janssen, dir., *Disgorgement of Profits : Gain-Based Remedies throughout the World* (2015), 29, p. 55; voir aussi *Asamera Oil Corp. Ltd. c. Sea Oil & General Corp.*, [1979] 1 R.C.S. 633, p. 673).

[51] More recently, courts have accepted that disgorgement may be available for breach of contract in certain exceptional circumstances (*Attorney General v. Blake*, [2001] 1 A.C. 268 (H.L.); *Bank of America*, at paras. 25 and 30-31). In *Blake*, the defendant was a former member of the British secret intelligence service who had defected to become an agent for the Soviet Union. He was discovered and sentenced to 42 years' imprisonment, but escaped prison and fled the country. Blake later entered into a contract to publish his memoirs, in contravention of the confidentiality undertaking in his employment agreement with the intelligence service. The information in his memoirs was, however, "no longer confidential, nor was its disclosure damaging to the public interest" (p. 275). Further, Blake's fiduciary obligations ceased to exist when he was dismissed from his post. The sole question was, therefore, whether the Crown could pursue disgorgement for his breach of contract.

[51] Plus récemment, les tribunaux ont reconnu que la restitution des gains illicites peut être possible en cas de violation de contrat dans certaines circonstances exceptionnelles (*Attorney General c. Blake*, [2001] 1 A.C. 268 (H.L.); *Banque d'Amérique*, par. 25 et 30-31). Dans l'arrêt *Blake*, le défendeur, un ancien membre du service du renseignement britannique, était devenu agent pour l'Union soviétique. Après avoir été découvert, il a été condamné à une peine d'emprisonnement de 42 ans, mais il s'est échappé de prison avant de fuir le pays. M. Blake a par la suite conclu un contrat pour la publication de ses mémoires, contrevenant ainsi à la clause de confidentialité du contrat de travail qu'il avait signé avec le service du renseignement. La cour a cependant jugé que l'information contenue dans ses mémoires n'était [TRADUCTION] « plus confidentielle et que sa divulgation ne portait pas non plus atteinte à l'intérêt public » (p. 275). Par ailleurs, les obligations fiduciaires de M. Blake ont pris fin lorsqu'il a été congédié de son poste. La seule question était donc celle de savoir si la Couronne pouvait le poursuivre en restitution des gains illicites pour ne pas avoir respecté son contrat.

[52] Lord Nicholls, for a majority of the House, held that disgorgement for breach of contract may be appropriate in exceptional circumstances, but only where, at a minimum, the remedies of damages, specific performance, and injunction are inadequate (*Blake*, at p. 285; *One Step (Support) Ltd. v. Morris-Garner*, [2018] UKSC 20, [2018] 3 All E.R. 659, at para. 64; see also Watterson, at p. 55). As to the types of circumstances that should be considered exceptional, Lord Nicholls concluded:

[52] S'exprimant au nom des juges majoritaires de la Chambre, lord Nicholls a conclu que la restitution des gains illicites pour violation de contrat pouvait convenir dans certaines circonstances exceptionnelles, mais seulement dans la mesure où, à tout le moins, les dommages-intérêts, l'exécution en nature et l'injonction ne convenaient pas (*Blake*, p. 285; *One Step (Support) Ltd. c. Morris-Garner*, [2018] UKSC 20, [2018] 3 All E.R. 659, par. 64; voir aussi Watterson, p. 55). Pour ce qui est des circonstances qui devraient être considérées exceptionnelles, lord Nicholls a conclu :

> No fixed rules can be prescribed. The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit. [Emphasis added; p. 285.]

> [TRADUCTION] Aucune règle fixe ne peut être prescrite. La cour tiendra compte de l'ensemble des circonstances, notamment de l'objet du contrat et de la clause qui n'a pas été respectée, des circonstances dans lesquelles la violation s'est produite, des conséquences de cette violation et du contexte dans lequel s'inscrit le recours. Un indice utile et général, quoique non exhaustif, réside dans la réponse à la question de savoir si le demandeur avait un intérêt légitime à empêcher le défendeur d'exercer ses activités lucratives et de le priver ainsi de ses profits. [Je souligne; p. 285.]

[53] Nothing in the law of Canada contradicts the "exceptional" standard articulated by Lord Nicholls in *Blake*. Indeed, this Court's statement in *Bank of America*, at para. 31 — that "[c]ourts generally avoid [the restitution] measure of damages" — affirms this Court's view, like that expressed by the House of Lords in *Blake*, that disgorgement awards are not generally available. In particular, and again as was held in *Blake*, disgorgement for breach of contract is available only where other remedies are inadequate and only where the circumstances warrant such an award. As to those circumstances, courts should in particular consider whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity.

[53] Rien en droit canadien ne va à l'encontre de la norme des circonstances « exceptionnelles » énoncée par lord Nicholls dans l'arrêt *Blake*. D'ailleurs, l'observation suivante faite par la Cour au par. 31 de l'arrêt *Banque d'Amérique* — « [l]es tribunaux évitent généralement de recourir à cette méthode de calcul des dommages-intérêts [de la restitution] » — confirme que, à l'instar de la Chambre des lords dans l'arrêt *Blake*, elle estime que la restitution des gains illicites n'est pas une réparation généralement disponible. En particulier, et encore comme il a été conclu dans l'arrêt *Blake*, la restitution des gains illicites pour cause de violation de contrat n'est possible que si les autres réparations ne conviennent pas et que si les circonstances justifient d'accorder cette réparation. Pour ce qui est de ces circonstances, les tribunaux devraient en particulier établir si le demandeur avait un intérêt légitime à empêcher le défendeur d'exercer ses activités lucratives.

[54] Ultimately, Lord Nicholls concluded in *Blake* that the circumstances before him were indeed "exceptional". The ordinary measure of expectation damages could not have vindicated the Crown's interest, as no economic loss resulted from the publication of Blake's memoirs. Further, in Lord Nicholls view, the Crown had a legitimate interest in Blake's profits because his confidentiality undertaking was "closely akin to a fiduciary obligation" (p. 287). I pause here because, I respectfully differ on this latter point. The imposition of "quasi-fiduciary" relationships by operation of law is a concept foreign to Canadian law (*RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, 2008 SCC 54, [2008] 3 S.C.R. 79, at paras. 51-54, per Abella J. (dissenting)). I therefore prefer the view of Professor McInnes, who states:

[54] En définitive, lord Nicholls a conclu dans l'arrêt *Blake* que les circonstances de l'affaire dont il était saisi étaient effectivement « exceptionnelles ». La mesure ordinaire de l'indemnisation pour la perte du profit escompté ne permettait pas de défendre l'intérêt de la Couronne, car la publication des mémoires de M. Blake n'avait causé aucun préjudice économique. Par ailleurs, de l'avis de lord Nicholls, la Couronne avait un intérêt légitime dans les profits réalisés par M. Blake parce que la clause de confidentialité à laquelle il était soumis [TRADUCTION] « se rapprochait d'une obligation fiduciaire » (p. 287). J'ouvre ici une parenthèse pour dire que, en toute déférence, je ne partage pas cette opinion quant au dernier point. La création d'une relation « quasi-fiduciaire », par application de la loi, est une notion étrangère au droit canadien (*RBC Dominion Valeurs mobilières Inc. c. Merrill Lynch Canada Inc.*, 2008 CSC 54, [2008] 3 R.C.S. 79, par. 51-54, la juge Abella (dissidente)). Je préfère donc l'opinion suivante du professeur McInnes :

To . . . impose relief in a contractual context on the basis of an undefined notion of *quasi*-fiduciary duty dangerously ignores Justice Sopinka's warning that such obligations "should not be imposed . . . simply to improve the nature or extent of the remedy". It is not merely that Lord Nicholls' approach fails to reveal a sound basis for liability; it also

[TRADUCTION] Imposer dans un contexte contractuel une mesure de redressement sur le fondement d'une conception non définie de l'obligation *quasi*-fiduciaire néglige dangereusement la mise en garde formulée par le juge Sopinka, à savoir que de telles obligations « ne devraient pas être superposées [. . .] simplement pour améliorer la

implicitly invites lower courts to similarly manipulate equitable doctrine for instrumental purposes. Such an exercise is inimical to the development of coherent principle.

("Gain-Based Relief for Breach of Contract: *Attorney General v. Blake*" (2001), 35 *Can. Bus. L.J.* 72, at p. 85, citing *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, at p. 312.)

[55] As to what circumstances *will* create a legitimate interest in the defendant's profit-making activity, I agree with Lord Nicholls that the boundaries of this remedy are "best hammered out on the anvil of concrete cases" (*Blake*, at p. 291). I can, however, offer some observations.

[56] Many scholars have recognized that it is difficult to reconcile disgorgement for breach of contract with private law principles (see e.g. E. J. Weinrib, "Punishment and Disgorgement as Contract Remedies" (2003), 78 *Chi.-Kent L. Rev.* 55, at p. 70; D. Winterton, "Contract Theory and Gain-Based Recovery" (2013), 76 *M.L.R.* 1129; McInnes (2001)). This Court has gone even further, cautioning that disgorgement awards may have the undesirable effect of deterring "efficient breach[es] of contract" (*Bank of America*, at paras. 30-31, Weinrib (2003), at p. 73). More importantly, it is difficult to explain disgorgement for breach of contract from the standpoint of corrective justice (Weinrib (2003), at p. 57). Granted, some attempts have been made to articulate a corrective justice rationale, but those accounts have been met with substantial criticism (see P. Benson, "Contract as a Transfer of Ownership" (2007), 48 *Wm. & Mary L. Rev.* 1673; A. Botterell, "Contractual Performance, Corrective Justice, and Disgorgement for Breach of Contract" (2010), 16 *Legal Theory* 135; and A. R. Sangiuliano, "A Corrective Justice Account of Disgorgement for Breach of Contract by Analogy to Fiduciary Remedies" (2016), 29 *Can. J.L. & Jur.* 149, at pp. 160-74).

nature ou la portée du redressement ». Non seulement l'approche du lord Nicholls ne laisse voir aucun motif valable de responsabilité, mais elle invite implicitement les tribunaux d'instance inférieure à manipuler ainsi la doctrine d'equity à des fins utiles. Une telle pratique est incompatible avec l'élaboration d'un principe cohérent.

(« Gain-Based Relief for Breach of Contract : *Attorney General v. Blake* » (2001), 35 *Rev. can. dr. comm.* 72, p. 85, citant *Norberg c. Wynrib*, [1992] 2 R.C.S. 226, p. 312.)

[55] Quant aux circonstances qui *créeront* un intérêt légitime dans les activités lucratives du défendeur, je conviens avec le lord Nicholls que les limites de cette mesure de réparation [TRADUCTION] « doivent être forgées sur l'enclume de cas concrets » (*Blake*, p. 291). Je me permettrai, cependant, de faire quelques observations.

[56] Plusieurs universitaires ont reconnu qu'il est difficile de concilier la restitution des gains illicites pour violation de contrat et les principes de droit privé (voir, p. ex., E. J. Weinrib, « Punishment and Disgorgement as Contract Remedies » (2003), 78 *Chi.-Kent L. Rev.* 55, p. 70; D. Winterton, « Contract Theory and Gain-Based Recovery » (2013), 76 *M.L.R.* 1129; McInnes (2001)). La Cour est même allée plus loin en précisant que les décisions octroyant la restitution des gains illicites pourraient avoir l'effet indésirable de décourager les « inexécution[s] contractuelle[s] rentable[s] » (*Banque d'Amérique*, par. 30-31; Weinrib (2003), p. 73). Plus important encore, il est difficile d'expliquer la restitution des gains illicites pour violation de contrat sous l'angle de la justice réparatrice (Weinrib (2003), p. 57). Certes, il y a eu certaines tentatives pour formuler un principe de justice réparatrice, mais elles ont fait l'objet de nombreuses critiques (voir P. Benson, « Contract as a Transfer of Ownership » (2007), 48 *Wm. & Mary L. Rev.* 1673; A. Botterell, « Contractual Performance, Corrective Justice, and Disgorgement for Breach of Contract » (2010), 16 *Legal Theory* 135; et A. R. Sangiuliano, « A Corrective Justice Account of Disgorgement for Breach of Contract by Analogy to Fiduciary Remedies » (2016), 29 *Can. J.L. & Jur.* 149, p. 160-174).

[57] In my view, the key to developing principles for gain-based recovery in breach of contract is to consider what legitimate interest a gain-based award serves to vindicate. A coherent approach that reconciles the relief awarded with the structure of breach of contract as a cause of action should be preferred (McInnes (2001), at pp. 88-93; see also N. W. Sage, "Disgorgement: From Property to Contract" (2016), 66 *U.T.L.J.* 244). To that end, it is useful to recall that courts have, in some exceptional circumstances, long awarded monetary amounts departing from the ordinary measure of expectation damages. That is to say, while disgorgement awards quantified solely by reference to the defendant's profit are a relatively recent development, other gain-based awards are nothing new. For example, this Court has awarded damages quantified by the amount a defendant saved through deficient performance, though the plaintiff would have been no better off had the contract been performed (*Sunshine Exploration Ltd. v. Dolly Varden Mines Ltd. (N.P.L.)*, [1970] S.C.R. 2). The Court of Appeal of Nunavut suggested a similar measure of relief in circumstances where the damage caused by the defendant's deficient performance was simply too difficult to quantify (*Nunavut Tunngavik Inc. v. Canada (Attorney General)*, 2014 NUCA 2, 580 A.R. 75, at para. 88 ("*Inuit of Nunavut*")). And courts have also granted what might be termed "negotiating damages" to prevent a defendant from obtaining for free an advantage for which it did not bargain (*Wrotham Park Estate Co. v. Parkside Homes Ltd.*, [1974] 2 All E.R. 321 (Ch. D.); *Smith v. Landstar Properties Inc.*, 2011 BCCA 44, 14 B.C.L.R. (5th) 48, at paras. 39-44; see also *Morris-Garner*, at paras. 91-100). As the Supreme Court of the United Kingdom recently explained in *Morris-Garner*, at para. 95:

> Negotiating damages can be awarded for breach of contract where the loss suffered by the claimant is appropriately measured by reference to the economic value of the right which has been breached, considered as an asset. . . .

[57] À mon avis, l'élément essentiel pour élaborer les principes d'une indemnisation fondée sur les gains réalisés en cas de violation de contrat consiste à se demander quel intérêt légitime une telle mesure vise à défendre. Une approche cohérente qui concilierait la réparation accordée et la structure de la violation de contrat en tant que cause d'action devrait être privilégiée (McInnes (2001), p. 88-93; voir aussi N. W. Sage, « Disgorgement : From Property to Contract » (2016), 66 *U.T.L.J.* 244). À cette fin, il est utile de rappeler que les tribunaux ont longtemps accordé, dans certaines circonstances exceptionnelles, des réparations pécuniaires s'écartant de l'évaluation ordinaire de l'indemnisation pour la perte du profit escompté. C'est donc dire que, si les montants accordés au titre de la restitution des gains illicites quantifiés uniquement en fonction du profit réalisé par le défendeur sont relativement nouveaux, d'autres réparations fondées sur les gains n'ont rien de nouveau. Par exemple, la Cour a accordé des dommages-intérêts calculés en fonction du montant que le défendeur avait économisé en raison d'une exécution fautive, alors que le demandeur ne se serait pas trouvé en meilleure position si le contrat avait été exécuté (*Sunshine Exploration Ltd. c. Dolly Varden Mines Ltd. (N.P.L.)*, [1970] R.C.S. 2). La Cour d'appel du Nunavut a suggéré une mesure de réparation semblable dans un cas où le préjudice causé par l'exécution fautive du défendeur était simplement trop difficile à quantifier (*Nunavut Tunngavik Inc. c. Canada (Attorney General)*, 2014 NUCA 2, 580 A.R. 75, par. 88 (« *Inuit of Nunavut* »)). Des tribunaux ont aussi accordé ce que l'on pourrait appeler des [TRADUCTION] « dommages-intérêts tenant lieu de négociations » en vue d'empêcher un défendeur d'obtenir gratuitement un avantage qu'il n'avait pas négocié (*Wrotham Park Estate Co. c. Parkside Homes Ltd.*, [1974] 2 All E.R. 321 (Ch. D.); *Smith c. Landstar Properties Inc.*, 2011 BCCA 44, 14 B.C.L.R. (5th) 48, par. 39-44; voir aussi *Morris-Garner*, par. 91-100). Comme l'a récemment expliqué la Cour suprême du Royaume-Uni dans l'arrêt *Morris-Garner*, par. 95 :

> [TRADUCTION] Des dommages-intérêts tenant lieu de négociations peuvent être accordés pour violation de contrat si la perte subie par le demandeur est dûment calculée en fonction de la valeur économique du droit qui a

The rationale is that the claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the right in question, considered as an asset. The defendant has taken something for nothing, for which the claimant was entitled to require payment. [Emphasis added.]

[58] As these various examples demonstrate, an award that appears to be measured by a defendant's gain might arguably, in certain circumstances, serve a compensatory purpose that distinguishes it from disgorgement and which therefore tends to support recovery (McInnes (2001), at pp. 76-80; Weinrib (2003), at pp. 71-72; see also *Morris-Garner*, at paras. 39-40). Whether viewed as compensatory or not, these cases are indicative of the types of circumstances where a plaintiff is entitled to receive a monetary award that goes beyond the economic position that it would have occupied had its contract been performed (see Burrows, at pp. 672-77; McInnes (2014), at p. 285). While the circumstances in which a gain-based award will be appropriate cannot be clearly delineated in advance (*Blake*, at p. 285; *Morris-Garner*, at para. 94), one would expect future legitimate interests protected by a gain-based award to resemble those interests that have been protected in the past.

[59] Returning to the present case, and applying the standard articulated in *Blake*, the plaintiffs' claim for disgorgement is plainly doomed to fail. I say this, first, because disgorgement is available for breach of contract only where, at a minimum, other remedies are inadequate. Circumstances of inadequacy arise when the nature of the claimant's interest is such that it cannot be vindicated by other forms of relief. This may arise where, for example, the plaintiff's loss is "impossible to calculate" or where the plaintiff's interest in performance is not reflected by a purely economic measure (*Inuit of Nunavut*, at para. 80; see also *Morris-Garner*, at paras. 39-40; Burrows, at p. 676). Where, as here, the argument is that the quantum of loss is equal to the defendant's gain, but the plaintiff would simply

été violé, considéré comme un élément d'actif. [. . .] La raison en est que le demandeur a en substance été privé d'un élément d'actif important, et que sa perte peut donc être évaluée en calculant la valeur économique du droit en question, considéré comme un élément d'actif. Le défendeur a pris quelque chose sans rien fournir en retour, chose pour laquelle le demandeur a le droit d'exiger le paiement. [Je souligne.]

[58] Comme le démontrent ces divers exemples, un montant octroyé qui serait calculé en fonction du gain réalisé par le défendeur pourrait, dans certaines circonstances, servir un objectif compensatoire qui le distingue de la restitution des gains illicites et qui tend donc à fonder le recouvrement (McInnes (2001), p. 76-80; Weinrib (2003), p. 71-72; voir aussi *Morris-Garner*, par. 39-40). Qu'elles soient ou non considérées comme étant de nature compensatoire, ces affaires montrent le genre de circonstances dans lesquelles un demandeur a droit à une réparation pécuniaire qui lui aurait permis d'être dans une situation économique allant au-delà de celle dans laquelle il aurait été si le contrat avait été exécuté (voir Burrows, p. 672-677; McInnes (2014), p. 285). Il est vrai que les circonstances dans lesquelles il conviendra d'accorder une réparation fondée sur les gains réalisés ne peuvent pas être clairement définies à l'avance (*Blake*, p. 285; *Morris-Garner*, par. 94), mais on peut penser qu'à l'avenir, les intérêts légitimes protégés par une telle réparation ressembleront à ceux qui ont été protégés par le passé.

[59] Revenant à la présente affaire et appliquant la norme énoncée dans l'arrêt *Blake*, je ne peux que constater que la demande en restitution des gains illicites présentée par les demandeurs est manifestement vouée à l'échec. Je dis cela avant tout parce que la restitution des gains illicites n'est possible pour la violation de contrat que lorsque, à tout le moins, les autres réparations ne conviennent pas, ce qui se produit lorsque la nature de l'intérêt du demandeur est telle qu'il ne peut la faire valoir par d'autres formes de réparation. C'est ce qui arrive lorsque, par exemple, la perte subie par le demandeur est [TRADUCTION] « impossible à calculer » ou lorsque l'intérêt du demandeur à ce que le contrat soit exécuté ne peut se traduire en termes purement économiques (*Inuit of Nunavut*, par. 80; voir aussi *Morris-Garner*,

rather pursue disgorgement, a gain-based remedy is not appropriate.

[60] My colleague Karakatsanis J. suggests that compensatory damages may be inadequate here because VLTs do not create records for particular customers, and that ALC's conduct may have contributed to the plaintiffs' lack of evidence. But the plaintiffs do not make these allegations. More importantly, compensatory damages are not inadequate merely because a plaintiff is unwilling, or does not have sufficient evidence, to prove loss (*Inuit of Nunavut*, at para. 85; see also *Morris-Garner*, at para. 90). Again, and as *Inuit of Nunavut* demonstrates, inadequacy flows *not* from the availability of evidence, but from the nature of the claimant's interest. There, the claimant's interest was in the Government of Canada's agreement to develop a general monitoring plan to support collection and analysis of "information on the long term state and health of . . . the Nunavut Settlement Area" (para. 9). While the Government of Canada's failure to do so resulted in an identifiable loss to the Inuit of Nunavut, it could not possibly be quantified in monetary terms. The Nunavut Court of Appeal therefore recognized that it would be appropriate to award gain-based damages measured by the amount the Government of Canada saved by breaching the agreement. This is a far cry from the plaintiffs' circumstances here. Their gambling losses are readily quantifiable and can be remedied through an award of compensatory damages.

[61] Disgorgement for breach of contract is exceptional relief; it is not available at the plaintiff's election to obviate matters of proof. And there is nothing exceptional about the breach of contract the plaintiffs allege. Once the allegations of criminal conduct are put aside (given that I determined that they should be struck), the plaintiffs' claim is simply that they paid

par. 39-40; Burrows, p. 676). Lorsque, comme en l'espèce, le demandeur soutient que le montant de la perte équivaut aux gains réalisés par le défendeur, mais qu'il intente simplement un recours en restitution des gains illicites, la réparation fondée sur les gains réalisés ne convient pas.

[60] Ma collègue la juge Karakatsanis laisse entendre que les dommages-intérêts compensatoires peuvent ne pas convenir en l'espèce parce que les ALV ne créent pas de relevés pour des clients précis et que la conduite de la SLA pourrait avoir contribué au manque de preuve des demandeurs. Cependant, les demandeurs ne font pas de telles allégations. Surtout, on ne peut dire que les dommages-intérêts compensatoires ne conviennent pas simplement parce que le demandeur refuse de prouver la perte, ou qu'il ne dispose pas d'une preuve suffisante pour l'établir (*Inuit of Nunavut*, par. 85; voir aussi *Morris-Garner*, par. 90). De plus, comme le démontre l'arrêt *Inuit of Nunavut*, le caractère inadéquat découle *non pas* de la disponibilité de la preuve, mais de la nature de l'intérêt du demandeur. Dans cette affaire, l'intérêt du demandeur visait le fait que le gouvernement du Canada avait accepté d'élaborer un plan général de surveillance afin de soutenir la collecte et l'analyse de [TRADUCTION] « renseignements sur l'état et la santé à long terme [. . .] de la région du Nunavut » (par. 9). Alors que le défaut du gouvernement canadien d'exécuter cette obligation a donné lieu à une perte déterminable pour les Inuits du Nunavut, cette perte ne pouvait être quantifiée du point de vue monétaire. La Cour d'appel du Nunavut a donc reconnu qu'il conviendrait d'accorder des dommages-intérêts fondés sur les gains réalisés, évalués en fonction du montant que le gouvernement du Canada a épargné en contrevenant à l'entente. On est loin de la situation des demandeurs en l'espèce. Leurs pertes découlant du jeu sont facilement quantifiables et un octroi de dommages-intérêts compensatoires peut y remédier.

[61] La restitution des gains illicites pour violation de contrat est une mesure de réparation exceptionnelle; le demandeur ne peut choisir de s'en prévaloir pour éviter des questions de preuve. De plus, la violation de contrat qu'allèguent les demandeurs n'a rien d'exceptionnel. Une fois les allégations de conduite criminelle écartées (puisque j'ai conclu qu'elles devraient être

to play a gambling game and did not get exactly what they paid for. The plaintiffs cannot be said to have a legitimate interest in ALC's profit-making activity.

[62] It follows that the plaintiffs' claim has no reasonable chance of achieving disgorgement damages for breach of contract.

(2) Punitive Damages for Breach of Contract

[63] Punitive damage awards for breach of contract are also exceptional, but will be awarded where the alleged breach of contract is an independent actionable wrong (*Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 78). As this Court held in *Whiten*, the actionable wrong need not be tortious: punitive damages may also be awarded where the defendant breaches a contractual obligation of good faith (para. 79).

[64] Having concluded that all of the plaintiffs' other claims are bound to fail, the only remaining actionable wrong is the claim that ALC breached an obligation of good faith owed to the plaintiffs under the alleged contract. To that effect, the plaintiffs' claim alleges:

> . . . the nature of the contract between the parties and the vulnerability of the Plaintiffs implies a duty of good faith which requires the Defendant to consider the interests of the Plaintiffs as at least equal to its own and not to offer or supply an inherently dangerous service or product. The Defendant breached its implied duty of good faith by designing, testing, researching, formulating, developing, manufacturing or altering, producing, labeling, advertising, promoting, distributing, and/or selling VLTs which were inherently dangerous to users and which the Defendant knew or ought to have known would lead to dependency and addiction.

(A.R., vol. II, at pp. 101-2)

radiées), les demandeurs prétendent simplement qu'ils ont payé pour jouer à un jeu de hasard et qu'ils n'ont pas obtenu exactement ce pour quoi ils ont payé. On ne peut affirmer que les demandeurs ont un intérêt légitime dans les activités lucratives de la SLA.

[62] Il s'ensuit que les demandeurs n'ont aucune chance raisonnable d'obtenir la restitution des gains illicites pour violation de contrat.

(2) Dommages-intérêts punitifs pour violation de contrat

[63] L'octroi de dommages-intérêts punitifs pour violation de contrat est aussi une mesure exceptionnelle, mais elle sera accordée si la violation alléguée du contrat équivaut à une faute indépendante donnant ouverture à l'action (*Whiten c. Pilot Insurance Co.*, 2002 CSC 18, [2002] 1 R.C.S. 595, par. 78). Comme l'a conclu la Cour dans l'arrêt *Whiten*, il n'est pas nécessaire que la faute donnant ouverture à action soit d'ordre délictuel : des dommages-intérêts punitifs peuvent aussi être accordés lorsque le défendeur contrevient à une obligation contractuelle d'agir de bonne foi (par. 79).

[64] Comme j'ai conclu que toutes les autres demandes présentées par les demandeurs sont vouées à l'échec, la seule autre faute donnant ouverture à action est que la SLA aurait manqué à l'obligation d'agir de bonne foi qu'elle avait envers les demandeurs en vertu du contrat allégué. À cet égard, les demandeurs soutiennent :

> [TRADUCTION] . . . la nature du contrat entre les parties et la vulnérabilité des demandeurs suppose une obligation d'agir de bonne foi qui exige que le défendeur tienne compte des intérêts des demandeurs au moins autant que des siens et qu'il n'offre ni ne fournisse un service ou un produit intrinsèquement dangereux. Le défendeur a manqué à son obligation implicite d'agir de bonne foi par ses activités de conception, de mise à l'essai, de recherche, de formulation, de mise au point, de fabrication ou de modification, de production, d'étiquetage, de publicité, de promotion, de distribution et/ou de vente ayant pour objet des ALV qui étaient intrinsèquement dangereux pour les utilisateurs, et que le défendeur savait ou aurait dû savoir qu'ils pouvaient mener à une dépendance.

(d.a., vol. II, p. 101-102)

[65] As this Court explained in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, however, not every contract imposes actionable good faith obligations on contracting parties. While good faith is an organizing principle of Canadian contract law, it manifests itself in specific circumstances. In particular, its application is generally confined to existing categories of contracts and obligations (para. 66). The alleged contract between ALC and the plaintiffs does not fit within any of the established good faith categories. Nor did the plaintiffs advance any argument for expanding those recognized categories.

[66] Accordingly, the plaintiffs' claim for punitive damages has no reasonable chance of success.

(3) Whether the Claim Should Survive For Nominal Damages

[67] The remaining question on breach of contract is whether the plaintiffs' claim should survive as a hollow cause of action that does not support any of the remedies they seek. In my view, it should not. While I agree with my colleague Karakatsanis J. that declaratory relief and nominal damages are available in theory as remedies for breach of contract, a reasonable claim is one that has a reasonable chance of achieving the outcome that the plaintiff seeks. That is not this claim. To be sure, the circumstances here are unusual. Not only did the plaintiffs plead only gain-based relief and punitive damages, both of which I have concluded are unavailable in the circumstances, the plaintiffs also expressly disclaimed remedies quantified on the basis of individual loss. At no point did the plaintiffs argue that their claim should survive because nominal damages are available. In my view, the plaintiffs' breach of contract claim should be assessed on the basis of the questions put before the Court — namely, whether a gain-based remedy or punitive damages are available in the circumstances. And on that basis, it is obvious that the plaintiffs' breach of contract claim does not disclose a reasonable cause of action. To allow this claim to proceed to trial would simply be to delay the inevitable, and

[65] La Cour a cependant expliqué, dans l'arrêt *Bhasin c. Hrynew*, 2014 CSC 71, [2014] 3 R.C.S. 494, que ce ne sont pas tous les contrats qui imposent aux parties contractantes des obligations d'agir de bonne foi donnant ouverture à action. Bien que la bonne foi soit un principe directeur du droit canadien des contrats, c'est un principe qui se manifeste dans des situations précises. En particulier, son application se limite généralement aux catégories existantes de contrats et d'obligations (par. 66). Le contrat qui unirait la SLA et les demandeurs n'entre dans aucune des catégories de bonne foi établies. Les demandeurs n'ont pas non plus soulevé d'argument visant à élargir ces catégories reconnues.

[66] En conséquence, la demande de dommages-intérêts punitifs présentée par les demandeurs n'a aucune chance raisonnable d'être accueillie.

(3) La demande devrait-elle subsister pour ouvrir droit à des dommages-intérêts symboliques?

[67] La dernière question qui se pose quant à la violation de contrat est de savoir si la demande présentée par les demandeurs devrait subsister en tant que cause d'action vide de sens n'ouvrant droit à aucune des réparations sollicitées. Je ne le crois pas. Bien que je sois d'accord avec ma collègue la juge Karakatsanis pour dire qu'un jugement déclaratoire et des dommages-intérêts symboliques sont possibles en théorie en tant que réparation pour la violation du contrat, une demande raisonnable en est une qui a une chance raisonnable d'atteindre le résultat recherché par le demandeur. Ce n'est pas le cas en l'espèce. Certes, la situation qui nous occupe est inhabituelle. Non seulement les demandeurs ne revendiquent qu'une réparation fondée sur les gains réalisés et des dommages-intérêts punitifs (et j'ai conclu que ces deux mesures n'étaient pas disponibles dans les circonstances), mais les demandeurs ont expressément renoncé aux réparations quantifiées en fonction de la perte individuelle. En aucun temps les demandeurs n'ont fait valoir que leur demande devrait subsister parce que des dommages-intérêts symboliques étaient possibles. À mon avis, la demande fondée sur la violation de contrat présentée par les demandeurs devrait être évaluée en fonction

would not reflect a "proportionate procedur[e] for adjudication" (*Hryniak*, at para. 27).

(4) Certification

[68] Even were the breach of contract claim to survive, the application judge's certification decision would have to be revisited. Given my conclusion that each of the plaintiffs' claims should be struck, it is unnecessary to address certification in detail. I respectfully disagree with my colleague, however, that the plaintiff's breach of contract claim, standing alone, would satisfy the preferability requirement in s. 5(1)(d) of the *Class Actions Act* (Karakatsanis J. Reasons, at paras. 165-70). As I have explained, punitive damages and disgorgement are unavailable to the plaintiffs. Without those remedies, the plaintiffs would be pursuing a breach of contract action wherein each plaintiff effectively elects to pursue nominal damages in lieu of the actual damages they have suffered. Such an action would not further the principal goals of class actions, namely judicial economy, behavior modification, and access to justice (*Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at paras. 27-28).

D. *Unjust Enrichment*

[69] The plaintiffs also rely on the principled unjust enrichment framework (or what the Court of Appeal referred to as "unjust enrichment *simpliciter*"). This claim requires establishing that ALC was enriched, that the plaintiffs suffered a corresponding deprivation, and that the enrichment and corresponding

des questions soumises à la Cour — soit celle de savoir si une réparation fondée sur les gains ou des dommages-intérêts punitifs sont possibles dans les circonstances. Il est donc évident que la demande fondée sur la violation de contrat introduite par les demandeurs ne révèle aucune cause d'action raisonnable. Permettre l'instruction de cette demande ne ferait que retarder l'inévitable et ne rendrait pas compte de « procédures de règlement des litiges [. . .] proportionnées » (*Hryniak*, par. 27).

(4) Autorisation d'exercer un recours collectif

[68] Même si la demande fondée sur la violation de contrat devait subsister, la décision d'autorisation du juge saisi de la demande devrait être revue. Étant donné ma conclusion que chacune des demandes présentées par les demandeurs devrait être radiée, il n'est pas nécessaire d'aborder la question de l'autorisation en détail. Soit dit en tout respect, je ne suis pas d'accord avec ma collègue, cependant, pour dire que la demande fondée sur la violation de contrat présentée par les demandeurs, à elle seule, satisferait au critère du meilleur moyen prévu à l'al. 5(1)(d) de la *Class Actions Act* (motifs de la juge Karakatsanis, par. 165-170). Comme je l'ai expliqué, les demandeurs n'ont pas droit à des dommages-intérêts punitifs ni à la restitution des gains illicites. Sans ces réparations, les demandeurs intenteraient une action pour violation de contrat dans laquelle chacun des demandeurs choisit en fait de réclamer des dommages-intérêts symboliques plutôt que des dommages-intérêts fondés sur la perte réellement subie. Une telle action n'atteindrait pas les principaux objectifs du recours collectif, à savoir l'économie de ressources judiciaires, la modification des comportements et l'accès à la justice (*Hollick c. Toronto (Ville)*, 2001 CSC 68, [2001] 3 R.C.S. 158, par. 27-28).

D. *Enrichissement sans cause*

[69] Les demandeurs se fondent également sur le cadre d'analyse de l'enrichissement sans cause (ou sur ce que la Cour d'appel a appelé [TRADUCTION] « l'enrichissement sans cause *simpliciter* »). Une telle action requiert qu'ils établissent que la SLA s'est enrichie, qu'ils ont subi un appauvrissement

deprivation occurred in the absence of any juristic reason therefor (*Moore*, at para. 37). The appellants argue that this claim is bound to fail because, even if ALC has been enriched at the plaintiff's expense, there is a juristic reason for the exchange.

[70] The juristic reason element of the unjust enrichment analysis proceeds in two stages. First, the plaintiff must demonstrate that the defendant's enrichment cannot be justified by any of the established categories of juristic reason. If none of the established categories of juristic reason are present, the plaintiff has a *prima facie* case for unjust enrichment. At the second stage, the defendant can rebut the plaintiff's *prima facie* case by showing that there is a residual reason to deny recovery (*Moore*, at paras. 57-58).

[71] Here, I do not have to go beyond the first stage of the analysis. The plaintiffs' own pleadings allege that there was a contract between ALC and the plaintiffs under which the plaintiffs paid to play VLTs. A defendant that acquires a benefit pursuant to a valid contract is justified in retaining that benefit (*Moore*, at para. 57). Nothing in the pleadings, apart from perhaps the allegations of criminal conduct that I have determined are bound to fail, could serve to vitiate the alleged contract between the plaintiffs and ALC. It follows that I agree with the appellants that the plaintiffs' unjust enrichment claim has no reasonable chance of success.

IV. Conclusion

[72] Each claim that the plaintiffs have pleaded is bound to fail because it discloses no reasonable cause of action. I would allow the appeals, set aside the certification order, and strike the plaintiffs' statement of claim in its entirety. The appellants have not sought costs, and I would therefore award none.

correspondant et que l'enrichissement et l'appauvrissement correspondant ont eu lieu en l'absence d'un motif juridique (*Moore*, par. 37). Les appelantes soutiennent que cette action est vouée à l'échec parce que, même si la SLA s'est enrichie aux dépens des demandeurs, un motif juridique justifie l'échange qui a eu lieu.

[70] L'élément de motif juridique de l'analyse de l'enrichissement sans cause comporte deux étapes. Premièrement, le demandeur doit démontrer qu'aucune des catégories établies de motifs juridiques ne peut justifier l'enrichissement du défendeur. Si aucune des catégories établies de motifs juridiques ne s'applique, le demandeur aura alors établi une preuve *prima facie* d'enrichissement sans cause. À la deuxième étape, le défendeur peut réfuter la preuve *prima facie* du demandeur en démontrant qu'il existe un autre motif de refuser le recouvrement (*Moore*, par. 57-58).

[71] En l'espèce, je n'ai pas besoin d'aller au-delà de la première étape de l'analyse. Les demandeurs allèguent dans leurs propres actes de procédure qu'il y avait un contrat entre eux et la SLA, en vertu duquel ils devaient payer pour jouer sur les ALV. Un défendeur qui tire un avantage dans le cadre d'un contrat valide est justifié de conserver cet avantage (*Moore*, par. 57). Rien dans les actes de procédure, à part peut-être les allégations de conduite criminelle qui, comme je l'ai conclu, sont vouées à l'échec, ne pourrait entacher la validité du contrat qui serait intervenu entre les demandeurs et la SLA. En conséquence, je conviens avec les appelantes que la demande pour enrichissement sans cause présentée par les demandeurs n'a aucune chance raisonnable d'être accueillie.

IV. Conclusion

[72] Toutes les demandes présentées par les demandeurs sont vouées à l'échec parce qu'elles ne révèlent aucune cause d'action raisonnable. J'accueillerais donc les pourvois, j'annulerais l'ordonnance autorisant l'exercice du recours collectif et je radierais la déclaration des demandeurs en entier. Les appelantes n'ont pas demandé que leurs dépens soient adjugés; par conséquent, je n'en adjugerais aucun.

The reasons of Wagner C.J. and Karakatsanis, Martin and Kasirer JJ. were delivered by

KARAKATSANIS J. (dissenting in part) —

I. Introduction

[73] The plaintiffs in this proposed class action allege that the Video Lottery Terminal (VLT) games offered by Atlantic Lottery Corporation (ALC) in Newfoundland and Labrador are deceptive, harmful, and inherently addictive. They further contend that ALC, both a regulator and a business corporation, deliberately put people at risk of addiction by deceiving the paying public for the sole purpose of making money. The statement of claim seeks a gain-based remedy through seven possible causes of action.

[74] The application judge at the Supreme Court of Newfoundland and Labrador dismissed ALC's application to strike the plaintiffs' statement of claim and certified the class action. The majority of the Court of Appeal of Newfoundland and Labrador struck two claims but allowed the remainder to proceed as a class action. ALC and several third parties now appeal to this Court.

[75] There are two main issues before this Court: whether to strike the plaintiffs' claims and whether to certify the plaintiffs' class action. The Court's concern is not whether the plaintiffs' claim will be successful, but rather whether it should be allowed to proceed to trial, and proceed as a class action.

[76] I agree with Brown J. that a mere breach of a duty of care, in the absence of loss, cannot ground a claim for disgorgement and that the term "waiver of tort" should not be used to refer to a cause of action. I also agree that VLTs cannot constitute "three-card monte" as that phrase is defined in the *Criminal*

Version française des motifs du juge en chef Wagner et des juges Karakatsanis, Martin et Kasirer rendus par

LA JUGE KARAKATSANIS (dissidente en partie) —

I. Introduction

[73] Les demandeurs dans le présent recours collectif projeté font valoir que les jeux sur appareils de loterie vidéo (ALV) offerts par la Société des loteries de l'Atlantique (SLA) à Terre-Neuve-et-Labrador sont trompeurs, nocifs et intrinsèquement générateurs de dépendance. Ils soutiennent aussi que la SLA, qui est à la fois un organisme de réglementation et une société commerciale, a délibérément mis les membres du public payant à risque de dépendance en les trompant dans le seul but de faire de l'argent. Dans leur déclaration, ils sollicitent une réparation fondée sur les gains réalisés en invoquant sept causes d'action possibles.

[74] Le juge saisi de la demande à la Cour suprême de Terre-Neuve-et-Labrador a rejeté la demande de la SLA en radiation de la déclaration des demandeurs et a autorisé le recours collectif. Les juges majoritaires de la Cour d'appel de Terre-Neuve-et-Labrador ont radié deux demandes, mais ont permis que les autres prennent la forme d'un recours collectif. La SLA et plusieurs tierces parties interjettent maintenant appel devant la Cour.

[75] La Cour est appelée à trancher deux questions principales : s'il y a lieu de radier les demandes présentées par les demandeurs et s'il y a lieu d'autoriser leur recours collectif. La Cour n'a pas à se prononcer sur la question de savoir si les demandeurs auront gain de cause dans leur action, mais plutôt sur l'opportunité de permettre que celle-ci soit instruite, et ce, par voie de recours collectif.

[76] Je suis d'accord avec le juge Brown pour dire qu'un simple manquement à une obligation de diligence, en l'absence de perte, ne peut fonder une demande de restitution des gains illicites et que l'expression « renonciation au recours délictuel » ne devrait pas être employée pour désigner une cause

Code, R.S.C. 1985, c. C-46, and that the plaintiffs' claim in unjust enrichment must be struck. However, I disagree with his analysis of whether the plaintiffs' claim in breach of contract is a reasonable cause of action as well as his conclusion that there are no available remedies for that breach.

[77] I agree with the courts below that common issues relating to breach of contract, punitive damages, and the availability of the remedy of disgorgement of ALC's gains are properly certified. However, I would not, on this record, certify the availability of aggregate monetary relief as a common issue. It follows that I would allow the appeals only in part, allowing the breach of contract claim to proceed and remain certified as a class action.

II. Statement of Claim and Procedural History

[78] ALC is a corporation incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (*CBCA*), whose shareholders are the governments of the four Atlantic provinces, including Newfoundland and Labrador. Under the *Video Lottery Regulations*, C.N.L.R. 760/96, made under the *Lotteries Act*, S.N.L. 1991, c. 53, ALC is authorized to offer gambling to the public. As part of this business, ALC offers games through VLTs at approved sites.

[79] The plaintiffs, Douglas Babstock and Fred Small, are individuals seeking to be the representative plaintiffs in a class action against ALC. In their statement of claim, the plaintiffs bring a class action on behalf of persons and estates harmed by the VLT

d'action. Je suis également d'accord pour dire que les ALV ne peuvent constituer un jeu de « bonneteau » au sens donné à ce terme dans le *Code criminel*, L.R.C. 1985, c. C-46, et que la demande fondée sur l'enrichissement sans cause présentée par les demandeurs doit être radiée. Toutefois, je ne souscris pas à son analyse de la question de savoir si la demande fondée sur la violation de contrat présentée par les demandeurs est une cause d'action raisonnable, ni à sa conclusion selon laquelle il n'y a aucune réparation possible pour cette violation.

[77] Je conviens avec les tribunaux d'instance inférieure que les questions communes liées à la violation de contrat, aux dommages-intérêts punitifs et à la possibilité d'ordonner la restitution des gains illicites de la SLA à titre de réparation ont été certifiées à bon droit. Toutefois, au vu du dossier, je ne certifierais pas la question de la possibilité d'accorder des mesures de redressement pécuniaire global en tant que question commune. Par conséquent, je suis d'avis d'accueillir les présents pourvois en partie seulement : je permettrais que la demande fondée sur la violation de contrat suive son cours et demeure certifiée à titre de recours collectif.

II. Déclaration et historique procédural

[78] La SLA est une personne morale constituée sous le régime de la *Loi canadienne sur les sociétés par actions*, L.R.C. 1985, c. C-44 (*LCSA*), dont les actionnaires sont les gouvernements des quatre provinces de l'Atlantique, y compris Terre-Neuve-et-Labrador. En vertu du règlement intitulé *Video Lottery Regulations*, C.N.L.R. 760/96, pris en application de la *Lotteries Act*, S.N.L. 1991, c. 53, la SLA est autorisée à offrir des jeux de hasard au public. Dans le cadre de cette entreprise, la SLA offre des jeux au moyen d'ALV à des emplacements approuvés.

[79] Les demandeurs, Douglas Babstock et Fred Small, sont des particuliers qui veulent représenter les demandeurs dans un recours collectif contre la SLA. Dans leur déclaration, les demandeurs intentent un recours collectif au nom des personnes

gambling that the defendant, ALC, manages in the Province of Newfoundland and Labrador. ALC has not yet filed its defence.

[80] The plaintiffs state that ALC is both a regulator and a business corporation driven by profit motive, remitting profits to the province in the range of $60-90 million annually. The statement of claim alleges that ALC knows or ought to know that VLTs are, and have been designed to be, inherently deceptive, addictive, and dangerous, programmed to create cognitive distortions of consumers' perceptions of winning. The plaintiffs say that ALC acted in bad faith, and that the reprehensibility of ALC's conduct is relevant to the issue of remedy. They do not advance claims for personal injuries but instead seek, among other remedies, damages equal to the total unlawful gain obtained by ALC from the class members, disgorgement of ALC's profits, and punitive damages.

[81] ALC joined several third parties in the action, including VLC, Inc.; IGT-Canada Inc.; International Game Technology; Spielo International Canada ULC; and Tech Link International Entertainment Limited (collectively, the third parties), who are the manufacturers and suppliers of VLTs and who supplied VLTs to ALC during the proposed class period.

[82] The plaintiffs brought an application for certification under the *Class Actions Act*, S.N.L. 2001, c. C-18.1 (*CAA*), and ALC brought an application to strike the plaintiffs' statement of claim under r. 14.24 of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D.

et des successions qui ont été lésées par les jeux de hasard sur des ALV que la défenderesse, la SLA, administre dans la province de Terre-Neuve-et-Labrador. La SLA n'a pas encore déposé sa défense.

[80] Les demandeurs affirment que la SLA est à la fois un organisme de réglementation et une société commerciale à but lucratif, qui verse à la province des profits de l'ordre de 60 à 90 millions de dollars annuellement. Dans leur déclaration, ils soutiennent que la SLA sait ou devrait savoir que les ALV sont — et ont été conçus pour être — intrinsèquement trompeurs, générateurs de dépendance et dangereux, programmés pour créer des distorsions cognitives des perceptions chez les consommateurs quant aux possibilités de gagner. Les demandeurs affirment que la SLA a agi de mauvaise foi, et que le caractère répréhensible de la conduite de la SLA est pertinent en ce qui concerne la question de la réparation. Ils ne réclament rien au titre de préjudices personnels, mais sollicitent plutôt, entre autres réparations, des dommages-intérêts d'un montant égal au gain illicite total obtenu par la SLA auprès des membres du groupe, la restitution des gains illicites de la SLA et des dommages-intérêts punitifs.

[81] La SLA a mis en cause plusieurs tiers, y compris VLC, Inc.; IGT-Canada Inc.; International Game Technology; Spielo International Canada ULC; et Tech Link International Entertainment Limited (collectivement, les tierces parties), qui sont des fabricants et fournisseurs d'ALV et qui ont fourni des ALV à la SLA pendant la période visée par le recours collectif projeté.

[82] Les demandeurs ont présenté une demande d'autorisation d'exercer un recours collectif sous le régime de la *Class Actions Act*, S.N.L. 2001, c. C-18.1 (*CAA*), et la SLA a présenté une requête en radiation de la déclaration des demandeurs en application de l'art. 14.24 des *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D.

III. Decisions on the Breach of Contract Claim and Certification

A. *Supreme Court of Newfoundland and Labrador (2014 NLTD(G) 114, 356 Nfld. & P.E.I.R. 293, and 2016 NLTD(G) 216, 93 C.P.C (7th) 307 (Faour J.))*

[83] On ALC's application to strike the claim, the application judge found that breach of contract was a reasonable cause of action and that disgorgement was potentially available as a remedy. He rejected the argument that ALC's status as a regulator prevented the implication of any terms into its contracts with the plaintiffs, finding that it was not plain and obvious that ALC would be able to defend against every allegation on the basis of its regulatory status. He found that the plaintiffs' failure to plead damage or individual loss arising from the breach of contract, and to instead claim the defendants' gain from the breach, was not a bar to their cause of action. In his certification reasons (which touched on other claims beyond breach of contract), Faour J. found that the criteria for certification had been established.

B. *Court of Appeal of Newfoundland and Labrador (2018 NLCA 71, 29 C.P.C. (8th) 1 (Green, Welsh, and Harrington JJ.A.))*

[84] In the Court of Appeal, Green J.A., writing for the majority, upheld the application judge's conclusion that breach of contract was a reasonable cause of action on the basis that it is actionable in the absence of pleaded or proven loss. The majority found disgorgement to be a potential remedy given its uncertain parameters; it could not be said that the claim for disgorgement of profits was doomed to fail. The majority also refused to strike the plaintiffs' claim for punitive damages given their allegations that ALC had engaged in reprehensible and high-handed conduct. Finally, the majority concluded that

III. Décisions sur la demande fondée sur la violation de contrat et sur l'autorisation d'exercer le recours collectif

A. *Cour suprême de Terre-Neuve-et-Labrador (2014 NLTD(G) 114, 356 Nfld. & P.E.I.R. 293, et 2016 NLTD(G) 216, 93 C.P.C. (7th) 307 (le juge Faour))*

[83] Statuant sur la demande de la SLA en radiation de l'action, le juge a conclu que la violation de contrat était une cause d'action raisonnable et que la restitution des gains illicites pouvait éventuellement être accordée à titre de réparation. Il a rejeté l'argument voulant que, en raison de la qualité d'organisme de réglementation de la SLA, il ne pouvait y avoir de conditions implicites dans ses contrats avec les demandeurs, et a conclu qu'il n'était pas évident et manifeste que la SLA serait en mesure d'opposer une défense à chaque allégation sur le fondement de sa qualité d'organisme de réglementation. Selon le juge, le fait que les demandeurs n'aient pas plaidé de préjudice ou de perte individuelle découlant de la violation de contrat, mais qu'ils ont plutôt réclamé le gain que les défendeurs ont tiré de la violation, ne faisait pas obstacle à leur cause d'action. Dans ses motifs relatifs à l'autorisation (qui portaient sur d'autres demandes, outre la violation de contrat), le juge Faour a conclu que les critères en vue de l'autorisation du recours collectif avaient été établis.

B. *Cour d'appel de Terre-Neuve-et-Labrador (2018 NLCA 71, 29 C.P.C. (8th) 1 (les juges Green, Welsh et Harrington))*

[84] En Cour d'appel, le juge Green, s'exprimant au nom des juges majoritaires, a confirmé la conclusion du juge saisi de la demande, selon laquelle la violation de contrat était une cause d'action raisonnable parce qu'elle donnait ouverture à action en l'absence de perte plaidée ou prouvée. Les juges majoritaires ont conclu que la restitution des gains illicites était une réparation possible en raison de ses paramètres incertains; on ne pouvait affirmer que la demande de restitution des gains illicites était vouée à l'échec. Les juges majoritaires ont en outre refusé de radier la demande de dommages-intérêts punitifs

the application judge had not erred in certifying the plaintiffs' class action.

[85] Welsh J.A. dissented, finding that the claim for breach of contract should be struck because the plaintiffs did not plead loss or damage.

IV. Analysis

[86] In these reasons, I consider two issues. First, is breach of contract a reasonable cause of action on these pleadings? Second, should the action for breach of contract remain certified as a class action?

A. *Standard on a Motion to Strike*

[87] A pleading may be struck or amended on the ground that it discloses no reasonable cause of action or defence (*Rules of the Supreme Court, 1986*, r. 14.24(1)(a)). When considering whether to strike a pleading on this ground, the question is whether the claim has "no reasonable prospect of success" (*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 17), or whether it is "plain and obvious" that the action cannot succeed (*Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980). This is a high standard that applies to determinations of fact, law, and mixed fact and law. The facts pleaded are assumed to be true "unless they are manifestly incapable of being proven" (*Imperial Tobacco*, at para. 22).

[88] On a motion to strike, the statement of claim should be read "as generously as possible and to accommodate any inadequacies in the form of the allegations which are merely the result of drafting deficiencies" (*Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, at p. 451), because "cases should, if possible, be disposed of on their merits" (*Montreal Trust Co. of Canada v. Hickman*, 2001 NFCA 42,

présentée par les demandeurs, en raison de leurs allégations selon lesquelles la SLA s'était livrée à un comportement répréhensible et abusif. Enfin, les juges majoritaires ont conclu que le juge saisi de la demande n'avait pas commis d'erreur en autorisant le recours collectif des demandeurs.

[85] La juge Welsh, dissidente, a conclu que la demande fondée sur la violation de contrat devrait être radiée parce que les demandeurs n'avaient pas plaidé de perte ou de préjudice.

IV. Analyse

[86] Dans les présents motifs, j'examine deux questions. D'abord, la violation de contrat est-elle une cause d'action raisonnable au vu des actes de procédure en l'espèce? Ensuite, l'action en violation de contrat devrait-elle demeurer autorisée en tant que recours collectif?

A. *Norme applicable à la requête en radiation*

[87] Un acte de procédure peut être radié ou modifié au motif qu'il ne révèle aucune cause d'action ou moyen de défense raisonnable (*Rules of the Supreme Court, 1986*, al. 14.24(1)(a)). Pour décider s'il y a lieu de radier un acte de procédure pour ce motif, la question est de savoir si la demande n'a « aucune possibilité raisonnable d'être accueillie » (*R. c. Imperial Tobacco Canada Ltée*, 2011 CSC 42, [2011] 3 R.C.S. 45, par. 17), ou s'il est « évident et manifeste » que l'action ne saurait aboutir (*Hunt c. Carey Canada Inc.*, [1990] 2 R.C.S. 959, p. 980). Il s'agit d'une norme élevée qui s'applique aux conclusions de fait, aux conclusions de droit et aux conclusions mixtes de fait et de droit. Les faits allégués sont présumés vrais « sauf s'ils ne peuvent manifestement pas être prouvés » (*Imperial Tobacco*, par. 22).

[88] Lorsqu'il est saisi d'une requête en radiation, le tribunal doit interpréter la déclaration « de manière aussi libérale que possible et [. . .] remédier à tout vice de forme, imputable à une carence rédactionnelle, qui aurait pu se glisser dans les allégations » (*Operation Dismantle c. La Reine*, [1985] 1 R.C.S. 441, p. 451), parce que [TRADUCTION] « les causes doivent, si possible, être jugées au fond » (*Montreal*

204 Nfld. & P.E.I.R. 58, at para. 12). At times, a proposed cause of action is so obviously at odds with precedent, underlying principle, and desirable social consequence that regardless of the evidence adduced at trial, the court can say with confidence that it cannot succeed. But this is not often the case, and our common law system generally evolves on the basis of the concrete evidence presented before judges at trial.

[89] This is why claims that do not contain a "radical defect" (*Hunt*, at p. 980) should nevertheless proceed to trial. Courts should consider whether the pleadings are sufficient to put the defendant on notice of the essence of the plaintiff's claim (*Holland v. Saskatchewan*, 2008 SCC 42, [2008] 2 S.C.R. 551, at para. 15) and whether "the facts pleaded would support one or more arguable causes of action" (*Anderson v. Bell Mobility Inc.*, 2009 NWTCA 3, 524 A.R. 1, at para. 5). In *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94, this Court explained that a cause of action is "only a set of facts that provides the basis for an action in court" (para. 27).

[90] The threshold to strike a claim is therefore high. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial (*Imperial Tobacco*, at paras. 17 and 21). The correct posture for the Court to adopt is to consider whether the pleadings, as they stand or may reasonably be amended, disclose a question that is not doomed to fail (*Hunt*, at p. 978, quoting *Minnes v. Minnes* (1962), 39 W.W.R. 112 (B.C.C.A.), at pp. 116 and 122).

B. *Breach of Contract*

(1) Breach of Contract as a Cause of Action

[91] The elements of a cause of action for breach of contract are the existence of a contract and the breach of a term of that contract. In order to strike the claim for breach of contract, ALC and the third parties must demonstrate either that a necessary fact is not pleaded or that there is a legal reason why

Trust Co. of Canada c. Hickman, 2001 NFCA 42, 204 Nfld. & P.E.I.R. 58, par. 12). Parfois, une cause d'action alléguée est si nettement contraire à la jurisprudence, au principe sous-jacent et aux conséquences sociales souhaitables que, sans égard à la preuve présentée au procès, le tribunal peut affirmer avec certitude que l'action ne saurait aboutir. Ce n'est toutefois pas souvent le cas, et notre système de common law évolue généralement sur le fondement d'éléments de preuve concrets présentés à des juges dans le cadre de procès.

[89] Voilà pourquoi les demandes qui ne contiennent pas de « vice fondamental » (*Hunt*, p. 980) devraient néanmoins être instruites. Les tribunaux doivent se demander si les actes de procédure suffisent pour informer le défendeur de l'essence de la réclamation du demandeur (*Holland c. Saskatchewan*, 2008 CSC 42, [2008] 2 R.C.S. 551, par. 15) et si [TRADUCTION] « les faits allégués appuieraient une ou plusieurs causes d'action défendables » (*Anderson c. Bell Mobility Inc.*, 2009 NWTCA 3, 524 A.R. 1, par. 5). Dans l'arrêt *Markevich c. Canada*, 2003 CSC 9, [2003] 1 R.C.S. 94, la Cour a expliqué qu'un « fait générateur », c'est-à-dire une cause d'action, « est un état de fait qui fonde une action en justice » (par. 27).

[90] En conséquence, le seuil à atteindre pour la radiation d'une demande est élevé. Lorsque la demande a une possibilité raisonnable d'être accueillie, il faut permettre qu'elle soit instruite (*Imperial Tobacco*, par. 17 et 21). La Cour doit donc se demander si les actes de procédure, tels qu'ils sont rédigés ou peuvent raisonnablement être modifiés, révèlent une question qui n'est pas vouée à l'échec (*Hunt*, p. 978, citant *Minnes c. Minnes* (1962), 39 W.W.R. 112 (C.A. C.-B), p. 116 et 122).

B. *Violation de contrat*

(1) La violation de contrat en tant que cause d'action

[91] Les éléments d'une cause d'action pour violation de contrat sont l'existence d'un contrat et la violation d'une condition de celui-ci. Pour faire radier la demande fondée sur la violation de contrat, la SLA et les tierces parties doivent démontrer soit

no contractual term existed or could be breached. In my view, they have done neither. As I discuss below, the plaintiffs have pleaded everything necessary to sustain a claim of breach of contract in this case. I begin by reviewing the plaintiffs' statement of claim more broadly before turning to the breach of contract claim.

[92] The plaintiffs allege that a disproportionate number of VLT gamblers have become addicted to gambling and are the source of a disproportionately large share of ALC's VLT revenues in the province. According to the pleadings, in Newfoundland and Labrador, 9.7 percent of VLT players are at moderate risk of problem gambling and an additional 8.6 percent are problem gamblers, compared to a problematic gambling rate of only about 3 percent for other forms of gambling. The plaintiffs have not pleaded that either of the representative plaintiffs are problem gamblers.

[93] The statement of claim also alleges that VLTs are deceptive in that both the mechanics of the game and the odds of winning are concealed. The VLTs are said to have asymmetrical virtual reels that are programmed to weight the distribution of symbols so that the visual reels give a false impression of the odds of winning. The plaintiffs also allege that the machines include a "stop" button that creates the illusion of control over the outcome, but is deceitful in that it provides no such control: in reality, the outcome is based on a random number generator. The pleadings further state that ALC knows or ought to know of the deceptive nature of VLTs and that these deceptive design features can be eliminated such that VLTs become a reasonably safe form of gambling and generate a reasonable stream of profit.

qu'un fait nécessaire n'est pas allégué, soit qu'il existe un motif d'ordre juridique pour lequel aucune condition contractuelle n'existait ou ne pouvait être violée. À mon avis, elles n'ont fait ni l'un ni l'autre. Comme je l'explique plus loin, les demandeurs ont fait valoir tous les éléments nécessaires pour étayer une demande fondée sur la violation de contrat en l'espèce. J'examine d'abord la déclaration des demandeurs de façon plus générale avant d'aborder la demande fondée sur la violation de contrat.

[92] Les demandeurs soutiennent qu'un nombre disproportionné de joueurs d'ALV ont développé une dépendance au jeu et sont la source d'une part disproportionnellement grande des revenus que la SLA tire des ALV dans la province. Selon les actes de procédure, à Terre-Neuve-et-Labrador, 9,7 p. 100 des joueurs d'ALV courent un risque modéré de devenir des joueurs à problèmes et un autre 8,6 p. 100 sont des joueurs à problèmes, en comparaison à un taux de jeu problématique de seulement 3 p. 100 environ pour les autres formes de jeu de hasard. Les demandeurs n'ont pas fait valoir que l'un ou l'autre des représentants des demandeurs est un joueur à problèmes.

[93] De plus, les demandeurs affirment dans leur déclaration que les ALV sont trompeurs en ce sens que le fonctionnement du jeu de même que les probabilités de gagner sont tenus secrets. Les ALV seraient munis de rouleaux virtuels asymétriques programmés pour pondérer la distribution de symboles de sorte que les rouleaux visuels donnent une fausse impression des probabilités de gagner. Les demandeurs soutiennent aussi que les appareils sont munis d'un bouton d'arrêt qui crée l'illusion de contrôle sur le résultat, mais qui est trompeur en ce qu'il ne procure pas un tel contrôle : en réalité, le résultat est fondé sur un générateur de numéros aléatoires. De plus, les demandeurs font valoir dans les actes de procédure que la SLA connaît ou devrait connaître la nature trompeuse des ALV et que ces caractéristiques de conception trompeuses peuvent être éliminées de sorte que les ALV soient une forme relativement sûre de jeu et représentent une source raisonnable de profits.

[94] Turning to the breach of contract claim, the plaintiffs allege that there was a contract between the parties "to provide a safe, interactive and entertaining way to play games of chance with the opportunity to win small cash prizes in exchange for small frequent cash bets" (Statement of Claim, at para. 46). Given the absence of a written contract between the parties, their claim rests on the existence of an implied contract. The plaintiffs have pleaded that ALC breached some of the contract's terms.

[95] The first implied term is a warranty that the VLTs were of merchantable quality and fit for use — that they were not inherently dangerous. ALC is alleged to have breached this term by "designing, testing, researching, formulating, developing, manufacturing or altering, producing, labeling, advertising, promoting, distributing and/or selling" VLTs that were "inherently dangerous to users" (Statement of Claim, at para. 47). The plaintiffs allege that ALC knew or ought to have known using VLTs would lead to dependency and addiction. In the alternative, the plaintiffs state that ALC breached a second implied contractual term: to use reasonable care and skill in its provision of VLT gaming. The plaintiffs plead that a necessary incident of this second implied term was that ALC owed the plaintiff class a duty to warn of any inherent danger in the consumption of the games and to satisfy itself of the safety of the games, which they allege ALC did not do. Finally, the plaintiffs allege that ALC breached an implied term of good faith.

[96] In this case, the plaintiffs have pleaded the nature of the contract between the parties, the terms they say are implied, and the manner in which ALC breached the contract between them. The existence and breach of these implied terms are thus matters that would usually be left for trial. Indeed, as *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*,

[94] Quant à la demande fondée sur la violation de contrat, les demandeurs affirment qu'il existait entre les parties un contrat [TRADUCTION] « ayant pour objet d'offrir une façon sûre, interactive et divertissante de jouer à des jeux de hasard donnant la possibilité de gagner de petits lots en argent en contrepartie de petites mises d'argent fréquentes » (déclaration, par. 46). En raison de l'absence de contrat écrit entre les parties, leur demande repose sur l'existence d'un contrat implicite. Selon les demandeurs, la SLA a violé certaines conditions du contrat.

[95] La première condition implicite est une garantie que les ALV étaient de qualité marchande et propres à être utilisés — c'est-à-dire qu'ils n'étaient pas intrinsèquement dangereux. La SLA aurait violé cette condition par ses activités [TRADUCTION] « de conception, de mise à l'essai, de recherche, de formulation, de mise au point, de fabrication ou de modification, de production, d'étiquetage, de publicité, de promotion, de distribution et/ou de vente » ayant pour objet des ALV qui étaient « intrinsèquement dangereux pour les utilisateurs » (déclaration, par. 47). Les demandeurs soutiennent que la SLA savait ou aurait dû savoir que l'utilisation des ALV mènerait à une dépendance et à une accoutumance. Subsidiairement, les demandeurs affirment que la SLA a violé une deuxième condition contractuelle implicite, à savoir celle de faire preuve de compétence et de diligence raisonnables dans la fourniture de jeux sur ALV. Selon les demandeurs, un élément accessoire nécessaire découle de cette deuxième condition implicite, soit que la SLA avait envers le groupe de demandeurs une obligation de mise en garde contre tout danger inhérent à la consommation des jeux et de s'assurer de la sécurité des jeux, obligation dont la SLA ne se serait pas acquittée selon eux. Enfin, les demandeurs soutiennent que la SLA aurait violé une condition implicite d'agir de bonne foi.

[96] En l'espèce, les demandeurs ont invoqué la nature du contrat entre les parties, les conditions qu'ils affirment être implicites et la manière dont la SLA aurait violé le contrat conclu entre eux. L'existence et la violation de ces conditions implicites constituent donc des questions qui feraient habituellement l'objet d'un procès. De fait, comme

[1999] 1 S.C.R. 619, confirmed, implied terms in a contract may be inferred

based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed" . . . .

(para. 27, quoting *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711, at p. 775.)

[97] This is the most commonly invoked manner of inferring the existence of implied terms in a contract and requires a factual determination based on the evidence adduced in a particular case. These terms are thus often referred to as being "implied in fact", and the existence of such a term in a contract is a question of fact that must be made out at trial (G. R. Hall, *Canadian Contractual Interpretation Law* (3rd ed. 2016), at pp. 176-78).

[98] The third parties, however, submit that the parties would have been precluded from implying these contractual terms because ALC, one of the parties to the alleged contract, is a public regulator. They submit that the contract here is simply the right to play a VLT game that has been approved by ALC as a regulator, whose authority cannot be limited or fettered by implying terms in the contract of play.

[99] I see no reason to find at this early stage that the terms the plaintiffs allege are implied in fact are unavailable at law. Without deciding whether ALC was acting in its capacity as a natural person in relation to its VLT operations, I note that ALC has authority to enter into contracts given that it has the capacity, rights, powers, and privileges of a natural person (*CBCA*, s. 15(1)). On a motion to

l'a confirmé la Cour dans *M.J.B. Enterprises Ltd. c. Construction de défense (1951) Ltée*, [1999] 1 R.C.S. 619, il peut y avoir introduction dans un contrat de conditions implicites

fondées sur l'existence d'une intention présumée des parties, soit la condition implicite dont l'introduction est nécessaire « pour donner à un contrat de l'efficacité commerciale ou pour permettre de quelque autre manière de satisfaire au critère de "l'observateur objectif", [condition] dont les parties diraient, si on leur posait la question, qu'elles avaient évidemment tenu son inclusion pour acquise » . . .

(par. 27, citant *Société hôtelière Canadien Pacifique Ltée c. Banque de Montréal*, [1987] 1 R.C.S. 711, p. 775.)

[97] Il s'agit de la manière la plus couramment invoquée d'inférer l'existence de conditions implicites dans un contrat, et elle exige une détermination factuelle fondée sur la preuve présentée dans une affaire donnée. Par conséquent, on dit souvent de ces conditions qu'elles sont « implicites en fait », et l'existence d'une telle condition dans un contrat est une question de fait qui doit être établie au procès (G. R. Hall, *Canadian Contractual Interpretation Law* (3e éd. 2016), p. 176-178).

[98] Les tierces parties soutiennent toutefois que les parties n'auraient pas pu incorporer implicitement ces conditions contractuelles parce que la SLA, une des parties au contrat allégué, est un organisme de réglementation public. Ils soutiennent que le contrat en l'espèce vise simplement le droit de jouer à un jeu sur ALV qui a été approuvé par la SLA en sa qualité d'organisme de réglementation, dont les pouvoirs ne peuvent être limités ou entravés par l'incorporation de conditions implicites dans le contrat de jeu.

[99] Je ne vois aucune raison de conclure, à ce stade préliminaire, que les conditions que les demandeurs prétendent être implicites en fait ne peuvent pas être invoquées en droit. Sans trancher la question de savoir si la SLA agissait en sa qualité de personne physique en lien avec ses opérations liées aux ALV, je remarque que la SLA est habilitée à conclure des contrats, étant donné qu'elle a la capacité, les

strike, it is not enough for the third parties to point in broad strokes to ALC's role as a "regulator" to ground a legal impediment to having implied these contractual terms.

[100] Indeed, the third parties have not pointed to anything in the regulatory scheme that would clearly preclude the terms the plaintiffs allege are implied when ALC sells games to playing members of the public. Under s. 5 of the *Lotteries Act*, the Lieutenant-Governor in Council is authorized to make regulations in relation to lottery schemes, including with respect to the amounts and values of prizes, the terms and conditions attached to prizes, and the consideration to be paid or given to secure a chance to win prizes (s. 5(d) and (e)). Section 8 of the *Video Lottery Regulations* delineates some of these conditions and prohibits operation of VLTs that do not comply with certain requirements — including the size of wagers, a player's monetary exposure in one play, and the minimum and maximum payout of prices for money accepted (between 80 percent and 96 percent). While some of the rules of the game are thus delineated in this regulatory scheme, the scheme leaves room to imply terms going to the core of the plaintiffs' grievance — concealment of the mechanics of the game, the odds of winning, and the asymmetrical visual reels that give players a false illusion of control.

[101] In other words, at this preliminary stage, I see nothing in the regulatory scheme that would preclude the regular application of contract law or that would conflict with a contractual term relating to how ALC ensures the safety and transparency of the games it offers to the public. Further, it is not plain and obvious that implying the terms alleged by the plaintiffs would improperly touch on or fetter ALC's authority. Under the *Video Lottery Regulations*, ALC is authorized to approve video lotteries (that is, a scheme or enterprise of one or more VLTs) and their sites and advertisement (ss. 2(e), 3, 5, and 10); the manufacture, supply, and operation of VLTs (ss. 4 and 6); and

droits, pouvoirs et privilèges d'une personne physique (*LCSA*, par. 15(1)). Dans le cadre d'une requête en radiation, il ne suffit pas que les tierces parties invoquent de façon générale le rôle de la SLA en tant qu'« organisme de réglementation » pour établir l'existence d'un obstacle juridique à l'incorporation implicite de ces conditions contractuelles.

[100] De fait, les tierces parties n'ont pas renvoyé à quoi que ce soit dans le régime réglementaire qui écarterait manifestement les conditions que les demandeurs prétendent être implicites lorsque la SLA vend des jeux aux membres du public joueurs. En vertu de l'art. 5 de la *Lotteries Act*, le lieutenant-gouverneur en conseil est autorisé à prendre des règlements en lien avec les loteries, notamment en ce qui a trait aux montants et aux valeurs des lots, aux modalités et conditions qui s'y rattachent et à la contrepartie à payer ou à donner pour obtenir une chance de gagner des lots (al. 5(d) et (e)). L'article 8 du *Video Lottery Regulations* énonce quelques-unes de ces conditions et interdit l'exploitation d'ALV qui ne respectent pas certaines exigences — y compris le montant des mises, le risque pécuniaire encouru par un joueur sur un jeu et les montants minimal et maximal des lots par rapport à l'argent accepté (entre 80 p. 100 et 96 p. 100). Bien que certaines règles du jeu soient ainsi énoncées dans ce régime réglementaire, celui-ci laisse place à l'incorporation de conditions implicites qui touchent à l'essentiel de ce dont se plaignent les demandeurs, à savoir la dissimulation du fonctionnement du jeu, des probabilités de gagner et des rouleaux visuels asymétriques qui donnent aux joueurs une illusion de contrôle.

[101] Autrement dit, à ce stade préliminaire, je ne vois rien dans le régime réglementaire qui empêcherait l'application régulière du droit des contrats ou qui soit incompatible avec une condition contractuelle liée à la façon dont la SLA assure la sécurité et la transparence des jeux qu'elle offre au public. Qui plus est, il n'est pas évident et manifeste que l'incorporation de conditions implicites qu'allèguent les demandeurs toucherait ou entraverait indûment le pouvoir de la SLA. En vertu du *Video Lottery Regulations*, la SLA est autorisée à approuver les loteries vidéo (c'est-à-dire un système ou une entreprise constitués d'un ou de plusieurs ALV) et

the operation of video lottery games (s. 4). However, any impact that the alleged implied terms might have on ALC's authority, and the interaction, if any, of such a contract with fettering principles, is best determined with the benefit of a full and developed factual record (see *Andrews v. Canada (Attorney General)*, 2014 NLCA 32, 354 Nfld. & P.E.I.R. 42; *Levy v. British Columbia (Crime Victim Assistance Program)*, 2018 BCCA 36, 7 B.C.L.R. (6th) 84). This is particularly so given the public policy issues at play, involving the implication of terms aimed at protecting public safety by preventing, or warning of, the danger of addiction.

[102] It is thus not plain and obvious that the contractual terms alleged are unavailable at law. I would therefore conclude that the plaintiffs' statement of claim pleads a contractual term and a breach of that term — the necessary elements for a breach of contract claim.

(2) Available Remedies For Breach of Contract

[103] Brown J. concludes that the cause of action for breach of contract, as framed, must fail because it is plain and obvious that there are no available remedies for this claim. As I elaborate below, I cannot agree that there is no valid cause of action for breach of contract on the basis that there is *no* available remedy. In my view, there are several remedies that are open to the plaintiffs on their pleadings, including nominal damages, declaratory relief, disgorgement, and punitive damages.

(a) *Nominal Damages or Declaratory Relief*

[104] Unlike a claim in negligence, loss is not an essential element of a cause of action for breach of

leurs emplacements et la publicité faite à leur égard (al. 2(e) et art. 3, 5 et 10); la fabrication, la fourniture et l'exploitation d'ALV (art. 4 et 6); et l'exploitation de jeux de loterie vidéo (art. 4). Toutefois, il est préférable que la question de l'incidence éventuelle des conditions implicites alléguées sur le pouvoir de la SLA et celle de l'interaction, s'il en est, entre un tel contrat et les principes constituant une entrave, soient tranchées en fonction d'un dossier factuel complet et étoffé (voir *Andrews c. Canada (Attorney General)*, 2014 NLCA 32, 354 Nfld. & P.E.I.R. 42; *Levy c. British Columbia (Crime Victim Assistance Program)*, 2018 BCCA 36, 7 B.C.L.R. (6th) 84). Cela est d'autant plus vrai compte tenu des questions d'ordre public en jeu, soulevant l'introduction de conditions implicites qui visent à protéger la sécurité du public par l'élimination du risque de dépendance ou la mise en garde contre ce risque.

[102] Il n'est donc pas évident et manifeste que les modalités contractuelles alléguées sont inexistantes en droit. Par conséquent, je suis d'avis de conclure que les demandeurs, dans leur déclaration, invoquent une modalité contractuelle et une violation de celle-ci — les éléments nécessaires d'une demande fondée sur la violation de contrat.

(2) Réparations possibles pour violation de contrat

[103] Le juge Brown conclut que la cause d'action pour violation de contrat, telle que formulée, est vouée à l'échec car il est évident et manifeste qu'il n'y a aucune réparation possible pour cette demande. Comme je vais l'expliquer, je ne peux convenir qu'il n'y a pas de cause d'action valable pour violation de contrat du fait qu'il n'y a *aucune* réparation possible. À mon avis, plusieurs réparations pourraient être accordées aux demandeurs au vu de leurs actes de procédure, notamment des dommages-intérêts symboliques, un jugement déclaratoire, la restitution des gains illicites et les dommages-intérêts punitifs.

a) *Dommages-intérêts symboliques ou jugement déclaratoire*

[104] Contrairement à une demande fondée sur la négligence, la perte n'est pas un élément essentiel

contract. In my view, there is a basis for an action for breach of contract and a basis to obtain remedies against ALC even in the absence of pleadings of specific personal loss. For example, a court finding breach of contract may make binding declarations of right, whether or not any consequential relief is or could be claimed, and whether or not a declaration was pleaded as relief sought (*Rules of the Supreme Court, 1986*, r. 7.16; see also L. Sarna, *The Law of Declaratory Judgments* (4th ed. 2016), at pp. 5-6; *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, at pp. 647-48).

[105] In addition, nominal damages may be given in all cases of breach of contract as a manner of "affirming . . . that there is an infraction of a legal right" (*Owners of the Steamship "Mediana" v. Owners, Master and Crew of the Lightship "Comet"*, [1900] A.C. 113 (H.L.), at p. 116, per Lord Halsbury L.C.). Nominal damages are thus always available for causes of action, like breach of contract, that do not require proof of loss, even if they are not pleaded (see, e.g., *Place Concorde East Ltd. Partnership v. Shelter Corp. of Canada Ltd.* (2006), 211 O.A.C. 141, at paras. 56 and 75-78; *Saskatchewan Government Insurance v. Wilson*, 2012 SKCA 106, 405 Sask. R. 8, at para. 13; J. Edelman, *McGregor on Damages* (20th ed. 2018), at pp. 406-7; M. Gannage, "Nominal Damages for Breach of Contract in Canada" (2011), 69 *Advocate* 833, at p. 834; J. Cassels and E. Adjin-Tettey, *Remedies: The Law of Damages* (3rd ed. 2014), at p. 355). Assuming that the plaintiffs can ultimately prove the existence of a contract and its breach by ALC, they may be entitled to an award of nominal damages.

[106] Litigants have the right to pursue reasonable causes of action to vindicate their rights. In my view, the plaintiffs' breach of contract claim is a reasonable cause of action. As it is actionable without proof of

d'une cause d'action pour violation de contrat. À mon avis, il y a matière à action en justice pour violation de contrat et matière à obtention de réparations contre la SLA même si les actes de procédure ne font pas état d'une perte personnelle en particulier. Par exemple, un tribunal qui conclut à la violation de contrat pourra faire des déclarations de droit obligatoires, qu'un redressement en conséquence soit ou puisse être demandé ou non, et qu'un jugement déclaratoire soit demandé ou non à titre de réparation (*Rules of the Supreme Court, 1986*, art. 7.16; voir aussi L. Sarna, *The Law of Declaratory Judgments* (4e éd. 2016), p. 5-6; *Assoc. des femmes autochtones du Canada c. Canada*, [1994] 3 R.C.S. 627, p. 647-648).

[105] De plus, des dommages-intérêts symboliques peuvent être accordés dans tous les cas de violation de contrat comme manière [TRADUCTION] « d'affirmer [. . .] qu'il y a atteinte à un droit reconnu par la loi » (*Owners of the Steamship "Mediana" c. Owners, Master and Crew of the Lightship "Comet"*, [1900] A.C. 113 (H.L.), p. 116, le lord chancelier Halsbury). Par conséquent, les dommages-intérêts symboliques peuvent toujours être accordés pour des causes d'action, comme la violation de contrat, qui ne nécessitent pas une preuve de perte, même s'ils ne sont pas demandés dans les actes de procédure (voir, p. ex., *Place Concorde East Ltd. Partnership c. Shelter Corp. of Canada Ltd.* (2006), 211 O.A.C. 141, par. 56 et 75-78; *Saskatchewan Government Insurance c. Wilson*, 2012 SKCA 106, 405 Sask. R. 8, par. 13; J. Edelman, *McGregor on Damages* (20e éd. 2018), p. 406-407; M. Gannage, « Nominal Damages for Breach of Contract in Canada » (2011), 69 *Advocate* 833, p. 834; J. Cassels et E. Adjin-Tettey, *Remedies : The Law of Damages* (3e éd. 2014), p. 355). À supposer que les demandeurs puissent, au final, prouver l'existence d'un contrat et la violation de celui-ci par la SLA, ils pourraient avoir droit à des dommages-intérêts symboliques.

[106] Les plaideurs ont le droit de faire valoir des causes d'action raisonnables pour défendre leurs droits. À mon avis, la demande fondée sur la violation de contrat présentée par les demandeurs est une

loss, it always necessarily implies nominal damages. This alone precludes striking the claim.

(b) *Disgorgement of Profits*

[107] While I agree with Brown J. that disgorgement is not an independent *cause of action* and has no reasonable chance of success as such, it does not follow that disgorgement cannot be pleaded as a *remedy* for breach of contract. As I will explain, disgorgement can be an appropriate remedy for breach of contract, though whether it is appropriate in this case is a matter for trial that cannot be resolved on the pleadings alone.

[108] The customary remedy for a breach of contract is compensation, usually measured in the form of expectation damages (*Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601, at para. 26; L. D. Smith, "Disgorgement of the Profits of Breach of Contract: Property, Contract and 'Efficient Breach'" (1995), 24 *Can. Bus. L.J.* 121, at p. 123; *Asamera Oil Corp. Ltd. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633, at p. 645). This means the plaintiff is generally entitled "to be placed in the same situation, with respect to damages, as if the contract had been performed" (*Robinson v. Harman* (1848), 1 Ex. 850, at p. 855; see also *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3, at para. 27).

[109] Nevertheless, despite this usual approach, the compensation principle does not always apply; there are well-established exceptions to that principle and other forms of relief can be appropriate, such as specific performance of the contract or an injunction (*IBM Canada Limited v. Waterman*, 2013 SCC 70, [2013] 3 S.C.R. 985, at para. 36; *Semelhago*

cause d'action raisonnable. Puisqu'elle donne ouverture à une action sans preuve de perte, elle implique toujours, nécessairement, des dommages-intérêts symboliques. Ce fait à lui seul exclut la radiation de la demande.

b) *Restitution des gains illicites*

[107] Bien que je sois d'accord avec le juge Brown pour dire que la restitution des gains illicites n'est pas une *cause d'action* indépendante et n'a aucune chance raisonnable de succès à ce titre, il ne s'ensuit pas que la restitution des gains illicites ne peut pas être plaidée en tant que *réparation* pour violation de contrat. Comme je l'expliquerai, la restitution des gains illicites peut être une réparation appropriée en cas de violation de contrat, même si la question de savoir si elle est appropriée en l'espèce doit être tranchée au procès, et ne peut l'être au vu des actes de procédure à eux seuls.

[108] La réparation habituelle pour violation de contrat est l'indemnisation, généralement évaluée sous forme de dommages-intérêts en fonction de la perte du profit escompté (*Banque d'Amérique du Canada c. Société de Fiducie Mutuelle*, 2002 CSC 43, [2002] 2 R.C.S. 601, par. 26; L. D. Smith, « Disgorgement of the Profits of Breach of Contract : Property, Contract and "Efficient Breach" » (1995), 24 *Rev. can. dr. comm.* 121, p. 123; *Asamera Oil Corp. Ltd. c. Sea Oil & General Corp.*, [1979] 1 R.C.S. 633, p. 645). Cela signifie que le demandeur a généralement droit à des « dommages-intérêts [qui le] place[nt] dans la situation où [il] se serait trouvé [. . .] si le contrat avait été exécuté » (*Robinson c. Harman* (1848), 1 Ex. 850, p. 855; voir aussi *Fidler c. Sun Life du Canada, compagnie d'assurance-vie*, 2006 CSC 30, [2006] 2 R.C.S. 3, par. 27).

[109] Néanmoins, malgré cette approche habituelle, le principe d'indemnisation ne s'applique pas toujours; il existe des exceptions bien établies à ce principe et d'autres formes de réparation peuvent être appropriées, comme l'exécution en nature du contrat ou l'injonction (*IBM Canada Limitée c. Waterman*, 2013 CSC 70, [2013] 3 R.C.S. 985,

v. Paramadevan, [1996] 2 S.C.R. 415, at para. 14; R. J. Sharpe, *Injunctions and Specific Performance* (loose-leaf), at p. 2-1).

[110] And, in some cases, disgorgement of a defendant's profits can be an appropriate remedy for breach of contract. Disgorgement is a measure of relief based solely upon the defendant's profit rather than the plaintiff's loss (Edelman (2018), at pp. 472-73). It is an exceptional remedy, available where a plaintiff has shown that the ordinary remedies of contract law are inadequate to protect and vindicate their contractual right.

[111] In *Attorney General v. Blake*, [2001] 1 A.C. 268 (H.L.), the House of Lords ordered disgorgement of profit as a remedy for breach of contract. In 1989, George Blake, a former member of the United Kingdom's Secret Intelligence Service (and Soviet spy), entered into a contract to publish a book of state secrets that he had undertaken never to reveal, thereby breaching his contractual undertaking. By the time of publication, however, the information was not confidential and its disclosure caused no loss to the Crown. There was, therefore, nothing to compensate. Compensatory damages could neither vindicate the government's contractual right nor deter and denounce the wrong committed by the defendant.

[112] The majority of the House of Lords concluded that disgorgement of the profits gained from that publishing contract — some £90,000 — was the appropriate remedy in all the circumstances for the breach of the undertaking. In determining that disgorgement was the appropriate remedy, Lord Nicholls explained that:

Normally the remedies of damages, specific performance and injunction, coupled with the characterisation of some contractual obligations as fiduciary, will provide an adequate response to a breach of contract. It will be only in exceptional cases, where those remedies are inadequate,

par. 36; *Semelhago c. Paramadevan*, [1996] 2 R.C.S. 415, par. 14; R. J. Sharpe, *Injunctions and Specific Performance* (feuilles mobiles), p. 2-1).

[110] Par ailleurs, dans certaines situations, la restitution des gains illicites du défendeur peut être une réparation appropriée en cas de violation de contrat. La restitution des gains illicites est une mesure de redressement fondée uniquement sur le profit du défendeur, plutôt que sur la perte du demandeur (Edelman (2018), p. 472-473). Il s'agit d'une réparation exceptionnelle, qui peut être accordée lorsqu'un demandeur démontre que les réparations ordinaires du droit des contrats sont inadéquates pour protéger et défendre son droit contractuel.

[111] Dans l'arrêt *Attorney General c. Blake*, [2001] 1 A.C. 268 (H.L.), la Chambre des lords a ordonné la restitution des gains illicites à titre de réparation pour une violation de contrat. En 1989, George Blake, ancien membre du service secret du renseignement du Royaume-Uni (et espion soviétique), a conclu un contrat de publication d'un livre contenant des secrets d'État qu'il s'était engagé à ne jamais révéler, violant ainsi son engagement contractuel. Cependant, au moment de la publication, les renseignements n'étaient pas confidentiels et leur divulgation ne causait aucun préjudice à Sa Majesté. Il n'y avait donc rien à indemniser. Des dommages-intérêts compensatoires ne pouvaient ni défendre le droit contractuel du gouvernement, ni dissuader et dénoncer la faute commise par le défendeur.

[112] Les juges majoritaires de la Chambre des lords ont conclu que la restitution des gains illicites tirés de ce contrat de publication — environ 90 000 £ — était la réparation appropriée eu égard à l'ensemble des circonstances pour la violation de l'engagement. En statuant que la restitution des gains illicites était la réparation appropriée, le lord Nicholls a expliqué ce qui suit :

[TRADUCTION] Normalement, les réparations que sont les dommages-intérêts, l'exécution en nature et l'injonction, conjuguées à la qualification de certaines obligations contractuelles en tant qu'obligations fiduciaires, fourniront une réponse adéquate à une violation de contrat. Ce n'est

that any question of accounting for profits will arise. [p. 285]

[113] Lord Nicholls held that "[n]o fixed rules can be prescribed" in this analysis and stressed the importance of having regard to all the circumstances, including:

(a) the subject matter of the contract;

(b) the purpose of the contractual provision which has been breached;

(c) the circumstances in which the breach occurred;

(d) the consequences of the breach; and

(e) the circumstances in which relief is being sought.

[114] The majority of the House of Lords concluded that disgorgement was appropriate in the circumstances, including that: the Attorney General had a legitimate interest in preventing Blake from profiting from the disclosure of confidential information; Blake had a quasi-fiduciary obligation to the intelligence service; Blake's profits indirectly stemmed from his breaches in the 1950s (which brought him notoriety leading to the book deal); and allowing agents a financial incentive to violate their undertaking would endanger the effectiveness of the intelligence service (pp. 286-87).

[115] While *Blake* set a standard for disgorgement in "exceptional circumstances", some have emphasized the need to further circumscribe and better reconcile the remedy with private law principles (see, e.g., A. Swan, J. Adamski and A. Y. Na, *Canadian Contract Law* (4th ed. 2018), at p. 582; S. M. Waddams, "Breach of Contract and the Concept of Wrongdoing" (2000), 12 *S.C.L.R.* (2d) 1, at pp. 7-13). The disgorgement remedy can appear more difficult to justify under traditional contract principles than compensatory or restitutionary damages, as the measure of relief is not based on what was been transferred or subtracted from the claimant

que dans des situations exceptionnelles, lorsque ces réparations sont inadéquates, que se posera la question de la remise des profits. [p. 285]

[113] Le lord Nicholls a statué [TRADUCTION] « [qu'a]ucune règle fixe ne peut être prescrite » dans cette analyse et il a souligné l'importance de tenir compte de l'ensemble des circonstances, y compris :

a) l'objet du contrat;

b) l'objet de la clause contractuelle qui a fait l'objet de la violation;

c) les circonstances dans lesquelles la violation s'est produite;

d) les conséquences de cette violation;

e) les circonstances dans lesquelles la réparation est demandée.

[114] Les juges majoritaires de la Chambre des lords ont conclu que la restitution des gains illicites était appropriée dans les circonstances, notamment les suivantes : le procureur général avait un intérêt légitime à empêcher M. Blake de tirer profit de la divulgation de renseignements confidentiels; M. Blake avait une obligation quasi-fiduciaire envers le service du renseignement; les profits de M. Blake provenaient indirectement des violations qu'il avait commises dans les années 1950 (qui lui ont apporté la notoriété ayant mené au contrat de publication); et le fait de donner aux agents un incitatif financier à violer leur engagement aurait mis en péril l'efficacité du service du renseignement (p. 286-287).

[115] Bien que l'arrêt *Blake* ait établi une norme ouvrant droit à la restitution des gains illicites dans des « circonstances exceptionnelles », certains ont souligné la nécessité de circonscrire davantage la réparation et de mieux la concilier avec les principes de droit privé (voir, p. ex., A. Swan, J. Adamski et A. Y. Na, *Canadian Contract Law* (4e éd. 2018), p. 582; S. M. Waddams, « Breach of Contract and the Concept of Wrongdoing » (2000), 12 *S.C.L.R.* (2d) 1, p. 7-13). La réparation de restitution des gains illicites peut paraître plus difficile à justifier au regard des principes contractuels traditionnels que les dommages-intérêts compensatoires ou restitutoires,

(J. Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (2002), at p. 81).

[116] But non-compensatory remedies for breach of contract are not inherently contrary to private law principles. For example, punitive damages may be awarded for breach of contract, even though they bear no relation to what the plaintiff should receive in compensation (see, e.g., *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 92). Thus, the availability of punitive damages for breach of contract confirms that gain-based remedies, such as disgorgement, are compatible with the existing scheme of remedies for private wrongs (R. J. Sharpe, "Commercial Law Damages: Market Efficiency or Regulation of Behaviour?", in The Law Society of Upper Canada, ed., *Special Lectures 2005: The Modern Law of Damages* (2006), 327, at p. 346).

[117] Indeed, it has been posited that the existence of disgorgement as a remedy is primarily justified by the need to deter wrongful conduct, underpinned by the recurring principle of contract law that a wrongdoer should not be permitted to profit from their wrong (Edelman (2002), at pp. 81-83; K. Barnett, *Accounting for Profit for Breach of Contract: Theory and Practice* (2012), at pp. 12 and 26; *Attorney-General v. Observer Ltd.*, [1990] 1 A.C. 109 (H.L.), at p. 286; J. D. McCamus, "Disgorgement for Breach of Contract: A Comparative Perspective" (2003), 36 *Loy. L.A. L. Rev.* 943, at p. 945). Although compensatory damages will often help to achieve deterrence of wrongful conduct (*Royal Bank of Canada v. W. Got & Associates Electric Ltd.*, [1999] 3 S.C.R. 408, at para. 28), they will not always be adequate or appropriate in the circumstances of the breach. And since disgorgement awards are limited by the amount of profit, the measure of the award implicitly effects deterrence and is "dictated by the minimum amount necessary to make the wrong unprofitable" (Edelman (2002), at p. 83).

puisque l'évaluation du redressement n'est pas fondée sur ce qui a été transféré ou soustrait du demandeur (J. Edelman, *Gain-Based Damages : Contract, Tort, Equity and Intellectual Property* (2002), p. 81).

[116] Toutefois, les réparations de nature non compensatoire pour violation de contrat ne sont pas intrinsèquement contraires aux principes de droit privé. Par exemple, des dommages-intérêts punitifs peuvent être accordés pour violation de contrat, même s'ils n'ont pas de lien avec ce que le demandeur est fondé à recevoir comme compensation (voir, p. ex., *Whiten c. Pilot Insurance Co.*, 2002 CSC 18, [2002] 1 R.C.S. 595, par. 92). Ainsi, la possibilité d'accorder des dommages-intérêts punitifs pour violation de contrat confirme que les réparations fondées sur les gains réalisés, comme la restitution des gains illicites, sont compatibles avec le système actuel de réparations pour les fautes de droit privé (R. J. Sharpe, « Commercial Law Damages : Market Efficiency or Regulation of Behaviour? », The Law Society of Upper Canada, dir., *Special Lectures 2005 : The Modern Law of Damages* (2006), 327, p. 346).

[117] De fait, certains considèrent que l'existence de la restitution des gains illicites en tant que réparation se justifie principalement par la nécessité de dissuader la conduite fautive, que sous-tend le principe récurrent du droit des contrats voulant que l'auteur d'une faute ne devrait pas pouvoir profiter de sa propre faute (Edelman (2002), p. 81-83; K. Barnett, *Accounting for Profit for Breach of Contract : Theory and Practice* (2012), p. 12 et 26; *Attorney-General c. Observer Ltd.*, [1990] 1 A.C. 109 (H.L.), p. 286; J. D. McCamus, « Disgorgement for Breach of Contract : A Comparative Perspective » (2003), 36 *Loy. L.A. L. Rev.* 943, p. 945). Bien que les dommages-intérêts compensatoires aident souvent à créer un effet dissuasif à l'égard de la conduite fautive (*Banque Royale du Canada c. W. Got & Associates Electric Ltd.*, [1999] 3 R.C.S. 408, par. 28), ils ne seront pas toujours adéquats ou appropriés eu égard aux circonstances de la violation. De plus, puisque les réparations de restitution des gains illicites se limitent au montant du profit, la portée de la réparation a implicitement un effet de dissuasion et est [TRADUCTION] « dictée par le montant minimal nécessaire pour rendre la faute non profitable » (Edelman (2002), p. 83).

[118] Further, it is clear that disgorgement awards are not limited to situations in which they serve a compensatory purpose. While the United Kingdom Supreme Court has recognized that some remedies that appear to be gain-based serve compensatory purposes (*One Step (Support) Ltd. v. Morris-Garner*, [2018] UKSC 20, [2018] 3 All E.R. 659, at para. 91), the remedy in *Blake* cannot be described as compensatory. The facts of *Blake* make clear that an award of disgorgement may be available without the claimant's having suffered a loss to be compensated, and Canadian courts have suggested that disgorgement may be available where "expectation damages are not readily quantifiable, or where the circumstances of the case call for a different measure of damages to provide an effective remedy" (*Nunavut Tunngavik Inc. v. Canada (Attorney General)*, 2014 NUCA 2, 580 A.R. 75, at para. 85 (emphasis added)). Compensatory principles of contract law do not explain why a disgorgement remedy may be necessary to vindicate or protect a contractual right in a particular case.

[118] De plus, il est clair que les réparations de restitution des gains illicites ne se limitent pas aux situations où elles servent une fin compensatoire. Bien que la Cour suprême du Royaume-Uni ait reconnu que certaines réparations qui semblent fondées sur les gains réalisés servent des fins compensatoires (*One Step (Support) Ltd. c. Morris-Garner*, [2018] UKSC 20, [2018] 3 All E.R. 659, par. 91), la réparation dont il est question dans l'arrêt *Blake* ne saurait être qualifiée de compensatoire. Il ressort clairement des faits dans l'arrêt *Blake* qu'une réparation de restitution des gains illicites peut être ordonnée sans que le demandeur ait subi une perte devant être indemnisée, et les tribunaux canadiens ont laissé entendre que la restitution des gains illicites pouvait être ordonnée lorsque [TRADUCTION] « les dommages-intérêts en fonction de la perte du profit escompté ne sont pas facilement quantifiables, ou lorsque les circonstances de l'affaire commandent une évaluation différente des dommages-intérêts pour accorder une réparation efficace » (*Nunavut Tunngavik Inc. c. Canada (Attorney General)*, 2014 NUCA 2, 580 A.R. 75, par. 85 (je souligne)). Les principes d'indemnisation du droit des contrats n'expliquent pas pourquoi une réparation de restitution des gains illicites peut être nécessaire pour défendre ou protéger un droit contractuel dans une affaire donnée.

[119] For example, although it may not support disgorgement on its own, a self-interested and deliberate breach weighs in favour of disgorgement when awarding compensatory damages alone would fail to deter wrongdoers who are "prepared to hurt somebody" because they "may well gain by doing so" (Edelman (2002), at p. 84, quoting *Cassell & Co. Ltd. v. Broome*, [1972] A.C. 1027 (H.L.), at p. 1094; see also P. Birks, "Restitutionary damages for breach of contract: *Snepp* and the fusion of law and equity" (1987), 4 *L.M.C.L.Q.* 421; American Law Institute, *Restatement of the Law, Third: Restitution and Unjust Enrichment* (2011), vol. 2, at §40).

[119] Par exemple, bien qu'elle ne puisse pas nécessairement justifier à elle seule la restitution des gains illicites, une violation intéressée et délibérée milite en faveur de la restitution des gains illicites dans les cas où l'octroi de dommages-intérêts compensatoires seulement ne dissuaderait pas les auteurs de fautes qui sont [TRADUCTION] « disposés à faire du tort à quelqu'un » parce qu'ils « pourraient bien gagner quelque chose en agissant de la sorte » (Edelman (2002), p. 84, citant *Cassell & Co. Ltd. c. Broome*, [1972] A.C. 1027 (H.L.), p. 1094; voir aussi P. Birks, « Restitutionary damages for breach of contract : *Snepp* and the fusion of law and equity » (1987), 4 *L.M.C.L.Q.* 421; American Law Institute, *Restatement of the Law, Third : Restitution and Unjust Enrichment* (2011), vol. 2, §40).

[120] Further, when calculating loss is impracticable, a narrow focus on compensation may relieve a wrongdoer from the obligation to remedy their

[120] Qui plus est, lorsque le calcul de la perte est impossible en pratique, le fait de s'en tenir uniquement à l'indemnisation peut décharger un auteur

wrong, whereas an award of disgorgement ensures that those who breach their contracts do not do so for free (see *Nunavut Tunngavik*, at paras. 85 and 88; *Esso Petroleum Co. Ltd. v. Niad Ltd.*, [2001] EWHC Ch. 458, at para. 63).

[121] And there are multiple circumstances in which a plaintiff has a legitimate interest in preventing the defendant's profit-making activity, even when they themselves may have suffered no loss. These include where the defendant expressly contracted not to do the particular thing that constituted the breach (*Chitty on Contracts*, vol. I, *General Principles* (33rd ed. 2018), at para. 26-063; *Experience Hendrix LLC v. PPX Enterprises Inc.*, [2003] EWCA Civ. 323, at paras. 30 and 36); where the defendant had a quasi-fiduciary duty to the plaintiff (*Blake*, at p. 287); and where the plaintiff's contractual right is quasi-proprietary, such as in *Blake*, where the information released by Blake "in a sense, belonged to the government" but was used for his own gain (S. Waddams, *Principle and Policy in Contract Law: Competing or Complementary Concepts?* (2011), at p. 201; see also D. Friedmann, "Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong" (1980), 80 *Colum. L. Rev.* 504).

[122] I cannot agree that it is plain and obvious that a quasi-fiduciary duty should be rejected as a factor justifying a disgorgement remedy. This Court has explicitly referred to the existence of quasi-fiduciary duties as an unresolved question and it is not appropriate to resolve that question on this motion to strike in the absence of argument (see *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, 2008 SCC 54, [2008] 3 S.C.R. 79, at para. 22). I would thus not rule out the possibility that contractual relationships based on trust, confidence, and the protection of vulnerability arising from the relationship could give rise to a disgorgement remedy even if they are not strictly fiduciary (see A. R. Sangiuliano, "A Corrective Justice Account of Disgorgement for Breach of Contract by Analogy to Fiduciary Remedies" (2016), 29 *Can. J.L. & Jur.* 149, at p. 178). In such cases, as Lord Steyn wrote

d'une faute de l'obligation de réparer le tort qu'il a causé, alors qu'une réparation de restitution des gains illicites fait en sorte que ceux qui violent leurs contrats ne le font pas impunément (voir *Nunavut Tunngavik*, par. 85 et 88; *Esso Petroleum Co. Ltd. c. Niad Ltd.*, [2001] EWHC Ch. 458, par. 63).

[121] Par ailleurs, il existe de multiples situations où un demandeur a un intérêt légitime à empêcher les activités lucratives du défendeur, même lorsqu'il n'a pas lui-même subi de perte. Ces situations comprennent le cas où le défendeur s'est engagé expressément à ne pas faire la chose qui constituait la violation (*Chitty on Contracts*, vol. 1, *General Principles* (33e éd. 2018), par. 26-063; *Experience Hendrix LLC c. PPX Enterprises Inc.*, [2003] EWCA Civ. 323, par. 30 et 36); le cas où le défendeur a une obligation quasi-fiduciaire envers le demandeur (*Blake*, p. 287); et le cas où le droit contractuel du demandeur est quasi propriétal, comme dans l'arrêt *Blake*, où les renseignements révélés par M. Blake [TRADUCTION] « appartenaient, en un sens, au gouvernement », mais ont été utilisés pour son propre gain (S. Waddams, *Principle and Policy in Contract Law : Competing or Complementary Concepts?* (2011), p. 201; voir aussi D. Friedmann, « Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong » (1980), 80 *Colum. L. Rev.* 504).

[122] Je ne peux me rallier à la thèse voulant qu'il est évident et manifeste qu'une obligation quasi-fiduciaire devrait être rejetée à titre de facteur justifiant une réparation de restitution des gains illicites. La Cour a expressément mentionné l'existence d'obligations quasi-fiduciaires en tant que question non réglée et il ne convient pas de régler cette question dans le cadre de la présente requête en radiation en l'absence d'arguments (voir *RBC Dominion Valeurs mobilières Inc. c. Merrill Lynch Canada Inc.*, 2008 CSC 54, [2008] 3 R.C.S. 79, par. 22). En conséquence, je n'écarterais pas la possibilité que des relations contractuelles fondées sur la confiance et la protection de la vulnérabilité découlant de cette relation puissent donner lieu à une réparation de restitution des gains illicites même si elles ne sont pas strictement fiduciaires (voir A. R. Sangiuliano, « A Corrective Justice Account of Disgorgement

in *Blake*, it is arguable that "[t]he reason of the rule applying to fiduciaries" may apply to the defendant (at p. 292 (emphasis added)), even if the rule itself does not.

[123] The overarching question in awarding disgorgement for breach of contract is whether, in all the circumstances, other remedies would not adequately protect or vindicate the contractual right (*Blake*, at p. 285; Edelman (2002), at pp. 154-55; Barnett, at p. 11; McCamus, at p. 961). I agree with Lord Nicholls's speech in *Blake* that when assessing whether disgorgement is appropriate, a non-exhaustive list of factors is to be preferred over a hard and fast rule. No single factor is necessarily crucial or dispositive; these considerations may work in tandem to support a disgorgement remedy (Waddams (2011), at pp. 200-201; see also *Blake*, at p. 285; *Chitty on Contracts*, at para. 26-063).

[124] The plaintiffs' pleadings in this case correspond with several factors that, if established at trial, may point to a disgorgement remedy. For example, the pleading that ALC's breach was self-interested, deliberate, and in bad faith may engage the deterrence rationale. Similarly, the plaintiffs' pleading that they were vulnerable to ALC's abuse of its power and the public trust may engage some of the values underlying fiduciary relationships, as was the case in *Blake*. The pleading that the plaintiffs' relationship with ALC engages trust, confidence, and vulnerability tends to distinguish it from a standard commercial relationship, a factor which supports recovery (see *Vercoe v. Rutland Fund Management Ltd.*, [2010] EWHC 424, at paras. 340-43).

[125] Thus, though I agree with Brown J. that disgorgement can only be awarded in exceptional

for Breach of Contract by Analogy to Fiduciary Remedies » (2016), 29 *Can. J.L. & Jur.* 149, p. 178). Dans de tels cas, comme l'a écrit le lord Steyn dans l'arrêt *Blake*, on peut soutenir qu'il est possible que [TRADUCTION] « [l]a raison qui sous-tend la règle applicable aux fiduciaires » s'applique au défendeur (p. 292 (je souligne)), même si la règle elle-même ne s'y applique pas.

[123] La principale question à se poser avant d'ordonner la restitution des gains illicites pour violation de contrat est de savoir si, eu égard à toutes les circonstances, d'autres réparations ne permettraient pas de protéger ou de défendre adéquatement le droit contractuel (*Blake*, p. 285; Edelman (2002), p. 154-155; Barnett, p. 11; McCamus, p. 961). J'accepte les propos du lord Nicholls dans l'arrêt *Blake* selon lesquels il faut préférer, lorsqu'on évalue si la restitution des gains illicites est appropriée, une liste non exhaustive de facteurs à une règle absolue. Aucun facteur à lui seul n'est forcément décisif ou déterminant; ces considérations peuvent aller de pair pour étayer une réparation de restitution des gains illicites (Waddams (2001), p. 200-201; voir aussi *Blake*, p. 295; *Chitty on Contracts*, par. 26-063).

[124] Les prétentions que formulent les demandeurs dans leurs actes de procédure correspondent à plusieurs facteurs qui, s'ils sont établis au procès, pourraient donner lieu à une réparation de restitution des gains illicites. Par exemple, la prétention selon laquelle la violation qu'a commise la SLA était intéressée, délibérée et de mauvaise foi pourrait faire intervenir la logique de la dissuasion. De même, la prétention des demandeurs selon laquelle ils étaient vulnérables à l'abus de pouvoir de la SLA et la confiance du public peuvent mettre en jeu certaines valeurs qui sous-tendent les relations fiduciaires, comme c'était le cas dans l'arrêt *Blake*. La prétention selon laquelle la relation des demandeurs avec la SLA implique la confiance et la vulnérabilité tend à la distinguer d'une relation commerciale ordinaire, facteur qui étaye le recouvrement (voir *Vercoe c. Rutland Fund Management Ltd.*, [2010] EWHC 424, par. 340-343).

[125] En conséquence, même si je suis d'accord avec le juge Brown pour dire que la restitution des

circumstances for breach of contract, in my view, whether the circumstances of this case are exceptional is clearly a determination for the trial judge alone. I am not persuaded that the trial judge will inevitably conclude that there is nothing exceptional about this case, or that the plaintiffs' claim is simply that they paid to play a gambling game and did not get exactly what they paid for. The plaintiffs pleaded that ALC, a corporation charged with managing a profit-making lottery scheme offered to the public, intentionally deceived those playing members of the public by knowingly providing an unfair game and putting them at risk of gambling addiction in order to turn a profit. They specifically pleaded that they had a legitimate interest in ALC's performance of its contractual obligation to provide safe games and that remedies other than disgorgement would be inadequate to deter ALC from misconduct. In assessing whether other remedies would be inadequate to protect their contractual rights, a trial judge may also find that ascertaining the actual amount lost is impracticable since VLTs are designed for players to have the opportunity to "win small cash prizes in exchange for small frequent cash bets" and not to create records of who uses them or how much money they have lost. The trial judge may even conclude that ALC's conduct in approving such designs may have, purposefully or not, contributed to that impracticability, such that the plaintiffs were not simply *unwilling* to prove their loss. These are matters for the trial judge.

gains illicites ne peut être ordonnée que dans des circonstances exceptionnelles pour violation de contrat, à mon avis, il est clair que seul le juge de première instance peut trancher la question de savoir si les circonstances de la présente affaire sont exceptionnelles. Je ne suis pas convaincue que le juge de première instance conclura inévitablement que la présente affaire n'a rien d'exceptionnel, ou que les demandeurs prétendent simplement qu'ils ont payé pour jouer à un jeu de hasard et qu'ils n'ont pas obtenu exactement ce pour quoi ils ont payé. Les demandeurs ont soutenu que la SLA, une société chargée d'administrer un système de loteries à but lucratif offert au public, avait intentionnellement trompé les membres du public joueurs en fournissant sciemment un jeu injuste et en les exposant à un risque de dépendance au jeu afin de réaliser un profit. Ils ont expressément plaidé qu'ils avaient un intérêt légitime à ce que la SLA exécute son obligation contractuelle d'offrir des jeux sûrs et que les réparations autres que la restitution des gains illicites ne conviendraient pas pour dissuader la SLA d'adopter une conduite fautive. Lorsqu'il évalue si d'autres réparations seraient inadéquates pour protéger leurs droits contractuels, le juge de première instance peut aussi conclure qu'il est impossible en pratique de fixer le montant réellement perdu, puisque les ALV sont conçus pour que les joueurs aient la possibilité de [TRADUCTION] « gagner de petits lots en argent en contrepartie de petites mises d'argent fréquentes » et non pour créer des relevés identifiant les utilisateurs ou les montants d'argent qu'ils ont perdu. Le juge de première instance peut même conclure que la conduite de la SLA en ce qu'elle a approuvé un tel fonctionnement peut, à dessein ou non, avoir contribué à cette impossibilité pratique, de sorte que les demandeurs n'ont pas simplement *refusé* de prouver leur perte. Ce sont là des questions que le juge de première instance doit trancher.

[126] The plaintiffs' decision not to prove individualized loss, personal injury, or specific claims based on addiction is not fatal. As is evident from *Blake*, loss is not a legal prerequisite for disgorgement. The plaintiffs instead seek remedies based on a breach of contract allegedly suffered by all class members, and what ultimately matters is whether other remedies for

[126] La décision des demandeurs de ne pas prouver une perte individualisée, un préjudice personnel ou des demandes particulières fondées sur la dépendance n'est pas fatale. Comme il ressort clairement de l'arrêt *Blake*, la perte n'est pas une condition légale préalable pour la restitution des gains illicites. Les demandeurs sollicitent plutôt des réparations

breach of contract would be inadequate to vindicate and protect the plaintiffs' contractual rights.

[127] Finally, Brown J. finds that because the plaintiffs have failed to demonstrate a causal link between the remedy sought and the alleged breach of contract, there can be no remedy of disgorgement on these pleadings. Pleadings, however, are not required to set out the evidence on which the parties will rely. Whether the plaintiffs will be able to prove causation between the breach and the gain to be disgorged is a matter of evidence, as I discuss below, but does not preclude disgorgement as an available remedy as a matter of law.

[128] As Lord Steyn noted in *Blake*, when to award disgorgement is an issue "best hammered out on the anvil of concrete cases" (p. 291). This is best done based upon evidence at trial.

(c) *Punitive Damages*

[129] The plaintiffs have also pleaded a sufficient basis to support a claim for punitive damages: their allegations of reprehensible conduct and deception in the performance of a contract have put the duty of honest performance in issue.

[130] The objective of punitive damages is to punish the defendant rather than compensate a plaintiff (*Whiten*, at para. 36). They are to be awarded where the defendant's conduct is "so malicious, oppressive and high-handed that it offends the court's sense of decency" (*Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196). Critically, the focus of punitive damages is on the defendant's misconduct, not the plaintiff's loss (*Whiten*, at para. 73), and injury to the plaintiff is not a condition precedent

fondées sur une violation de contrat dont tous les membres du groupe auraient été victimes, et ce qui compte en définitive est de savoir si les autres réparations pour violation de contrat seraient inadéquates pour défendre et protéger les droits contractuels des demandeurs.

[127] Enfin, le juge Brown conclut que parce que les demandeurs n'ont pas démontré l'existence d'un lien de causalité entre la réparation sollicitée et la violation de contrat alléguée, les actes de procédure en l'espèce ne donnent pas ouverture à une réparation de restitution des gains illicites. Cependant, il n'est pas nécessaire que les actes de procédure énoncent la preuve sur laquelle les parties s'appuieront. La question de savoir si les demandeurs seront capables de prouver la causalité entre la violation et le gain à restituer est une question de preuve, comme je l'expliquerai, mais n'exclut pas la restitution des gains illicites en tant que réparation possible en droit.

[128] Comme l'a fait observer le lord Steyn dans l'arrêt *Blake*, les situations où il convient d'accorder la restitution des gains illicites est une question à laquelle il vaut mieux répondre en [TRADUCTION] « forgeant sur l'enclume de cas concrets » (p. 291). La meilleure façon de le faire est de s'appuyer sur la preuve au procès.

c) *Dommages-intérêts punitifs*

[129] Les demandeurs ont en outre plaidé un fondement suffisant au soutien d'une demande de dommages-intérêts punitifs : leurs allégations de conduite répréhensible et de tromperie dans l'exécution d'un contrat ont mis en cause l'obligation d'exécution honnête.

[130] Les dommages-intérêts punitifs ont pour objet de punir le défendeur, plutôt que d'indemniser le demandeur (*Whiten*, par. 36). Il y a lieu de les accorder lorsque la conduite du défendeur est « si malveillante, opprimante et abusive qu'elle choque le sens de dignité de la cour » (*Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130, par. 196). Fait crucial, les dommages-intérêts punitifs se rattachent à la conduite répréhensible du défendeur, et non à la perte du demandeur (*Whiten*, par. 73),

to an award of punitive damages (H. D. Pitch and R. M. Snyder, *Damages for Breach of Contract* (looseleaf), at pp. 4-1 to 4-2).

[131] The misconduct at issue must "take it beyond the usual opprobrium that surrounds breaking a contract", and punitive damages should only be resorted to in "exceptional cases" (*Fidler*, at para. 62). In addition to this exceptional conduct requirement, the defendant's conduct giving rise to the claim must itself be an independent actionable wrong (*Whiten*, at para. 78; *Fidler*, at para. 63).

[132] This Court confirmed in *Whiten* that an independent actionable wrong does not require an independent tort, and held that a breach of the contractual duty of good faith can constitute an "actionable wrong" to ground a claim for punitive damages (para. 79). I note that since the pleadings in this case were filed in 2012, this Court in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, has recognized a duty of honest performance applicable to *all* contracts as a "general doctrine of contract law" (at paras. 74-75 and 93): parties "must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract" (para. 73). *Bhasin* was resolved on the basis of a breach of that duty alone.

[133] The plaintiffs have pleaded a breach of the duty of honest performance recognized in *Bhasin*. They allege that the contractual relations between ALC and consumers of VLT gaming are subject to an implied term of good faith. In addition to this allegation, the pleadings are replete with allegations of dishonesty — that VLTs are "inherently deceptive", "give a false impression of the odds of winning", "manipulate" consumers, and contain a "stop" button that is "deceitful" (Statement of Claim, at paras. 12, 14, 19 and 21) — and allege ALC's full knowledge

et il n'est pas nécessaire que le demandeur ait subi un préjudice pour que des dommages-intérêts punitifs soient accordés (H. D. Pitch et R. M. Snyder, *Damages for Breach of Contract* (feuilles mobiles), p. 4-1 à 4-2).

[131] L'inconduite en cause doit « être d'une nature propre à provoquer davantage que la réprobation entourant l'inexécution d'un contrat », et on ne doit avoir recours aux dommages-intérêts punitifs que dans des « cas exceptionnels » (*Fidler*, par. 62). Outre cette exigence que la conduite soit exceptionnelle, la conduite du défendeur qui donne lieu à la demande doit elle-même être une faute indépendante donnant ouverture à action (*Whiten*, par. 78; *Fidler*, par. 63).

[132] Dans l'arrêt *Whiten*, la Cour a confirmé qu'une faute indépendante donnant ouverture à action n'exige pas un délit indépendant, et a statué qu'un manquement à l'obligation contractuelle d'agir de bonne foi peut constituer une « faute donnant ouverture à action » susceptible de fonder une demande de dommages-intérêts punitifs (par. 79). Je souligne que depuis le dépôt en 2012 des actes de procédure en l'espèce, la Cour, dans l'arrêt *Bhasin c. Hrynew*, 2014 CSC 71, [2014] 3 R.C.S. 494, a reconnu l'existence d'une obligation d'exécution honnête applicable à *tous* les contrats à titre de « doctrine générale du droit des contrats » (par. 74-75 et 93) : les parties « ne doivent pas se mentir ni autrement s'induire intentionnellement en erreur au sujet de questions directement liées à l'exécution du contrat » (par. 73). L'affaire *Bhasin* a été tranchée sur le fondement d'un manquement à cette seule obligation.

[133] Les demandeurs ont plaidé un manquement à l'obligation d'exécution honnête reconnue dans l'arrêt *Bhasin*. Ils affirment que les relations contractuelles entre la SLA et les consommateurs de jeux sur ALV sont soumises à une condition implicite de bonne foi. Outre cette allégation, les actes de procédure sont remplis de nombreuses allégations de malhonnêteté — que les ALV sont [TRADUCTION] « intrinsèquement trompeurs », qu'ils « donnent une fausse impression des probabilités de gagner », qu'ils « manipulent » les consommateurs et qu'ils

of that deception. In *Bhasin* itself, Cromwell J. recognized that allegations of dishonesty were sufficient to put the duty of honest performance in issue (para. 19).

[134] Thus, I disagree with Brown J.'s conclusion that the alleged contract between ALC and the plaintiffs does not give rise to an established duty of good faith. The plaintiffs have specifically pleaded punitive damages, as well as facts to justify such damages with sufficient particularity (*Whiten*, at paras. 85-86). There is no reason to conclude that punitive damages are unavailable to these plaintiffs as a matter of law.

(3) Conclusion on Motion to Strike the Breach of Contract Claim

[135] I therefore conclude that the plaintiffs' statement of claim discloses a reasonable cause of action for breach of contract, with several potential remedies available to the plaintiffs at law. There is no basis to strike their claim for breach of contract.

C. *Certification*

[136] There are five requirements for certification of a class action: (1) the pleadings must disclose a cause of action, (2) there must be an identifiable class of two or more persons, (3) the proposed representative must be appropriate, (4) there must be at least one common issue, and (5) the class action must be the preferable procedure (*CAA*, s. 5).

[137] The parties agreed that the outcome of the motion to strike would determine the first factor of the certification analysis under s. 5(1) and the breach of contract claim therefore satisfies that requirement. There is no serious dispute that the proposed representatives are appropriate. The third parties dispute the remaining three requirements.

sont munis d'un bouton d'arrêt qui est « trompeur » (déclaration, par. 12, 14, 19 et 21) — et ils allèguent que la SLA était parfaitement consciente de cette tromperie. Dans l'arrêt *Bhasin*, le juge Cromwell a reconnu que les allégations de malhonnêteté suffisaient à mettre en cause l'obligation d'exécution honnête (par. 19).

[134] Par conséquent, je ne souscris pas à la conclusion du juge Brown selon laquelle le contrat allégué entre la SLA et les demandeurs ne donne pas naissance à une obligation établie d'agir de bonne foi. Les demandeurs ont expressément plaidé les dommages-intérêts punitifs, ainsi que les faits qui les justifient, avec suffisamment de précision (*Whiten*, par. 85-86). Il n'y a aucune raison de conclure que des dommages-intérêts punitifs ne peuvent pas être accordés en droit aux demandeurs en l'espèce.

(3) Conclusion sur la requête en radiation de la demande fondée sur la violation de contrat

[135] En conséquence, je conclus que la déclaration des demandeurs révèle une cause d'action raisonnable pour violation de contrat, et que plusieurs réparations sont susceptibles d'être accordées en droit aux demandeurs. Rien ne justifie de radier leur demande fondée sur la violation de contrat.

C. *Autorisation d'exercer un recours collectif*

[136] Cinq conditions doivent être réunies pour l'autorisation d'un recours collectif : (1) les actes de procédure doivent révéler une cause d'action, (2) il doit exister un groupe identifiable d'au moins deux personnes, (3) le représentant proposé doit être approprié, (4) il doit y avoir au moins une question commune et (5) le recours collectif doit être le meilleur moyen de régler ces questions (*CAA*, art. 5).

[137] Les parties ont convenu que l'issue de la requête en radiation déterminerait le premier facteur de l'analyse en ce qui concerne l'autorisation aux termes du par. 5(1), et la demande fondée sur la violation de contrat remplit donc cette condition. Il n'y a pas de contestation sérieuse que les représentants proposés sont appropriés. Les tierces parties contestent les trois conditions restantes.

[138] The class representative must show that there is some "basis in fact" for each remaining requirement (*Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, at para. 99; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 25). Certification requires that the representative plaintiff provide a "certain minimum evidentiary basis" (*Hollick*, at para. 24 (emphasis omitted), citing *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Gen. Div.), at pp. 380-81), and the "basis in fact" standard ensures that there is an evidentiary foundation to support the certification order, even if that record is not exhaustive or one upon which the merits will be argued (*AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949, at para. 41, citing *McCracken v. Canadian National Railway Co.*, 2012 ONCA 445, 111 O.R. (3d) 745, at paras. 75-76). The certification process "does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial" and the approach is not to engage "in a robust analysis of the merits at the certification stage" (*Microsoft*, at para. 105), but to instead ensure that the action is suited to being a class proceeding (*Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 312 D.L.R. (4th) 419, at para. 65; *Hollick*, at para. 16).

[139] At first instance, the application judge decided to certify the action on certain common issues (see appendix). The majority of the Court of Appeal amended the certification order in light of the claims it struck, but otherwise found that ALC and the third parties' arguments on appeal were no more than an attempt to reargue the factual and discretionary issues before the application judge.

(1) Identifiable Class of Two or More Persons

[140] The class is defined in the certification application as "[n]atural persons and their estates, resident in Newfoundland and Labrador, who, during the Class Period, paid the Defendant [ALC] to gamble on VLT games, excluding video poker and

[138] Le représentant du groupe doit établir l'existence d'un certain « fondement factuel » pour chacune des conditions restantes (*Pro-Sys Consultants Ltd. c. Microsoft Corporation*, 2013 CSC 57, [2013] 3 R.C.S. 477, par. 99; *Hollick c. Toronto (Ville)*, 2001 CSC 68, [2001] 3 R.C.S. 158, par. 25). L'autorisation exige que le représentant des demandeurs offre un « minimum d'éléments probants » (*Hollick*, par. 24 (soulignement omis), citant *Taub c. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Div. gén.), p. 380-381), et la norme du « fondement factuel » assure qu'il existe une preuve sur laquelle peut reposer l'ordonnance d'autorisation, même si cette preuve n'est pas exhaustive ou n'est pas propre à présider au débat sur le fond (*AIC Limitée c. Fischer*, 2013 CSC 69, [2013] 3 R.C.S. 949, par. 41, citant *McCracken c. Canadian National Railway Co.*, 2012 ONCA 445, 111 O.R. (3d) 745, par. 75-76). Le processus d'autorisation « ne permet pas d'apprécier toutes les difficultés et tous les défis que le demandeur devra surmonter pour prouver ses allégations au procès » et l'approche consiste à ne pas se livrer « à une analyse rigoureuse sur le fond à l'étape de la certification » (*Microsoft*, par. 105), mais plutôt à assurer que l'action se prête à un recours collectif (*Pro-Sys Consultants Ltd. c. Infineon Technologies AG*, 2009 BCCA 503, 312 D.L.R. (4th) 419, par. 65; *Hollick*, par. 16).

[139] En première instance, le juge saisi de la demande a décidé d'autoriser le recours relativement à certaines questions communes (voir l'annexe). Les juges majoritaires de la Cour d'appel ont modifié l'ordonnance d'autorisation à la lumière des demandes qu'ils ont radiées, mais ont autrement conclu que les arguments que faisaient valoir la SLA et les tierces parties en appel revenaient à une tentative de plaider à nouveau les questions de fait et relevant du pouvoir discrétionnaire du juge saisi de la demande tranchées par celui-ci.

(1) Groupe identifiable d'au moins deux personnes

[140] Dans la demande d'autorisation, le groupe est défini comme suit : [TRADUCTION] « Personnes physiques et leurs successions, résidant à Terre-Neuve-et-Labrador qui, durant la période visée par le recours collectif, ont payé la défenderesse [la SLA]

keno games, in Newfoundland and Labrador". The third parties submit that the class is "indeterminate" because there is "no conceivable way to verify who the class members are".

[141] The identifiable class requirement ensures it is possible to determine who is entitled to notice, who is entitled to relief, and who will be bound by the final judgment (*Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58, [2013] 3 S.C.R. 545, at para. 57). There must be some basis in fact that at least two persons will be able to self-identify as members of the class, and a person's claim to membership in the class must "be determinable by stated, objective criteria" (*Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 38; *Jiang v. Peoples Trust Co.*, 2017 BCCA 119, 408 D.L.R. (4th) 1, at para. 81).

[142] In this case, the proposed class definition uses objective criteria that will allow for identification of those who can attest to playing the games, and there is a basis to believe that at least two persons will be able to establish that they paid ALC to gamble on VLT games during the proposed class period. This can be distinguished from the proposed class in *Sun-Rype*, which was defined as those who had purchased products containing a particular ingredient, which was often used interchangeably with another, and with product labels that did not identify it. In that case, there was no basis in fact to show that the putative class members would have had the information to determine their own class membership (*Sun-Rype*, at paras. 61-65). Here, there is no such evidentiary concern that would prevent individuals from determining their membership, and the fact that the number of class members or the identity of each class member is not or may not be determined is not a bar to certification (*CAA*, s. 8(d)).

pour jouer à des jeux de hasard sur des ALV, excluant les jeux de vidéopoker et de keno, à Terre-Neuve-et-Labrador ». Les tierces parties affirment que le groupe est [TRADUCTION] « indéterminé », parce qu'il « est impossible de concevoir une façon de vérifier qui en sont les membres ».

[141] La condition voulant que le groupe soit identifiable permet de déterminer les personnes ayant le droit d'être avisées, celles ayant droit à la réparation et celles qui seront liées par le jugement final (*Sun-Rype Products Ltd. c. Archer Daniels Midland Company*, 2013 CSC 58, [2013] 3 R.C.S. 545, par. 57). Il doit y avoir un certain fondement factuel selon lequel au moins deux personnes s'identifieront comme membres du groupe, et l'appartenance d'une personne au groupe doit pouvoir « être déterminée sur des critères explicites et objectifs » (*Western Canadian Shopping Centres Inc. c. Dutton*, 2001 CSC 46, [2001] 2 R.C.S. 534, par. 38; *Jiang c. Peoples Trust Co.*, 2017 BCCA 119, 408 D.L.R. (4th) 1, par. 81).

[142] En l'espèce, la définition du groupe proposée s'appuie sur des critères objectifs qui permettront l'identification des personnes qui peuvent attester avoir pris part aux jeux, et il existe des motifs de croire qu'au moins deux personnes seront capables d'établir qu'ils ont payé la SLA pour jouer à des jeux de hasard sur un ALV durant la période visée par le recours collectif. Cette situation se distingue de celle du groupe proposé dans l'arrêt *Sun-Rype*, qui avait été défini comme les personnes qui avaient acheté des produits contenant un ingrédient en particulier, lequel était souvent utilisé de façon interchangeable avec un autre, et avec des étiquettes de produits qui ne l'identifiait pas. Dans cette affaire, aucun fondement factuel ne permettait d'établir que les membres du groupe proposé auraient disposé des renseignements nécessaires pour déterminer s'ils appartenaient ou non au groupe (*Sun-Rype*, par. 61-65). En l'espèce, aucun problème de preuve semblable n'empêcherait les individus de déterminer s'ils appartiennent au groupe, et le fait que le nombre de membres du groupe ou l'identité de chaque membre de celui-ci ne soit pas déterminé ou ne puisse peut-être pas l'être n'empêche pas l'autorisation du recours collectif (*CAA*, al. 8(d)).

(2) Common Issues

[143] The common issue requirement for certification is met if the "claims of the class members raise a common issue, whether or not the common issue is the dominant issue" (*CAA*, s. 5(1)(c)). An issue is common where its resolution is necessary to the resolution of each class member's claim (*Dutton*, at para. 39). Issues are not common when they are dependent upon findings of fact that must be made with respect to each individual claimant (*Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54 (S.C.J.), at para. 39, aff'd (2003), 226 D.L.R. (4th) 112 (Ont. C.A.)). Findings made by the application judge on these issues are entitled to deference from an appellate court (*Microsoft*, at para. 111). As recognized in *Pioneer Corp. v. Godfrey*, 2019 SCC 42, [2019] 3 S.C.R. 295, at paras. 110-11, identification of an issue as common to the members of the class is a question of fact that attracts the standard of review of palpable and overriding error.

[144] In light of the causes of action that have been struck from the plaintiffs' statement of claim, only four of the common issues as certified by the application judge remain relevant to the plaintiffs' breach of contract claim:

(e) Has the Defendant breached a duty owed in contract or tort?

(f) Can monetary relief be measured on an aggregate, class-wide basis and, if so, what is the amount of aggregate monetary relief?

(g) If the answer to Issue (f) is no, can loss or damage be measured by the gain to the Defendant, and if so, what is the appropriate restitutionary remedy and in what amount?

. . .

(2) Questions communes

[143] La condition relative à l'existence d'une question commune pour qu'il y ait autorisation du recours collectif est remplie si les [TRADUCTION] « demandes des membres du groupe soulèvent une question commune, que celle-ci soit ou non la question dominante » (*CAA*, al. 5(1)(c)). Une question est commune lorsque sa résolution est nécessaire pour le règlement des demandes de chaque membre du groupe (*Dutton*, par. 39). Lorsqu'elles dépendent de conclusions de fait qui doivent être tirées à l'égard de chaque demandeur individuel, les questions ne sont pas communes (*Williams c. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54 (C.S.J.), par. 39, conf. par (2003), 226 D.L.R. (4th) 112 (C.A. Ont.)). Une cour d'appel doit faire preuve de déférence à l'égard des conclusions tirées par le juge saisi de la demande sur ces questions (*Microsoft*, par. 111). Comme l'a reconnu la Cour dans l'arrêt *Pioneer Corp. c. Godfrey*, 2019 CSC 42, [2019] 3 R.C.S. 295, par. 110-111, l'identification d'une question comme étant commune aux membres du groupe est une question de fait qui entraîne l'application de la norme de contrôle de l'erreur manifeste et déterminante.

[144] Compte tenu des causes d'action qui ont été radiées de la déclaration des demandeurs, seulement quatre des questions communes certifiées par le juge saisi de la demande demeurent pertinentes à l'égard de la demande fondée sur la violation de contrat présentée par les demandeurs :

[TRADUCTION]

e) La défenderesse a-t-elle manqué à une obligation ayant un fondement contractuel ou délictuel?

f) Les mesures de redressement pécuniaire peuvent-elles être évaluées globalement, à l'échelle du groupe et, dans l'affirmative, quel en est le montant?

g) Si la réponse à la question f) est négative, la perte ou le préjudice peut-il être calculé en fonction du gain réalisé par la défenderesse et, dans l'affirmative, quelle est la réparation par restitution appropriée et quel en est le montant?

. . .

(i) Should punitive or exemplary damages be awarded against the Defendant and, if so, in what amount?

[145] These issues overlap with one another, use unclear restitutionary language to describe the remaining claim for disgorgement of profits, and make reference to claims that have been struck. In my view, four core issues remain to be considered in this proposed class action:

(a) whether ALC breached a duty owed in contract;

(b) whether disgorgement of ALC's profits is an appropriate remedy;

(c) whether monetary relief can be measured on an aggregate, class-wide basis and, if so, the amount; and

(d) whether punitive or exemplary damages should be awarded against ALC and, if so, the amount.

I conclude that all but the issue relating to aggregate monetary relief are appropriate common issues.

(a) *Breach of Contract*

[146] The third parties submit that liability is not a common issue because only some class members became problem gamblers. They argue that it will have to be individually determined whether each person became a problem gambler and whether their loss of control was caused by the characteristics of the machines.

[147] I disagree. First, the third parties have approached this issue as though the plaintiffs' claim seeks recovery of losses particular to each problem gambler; this does not reflect the proposed class, nor the theory of the plaintiffs' case, as they chose not to prove individual loss or use personal injury as the measure of damages. The pleadings instead assert a civil wrong that is common to each member

i) Y a-t-il lieu de condamner la défenderesse à verser des dommages-intérêts punitifs ou exemplaires et, dans l'affirmative, quel devrait en être le montant?

[145] Ces questions se recoupent, elles emploient des termes imprécis en matière de restitution pour décrire la demande restante pour la restitution des gains illicites et elles renvoient à des demandes qui ont été radiées. À mon avis, il reste quatre questions fondamentales à examiner dans le présent recours collectif proposé :

a) La SLA a-t-elle manqué à une obligation contractuelle?

b) La restitution des gains illicites de la SLA est-elle une réparation appropriée?

c) Les mesures de redressement pécuniaire peuvent-elles être évaluées globalement, à l'échelle du groupe et, dans l'affirmative, quel en est le montant?

d) Y a-t-il lieu de condamner la SLA à verser des dommages-intérêts punitifs ou exemplaires et, dans l'affirmative, de quel montant?

Je conclus que ce sont toutes des questions communes appropriées, à l'exception de celle relative aux mesures de redressement pécuniaire globales.

a) *Violation de contrat*

[146] Les tierces parties soutiennent que la responsabilité n'est pas une question commune, car seulement certains membres du groupe sont devenus des joueurs à problèmes. Selon eux, il faudra déterminer au cas par cas si chaque personne est devenue un joueur à problèmes et si la perte de contrôle de cette personne a été causée par les caractéristiques des appareils.

[147] Je ne suis pas de cet avis. En premier lieu, les tierces parties ont abordé cette question comme si la demande présentée par les demandeurs visait le recouvrement des pertes propres à chaque joueur à problèmes; cette approche ne correspond pas au groupe proposé ni à la thèse des demandeurs, puisqu'ils ont choisi de ne pas prouver les pertes individuelles ni de s'appuyer sur le préjudice personnel pour évaluer

of the class. Second, the VLTs are the vehicle for a contract between ALC and the consumer. Each time a consumer pays money to play the VLT, they enter into the same implied contract, carried out in the same way, based on the programming of the VLTs. The expert's affidavit suggests that what players see on the VLT screen conceals and misrepresents how the game actually works. Whether the terms alleged by the plaintiffs are in fact implied will be the same for each consumer. Whether the functioning of the VLTs routinely violates those terms would also be the same for every consumer and will be necessary to resolve each member's claim (*Dutton*, at para. 39). I would not disturb the finding of the courts below that breach of contract is a common issue.

(b) *Disgorgement*

[148] The plaintiffs seek an accounting or disgorgement of ALC's profits for the breach of contract claim. The third parties say that assessing ALC's gain from its breach of contract would require individual determination because some players have become problem gamblers and some have not. They submit that the amount of any benefit to ALC as a result of the breach of contract will have to be individually determined. In short, the third parties' submission is that success for one class member does not mean success for all.

[149] While I agree that the required causal link for disgorgement may preclude certification of some aspects of the disgorgement analysis (such as quantum, discussed below in relation to aggregate monetary relief), I am not persuaded that *no* aspect of disgorgement as a remedy can be determined on a class-wide basis. In my view, whether a disgorgement award is appropriate, based on the multi-factored analysis described above, can be determined for the entire class

les dommages-intérêts. Les actes de procédure invoquent plutôt une faute civile qui est commune à tous les membres du groupe. En second lieu, les ALV servent de véhicule à un contrat entre la SLA et le consommateur. Chaque fois qu'un consommateur verse de l'argent pour jouer sur un ALV, il conclut le même contrat implicite, exécuté de la même façon, fondé sur la programmation des ALV. Selon l'affidavit de l'expert, ce que les joueurs voient à l'écran de l'ALV dissimule et représente faussement le fonctionnement réel du jeu. La question de savoir si les conditions qu'allèguent les demandeurs sont effectivement implicites sera la même pour chaque consommateur. La question de savoir si le fonctionnement des ALV viole systématiquement ces conditions serait également la même pour chaque consommateur et il faudra y répondre pour trancher la demande de chaque membre (*Dutton*, par. 39). Je suis d'avis de ne pas modifier la conclusion des juridictions inférieures selon laquelle la violation de contrat est une question commune.

b) *Restitution des gains illicites*

[148] Les demandeurs sollicitent une remise ou la restitution des gains illicites de la SLA au titre de la demande fondée sur la violation de contrat. Les tierces parties affirment que pour évaluer le gain qu'a tiré la SLA de la violation de contrat, il faudrait le faire au cas par cas, car certains joueurs sont devenus des joueurs à problèmes et d'autres non. Ils soutiennent que le montant de tout bénéfice de la SLA découlant de la violation de contrat devra être déterminé au cas par cas. Bref, selon les tierces parties, le succès d'un membre du groupe ne signifie pas le succès de tous.

[149] Bien que je sois d'accord pour dire que le lien de causalité exigé pour la restitution des gains illicites est susceptible d'empêcher la certification de certains aspects de l'analyse portant sur la restitution des gains illicites (comme le quantum, dont il est question ci-dessous en lien avec les mesures de redressement pécuniaire globales), je ne suis pas convaincue qu'*aucun* aspect de la restitution des gains illicites en tant que réparation ne peut être

at once based on evidence and analysis that will be common to all class members.

[150] While compensatory damages are the normal measure of relief for breach of contract, it does not necessarily follow that they will be either practical or adequate for the class members in this case. The focus of the disgorgement analysis is on the gain of the defendant, and each of these contracts was allegedly entered into in materially the same circumstances and breached through the same conduct. If ALC's breaches are self-interested and deliberate in relation to the representative plaintiffs, then they are self-interested and deliberate in relation to the whole class; if it is impracticable to determine the amount of the representative plaintiffs' loss as a result of those breaches — because VLTs are operated with cash and do not produce receipts or other records for particular customers, or even that ALC's conduct contributed to that impracticability — then it is impracticable for the entire class. Whether the plaintiffs have a legitimate interest in ALC's profit-making activity would be common to all members of the VLT-playing public. The circumstances of the breach and the interest in deterring breaches of contracts of this nature will be similar for all members; a common inquiry into allegations of systemic conduct by a corporation in a monopolistic lottery scheme offered to the public will avoid duplication of fact-finding and legal analysis (*Dutton*, at para. 39).

[151] An issue can be common "even if it makes up a very limited aspect of the liability question" (*Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), at para. 53). Here, determining whether the circumstances of this case are exceptional, such that other contractual remedies are inadequate, is a substantial ingredient of each member's claim and

tranché à l'échelle du groupe. À mon avis, la question de savoir si une réparation de restitution des gains illicites est appropriée, en fonction de l'analyse multifactorielle décrite ci-dessus, peut être tranchée pour l'ensemble du groupe en une seule fois sur le fondement de la preuve et d'une analyse qui sera commune à tous les membres du groupe.

[150] Bien que les dommages-intérêts compensatoires soient le redressement normalement accordé en cas de violation de contrat, il ne s'ensuit pas nécessairement qu'ils seront pratiques ou adéquats pour les membres du groupe en l'espèce. L'analyse relative à la restitution des gains illicites porte principalement sur le gain du défendeur, et chacun de ces contrats aurait été conclu dans les mêmes circonstances quant au fond et violé par la même conduite. Si les violations commises par la SLA sont intéressées et délibérées relativement aux représentants des demandeurs, elles le sont aussi relativement au groupe au complet; s'il est impossible en pratique de déterminer le montant de la perte subie par les représentants des demandeurs en raison de ces violations — parce que les ALV fonctionnent avec de l'argent comptant et ne produisent pas de reçus ou d'autres relevés pour des clients donnés, ou même parce que la conduite de la SLA contribuait à cette impossibilité pratique — il est aussi impossible en pratique de le faire pour le groupe en entier. La question de savoir si les demandeurs ont un intérêt légitime à l'égard des activités lucratives de la SLA serait commune à tous les membres du public qui jouent sur des ALV. Les circonstances de la violation et l'intérêt à dissuader les violations de contrats de cette nature seront semblables pour tous les membres; une enquête commune portant sur les allégations de conduite généralisée d'une société dans un système de loterie monopolistique offert au public permettra d'éviter la répétition de l'appréciation des faits et de l'analyse juridique (*Dutton*, par. 39).

[151] Une question peut être commune [TRADUCTION] « même si elle ne constitue qu'un aspect très limité de la question de la responsabilité » (*Cloud c. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), par. 53). En l'espèce, le fait d'établir si les circonstances de la présente affaire sont exceptionnelles, de sorte que les autres réparations

will benefit all members of the class. I would therefore find that this aspect of ALC's potential liability to the plaintiffs in disgorgement is amenable to common determination, and would articulate the question as follows: "Would the ordinary remedies of contract law be inadequate to protect or vindicate the class members' contractual right such that disgorgement is available as a remedy?"

contractuelles sont inadéquates, est un élément important de la demande de chaque membre et profitera à tous les membres du groupe. En conséquence, je conclurais que cet aspect de la responsabilité éventuelle de la SLA envers les demandeurs au titre de la restitution des gains illicites se prête à un jugement commun, et je formulerais la question ainsi : « Les réparations ordinaires du droit des contrats seraient-elles inadéquates pour protéger ou défendre le droit contractuel des membres du groupe, de sorte que la restitution des gains illicites pourrait être accordée comme réparation? »

(c) *Aggregate Monetary Relief*

c) *Redressement pécuniaire global*

[152] The third potential common issue relates to whether monetary relief can be measured on an aggregate, class-wide basis and, if so, in what amount. In my view, there is no "basis in fact" on the record before us to certify this as a common issue.

[152] La troisième question commune potentielle est de savoir si le redressement pécuniaire peut être évalué globalement, à l'échelle du groupe, et, dans l'affirmative, d'en déterminer le montant. À mon avis, au vu du dossier dont nous disposons, il n'y a pas de « fondement factuel » permettant de certifier cette question comme question commune.

[153] Section 29(1) of the *CAA* sets out three preconditions to an aggregate monetary award: (a) monetary relief must be claimed on behalf of some or all class members; (b) no questions of fact or law other than those relating to the assessment of monetary relief can remain to be determined in order to establish the amount of the defendant's monetary liability; and (c) all or part of the defendant's liability to some or all class members must be reasonably determined without proof by individual class members. The inquiry invites the Court to consider whether the non-individualized evidence presented by the plaintiffs is sufficiently reliable, whether use of the evidence will produce unfairness or injustice to the defendant (e.g., overstating the defendant's liability), and whether denying an aggregate approach would result in reduced or denied access to justice for the plaintiffs (see *Ramdath v. George Brown College of Applied Arts and Technology*, 2015 ONCA 921, 392 D.L.R. (4th) 490, at para. 76).

[153] Le paragraphe 29(1) de la *CAA* énonce trois conditions préalables à l'octroi d'un redressement pécuniaire global : a) le redressement pécuniaire doit être demandé au nom de tous les membres du groupe ou de certains d'entre eux; b) il ne reste à trancher que des questions de fait ou de droit se rapportant à l'évaluation du redressement pécuniaire afin de fixer le montant correspondant à l'obligation pécuniaire du défendeur; et c) la totalité ou une partie de la responsabilité du défendeur envers tous les membres du groupe ou certains d'entre eux peut raisonnablement être établie sans que les membres du groupe aient à en faire la preuve individuellement. Dans le cadre de l'enquête, la Cour est appelée à se demander si la preuve non individualisée présentée par les demandeurs est suffisamment fiable, si le recours à la preuve produira une iniquité ou une injustice envers le défendeur (p. ex., en surestimant la responsabilité de celui-ci) et si le refus d'une approche globale priverait les demandeurs de l'accès à la justice ou réduirait cet accès (voir *Ramdath c. George Brown College of Applied Arts and Technology*, 2015 ONCA 921, 392 D.L.R. (4th) 490, par. 76).

[154] The key concern in certifying this issue is whether there is some basis in fact to determine part or the whole of ALC's total liability as a result of its breach of contract. The issue is primarily a question of causation. Whether the remedy is ultimately based on compensating class-wide loss or disgorging ALC's gains, causation between the breach of contract and the quantum awarded will have to be proven.

[155] As Ernest J. Weinrib has recognized in the compensatory context, causation connects the plaintiff and defendant "as the doer and sufferer of the same injustice" ("Causal Uncertainty" (2016), 36 *Oxford J. Legal Stud.* 135, at p. 136). The same reasoning requires a causal link between a wrong and a gain. Thus, while the appropriateness of a disgorgement remedy in contract is ultimately a contextual question, before making the award the court must be satisfied that the *breach* of contract is causally connected to the *gain* to be disgorged — a requirement also found in other contexts in which disgorgement is an available remedy. For example, in the context of a breach of fiduciary duty, disgorgement is a familiar remedy, but it is only available where the breach of the duty is linked to the gain (*Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177, at para. 77). Another example is that of an inventor seeking an accounting of profits, who "is only entitled to that portion of the infringer's profit which is causally attributable to the invention" — consistent with a common sense view of causation from the breach (*Monsanto Canada Inc. v. Schmeiser*, 2004 SCC 34, [2004] 1 S.C.R. 902, at para. 101).

[156] In the context of a breach of contract, it is similarly important to connect the breach to the gain to be disgorged. Indeed, James Edelman writes that "the only difference between compensatory damages and disgorgement damages is that the former aim to

[154] La principale préoccupation que soulève la certification de cette question est de savoir s'il existe un fondement factuel permettant de déterminer en totalité ou en partie la responsabilité totale de la SLA en raison de sa violation de contrat. Il s'agit principalement d'une question de causalité. Que la réparation soit ultimement fondée sur l'indemnisation d'une perte à l'échelle du groupe ou sur la restitution des gains illicites de la SLA, le lien de causalité entre la violation de contrat et le montant accordé devra être prouvé.

[155] Comme l'a reconnu Ernest J. Weinrib dans le contexte de l'indemnisation, la causalité unit le demandeur et le défendeur [TRADUCTION] « en tant qu'auteur et victime d'une même injustice » (« Causal Uncertainty » (2016), 36 *Oxford J. Legal Stud.* 135, p. 136). Le même raisonnement exige un lien de causalité entre une faute et un gain. Par conséquent, bien que le caractère approprié d'une réparation de restitution des gains illicites en matière contractuelle soit ultimement une question contextuelle, le tribunal doit, avant d'accorder la réparation, être convaincu que la *violation* du contrat a un lien de causalité avec le *gain* à restituer — une exigence que l'on trouve aussi dans d'autres contextes où la restitution des gains illicites peut être accordée à titre de réparation. Par exemple, dans le contexte d'un manquement à une obligation fiduciaire, la restitution des gains illicites est une réparation courante, mais elle ne peut être ordonnée que si le manquement à l'obligation est lié au gain (*Strother c. 3464920 Canada Inc.*, 2007 CSC 24, [2007] 2 R.C.S. 177, par. 77). Un autre exemple est celui de l'inventeur qui demande la remise des profits, lequel « a seulement droit à la remise de la portion des profits réalisés par le contrefacteur, qui a un lien de causalité avec l'invention » — conformément à une conception normale du lien de causalité avec le manquement (*Monsanto Canada Inc. c. Schmeiser*, 2004 CSC 34, [2004] 1 R.C.S. 902, par. 101).

[156] Dans le contexte d'une violation de contrat, il est tout aussi important d'établir le lien entre la violation et le gain à restituer. En effet, James Edelman écrit que [TRADUCTION] « la seule différence entre les dommages-intérêts compensatoires

put the claimant in the position as if the wrong had not occurred and the latter aim to put the defendant in that position" (Edelman (2002), at p. 103; see also Barnett, at p. 12; M. A. Eisenberg, *Foundational Principles of Contract Law* (2018), at p. 335). As noted by this Court in *Mutual Trust*, this remedy may be appropriate where "a defendant has, as a result of his or her own breach, profited in excess of his or her expected profit had the contract been performed" (para. 30 (emphasis added)). Applying a "but-for-the-breach" standard ensures a causal connection between the quantum of gain and the plaintiff's right (Smith, at p. 136; Barnett, at pp. 189, 192 and 210).

[157] All this means that the plaintiffs need to provide some methodology that is "sufficiently credible or plausible to establish some basis in fact for the commonality requirement", that is, a realistic prospect of assessing class-wide monetary relief in the aggregate (*Microsoft*, at para. 118).

[158] The plaintiffs seek disgorgement of the "unlawful gain" and have pleaded that VLTs could be "a reasonably safe form of gambling [that] generate[s] a reasonable stream of profit" absent the pleaded breaches (Statement of Claim, at para. 31). On this pleading, the plaintiffs must identify some methodology for determining the amount in excess of the "reasonable stream of profit" ALC would have gained absent the breach of contract. The plaintiffs' evidence on this point is limited, as their expert was asked only to estimate ALC's revenue from VLT line games that are derived from problem gamblers. However, the plaintiffs' class membership is not limited to problem gamblers, and instead captures all natural persons or estates who paid ALC to gamble on VLT games. Further, the expert does not provide any estimation or methodology to account for any revenue ALC might have made even while upholding and performing its contract with the class, by offering safe and non-deceptive VLT games to class

et les dommages-intérêts de restitution des gains illicites est que les premiers visent à placer le demandeur dans la situation où il se trouverait si la faute n'avait pas eu lieu et que les derniers visent à placer le défendeur dans cette situation » (Edelman (2002), p. 103; voir également Barnett, p. 12; M. A. Eisenberg, *Foundational Principles of Contract Law* (2018), p. 335). Comme l'a affirmé la Cour dans l'arrêt *Mutual Trust*, cette réparation peut être appropriée lorsque « le défendeur a réalisé, du fait de sa propre inexécution, un gain supérieur à celui qu'il pouvait escompter si le contrat avait été exécuté » (par. 30 (je souligne)). L'application de la norme du « facteur déterminant » (parfois décrite au moyen des mots « n'eût été ») assure un lien de causalité entre le montant du gain et le droit du demandeur (Smith, p. 136; Barnett, p. 189, 192 et 210).

[157] En définitive, les demandeurs doivent fournir une méthode qui est « suffisamment valable ou acceptable pour établir un certain fondement factuel aux fins du respect de l'exigence d'une question commune », c'est-à-dire une possibilité réaliste d'évaluer globalement le redressement pécuniaire à l'échelle du groupe (*Microsoft*, par. 118).

[158] Les demandeurs sollicitent la restitution du « gain illicite » et ont fait valoir que les ALV peuvent être [TRADUCTION] « une forme raisonnablement sûre de jeu [qui] représente une source raisonnable de profits » n'eût été des violations alléguées (déclaration, par. 31). Au vu de cette allégation, les demandeurs doivent identifier une méthode pour déterminer le montant qui excède la « source raisonnable de profits » que la SLA aurait touchés n'eût été la violation de contrat. La preuve des demandeurs sur ce point est limitée, vu que leur expert a été chargé uniquement d'estimer la partie des recettes que la SLA a tirée des jeux de lignes sur ALV qui provenait de joueurs à problèmes. Toutefois, la composition du groupe de demandeurs ne se limite pas aux joueurs à problèmes et englobe plutôt toutes les personnes physiques ou successions qui ont payé la SLA pour jouer à des jeux de hasard sur des ALV. De plus, l'expert ne fournit aucune estimation ou méthode pour comptabiliser les recettes que la SLA aurait pu toucher si elle avait

members or by warning class members of the inherent dangers of the games.

[159] To meet the required causal nexus and ensure that ALC's total liability is limited to that flowing from the breach and not overstated, some plausible methodology, grounded in the facts and data of the case, is needed to estimate ALC's financial liability from its breach of contract, including what ALC's profits might have been had it not breached its contractual obligations to class members. No methodology has been suggested.

[160] I note that the plaintiffs have also pleaded that the deceptive nature of VLTs is so integrated into their profit generation that VLT gaming could not have been marketed at all without the wrongdoing. Although this pleading appears in the section pleading disgorgement as a cause of action (and would therefore be struck in its current form for disclosing no reasonable cause of action), I accept that it could be restored. On such a pleading, the amount to be disgorged to the class as a whole would be the entirety of ALC's profits from VLT gaming, and issues of causation are simplified. But a bare pleaded allegation is not enough to establish "some basis in fact". The purpose of the basis in fact requirement is to ensure that the class proceeding does not "founde[r] at the merits stage" (*Microsoft*, at para. 104). Here, the plaintiffs' expert has provided no evidence to suggest that VLTs could not be marketed without wrongdoing. This is a bare allegation and therefore cannot provide some basis in fact that monetary relief can ultimately be determined on a class-wide basis.

[161] For these reasons, I am not satisfied that there is some basis in fact to certify whether the amount of monetary relief can be assessed on an aggregate, class-wide basis as a common issue. There is no basis in fact on either of the alternative pleadings that

respecté et exécuté son contrat avec le groupe, en offrant des jeux sur ALV sûrs et non trompeurs aux membres du groupe ou en les mettant en garde contre les dangers inhérents à ces jeux.

[159] Pour établir le lien de causalité exigé et faire en sorte que la responsabilité totale de la SLA se limite à celle découlant de la violation et ne soit pas surestimée, il faut une méthode plausible, fondée sur les faits et les données de l'espèce, pour estimer la responsabilité financière de la SLA au titre de sa violation de contrat, y compris ce qu'auraient été les profits de la SLA si elle n'avait pas violé ses obligations contractuelles envers les membres du groupe. Or, aucune méthode n'a été proposée.

[160] Je remarque que les demandeurs ont aussi fait valoir que la nature trompeuse des ALV est à ce point intégrée dans leur production de profits que les jeux sur ALV n'auraient pas pu être commercialisés du tout sans la faute. Bien que cette allégation figure dans la partie où est plaidée la restitution des gains illicites en tant que cause d'action (et elle serait radiée en sa forme actuelle, car elle ne révèle aucune cause d'action raisonnable), j'admets qu'elle peut être rétablie. Au vu de cette allégation, le montant à restituer au groupe dans son ensemble serait l'intégralité des profits que la SLA a tirés des jeux sur ALV, ce qui simplifie les questions de causalité. Toutefois, une simple allégation dans un acte de procédure ne suffit pas pour établir un « certain fondement factuel ». L'exigence du fondement factuel a pour objet de faire en sorte que le recours collectif ne « s'écroule [pas] à l'étape de l'examen au fond » (*Microsoft*, par. 104). En l'espèce, l'expert des demandeurs n'a fourni aucune preuve laissant entendre que les ALV ne pouvaient pas être commercialisés sans qu'il y ait de faute. Il s'agit d'une simple allégation et elle ne peut donc pas fournir un certain fondement factuel selon lequel un redressement pécuniaire peut, au final, être établi à l'échelle du groupe.

[161] Pour ces motifs, je ne suis pas convaincue qu'il existe un certain fondement factuel pour certifier, en tant que question commune, la question de savoir si le montant du redressement pécuniaire peut être évalué globalement, à l'échelle du groupe. Ni

the quantum of monetary relief owed to all the class members could be reasonably determined.

[162] The failure to certify the calculation of aggregate monetary relief as a common issue does not preclude the trial judge from ultimately turning to the aggregate award provisions in the *CAA* if appropriate (*Pioneer*, at para. 114, citing *Microsoft*, at para. 134).

(d) *Punitive Damages*

[163] I agree with the application judge that the punitive damages claim is a common issue. As noted above, the focus of punitive damages is on the *defendant's* misconduct, not the plaintiff's loss (*Whiten*, at para. 73).

[164] This Court has recognized that punitive damages may be amenable to determination as a common issue, including in cases where liability will relate to a class of victims as a group and the court will be making "exactly the kind of fact-finding that will be necessary to determine whether punitive damages are justified" (*Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184, at para. 34). In this case, ALC's conduct and the alleged breach of the duty of good faith would be common to all class members. The application judge's finding that "a determination on this question will address the common interests of all members of the class" (NLTD Certification Reasons, at para. 119) is entitled to deference and I see no reason to interfere with it.

(3) Preferable Procedure

[165] Section 5(2) of the *CAA* provides that in determining whether a class action is a preferable

l'un ni l'autre des actes de procédure subsidiaires ne révèle un fondement factuel selon lequel le montant du redressement pécuniaire dû à tous les membres du groupe pourrait être raisonnablement déterminé.

[162] Le fait que le calcul du redressement pécuniaire global n'ait pas été certifié en tant que question commune n'empêche pas le juge de première instance de se fonder au final sur les dispositions de la *CAA* relatives à l'octroi d'un montant global s'il l'estime indiqué (*Pioneer*, par. 114, citant *Microsoft*, par. 134).

d) *Dommages-intérêts punitifs*

[163] Je souscris à l'opinion du juge saisi de la demande voulant que la demande de dommages-intérêts punitifs est une question commune. Comme je l'ai expliqué, l'aspect auquel il faut s'attacher en matière de dommages-intérêts punitifs est la conduite répréhensible du *défendeur*, et non la perte du demandeur (*Whiten*, par. 73).

[164] La Cour a reconnu que les dommages-intérêts punitifs peuvent être traités comme une question commune, notamment dans les affaires où la responsabilité a trait à des victimes en tant que groupe et où le tribunal se livrera « exactement [au] genre de recherche des faits à laquelle le tribunal devra se livrer pour déterminer si des dommages-intérêts exemplaires sont justifiés » (*Rumley c. Colombie-Britannique*, 2001 CSC 69, [2001] 3 R.C.S. 184, par. 34). En l'espèce, la conduite de la SLA et le manquement allégué à l'obligation d'agir de bonne foi seraient des questions communes à tous les membres du groupe. Il y a lieu de faire preuve de déférence à l'égard de la conclusion du juge saisi de la demande selon laquelle [TRADUCTION] « une décision sur cette question abordera les intérêts communs de tous les membres du groupe » (motifs de la décision de la division de première instance de la C.S. T.-N.-L. sur l'autorisation, par. 119) et je ne vois aucune raison d'intervenir.

(3) Procédure constituant le meilleur moyen

[165] Le paragraphe 5(2) de la *CAA* prévoit que pour établir si le recours collectif serait le meilleur

procedure for the fair and efficient resolution of the common issues, the court may consider all relevant matters including whether:

(a) questions of fact or law common to the members of the class predominate over questions affecting only individual members;

(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

(c) the class action would involve claims that are or have been the subject of another action;

(d) other means of resolving the claims are less practical or less efficient; and

(e) the administration of the class action would create greater difficulties than those likely to be experienced if relief were sought by other means.

[166] As noted in *Hollick*, preferability is best analysed through the lens of the three main advantages of class actions — judicial economy, access to justice, and behaviour modification — and must take into account the importance of the common issues in relation to the claims as a whole (paras. 27 and 30). The third parties submit that individual issues predominate over common issues and that the claims break down into an individualistic determination with respect to both liability and quantum. Again, however, I agree with the application judge that ALC and the third parties' objections do not address the action as framed, and instead proceed on the assumption that the plaintiffs are seeking recovery of losses suffered, as particularized to each class member.

[167] The keystone of the plaintiffs' action is a deception common to each member of the class. Determining the content of a contract entered into by each member of the class, and whether that contract was systematically breached, does not require individualized assessments for each class member and is decidedly more practical and efficient than requiring each member to begin an action as an individual

moyen de régler les questions communes de manière juste et efficace, le tribunal peut tenir compte de tous les facteurs pertinents, notamment les suivants :

a) les questions de fait ou de droit communes aux membres du groupe l'emportent sur celles touchant uniquement les membres individuels;

b) un nombre important de membres du groupe ont véritablement intérêt à mener individuellement la poursuite d'actions distinctes;

c) le recours collectif comprend des demandes qui ont été ou qui font l'objet d'autres instances;

d) les autres modes de règlement sont moins pratiques ou efficaces;

e) la gestion du recours collectif créerait de plus grandes difficultés que l'adoption d'un autre moyen pour solliciter le redressement.

[166] Comme l'a affirmé la Cour dans l'arrêt *Hollick*, il convient d'analyser la question du meilleur moyen en fonction des trois principaux avantages du recours collectif — l'économie de ressources judiciaires, l'accès à la justice et la modification des comportements — et il faut examiner l'importance des questions communes par rapport à l'ensemble des demandes (par. 27 et 30). Les tierces parties soutiennent que les questions individuelles l'emportent sur les questions communes et que les demandes se réduisent à une détermination au cas par cas en ce qui concerne tant la responsabilité que le quantum. Cependant, encore une fois, je souscris à l'opinion du juge saisi de la demande voulant que les objections de la SLA et des tierces parties ne répondent pas à l'action telle qu'elle est formulée et présupposent plutôt que les demandeurs cherchent à obtenir le recouvrement des pertes subies, ventilées pour chaque membre du groupe.

[167] La clé de voûte de l'action des demandeurs est une tromperie commune à tous les membres du groupe. Il est assurément plus pratique et efficace de déterminer le contenu d'un contrat auquel est partie chaque membre du groupe et d'établir si le contrat a été systématiquement violé, que d'obliger chaque membre du groupe à intenter une action à titre de demandeur individuel, et cette façon de faire n'exige

plaintiff. That alone would make this a preferable procedure.

[168] Further, a common set of fact-finding will allow the trial judge to determine, without duplication, whether other contractual remedies will adequately vindicate and protect the contractual interest the class members had in playing a safe, honest game offered by a corporation charged with running a monopolistic public scheme.

[169] On punitive damages in particular, ALC submits that a class action is not a preferable procedure, because granting punitive damages in the absence of other monetary relief would allow the plaintiffs to play the role of "a private Attorney General". However, punitive damages are not necessarily parasitic on the plaintiff's having suffered a loss or personal injury. The fact that punitive damages focus on the defendant's conduct makes a class proceeding "particularly well-suited" to such awards (*Chace v. Crane Canada Inc.* (1997), 44 B.C.L.R. (3d) 264 (C.A.), at para. 24), especially where the allegation of liability is founded on systemic wrongdoing (see, e.g., *Rumley*, at para. 34). Deterrence of wrongful conduct is a primary goal of class actions (C. Jones, "The Class Action as Public Law", in J. Walker and G. D. Watson, eds., *Class Actions in Canada: Cases, Notes, and Materials* (2014), 28, at p. 29), and punitive damages are measured, in part, to ensure deterrence (*Whiten*, at para. 111).

[170] A class action is the preferable procedure for the plaintiffs' claim, even if some individualized assessments are ultimately needed (see, e.g., *Pederson v. Saskatchewan*, 2016 SKCA 142, 408 D.L.R. (4th) 661, at paras. 80-94; *Chalmers v. AMO Canada Co.*, 2010 BCCA 560, 297 B.C.A.C. 186, at paras. 25-35; *Fakhri v. Capers Community Markets*, 2004 BCCA 549, 203 B.C.A.C. 227, at paras. 20-26). The existence of individual issues is no bar to a class action (*Microsoft*, at para. 140). The very point of a class action is that individuals can come together to pursue,

pas d'évaluations individuelles pour chaque membre du groupe. Cette considération à elle seule fait du recours collectif le meilleur moyen.

[168] Qui plus est, une seule appréciation des faits permettra au juge de première instance d'établir, sans double emploi, si d'autres réparations contractuelles défendront et protégeront adéquatement l'intérêt contractuel des membres du groupe à jouer à un jeu sûr et honnête offert par une société chargée de diriger un système public monopolistique.

[169] Pour ce qui est des dommages-intérêts punitifs en particulier, la SLA soutient que le recours collectif n'est pas le meilleur moyen de régler la question, car l'octroi de dommages-intérêts punitifs en l'absence d'autres mesures de redressement pécuniaire permettrait aux demandeurs de jouer le rôle de [TRADUCTION] « procureur général privé ». Toutefois, les dommages-intérêts punitifs ne dépendent pas nécessairement de la perte ou du préjudice personnel que subit le demandeur. Le fait que les dommages-intérêts punitifs sont axés sur la conduite du défendeur rend le recours collectif [TRADUCTION] « particulièrement adapté » à de tels octrois (*Chace c. Crane Canada Inc.* (1997), 44 B.C.L.R. (3d) 264 (C.A.), par. 24), surtout lorsque l'allégation de responsabilité est fondée sur une faute systémique (voir, p. ex., *Rumley*, par. 34). La dissuasion de la conduite fautive est un des principaux objectifs des recours collectifs (C. Jones, « The Class Action as Public Law », dans J. Walker et G. D. Watson, dir., *Class Actions in Canada : Cases, Notes and Materials* (2014), 28, p. 29), et les dommages-intérêts punitifs sont calculés, en partie, pour assurer la dissuasion (*Whiten*, par. 111).

[170] Le recours collectif est le meilleur moyen de régler l'action des demandeurs, même si certaines évaluations au cas par cas sont ultimement nécessaires (voir, p. ex., *Pederson c. Saskatchewan*, 2016 SKCA 142, 408 D.L.R. (4th) 661, par. 80-94; *Chalmers c. AMO Canada Co.*, 2010 BCCA 560, 297 B.C.A.C. 186, par. 25-35; *Fakhri c. Capers Community Markets*, 2004 BCCA 549, 203 B.C.A.C. 227, par. 20-26). L'existence de questions individuelles n'empêche pas le recours collectif (*Microsoft*, par. 140). L'idée même d'un recours collectif est que

as a class, a cause of action that they could, as a matter of law, already bring individually. The economy of the class action derives partly from the savings in litigation costs and partly from the removal of barriers that those individuals might otherwise face (*Rumley*, at para. 39). The latter point is particularly compelling in light of the many economic, social, and psychological barriers that individual players or problem gamblers may face in coming forward and advancing a claim for breach of contract against ALC through individualized avenues. This is especially so given that those individuals who have suffered particularly from ALC's alleged breach may be the least capable of advancing a claim. Class actions "overcome barriers to litigation by providing a procedural means to a substantive end" (*Fischer*, at para. 34). In this case, that end includes the potential to acknowledge, vindicate, and protect individual players' contractual interest in a safe and fair game, or to encourage behavioural modification and to punish allegedly deceptive, manipulative, and high-handed conduct in the provision of such games. Even if breach of contract were the only common issue, a trial to determine whether ALC systematically breached contracts with VLT players would go some way to acknowledging players' contractual interests and, potentially, vindicating and protecting those interests.

(4) Conclusion on Certification

[171] For the above reasons, I conclude that the plaintiffs' claim should be certified as a class action on the common issues of breach of contract, punitive damages, and the appropriateness of a disgorgement remedy.

V. Conclusion

[172] For these reasons, I would allow the appeals in part. I would strike disgorgement (referred to in

les gens peuvent s'unir pour faire valoir, en tant que groupe, une cause d'action qu'ils pourraient chacun faire valoir individuellement en droit. L'économie liée au recours collectif découle en partie des coûts épargnés en matière de frais de justice et en partie du retrait des obstacles auxquels ces gens feraient autrement face (*Rumley*, par. 39). Ce dernier élément est particulièrement convaincant en raison des nombreux obstacles d'ordre pécuniaire, social et psychologique auxquels peuvent faire face les joueurs individuels ou les joueurs à problèmes, en se manifestant et en faisant valoir une demande fondée sur la violation de contrat contre la SLA par des voies individuelles. Cela est d'autant plus vrai étant donné que les individus qui ont souffert particulièrement de la violation reprochée à la SLA peuvent être ceux qui sont les moins capables de faire valoir une demande. Le recours collectif « permet de surmonter les obstacles aux litiges en fournissant un moyen procédural d'arriver à une fin substantielle » (*Fischer*, par. 34). En l'espèce, cette fin comprend la possibilité de reconnaître, de défendre et de protéger l'intérêt contractuel de chaque joueur à jouer à un jeu sûr et juste, ou d'encourager une modification du comportement et de punir une conduite qui serait trompeuse, manipulatrice et abusive dans la prestation de ces jeux. Même si la violation de contrat était la seule question commune, un procès pour trancher la question de savoir si la SLA a systématiquement violé les contrats intervenus avec des joueurs d'ALV permettrait dans une certaine mesure de reconnaître les intérêts contractuels des joueurs et, éventuellement, de défendre et de protéger ces intérêts.

(4) Conclusion sur l'autorisation du recours collectif

[171] Pour les motifs qui précèdent, je conclus que l'action des demandeurs devrait être autorisée en tant que recours collectif portant sur les questions communes relatives à la violation de contrat, aux dommages-intérêts punitifs et au caractère approprié de la réparation de restitution des gains illicites.

V. Conclusion

[172] Pour ces motifs, je suis d'avis d'accueillir les pourvois en partie, et de radier la restitution des

the pleadings as "waiver of tort") and unjust enrichment as causes of action. I would certify the class action with common issues as follows:

(1) Has ALC breached a duty owed in contract?

(2) If there is a breach of contract, would the ordinary remedies of contract law be inadequate to protect or vindicate the class members' contractual right such that disgorgement is available as a remedy?

(3) If there is a breach of contract, should punitive or exemplary damages be awarded and, if so, in what amount?

[173] Of course, the plaintiffs may seek to amend their pleadings in accordance with these reasons. As s. 37 of the *CAA* generally precludes costs awards in respect of applications for certification, I would order that the parties bear their own costs.

gains illicites (appelée « renonciation au recours délictuel » dans les actes de procédure) et l'enrichissement sans cause en tant que causes d'action. J'autoriserais le recours collectif portant sur les questions communes suivantes :

(1) La SLA a-t-elle manqué à une obligation contractuelle?

(2) S'il y a eu violation de contrat, les réparations ordinaires du droit des contrats seraient-elles inadéquates pour protéger ou défendre le droit contractuel des membres du groupe, de sorte que la restitution des gains illicites pourrait être accordée à titre de réparation?

(3) S'il y a eu violation de contrat, y a-t-il lieu d'octroyer des dommages-intérêts punitifs ou exemplaires et, dans l'affirmative, quel devrait en être le montant?

[173] Bien entendu, les demandeurs peuvent demander de modifier leurs actes de procédure conformément aux présents motifs. Comme l'art. 37 de la *CAA* exclut généralement l'adjudication de dépens relativement aux demandes d'autorisation de recours collectifs, j'ordonnerais que les parties assument leurs propres dépens.

APPENDIX

Common Issues as Certified by Faour J. (A.R., vol. I, at p. 117)

(a) Does the *Criminal Code* authorize the operation of video lotteries by siteholders, in view of s. 206(1)(g) which prohibits games similar to "three card monte"?

(b) Does the *Criminal Code* authorize the operation of video lotteries by siteholders, in view of s. 201, which prohibits keeping a common gaming house?

(c) Has the Defendant been unjustly enriched?

(d) Has the Defendant breached s. 52 of the *Competition Act* [R.S.C. 1985, c. C-34]?

ANNEXE

Questions communes certifiées par le juge Faour (d.a., vol. I, p. 117)

[TRADUCTION]

a) Le *Code criminel* autorise-t-il l'exploitation de loteries vidéo par des exploitants de site, compte tenu de l'al. 206(1)g) qui interdit les jeux analogues au « bonneteau »?

b) Le *Code criminel* autorise-t-il l'exploitation de loteries vidéo par des exploitants de site, compte tenu de l'art. 201, qui interdit la tenue d'une maison de jeu?

c) La défenderesse s'est-elle enrichie sans cause?

d) La défenderesse a-t-elle contrevenu à l'art. 52 de la *Loi sur la concurrence* [L.R.C. 1985, c. C-34]?

(e) Has the Defendant breached a duty owed in contract or tort?

(f) Can monetary relief be measured on an aggregate, class-wide basis and, if so, what is the amount of aggregate monetary relief?

(g) If the answer to Issue (f) is no, can loss or damage be measured by the gain to the Defendant, and if so, what is the appropriate restitutionary remedy and in what amount?

(h) Has the Defendant breached provisions of the *Statute of Anne, 1710* [9 Anne, c. 19], and should the remedy of treble damages be granted, and if so, what is the appropriate amount?

(i) Should punitive or exemplary damages be awarded against the Defendant and, if so, in what amount.

Appeals allowed, Wagner C.J. *and* Karakatsanis, Martin *and* Kasirer JJ. *dissenting in part.*

Solicitors for the appellant the Atlantic Lottery Corporation Inc.: Goodmans, Toronto; Bennett Jones, Toronto.

Solicitors for the appellants VLC, Inc., IGT-Canada Inc. and International Game Technology: Curtis, Dawe, St. John's.

Solicitors for the appellant Spielo International Canada ULC: Stewart McKelvey, St. John's.

Solicitors for the appellant Tech Link International Entertainment Limited: Cox & Palmer, St. John's.

Solicitors for the respondents: Koskie Minsky, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

e) La défenderesse a-t-elle manqué à une obligation ayant un fondement contractuel ou délictuel?

f) Les mesures de redressement pécuniaire peuvent-elles être évaluées globalement, à l'échelle du groupe et, dans l'affirmative, quel en est le montant?

g) Si la réponse à la question f) est négative, la perte ou le préjudice peut-il être calculé en fonction du gain réalisé par la défenderesse et, dans l'affirmative, quelle est la réparation par restitution appropriée et quel en est le montant?

h) La défenderesse a-t-elle contrevenu aux dispositions du *Statute of Anne, 1710* [9 Anne, c. 19], et la réparation de dommages-intérêts triples devrait-elle être accordée, et dans l'affirmative, quel en serait le montant approprié?

i) Y a-t-il lieu de condamner la défenderesse à verser des dommages-intérêts punitifs ou exemplaires et, dans l'affirmative, quel devrait en être le montant?

Pourvois accueillis, le juge en chef Wagner *et les juges* Karakatsanis, Martin *et* Kasirer *sont dissidents en partie.*

Procureurs de l'appelante la Société des loteries de l'Atlantique : Goodmans, Toronto; Bennett Jones, Toronto.

Procureurs des appelantes VLC, Inc., IGT-Canada Inc. et International Game Technology : Curtis, Dawe, St. John's.

Procureurs de l'appelante Spielo International Canada ULC : Stewart McKelvey, St. John's.

Procureurs de l'appelante Tech Link International Entertainment Limited : Cox & Palmer, St. John's.

Procureurs des intimés : Koskie Minsky, Toronto.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General of Saskatchewan, Regina.

Solicitors for the interveners Bally Gaming Canada Ltd. and Bally Gaming Inc.: Benson Buffett, St. John's; Dickinson Wright, Toronto.

Solicitors for the intervener the Western Canada Lottery Corporation: Kanuka Thuringer, Regina.

Solicitor for the intervener the Alberta Gaming, Liquor, and Cannabis Commission: Alberta Justice and Solicitor General, Edmonton.

Solicitors for the intervener the Canadian Gaming Association: McCarthy Tétrault, Toronto.

Solicitors for the intervener the Canadian Chamber of Commerce: Davies Ward Phillips & Vineberg, Toronto.

Solicitors for the intervener the British Columbia Lottery Corporation: Hunter Litigation Chambers, Vancouver.

Procureur de l'intervenant le procureur général du Manitoba : Procureur général du Manitoba, Winnipeg.

Procureur de l'intervenant le procureur général de la Saskatchewan : Procureur général de la Saskatchewan, Regina.

Procureurs des intervenantes Bally Gaming Canada Ltd. et Bally Gaming Inc. : Benson Buffett, St. John's; Dickinson Wright, Toronto.

Procureurs de l'intervenante Western Canada Lottery Corporation : Kanuka Thuringer, Regina.

Procureur de l'intervenante Alberta Gaming, Liquor and Cannabis Commission : Alberta Justice and Solicitor General, Edmonton.

Procureurs de l'intervenante Canadian Gaming Association : McCarthy Tétrault, Toronto.

Procureurs de l'intervenante la Chambre de commerce du Canada : Davies Ward Phillips & Vineberg, Toronto.

Procureurs de l'intervenante British Columbia Lottery Corporation : Hunter Litigation Chambers, Vancouver.

25

COURT OF APPEAL FOR ONTARIO

CITATION: Dasham Carriers Inc. v. Gerlach, 2013 ONCA 707
DATE: 20131119
DOCKET: C56868 & M42906

Feldman, MacPherson and Epstein JJ.A.

BETWEEN

Dasham Carriers Inc.

Applicant (Respondent)

and

David Gerlach

Respondent (Appellant)

Sukhjinder Bhangu, for the appellant

Ajay Duggal and Harinder Dhaliwal, for the respondent

Heard: October 1, 2013

On appeal from the judgment of Justice David Price of the Superior Court of Justice, dated August 21, 2012, with reasons reported at 2012 ONSC 4797.

Epstein J.A.:

INTRODUCTION

[1] The appellant landlord, David Gerlach, appeals from a judgment ordering him to pay the respondent tenant, Dasham Carriers Inc., damages in the amount of $130,600. These damages flow from Mr. Gerlach's improper termination of Dasham's lease of commercial property (the "leased premises").

[2] On appeal, the appellant does not contest the finding that he wrongly terminated the lease. The appeal is restricted to the quantum of damages.

[3] For the reasons that follow, I would allow the appeal to correct an error the application judge made in computing the respondent's damages. In my view, this is a mere error in calculation as opposed to an error of law.

[4] Before this court, the appellant also sought a review of the order of Cronk J.A., dated September 17, 2013, in which she struck his affidavit, dated May 7, 2013, along with all references to it in his factum. I see no basis to interfere with Cronk J.A.'s order and would therefore dismiss the motion.

BACKGROUND FACTS

[5] On May 1, 2010, the appellant and respondent entered into a three-year lease. The lease required the respondent to pay rent to the appellant of $6,500 per month for the first year and $7,000 per month thereafter.

[6] Pursuant to a term of the lease allowing it to do so, the respondent sublet the premises. On October 1, 2010, it entered into a sublease with Jandu Truck Centre for the west portion of the leased premises. The sublease, which ended on April 30, 2013, required Jandu to pay the respondent monthly rent of $4,000. In May 2011, the respondent entered into a sublease with Truck Spa. It provided for the payment of monthly rent of $4,800. In October 2011, Truck Spa sold its

business to Best Performance Truck Repairs Inc. Best Performance assumed Truck Spa's obligations under its sublease.

[7] On December 1, 2011, the respondent entered into a sublease directly with Best Performance under which Best Performance would pay the respondent monthly rent of $4,600 until April 30, 2012 and then $4,800 until the end of the respondent's lease on April 30, 2013.

[8] Subsequently, the appellant entered into a one-year lease with Jandu for $4,500 per month. This lease commenced on May 1, 2012 – one year before the respondent's lease with the appellant and its sublease with Jandu were to expire.

[9] On May 6, 2012, the appellant improperly terminated the respondent's lease. At that time, the two subtenants were paying aggregate monthly rent to the respondent of $8,800. Dasham was therefore receiving $1,800 more from its subtenants than it was paying to the appellant.

THE APPLICATION JUDGE'S ANALYSIS OF THE DAMAGES TO WHICH THE RESPONDENT IS ENTITLED

[10] Citing *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, and *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, 106 O.R. (3d) 427, supplementary reasons at 2011 ONCA 581, 56 C.C.L.T. (3d) 206, the application judge held, correctly in my view, that the respondent's damages arising out of the appellant's wrongful termination of the lease is the amount that

would restore the respondent to the position it would have been in had the lease agreement been performed.

[11] To understand the nature of the application judge's error, an error that arose in spite of his identifying the appropriate legal principles, it is necessary to set out, *verbatim*, the application judge's explanation of his approach to the calculation of the respondent's damages. This approach is set out at paras. 67-75 of his reasons.

> **67** In the present case, to be "restored", [the respondent] is entitled to the difference between the rent it received from the sub-tenants and the rent it paid to [the appellant].
>
> **68** [The respondent] was entitled to receive $4,000.00 per month from its sub-tenant, Jandu, beginning in October 1, 2010, and $4,800.00 per month from its sub-tenant, Best Performance, beginning October 1, 2011.
>
> **69** Throughout this period, it was paying $7,000.00 per month to [the appellant], as its rent increased on April 30, 2011, from $6,500.00 per month to $7,000.00 per month.
>
> **70** Based on the foregoing, [the appellant] owes [the respondent] $8,800.00 per month from May 1, 2012, when [the appellant] received rent from both of [the respondent's] former sub-tenants for the property in respect of which [the respondent] still held a valid lease, to the end of his three year term on April 30, 2013, for a total of $105,600.00. In addition, he owes [the respondent] $4,800.00 per month for the earlier period from December 1, 2011, when he entered into his separate lease with Best Performance, to the end of April 2012, when he signed his lease with Jandu. He

owes [the respondent] a total of $24,000.00 for the earlier period ($4,800.00 x 5 months). Its total lost rent was therefore $130,600.00 ($105,600.00 + $24,000.00).

71 From this amount should be deducted $7,000.00 for any month in which [the respondent] did not pay its rent to [the appellant].

72 [The appellant] questions whether he should be required to pay the rent received from [the respondent's] former sub-tenants beyond the initial terms of their sub-leases with [the respondent].The fact is that both Jandu and Best Performance continued their leases into the final year of [the respondent's] lease with [the appellant], paying the same amount of rent which they previously had paid to [the respondent]. I therefore find, on a balance of probabilities, that both would have renewed their sub-leases with [the respondent].

73 In *Hamilton v. Open Bakery Ltd.*, above, the Supreme Court affirmed the principle of remoteness, which restricts damages to the amount required to put the plaintiff in the position it would have been in if the contract had been performed. [The respondent's] claim for its loss during the period of renewal must be based on at least "probable renewal" in order to avoid being too speculative. In *Morgan v. Fry*, where the defendant wrongfully caused the plaintiff to be dismissed from his employment, damages were allowed on the basis [the judge found on the evidence] that the plaintiff would "probably have" retained his employment in order to be entitled to lost wages.

74 Jandu and Best Performance would probably have renewed their subleases with [the respondent] because they did so with [the appellant]. [The respondent] is therefore entitled to damages for the renewal period.

75 The appellant holds the rent he receives from his tenants ([the respondent's] former sub-tenants) in trust for [the respondent], and shall pay this amount to [the respondent], less the rent that [the respondent] would

> have been required to pay [the appellant] pursuant to the lease that [the appellant] breached.

[12] To this point the application judge's analysis was entirely consistent with the law and an application of the facts to the law. The calculation error appears in para. 89, in which the application judge performed the mathematical calculation of the respondent's damages:

> **89** Based on the foregoing, it is ordered that:
>
> 1. [The appellant] shall pay [the respondent] its damages in the amount of $130,600.00.
> 2. [The appellant] shall refund [the respondent's] security deposit in the amount of $14,735.00.
> 3. [The appellant] shall pay post-judgment interest on the sum of $145,335.00 from today's date.
> 4. If the parties are unable to agree on costs, they may make submissions in writing, not to exceed three pages, with a Costs Outline, by August 31, 2012.

[13] The judgment, as issued and entered, tracks this calculation.

ISSUES

[14] There is only one issue of substance in this appeal. As identified above, it is the quantum of damages.

[15] Neither the appellant nor the respondent disputes the legal principles upon which the application judge approached the calculation of the respondent's damages. They agree that the respondent is entitled to the amount that will restore it to the position it would have been in had the appellant not breached the lease agreement. Their disagreement lies in what factors should be considered in the calculation of this amount.

ANALYSIS

(a) Request for a review of the order of Cronk J.A.

[16] I will first deal with the appellant's request for a review of the order of Cronk J.A. In addition to striking out the appellant's affidavit of May 7, 2013 and all exhibits to which it refers, the order required the appellant to deliver a new factum in which all references to the affidavit and exhibits were removed. The impugned affidavit post-dates the application judge's reasons, is unsworn and contains material not in the record before the application judge. The appellant's original factum made repeated references to the affidavit and exhibits, but the appellant had not moved for an order allowing the introduction of fresh evidence. In these circumstances, I see no reason to interfere with Cronk J.A.'s disposition of the motion and would therefore dismiss the appellant's motion to review the order.

(b) The Appeal

[17] When a party sustains a loss by reason of a breach of contract, damages are to be awarded in an amount that will place him in the same position as if the contract had been performed. This method of calculating damages, commonly referred to as "expectation damages," is the standard common law rule.

[18] There is no special approach to the calculation of damages recoverable by a wrongly evicted tenant. The calculation is governed by the rule applicable to all breaches of contract: the tenant is entitled to be placed in the same position as if the lease agreement had been performed. This proposition was recognized in *Haack v. Martin*, [1927] S.C.R. 413, a case in which the Supreme Court wrestled with the calculation of a farmer's loss of profit as a result of his being evicted from land he had leased for the purpose of operating a farm. Although *Haack* is a dated case, its discussion of damages for wrongful eviction remains good law today and continues to be cited in Ontario: see *e.g. Burns v. Sohi*, 2012 ONSC 2414, 21 R.P.R. (5th) 205, at para. 300; and *Upper Room Alliance Group Ltd. v. John Volken Foundation* (2008), 54 B.L.R. (4th) 97 (Ont. S.C.), at paras. 139-40, supplementary reasons at [2008] O.J. No. 4899.

[19] This approach to the calculation of expectation damages in wrongful eviction cases, namely, the benefit the tenant expected to receive to the end of the lease term less the rent the tenant would have had to pay the landlord, was approved

by this court in *Procopio v. D'Abbondanza* (1975), 8 O.R. (2d) 496 (C.A.), at p. 498. In *Procopio*, the tenant entered into a lease under which she was paying below-market rent. The landlord subsequently locked her out of the rental unit. The court held that the tenant was entitled to damages equivalent to the difference between the current market value of the rental premises and the amount she was paying under the favourable terms of the lease.

[20] Accordingly, to calculate the amount required to restore the respondent to the position it would have been in if the contract had been performed, the respondent is entitled to the benefit it would have received over the course of the twelve months left to run under the lease – that is, the amount of rent it would have received from its two subtenants – less the amount of rent it would have owed the appellant for the use of the leased premises during that period.

[21] The passages set out above demonstrate that this is precisely how the application judge intended to measure the respondent's damages. However, this is not how the application judge calculated the respondent's damages in para. 89 of his reasons. He overlooked the second part of the equation. He neglected to subtract the amount the respondent would have owed the appellant for rent during the final year of the lease. This is an obvious oversight and must be corrected.

[22] Based on the application judge's findings of fact, the calculation of the respondent's damages, in accordance with the correct legal principles and with the application judge's own analysis, is as follows.

[23] I start with the respondent's income over the twelve month period. The application judge found as a fact that both subtenants would have continued to sublet their portions of the leased premises until the end of the respondent's lease. This finding was open to him to make on the evidence and I see no reason to interfere with it. Accordingly, the respondent reasonably expected to receive aggregate rent of $8,800 per month from its subtenants for twelve additional months.

[24] From this must be deducted the cost the respondent reasonably expected to pay in order to use the leased premises during the final year of the lease for the purposes of earning rental income from its subtenants. The parties agree that ten months' rent remains owing to the appellant under the terms of the lease.

[25] The appellant submits, for the first time in this court, that the rent during that last year was $7,910, not $7,000. I do not accept this submission. The additional $910 is HST and is not part of the rent.

[26] Paragraph 75 of the reasons appears to have caused some confusion as a result of the application judge's choice of words, specifically, his statement that the appellant holds the rent he receives from the respondent's former subtenants

"in trust" for the respondent. However, what follows next, a statement that the appellant "shall pay this amount to [the respondent], *less the rent that* [*the respondent*] *would have been required to pay* [*the appellant*] *pursuant to the lease that* [*the appellant*] *breached*" (emphasis added), makes the application judge's reasoning clear. To the extent necessary to restore the respondent to the position it would have been in if the lease agreement had been performed, the appellant holds any rent he receives during the final year of the respondent's lease (plus the rent the respondent would have received from Best Performance but for the breach) effectively to the credit of the respondent. From this amount, the rent the respondent would have had to pay under the lease must be deducted. The excess belongs to the respondent.

[27] The respondent submits that because it was wrongly evicted from the leased premises, the rent it would have paid the appellant under the lease should not be deducted from the amount of damages to which it is entitled. It argues that reducing its damage award by this amount while simultaneously allowing the appellant the benefit of the rent he is receiving from Jandu permits the appellant to "double dip" and is simply unfair.

[28] I disagree. First, and most importantly, determining the respondent's damages in accordance with my above calculation puts the respondent in the position it would have been in had the lease agreement not been breached. This

position involves two things. The respondent pays the rent due under the lease. The respondent receives the benefit of the rent from its subtenants.

[29] Second, even if, as a result of his use of the premises during the remainder of the lease, the appellant realized a profit beyond what he would have received from the respondent's rent payments, this would not affect the quantum of the respondent's damages in the light of the fact that his claim is solely for damages for breach of contract. As previously noted, the measure of damages for a breach of contract is expectation damages: see *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601, at para. 26. As recognized by both the Supreme Court and academic commentators, "[n]o general principle exists whereby a defendant can be made to account for a profit derived from a simple breach of contract": see S.M. Waddams, *The Law of Damages*, 5th ed. (Toronto: Thomson Reuters, 2012), at p. 9-9; *Asamera Oil Corp. Ltd. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633, at pp. 672-73, varied as to the amount of interest ordered, [1979] 1 S.C.R. 677. Therefore, the focus in any damages calculation is on the injured party's loss and on the measure of compensation required to restore it to the position it would have been in had the contract been performed. Any benefit or detriment to the breaching party is simply not relevant to this determination.

[30] This principle is most clearly illustrated by cases involving an "efficient breach." In such cases, the defendant's profit from the breach is greater than the

measure of damages required to compensate the plaintiff. Even when there is an efficient breach, courts award expectation damage – the amount of the plaintiff's loss. The injured party is not entitled to a higher damage award merely because the breaching party has profited from his repudiation of the contract. To the contrary, the Supreme Court has issued a clear directive that an "[e]fficient breach should not be discouraged by the courts. This lack of disapproval emphasizes that a court will usually award money damages for breach of contract equal to the value of the bargain to the plaintiff": *Bank of America*, at para. 31. Therefore, even if, as the respondent alleges, the appellant has profited from his repudiation of the lease, it does not change the amount of damages to which the respondent is entitled.

[31] Based on the application judge's approach – an approach that is in accordance with the governing legal principles – the amount the appellant is required to pay to put the respondent in the position it would have been in had the lease been performed is $35,600. I arrive at this number by calculating the total amount of rent the respondent would have received from its subtenants, $105,600 ($8,800 x 12), and subtracting the $70,000 that remained outstanding under the lease with Mr. Gerlach ($7,000 x 10).

THE APPELLANT'S ARGUMENTS CONCERNING THE DAMAGE DEPOSIT AND PROOF OF INCOME

[32] The appellant submits that the application judge erred in ordering him to return the $14,735 security deposit. He argues that the full amount of the deposit has been credited for unpaid amounts of the first and last months' rent owing under the lease. However, the appellant is unable to point to any evidence in the record in support of this submission. I would therefore not give effect to this ground of appeal.

[33] For the first time on appeal, the appellant also challenges the application judge's finding that the respondent actually entered into a sublease with, or received any income from, Best Performance. I would reject this argument. Without any evidence to the contrary, the application judge was entitled to accept the sublease as genuine and draw the inference that it was in good standing.

[34] Finally, I should comment on the fact that the parties agreed that the application judge misapprehended the evidence about the respondent's lease with Best Performance and also made an arithmetic error – two mistakes that increased, by $25,000, the damages he found owing to the respondent. These were fair concessions. The correction I would make to the application judge's calculation of damages eliminates the effect of these errors.

CONCLUSION

[35] I appreciate that the approach I have taken to resolve the application judge's oversight in not deducting the $70,000 in rent owed to the appellant in his calculation of damages was not argued by counsel for the appellant. Normally, I would not determine an appeal on a basis not put forward by counsel as it is counsel's responsibility, not the court's, to advance a party's position. However, as I see it, there is a factor that allows me to proceed as I have. My analysis tracks that of the application judge but for a correction that is necessary in order to bring the final calculation in line with his reasons. The application judge, as I have said, accurately identified the way in which the respondent's damages should be calculated and noted, a number of times, that the $7,000 monthly rent the respondent owed to the end of the lease must be deducted from the rental income it would have received from the subtenants. The respondent was required to pay rent in order to use the leased premises for the purposes of earning rent money from the subtenants. Subtracting the cost of having access to the leased premises is an essential part of putting the respondent in the position as though the contract had been fulfilled.

[36] I am of the view that endorsing the application judge's reasoning to this effect fits precisely within the jurisdiction provided in s. 134(1)(a) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. This section gives this court unconditional authority to "make any order or decision that ought to or could have been made

by the court or tribunal appealed from." The guiding force, as it invariably is and must be, is the interests of justice.

[37] In my opinion, in these circumstances, it is in the interests of justice to apply the correct law and give effect to the application judge's analysis.

DISPOSITION

[38] I would dismiss the motion to review the order of Cronk J.A.

[39] For the above reasons, I would allow, in part, the appeal from the judgment of Price J. by varying paragraph 1 of the judgment to reflect a damage award in the amount of $35,600. Except for a necessary adjustment to the post-judgment interest calculation in paragraph 3 of the judgment, I would leave the remainder of the judgment unchanged.

[40] In the circumstances I would make no order as to costs.

Released: November 19, 2013 ("KF")

"G. Epstein J.A."
"I agree. K. Feldman J.A."
"I agree. J.C. MacPherson J.A."

26

Performance Industries Ltd. and Terrance O'Connor *Appellants/Respondents on cross-appeal*

v.

Sylvan Lake Golf & Tennis Club Ltd. *Respondent/Appellant on cross-appeal*

Performance Industries Ltd. et Terrance O'Connor *Appelants/Intimés au pourvoi incident*

c.

Sylvan Lake Golf & Tennis Club Ltd. *Intimée/Appelante au pourvoi incident*

INDEXED AS: PERFORMANCE INDUSTRIES LTD. *v.* SYLVAN LAKE GOLF & TENNIS CLUB LTD.

Neutral citation: 2002 SCC 19.

File No.: 27934.

2000: December 14; 2002: February 22.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Major, Binnie, Arbour and LeBel JJ.

RÉPERTORIÉ : PERFORMANCE INDUSTRIES LTD. *c.* SYLVAN LAKE GOLF & TENNIS CLUB LTD.

Référence neutre : 2002 CSC 19.

N° du greffe : 27934.

2000 : 14 décembre; 2002 : 22 février.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Major, Binnie, Arbour et LeBel.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Contracts — Equitable remedies — Rectification of contract — Written contract not reflecting prior oral agreement — Whether equitable remedy of rectification available — Whether lack of due diligence a bar to rectification.

Damages — Punitive damages — Written contract not reflecting prior oral agreement owing to fraud of one of parties — Whether trial judge's award of punitive damages should be restored.

The respondent operated an 18-hole golf course. The appellant O entered into negotiations with B, the respondent's principal, for a joint venture. The trial judge found that B and O made an oral agreement, which included an option on the 18th fairway for a specific residential development to be undertaken by B. During the negotiations, B discussed with O photographs and plans of a double row of houses clustered around a *cul-de-sac* along the length of the 18th fairway. When O's lawyer reduced the terms of the oral agreement to writing, the option clause accurately specified the 480-yard length of the proposed development, but instead of sufficient width to permit a double row of houses (approximately 110 yards), the clause as written allowed only enough land for a single row of houses (110 feet).

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Contrats — Réparations fondées sur l'equity — Rectification du contrat — Contrat écrit ne reflétant pas l'entente verbale antérieure — Y a-t-il ouverture à la réparation en equity que constitue la rectification? — Le défaut de faire montre de diligence raisonnable fait-il obstacle à la rectification?

Dommages-intérêts — Dommages-intérêts punitifs — Contrat écrit ne reflétant pas l'entente verbale antérieure en raison de la fraude commise par l'une des parties — La décision du juge du procès accordant des dommages-intérêts punitifs doit-elle être rétablie?

L'intimée exploitait un terrain de golf comptant 18 trous. L'appelant O a entamé des négociations en vue d'établir une coentreprise avec B, le propriétaire de l'intimée. Le juge de première instance a estimé que B et O avaient conclu une entente verbale, qui comportait une option visant la construction d'un complexe domiciliaire particulier par B au 18e trou. Durant les négociations, B a examiné avec O des photographies et des plans du type de complexe qu'il envisageait, à savoir une double rangée de maisons regroupées autour d'un cul-de-sac le long du 18e trou. Après que l'avocat de O a couché par écrit les termes de l'entente verbale, la clause établissant l'option mentionnait de façon précise la longueur de 480 verges du complexe proposé, mais, telle qu'elle avait été rédigée, au lieu

When B sought to exercise the option, O insisted on the written terms, despite knowing that these terms did not accurately reflect the prior oral option agreement. The respondent commenced the present action against the appellants for rectification of the agreement or damages in lieu thereof, punitive damages and solicitor-client costs. The trial judge held that the respondent was entitled to rectification of the option clause, awarding damages in lieu assessed on the basis of the loss of profit on a fully built residential development. Punitive damages were assessed at $200,000. The Court of Appeal set aside the punitive damages award. In all other respects, the appeal was dismissed.

Held: The appeal and cross-appeal should be dismissed.

Per McLachlin C.J. and L'Heureux-Dubé, Gonthier, Major, Binnie and Arbour JJ.: The necessary preconditions to obtaining the equitable remedy of rectification of the contract are met in this case. First, the respondent has shown the existence and content of the prior oral agreement. There was a definite project in a definite location to which O and B had given their definite assent. Although the parties did not discuss a metes and bounds description, they were working on a defined development proposal. O's numbers (110 x 480) can be accepted, while rejecting the error created by his apparently duplicitous substitution of feet for yards in the write-up of the option clause. Second, it was found that O had fraudulently misrepresented the written document as accurately reflecting the terms of the prior oral contract. Third, the precise terms of rectification are readily ascertained, namely to change the word "feet" in the phrase "one hundred ten (110) feet in width" to "yards". Fourth, there is convincing proof of B's unilateral mistake and O's knowledge of that mistake. B's version of the oral agreement was sufficiently corroborated on significant points by other witnesses and documents. While as an experienced businessman, B ought to have examined the text of the option clause before signing the document, due diligence on the part of the plaintiff is not a (fifth) condition precedent to rectification. Lack of due diligence may be taken into account in the exercise of a discretion to refuse the remedy, but here lack of due

de prévoir une largeur suffisante pour permettre la construction d'une double rangée de maisons (environ 110 verges), elle ne faisait état que d'une largeur suffisante pour une seule rangée de maisons (110 pieds). Lorsque B a voulu lever l'option, O a insisté sur l'application de la convention écrite même s'il savait qu'elle ne reflétait pas fidèlement l'entente verbale antérieure concernant l'option. L'intimée a entamé contre les appelants la présente action, dans laquelle elle sollicitait soit la rectification de la Convention soit des dommages-intérêts en tenant lieu, des dommages-intérêts punitifs et les dépens sur la base procureur-client. Le juge du procès a conclu que l'intimée avait droit à la rectification de la clause relative à l'option, et il a accordé des dommages-intérêts tenant lieu de rectification, établis sur la base de la perte des profits qui auraient été réalisés par la construction complète du complexe domiciliaire. Les dommages-intérêts punitifs ont été fixés à 200 000 $. La Cour d'appel a annulé la décision accordant les dommages-intérêts punitifs, mais elle a toutefois rejeté l'appel sur tous les autres points.

Arrêt : Le pourvoi principal et le pourvoi incident sont rejetés.

Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Major, Binnie et Arbour : Les préalables nécessaires pour donner ouverture à la réparation en equity que constitue la rectification sont réunis en l'espèce. Premièrement, l'intimée a établi l'existence et la teneur de l'entente verbale antérieure. Il existait un projet défini et devant être réalisé à un endroit déterminé, dont O et B avaient convenu précisément. Bien que les parties n'aient pas discuté de la description technique des lieux, elles travaillaient à un projet d'aménagement défini. Il est possible d'accepter les chiffres inscrits par O (110 x 480), tout en écartant l'erreur créée par sa substitution apparemment frauduleuse, relativement à une des dimensions, d'une mesure en pieds à une mesure en verges dans la rédaction de la clause relative à l'option. Deuxièmement, il a été jugé que O avait fait une assertion inexacte et frauduleuse en laissant croire que l'écrit reflétait fidèlement les conditions prévues par l'entente verbale antérieure. Troisièmement, la façon précise par laquelle l'écrit doit être rectifié est facile à déterminer : Il s'agit de remplacer le mot « pieds » par le mot « verges » dans la phrase « cent dix (110) pieds de largeur ». Quatrièmement, il existe une preuve convaincante de l'erreur unilatérale de B et de la connaissance par O de cette erreur. La version donnée par B de l'entente verbale était suffisamment corroborée sur des aspects importants par d'autres témoins ainsi que par des documents. Bell, en tant qu'homme d'affaires expérimenté, aurait dû examiner le texte de la clause

diligence was offset by the finding of fraud against O, and rectification was therefore properly granted.

In the absence of an error of principle, or a factual record that supports the appellants' criticisms, the findings in the courts below on the amount of compensatory damages must stand. Damages for breach of the contract, as rectified, include losses flowing from the special circumstances known to the parties at the time they made their contract.

The award of punitive damages in this case should not be restored as it does not serve a rational purpose. Only in exceptional cases does tort attract punitive damages. An award of punitive damages is rational "if, but only if" compensatory damages do not adequately achieve the objectives of retribution, deterrence and denunciation. In this case, neither the making of a punitive damages award nor the $200,000 assessment meets the test of rationality.

Per LeBel J.: Subject to the comments on punitive damages in *Whiten*, the majority reasons were agreed with. Rectification of the contract was properly ordered, but punitive damages would fulfill no rational purpose in this case.

Cases Cited

By Binnie J.

Applied: *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18; **referred to:** *Hart v. Boutilier* (1916), 56 D.L.R. 620; *Ship M. F. Whalen v. Pointe Anne Quarries Ltd.* (1921), 63 S.C.R. 109; *Downtown King West Development Corp. v. Massey Ferguson Industries Ltd.* (1996), 133 D.L.R. (4th) 550; *Lamb v. Kincaid* (1907), 38 S.C.R. 516; *First City Capital Ltd. v. British Columbia Building Corp.* (1989), 43 B.L.R. 29; *McMaster University v. Wilchar Construction Ltd.* (1971), 22 D.L.R. (3d) 9; *Montreal Trust Co. v. Maley* (1992), 99 D.L.R. (4th) 257; *Alampi v. Swartz* (1964), 43 D.L.R. (2d) 11; *Stepps Investments Ltd. v. Security Capital Corp.* (1976), 73 D.L.R. (3d) 351; *Augdome Corp. v. Gray*, [1975] 2 S.C.R. 354; *I.C.R.V. Holdings*

relative à l'option avant de signer le document, mais la diligence raisonnable de la part du demandeur n'est pas un (cinquième) préalable au prononcé d'une ordonnance de rectification. L'absence de diligence raisonnable peut être prise en compte dans l'exercice du pouvoir discrétionnaire de refuser la réparation en question, mais en l'espèce cette omission est contre balancée par la conclusion de fraude prononcée contre O, et la rectification a donc été accordée à bon droit.

En l'absence d'erreur de principe ou d'éléments factuels qui appuieraient les critiques formulées par les appelants, les conclusions des juridictions inférieures sur le montant des dommages-intérêts compensatoires doivent être confirmées. Les dommages-intérêts accordés pour la rupture du contrat rectifié doivent par conséquent inclure les pertes découlant des circonstances particulières connues des parties au moment où elles ont conclu le contrat.

La décision d'accorder des dommages-intérêts punitifs en l'espèce ne doit pas être rétablie puisqu'elle ne sert aucun objectif rationnel. Ce n'est que dans des circonstances exceptionnelles qu'un délit civil commande des dommages-intérêts punitifs. Une décision accordant des dommages-intérêts punitifs n'est rationnelle que « si, mais seulement si » les dommages-intérêts compensatoires ne permettent pas de donner effet adéquatement aux objectifs de châtiment, de dissuasion et de dénonciation. En l'espèce, ni la décision accordant des dommages-intérêts punitifs ni la somme de 200 000 $ accordée à ce titre ne satisfont au critère de la rationalité.

Le juge LeBel : Sous réserve des commentaires exposés sur la question des dommages-intérêts punitifs dans l'arrêt *Whiten*, il y a accord avec les motifs de la majorité. C'est à juste titre que la rectification du contrat a été ordonnée, mais des dommages-intérêts punitifs ne serviraient aucune fin rationnelle dans la présente affaire.

Jurisprudence

Citée par le juge Binnie

Arrêt appliqué : *Whiten c. Pilot Insurance Co.*, [2002] 1 R.C.S. 595, 2002 CSC 18; **arrêts mentionnés :** *Hart c. Boutilier* (1916), 56 D.L.R. 620; *Ship M. F. Whalen c. Pointe Anne Quarries Ltd.* (1921), 63 R.C.S. 109; *Downtown King West Development Corp. c. Massey Ferguson Industries Ltd.* (1996), 133 D.L.R. (4th) 550; *Lamb c. Kincaid* (1907), 38 R.C.S. 516; *First City Capital Ltd. c. British Columbia Building Corp.* (1989), 43 B.L.R. 29; *McMaster University c. Wilchar Construction Ltd.* (1971), 22 D.L.R. (3d) 9; *Montreal Trust Co. c. Maley* (1992), 99 D.L.R. (4th) 257; *Alampi c. Swartz* (1964), 43 D.L.R. (2d) 11; *Stepps Investments Ltd. c. Security Capital Corp.* (1976), 73 D.L.R. (3d) 351; *Augdome Corp. c. Gray*, [1975] 2 R.C.S. 354;

Ltd. v. Tri-Par Holdings Ltd. (1994), 53 B.C.A.C. 72; *Gordeyko v. Edmonton* (1986), 45 Alta. L.R. (2d) 201; *Kerr v. Cunard* (1914), 16 D.L.R. 662; *Byrnlea Property Investments Ltd. v. Ramsay*, [1969] 2 Q.B. 253; *Rumble v. Heygate* (1870), 18 W.R. 749; *Bloom v. Averbach*, [1927] S.C.R. 615; *Beverly Motel (1972) Ltd. v. Klyne Properties Ltd.* (1981), 126 D.L.R. (3d) 757; *Big Quill Resources Inc. v. Potash Corp. of Saskatchewan* (2001), 203 Sask. R. 298; *Prince Albert Credit Union v. Diehl*, [1987] 4 W.W.R. 419; *Windjammer Homes Inc. v. Generation Enterprises* (1989), 43 B.L.R. 315; *Farah v. Barki*, [1955] S.C.R. 107; *May v. Platt*, [1900] 1 Ch. 616; *Central R. Co. of Venezuela v. Kisch* (1867), L.R. 2 H.L. 99; *United Services Funds (Trustees of) v. Richardson Greenshields of Canada Ltd.* (1988), 22 B.C.L.R. (2d) 322; *Dalon v. Legal Services Society (British Columbia)* (1995), 10 C.C.E.L. (2d) 89; *Brown & Root Ltd. v. Chimo Shipping Ltd.*, [1967] S.C.R. 642; *General Securities Ltd. v. Don Ingram Ltd.*, [1940] S.C.R. 670; *Burrard Drydock Co. v. Canadian Union Line Ltd.*, [1954] S.C.R. 307; *Corbin v. Thompson* (1907), 39 S.C.R. 575; *Asamera Oil Corp. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633; *New Horizon Investments Ltd. v. Montroyal Estates Ltd.* (1982), 26 R.P.R. 268; *Kinkel v. Hyman*, [1939] S.C.R. 364; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130.

By LeBel J.

Referred to: *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18.

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APPEAL and CROSS-APPEAL from a judgment of the Alberta Court of Appeal (2000), 255 A.R. 329, 185 D.L.R. (4th) 269, 6 B.L.R. (3d) 24, [2000] A.J. No. 408 (QL), 2000 ABCA 116, setting aside the punitive damages award but dismissing the appellants' appeal in all other respects from a judgment of the Court of Queen's Bench (1999), 246 A.R. 272, 49 B.L.R. (2d) 284,

I.C.R.V. Holdings Ltd. c. Tri-Par Holdings Ltd. (1994), 53 B.C.A.C. 72; *Gordeyko c. Edmonton* (1986), 45 Alta. L.R. (2d) 201; *Kerr c. Cunard* (1914), 16 D.L.R. 662; *Byrnlea Property Investments Ltd. c. Ramsay*, [1969] 2 Q.B. 253; *Rumble c. Heygate* (1870), 18 W.R. 749; *Bloom c. Averbach*, [1927] R.C.S. 615; *Beverly Motel (1972) Ltd. c. Klyne Properties Ltd.* (1981), 126 D.L.R. (3d) 757; *Big Quill Resources Inc. c. Potash Corp. of Saskatchewan* (2001), 203 Sask. R. 298; *Prince Albert Credit Union c. Diehl*, [1987] 4 W.W.R. 419; *Windjammer Homes Inc. c. Generation Enterprises* (1989), 43 B.L.R. 315; *Farah c. Barki*, [1955] R.C.S. 107; *May c. Platt*, [1900] 1 Ch. 616; *Central R. Co. of Venezuela c. Kisch* (1867), L.R. 2 H.L. 99; *United Services Funds (Trustees of) c. Richardson Greenshields of Canada Ltd.* (1988), 22 B.C.L.R. (2d) 322; *Dalon c. Legal Services Society (British Columbia)* (1995), 10 C.C.E.L. (2d) 89; *Brown & Root Ltd. c. Chimo Shipping Ltd.*, [1967] R.C.S. 642; *General Securities Ltd. c. Don Ingram Ltd.*, [1940] R.C.S. 670; *Burrard Drydock Co. c. Canadian Union Line Ltd.*, [1954] R.C.S. 307; *Corbin c. Thompson* (1907), 39 R.C.S. 575; *Asamera Oil Corp. c. Sea Oil & General Corp.*, [1979] 1 R.C.S. 633; *New Horizon Investments Ltd. c. Montroyal Estates Ltd.* (1982), 26 R.P.R. 268; *Kinkel c. Hyman*, [1939] R.C.S. 364; *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130.

Citée par le juge LeBel

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POURVOI PRINCIPAL et POURVOI INCIDENT contre un arrêt de la Cour d'appel de l'Alberta (2000), 255 A.R. 329, 185 D.L.R. (4th) 269, 6 B.L.R. (3d) 24, [2000] A.J. No. 408 (QL), 2000 ABCA 116, qui a annulé la décision accordant des dommages-intérêts punitifs mais qui a rejeté, sur tous les autres aspects, l'appel formé par les appelants à l'encontre d'un jugement de la Cour du

[1999] A.J. No. 741 (QL). Appeal and cross-appeal dismissed.

David R. Haigh, *Q.C.*, and *Brian Beck*, for the appellants/respondents on cross-appeal.

Lowell Westersund and *Munaf Mohamed*, for the respondent/appellant on cross-appeal.

The judgment of McLachlin C.J. and L'Heureux-Dubé, Gonthier, Major, Binnie and Arbour JJ. was delivered by

1 BINNIE J. — In this appeal the Court is called on to deal with rectification of a contract for a real estate development dream that turned into a nightmare for the warring partners. Houses were to have been built along the 18th fairway of the Sylvan Lake Golf Course, within commuting distance of Red Deer, Alberta. It did not happen because the parties fell out over the amount of land to be included in the development contract.

2 There was a written contract but the respondent's President did not bother to read it before it was signed. Had he done so, the error in reducing the parties' prior oral agreement to writing would likely have been detected and the development would have gone ahead. The appellants, who rely on the written document, say that a party who fails to exercise due diligence in its business affairs should be refused the equitable remedy of rectification. That is their strongest argument.

3 The principal witness and "directing mind" of the appellant Performance Industries Ltd. ("Performance"), which stands firm on the written document, is Terrance O'Connor. For him, the joint venture ended with his actions being characterized by the trial judge as "fraudulent, dishonest and deceitful" (1999), 246 A.R. 272, at para. 114. The trial judgment made him personally liable (jointly and severally with his company Performance Industries Ltd.) for $1,047,810, including a

Banc de la Reine (1999), 246 A.R. 272, 49 B.L.R. (2d) 284, [1999] A.J. No. 741 (QL). Pourvoi principal et pourvoi incident rejetés.

David R. Haigh, *c.r.*, et *Brian Beck*, pour les appelants/intimés au pourvoi incident.

Lowell Westersund et *Munaf Mohamed*, pour l'intimée/appelante au pourvoi incident.

Version française du jugement du juge en chef McLachlin et des juges L'Heureux-Dubé, Gonthier, Major, Binnie et Arbour rendu par

LE JUGE BINNIE — Dans le présent pourvoi, notre Cour est appelée à se prononcer sur la rectification d'un contrat envisageant la réalisation d'un rêve d'aménagement immobilier qui s'est transformé en cauchemar pour les associés en conflit. On projetait de construire des maisons le long du 18e trou du terrain de golf de Sylvan Lake, en périphérie de Red Deer, en Alberta. Le projet ne s'est pas concrétisé en raison de la mésentente survenue entre les parties au sujet de la superficie du terrain visé par le contrat d'aménagement.

Il existait un contrat écrit, mais le président de l'intimée ne s'est pas donné la peine de le lire avant de le signer. S'il l'avait fait, l'erreur qui a été commise lorsqu'on a couché par écrit l'entente verbale intervenue antérieurement entre les parties aurait vraisemblablement été décelée et le projet d'aménagement aurait été réalisé. Les appelants, qui se fondent sur l'écrit, affirment qu'une partie qui a omis de faire montre de diligence raisonnable dans ses opérations commerciales doit être déboutée de sa demande en rectification fondée sur l'equity. Il s'agit de leur argument le plus solide.

Le témoin principal et l'« âme dirigeante » de l'appelante Performance Industries Ltd. (« Performance »), qui s'en tient fermement à l'écrit, est Terrance O'Connor. L'entreprise commune lui a finalement valu de voir ses actions être qualifiées par le juge de première instance de [TRADUCTION] « frauduleuses, malhonnêtes et dolosives » ((1999), 246 A.R. 272, par. 114). Ce dernier l'a condamné personnellement (solidairement avec sa société Performance Industries Ltd.) à verser la somme de

$200,000 award of punitive damages, plus costs on a solicitor-client basis. He and his company appeal to this Court on various errors of law, few of which were argued before the trial judge.

For his erstwhile partner, Frederick Bell, whose corporate vehicle is Sylvan Lake Golf & Tennis Club Ltd. ("Sylvan"), his commercial aspirations have been trapped in the courts for seven years. This was because, so the trial judge found, O'Connor swore false affidavits, refused to produce relevant documents, gave false testimony in the course of two separate trials, and did "everything in his power to prevent the truth from coming to light" (para. 115). Bell is now said to be a spent force, "divorced [and lacking] the initiative or drive and determination to proceed with such a development at his present age" (para. 90). Bell obtained a $200,000 punitive damage award at trial, but this was disallowed by the Alberta Court of Appeal ((2000), 255 A.R. 329, 2000 ABCA 116). In its cross-appeal, his company, Sylvan, seeks restoration of that award.

Because of the punitive damages issues, this appeal was heard concurrently with *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18, judgment which is being released concurrently with this judgment.

In my view, for reasons which differ somewhat from the memorandum of judgment handed down by the Alberta Court of Appeal, the appeal and the cross-appeal should be dismissed both with costs on a party-and-party basis.

I. Facts

Sylvan had operated a 171.53 acre, 18-hole golf course since 1979 under a lease which gave it a right of first refusal in the event the owner decided to sell the land. On November 3, 1989, a purchaser unrelated to O'Connor or Performance offered to

1 047 810 $, y compris 200 000 $ au titre des dommages-intérêts punitifs, plus les dépens établis sur la base procureur-client. Sa société et lui se pourvoient devant notre Cour, invoquant diverses erreurs de droit, dont peu ont été débattues devant le juge de première instance.

4 Dans le cas de son ancien associé, Frederick Bell, propriétaire de la société Sylvan Lake Golf & Tennis Club Ltd. (« Sylvan »), le litige qui traîne devant les tribunaux depuis sept ans met un frein à ses aspirations commerciales. Tout cela, de conclure le juge de première instance, parce qu'O'Connor a souscrit des affidavits mensongers, refusé de produire des documents pertinents, donné de faux témoignages au cours de deux procès distincts et fait [TRADUCTION] « tout en son pouvoir pour empêcher la vérité d'éclater au grand jour » (par. 115). Aujourd'hui, Bell serait, dit-on, un homme usé, [TRADUCTION] « divorcé [et sans] l'initiative ou l'enthousiasme et la détermination nécessaires pour s'engager, à son âge, dans une telle entreprise » (par. 90). Bell a obtenu une somme de 200 000 $ au titre des dommages-intérêts punitifs en première instance, mais la Cour d'appel de l'Alberta a infirmé cet aspect du jugement ((2000), 255 A.R. 329, 2000 ABCA 116). Dans son pourvoi incident devant notre Cour, sa société, Sylvan, demande le rétablissement de cette décision.

5 Parce qu'il est question dans les deux cas de dommages-intérêts punitifs, le présent pourvoi a été entendu avec l'affaire *Whiten c. Pilot Insurance Co.*, [2002] 1 R.C.S. 595, 2002 CSC 18, qui est décidée en même temps.

6 Je suis d'avis, pour des motifs quelque peu différents de ceux exposés par la Cour d'appel de l'Alberta, de rejeter le pourvoi principal et le pourvoi incident, avec dépens sur la base partie-partie dans les deux cas.

I. Les faits

7 Sylvan exploitait depuis 1979 un terrain de golf d'une superficie de 171,53 acres et comptant 18 trous, en vertu d'un bail qui lui conférait un droit de premier refus si le propriétaire du golf décidait de le vendre. Le 3 novembre 1989, un acheteur sans

purchase the golf course property for $1.3 million. Sylvan then had until December 31, 1989 to make the purchase on the same terms and conditions. The outside offer triggered the chain of events that led to this action.

8 O'Connor was familiar with the Sylvan Lake Golf Course, having played it frequently and having hosted his corporate tournament at that site for some years.

9 O'Connor, unbeknownst to Bell, had approached the landowner with a view to purchasing the leased golf course property, without result. He had obtained a financing commitment as early as March 31, 1989, from the Federal Business Development Bank ("FBDB"). On learning that Sylvan had exercised its right of first refusal, O'Connor approached Bell with an offer of financial assistance, which was declined. However, when Bell's former partner dropped out, and Sylvan's efforts to finance the purchase of the golf course through other means proved unsuccessful, Bell went back to O'Connor. Bell testified that at that meeting he discussed with O'Connor how Bell wanted to secure another five years of operation of the golf course with a chance at the end of that time to secure his retirement by the development of the 18th hole for residential development. Negotiations for a joint venture ensued near the end of November or early December 1989.

10 After a number of preliminary meetings, O'Connor spent about two and a half hours at Bell's home during the December 16-17 weekend. The two men met at length in O'Connor's truck a day or two later. The trial judge found that Bell and O'Connor came to a verbal agreement on the terms of their joint venture. They would pool their resources plus a $700,000 mortgage from the FBDB to purchase the property. Sylvan (Bell) would thereafter operate the facilities for five years for its own account without any day-to-day involvement of O'Connor. In brief, at the conclusion of five years, Sylvan would be bought out by Performance

aucun lien avec O'Connor ou Performance a offert d'acheter le terrain de golf pour la somme de 1,3 million de dollars. Sylvan avait jusqu'au 31 décembre 1989 pour faire l'acquisition du golf aux mêmes conditions. L'offre extérieure a déclenché la succession d'événements qui ont conduit à la présente action.

O'Connor connaissait le terrain de golf de Sylvan Lake, puisqu'il y avait joué fréquemment et y avait organisé le tournoi de golf de son entreprise pendant quelques années.

À l'insu de Bell, O'Connor avait discuté avec le propriétaire du terrain de golf loué par Sylvan de la possibilité d'acquérir le terrain, mais sans succès. Dès le 31 mars 1989, il avait obtenu un engagement de financement de la Banque fédérale de développement (« BFD »). Lorsqu'il a appris que Sylvan avait exercé son droit de premier refus (ou droit de préemption), O'Connor a fait une offre d'aide financière à Bell, qui l'a refusée. Toutefois, lorsque l'ancien associé de Bell s'est désisté et que les efforts de Sylvan en vue de financer par d'autres moyens l'achat du golf se sont révélés infructueux, Bell a repris contact avec O'Connor. Bell a témoigné que, au cours de leur rencontre, il avait dit à O'Connor qu'il souhaitait s'assurer la faculté d'exploiter le golf pendant une autre période de cinq ans, ainsi que la possibilité, au terme de cette période, de réaliser un complexe domiciliaire près du 18^{e} trou, dans le but de s'assurer une retraite confortable. Des négociations en vue d'établir une coentreprise se sont amorcées vers la fin novembre ou le début décembre 1989.

Après un certain nombre d'entretiens préliminaires, O'Connor a passé environ deux heures et demie à la résidence de Bell au cours de la fin de semaine des 16 et 17 décembre. Les deux hommes ont discuté abondamment dans le camion d'O'Connor un ou deux jours plus tard. Le juge de première instance a estimé que Bell et O'Connor s'étaient entendus verbalement sur les modalités de leur coentreprise. Ils mettraient en commun leurs ressources ainsi qu'un prêt hypothécaire de 700 000 $ consenti par la BFD pour acheter le terrain de golf. Sylvan (Bell) l'exploiterait ensuite pour son propre compte pendant cinq ans, sans la participation journalière

(O'Connor) for an agreed sum less any money then outstanding on the FBDB mortgage.

For present purposes, the only contentious issue was the option for a residential development to be undertaken by Bell (or a third party) "along the 18th fairway". O'Connor and Bell did not discuss a metes and bounds description of the optioned land, but Bell testified, and the trial judge accepted, that he showed O'Connor photographs and plans of the sort of development he had in mind, namely a *double* row of houses (i.e., on both sides of a street) clustered around a *cul-de-sac* along the length of the 18th fairway (480 yards). A photograph of a comparable golf course development where Bell had lived in the Bayview area of Toronto formed part of the negotiations (and was marked at trial as Exhibit 1, Tab 67). O'Connor agreed to option the land to permit such a development, otherwise (as the trial judge found) Bell would not have agreed to the five-year joint venture. The parties agreed that the purchase price of the optioned land would be $400,000 by a third party (or $200,000 if the existing owner Sylvan (Bell) chose to develop the parcel).

As part of the agreement, O'Connor undertook to have his lawyer reduce the verbal terms to writing. In due course, a document was produced. Clause 18, the option, accurately specified the 480-yard length of the proposed development, but instead of sufficient width to permit a double row of houses (approximately 110 *yards*), clause 18 allowed only enough land for a single row of houses (110 *feet*). This misstatement of the oral agreement was thus pleaded in para. 9 of the Statement of Claim:

Paragraph 18 of the December 21st, 1989 written Agreement did not accurately reflect the terms of the oral agreement made between Performance and Sylvan in that it misdescribed the width of the lands subject

d'O'Connor. Au terme de la période de cinq ans, Sylvan serait achetée par Performance (O'Connor) pour une somme déterminée, déduction faite de tout solde de l'emprunt hypothécaire obtenu de la BFD.

11 Dans le présent pourvoi, le seul point litigieux est l'option relative à la construction du complexe domiciliaire susceptible d'être exécutée par Bell (ou par un tiers) au [TRADUCTION] « 18e trou ». O'Connor et Bell n'ont pas discuté de la description technique du terrain visé par l'option, mais dans son témoignage Bell a affirmé — et le juge de première instance l'a cru — avoir montré à O'Connor des photographies et des plans du type de complexe qu'il envisageait, à savoir une *double* rangée de maisons (c.-à-d. de chaque côté d'une rue) regroupées autour d'un cul-de-sac le long du 18e trou (qui mesure 480 verges). Une photographie montrant un complexe comparable — qui est situé près d'un terrain de golf et où Bell a habité dans la région torontoise de Bayview — a été produite dans le cours des négociations (et déposée en preuve sous la cote P1, onglet 67). O'Connor a accepté de consentir une option visant l'achat de terrains en vue de permettre la construction d'un tel complexe, option sans laquelle (a conclu le juge de première instance) Bell n'aurait pas accepté la coentreprise de cinq ans. Les parties ont convenu que le prix d'achat des terrains visés par l'option serait de 400 000 $ en cas d'acquisition par un tiers (ou de 200 000 $ si Sylvan (Bell), qui en était alors propriétaire, décidait de les aménager).

12 Comme convenu, O'Connor a confié à son avocat la tâche de coucher par écrit les termes de l'entente verbale. Un document a été produit en temps voulu. La clause 18, établissant l'option, mentionnait de façon précise la longueur de 480 verges du complexe proposé, mais au lieu de prévoir une largeur suffisante pour permettre la construction d'une double rangée de maisons (environ 110 *verges*), elle ne faisait état que d'une largeur suffisante pour une seule rangée de maisons (110 *pieds*). Cette constatation inexacte de l'entente verbale a été invoquée ainsi, au par. 9 de la déclaration :

[TRADUCTION] Le paragraphe 18 de la Convention écrite du 21 décembre 1989 ne reflète pas fidèlement les termes de l'entente verbale intervenue entre Performance et Sylvan, en ce qu'il décrit faussement la largeur des

to the Agreement as "One Hundred and Ten (110 ft.) feet in width east to west", when the width of the lands comprising the 18th hole was approximately 110 *yards* in width east to west. [Emphasis in original.]

Bell had in mind a development of about 58 homes on about 11 acres. O'Connor's draft allowed 3.6 acres. Bell testified, and the trial judge accepted, that he had specifically told O'Connor during the negotiations that a single row housing development (which is all that clause 18 would permit) would "be a waste of land and an uneconomic use of the 18th hole" (para. 42).

13 Clause 18 of the Joint Venture Agreement, as drawn up by O'Connor's lawyer, provided as follows:

18. The parties agree that sale of a portion of the lands for development of residential housing is contemplated by both of them within the term of Sylvan's tenancy. Such portion of the lands is: one hundred ten (110 ft) feet in width east to west and approximately four hundred eighty (480 yds) yards in length north to south, and abutted by the eastern border of the lands along its entire length. The parties agree that, if they are presented with an appropriate offer, those lands will be sold to a third party developer. It is agreed that such appropriate offer will offer the sum of at least four hundred thousand ($400,000) dollars cash for those lands and provide for the continued, uninterrupted existence of the golf course consisting of no less than six thousand two hundred fifty (6250 yds) yards in length with all eighteen fairways well divided, defined and reasonably wide (for reference sake the parties agree that the fairways of the golf course are, at the date of this agreement, for the most part well divided, defined and reasonably wide). [Emphasis added.]

14 On December 21, 1989, O'Connor and Bell signed the Joint Venture Agreement as well as the documentation to finance the purchase of all of the land. The documents were then delivered to the solicitor for Sylvan, who reviewed it, and suggested revisions, which led to the signing of an amended Joint Venture Agreement on December 27, 1989. Sylvan's solicitor testified at trial that he did not

terrains visés par la convention comme étant « cent dix pieds (110 pi.) de largeur dans une orientation est-ouest », alors que la largeur des terrains du 18e trou était d'environ 110 *verges* dans une orientation est-ouest. [En italique dans l'original.]

Bell envisageait la construction d'environ 58 maisons, sur à peu près 11 acres. Le projet de convention établi par O'Connor ne prévoyait que 3,6 acres. Le juge de première instance a ajouté foi à l'affirmation de Bell selon laquelle il avait expressément dit à O'Connor, au cours des négociations, que la construction d'une seule rangée de maisons (qui était tout ce que la clause 18 permettait) serait [TRADUCTION] « un gaspillage de terrain et une utilisation non rentable du 18e trou » (par. 42).

Voici le texte de la clause 18 de la Convention de coentreprise, telle qu'elle avait été rédigée par l'avocat d'O'Connor :

[TRADUCTION]

18. Les deux parties reconnaissent qu'elles envisagent la vente d'une partie des terrains aux fins de construction d'un complexe domiciliaire pendant la durée de la tenance à bail de Sylvan. Cette parcelle est décrite ainsi : cent dix (110) pieds de largeur dans une orientation est-ouest et environ quatre cent quatre-vingt (480) verges de longueur dans une orientation nord-sud, et contiguë à la limite est du terrain sur toute sa longueur. Les parties conviennent que, si elles reçoivent une offre convenable, ces terrains seront vendus à un tiers promoteur. Il est convenu que constituerait une offre convenable le paiement d'une somme d'au moins quatre cent mille dollars (400 000 $) en espèces pour ces terrains, en plus de l'engagement d'assurer sans interruption l'existence du terrain de golf, qui doit avoir une superficie minimale de six mille deux cent cinquante (6250) verges de longueur et compter dix-huit trous bien divisés, bien définis et raisonnablement larges (à titre d'information, les parties reconnaissent que, à la date de la présente convention, les trous du terrain de golf sont pour la plupart bien divisés, bien définis et raisonnablement larges). [Je souligne.]

Le 21 décembre 1989, O'Connor et Bell ont signé la Convention de coentreprise de même que la documentation relative au financement de l'achat de l'ensemble de la propriété. Les documents ont alors été communiqués à l'avocat de Sylvan, qui les a examinés et a suggéré quelques modifications, ce qui a eu pour effet de retarder au 27 décembre 1989 la signature de la Convention de coentreprise

discuss the optioned property dimensions with Bell, and Bell said he never read the option clause. All copies of the documents had been left with his lawyer. O'Connor's solicitor was not called to testify, an omission that caused the trial judge to draw the adverse inference that if the lawyer had testified, it would not have assisted O'Connor.

O'Connor knew from Bell's comment during the negotiations that he would not sign an agreement without the option for sufficient land to create the "Bayview" layout development with two rows of housing. Anything less would be "a waste". O'Connor therefore knew when Bell signed the document that he had not detected the substitution of 110 *feet* for 110 *yards*.

In 1990, Bell experienced some "cash flow difficulties" that led to a modification to the financial terms of the Agreement, but pressed ahead with plans for the potential development. For a time in 1992, he worked with UMA Engineering Ltd. He subsequently retained Norman Trouth, a development consultant, who produced alternative plans and sketches for developments of 50 and 58 houses along the 18th fairway. Trouth estimated the 58-house project on or about 10.9 acres would net $820,100. In some respects, Bell was looking for more land than O'Connor had verbally agreed to. The proposals would, as contemplated from the outset, involve a measure of realignment of the 18th fairway. Bell therefore left these development proposals with O'Connor, who said he would review them. In the meantime, the lands in the golf course had been annexed to the Town of Sylvan Lake and there was potential for development of the entire 171.5 acres, much to O'Connor's benefit.

modifiée. Au procès, l'avocat de Sylvan a témoigné ne pas avoir discuté avec Bell des dimensions de la parcelle visée par l'option, et Bell a déclaré ne jamais avoir lu la clause relative à l'option. Tous les exemplaires des documents avaient été remis à son avocat. L'avocat d'O'Connor n'a pas été appelé à témoigner, omission qui a amené le juge du procès à tirer la conclusion défavorable à O'Connor selon laquelle la déposition de l'avocat n'aurait pas aidé la cause d'O'Connor.

15 O'Connor savait, à la lumière des commentaires formulés par Bell durant les négociations, que ce dernier ne signerait aucune Convention ne lui accordant pas la faculté d'acquérir suffisamment de terrain pour aménager un complexe de type « Bayview » comportant deux rangées de maisons. Toute superficie inférieure serait [TRADUCTION] « un gaspillage de terrain ». O'Connor savait par conséquent que, lorsque Bell avait signé le document, il n'avait pas remarqué qu'on avait substitué la mesure 110 *pieds* à la mesure 100 *verges*.

16 En 1990, Bell a connu quelques [TRADUCTION] « problèmes de trésorerie » qui ont entraîné une modification des modalités financières de la Convention, mais il n'en a pas moins poursuivi l'élaboration des plans de l'éventuel complexe. Pendant un certain temps en 1992, il y a travaillé avec la société UMA Engineering Ltd. Il a subséquemment retenu les services de Norman Trouth, consultant en aménagement, qui a préparé d'autres plans et croquis proposant la construction de 50 et 58 maisons le long du 18e trou. M. Trouth estimait que le projet de construction de 58 maisons sur une parcelle d'environ 10,9 acres pourrait rapporter 820 100 $. À certains égards, Bell envisageait une superficie plus vaste que celle dont avait convenu verbalement O'Connor. Conformément à ce qui avait été envisagé dès le départ, ces propositions impliquaient un certain réaménagement du tracé du 18e trou. Bell a donc remis ces propositions d'aménagement à O'Connor, qui a dit qu'il les examinerait. Entre-temps, les terrains du parcours de golf avaient été annexés à la ville de Sylvan Lake et il était devenu possible d'aménager l'ensemble des 171,5 acres, situation très avantageuse pour O'Connor.

17 Time went by. In May 1993, Bell again contacted O'Connor, who promised to review the proposal, but did not respond either then or even after a later meeting arranged by Bell's wife. The clock was running because the option required the development to be completed by December 31, 1994. Finally, by letter dated June 8, 1993, O'Connor's lawyer advised Bell that "[i]t is very unlikely that Performance Industries Ltd. will approve of any development plan which is not strictly in line with the Agreement".

18 Bell testified that at that point, for the first time, he read clause 18 and realized that it did not conform to the oral agreement. O'Connor, he concluded, had slipped in a change of dimensions that turned a viable project into "a waste of land". Bell says he was incensed. He attended at O'Connor's office for what he described as a heated meeting.

19 Attempts were made to resolve the dispute, but O'Connor continued to insist that Bell's right to develop the property was limited under clause 18 of the Agreement to a strip of land 110 feet wide on the easterly boundary of the golf course adjacent to the 18th hole. Bell continued to insist that O'Connor live up to the verbal agreement, which would require 110 feet being read as 110 yards.

20 In December 1994, the 5-year duration of the joint venture coming up for expiry, O'Connor tendered the funds required to buy out Sylvan's interest. Bell refused to allow Sylvan to relinquish possession of the land, and O'Connor commenced an action for specific performance. The Alberta Court of Queen's Bench granted an order for specific performance and O'Connor assumed possession of the property and built a clubhouse at the 18th hole. Also in late 1994, Sylvan commenced the present action against Performance and O'Connor for rectification of the Agreement or damages in lieu thereof, punitive damages and solicitor-client costs.

Puis le temps a passé. En mai 1993, Bell a de nouveau communiqué avec O'Connor, qui a promis d'examiner la proposition mais n'y a pas répondu, ni à ce moment ni après une rencontre subséquente organisée par l'épouse de Bell. Le temps continuait cependant de courir, car l'option exigeait que l'aménagement soit complété au plus tard le 31 décembre 1994. Finalement, dans une lettre datée du 8 juin 1993, l'avocat d'O'Connor a avisé Bell qu'[TRADUCTION] « [i]l [était] très peu probable que Performance Industries Ltd. approuve tout projet d'aménagement qui ne soit pas strictement conforme à la Convention ».

Bell a témoigné qu'à ce moment, pour la première fois, il a lu la clause 18 et constaté qu'elle ne correspondait pas à l'entente verbale. O'Connor, a-t-il conclu, avait introduit un changement de dimension qui avait transformé un projet viable en [TRADUCTION] « un gaspillage de terrain ». Il était furieux, a-t-il dit. Il s'est rendu au bureau d'O'Connor, où ils ont eu une discussion qu'il a qualifiée de très animée.

Des efforts ont été déployés afin de résoudre le différend, mais O'Connor continuait à maintenir que, aux termes de la clause 18 de la Convention, Bell n'avait le droit d'aménager la propriété que sur une bande de terrain de 110 pieds de largeur, contiguë au 18e trou, du côté est du terrain de golf. Bell, pour sa part, continuait d'exiger qu'O'Connor respecte l'entente verbale, ce qui impliquait qu'on considère que la mention 110 pieds signifiait plutôt 110 verges.

En décembre 1994, avant l'expiration de la période de validité de cinq ans de la coentreprise, O'Connor a offert les sommes nécessaires pour racheter la participation de Sylvan. Bell a refusé de permettre à Sylvan de se départir de la possession du terrain et O'Connor a engagé une action demandant l'exécution forcée de la Convention. La Cour du Banc de la Reine de l'Alberta a fait droit à l'action et O'Connor a pris possession de la propriété et construit un pavillon au 18e trou. Également à la fin de 1994, Sylvan a entamé contre Performance et O'Connor la présente action sollicitant soit la rectification de la Convention soit des dommages-intérêts en tenant lieu, des dommages-intérêts punitifs et les dépens sur la base procureur-client.

II. Judicial History

A. *Alberta Court of Queen's Bench* (1999), 246 A.R. 272

Wilkins J. noted that the onus was on the plaintiff "to establish both that Bell was mistaken as to the description of the development property when he signed the Agreement and that O'Connor knew of his mistake" (para. 66).

In the view of Wilkins J., "O'Connor's conduct in attempting to take advantage of the mistake he knew Bell to have made in signing the Agreement is equivalent to a fraud or a misrepresentation amounting [to] fraud or sharp practice" (para. 87). He concluded that "[i]t would be unjust, inequitable and unconscionable for this court not to offer redress to Bell in the face of that conduct" (para. 87). Accordingly, it was "clear from the evidence" that Bell is entitled to rectification of clause 18 of the Agreement. Sylvan was awarded damages in lieu of specific performance of the rectified Joint Venture Agreement.

The compensatory damages were assessed on the basis of "the amount of money that Bell would have been entitled to [receive] had he been permitted to complete the residential development of the 18th hole in accordance with the terms of the rectified clause 18" (para. 92). Wilkins J. was satisfied that a development of 58 houses could have "been constructed and substantially marketed prior to December 31, 1994" (para. 93). In the result, he assessed damages on the basis of the 58-lot development on the 480-yard 18th fairway in the amount of $820,100. From this he subtracted $200,000 (being the amount Sylvan (Bell) would have had to pay Performance (O'Connor) to exercise the $400,000 option) for a net of $620,100.

With respect to punitive damages, Wilkins J. reiterated that he found "the actions of O'Connor to be tantamount to fraud, equivalent to a misrepresentation in the nature of fraud, and sharp practice" (para. 109). O'Connor's "actions demand an award which will stand as an example to others

II. L'historique des procédures judiciaires

A. *Cour du Banc de la Reine de l'Alberta* (1999), 246 A.R. 272

21 Le juge Wilkins a souligné qu'il incombait au demandeur [TRADUCTION] « d'établir à la fois que Bell se trompait quant à la description du bien-fonds à aménager lorsqu'il a signé la Convention et qu'O'Connor savait qu'il se trompait » (par. 66).

22 Selon le juge Wilkins, [TRADUCTION] « [l]a façon dont O'Connor s'est comporté en tentant de tirer avantage de l'erreur qu'il savait que Bell avait commise en signant la Convention équivaut à une fraude ou à une assertion inexacte assimilable à fraude ou à dol » (par. 87). Il a conclu qu'[TRADUCTION] « [i]l serait injuste, inéquitable et abusif que la cour n'accorde pas réparation à Bell devant une telle conduite » (par. 87). En conséquence, il ressortait [TRADUCTION] « clairement de la preuve » que Bell avait droit à la rectification de la clause 18 de la Convention. Sylvan a obtenu des dommages-intérêts au lieu de l'exécution forcée de la Convention de coentreprise rectifiée.

23 Les dommages-intérêts compensatoires ont été fixés à [TRADUCTION] « la somme que Bell aurait eu le droit de [recevoir] si on lui avait permis de construire le complexe domiciliaire au 18e trou conformément aux termes de la clause 18 rectifiée » (par. 92). Le juge Wilkins était convaincu qu'un complexe de 58 maisons aurait pu [TRADUCTION] « être construit et en grande partie vendu avant le 31 décembre 1994 » (par. 93). En conséquence, il a fixé 820 100 $ les dommages-intérêts compensatoires, sur la base de l'aménagement d'un complexe de 58 lots au 18e trou, qui mesure 480 verges. De cette somme, il a soustrait 200 000 $ (soit la somme que Sylvan (Bell) aurait eu à verser à Performance (O'Connor) pour lever l'option de 400 000 $), ce qui a donné un résultat net de 620 100 $.

24 Relativement aux dommages-intérêts punitifs, le juge Wilkins a réitéré sa conclusion que les [TRADUCTION] « actions d'O'Connor étaient assimilables à une fraude ou à une assertion inexacte participant de la fraude et du dol » (par. 109). Les « actions [d'O'Connor] commandent [sa] condamnation

and at the same time assure that [he] does not unduly profit from his conduct" (para. 109). Wilkins J. stated that "[this] latter statement is the only proper basis for an award of punitive damages" (para. 109) in this case. Accordingly, O'Connor's punitive damages should be awarded "at least to the extent of disgorging the base profit he has realized by his improper conduct" (para. 110). Punitive damages were assessed at $200,000. For their misbehaviour in the conduct of the action, the defendants (now appellants) were required to pay solicitor-client costs.

25 O'Connor argued that he should not be personally liable for any judgment against Performance in favour of the plaintiff, but Wilkins J. rejected this argument "in its entirety" (para. 119). He said that every step taken in furtherance of this joint venture was directed by O'Connor, as was every attempt to defeat Bell's legitimate interests in the protracted litigation. "Surely there could never be a clearer case in which the court must pierce the corporate veil and attribute" (para. 119) liability personally to O'Connor. And so he did.

B. *Alberta Court of Appeal* (2000), 255 A.R. 329, 2000 ABCA 116

26 In a *per curiam* decision, the Court of Appeal upheld Wilkins J.'s rulings that the Agreement could be rectified and that the corporate veil could be lifted. It also upheld the damages award, with the exception of the award for punitive damages, which it set aside. The order for solicitor-client costs was similarly upheld.

27 With respect to compensatory damages, the Court of Appeal was "not prepared to interfere with the award of damages in this case" (para. 27). It

à une somme qui aura valeur d'exemple et en même temps fera en sorte qu'[il] ne profite pas indûment de sa conduite » (par. 109). Le juge Wilkins a dit que [TRADUCTION] « [l]a seconde partie de l'affirmation qui précède est le seul fondement justifiant d'accorder des dommages-intérêts punitifs » (par. 109) en l'espèce. Par conséquent, O'Connor devrait être condamné, au titre des dommages-intérêts punitifs, au paiement d'une somme [TRADUCTION] « à tout le moins suffisante pour lui faire remettre le profit indigne qu'il a réalisé par sa conduite répréhensible » (par. 110). Les dommages-intérêts punitifs ont été établis à 200 000 $. En raison de leur comportement abusif pendant le déroulement de l'action, les défendeurs (appelants au présent pourvoi) ont été condamnés aux dépens sur la base procureur-client.

O'Connor a prétendu qu'il ne devait pas être tenu personnellement responsable à l'égard de tout jugement prononcé contre Performance en faveur de la demanderesse, mais le juge Wilkins a « complètement » (par. 119) rejeté cet argument. Le juge a dit que chaque mesure prise pour appuyer cette coentreprise l'avait été à l'instigation d'O'Connor, comme toutes les tentatives visant à miner les intérêts légitimes de Bell dans cet interminable litige. [TRADUCTION] « Il ne saurait certes y avoir de cas plus clair où la cour doit écarter le bénéfice de la personnalité juridique et tenir » (par. 119) O'Connor personnellement responsable. Et c'est ce qu'a fait le juge Wilkins.

B. *Cour d'appel de l'Alberta* (2000), 255 A.R. 329, 2000 ABCA 116

Dans un arrêt *per curiam*, la Cour d'appel a confirmé la décision du juge Wilkins indiquant que la Convention pouvait être rectifiée et que le bénéfice de la personnalité juridique pouvait être écarté. Elle a aussi confirmé les décisions de ce dernier relativement aux dommages-intérêts, sauf celle concernant les dommages-intérêts punitifs, qu'elle a annulée. Elle a également confirmé l'ordonnance accordant les dépens sur la base procureur-client.

En ce qui a trait aux dommages-intérêts compensatoires, la Cour d'appel a dit [TRADUCTION] « ne pas être disposée à modifier les

did, however, describe the trial judge's award as "generous" (para. 27).

The Court of Appeal agreed with the trial judge that "the misconduct of the defendants was so outrageous that punishment and deterrence [were] required" (para. 28), but that punitive damages "should be awarded only if they achieve some rational purpose" (para. 28). In the Court of Appeal's view, the "substantial and generous compensatory damages awarded" (para. 29) by the trial judge satisfy both the punishment and deterrence objectives in this case. The Court of Appeal was also of the view that this was not a case where it was necessary to award punitive damages to ensure that the defendant does not profit from his misconduct. O'Connor would have profited under the Agreement even if he had not misbehaved. Accordingly, the Court of Appeal set aside the punitive damages award. In all other respects, the appeal was dismissed.

III. Analysis

When reasonably sophisticated businesspeople reduce their oral agreements to written form, which are prepared and reviewed by lawyers, and changes made, and the documents are then executed, there is usually little scope for rectification. Nor does a falling out between business partners usually attract an award of punitive damages. This case is unusual because of the findings of fraud and deceit made against the appellant O'Connor by the trial judge. The appellants are therefore obliged to try to make their case, if at all, out of the mouth of Bell, with such help as they can find in the law books for their position.

Counsel for the appellants (who was not counsel at trial) seeks to raise three issues, which he describes as follows: (1) the relationship between the plea of

dommages-intérêts en l'espèce» (par. 27). Elle a toutefois qualifié de « généreux » (par. 27) le quantum accordé par le juge de première instance.

28 La Cour d'appel a souscrit à la conclusion du juge de première instance que [TRADUCTION] « la conduite répréhensible des défendeurs était à ce point inacceptable que des mesures de punition et de dissuasion s'imposaient » (par. 28), mais elle a ajouté que des dommages-intérêts punitifs « ne doivent être accordés que s'ils servent un objectif rationnel » (par. 28). De l'avis de la Cour d'appel, les [TRADUCTION] « dommages-intérêts compensatoires substantiels et généreux accordés » (par. 29) par le juge de première instance satisfaisaient à la fois aux objectifs de punition et de dissuasion en l'espèce. La Cour d'appel estimait également ne pas être en présence d'une affaire où des dommages-intérêts punitifs étaient requis pour faire en sorte que le défendeur ne profite pas de sa conduite répréhensible. O'Connor aurait tiré des bénéfices de l'exécution de la Convention, même s'il ne s'était pas comporté de façon répréhensible. La Cour d'appel a donc annulé la décision accordant les dommages-intérêts punitifs. L'appel a toutefois été rejeté sur tous les autres points.

III. L'analyse

29 Lorsque des gens d'affaires raisonnablement avertis couchent par écrit leurs ententes verbales, dans des documents qui sont préparés et revus par des avocats puis modifiés avant d'être signés, il y a généralement peu de chances qu'il y ait lieu à rectification. Pas plus d'ailleurs qu'une mésentente entre associés commerciaux n'entraîne ordinairement une condamnation à des dommages-intérêts punitifs. La présente affaire est inhabituelle en ce que le juge de première instance a conclu à l'existence de fraude et de dol de la part de l'appelant O'Connor. Les appelants doivent par conséquent tenter d'établir le bienfondé de leurs prétentions, pour peu que cela soit possible, à partir des assertions mêmes de Bell et en s'appuyant sur tout ce qu'ils peuvent trouver dans la jurisprudence au soutien de leur thèse.

30 L'avocat des appelants (qui ne les représentait pas en première instance) soulève trois points, qu'il énonce ainsi : (1) le rapport entre l'allégation

unilateral mistake and the remedy of rectification (particularly where the mistake is the product of the plaintiff's own negligence); (2) the kind of pleading and proof that a plaintiff who seeks rectification must offer, as well as the proper standard of proof to apply in rectification cases; and, (3) the proper method of quantifying damages ordered in lieu of rectification in cases where the subject matter of the rectified contract is an option for the sale of land. The respondent, as stated, cross-appeals against the quashing of the award of punitive damages.

d'erreur unilatérale et la réparation que constitue la rectification (particulièrement lorsque l'erreur est le fruit de la propre négligence du demandeur); (2) le type d'allégations et de preuve que doit présenter le demandeur qui sollicite la rectification, de même que la norme de preuve applicable en pareil cas; (3) la méthode appropriée pour quantifier les dommages-intérêts accordés à la place de la rectification lorsque l'objet du contrat rectifié est une option portant sur la vente de terrains. Comme il a été mentionné plus tôt, l'intimée se pourvoit de façon incidente contre l'annulation de la décision accordant les dommages-intérêts punitifs.

A. *Rectification of the Contract*

A. *Rectification du contrat*

31 Rectification is an equitable remedy whose purpose is to prevent a written document from being used as an engine of fraud or misconduct "equivalent to fraud". The traditional rule was to permit rectification only for mutual mistake, but rectification is now available for unilateral mistake (as here), provided certain demanding preconditions are met. Insofar as they are relevant to this appeal, these preconditions can be summarized as follows. Rectification is predicated on the existence of a prior oral contract whose terms are definite and ascertainable. The plaintiff must establish that the terms agreed to orally were not written down properly. The error may be fraudulent, or it may be innocent. What is essential is that at the time of execution of the written document the defendant knew or ought to have known of the error and the plaintiff did not. Moreover, the attempt of the defendant to rely on the erroneous written document must amount to "fraud or the equivalent of fraud". The court's task in a rectification case is corrective, not speculative. It is to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other: *Hart v. Boutilier* (1916), 56 D.L.R. 620 (S.C.C.), at p. 630; *Ship M. F. Whalen v. Pointe Anne Quarries Ltd.* (1921), 63 S.C.R. 109, at pp. 126-27; *Downtown King West Development Corp. v. Massey Ferguson Industries Ltd.* (1996), 133 D.L.R. (4th) 550 (Ont. C.A.), at p. 558; G. H. L. Fridman, *The Law of Contract in Canada* (4th ed. 1999), at p. 867; S. M. Waddams, *The Law of Contracts* (4th

La rectification est une réparation en equity visant à empêcher qu'un écrit soit utilisé comme moyen de commettre une fraude ou de se livrer à une conduite répréhensible [TRADUCTION] « équivalant à fraude ». La règle traditionnelle ne permettait la rectification qu'en cas d'erreur mutuelle, mais il y a maintenant ouverture à rectification en cas d'erreur unilatérale (comme dans la présente affaire), pourvu que certains préalables rigoureux soient réunis. Dans la mesure où ils sont pertinents en l'espèce, ces préalables peuvent être résumés ainsi. La rectification est fondée sur l'existence d'un contrat verbal préalable dont les conditions sont déterminées et déterminables. Le demandeur doit établir que les conditions convenues verbalement n'ont pas été couchées adéquatement par écrit. L'erreur peut être frauduleuse ou innocente. L'exigence essentielle est que, au moment de la signature de l'écrit, le défendeur connaissait l'erreur ou aurait dû la connaître, et que le demandeur n'en connaissait pas l'existence. De plus, la tentative du défendeur d'utiliser l'écrit erroné doit constituer « une fraude ou l'équivalent d'une fraude ». La tâche des tribunaux dans une affaire de rectification est de corriger et non de faire des supputations. Elle consiste à reconstituer le marché original conclu par les parties, et non à rectifier une erreur de jugement qu'une partie aurait reconnue tardivement : *Hart c. Boutilier* (1916), 56 D.L.R. 620 (C.S.C.), p. 630; *Ship M. F. Whalen c. Pointe Anne Quarries Ltd.* (1921), 63 R.C.S. 109, p. 126-127; *Downtown King West Development Corp. c. Massey*

ed. 1999), at para. 336. In *Hart*, *supra*, at p. 630, Duff J. (as he then was) stressed that "[t]he power of rectification must be used with great caution". Apart from everything else, a relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts.

B. *Preliminary Objection*

The respondent says the appellants ought not to be allowed to argue various objections to rectification that were not raised at trial. The alleged uncertainty about the terms of the prior oral agreement, for example, is an issue that did not come into bloom until after the appellants had lost in the Alberta Court of Appeal. There is some merit in this objection. Unless the parties have fully addressed a factual issue at trial in the evidence, and preferably in argument for the benefit of the trial judge, there is always the very real danger that the appellate record will not contain all of the relevant facts, or the trial judge's view on some critical factual issue, or that an explanation that might have been offered in testimony by a party or one or more of its witnesses was never elicited. As Duff J. put it in *Lamb v. Kincaid* (1907), 38 S.C.R. 516, at p. 539:

A court of appeal, I think, should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it.

In my view, the appellants' contentions on the rectification issues are fact-based, but are manageable on the evidentiary record and raise important issues of law and equity. The Court is free to consider a new issue of law on the appeal where it is able to do so without procedural prejudice to the

Ferguson Industries Ltd. (1996), 133 D.L.R. (4th) 550 (C.A. Ont.), p. 558; G. H. L. Fridman, *The Law of Contract in Canada* (4e éd. 1999), p. 867; S. M. Waddams, *The Law of Contracts* (4e éd. 1999), par. 336. Dans l'arrêt *Hart*, précité, p. 630, le juge Duff (plus tard Juge en chef du Canada) a souligné que [TRADUCTION] « [l]e pouvoir de rectification ne doit être utilisé qu'avec grande prudence ». Tout assouplissement de l'application de la rectification qui en ferait un substitut à l'exercice de diligence raisonnable lors de la signature d'un document aurait pour effet d'ébranler la confiance du monde des affaires à l'égard des contrats écrits.

B. *Objection préliminaire*

32 L'intimée prétend que les appelants ne devraient pas être admis à plaider des objections à la rectification qui n'ont pas été soulevées au procès. Par exemple, l'incertitude qui caractériserait les conditions de l'entente verbale antérieure est une question que n'ont soulevée les appelants qu'après avoir été déboutés par la Cour d'appel de l'Alberta. Cette objection n'est pas sans fondement. À moins que les parties n'aient traité de façon exhaustive une question de fait au procès en présentant leur preuve, et de préférence au cours des plaidoiries devant le juge, il y a toujours un risque très réel que le dossier d'appel ne comporte pas tous les faits pertinents ou l'opinion du juge de première instance sur quelque question de fait cruciale, ou encore que n'ait jamais été obtenue une explication qui aurait pu être donnée par une partie ou par un ou plusieurs de ses témoins en déposant. Comme l'a dit le juge Duff dans l'arrêt *Lamb c. Kincaid* (1907), 38 R.C.S. 516, p. 539 :

[TRADUCTION] Selon moi, un tribunal d'appel ne devrait pas recevoir un tel argument soulevé pour la première fois en appel, à moins qu'il ne soit clair que, même si la question avait été soulevée en temps opportun, elle n'aurait pas été éclaircie davantage.

33 À mon avis, les prétentions des appelants au sujet des questions touchant à la rectification reposent sur des faits, mais elles peuvent être examinées à la lumière de la preuve au dossier et elles soulèvent d'importantes questions de droit et d'equity. Il est loisible à la Cour, dans le cadre d'un pourvoi,

opposing party and where the refusal to do so would risk an injustice.

34 Here the respondent sought and obtained an equitable remedy to rectify a situation which need never have arisen had Bell properly read the draft document in December 1989. He who seeks equity must do equity. If equitable relief had been wrongfully granted, we should not close our eyes to a fatal objection because of counsel's oversight at trial. The facts vital to the appellants' new legal position are readily ascertainable in the evidence and the necessary findings are implicit, if not always explicit, in the trial judge's reasons.

C. *The Conditions Precedent to Rectification*

35 As stated, high hurdles are placed in the way of a businessperson who relies on his or her own unilateral mistake to resile from the written terms of a document which he or she has signed and which, on its face, seems perfectly clear. The law is determined not to open the proverbial floodgates to dissatisfied contract makers who want to extricate themselves from a poor bargain.

36 I referred earlier to the four conditions precedent, or "hurdles" that a plaintiff must overcome. To these the appellants wish to add a fifth. Rectification, they say, should not be available to a plaintiff who is negligent in reviewing the documentation of a commercial agreement. To the extent the appellants' argument is that in such circumstances the Court may exercise its discretion to refuse the equitable remedy to such a plaintiff, I agree with them. To the extent they say the want of due diligence (or negligence) on the plaintiff's part is an absolute bar, I think their proposition is inconsistent with principle and authority and should be rejected.

d'examiner une nouvelle question de droit dans les cas où elle peut le faire sans qu'il en résulte de préjudice d'ordre procédural pour la partie adverse et où son refus de le faire risquerait d'entraîner une injustice.

En l'espèce, l'intimée a demandé et obtenu une réparation en equity pour faire rectifier une situation qui n'aurait jamais dû se produire si Bell avait lu adéquatement le projet de convention en décembre 1989. Qui sollicite l'équité doit lui-même agir avec équité. Si la réparation en equity a été accordée à tort, nous ne devrions pas faire abstraction d'une objection fatale parce que l'avocat a omis de la soulever au procès. Les faits essentiels à la nouvelle thèse juridique avancée par les appelants sont faciles à dégager de la preuve et les conclusions nécessaires sont implicites, sinon toujours explicites, dans les motifs du juge de première instance.

C. *Les préalables à la rectification*

Comme il a été indiqué précédemment, la personne en affaires qui invoque sa propre erreur unilatérale pour se soustraire aux conditions — couchées par écrit — d'un document qu'elle a signé et qui, à première vue, semble parfaitement clair, doit surmonter de sérieux obstacles. Le droit est résolu à prévenir la proverbiale avalanche de poursuites que pourraient vouloir engager des contractants insatisfaits, qui veulent se délier d'un marché peu avantageux.

J'ai évoqué plus tôt les quatre préalables, ou « obstacles », que le demandeur doit surmonter. Les appelants cherchent à en ajouter un cinquième. La rectification ne devrait pas, affirment-ils, être ouverte à un demandeur qui a été négligent dans l'examen de la documentation relative à un contrat commercial. Dans la mesure où leur argument signifie que, en pareils cas, la Cour peut exercer son pouvoir discrétionnaire de refuser d'accorder la réparation en equity à un tel demandeur, je suis d'accord avec eux. Dans la mesure où ils affirment que l'absence de diligence raisonnable (ou la négligence) d'un demandeur constitue un empêchement absolu, je crois que leur thèse est incompatible avec les principes et les autorités, et qu'elle devrait être rejetée.

The first of the traditional hurdles is that Sylvan (Bell) must show the existence and content of the inconsistent prior oral agreement. Rectification is "[t]he most venerable breach in the parol evidence rule" (Waddams, *supra*, at para. 336). The requirement of a prior oral agreement closes the "floodgate" to unhappy contract makers who simply failed to read the contractual documents, or who now have misgivings about the merits of what they have signed.

37 Selon le premier des obstacles traditionnels, il incombe à Sylvan (Bell) d'établir l'existence et la teneur de l'entente verbale antérieure incompatible. La rectification est [TRADUCTION] « [l']entorse la plus consacrée à la règle de l'exclusion de la preuve extrinsèque » (Waddams, *op. cit.*, par. 336). La condition exigeant une entente verbale antérieure prévient « l'avalanche de poursuites » de la part de contractants insatisfaits qui ont tout simplement omis de lire les documents contractuels, ou qui éprouvent maintenant des réserves sur le bien-fondé de ce qu'ils ont signé.

The second hurdle is that not only must Sylvan (Bell) show that the written document does not correspond with the prior oral agreement, but that O'Connor either knew or ought to have known of the mistake in reducing the oral terms to writing. It is only where permitting O'Connor to take advantage of the error would amount to "fraud or the equivalent of fraud" that rectification is available. This requirement closes the "floodgate" to unhappy contract makers who simply made a mistake. Equity acts on the conscience of a defendant who seeks to take advantage of an error which he or she either knew or ought reasonably to have known about at the time the document was signed. Mere unilateral mistake alone is not sufficient to support rectification but if permitting the non-mistaken party to take advantage of the document would be fraud or equivalent to fraud, rectification may be available: *Hart*, *supra*, at p. 630; *Ship M. F. Whalen*, *supra*, at pp. 126-27.

38 Pour franchir le deuxième obstacle, Sylvan (Bell) doit démontrer non seulement que l'écrit ne correspond pas à l'entente verbale antérieure, mais également qu'O'Connor connaissait ou aurait dû connaître l'existence de l'erreur lorsque les conditions convenues verbalement ont été couchées par écrit. Ce n'est que lorsque le fait de permettre à O'Connor de tirer profit de l'erreur constituerait « une fraude ou l'équivalent d'une fraude » qu'il y a ouverture à rectification. Cette exigence prévient l'avalanche de poursuites de la part de contractants insatisfaits qui ont simplement fait une erreur. L'equity agit sur la conscience du défendeur qui cherche à tirer profit d'une erreur dont il connaissait ou aurait raisonnablement dû connaître l'existence au moment où le document a été signé. À elle seule, une erreur unilatérale ne peut justifier la rectification d'un document, mais il peut y avoir ouverture à cette réparation si le fait de permettre à la partie qui n'était pas dans l'erreur de tirer profit du document constitue une fraude ou l'équivalent d'une fraude : *Hart*, précité, p. 630; *Ship M. F. Whalen*, précité, p. 126-127.

What amounts to "fraud or the equivalent of fraud" is, of course, a crucial question. In *First City Capital Ltd. v. British Columbia Building Corp.* (1989), 43 B.L.R. 29 (B.C.S.C.), McLachlin C.J.S.C. (as she then was) observed that "in this context 'fraud or the equivalent of fraud' refers not to the tort of deceit or strict fraud in the legal sense, but rather to the broader category of equitable fraud or constructive fraud. . . . Fraud in this wider sense refers to transactions falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself

39 Déterminer ce qui constitue « une fraude ou l'équivalent d'une fraude » constitue, bien sûr, une question cruciale. Dans *First City Capital Ltd. c. British Columbia Building Corp.* (1989), 43 B.L.R. 29, madame le juge en chef McLachlin de la Cour suprême de la Colombie-Britannique (maintenant Juge en chef du Canada) a souligné que, [TRADUCTION] « dans ce contexte, "une fraude ou l'équivalent d'une fraude" ne s'entend pas du délit que constituent le dol ou la fraude stricte au sens juridique du terme, mais plutôt à la catégorie plus vaste des fraudes par implication ou fraudes

of the advantage obtained" (p. 37). Fraud in the "wider sense" of a ground for equitable relief "is so infinite in its varieties that the Courts have not attempted to define it", but "all kinds of unfair dealing and unconscionable conduct in matters of contract come within its ken": *McMaster University v. Wilchar Construction Ltd.* (1971), 22 D.L.R. (3d) 9 (Ont. H.C.), at p. 19. See also *Montreal Trust Co. v. Maley* (1992), 99 D.L.R. (4th) 257 (Sask. C.A.), *per* Wakeling J.A.; *Alampi v. Swartz* (1964), 43 D.L.R. (2d) 11 (Ont. C.A.); *Stepps Investments Ltd. v. Security Capital Corp.* (1976), 73 D.L.R. (3d) 351 (Ont. H.C.), *per* Grange J. (as he then was), at pp. 362-63; and Waddams, *supra*, at para. 342.

reconnues en equity [. . .] Dans ce sens plus large, la fraude s'entend également d'opérations qui ne sont pas dolosives, mais à l'égard desquelles le tribunal estime qu'il serait abusif de laisser une personne profiter de l'avantage obtenu » (p. 37). Au « sens plus large » de fraude donnant ouverture à une réparation en equity, la fraude se présente sous [TRADUCTION] « un nombre tellement infini de formes que les tribunaux n'ont pas tenté de la définir », mais « elle vise toutes sortes de manœuvres déloyales et de conduites abusives en matière contractuelle » : *McMaster University c. Wilchar Construction Ltd.* (1971), 22 D.L.R. (3d) 9 (H.C. Ont.), p. 19. Voir également *Montreal Trust Co. c. Maley* (1992), 99 D.L.R. (4th) 257 (C.A. Sask.), le juge Wakeling; *Alampi c. Swartz* (1964), 43 D.L.R. (2d) 11 (C.A. Ont.); *Stepps Investments Ltd. c. Security Capital Corp.* (1976), 73 D.L.R. (3d) 351 (H.C. Ont.), le juge Grange (plus tard juge à la Cour d'appel), p. 362-363, et Waddams, *op. cit.*, par. 342.

40 The third hurdle is that Sylvan (Bell) must show "the precise form" in which the written instrument can be made to express the prior intention (*Hart*, *supra*, *per* Duff J., at p. 630). This requirement closes the "floodgates" to those who would invite the court to speculate about the parties' unexpressed intentions, or impose what in hindsight seems to be a sensible arrangement that the parties might have made but did not. The court's equitable jurisdiction is limited to putting into words that — and only that — which the parties had already orally agreed to.

Suivant le troisième obstacle, Sylvan (Bell) doit démontrer [TRADUCTION] « de façon précise » comment l'écrit peut être formulé pour exprimer l'intention antérieure (*Hart*, précité, le juge Duff, p. 630). Cette exigence prévient « l'avalanche de poursuites » de la part de ceux qui inviteraient les tribunaux à spéculer sur les intentions inexprimées des parties ou à imposer ce qui, a posteriori, semble être un arrangement judicieux, qu'auraient pu conclure les parties mais qu'elles n'ont par ailleurs pas choisi. La compétence des tribunaux en equity se limite à exprimer en mots ce sur quoi — et uniquement ce sur quoi — les parties s'étaient déjà entendues verbalement.

41 The fourth hurdle is that all of the foregoing must be established by proof which this Court has variously described as "beyond reasonable doubt" (*Ship M. F. Whalen*, *supra*, at p. 127), or "evidence which leaves no 'fair and reasonable doubt'" (*Hart*, *supra*, at p. 630), or "convincing proof" or "more than sufficient evidence" (*Augdome Corp. v. Gray*, [1975] 2 S.C.R. 354, at pp. 371-72). The modern approach, I think, is captured by the expression "convincing proof", i.e., proof that may fall well short of the criminal standard, but which goes beyond the sort of proof that only reluctantly and

Le quatrième obstacle oblige à établir tous les éléments susmentionnés en apportant, conformément aux diverses façons dont notre Cour l'a décrite, une preuve [TRADUCTION] « au-delà de tout doute raisonnable » (*Ship M. F. Whalen*, précité, p. 127), une preuve [TRADUCTION] « qui ne laisse aucun "doute juste et raisonnable" » (*Hart*, précité, p. 630), une « preuve convaincante » ou une « preuve [. . .] plus que suffisante » (*Augdome Corp. c. Gray*, [1975] 2 R.C.S. 354, p. 371-372). Selon moi, l'approche moderne est bien décrite par l'expression « preuve convaincante », c.-à-d. une preuve qui peut être bien

with hesitation scrapes over the low end of the civil "more probable than not" standard.

Some critics argue that anything more demanding than the ordinary civil standard of proof is unnecessary (e.g., Waddams, *supra*, at para. 343), but, again, the objective is to promote the utility of written agreements by closing the "floodgate" against marginal cases that dilute what are rightly seen to be demanding preconditions to rectification.

It was formerly held that it was not sufficient if the evidence merely comes from the party seeking rectification. In *Ship M. F. Whalen*, *supra*, Duff J. (as he then was) said, at p. 127, "[s]uch parol evidence must be adequately supported by documentary evidence and by considerations arising from the conduct of the parties". Modern practice has moved away from insistence on documentary corroboration (Waddams, *supra*, at para. 337; Fridman, *supra*, at p. 879). In some situations, documentary corroboration is simply not available, but if the parol evidence is corroborated by the conduct of the parties or other proof, rectification may, in the discretion of the court, be available.

It is convenient at this point to deal with the trial judge's findings in relation to these traditional requirements. I will then turn to the appellants' proposed fifth precondition — due diligence on the part of the plaintiff.

(1) The Existence and Content of the Prior Oral Agreement

The appellants' principal argument against rectification is that the alleged prior oral agreement is void for uncertainty. Reliance is placed on *I.C.R.V. Holdings Ltd. v. Tri-Par Holdings Ltd.* (1994), 53 B.C.A.C. 72, where rectification of an agreement to purchase a recreational vehicle park was refused because, *per* Finch J.A. (now C.J.B.C.), at para. 7, the parties never agreed on "the precise location of

inférieure à la norme applicable en matière criminelle, mais qui excède toutefois la preuve qui satisfait péniblement à la norme de la « prépondérance des probabilités » applicable en matière civile.

42 Certains critiques avancent qu'il est inutile de recourir à une norme de preuve plus exigeante que celle ordinairement applicable en droit civil (par exemple, Waddams, *op. cit.*, par. 343), mais une fois de plus, l'objectif est de renforcer l'utilité des ententes écrites en prévenant une « avalanche » d'affaires limites qui affaibliraient des exigences perçues à juste titre comme de rigoureux préalables à la rectification.

43 Il a déjà été jugé que la preuve était insuffisante si elle émanait seulement de la partie demandant la rectification. Dans l'arrêt *Ship M. F. Whalen*, précité, p. 127, le juge Duff a dit qu'[TRADUCTION] « [u]n tel témoignage oral doit être adéquatement étayé par des éléments de preuve documentaire et par des éléments résultant de la conduite des parties ». La pratique moderne a cessé d'insister sur la présentation d'éléments de preuve documentaire corroborants (Waddams, *op. cit.*, par. 337; Fridman, *op. cit.*, p. 879). Dans certains cas, il est tout simplement impossible d'apporter une telle preuve, mais si le témoignage oral est corroboré par la conduite des parties ou par une autre preuve, le tribunal peut, à son appréciation, accorder la rectification.

44 Il convient maintenant d'examiner les constatations du juge de première instance au sujet de ces exigences traditionnelles. Je me pencherai ensuite sur le cinquième préalable proposé par les appelants, à savoir l'exercice de diligence raisonnable par l'auteur de la demande.

(1) L'existence et la teneur de l'entente verbale antérieure

45 L'argument principal des appelants à l'encontre de la rectification est que l'entente verbale antérieure est nulle pour cause d'incertitude. Ils invoquent l'arrêt *I.C.R.V. Holdings Ltd. c. Tri-Par Holdings Ltd.* (1994), 53 B.C.A.C. 72, dans lequel la Cour d'appel de la Colombie-Britannique a refusé d'accorder la rectification d'une convention d'achat d'un terrain de caravaning parce que, de

the eastern boundary", and *Gordeyko v. Edmonton* (1986), 45 Alta. L.R. (2d) 201 (Q.B.), where Stratton J. (as he then was) found the evidence uncertain about a notice period envisaged by the prior oral agreement. See also *Kerr v. Cunard* (1914), 16 D.L.R. 662 (N.B.S.C.). Appellants' counsel quotes Lord Denning's "pithy" observation that: "[a] mistake made by one party to the knowledge of the other is a ground for avoiding a contract, but not for making one" (*Byrnlea Property Investments Ltd. v. Ramsay*, [1969] 2 Q.B. 253 (C.A.), at p. 265).

46 I agree with the appellants that on this point the trial judge's reasons are somewhat unsatisfactory, but this appears to be because the "uncertainty" argument now made against rectification was not before him. The issue of uncertainty of subject matter was raised neither in the pleadings nor at trial. The trial judge directed his reasons to the points that he believed were in controversy. As to the appellants' new arguments, one may echo the words of James, V.C., in *Rumble v. Heygate* (1870), 18 W.R. 749 (Ch.), who said, at p. 750, that the objections to the agreement in that case on the basis of uncertainty of quantity of land and of its site "are mere shadows which vanish when examined by the light of common sense".

47 The Court should attempt to uphold the parties' bargain where the terms can be ascertained with a reasonable level of comfort, i.e., convincing proof. Here the trial judge predicated his award of compensatory damages on the finding that the optioned land could accommodate 58 single family houses located along the 480 yard length of the 18th fairway. There is no argument about the 480 yards. O'Connor himself plucked the 480 figure from the length of play listed on the Sylvan Lake Golf

l'avis du juge Finch (maintenant Juge en chef de la Colombie-Britannique), les parties ne s'étaient jamais entendues sur [TRADUCTION] « l'emplacement précis de la limite est » (par. 7), et l'arrêt *Gordeyko c. Edmonton* (1986), 45 Alta. L.R. (2d) 201 (B.R.), où le juge Stratton (plus tard juge à la Cour d'appel) a conclu au caractère incertain de la preuve relative au délai de préavis envisagé par l'entente verbale antérieure. Voir également l'affaire *Kerr c. Cunard* (1914), 16 D.L.R. 662 (C.S.N.-B.). L'avocat des appelants a cité l'observation « lapidaire » suivante de lord Denning : [TRADUCTION] « [l]'erreur commise par une partie, au su de l'autre, est un motif justifiant de résoudre un contrat, non d'en conclure un » (*Byrnlea Property Investments Ltd. c. Ramsay*, [1969] 2 Q.B. 253 (C.A.), p. 265).

Je reconnais avec les appelants que, sur ce point, les motifs du juge de première instance sont quelque peu insatisfaisants, mais cela semble s'expliquer par le fait qu'on ne lui avait pas présenté l'argument fondé sur « l'incertitude » plaidé devant nous à l'encontre de la rectification. La question de l'incertitude concernant l'objet n'a été soulevée ni dans les actes de procédure, ni au procès. Dans ses motifs, le juge de première instance s'est attaché aux points qu'il estimait litigieux. Relativement aux nouveaux arguments des appelants, il convient de rappeler les propos du vice-chancelier James dans *Rumble c. Heygate* (1870), 18 W.R. 749 (Ch.), où ce dernier a dit, à la p. 750, à l'égard des objections formulées dans cette affaire à l'encontre de la validité de l'entente, sur le fondement de l'incertitude caractérisant l'emplacement et la superficie des terrains, elles [TRADUCTION] « ne sont rien d'autre que des ombres qui se dissipent sous la lumière du sens commun ».

La Cour doit tenter de maintenir la validité du marché conclu par les parties lorsqu'il est possible d'en dégager les conditions avec un degré de certitude raisonnable, c.-à-d. si on présente une preuve convaincante. En l'espèce, le juge de première instance a fondé sa décision accordant des dommages-intérêts compensatoires sur la conclusion que le terrain visé par l'option permettait la construction de 58 maisons unifamiliales situées le long des 480 verges du 18e trou. Personne ne conteste

Club score card. O'Connor's number for the width of the development (110) may also be accepted. The issue is whether the number was intended to express yards or feet. The trial judge appears to have concluded that the dispute about the depth of the residential development (which is all that divided the parties) came down to a simple choice between Bell's version (Plan A) and O'Connor's version (Plan B). Both plans were predicated on the length of the 18th fairway, namely 480 yards. Plan B, which O'Connor had described in the document, contemplated a single row of houses on a development plan 110 *feet* deep. Bell's Plan A was based on two rows of housing separated by a road allowance, in a configuration similar to that shown in the aerial photo of the Bayview development discussed by Bell and O'Connor at their December 16-17 meeting. Plan A called for a depth of about 110 *yards*. If Plan B's 110-*foot* depth is tripled to 110 *yards*, the acreage under option would be roughly tripled from about 3.6 acres (Plan B) to about 10.9 acres (Plan A), which accommodates the 58 lots plus the standard municipal road allowance. The problem in *I.C.R.V. Holdings*, *supra*, was that the parties never agreed on the boundary. Here the trial judge concluded that there *was* agreement even though the parties did not express themselves to each other in lawyerly language. This not infrequently happens: *Bloom v. Averbach*, [1927] S.C.R. 615, *per* Lamont J., at p. 621:

> It is suggested that had the letters been handed to a lawyer to prepare a formal contract therefrom, he would not have been able to determine what assets were to be included in the term "building, machinery and fixtures," or what were to be covered by "stock, etc." It may be that he would not, but that is not the test. The test is, did the parties themselves clearly understand what was comprised in each. In other words were their minds *ad idem* as to these expressions? [Emphasis added.]

la longueur de 480 verges. O'Connor lui-même a tiré le chiffre 480 de la distance indiquée sur la carte de pointage utilisée au terrain de golf de Sylvan Lake. Le chiffre mentionné par O'Connor quant à la largeur du complexe (110) peut aussi être accepté. Il s'agit de décider si ce chiffre exprimait une profondeur en verges ou en pieds. Le juge de première instance semble avoir conclu que le différend au sujet de la profondeur du complexe domiciliaire (unique objet de désaccord entre les parties) se résumait à un simple choix entre la version de Bell (le « plan A ») et celle d'O'Connor (le « plan B »). Les deux plans étaient basés sur la longueur du 18e trou, soit 480 verges. Le plan B, qu'O'Connor avait décrit dans le document, envisageait une seule rangée de maisons selon un plan d'aménagement de 110 *pieds* de profondeur. Le plan A de Bell envisageait deux rangées de maisons séparées par une emprise routière, selon un aménagement analogue à celui illustré par la photographie aérienne du complexe de Bayview dont Bell et O'Connor avaient discuté au cours de leur rencontre des 16 et 17 décembre. Suivant le plan A, la profondeur était d'environ 110 *verges*. Si la profondeur de 110 *pieds* du plan B était triplée, passant à 110 *verges*, le bien-fonds visé par l'option triplerait grosso modo de superficie, passant d'environ 3,6 acres (plan B) à environ 10,9 acres (plan A), et pourrait accueillir les 58 lots plus l'emprise routière municipale standard. Dans l'affaire *I.C.R.V. Holdings*, précitée, le problème était que les parties ne s'étaient jamais entendues sur les limites du bien-fonds. En l'espèce, le juge de première instance a conclu qu'il y *avait eu* accord, même si les parties ne s'étaient pas exprimées en jargon juridique. C'est une situation qui n'est pas rare : *Bloom c. Averbach*, [1927] R.C.S. 615, le juge Lamont, p. 621 :

> [TRADUCTION] On prétend que, si les lettres avaient été remises à un avocat pour qu'il prépare un contrat formel à partir de celles-ci, il aurait été incapable de déterminer quels éléments d'actif devaient être inclus dans l'expression « bâtiments, matériel et accessoires fixes » ou ce qui était visé par les mots « stock, etc. » Peut-être n'aurait-il pas été capable de le faire, mais il ne s'agit pas du critère applicable. Voici quel est ce critère : Les parties elles-mêmes comprenaient-elles clairement ce qui était inclus dans chaque expression? En d'autres termes, y avait-il accord des volontés au sujet de ces expressions? [Je souligne.]

48 The trial judge thus found that the parties had made a verbal agreement with reference to a residential development along the 18th hole. It was more than an agreement to agree. He concluded that there was a definite project in a definite location to which O'Connor and Bell had given their definite assent.

49 Although the parties did not discuss a metes and bounds description, they were working on a defined development proposal. O'Connor cannot complain if the numbers he inserted in clause 18 (110 x 480) are accepted and confirmed. The issue, then, is the error created by his apparently duplicitous substitution of feet for yards in one dimension. We know the 480 must be yards because it measures the 18th fairway. If the 110 is converted from feet to yards, symmetry is achieved, certainty is preserved and Bell's position is vindicated.

(2) Fraud or Conduct Equivalent to Fraud

50 The notion of "*equivalent* to fraud" as distinguished from fraud itself, is often utilized where "the court is unwilling to go so far as to find actual knowledge on the side of the party seeking enforcement" (Waddams, *supra*, at para. 342). The trial judge had no such hesitation in this case. He characterized O'Connor's actions as "fraudulent, dishonest and deceitful" (para. 114).

51 The trial judge was persuaded not only of the terms of the prior oral agreement and of Bell's mistake but "beyond any reasonable doubt" of O'Connor's knowledge of that mistake. He states (at para. 79):

> This court is satisfied beyond any reasonable doubt that O'Connor knew of Bell's mistake and he chose to permit Bell to sign it in the mistaken belief that it represented the verbal agreement. He did so with the full intention that he would in the future rely on the terms of the Agreement to thwart or reduce any plan by

Le juge de première instance a donc estimé que les parties s'étaient entendues verbalement à l'égard d'un complexe domiciliaire le long du 18e trou. Il ne s'agissait pas d'un simple avant-contrat. Il a conclu à l'existence d'un projet défini et devant être réalisé à un endroit déterminé dont O'Connor et Bell avaient convenu précisément.

Bien que les parties n'aient pas discuté de la description technique des lieux, elles travaillaient à un projet d'aménagement défini. O'Connor ne saurait se plaindre du fait que les chiffres qu'il a inscrits à la clause 18 (110 x 480) sont acceptés et confirmés. La question, par conséquent, est l'erreur créée par sa substitution apparemment frauduleuse, relativement à une des dimensions, d'une mesure en pieds à une mesure en verges. Nous savons que le chiffre 480 désigne des verges puisqu'il correspond à la distance du 18e trou. Si le chiffre 110 désigne non pas des pieds mais des verges, il y a alors symétrie des unités de mesure, la certitude est maintenue et la thèse de Bell est confirmée.

(2) Fraude ou conduite équivalant à fraude

La notion de conduite « *équivalant* à fraude », par opposition à la fraude en soi, est souvent utilisée lorsque [TRADUCTION] « le tribunal n'est pas convaincu que la partie qui demande l'exécution a réellement eu connaissance de l'erreur » (Waddams, *op. cit.*, par. 342). Le juge de première instance n'a aucunement hésité à conclure de la sorte en l'espèce. Il a qualifié les actions d'O'Connor de [TRADUCTION] « frauduleuses, malhonnêtes et dolosives » (par. 114).

Non seulement le juge de première instance était-il convaincu des conditions de l'entente verbale antérieure ainsi que de l'erreur de Bell, mais il était également convaincu « hors de tout doute raisonnable » qu'O'Connor connaissait l'existence de cette erreur. Il a dit ceci, au par. 79 :

> [TRADUCTION] La cour est convaincue hors de tout doute raisonnable qu'O'Connor connaissait l'existence de l'erreur de Bell et qu'il a choisi de laisser Bell signer la Convention alors que ce dernier croyait erronément que le document représentait l'entente verbale. Il a agi ainsi avec la nette intention d'invoquer

Bell to develop an increased area of the golf course for residential development.

O'Connor thus fraudulently misrepresented the written document as accurately reflecting the terms of the prior oral contract. He knew that Bell would not sign an agreement without the option for sufficient land to create the "Bayview" layout development with two rows of housing as specified in the prior oral contract. O'Connor therefore knew when Bell signed the document that he had not detected the substitution of 110 feet for 110 yards. O'Connor knowingly snapped at Bell's mistake "to thwart or reduce any plan by Bell to develop an increased area of the golf course for residential development". Bell's loss would be O'Connor's gain, as O'Connor (Performance) would come into sole ownership of the optioned land as of December 31, 1994.

Although on occasion the trial judge describes O'Connor's conduct as "equivalent to a fraud", and elsewhere he describes it as actual fraud, his reasons taken as a whole can only be characterized as a finding of actual fraud.

(3) Precise Terms of Rectification

It follows from the foregoing that "the precise form" in which the written document can be made to conform to the oral agreement would be simply to change the word "feet" in the phrase "one hundred ten (110) *feet* in width" to "yards".

(4) Existence of "Convincing Proof"

The trial judge made his key findings in respect of the prior oral agreement, Bell's unilateral mistake and O'Connor's knowledge of that mistake to a standard of "beyond any reasonable doubt".

ultérieurement les conditions de la Convention pour contrecarrer ou limiter tout projet de Bell d'affecter une partie plus grande du terrain de golf à la construction résidentielle.

52 O'Connor a donc fait une assertion inexacte et frauduleuse en laissant croire que l'écrit reflétait fidèlement les conditions prévues par l'entente verbale antérieure. Il savait que Bell ne signerait pas un accord ne comportant pas l'option d'acquérir suffisamment de terrain pour réaliser l'aménagement de type « Bayview » comptant deux rangées de maisons qui avait été précisé dans le contrat verbal antérieur. Par conséquent, O'Connor savait que, au moment où il a signé le document, Bell n'avait pas décelé la substitution de la mesure 110 pieds à la mesure 110 verges. O'Connor a sciemment profité de l'erreur de Bell pour [TRADUCTION] « contrecarrer ou limiter tout projet de Bell d'affecter une partie plus grande du terrain de golf à la construction résidentielle ». La perte de Bell se traduirait par un gain pour O'Connor, puisque ce dernier (Performance) allait devenir seul propriétaire du terrain visé par l'option le 31 décembre 1994.

53 Bien que, à certains endroits, le juge de première instance ait décrit la conduite d'O'Connor comme « équivalant à une fraude » alors qu'ailleurs il l'a qualifiée de véritable fraude, considérés globalement, ses motifs ne peuvent être caractérisés que comme une constatation de véritable fraude.

(3) Formulation précise de la rectification

54 Il ressort de ce qui précède que la [TRADUCTION] « façon précise » dont peut être formulé l'écrit pour qu'il soit conforme à l'entente verbale antérieure consiste simplement à remplacer le mot « pieds » par le mot « verges » dans la phrase [TRADUCTION] « cent dix (110) *pieds* de largeur ».

(4) Existence d'une « preuve convaincante »

55 C'est au regard de la norme de la preuve « hors de tout doute raisonnable » que le juge de première instance a tiré ses conclusions clés à l'égard de l'entente verbale antérieure, de l'erreur unilatérale de Bell et de la connaissance par O'Connor de cette erreur.

56 He also found that Bell's version of the verbal agreement was sufficiently corroborated on significant points by other witnesses (including his wife, his former partner, his lawyer and, subsequently, the development consultants), and documents (including his lawyer's notes and the plan of the Bayview Golf Course development discussed in mid-December 1989).

Il a aussi conclu que la version donnée par Bell de l'entente verbale était suffisamment corroborée sur des aspects importants par d'autres témoins (dont son épouse, son ancien associé, son avocat et, par la suite, les consultants en aménagement) ainsi que par des documents (notamment les notes de son avocat et le plan du complexe du terrain de golf Bayview discuté vers la mi-décembre 1989).

D. *Bell's Lack of Due Diligence*

D. *Le défaut de diligence raisonnable de Bell*

57 The appellants seek, in effect, to add a fifth hurdle (or condition precedent) to the availability of rectification. A plaintiff, they say, should be denied such a remedy unless the error in the written document could not have been discovered with due diligence.

Dans les faits, les appelants cherchent à subordonner la rectification à un cinquième obstacle (ou préalable). Selon eux, cette réparation doit être refusée, sauf dans les cas où l'erreur que comporte l'écrit n'aurait pu être décelée même si l'intéressé avait fait preuve de diligence raisonnable.

58 O'Connor says that Bell's failure to read clause 18 and note the mixture of yards and feet should be fatal to his claim because the Court ought not to assist businesspersons who are negligent in protecting their own interests. Alternatively, the effective cause of Bell's loss is not the fraudulent document but Bell's failure to detect the fraud when he had an opportunity to do so.

O'Connor prétend que le fait que Bell n'ait pas lu la clause 18 et constaté qu'on y utilisait une mesure en verges et une autre en pieds devrait être fatal à sa demande, parce que la Cour ne devrait pas venir en aide aux gens d'affaires qui se montrent négligents dans la protection de leurs intérêts. Par ailleurs, il affirme que la cause réelle de la perte de Bell n'est pas le document frauduleux, mais l'omission de ce dernier de déceler la fraude quand il en a eu l'occasion.

59 I agree that Bell, an experienced businessman, ought to have examined the text of clause 18 before signing the document. The terms of clause 18 were clear on their face (even though many readers might have misread a description of land that mixed units of measurement as clause 18 did here). He had time to review the document with his lawyer. He did so. Changes were requested. He did not catch the substitution of 110 feet for 110 yards; indeed, he says he did not read clause 18 at all.

Je reconnais que Bell, homme d'affaires expérimenté, aurait dû examiner le texte de la clause 18 avant de signer le document. Les termes de la clause 18 étaient clairs à première vue (encore que bien des gens auraient pu mal interpréter une description technique où sont utilisées diverses unités de mesure, comme c'est le cas à la clause 18 en l'espèce). Il a eu le temps d'examiner le document avec son avocat. Il l'a fait. Des modifications ont été demandées. Il n'a pas remarqué qu'on avait substitué 110 pieds à 110 verges; de fait, il dit ne pas avoir lu du tout la clause 18.

60 The trial judge, at para. 76, accepted the evidence of Bell's lawyer who admitted that he had not directed his mind to the limitations of the size of the development parcel found in clause 18, nor had he made any note of bringing those to

Au paragraphe 76 de ses motifs, le juge de première instance a accepté le témoignage de l'avocat de Bell, qui a admis ne pas s'être attardé aux limites prévues à la clause 18 relativement à l'étendue de la parcelle devant être aménagée, ni s'être mis une

Bell's attention which would have been his normal practice.

He could offer no explanation for why he had not done so other than the fact that his focus on receipt of the Agreement signed by Bell was to ensure the completion and registration of documentation to facilitate the closing of [the purchase] on or before December 31, 1989. This court accepts the evidence offered by Mr. Hancock and that of Bell that they at no time discussed the description of property contained in clause 18.

It is undoubtedly true that courts ought to hold commercial entities to a reasonable level of due diligence in documenting their transactions. Otherwise, written agreements will lose their utility and commercial life will suffer. Rectification should not become a belated substitute for due diligence.

On the other hand, most cases of unilateral mistake involve a degree of carelessness on the part of the plaintiff. A diligent reading of the written document would generally have disclosed the error that the plaintiff, after the fact, seeks to have corrected. The mistaken party will often have failed to read the document entirely, or may have read it too hastily or without parsing each word. As the American *Restatement of the Law, Second: Contracts (2d)* (1981) points out in its commentary under s. 157 ("Effect of Fault of Party Seeking Relief"), "since a party can often avoid a mistake by the exercise of such care, the availability of relief would be severely circumscribed if he were to be barred by his negligence". Comment B discusses "[f]ailure to read writing". "Generally, one who assents to a writing is presumed to know its contents and cannot escape being bound by its terms merely by contending that he did not read them; his assent is deemed to cover unknown as well as known terms." But this proposition is qualified by that Comment's further statement that the "exceptional rule" in s. 157 (which permits rectification or "reformation" of the contract) applies only where there has been an agreement that preceded the writing. "In such a case, a party's negligence in failing to read the writing

note lui rappelant de les porter à l'attention de M. Bell, comme il l'aurait fait normalement :

[TRADUCTION] Il n'a pu expliquer son omission de le faire autrement que par le fait que, après avoir reçu la Convention signée par Bell, il s'était concentré sur le parachèvement et l'enregistrement de la documentation pour faciliter la clôture de [l'acquisition] au plus tard le 31 décembre 1989. La cour accepte le témoignage de M. Hancock et celui de Bell portant qu'ils n'ont à aucun moment parlé de la description technique de la propriété figurant à la clause 18.

61 Il est incontestable que les tribunaux doivent exiger des entités commerciales qu'elles fassent preuve d'un niveau raisonnable de diligence lorsqu'elles constatent leurs opérations par écrit. Autrement, les contrats écrits perdront leur utilité et les échanges commerciaux en souffriront. La rectification ne doit pas devenir un substitut tardif à l'exercice de diligence raisonnable.

62 Par ailleurs, la plupart des affaires d'erreur unilatérale impliquent un certain manque de diligence de la part du demandeur. Une lecture attentive du texte du contrat aurait normalement permis de déceler l'erreur dont le demandeur sollicite, après coup, la correction. La partie invoquant l'erreur aura souvent omis de lire le document en entier ou bien elle l'aura lu trop rapidement ou sans en avoir bien pesé chaque mot. Comme on le souligne dans l'ouvrage américain *Restatement of the Law, Second : Contracts (2d)* (1981), au commentaire accompagnant l'art. 157 (« Effect of Fault of Party Seeking Relief »), [TRADUCTION] « étant donné qu'une partie peut souvent éviter une erreur en faisant preuve d'une telle diligence, l'ouverture du recours serait gravement restreinte si la négligence de la partie l'empêchait d'exercer ce recours ». Le commentaire B traite de l'[TRADUCTION] « [o]mission de lire un écrit ». [TRADUCTION] « En règle générale, quiconque donne son assentiment à un écrit est présumé en connaître la teneur et ne peut se soustraire aux obligations qui lui incombent aux termes de ce document simplement en prétendant ne pas les avoir lus; son assentiment est réputé couvrir autant les clauses inconnues que les clauses connues. » Cette proposition est toutefois assortie de la réserve suivante, précisant que la [TRADUCTION] « règle

does not preclude reformation if the writing does not correctly express the prior agreement".

63 One reason why the defence of contributory negligence or want of due diligence is not persuasive in a rectification case is because the plaintiff seeks no more than enforcement of the prior oral agreement to which the defendant has already bound itself.

64 The commentary in the American *Restatement* is consistent with the Canadian case law. For example, in *Beverly Motel (1972) Ltd. v. Klyne Properties Ltd.* (1981), 126 D.L.R. (3d) 757 (B.C.S.C.), the vendor signed documents, already signed by the purchaser, in the office of the purchaser's solicitor that conveyed two lots, the single lot (with a motel) that the vendor had offered for sale and the adjacent residentially zoned vacant lot. Of that group of individuals, only the purchaser noted the error (on the day of signing) and he was "pleased and surprised" another lot had been included. He snapped at the offer but he had played no role in inducing the mistake. Gould J. conceded (at pp. 758-59), "[i]t is quite true that if they [the three shareholders of the vendor] had read the legal description in the documents with any care, they would have caught the error. Obviously they did not so read the legal description, and that is understandable, although careless, because they were with their own solicitor, present in the purchaser's solicitor's office, and both solicitors were obviously giving the impression that the final documents were in order and ready for signature". Gould J. ordered that the second lot be conveyed back to the original vendor because it was "unfair, unjust or unconscionable" (p. 760) for the purchaser "to hold the legal advantage he ha[d] gained" (p. 759). Gould J. acknowledged that the presence of a solicitor can help explain why a party might not himself read the written document. In the present case, Bell left the documentation up to the lawyers without appreciating that he had given his lawyer

exceptionnelle » de l'art. 157 (laquelle permet la rectification ou la « réformation » du contrat) ne s'applique que lorsqu'une entente a précédé l'écrit. [TRADUCTION] « Dans un tel cas, la négligence dont a fait montre une partie en ne lisant pas l'écrit ne fait pas obstacle à la réformation de ce document s'il n'exprime pas adéquatement l'entente préalable ».

L'une des raisons pour lesquelles, dans les affaires de rectification, le moyen de défense fondé sur la négligence contributive ou le défaut de diligence raisonnable n'est pas convainquant est le fait que le demandeur ne réclame rien de plus que l'exécution de l'entente verbale antérieure par laquelle le défendeur était déjà lié.

Le commentaire formulé dans l'ouvrage américain *Restatement* est compatible avec la jurisprudence canadienne. Par exemple, dans *Beverly Motel (1972) Ltd. c. Klyne Properties Ltd.* (1981), 126 D.L.R. (3d) 757 (C.S.C.-B.), le vendeur a signé, dans le bureau de l'avocat de l'acquéreur, des documents que ce dernier avait déjà signés et qui transféraient la propriété de deux lots, le lot particulier (avec un motel) que le vendeur avait offert en vente et le lot adjacent, qui était vacant et zoné résidentiel. De toutes ces personnes, seul l'acquéreur a (le jour de la signature) remarqué l'erreur et il était [TRADUCTION] « heureux et étonné » de voir qu'un autre lot avait été inclus dans l'opération. L'acquéreur, qui n'a pas manqué de saisir l'occasion, n'avait toutefois joué aucun rôle dans la création de cette erreur. Le juge Gould a reconnu (aux p. 758-759) qu'[TRADUCTION] « [i]l était vrai que s'ils [les trois actionnaires du vendeur] avaient fait un peu attention en lisant la description officielle dans les documents, ils auraient décelé l'erreur. Ils ne l'ont manifestement pas lue avec attention et, quoique leur omission témoigne d'un manque de la diligence, elle est compréhensible puisqu'ils étaient accompagnés de leur propre avocat, qui était présent dans le bureau de l'avocat de l'acquéreur, et que les deux avocats donnaient clairement l'impression que les documents définitifs étaient en règle et prêts à être signés ». Le juge Gould a ordonné la restitution du deuxième lot au vendeur original, car il était [TRADUCTION] « injuste, inéquitable ou abusif » (p. 760) de permettre « à

insufficient information to check O'Connor's figures. He had, at that time, no reason to question O'Connor's integrity.

If want of due diligence had been a good defence to rectification, relief would likely have been refused in *Big Quill Resources Inc. v. Potash Corp. of Saskatchewan* (2001), 203 Sask. R. 298, 2001 SKCA 31; *Stepps Investments*, *supra*, *per* Grange J., at p. 362; *Prince Albert Credit Union v. Diehl*, [1987] 4 W.W.R. 419 (Sask. Q.B.); *Montreal Trust*, *supra*, at p. 262; *Windjammer Homes Inc. v. Generation Enterprises* (1989), 43 B.L.R. 315 (B.C.S.C.).

E. *Discretionary Relief*

I conclude, therefore that due diligence on the part of the plaintiff is not a condition precedent to rectification. However, it should be added at once that rectification is an equitable remedy and its award is in the discretion of the court. The conduct of the plaintiff is relevant to the exercise of that discretion. In a case where the court concludes that it would be unjust to impose on a defendant a liability that ought more properly to be attributed to the plaintiff's negligence, rectification may be denied. That was not the case here.

F. *Fraud*

There is, on the facts of this case, a more fundamental reason why the appellants' complaint about Bell's lack of due diligence provides no defence. O'Connor did more than "snap" at a business partner's mistake. O'Connor undertook as part of the verbal agreement to have a document prepared that set out its terms. According to the

l'acquéreur » de conserver l'avantage juridique qu'il venait de recevoir » (p. 759). Le juge Gould a reconnu que la présence d'un avocat pourrait permettre d'expliquer pourquoi une partie peut ne pas avoir lu elle-même le texte d'un document. En l'espèce, Bell a laissé aux avocats le soin de s'occuper des documents, sans s'apercevoir qu'il n'avait pas donné suffisamment d'information à son propre avocat pour lui permettre de vérifier les chiffres d'O'Connor. Il n'avait, à l'époque, aucune raison de mettre en doute l'intégrité d'O'Connor.

65 Si le défaut de diligence raisonnable avait été un bon moyen de défense à l'encontre d'une demande en rectification, cette réparation aurait probablement été refusée dans les affaires *Big Quill Resources Inc. c. Potash Corp. of Saskatchewan* (2001), 203 Sask. R. 298, 2001 SKCA 31; *Stepps Investments*, précitée, le juge Grange, p. 362; *Prince Albert Credit Union c. Diehl*, [1987] 4 W.W.R. 419 (B.R. Sask.); *Montreal Trust*, précitée, p. 262; *Windjammer Homes Inc. c. Generation Enterprises* (1989), 43 B.L.R. 315 (C.S.C.-B.).

E. *Réparation à caractère discrétionnaire*

66 En conséquence, je conclus que la diligence raisonnable de la part du demandeur n'est pas un préalable au prononcé d'une ordonnance de rectification. Toutefois, je m'empresse d'ajouter que la rectification est une réparation en equity et que la décision de l'accorder ou non relève du pouvoir discrétionnaire de la cour. La conduite du demandeur est pertinente dans l'exercice de ce pouvoir discrétionnaire. Lorsque le tribunal conclut qu'il serait injuste d'imputer au défendeur une responsabilité qu'il convient plutôt d'attribuer à la négligence du demandeur, il peut refuser d'ordonner la rectification. Ce n'est pas le cas en l'espèce.

F. *Fraude*

67 À la lumière des faits de l'espèce, il existe une raison plus fondamentale expliquant pourquoi l'argument des appelants fondé sur le défaut de diligence raisonnable de Bell ne constitue pas un moyen de défense. O'Connor n'a pas fait que « saisir » l'occasion et profiter de l'erreur d'un associé commercial. Dans l'entente verbale

trial judge, he not only breached that term, it became part of his fraudulent scheme to have the document wrongly state the terms of the option, to fraudulently misrepresent to Bell that it did accurately set out their verbal agreement, to allow Bell to sign it when O'Connor knew Bell was mistaken in doing so, then to delay any response to Bell's development proposals (and thus bring the error to Bell's attention) until it was almost too late for the development to proceed. O'Connor admitted providing his lawyer with the erroneous metes and bounds description in clause 18. It should not, I think, lie in his mouth to say that he should not be responsible for what followed because his fraud was so obvious that it ought to have been detected.

antérieure, O'Connor s'était engagé à faire préparer un document qui en énoncerait les modalités. Selon le juge de première instance, non seulement O'Connor a-t-il violé cet engagement, mais en outre, dans le cadre de son stratagème frauduleux, il a fait en sorte que le document énonce erronément les modalités de l'option, il a laissé croire à Bell, de manière inexacte et frauduleuse, que le document reflétait adéquatement leur entente verbale, il a laissé Bell le signer tout en sachant que ce dernier commettait une méprise en le signant, puis il a tardé à répondre aux propositions d'aménagement de celui-ci (et ainsi évité d'attirer l'attention de ce dernier sur l'erreur) jusqu'à ce qu'il soit devenu presque trop tard pour que le projet de construction puisse être réalisé. O'Connor a admis avoir donné à son avocat la description technique erronée qui figure à la clause 18. À mon avis, il ne devrait pas être autorisé à plaider qu'il ne doit pas être tenu responsable de ce qui est survenu par la suite parce que sa fraude était tellement évidente qu'elle aurait dû être décelée.

68 "[F]raud 'unravels everything'": *Farah v. Barki*, [1955] S.C.R. 107, at p. 115 (Kellock J. quoting Farwell J. in *May v. Platt*, [1900] 1 Ch. 616, at p. 623).

[TRADUCTION] « La fraude "corrompt tout" » : *Farah c. Barki*, [1955] R.C.S. 107, p. 115 (le juge Kellock citant les propos du juge Farwell dans *May c. Platt*, [1900] 1 Ch. 616, p. 623).

69 The appellants' concept of a due diligence defence in a fraud case was rejected over 125 years ago by Lord Chelmsford L.C. who said, "when once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector, 'You, at least, who have stated what is untrue, or have concealed the truth, for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty'": *Central R. Co. of Venezuela v. Kisch* (1867), L.R. 2 H.L. 99, at pp. 120-21.

Le type de moyen de défense fondé sur la diligence raisonnable que préconisent les appelants dans les affaires de fraude été rejeté dans les termes suivants, il y a plus de 125 ans, par le lord chancelier Chelmsford : [TRADUCTION] « dès qu'il est établi qu'il y a eu assertion inexacte et frauduleuse ou dissimulation intentionnelle ayant induit une personne à conclure un contrat, ne peut alors être opposé à la demande présentée par cette personne en vue d'être déliée du contrat l'argument que celle-ci aurait pu découvrir la vérité par un examen adéquat. Cette personne a le droit de répondre à son adversaire : "Vous, en particulier, qui avez déclaré des faussetés, ou avez caché la vérité, dans le but de m'inciter à conclure le contrat, ne pouvez m'accuser d'avoir manqué de prudence parce que je me suis fondé implicitement sur votre intégrité et votre honnêteté" » : *Central R. Co. of Venezuela c. Kisch* (1867), L.R. 2 H.L. 99, p. 120-121.

Lord Chelmsford's strictures were quoted and applied by Southin J. (as she then was) in *United Services Funds (Trustees of) v. Richardson Greenshields of Canada Ltd.* (1988), 22 B.C.L.R. (2d) 322 (S.C.), where she observed that "[c]arelessness on the part of the victim has never been a defence to an action for fraud" (p. 335).

Once the plaintiff knows of the fraud, he must mitigate his loss but, until he knows of it, in my view, no issue of reasonable care or anything resembling it arises at law.

And, in my opinion, a good thing, too. There may be greater dangers to civilized society than endemic dishonesty. But I can think of nothing which will contribute to dishonesty more than a rule of law which requires us all to be on perpetual guard against rogues lest we be faced with a defence of "Ha, ha, your own fault, I fool you". Such a defence should not be countenanced from a rogue. [p. 336]

See also *Dalon v. Legal Services Society (British Columbia)* (1995), 10 C.C.E.L. (2d) 89 (B.C.S.C.). To the same effect is Spencer Bower and Turner, *The Law of Actionable Misrepresentation* (3rd ed. 1974), at p. 218:

A man who has told even an innocent untruth, by which he has induced another to alter his position, — much more one who has fraudulently lied with that object and result, — has debarred himself from ever complaining in a court of justice, any more than he could in a court of morals, that the representee acted on the faith of his misstatement in the manner in which he, the representor, intended that he should. He can never be heard to resent the fact that another believed the lie that was told for the very purpose of inspiring that belief, or plead as an excuse that, if the representee had not been such a fool as to trust such a knave, no harm would have been done.

The appellants having failed to establish that due diligence on the part of the plaintiff is a precondition to rectification, or to shake the trial judge's findings with respect to the traditional preconditions

Les restrictions énoncées par lord Chelmsford ont été citées et appliquées par madame le juge Southin (maintenant juge à la Cour d'appel) dans *United Services Funds (Trustee of) c. Richardson Greenshields of Canada Ltd.* (1988), 22 B.C.L.R. (2d) 322 (C.S.), où elle a fait remarquer que [TRADUCTION] « [l]a négligence de la victime ne constitue jamais un moyen de défense dans une action pour fraude » (p. 355).

[TRADUCTION] Dès que le demandeur prend connaissance de la fraude, il doit atténuer ses pertes, mais, à mon avis, tant qu'il n'en connaît pas l'existence, il ne se pose en droit aucune question concernant la diligence raisonnable ou quoi que ce soit d'autre s'y apparentant.

Et, à mon avis, il s'agit aussi d'une bonne chose. Il est bien possible que la société civilisée soit menacée par des périls beaucoup plus grands que la malhonnêteté endémique. Mais je ne vois rien qui contribuerait davantage à la malhonnêteté qu'une règle de droit qui exigerait que nous soyons continuellement sur nos gardes contre les escrocs, au risque de nous faire répondre, en défense : « Ah! Ah! c'est de votre faute si je vous ai trompé ». Un tel moyen de défense ne devrait pas pouvoir être invoqué par un escroc. [p. 336]

Voir également *Dalon c. Legal Services Society (British Columbia)* (1995), 10 C.C.E.L. (2d) 89 (C.S.C.-B.). Dans leur ouvrage *The Law of Actionable Misrepresentation* (3e éd. 1974), p. 218, les auteurs Spencer Bower et Turner abondent dans le même sens :

[TRADUCTION] Celui qui a fait un mensonge, même innocent, par lequel il a amené autrui à changer d'avis — a fortiori celui qui a frauduleusement menti à cette fin et avec un résultat semblable —, s'est à jamais privé lui-même du droit de faire valoir devant une cour de justice, tout autant que devant un tribunal de moralité, que la personne induite en erreur a agi sur la foi de son mensonge de la façon dont lui, l'auteur, entendait qu'elle le fasse. Il ne saurait jamais être admis à se plaindre du fait que l'autre personne a cru le mensonge qui lui a été fait dans le but même de lui inspirer cette conviction, ou de plaider, comme excuse, que si la personne induite en erreur n'avait pas été assez stupide pour faire confiance à un fripon de son espèce, il n'y aurait pas eu de préjudice.

Comme les appelants n'ont pas réussi à établir que la diligence raisonnable de la part de la demanderesse constitue un préalable à la rectification, ni à ébranler le bien-fondé des conclusions du juge de

discussed above, their appeal on the rectification issues must be rejected.

G. *Damages in Lieu of Rectification*

72 The trial judge awarded $620,100 in compensatory damages representing the loss of profit on a fully built residential development on the 18th fairway. The appellants argue that damages should be limited to the difference between the market value of the land and the option price of $400,000. They say compensatory damages should not include the "reasonably expected profit" from a 58-lot housing development.

73 The finding of fact is, however, that the parties specifically contemplated (even on O'Connor's evidence) that the optioned land would be put to the use of residential housing. Damages for breach of the contract, as rectified, therefore must include losses flowing from the special circumstances known to the parties at the time they made their contract: *Brown & Root Ltd. v. Chimo Shipping Ltd.*, [1967] S.C.R. 642, at p. 648; *General Securities Ltd. v. Don Ingram Ltd.*, [1940] S.C.R. 670; *Burrard Drydock Co. v. Canadian Union Line Ltd.*, [1954] S.C.R. 307; *Corbin v. Thompson* (1907), 39 S.C.R. 575; *Asamera Oil Corp. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633, at p. 655. In *New Horizon Investments Ltd. v. Montroyal Estates Ltd.* (1982), 26 R.P.R. 268 (B.C.S.C.), Nemetz C.J.B.C. observed, at pp. 272-73:

> [T]he plaintiff's damages should be assessed by reference to the profits which both parties contemplated the plaintiff would make but for the breach. It is not necessary that this contemplation include a precise pre-estimate or calculation of these losses, only a ". . . contemplation of circumstances which embrace the head or type of damage in question".

première instance à l'égard des préalables traditionnels examinés précédemment, leur pourvoi doit être rejeté relativement aux questions touchant à la rectification.

G. *Dommages-intérêts accordés en lieu et place de la rectification*

Le juge de première instance a accordé, au titre des dommages-intérêts compensatoires, une somme de 620 100 $ représentant la perte des profits qu'aurait permis de réaliser la construction complète d'un complexe domiciliaire au 18e trou. Les appelants prétendent que les dommages-intérêts devraient se limiter à la différence entre la valeur marchande du terrain et le prix de l'option, prix établi à 400 000 $. Ils font valoir que les dommages-intérêts compensatoires ne devraient pas comprendre [TRADUCTION] « le profit qu'on pouvait raisonnablement s'attendre à tirer » d'un ensemble résidentiel de 58 lots.

La conclusion de fait est toutefois que les parties ont expressément envisagé (même le témoignage d'O'Connor en fait foi) que les terrains visées par l'option seraient affectés à la construction domiciliaire. Les dommages-intérêts accordés pour la rupture du contrat rectifié doivent par conséquent inclure les pertes découlant des circonstances particulières connues des parties au moment où elles ont conclu le contrat : *Brown & Root Ltd. c. Chimo Shipping Ltd.*, [1967] R.C.S. 642, p. 648; *General Securities Ltd. c. Don Ingram Ltd.*, [1940] R.C.S. 670; *Burrard Drydock Co. c. Canadian Union Ligne Ltd.*, [1954] R.C.S. 307; *Corbin c. Thompson* (1907), 39 R.C.S. 575; *Asamera Oil Corp. c. Sea Oil & General Corp.*, [1979] 1 R.C.S. 633, p. 655. Dans *New Horizon Investments Ltd. c. Montroyal Estates Ltd.* (1982), 26 R.P.R. 268 (C.S.C.-B.), le juge en chef Nemetz a dit ceci, aux p. 272-273 :

> [TRADUCTION] [L]es dommages-intérêts de la demanderesse doivent être établis en fonction des profits que les deux parties avaient estimé pouvoir être tirés par la demanderesse, n'eût été la rupture du contrat. Il n'est pas nécessaire que ces prévisions comprennent une estimation ou un calcul précis de ces pertes, seulement « [. . .] qu'on tienne compte des circonstances visant le chef ou type de dommage en question ».

The appellants then contend that even if the trial judge selected the correct measure of damages, he ought to have applied a higher discount for contingencies, particularly the contingencies that (1) Sylvan (Bell) lacked the financial resources to exercise the option and fund the project, and (2) the project could not in any event have been completed by the end of 1994, as required. In essence, they argue that in assessing damages, the court must discount the value of the chance of profit by the improbability of its occurrence, and call in aid the observation of Crocket J. in *Kinkel v. Hyman*, [1939] S.C.R. 364, at p. 383:

> For my part, I can find no authority . . . justifying any court in awarding any more than a nominal sum as damages for the loss of a mere chance of possible benefit except upon evidence proving that there was some reasonable probability of the plaintiff realizing therefrom an advantage of some real substantial monetary value.

It is at this point, I think, that the appellants' argument runs afoul of the rule against raising new fact-based issues on appeal. The trial judge has found as a fact that the respondent contracted for the opportunity to build a residential development on about 10.9 acres of prime land. It was wrongfully deprived of that opportunity. The trial judge set out to assess the value of that lost opportunity (which was, of course, potentially worth considerably less than a certainty). The appellants' trial counsel took little issue with the damages claim as advanced by Sylvan, and did not adduce much of an evidentiary record to the contrary, whether by calling his own witnesses, or through cross-examination of the respondent's witnesses, to challenge significantly the expert evidence of Trouth and others. Trouth may have been overly optimistic and his figures generous, but his evidence was uncontradicted.

74 Les appelants font ensuite valoir que, même en supposant que le juge de première instance ait choisi la bonne méthode de calcul des dommages-intérêts, celui-ci aurait dû soustraire des sommes plus élevées au titre des éventualités, en particulier les éventualités suivantes : (1) Sylvan (Bell) ne disposait pas des ressources financières requises pour lever l'option et financer le projet; (2) le projet n'aurait pu de toute façon être complété avant la fin de 1994, comme cela était stipulé. Essentiellement, ils prétendent que, dans la détermination des dommages-intérêts, le tribunal doit soustraire de la valeur d'une possibilité de réaliser un bénéfice une somme correspondant à l'improbabilité que cette possibilité se concrétise, et ils invoquent à cette fin l'observation faite par le juge Crocket dans l'arrêt *Kinkel c. Hyman*, [1939] R.C.S. 364, p. 383 :

> [TRADUCTION] Quant à moi, je ne puis trouver aucune décision [. . .] justifiant un tribunal d'accorder plus qu'une somme symbolique en dommages-intérêts pour la perte d'une simple occasion de réaliser un bénéfice possible, sauf preuve établissant l'existence d'une probabilité raisonnable que la demanderesse tire de cette occasion un avantage ayant quelque valeur pécuniaire substantielle.

75 C'est ici, selon moi, que l'argument des appelants va à l'encontre de la règle qui interdit de soulever, en appel, de nouvelles questions basées sur les faits. Le juge de première instance a tiré la conclusion de fait que l'intimée avait contracté en vue d'obtenir la possibilité de construire un complexe domiciliaire sur environ 10,9 acres de terrain de premier ordre. Elle a été injustement privée de cette possibilité. Le juge de première instance a entrepris de déterminer la valeur de cette possibilité perdue (qui, bien sûr, valait considérablement moins qu'une certitude). L'avocat ayant occupé pour les appelants en première instance ne s'est pas vraiment opposé à la demande de dommages-intérêts présentée par Sylvan, et il n'a pas présenté beaucoup d'éléments de preuve tendant à en réfuter le bien-fondé, soit en appelant ses propres témoins soit en contre-interrogeant ceux de l'intimée afin de contester vigoureusement le témoignage d'expert donné par M. Trouth et d'autres témoins. Il est bien possible que M. Trouth ait été excessivement optimiste et ses chiffres généreux, mais son témoignage n'a pas été contredit.

76 The Alberta Court of Appeal characterized the compensatory award as "substantial and generous" (para. 29) but concluded that: "Despite our reservations, we are not prepared to interfere with the award of damages in this case" (para. 27). In the absence of an error of principle, or a factual record that supports the appellants' criticisms, this Court ought not to interfere with the concurrent findings in the Alberta courts on the amount of compensatory damages.

H. *Should the Award of Punitive Damages Be Restored?*

77 The respondent in its cross-appeal seeks restoration of the $200,000 award of punitive damages disallowed by the Alberta Court of Appeal. Principles concerning the award and assessment of punitive damages were canvassed at the hearing of this appeal, heard the same day as *Whiten*, *supra*, reasons in which are released concurrently.

78 It is sufficient to apply the principles developed in *Whiten* without repeating the underlying analysis.

79 Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency". The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour: *Whiten*, *supra*, at para. 36, and *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196.

80 The misconduct found against O'Connor was his contemptuous disregard for Bell's rights under the verbal agreement of December 1989, together with his subsequent use of the written document (which he knew misstated their verbal agreement) leading up to and including court proceedings filed January 4, 1995, to obtain possession of the golf

La Cour d'appel de l'Alberta a qualifié de [TRADUCTION] « substantiels et généreux » (par. 29) les dommages-intérêts compensatoires accordés en l'espèce, mais elle a conclu ainsi, à cet égard : [TRADUCTION] « [m]algré nos réserves, nous ne sommes pas disposés à modifier les dommages-intérêts en l'espèce » (par. 27). En l'absence d'erreur de principe ou d'éléments factuels qui appuieraient les critiques formulées par les appelants, notre Cour ne devrait pas modifier les conclusions concordantes des tribunaux de l'Alberta sur le montant des dommages-intérêts compensatoires.

H. *Y a-t-il lieu de rétablir la décision accordant les dommages-intérêts punitifs?*

Dans son pourvoi incident, l'intimée demande le rétablissement de la décision lui accordant des dommages-intérêts punitifs de 200 000 $ qu'a annulée la Cour d'appel de l'Alberta. Les principes régissant l'opportunité d'accorder de tels dommages-intérêts et la détermination de leur quantum ont été débattus à l'audition du présent pourvoi, qui a été entendu le même jour que l'affaire *Whiten*, précitée, dont les motifs ont été déposés en même temps que les présents motifs.

Il suffit d'appliquer les principes élaborés dans l'arrêt *Whiten*. Il n'est pas nécessaire de refaire l'analyse qui les sous-tend.

Exceptionnellement, des dommages-intérêts punitifs sont accordés lorsqu'une conduite « malveillante, opprimante et abusive [. . .] choque le sens de la dignité de la cour ». Ce critère limite en conséquence de tels dommages-intérêts aux seules conduites répréhensibles représentant un écart marqué par rapport aux normes ordinaires en matière de comportement acceptable : *Whiten*, précité, par. 36, et *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130, par. 196.

La conduite répréhensible reprochée à O'Connor fut l'indifférence éhontée qu'il a manifestée à l'égard des droits accordés à Bell par l'entente verbale de décembre 1989, et l'utilisation qu'il a faite ultérieurement de l'écrit (qui, savait-il, ne reflétait pas fidèlement leur entente verbale) jusqu'au dépôt de l'action en justice le 4 janvier 1995, en vue

course property and thereby to destroy the value of Bell's option to develop the agreed-upon residential project.

de s'approprier le terrain de golf et ainsi réduire à néant la valeur de l'option accordant à Bell la faculté de construire le complexe domiciliaire convenu.

Torts such as deceit or fraud already incorporate a type of misconduct that to some extent "offends the court's sense of decency" and which "represents a marked departure from ordinary standards of decent behaviour", yet not all fraud cases lead to an award of punitive damages.

81 Les délits comme le dol ou la fraude intègrent déjà un type de conduite répréhensible qui, jusqu'à un certain point, « choque le sens de la dignité de la cour » et « représent[e] un écart marqué par rapport aux normes ordinaires en matière de comportement acceptable ». Pourtant les affaires de fraude ne donnent pas toutes lieu à une condamnation au paiement de dommages-intérêts punitifs.

O'Connor's fraud was a condition precedent to Bell's successful claim to rectification, for which his company will now receive compensatory damages of $620,100. Payment of $620,100 hurts. The question is whether *more* punishment is rationally required by way of retribution, deterrence or denunciation (*Whiten*, *supra*, at para. 43).

82 La fraude d'O'Connor était un préalable au succès de la demande en rectification de Bell, dont la société recevra maintenant la somme de 620 100 $ en dommages-intérêts compensatoires. Le fait de devoir payer 620 100 $ est une punition qui fait mal. Il reste à se demander si une punition *additionnelle* est rationnellement requise pour satisfaire aux objectifs de châtiment, de dissuasion ou de dénonciation (*Whiten*, précité, par. 43).

Whiten emphasizes that defendants should have "advance notice of the charge sufficient to allow them to consider the scope of their jeopardy as well as the opportunity to respond to it" (*Whiten*, *supra*, at para. 86). Here, punitive damages in the sum of $1,020,100 were expressly sought in the Amended Amended Statement of Claim and the basis for the claim was "disgorgement of the profits the Defendants will enjoy as a result of the [plaintiff's] unilateral mistake". The trial judge, as stated, awarded $200,000 in punitive damages.

83 Dans l'arrêt *Whiten*, on souligne que tout défendeur doit « être informé suffisamment à l'avance de ce qu'on lui reproche afin de pouvoir apprécier l'ampleur du risque qu'il court et d'avoir la possibilité de répliquer » (*Whiten*, précité, par. 86). En l'espèce, la déclaration modifiée réclamait expressément des dommages-intérêts punitifs de 1 020 100 $, dont le fondement était la [TRADUCTION] « remise des profits que les défendeurs tireront par suite de l'erreur unilatérale [de la demanderesse] ». Comme il a été mentionné plus tôt, le juge de première instance a accordé la somme de 200 000 $ au titre des dommages-intérêts punitifs.

The applicable standard of appellate review for "rationality" was articulated by Cory J. in *Hill*, *supra*, at para. 197:

84 Dans l'arrêt *Hill*, précité, par. 197, le juge Cory a décrit ainsi la norme de contrôle applicable pour l'appréciation de la « rationalité » :

> Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a much greater scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose. In other words, was the misconduct of the defendant

> Contrairement aux dommages-intérêts compensatoires, les dommages-intérêts punitifs ne sont pas généralisés. En conséquence, les tribunaux disposent d'une latitude et d'une discrétion beaucoup plus grandes en appel. Le contrôle en appel devrait consister à déterminer si les dommages-intérêts punitifs servent un objectif

so outrageous that punitive damages were rationally required to act as deterrence?

85 *Whiten* affirms that "[t]he 'rationality' test applies both to the question of whether an award of punitive damages should be made at all, as well as to the question of its quantum" (para. 101).

86 I agree with the Alberta Court of Appeal that the award of punitive damages in this case does not serve a rational purpose.

87 O'Connor's fraud was, of course, reprehensible. Indeed, fraud is generally reprehensible, but only in exceptional cases does it attract punitive damages. In this case, the trial judge, at para. 109, thought punishment above and beyond the payment of generous compensatory damages was required for two reasons, namely that O'Connor's actions (1) "demand an award which will stand as an example to others" and (2) "at the same time assure that O'Connor does not unduly profit from his conduct". These are both legitimate objectives for the award of punitive damages (*Whiten*, *supra*, at paras. 43 and 111). However, it must be kept in mind that an award of punitive damages is rational "if, but only if" compensatory damages do not adequately achieve the objectives of retribution, deterrence and denunciation.

88 This was a commercial relationship between two businessmen. One tried to pull a fast one on the other. There was no abuse of a dominant position. O'Connor's misconduct was planned and deliberate and he persisted in it over a period of four and a half years, but in the end the courts did their work and Bell obtained full compensation plus costs on a solicitor-client basis, all of which undoubtedly had a punitive effect on O'Connor. In addition, O'Connor is stigmatized with a judicial finding (now upheld by two appellate courts) that he acted in a way that

rationnel. En d'autres termes, la mauvaise conduite du défendeur était-elle si outrageante qu'il était rationnellement nécessaire d'accorder des dommages-intérêts punitifs dans un but de dissuasion?

L'arrêt *Whiten* confirme que « [l]e critère de la "rationalité" s'applique tant pour statuer sur l'opportunité des dommages-intérêts punitifs que sur leur quantum » (par. 101).

Je souscris à la conclusion de la Cour d'appel de l'Alberta selon laquelle la décision d'accorder des dommages-intérêts punitifs en l'espèce ne sert aucun objectif rationnel.

La fraude commise par O'Connor était, bien sûr, répréhensible. D'ailleurs, la fraude est généralement une conduite répréhensible, mais ce n'est que dans des circonstances exceptionnelles qu'elle commande des dommages-intérêts punitifs. En l'espèce, le juge de première instance a estimé qu'une punition additionnelle s'imposait en sus du paiement de dommages-intérêts compensatoires généreux, et ce pour deux raisons, à savoir que les actions d'O'Connor (1) [TRADUCTION] « commandent une condamnation à une somme qui aura valeur d'exemple » et (2) « en même temps fera en sorte qu'O'Connor ne profite pas indûment de sa conduite » (par. 109). Il s'agit là de deux objectifs légitimes d'une condamnation au paiement de dommages-intérêts punitifs (*Whiten*, précité, par. 43 et 111). Il faut toutefois se rappeler qu'une décision accordant des dommages-intérêts punitifs n'est rationnelle que « si, mais seulement si » les dommages-intérêts compensatoires ne permettent pas de donner effet adéquatement aux objectifs de châtiment, de dissuasion et de dénonciation.

En l'espèce, il s'agissait de relations commerciales entre deux hommes d'affaires, dont l'un a tenté de rouler l'autre. Il n'y a pas eu abus de position dominante. La conduite d'O'Connor était préméditée et délibérée, et elle a persisté pendant une période de quatre ans et demi. En fin de compte, les tribunaux ont rempli leur rôle et Bell a été pleinement indemnisé, en plus de se voir adjuger les dépens sur la base procureur-client, décisions qui, globalement, ont sans aucun doute eu un effet punitif sur O'Connor. De plus, ce dernier est stigmatisé

was "fraudulent, dishonest and deceitful". His conduct has been soundly denounced and he has been required personally to pay a large amount of money in compensation. The respondent is unable to identify any aggravating circumstances that would not be present in almost any case of business fraud except that O'Connor was found to have behaved abominably in the conduct of the litigation. However, as stated, the trial judge excluded this consideration from the award of punitive damages because he identified it as the basis for his award of solicitor-client costs.

d'une décision judiciaire (maintenant confirmée par deux tribunaux d'appel) ayant qualifié ses actions de [TRADUCTION] « frauduleuses, malhonnêtes et dolosives ». Sa conduite a été sévèrement dénoncée et il a été condamné personnellement à verser une indemnité considérable. L'intimée est incapable de mentionner quelque circonstance aggravante qu'on ne retrouve pas dans la plupart des affaires de fraude commerciale, outre le fait qu'il a été jugé qu'O'Connor s'était comporté de façon abominable pendant le déroulement de l'instance. Toutefois, comme il a été indiqué précédemment, le juge de première instance n'a pas tenu compte de cette considération dans sa décision accordant les dommages-intérêts punitifs, puisqu'elle avait servi de fondement à sa décision adjugeant les dépens sur la base procureur-client.

89 The trial judge's second reason for punitive damages was to ensure that O'Connor "[did] not unduly profit from his conduct" (para. 109). But in fact O'Connor did not profit at all from his misconduct. The source of his development profits was the prior oral contract. Whatever Performance (O'Connor) made after paying $620,100 compensatory damages to the respondent rightfully belonged to them under the terms of the (rectified) agreement. As discussed earlier, the verbal agreement of December 1989 contemplated that after five years, O'Connor's company, Performance, would acquire the golf club lands (minus the optioned lands if the option had been exercised) to develop as it wished for its own account. While on the whole O'Connor's conduct in this matter was found to be reprehensible, his behaviour also had some redeeming qualities. Early on in the project, for example, O'Connor picked up Bell's share of mortgage interest when Bell was not able to afford to contribute the amount that he had agreed to pay. The conflict between Bell and O'Connor should not be caricatured as a battle between good and evil.

89 La deuxième raison invoquée par le juge de première instance pour justifier les dommages-intérêts punitifs était de faire en sorte qu'O'Connor « ne profite pas indûment de sa conduite » (par. 109). Mais en fait, O'Connor n'a aucunement profité de sa conduite répréhensible. La source de ses profits liés au projet d'aménagement était le contrat verbal. Tout profit réalisé par les appelants Performance et O'Connor après paiement à l'intimée de la somme de 620 100 $ au titre des dommages-intérêts compensatoires leur revenait de plein droit en vertu des conditions de la Convention (rectifiée). Comme on l'a vu plus tôt, l'entente verbale de décembre 1989 prévoyait que, au terme d'une période de cinq ans, la société d'O'Connor, Performance, acquérerait les terrains formant le club de golf (moins ceux visés par l'option si celle-ci était levée), qu'elle pourrait alors aménager à son gré pour son propre compte. Bien que, dans l'ensemble, la conduite d'O'Connor en l'espèce ait été jugée répréhensible, son comportement ne fut pas entièrement dénué d'aspects positifs. Au tout début du projet, par exemple, O'Connor a assumé la quote-part de Bell aux intérêts du prêt hypothécaire quand ce dernier a cessé d'être en mesure de contribuer la somme qu'il s'était engagé à payer. Le conflit opposant Bell et O'Connor ne devrait pas être dépeint caricaturalement comme une bataille entre le bien et le mal.

90 It may be true, as the trial judge found, that O'Connor's profits on the balance of lands not

90 Il se peut, comme a estimé le juge de première instance, que les profits d'O'Connor sur les terrains

subject to the option will "recover all or more of the amount of damage for loss of profit awarded against him in favour of Bell" (para. 109), but, with respect, that is not a rational reason to punish O'Connor further. Those profits are not the fruit of misconduct directed at Bell.

91 Finally, the assessment of $200,000 coincides with the payment that Sylvan (Bell) was obliged to pay in order to exercise the option, and which the trial judge properly took into account in his assessment of compensatory damages. This figure has no rational relationship to the appellants' potential development profits on the balance of the golf course land, on which there was no evidence. Moreover, it is a payment that the appellants, under the rectified agreement, were entitled to keep.

92 As pointed out in *Whiten*, *supra*, at paras. 98 and 100, and *Hill*, *supra*, at para. 197, punitive damages are not "at large", and both the award and the assessment of quantum must meet the test of rationality. In this case, with respect, neither the punitive damages award nor the $200,000 assessment survives that test.

IV. Conclusion

93 I would therefore dismiss the appeal and cross-appeal both with costs on a party-and-party basis.

The following are the reasons delivered by

94 LeBel J. — Subject to my comments on punitive damages in *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18, I agree with Binnie J.'s reasons. I would dispose of the appeal and cross-appeal as he suggests. Rectification of the contract was properly ordered, but punitive

non visés par l'option lui permettent [TRADUCTION] « de recouvrer la totalité des dommages-intérêts qu'il a été condamné à payer à Bell au titre du manque à gagner, ou une somme plus grande encore » (par. 109) mais, en toute déférence, cela ne constitue pas une justification rationnelle pour punir O'Connor davantage. Ces profits ne sont pas le fruit d'une conduite répréhensible visant Bell.

Enfin, la somme de 200 000 $ coïncide avec celle que Sylvan (Bell) était tenue de verser pour lever l'option et dont le juge de première instance a à juste titre tenu compte dans la détermination des dommages-intérêts compensatoires. Ce chiffre n'a aucun lien rationnel avec les profits susceptibles d'être tirés par les appelants de la réalisation d'activités d'aménagement sur le reste des terrains du parcours de golf, profits au sujet desquels aucune preuve n'a été produite. De plus, il s'agissait d'un paiement que les appelants avaient le droit de conserver en vertu de la Convention rectifiée.

Comme il a été mentionné dans l'arrêt *Whiten*, précité, par. 98 et 100, ainsi que dans l'arrêt *Hill*, précité, par. 197, les dommages-intérêts punitifs ne sont pas des dommages-intérêts « généraux », et l'opportunité d'accorder de tels dommages-intérêts ainsi que la détermination de leur quantum doivent satisfaire au critère de la rationalité. En toute déférence, en l'espèce ni la décision accordant des dommages-intérêts punitifs ni la somme de 200 000 $ ne satisfont à ce critère.

IV. Conclusion

Par conséquent, je suis d'avis de rejeter le pourvoi principal et le pourvoi incident, avec dépens sur la base partie-partie dans les deux cas.

Version française des motifs rendus par

Le juge LeBel — Sous réserve des commentaires que j'ai faits sur la question des dommages-intérêts punitifs dans le pourvoi connexe *Whiten c. Pilot Insurance Co.*, [2002] 1 R.C.S. 595, 2002 CSC 18, je souscris aux motifs du juge Binnie en l'espèce. Je trancherais le pourvoi principal et le pourvoi

damages would fulfill no rational purpose in this case.

Appeal and cross-appeal dismissed with costs.

Solicitors for the appellants/respondents on cross-appeal: Burnet, Duckworth & Palmer, Calgary.

Solicitors for the respondent/appellant on cross-appeal: Fraser Milner Casgrain, Calgary.

incident de la manière qu'il suggère. C'est à juste titre que la rectification du contrat a été ordonnée, mais des dommages-intérêts punitifs ne serviraient aucune fin rationnelle dans la présente affaire.

Pourvoi principal et pourvoi incident rejetés avec dépens.

Procureurs des appelants/intimés au pourvoi incident : Burnet, Duckworth & Palmer, Calgary.

Procureurs de l'intimée/appelante au pourvoi incident : Fraser Milner Casgrain, Calgary.

27

COURT OF APPEAL FOR ONTARIO

CITATION: The Rosseau Group Inc. v. 2528061 Ontario Inc., 2023 ONCA 814
DATE: 20231208
DOCKET: C70373

Benotto, Trotter and Zarnett JJ.A.

BETWEEN

The Rosseau Group Inc.

Plaintiff (Respondent)

and

2528061 Ontario Inc.

Defendant (Appellant)

J. Thomas Curry and Aoife Quinn, for the appellant

Stephen Schwartz and Emily Quail, for the respondent

Heard: March 20, 2023

On appeal from the judgment of Justice Kendra D. Coats of the Superior Court of Justice dated January 24, 2022, with reasons reported at 2022 ONSC 486.

Zarnett J.A.:

Overview

[1] When a vendor breaches an agreement to sell real estate, the normal measure of the innocent purchaser's damages is the difference between the purchase price and the market value of the property on the date the sale was to be completed. Among other issues, this appeal raises the question of whether a

departure from the normal measure of damages is appropriate because the subject of the sale was land the purchaser intended to develop.

[2] The respondent ("Rosseau Group") was the purchaser, and the appellant ("252") was the vendor, under an agreement for the sale of development lands (the "APS"). The purchase price was $350,000 per acre based on the number of developable acres within the property, and was ultimately set, subject to final adjustment at about $6.6 million.

[3] The purchase did not close. Rosseau Group brought an action alleging that 252 breached the agreement. Rosseau Group did not, however, seek the normal measure of damages for that breach, and led no expert appraisal evidence that the property was worth more on the closing date than the contractual purchase price. Instead, it sought the profits it claimed it would have earned had it acquired the property and developed it into serviced residential lots over a period of about six years after closing.

[4] The trial judge found that 252 had breached the APS. She held that this was an appropriate case to depart from the normal measure of damages and awarded Rosseau Group over $11 million as a "reasonable estimate" of its "lost expected profit".

[5] 252 appeals. It argues that the trial judge erred in finding that 252 breached the APS. And it argues that the trial judge erred by awarding an “exceptional measure of damages”.

[6] For the reasons that follow, I would allow the appeal in part. I reject the argument that the trial judge erred in concluding that 252 breached the APS. But in my view, the trial judge did err in departing from the normal measure of damages. A new hearing to assess the damages on the proper measure is required.

Factual Background

[7] On January 20, 2017, the parties entered into the APS. Under it, Rosseau Group was to purchase property of about 45.71 acres in Caledon, Ontario from 252. At the time of the APS, the property was undeveloped and consisted of a residential house, wetlands, and vacant farmland. It was zoned for agricultural and conservation uses.

[8] The APS initially contemplated a purchase price of $10.5 million, but provided that the ultimate purchase price was tied to the number of “developable acres”. It stated that the $10.5 million purchase price was “based on…approximately 30 ac[res] be[i]n[g] [d]evelopable and designated for [r]esidential development, allowing [t]ownhouses, [s]emis and [s]ingle homes”. The

purchase price was to be adjusted in the event the “number of developable ac[r]es is changed…based on a price of $350,000.00 per developable acre”.

[9] The APS provided for an initial deposit of $50,000. It was conditional, for a period of 90 days, during which Rosseau Group was to satisfy itself on a number of issues, including the economic feasibility of the development of the site. If the conditions were not waived during the due diligence period, the APS would be null and void and the deposit of $50,000 would be returned in full. On waiver of the conditions, a further deposit of $400,000 was to be paid by Rosseau Group. The closing was to be 60 days after the removal of all conditions set out in Schedule A of the APS.

[10] After signing the APS, 252 was advised by its consultants that the net developable area was 18.9 acres, over 10 acres less than initially thought. 252 relayed this information to Rosseau Group, which prompted discussions between both parties including about changes to the payment terms. One of the changes discussed was 252’s request that Rosseau Group assume the first mortgage on the property in favour of Bank of Montreal (the “BMO Mortgage”). The trial judge found that a representative of Rosseau Group told a representative of 252 that Rosseau Group would agree to that request if the requirement for the $400,000 further deposit was deleted.

[11] The APS was amended by a document in writing dated March 10, 2017 that addressed the reduced number of developable acres and changes in the payment terms. The amending provisions, which were "inserted" into the APS, stipulated that (i) the purchase price was reduced to $6,615,000 to reflect the reduced net developable acres[1] and (ii) Rosseau Group agreed to assume "subject to approval" the BMO Mortgage in the amount of $1,660,000, give a mortgage back to 252 (a "VTB" mortgage) in the amount of $3,115,000, and pay a balance on closing of $1,790,000. The amending provisions noted that these three amounts, plus the $50,000 initial deposit, totalled the purchase price of $6,615,000[2]. The document amending the APS did not expressly refer to the $400,000 further deposit, and although it deleted certain paragraphs of the original APS, it did not expressly delete the schedule to the original APS that had provided for the $400,000 further deposit.

[12] On June 7, 2017, Rosseau Group waived all conditions, but did not provide a $400,000 further deposit. On June 13, 2017, 252 communicated to Rosseau Group that it was treating the failure to provide a further deposit as a repudiation

[1] 18.9 developable acres x $350,000. The price remained subject to change upon the final determination of "natural net Developable Acres…when final studies are completed and confirmed by … the Toronto and Region Conservation Authority …and [the] Town of Caledon…the final price shall be adjusted accordingly based on more or less at $350,000 … per Natural net developable acre".

[2] Any further change in the purchase price resulting from a change in the net developable acres was to be reflected in the amount of the VTB mortgage.

of the APS. 252 later sent a certified cheque purporting to return the $50,000 initial deposit.

[13] Rosseau Group took the position that the APS was not at an end. In August 2017, Rosseau Group's lawyer indicated that it was "ready, willing and able to complete the purchase." It set closing dates of September 4, and then September 19, 2017.

[14] No closing took place. Neither side tendered, 252 taking the position that it had no obligation to close as the APS was at an end, and Rosseau Group taking the position that it was relieved of any obligation to tender because 252 had clearly indicated it would not close the APS.

[15] The trial judge found that when 252 took the position that the APS was at an end, its principal knew the value of the property had increased from January 2017 when the original APS was agreed to. She referred to the fact that 252 received an offer for the property of $11 million in April 2017. It also received a Letter of Intent at $640,000 per developable acre in September 2017, and an offer for the property that same month of $14 million.

The Action and the CPL

[16] Rosseau Group commenced an action in August 2017 claiming specific performance and, in the alternative, damages. It obtained a Certificate of Pending Litigation ("CPL") and registered it against the property.

[17] 252 moved successfully to vacate the CPL. In his decision vacating the CPL dated December 14, 2017, Trimble J. found that the property was not unique as Rosseau Group intended to resell, not develop, and that Rosseau Group was not ready, willing, and able to close as it had taken no steps to assume the BMO Mortgage.

[18] Rosseau Group subsequently abandoned the claim for specific performance.

The Trial Judge's Decision

[19] The trial judge found that 252 breached the APS by refusing to complete the transaction because the $400,000 further deposit had not been paid. She found that there was no provision for the $400,000 further deposit in the amended APS, which was consistent with the negotiation that led up to the amendments to the APS, as Rosseau Group had indicated it would agree to assume the BMO Mortgage if the requirement to post a further $400,000 deposit was dispensed with.

[20] The trial judge also found that Rosseau Group was ready, willing, and able to carry out the APS. Despite the reduction in developable acreage, Rosseau Group wanted to close the transaction – it conducted due diligence, was prepared to assume the BMO Mortgage and had, or could acquire, the required funds to pay the balance due on closing. She considered that 252's conduct relieved Rosseau Group of any obligation to tender.

[21] The trial judge rejected 252's argument that Rosseau Group was estopped from asserting the "uniqueness" of the property and that it was ready, willing, and able to close because those points were determined against Rosseau Group on the motion to vacate the CPL. She held that Trimble J.'s determinations were not binding at trial.

[22] Turning to the question of damages, the trial judge considered this a proper case to depart from the normal measure of damages, namely the difference between the market value of the property on the date of closing and the contractual purchase price. She found that Rosseau Group was entitled to damages based on the estimated profit it would have earned had the transaction closed. She noted that it had acquired the property with the intention of earning a profit by developing it; these were special circumstances known to the parties at the time the APS was made.

[23] The trial judge accepted the expert evidence of Martin Quarcoopome. Although not an appraiser or business valuator, he was a development consultant with experience in helping landowners determine the financial cost and profit of real estate development. She rejected an objection that he was not impartial, and found him qualified to give opinion evidence in the areas of planning approvals; land use planning, development, and their costs; as well as estimated profits of proposed developments.

[24] Mr. Quarcoopome estimated the profits that Rosseau Group would have earned, if it had developed the property over a six-year period following the closing date, including rezoning the property to permit residential uses and creating 49 serviced lots, to be between $10,141,345.27 and $12,103,345.27. No expert evidence on damages was called by 252.

[25] The trial judge selected the midpoint of Mr. Quarcoopome's range as a reasonable estimate of the lost expected profit. She rejected the argument that Rosseau Group failed to mitigate its losses by purchasing and developing another property, finding that 252 had not satisfied her that it had been possible for Rosseau Group to purchase a similar property.

[26] The trial judge gave judgment in favour of Rosseau Group for $11,122,345.27 and dismissed 252's counterclaim which was premised on Rosseau Group having had, and breached, an obligation to post a further $400,000 deposit.

Analysis

(a) The Liability Appeal

[27] 252 makes three arguments in relation to its appeal from the trial judge's finding that it breached the APS rendering it liable for damages. First, it submits that the trial judge erred in finding that the amendments to the APS removed the requirement that Rosseau Group post a further $400,000 deposit. Second, it

argues that the trial judge erred in finding that Rosseau Group was not required to tender. Third, it argues that the trial judge erred in finding that Rosseau Group was ready, willing, and able to tender and in any event erred by not considering herself bound by the finding on the motion to vacate the CPL that Rosseau Group was not ready, willing, and able to close the transaction on the closing date.

[28] I reject these grounds of appeal. I agree with trial judge's liability finding.

(i) The Further Deposit Issue

[29] Whether the amended APS did away with the requirement for a $400,000 further deposit is an issue of contractual interpretation. Absent an extricable legal error, the trial judge's interpretation is entitled to deference on appeal: *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 50, 52. In my view, the trial judge did not make an extricable legal error.

[30] 252 contends the trial judge misunderstood the legal nature of a deposit as something that is credited against the purchase price. According to 252, this led her to the erroneous conclusion that "there was a practical difficulty with the $400,000 deposit and the amended APS co-existing". It submits the trial judge mistakenly thought that because the amended APS said that the initial $50,000 deposit was to be credited against the balance due on closing, but made no such provision relating to a further deposit, payment of a further deposit would increase

the total that Rosseau Group had to pay, which could not have been the parties' intention.

[31] In my view, the trial judge did not make this error. She was not construing the legal effect of a deposit in a situation where the parties had not specified what that effect would be. She was deciding what effect should be given to the language the parties used in the amendment to the APS. In the amendment, the parties set out the precise components of the purchase price − the assumption of the BMO Mortgage, the VTB mortgage, the initial deposit and the balance to be paid on closing. These four amounts were expressly described in the amendment as totalling the full purchase price. The initial deposit was referred to in the amendment as being credited against the balance payable on closing, and future changes to net developable acres were to be adjusted from the VTB mortgage. It was thus significant that the amendment did not refer to the further deposit as a component of the purchase price at all, let alone state how, or against what component of the purchase price, the further deposit was to be credited.

[32] Although the amendment did not expressly say that the Schedule to the original APS that provided for the further deposit was deleted, the trial judge was required to construe the APS as a whole, post-amendment, including reconciling apparently inconsistent terms. In doing so she was entitled to consider whether the express language of the amendment should be given priority over a Schedule to the original APS that was inconsistent with it. The trial judge was entitled to

conclude that the parties' express treatment, in the amendment, about the components of the purchase price including the initial deposit, without any reference to the further deposit, was tantamount to deleting any continuing requirement for the further deposit. In other words, she was entitled to conclude that the parties deleted the requirement for the further deposit by the language of the amendment.

[33] 252 also submits that the trial judge's interpretation is tainted by her reference to Rosseau Group's communicated position that it would agree to assume the BMO Mortgage if the further deposit requirement were dropped, and by her failure to advert to the entire agreement clause in the APS.

[34] I do not accept these arguments.

[35] The genesis of the amendment, in the sense of the identification of points the parties were expecting it to address, was relevant objective evidence of "background facts at the time of the execution of the contract". The trial judge used those facts properlyto deepen her understanding of the language of the amended APS, not to overwhelm that language. She reached an interpretation that was grounded in the text: *Sattva*, at paras. 57-8.

[36] The trial judge's interpretation is not affected by the entire agreement clause. Such a clause does not prevent the court from considering relevant surrounding circumstances in interpreting the meaning of the contract: *Ontario First Nations*

(2008) Limited Partnership v. Ontario Lottery and Gaming Corporation, 2021 ONCA 592, at para. 62.

(ii) No Requirement to Tender

[37] 252 argues that although it indicated on June 13, 2017 that it was taking the position the APS was at an end, Rosseau Group did not accept the repudiation, and demanded a closing date of September 19, 2017. It submits that Rosseau Group was therefore required not only to be ready, willing, and able to close on that date, but to demonstrate that by tendering the closing funds and other required documents. 252 argues that the trial judge should have treated the failure to tender as fatal to Rosseau Group's claim.

[38] I disagree.

[39] Because Rosseau Group did not accept 252's anticipatory repudiation of the APS, but instead rejected it, it kept the APS alive, and both parties remained bound to perform their obligations on the closing date. In order to rely on 252's failure to close on September 19, 2017, Rosseau Group had to be ready, willing, and able to close on that date: *Domicile Developments Inc. v. MacTavish* (1999), 45 O.R. (3d) 302, 175 D.L.R. (4th) 334 (C.A.), at paras. 14-15. But that obligation was satisfied if Rosseau Group was (as the trial judge found) actually ready, willing, and able to close. For 252's argument to be correct, Rosseau Group's obligation

had to extend to include a requirement to tender on a party who had unequivocally indicated that the tender would be useless because it would not close.

[40] I see no error in the trial judge's conclusion that a tender was not required. Although tendering is one way of showing that a party is ready, willing, and able to close, it is not the only way. "While tender is the best evidence that a party is ready, willing and able to close, tender is not required from an innocent party enforcing his or her contractual rights when the other party has clearly repudiated the agreement or has made it clear that they have no intention of closing the deal" (emphasis added): *Di Millo v. 2099232 Ontario Inc.*, 2018 ONCA 1051, 430 D.L.R. (4th) 296, at para. 45, leave to appeal refused, [2019] S.C.C.A. No. 55 The rationale for this is clear: "the law does not require what would be a meaningless or futile gesture": *Time Development Group Inc. (In trust) v. Bitton*, 2018 ONSC 4384, at paras. 56-7.

[41] 252's reliance on the decision of this court in *1179 Hunt Club Inc. v. Ottawa Medical Square Inc.*, 2019 ONCA 700, 438 D.L.R. (4th) 566 for the proposition that tender was required is misplaced. *1179 Hunt Club* was not a case of a party who was in fact ready, willing, and able to close being denied a contractual remedy because it failed to tender on a party who had indicated that such a tender would be useless.

[42] In *1179 Hunt Club*, the vendor rejected the purchaser's anticipatory repudiation of the agreement, insisted that the transaction close on a specific date, and indicated that there would be immediate pursuit of legal remedies if the purchaser did not perform. The application judge found, and this court agreed, that the vendor was not in fact ready, willing, and able to close on the date it insisted upon, because it was unable to transfer title to the purchaser: at paras. 2, 17, 20, 21, 22 and 27. It was in that context − a party who was in fact not ready to perform insisting on strict performance from the other party − that Lauwers J.A. referred to the failure to tender as being "fatal" to the vendor's position that it could "render perfection in its own performance": at para. 23. Later in his reasons, Lauwers J.A. brought those two key aspects together when he explained: "[h]aving set the date, here the vendor did not trouble itself to tender, and in fact could not have tendered because on that day it was incapable of transferring title" (emphasis added): at para. 27.

[43] Accordingly, *1179 Hunt Club* does not assist 252, because it does not stand for the proposition that a failure to tender by a party who is ready, willing and able to close precludes their claim.

(iii) The Trial Judge Did Not Err in Finding Rosseau Group Was Ready, Willing, and Able to Close

[44] 252 goes on to argue that the trial judge erred in finding that Rosseau Group was in fact ready, willing, and able to close. It argues that although the trial judge

found that Rosseau Group had sufficient funds available from related entities to close the transaction, this was insufficient as it had not taken possession of those funds itself. It also argues that although the trial judge found Rosseau Group could assume the BMO Mortgage, this too was insufficient because it took no steps to do so. And it argues that the trial judge should have considered herself bound by the findings about readiness to close made on the CPL motion.

[45] I disagree.

[46] On the question of funds for closing, the trial judge's finding that the funds required to close were available to Rosseau Group was sufficient. With that availability, it was ready, willing, and able to close. The added step of symbolically depositing the funds in its own account for a transaction that 252 would not complete would have been "a meaningless or futile gesture" of the type the law does not insist upon.

[47] The obligation of Rosseau Group to assume the BMO Mortgage was an obligation in favour of 252. To perform it, if the transaction were completed, Rosseau Group would have had to make the mortgage payments that 252 had committed to − it would be in breach of that obligation and would have to indemnify 252 if it did not[3].

[3] The mortgagee would have had a direct right of action against Rosseau Group for payment under these circumstances: *Mortgages Act*, R.S.O. 1990. c. M. 40, s. 20.

[48] The trial judge found Rosseau Group could have assumed the BMO Mortgage, in other words, that it could have performed the BMO Mortgage obligations it agreed to assume. That finding was sufficient. It was not germane whether the parties had contacted the mortgagee about the assumption—whatever rights would accrue to the mortgagee on the sale were rights under the BMO Mortgage that Rosseau Group would have had to ensure (and on the trial judge's finding could have ensured) were honoured.

[49] Nor did the reasons given on the motion to vacate the CPL, that Rosseau Group was not ready, willing, and able to close because it took no steps to assume the BMO Mortgage, preclude the trial judge from reaching a different conclusion on this point.

[50] 252 relies on the principle accepted in *Earley-Kendall v. Sirard*, 2007 ONCA 468, 225 O.A.C. 246, at para. 43, that a decision on an interlocutory motion is binding on the parties with respect to other proceedings in the same action. In *Earley-Kendall*, a defence motion seeking to adjourn the trial to allow for a medical examination of the plaintiff was dismissed. This was held to preclude a second defence motion compelling the plaintiff to attend a defence medical examination. The two defence motions were found to have been for substantially the same relief; the decision on the first motion therefore barred the second motion under the doctrine of issue estoppel: at paras. 44, 45, and 47.

[51] 252 argues that this principle has been applied to preclude a party, on a motion for summary judgment, from arguing a point decided against them on a CPL motion, and that the same approach should follow at trial. It points to *Lamba v. Mitchell*, 2021 ONSC 1612, where one of the issues on a summary judgment motion was whether there had been a material misrepresentation in pre-contractual information about the house that was to be purchased. The summary judgment motion judge noted, as one of the reasons for rejecting the claim of material misrepresentation, that there was a finding about this issue on an earlier motion for leave to issue a CPL: at paras. 31-35. He used this as an alternative ground for rejecting the argument of material misrepresentation, having also found on the record before him that there was no material misrepresentation: at para. 30.

[52] I do not accept the argument of 252 that the trial judge was, in this case, bound by the reasons given when the CPL was vacated. To the extent that the decision in *Lamba* suggests otherwise, it is inconsistent with the jurisprudence of this court and should not be followed.

[53] The principle in *Earley-Kendall* applies to prevent a party from relitigating a decision. When the question is whether a trial judge is bound by something that occurred on an interlocutory motion, the distinction between what was decided and the reasons why that decision was made is important.

[54] A CPL confers no rights − it gives notice that there is a claim in the action to an interest in land. The decision as to whether a CPL should be granted or vacated is only a decision about whether notice of the claim should be registered or removed from title. The claim itself is only determined by the final decision in the action: *G.P.I. Greenfield Pioneer Inc. v. Moore,* [2002] 58 O.R. (3d) 87 (C.A.), at para. 26. A decision about the CPL does not determine the validity of the claim one way or the other. Litigating the claim, and issues in the claim, at trial is not relitigating anything decided in a motion about the CPL.

[55] This court has held that an order granting or lifting a CPL is, for appeal purposes, an interlocutory, not a final, order. This is precisely because it "does not finally determine the litigation" or "any issue in the litigation, which remains ongoing": *1476335 Ontario Inc. v. Frezza*, 2021 ONCA 822, at para. 9.

[56] As the decision about the CPL in this case did not finally determine any issue in the litigation, comments in the reasons given on the CPL motion have no effect on those issues. In *Frezza*, this court held that the reasons of a motion judge for denying a CPL (for example, reasons about whether the claim was statute barred) are not binding on the trial judge, because they do not constitute the final determination of any issue relating to the validity of the claim for the purpose of granting or denying judgment on the claim: at paras. 10, 14.

[57] Accordingly, the trial judge was correct not to consider herself bound by the reasons given on the motion to vacate the CPL. Adopting the language in *Frezza,* the "full record for finally determining the issue [of whether Rosseau Group was ready, willing, and able to close] may or may not have been placed before the motion judge, but only enough to allow the motion judge to make or deny the discretionary order that was sought. In any event, the court [on the CPL motion] was not asked to make a final determination of [that] issue": at para. 14.

(iv) Conclusion on the Liability Appeal

[58] I would therefore uphold the trial judge's determination that 252 breached the amended APS, and therefore her finding that it was liable for damages, and her dismissal of the counterclaim.

(b) The Damages Appeal

[59] A trial judge's assessment of damages attracts considerable deference on appeal. However, an assessment made on the basis of an error of principle or law may be interfered with on appeal: *SFC Litigation Trust v. Chan,* 2019 ONCA 525, 147 O.R. (3d) 145, at para. 112, leave to appeal refused [2019] S.C.C.A. No. 314.

[60] 252 submits that the trial judge erred in departing from the normal measure of damages, awarded damages that violated the remoteness principle, did not use the proper date for assessment of damages, and made an award that failed to address contingencies.

[61] I do not agree with 252 that an award that takes into account the loss to Rosseau Group flowing from it being deprived of the opportunity to acquire developable property violates the remoteness principle. However, the question of remoteness − whether the type of loss is recoverable − is separate from the question of how to measure the loss. In my view, the trial judge erred in departing from the normal measure of damages in the absence of anything that suggested that that measure would not address Rosseau Group's recoverable loss. That conclusion is supported by the issues about the assessment date and contingencies that 252 raises in connection with the trial judge's approach.

(i) The Normal Measure of Damages

[62] The normal measure of damages for a failed real estate purchase is the difference between the contract price and the market value of the land on the "assessment date". The assessment date is usually the date on which the purchase was scheduled to close. Although the court may set a later date if the party seeking damages satisfies certain criteria, the presumption is that damages are to be assessed as of the date of the breach. That presumption is not easily displaced; any deviation from it must be based on legal principle: *100 Main Street Ltd. v. W.B. Sullivan Construction Ltd.* (1978), 20 O.R. (2d) 401, 88 D.L.R. (3d) 1 (C.A.), at para. 55, leave to appeal refused (1978) 20 O.R. (2d) 401 (S.C.C.); *642947 Ontario Ltd. v. Fleischer* (2001), 56 O.R. (3d) 417, 209 D.L.R. (4th) (C.A.), at paras. 41-43; *Rougemount Capital Inc. v. Computer Associates International*

Inc., 2016 ONCA 847, 410 D.L.R. (4th) 509, at para. 50; *Akelius Canada Ltd. v. 2436196 Ontario Inc.,* 2022 ONCA 259, 161 O.R. (3d) 469, leave to appeal refused, [2022] S.C.C.A. No. 183, at para. 27.

[63] There are several reasons why the normal measure is the presumptive, measure of the innocent party's damages and is not to be easily displaced.

[64] First, when a purchase contract is performed, the purchaser pays the purchase price on closing and obtains, on the same date, ownership of an asset. Damages are awarded on the principle that the innocent party, as nearly as possible, should be put in the position it would have been in if the contract had been performed. Using, as the measure of damages, the difference between the purchase price and the land's market value on the closing date puts this principle into effect: *100 Main Street*, at paras. 55-56. The market value represents the financial equivalent of the asset itself.

[65] Second, commercial certainty is enhanced by a predictable damages methodology. This court has stated that an early, and predictable, date on which the innocent party's damages are crystallized promotes efficient behaviour and reduces uncertainty and speculation: *Kinbauri Gold Corp. v. Iamgold International African Mining Gold Corp.* (2004), 246 D.L.R. (4th) 595 (Ont. C.A.), at para. 125, *per* Laskin J.A. (concurring), leave to appeal refused, [2000] S.C.C.A. No. 658.

Although made in the context of a sale of goods, the observation applies equally to the sale of land.

(ii) The Remoteness Test Does Not Determine the Measure of Damages

[66] The trial judge noted that Rosseau Group, in calculating its lost expected profit from the opportunity it would have had to develop the property, was not claiming damages according to the normal measure. She said that "there is a general discretion in the court to depart from that [measure] if circumstances warrant". She held the circumstances here justified the departure because the "parties in this case specifically contemplated that the [p]roperty would be developed into serviced lots…[t]hese were special circumstances known to the parties at the time they made the APS and amended [the] APS".

[67] In my view, it was an error to rely solely on the parties' contemplation of future development to justify a departure from the normal measure of damages in this case. The existence of what the trial judge referred to as special circumstances only meant that a type of loss was recoverable − in other words, it was not too remote. That conclusion is not the same as, let alone determinative of, the question of whether the normal measure is somehow inadequate to measure that loss.

[68] To explain, the term special circumstances known to the parties at the time of contracting, in the context of damages for breach of contract, is a reference to the second of the two branches of the remoteness limit on such damages. As this

court stated in *Saramia Crescent General Partner Inc. v. Delco Wire and Cable Limited*, 2018 ONCA 519, at para. 36: "…there are two branches to the *Hadley v. Baxendale* remoteness test. Damages may be recovered if: (i) in the "usual course of things", they arise fairly, reasonably, and naturally as a result of the breach of contract; or (ii) they were within the reasonable contemplation of the parties at the time of contract". Damages that fall outside of either branch are not recoverable because they are too remote.

[69] The fact the property had known development potential, and therefore that if Rosseau Group acquired ownership it could benefit from having land with that potential, meant that damages for loss of the value of that potential (that is, the development value) would not be too remote. Indeed, even without the trial judge's finding of special circumstances the same result would follow. The APS, originally and as amended, provided for the sale of development lands. The price was a direct function of the net developable acres for residential purposes. The APS was conditional on Rosseau Group satisfying itself as to the economic feasibility of development. The loss, measured in money, of the ability to acquire development lands and the opportunity that provided would, on an objective basis, flow fairly, reasonably, and naturally from the breach of the APS. Loss of development value would not be too remote even on the first branch of the remoteness test.

[70] But, importantly, the remoteness test deals with the "type" of loss that is recoverable, while the measure is about how the loss is quantified. Regardless of

the branch of the remoteness test into which the loss of an opportunity to acquire lands that can be developed falls, the normal measure of damages should not be departed from unless the party seeking damages shows that that measure does not address that type of loss. The trial judge made no such finding, nor, in my view, was it available on the record[4].

[71] The key driver of damages under the normal measure is the market value of the land on the assessment date. The normal measure of damages compensates the innocent purchaser for the loss of the market value of the lands on the closing date less the purchase price that had to be paid to acquire them. The concept of market value of the land takes into account the value the land has because it can be developed.

[72] In *Musqueam Indian Band v. Glass*, 2000 SCC 52, [2000] 2 S.C.R. 633, at para. 37, Gonthier J. drew on precedents from various situations in which the term value is used in connection with real estate to provide an all-compendious general definition. He said: "'Value' in real estate law generally means the fair market value of the land, which is based on what a seller and buyer, 'each knowledgeable and willing,' would pay for it on the open market".

[4] The trial judge did not find that Rosseau Group could extract a special value from developing the land that other market participants could not because, for example, it owned adjacent land and could combine it in a unique way with the land to be acquired, or because it had special development techniques not known generally to the market. In those types of situations, the normal measure of damages may not be adequate because the key driver of damages according to the normal measure − the market value of the land − may not reflect the development value the disappointed purchaser has lost.

[73] One of the cases relied on by Gonthier J. was the decision of this court in *Re Farlinger Developments Ltd. and Borough of East York*, [1975] 61 D.L.R. (3d) 193, 9 O.R. (2d) 553, an expropriation case. As that case shows, determining market value in the expropriation context relies on expert appraisal evidence that considers the highest and best use of the property, that is, the use to which the property could reasonably and probably be put in the future to maximize its economic return, including by redevelopment: at pp. 199-200.

[74] Assessing market value for the purpose of damages for breach of a purchase agreement for the sale of land employs the same concepts. It generally requires appraisal evidence: *DHMK Properties Inc. v. 2296608 Ontario Inc.,* 2017 ONSC 2432, at para. 56, rev'd on other grounds 2017 ONCA 961. Appraisal evidence can take into account the value of the property based on what would be its reasonable and probable highest and best use and that includes development: see for example *1427814 Ontario Limited v. 3697584 Canada Inc.*, 2012 ONSC 156, at paras. 511-17; *WED Investments Limited v. Showcase Woodycrest Inc.,* 2021 ONSC 237, at paras. 149, 151, and 155. In other words, the market value of the land can take into account, as at the valuation date, the market's perspective of the value of the current and potential future uses and opportunities available to the land's owner, including development.

[75] There was no suggestion here that a calculation of market value at the closing date would somehow miss or exclude the development value of the lands.

The APS, negotiated in January 2017 between arms' length market participants, attributed value to the property solely by reference to its potential development, as the price was $350,000 per developable acre for residential development. The trial judge found that 252 had knowledge that the value of the property had increased by the closing date based on market evidence − 252 received an offer to purchase the property of $11 million in April 2017, a Letter of Intent at $640,000 per developable acre (almost double that in the APS) in September 2017, and an additional offer to purchase the property that same month for $14 million.

[76] The trial judge referred to the decision in *WED Investments Limited* as support for her approach. In my view, it does not provide that support. In that case Schabas J., at paras. 93-97, considered it permissible for the plaintiff purchaser to "advance" two approaches to damages: "The first approach seeks the lost profits the plaintiff says it would have earned if it had acquired the properties and developed them, as was its intention when it signed the Agreements in 2016….[T]he second approach considers the increase in value of the properties as undeveloped land calculated on expected closing dates in July 2018." The first approach is similar to that of the trial judge. The second approach is the normal measure.

[77] Importantly, Schabas J. did not award damages under the first approach, which he found "to be quite speculative and uncertain": at para. 147. He did award damages based on the second approach, the difference between the purchase

price and the market value of the property on the closing date. To determine the latter amount, he relied on appraisal evidence that "treated the property as vacant land available for redevelopment for a highest and best use of medium or higher density residential development….": at paras. 149, 151, and 155. In other words, he used the normal measure, and that measure took into account the development value of the land.

[78] The trial judge also referred to *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.,* 2002 SCC 19, [2002] 1 S.C.R. 678. In that case, the parties had agreed to jointly own golf course lands, and that an area around the 18th hole could be developed either by a third party or by one of the parties to the joint venture. Bell, the joint venturer who wished to develop was later prevented from proceeding with development by the other joint venturer's insistence on the terms of their written agreement which did not reflect the terms that had been orally agreed to. The trial judge found the written agreement should be rectified and granted damages in lieu of rectification equal to "the amount of money that Bell would have been entitled to have received had he been permitted to complete the residential development of the 18th hole in accordance with the terms of the rectified [agreement]": 1999 ABQB 479, 246 A.R. 272, at para. 92. Although the award was considered generous by the Alberta Court of Appeal due to the failure of the trial judge to fully consider contingencies, the award was upheld: 2000 ABCA 116, 185 D.L.R. (4th) 269, at paras. 27-29.

[79] The Supreme Court of Canada also upheld the award. Binnie J. rejected the argument that damages should not include the "reasonably expected profit from a 58-lot housing development" and should instead be limited to the difference between the market value of the land and the option price (which presumably would not include any of that housing development value). He noted that the parties had specifically contemplated "the optioned land would be put to the use of residential housing", therefore the damages should include the losses flowing from those circumstances: at paras. 72-73.

[80] The normal measure will not be appropriate where it will not address the type of loss suffered by the innocent party. In *Performance Industries,* one joint venturer was denied a promised opportunity to engage in a specific development. It is implicit in the argument that Binnie J. rejected that for those lands, in those circumstances, the market value would not take into account expected profit from the residential development. I do not take *Performance Industries* to stand for the proposition that the normal measure of damages is not to be used for a failed arms' length sale of development lands, such as occurred in this case, simply because the parties had an awareness that the lands could be developed, where there is no suggestion that development value is ignored or excluded by the normal measure.

[81] Rosseau Group's compensation for breach of the APS should take into account development value of the lands. That loss is not too remote. But absent

anything that suggests the normal measure of damages would not address development value, *Performance Industries* did not require departure from the normal measure in this case.

(iii) Assessment Date Concerns and Contingencies Support the Use of the Normal Measure

[82] Two additional issues that 252 raises about the trial judge's approach to damages reinforce the conclusion that use of the normal measure of damages is appropriate.

[83] The first issue has to do with calculating damages as of an assessment date. The assessment date is presumptively the date of closing. It can be moved, in the discretion of the court, where to do so is fair, which usually has to do with when the innocent party should re-enter the market so they can engage in mitigating transactions. As this court stated in *Akelius*: "the date of breach remains a starting point for the assessment of loss, modified only to the extent that the innocent party satisfies the court that a later date is appropriate on the grounds that it is the first date upon which the party could reasonably have been expected to re-enter the market and mitigate its damages": at para. 27.

[84] The trial judge did not use the date of closing as the assessment date. She was of the view that for a calculation of damages based on an estimate of lost profits, no date of assessment was necessary. Nor does it appear that she used a later date (in the sense of a specific date). Instead, she stated that if a date was

required, she considered it to be fair in the circumstances “to start the assessment at the date of closing and estimate the expenses and revenue over the period over which the land would be developed − in this case, six years from the closing date”.

[85] The trial judge did not otherwise explain why no date of assessment was required. Her alternative approach does not identify an assessment date but instead a period of six years. Other than a statement that this is fair, the trial judge does not explain why using a six-year period instead of a date is appropriate. Although when she came to consider mitigation, the trial judge found that 252 had not satisfied its onus of showing Rosseau Group did not take reasonable efforts to mitigate, she did not expressly link that conclusion to the lack of a specific assessment date or the use of a six year period, or specifically equate it to Rosseau Group having satisfied its onus to depart from the presumptive date, or to use a later specific date.

[86] The lack of a specific date of assessment of damages is problematic. First, the expected profit is inherent in the value of the land at the date of closing. Second, because the normal measure of damages compares the purchase price to the market value at the date of closing, it compares outflows and inflows of value at the same date. When a later date of assessment is used, expected inflows and outflows of value may have to be adjusted so they are measured consistently, given considerations of interest, the time value of money, inflation, etc. But if no date, or multiple dates over a period are used, there can be concerns about what

is being measured, and whether amounts are being measured and treated consistently.

[87] The second concern raised by 252 with the trial judge's approach has to do with contingencies. When damages are assessed on the basis that an opportunity to make a profit in a certain way was lost, the question arises as to whether a discount is appropriate to reflect the contingency that the opportunity may not be realized, perfectly or at all: *Eastwalsh Homes Ltd. v. Anatal Developments Ltd.*, [1993] 12 O.R. (3d) 675, at para. 38. 252 argues that the trial judge failed to apply any discount notwithstanding what it argues was Mr. Quarcoopome's concession that there were risks that the project might not proceed as he envisaged it.

[88] I need not decide whether or what contingency discount should have been applied to Mr. Quarcoopome's calculations, as the trial judge erred in using them as she did. But I note that the normal measure of damages accounts for contingencies through its use of market value, which represents the price at which knowledgeable arms' length parties are prepared to transact given their assessment of the opportunity the property provides and the chance of realizing on it successfully.

(iv) Conclusion on Damages

[89] The trial judge erred in not using the normal measure of damages. Her award must be set aside.

[90] I do not consider that it would be appropriate to substitute an award of nominal damages. The trial judge found that the property had increased in value by the closing date (meaning there were damages according to the normal measure), but she did not make a specific finding as to what that value was, and this court is not in a position to determine that value. A new hearing on the issue of damages according to the normal measure is therefore required.

Disposition

[91] I would dismiss the appeal as to liability.

[92] I would allow the appeal on damages, set aside the damages award, and direct a new hearing on damages to be assessed according to the normal measure, namely, the difference between the purchase price and the market value of the lands on the date set for closing.

[93] Because of this disposition, it is unnecessary to address 252's argument that the trial judge erred in rejecting its mitigation arguments. On the measure of damages to be used, mitigation is not an issue, as Rosseau Group had suffered the loss of the difference between the purchase price and the market value on the closing date, regardless of any activities it undertook, or could have undertaken, following that date.

[94] It is also unnecessary to consider the argument that the trial judge erred in qualifying Mr. Quarcoopome as an expert. The issue of what expert(s) are qualified

to testify on the issue to be determined at the new damages hearing will be for the judge presiding over that hearing.

[95] Success on the appeal is divided. If the parties are unable to agree on the costs of the appeal given this disposition (which was not contemplated by their agreement on costs at the time of the hearing), they may make written submissions not exceeding three double spaced pages each, within ten days of the release of these reasons.

Released: December 8, 2023 “M.L.B.”

“B. Zarnett J.A.”
“I agree. M.L. Benotto J.A.”
“I agree. Gary Trotter J.A.”

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DATE: 20041110
DOCKET: C39435

COURT OF APPEAL FOR ONTARIO

LASKIN, SIMMONS and CRONK JJ.A.

B E T W E E N :	)	
	)	
KINBAURI GOLD CORPORATION	)	Paull N. Leamen, Graham Jones
	)	and Jeff Saikaley,
	)	for the Appellant (Plaintiff) and
	)	Respondent by Cross-appeal
Appellant (Plaintiff) and Respondent by Cross-appeal	)	
	)	
- and -	)	
	)	
IAMGOLD INTERNATIONAL AFRICAN MINING GOLD CORPORATION	)	Sheila R. Block and Kathleen Riggs,
	)	for the Respondent (Defendant) and
	)	Appellant by Cross-appeal
	)	
Respondent (Defendant) and Appellant by Cross-appeal	)	
	)	
	)	Heard: April 15, 2004

On appeal from the judgment of Justice G. Gordon Sedgwick of the Superior Court of Justice, sitting without a jury, dated December 23, 2002 and August 27, 2003, reported at [2002] O.J. No. 5028.

CRONK J.A.:

I. OVERVIEW

[1] This appeal and cross-appeal arise out of a failed reverse take-over transaction contemplated under an amalgamation agreement made in 1990 (the "Agreement") by the appellant, Kinbauri Gold Corporation, and the shareholders of International African Mining Gold Inc., the predecessors in interest under the Agreement to the respondent, Iamgold International African Mining Gold Corporation (now known as "IAMGOLD Corporation").

[2] At the time of the Agreement, Kinbauri was a Canadian mining company whose shares were listed for sale on the Alberta Stock Exchange (the "ASE"). Its main asset was its ASE listing. Iamgold was a private Canadian mining exploration and development company. Its primary asset was a 90% interest in the right to mine gold and other minerals on a property in Mali, West Africa, known as the 'Sadiola Concession'. This included an area called the 'Sadiola Hill' that was thought to contain potentially significant gold deposits (the "Sadiola Hill Deposit").

[3] Under the Agreement, Iamgold was to control the amalgamated corporation ("Amalco"): the shareholders of Iamgold would own 97.96%, and the shareholders of Kinbauri would own 2.04%, of the issued and outstanding shares in Amalco at the end of the transaction. Amalco would succeed to Iamgold's interest in the Sadiola Concession and its shares would be listed for sale on the ASE in the summer or fall of 1991.

[4] However, in early 1991, Iamgold unilaterally terminated the Agreement, claiming that the ASE's 'public float' requirement – the obligation to ensure a specific minimum percentage of public shareholdings in Amalco – could not be satisfied.

[5] Kinbauri then sued Iamgold, seeking specific performance of the Agreement or, in the alternative, damages for breach of contract, amongst other relief. Iamgold counter-claimed against Kinbauri, claiming damages for various causes of action.

[6] In the fall of 1992, while the litigation was pending, Iamgold entered into an options agreement with Anglo American Corporation of South Africa Ltd., one of the world's largest mining concerns. Under this agreement, Anglo American obtained options, exercisable on certain conditions, to acquire an interest in the Sadiola Concession equal to Iamgold's interest. Anglo American subsequently exercised its options, assumed responsibility for the financing and development of the Sadiola Hill Deposit and became the operator of the development project.

[7] On February 28, 1996, Iamgold 'went public', making an initial public offering under applicable securities legislation (the "IPO"). A value of $5.75 (Cdn.) per share was placed on Iamgold's common shares under the IPO. Within the next three months, this share price rose to $6.25 per common share. The IPO had a market value of $404 million (Cdn.) and Iamgold's shares became listed for sale on the Toronto Stock Exchange (the "TSX").

[8] Kinbauri's action was tried in two phases before Sedgwick J. of the Superior Court of Justice. The first phase concerned liability issues. By judgment dated May 28, 1999, the trial judge held that Iamgold was bound by and had unjustifiably terminated the Agreement. Iamgold's counterclaim was dismissed. Its subsequent efforts to appeal the liability judgment were unsuccessful.

[9] The remedies phase of the trial was conducted over 15 days in early 2002. By reasons for judgment dated December 23, 2002, Iamgold was ordered to pay Kinbauri compensatory damages for breach of the Agreement in the sum of $1.7 million (Cdn.), plus pre-judgment interest at the rate of 10% per annum from the date of Iamgold's breach of the Agreement. A claim by Kinbauri for punitive damages was dismissed.

[10] The main issue in this proceeding relates to the manner in which the trial judge assessed damages. The trial judge rejected Kinbauri's assertion that its damages should be assessed according to the value of Iamgold's shares during the period from late 1993 to March 1996, holding that the critical date for the damages assessment was the date of Iamgold's breach of the Agreement. He also held that to compute Kinbauri's damages, it was necessary to consider the value of the underlying assets of Iamgold.

[11] The trial judge relied on an assets valuation report prepared by Watts, Griffis, and McOuat Limited ("WGM"), Canadian consulting geologists and engineers, in assessing Kinbauri's damages. This report, prepared in February 1993, addressed the value of Iamgold's interests in the Sadiola Concession as at December 15, 1992. Based on this report, the trial judge concluded that the value of the Kinbauri shareholders' 2.04% interest in Amalco at the breach date was $1.79 million (Cdn.). He then reduced these damages to the net sum of $1.7 million (Cdn.) on account of contingencies.

[12] Kinbauri appeals from the trial judge's damages assessment, arguing that he erred in failing to apply the principles established in *Asamera Oil Corp. Ltd. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633 or, in the alternative, in failing to apply an appropriate multiplier to the value of Iamgold's assets in determining Iamgold's market value. Kinbauri also asserts that the trial judge erred in reducing its damages on account of contingencies.

[13] Iamgold cross-appeals from part of the damages assessment. It claims that the trial judge erred in his calculation of an appropriate contingency allowance by failing to allow for the possibility that approval of the amalgamation by Iamgold's shareholders would have been withheld. It also challenges the rate of pre-judgment interest awarded to Kinbauri.

[14] For the reasons that follow, I conclude that the trial judge did not err in his assessment of Kinbauri's damages or in fixing the rate of awarded pre-judgment interest. Accordingly, I would dismiss both the appeal and the cross-appeal.

II. FACTUAL BACKGROUND

(1) Parties and the Agreement

[15] Kinbauri was incorporated in 1984 under the *Canada Business Corporations Act*, R.S.C. 1974-75-76, c. 33 (the "*CBCA*") (now R.S.C. 1985, c. C-44, S.C. 1994, c. 24). By the late 1980s, it was essentially inactive and its main asset was its ASE listing. It entered into the Agreement with International's shareholders on February 21, 1990.

[16] Iamgold was incorporated under the *CBCA* on March 27, 1990. Iamgold and International's shareholders were identical, comprising a syndicate controlled by William Pugliese and Mark Nathanson, either personally or through holding corporations controlled by them. By the spring of 1990, Iamgold had assumed the rights and obligations of International's shareholders under the Agreement and had acquired their interest in the Sadiola Concession.

[17] The Agreement provided for the following share structure for Amalco: (i) 2,088,109 outstanding common shares in Kinbauri would be converted into a like number of common shares in Amalco; (ii) 100,000,000 common shares in Iamgold, to be issued at the time of the amalgamation, would be converted into a like number of common shares in Amalco; and (iii) 10,000,000 options in Iamgold, also to be issued at the time of the amalgamation, would be converted into a like number of options in Amalco. This structure, once implemented, would effect the reverse take-over of Kinbauri (the public company) by Iamgold (the private company).

[18] The amalgamation transaction was conditional on the approval of the amalgamation by the directors of Iamgold, the shareholders of Kinbauri and Iamgold, the ASE and the Alberta and Ontario Securities Commissions.

(2) Post-Agreement Events

[19] Kinbauri notified the ASE of the proposed amalgamation shortly after the execution of the Agreement. As a result, trading in Kinbauri's shares was halted by the ASE in late February 1990 and suspended the following month pending review of the amalgamation transaction.

[20] Following Iamgold's incorporation, Pugliese and Nathanson tightened their control of Iamgold and, prospectively, of Amalco. This was accomplished in several ways:

> (a) Pugliese and Nathanson were both officers and directors of Iamgold and companies controlled by them were Iamgold shareholders. On March 27, 1990, the

Iamgold shareholders entered into a shareholders agreement (the "Shareholder Agreement"), under which Pugliese and Nathanson were authorized to exercise each of the other Iamgold shareholder's voting rights at all Iamgold shareholder meetings, including the right to "vote in favour of the proposed amalgamation of [Iamgold] with a publicly listed corporation";

(b) in May 1990, the Iamgold shareholders entered into a management group agreement (the "Management Agreement") under which, effectively, voting control on behalf of Iamgold's shareholders concerning Amalco was transferred to Pugliese and Nathanson, as trustees. The Management Agreement also restricted the ability of Iamgold shareholders to convey to or otherwise deal in their Amalco shares with any persons outside the then existing group of Iamgold shareholders; and

(c) Pugliese and Nathanson increased their personal beneficial shareholdings in Iamgold through a series of share acquisitions. By January 1991, Pugliese and Nathanson beneficially owned or controlled more than 76% of the voting shares of Iamgold.

[21] In mid-February 1991, the ASE notified Kinbauri that the share structure for Amalco proposed under the Agreement might not meet the ASE's public float requirement, which required that 10% to 15% (or another percentage agreed upon by the ASE) of the total number of issued and outstanding shares of Amalco be freely tradeable and held by public shareholders. On February 26, 1991, Iamgold unilaterally terminated the Agreement, claiming that the ASE's minimum public float requirement could not be satisfied.

[22] On July 11, 1991, Kinbauri's shares were delisted by the ASE. Despite subsequent efforts, Kinbauri was unsuccessful in regaining a listing on the ASE, although it became listed on CDMX, TSX Venture as a Tier 3 company.

(3) Liability Phase of the Trial

[23] In August 1991, Kinbauri sued Iamgold, seeking a declaration that Iamgold had breached the Agreement and specific performance of the Agreement or, in the alternative, damages in the aggregate amount of $3,050,000. Kinbauri's pleading was subsequently

amended to increase the claimed compensatory damages to $10 million and to include a claim for punitive damages. Iamgold counterclaimed against Kinbauri, seeking the sum of $500,000 as damages for alleged misrepresentation and injurious reliance or, in the alternative, for negligence.

[24] By judgment dated May 28, 1999, the trial judge granted declarations that the Agreement was binding on and enforceable against Iamgold and that Iamgold had unjustifiably terminated the Agreement. He held that Iamgold had failed to perform its contractual obligation to use its best efforts to comply with the ASE's public float requirement and that it had used the ASE's February 1991 non-compliance notice as a pretext upon which to terminate the Agreement, in which it had lost interest. In so doing, Iamgold had acted towards Kinbauri "in questionable good faith". The trial judge also dismissed Iamgold's counterclaim and directed that the remedies phase of the trial be conducted following discoveries on the issue of damages. By order dated January 17, 2000, he awarded Kinbauri the costs of the liability phase of the trial, including the costs of the counterclaim proceeding.

[25] Iamgold's appeal from this liability judgment was dismissed by this court on November 2, 2000: [2000] O.J. No. 4207. The court also set aside the costs order of the trial judge and directed that the issue of the costs of the liability phase of the trial be deferred until completion of the entire trial. Iamgold's subsequent leave to appeal application to the Supreme Court of Canada from the liability judgment was dismissed: [2000] S.C.C.A. No. 658.

(4) Entry of Anglo American

[26] Both prior to and following its termination of the Agreement, Iamgold investigated various means of financing the exploration and development of the Sadiola Hill Deposit, including equity, debt and joint venture opportunities. By 1992, it had been in contact with several major mining companies regarding a possible exploration and development joint venture.

[27] On October 19, 1992, Anglo American entered into an options agreement with Iamgold under which Anglo American agreed to conduct exploration and evaluation work and to prepare a feasibility study concerning the development of the Sadiola Hill Deposit.

[28] Anglo American's feasibility study was completed in December 1993. Thereafter, Anglo American exercised its options and acquired an interest in the Sadiola Concession equal to Iamgold's interest. It also agreed to finance the Sadiola Hill Deposit development project and to build and operate the mine site.

[29] The trial judge found that Anglo American's entry into the project was unforeseeable and outside the expectations of the parties when they entered into the Agreement. Kinbauri does not challenge these key findings.

[30] The involvement of Anglo American brought a seasoned and sophisticated mining company into the evolving Sadiola Concession development project. The trial judge held (at para. 82):

> With the entry of Anglo American, an experienced gold mining operator knowledgeable about the African environment, the development of the Sadiola Concession turned the corner.

This finding is also uncontested by Kinbauri.

(5) Iamgold's IPO

[31] Iamgold continued to grow its business in the years following the termination of the Agreement. By early 1996, either alone or in combination with others and in addition to its interest in the Sadiola Concession, Iamgold held prospecting licences or interests in mineral exploration rights for gold and other substances on properties in Senegal, Ghana, Guinea and Ecuador. It had also entered into a mineral exploration and development joint venture regarding other properties in West Africa.

[32] Iamgold made its IPO on February 28, 1996, under which a total of 10.4 million of its common shares were offered for sale, either from treasury or existing shareholders, at a price of $5.75 per share. Iamgold's prospectus indicated that the TSX had approved the listing of Iamgold's shares, subject to certain conditions. The IPO established a $404 million (Cdn.) market capitalization cap for Iamgold. In the 90 days following the IPO, Iamgold's share price increased to $6.25 per share.

(6) Damages Phase of the Trial

(i) Valuation Evidence

[33] Neither party led evidence at trial concerning the value of Amalco or Iamgold's assets or shares in 1991, the year in which Amalco's shares would have been listed for sale on the ASE had the amalgamation proceeded. The valuation evidence that was led at trial is critical to the main issues on Kinbauri's appeal. It may be briefly summarized as follows.

(a) Klöckner Industrie

[34] In January 1990, International's shareholders retained a German company, Klöckner Industrie – Anlagen GmbH, to carry out a gold exploration programme on the Sadiola Concession. Klöckner suggested that the Sadiola Hill Deposit contained approximately 5.4 million tonnes of open-pittable mineable reserves in the 'probable' category. In November 1990, Klöckner estimated the value of the Sadiola Concession at $60 to $70 million (U.S.).

(b) WGM

[35] WGM was retained by Iamgold in April 1991 to prepare a preliminary economic assessment of the Sadiola Hill Deposit. It recommended a large mineral exploration programme on the Sadiola Concession. Subsequently, based on 1991-1992 field exploration results, WGM confirmed "the presence of a major and rich gold deposit" and estimated that the area contained a total of 45.8 million tonnes of 'probable' and 'possible' ore reserves.

[36] In a report dated February 2, 1993 that was prepared for Iamgold's "internal corporate planning purposes", WGM assessed the fair market value of Iamgold's interest in the Sadiola Concession on December 15, 1992 at $33 to $39 million (Cdn.). This valuation was based on an assumed total tonnage of 45.8 million tonnes of ore and 'probable' and 'possible' gold reserves of 4.289 million ounces. It also assumed that Anglo American would exercise its options to acquire an interest in the Sadiola Concession, thereby reducing Iamgold's interest to 40% net of an interest obtained by the government of Mali. However, at the date of the valuation, Iamgold continued to hold a 90% interest in the right to develop the Sadiola Concession. WGM's calculations, adjusted to account for this 90% interest, produced a value of $74.25 to $87.75 million (Cdn.) for Iamgold's interest in the Sadiola Concession as at December 1992.

(c) Anglo American

[37] In its December 1993 feasibility study, Anglo American estimated the net present value of Iamgold's interest in the Sadiola Hill Deposit at $133.4 million (Cdn.). This was based on projections of 3.7 million ounces of gold, a constant gold price of $350 (U.S.) per ounce and direct cash operating costs of $123 (U.S.) per ounce during the proposed 13 year lifetime of the development project.

(d) Carter

[38] Kinbauri called Geoffrey S. Carter of Broad Oak Associates as an expert valuation witness at trial. In his valuation report dated December 19, 2001, Carter used five inter-related and overlapping valuation methods to ascertain the fair market value of Iamgold. One of these methods was based on a valuation of Iamgold's assets, while others focused on the value of Iamgold's shares.

[39] Carter testified that he placed the most weight on a 'market capitalization' valuation method, which produced a value of $400 million (Cdn.) for Iamgold from late 1993 to mid-1996. This was based on the IPO price of $5.75 per share for Iamgold's common shares and subsequent trading in those shares at $6.25 per share. Carter also used a 'discounted cash flow - net present value' valuation method to estimate Iamgold's fair market value, which was based on the data and asset valuation contained in Anglo American's feasibility study. Under this method, Carter placed a value of $333 million (Cdn.) on Iamgold's interest in the Sadiola Concession in late 1993.

[40] Carter testified that he valued both the assets and the shares of Iamgold and that "[T]hey effectively are the same in value". However, he did not undertake a valuation of Iamgold for any of the years 1990 to 1992.

(e) Bogden

[41] Gordon J. Bogden, a former employee of CIBC Wood Gundy Securities, testified at trial on behalf of Iamgold. He was qualified as an expert witness on international mining finance and related investment banking. Neither Wood Gundy nor Bogden undertook a formal 'valuation' of Iamgold or Amalco.

[42] In his evidence, Bogden outlined numerous risks associated with the proposed development of the Sadiola Concession that caused Wood Gundy to conclude in July 1994 that it was not prepared to act as lead underwriter on an Iamgold public offering. Bogden also testified that in May 1994, gold companies were trading in the Canadian capital markets at a 2.5 times multiple to their net asset value. Wood Gundy applied this multiple in conducting a net present value analysis of the Sadiola Hill Deposit in 1994, which produced a value of $455 million (Cdn.) for Iamgold's assets as at May 1994.

(ii) Positions of the Parties at Trial

[43] At trial, Kinbauri claimed compensatory damages for Iamgold's breach of the Agreement in an amount equal to the 2.04% equity interest in Amalco to which it was entitled under the Agreement. In reliance on Carter's valuation report, Kinbauri argued that its damages should be calculated on the basis of Iamgold's $400 million (Cdn.) market capitalization value during the period from late 1993 to mid-1996, rather than at the date of Iamgold's breach of the Agreement in 1991. Under this approach, Kinbauri's damages totalled $8.16 million (Cdn.) (2.04% x $400 million (Cdn.)). Kinbauri also claimed the approximate amount of $416,098 for costs and expenses allegedly incurred in connection with the failed amalgamation.

[44] In contrast, Iamgold maintained that Kinbauri's damages should be assessed according to the common law relating to the loss of chance, that is, on the basis of Kinbauri's loss of the chance to complete the amalgamation transaction, calculated at the date of the breach of the Agreement.

(iii) Trial Judge's Findings

[45] The trial judge accepted Iamgold's argument that the calculation of Kinbauri's damages should be based on the 'breach date' – the date when Iamgold wrongfully terminated the Agreement. In assessing Kinbauri's damages, the trial judge took into account the value of Iamgold's underlying assets, the reasonable expectations of the parties and the reasonably foreseeable consequences of entering into the Agreement. He concluded (at para. 84):

> In my view, it is appropriate in this case to base the assessment of compensatory damages on the fair market value of Iamgold's interests in the Sadiola Concession according to the WGM valuation [dated February 2, 1993]. Adjusting the WGM valuation to reflect a 90% interest (instead of 40%), the value of the 2.04% interest of the Kinbauri shareholders in Amalco at the date of the breach of [the Agreement] is calculated at $1,790,100.

[46] Having assessed Kinbauri's compensatory damages at $1.79 million (Cdn.), the trial judge then applied a 10% contingency allowance to reduce these damages to account for the possible denial of the regulatory approvals of the amalgamation that were required under the Agreement. Consequently, Kinbauri was awarded compensatory damages in the net amount of $1.7 million (Cdn.).

III. ISSUES

[47] Before this court, both parties challenge aspects of the trial judge's damages assessment. Kinbauri argues that the trial judge erred: (i) in assessing Kinbauri's damages at the date of the breach of the Agreement and in using an asset value, instead of a share value approach to the assessment, contrary to the principles established in *Asamera, supra*; (ii) in the alternative, in basing his damages assessment on WGM's asset valuation report without applying an appropriate multiplier to determine the market value of Iamgold; and (iii) in reducing Kinbauri's damages on account of contingencies.

[48] On its cross-appeal, Iamgold asserts that the trial judge erred: (i) in his calculation of an appropriate contingency allowance by declining to reduce Kinbauri's damages on account of the possibility that Iamgold shareholder approval of the amalgamation, required under the Agreement, would have been withheld; and (ii) in awarding Kinbauri pre-judgment interest at the rate of 10% per annum without regard to market interest rate fluctuations between 1991 and the date of the damages judgment.

IV. ANALYSIS

(1) Appeal

[49] Kinbauri's primary claim is that it is entitled, on a proper assessment, to damages in the sum of $8.16 million (Cdn.) based on the principles enunciated in *Asamera, supra*, and Carter's valuation of Iamgold's fair market value during the period from late 1993 to mid-1996 ($400 million (Cdn.)). In the alternative, it seeks damages in the sum of approximately $6.14 million (Cdn.), calculated on the basis of Anglo American's December 1993 valuation of Iamgold's interest in the Sadiola Hill Deposit ($133.4 million (Cdn.)). In the further alternative, it submits that if its damages are to be based on WGM's asset valuation report, a multiplier of 2.5 should be applied, resulting in a damages award of $4.13 million (Cdn.). These calculations are all subject to Kinbauri's additional assertion that no contingency allowance should apply in this case. As Kinbauri's primary damages claim rests on its argument that the trial judge was obliged to follow *Asamera* in assessing damages, I will consider this argument first.

(i) Asamera Argument

[50] *Asamera* involved the failure of a bailee of shares to return the shares to their rightful owner. The value of the shares fluctuated dramatically between the dates of the breach of the bailment contract and trial. The owner of the shares obtained an injunction to restrain the bailee from disposing of the shares and sued the bailee for the return of the shares, as well as damages. Significantly, it also agreed to a request from the bailee that it refrain from pressing its litigation for several years. The Supreme Court of Canada held that the measure of damages was presumptively the value of the shares on the breach

date. The court then undertook an analysis of the owner's duty to mitigate its damages, including whether this duty obliged the owner to 'crystallize' its damages by purchasing replacement shares in the market.

[51] The Supreme Court held that the owner of the shares had a specific duty to crystallize its damages by the acquisition of replacement shares in the market so as to minimize the avoidable losses flowing from the bailee's deprivation of the owner's opportunity to market the unreturned shares. The court concluded that, "Such share purchases should have taken place within a reasonable time after the date of breach" (at p. 674). In the circumstances, a reasonable time for the purchase of the replacement shares was approximately 6 years after the breach date, when the owner was free from its agreement not to press its claims against the bailee and when Asamera's share price had begun to show improvement in the market.

[52] The trial judge undertook a detailed consideration of *Asamera*. He concluded that it was of little assistance in this case. He reasoned as follows (at paras. 66 and 67):

> The main point of law in *Asamera* is the application to that case of the proposition…that the owner of shares which a bailee wrongfully fails to return, is not entitled to recover damages based on the value of the shares after a date at which he could reasonably have replaced them in the market. *The analysis in Asamera lends itself to a situation in which shares of a publicly traded corporation are involved at every stage. The availability of a market price at all times facilitates the assessment by a court of a plaintiff's reasonable foreseeable losses for breach of a contract to deliver or redeliver shares and to determine the point in time at which the plaintiff, acting reasonably, could and should have purchased replacement shares. …There was a market price [for Asamera shares]…during the entire course of the litigation between the parties.*
>
> *I am not persuaded by the submissions of counsel for Kinbauri, however, that a rigid application of the method used to assess damages in Asamera is the appropriate way to assess the compensatory damages of Kinbauri in this case.* This case results from an amalgamation transaction which did not proceed because the [Agreement] under which the parties agreed to amalgamation was wrongfully terminated by IAMGOLD. As a consequence, no shares of Amalco were ever issued or listed for public trading as had been the

> intention of the parties as expressed in the [Agreement]. *Prior to the date of repudiation of the [Agreement], there was no discussion between the parties about a price for Amalco shares…There was a relative paucity of evidence led by either party, however, to establish the value of the shares or of the underlying assets of Kinbauri and IAMGOLD at the date of the [Agreement] or of its breach. The analysis followed by the court in Asamera, in which shares of a publicly traded corporation are involved at every stage, simply does not lend itself to this case, in which there is no reliable evidence of the market price of the shares of either Kinbauri or IAMGOLD at the date of the [Agreement] or of its breach* [emphasis added].

[53] The trial judge also recognized the well-established objective of compensatory damages in contract cases (at para. 59):

> Compensatory damages for breach of contract are normally measured by the value of the performance of the contract by the defaulting party. The objective is to place the innocent party, insofar as it can be done by money, in the same position as it would have been in if the contract had been performed.

[54] He was also alive to the limitations on damages recoverable in contract cases, as endorsed by the Supreme Court of Canada in *Asamera* (at para. 62):

> The plaintiff is only entitled to recover that part of its loss that was reasonably foreseeable as a result of the breach at the time the contract was made. The plaintiff is not entitled to recover losses resulting from the breach that were "improbable" or "unpredictable" at the time the contract was made.

[55] Kinbauri acknowledges that the trial judge correctly identified these fundamental principles, as discussed in *Asamera*. It argues, however, that the trial judge erred in their application to the facts of this case by failing to follow the approach to the assessment of damages employed in *Asamera*. In particular, it asserts that the trial judge erred in concluding that damages should be assessed at the date of Iamgold's breach of the Agreement and in basing his assessment on WGM's asset valuation report rather than on Amalco's notional share value.

[56] Kinbauri makes three main submissions in support of this argument. First, it submits that the trial judge erred in distinguishing *Asamera*. It claims that the only difference between the facts here and those in *Asamera* is that Asamera was a public company at the date of the contract and at the date of the contract breach. In this case, but for Iamgold's wrongful breach of the Agreement, Amalco would have been created and, thereafter, its shares would have had a demonstrable market value. Thus, Kinbauri argues that the *Asamera* approach to the assessment of damages governs here.

[57] Next, Kinbauri asserts that the controlling date for the assessment of its damages was not the date of Iamgold's breach of the Agreement; rather, it was the date when Kinbauri was entitled to the delivery of shares in a publicly traded company that held an interest in the Sadiola Concession, as contemplated under the Agreement. It submits that the first possible date for the delivery of such shares was when the shares came into existence in March 1996, following Iamgold's IPO. Accordingly, to put Kinbauri back in the position it would have been in but for Iamgold's breach of the Agreement, Kinbauri submits that the 1996 value of Iamgold's shares ($400 million according to Carter) is the minimum value on which to calculate Kinbauri's damages.

[58] Finally, under the mitigation of damages principles established in *Asamera*, Kinbauri contends that it had a reasonable time after the breach date within which to mitigate its damages. In the circumstances of this case, Kinbauri's first opportunity to discharge its mitigation duty, by 'crystallizing' its damages through the purchase of replacement shares for its lost Amalco shares, arose in March 1996 when Iamgold's shares first became available on the public market.

[59] I am unable to accept these submissions, for the following reasons.

[60] First, I agree with the trial judge that there are important differences between this case and *Asamera*. In *Asamera*, the shares at issue were listed for sale on a public stock exchange at all relevant times. The bailment contract was entered into between two Asamera shareholders. The fact that Asamera was a public company at the date of the breach of the bailment contract *and* at the time when the owner of the shares was obliged to crystallize its damages, established a foundation for a damages assessment based on share value. In *Asamera*, regardless of the date at which the damages were to be assessed, this share value was established by evidence of the price for Asamera's shares as reflected in the trading history of its shares.

[61] In contrast, in this case, there is no evidentiary footing upon which to calculate contract damages based on share value – for either Amalco or Iamgold – prior to March 1996. Kinbauri led no evidence concerning the value of Amalco's shares at any time; nor did it lead evidence concerning the value of Iamgold's shares that was not dependant,

under Carter's preferred valuation method, on the share price established by Iamgold's 1996 IPO.

[62] However, the share value established by Iamgold's IPO pertains to a commercially transformed Iamgold. By 1996, with the committed involvement of Anglo American in the development of the gold deposits in the Sadiola Concession, Iamgold was effectively 'a different company' than it was in 1991. The trial judge found that the development project for the Sadiola Concession "turned the corner" once Anglo American became involved. Its involvement with the development project, in a real sense, signalled a sea change in the prospects for gold production in the Sadiola Concession and, hence, in Iamgold's fortunes. As well, by 1996, Iamgold's business had grown and it was involved in several commercial ventures in various countries.

[63] There was also evidence at trial of considerable investor interest in the shares of gold companies in 1996, with the result that the shares of such companies were then trading at a significant premium to their underlying asset value. In contrast, the trial judge accepted Bogden's uncontradicted evidence that the equity capital markets in Canada in 1990 and 1991 were "virtually moribund" for mining financing proposals.

[64] The value of Iamgold's shares in 1996, therefore, cannot be equated with the value of its shares in 1991, the time when the parties agree that Amalco's shares, but for the breach of the Agreement, would have been available for public trading.

[65] In addition, and importantly, the Supreme Court of Canada confirmed in *Asamera* that, as a general rule, in the computation of contract damages the value of the loss is to be determined at the date of the breach of the contract.

[66] The trial judge in this case recognized that the presumptive date for the assessment of contract damages (the date of the contract breach), may be displaced in appropriate circumstances. He stated (at para. 63): "The normal date of assessment of damages for a breach of contract is the date of the breach. This date is not invariable. In some circumstances a later date is chosen, although the merit of crystallizing damages at an early date is recognized."

[67] The trial judge concluded that the court's departure in *Asamera* from the general rule for the assessment of contract damages was driven by the special circumstances of that case. I agree. As this court observed in *Hunt v. TD Securities Inc.* (2003), 229 D.L.R. (4th) 609 at 629, the postponement in *Asamera* of the date of mitigation from the date of the contract breach was occasioned by several special circumstances, including the owner's litigation forbearance agreement with the bailee, the number of shares in issue, market fluctuations and the time required to arrange the financing and acquisition of replacement shares.

[68] For example, the Supreme Court stated in *Asamera* (at pp. 664-65 and 673-75):

> Some classes of property, including shares, whose value is subject to sudden and constant fluctuations of unpredictable amplitude, and whose purchase is not lightly entered into, call for a modification of the general rule that the value of the property on the "date of breach" be taken as the starting point for the calculation of damages.
>
> ….
>
> We therefore approach the matter of the proper appraisal of the damages assessable *in the peculiar circumstances of this case* on the following basis:…that [the owner of the shares] was under the general duty to mitigate its losses and may not escape this duty by relying on the 1960 injunction interminably; that the specific duty to mitigate and to crystallize its claim for damages within a reasonable time of the breach of contract by bringing action seeking appropriate remedies and to prosecute such action with due diligence, was qualified or postponed by [the bailee's] request of [the owner] sometime prior to 1966 to refrain from enforcing its claims; *that any postponement of such requirement to prosecute and to acquire replacement shares had come to an end at the latest on the awareness of [the owner] that the defaulting party was not only in breach of the duty to return the shares but had disposed of shares at least equal in number to those loaned by [the owner]*…
>
> The application of these principles and determinations to *the particular circumstances in this case* requires in my respectful view a determination of the damages payable by [the bailee] on the assumption that [the owner] ought to have crystallized these damages by the acquisition of replacement shares so as to minimize the avoidable losses flowing from the deprivation by [the bailee] of [the owner's] opportunity to market the 125,000 shares. Such share purchases should have taken place within a reasonable time after the date of breach. *Having regard to all the above-noted special circumstances*, the time for purchase in my opinion was the fall of 1966 when [the owner] was by its own admission free from any agreed restraint not to press its claims against [the bailee]. It

> would be unreasonable to impose on [the owner] the burden of going into the market and acquiring replacement shares at a time when the litigation of its claims was in a dormant state at [the bailee's] request. Furthermore [the owner] acknowledged that by the fall of 1966 the fortunes of Asamera had improved and this had begun to be reflected in the market price of its shares. In short, [the owner] is not in my view entitled in law to any compensation for the loss of opportunity to sell its shares after that date. Thereafter its loss of this opportunity is of its own making [emphasis added].

[69] The type of special circumstances engaged in *Asamera* are not in play here. To the contrary, in my view, Kinbauri's damages crystallized when its loss became clear. It knew by February 1991 that Iamgold did not intend to perform its obligations under the Agreement. It also knew, by November 1991 at the latest, that no public company with shares listed for sale on a stock exchange was in existence. In the event, Amalco was never created. Accordingly, no opportunity to purchase replacement shares of the type envisaged by the Agreement existed at any time.

[70] Kinbauri's submission that the assessment of its damages should be based on Iamgold's value during the period from late 1993 to mid-1996 is flawed for an additional, compelling reason. Kinbauri is not entitled to recover damages for losses that were not within the reasonable contemplation of the parties at the time of the execution of the Agreement. The trial judge found as a fact, and Kinbauri concedes in this proceeding, that the entry of Anglo American into the Sadiola Concession development project was unforeseeable. With the involvement of Anglo American, the value of Iamgold's assets and, ultimately, its shares was materially and unpredictably enhanced.

[71] In my view, this is fatal to an assessment of damages calculated at any date after October 1992, whether based on the Anglo American study or Carter's valuation. Simply put, the quantification of Kinbauri's losses occasioned by Iamgold's breach cannot reasonably encompass the loss of the opportunity to enjoy an equity interest in a mining company that had unpredictably secured a financing and development joint venture agreement with Anglo American in respect of its major asset.

[72] Finally, the significance of the evidentiary gaps in this case, which I have previously mentioned, cannot be overemphasized.

[73] Kinbauri attacks the trial judge's reliance on WGM's December 15, 1992 asset valuation on the ground that a damages assessment based on it cannot "come anywhere close" to placing Kinbauri in the position that it would have enjoyed had the Agreement not been breached. Although it is true that no party requested an asset value assessment

of damages at trial, neither party led any evidence to establish Amalco or Iamgold's share value prior to October 1992.

[74] The 'share value' evidence most heavily relied upon by Kinbauri was established by Carter's testimony at trial and his valuation report. Carter's opinion of Iamgold's fair market value was primarily based on his market capitalization analysis. This valuation was driven by the IPO value of Iamgold's shares in the spring of 1996. However, Bogden pointed out the weaknesses of this approach. He said that, "The market [capitalization] value of a public company does not necessarily reflect its fundamental value, it is a proxy for value…a company can trade at a premium or a discount to its fundamental value, and the purpose of a valuation is to establish that fundamental value or fair market value." Bogden explained that the market capitalization of a public company may vary "quite dramatically" from the value of the company's underlying assets.

[75] Thus, the trial judge was placed in the unenviable position of assessing Kinbauri's damages in the absence of evidence concerning the value of Iamgold or Amalco's shares in 1991. Rather, he was faced with share value evidence pertaining to Iamgold, not Amalco, dating from some 5 years after the date of the breach of the Agreement, when Iamgold was fundamentally a different company, that was derived from a share valuation method of questionable reliability. On the record before him, therefore, how was the trial judge reasonably to assess damages?

[76] Counsel for Kinbauri argues that difficulties in quantifying damages in breach of contract cases do not free a court from the obligation to assess damages to the extent possible on the existing evidentiary record; nor do they justify the denial of damages or the award of only nominal damages unless otherwise warranted: see *Eastwalsh Homes Ltd. v. Anatal Developments Ltd.* (1993), 100 D.L.R. (4th) 469 (Ont. C.A.), leave to appeal to the Supreme Court of Canada refused, 104 D.L.R. (4th) vii and *Webb & Knapp (Canada) Ltd. v. City of Edmonton* (1970), 11 D.L.R. (3d) 544 (S.C.C.).

[77] I agree. However, as this court observed in *Eastwalsh*, where it is clear that the defendant's breach has caused loss to the plaintiff (at pp. 483-84):

> [I]t is no answer to the claim that the loss is difficult to assess or calculate. The concept of the loss of a chance then begins to operate and the court will estimate the plaintiff's chance of obtaining a benefit had the contract been performed. But even in this situation, the Supreme Court of Canada has said in *Kinkel v. Hyman* [[1939] 4 D.L.R. 1, [1939] S.C.R. 364] that proof of the loss of a mere chance is not enough; the plaintiff must prove that the chance constitutes "some

> reasonable probability" of realizing "an advantage of some real substantial monetary value".

[78] Kinbauri bore the burden of establishing the value of the loss of what it had bargained for – the opportunity to enjoy a 2.04% equity position in a public company that enjoyed an interest in the Sadiola Concession. It lost that opportunity in February 1991, when Iamgold breached the Agreement. Thereafter, there was no market value for Amalco, or any opportunity for Kinbauri to replace its lost shares in Amalco, because Amalco was never created. In these circumstances, in my view, it was incumbent on Kinbauri to demonstrate that there was a reasonable probability that the lost opportunity to enjoy shares in Amalco would have generated "an advantage of some real substantial monetary value" prior to Anglo American's commitment to the Sadiola Concession development project.

[79] Kinbauri failed to discharge this burden. The evidence established that there was no market for Iamgold's shares in 1991. If Amalco had been created, it would have succeeded to Iamgold's interest in the Sadiola Concession. The trial judge found that, in 1991, the Sadiola Concession was still at an exploratory stage; its ore reserves were classified as 'probable', not proven; no feasibility study had been undertaken; there were serious management, development, political and financial risks associated with the project; and the equity capital markets in Canada for mining financing proposals were "virtually moribund". These findings are unchallenged and amply supported by the evidence.

[80] Consequently, the value of Amalco's shares and, indeed, the value of Iamgold's shares prior to October 1992, was unknown on the record before the trial judge. This court is in no better position than the trial judge to determine the value of such shares in 1991. In contrast, the earliest valuation of Iamgold's assets was the February 1993 WGM report, which provided an asset valuation as at December 1992. In the absence of relevant share value evidence, the trial judge determined to assess Kinbauri's damages on the basis of the earliest available valuation evidence – WGM's asset valuation. In essence, he relied upon this evidence as a proxy for the notional share value of Iamgold or Amalco's shares prior to October 1992. On the record that confronted the trial judge, this was not unreasonable.

[81] I conclude that the trial judge's use of WGM's valuation of Iamgold's interest in the Sadiola Concession as at December 1992, and his finding that this evidence was the "best evidence" available concerning the value of Iamgold's underlying assets, were entirely reasonable, supported by the evidence and consistent with his obligation to assess Kinbauri's damages on the basis of the case as led before him. Indeed, in my view, no reliable alternative was open to the trial judge on the evidence.

(ii) Multiplier Claim

[82] Kinbauri argues that the trial judge erred in basing his damages assessment on WGM's asset valuation report without applying an appropriate multiplier to determine Iamgold's market value. It submits that the trial judge ignored evidence that the market value of a public company that owns a gold deposit, as reflected by its share price, is based on a multiple of the company's assets.

[83] Kinbauri asserts that the appropriate multiplier in this case is 2.5. If this multiplier is applied to WGM's valuation of Iamgold's interest in the Sadiola Concession as at December 15, 1992, as adjusted to account for Iamgold's 90% interest in the Sadiola Concession at that time, it results in a value of $185.63 to $219.38 million (Cdn.) for Iamgold, and a value of about $4.13 million (Cdn.) for Kinbauri's 2.04% interest.

[84] Similarly, if a 2.5 multiplier is applied to Anglo American's $133.4 million (Cdn.) estimate of Iamgold's net present value in December 1993, it produces a value of approximately $6.8 million (Cdn.) for Kinbauri's interest.

[85] In my view, Kinbauri's claim for the application of a multiplier must be rejected. I say this for several reasons.

[86] First, I have already concluded that the proper date for the assessment of Kinbauri's damages was the 1991 date of the breach or, at the latest, November 1991, when the parties agree that Amalco's shares would have been listed for trading on the ASE if the amalgamation transaction had been completed. However, there was no market for Iamgold's shares in 1991. Therefore, application of any multiplier has no effect on Iamgold's 1991 market value.

[87] Second, there was no evidence at trial concerning an appropriate multiplier for gold companies trading in Canada's capital markets in 1991 or 1992. Bogden, who confirmed in his testimony that Wood Gundy used a multiplier of 2.5 in arriving at its calculation of the net present value of Iamgold, was clear that this multiplier applied to the trading in securities of gold companies in 1994. He gave no evidence concerning an appropriate multiplier for such companies in 1991 or 1992.

[88] Similarly, Carter's testimony and the evidence concerning WGM's report are of no assistance on this issue. WGM did not utilize a multiplier in its February 1993 valuation report. Although Carter applied a 2.5 multiplier in some of his calculations of Iamgold's value, this was done to obtain a fair market value for Iamgold commencing in late 1993. Carter did not prepare a valuation of Iamgold for any of the years from 1990 to 1992, under any methodology; nor did he provide evidence of an appropriate multiplier in any of these years.

[89] Bogden testified that many factors affect whether the securities in a mining company trade at premiums beyond the assessed value of the company. He said that the value of such companies increases or falls at the various stages of initial resource exploration, feasibility studies, examination of financing sources, the obtaining of financing, production completion tests and, ultimately, at the production stage. As well, commodities values affect the trading values of mining securities. For example, according to Bogden, when Iamgold made its IPO in 1996, the market value of mining companies was established by trading at a factor of 3 times net asset value; however, thereafter, these trading premiums were either eliminated or decreased significantly. In effect, therefore, although the securities of mining companies may trade at a premium, it was Bogden's evidence that a premium or multiplier is neither constant nor assured.

[90] I agree with Iamgold that, absent evidence concerning an appropriate multiplier in 1991 or 1992, there was no evidentiary foundation for the application of a multiplier in the assessment of Kinbauri's damages. It was not open to the trial judge to speculate on an appropriate multiplier for 1991 or 1992; nor was it open to him to retrospectively set an appropriate multiplier by extrapolating from the evidence of multipliers used in 1993 or 1994, absent evidence that such multipliers were also appropriate for and in use in 1991 or 1992. Consequently, I am far from persuaded that the trial judge erred by failing to utilize a multiplier, at any level, in his assessment of Kinbauri's damages.

(iii) Kinbauri's Contingencies Claim

[91] The trial judge applied a 10% contingency allowance to reduce Kinbauri's compensatory damages in recognition of the possible denial of regulatory approvals of the amalgamation. He reasoned as follows (at paras. 69 and 78):

> Counsel for IAMGOLD submits that the compensatory damages of Kinbauri should be measured by the common law relating to loss of chance: *Chaplin v. Hicks*, [1911] 2 K.B. 786 (C.A.). This approach would require an evaluation of the chance of completing the amalgamation transaction upon which Kinbauri and IAMGOLD had agreed in the [Agreement]. This approach is taken where the loss can be shown to be more probable than not, but substantially less than certain. As a result of a breach of contract, a plaintiff may lose the chance of gaining a benefit. The plaintiff can recover damages for loss of the chance even though it is not certain that he would have received the benefit if the contract had been performed. In deciding how much the chance is worth, the court will consider: (1) the number of contingencies on which it depends; and (2) the likelihood of

> their being satisfied in the plaintiff's favour. Quantifying the plaintiff's damages in such a case is necessarily a speculative exercise by the court.
>
> ….
>
> In my view, the only true third party approvals in this transaction were those of the ASE [and the securities commissions]. As to those approvals, the court received the videotape evidence of Gerald Romanzin, an official of the ASE, that the amalgamation would likely have been approved, if the public float requirement were complied with. …In its non-compliance letter dated February 13, 1991, the ASE recognized that the responsibility for resolving the issue of the public float lay in the shareholdings of IAMGOLD in Amalco. …The 2.04% of the shareholdings of Kinbauri's shareholders in Amalco would clearly constitute 2.04% of the requisite public float. Romanzin also testified that the approval of the ASE was the key regulatory approval. If obtained, the regulatory approvals of the [securities commissions] would have followed. His evidence on this point was confirmed by both expert legal witnesses at the damages segment of this trial. I would assess the likelihood of these third party regulatory approvals being obtained at 90%, if the [Agreement] had not been breached by IAMGOLD.

[92] Kinbauri argues that a finding of *any* risk of the denial of the requisite regulatory approvals is not supported by the evidence. It also contends that a contingency allowance for third party regulatory approvals for a securities exchange listing, "even if justified", has no application under the asset value approach to the assessment of damages utilized by the trial judge. I disagree.

[93] The courts have recognized the application of a contingency allowance to the calculation of damages in breach of contract cases where performance of the contract may have been prevented, notwithstanding the wrongdoer's breach, by some other intervening factor. Where the plaintiff establishes that its loss was caused by the defendant's breach of contract, but is unable to prove loss of a definite benefit, demonstrating only the 'chance' of receiving a benefit had the contract been performed, the courts will discount the value of the chance by the improbability of its occurrence: see *Eastwalsh, supra*; *Chaplin, supra; Webb & Knapp (Canada) Ltd., supra;* and *Multi-Malls*

Inc. v. Tex-Mall Properties Ltd. (1980), 108 D.L.R. (3d) 399, affirmed 128 D.L.R. (3d) 192 (C.A.), leave to appeal to the Supreme Court of Canada refused [1982] 1 S.C.R. xiii.

[94] In this case, Iamgold's contract breach was established during the liability phase of the trial. Kinbauri bore the onus of demonstrating its loss. The trial judge found that the amalgamation was conditional upon approval by the ASE and the applicable securities commissions. On these facts, unless it can be said that there was virtually no realistic chance that the requisite regulatory approvals would be denied, the application of a contingency allowance cannot be said to be inappropriate.

[95] The trial judge was clearly of the view that there was some material chance that the approval of the amalgamation by the ASE and, correspondingly, of the securities commissions, would not be forthcoming. He discounted Kinbauri's lost opportunity of enjoying an equity interest in Amalco by taking into account the improbability of ASE approval of the amalgamation. He found that this improbability was low (10%). I see no overriding and palpable error in this finding, as is required to support appellate intervention.

[96] The ASE's approval of the amalgamation was dependant upon satisfaction of its public float requirement. The evidence at trial indicated that this could have been achieved by Iamgold in several different ways. Compliance with the requirement was in the control of Iamgold and its shareholders. The manner of its compliance, however, still required ASE scrutiny and approval. It is not suggested that the ASE's approval of the amalgamation was guaranteed, regardless of the method by which Iamgold might have sought to achieve compliance with the public float requirement.

[97] Kinbauri's corporate solicitor testified that it "would probably take a couple of months" to satisfy the ASE, assuming that the necessary documentation was filed with the ASE as a package. She later clarified that a period of 4 to 6 months would have been required. However, Kinbauri's solicitor was not asked and did not suggest that ASE approval was a virtual certainty following the submission to the ASE of the necessary documentation.

[98] Nor did the evidence of Gerald Romanzin, a representative of the ASE, indicate that ASE approval would follow automatically if Iamgold sought to satisfy the public float requirement. He said that ASE approval "likely" would have been forthcoming if the public float requirement was met.

[99] Based on this evidence, the probability of obtaining ASE approval of the amalgamation was high – but not absolute. There remained some degree of uncertainty. This evidence supports the trial judge's application of a contingency allowance. Kinbauri does not challenge his selection of 10% as the appropriate contingency percentage.

[100] Finally, although Kinbauri also argues that the imposition of any contingency allowance was misplaced where the trial judge's damages assessment was based on Iamgold's underlying assets rather than on its share value, it advanced no authority in support of this proposition. In my view, there is no principled basis upon which to conclude that the application of the law relating to loss of chance in the assessment of contract damages should be so restricted.

(2) Cross-appeal

(i) Iamgold's Contingencies Claim

[101] Iamgold asserts that the trial judge erred in his calculation of the contingency allowance in failing to include a discount to reflect the possibility that approval of the amalgamation by Iamgold's shareholders would have been withheld and in concluding that the only "true third party approvals" required in the reverse take-over transaction were those of the ASE and the involved securities commissions. In essence, Iamgold urges the application of a higher contingency allowance.

[102] In my view, on the record before the trial judge and in the face of his unchallenged factual findings, the trial judge's rejection of this claim is unassailable.

[103] The trial judge made the following findings in his reasons for judgment dated December 23, 2002 (at paras. 76 and 77):

> On the evidence at both segments of the trial, at all material times IAMGOLD was completely in the grip of its two major shareholders, Nathanson and Pugliese. Between them, they owned or controlled through their personal corporations Marzen and Fundeco, more than 76% of the voting shares of IAMGOLD on January 7, 1991. …Through the Shareholder Agreement and accompanying powers of attorney, they voted 100% of the shares of IAMGOLD. Those documents specifically empowered them "to vote in favour of the proposed amalgamation of the Corporation with a publicly listed corporation". …The Shareholders Agreement became effective as of the date of incorporation of IAMGOLD, on March 27, 1990. Under the Management Group Agreement dated as of May 31, 1990, and accompanying powers of attorney, Nathanson and Pugliese would have exercised similar rights to vote all of the shares of Amalco to be held by the former shareholders of IAMGOLD.

> Most items submitted to the court as "third party" approvals by IAMGOLD's counsel are standard legal requirements for approvals by the directors and shareholders of IAMGOLD and Kinbauri to carry out the amalgamation transaction in accordance with the [Agreement]. In some cases, the actions of directors and shareholders of a corporation may be unpredictable and lead to uncertainty about the result. This case is not one of them. It is not seriously questioned that the directors and shareholders of Kinbauri would have approved the amalgamation. At the damages segment of the trial, both Nathanson and Pugliese testified that they would have voted against the amalgamation. This is self-serving testimony after the fact. On August 14, 1990, on the letterhead of IAMGOLD, they gave formal written assurances to Rampton of "the intention of IAMGOLD to complete the amalgamation in accordance the [Agreement]". … At that time, they were specifically authorized under the Shareholder Agreement to vote all of the shares of the other shareholders of IAMGOLD in favour of the amalgamation. It was in their power to decide whether to go ahead with the amalgamation or not.

[104] These findings are fatal to Iamgold's contingencies claim. Although the trial judge did not expressly state that Pugliese and Nathanson were obliged to vote in favour of the amalgamation, Pugliese and Nathanson's conduct, in their capacities as both directors and shareholders of Iamgold, indicates that they were committed to vote to approve the amalgamation.

[105] Pugliese and Nathanson, on behalf of their respective holding companies through which they held shares in Iamgold, signed the Shareholder Agreement, under which each Iamgold shareholder appointed Pugliese and Nathanson as his or its attorney and expressly agreed that, "such powers of attorney *shall be exercised* to vote in favour of the proposed amalgamation of [Iamgold] with a publicly listed corporation [Kinbauri] [emphasis added]". In this manner, Pugliese and Nathanson committed to exercise their powers of attorney and the other shareholders of Iamgold directed that their voting rights attaching to their Iamgold shares be cast in favour of the amalgamation.

[106] The trial judge held that the Shareholder Agreement and accompanying powers of attorney "empowered" Pugliese and Nathanson to vote in favour of the amalgamation. In fact, these documents required them so to do. Moreover, little purpose would be achieved in obtaining this direction from the other Iamgold shareholders if Pugliese and

Nathanson, the controlling shareholders of Iamgold, were not themselves intent on approving the amalgamation.

[107] As well, the May 1990 Management Agreement entered into by all the shareholders of Iamgold provided Pugliese and Nathanson with powers of attorney to exercise the voting rights attaching to Amalco shares at all Amalco shareholders' meetings after the amalgamation took place. This grant of authority effectively placed control of 98% of the voting shares of Amalco with Pugliese and Nathanson. Once again, if any real possibility existed that the amalgamation would not be approved by Iamgold's shareholders, these authorizations, which followed on the voting direction and authorization contained in the Shareholder Agreement, would serve little meaningful purpose.

[108] Thereafter, by written resolution dated June 22, 1990, the directors of Iamgold approved the amalgamation in principle. This resolution was accompanied by a confirmation from the Iamgold shareholders, including Pugliese and Nathanson through their respective holding companies, by which the shareholders "confirmed, ratified and approved" the directors' resolution.

[109] On August 14, 1990, Pugliese and Nathanson wrote to the president of Kinbauri confirming Iamgold's intention to complete the amalgamation in accordance with the Agreement and indicating that "time shall be of the essence". There was no indication in this letter that Pugliese and Nathanson were offering this assurance only in their capacities as directors of Iamgold and that they were reserving the right, as the controlling shareholders of Iamgold, to effect a diametrically different result.

[110] By this conduct, Pugliese and Nathanson both indicated their intent to proceed with the amalgamation and took steps to ensure their legal ability to effect the approval of the amalgamation by the other Iamgold shareholders. All these activities took place before the delivery of the ASE's preliminary non-compliance notice in February 1991. Thus, any possibility that Pugliese and Nathanson would not approve the amalgamation flowed from the implications of the public float requirement referenced in the ASE's non-compliance notice. This court, in dismissing Iamgold's appeal from the liability judgment, stated:

> *The trial judge made two crucial findings, based on credibility. First, several principals of the appellant were aware of the public float requirement at the time the [Agreement] was signed. Second, compliance with the public float requirement was not a difficult problem and the appellant could have done so in a number of possible ways.*

> The trial judge further found that the appellant made no effort to satisfy its contractual obligation and that by its own actions (the Shareholders Agreement and the Management Group Agreement which it failed to disclose) the appellant made compliance with the public float requirement impossible.
>
> We see no merit in the appellant's argument that there was no contract until the shareholders' approval had been given. *The directors controlled 98% of the shares*. In the end, the trial judge concluded that the appellant was not justified in unilaterally terminating the [Agreement] which, for other business reasons, was no longer in its corporate interests. The appellant had acted towards the respondent in questionable good faith [emphasis added].

The same reasoning applies to Iamgold's contingencies claim.

[111] Finally, Iamgold maintains that Pugliese and Nathanson's only obligation to vote in favour of the amalgamation arose from their role as directors, rather than as shareholders of Iamgold and that, in the latter capacity, they were free to vote as they wished.

[112] On the record before this court, these submissions cannot succeed. The only evidence at trial that Iamgold shareholder approval would not have been forthcoming was the testimony of Pugliese and Nathanson, both of whom asserted that they would have withheld their approval of the amalgamation after learning of the ASE's public float requirement. The trial judge considered and rejected this evidence, as he was entitled to do, describing it as "self-serving testimony after the fact". He found, essentially, that these assertions were claims made to advance Pugliese and Nathanson's litigation interests. This finding flowed from his assessment of Pugliese and Nathanson's credibility on this issue and was open to the trial judge on the evidence. Accordingly, it attracts considerable deference from this court.

[113] On the findings of the trial judge, shareholder approval of the amalgamation was anticipated and assured, but for Iamgold's wrongful termination of the Agreement. It is not open to Iamgold to seek to reduce Kinbauri's damages in reliance on the possibility of non-compliance with a condition to the amalgamation, the satisfaction of which, throughout, was entirely within Pugliese and Nathanson's control and authority.

(ii) Pre-judgment Interest Rate

[114] The trial judge's reasons in support of his award of pre-judgment interest to Kinbauri are briefly set out (at para. 89):

> Kinbauri is entitled to prejudgment interest on the amount of its compensatory damages…calculated in accordance with sections 127 and 128 of the *Courts of Justice Act*. This action was commenced on August 27, 1991. Under ss. 127(1), the applicable annual rate of prejudgment [*sic*] interest appears to be 10%. I see no reason to vary the applicable annual rate of interest.

[115] Kinbauri's action against Iamgold was commenced on August 27, 1991. Iamgold's breach of the Agreement occurred in February 1991. The trial judge's reasons for judgment concerning the damages phase of the trial were released more than ten years later, on December 23, 2002. It is not contested that 10% was the highest rate of annual interest during the 10-year period between the date of the commencement of Kinbauri's action and the date of the trial judge's decision. Indeed, the applicable interest rate during this 10-year period was volatile, reaching as low as 2.3%. The average interest rate during this period was 5.6%.

[116] Iamgold argues that the trial judge erred in failing to consider the fluctuations in the applicable market interest rates during the 10 years following the commencement of Kinbauri's action. It submits that the award of pre-judgment interest at the rate of 10% per annum, notwithstanding these fluctuations, is punitive and not rationally connected to the actual interest rates that prevailed over the relevant period. Kinbauri, in turn, asserts that the awarded rate of pre-judgment interest is a matter of discretion for the trial judge and that, absent any demonstration that the trial judge proceeded on an erroneous principle of law, there is no basis for appellate intervention. I agree with Kinbauri's submission.

[117] Section 128(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "*CJA*") provides that a person who is entitled to an order for the payment of money is also entitled to an award of interest thereon at the pre-judgment interest rate, "calculated from the date the cause of action arose to the date of the order". The applicable pre-judgment interest rate is established by s. 127 of the *CJA*. In February 1991, the applicable rate was 10% per annum.

[118] Section 130(1) of the *CJA* authorizes a court, in its discretion and where it considers it just, to disallow pre-judgment interest, to allow pre-judgment interest at a rate higher or lower than that provided in s. 128, or to allow interest for a period other

than that provided in s. 128. By s. 130(2) of the *CJA*, the court is obliged to consider various enumerated factors, including "changes in market interest rates", when exercising its discretion under s. 130(1).

[119] Although the trial judge did not expressly refer to s. 130 of the *CJA*, he stated: "I see no reason to vary the applicable annual rate of interest." Thus, he explicitly recognized his authority to vary the pre-judgment interest rate that applied under ss. 127 and 128 of the *CJA*. Trial judges are presumed to know the law. It cannot be inferred, therefore, that the trial judge failed to direct himself to the factors outlined in s. 130(2) when exercising his discretion under s. 130(1).

[120] This court has recognized that the legislature's policy in providing for the payment of pre-judgment interest is intended to encourage early settlements and the timely compromise of litigation: see, for example, *Spencer v. Rosati* (1985), 50 O.R. (2d) 661 (C.A.) at 665 and *Borland v. Muttersbach*, [1986] 53 O.R. (2d) 129 (C.A.) at 145. In this case, the awarded rate of interest of 10% was 4.4% higher than the average rate of interest that prevailed during the relevant period. The possibility that the trial judge would award pre-judgment interest in accordance with s. 128 at the rate applicable at the time of Iamgold's breach of the Agreement was a risk of the damages assessment litigation from the outset, especially where, as here, the trial judge had already concluded that Iamgold had wrongfully breached the Agreement and that it had acted in questionable good faith.

[121] In the result, I see no error in the trial judge's discretionary award of the rate of pre-judgment interest and would not interfere with it.

V. DISPOSITION

[122] Accordingly, for the reasons given, I would dismiss the appeal and the cross-appeal. As success in this proceeding has been divided, I would make no award of costs.

RELEASED:

"NOV 10 2004"

"JL" "E.A. Cronk J.A."

"I agree Janet Simmons J.A."

LASKIN J.A. (Concurring):

[123] I have had the benefit of reading Cronk J.A.'s reasons. I, too, would dismiss Kinbauri's appeal and IAMGOLD's cross-appeal. I agree with my colleague's analysis of the issues on the cross-appeal. I write these brief concurring reasons because I take a different approach to the issues on Kinbauri's appeal.

[124] Kinbauri's appeal rests on two related submissions: the trial judge erred by choosing both the wrong date and the wrong yardstick to assess Kinbauri's damages. The trial judge assessed Kinbauri's damages at the date its contract was breached (February 1991); Kinbauri contends that its damages should have been assessed at a later date, ideally in March 1996 when IAMGOLD's shares were publicly listed on the TSX. Furthermore, the trial judge measured Kinbauri's damages in an amount equal to 2.04 per cent of the value of IAMGOLD's interest in the Sadiola Concession. Kinbauri contends that its damages should have been measured in an amount equal to what it bargained for: 2.04 per cent of the value of the shares of Amalco.

i. Date for assessment

[125] As Cronk J.A. points out, damages for breach of contract are generally assessed at the date of breach. An early crystallization of the plaintiff's damages promotes efficient behaviour: the litigants become as free as possible to conduct their affairs as they see fit. Early crystallization also avoids speculation: the plaintiff is precluded from speculating at the defendant's expense by reaping the benefits of an increase in the value of the goods in question without bearing any risk of loss. See S.M. Waddams, *The Law of Damages* 4th ed. (Toronto: Canada Law Book Inc., 2004) at paras. 1.670-1.680.

[126] A court may, however, depart from the general rule when it is in the interests of justice to do so. See *Johnson v. Agnew*, [1980] A.C. 367 (H.L.) and *Asamera, supra*. This case presents one example where departing from the general rule may be in the interests of justice because no market existed to replace the undelivered shares at the date of breach. It is on the significance of the absence of a market that I differ from my colleague. Cronk J.A. suggests that the absence of a market is a reason why damages should be assessed at the date of breach or shortly afterwards. In my view, the absence of a market is a reason why the date of assessment may be postponed for a reasonable period after the date of breach.

[127] In a contract for the delivery of shares, an early crystallization of the plaintiff's damages is tied to the plaintiff's ability to replace the shares or to purchase a reasonable substitute in the market. Thus, assessing the plaintiff's damages at the date of the defendant's breach is generally appropriate because on the date of the non-delivery of the shares the plaintiff has a reasonable opportunity to go into the market and replace the shares promised to it. As *Asamera* shows, even where a market to replace the shares

existed at the date of breach, special circumstances may justify postponing the date of assessment for several years beyond the date of breach. See Waddams, *supra*, at paras. 1.760-1.840; *J. & E. Hall v. Barclay*, [1937] 3 All E.R. 620 (C.A.); and *Bwllfa and Merthyr Dare Steam Collieries (1891), Ltd. v. Pontypridd Waterworks Co.*, [1903] A.C. 426 (H.L.).

[128] Where, however, on the date of breach, no market to replace the shares existed at all, I see a greater justification for postponing the date of assessment. Here, where IAMGOLD defaulted on its promise to amalgamate and, therefore, on its promise to deliver to Kinbauri 2.04 per cent of the shares of Amalco, no market existed for Kinbauri to replace those shares or to purchase a reasonable substitute. In my view, Kinbauri was entitled to wait a reasonable period before crystallizing its damages. It was just in all of the circumstances that it be permitted to do so. I would fix two years as the outside limit of a reasonable period. Therefore, if, for example, within two years of the date of breach IAMGOLD had effected a similar reverse takeover of another dormant public company, Kinbauri may have been entitled to measure its damages by the share value of this new public company.

[129] However, in this appeal, Kinbauri seeks to extend the date for assessment into the period from 1993-1996 and to quantify its damages either by reference to the value of IAMGOLD's shares on the TSX in 1996 or by the use of a multiplier. My problem with Kinbauri's position is threefold. First, extending the date for assessment beyond two years from the date of breach does not seem to be reasonable. Second, as Cronk J.A. points out, Kinbauri led no evidence of an appropriate multiplier for gold mining companies during the period of February 1991 to February 1993. Third, as Cronk J.A. also points out, on the findings of the trial judge, Anglo-American's participation – which led to IAMGOLD's initial public offering in early 1996 – was not contemplated by Kinbauri and IAMGOLD when they signed their amalgamation agreement. Therefore, in my opinion, at most Kinbauri was entitled to postpone the date for assessment of its damages until February 1993, two years after the date of breach.

ii. The yardstick

[130] Kinbauri also takes issue with the trial judge's use of asset values to assess its damages. As it did for a later period, Kinbauri could have led evidence of the notional value of Amalco or of an appropriate multiplier in February 1993. But it did not do so. Therefore, even if I am justified in postponing the date of assessment until February 1993 I have no better evidence to measure Kinbauri's damages than did the trial judge. The only relevant evidence up to that date was WGM's December 15, 1992, asset evaluation. Thus, the trial judge cannot be faulted for relying on this evaluation for assessing Kinbauri's damages.

[131] The trial judge appreciated that Kinbauri bargained for 2.04 per cent of the equity of a public company holding IAMGOLD's interest in the Sadiola Concession, not merely 2.04 per cent of IAMGOLD's interest in the Concession itself. However, as he had no expert evidence of the value of Kinbauri's notional equity interest, he used 2.04 per cent of the value of the underlying asset as a proxy for the equity interest. That he did so is evident from para. 67 of his reasons.

> From the evidence at both segments of this trial, it is clear that the main contribution which Kinbauri was making to the intended amalgamation was the intangible asset of its status as a public company and its listing on the ASE. The main asset which IAMGOLD was bringing, was its interest in the Sadiola Concession. There was a relative paucity of evidence led by either party, however, to establish the value of the shares or of the underlying assets of Kinbauri and IAMGOLD at the date of the value of the shares or of the underlying assets of Kinbauri and IAMGOLD at the date of the Contract or of its breach. The analysis followed by the court in *Asamera*, in which shares of a publicly traded corporation are involved at every stage, simply does not lend itself to this case, in which there is no reliable evidence of the market price of the shares of either Kinbauri or IAMGOLD at the date of the Contract or of its breach. In this case, it will be necessary to consider the value of the underlying assets on the material available, for the purpose of determining any compensatory damages for Kinbauri.

[132] In the light of the limited evidence available to measure Kinbauri's damages at the date of breach (February 1991) or at the date Amalco was to be listed on the ASE (November 1991) or even two years after the date of breach (February 1993), the trial judge did not err in relying on the WGM report to assess Kinbauri's damages.

iii. The ten per cent contingency discount

[133] As Cronk J.A. notes, the issue here is not the amount of the discount but whether the trial judge should have applied any discount at all. The trial judge reduced Kinbauri's damages by ten per cent to account for the possibility that the ASE would not approve the amalgamation.

[134] At first blush it seems anomalous to discount Kinbauri's damages because of the possibility IAMGOLD would not obtain regulatory approval. The trial judge measured Kinbauri's damages not on the basis of an equity interest in a public company, but on the

basis of an asset valuation report. The contingency discount is acceptable, however, because the asset valuation stood as a proxy for Kinbauri's equity interest.

[135] I would dismiss the appeal and the cross-appeal.

"John Laskin J.A."

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CITATION: Kipfinch Developments Ltd. v. Westwood Mall (Mississauga) Limited, 2010 ONCA 45
DATE: 20100122
DOCKET: C49416

COURT OF APPEAL FOR ONTARIO

Goudge, Cronk and LaForme JJ.A.

BETWEEN:

Kipfinch Developments Ltd.

Plaintiff (Appellant)

and

Westwood Mall (Mississauga) Limited

Defendant (Respondent)

Harvin D. Pitch, for the appellant

Geoff R. Hall and Adam Ship for the respondent

Heard: December 14, 2009

On appeal from the judgment of Justice Herman Wilton-Siegel of the Superior Court of Justice, dated September 3, 2008, with reasons reported at (2008), 50 B.L.R. (4th) 233.

By the Court:

[1] The appellant Kipfinch Developments Ltd. (“Kipfinch”) entered into an agreement on April 16, 2004 to purchase the Westwood Mall from the respondent Westwood Mall (Mississauga) Limited (“Westwood”). Thirty percent of the Mall was empty, presenting the appellant with the opportunity to revitalize and lease-up an additional 90,000 square feet. The agreement entitled Kipfinch to carry out environmental testing as part of its due diligence. It also provided that unless Kipfinch gave notice that its due diligence entitlement was satisfied or waived by June 15, 2004(later extended to June 16, 2004), the agreement would terminate at that point.

[2] In May 2004, Westwood declined to permit Kipfinch to carry out its environmental testing and as a result the agreement came to an end on June 16, 2004. Kipfinch then sued Westwood for breach of contract.

[3] Wilton-Siegel J. concluded that Westwood breached its contractual obligation by refusing to allow Kipfinch to conduct its environmental testing. On appeal, Westwood does not challenge this finding, and the appeal proceeded on the basis of Westwood’s liability for damages for breach of the agreement.

[4] The trial judge determined damages by applying the principle of lost chance. He found that the breach caused Kipfinch the loss of the contractual opportunity to close the transaction. He determined that had the breach not occurred, Kipfinch would have had a 50 per cent probability of closing the transaction.

[5] The trial judge then quantified the damages Kipfinch suffered. He did so as of the date the agreement terminated, using a discounted cash flow methodology, but he excluded the recovery of certain management expenses that Kipfinch argued it would have been able to pass on to the tenants. He concluded that if the transaction had closed, Kipfinch would have realized the profit or gain of approximately $660,000. Given the 50 per cent probability of closing, he awarded damages to Kipfinch in the amount of $330,000.

[6] In this court, Kipfinch raises four challenges to these findings.

[7] The appellant's first challenge is to the finding that, had the breach not occurred, there was a 50 per cent chance that the transaction would have closed. It argues that this conclusion constitutes a palpable and overriding error of fact.

[8] In reaching this conclusion, the trial judge examined three separate contingencies that each constituted a risk to the successful conclusion of the transaction: the risk that Kipfinch's environmental testing could not be successfully completed due to physical conditions; the risk that this testing would not delineate environmental contamination sufficiently to allow a satisfactory report to Kipfinch's lenders; and the risk that the testing would reveal contamination that exceeded the threshold considered acceptable by the lenders. On the basis of expert evidence, the trial judge evaluated each risk to be not merely speculative, but instead a real, although not significant, possibility.

[9] The appellant does not contest these individual findings, nor is there any basis to do so. Rather, the appellant submits that, taken together, they do not justify the conclusion that the transaction had a 50 per cent chance of closing.

[10] We do not agree. The trial judge simply took three small but separate risks that the transaction would fail and accumulated them to reach his conclusion that there was a 50 per cent chance of failure, which he then expressed in positive terms as a 50 per cent possibility that the transaction would close. He did not err in proceeding in this way. His conclusion of a 50 per cent possibility of closing is not a palpable and overriding error.

[11] The appellant also attacks this conclusion by saying that the trial judge should have applied the principle of *omnia praesumuntur contra spoliatorem* (i.e., everything is presumed against the wrongdoer) where the nature of the wrong makes it difficult for a plaintiff to establish a loss. The appellant states that this principle required the trial judge to discount Westwood's expert evidence on the three risks to the transaction, because Westwood prevented Kipfinch from establishing the facts with certainty when it prevented Kipfinch from conducting environmental testing.

[12] Again we disagree. The issue addressed here was causation: was the lost chance caused by the appellant's breach of contract? On this issue, the appellant can get no assistance from the above legal principle. The appellant could not rely on any presumption, but was required to prove on a balance of probabilities that its projections of risk were a close approximation of what would have occurred had the contract been

performed: see: *Ticketnet Corp. v. Air Canada* (1997), 154 D.L.R. (4th) 271 (Ont. C.A.) at para. 84.

[13] While, in an appropriate case, the principle can be relied on by a plaintiff when the issue is the quantification of damages, that is not what the appellant seeks here. The respondent's refusal to permit the appellant to do environmental testing is simply irrelevant to the task of quantifying the value of the 50 per cent chance that the transaction would close. The principle has no application to the quantification of damages in this case.

[14] The appellant's second challenge is to the trial judge's assessment of damages as of the date the transaction terminated, rather than a date two years later when the leasing-up of the empty space would have been completed. Use of the later date would encompass the general increase in property values that occurred over those two years.

[15] We see no error in the way the trial judge proceeded. The general rule is that contract damages are assessed at the date of breach: see: *Kinbauri Gold Corp. v. IAMGOLD International African Mining Gold Corp.* (2004), 246 D.L.R. (4th) 595 (Ont. C.A.). Moreover, the trial judge found as a fact that the general increase in property values was not in the contemplation of the parties when they made the agreement. There is no basis to interfere with the trial judge's use of the June 2004 date.

[16] The appellant's third challenge is to the trial judge's assessment of damages based on a discounted cash flow methodology. However, there was ample expert evidence to support his conclusion that this most accurately quantified the loss. There is no basis to interfere with this finding of fact.

[17] Finally, the appellant submits that the trial judge erred in excluding the recovery of certain management expenses from the quantification of damages. The trial judge did so because he found that the capital expenditures contemplated by the appellant were to be amortized and charged to the tenants over the first five years of the project, thereby creating tenant resistance to also paying certain management expenses that Kipfinch sought to pass on to them.

[18] We agree with the appellant that the trial judge based his conclusion on a misapprehension of the evidence, although it is fair to say that this evidence was presented less clearly than it might have been. The capital expenditures were in fact to be amortized and charged to the tenants over nine years, not five years. In at least some of those nine years, these amounts were projected to be considerably lower than would have resulted from the five-year period used by the trial judge. Arguably this would reduce tenant resistance to paying for additional management expenses, and possibly allow recovery by Kipfinch of expenses excluded by the trial judge.

[19] We would therefore set aside the trial judge's decision to exclude the recovery of certain management expenses from the quantification of damages, since it was based on a

misapprehension of the evidence. We would direct a new trial on the issue of the recovery of management expenses, as both parties suggested we should if we reached this conclusion.

[20] In the result, the appeal is allowed on this issue, but is otherwise dismissed.

[21] The respondent has succeeded on three issues, and the appellant on one. In these circumstances, we would award the respondent half of its partial indemnity costs which we would fix at $12,500 all inclusive. We would leave the trial costs unaltered, but leave to the new trial judge the costs of the issue that we have ordered to be tried.

RELEASED: January 22, 2010 (“S.T.G.”)

“S.T. Goudge J.A.”
“E.A. Cronk J.A.”
“H.S. LaForme J.A.”

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63482

Asamera Oil Corporation Ltd. (*Plaintiff*) *Appellant*;

and

Sea Oil & General Corporation and Baud Corporation, N.V. (*Defendants*) *Respondents.*

63472

Baud Corporation, N.V. (*Plaintiff*) *Appellant*;

and

Thomas L. Brook (*Defendant*) *Respondent.*

87405

Baud Corporation, N.V. (*Plaintiff*) *Appellant*;

and

Thomas L. Brook (*Defendant*) *Respondent.*

1977: November 23, 24; 1978: October 3.

Present: Laskin C.J. and Martland, Spence, Pigeon, Dickson, Estey and Pratte JJ.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Damages — Agreements concerning shares and operations of oil exploration company — Breach of contract by company's chief officer to return shares loaned to him by another company — Appraisal of damages — Applicable principles.

These appeals arose out of a long series of agreements concerning the shares and operations of the appellant, Asamera Oil Corporation Ltd., which company was in one way or another involved in exploration for oil in Indonesia. Three separate actions were commenced by the parties.

1. *Baud Corporation, N.V. v. Thomas L. Brook*, (commenced on July 26, 1960) wherein Baud, a wholly owned subsidiary of Sea Oil & General Corporation (SOG), sought the return of 125,000 Asamera shares from Brook, the president and chief officer of Asamera. Baud alleged that 125,000 Asamera shares were loaned

63482

Asamera Oil Corporation Ltd. (*Demanderesse*) *Appelante*;

et

Sea Oil & General Corporation et Baud Corporation, N.V. (*Défenderesses*) *Intimées.*

63472

Baud Corporation, N.V. (*Demanderesse*) *Appelante*;

et

Thomas L. Brook (*Défendeur*) *Intimé.*

87405

Baud Corporation, N.V. (*Demanderesse*) *Appelante*;

et

Thomas L. Brook (*Defendeur*) *Intimé.*

1977: 23 et 24 novembre; 1978: 3 octobre.

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

EN APPEL DE LA DIVISION D'APPEL DE LA COUR SUPRÊME DE L'ALBERTA

Dommages-intérêts — Accords concernant les actions et les opérations d'une corporation d'exploration pétrolière — Rupture d'un contrat en raison du défaut du directeur général de restituer les actions que lui avait prêtées une autre compagnie — Évaluation des dommages-intérêts — Principes applicables.

Ces pourvois résultent d'une longue série d'accords concernant les actions et les opérations de l'appelante, Asamera Oil Corporation Ltd., une compagnie engagée de diverses façons dans l'exploitation pétrolière en Indonésie. Les parties ont intenté trois actions distinctes.

1. *Baud Corporation, N.V. c. Thomas L. Brook*, intentée le 26 juillet 1960, dans laquelle Baud, une filiale en propriété exclusive de Sea Oil & General Corporation (SOG), demande que l'intimé Brook (qui, à toutes les époques en cause, était le président directeur général d'Asamera) lui rende 125,000 actions d'Asa-

by it in October and November of 1957 to Brook under an agreement dated November 10, 1958, requiring their return by the end of 1959. In addition, Baud claimed damages in the sum of $150,750 representing the difference in the market value of the 125,000 shares between the date upon which they were to have been returned and the date of the writ.

2. *Asamera Oil Corporation Ltd. v. Sea Oil & General Corporation and Baud Corporation, N.V.*, (commenced July 27, 1960) wherein Asamera sought rescission of the basic agreement between the two groups of entrepreneurs represented by Baud on the one hand, and Brook on the other. Under the basic agreement, entered into on June 18, 1957, Baud was to receive 3,500,000 shares of Asamera, and SOG was to receive 500,000 shares in that company. In return Asamera was to receive $250,000 together with 196 shares in an Indonesian corporation known as Nusantara, which shares represented a 49 per cent interest therein.

3. *Baud Corporation, N.V. v. Thomas L. Brook*, (commenced December 6, 1966) wherein Baud repeated its allegations as asserted in Action No. 1, and claimed the return of 125,000 Asamera shares, which Brook was required to return under the agreements mentioned in Action No. 1. The third action arose out of the allegation by Brook that the first action was premature since the date for the return of the shares had been extended by the parties until December 31, 1960. In addition to its claim for the return of the shares, Baud claimed damages in the sum of $400,000. An amendment to the statement of claim whereby the damage claim was raised to $6,000,000 was allowed at trial. In this action, Brook counterclaimed for substantially the same relief sought by him in Action No. 2.

Held: 1. The appeal of Baud from the judgment of the Appellate Division of the Supreme Court of Alberta affirming the dismissal at trial, because premature, of its action of July 26, 1960, against Brook should be dismissed. 2. The appeal of Asamera from the judgment of the Appellate Division affirming dismissal of its action of July 27, 1960, against SOG and Baud should be dismissed. 3. The appeal of Baud from the judgment of the Appellate Division affirming the judgment of the trial judge awarding it damages of $250,000 against Brook should be allowed and there should be substituted an award of damages to the appellant of $812,500.

The first action was dismissed by the trial judge when he found that there was indeed an agreement extending the loan of the 125,000 Asamera shares beyond the

mera. Baud prétend avoir prêté à l'intimé, Brook, en octobre et novembre 1957, 125,000 actions d'Asamera en conformité d'un accord daté du 10 novembre 1958, qui prévoyait leur restitution avant la fin de 1959. En outre, Baud réclame des dommages-intérêts au montant de $150,750, au titre de la variation de la valeur marchande des 125,000 actions entre la date où elles devaient être rendues et la date du bref.

2. *Asamera Oil Corporation Ltd. c. Sea Oil & General Corporation et Baud Corporation, N.V.*, intentée le 27 juillet 1960. Asamera y réclame la rescision de l'accord principal conclu entre les deux groupes d'entrepreneurs, représentés respectivement par Baud et par Brook. En vertu de cet accord (conclu le 18 juin 1957), Baud et SOG devaient respectivement recevoir 3,500,000 et 500,000 actions d'Asamera. En contrepartie, Asamera devait recevoir $250,000 et 196 actions de Nusantara, une compagnie indonésienne, soit une participation de 49 pour cent.

3. *Baud Corporation, N.V. c. Thomas L. Brook*, intentée le 6 décembre 1966. Dans cette action, Baud reprend les allégations formulées dans l'action nº 1 et réclame la restitution des 125,000 actions d'Asamera que Brook devait rendre en vertu des accords mentionnés dans l'action nº 1. Cette troisième action résulte de ce que Brook affirme que l'action initiale était prématurée puisque les parties avaient convenu de proroger la date de restitution des actions jusqu'au 31 décembre 1960. En plus du recouvrement des actions, Baud réclame des dommages-intérêts au montant de $400,000. Sur autorisation du tribunal de première instance, la déclaration a été modifiée pour porter le montant des dommages-intérêts réclamés à $6,000,000. Dans cette action, Brook a fait une demande reconventionnelle pour obtenir à peu près le même redressement que dans l'action nº 2.

Arrêt: 1. Le pourvoi de Baud à l'encontre du jugement de la Division d'appel de la Cour suprême de l'Alberta confirmant le rejet de l'action intentée contre Brook le 26 juillet 1960 est, parce qu'elle était prématurée, rejeté. 2. Le pourvoi d'Asamera à l'encontre du jugement de la Division d'appel confirmant le rejet de l'action intentée contre SOG et Baud le 27 juillet 1960 est rejeté. 3. Le pourvoi de Baud à l'encontre du jugement de la Division d'appel confirmant le jugement de première instance condamnant Brook à payer $250,000 de dommages-intérêts est accueilli et le montant des dommages-intérêts payables à l'appelante est porté à $812,500.

Le savant juge de première instance a rejeté la première action au motif qu'une entente prorogeait effectivement le contrat de prêt des 125,000 actions d'Asamera

original expiry date, December 31, 1959, until December 31, 1960. The record included considerable evidence in support of such a finding which was confirmed on appeal. There being no demonstration of any error in law in the Courts below in so disposing of Action No. 1, the appeal with reference to that action should be dismissed.

The trial judge dismissed the second action, finding that the parties had settled their differences in respect of this action by an agreement dated October 28, 1958. The evidence amply supported the finding of the trial judge relating to the scope and effect of the settlement agreement. This finding was confirmed on appeal. Accordingly, the appeal to this Court with respect to the second action and the counterclaim by the respondent in Action No. 3 should be dismissed.

As to Action No. 3, the trial judge dismissed Baud's claims in detinue and conversion and assessed damages on the basis that Brook's failure to deliver constituted a breach of contract. The action in substance was a simple case of breach of contract to return 125,000 Asamera shares and the claims made and the issues arising in this action should be disposed of on that basis. The circumstances were such that damages constituted an adequate remedy.

The Court approached the matter of the proper appraisal of the damages assessable in the peculiar circumstances of this case on the following basis: that the same principles of remoteness will apply to the claims made whether they sound in tort or contract subject only to special knowledge, understanding or relationship of the contracting parties or to any terms express or implied of the contractual arrangement relating to damages recoverable on breach; that Baud was under the general duty to mitigate its losses and may not escape this duty by relying interminably on an injunction obtained by it in 1960, restraining the sale of 125,000 Asamera shares held by Brook; that the specific duty to mitigate and to crystallize its claim for damages within a reasonable time of the breach of contract by bringing action seeking appropriate remedies and to prosecute such action with due diligence, was qualified or postponed by Brook's request of Baud sometime prior to 1966 to refrain from enforcing its claims; that any postponement of such requirement to prosecute and to acquire replacement shares had come to an end at the latest on the awareness of Baud that the defaulting party was not only in breach of the duty to return the shares but had disposed of shares at least equal in

au-delà de la date initiale d'expiration, soit le 31 décembre 1959, jusqu'au 31 décembre 1960. Le dossier contient une preuve volumineuse à l'appui de cette conclusion, confirmée en appel. La preuve ne révélant aucune erreur de droit dans la façon dont les tribunaux d'instance inférieure sont arrivés à cette conclusion quant à l'action nº 1, le pourvoi relatif à cette action est rejeté.

Le savant juge de première instance a rejeté la deuxième action, concluant que les parties avaient réglé leurs différends relatifs à l'action nº 2 dans un règlement daté du 28 octobre 1958. La preuve étayait amplement cette conclusion du juge de première instance quant à la portée et à l'effet du règlement, conclusion qui a été confirmée en appel. En conséquence, le pourvoi interjeté devant cette Cour relativement à la deuxième action ainsi que la demande reconventionnelle de l'intimé dans l'action nº 3 sont rejetés.

En ce qui concerne l'action nº 3, le savant juge de première instance a rejeté les réclamations de Baud en restitution et pour appropriation illégale, et a évalué les dommages-intérêts en tenant pour acquis que l'omission de Brook de rendre les actiors constituait une rupture de contrat. En fait, l'action est un cas de simple rupture de contrat, savoir de l'engagement de rendre 125,000 actions d'Asamera, et les réclamations et les questions soulevées dans cette affaire doivent être tranchées sur cette base. Dans ces circonstances, l'adjudication de dommages-intérêts est un redressement approprié.

La Cour a abordé comme suit la question de l'évaluation des dommages exigibles dans les circonstances particulières de cette affaire: les principes relatifs au caractère prévisible s'appliquent également que la réclamation soit fondée sur la responsabilité délictuelle ou contractuelle, sous réserve cependant de connaissances, ententes ou relations particulières entre les parties contractantes ou de toute disposition expresse ou implicite dans le contrat au sujet des dommages recouvrables en cas d'inexécution; Baud avait l'obligation générale de limiter le préjudice et ne peut s'en dégager en invoquant indéfiniment l'injonction de 1960 interdisant à Brook de vendre 125,000 actions d'Asamera; l'obligation spécifique de Baud de limiter le préjudice et d'établir sa demande de dommages-intérêts en intentant l'action appropriée dans un délai raisonnable après la rupture et en procédant avec diligence a été repoussée dans le temps parce que Brook lui avait demandé, avant 1966, de ne pas poursuivre l'affaire; Baud aurait dû corriger son manque de diligence à poursuivre son action et à acheter des actions de remplacement dès qu'elle a appris que la partie contrevenante refusait non seulement de lui rendre les actions, mais en avait vendu un nombre identique; le retard apporté par Baud à l'achat d'actions

number to those loaned by Baud; that any postponement of the duty to acquire replacement shares which may have been due to the sharp reduction in the value of the shares which occurred during the loan, was ended with the revival in values on the public market at least by the end of 1966; that a plaintiff in the position of Baud may not successfully assert throughout the years of litigation a right to specific performance of the contract to redeliver the subject-matter of the contract and at the same time seek to avoid or reduce his losses on the grounds that to do so by buying replacement shares would involve him in investing his funds in the shares of a company managed or dominated by his adversary, Brook; that having regard to the nature of a common share neither the terms of the injunction or the loan contract, nor the action by Brook in disposing of shares in number equal to those loaned, have any effect on the characterization of the rights of Baud or the obligation of Brook throughout this long and tortuous transaction; that damages are an adequate remedy and that a court in these complex and particular circumstances will not invoke the extraordinary remedies of equity.

The application of these principles and determinations to the particular circumstances in this case requires a determination of the damages payable by Brook on the assumption that Baud ought to have crystallized these damages by the acquisition of replacement shares so as to minimize the avoidable losses flowing from the deprivation by Brook of Baud's opportunity to market the 125,000 shares. Such share purchases should have taken place within a reasonable time after the date of breach. Having regard to all the special circumstances, the time for purchase was the fall of 1966 when Baud was by its own admission free from any agreed restraint not to press its claims against Brook. It would be unreasonable to impose on Baud the burden of going into the market and acquiring replacement shares at a time when the litigation of its claims was in a dormant state at Brook's request. Furthermore Baud acknowledged that by the fall of 1966 the fortunes of Asamera had improved and this had begun to be reflected in the market price of its shares. In short, the appellant is not entitled in law to any compensation for the loss of opportunity to sell its shares after that date. Thereafter its loss of this opportunity is of its own making. The theory of such a damage award is to provide the funds needed to replace the shares at the time the law required it to do so in order to avoid an accumulating claim. There should be an allowance of a reasonable time to permit the organization of the finances and the mechanics required for the careful acquisition of 125,000 shares either by a series of relatively small purchases or by negotiated block purchases. This would carry the matter into the fall of 1967. By

de remplacement justifié par la baisse importante de la valeur des actions à l'époque du prêt ne tient plus après la fin de 1966, les actions ayant dès lors repris de la valeur; un demandeur dans la situation de Baud ne peut pendant toutes ces années à la fois prétendre avoir droit à l'exécution intégrale du contrat de restitution des biens et tenter d'éviter de limiter le préjudice en invoquant le fait que l'achat d'actions de remplacement l'obligerait à investir dans une compagnie gérée ou contrôlée par son adversaire, Brook; compte tenu de la nature d'une action ordinaire, ni des dispositions de l'injonction ni celles du contrat de prêt, ni le fait que Brook ait vendu le même nombre d'actions que celles prêtées, n'ont d'effet sur le caractère des droits de Baud ou sur les obligations de Brook aux termes d'une opération aussi complexe; l'adjudication de dommages-intérêts est une solution adéquate et, dans des circonstances aussi particulières que complexes, la Cour ne doit pas recourir aux redressements extraordinaires prévus en *equity*.

L'application de ces principes et solutions aux circonstances particulières de l'espèce exige une évaluation des dommages-intérêts payables par Brook fondée sur la supposition que Baud aurait dû établir les dommages en achetant des actions de remplacement de façon à limiter les pertes évitables résultant de l'impossibilité pour Baud, du fait de Brook, de mettre les 125,000 actions sur le marché. Cet achat d'actions aurait dû être effectué dans un délai raisonnable après la rupture du contrat. Compte tenu de toutes les circonstances particulières susmentionnées, cet achat aurait dû être effectué à l'automne de 1966 alors que Baud, de son propre aveu, n'était plus assujettie à l'entente conclue avec Brook de ne pas poursuivre l'affaire. Il ne serait pas raisonnable en effet de s'attendre à ce que Baud ait acheté des actions de remplacement alors que les procédures judiciaires étaient en veilleuse, à la demande même de Brook. En outre, Baud a reconnu qu'à l'automne de 1966, la situation d'Asamera s'était améliorée, résultant en une augmentation de la valeur marchande de ses actions. Bref l'appelante n'a aucun droit à une indemnisation pour la perte de la possibilité de vendre les actions après cette date. Elle est alors devenue l'auteur du préjudice qu'elle a subi. Le principe sous-jacent à l'adjudication des dommages-intérêts est d'accorder une indemnisation correspondant au prix de remplacement des actions à leurs cours au moment où la demanderesse était tenue en droit de les remplacer afin d'éviter l'accroissement de sa réclamation. On doit laisser à la demanderesse un délai raisonnable pour procéder de façon ordonnée au financement et à l'acquisition des

this time the price had risen to a range of $5 to $6. Making allowance for the upward pressure on the market price which would be generated by the purchase of such a large number of shares on a relatively low volume stock, the purchase price would surely have exceeded the $6 price reached in mid-1967 without any market intervention by Baud. For this factor an allowance of $1 per share should be made. Taking into account the effect of market intervention by Baud, the median price during the period from late 1966 to mid-1967, adjusted accordingly, would be about $6.50, and the damages should be awarded to Baud on that basis; that is, the total damages for breach of agreement to return the Asamera shares should amount to $812,500. In weighing the magnitude of this award one should not lose sight of the essential fact that Brook at any time right down to trial could, if he had remained in compliance with the injunction of July 1960, have avoided this result or the risk of this award by delivering from any source 125,000 Asamera shares.

As held by the Courts below, Brook's claim for damages in respect of the undertaking given by Baud upon the issuance of the interim injunction in July 1960 should be dismissed.

APPEALS from a judgment of the Supreme Court of Alberta, Appellate Division[1], dismissing appeals from a judgment of Kirby J. in three actions consolidated for trial. Appeals dismissed in two actions; appeal allowed in third action and cross-appeal dismissed.

P. B. C. Pepper, Q.C., and *J. L. McDougall*, for the plaintiffs, appellants.

R. A. MacKimmie, Q.C., for the defendants, respondents.

The judgment of the Court was delivered by

ESTEY J.—These appeals arise out of a long series of agreements concerning the shares and operations of the appellant, Asamera Oil Corporation Ltd. (hereinafter referred to as Asamera), which company was in one way or another involved in exploration for oil in Indonesia. Three separate actions were commenced by the parties.

[1] (1973), 40 D.L.R. (3d) 418.

125,000 actions d'Asamera, soit par de petits achats soit en bloc. Ceci nous mène à l'automne de 1967. A ce moment-là, la valeur des actions était de $5 à $6. Compte tenu de la tendance à la hausse qu'aurait entraîné l'achat d'un aussi grand nombre d'actions dans un marché restreint, le prix des actions aurait certainement dépassé les $6 l'unité atteints vers la mi-1967, sans que Baud intervienne sur le marché. En conséquence, la somme d'un dollar est ajoutée à la valeur des actions à cette date. Prenant en considération l'effet d'une intervention de Baud sur le marché, la valeur moyenne des actions entre la fin de l'année 1966 et le milieu de l'année 1967 serait d'environ $6.50 et c'est ce chiffre qui doit fonder les dommages-intérêts dus à Baud; en conséquence, le montant total des dommages-intérêts dus pour la nonrestitution des actions d'Asamera est de $812,500. Devant ce chiffre important, il ne faut pas oublier que jusqu'au procès, Brook aurait pu, s'il avait respecté l'injonction prononcée en juillet 1960, éviter le risque et les effets d'une telle décision en procédant à la remise de 125,000 actions d'Asamera, sans égard à leur provenance.

Comme l'ont décidé les tribunaux d'instance inférieure, la réclamation de Brook en dommages-intérêts relativement à l'engagement pris par Baud lors de la délivrance de l'injonction interlocutoire de juillet 1960 doit être rejetée.

POURVOIS interjetés à l'encontre d'un arrêt de la Division d'appel de la Cour suprême de l'Alberta[1] rejetant des appels d'un jugement du juge Kirby relativement à trois actions entendues ensemble. Pourvois rejetés relativement à deux actions; pourvoi accueilli relativement à la troisième action et pourvoi incident rejeté.

P. B. C. Pepper, c.r., et *J. L. McDougall*, pour les demanderesses, appelantes.

R. A. MacKimmie, c.r., pour les défendeurs, intimés.

Le jugement de la Cour a été rendu par

LE JUGE ESTEY—Ces pourvois résultent d'une longue série d'accords concernant les actions et les opérations de l'appelante, Asamera Oil Corporation Ltd. (ci-après appelée Asamera), une compagnie engagée de diverses façons dans l'exploration pétrolière en Indonésie. Les parties ont intenté trois actions distinctes.

[1] (1973), 40 D.L.R. (3d) 418.

1. *Baud Corporation, N.V. (Plaintiff) v. Thomas L. Brook (Defendant)*, (commenced on July 26, 1960) wherein Baud, as it shall hereinafter be called, (which is a wholly owned subsidiary of the Sea Oil & General Corporation) sought the return of 125,000 Asamera shares from the respondent, Brook (who at all material times was the president and chief officer of Asamera). Baud alleged that 125,000 Asamera shares were loaned by it in October and November of 1957 to the respondent, Brook, under an agreement dated November 10, 1958, requiring their return by the end of 1959. In addition, Baud claimed damages in the sum of $150,750 representing the difference in the market value of the 125,000 shares between the date upon which they were to have been returned and the date of the writ.

2. *Asamera Oil Corporation Ltd. (Plaintiff) v. Sea Oil & General Corporation and Baud Corporation, N.V. (Defendants)*, (commenced on July 27, 1960). This action was instituted the day after Action No. 1. In it Asamera sought rescission of the basic agreement between the two groups of entrepreneurs represented by Baud on the one hand, and Brook on the other. The effect of rescission, if granted, would be the cancellation of treasury shares issued by Asamera to Baud and Sea Oil & General Corporation Ltd. pursuant to this agreement.

3. *Baud Corporation, N.V. (Plaintiff) v. Thomas L. Brook (Defendant)*, (commenced on December 6, 1966). In this action, Baud repeated its allegations as asserted in Action No. 1, and claimed the return of 125,000 Asamera shares, which the respondent, Brook, was required to return under the agreements mentioned in Action No. 1. The third action arose out of the allegation by the respondent in Action No. 1 that the first action was premature since the date for the return of the shares had been extended by the parties until December 31, 1960. In addition to its claim for the return of the shares, Baud claimed damages in the sum of $400,000. An amendment of the statement of claim whereby the damage claim was raised to $6,000,000 was allowed at trial. In this action, the respondent, Brook, counterclaimed for

1. *Baud Corporation, N.V. (Demanderesse) c. Thomas L. Brook (Défendeur)*, intentée le 26 juillet 1960, dans laquelle Baud (comme elle sera ci-après désignée) une filiale en propriété exclusive de Sea Oil & General Corporation, demande que l'intimé Brook (qui, à toutes les époques en cause, était le président directeur général d'Asamera) lui rende 125,000 actions d'Asamera. Baud prétend avoir prêté à l'intimé, Brook, en octobre et novembre 1957, 125,000 actions d'Asamera en conformité d'un accord daté du 10 novembre 1958, qui prévoyait leur restitution avant la fin de 1959. En outre, Baud réclame des dommages-intérêts au montant de $150,750, au titre de la variation de la valeur marchande des 125,000 actions entre la date où elles devaient être rendues et la date du bref.

2. *Asamera Oil Corporation Ltd. (Demanderesse) c. Sea Oil & General Corporation et Baud Corporation, N.V. (Défenderesses)*, intentée le 27 juillet 1960. Cette action fut introduite le lendemain de l'action nº 1. Asamera y réclame la rescision de l'accord principal conclu entre les deux groupes d'entrepreneurs, représentés respectivement par Baud et par Brook. Si elle était accordée, la rescision aurait pour effet d'annuler les actions de trésorerie émises par Asamera en faveur de Baud et de Sea Oil & General Corporation Ltd. en vertu de l'accord.

3. *Baud Corporation, N.V. (Demanderesse) c. Thomas L. Brook (Défendeur)*, intentée le 6 décembre 1966. Dans cette action, Baud reprend les allégations formulées dans l'action nº 1 et réclame la restitution des 125,000 actions d'Asamera que l'intimé Brook devait rendre en vertu des accords mentionnés dans l'action nº 1. Cette troisième action résulte de ce que l'intimé dans l'action nº 1 affirme que l'action initiale était prématurée puisque les parties avaient convenu de proroger la date de restitution des actions jusqu'au 31 décembre 1960. En plus du recouvrement des actions, Baud réclame des dommages-intérêts au montant de $400,000. Sur autorisation du tribunal de première instance, la déclaration a été modifiée pour porter le montant des dommages-intérêts réclamés à $6,000,000. Dans cette action, l'intimé

substantially the same relief sought by him in Action No. 2.

It is convenient to deal first with the issues raised in Action No. 2. Under the formative agreement, of which rescission is sought by Asamera in the second action, entered into on June 18, 1957 (hereafter called the basic agreement), Baud was to receive 3,500,000 shares of Asamera, and Sea Oil & General Corporation (hereafter referred to as SOG) was to receive 500,000 shares in that company. In return, Asamera was to receive $250,000 together with 196 shares in an Indonesian corporation known as Nusantara, which shares represented a 49 per cent interest therein. The transaction was closed on September 9, 1957, when the 4,000,000 shares were issued from the treasury of Asamera and, thereafter, the sum of $250,000 was advanced to Asamera and action was taken to deposit the 196 shares in Nusantara in a repository subject to Asamera's control. 500,000 shares were issued to SOG. 2,000,000 of the 3,500,000 shares issued by Asamera to Baud were subject to an escrow agreement for a period of six months from September 9, 1957. On February 5, 1958, the time for holding these shares in escrow was extended to November 1958.

In Action No. 2, Asamera alleged a total failure of consideration under the basic agreement, and accordingly, claimed that the agreement was null and void *ab initio*. In the alternative Asamera claimed that the performance of the agreement had been frustrated, and thus that the contract was voidable at its option. The learned trial judge dismissed this action, finding that the parties had settled their differences in respect of Action No. 2 by an agreement dated October 28, 1958. The Court of Appeal of Alberta reached the same conclusion.

Counsel for Brook in this Court reasserted his submissions that there was an entire failure of consideration under the basic agreement and that Asamera "received nothing whatever of any value from Baud in exchange for ..." the 1,500,000 shares which remained outstanding in Baud's hands after the aforementioned settlement agreement of October 28, 1958. As explained earlier,

Brook a fait une demande reconventionnelle pour obtenir à peu près le même redressement que dans l'action nº 2.

Il convient de traiter d'abord des questions soulevées dans l'action nº 2. L'accord initial dont Asamera demande la rescision dans la deuxième action a été conclu le 18 juin 1957. En vertu de cet accord (ci-après appelé l'accord principal), Baud et Sea & Oil General Corporation (ci-après appelée SOG) devaient respectivement recevoir 3,500,000 et 500,000 actions d'Asamera. En contrepartie, Asamera devait recevoir $250,000 et 196 actions de Nusantara, une compagnie indonésienne, soit une participation de 49 pour cent. L'affaire a été conclue le 9 septembre 1957, alors que Asamera a délivré les 4,000,000 d'actions. Par la suite, Asamera reçut $250,000 et les dispositions nécessaires furent prisent pour placer les 196 actions de Nusantara en dépôt sous le contrôle d'Asamera. 500,000 actions furent émises au profit de SOG. Des 3,500,000 actions émises par Asamera au profit de Baud, 2,000,000 étaient assujetties à un contrat d'entiercement pour une période de 6 mois commençant le 9 septembre 1957. Le 5 février 1958, cette période fut prorogée jusqu'en novembre 1958.

Dans l'action nº 2, Asamera prétend que le contrat principal est nul *ab initio* pour absence totale de contrepartie. Subsidiairement, elle prétend que puisque le contrat n'a pas été intégralement exécuté, il est susceptible d'annulation à sa demande. Le savant juge de première instance a rejeté cette action, concluant que les parties avaient réglé leurs différends relatifs à l'action nº 2 dans un règlement daté du 28 octobre 1958. La Cour d'appel de l'Alberta est parvenue à la même conclusion.

Devant cette Cour, l'avocat de Brook a de nouveau prétendu qu'il y avait eu absence totale de contrepartie à l'accord principal et que Asamera [TRADUCTION] «n'avait rien reçu de valeur de Baud en contrepartie des ...» 1,500,000 actions qui étaient demeurées en circulation et que Baud avait toujours en sa possession après le règlement du 28 octobre 1958, susmentionné. Comme je l'ai

the parties had agreed to escrow 2,000,000 of the 3,500,000 Asamera shares in order to ensure the performance by Baud of the transfer of the Nusantara shares which could not apparently be completed on September 9, 1957. Under the settlement agreement, the 2,000,000 escrowed shares were cancelled, leaving outstanding in the hands of SOG 500,000 Asamera shares, and in the hands of Baud, 1,500,000 shares.

Counsel for Brook bases his plea of total failure of consideration on two points:

(a) The Nusantara shares were never transferred to Asamera as required by the agreement of 1957; and,

(b) Baud did not deliver to Asamera, either through Nusantara or otherwise, any exploration permits for Indonesia.

The first item relating to the failure to deliver the 49 per cent interest in Nusantara is founded on what transpired after the closing under the 1957 agreement on September 9. At that time Baud delivered an irrevocable direction to the holder of the 196 shares of Nusantara to hold them thereafter for the exclusive account, and subject to the order of Asamera only. The trial judge found that the deposit of the Nusantara shares in the bank in Djakarta, which resulted in the acquisition by Asamera of an interest in four exploration licences held by Nusantara, was good consideration for Asamera's promise to issue treasury shares to Baud and SOG. In any event it is unnecessary to determine this issue. The learned trial judge determined that any and all claims outstanding between these parties on October 28, 1958, including any claims with reference to the Nusantara shares and escrow arrangements, were mutually released pursuant to the aforementioned settlement agreement. The evidence in the record amply supports, in my respectful view, this finding of the learned trial judge relating to the scope and effect of the settlement agreement. This finding was confirmed on appeal. I would dismiss the appeal to this Court with respect to the second action and the counterclaim by the respondent in Action No. 3.

déjà indiqué, les parties avaient convenu de l'entiercement de 2,000,000 des 3,500,000 actions d'Asamera afin de garantir le transfert des actions de Nusantara par Baud, qui ne semblait pas pouvoir se faire le 9 septembre 1957. Aux termes du règlement, les 2,000,000 d'actions entiercées étaient annulées, ce qui laissait en circulation les 500,000 actions d'Asamera appartenant à SOG et les 1,500,000 actions appartenant à Baud.

L'avocat de Brook fonde sa défense d'absence totale de contrepartie sur deux points:

a) Les actions de Nusantara n'ont jamais été transférées à Asamera comme l'exigeait l'accord de 1957; et

b) Baud n'a pas remis à Asamera les permis d'exploration en Indonésie, ni par l'intermédiaire de Nusantara ni autrement.

Le premier point relatif au défaut de transférer la participation de 49 pour cent dans Nusantara est fondé sur ce qui s'est produit après la conclusion de l'accord du 9 septembre 1957. A cette époque, Baud a donné des instructions irrévocables au détenteur des 196 actions de Nusantara, lui demandant de détenir les actions pour le compte exclusif et à l'entière disposition d'Asamera. Le juge de première instance a conclu que le dépôt des actions de Nusantara à une banque de Djakarta, qui a assuré à Asamera une participation dans quatre licences d'exploration détenues par Nusantara, constituait une contrepartie valable pour la promesse d'Asamera d'émettre des actions de trésorerie en faveur de Baud et SOG. Quoi qu'il en soit, il n'est pas nécessaire de trancher cette question. Le savant juge de première instance a décidé que le 28 octobre 1958, toutes les réclamations en litige entre les parties, y compris les réclamations relatives aux actions de Nusantara et à leur entiercement, avaient été résolues par le règlement susmentionné. Avec égards, je considère que la preuve au dossier étaye amplement cette conclusion du juge de première instance quant à la portée et à l'effet du règlement, conclusion qui a été confirmée en appel. Je suis donc d'avis de rejeter le pourvoi interjeté devant cette Cour relativement à la deuxième action ainsi que la demande reconventionnelle de l'intimé dans l'action nº 3.

The first action was dismissed by the learned trial judge when he found that there was indeed an agreement extending the loan of the 125,000 Asamera shares beyond the original expiry date, December 31, 1959, until December 31, 1960. The record includes considerable evidence in support of such a finding which was confirmed on appeal. There being no demonstration of any error in law in the Courts below in so disposing of Action No. 1, I would dismiss the appeal with reference to that action.

This leaves outstanding before this Court only the appeal from the disposition of Action No. 3. The issue in this action, despite the elaborate record, is very narrow. Brook raised several defences to the claim by Baud for the return of 125,000 Asamera shares. Brook took the position at trial that Baud had waived the return of the shares. The learned trial judge rejected this defence and I have discovered no error in principle which would justify appellate interference in what is a clear finding of fact on the evidence. Brook alleged also that the shares were not loaned to him by Baud but by its chief executive officer, Diamantidi, and therefore no action for recovery can be brought by Baud. The simple and short answer is that if the loan was mechanically made by Diamantidi, he did so as the agent of Baud. The option agreement itself and a prior letter agreement states that upon the expiry of the term of the option on December 31, 1959, the shares will be returned to Baud. The option agreement is signed on behalf of Baud by Diamantidi. In any event there was evidence, oral and written, of the fact that the loan of the shares had first been made by Baud to Diamantidi and then by Diamantidi to Brook. Such an arrangement (expressed to be for tax considerations) affords no defence to Brook to a demand by Baud for their return and, consequently, this defence must fail.

Le savant juge de première instance a rejeté la première action au motif qu'une entente prorogeait effectivement le contrat de prêt des 125,000 actions d'Asamera au-delà de la date initiale d'expiration, soit le 31 décembre 1959, jusqu'au 31 décembre 1960. Le dossier contient une preuve volumineuse à l'appui de cette conclusion, confirmée en appel. La preuve ne révélant aucune erreur de droit dans la façon dont les tribunaux d'instance inférieure sont arrivés à cette conclusion quant à l'action nº 1, je suis d'avis de rejeter le pourvoi relatif à cette action.

Ceci ne laisse devant cette Cour que le pourvoi interjeté à l'encontre du jugement relatif à l'action nº 3. Malgré l'épaisseur du dossier, la question soumise à la Cour dans cette action est très limitée. Brook a invoqué plusieurs moyens de défense contre la demande de restitution des 125,000 actions d'Asamera présentée par Baud. En première instance, il a prétendu que Baud l'avait relevé de l'obligation de lui rendre ces actions. Le savant juge de première instance a rejeté ce moyen et je n'ai trouvé dans ce jugement aucune erreur de principe pouvant justifier la modification par une juridiction d'appel d'une conclusion de fait clairement fondée sur la preuve. Brook a également prétendu que les actions ne lui avaient pas été prêtées par Baud, mais par son directeur général, Diamantidi, et qu'en conséquence, Baud n'avait pas qualité pour intenter l'action en restitution. La réponse à cette prétention est vite trouvée: même s'il est matériellement exact que Diamantidi a fait le prêt, il agissait comme mandataire de Baud. L'option et une lettre d'entente antérieure à celle-ci précisent d'ailleurs qu'à la date de la levée de l'option, soit le 31 décembre 1959, les actions devaient être rendues à Baud. L'option est signée par Diamantidi au nom de Baud. Quoi qu'il en soit, la preuve orale et écrite établit que Baud a d'abord prêté les actions à Diamantidi qui les a à son tour prêtées à Brook. Cette façon de procéder (supposément fondée sur des considérations fiscales) ne permet pas à Brook d'opposer une défense valable à l'action en restitution des actions intentée par Baud et, en conséquence, ce moyen ne peut être retenu.

The learned trial judge appears to have found that Brook was in breach of his agreement when he failed to return the shares to Diamantidi; the Court of Appeal on the other hand found the breach to be the failure by Brook to return the shares to Baud. There is ample evidence to support the conclusion reached by the Court of Appeal. Indeed all the written evidence accords with this result and I respectfully agree with that Court on this point.

This leaves outstanding only the question of the remedy or remedies open to Baud. The action apparently proceeded on the basis that Brook, by his wrongful retention of the shares, was open to an action by Baud in detinue, or alternatively, in conversion because Brook had wrongfully disposed of the shares loaned to him. Brook admitted in his statement of defence, filed on July 6, 1967, that these shares had been sold, and further admitted on examination for discovery in May of 1968 that the sale had occurred in 1958. The trial judge found that the brokers, in an effort to protect their position, had sold shares of Asamera from the Brook account in December of 1957 and in January and February of 1958.

This phase of the matter is somewhat complicated by the fact that an injunction was issued by McLaurin C.J.T.D. in the Supreme Court of Alberta on July 27, 1960, which might be construed as restraining Brook from selling the 125,000 shares loaned to him by Baud. Brook's interpretation of his position under the injunction order was that he remained in compliance therewith so long as he held not less than 125,000 shares. There is nothing to indicate that on this interpretation he was in breach of the injunction. Baud, on the other hand, took the position that, as regards the action of detinue or conversion, it had the right to insist that Brook make whatever arrangements may have been necessary with the broker to retain the actual certificates forwarded to him by Baud. The order itself is ambiguous as to whether some retention in specie or a mere credit balance is required for compliance by Brook. The injunction issued by Chief Justice McLaurin in 1960 enjoins Brook from voting, or disposing of or dealing with "the

Le juge de première instance semble avoir conclu que Brook avait violé l'accord en ne rendant pas les actions à Diamantidi; par contre, la Cour d'appel a jugé que Brook avait violé l'accord parce qu'il n'avait pas remis les actions à Baud. Une preuve considérable, en fait toute la preuve écrite, appuie la conclusion de la Cour d'appel et, avec égards, je partage son opinion sur cette question.

Il ne reste donc qu'à établir de quels recours Baud disposait. L'action a apparemment été instituée en tenant pour acquis qu'en détenant illégalement les actions, Brook s'exposait à une action en restitution ou, subsidiairement, à une action pour appropriation illégale, puisqu'il s'était départi sans droit des actions qui lui avaient été prêtées. Dans sa défense, déposée le 6 juillet 1967, Brook a admis que lesdites actions avaient été vendues et il a en outre admis, lors d'un interrogatoire préalable, en mai 1968, que la vente avait eu lieu en 1958. Le juge de première instance a conclu que les courtiers, cherchant à se protéger, avaient vendu des actions d'Asamera détenues au compte de Brook, en décembre 1957 et en janvier et février 1958.

La question se complique encore du fait que le 27 juillet 1960, le juge en chef McLaurin de la Division d'instruction de la Cour suprême de l'Alberta a délivré une injonction qu'on pourrait interpréter comme une interdiction à Brook de vendre les 125,000 actions prêtées par Baud. Brook prétend qu'il respectait l'injonction tant qu'il restait en possession d'au moins 125,000 actions. Si l'on adopte cette interprétation, rien n'indique qu'il ait violé l'injonction. En revanche, Baud soutient, relativement à l'action en restitution ou à l'action pour appropriation illégale, qu'elle avait le droit d'exiger de Brook qu'il prenne les mesures nécessaires avec son courtier afin de conserver les certificats qu'elle lui avait remis. L'injonction est ambiguë quant à savoir si Brook devait demeurer en possession de certificats déterminés ou si un simple solde créditeur suffisait. L'injonction délivrée par le juge en chef McLaurin en 1960 interdit à Brook de prendre part à un vote concernant [TRADUCTION] «les 125,000 actions ... mentionnées aux

125,000 shares . . . referred to in paragraphs 2 and 3 of the Statement of Claim . . .". Baud's reference in its statement of claim is directed to the 125,000 shares loaned to Brook in 1957. The injunction therefore may be construed as restraining dealing by Brook with those specific 125,000 shares. But this relation of the history of the transaction does not dispose of the matter. In the course of the trial the appellant moved for an order that the shares be deposited in court by Brook. This application was dismissed by the trial judge apparently on the basis that the retention of 125,000 shares by Brook would be sufficient compliance with the order. Since all the shares of Asamera are identical in class and conditions attaching thereto, no practical consideration arises which requires retention in specie, if that be technically possible, of the actual 125,000 shares loaned to Brook. The background against which the loan of the shares was made and the subsequent option granted for their purchase lead one to the view that should a determination of this issue become necessary, Baud is protected by the order and Brook from its contravention by the retention by Brook of a like number of shares of Asamera. To other aspects of this issue I will return later.

paragraphes 2 et 3 de la déclaration . . .» , de les vendre ou de les aliéner. Dans sa déclaration, Baud parle des 125,000 actions prêtées à Brook en 1957. L'injonction peut donc être interprétée comme interdisant à Brook d'aliéner ces 125,000 actions en particulier. Mais cet historique ne rend pas compte de toute la réalité. En première instance, l'appelante a demandé une ordonnance enjoignant à Brook de consigner les actions à la cour. Le juge de première instance a rejeté cette requête, au motif semble-t-il qu'en demeurant en possession de 125,000 actions, Brook se conformait suffisamment à l'ordonnance. Comme toutes les actions d'Asamera sont de même classe et son assujetties aux mêmes conditions, aucune considération pratique ne justifie la conservation des actions mêmes prêtées à Brook, à supposer que la chose soit matériellement possible. Les circonstances dans lesquelles on a d'abord consenti le prêt des actions et ensuite accordé une option d'achat à leur égard nous amènent à conclure, s'il devenait nécessaire de trancher cette question, que Baud est protégée par l'ordonnance et que Brook est à l'abri de tout reproche de violation en retenant le nombre spécifié d'actions d'Asamera. Je reviendrai aux autres aspects de cette question ultérieurement.

It is trite law that under the applicable statutes and common law a certificate is not in itself a share or shares of the corporation but only evidence thereof. (*Vide Solloway v. Blumberger*[2], *per* Rinfret J. at p. 167.) These shares are intangible, incorporeal property rights represented or evidenced by share certificates. They are not in themselves capable of individual identification and isolation from all other shares of the corporation of the same class. Therefore, once these shares were pledged by Brook in fully negotiable form and placed in the name of the broker, as was the evidence here, it was not possible to determine whether some or all of these 125,000 shares had been sold even presuming that at any time a specific share of a corporation as distinct from the certificate representing the share can be isolated and given an existence separate and apart from all other shares of the same class. In any case, it

Il est constant en droit qu'en vertu des lois applicables et de la *common law*, un certificat d'action ne constitue pas en lui-même une action de la compagnie, mais en est seulement la preuve. (Voir *Solloway c. Blumberger*[2], le juge Rinfret, à la p. 167.) Les actions sont des droits de propriété incorporels et les certificats en constituent une attestation ou une preuve. Elles ne peuvent être identifiées séparément ni isolées des autres actions de même classe de la compagnie. En conséquence, dès que Brook a mis les actions en gage au nom du courtier, sous une forme entièrement négociable, comme le révèle la preuve présentée en l'espèce, il est devenu impossible de déterminer si une partie ou la totalité des 125,000 actions avaient été vendues, à supposer même qu'on puisse, à un moment donné, isoler une action (et non le certificat qui en constitue la représentation tangible) et la considérer séparément des autres actions de même classe.

[2] [1933] S.C.R. 163.

[2] [1933] R.C.S. 163.

seems almost academic to argue that Baud could assert such a position in this regard when the shares were delivered through Diamantidi in fully negotiable form to Brook after Brook had announced that the purpose of the loan was to pledge the shares with his broker as security for his marginal transactions in other Asamera shares, and this apart altogether from the fact that redelivery of 125,000 Asamera shares free of encumbrance by Brook from any source would meet his obligation of redelivery.

The learned trial judge dismissed Baud's claims in detinue and conversion and assessed damages on the basis that Brook's failure to deliver constituted a breach of contract. The action in substance is a simple case of breach of contract to return 125,000 Asamera shares and in my view the claims made and the issues arising in this action should be disposed of on that basis. That being so, we come to the only real issue in this appeal, namely, to what recovery is the appellant, Baud, in these circumstances entitled and, if the appropriate relief be a monetary award, the quantum of damages.

Baud has asked this Court to award specific performance of the agreement to return 125,000 Asamera shares, and in particular, in its statement of claim has requested an order directing the return or replacement of the shares. The jurisdiction to award specific performance of contractual obligations is ordinarily exercised only where damages would be inadequate to compensate a plaintiff for his losses. As the original 125,000 shares are indistinguishable from all other Asamera shares, and since there has been no suggestion that corporate control is at issue in this case, or that shares were not readily available in the stock market, an order for delivery of shares would merely be another method or form for the payment of any judgment awarded. Asamera shares are listed on the public stock exchanges and consequently some estimate of their market value can be readily ascertained from day to day. The parties themselves therefore throughout the 21 years since

Quoi qu'il en soit, l'argument de Baud à ce sujet semble purement théorique puisque Baud a remis les actions à Brook, par l'intermédiaire de Diamantidi, sous une forme entièrement négociable, quand Brook a indiqué que les actions prêtées seraient mises en garde auprès de son courtier afin de garantir ses opérations sur marge visant ses autres actions d'Asamera et ce, mis à part le fait que pour remplir son obligation, Brook n'avait qu'à remettre 125,000 actions d'Asamera, sans indication de provenance, à condition qu'elles soient libres de toute charge.

Le savant juge de première instance a rejeté l'action de Baud en restitution et l'action pour appropriation illégale, et a évalué les dommages-intérêts en tenant pour acquis que l'omission de Brook de rendre les actions constituait une rupture de contrat. En fait, l'action est une affaire de simple rupture de contrat, savoir de l'engagement de rendre 125,000 actions d'Asamera et, à mon avis, les réclamations et les questions soulevées dans cette affaire doivent être tranchées sur cette base. Nous en venons donc à la véritable question en litige dans ce pourvoi: à quel dédommagement l'appelante Baud a-t-elle droit en l'instance et, si ce redressement est pécuniaire, quel doit être le montant des dommages-intérêts?

Baud demande à cette Cour d'ordonner l'exécution intégrale de l'accord pour la restitution des 125,000 actions d'Asamera et, plus précisément, elle demande dans sa déclaration une ordonnance exigeant la restitution ou le remplacement des actions. Habituellement, le pouvoir d'ordonner l'exécution intégrale d'une obligation contractuelle n'est exercé que dans les cas où des dommages-intérêts ne sauraient indemniser le demandeur du préjudice subi. Comme les 125,000 actions en cause ne peuvent être différenciées des autres actions d'Asamera et comme il n'est pas question que le contrôle de la compagnie soit en cause ou qu'il y ait eu un problème de disponibilité des actions sur le marché des valeurs, une ordonnance de restitution des actions ne serait qu'une façon d'exiger le paiement de tout montant accordé par jugement. Les actions d'Asamera sont cotées en bourse et il est en conséquence facile d'obtenir une estimation quotidienne de leur valeur marchande.

these transactions began have had the benefit of the daily assessment by the stock market of the value of these shares. It is obvious that damages are an adequate remedy and that the courts in such circumstances do not resort to the equitable remedy of specific performance.

The assessment of the quantum of damages for this breach of contract is somewhat complex. The calculation of damages relating to a breach of contract is, of course, governed by well-established principles of common law. Losses recoverable in an action arising out of the non-performance of a contractual obligation are limited to those which will put the injured party in the same position as he would have been in had the wrongdoer performed what he promised.

Not all kinds of losses are recoverable in actions for breach of contract. The limitations on damages recoverable in contract were discussed in *Victoria Laundry (Windsor) LD. v. Newman Industries LD.*[3], wherein Asquith L.J. at p. 539 went to great lengths to explain such limits:

(1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed: (*Sally Wertheim v. Chicoutimi Pulp Company*). This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognized as too harsh a rule. Hence,

(2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably forseeable as liable to result from the breach.

(3) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.

[3] [1949] 2 K.B. 528.

Les parties ont donc, pendant les 21 années écoulées depuis le début de ces opérations, bénéficié d'une évaluation boursière quotidienne de ces actions. Il est évident que des dommages-intérêts sont un redressement approprié et qu'il n'est pas question, dans un tel cas, que les tribunaux aient recours au redressement en *equity* que constitue l'exécution intégrale.

L'évaluation des dommages-intérêts pour cette rupture de contrat est assez complexe. Bien sûr, le calcul des dommages-intérêts pour rupture de contrat est régi par des principes de *common law* bien établis. Les pertes recouvrables dans une action fondée sur l'inexécution d'une obligation contractuelle sont limitées au montant qui placera la partie lésée dans la situation qui aurait existé si le contrevenant avait respecté son engagement.

Dans une action fondée sur une rupture de contrat, les pertes ne donnent pas toutes lieu à une indemnisation. Les restrictions applicables aux dommages-intérêts recouvrables en matière de contrat ont été analysées en profondeur dans l'arrêt *Victoria Laundry (Windsor) LD. v. Newman Industries LD.*[3], par le lord juge Asquith (à la p. 539):

[TRADUCTION] (1) Il est bien établi que les dommages-intérêts ont pour objet principal de placer, dans la mesure où l'argent peut le faire, la partie dont les droits ont été violés dans la situation qui aurait existé si ses droits avaient été respectés: (*Sally Wertheim v. Chicoutimi Pulp Company*). Cet objet, s'il est poursuivi jusqu'au bout, lui permettra d'être totalement indemnisée de toute perte résultant de facto d'une violation particulière, même improbable ou imprévisible. En matière de contrat, tout au moins, cette règle est considérée comme trop stricte. D'où,

(2) En cas de rupture de contrat, la partie lésée n'a droit à une indemnité que pour la perte qui en découle effectivement et qui était, à la date du contrat, susceptible d'en découler d'après ce qu'on pouvait raisonnablement prévoir.

(3) On apprécie les faits raisonnablement prévisibles à cette date en fonction des renseignements que possédaient alors les parties, ou du moins la partie qui rompt par la suite le contrat.

[3] [1949] 2 K.B. 528.

Three additional rules or refinements of the above rules are thereupon enumerated by Asquith L.J. but these are not here relevant. The principle set out in paragraph 2 above was thereafter modified somewhat by the House of Lords in *Koufos v. C. Czarnikow (The Heron II)*[4], where it was determined that the proper test for remoteness was not the 'reasonable foreseeability' of the head of damages claimed as in an action in tort, but whether the probability of the occurrence of the damage in the event of breach should have been within the reasonable contemplation of the contracting parties at the time of the entry into the contract. (*Vide Brown & Root Ltd. v. Chimo Shipping Ltd.*[5], *per* Ritchie J., at p. 648.)

These principles were most recently discussed in *Parsons (Livestock) Ltd. v. Uttley Ingham & Co. Ltd.*[6], where subject to qualifications raised in the judgment, it was concluded by all members of the Court of Appeal that the appropriate legal rules relating to remoteness will not depend upon the classification of the action as being one of contract or tort. The case has already been the subject of comment, *vide* Note, (1978) 94 L.Q.R. 171. Scarman L.J. at p. 529 stated:

> As to the first problem, I agree with Lord Denning M.R., in thinking that the law must be such that, in a factual situation where all have the same actual or imputed knowledge and the contract contains no term limiting the damages recoverable for breach, the amount of damages recoverable does not depend upon whether, as a matter of legal classification, the plaintiffs' cause of action is breach of contract or tort. It may be that the necessary reconciliation is to be found, notwithstanding the strictures of Lord Reid at pp. 446 and 389-390, in holding that the difference between "reasonably foreseeable" (the test in tort) and "reasonably contemplated", (the test in contract) is semantic, not substantial. Certainly Lord Justice Asquith in *Victoria Laundry v. Newman* [1949] 2 K.B. 528 at p. 535 and Lord Pearce in *Czarnikow v. Koufos* thought so: and I confess I think so too.

[4] [1969] 1 A.C. 350.
[5] [1967] S.C.R. 642.
[6] [1977] 2 Lloyd's Rep. 522, [1978] 1 All E.R. 525.

Le lord juge Asquith a ensuite formulé trois autres règles ou corollaires, qui ne sont pas pertinents en l'espèce. Le principe énoncé au paragraphe (2) a été un peu modifié par la suite dans l'arrêt *Koufos v. C. Czarnikow (The Heron II)*[4], où la Chambre des lords a jugé que le véritable critère du caractère prévisible ne consistait pas à étudier la «prévisibilité raisonnable» comme dans le cas d'une action en responsabilité délictuelle, mais plutôt à se demander si, à l'époque de la conclusion du contrat, les parties contractantes pouvaient raisonnablement prévoir la probabilité que des dommages résultent de la rupture du contrat. (Voir *Brown & Root Ltd. c. Chimo Shipping Ltd.*[5], le juge Ritchie, à la p. 648.)

L'examen le plus récent de ces principes se trouve dans l'arrêt *Parsons (Livestock) Ltd. v. Uttley Ingham & Co. Ltd.*[6], où la Cour d'appel, avec les réserves formulées dans le jugement, a jugé à l'unanimité que les principes juridiques régissant l'appréciation du caractère prévisible ne devaient pas dépendre de ce que l'action intentée est en responsabilité contractuelle ou en responsabilité délictuelle. L'arrêt a déjé fait l'objet d'un commentaire (voir Note, (1978) 94 L.Q.R. 171). Dans cette affaire, le lord juge Scarman a écrit (à la p. 529):

> [TRADUCTION] En ce qui concerne la première question, je pense, comme le maître des rôles lord Denning, que le droit doit être tel que dans un cas donné, quand tous ont les mêmes connaissances, réelles ou supposées, et que le contrat ne contient aucune disposition limitant les dommages recouvrables en cas de rupture, le montant des dommages-intérêts recouvrables ne dépend pas de la nature juridique de l'action, c.-à-d. de ce qu'elle soit fondée sur un contrat plutôt que sur un délit. On pourrait fort bien résoudre cette question, nonobstant les distinctions de lord Reid aux pp. 466 et 389 et 390, entre le critère applicable en matière délictuelle, «ce qui est raisonnablement prévisible», et le critère applicable en matière contractuelle, «ce qui est raisonnablement envisagé», en considérant qu'il s'agit d'une distinction sémantique et non de fond. C'est d'ailleurs ce qu'ont conclu lord Asquith dans *Victoria Laundry v. Newman* [1949] 2 K.B. 528, à la p. 535 et lord Pearce dans *Czarnikow v. Koufos* et j'avoue être aussi de cet avis. . . . ;

[4] [1969] 1 A.C. 350.
[5] [1967] R.C.S. 642.
[6] [1977] 2 Lloyd's Rep. 522, [1978] 1 All E.R. 525.

or more succinctly at p. 528:

> . . . the law is not so absurd as to differentiate between contract and tort save in situations where the agreement, or the factual relationship, of the parties with each other requires it in the interests of justice.

(Leave to appeal to the House of Lords was granted by the Court of Appeal.)

In any event the damage flowing from the wrongful act of the respondent in this case, that is the loss of the opportunity to resell the shares at a profit, is recoverable under any of the tests set out above.

In cases dealing with the measure of damages for non-delivery of goods under contracts for sale, the application over the years of the above-mentioned principles has given the law some certainty, and it is now accepted that damages will be recoverable in an amount representing what the purchaser would have had to pay for the goods in the market, less the contract price, at the time of the breach. This rule which was authoritatively stated in *Barrow v. Arnaud*[7] may be seen as a combination of two principles. The first, as stated earlier, is the right of the plaintiff to recover all of his losses which are reasonably contemplated by the parties as liable to result from the breach. The second is the responsibility imposed on a party who has suffered from a breach of contract to take all reasonable steps to avoid losses flowing from the breach. This responsibility to mitigate was explained by Laskin C.J.C. in *Red Deer College v. Michaels and Finn*[8], at pp. 330-1:

> It is, of course, for a wronged plaintiff to prove his damages, and there is therefore a burden upon him to establish on a balance of probabilities what his loss is. The parameters of loss are governed by legal principle. The primary rule in breach of contract cases, that a wronged plaintiff is entitled to be put in as good a position as he would have been in if there had been proper performance by the defendant, is subject to the qualification that the defendant cannot be called upon to pay for avoidable losses which would result in an increase in the quantum of damages payable to the

[7] (1846), 8 Q.B. 595.
[8] [1976] 2 S.C.R. 324.

ou plus succinctement, à la p. 528:

> [TRADUCTION] . . . le droit n'a pas l'absurde prétention de distinguer entre les contrats et les délits, sauf dans les cas où l'entente ou les rapports de fait entre les parties l'exigent dans l'intérêt de la justice.

(La Cour d'appel a accordé l'autorisation d'en appeler à la Chambre des lords.)

Quoi qu'il en soit, une indemnité pour les dommages résultant des agissements de l'intimé en l'espèce, c.-à-d. l'impossibilité de revendre les actions à profit, peut être recouvrée en vertu de n'importe lequel des critères énoncés plus haut.

Dans les affaires relatives à l'évaluation des dommages résultant du défaut de livrer des marchandises en violation d'un contrat de vente, l'application répétée des principes susmentionnés a clarifié le droit et il est maintenant établi que le montant des dommages-intérêts doit correspondre au montant que l'acheteur aurait dû dépenser pour se procurer les marchandises sur le marché à l'époque de la rupture du contrat, moins le prix fixé au contrat. Cette règle, fermement énoncée dans l'arrêt *Barrow v. Arnaud*[7] ressort de l'effet conjugué de deux principes. Le premier, déjà exposé, est le droit du demandeur d'être indemnisé des pertes que les parties pouvaient raisonnablement envisager en cas d'inexécution du contrat. Le deuxième est l'obligation pour la partie lésée par l'inexécution d'un contrat de prendre toutes les mesures raisonnables afin de limiter le préjudice en résultant. Voici en quels termes le juge en chef Laskin explique, dans l'arrêt *Red Deer College c. Michaels et Finn*[8], cette obligation de limiter le préjudice (aux pp. 330 et 331):

> Naturellement, il incombe au demandeur lésé de prouver le dommage subi et, par conséquent, de prouver par la prépondérance des probabilités la perte qu'il a essuyée. Des principes juridiques régissent les paramètres d'une perte. Dans une affaire d'inexécution contractuelle, la règle fondamentale qu'un demandeur lésé a le droit d'être mis dans une position aussi favorable que s'il y avait eu exécution régulière de la part du défendeur, est sujette à la réserve que le défendeur ne peut être appelé à défrayer toute perte évitable qui résulterait en une augmentation du quantum des dommages-intérêts

[7] (1846), 8 Q.B. 595.
[8] [1976] 2 R.C.S. 324.

plaintiff. The reference in the case law to a "duty" to mitigate should be understood in this sense.

In short, a wronged plaintiff is entitled to recover damages for the losses he has suffered but the extent of those losses may depend on whether he has taken reasonable steps to avoid their unreasonable accumulation.

and later in the judgment at p. 331:

If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial judge's assessment of the plaintiff's evidence on avoidable consequences.

Thus, if one were to adopt, without reservation, in the settlement of Baud's damage claims, the rules governing recovery for non-delivery of goods in sales contracts, the *prima facie* measure of damages in the case at bar would be the value of the shares on the date of breach, that is, December 31, 1960. The learned trial judge found the market price on December 31, 1960, to be 29 cents per share. The value of the 125,000 shares wrongfully retained by Brook, and thus the loss to Baud by reason of its not being in possession of those shares, on that date therefore was $36,250 assuming, for the purposes of discussion only, the market price to be constant throughout the purchase or sale of such a number of shares. To this must be added other expenses which could reasonably be said to be incidental to steps taken to mitigate the damages flowing from the breach. The most obvious of these are brokerage and commission fees which would have been incurred by Baud in purchasing replacement shares. Of greater importance is the inevitable upward pressure the purchase on the open market of such a large number of Asamera shares would exert on the market price. The impact of forced sales or purchases of shares on market prices has been the subject of judicial comment in the past (*vide Crown Reserve Consolidated Mines Ltd. v. Mackay*[9]) and must be taken into account in determining the weight to be accorded to mitigation factors in an assessment of damages in circumstances such as exist here. Unhappily, Baud has led no evidence on this prob-

[9] [1941] O.W.N. 269.

payables au demandeur. C'est dans ce sens que doit être interprétée l'expression «obligation» de minimiser dont fait état la jurisprudence.

En deux mots, un demandeur lésé a droit de recouvrer des dommages-intérêts pour les pertes qu'il a subies, mais l'étendue de ces pertes peut dépendre de la question de savoir s'il a ou non pris des mesures raisonnables pour éviter qu'elles s'accroissent immodérément.

Puis, un peu plus loin à la p. 331:

Si le défendeur prétend que le demandeur aurait pu raisonnablement minimiser la perte alléguée, il incombe au défendeur d'en faire la preuve, à moins que ce dernier ne se contente de laisser au juge de première instance le soin de trancher cette question à la lumière de son évaluation de la preuve des conséquences évitables fournie par le demandeur.

Par conséquent, si aux fins du règlement des réclamations en dommages-intérêts de Baud on appliquait intégralement les règles régissant les dommages-intérêts pour défaut de livrer des marchandises en violation d'un contrat de vente, l'évaluation des dommages subis en l'espèce devrait, à première vue, s'aligner sur la valeur des actions le jour de la rupture du contrat, soit le 31 décembre 1960. Le savant juge de première instance a conclu qu'à cette date, les actions avaient une valeur marchande de 29 cents chacune. La valeur des 125,000 actions illégalement détenues par Brook et, en conséquence, la perte subie par Baud parce qu'elle n'était pas en possession de ces actions, était donc, au 31 décembre 1960, de $36,250, en supposant aux fins de la discussion que la valeur marchande demeure constante pendant l'achat et la vente d'un tel nombre d'actions. Il faut ajouter à cela d'autres dépenses qu'on pourrait raisonnablement qualifier d'accessoires aux mesures prises pour limiter le préjudice résultant de la rupture du contrat, les plus évidentes étant les frais de courtage et de commission que Baud aurait eu à payer pour acheter d'autres actions. Encore plus importante est la tendance à la hausse des cours qu'aurait entraînée l'achat sur le marché libre d'un aussi grand nombre d'actions d'Asamera. L'effet des ventes ou achats d'actions accélérés sur les cours a déjà été étudié dans la jurisprudence (voir *Crown Reserve Consolidated Mines Ltd. v. Mackay*[9]) et doit entrer en ligne de compte pour déterminer l'importance à accorder aux facteurs de limitation

[9] [1941] O.W.N. 269.

lem and one is left to take note of the presence of this factor without being able precisely to quantify it. This point requires more detailed discussion at a later stage.

Assuming for the moment that the breach of contract occurred on December 31, 1960, and that the appellant's right to damages came into being at that time; and assuming that it should then have acted to forestall the accumulation of avoidable losses, what action did the law then require of the appellant by way of mitigation of damages? A plaintiff need not take all possible steps to reduce his loss, and accordingly, it is necessary to examine some of the special circumstances here present. The appellant argues that there exist in this case clear circumstances which render the duty to purchase 125,000 Asamera shares an unreasonable one. The first of these has its foundations in the established principle that a plaintiff need not put his money to an unreasonable risk including a risk not present in the initial transaction in endeavouring to mitigate his losses. This principle was demonstrated in *Lesters Leather and Skin Co. v. Home and Overseas Brokers*[10] and in *Jewelowski v. Propp*[11], as well as in *Pilkington v. Wood*[12]. The appellant here was placed in the unusual position where mitigative action would require that it purchase as replacement property, shares of a company engaged in a speculative undertaking under the effective control and under the promotional management of a person in breach of contract, the respondent, Brook, who thereafter was in an adversarial position in relation to the appellant.

On the evidence adduced at trial, the market value of shares in Asamera had fallen from $3 shortly before the dates on which Baud first loaned the two blocs of shares to Brook, to between $1.62 and $1.87 in November 1958, and to 29 cents per share on December 31, 1960. Evidence of share

[10] (1948), 64 T.L.R. 569 (C.A.).
[11] [1944] K.B. 510.
[12] [1953] Ch. 770.

des dommages aux fins de l'évaluation du préjudice dans les circonstances de l'espèce. Malheureusement, Baud n'a présenté aucune preuve sur cet aspect du problème, dont il faut néanmoins tenir compte sans être en mesure de l'évaluer avec précision. Je reviendrai sur ce sujet plus en détail à une étape ultérieure.

Supposons pour le moment que la rupture du contrat et le droit de l'appelante à des dommages-intérêts remontent au 31 décembre 1960 et supposons également qu'elle aurait dû prendre à ce moment-là les mesures nécessaires pour limiter les pertes évitables, quelles étaient alors, en droit, les choses que l'appelante était tenue de faire pour limiter le préjudice? Un demandeur n'étant pas tenu de prendre toutes les mesures possibles pour réduire ses pertes, il est nécessaire d'examiner certains facteurs particuliers en l'espèce. L'appelante soutient que lesdits facteurs rendaient déraisonnable l'obligation d'acheter 125,000 actions d'Asamera. Un premier facteur découle du principe bien établi qu'un demandeur n'est pas tenu, pour limiter le préjudice, de courir un risque financier déraisonnable, y compris un risque inexistant dans l'opération initiale. C'est d'ailleurs le sens des arrêts *Lesters Leather and Skin Co. v. Home and Overseas Brokers*[10]; *Jewelowski v. Propp*[11]; et *Pilkington v. Wood*[12]. L'appelante se trouvait donc dans une situation inhabituelle en ce que, pour limiter le préjudice, il lui aurait fallu acheter en remplacement des actions d'une compagnie engagée dans une entreprise de nature spéculative, gérée et contrôlée par l'intimé, Brook, qui avait violé son contrat et qui se trouvait de ce fait un adversaire de l'appelante.

La preuve présentée en première instance révèle que, peu de temps avant le prêt par Baud des deux blocs d'actions à Brook, la valeur marchande des actions d'Asamera est passée de $3 l'action à un montant situé entre $1.62 et $1.87 en novembre 1958, pour tomber à 29 cents au 31 décembre

[10] (1948), 64 T.L.R. 569 (C.A.).
[11] [1944] K.B. 510.
[12] [1953] Ch. 770.

values after that date indicates only that there was a relatively small recovery in value to about $1.21 a share by March 1965, when the fortunes of the company improved. The appellant argues that it could not have been expected in December of 1960 to purchase shares in mitigation of its losses where the value of these shares had fallen as rapidly as is indicated in the evidence.

1960. La preuve relative à la valeur des actions après cette date indique une faible remontée de leur valeur à $1.21 chacune en mars 1965, avec le rétablissement de la situation économique de la compagnie. L'appelante soutient qu'on ne peut lui reprocher de ne pas avoir acheté des actions en décembre 1960, dans le but de limiter le préjudice, eu égard à la diminution rapide de leur valeur démontrée par la preuve.

A more important circumstance which might render unreasonable any requirement that Baud purchase shares in the market was the existence of the aforementioned injunction issued on July 27, 1960, restraining the respondent from selling 125,-000 Asamera shares. The appellant contends that it is inconceivable that the law should require a party, who has suffered a misappropriation of his property and who has requested and been afforded the considerable protection of an injunction granted by a Court of Equity, to ignore the force and effect of that injunction and to go out and acquire the same number of shares as Brook was required to retain, however the terms of the injunction be construed.

Un autre facteur plus important pouvait également rendre déraisonnable toute obligation pour Baud d'acheter des actions sur le marché: il s'agit de l'injonction susmentionnée du 27 juillet 1960, qui interdisait à l'intimé de vendre 125,000 actions d'Asamera. L'appelante prétend qu'il est inconcevable qu'une partie dont les biens sont illégalement détenus par une autre personne, et qui a réclamé et obtenu la protection considérable qu'offre une injonction délivrée par une cour d'*equity*, soit tenue en droit d'ignorer la force obligatoire et l'effet de cette injonction et donc d'acheter le même nombre d'actions que celles que Brook devait conserver en sa possession, quelle que soit l'interprétation donnée aux termes de l'injonction.

Even if one accepts that submission, it must be acknowledged that the right of Baud to rely on the injunction as a shield against an obligation to minimize its losses is not absolute. In the first place, Baud was informed by Brook in his pleadings of July 6, 1967, that shares which were subject to the injunction had been sold. As of that date the shares were selling at $4.30 to $4.35 and had been rising in value since April of 1965 and at a median price of $4.33 would have cost Baud $541,250. Accordingly, at least by July of 1967 it could not be said that Baud would reasonably be discouraged from replacing the 125,000 shares in the open market because of the low price of an inactive company, nor could it be said that thereafter it could reasonably refrain from prosecuting its claim for damages because of the order enjoining the disposition of the shares by Brook. It remains the case, however, that the market price for such speculative shares as those of an oil-exploration company was subject to wide price fluctuations sometimes inspired by management which itself

Même si l'on accepte cet argument, il faut noter que le droit de Baud d'invoquer l'injonction pour se dégager de son obligation de limiter ses pertes n'est pas absolu. Tout d'abord, la défense produite par Brook le 6 juillet 1967 a fait savoir à Baud que les actions visées par l'injonction avaient été vendues. A cette époque, les actions se vendaient entre $4.30 et $4.35 chacune et étaient à la hausse depuis avril 1965; à un prix moyen de $4.33, le tout aurait coûté $541,250 à Baud. En conséquence, au moins à partir du mois de juillet 1967, on ne peut s'appuyer sur le prix peu élevé des actions d'une compagnie inactive pour dire que le remplacement des 125,000 actions sur le marché libre pouvait raisonnablement décourager Baud; on ne peut pas dire non plus que Baud aurait raisonnablement été empêchée de poursuivre son action en dommages-intérêts en se fondant sur l'injonction interdisant à Brook de vendre les actions. Il n'en demeure pas moins, cependant, que dans le cas de valeurs aussi spéculatives que celles d'une compagnie d'exploration pétrolière, le cours

held, as did Brook, a considerable number of shares.

The learned trial judge referred to a number of English authorities in support of the proposition that in the case of a loan of shares a plaintiff need not mitigate his losses either by purchasing shares on the market, or even by bringing a suit for recovery of damages within a reasonable time. The result under these authorities where the market value of the shares has risen or fallen between breach and trial, has been an award of damages representing the value of the shares at the time of the breach or of the trial at the election of the plaintiff. (*Vide Harrison v. Harrison*[13]; *Shepherd v. Johnson*[14]; *McArthur v. Seaforth*[15]; *Sanders v. Kentish*[16].) These cases were adopted in Canada and other jurisdictions (*vide Vicary v. Foley*[17]; *Galigher v. Jones*[18] and cases cited therein). These authorities raise no responsibility in the plaintiff to mitigate his losses. *Shepherd v. Johnson, supra, per* Grose J. at p. 211. The application of the principle developed in these early cases would produce damages calculated at the end of the trial or perhaps at the highest point prior to that date. The trial proceeded intermittently from June 1969 to December 1971, and final judgment was pronounced in May 1972. The latter price would be about $21 a share and the highest price attained was about $46.50 per share, allowing recovery of approximately $2,625,000 and $5,812,500 respectively.

A proper analysis of these cases is made difficult by reason of their antiquity and after serious consideration, I have concluded that they ought not to be followed by this Court. In the first place, they were decided long before modern principles of contractual remedies had been developed. Second-

[13] (1824), 1 C. & P. 412.
[14] (1802), 2 East 211.
[15] (1810), 2 Taunt. 257.
[16] (1799), 8 T.R. 162.
[17] (1891), 17 V.L.R. 407 (Australia).
[18] 129 U.S. 193 (1899).

du marché fait l'objet de fluctuations considérables, quelquefois suscitées par la direction de l'entreprise lorsque celle-ci détient, comme Brook, un nombre considérable d'actions.

Le savant juge de première instance a cité plusieurs arrêts anglais étayant la thèse selon laquelle dans le cas d'un prêt d'actions, la personne lésée n'est pas tenue de limiter le préjudice en achetant des actions sur le marché ni d'intenter une action en dommages-intérêts dans un délai raisonnable. Selon cette jurisprudence, lorsque la valeur marchande des actions a fluctué entre la date de la rupture du contrat et celle du procès, le montant des dommages-intérêts correspond à la valeur marchande des actions soit au moment de la rupture soit à celui du procès, au choix du demandeur. Voir *Harrison v. Harrison*[13]; *Shepherd v. Johnson*[14]; *McArthur v. Seaforth*[15]; *Sanders v. Kentish*[16].) Ces arrêts ont été suivis au Canada et dans d'autres pays (voir *Vicary v. Foley*[17]; *Galigher v. Jones*[18] et la jurisprudence y citée). Ces arrêts n'imposent aucune obligation au demandeur de limiter le préjudice. *Shepherd v. Johnson*, précité, le juge Grose à la p. 211. L'application du principe élaboré dans ces anciennes affaires donnerait lieu à des dommages-intérêts calculés selon la valeur marchande des actions à la fin du procès ou, dans certains cas, selon leur cote maximale avant cette date. En l'espèce, le procès s'est déroulé de façon intermittente de juin 1969 à décembre 1971 et le jugement a été finalement rendu en mai 1972. En gros, la valeur des actions à cette dernière date était de $21 et leur cote maximale de $46.50, ce qui donnerait des dommages-intérêts approximatifs de $2,625,000 et de $5,812,500 respectivement.

L'ancienneté de ces arrêts en rend toute analyse pertinente presque impossible et, après mûre réflexion, je conclus que cette Cour ne devrait pas les suivre. Premièrement, ils ont été prononcés longtemps avant l'élaboration des principes modernes relatifs aux recours en matière contractuelle.

[13] (1824), 1 C. & P. 412.
[14] (1802), 2 East 211.
[15] (1810), 2 Taunt. 257.
[16] (1799), 8 T.R. 162.
[17] (1891), 17 V.L.R. 407 (Australie).
[18] 129 U.S. 193 (1899).

ly, they are not in accord with recent decisions of this Court. Thirdly, they ignore the all-important and overriding considerations which have led to the judicial recognition of the desirability and indeed the necessity that a plaintiff mitigate his losses arising on a breach of contract. There is a fourth consideration. This old principle produces an arbitrary, albeit a readily ascertainable result because it lacks the flexibility needed to take into account the infinite range of possible circumstances in which the parties may find themselves at the time of the breach and before a trial can in practice take place. The pace of the market place and the complexities of business have changed radically since this rule or principle was developed in the early nineteenth century.

Deuxièmement, ils sont en contradiction avec des arrêts récents de cette Cour. Troisièmement, ils ne tiennent pas compte des considérations extrêmement importantes et capitales qui sont à l'origine de la reconnaissance judiciaire de l'opportunité et même de la nécessité pour le demandeur de limiter le préjudice dû à la rupture du contrat. Quatrièmement, cet ancien principe mène à un résultat arbitraire, quoique facilement calculable, parce qu'il n'est pas suffisamment flexible pour permettre de prendre en considération l'énorme éventail de circonstances dans lesquelles les parties peuvent se trouver au moment de la rupture du contrat et avant que le procès puisse être mis en train. Le rythme du marché des valeurs et la complexité des opérations financières ont radicalement changé depuis l'élaboration de cette règle, ou principe, qui remonte au début du dix-neuvième siècle.

Before proceeding further with the analysis of the nature and extent of damages in the field of contract law, it will be helpful to examine briefly the principles which have evolved in analogous situations in the law of torts. In conversion, the measure of damages has been said to be the value of the shares at the date of conversion, and in addition, consequential damages represented by the loss of the opportunity to dispose of the shares at the highest price attained prior to the end of trial. (*Vide McNeil v. Fultz et al.*[19] *per* Duff J. at p. 205; *The Queen in right of Alberta v. Arnold*[20], *per* Spence J. at p. 230.) I am aware of course that these cases were for the most part dealing with the wrongful refusal of a person under the liability of a trustee to deliver property to a beneficiary, but on principle the result would be the same in simple cases of conversion. (*Vide McGregor on Damages* (13th ed. 1972) at p. 671.)

In detinue, the measure of damages has been said to be the value of the shares at the end of the trial, and in addition, damages for the detention. The value of the shares at the end of the trial must be awarded on the basis that the action in detinue is, in fact, a quasi-proprietary action for return of the plaintiff's goods. If that cannot be done, then the clearest approximation of the plaintiff's loss is

[19] (1906), 38 S.C.R. 198.
[20] [1971] S.C.R. 209.

Avant de passer à l'analyse de la nature et de l'étendue des dommages-intérêts en droit des contrats, il convient d'examiner rapidement les principes qui ont cours dans des situations analogues en matière délictuelle. En cas d'appropriation illégale, les dommages-intérêts correspondent à la valeur des actions au moment de l'appropriation illégale, plus le montant accordé pour la perte de la possibilité de vendre les actions à leur cote maximale avant la fin du procès. (Voir *McNeil c. Fultz et autres*[19], le juge Duff à la p. 205, et *La Reine du chef de l'Alberta c. Arnold*[20], le juge Spence à la p. 230.) Je sais bien que ces arrêts traitent en grande partie du refus illégal d'une personne ayant des responsabilités de fiduciaire de rendre certains biens à un bénéficiaire, mais le résultat serait en principe le même dans les cas de simple appropriation illégale. (Voir *McGregor on Damages* (13e éd. 1972) à la p. 671.)

Dans l'action en restitution, les dommages-intérêts correspondraient à la valeur des actions à la fin du procès plus le montant accordé à titre de dommages-intérêts pour la détention des biens. Si le dédommagement est égal à la valeur des actions à la fin du procès, c'est que l'action en restitution est, en fait, pratiquement une action en revendication dans laquelle le demandeur réclame que ses

[19] (1906), 38 R.C.S. 198.
[20] [1971] R.C.S. 209.

the value of those goods when they would have been recovered, that is, at the end of trial. In addition, an award must compensate the plaintiff for damages flowing from the wrongful detention of his property, which it seems must be assessed on the basis of the highest value of the goods between the date at which the plaintiff ought to have recovered possession and the end of trial. In *McGregor on Damages, supra*, at p. 699, the case is put this way:

As with conversion there is no clear case of a market rise followed by a market fall between the time of the initial detention and the time of judgment. Although in *Williams v. Peel River Co.* the market appears to have risen and then fallen, it seems that the plaintiff was only claiming, as damages for detention, the value at initial default less the value at judgment. In *Archer v. Williams*, in detinue for scrip certificates, Cresswell J. directed the jury that "the measure of damages is the highest sum the scrip could have been sold for from the time of the detention till the time when it was returned," but on appeal the case was argued only on whether the plaintiff was entitled to recover the amount by which the market value of the scrip certificates had fallen between the defendant's refusal to deliver and his actual delivery. It is submitted that the highest price which the market had attained before the time when the plaintiff ought to have sued, should control here also.

One should pause here to point out that I have advisedly referred to the cut-off time as being the end of the trial. In some cases and texts, reference is made to 'judgment'. No authority has come to my attention where a significant factual change has occurred during the gap between end of trial and judgment. Protracted difficulties could arise if the books must be kept open for a last value measurement after trial and before settlement of the final judgment. Therefore I would apply the principle as closing off valuation considerations at the end of the trial. Holland J. in *Metropolitan Trust Co. of Canada et al. v. Pressure Concrete*

biens lui soient rendus. Si c'est impossible, l'estimation la plus exacte du préjudice subi par le demandeur correspond alors à la valeur qu'auraient eue les biens à leur restitution, soit à la fin du procès. Un montant supplémentaire est ajouté pour indemniser le demandeur du préjudice résultant de la détention illégale de ses biens; ce montant est fonction de la valeur maximale des biens entre la date à laquelle le demandeur aurait dû en reprendre possession et la fin du procès. Voici en quels termes *McGregor on Damages*, précité, en explique le principe à la p. 699:

[TRADUCTION] Comme dans les cas d'appropriation illégale, il n'existe aucune preuve précise de hausse puis de fléchissement des valeurs entre les dates de la détention initiale et du jugement. Même s'il paraît y avoir eu des fluctuations semblables dans l'affaire *Williams v. Peel River Co.*, il semble que le demandeur ne réclamait, à titre de dommages-intérêts pour la détention, que la valeur des biens au moment du refus de les remettre moins leur valeur lors du jugement. Dans l'affaire *Archer v. Williams*, une action en restitution de titres provisoires, le juge Cresswell a indiqué au jury que «les dommages-intérêts correspondaient au montant maximal pour lesquels les titres auraient pu être vendus entre la date de la détention et celle à laquelle ils ont été rendus»; mais en appel, la seule question en litige concernait le droit du demandeur de recevoir la différence entre la valeur des titres au moment du refus de les rendre et leur valeur moindre au moment où ils ont été rendus. Nous croyons qu'il faut également en ce cas retenir la cote maximale atteinte par les titres avant l'époque où le demandeur aurait dû intenter son recours.

Je m'arrête un instant pour souligner que c'est à dessein que j'ai pris la fin du procès comme date limite. On a déjà parlé, en doctrine et en jurisprudence, de la date du «jugement». Je ne connais aucun cas précis de différence importante survenue entre la date de la fin du procès et celle du jugement. De nouvelles difficultés pourraient surgir s'il fallait attendre, pour fermer les livres, d'être en mesure d'établir la valeur des biens juste avant le prononcé du jugement. En conséquence, je retiendrais donc la date de la fin du procès comme date finale aux fins de l'évaluation. Dans l'affaire *Metropolitan Trust Co. of Canada et al. v. Pres-*

Services Ltd. et al.[21] directed the assessment officer to take into account damages incurred beyond the end of trial to the date reserved judgment was delivered. In the course I propose to follow herein, this point need not be determined.

The application of the basic principles of remoteness and causality enunciated in the leading cases mentioned earlier points to the conclusion that Baud may have, in the absence of a duty to mitigate, a right of recovery in damages for breach of contract represented by the highest value attained by the shares between the date of breach and the end of trial, that is, $46.50 or $5,812,500. That is the high-water mark attainable under the doctrines which can be gleaned from the older authorities, but as we shall see is not now properly attainable. Such authorities as I have been able to discover suggest that this highest intermediate value is the proper starting point in assessing damages arising on the wrongful detention of another's shares, although the basis therefor is not clearly founded in the concepts of either tort or contract discussed above. (*Vide Archer v. Williams*[22].) Before the courts made a conscious effort to remove the distinctions between recovery in tort and recovery in contract it had been held in the case of a breach of contract that the loss of an opportunity to sell shares at the highest intervening market price was too remote to support recovery (*Simmons v. London Joint Stock Bank*[23], at p. 284, reversed on other grounds *sub nom. London Joint Stock Bank v. Simmons*[24]). The editors of *Halsbury's Laws of England* (4th ed. 1975) vol. 12 at p. 467 comment on this authority:

> It is not to be assumed that the plaintiff would necessarily have sold at such a value and that the loss of such a speculative increase in value is the natural or probable result of the breach of contract.

[21] [1973] 3 O.R. 629, aff'd (1976), 60 D.L.R. (3d.) 431 (Ont. C.A.).
[22] (1846), 2 Car. & K. 26, 175 E.R. 11.
[23] [1891] 1 Ch. 270, aff'd [1891] 1 Ch. 287.
[24] [1892] A.C. 201.

sure Concrete Services Ltd. et al.[21], le juge Holland a ordonné au fonctionnaire responsable d'évaluer les dommages survenus entre la date de la fin du procès et celle du prononcé du jugement pris en délibéré. Étant donné mes conclusions en l'espèce, je n'ai pas à trancher cette question.

L'application des principes de base concernant le caractère prévisible et les rapports de cause à effet énoncés dans la jurisprudence précitée mène à la conclusion qu'en l'absence de toute obligation de limiter le préjudice, Baud aurait droit à des dommages-intérêts pour violation du contrat correspondant à la cote maximale des actions entre la date de la violation et la fin du procès, c.-à-d. $46.50 l'action ou $5,812,500. C'est l'indemnité maximale que permettent les thèses fondées sur l'ancienne jurisprudence mais, comme nous le verrons, elle ne convient pas. Il semble, selon la jurisprudence que j'ai pu relever, que cette cote intermédiaire maximale doive servir de point de départ aux fins de l'évaluation des dommages-intérêts résultant de la détention illégale d'actions appartenant à autrui; on ne peut cependant en retrouver le fondement dans les concepts susmentionnés qui prévalent en matière délictuelle et contractuelle. (Voir *Archer v. Williams*[22].) Avant la tentative consciente des tribunaux pour éliminer les distinctions entre les dommages-intérêts en matière délictuelle et ceux en matière contractuelle, on avait jugé, dans le cas d'une violation de contrat, que la perte de la possibilité de vendre les actions à leur cote maximale était trop peu prévisible pour pouvoir servir de fondement aux dommages-intérêts (*Simmons v. London Joint Stock Bank*[23], à la p. 284, infirmé pour d'autres motifs sous le nom *London Joint Stock Bank v. Simmons*[24]). Voici en quels termes les rédacteurs de *Halsbury's Laws of England* (4e éd. 1975) t. 12, à la p. 467, ont commenté cet arrêt:

> [TRADUCTION] Il ne faut pas présumer que le demandeur aurait nécessairement vendu à ce prix et que l'impossibilité de profiter d'une augmentation de valeur de nature spéculative résulte naturellement ou probablement de la rupture du contrat.

[21] [1973] 3 O.R. 629, conf. (1976), 60 D.L.R. (3d) 431 (C.A. de l'Ont.).
[22] (1846), 2 Car. & K. 26, 175 E.R. 11.
[23] [1891] 1 ch. 270, conf. [1891] Ch. 287.
[24] [1892] A.C. 201.

Once a foreseeable or contemplated consequence occurs, in this case the loss of opportunity to sell the shares, all of the damages of that kind are recoverable in assessing the quantum of damages on proper principles. (*Vide Cheshire & Fifoot's Law of Contract* (9th ed. 1976) at p. 593; *Wroth v. Tyler*[25], at pp. 60-62.)

It is very likely that Brook would have foreseen the probable loss to be suffered by Baud on the non-return of its property; particularly bearing in mind his activity as a stock broker and his own dealings in Asamera shares. In the absence of a contrary indication he may be taken to have assumed the risk of its occurrence. Such a loss is not speculative, neither is it so improbable nor so remote as to remove it from the kind of damages recoverable in an action in contract. As to quantum of damages it is not unreasonable to scale the recovery for the loss suffered by Baud by virtue of its loss of the opportunity to sell the shares to a price or prices at least approaching the median point between breach and trial, subject to the varying influences of the many relevant factors to be discussed below.

The application of another basic principle relating to the computation of contract damages, namely that the plaintiff should be, so far as money may do so, placed in the same position as he would have enjoyed had the breach not occurred, produces a like result. Had Brook returned the shares when the contract provided, Baud would then have been in a position to dispose of those shares during the period of market appreciation. The range of damages on such a basis would be from 29 cents or more realistically $2 per share to $46.50 per share. The $2 per share is more properly the baseline for computation of value because that is the option price agreed upon between the parties for the period ending at the time the breach of contract occurred. Since it is entirely unrealistic to assume that the peak price was attainable for a block sale of 125,000 Asamera shares, and as it is most unlikely that Baud or anyone else would enjoy such perspicacity, a median range of $20 to $25 for the period from mid-1967 to the end of trial is more appropriate.

[25] [1974] Ch. 30.

Lorsqu'une conséquence prévisible ou prévue se produit, en l'espèce la perte d'une possibilité de vendre les actions, tout préjudice subi est inclus dans le montant global des dommages-intérêts calculé selon les principes appropriés. (Voir *Cheshire & Fifoot's Law of Contract* (9e éd. 1976) à la p. 593 et *Wroth v. Tyler*[25], aux pp. 60-62.)

Étant lui-même un courtier en valeurs et ayant lui-même négocié des actions d'Asamera, Brook pouvait très vraisemblablement prévoir le préjudice causé à Baud en ne lui rendant pas ses actions. En l'absence de preuve contraire, on peut présumer que Brook a assumé ce risque. Ce genre de préjudice n'est pas de nature spéculative, ni suffisamment improbable ou imprévisible qu'il doive être négligé dans le calcul des dommages-intérêts pour rupture de contrat. Quant au montant de ces derniers, il n'est pas déraisonnable de l'établir en tenant compte du préjudice qu'a subi Baud en perdant la possibilité de vendre les actions à un prix voisin de la valeur médiane atteinte entre la date de la rupture du contrat et celle du procès, sous réserve des répercussions des nombreux facteurs pertinents étudiés ci-après.

Un autre principe fondamental dans le calcul des dommages-intérêts en matière contractuelle, savoir que le demandeur devrait, financièrement du moins, être placé dans la même situation que si le contrat avait été exécuté, donne un résultat semblable. Si Brook avait rendu les actions conformément au contrat, Baud aurait pu les vendre pendant que le marché était à la hausse. Suivant ce principe, les dommages s'échelonnent de 29 cents ou, pour être plus réaliste, de $2 à $46.50 l'action. La valeur de $2 l'action est plus appropriée parce que c'est le prix de l'option d'achat dont les parties avaient convenu pour la période venant à échéance lorsqu'est survenue la violation du contrat. Puisqu'il est irréaliste de penser qu'un bloc de 125,000 actions d'Asamera atteindrait cette cote maximale en une seule vente et que Baud, pas plus que les autres, n'est douée d'une telle perspicacité, la valeur médiane de $20 à $25 l'action pour la période commençant vers la moitié de l'année 1967 et se terminant à la fin du procès me semble plus appropriée. (Voir *Fales et autres c.*

[25] [1974] Ch. 30.

(*Vide Fales et al. v. Canada Permanent Trust Company*[26], *per* Dickson J. at p. 322.) This would produce damages of about $3,000,000 before any consideration is given to the required mitigation.

It must be noted at once that the authorities which deny a responsibility to avoid losses in the case of the non-return of shares have been viewed somewhat harshly. (*Vide Dawson v. Helicopter Exploration Co. Ltd.*[27], *per* Sydney Smith J.A. at pp. 103, 104. The appeal to this Court was allowed for reasons not here relevant and without any comment on this point. ((1958), 12 D.L.R. (2d) 1.)

The cases which establish the exceedingly technical rules relating to recovery of damages for the non-return of shares turn on the theory that only where a breach of contract gives rise to an asset in the hands of the plaintiff will the law require him to mitigate his losses by employing that asset in a reasonable manner. Thus if an employer wrongfully dismisses an employee the breach results in the employee obtaining an asset, an ability to work for another employer, or at least the opportunity to offer his services to that end, which he did not enjoy prior to the dismissal. This is no more than a philosophical explanation of the simple test of fairness and reasonableness in establishing the presence and extent of the burden to mitigate in varying circumstances.

This approach was adopted by Rand J. in *Karas et al. v. Rowlett*[28], at p. 8, where he said, in a case of fraud resulting in a loss of profits:

> . . . by the default or wrong there is released a capacity to work or to earn. That capacity becomes an asset in the hands of the injured party, and he is held to a reasonable employment of it in the course of events flowing from the breach.

An analogous situation arises in the breach of a contract for the sale of goods where on the failure

[26] [1977] 2 S.C.R. 302.
[27] (1957), 8 D.L.R. (2d) 97.
[28] [1944] S.C.R. 1.

Canada Permanent Trust Company[26], le juge Dickson, à la p. 322.) Ce calcul donne un montant de dommages-intérêts de $3,000,000, mais il reste encore à étudier l'obligation de limiter le préjudice.

Il faut noter d'emblée que la jurisprudence qui ne reconnaît pas l'obligation de limiter le préjudice dans un cas de non-restitution d'actions a été passablement critiquée. (Voir *Dawson v. Helicopter Exploration Co. Ltd.*[27], le juge Sydney Smith de la Cour d'appel, aux pp. 103 et 104. Le pourvoi interjeté devant cette Cour a été accueilli pour des motifs non pertinents en l'espèce et sans qu'il y ait le moindre commentaire sur cette question, (1958), 12 D.L.R. (2d) 1.)

Les arrêts qui établissent les règles très rigoureuses relatives au recouvrement de dommages-intérêts en cas de non-restitution d'actions sont fondés sur le principe suivant: l'obligation légale de limiter le préjudice n'existe que lorsque la violation du contrat met un bien entre les mains du demandeur, ce dernier devant alors l'utiliser d'une manière raisonnable. Ainsi, lorsqu'un employeur congédie illégalement un employé, la rupture du contrat donne à ce dernier la possibilité de travailler pour un autre employeur ou tout au moins de lui offrir ses services, une possibilité qu'il n'avait pas avant son congédiement. Cette théorie n'est qu'une explication philosophique du simple critère d'équité et de raison qui détermine l'existence et l'étendue, selon les circonstances, de l'obligation de limiter le préjudice.

Le juge Rand a adopté ce raisonnement dans l'arrêt *Karas et autres c. Rowlett*[28], une affaire de fraude qui avait causé une perte de bénéfices, en déclarant, à la p. 8:

> [TRADUCTION] . . . la violation ou le tort causé entraîne une possibilité de travail ou de gain. Cette possibilité est un avantage pour la partie lésée et elle est tenue d'en user de manière raisonnable dans le contexte de la rupture du contrat.

L'inexécution par un fournisseur d'un contrat de vente de marchandises entraîne une situation ana-

[26] [1977] 2 R.C.S. 302.
[27] (1957), 8 D.L.R. (2d) 97.
[28] [1944] R.C.S. 1.

of a supplier to deliver goods, the purchaser because he is relieved of the obligation to pay, has an asset (the financial resource represented by the sums previously committed to the purchase) of which he did not have the free use prior to the breach. This is not the situation of Baud who might in mitigation of the damage suffered on the non-return of its shares of Asamera, be called upon to lay out substantial assets to replace the shares retained by Brook. Because there is no evidence of lack of funds for these purposes we need not be concerned with the relevance of the judgment in *Liesbosch Dredger v. S.S. "Edison"*[29]. There is of course no asset created by the breach of the contract to return shares and if that theory be the law and the creation of an asset be a necessary prerequisite of a duty to mitigate, no such duty arose in the case at hand.

It follows that a contrary result should arise where damages are recoverable for a breach of contract by a vendor on a *sale of shares*. There the breach would normally allow a buyer the use of his funds formerly committed to the purchase, and consequently damages should be calculated on the basis that he ought to have taken steps to avoid his losses by the purchase of shares on the market at the time of the breach. This, in fact, appears to be the law at present. (*Vide Dawson v. Helicopter Exploration Co. Ltd., supra; Pitfield & Co. Ltd. v. Jomac Gold Syndicate Ltd. et al.*[30], at p. 165 (Ont. C.A.); *Williams and Cameron v. Keyes and Pyramid Mining Co. Ltd.*[31], at p. 568 (B.C.S.C.); *Shaw v. Holland*[32].)

A different consideration arises where the plaintiff-buyer has prepaid the contract price and has not received delivery. As in the case of non-return of shares, the breach does not give rise to any asset in the hands of the plaintiff since he has already parted with his funds and on that basis some courts have held that the injured party need not purchase like goods in the market. This view received indirect support in *Gainsford v. Carroll et*

[29] [1933] A.C. 449.
[30] [1938] 3 D.L.R. 158.
[31] [1971] 5 W.W.R. 561.
[32] (1846), 15 M. & W. 136.

logue car, étant libéré de l'obligation de payer, l'acheteur détient un bien (en l'occurrence l'argent réservé au paiement des marchandises) dont il ne disposait pas avant. Ce n'est pas le cas de Baud qui, pour limiter le préjudice résultant de la détention de ses actions d'Asamera, aurait pu être appelée à débourser une somme considérable pour remplacer les actions que Brook refusait de lui rendre. Puisque le preuve ne révèle aucun manque de fonds pour ce faire, l'arrêt *Liesbosch Dredger v. S.S. «Edison»*[29] n'est pas pertinent. Il est évident que la non-restitution des actions ne procurait aucun bien. Si cette théorie reflète l'état du droit et la survenance d'un bien est une condition essentielle à l'existence de l'obligation de limiter le préjudice, cette obligation n'existe pas en l'espèce.

Le résultat contraire surviendrait donc dans le cas de dommages-intérêts découlant de l'inexécution par le vendeur d'un contrat de *vente d'actions*. Dans ce cas, l'inexécution permettrait à l'acheteur d'utiliser l'argent réservé à l'achat et, en conséquence, le montant des dommages-intérêts devrait être évalué en tenant compte de l'obligation de l'acheteur de prendre des mesures pour limiter le préjudice, savoir l'achat d'actions sur le marché au moment de la violation du contrat. C'est actuellement l'état du droit. (Voir *Dawson v. Helicopter Exploration Co. Ltd.*, précité; *Pitfield & Co. Ltd. v. Jomac Gold Syndicate Ltd. et al.*[30], à la p. 165 (C.A. de l'Ont.); *Williams and Cameron v. Keyes and Pyramid Mining Co. Ltd.*[31], à la p. 568 (C.S. de la C.-B.); *Shaw v. Holland*[32].)

La situation est différente lorsque le demandeur-acheteur a payé d'avance le prix et n'a pas reçu la contrepartie. Comme dans le cas de la non-restitution des actions, la violation du contrat ne met aucun bien dans les mains du demandeur puisqu'il a déjà payé. Pour cette raison, certains tribunaux ont jugé que la partie lésée n'est pas tenue d'acheter des marchandises équivalentes sur le marché. Les arrêts *Gainsford v. Carroll et al.*[33]

[29] [1933] A.C. 449.
[30] [1938] 3 D.L.R. 158.
[31] [1975] 5 W.W.R. 561.
[32] (1846), 15 M. & W. 136.
[33] (1824), 2 B. & C. 624.

al.[33] and in *Shaw v. Holland, supra*, but was rejected in *Startup et al. v. Cortazzi*[34]. However, when the point was raised in the Court of Appeal of England in *Aronson v. Mologa Holzindustrie A/G Leningrad*[35], Atkin L.J. after considering American authority, left the point open. In *Peebles v. Pfeifer*[36], Bigelow J. held that a purchaser of wheat who had paid for delivery was entitled to recover the market price of the wheat not at the time of breach when the price was 76 cents a bushel but at the time of trial when the price was $1.68. The same reasoning was applied by the Privy Council in *Robertson v. Dumaresq*[37], in assessing damages on the non-conveyance of land where the purchaser had already supplied the consideration. (*Per* Lord Chelmsford at p. 95; referred to in *Horsnail v. Shute*[38], at p. 200.)

et *Shaw v. Holland*, précité, appuient indirectement cette opinion alors que l'arrêt *Startup et al. v. Cortazzi*[34] la rejette. Lorsque la question a été soulevée devant la Cour d'appel d'Angleterre dans l'affaire *Aronson v. Mologa Holzindustrie A/G Leningrad*[35], après avoir étudié la jurisprudence américaine, le lord juge Atkin n'a pas tranché ce point. Dans l'arrêt *Peebles v. Pfeifer*[36], le juge Bigelow a statué qu'un acheteur de blé qui avait payé d'avance avait le droit d'être indemnisé en fonction de la valeur marchande du blé au moment du procès, soit $1.68 le boisseau même s'il ne valait que 76 cents au moment de la rupture du contrat. Le Conseil privé a suivi le même raisonnement dans l'arrêt *Robertson v. Dumaresq*[37], en évaluant les dommages-intérêts pour refus de céder le titre d'un terrain pour lequel l'acheteur avait déjà fourni la contrepartie. (Lord Chelmsford à la p. 95; mentionné dans l'arrêt *Horsnail v. Shute*[38], à la p. 200.)

In *Hoefle v. Bongard & Company*[39], this Court had to contend with facts which bear a remarkable similarity to the facts in the case at bar. Rand J. adopted the English test and denied a duty to mitigate after a breach involving the non-return of shares. The facts were simple. Hoefle had authorized the transfer of 500 shares which were held on his account by his brokers, to the account of a close friend, a Mrs. Hazel Weeks, to secure the deficit in Mrs. Weeks' account. The brokers sold the shares to liquidate the deficit, and Hoefle sued for damages arising on the alleged unauthorized disposition of the shares. Four members of a Court of five found that the sale had in fact been authorized under the terms of the transfer, dismissed the action, and thus did not consider the damage issue.

Dans l'arrêt *Hoefle c. Bongard & Company*[39], cette Cour avait à considérer des faits d'une ressemblance frappante avec ceux de la présente affaire. Le juge Rand a adopté le critère anglais et jugé que l'obligation de limiter le préjudice n'existe pas dans le cas de non-restitution d'actions. Les faits sont simples. Hoefle avait autorisé le transfert de 500 actions détenues par ses courtiers en son nom pour garantir le déficit au compte d'une amie intime, une nommée Hazel Weeks. Les courtiers ont vendu les actions pour combler le déficit et Hoefle les a poursuivis en dommages-intérêts en alléguant que la vente n'était pas autorisée. Quatre juges sur cinq ont jugé que la vente était effectivement autorisée par le transfert et ont rejeté l'action sans étudier la question des dommages-intérêts.

Rand J. concluded that the sale of the shares constituted a breach of contract and had this to say regarding the assessment of damages (at p. 373):

Le juge Rand ayant conclu que la vente des actions constituait une violation de contrat, a écrit ce qui suit au sujet de l'évaluation des dommages-intérêts (p. 373):

[33] (1824), 2 B. & C. 624.
[34] (1835), 2 Cr. M. & R. 165.
[35] (1927), 32 Com. Cas. 276.
[36] [1918] 2 W.W.R. 877 (Sask. K. B.).
[37] (1864), 11 Moore (N.S.) 66.
[38] (1922), 62 D.L.R. 199 (B.C. C.A.).
[39] [1945] S.C.R. 360.

[34] (1835), 2 Cr. M. & R. 165.
[35] (1927), 32 Com. Cas. 276.
[36] [1918] 2 W.W.R. 877 (B.R. de la Sask.).
[37] (1846), 11 Moore (N.S.) 66.
[38] (1922), 62 D.L.R. 199 (C.A. de la C.-B.).
[39] [1945] R.C.S. 360.

One consideration may be cleared away. It is not a case for any rule of mitigation. The broker is in as good a position as the owner to redeem the situation or to mitigate the consequences: Grose, J. in *Shepherd v. Johnson.*

The object of damages is to restore the owner as nearly as possible to the same position as if the terms of the bailment had been respected. What he would have done in the intervening time, if the security had remained, is the speculative basis from which the inferences must be drawn. We cannot say that he would have sold at the highest or at the lowest price or that he would have sold at all. But so far as the circumstances permit, they are to be the ground of conclusions of probability: *Williams v. Peel River Land and Mineral Company Ltd.* The case is analogous to that of a breach of covenant to re-deliver shares and *prima facie* the defendants are held to have prevented the shares from remaining the property of the plaintiff up to the trial: Best C.J., in *Harrison v. Harrison*:

> I think the fair rule is, to take the damages at the price of yesterday or to-day. When you had the money, you promised to restore the stock. Justice is not done, if you do not place the plaintiff in the same situation in which he would have been if the stock had been replaced at the stipulated time. We cannot act on the possibility of the plaintiff's not keeping it there. All we can say is,—you have effectually prevented him from doing so.

Owen v. Routh treats the rule as absolute.

Accordingly, although the shares at the date of breach were trading at $1.80 per share, Rand J. calculated Hoefle's damages on the basis of a share value of $4 that being the value at the time of trial.

This view was not shared by the majority of the Court who in the event found it unnecessary to settle the point. The creation of an 'asset' on a breach of contract cannot be an invariable prerequisite to the operation of the principle that a party injured by a breach of contract must respond in mitigation to avoid an unconscionable accumulation of losses. Nor should the absence of such an 'asset' invariably exonerate a plaintiff from taking mitigative action. The presence or absence of such an 'asset' is but one of many factors which bear on the task of determining in a particular case what is

[TRADUCTION] Une question peut être tranchée immédiatement. L'obligation de limiter le préjudice n'existe pas en l'espèce. Le courtier était autant en mesure que le propriétaire de corriger la situation ou d'en limiter les conséquences: le juge Grose, dans *Shepherd v. Johnson.*

L'adjudication de dommages-intérêts vise à remettre le propriétaire dans la même situation, autant que faire se peut, que si le contrat de dépôt avait été respecté. Pour fonder notre raisonnnement, il faut se demander ce qu'il aurait fait des valeurs pendant la période en cause. On ne peut pas dire qu'il les aurait vendues à leur cote maximale ou minimale, ni même s'il les aurait vendues. Mais ce sont ces considérations qu'il faut peser, compte tenu des circonstances, pour déterminer les probabilités: *Williams v. Peel River Land and Mineral Company Ltd.* Il s'agit d'un cas analogue au défaut de rendre des actions et, dans un tel cas, les défendeurs sont à première vue présumés avoir empêché le demandeur de conserver la propriété de ses actions jusqu'au procès: le juge en chef Best dans *Harrison v. Harrison*:

> A mon avis, pour être juste, il faut établir les dommages-intérêts en fonction des cours d'hier ou d'aujourd'hui. L'engagement de rendre les actions a été pris alors que le défendeur avait l'argent. Justice n'est faite que lorsque le demandeur est remis dans la même situation que si les actions lui avaient été rendues à la date convenue. On ne peut présumer que le demandeur s'en serait départi. Tout ce qu'on peut dire, c'est que vous l'en avez empêché.

L'arrêt *Owen v. Routh* considère cette règle comme absolue.

En conséquence, même si les actions valaient $1.80 chacune au moment de la violation du contrat, le juge Rand a pris la valeur au moment du procès, soit $4 l'action, pour calculer les dommages-intérêts dus à Hoefle.

Ne parvenant pas à la même conclusion, la majorité en cette Cour n'a pas jugé nécessaire de trancher cette question. La survenance d'un «bien» lors de la rupture du contrat ne peut pas constituer dans tous les cas une condition préalable à l'existence de l'obligation pour la partie lésée de limiter le préjudice en empêchant une accumulation indue de pertes pouvant résulter de la violation. Et on ne peut dire non plus qu'à défaut d'un tel «bien», le demandeur soit automatiquement libéré de l'obligation de limiter le préjudice. La présence ou l'absence d'un «bien» n'est qu'un des nombreux

or is not reasonable on the part of the injured party in all the circumstances. The decisions which purport to allow recovery on the basis of the increased value of the *res* of the action between the date of breach and the end of trial have been denied authority by the learned editors of *Halsbury's Laws of England* (3rd ed. 1960) vol. 34, at p. 155. After noting the old cases, some of which are reviewed above, the editors conclude that "the measures [of damages] must vary according to the facts".

In short it would appear that the principles of mitigation in respect of contracts for the sale of goods generally may not be applied without reservation to the determination of the duty to mitigate arising in respect of contracts for the sale of shares; and in any case differ fundamentally from the case of a breach of a contract for the return of shares. It is inappropriate in my view simply to extend the old principles applied in the detinue and conversion authorities to the non-return of shares with the result that a party whose property has not been returned to him, could sit by and await an opportune moment to institute legal proceedings, all the while imposing on a defendant the substantial risk of market fluctuations between breach and trial which might very well drive him into bankruptcy. Damages which could have been avoided by the taking of reasonable steps in all the circumstances should not, and indeed in the interests of commercial enterprise, must not be thrown onto the shoulders of a defendant by an arbitrary although neatly universal rule for the recovery of damages on breach of the contract for redelivery of property.

We start of course with the fundamental principle of mitigation authoritatively stated by Viscount Haldane L.C. in *British Westinghouse Electric and Manufacturing Company, Limited v. Underground Electric Railways Company of*

facteurs à prendre en considération pour déterminer si, dans une affaire donnée, l'attitude de la partie lésée est raisonnable compte tenu des circonstances. D'après les savants rédacteurs de *Halsbury's Laws of England*, (3e éd. 1960) t. 34, à la p. 155, les jugements qui accordent des dommages-intérêts calculés d'après l'augmentation de la valeur du bien faisant l'objet du litige entre la date de la rupture du contrat et celle de la fin du procès ne font pas jurisprudence. Après avoir pris note des anciennes causes, dont certaines sont étudiées plus haut, ils concluent que [TRADUCTION] «l'évaluation [des dommages-intérêts] doit dépendre des circonstances».

Il ressort donc que les principes concernant l'obligation de limiter le préjudice dans le cas des contrats de vente de marchandises en général ne s'appliquent pas intégralement aux fins de l'évaluation de cette obligation dans le cas des contrats de vente d'actions et diffèrent fondamentalement des cas d'inexécution de contrat par défaut de rendre des actions. A mon avis, les anciens principes régissant l'action en restitution et l'action pour appropriation illégale ne s'appliquent pas en cas de défaut de rendre des actions en conformité d'un contrat, car ils permettraient à la partie lésée d'attendre le moment opportun pour intenter son recours, tout en faisant subir au défendeur le risque de fluctuations considérables du marché entre la date de la rupture du contrat et celle du procès, qui pourraient le pousser à la faillite. Les pertes qui auraient pu être évitées si l'on avait pris des mesures raisonnables dans les circonstances pour limiter le préjudice ne doivent pas, dans l'intérêt même du monde des affaires, être uniquement supportées par le défendeur en vertu d'une règle d'application universelle, mais arbitraire, pour le calcul des dommages-intérêts en cas de défaut de rendre des biens conformément à un contrat.

Il importe d'abord de voir en quels termes le lord chancelier vicomte Haldane a énoncé de façon non équivoque le principe de base en matière d'obligation de limiter le préjudice dans l'arrêt *British Westinghouse Electric and Manufacturing Company, Limited v. Underground Electric Rail-*

London, Limited[40], at p. 689:

The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. In the words of James L.J. in *Dunkirk Colliery Co. v. Lever*, "The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise that in the ordinary course of business."

As James L.J. indicates, this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. But when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act.

That principle has been applied in the case of conversion of shares, as well as in the case of breach of contract to sell shares, and should for the reasons developed above, be applied according to the circumstances to the case of a breach of contract to return shares.

It is interesting that in the United States, rules essentially the same as those advanced towards the end of the nineteenth century in England were jettisoned in 1899 through the adoption of what is now commonly referred to as the "New York rule". This rule has been applied in a variety of situations encompassing both contractual and tortious wrongs, and its justification is not easily disputed.

The leading authority for the "New York rule" is *Galigher v. Jones*[41], where the Supreme Court of the United States laid to rest the proposition that a plaintiff wronged by the unauthorized sale of his shares, or by the failure to purchase shares

[40] [1912] A.C. 673.
[41] 129 U.S. 193 (1899).

ways Company of London, Limited[40], à la p. 689:

[TRADUCTION] Le principe fondamental est donc la compensation des pertes pécuniaires découlant naturellement de l'inexécution; mais ce principe est mitigé par un autre qui veut que le demandeur ait l'obligation de prendre toutes mesures raisonnables pour limiter le préjudice résultant de la rupture du contrat et ne puisse être indemnisé pour la partie du préjudice qu'il aurait ainsi pu éviter. Comme l'a écrit le lord juge James dans *Dunkirk Colliery Co. v. Lever*, «Celui qui ne respecte pas un contrat n'est pas responsable des dommages supplémentaires attribuables à l'inaction des demandeurs, ces derniers étant tenus d'agir en hommes raisonnables sans toutefois être obligés de prendre d'autres mesures que celles se situant dans le cours normal des affaires».

Comme le précise le lord juge James, ce second principe n'impose pas au demandeur l'obligation de prendre des mesures différentes de celles que prendrait un homme raisonnable et prudent dans le cours normal de ses affaires. Cependant, lorsque dans le cours de ses affaires il prend une mesure liée à la transaction qui a pour effet de réduire les pertes, la diminution du préjudice peut être prise en considération même s'il n'était pas tenu d'agir ainsi.

Ce principe a été appliqué dans les cas d'appropriation illégale d'actions et de rupture de contrats de vente d'actions et, pour les motifs susmentionnés, il devrait également s'appliquer, selon les circonstances, aux cas de violation d'un engagement de rendre des actions.

Il est intéressant de noter qu'aux États-Unis, des règles semblables aux règles élaborées en Angleterre vers la fin du dix-neuvième siècle ont été mises au rancart en 1899 en faveur de ce que l'on appelle communément la «règle de New York». Cette règle a été appliquée autant en matière contractuelle que délictuelle et ses assises sont difficilement contestables.

L'arrêt clé en ce qui concerne la «règle de New York» est *Galigher v. Jones*[41], où la Cour suprême des États-Unis a rejeté définitivement la thèse selon laquelle un demandeur lésé par la vente non autorisée de ses actions ou par l'omission d'acheter

[40] [1912] A.C. 673.
[41] 129 U.S. 193 (1899).

at his direction, may recover losses which he might have avoided. The Court was critical of the old rules which would arbitrarily award the highest intermediate value of the stock between the date of the wrong and the date of trial. The remarks of Mr. Justice Bradley at pp. 200-202 are apt to the resolution of the issues in this case:

The rule of highest intermediate value as applied to stock transactions has been adopted in England and in several of the States in this country whilst in some others it has not obtained. The form and extent of the rule have been the subject of much discussion and conflict of opinion. The cases will be found collected in Sedgwick on the Measure of Damages [479], Vol. 2, 7th ed. p. 379, note (b); Mayne, Damages, 83 (92 Law Lib.); 1 Sm. Lead. Cas. 7th Am. ed. 367. The English cases usually referred to are *Cud v. Rutter*, 1 P. Wms. 572, 4th ed. note (3); *Owen v. Routh*, 14 C.B. 327; *Loder v. Kekulé*, 3 C.B.N.S. 128; *France v. Gaudet*, L.R. 6 Q.B. 199. It is laid down in these cases that where there has been a loan of stock and a breach of the agreement to replace it, the measure of damages will be the value of the stock at its highest price on or before the day of trial.

. . .

Perhaps more transactions of this kind arise in the State of New York than in all other parts of the country. The rule of highest intermediate value up to the time of trial formerly prevailed in that State, and may be found laid down in *Romaine v. Van Allen*, 26 N.Y. 309, and *Markham v. Jaudon*, 41 N.Y. 235, and other cases,—although the rigid application of the rule was deprecated by the New York Superior Court in an able opinion by Judge Duer, in *Suydam v. Jenkins*, 3 Sandf. 614. The hardship which arose from estimating the damages by the highest price up to the time of trial, which might be years after the transaction occurred, was often so great that the Court of Appeals of New York was constrained to introduce a material modification in the form of the rule, and to hold the true and just measure of damages in these cases to be the highest intermediate value of the stock between the time of its conversion and a reasonable time after the owner has received notice of it to enable him to replace the stock. This modification of the rule was very ably enforced in an opinion of the court of appeals delivered by Judge Rapallo, in the case of *Baker v. Drake*, 53 N.Y. 211 .... It would be a herculean task to review all the various and conflicting opinions that have been delivered on this subject. On the whole, it seems to us that the New York rule, as finally settled by the court of appeals,

des actions selon ses directives pourrait recouvrer des dommages-intérêts qu'il aurait pu éviter. La Cour a critiqué l'ancienne règle qui accordait arbitrairement la cote intermédiaire maximale atteinte par les actions entre la date de la violation et celle du procès. Les commentaires suivants du juge Bradley sont pertinents (pp. 200 à 202):

[TRADUCTION] La règle de la cote intermédiaire maximale relative aux opérations de bourse a été adoptée en Angleterre et dans plusieurs États américains, alors qu'elle était rejetée dans d'autres. Sa nature et sa portée ont fait l'objet de nombreuses discussions et divergences d'opinion. Les arrêts pertinents sont étudiés dans Sedgwick on the Measure of Damages [479], t. 2, 7e éd. p. 379, note (b); Mayne, Damages, 83 (92 Law Lib.); 1 Sm. Lead. Cas. 7e éd. mod. 367. Les arrêts anglais auxquels on se réfère le plus souvent sont: *Cud v. Rutter*, 1 P. Wms. 572, 4e éd. note (3); *Owen v. Routh*, 14 C.B. 327; *Loder v. Kekulé*, 3 C.B.N.S. 128; *France v. Gaudet*, L.R. 6 Q.B. 199. Ces arrêts établissent que dans le cas d'un prêt d'actions et de la violation de l'engagement prévoyant leur remplacement, les dommages-intérêts sont fondés sur le cote maximale atteinte par les actions à la date du procès ou avant.

. . .

Il y a probablement plus d'opérations de ce genre dans l'État de New York que dans tout le reste du pays. La règle de la cote intermédiaire maximale des actions y a déjà prévalu, comme le démontrent certains arrêts, notamment *Romaine v. Van Allen*, 26 N.Y. 309 et *Markham v. Jaudon*, 41 N.Y. 235,—mais son application rigoureuse a été désapprouvée par la Cour supérieure de New York: voir le jugement du juge Duer dans *Suydam v. Jenkins*, 3 Sandf. 614. Les difficultés qu'entraînait l'évaluation des dommages-intérêts à partir de la cote maximale atteinte avant le procès, qui pouvait avoir lieu plusieurs années après l'opération, étaient telles que la Cour d'appel de New York s'est vue obligée de modifier considérablement la règle et de statuer que la seule façon équitable d'évaluer les dommages était de considérer la cote intermédiaire maximale atteinte par les actions entre le moment de leur appropriation illégale et un temps raisonnable après que leur propriétaire en eut été informé afin de lui permettre de les remplacer. Cette règle modifiée a été très habilement appliquée dans une décision de la Cour d'appel rendue par le juge Rapallo dans l'affaire *Baker v. Drake*, 53 N.Y. 211 ... Ce serait un travail énorme de revoir toutes les opinions, souvent divergentes, rédigées sur le sujet. Tout bien considéré, nous concluons que la règle de New York, qu'a entérinée la Cour d'appel, doit l'emporter parce

has the most reasons in its favour, and we adopt it as a correct view of the law. (Emphasis added.)

(*Vide* Annot. 31 ALR 3d 1286; *Mitchell v. Texas Gulf Sulphur Company*[42].)

While the circumstances of the case prompted the Court to direct if not to confine its direction to conversion of the shares and its consequences, the broader principle is simply the right to damages arising on the breach of contract to redeliver whatever the reason for breach might have been, that is with or without a conversion. The application of such a principle to the circumstances arising herein following the breach to redeliver raises some additional considerations.

This Court in *The Queen v. Arnold, supra*, considered in some detail the limitations to be placed on the damages recoverable in conversion upon a failure to return securities. The majority dismissed the plaintiff's claim for reasons not here relevant. Spence J. would have allowed the claim in part and in doing so stated at p. 230:

> Surely a plaintiff whose securities have been converted, cannot wait to issue process for their recovery or damages for the conversion until just before the period of limitation lapses, then be entitled to claim damages fixed at the highest value of those securities within the six-year limitation term.

Spence J. concluded that the plaintiff could not recover losses which might have been avoided by the purchase of alternate shares. The majority judgment by Martland J. as I have noted did not have to deal with damages but concluded at p. 221:

> . . . but, if I had had to deal with that issue, I would have concurred in the views expressed by my brother Spence.

The result is in accord with the so-called New York rule in so far as it abrogates the "highest intermediate point" doctrine. The same principle was applied in assessing damages for conversion of personal property other than corporate securities

[42] 446 F. 2d 90 (1971).

qu'à notre avis, elle énonce correctement l'état du droit. (C'est moi qui souligne.)

(Voir la note 31 ALR 3d 1286; *Mitchell v. Texas Gulf Sulphur Company*[42].)

Même si les circonstances de cette affaire ont fait que la Cour s'est en pratique limitée à la question de l'appropriation illégale d'actions et à ses conséquences, le principe général qui se dégage est le droit de recouvrer les dommages-intérêts résultant de la rupture d'un contrat prévoyant la restitution d'un bien, peu importe la cause de la rupture et qu'il y ait eu ou non appropriation illégale. L'application de ce principe en l'espèce, savoir la rupture du contrat prévoyant la restitution et ce qui s'ensuit, soulève d'autres questions.

Dans l'affaire *La Reine c. Arnold*, précitée, cette Cour a analysé les restrictions à appliquer à l'évaluation des dommages-intérêts pour défaut de restitution des actions par suite d'une appropriation illégale. A la majorité, la Cour a rejeté l'action pour des motifs non pertinents en l'espèce. Le juge Spence aurait accueilli la demande en partie, et a déclaré ce faisant (à la p. 230):

> Il va sans dire qu'un demandeur dont les valeurs ont été réalisées illégalement ne peut attendre que le délai de prescription soit presque écoulé pour intenter des procédures en recouvrement ou en dommages pour l'appropriation, et ensuite avoir le droit de réclamer des dommages correspondant à la cote maximale atteinte par ces valeurs pendant le délai de prescription de six ans.

Le juge Spence a conclu que le demandeur n'avait pas le droit d'être indemnisé pour un préjudice qu'il aurait pu éviter en achetant des actions de remplacement. Comme je l'ai indiqué, le jugement de la majorité, rédigé par le juge Martland, n'avait pas à trancher la question des dommages-intérêts, mais précise quand même (à la p. 221):

> . . . cependant, si j'avais eu à décider de cette question, je me serais rangé à l'avis de mon collègue le juge Spence.

Le résultat est conforme à la règle dite de New York, dans la mesure où il rejette la doctrine de la «cote intermédiaire maximale». Le même principe a été retenu aux fins de l'évaluation des dommages résultant de l'appropriation illégale de biens per-

[42] 446 F. 2d 90 (1971).

in *Sachs v. Miklos*[43]. There may, as already discussed, be instances where mitigation will not require a plaintiff to incur the significant risk and expense of purchasing replacement property, but in any case the plaintiff must crystallize his claim either by replacement acquisition or in some circumstances by prompt litigation expeditiously prosecuted which will enable the court to establish the damage with reference to the mitigative measures imposed by law. The failure of the appellant either to mitigate or litigate promptly makes difficult the task of applying these principles to the circumstances of this case.

In the light of the enormous hardships sometimes occasioned by the application of the old doctrine of damage assessment, and in view of the massive distortion which may follow when the principles of mitigation are, as in the older authorities, made inapplicable to non-delivery of shares, I have come to the conclusion that the authorities cited from the early 1800's principally from the courts of England, which in effect allow recovery of "avoidable losses" ought not to be followed. Rather the lead furnished by *The Queen v. Arnold, supra*, should be taken. Subject always to the precise circumstances of each case, this will impose on the injured party the obligation to purchase like shares in the market on the date of breach (or knowledge thereof in the plaintiff) or more frequently within a period thereafter which is reasonable in all the circumstances. The implementation of this principle must take cognizance of the realities of market operations including the nature of the shares in question, the strength of the market when called upon to digest large orders to buy or sell, the number of shares qualified for public trading, the recent volatility of the price, the recent volume of trading, the general state of the market at the time, the susceptibility of the price of the shares to the current operation of the corporation, and similar considerations.

Some classes of property, including shares, whose value is subject to sudden and constant fluctuations of unpredictable amplitude, and

[43] [1948] 2 K.B. 23 (C.A.).

sonnels autres que des valeurs mobilières dans l'arrêt *Sachs v. Miklos*[43]. Comme je l'ai déjà noté, il peut y avoir des cas où le devoir de limiter le préjudice n'oblige pas le demandeur à s'exposer aux risques et aux dépenses considérables d'un achat de biens de remplacement, mais il n'en demeure pas moins que le demandeur doit dans tous les cas établir sa réclamation soit en achetant des biens de remplacement soit en intentant rapidement une action et en procédant avec diligence afin de permettre à la cour d'évaluer le montant des dommages compte tenu des mesures qu'il est tenu de prendre, en droit, pour limiter le préjudice. L'appelante n'ayant fait ni l'un ni l'autre, il est difficile d'appliquer ces principes en l'espèce.

Compte tenu des difficultés considérables que peut entraîner l'application de l'ancienne jurisprudence en matière d'évaluation des dommages-intérêts et des différences importantes qui résultent de ce que cette jurisprudence n'impose aucune obligation de limiter le préjudice dans les cas de non-restitution d'actions, je conclus que la jurisprudence constituée depuis le début du dix-neuvième siècle, en grande partie devant les tribunaux anglais, et selon laquelle des «pertes évitables» sont sujettes à indemnisation, ne doit pas être suivie. C'est plutôt le principe énoncé dans *La Reine c. Arnold, précité,* qu'il faut retenir. Sous réserve des circonstances propres à chaque cas, la partie lésée sera donc dans l'obligation d'acheter des actions semblables sur le marché, au moment de la rupture du contrat (ou au moment où elle en prend connaissance), ou bien, ce qui sera plus souvent le cas, dans un délai raisonnable dans les circonstances. L'application de ce principe doit tenir compte des aléas du marché des valeurs, savoir la nature des actions en cause, la résistance du marché lors de transactions importantes, le nombre d'actions en vente libre, les fluctuations récentes de prix, le volume des transactions récentes, le climat général du marché à ce moment-là, l'influence des opérations courantes de la compagnie sur le prix des actions et d'autres considérations de ce genre.

Pour certains biens, comme les actions, dont la valeur est constamment exposée à des fluctuations soudaines et d'une ampleur imprévisible, et dont

[43] [1948] 2 K.B. 23 (C.A.).

whose purchase is not lightly entered into, call for a modification of the general rule that the value of the property on the "date of breach" be taken as the starting point for the calculation of damages. There is some authority for this view in English law as well. In Atiyah, *Sale of Goods*, (4th ed. 1974), at p. 294, the learned author has this to say:

> Although the market price rule is now firmly established in English law it may be observed that there are cases in which it does not do full justice to the buyer. In particular it is unrealistic to suppose that a buyer will in practice be able to buy goods on the market on the very day on which the seller fails to deliver. The buyer will often wish to consider his position, or to negotiate with the seller on breach and some delay before he buys substitute goods is likely to be the rule rather than the exception.

This principle has been discussed and at least partially adopted in *Hooper v. Herts*[44], *per* Romer L.J. at p. 564; *Sharpe & Co., Ltd*[45]; *Stewart v. Cauty*[46], *per* Alderson B. at p. 162; *Pitfield & Co. Ltd. v. Jomac Gold Syndicate Ltd. et al., supra.*

It is contended by the appellant, Baud, however, that the peculiar circumstances of this case rendered the purchase of highly speculative shares in a company controlled by its adversary unreasonable in all of the circumstances, particularly the injunction obtained by the appellant restraining the sale of 125,000 Asamera shares held by Brook. Nonetheless, it remains the case that at least some of the losses claimed by the appellant could have been avoided by the taking of other reasonable steps. The most obvious of these would have been to move with reasonable speed to institute and proceed with legal action in an effort either to recover the shares, and if that was not possible, then to recover damages. It is, of course, exceedingly difficult to establish in this Court the precise point in time at which the trial in this action would have been held had the appellant moved with reasonable dispatch. The case has slowly wended its way through interlocutory stages and eventually reached trial which in turn was spread over 1½

[44] [1906] 1 Ch. 549.
[45] [1917] 2 K.B. 814.
[46] (1841), 8 M. & W. 160.

l'achat exige une certaine expérience, il faut modifier la règle générale selon laquelle la valeur du bien à la «date de la rupture» constitue la base de calcul des dommages-intérêts. La jurisprudence anglaise semble aussi appuyer cette thèse. On trouve à la p. 294 de Atiyah, *Sale of Goods* (4e éd. 1974):

> [TRADUCTION] Même si la règle de la valeur marchande est actuellement bien ancrée en droit anglais, il existe des cas où son application ne rend pas pleinement justice à l'acheteur. En effet, il n'est pas réaliste de présumer qu'un acheteur achètera des biens sur le marché le jour même du défaut du vendeur de les livrer. En pratique, et c'est la règle plutôt que l'exception, il prendra un certain temps pour étudier sa situation et négocier avec le vendeur défaillant avant d'acheter des biens de remplacement.

Cette thèse a été analysée et adoptée, du moins en partie, dans les arrêts suivants: *Hooper v. Herts*[44], le lord juge Romer, à la p. 564; *Sharpe & Co., Ltd.*[45]; *Stewart v. Cauty*[46], le baron Alderson, à la p. 162; *Pitfield & Co. Ltd. v. Jomac Gold Syndicate Ltd. et al.*, précité.

L'appelante Baud soutient cependant que les circonstances particulières de l'espèce rendaient tout à fait déraisonnable l'achat d'actions hautement spéculatives d'une compagnie contrôlée par son adversaire, notamment parce qu'elle avait obtenu une injonction interdisant à Brook de vendre 125,000 actions d'Asamera qu'il détenait. Il n'en demeure pas moins que l'appelante aurait pu éviter certaines pertes à l'égard desquelles elle réclame un dédommagement en prenant d'autres mesures raisonnables. Il est évident qu'elle aurait dû faire preuve d'une diligence raisonnable pour intenter des poursuites en vue de récupérer les actions et, subsidiairement, obtenir des dommages-intérêts. Il est bien sûr extrêmement difficile en cette Cour d'établir le moment précis auquel le procès aurait eu lieu si l'appelante avait fait preuve de diligence raisonnable. L'affaire a lentement suivi son cours au gré des procédures interlocutoires, pour finalement atteindre l'étape du procès qui a duré un an et demi. Le premier recours ayant été

[44] [1906] 1 Ch. 549.
[45] [1917] 2 K.B. 814.
[46] (1841), 8 M. & W. 160.

years. The litigation has been in the Courts now some 18 years having commenced in July 1960.

There are numerous explanations given by the appellant and indeed not seriously disputed in this Court by the respondent for these protracted proceedings. At one stage for example Brook asked Baud sometime prior to 1966 to "abstain from following up the law suit". Baud on the other hand expressed no desire for very practical reasons either to press its suit until the end of 1966, when Asamera finally managed to produce its first oil in Sumatra, ". . . and the shares began to slowly get up in value," and as the appellant put it, "we had to renew the case against him . . .". In my view the law required more of Baud. It placed upon Baud the duty in the sense referred to in *Red Deer College v. Michaels and Finn, supra,* to mitigate its losses by acquiring shares in a company known by Baud to be far from financially sound. It might therefore be said that Baud would have hung back from any action (either the purchase of shares or the pressing of its claims in court) until Asamera struck oil, whether or not Brook had requested it to do so.

One must not become so lost in the technicalities of damages in the law of contract as to lose sight of the practical consideration of the cost of money and of the reality of the risks to be imposed on a plaintiff by a requirement of complete mitigating measures. In this case the magnitude of the operation, in the range of $800,000 to $1,000,000 if the shares were to cost $7 to $8 each, leads one to conclude that a 'reasonable' time for mitigative action must be allowed after the appropriate point of time in law has been isolated.

The appellant bases its contention that it has no obligation to purchase shares in the market in part on the ground that it ought to be allowed to seek specific performance of the contract to return the shares, and while relying on an injunction restraining their disposition it need not have any concern with losses occasioned by its inaction. Counsel for the appellant did not refer this Court to any cases

introduit en juillet 1960, les tribunaux sont saisis de ce litige depuis maintenant 18 ans.

L'appelante a donné plusieurs raisons, que l'intimé n'a pas vraiment contestées devant cette Cour, pour expliquer cette prolongation des procédures. Par exemple, à un moment donné (avant 1966), Brook aurait demandé à Baud de [TRADUCTION] «laisser tomber les procédures judiciaires». Par contre, Baud, pour des raisons bien pratiques, n'a rien fait pour accélérer les procédures avant la fin de 1966, époque à laquelle Asamera s'est finalement mise à extraire du pétrole à Sumatra; [TRADUCTION] «les actions ont alors lentement pris de la valeur» et il a fallu, pour citer l'appelante, [TRADUCTION] «intenter une nouvelle action contre lui . . .» . A mon avis, en droit, Baud devait aller plus loin. Elle avait l'obligation, au sens de l'arrêt *Red Deer College c. Michaels et Finn*, précité, de limiter le préjudice en achetant des actions dans une compagnie qu'elle savait loin d'être dans une situation financière solide. On peut donc dire que Baud n'aurait rien fait (ni en achetant des actions, ni en accélérant les procédures judiciaires) avant qu'Asamera n'ait commencé à extraire du pétrole, que Brook lui ait demandé ou non de s'abstenir.

L'analyse rigoureuse de la théorie des dommages-intérêts en matière contractuelle ne doit pas nous faire perdre de vue l'aspect pratique de la valeur de l'argent et des risques financiers auxquels on expose un demandeur en l'obligeant à prendre toutes les mesures possibles pour limiter le préjudice. En l'espèce, l'importance de l'opération, qui porte sur une somme de $800,000 à $1,000,000 de dollars—si les actions atteignent une valeur de $7 à $8 l'unité—nous amène à conclure qu'il faut accorder, après avoir identifié en droit la période clé, un délai «raisonnable» pour prendre lesdites mesures.

L'appelante soutient qu'elle n'était pas obligée d'acheter des actions sur le marché parce qu'elle avait le droit d'exiger l'exécution intégrale de l'engagement de rendre les actions et que, puisqu'une injonction en interdisait la vente, elle n'avait pas à se préoccuper des dommages qui pouvaient résulter de son inaction. Son avocat n'a cité devant nous aucune jurisprudence où les principes de limitation

in which the principle of mitigation has interacted and conflicted with recovery by way of specific performance, and such authority as I have been able to discover supports the common sense view that the principle of mitigation should, unless there is a substantial and legitimate interest represented by specific performance, prevail in such a case.

This conflict sometimes occurs on the interaction of the principle of mitigation and an award of damages in lieu of or in addition to specific performance in equity. In decisions relating to damages, the Courts of Equity have acted on the authority of *Lord Cairns' Act* (more properly cited as the *Chancery Amendment Act, 1858*, 21 & 22 Vict. c. 27, s. 2), which empowers a Court of Equity to award damages "either in addition to or in substitution for ... specific performance". Accordingly, in a number of cases concerning contracts for the sale of land, damages calculated on the value of the land as of the date of judgment, as opposed to the date of breach, have been awarded. (*Vide Wroth v. Tyler, supra; Metropolitan Trust Co. of Canada et al. v. Pressure Concrete Services Ltd. et al., supra; Calgary Hardwood & Veneer Ltd. and Foreign and Domestic Wood Ltd. v. Canadian National Railway Company*[47].) The Supreme Court of New Zealand in *Hickey v. Bruhns*[48], had occasion to review *Wroth v. Tyler, supra,* and the earlier authorities and after concluding that specific performance was inappropriate, held that an award of damages in substitution for specific performance must take into account the conduct of the parties, particularly when inordinate delay has occurred thereby making critical the date selected for the computation of damages. *Vide Kaunas v. Smyth et al.*[49]

On principle it is clear that a plaintiff may not merely by instituting proceedings in which a request is made for specific performance and/or damages, thereby shield himself and block the

[47] [1977] 4 W.W.R. 18.
[48] [1977] 2 N.Z.L.R. 71.
[49] (1976), 75 D.L.R. (3d) 368.

du préjudice entrent en conflit avec ceux de l'exécution intégrale du contrat. D'après la jurisprudence que j'ai consultée, c'est le bon sens qui l'emporte, savoir que le principe de la limitation du préjudice prévaut sauf si des intérêts primordiaux et légitimes justifient l'exécution intégrale du contrat.

En *equity*, ce conflit peut survenir lors de l'interaction du principe de limitation du préjudice et de celui de l'adjudication de dommages-intérêts au lieu ou en sus de l'exécution intégrale du contrat. Les décisions en matière de dommages-intérêts rendues par des tribunaux d'*equity* sont fondées sur la *Lord Cairns' Act* (dont la référence exacte est la *Chancery Amendment Act, 1858*, 21 & 22 Vict. chap. 27, art. 2), qui habilite les tribunaux d'*equity* à accorder des dommages-intérêts [TRADUCTION] «en sus ou au lieu de ... l'exécution intégrale». En conséquence, dans plusieurs affaires de contrats de vente de terrains, les dommages-intérêts ont été accordés sur la base de la valeur du terrain au moment du jugement plutôt qu'au moment de la rupture du contrat. (Voir *Wroth v. Tyler*, précité; *Metropolitan Trust Co. of Canada et al. v. Pressure Concrete Services Ltd. et al.*, précité; *Calgary Hardwood & Veneer Ltd. and Foreign and Domestic Wood Ltd. c. La Compagnie de chemins de fer nationaux du Canada*[47].) Dans l'arrêt *Hickey v. Bruhns*[48], la Cour suprême de la Nouvelle-Zélande a eu l'occasion d'examiner l'arrêt *Wroth v. Tyler*, précité, de même que la jurisprudence antérieure et, après en être venue à la conclusion qu'une ordonnance d'exécution intégrale n'était pas appropriée, elle a statué que l'adjudication de dommages-intérêts au lieu d'une ordonnance d'exécution intégrale devait tenir compte de la conduite des parties, particulièrement dans un cas de retard excessif où la détermination de la date aux fins du calcul des dommages-intérêts est cruciale. Voir *Kaunas v. Smyth et al.*[49]

Il est en principe évident que la seule introduction de procédures judiciaires visant l'exécution intégrale du contrat en sus ou au lieu des dommages-intérêts ne peut couvrir le demandeur et empê-

[47] [1977] 4 W.W.R. 18.
[48] [1977] 2 N.Z.L.R. 71.
[49] (1976) 75 D.L.R. (3d) 368.

court from taking into account the accumulation of losses which the plaintiff by acting with reasonable promptness in processing his claim could have avoided. Similarly, the bare institution of judicial process in circumstances where a reasonable response by the injured plaintiff would include mitigative replacement of property, will not entitle the plaintiff to the relief which would be achieved by such replacement purchase and prompt prosecution of the claim. Before a plaintiff can rely on a claim to specific performance so as to insulate himself from the consequences of failing to procure alternate property in mitigation of his losses, some fair, real, and substantial justification for his claim to performance must be found. Otherwise its effect will be to cast upon the defendant all the risk of aggravated loss by reason of delay in bringing the issue to trial. The appellant in this case contends that it ought to be allowed to rely on its claim for specific performance and the injunction issued in support of it, and thus recover avoidable losses. After serious consideration, I have concluded that this argument must fail.

cher la Cour de tenir compte de l'accumulation des pertes qu'il aurait pu éviter en procédant avec une diligence raisonnable. De même, la simple introduction de procédures judiciaires, quand le demandeur aurait dû aussi acheter des biens de remplacement en vue de limiter le préjudice, ne donne pas à ce dernier droit au même redressement que celui qu'il aurait obtenu en achetant des biens de remplacement et en faisant preuve de diligence à instituer son action. Pour qu'un demandeur puisse invoquer une action en exécution intégrale pour justifier son omission d'acheter des biens de remplacement pour limiter le préjudice, son action en exécution intégrale doit être fondée sur des motifs équitables, réels et importants. Sinon, le défendeur se trouve à supporter seul les risques d'une augmentation des pertes dues au retard dans l'institution du procès. En l'espèce, l'appelante soutient qu'on devrait lui reconnaître le droit d'invoquer son action en exécution intégrale et l'injonction décernée à cet égard de façon à lui permettre de recouvrer des pertes inévitables. Après mûre réflexion, je suis d'avis que cet argument n'est pas fondé.

It is, of course, an eminently reasonable position to take if, as Lord Reid suggests in *White and Carter (Councils) Ltd. v. McGregor*[50], in the case of anticipatory breach, there is a substantial and legitimate interest in looking to performance of a contractual obligation. So a plaintiff who has agreed to purchase a particular piece of real estate, or a block of shares which represent control of a company, or has entered into performance of his own obligations and where to discontinue performance might aggravate his losses, might well have sustained the position that the issuance of a writ for specific performance would hold in abeyance the obligation to avoid or reduce losses by acquisition of replacement property. Yet, even in these cases, the action for performance must be instituted and carried on with due diligence. This is but another application of the ordinary rule of mitigation which insists that the injured party act reasonably in all of the circumstances. Where those circumstances reveal a substantial and legiti-

[50] [1962] A.C. 413.

Cet argument serait très raisonnable si, pour reprendre l'exemple de lord Reid dans *White and Carter (Councils) Ltd. v. McGregor*[50], une affaire d'intention arrêtée de ne pas exécuter un engagement, un intérêt important et légitime justifiait l'exécution intégrale de l'obligation. Prenons l'hypothèse d'un demandeur qui aurait convenu d'acheter un immeuble, ou une tranche d'actions lui donnant le contrôle d'une compagnie, ou qui aurait entrepris l'exécution de ses propres obligations et risquerait d'aggraver le préjudice s'il arrêtait ladite exécution. Un tel demandeur pourrait faire valoir qu'une ordonnance d'exécution intégrale de l'engagement suspend l'obligation d'éviter et de limiter le préjudice par l'achat d'un bien de remplacement. Mais même dans de tels cas, l'action en exécution intégrale doit être intentée et poursuivie avec une diligence raisonnable. Il s'agit ici de l'application de la règle en matière de limitation du préjudice, selon laquelle la partie lésée doit agir raisonnablement dans les circonstances. Le

[50] [1962] A.C. 413.

mate interest in seeking performance as opposed to damages, then a plaintiff will be able to justify his inaction and on failing in his plea for specific performance might then recover losses which in other circumstances might be classified as avoidable and thus unrecoverable; but such is not the case here.

All such principles lead back to the law enunciated in *British Westinghouse Electric and Manufacturing Company, Limited v. Underground Electric Railways Company of London, Limited, supra,* and in fact are merely instances of the application of the principles set out therein to unusual circumstances or unusual combinations of conditions surrounding the parties after the breach.

Counsel for the appellant, Baud, faced with the argument that Baud's failure to mitigate its losses by the purchase of shares on the open market has exposed Brook to unreasonable claims for compensation for losses consequent upon Brook's failure to return the Asamera shares, asserted in this Court the proposition that mitigation in such circumstances would be unreasonable in that it would require the purchase of 125,000 Asamera shares by an investment by Baud in its adversary in these proceedings at the very time when Baud was asserting that Asamera was dominated and controlled by Brook. The answer to this proposition is simply that the appellant cannot have it both ways. On the one hand, it seeks recovery of certain shares which it alleges have been and are of substantial value to it. Yet it argues that it cannot reasonably have been expected to purchase replacement shares identical in all regards. If it is correct and sincere in its submission regarding the importance and inherent value of the shares, it ought to have instructed its brokers to acquire replacement shares within a reasonable time after the breach of contract. There is no suggestion that the appellant would not have been able to do so at that time.

Apparently at some stage in this transaction the Securities Exchange Commission of the United States limited or prohibited the sale of these and

seul cas où un demandeur peut justifier son inaction est celui où l'action en exécution intégrale, par opposition à une action en dommages-intérêts, est fondée sur un intérêt important et légitime; dans ce cas, s'il n'obtient pas l'exécution intégrale, il peut obtenir des dommages-intérêts pour des pertes qui, en d'autres circonstances, auraient pu être évitées et pour lesquelles il n'aurait donc pas pu se faire indemniser. Ce n'est pas le cas en l'espèce.

Ces principes sont fondés sur l'arrêt *British Westinghouse Electric and Manufacturing Company, Limited v. Underground Electric Railways Company of London, Limited*, précité, et ne sont en fait que des exemples d'application des principes contenus dans cet arrêt à des circonstances, ou à des combinaisons de circonstances, plutôt inhabituelles dans lesquelles les parties peuvent se trouver après la rupture du contrat.

En réponse à l'argument selon lequel le fait que Baud n'ait pas tenté de limiter le préjudice en achetant des actions sur le marché libre exposait Brook à des réclamations de dommages-intérêts excessifs pour son refus de rendre les actions d'Asamera, l'avocat de Baud soutient que l'application des principes de limitation du préjudice est déraisonnable en l'espèce car l'investissement de Baud en achetant 125,000 actions d'Asamera aurait été à l'avantage de son adversaire en l'espèce, alors qu'Asamera était, aux dires de Baud, dirigée et contrôlée par Brook. Ma réponse à cet argument est que l'appelante ne peut pas tout avoir à la fois. D'une part, elle demande qu'on lui rende des actions qui, selon elle, ont eu et ont encore beaucoup de valeur à ses yeux. D'autre part, elle prétend qu'il n'est pas raisonnable de dire qu'elle aurait dû acheter des actions de remplacement, identiques en tous points. Si elle croyait réellement à la valeur des actions, elle aurait dû demander à ses courtiers d'acheter des actions de remplacement dans un délai raisonnable après la rupture du contrat. Rien n'indique que l'appelante n'aurait pas pu le faire.

Il semble qu'à un stade de cette opération, la Commission américaine des valeurs mobilières ait restreint ou interdit la vente de ces actions et

perhaps other Asamera holdings of the parties. By 1959 and 1960 when Brook sold the shares in question or a like number there appeared to be no prohibition either by S.E.C. order or regulation and so that element may be disregarded in the damage assessment process.

It was argued by counsel for Brook that failure by Baud to bring its claim for damages arising from the non-return of the Asamera shares before a trial court with promptness exposed Brook improperly to a magnified claim for damages. It is said by Baud on the other hand that by reason of the geographical spread of the adversaries, their witnesses and advisors, ranging as it did from Indonesia to New York, the Netherlands and Calgary, the staging of the legal proceedings including the examination for discovery was difficult and prolonged and this is no doubt true. For example, in May 1968 Brook revealed during examination for discovery that the sale of 125,000 shares had been carried out by Brook even before the date of expiry of the initial term of his option to purchase. He did not, however, at that time, know the precise dates and prices of the sale or sales and despite an undertaking to do so these were not communicated to Baud until April 1970 when Brook gave testimony at trial to the effect that these sales took place in December of 1957 and January-February 1958. Furthermore, as already observed, Brook asked Baud some time in the interval between the institution of action in 1961 and 1966 not to press the pending court actions. As we have seen, even the trial itself went with interruptions from June 1969 to December 1970 and judgment was ultimately entered in May 1972. The learned trial judge gave his reasons for judgment in April 1971 but by reason of issues thereupon brought to the attention of the Court further submissions were made by counsel and additional reasons were issued in May 1972. What then in all these circumstances is a 'reasonable' period of time within which to litigate these claims? Fortunately, the outcome of these proceedings does not depend directly on the determination of what in all these circumstances was a reasonable time within which to litigate these claims. The damages as already concluded are not

peut-être d'autres valeurs d'Asamera détenues par les parties. Mais lorsqu'en 1959 et 1960 Brook a vendu les actions en question (ou le même nombre), aucune ordonnance ni aucun règlement de ladite Commission ne l'interdisait; nous n'avons donc pas à tenir compte de cet élément aux fins du calcul des dommages-intérêts.

L'avocat de Brook soutient que le manque de diligence de Baud dans la poursuite de son action en dommages-intérêts après le refus de Brook de lui rendre les actions d'Asamera exposait injustement ce dernier à des réclamations excessives. Baud prétend en revanche que la distance séparant les parties, leurs témoins et leurs conseillers, de l'Indonésie à New York en passant par la Hollande et Calgary, explique la lenteur des procédures et de l'interrogatoire préalable. C'est sans doute vrai. Par exemple, en mai 1968, Brook a révélé, à l'interrogatoire préalable, qu'il avait vendu 125,000 actions avant la date initiale d'expiration de son option d'achat. Il ne connaissait cependant pas, à cette époque, les dates et les prix de vente précis et, malgré les engagements pris, ces renseignements n'ont été communiqués à Baud qu'en avril 1970, au cours du témoignage de Brook qui a alors déclaré que les ventes avaient eu lieu en décembre 1957 et en janvier et février 1958. En outre, comme on l'a déjà noté, Brook avait demandé à Baud, entre l'institution de l'action en 1961 et 1966, de ne pas poursuivre l'affaire. Comme nous l'avons vu, même le procès (de juin 1969 à décembre 1970) a connu des interruptions et le jugement final date de mai 1972. Le savant juge de première instance avait rendu jugement en avril 1971, mais il restait des questions en litige. Les avocats ont donc présenté de nouveaux mémoires et des motifs supplémentaires ont été exposés en mai 1972. Dans ces circonstances, quelle période peut-on considérer «raisonnable» pour la poursuite de l'action? Fort heureusement, la solution du présent litige ne dépend pas directement de savoir quelle aurait pu être cette période raisonnable pour obtenir un jugement. Comme je l'ai déjà dit, les dommages-intérêts ne doivent pas être évalués en fonction de la cote maximale des actions entre la date de la rupture du contrat et la date du procès. L'obligation en droit de l'appelante de limiter le préjudice ne dépend pas de la date du

to be assessed on the basis of the highest price of the shares between breach and trial. The mitigation required of the appellant in law is not dependent on the date of judgment. Litigation may be an alternate procedure leading to the crystallization of losses in circumstances where actual replacement of the property would be unreasonable. In this proceeding, the damage due to delay was suffered by the appellant which thereby has deprived itself of the use of its money. In any case the damage assessment technique is derived from substantive law and not procedural law and the result should be consistent and not subject to the vagaries of litigation delays.

Having regard to the complex issues raised in all three actions (and the period devoted to this litigation must take into account more than the simple action for the recovery of shares loaned to Brook) and taking into account the other circumstances mentioned it would be unreasonable to hold the appellant to any timetable which contemplated the trial of these many issues prior to the end of 1966 or early in 1967. If litigation may represent an alternative to the investment by a plaintiff of substantial funds to avoid the accumulation of losses, the courts cannot apply in the computation of damages a principle recognizing some relevance of the fluctuating value of the *res* of the contract between breach and trial and not at the same time maintain a strict surveillance on the assiduity of a plaintiff in bringing his claim to judgment.

The price of these shares on the Toronto Stock Exchange was the subject of much testimony and before this Court Baud, without any objection from counsel for Brook, reduced such evidence to a series of graphs which records prices and volumes of trade on the Exchange during each year from 1955 to 1977. When Brook pleaded (on July 6, 1967) (a) his right to refuse return of the shares, and (b) the previous sale of shares by Brook, the shares were trading from $4.30 to $4.35 per share. The volume of trading was very low. By the end of 1967 the price had climbed to $7.25 but the volume of trading remained low. Unfortunately there is no evidence of the depth or strength of the market but it is reasonable to conclude from the small volume of trade over a lengthy period of

jugement. L'introduction d'une procédure judiciaire est une façon d'établir les pertes lorsqu'il n'est pas raisonnable d'exiger l'achat d'un bien de remplacement. En l'espèce, l'appelante est responsable des pertes résultant de son manque de diligence et elle s'est donc elle-même privée de l'utilisation de son argent. Quoi qu'il en soit, la méthode d'évaluation du préjudice est une question de fond et non de procédure et le résultat doit être constant, indépendamment des aléas d'une poursuite en justice.

Compte tenu de la complexité des questions soulevées dans les trois actions (il ne faut pas considérer seulement la durée de l'action en restitution des actions prêtées à Brook) et des circonstances de l'affaire, il serait déraisonnable d'astreindre l'appelante à un calendrier pour la poursuite de ces actions qui situerait l'instruction avant la fin de 1966 ou le début de 1967. Si l'institution d'une action peut permettre au demandeur d'éviter d'investir une somme considérable en vue de limiter le préjudice, les tribunaux ne peuvent calculer les dommages en fonction de l'impact des fluctuations de la valeur du bien faisant l'objet du contrat entre la date de la rupture et celle du procès sans exiger du demandeur qu'il ait fait preuve de diligence dans la poursuite de son action.

Le prix de ces actions à la Bourse de Toronto a fait l'objet de nombreux témoignages. Devant cette Cour, Baud, sans aucune objection de l'avocat de Brook, a résumé cette preuve par une série de graphiques indiquant le prix et le volume annuel des transactions entre 1955 et 1977. Lorsque Brook a plaidé (le 6 juillet 1967) a) le droit de refuser de rendre les actions, et b) la vente des actions, elles valaient entre $4.30 et $4.35 chacune. Le volume des transactions était très faible. Vers la fin de 1967, le prix des actions a atteint $7.25, mais le volume des transactions était encore faible. Il n'existe malheureusement aucune preuve sur la solidité du marché, mais il est raisonnable de conclure, d'après le faible volume des transactions sur une période aussi longue, que le marché était

time that the market was thin and probably could not have absorbed large purchases or sustained the quoted prices in the face of large sales. By the time of the examination for discovery in May 1968 the price per share had reached a range from $7.60 to $8.20. The volume of trading had increased markedly over the preceding year but was sporadic. By the end of the year the price quoted on the Exchange was $27 in comparatively active trading. The price of Asamera shares peaked at $46.50 in 1969 during the opening session of the trial. By the time of the issuance of the reasons for judgment in April 1971 as mentioned above, the price had declined to $22 per share and when final issues were disposed of and formal judgment entered in May 1972, the price of Asamera shares on the Stock Exchange was about $21.

médiocre et n'aurait probablement pas été capable d'absorber des achats massifs ou de maintenir le prix coté en cas de ventes massives. A l'époque de l'interrogatoire préalable, en mai 1968, les actions avaient atteint une valeur de $7.60 à $8.20 chacune. Les transactions avaient considérablement augmenté l'année précédente, mais restaient sporadiques. A la fin de l'année, le prix coté à la Bourse était de $27 et, en comparaison, le marché était animé. Les actions d'Asamera ont atteint un prix maximum de $46.50 l'unité en 1969, époque du début du procès. En avril 1971, date du dépôt des motifs de jugement, le prix des actions était descendu à $22 l'unité et, en mai 1972, époque à laquelle les questions supplémentaires furent tranchées et le jugement formel enregistré, les actions d'Asamera étaient cotées approximativement $21 en Bourse.

The Courts below determined from different approaches that the critical date for assessment of damages was the date of the breach of the contract to return the shares on December 31, 1960. The price was then 29 cents on the open market. Each Court observed as well that the parties had agreed that the purchase price (if the option be exercised) on that date was $2 and accordingly damages could not be assessed at less. Furthermore, the evidence indicated that Brook on the sale of a like number of shares in 1957 and 1958 had realized prices ranging from $1.50 to $1.80 so that an award based on the market price on the date of breach would allow Brook to profit from his wrongdoing. It would appear from the judgments in the Courts below that Brook's enrichment through his breach of contract played an important role in the assessment of damages. Accordingly damages were assessed at $2 per share or $250,000 in gross.

Les tribunaux d'instance inférieure ont conclu, en suivant des méthodes différentes, que la date pertinente aux fins de l'évaluation des dommages était celle de la rupture du contrat prévoyant la restitution des actions, en l'occurrence le 31 décembre 1960. Les actions valaient alors 29 cents sur le marché libre. Les mêmes tribunaux ont également fait remarquer que les parties avaient convenu que le prix d'achat à cette date serait de $2 (si l'option d'achat était exercée) et que les dommages ne pouvaient donc être évalués à moins. La preuve révélait en outre qu'en vendant le même nombre d'actions en 1957 et 1958, Brook avait obtenu de $1.50 à $1.80 l'action. Des dommages fondés sur le prix du marché à la date de la rupture du contrat permettraient à Brook de tirer profit de son acte illégal. Les jugements des tribunaux d'instance inférieure donnent à penser que cet enrichissement de Brook moyennant la rupture du contrat a joué un rôle important dans l'évaluation des dommages. En conséquence, les dommages ont été fixés à $2 l'action, soit une somme globale de $250,000.

It seems to me that the motives or unjust enrichment of the defendant on breach are generally of no concern in the assessment of contractual damages. *Vide* Treitel, *The Law of Contract*, (4th ed., 1975), at p. 618:

Il me semble que les motifs du défendeur ou son enrichissement injuste par la rupture ne doivent normalement pas entrer en ligne de compte dans l'évaluation des dommages. Voir Treitel, *The Law of Contract*, (4e éd., 1975), à la p. 618:

In general, damages are based on loss to the plaintiff and not on gain to the defendant. They are not, in other words, based on any profit which the defendant may have made out of the breach.

An appellate tribunal in such an appeal as this is in an invidious position. The record at trial is deficient. In the result precise evidence as to market conditions, credit facilities, rates of interest, borrowing power of the appellant, effect on market price of mitigative action by it, the time reasonably required to acquire by purchase such a volume of shares on the open market, and other evidence relevant to the assessment of damages is not before this Court. On the other hand the transaction occurred 20 years ago, and the trial which was extensive and no doubt expensive, was completed 7 years ago. To direct a re-assessment of the damages would be time consuming, difficult to carry out after such a lapse of time, and expensive for the parties. Faced with these unsatisfactory alternatives, an appellate court must discern if at all possible from the record the elements necessary to permit the completion of the assessment process.

We therefore approach the matter of the proper appraisal of the damages assessable in the peculiar circumstances of this case on the following basis: that the same principles of remoteness will apply to the claims made whether they sound in tort or contract subject only to special knowledge, understanding or relationship of the contracting parties or to any terms express or implied of the contractual arrangement relating to damages recoverable on breach; that Baud was under the general duty to mitigate its losses and may not escape this duty by relying on the 1960 injunction interminably; that the specific duty to mitigate and to crystallize its claim for damages within a reasonable time of the breach of contract by bringing action seeking appropriate remedies and to prosecute such action with due diligence, was qualified or postponed by Brook's request of Baud sometime prior to 1966 to refrain from enforcing its claims; that any postponement of such requirement to prosecute and to acquire replacement shares had come to an end at the latest on the awareness of Baud that the

[TRADUCTION] En règle générale, les dommages sont fondés sur le préjudice causé au demandeur et non sur le gain réalisé par le défendeur. Autrement dit, ils ne sont pas calculés en fonction de l'avantage que le défendeur a pu tirer de la rupture du contrat.

Placée devant une telle situation, une cour d'appel n'a pas la tâche facile. Le dossier du procès est déficient. Cette Cour n'a devant elle aucune preuve précise des conditions du marché, des facilités de crédit, des taux d'intérêt, de la capacité d'emprunt de l'appelante, de l'effet de mesures qu'elle aurait prises pour limiter le préjudice sur les cours du marché, de la période de temps raisonnable pour acheter un tel volume d'actions sur le marché libre, et d'autres questions pertinentes aux fins de l'évaluation des dommages. En revanche, l'opération remonte à vingt ans et ce procès, long et sans nul doute onéreux, est terminé depuis sept ans. Ordonner une nouvelle évaluation des dommages entraînerait d'autres retards, comporterait de nombreuses difficultés après aussi longtemps et serait onéreux pour les parties. Devant un choix aussi peu satisfaisant, une cour d'appel doit, si la chose est possible, trouver dans le dossier soumis les éléments nécessaires à l'évaluation définitive des dommages-intérêts.

Il convient donc d'aborder comme suit la question de l'évaluation des dommages exigibles dans les circonstances particulières de cette affaire: les principes relatifs au caractère prévisible s'appliquent également que la réclamation soit fondée sur la responsabilité délictuelle ou contractuelle, sous réserve cependant des connaissances, ententes ou relations particulières entre les parties contractantes ou de toute disposition expresse ou implicite dans le contrat au sujet des dommages recouvrables en cas d'inexécution; Baud avait l'obligation générale de limiter le préjudice et ne peut s'en dégager en invoquant indéfiniment l'injonction de 1960; l'obligation spécifique de Baud de limiter le préjudice et d'établir sa demande de dommages-intérêts en intentant l'action appropriée dans un délai raisonnable après la rupture et en procédant avec diligence a été repoussée dans le temps parce que Brook lui avait demandé, avant 1966, de ne pas poursuivre l'affaire; Baud aurait dû corriger son manque de diligence à poursuivre son action et à acheter des actions de remplacement dès qu'elle

defaulting party was not only in breach of the duty to return the shares but had disposed of shares at least equal in number to those loaned by Baud; that any postponement of the duty to acquire replacement shares which may have been due to the sharp reduction in the value of the shares which occurred during the loan, was ended with the revival in values on the public market at least by the end of 1966; that a plaintiff in the position of Baud may not successfully assert throughout the years of litigation a right to specific performance of the contract to redeliver the subject-matter of the contract and at the same time seek to avoid or reduce his losses on the grounds that to do so by buying replacement shares would involve him in investing his funds in the shares of a company managed or dominated by his adversary, Brook; that having regard to the nature of a common share neither the terms of the injunction or the loan contract, nor the action by Brook in disposing of shares in number equal to those loaned, have any effect on the characterization of the rights of Baud or the obligation of Brook throughout this long and tortuous transaction; that damages are an adequate remedy and that a court in these complex and particular circumstances will not invoke the extraordinary remedies of equity.

The application of these principles and determinations to the particular circumstances in this case requires in my respectful view a determination of the damages payable by Brook on the assumption that Baud ought to have crystallized these damages by the acquisition of replacement shares so as to minimize the avoidable losses flowing from the deprivation by Brook of Baud's opportunity to market the 125,000 shares. Such share purchases should have taken place within a reasonable time after the date of breach. Having regard to all the above-noted special circumstances, the time for purchase in my opinion was the fall of 1966 when Baud was by its own admission free from any agreed restraint not to press its claims against Brook. It would be unreasonable to impose on Baud the burden of going into the market and acquiring replacement shares at a time when the litigation of its claims was in a dormant state at Brook's request. Furthermore Baud acknowledged that by the fall of 1966 the fortunes of Asamera

a appris que la partie contrevenante refusait non seulement de lui rendre les actions mais en avait vendu un nombre identique; le retard apporté par Baud à l'achat d'actions de remplacement justifé par la baisse importante de la valeur des actions à l'époque du prêt ne tient plus après la fin de 1966, les actions ayant dès lors repris de la valeur; un demandeur dans la situation de Baud ne peut pendant toutes ces années à la fois prétendre avoir droit à l'exécution intégrale du contrat de restitution des biens et tenter d'éviter de limiter le préjudice en invoquant le fait que l'achat d'actions de remplacement l'obligerait à investir dans une compagnie gérée ou contrôlée par son adversaire, Brook; compte tenu de la nature d'une action ordinaire, ni les dispositions de l'injonction ni celles du contrat de prêt, ni le fait que Brook ait vendu le même nombre d'actions que celles prêtées, n'ont d'effet sur le caractère des droits de Baud ou sur les obligations de Brook aux termes d'une opération aussi complexe; l'adjudication de dommages-intérêts est une solution adéquate et, dans des circonstances aussi particulières que complexes, la Cour ne doit pas recourir aux redressements extraordinaires prévus en *equity*.

L'application de ces principes et solutions aux circonstances particulières de l'espèce exige, à mon avis, une évaluation des dommages-intérêts payables par Brook fondée sur la supposition que Baud aurait dû établir les dommages en achetant des actions de remplacement de façon à limiter les pertes évitables résultant de l'impossibilité pour Baud, du fait de Brook, de mettre les 125,000 actions sur le marché. Cet achat d'actions aurait dû être effectué dans un délai raisonnable après la rupture du contrat. Compte tenu de toutes les circonstances particulières susmentionnées, cet achat aurait dû, à mon avis, être effectué à l'automne de 1966 alors que Baud, de son propre aveu, n'était plus assujettie à l'entente conclue avec Brook de ne pas poursuivre l'affaire. Il ne serait pas raisonnable en effet de s'attendre à ce que Baud ait acheté des actions de remplacement alors que les procédures judiciaires étaient en veilleuse, à la demande même de Brook. En outre, Baud a reconnu qu'à l'automne de 1966, la situation

had improved and this had begun to be reflected in the market price of its shares. In short, the appellant is not in my view entitled in law to any compensation for the loss of opportunity to sell its shares after that date. Thereafter its loss of this opportunity is of its own making. The theory of such a damage award is to provide the funds needed to replace the shares at the time the law required it to do so in order to avoid an accumulating claim. There should be an allowance of a reasonable time to permit the organization of the finances and the mechanics required for the careful acquisition of 125,000 shares either by a series of relatively small purchases or by negotiated block purchases. This would carry the matter into the fall of 1967. By this time the price had risen to a range of $5 to $6. Making allowance for the upward pressure on the market price which would be generated by the purchase of such a large number of shares on a relatively low volume stock, the purchase price would surely have exceeded the $6 price reached in mid-1967 without any market intervention by Baud. For this factor in my best consideration an allowance of $1 per share should be made. Taking into account the effect of market intervention by Baud, the median price during the period from late 1966 to mid-1967, adjusted accordingly, would be about $6.50, and in my view, the damages should be awarded to Baud on that basis; that is, the total damages for breach of agreement to return the Asamera shares should amount to $812,500. In weighing the magnitude of this award one should not lose sight of the essential fact that Brook at any time right down to trial could, if he had remained in compliance with the injunction of July 1960, have avoided this result or the risk of this award by delivering from any source 125,000 Asamera shares.

Brook has below and before this Court asserted a claim for damages in respect of the undertaking given by Baud upon the issuance of the interim injunction in July 1960. This claim was dismissed by the learned trial judge and in this dismissal the Court of Appeal of Alberta concurred. Nothing has been advanced in this Court to indicate error below and I therefore would dismiss this cross-appeal by Brook.

d'Asamera s'était améliorée, résultant en une augmentation de la valeur marchande de ses actions. Bref, à mon avis, l'appelante n'a aucun droit à une indemnisation pour la perte de la possibilité de vendre les actions après cette date. Elle est alors devenue l'auteur du préjudice qu'elle a subi. Le principe sous-jacent à l'adjudication des dommages-intérêts est d'accorder une indemnisation correspondant au prix de remplacement des actions à leur cours au moment où la demanderesse était tenue en droit de les remplacer afin d'éviter l'accroissement de sa réclamation. On doit laisser à la demanderesse un délai raisonnable pour procéder de façon ordonnée au financement et à l'acquisition des 125,000 actions d'Asamera, soit par de petits achats soit en bloc. Ceci nous mène à l'automne de 1967. A ce moment-là, la valeur des actions était de $5 à $6. Compte tenu de la tendance à la hausse qu'aurait entraînée l'achat d'un aussi grand nombre d'actions dans un marché restreint, le prix des actions aurait certainement dépassé les $6 l'unité atteints vers la mi-1967, sans que Baud intervienne sur le marché. Tout bien pesé, j'ajouterais un dollar à la valeur des actions à cette date. Prenant en considération l'effet d'une intervention de Baud sur le marché, la valeur moyenne des actions entre la fin de l'année 1966 et le milieu de l'année 1967 serait d'environ $6.50 et, à mon avis, c'est ce chiffre qui doit fonder les dommages-intérêts dus à Baud; en conséquence, le montant total des dommages-intérêts dus pour la non-restitution des actions d'Asamera est de $812,500. Devant ce chiffre important, il ne faut pas oublier que jusqu'au procès, Brook aurait pu, s'il avait respecté l'injonction prononcée en juillet 1960, éviter le risque et les effets d'une telle décision en procédant à la remise de 125,000 actions d'Asamera, sans égard à leur provenance.

Tant devant les tribunaux d'instance inférieure que devant cette Cour, Brook a fait valoir une réclamation en dommages-intérêts relativement à l'engagement pris par Baud lors de la délivrance de l'injonction interlocutoire de juillet 1960. Le savant juge de première instance a rejeté cette demande et la Cour d'appel de l'Alberta a confirmé son jugement. Rien d'allégué devant cette Cour ne démontre que les tribunaux d'instance inférieure ont commis une erreur. Je conclus donc au rejet de l'appel incident de Brook.

I would therefore allow the appeal, and vary the judgment below by awarding damages payable by Brook to Baud in the amount of $812,500 together with costs to Baud throughout.

Judgment accordingly.

Solicitors for Baud Corporation, N.V. and Sea Oil & General Corporation: Fenerty, McGillivray, Robertson, Prowse, Brennan, Fraser, Bell & Hatch, Calgary.

Solicitors for Asamera Oil Corporation Ltd. and Thomas L. Brook: MacKimmie, Matthews, Calgary.

Je suis donc d'avis d'accueillir le pourvoi et de modifier le jugement porté en appel en condamnant Brook à payer $812,500 à Baud à titre de dommages-intérêts, avec dépens en faveur de Baud dans toutes les cours.

Jugement en conséquence.

Procureurs de Baud Corporation, N.V. et Sea Oil & General Corporation: Fenerty, McGillivray, Robertson, Prowse, Brennan, Fraser, Bell & Hatch, Calgary.

Procureurs de Asamera Oil Corporation Ltd. et Thomas L. Brook: MacKimmie, Matthews, Calgary.

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642947 Ontario Limited v. Fleischer et al.

Fleischer et al. v. 642947 Ontario Limited et al.; Sweet Dreams Delights Inc. et al., Third Parties

[Indexed as: 642947 Ontario Ltd. v. Fleischer]

56 O.R. (3d) 417
[2001] O.J. No. 4771
Docket Nos. C27257 and C27338

Court of Appeal for Ontario,
Abella, Laskin and Rosenberg JJ.A.
December 7, 2001

Corporations -- Piercing the corporate veil -- Corporation having right of first refusal to purchase land -- Corporation suing to enjoin sale of land to third party purchaser -- Corporation giving undertaking as to damages -- Corporation failing to disclose that it did not have assets to honour undertaking as to damages -- Shareholder alter ego for corporation -- Shareholder personally liable for corporation's undertaking as to damages.

Injunctions -- Interlocutory injunction -- Undertaking as to damages -- Party giving undertaking as to damages obliged to disclose whether its assets are adequate to honour undertaking.

Injunctions -- Interlocutory injunction -- Undertaking as to damages -- Corporation having right of first refusal to purchase land -- Corporation suing to enjoin sale to third party purchaser -- Corporation giving undertaking as to damages -- Third party purchaser enjoined on terms that closing of its agreement be extended until resolution of claim by corporation to enforce right of first refusal -- Corporation abandoning action and injunction dissolved -- Third party purchaser

refusing to complete its purchase and found liable to vendor for damages for breach of contract -- Corporation not liable under its undertaking as to damages to indemnify third party purchaser for damages it had to pay vendor -- Granting of injunction not causing damages suffered by third party purchaser.

Sale of land -- Breach of contract -- Damages -- Date of assessment -- Corporation having right of first refusal to purchase land -- Corporation suing to enjoin sale to third party purchaser -- Third party enjoined on terms that closing of its agreement be extended until resolution of claim by corporation to enforce right of first refusal -- Corporation abandoning action and injunction dissolved -- Market values for land having declined and third party refusing to complete its purchase -- Third party liable to vendor for damages for breach of contract -- Vendor retaining property in anticipation that value would return -- Damages to be assessed as at around time of failure to close.

F and N owned a property that they leased to S Inc., which was owned by H and K. The lease had a right of first refusal. In August 1989, 642947 Ontario Ltd. ("642947"), a nominee of B Corp. under a bare trust that required 642947 to act on the instructions of B Corp., offered to purchase the property. This offer triggered the right of first refusal, but S Inc. did not complete a purchase and, in September 1989, 642947 resubmitted its offer, which was to buy the property for $2 million. F and N accepted the resubmitted offer and took the position that the right of first refusal had been extinguished. S Inc., however, took the position that the right remained available.

S Inc. sued, and it moved for an interlocutory injunction to restrain the sale to 642947. In the motion for the injunction, B Corp., which previously had been an undisclosed principal, filed an affidavit stating it would suffer great harm if the injunction were granted. Isaac J. granted the injunction on terms, which were requested by 642947 and B Corp., that the closing of the sale to 642947 be extended. S Inc. gave an undertaking to pay any damages caused by the injunction in the language prescribed by rule 40.03 of the Rules of Civil

Procedure.

In 1990, the real estate market collapsed, and S Inc. abandoned its action. The injunction was dissolved, and December 7, 1990 was set for the closing of the sale to 642947, but it now refused to close because of the effect of the injunction and the market downturn. It sued for its deposit. F and N counterclaimed. The counterclaim was against 642947 and B Corp., which brought a third party claim against S Inc., H and K.

The trial was heard in July of 1995 and 1996 and, at the time of the trial, F and N still owned the property, which was still leased but not to S Inc. Greer J. held that 642947 was the agent of B Corp. and that it and B Corp. were liable for breach of contract or for inducing breach of contract. She held that the deposit was forfeit and damages were to be assessed as at December 7, 1990, when the property was worth $1,130,000, yielding a judgment of $870,000 (the difference between the purchase price and the value of the property) plus pre-judgment interest as provided by the Courts of Justice Act, R.S.O. 1990, c. C.43. She held that the right of first refusal had been extinguished and S Inc. was liable to indemnify 642947 and B Corp. under the undertaking as to damages. Greer J., piercing the corporate veil, held that H and K were jointly and severally liable because they were the alter ego of S Inc. and had defrauded the court by offering the undertaking when they knew that S Inc. had no assets to satisfy it. All parties appealed.

The following were the grounds for the appeal by 642947 and B Corp.: (1) B Corp. as an undisclosed principal was entitled to rely on the sealed contract rule; (2) F and N were precluded from suing B Corp., having elected to contract with 642947; (3) 642947 and B Corp. were not liable because F and N acted in bad faith; and (4) 642947 and B Corp. were not liable because F and N could not give vacant possession on closing. On their appeal, F and N contended that they had not been fully compensated for their loss and that damages should have been assessed at or near the date of the trial. (The evidence was that the value of the land had declined to only $410,000 as of November 1994.)

They also contended that pre-judgment and post-judgment interest should have been awarded at commercial rates of interest. On their appeal, S Inc., H and K submitted that S Inc. was not liable to indemnify 642947 and B Corp. under the undertaking as to damages because the injunction had not caused damages to them and that even if S Inc. was liable, there were no grounds to pierce the corporate veil.

Held, The appeals of F and N, and 642947 and B Corp. should be dismissed; the appeal of S Inc., H and K should be allowed.

There was no merit to any of the grounds of appeal advanced by 642947 and B Corp., and their appeal should be dismissed. The subject of the litigation was not a contract under seal and, therefore, the sealed contract rule, which holds that where a contract is made under seal, only the parties to the contract may sue or be sued on it, did not apply. There was no merit to the arguments that effect should be given to 642947's intention to execute the offer under seal and that the Land Registration Reform Act, R.S.O. 1990, c. L.4 made the contract under seal. Further, there was no bad faith and no basis to preclude F and N from suing B Corp. as the principal of the contract negotiated by its agent 642947, and the inability to give vacant possession on closing was never an impediment to closing the transaction.

The appeal of F and N should be dismissed. Greer J. did not err in selecting the date for the assessment of damages or in her award of interest on the judgment. As a general rule, in a falling market, the court should award an innocent vendor damages equal to the difference between the contract price and the highest price obtainable within a reasonable time after the contractual date for completion following the making of reasonable efforts to sell the property commencing on that date. Where, however, the vendor retains the property in order to speculate on the market, damages will be assessed as at the date of closing. In the immediate case, F and N decided to retain the property, speculating that the value would return. They alone had to assume the burden or the benefit of changes in the market after the closing date.

The appeal of S Inc. should be allowed. It was not liable under its undertaking as to damages. Under its undertaking, which tracked the wording of rule 40.03, S Inc. undertook "to abide by any Order concerning damages that the Court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the applicant ought to compensate it". The trial judge erred by finding a causal connection between the injunction and any damages suffered by 642947 and B Corp. The injunction did not cause or materially contribute to the damages 642947 and B Corp. were obliged to pay F and N. Those damages were caused by the fall in the market and by B Corp.'s refusal to close after having asked the motions judge to extend the closing date to preserve its interest in the property.

Assuming, however, that S. Inc. was liable under the undertaking as to damages, H and K would have been jointly and severally liable. Contrary to their submission, there was ample evidence to support the finding that S Inc. did not have sufficient assets to honour the undertaking. Contrary to their submission, it was not necessary for B Corp. to raise the issue of the adequacy of the assets on the injunction application. S Inc. had the primary obligation to disclose that its assets were inadequate. Its undertaking was to the court. It implicitly represented that it had sufficient assets and both the court and B Corp. were entitled to rely on that representation without making inquiries. After disclosure, it could have asked to be relieved of its undertaking or could have been asked to post security. Finally, contrary to their submissions, the trial judge made no error in piercing the corporate veil. It was open on the evidence to find that H and K were the alter egos of S Inc. and it was appropriate to make them personally liable for trying to use S Inc. as a shield for improper conduct.

Cases referred to

100 Main Street Ltd. v. W.B. Sullivan Construction Ltd. (1978), 20 O.R. (2d) 401, 88 D.L.R. (3d) 1 (C.A.) [leave to appeal to S.C.C. refused (1978), 20 O.R. (2d) 401n, 88 D.L.R.

(3d) 1n]; Air Express Ltd. v. Ansett Transportation Industries (Operations) Pty Ltd. (1979 to 1981), 146 C.L.R. 249, 33 A.L.R. 578; Bitton v. Jakovljevic (1990), 75 O.R. (2d) 143, 13 R.P.R. (2d) 48 (H.C.J.); Brock v. Cole (1983), 40 O.R. (2d) 97, 142 D.L.R. (3d) 461, 31 C.P.C. 184, 13 E.T.R. 235 (C.A.); Claiborne Industries Ltd. v. National Bank of Canada (1989), 69 O.R. (2d) 65, 34 O.A.C. 241, 59 D.L.R. (4th) 533 (C.A.); Clarkson Co. v. Zhelka, [1967] 2 O.R. 565, 64 D.L.R. (2d) 457 (H.C.J.); Constitution Insurance Co. of Canada v. Kosmopoulos, [1987] 1 S.C.R. 2, 21 O.A.C. 4, 34 D.L.R. (4th) 208, 74 N.R. 360, 36 B.L.R. 233, [1987] I.L.R. 1-2147; F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry, [1975] A.C. 295, [1974] 2 All E.R. 1128, [1974] 3 W.L.R. 104, 118 Sol. Jo. 500 (H.L.); Friedmann Equity Developments Inc. v. Final Note Ltd., [2000] 1 S.C.R. 842, 48 O.R. (3d) 800n, 188 D.L.R. (4th) 269, 255 N.R. 80, 34 R.P.R. (3d) 159, 7 B.L.R. (3d) 153; Rice v. Rawluk (1992), 8 O.R. (3d) 696 (Gen. Div.); Salomon v. Salomon & Co., [1897] A.C. 22, [1895-9] All E.R. Rep. 33, 66 L.J. Ch. 35, 75 L.T. 426, 45 W.R. 193, 13 T.L.R. 46, 41 Sol. Jo. 63, 4 Mans. 89 (H.L.); Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co. (1996), 28 O.R. (3d) 423 (Gen. Div.), affd [1997] O.J. No. 3754 (C.A.); Trident Holdings Ltd. v. Danand Investments Ltd. (1988), 64 O.R. (2d) 65, 25 O.A.C. 37, 49 D.L.R. (4th) 1, 39 B.L.R. 296, 30 E.T.R. 67 (C.A.); Vieweger Construction Co. v. Rush Tompkins Construction Ltd. (1964), [1965] S.C.R. 195, 48 D.L.R. (2d) 509; Village Gate Resorts Ltd. v. Moore (1999), 71 B.C.L.R. (3d) 1, 37 C.P.C. (4th) 5 (C.A.)

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
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Rules and regulations referred to

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Authorities referred to

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APPEAL and CROSS-APPEALS of a judgment of Greer J. (1997), 9 R.P.R. (3d) 261 (Ont. Gen. Div.) (supplementary reasons reported 86 O.T.C. 390) in an action and third party proceeding for damages for breach of contract for the sale of land.

Ronald E. Carr, for 642947 Ontario Limited and Burnac Corporation.
Valerie A. Edwards and Duncan Embury, for Jules Fleischer and Melvin Newton.
Brian Morgan and Monica Creery, for George Halasi.
Robert L. Falby, Q.C., for Sweet Dreams Delights Inc. and Larry Krauss.

The judgment of the court was delivered by

LASKIN J.A.: --

INTRODUCTION

[1] These appeals raise three main questions:

1. On what date should damages for breach of an agreement to buy land be assessed?

2. When should a party who obtains an interlocutory injunction be liable on its undertaking to pay damages?

3. Where the party tendering the undertaking is a corporation, when should the corporation's principals be liable?

[2] The litigation arises out of a fight between two sophisticated developers -- Burnac Corporation and George Halasi -- to acquire a property in North York (the "Property")

considered key to the development of the North York corridor. The Property was owned by Jules Fleischer and Melvin Newton and leased to Sweet Dreams Delights Inc., a company controlled by Halasi and his partner Larry Krauss, a lawyer. Sweet Dreams' lease contained a right of first refusal on any offer to buy the Property.

[3] In August 1989, 642947 Ontario Limited ("642947"), a nominee of Burnac, agreed to buy the Property for $2,000,000. Sweet Dreams exercised its right of first refusal, but later terminated the agreement. Then, in late September 1989, 642947 resubmitted its original offer to Fleischer and Newton, who accepted it and took the position that Sweet Dreams' right of first refusal was spent. Sweet Dreams, however, obtained an interlocutory injunction restraining the sale. It gave the usual undertaking to pay any damages caused by the injunction. On the injunction application, 642947 and Burnac requested and were granted an extension of the closing date until after the injunction proceedings had concluded. In 1990, the real estate market in Metropolitan Toronto collapsed. The Property fell in value, and both Burnac and Halasi lost interest in it. Sweet Dreams' injunction was dissolved in November 1990 and a new closing date for the sale to 642947 was fixed for December 1990. But 642947 refused to close, citing th e downturn in the real estate market.

[4] 642947 sued for a declaration that its agreement with Fleischer and Newton had been terminated and for a return of its deposit. Fleischer and Newton counterclaimed for damages for breach of the agreement, and 642947 and Burnac sought to be indemnified by Sweet Dreams, Halasi and Krauss on the undertaking to pay damages.

[5] After a long trial heard in July of 1995 and 1996, Greer J. held 642947 and Burnac liable for breach of the agreement of purchase and sale. She assessed damages at the date of closing in December 1990, though the Property fell in value afterwards. She also held that Sweet Dreams' undertaking required it to indemnify 642947 and Burnac for their loss and she found Halasi and Krauss jointly and severally liable on the undertaking because Sweet Dreams had no assets and was simply their alter

ego.

[6] All parties appealed the trial judgment. Burnac and 642947 raised several technical grounds why they were not liable to Fleischer and Newton. In turn, Fleischer and Newton contended that the trial judge erred in assessing damages at the date of closing instead of at or near the date of trial and, alternatively, that she erred in failing to order pre-judgment interest and post-judgment interest at the commercial rate instead of the statutory rate. Sweet Dreams, Halasi and Krauss submitted that they were not liable on the undertaking because 642947 and Burnac's damages were not caused by the injunction. Finally, Halasi and Krauss submitted that even if Sweet Dreams was liable on the undertaking, the trial judge erred by piercing the corporate veil and making them liable as well.

[7] We found no merit in the appeal by 642947 and Burnac and did not call on Fleischer and Newton to respond to it. I would dismiss the appeal by Fleischer and Newton on damages. I would, however, allow the appeal by Sweet Dreams, Halasi and Krauss because, in my view, the damages awarded against 642947 and Burnac were not caused by the injunction but by the fall in the real estate market and by their deliberate refusal to close the transaction. Had I, however, found Sweet Dreams liable on its undertaking, I would have upheld the trial judge's conclusion that Sweet Dreams' principals, Halasi and Krauss, were also liable.

FACTUAL BACKGROUND

A. The Agreements of Purchase and Sale Between 642947 and Fleischer and Newton

[8] The Property that has been the subject of all this litigation is on a municipal block bounded by Yonge Street, Empress Avenue, Doris Avenue and Kingsdale Avenue in the former City of North York. It is next to a block of land owned by the City. Developers interested in assembling land in the North York corridor knew that the City would only sell its block to a party that owned neighbouring land. Therefore, acquiring the

Property was key to developing the corridor.

[9] The Property was bought by Fleischer, a lawyer and a developer, and Newton in 1985. In 1986 they leased it to Sweet Dreams, a company controlled by Halasi and Krauss, each of whom was a 40 [per cent] shareholder through corporations owned or controlled by them. Sweet Dream's lease was for five years with several renewal options to 2006. The lease also contained a right of first refusal, which provided that if the landlord received a bona fide offer to purchase the property, Sweet Dreams had the right to purchase it on the same terms:

> In the event any Landlord hereunder receives a bona fide offer (the "Offer") to purchase the building and land during the Term or the Renewal Periods from an arm's length third party purchaser as defined under the Income Tax Act, the Landlord shall send a copy of the Offer to the Tenant (the "Notice") and the Tenant shall have a first right of refusal to purchase the building and land at a purchase price and upon terms and conditions equal and similar to those contained in the Offer. Upon receipt of the Notice, the Tenant shall have seven (7) business days to reply to the Landlord in writing of its intent to exercise or not exercise its right of first refusal as the case may be. Should the Tenant elect to exercise its right of first refusal as set out hereunder, there shall be a binding agreement of purchase and sale of the Landlord's freehold estate in the building and the land upon which is situated the Leased Premises between the Landlord and Tenant and the parties agree to execute all additional documen tation to give effect thereto. . . .

This right of first refusal gave Sweet Dreams control over the development of the Property.

[10] In the late 1980s, the real estate market in Metropolitan Toronto was booming. Burnac became interested in the Property and used a nominee or shelf company, 642947, to try to buy it. 642947 was a bare trustee under a trust agreement with Burnac dated August 28, 1989. The sole shareholder, director and officer of 642947 was John Handiak, a

solicitor who had done work for Burnac for about 15 years. 642947, however, had no assets, no employees and no independent authority. Under the trust agreement, 642947 was to act "solely and entirely on the instructions" of Burnac. Burnac's Vice-Chairman Theodore Burnett testified that the company typically used trust agreements to acquire real property in order to hide the identity of the true purchaser and to limit Burnac's liability.

[11] On August 31, 1989, 642947 entered into an agreement with Fleischer and Newton (the "first agreement") to buy the Property for $2,000,000, made up of a $100,000 deposit and the balance due on closing, fixed for November 24, 1989. The agreement was conditional on Sweet Dreams' right of first refusal.

[12] Fleischer and Newton submitted the first agreement to Sweet Dreams and on September 13, 1989, Sweet Dreams exercised its right of first refusal. By doing so, Sweet Dreams took over 642947's position as purchaser. It then turned around and offered to sell the property to 642947 for $2,050,000, an increase of $50,000 over the original purchase price. 642947 declined the offer. Later, Sweet Dreams used an unrelated condition in the first agreement to get out of the deal.

[13] On September 25, 1989, 642947 made an identical offer of $2,000,000 to purchase the Property, which Fleischer and Newton accepted (the "second agreement"). Fleischer and Newton, and Handiak, representing 642947, then signed a waiver notice dispensing with the right of first refusal condition in the second agreement. They took the position that once Sweet Dreams had exercised its right of first refusal in connection with the first agreement that right was extinguished. The trial judge agreed. She found that 642947's first offer was a bona fide offer, and that "once Sweet Dreams exercised its option, even though it then declined to purchase prior to the inspection period being concluded, its right of first refusal was extinguished and it then no longer became necessary for Fleischer and Newton to submit 642[947]'s identical second Offer to Sweet Dreams": (1997), 9 R.P.R. (3d) 261 at p. 292 (Ont. Gen. Div.). In this court, neither Sweet Dreams nor

its principals Halasi and Krauss challenged thes e findings.

B. The Injunction Proceedings

[14] The second agreement was scheduled to close on Friday, November 24, 1989. In mid-November, Sweet Dreams sought to enjoin the closing on the ground that it had not been given an opportunity to exercise its right of first refusal. The application for the injunction was supported by the affidavit of Halasi, who gave an undertaking on behalf of Sweet Dreams in the standard form prescribed by rule 40.03 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194:

> The Applicant undertakes to abide by any Order concerning damages that the Court may make if it ultimately appears that the granting of the Order has caused damage to the responding party for which the Applicant ought to compensate it.

Acting on Burnett's instructions, Andrew Federer, a lawyer and president of a Burnac subsidiary, filed a responding affidavit stating that Burnac would suffer great harm if the injunction were granted.

[15] The application for the injunction was argued on Thursday, November 23, the day before the scheduled closing date. Both Krauss and Fleischer attended the hearing. Krauss offered to buy the Property for $2,000,000 if the motions judge, Isaac J., restrained 642947 and Fleischer and Newton from closing the second agreement. Fleischer said that he was indifferent and would sell to whichever party the court found was entitled to buy. After a full day of argument, Isaac J. reserved his decision until Monday, November 27. To avoid being prejudiced while the decision was under reserve, 642947 and Burnac asked the motions judge to extend the closing date until Monday, which he did. On Monday the 27th, Isaac J. released his decision, in which he enjoined 642947 and Fleischer and Newton from completing their agreement of purchase and sale until trial or other order of the court. To preserve their interest in the Property while the injunction was outstanding, 642947 and Burnac again asked the motions judge to extend the closing date of the second agreement. In Federer's words, 642947 and

Burnac were "betting that the market would stay the same or go up". Isaac J. ordered an extension until the disposition of the action or further order of the court.

[16] Before the injunction proceedings, Burnac had been an undisclosed principal but during the injunction it participated openly and actively and thus became a disclosed principal. Burnac was later added as a defendant in the action.

C. Subsequent Events

[17] In 1990, the real estate market in Metropolitan Toronto collapsed. Property values in the North York area fell dramatically, by as much as 50 to 70 per cent. Halasi and Krauss lost interest in buying the property. Therefore, in November 1990, Sweet Dreams moved to discontinue the action. On November 22, 1990, Dunnet J. granted Sweet Dreams leave to discontinue, dissolved the injunction and fixed December 7, 1990 for closing the second agreement. She also ordered that the question whether the undertaking of Sweet Dreams could be imposed on Halasi and Krauss could be considered on an inquiry into damages or in another proceeding.

[18] Burnac, too, lost interest in buying the Property. The day after Dunnet J.'s order, 642947 wrote to Fleischer and Newton waiving tender and stating that it would not close the second agreement because of "the effect of the injunction granted by Mr. Justice Isaac dated November 27, 1989 and the downturn in the real estate market since that date". As Burnett testified at trial, Burnac did not complete the transaction because "I didn't think I was getting what I had bargaining for".

[19] After the injunction was dissolved, Fleischer and Newton let it be known that the Property was back on the market, though they did not list it for sale. When Sweet Dreams' lease expired in 1991, Fleischer and Newton leased the Property to a new tenant, Sonic Temple Music Store. The litigation began in April 1991. When the trial ended in July 1996, Fleischer and Newton still owned the Property and the music store remained a tenant with an option to renew its lease until 2006.

D. The Reasons of the Trial Judge

[20] The trial judge gave detailed reasons [reported at 9 R.P.R. (3d) 261] in what turned out to be a difficult case. She held that both 642947 and Burnac were liable to Fleischer and Newton for breaching the second agreement. And because it had repudiated the agreement, 642947 was not entitled to the return of its deposit.

[21] The trial judge dismissed the "technical" real property issues raised by 642947 and Burnac -- for example, the inability of the vendors to give vacant possession on closing -- by concluding that these issues did not impede the closing. She found that the trust agreement between 642947 and Burnac applied to the second agreement, that 642947 acted as agent on the transaction, and that, therefore, Burnac was liable as an undisclosed principal. Alternatively, she held that Burnac was liable for inducing breach of contract.

[22] The trial judge then turned to assess Fleischer and Newton's damages. She made findings of fact on the value of the Property and on mitigation, which are not challenged on this appeal. She found that the Property was worth $1,130,000 on the date scheduled for closing, December 7, 1990, and that by November 1994, the last time it was appraised before trial, it had a value of only $410,000. She also found that the vendors had mitigated their loss by re-leasing the Property at a reasonable rate and by advising the developer community it was back on the market. As well, in her view, 642947 and Burnac had not shown that the vendors had breached their duty to mitigate. Having made these factual findings, the trial judge chose the date of closing to assess Fleischer and Newton's damages. She therefore awarded them $870,000 (the difference between the purchase price and the value of the Property on December 7, 1990) plus pre-judgment interest on that amount at 8.8 per cent, the rate provided by the Courts of Justice Act, R.S.O. 1990, c. C.43. She rejected Fleischer and Newton's request for compound interest, holding that they did not satisfy the requirements in Claiborne Industries Ltd. v. National Bank of Canada (1989), 69 O.R. (2d) 65, 59 D.L.R. (4th) 533 (C.A.) or

Brock v. Cole (1983), 40 O.R. (2d) 97, 142 D.L.R. (3d) 461 (C.A.).

[23] Finally, the trial judge dealt with 642947 and Burnac's third party claim for indemnity based on Sweet Dream's undertaking. She held that the undertaking should be enforced because its non-performance is a contempt of court. She concluded, at p. 297 R.P.R., that the damages she assessed, $870,000, "flow from the undertaking given by Sweet Dreams". She also concluded that Halasi and Krauss were liable on Sweet Dreams' undertaking because they "were the alter ego of Sweet Dreams and knew when the undertaking was given that Sweet Dreams had no assets from which to pay damages". In her view, the undertaking was fraudulent and Halasi and Krauss misconducted themselves by offering it to the court. She thus considered it appropriate to pierce the corporate veil and hold Halasi, Krauss and Sweet Dreams jointly and severally liable both to 642947 and to Burnac, which she found was a party to the injunction. She fixed their liability at $770,000 (the amount of damages awarded to Fleischer and Newton less the deposit) together with pre-judgment interest.

[ANALYSIS]

[24] I turn now to the three sets of appeals.

I. The Appeal by 642947 and Burnac

[25] On their appeal, 642947 and Burnac sought to avoid their liability to the vendors Fleischer and Newton. Their counsel, Mr. Carr, advanced two arguments why Burnac should not be liable and two arguments why neither Burnac nor 642947 should be liable. These arguments were:

1. Burnac was entitled to rely on the sealed contract rule that an undisclosed principal cannot be sued on a contract made under seal.

2. Fleischer and Newton elected to contract with the agent 642947 and are therefore precluded from suing the principal Burnac;

3. 642947 and Burnac are not liable because Fleischer and Newton acted in bad faith; and

4. 642947 and Burnac are not liable because Fleischer and Newton could not give vacant possession on closing, as required by the second agreement.

[26] We found no merit in any of these arguments and therefore did not ask counsel for Fleischer and Newton to respond to them. I will briefly give my reasons for dismissing 642947 and Burnac's appeal.

1. The sealed contract argument

[27] In Friedmann Equity Developments Inc. v. Final Note Ltd., [2000] 1 S.C.R. 842, 188 D.L.R. (4th) 269, the Supreme Court of Canada affirmed the continuing validity of the sealed contract rule. This rule holds that where a contract is made under seal, only the parties to the contract may sue or be sued on it. Therefore, an undisclosed principal is not liable on a sealed contract. This rule is an exception to the general rule that a principal, whether disclosed or not, may sue or be sued on a contract made on its behalf by the principal's agent.

[28] The trial judge found that when it entered into both agreements with Fleischer and Newton, 642947 acted as Burnac's agent. And Burnac was an undisclosed principal when the agreements were signed. Although the first agreement was made under seal, the second agreement was not. Yet the second agreement was the subject of the litigation.

[29] Burnac still contends that it is entitled to invoke the sealed contract rule for the second agreement for two reasons: 642947 intended to execute it under seal and the court should give effect to that intention; and s. 13(1) of the Land Registration Reform Act, R.S.O. 1990, c. L.4. Neither contention has merit.

[30] Mr. Handiak, the sole director and shareholder of 642947, testified that his standard practice was to seal all

agreements of purchase and sale. He did seal the first agreement and, though he intended to seal the second, he failed to do so. In my view, Mr. Handiak's mere intention, unaccompanied by any act of sealing, is insufficient to bring the sealed contract rule into play. The rule, at once historical and technical, should not be given any wider effect than necessary. To invoke it, more than an agent's intention is required. That intention must be accompanied by the deliberate application of the seal. See Friedmann Equity at p. 867 S.C.R.

[31] Section 13(1) of the Land Registration Reform Act treats all conveyances and charges (or mortgages) as sealed documents for all purposes, including the application of the sealed contract rule. Section 13(1) reads:

> 13(1) Despite any statute or rule of law, a transfer or other document transferring an interest in land, a charge or discharge need not be executed under seal by any person, and such a document that is not executed under seal has the same effect for all purposes as if executed under seal.

Burnac submits that the second agreement of purchase and sale is a "charge" under s. 13(1) because 642947 was entitled to a purchaser's lien to the extent of the $100,000 deposit. To come under s. 13(1), however, the charge must be created by a document. That is consistent with the wording of the subsection and its purpose, which "is to preserve the common law substantive consequences associated with traditional forms of conveyancing and mortgages". See Friedmann Equity at p. 869 S.C.R. The purchaser's lien for deposit money is not a charge created by a document but a charge created by equity. It is an equitable charge on land, not included in s. 13(1). And even if it was, in this case any existing purchaser's lien ended when 642947 and Burnac wrongfully repudiated the agreement. For these reasons, the second agreement was not made or deemed to be made under seal and Burnac could be sued on it. This first ground of appeal fails.

2. Fleischer and Newton's election

[32] Assuming the second agreement of purchase and sale was

not sealed, Burnac advanced an alternative reason why it was not liable. It submitted that Fleischer and Newton chose to contract with 642947 knowing that it was a nominee for an undisclosed principal. Having elected to so contract, Fleischer and Newton cannot now look to hold the principal Burnac liable.

[33] This submission has an air of unreality to it. At trial, Burnac's main contention was that the trust agreement between it and 642947 applied only to the first agreement but not the second and, therefore, 642947 entered into the second agreement as principal, not agent. The trial judge rejected that contention, finding that the trust agreement applied to both agreements of purchase and sale. That finding is not challenged on appeal.

[34] Instead, Burnac now tries to mount an estoppel or election argument. But I see no basis for precluding Fleischer and Newton from suing Burnac simply because they contracted with 642947. To the contrary, had Burnac wished to limit its liability it could have insisted on a clause to that effect in the agreements of purchase and sale.

[35] 642947 was a bare trustee under its trust agreement with Burnac. But as Morden J.A. pointed out in Trident Holdings Ltd. v. Danand Investments Ltd. (1988), 64 O.R. (2d) 65, 49 D.L.R. (4th) 1 (C.A.), in many cases, a bare trustee will also be an agent, and when it contracts on behalf of a principal, the principal may be liable for breach of the contract. Here, 642947 was undoubtedly an agent for Burnac in executing the second agreement of purchase and sale. Under the trust agreement, 642947 had no independent power, responsibility or discretion; it acted only on the instructions of Burnac. It was not so much carrying out the terms of the trust as it was doing Burnac's bidding. In short, 642947 was an agent for Burnac and the agency relationship predominated over the trust relationship. Because the agency relationship predominated, the agent's principal Burnac, though not disclosed and not a party to the second agreement, is still liable for the agreement's breach. Holding Burnac liable simply gives effect to the proposition that though an agent negotiates and signs a contract with a third party, the contract remains one between

the principal and the third party. Fleischer and Newton were therefore not estopped from suing Burnac for breach of the second agreement of purchase and sale.

3. Bad faith

[36] 642947 and Burnac argued that the vendors Fleischer and Newton should not be allowed to enforce the second agreement because they acted in bad faith. 642947 and Burnac gave two examples of the vendors' alleged bad faith: failing to submit the second agreement to Sweet Dreams under its right of first refusal, and then negotiating to sell the Property to Sweet Dreams while contractually obligated to 642947. Neither example evidences bad faith.

[37] The trial judge held correctly that Sweet Dreams' right of first refusal was spent once it was exercised in connection with the first agreement. Therefore, Fleischer and Newton were not obliged to give Sweet Dreams an opportunity to exercise the right of first refusal in connection with the second agreement. Moreover, it hardly lies in the mouth of 642947 or Burnac to complain about the vendors' failure to submit the right of first refusal to Sweet Dreams, because 642947 signed the waiver notice.

[38] Burnac and 642947 argued that Fleischer and Newton exhibited bad faith at the injunction proceedings by offering to sell the Property to Sweet Dreams despite their agreement with 642947. Both the motions judge and the trial judge implicitly rejected this argument by concluding that Fleischer and Newton took a neutral position. The vendors were willing to sell the Property to whichever party was entitled to buy it. Their stance does not show bad faith.

4. Inability to give vacant possession on closing

[39] 642947 and Burnac also claimed that Fleischer and Newton could not give vacant possession on closing because of Sweet Dreams' lease. Two obvious answers to this claim are: first, 642947 waived tender, thus making it unnecessary for the vendors to show their ability to complete the transaction in

accordance with its terms; and second, on the injunction application Burnac, though aware of the lease, represented that it was ready, willing and able to close and asked for an extension of time to do so. The existence of the lease was never an impediment to closing the transaction.

II. The Cross-Appeal by Fleischer and Newton

[40] On their cross-appeal, Fleischer and Newton contended that the trial judge's damages award did not fully compensate them for their loss. Their main submission was that the trial judge erred by assessing damages in a falling market at the date of closing instead of at or near the date of trial. Their other submission was that the trial judge erred in awarding pre-judgment interest and post-judgment interest at the statutory rate instead of at the commercial rate.

1. The date for assessment of damages

[41] The judgment of Morden J.A. in 100 Main Street Ltd. v. W.B. Sullivan Construction Ltd. (1978), 20 O.R. (2d) 401, 88 D.L.R. (3d) 1 (C.A.) is the principal authority in this court on the assessment of damages for breach of an agreement of purchase and sale. In that case, the purchaser agreed to buy an apartment building but repudiated the contract before closing. The vendor sued for damages and both the trial judge and this court held the purchaser liable. The main issue in this court was when the damages should have been assessed. At the risk of doing a disservice to the thorough and thoughtful reasons of my colleague, I summarize what he wrote about the choice of the date for assessing damages for breach of an agreement to buy land in the following six propositions, which are relevant to this appeal:

(1) The basic principle for assessing damages for breach of contract applies: the award of damages should put the injured party as nearly as possible in the position it would have been in had the contract been performed.

(2) Ordinarily courts give effect to this principle by assessing damages at the date the contract was to be

performed, the date of closing. [See Note 1 at end of document]

(3) The court, however, may choose a date different from the date of closing depending on the context. Three important contextual considerations are the plaintiff's duty to take reasonable steps to avoid its loss, the nature of the property and the nature of the market.

(4) Assessing damages at the date of closing may not fairly compensate an innocent vendor who makes reasonable efforts to resell in a falling market. In some cases, the nature of the property -- for example an apartment building -- hampers the vendor's ability to resell quickly. Thus, if the vendor takes reasonable steps to sell from the date of breach and resells the property in some reasonable time after the breach, the court may award the vendor damages equal to the difference between the contract price and the resale price, instead of the difference between the contract price and the fair market value on the date of closing.

(5) Therefore, as a general rule, in a falling market the court should award the vendor damages equal to the difference between the contract price and the "highest price obtainable within a reasonable time after the contractual date for completion following the making of reasonable efforts to sell the property commencing on that date" (at p. 421 O.R.).

(6) Where, however, the vendor retains the property in order to speculate on the market, damages will be assessed at the date of closing.

[42] Underlying these propositions is the simple notion of fairness. As Professor S.M. Waddams wrote in his text, The Law of Contracts, 4th ed. (Toronto: Canada Law Book, 1999), at p. 518, "[i]t is on general considerations of justice, therefore, that the choice of date must depend." The date for the assessment of damages is determined by what is fair on the facts of each case. See Rice v. Rawluk (1992), 8 O.R. (3d) 696

(Gen. Div.); Bitton v. Jakovljevic (1990), 75 O.R. (2d) 143, 13 R.P.R. (2d) 48 (H.C.J.).

[43] With these propositions in mind, I turn to Fleischer and Newton's submission that on the trial judge's factual findings, she should have chosen November 1994 instead of December 7, 1990, the date of closing, to assess the vendors' damages. The trial judge found that the Property was worth $1,130,000 on December 7, 1990 but only $410,000 in November 1994. She also found that Fleischer and Newton had fulfilled their duty to mitigate by re-leasing the Property and by letting the development community know that it was again on the market. Having made these findings, the trial judge still chose the date of closing to assess the vendors' damages. In my view, she was correct to do so.

[44] The vendors led no evidence about the "highest price obtainable in a reasonable time" after the closing date. They cannot pick a date at random, nearly four years after the closing date, when the market was likely at its lowest, and reasonably expect the court to choose that date to measure their loss. Even the trial judge's finding that Fleischer and Newton initially met their duty to mitigate must be viewed in the context of what occurred subsequently. The trial was ongoing in July 1996, five and one-half years after the scheduled closing date, yet Fleischer and Newton still owned the Property. Although they may not have been able to sell the Property immediately after 642947 repudiated the second agreement, one might reasonably have expected them to have sold it by the time of trial if they seriously intended to do so. Indeed, they leased the Property to a new tenant for a period that could extend to 2006, a period that even they acknowledged was an impediment to a resale. I think the irresistible i nference is that, at some point after the fall of the market in 1990, Fleischer and Newton decided to retain the Property, speculating that eventually the real estate market would go back up. Having decided to do so, they alone must assume the burden or the benefit of changes in the market after the closing date. Fairness dictated that the vendors' damages be assessed at December 1990. I therefore do not accept Fleischer and Newton's main submission that the trial judge erred by

failing to assess damages as of November 1994.

[45] Their alternative submission that the trial judge should have awarded both pre-judgment interest and post-judgment interest at the commercial rate of interest instead of the rate under the Courts of Justice Act was not pressed in oral argument. I see no error in the trial judge's award of interest. Indeed, the pre-judgment interest rate of 8.8 per cent awarded by the trial judge seems reasonable. For these reasons, I would dismiss the cross-appeal of Fleischer and Newton.

III. The Appeal by Sweet Dreams, Halasi and Krauss

[46] The trial judge found that Sweet Dreams was liable on its undertaking for the loss sustained by 642947 and Burnac, and she then found that Sweet Dreams' principals, Halasi and Krauss, were jointly and severally liable for the loss because Sweet Dreams had no assets and was simply their alter ego. Sweet Dreams, Halasi and Krauss each appealed these findings. Sweet Dreams argued that it cannot be held responsible principally because the injunction did not cause 642947 and Burnac's loss. Halasi and Krauss argued that even if Sweet Dreams is held responsible, they cannot be held liable personally because no grounds existed to pierce the corporate veil.

1. Is Sweet Dreams liable on its undertaking?

[47] The trial judge conducted an inquiry into the liability of Sweet Dreams and its principals Halasi and Krauss under paras. 3 and 4 of Dunnet J.'s order, which provided:

> 3. THIS COURT ORDERS that the inquiry as to the entitlement of the Defendants, 642947 Ontario Limited, Jules Fleischer and Melvin Newton to damages pursuant to the undertaking of the Plaintiff, Sweet Dreams Delights Inc., made in the Order of The Honourable Mr. Justice Isaac is adjourned sine die.
>
> 4. THIS COURT ORDERS that the issue as to whether or not the undertaking of the Plaintiff Sweet Dreams Delights Inc.

> may be imposed on the Plaintiff Paradox Developments Inc. and the principals of Sweet Dreams Delights Inc. may be considered on the inquiry as to damages, if any, or other proceedings. The issue as to whether or not the undertaking can be extended to the Defendants, Andrew Federer, Lakeburn Land Capital Corporation and Burnac Corporation was not raised when the motion was argued on November 22, 1990. This issue may also be considered on the inquiry as to damages, if any, or other proceedings.

An inquiry was unquestionably called for. The basis for Sweet Dreams' injunction -- that it was denied an opportunity to exercise its right of first refusal under the second agreement -- was, as the trial judge found, devoid of merit. Having obtained the injunction, Sweet Dreams sought its dissolution only when the market fell and the Property was no longer attractive.

[48] Sweet Dreams, however, argued two grounds why it should not be liable on its undertaking. First, it submitted that it can be liable only if the injunction caused 642947 and Burnac's loss and it contended that the injunction did not do so. Second, Sweet Dreams submitted that 642947 and Burnac cannot look to the undertaking when they voluntarily relinquished a valid ground not to complete the transaction, the inability of the vendors to give vacant possession on closing.

[49] This latter submission has no merit. Admittedly, one of the conditions of closing required Fleischer and Newton to give vacant possession. But no party to the dispute ever took this condition seriously, and the trial judge rightly found that the failure to satisfy this condition would not have prevented the closing.

[50] I therefore turn to the question whether the damages that 642947 and Burnac have to pay Fleischer and Newton flow from the injunction. Many cases have stated the principle that damages for an injunction wrongly granted should be assessed on the same basis as damages for breach of contract. This principle was affirmed by the House of Lords in F. Hoffmann-LaRoche & Co. A.G. v. Secretary of State for Trade and

Industry, [1975] A.C. 295 at p. 361, [1974] 2 All E.R. 1128 (H.L.), where Lord Diplock said:

> The court has no power to compel an applicant for an interim injunction to furnish an undertaking as to damages. All it can do is to refuse the application if he declines to do so. The undertaking is not given to the defendant but to the court itself. Non-performance of it is contempt of court, not breach of contract, and attracts the remedies available for contempts, but the court exacts the undertaking for the defendant's benefit. It retains a discretion not to enforce the undertaking if it considers that the conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so, but if the undertaking is enforced the measure of the damages payable under it is not discretionary. It is assessed on an inquiry into damages at which principles to be applied are fixed and clear. The assessment is made upon the same basis as that upon which damages for breach of contract would be assessed if the undertaking had been a contra ct between the plaintiff and the defendant that the plaintiff would not prevent the defendant from doing that which he was restrained from doing by the terms of the injunction: see Smith v. Day (1882), 21 Ch.D. 421, per Brett L.J., at p. 427.

(Emphasis added)

See also Village Gate Resorts Ltd. v. Moore (1999), 71 B.C.L.R. (3d) 1, 37 C.P.C. (4th) 5 (C.A.) and Vieweger Construction Co. v. Rush Tompkins Construction Ltd. (1964), [1965] S.C.R. 195, 48 D.L.R. (2d) 509.

[51] I accept that contract principles apply to the assessment of damages, but it seems to me that, in Ontario, the wording of rule 40.03 focuses more precisely on causation. Rule 40.03 provides:

> 40.03 On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning

> damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party.

The undertaking by Halasi for Sweet Dreams tracks the wording of rule 40.03. Thus, Sweet Dreams undertook "to abide by any Order concerning damages that the Court may make if it ultimately appears that the granting of the Order has caused damage to the responding party for which the Applicant ought to compensate it".

[52] Sweet Dreams is liable on its undertaking if the injunction caused the damages that 642947 and Burnac must pay to the vendors, or, assuming more than one cause, if the injunction materially contributed to these damages. In my view, the trial judge erred in finding a causal connection. Although I think little of the conduct of Sweet Dreams and its principals, I cannot see how the injunction caused or materially contributed to the damages 642947 and Burnac must pay to Fleischer and Newton. These damages were caused by the fall in the real estate market and by Burnac's deliberate refusal to close the transaction, after having asked the motions judge to extend the closing date to preserve its interest in the Property.

[53] The injunction and its later dissolution gave rise to at least three possible scenarios. First, whether asked to or not, the motions judge could have refused to extend the closing date. On this scenario, the injunction would have caused the loss of 642947's bargain with Fleischer and Newton, and Sweet Dreams could have been liable on its undertaking for that loss. A second possibility is that the motions judge could have extended the closing date as requested by Burnac, and 642947 could then have closed the transaction on the extended date. On this scenario, Fleischer and Newton would not have suffered any damages and Burnac would have acquired the Property it agreed to buy at the price it agreed to pay. But the injunction would have caused an approximately one-year delay in the closing (from November 24, 1989 to December 7, 1990). Sweet Dreams would therefore be liable to 642947 and Burnac for any damages

attributable to the delay. These damages could have included increased carrying costs, loss of re ntal income or even loss of profits.

[54] The third scenario is the one that occurred. The motions judge extended the closing as requested by Burnac but then 642947 refused to close. On this scenario, the injunction caused none of the damages that 642947 and Burnac have been ordered to pay. Instead, these damages were caused by the combination of the fall in the real estate market and 642947's refusal to close. That this must be so can be seen by considering the position of 642947 and Burnac had the injunction not been granted. In that case, 642947 would have paid Fleischer and Newton $2,000,000 for the Property in 1989 and a year later would have been left with a Property worth only $1,130,000. Although Fleischer and Newton would have been paid the contract price, Burnac would still have suffered the same loss, a loss caused solely by the fall in the market.

[55] I therefore conclude that, on causation principles, 642947 and Burnac's claim to be indemnified by Sweet Dreams must fail. Some authorities, however, have suggested that in assessing damages for the wrongful granting of an injunction, a court is not limited by contract law principles but has a wider equitable discretion to do what is "fair and reasonable" or what is "just" in all the circumstances. See Air Express Ltd. v. Ansett Transportation Industries (Operations) Pty Ltd. (1979 to 1981), 146 C.L.R. 249, 33 A.L.R. 578; Village Gate Resorts, supra; I.C.F. Spry, The Principles of Equitable Remedies, 5th ed. (Toronto: Carswell, 1997) at p. 660.

[56] These other authorities address the extent to which damages under an undertaking must conform to the general law applicable to contract damages. They suggest that a judge awarding damages under an undertaking has some discretion to depart from contract damages principles, particularly on the issue of remoteness. None of these authorities states that damages may be awarded when a causal link between the undertaking and the loss is entirely absent. Indeed, each affirms the necessity of establishing factual causation to obtain damages under an undertaking.

[57] Even assuming that a wide discretion to order damages in the absence of a causal connection does exist in some jurisdictions, I doubt that an Ontario court could invoke it in the face of the wording of rule 40.03, which focuses the inquiry on causation. And even if an Ontario court could award damages that seem fair or just, I am not persuaded that this is the right case to do so. In asking for an extension of the closing date, Burnac gambled that the value of the Property would stay the same or go up. When its gamble did not pay off, Burnac reneged on its bargain. It cannot now look to Sweet Dreams to relieve it from the consequences of its own default. That would not be a just result. Therefore, I would set aside the trial judge's order that Sweet Dreams indemnify 642947 and Burnac for their loss.

2. Are Halasi and Krauss personally liable?

[58] Halasi and Krauss' liability depended on finding Sweet Dreams liable on its undertaking. Because 642947 and Burnac's claim against Sweet Dreams failed, so must their claim against the two principals of Sweet Dreams. Nonetheless, I propose to discuss the liability of Halasi and Krauss on the footing that Sweet Dreams was responsible for Burnac's loss. I do so because the issue was fully argued before us and because I consider it relevant to the question of costs.

[59] Halasi and Krauss put forward three reasons why they should not have been held jointly and severally responsible for the damages Burnac and 642947 were ordered to pay Fleischer and Newton. First, they submitted that the trial judge erred in finding Sweet Dreams had insufficient assets to honour its undertaking if called on to pay. Second, they submitted that the adequacy of Sweet Dreams' assets should have been raised by 642947 and Burnac on the injunction application. And, third, they submitted that the trial judge erred in piercing the corporate veil to hold them responsible.

[60] The trial judge found that, when its undertaking was given, Sweet Dreams had no assets from which to pay damages. Halasi and Krauss submitted that this finding cannot be

supported on the evidence. I disagree. Sweet Dreams was used by Halasi and Krauss solely to hold their interest and their investors' interest in the property. It had no other purpose. It had no income other than the rent it received on a sublease, a rent that was insufficient to pay its own rent to Fleischer and Newton. It had no assets other than the lease itself. Some evidence of the value of the lease, including the right of first refusal, is found in the offer made by Halasi and Krauss to sell the Property to Burnac for $50,000 more than the contract price. Even if that figure is not an accurate estimate of the lease's value, the lease alone was inadequate to protect 642947 and Burnac from any damages they may have sustained because of the injunction. Sweet Deams simply had no cash or liquid assets to honour its undertaking.

[61] Thus, the trial judge's finding that Sweet Dreams did not have sufficient assets to pay a damages award is amply supported by the evidence. Indeed, Halasi admitted as much when cross-examined on his affidavit in support of the injunction. Hard cases may arise where the ability of a party to pay damages for an injunction wrongly granted may not be obvious. This is not one of those cases.

[62] Even if Sweet Dreams did not have any assets to pay a damages award, Halasi and Krauss contended that the adequacy of its assets should have been raised by Burnac on the injunction application, and that Burnac cannot, after the fact, extract what amounted to personal guarantees. Halasi and Krauss say that the adequacy of Sweet Dreams' assets was relevant to the balance of convenience. If [it was] raised during the hearing, Sweet Dreams could have decided whether to proceed with its injunction application and, if it did, the court could have decided whether to require security or personal guarantees as a condition of granting the injunction. In substance, Halasi and Krauss' submission puts the onus on the party seeking the undertaking -- here 642947 and Burnac -- to raise the adequacy of the assets of the party giving the undertaking.

[63] I do not accept this submission. I agree that on the injunction application Burnac could have questioned the sufficiency of Sweet Dreams' assets. But Sweet Dreams itself

had the primary obligation to disclose that its assets were inadequate to satisfy its undertaking if called on to pay. The undertaking was not given to 642947 and Burnac. It was given to the court. By undertaking to "abide by any Order concerning damages that the Court may make", Sweet Dreams implicitly represented that it had sufficient assets to honour that undertaking. Both the court and Burnac were entitled to rely on that representation without making inquiries into its accuracy. If, as was the case here, Sweet Dreams did not have sufficient assets to honour its undertaking, it had an obligation to disclose that fact to the court. Sweet Dreams could then have asked to be relieved of its undertaking, or could have been asked to post security.

[64] Even so, Halasi and Krauss argued that the trial judge erred in law in going behind Sweet Dreams to hold them personally liable. In piercing the corporate veil and imposing personal liability, the trial judge held that Halasi and Krauss used Sweet Dreams as their alter ego and knew when the undertaking was given that Sweet Dreams had no assets from which to pay damages. She therefore concluded, at p. 297 R.P.R., that "the undertaking was fraudulent and it was misconduct on the part of Krauss and Halasi as officers of Sweet Dreams to offer it to the Court."

[65] Halasi and Krauss argued that the trial judge's reasoning reflects two errors: Sweet Dreams was not their alter ego, indeed, they were not even shareholders of Sweet Dreams; and the corporate veil should not have been pierced because Halasi and Krauss incorporated Sweet Dreams for a valid purpose -- to hold property -- and did not use the company as a sham to perpetrate a fraud.

[66] The first argument is specious. Halasi and Krauss, through companies they owned or controlled, each held 40 per cent of the shares of Sweet Dreams. They described themselves as "partners" in trying to assemble land in the North York corridor. Whatever the legal form, they controlled Sweet Dreams and the interest it held in the property. The trial judge's finding (at p. 298 R.P.R.) that "Sweet Dreams was merely the alter ego of both Halasi and Krauss" was open to her on this

evidence and I would not interfere with it.

[67] Halasi and Krauss' second argument is that the trial judge disregarded well-known principles of corporate law in holding them personally liable. In my opinion, however, the trial judge took the correct view in concluding (at p. 298 R.P.R.) that "Krauss and Halasi cannot hide behind the corporate veil." To pierce the corporate veil is to disregard the separate legal personality of a corporation, a fundamental principle of corporate law recognized in Salomon v. Salomon & Co., [1897] A.C. 22, [1895-9] All E.R. Rep. 33. Only exceptional cases -- cases where applying the Salomon principle would be "flagrantly" unjust -- warrant going behind the company and imposing personal liability. Thus, in Clarkson Co. v. Zhelka, [1967] 2 O.R. 565 at p. 578, 64 D.L.R. (2d) 457 (H.C.J.), Thompson J. held that instances in which the corporate veil has been pierced "represent refusals to apply the logic of the Salomon case where it would be flagrantly opposed to justice". Similar ly, Wilson J. observed in Kosmopoulos v. Constitution Insurance Co., [1987] 1 S.C.R. 2 at p. 10, 34 D.L.R. (4th) 208, that the law on when the corporate veil can be pierced "follows no consistent principle. The best that can be said is that the 'separate entities' principle is not enforced when it would yield a result 'too flagrantly opposed to justice, convenience or the intersts of the Revenue': L.C.B. Gower, Modern Company Law (4th ed. 1979), at p. 112".

[68] Typically, the corporate veil is pierced when the company is incorporated for an illegal, fraudulent or improper purpose. But it can also be pierced if when incorporated "those in control expressly direct a wrongful thing to be done": Clarkson Co. v. Zhelka at p. 578. Sharpe J. set out a useful statement of the guiding principle in Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co. (1996), 28 O.R. (3d) 423 at pp. 433-34 (Gen. Div.), affd [1997] O.J. No. 3754 (C.A.): "the courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct."

[69] These authorities indicate that the decision to pierce the corporate veil will depend on the context. They also indicate that the separate legal personality of the corporation cannot be lightly set aside. Yet, however restrictive corporate law principles for piercing the corporate veil may be, in the context of an undertaking to the court, the trial judge's findings support going behind Sweet Dreams and imposing personal liability.

[70] She found that Sweet Dreams had no assets to honour its undertaking, that Halasi and Krauss controlled Sweet Dreams and that when Halasi and Krauss tendered the undertaking for Sweet Dreams they knew it had no assets. All of these findings are reasonably supported by the evidence. Moreover, Halasi was a sophisticated developer and Krauss was a lawyer. They tendered an undertaking to the court, which they knew was worthless, to gain an advantage. When called on to honour the undertaking, they tried to hide behind a shell company, which they controlled, to escape liability. In the words of Sharpe J. in Transamerica Life, Sweet Dreams was "completely dominated and controlled" by Halasi and Krauss, and used by them "as a shield for . . . improper conduct". The trial judge put it this way (at p. 298 R.P.R.), in a passage that I endorse:

> Undertakings cannot be lightly given to the Court to selfishly protect the self-interest of the parties giving the undertaking. It would be a mockery of injunction proceedings if that were so. It would effectively mean that worthless hollow undertakings could be given to the Court, leaving the Court powerless to grant effective sanctions by way of damages which, in the final analysis, could never be collected by the injured party.

Had I upheld the trial judge's finding that Sweet Dreams was liable on its undertaking, I would have also upheld her finding that Halasi and Krauss were liable.

[71] But as I said at the outset of this discussion, Halasi and Krauss could be held liable only if Sweet Dreams were liable. Because Burnac and 642947 could not show a causal connection between the injunction and the damages they

suffered, they cannot look to Sweet Dreams and therefore to Halasi and Krauss for indemnification. I would therefore allow the appeal by Sweet Dreams, Halasi and Krauss and dismiss the third party claim against them.

[72] I would, however, deprive them of their costs both at trial and on appeal. The trial judge took a dim view of their conduct and so do I. Indeed, in the dispute between 642947 and Burnac on the one side, and Sweet Dreams, Halasi and Krauss on the other, neither occupies the moral high ground. 642947 and Burnac refused to honour their bargain; Sweet Dreams, Halasi and Krauss exercised a right -- the right of first refusal -- that was spent after the first agreement in order to obtain the injunction. At the hearing of the injunction, they told the motions judge that they were willing to buy the Property for $2,000,000. Then they too abandoned the Property and the injunction when the market fell. Burnac and 642947 must bear full responsibility for the vendors' loss. Although Sweet Dreams, Halasi and Krauss have been successful, because of their conduct I would not award them any costs.

DISPOSITION

[73] For the reasons I have given, I would dismiss both the appeal by Burnac and 642947 and the cross-appeal by Fleischer and Newton with costs. I would allow the appeal by Sweet Dreams, Halasi and Krauss without costs. I would therefore set aside paras. 5 and 6 of the judgment of Greer J. and in their place would order that the claim of 642947 and Burnac against Sweet Dreams, Halasi and Krauss be dismissed but without costs. I am grateful to all counsel for their assistance on these appeals.

Order accordingly.

Notes

Note 1: These damages may be reduced in a case where the plaintiff accepts the defendant's repudiation before closing and the defendant shows that the plaintiff failed to mitigate its loss in the period between the acceptance of the repudiation and

the scheduled closing date.

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COURT OF APPEAL FOR ONTARIO

CITATION: Rougemount Capital Inc. v. Computer Associates International Inc., 2016 ONCA 847
DATE: 20161110
DOCKET: C59920

LaForme, Pardu and Roberts JJ.A.

BETWEEN

Rougemount Capital Inc.

Plaintiff (Respondent)

and

Computer Associates International Inc.

Defendant (Appellant)

Michael J.W. Round and Nicholas Robar, for the appellant

Peter J.E. Cronyn, for the respondent

Heard: March 8-9, 2016

On appeal from the judgment of Justice Mary A. Sanderson of the Superior Court of Justice, dated December 17, 2014, with reasons reported at 2014 ONSC 7070.

By the Court:

INTRODUCTION

[1] Sixdion Inc. (“Sixdion”) describes itself as an Aboriginal IT company. Its goal was to market comprehensive IT systems to Aboriginal communities. Computer Associates International Inc. (“CA”)[1] carries on the business of developing, manufacturing and licensing proprietary computer software programs in the U.S. and elsewhere. It has a subsidiary that markets and sells CA’s products in Canada.

[2] In 2004, Sixdion believed that it had a contract with CA. Sixdion claimed that CA breached the contract, resulting in Sixdion's filing for bankruptcy in 2005. Rougemount Capital Inc. (“Rougemount”), a former Sixdion creditor, purchased the action against CA from Sixdion’s trustee for $5,000. It is common ground that this entitles Rougemount to 60% of any damages assessed to have been incurred by Sixdion as a result of CA’s breach of their agreement. Rougemount claimed damages suffered by Sixdion of $20 million - $54 million as a result.

[3] The trial judge found that there was a contract that CA breached and awarded $11 million in damages. CA appeals and argues that the trial judge made fatal errors in reaching her decision on both the issue of the validity and nature of the contract and in her assessment of damages.

[1] We refer to CA as one entity for the purpose of these reasons. The company’s corporate structure is not explained in the trial judge’s reasons for decision or the parties’ factums; however, it seems there was some division. Where appropriate, we refer to CA-Canada and CA-International.

[4] Rougemount, on the other hand, stresses that this action is not just about the destruction of Sixdion, which flowed from CA's breach of contract. Rather, it argues that it is also about the loss of a formidable opportunity for both Sixdion and CA, as a direct result of CA's failure to fulfill its agreement.

BACKGROUND

(a) Sixdion's business and development

[5] Sixdion was incorporated on February 22, 1996. At all material times it had three primary shareholders: Murray Dion ("M. Dion"), Lewis Staats ("Staats"), and Leo Dion ("L. Dion"). Sixdion was an Aboriginal company[2] involved in the information and communications technology business. Initially Sixdion provided "low-tech" services. However, Sixdion's principals testified (and the trial judge accepted) that the company was constantly developing its business model and trying to provide more sophisticated services and products.

[6] In 2004, Sixdion was at a crossroads. Its principals believed that it could achieve commercial success by capitalizing on the company's status as an Aboriginal company (in relation to government procurement contracts) and by providing technology services for Canadian (and eventually international) indigenous populations. However, in order to exploit that potential, it needed

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[2] The trial judge at para. 3 describes an Aboriginal company as a company with at least 51% Aboriginal ownership and control.

capital investment and partnership with more established companies. It is in this context that Sixdion began to interact with CA.

(b) Negotiations and contract between Sixdion and CA

[7] Representatives of CA-Canada approached Sixdion in March 2004. They were interested in Sixdion because working with an Aboriginal company would make it easier for CA to benefit from government projects and procurement. Initially, CA wanted a marketing agreement wherein Sixdion would re-sell CA products. However, Sixdion insisted on an agreement in which CA would purchase some equity in Sixdion and be an active partner in its business.

[8] The trial judge provided a lot of detail about the negotiations between the two companies over the summer of 2004. We highlight the following salient details:

- CA-Canada was enthusiastic about the deal but CA-International (specifically the head office in New York) was not;
- Chris Devlin ("Devlin") was a significant actor in these negotiations and CA's main representative to Sixdion;
- Devlin told Sixdion's principals that Gary Quinn ("Quinn"), Executive Vice-President at CA-International, had the authority to approve the deal;
- Quinn approved the deal and, on July 30, 2004, Devlin told M. Dion that Quinn had approved the deal; and,
- Devlin sent a letter dated August 11, 2004, which stated: "I am pleased to commit our partnership based on your Term Sheet delivered to me on May 6 of this year. In addition to capital we will invest technical and architectural

> resources to ensure that Sixdion can deliver the industries [sic] best practices in infrastructure management".

[9] The deal comprised the following elements: Sixdion would receive $1.5 million from CA; CA would get share warrants that would provide the option to obtain up to ten percent of Sixdion's shares; Sixdion would cooperate in selling CA products to the federal government, allowing CA to benefit from Aboriginal procurement initiatives; and CA would become a partner of Sixdion, finding other investors and businesses, and helping Sixdion develop the capacity to achieve its business objectives.

(c) Breach of agreement

[10] CA did not honour its agreement with Sixdion. It never made the payments that it had promised. Officials at CA-International began to question Quinn's decision to approve the transaction and in October 2004, Jeff Clarke, Chief Operating Officer at CA-International, told Quinn to "kill" the deal. CA then informed Sixdion that it would not be continuing with their arrangement.

[11] The trial judge made a number of findings about the period between July 2004 (when Quinn approved the proposed deal) and November 2004 (when the deal was killed). We note the following:

- Sixdion hired additional staff and incurred additional expenses on the understanding that it would be receiving $1.5 million from CA and would be expanding its business;

- People from CA worked with Sixdion, acting as if they had reached a deal. Devlin volunteered to look for other investors. A CA employee worked with Sixdion to create and implement a business plan for the partnership; and,
- Quinn and Devlin believed that they had the authority to commit to the deal and believed that their agreement was sufficient to commit CA to the contract.

[12] As noted, CA-International decided to "kill" the deal. Sixdion, which had been facing financial difficulties this entire time, collapsed. It filed an assignment into bankruptcy in February 2005.

TRIAL JUDGE'S DECISION

[13] As mentioned earlier, Rougemount commenced the action, alleging breach of contract and seeking damages suffered by Sixdion of $20 million to $54 million as a result.

[14] CA defended Rougemount's claim and argued that: (a) there was no binding contract between CA and Sixdion; (b) CA could rescind any contract because it was obtained through misrepresentations; and (c) Sixdion did not suffer any damages. The trial judge rejected CA's position. She concluded that there was a valid contract and that Sixdion had not made any misrepresentations. She awarded $11 million in damages, along with prejudgment interest.

(a) Sixdion and CA entered into a binding contract

(i) Quinn had the authority to approve the proposed contract

[15] CA argued that Quinn and Devlin did not have the requisite authority to approve the proposed contract. They primarily relied on the evidence of George Cox ("Cox"), an employee at CA's business development group, who stated that any "equity" transaction needed the approval of CA-International's business development team and that Quinn could not approve an "equity" transaction.

[16] On the other hand, Rougemount relied on the fact that Devlin (who testified) believed that Quinn had the authority, and communications from the time of the negotiation showed that both Devlin and Quinn thought that the latter could approve the deal as a "marketing expense" or a "marketing transaction".

[17] The trial judge concluded that Quinn had the requisite authority. She concluded that the proposed deal was a marketing deal and that, therefore, Quinn had the authority to pay the $1.5 million price out of his marketing budget. Furthermore, she concluded that Devlin and Quinn had obtained the requisite approvals.

[18] In the alternative, the trial judge concluded that Quinn and Devlin had apparent authority to bind CA. CA held out Devlin and Quinn as having the requisite authority and did nothing to suggest to Sixdion that they were not authorized to make the deal. She found that the principals of Sixdion reasonably relied on what Devlin told them in regard to Quinn and Devlin's authority.

(ii) Remaining issues regarding the contract

[19] The remaining issues regarding the validity of the contract are not relevant on appeal. We summarize them briefly. The trial judge concluded that the parties had settled all essential terms of the contract by August 11, 2004, and the contract was not conditional on any due diligence, obtaining a second investor, or amalgamation. The trial judge also rejected CA's argument that Sixdion had induced it to enter into the agreement through misrepresentations. Therefore, the contract could not be rescinded.

(b) Sixdion's damages

[20] The trial judge held that CA had breached its contract with Sixdion by (a) failing to pay the $1.5 million promised and (b) failing to provide the promised assistance, training and services business. The trial judge further found that CA had contributed to Sixdion's losses in several ways: (i) CA wrongly informed one of Sixdion's service providers (Telesat) that there was no contract, due to which Telesat insisted on more rigorous repayment terms, contributing to Sixdion's demise; (ii) Devlin discouraged Sixdion from pursuing certain other investors, particularly competitors of CA; and (iii) in reliance on the promised business relationship, Sixdion incurred additional expenses and worsened its precarious financial situation.

[21] Broadly speaking, the damages claimed by Rougemount related to the loss Sixdion suffered because of the collapse of Sixdion's business and

Sixdion's failure to achieve its business plan. Rougemount was seeking damages on the basis that, had CA kept to its bargain, Sixdion would have achieved all of the goals set out in the five-year business plan Sixdion had developed with CA. Therefore, the issue ended up being whether Rougemount was entitled to damages on the basis that CA deprived Sixdion of the opportunity to achieve this potential business plan (the "Business Plan").

[22] The trial judge first addressed a number of preliminary issues regarding whether the Business Plan was a proper basis for quantifying damages:

- Would Sixdion have survived: the trial judge concluded that if CA had honoured its commitment, Sixdion would have survived through the critical period of 2004-2006 and would have become a profitable enterprise.
- Was Sixdion's demise foreseeable: CA knew of Sixdion's precarious financial circumstances and its need for cash. Therefore, Sixdion's demise was a foreseeable result of CA's breach of contract.
- Date of assessment of damages: the trial judge recognized that damages for a breach of contract are presumptively quantified with reference to the date of the breach. However, in this case, doing that would not fairly reflect Sixdion's actual loss. The trial judge concluded that damages should be assessed as of January 31, 2010, the end of the period reflected on the Business Plan.

The quantum of damages

[23] As noted, the trial judge concluded that a fair assessment of Sixdion's damages would be to quantify its losses based on its five-year business plan as of January 31, 2010. The trial judge concluded that there was sufficient evidence in support of this business plan. Therefore, Rougemount's assertions were supported by evidence sufficient to discharge its onus.

[24] The parties mostly relied on two expert witnesses in support of their respective positions regarding damages. The plaintiff relied on the testimony and expert report of Stephen Pittman ("Pittman"), a chartered professional accountant and chartered business valuator. The defendant relied on Domenic Marino ("Marino"), also an accountant and business valuator. Marino, however, did not present an independent report or valuation; he only provided a "limited critique" of Pittman's methodology.

[25] After reviewing the parties' evidence, the trial judge concluded that it was reasonable for Pittman to rely on the assumptions contained in the Business Plan. Then, she reviewed the competing methodologies presented by Pittman and Marino, and concluded that she preferred Pittman's.

[26] As noted, the trial judge concluded that damages should be assessed as of January 31, 2010. However, Pittman's report was premised on damages being assessed as of 2012. The trial judge tweaked Pittman's assessment and calculated damages as of January 31, 2010. She also made some additional

adjustments to reflect the risk that she found that Sixdion would have been facing between October 2004 and January 31, 2010. Based on this, she concluded that the plaintiff was entitled to $11 million in damages.

THE ISSUES

[27] There are two questions that need to be answered on this appeal. First, did the trial judge err by concluding that Quinn or Devlin had the authority to enter into the contract with Sixdion? Second, did the trial judge err in her award of damages?

[28] As we will explain, we conclude that Quinn and Devlin did have authority to enter into the contract and that CA breached the contract. However, we also conclude that the trial judge erred in assessing damages as of 2010, rather than as of 2004, when the breach of contract occurred. Accordingly, the appeal is allowed in part with respect to damages.

DISCUSSION

(a) Did the trial judge err by concluding that Quinn or Devlin had the authority to enter into the contract with Sixdion?

[29] CA makes two submissions regarding this ground of appeal. First, it argues the trial judge wrongly concluded that the proposed deal was a “marketing deal” and not an “equity transaction”. It points out that, as a result of

the contract, CA would have acquired ten percent of Sixdion's shares. Thus, it says, it was an equity transaction, which Quinn had no authority to approve.

[30] Second, CA argues that neither Quinn nor Devlin had apparent authority. It says that there is no evidence that anyone from CA with actual authority ever represented that either Devlin or Quinn had authority. Moreover, CA asserts, Sixdion never made any attempt to inquire into their authority.

(i) Nature of the contract

[31] CA argues that the trial judge made a palpable and overriding error by disregarding the equity component of this transaction in her findings in deciding Quinn's authority. It contends, as it did at trial, that the transaction was an acquisition of ten percent of the equity interest in Sixdion. Thus, it required a process of approval that did not include Quinn. We reject this argument.

[32] The trial judge specifically identified and fully addressed CA's view of the deal. She thoroughly reviewed the evidence related to it and, at para. 379 of her reasons, summarized her conclusion:

> From the exhibits and Devlin's evidence, I infer and I find that Quinn had actual authority to authorize and incur a $1.5 million marketing expense. In essence Quinn authorized a marketing deal that gave CA the additional option of exercising the warrants if it so chose. Quinn and Devlin considered that aspect to be an additional peripheral benefit, not the essence of the deal.

[33] The contract included a purchase of share warrants that could lead to a ten percent equity interest in Sixdion only if CA chose to exercise the warrants. In other words, the trial judge did not disregard the equity component; rather, she put it in proper perspective in the larger scheme of the deal.

(ii) Actual authority

[34] CA argues that the trial judge made a palpable and overriding error in finding that Quinn had authority to approve the deal with Sixdion. We disagree.

[35] As recently noted by Weiler J.A. in *1196303 Inc. v. Glen Grove Suites Inc.*, 2015 ONCA 580, 337 O.A.C. 85, at para. 71:

> While agency is often created by an express contract, setting out the scope of the agent's authority, the creation of an agency relationship may be implied from the conduct or situation of the parties. Whether an agency relationship exists is ultimately a question of fact, to be determined in the light of the surrounding circumstances. [Citations omitted.]

[36] In our opinion, there is no reason for taking a different approach to determining the scope of an agent's authority. It is a question of fact to be determined in light of the circumstances, including the conduct or situation of the parties.

[37] In this case, it is important to note that the trial judge did not receive any direct evidence about the scope of Quinn's authority. CA did not provide any written record of its policies and did not call any senior officers or directors to

testify. Rather, it called Cox, a relatively junior employee, who was the only witness who testified that Quinn did not have actual authority to approve the deal.

[38] On the other hand, Devlin testified that Quinn did have actual authority and there was support for that position in the documentary evidence from the relevant time period.

[39] The trial judge had to decide this issue on the basis of competing circumstantial evidence. Her conclusion, as quoted above, is reasonable and supported by the evidence. CA has not provided any reason why we should interfere.

[40] Given this conclusion, it is not necessary to address CA's arguments on apparent, as opposed to actual, authority.

(iii) Did the trial judge err in her award of damages?

Standard of review

[41] Damages awards attract considerable deference. The limited scope for appellate interference was noted in *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 S.C.R. 943, at para. 80:

> It is common ground that the Court of Appeal was not entitled to substitute its own view of a proper award unless it could be shown that the trial judge had made an error of principle of law, or misapprehended the evidence, or it could be shown there was no evidence on which the trial judge could have reached his or her conclusion, or the trial judge failed to consider relevant factors in the assessment of damages, or considered

> irrelevant factors, or otherwise, in the result, made "a palpably incorrect" or "wholly erroneous" assessment of the damages. Where one or more of these conditions are met, however, the appellate court is obliged to interfere. [Citations omitted.]

[42] Moreover, as recently observed by this court in *Livent Inc. v. Deloitte & Touche*, 2016 ONCA 11, 128 O.R. (3d) 225, at para. 388, quantifying damages is not an exact science and trial judges are obliged to do the best they can on the evidence, short of failing to analyze the evidence at all or simply guessing.

What is the appropriate date for the assessment of damages?

[43] The appellant submits that the trial judge erred in following the approach offered by Rougemount's expert, thereby rejecting the date of the breach and using the date at the end of the Business Plan as the date for the assessment of damages. We agree.

[44] It is well established that the general measure of damages for breach of contract is the amount of damages that will, so far as money can, place the aggrieved party in the same position as if the wrong had not been done: *Ticketnet Corp. v. Air Canada* (1997), 154 D.L.R. (4th) 271 (Ont. C.A.), at para. 97. The focus is on the injured party's loss and on the measure of compensation required to restore it to the position that it would have been in had the contract been performed: *642947 Ontario Ltd. v. Fleischer* (2001), 56 O.R. (3d) 417 (C.A.) , at para. 41; *Kinbauri Gold Corp. v. Iamgold International African Mining Gold Corp.* (2004), 246 D.L.R. (4th) 595 (Ont. C.A.), at para. 53.

[45] With respect to the appropriate date for the assessment of damages, the presumption is that damages, including those for loss of a business or opportunity, should generally be assessed as of the date of breach: *Johnson v. Agnew*, [1980] A.C. 367 (H.L.), at pp. 400-401.

[46] The trial judge correctly noted that the presumptive rule for assessing damages is that damages for breach of contract are to be quantified at the time of breach. However, she accepted Rougemount's submission that she could choose a date other than the date of the breach if an assessment as of that date would not fairly reflect Sixdion's actual loss.

[47] The trial judge found that an assessment of damages at the date of breach would not fairly reflect Sixdion's actual loss or put it in the position it would have been in but for CA's breach. She concluded that had the contract been honoured, Sixdion's earnings from the contract would have started shortly after July 30, 2004 and continued until at least January 31, 2010. As a result, she found that it would be unfair to assess damages as of the date of breach in 2004 and to fail to reflect the benefits Sixdion would have derived after 2004 from the CA contract. Instead, she assessed damages as of the end of the Business Plan, on January 31, 2010.

[48] The trial judge appears to have based her conclusion largely on the opinion of Rougemount's expert, which she modified. Mr. Pittman did not assess Sixdion's damages as of the date of breach in 2004. Rather, he valued Sixdion

as it would have been in 2012 or 2014. In response to the trial judge's question as to why he did not choose the date of breach, Mr. Pittman testified that it would not have properly reflected the "upside" of executing the Business Plan. Specifically, he opined that the discounted valuation at the date of breach was not appropriate because it would apply all of the weight to the early years when there were losses anticipated and very little weight to the latter years when all of the upside of the Business Plan would be realized. As a result, he felt it did not fairly reflect the true damages sustained by Sixdion.

[49] Rougemount submits that the presumptive rule that damages are assessed at the date of breach can be displaced where fairness requires it: *Kinbauri*, at paras. 66-68. Moreover, Rougemount submits that the trial judge's determination that fairness required damages to be assessed at a later date in this case was an exercise of her discretion, based on the all of the circumstances, which should not be disturbed on appeal.

[50] We agree that the general presumption that damages will be assessed as of the date of breach may be subject to exceptions where fairness requires it. However, this presumption should not be easily displaced; any deviation from it must be based on legal principle. As the British Columbia Court of Appeal recently noted in *Dosanjh v. Liang*, 2015 BCCA 18, 380 D.L.R. (4th) 137, at para. 55:

> [T]he presumption that contract damages are to be assessed as of the date of the breach is not so easily displaced. It is important that the law in this area be predictable, and such predictability is not served by allowing judges unbounded discretion as to the date for assessment of damages.

[51] The rationale for this general presumption was articulated by Laskin J.A., concurring in *Kinbauri*, at para. 125:

> As Cronk J.A. points out, damages for breach of contract are generally assessed at the date of breach. An early crystallization of the plaintiff's damages promotes efficient behaviour: the litigants become as free as possible to conduct their affairs as they see fit. Early crystallization also avoids speculation: the plaintiff is precluded from speculating at the defendant's expense by reaping the benefits of an increase in the value of the goods in question without bearing any risk of loss.

[52] Indeed, this general presumption should only be displaced in special circumstances, such as, for example, where no market exists to replace undelivered shares at the date of breach: *Kinbauri*, at para. 126; or in relation to "[s]ome classes of property, including shares, whose value is subject to sudden and constant fluctuations of unpredictable amplitude, and whose purchase is not lightly entered into": *Asamera Oil Corp. Ltd. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 663, at pp. 664-65.

[53] The kind of special circumstances alluded to in *Kinbauri* and *Asamera* were not present in this case. The trial judge did not reference any. The circumstances of this case were no different than any other case where damages

for future loss have to be determined. In concluding that the circumstances of the present case constituted the kind of unfairness that would allow an exception to the calculation of damages as at the date of breach, the trial judge erred.

[54] First, by assessing damages starting in the future in 2010, the trial judge erroneously focused solely on maximizing the potential benefits to Sixdion under the contract with CA. The trial judge failed to take into account Sixdion's deeply troubled financial history and uncertain status going into the contract with CA and the fact that Sixdion was embarking on a new line of business.

[55] The evidence clearly established that Sixdion was in a very precarious financial position in October 2004. Its financial statements show a company on the brink of insolvency, with its liabilities well exceeding its assets and its revenues not covering its expenses. Moreover, Sixdion's correspondence with CA during this time period is replete with references to its desperate need for financing simply to allow it to meet ordinary expenses as they came due, such as its payroll. Other than CA, Sixdion was unable to attract other investors. Sixdion voluntarily wound up its operations on October 27, 2004 and filed for bankruptcy in February 2005, with liabilities outweighing its assets by nearly $2.7 million.

[56] While her evaluation of damages was based on her findings that Sixdion would have survived and avoided bankruptcy, the trial judge could not ignore the unchallenged evidence that Sixdion was in an insecure financial position with

significant liabilities that it had to satisfy, even if it managed to become profitable in the future.

[57] Further, the trial judge erred by not applying the discounted cash flow analysis prepared by the appellant's expert. The appellant's expert, Mr. Marino, opined that if the trial judge were to conclude that the forecasts were sufficiently reliable, the correct valuation methodology would involve a discounted cash flow analysis as set out in his calculations. Using a discounted cash flow approach and applying a venture capital discount rate of between 40% and 70% to Mr. Pittman's averages, Mr. Marino estimated that Rougemount's resulting share of Sixdion's losses as at August 1, 2004, would be in a range of approximately between $0 and $2.6 milliion.

[58] The respondent's expert, Mr. Pittman, confirmed that had he used August 2004, the date of breach, for the assessment of damages, the discounted cash flow approach applied by Mr. Marino would have been correct. He also testified in cross-examination that when venture capitalists are looking at a business with no prior history of revenue and are basing their assessment of a forecast, they would be looking at discount rates in the range of 40% to 100%.

[59] In our view, although there were some obvious issues concerning the reliability estimates contained in the Business Plan, it was open to the trial judge, in the absence of better or other evidence, to use the Business Plan as a basis

for her assessment of damages. The trial judge's reasons demonstrate that she was well aware of the Business Plan's deficiencies.

[60] We agree that the Business Plan was subject to some inflationary puffery, given that it was an optimistic presentation of what the parties hoped would happen in the future in order to obtain CA head office's agreement to the investment. However, we also agree with the trial judge's observation that it was the product of Sixdion and CA and, subject to appropriate tweaking and discounts, was the only solid financial information that was available for the purposes of estimating Sixdion's future loss of opportunity.

[61] That said, we are also of the view that the trial judge erred in failing to apply a discounted cash flow analysis as of the date of the breach. This meant that the risk and unpredictability of Sixdion's future cash flows were ignored until a point many years after the date of breach and resulted in an artificial inflation of the damages. The approach followed by the trial judge failed to take into account the cumulative risk that the profits set out in the Business Plan might not materialize.

[62] As such, even had CA fulfilled its contractual obligations, the new business would have had significant start-up costs, including the payment of significant past liabilities to Sixdion's creditors, and the enormous revenues predicted towards the end of the Business Plan would have taken some time to generate. Accordingly, placing Sixdion in the position that it would have occupied had the

contract been performed meant taking into account the costs as well as the benefits of the new business venture. The trial judge's approach failed to do this.

[63] We conclude that the discounted cash flow analysis prepared by the appellant's expert, calculating damages as of the date of breach in 2004, would be the fairest method to assess Sixdion's damages. We also agree that Sixdion's unstable financial past and condition, as well as the uncertainty of the new venture, justifies a substantial discount.

[64] Having regard to the fact that the calculation of these damages is not an exact science, we are of the view that the mid-range of Mr. Marino's calculation would allow for the fairest assessment of damages in all the particular circumstances of the present case. This would result in damages of $1,300,000.

DISPOSITION

[65] For these reasons, we would allow the appeal with respect to damages and order that CA pay damages of $1,300,000 to the respondent, as a result of CA's breach of its agreement with Sixdion.

[66] The parties' costs submissions on appeal and at trial were premised on one party being entirely successful on all issues. Given the disposition of this appeal, if the parties cannot agree on the disposition of costs, we believe that the fairest approach to both parties is that further brief written submissions be delivered.

[67] Accordingly, the parties shall deliver costs submissions of no more than five pages, not including a costs outline, concerning the disposition of the costs at trial and on appeal, as follows: the appellant shall deliver its submissions by November 14, 2016; the respondent shall deliver its submissions by November 28, 2016. There shall be no reply submissions.

Released: November 10, 2016

"H.S. LaForme J.A."
"G. Pardu J.A."
"L.B. Roberts J.A."

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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Dosanjh v. Liang,*
2015 BCCA 18

Date: 20150114
Docket: CA041619

Between:

Kuldip Dosanjh

Respondent
(Plaintiff)

And

Xuemei Liang

Appellant
(Defendant)

Corrected Judgment: The text of the judgment was corrected on page 2 on January 19, 2015.

Before: The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Groberman
The Honourable Madam Justice Bennett

On appeal from: An order of the Supreme Court of British Columbia, dated January 31, 2014 (*Dosanjh v. Liang*, 2014 BCSC 162, New Westminster Docket S137347)

Counsel for the Appellant:	D.P. Davison
Counsel for the Respondent:	H.S. Nirwan
Place and Date of Hearing:	Vancouver, British Columbia November 26, 2014
Place and Date of Judgment:	Vancouver, British Columbia January 14, 2015

Written Reasons by:
The Honourable Mr. Justice Groberman

Concurred in by:
The Honourable Mr. Justice Lowry
The Honourable Madam Justice Bennett

Summary:

The plaintiff agreed to purchase residential property from the defendant. The defendant refused to complete the transaction because she considered the purchase price to be too low. After initially insisting on completion, the plaintiff wrote to the defendant, accepted her repudiation and sued for damages. The trial judge found that the purchaser had not unequivocally affirmed the contract, and that he was entitled to accept the repudiation and sue for damages. Over the objection of the vendor, the judge accepted a property assessment under the Assessment Act as evidence of the market value of the property. The vendor appealed. Held: Appeal allowed to the extent of remitting the assessment of damages to the trial court. While the purchaser had unequivocally affirmed the contract, the vendor's conduct amounted to a continuing repudiation, and the purchaser was entitled to accept the repudiation when he did. The property assessment was not admissible evidence to establish the market value, and it should not have been considered by the judge. The court acknowledges that property assessments are sometimes used as evidence of value in family law cases; whether or not that is proper practice, it does not extend to other types of civil litigation.

Reasons for Judgment of the Honourable Mr. Justice Groberman:

[1] This appeal arises out of a residential real estate sale that failed to close. Mr. Dosanjh, the purchaser, alleges that Ms. Liang, the vendor, repudiated the contract, and that she is liable to him in damages. While Ms. Liang accepts the trial judge's finding that her actions constituted a repudiation of the contract, she says that Mr. Dosanjh thereafter elected to affirm the contract rather than accept the repudiation. She says that he cannot, therefore, claim damages for her breach. She also argues that Mr. Dosanjh himself breached the agreement by failing to pay a deposit in a timely manner, and that that breach bars him from recovery.

[2] The trial judge found that Mr. Dosanjh did not affirm the contract, and that he was entitled to accept the repudiation and sue for damages. She awarded Mr. Dosanjh $37,400, which she found to be the difference between the contract price and the market value of the property on a date three months after the closing date. She found that it was reasonable to expect that Mr. Dosanjh would have found another suitable house by that time. The appellant appeals the judgment, both in respect of liability and damages.

[3] I am of the view that the judge was correct in finding the appellant liable for breach of contract. Her assessment of damages, however, was based on inadmissible evidence, and cannot stand. In the course of the appeal, both parties agreed that, in the event that the appeal is allowed on the issue of damages alone, the matter should be returned to the trial court for a new hearing to assess the quantum of damages.

The Agreement for Purchase and Sale

[4] The appellant owned residential property in Burnaby, which she rented to tenants. In August 2011, the RCMP informed her that her tenants had been using the property to grow marijuana. Ms. Liang was upset by this news, and immediately contacted a realtor for the purpose of putting the property up for sale.

[5] The realtor arranged for an advertisement on Craigslist, which first appeared on August 26, 2011. It listed the property for sale for $629,000. The realtor also arranged for the property to be listed on the Multiple Listing Service ("MLS"), but the listing was not to take effect until the following Monday, August 29.

[6] Mr. Dosanjh saw the Craigslist listing on the day that it was published, and contacted the realtor to express interest in the property. He was given the address of the property, and arranged to meet with the realtor the following day.

[7] Mr. Dosanjh viewed the exterior of the house on August 27, but did not have access to the interior. He then met with the realtor, as planned, and made an offer to purchase the property. After some negotiations, the parties reached an agreement that same day, under which Mr. Dosanjh would purchase the property for $605,000, with an October 1, 2011 completion date.

[8] Mr. Dosanjh's offer was subject to three conditions inserted for his sole benefit. First, he was entitled to inspect the property for the presence of asbestos products, and was entitled to demand that Ms. Liang arrange for the removal of any such products. Second, he was entitled to have any oil storage tanks on the property removed by Ms. Liang prior to the completion date. Finally, the agreement was

conditional upon Mr. Dosanjh obtaining a building permit and municipal approvals by September 15, 2011.

[9] The deposit clause in the contract read as follows:

> DEPOSIT: A deposit of $30,000.00 which will form part of the Purchase Price, will be paid on the following terms:
>
> Deposit to be paid after subjects are removed.
>
> All monies paid pursuant to this section (Deposit) will … be delivered to [the realtor] and held in trust….

[10] By August 29, Ms. Liang had second thoughts about the deal. Late that evening, Ms. Liang's realtor sent an e-mail to Mr. Dosanjh as follows:

> I wanted to let you know right away of a situation that has developed. The owner of 7849 18th Ave has contacted me and advised me she will not proceed with this contract. She explained to me that she was under great duress in making a decision. She was contacted by the police about the grow [o]p the previous day and then felt so much pressure in having to make a major decision within a few hours. I tried to contact her today but her family told me she is being treated by her doctor at the hospital for anxiety and depression and has not called me back. Her family told me they have an appointment with the lawyer on Thursday to discuss this situation. It's all I know at this point. I am gathering from what I know that the family feels that the price was unreasonable in the current market place.
>
> I don't know what else I can do at this point.

[11] Mr. Dosanjh attempted to contact the realtor by telephone, but was not immediately successful. On August 30, he sent an e-mail indicating that he had not observed Ms. Liang to be under stress on August 27, and stating that he wished to proceed to have an inspector check the property for asbestos and for oil tanks. Mr. Dosanjh also spoke with the realtor after sending the e-mail, and told him that he wanted to remove the conditions and to proceed to complete the purchase.

[12] The MLS listing resulted in considerable interest in the property, and on August 30, Ms. Liang increased the asking price on the MLS listing to $669,000.

[13] On September 6, 2011, Mr. Dosanjh sent another e-mail to the realtor, which read, in part:

> Although the subject removal date is September 15, 2011 … on August 31st we … told you that we are ready to remove all subjects. We tried several

> times but you don't pick up the phone so we are removing the subjects and sending it to your office. As soon as the seller signs the subject removal form, we are ready to send the $30,000 deposit cheque.

[14] On September 8, 2011, Mr. Dosanjh sent a fax to the realtor in the same terms. Attached to the fax was a copy of the addendum to the contract that contained the conditions, upon which he wrote "Removal of following 'subjects to clauses'". On the same day, Mr. Dosanjh's lawyer sent a letter to Ms. Liang and to the realtor which included the following:

> **We advise that the Buyer is ready, willing and able to complete this transaction on the completion date, October 1, 2011.**
>
> With respect to the email letter of August 28, 2011 in which [the realtor] says "[t]he owner... has contacted me and advised me she will not proceed with this contract" we ask that you, Ms. Liang, immediately contact the writer to confirm whether that statement should be viewed as any anticipatory breach of Contract by the Seller.
>
> We advise that should you fail to complete the transaction on October 1, 2011 our client will take immediate proceedings to pursue any and all remedies available … under the Contract including, but not limited to, the specific performance of the Contract and damages, or alternatively, damages.

[15] Ms. Liang received the letter, but did not respond to it. It is not clear whether the realtor also received the letter; in any event, he did not respond to it.

[16] Mr. Dosanjh went to the realtor's office with the intention of dropping off a cheque for the deposit. The receptionist advised him that the realtor was not in. Mr. Dosanjh did not leave the cheque at the office, but attempted, unsuccessfully, to contact the realtor by telephone. It appears that the realtor was, in fact, away from British Columbia between September 4 and September 11, 2011.

[17] On September 14, Mr. Dosanjh's lawyer couriered a cheque for the deposit amount to the realtor's office during business hours. The courier was unable to deliver it because the office was closed. On September 15, the lawyer wrote to Ms. Liang as follows:

> We confirm that the deposit of $30,000.00 was sent via courier in the form of a certified cheque to the offices of [your realtor]. Our courier advises that the office was closed and that no one was present to accept the deposit ….
>
> Coupled with the letter by the Realtor … of August 29, 2011 in which [he] advised our client that you did not intend to complete this transaction, and given that you have not responded to our letter of September 8, 2011 which was sent to you by registered mail and because the deposit was not accepted today, please be advised that our client regards this conduct as amounting to an anticipatory breach of the contract of purchase and sale and our client will pursue all available remedies.
>
> This is clear and unequivocal notice to you that we accept your repudiation of said contract and that this acceptance ends any obligation on our client to tender the purchase price on the date stipulated in the contract as a precondition to seeking enforcement in this action.

[18] Ms. Liang received the letter on September 19, and did not respond to it. Mr. Dosanjh immediately commenced an action. Neither party took any steps to close the transaction on the scheduled completion date.

The Trial Judge's Decision

[19] At trial, Mr. Dosanjh contended that Ms. Liang's realtor's e-mail of August 29, 2011 constituted a repudiation of the contract. Ms. Liang, on the other hand, argued that the e-mail merely outlined concerns that she had, and was not a statement that she was refusing to proceed with the contract.

[20] The judge found that the e-mail did constitute a repudiation of the contract. She noted that the realtor's e-mail unequivocally stated: "The owner … has advised me she will not proceed with this contract." At para. 47 of her reasons, she accepted that "Mr. Dosanjh was entitled to conclude, from reading the whole of the e-mail, that Ms. Liang did not intend to proceed." She also noted that the realtor's subsequent telephone conversations with Mr. Dosanjh confirmed that Ms. Liang would not proceed with the sale.

[21] The next issue was whether Mr. Dosanjh accepted the repudiation or, instead, affirmed the contract. Mr. Dosanjh took the position that he accepted the repudiation in his lawyer's letter of September 15, 2011. Ms. Liang's position was that Mr. Dosanjh had unequivocally and irrevocably affirmed the contract prior to

September 15, and could, as of that date, no longer choose to accept the repudiation. In support of her position, she relied on Mr. Dosanjh's e-mail of August 30 and his telephone conversations with the realtor around that time. She also points to his September 6 e-mail, his September 8 fax, and his attempts to deliver the deposit cheque to the realtor's office.

[22] Ms. Liang argued that, having affirmed the contract, Mr. Dosanjh was no longer in a position, on September 15, 2011, to accept the repudiation. Further, she argued that Mr. Dosanjh had himself breached the contract by failing to tender the deposit when he waived the "subject to" conditions. She contended that a party, while himself in breach of a contract, cannot purport to accept the other side's repudiation and sue for damages.

[23] The trial judge noted, at para. 55, that "the court should be careful not to find that a party has affirmed a contract without very clear evidence that he or she has irrevocably chosen to go with the contract." At para. 64, she characterized Mr. Dosanjh's actions between August 29, 2011 and September 15, 2011 as "assessing the circumstances, considering his options, attempting to resolve the situation, and trying to ensure that he did what he had to do to complete the Contract in the event he was able to convince Ms. Liang to recognize her obligations." She concluded that he did not affirm the Contract, and that he was still entitled, at the time he communicated his intentions by his lawyer's letter of September 15, 2011, to accept Ms. Liang's repudiation.

[24] The judge found it unnecessary to resolve the issue of whether Mr. Dosanjh was in breach of the contract by failing to pay the deposit on time. She said:

> [72] Mr. Dosanjh did not succeed in delivering the deposit prior to accepting Ms. Liang's earlier repudiation. However, even if this amounted to a breach of the deposit clause in the Contract, Ms. Liang did not do anything to exercise her right to terminate the Contract pursuant to the terms of the deposit clause or under the common law. Accordingly, even if Mr. Dosanjh breached the Contract by failing to pay the deposit when it was due, his repudiation remained unaccepted and the Contract continued in existence until Mr. Dosanjh accepted Ms. Liang's earlier repudiation by his letter dated September 15.

> [73] For these reasons, I find that the Contract was not discharged by Mr. Dosanjh's failure to pay the deposit.

[25] With respect to remedy, the judge accepted Ms. Liang's argument that Mr. Dosanjh could not claim specific performance because he had accepted the repudiation of the contract. She also found that, as specific performance was not an available remedy, damages in lieu of specific performance were also unavailable. In the result, Mr. Dosanjh was not entitled to damages based on the value of the property at the date of trial.

[26] The judge recognized that, ordinarily, damages are to be assessed on the date of the breach, but noted that circumstances may, in some instances, justify a court in choosing a different date. The judge chose January 2012, based on her view that Mr. Dosanjh should have located another residential property to purchase by that time, some three months after the closing date.

[27] The judge noted that there was evidence to suggest that the $605,000.00 purchase price was materially less than the market value of the property. She found that Ms. Liang's primary reason for refusing to proceed with the deal was that she considered the purchase price to be below market value. She also noted that there was considerable interest in the property as soon as the MLS listing appeared, and that Ms. Liang increased the list price to $669,000. The judge concluded, at para. 90, that the increase was motivated by the fact that "the market value [of the property] materially exceeded the Contract price."

[28] With respect to the quantification of damages, the judge mentioned that the plaintiff had obtained an appraisal of the property (as of November 8, 2012). The appraisal did not comply with the requirements for expert evidence, and it was not tendered as evidence of the value of the property, though it was, apparently, tendered for the limited purpose of showing that an appraisal had been obtained. The judge did not use the appraisal as evidence of the value of the property.

[29] Instead, over the objections of Ms. Liang, she used the 2013 assessment by the BC Assessment Authority (prepared under s. 2 of the *Assessment Act*, R.S.B.C.

1996, c. 20) as evidence of the value of the property. That assessment report attributed values to the property as of July 1 of each of 2011, 2012 and 2013. The trial judge took the arithmetic mean of the 2011 and 2012 values as the appropriate market value of the property in January 2012.

Issues on this Appeal

[30] On this appeal, Ms. Liang accepts the judge's finding that her real estate agent's letter of August 29, 2011 constituted a repudiation of the contract. She says, however, that Mr. Dosanjh unequivocally and irrevocably affirmed the contract in his subsequent communications and actions. She says that it was no longer open to him to accept the repudiation when he purported to do so in his letter of September 15, 2011.

[31] She also argues that, whether or not Mr. Dosanjh affirmed the contract, it was not open to him to accept the repudiation by his letter of September 15, 2011, because he was, by then, himself in breach of the contract, having failed to deliver the required $30,000 deposit to her. She also says that the judge erred in finding that Ms. Liang did not, by her actions, show that she was accepting Mr. Dosanjh's breach as a repudiation of the contract.

[32] Finally, Ms. Liang argues that the judge erred in her assessment of damages, both by using inadmissible evidence to determine the market value of the property and by inappropriately choosing January 2012 as the date for assessment of damages.

Did Mr. Dosanjh Unequivocally Affirm the Contract?

[33] The trial judge summarized the general law with respect to a party's right to accept a repudiation of a contract at para. 50 of her judgment:

> The consequences of a repudiation, whether by anticipatory breach or breach of a fundamental term, are well established. They are referred to in *Sethna v. 350 Kingsway Development Ltd.*, 2011 BCCA 434, at para. 24, and *Homestar Industrial Properties Ltd. v. Philps* (1992), 72 B.C.L.R. (2d) 69 (C.A.), at para. 13, and may be summarized as follows:

- A party to a contract has two alternatives if the other party repudiates the contract: the innocent party may accept the repudiation or affirm the contract.
- If the innocent party accepts the repudiation, the contract is at an end, both parties are relieved of their obligations under it, and the innocent party may sue for damages immediately without waiting for the time that the contract should have been performed.
- If the innocent party affirms the contract, the contract remains alive in all respects for both parties, and the risk exists that the party beginning as the innocent party will subsequently commit a breach of its own.
- If the innocent party wishes to accept the repudiation, he or she must make his or her election known.
- Once made, the election is irrevocable.

[34] Neither party quarrels with these general propositions, which are well-supported in the case law. As I will indicate, however, the last proposition – that an election, once made, is irrevocable – requires some qualification to ensure that it is not inappropriately applied in cases of repeated or continuing repudiation.

[35] A court will not find that an innocent party has affirmed a contract in the absence of clear evidence leading it to that conclusion. The trial judge expressed the proposition as follows:

> [55] Affirmation may be express or implied, but the court should be careful not to find that a party has affirmed a contract without very clear evidence that he or she has irrevocably chosen to go on with the contract. This is explained in *Chitty* [*Chitty on Contracts,* 31st ed (London, UK: Sweet & Maxwell Ltd., 2012) vol 1] at 1696-97 as follows:
>
> > [The innocent party] will not be held to have elected to affirm the contract unless, first, he has knowledge of the facts giving rise to the breach, and, secondly, he has knowledge of his legal right to choose between the alternatives open to him. Affirmation may be express or implied. It will be implied if, with knowledge of the breach and of his right to choose, he does some unequivocal act from which it may be inferred that he intends to go on with the contract regardless of the breach or from which it may be inferred that he will not exercise his right to treat the contract as repudiated. … Mere inactivity after breach does not of itself amount to affirmation, nor (it seems) does the commencement of an action claiming damages for breach. The mere fact that the innocent party has called on the party in breach to change his mind, accept his obligations and perform the contract will not generally, of itself, amount to an affirmation …

[36] The judge then cited *Yukong Line Ltd. of Korea v. Rendsburg Investments Corporation of Liberia*, [1996] 2 Lloyd's Rep. 604. She also referred to the following passage from *Abraham v. Coblenz Holdings Ltd.*, 2013 BCCA 512:

> [28] In my view, an innocent party is not required to communicate its acceptance of a repudiation immediately. An innocent party must have a reasonable opportunity to assess the circumstances it finds itself in, to assess its options, and to explore the possibility of resolving the situation. That is particularly so where, as here, the tenants had invested a substantial amount of money in the premises and were not willing to walk away without trying to negotiate a workable arrangement. What matters is whether, in all of the circumstances, the tenants acted reasonably in communicating their course of action so as not to prejudice the other party by inducing it to act as if its repudiation of the agreement had not been accepted: *Allen v. Robles*, [1969] 3 All E.R. 154 (C.A.).

[37] I accept that, where a party has repudiated a contract, the opposite party is entitled to a reasonable period of time in which to decide whether to affirm the contract or accept the repudiation. I also accept that, at least until that reasonable period of time has elapsed, a court should be slow to treat equivocal statements or acts as affirmations of the contract. The court's solicitude toward the innocent party, however, must not extend to ignoring unequivocal acts or statements of affirmation made by a party that is aware of its legal rights.

[38] In the case before us, I am not persuaded that Mr. Dosanjh's statements and actions in the aftermath of Ms. Liang's repudiation of the contract can be interpreted as anything other than an affirmation of the contract. Immediately after being advised of Ms. Liang's intentions not to complete the contract, Mr. Dosanjh indicated that it was his intention to proceed with the purchase. All of his subsequent actions up to September 15, 2011 were consistent only with an intention to treat the contract as an ongoing one.

[39] Of particular importance is the lawyer's letter of September 8, 2011, which affirmed that Mr. Dosanjh was "ready, willing and able to complete this transaction on the completion date, October 1, 2011" and indicated that if Ms. Liang failed to complete, he would pursue remedies including specific performance. The letter is not consistent with an acceptance of the repudiation. Further, and most importantly,

it is a letter sent at a time when Mr. Dosanjh had had some time to reflect on the situation, and had obtained legal advice as to his position.

[40] Mr. Dosanjh's communications and actions (up until the letter of September 15, 2011) unequivocally demonstrated an intention to affirm the contract. There was no evidentiary basis for the judge's finding to the contrary. The evidence establishes that by September 8, 2011 Mr. Dosanjh made an election to affirm the contract rather than accept Ms. Liang's repudiation of it.

To What Extent was the Affirmation of the Contract Irrevocable?

[41] Normally, after a party has repudiated a contract, the opposite party must elect whether to affirm the contract or accept the repudiation. If it affirms the contract, it cannot, later on, re-elect, and choose to accept the repudiation.

[42] That does not mean, however, that a party that repudiates a contract is free to commit fundamental breaches without fear that the contract will be terminated, nor does it mean that a party guilty of a fundamental breach may continue to refuse to perform with impunity. Each time a party commits an act amounting to a repudiation, the opposite party is entitled to elect to affirm the contract or accept the repudiation. The fact that the innocent party has previously affirmed a contract does not disentitle it from accepting a new repudiation of it by the guilty party.

[43] Equally, a party that has affirmed a contract after a repudiation by the other party may, if the repudiation is continuing, choose to accept it and treat the contract as at an end. The issue was explored by Lowry J.A. (Prowse J.A. concurring) in *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. – Canada*, 2007 BCCA 88. After discussing a number of authorities, including *Fletton Ltd. v. Peat Marwick Ltd.* (1988), 27 B.C.L.R. (2d) 209 (C.A.) leave refused [1988] 2 S.C.R. vi; *Elderfield v. Aetna Life Insurance Co. of Canada* (1996), 27 B.C.L.R. (3d) 1 (C.A.); and *Bridgesoft Systems Corp. v. British Columbia*, 2000 BCCA 313, he summarized the law as follows:

> [109] Where a party to an agreement commits a fundamental breach of its terms, the agreement is repudiated. There has been what amounts to a refusal to perform. If the repudiation is not accepted, the agreement is affirmed. Where the breach is ongoing, as distinct from one instance of fundamental non-performance, there is a continuing repudiation which may, in the absence of subsequent affirmation, be accepted as long as the repudiation continues. What in my view is important is that, in order to establish the existence of a continuing repudiation, particularly when an extended period of time has elapsed following the affirmation of an agreement, it must be clear beyond question that there is a continued (*Elderfield)* or repeated (*Bridgesoft)* refusal to perform. The refusal may be manifest in different ways, which may include silence in response to a request for performance at the time the request is made, but the refusal must be clear for it is that refusal which is the repudiation to be accepted.

[44] In my opinion, the current case is one of continuing repudiation by Ms. Liang. Mr. Dosanjh and his lawyer undertook extensive communications with Ms. Liang and her realtor, attempting to ascertain whether Ms. Liang would complete the transaction. Ms. Liang was unresponsive. Her own silence, combined with the silence or indifference of her real estate agent, clearly communicated to Mr. Dosanjh that she would not complete the sale.

[45] While it became apparent, at trial, that the real estate agent was not actually avoiding receipt of the deposit, Mr. Dosanjh and his lawyer reasonably believed that he was doing so. The failure of the realtor to communicate with them, and his failure to make arrangements for receipt of the deposit, played a significant role in leaving them with the impression that he was trying to ensure that the deposit could not be paid.

[46] In all the circumstances, it is my view that Ms. Liang's repudiation of the contract was not a single incident, but rather a continuing fundamental breach of contract. Mr. Dosanjh was, in the circumstances, entitled to affirm the contract after the initial repudiation on August 29, 2011, and then later, in response to Ms. Liang's continued repudiation, to treat the contract as at an end.

[47] In the result, while I differ from the trial judge somewhat in my analysis of the events, I find that she did not err in finding that Mr. Dosanjh was in a position, on September 15, 2011, to accept Ms. Liang's repudiation of the contract.

Was Mr. Dosanjh in Breach of the Contract?

[48] Ms. Liang contends that Mr. Dosanjh breached the contract by failing to pay the $30,000 deposit at the time he waived the conditions that had been inserted in the contract for his benefit. She argues that this, itself, constituted a fundamental breach of the agreement, and that she accepted the breach, thus terminating the contract. In the alternative, she argues that Mr. Dosanjh was not entitled to accept her repudiation of the contract at a time when he, himself, was in breach.

[49] In my view, the issue is simply resolved with reference to the contractual provisions concerning the deposit. Nothing in the contract required Mr. Dosanjh to pay the deposit at the time he waived the conditions. Rather, the deposit was to be paid *after* the conditions were removed. It can be inferred that the deposit was to be paid before the closing date. Beyond that, there is little in the contract that sheds light on precisely when the deposit was to be tendered.

[50] In my view, the best that can be done with the contractual language is to interpret it as requiring Mr. Dosanjh to tender the deposit within a reasonable period once the conditions were waived. Given the unavailability of the real estate agent, his failure to keep his office open during office hours, the absence of any communications from Ms. Liang or her realtor on the issue of the deposit, and Mr. Dosanjh's attempts to tender the deposit, it is my view that Mr. Dosanjh did not fail to tender the deposit within a reasonable time period after waiving the conditions. He was, on September 15, 2011, when he gave notice of his decision to accept Ms. Liang's repudiation of the contract, not in breach of the term requiring him to deposit funds. The same situation subsisted on September 19, 2011 when Ms. Liang received his letter.

[51] I am, therefore, not persuaded that the judge erred in finding that Mr. Dosanjh was entitled to accept Ms. Liang's repudiation of the contract and sue for damages. I also agree with her conclusion that he did accept the repudiation, and did so in a timely manner.

Damages

[52] Ms. Liang says that the trial judge erred in two respects in assessing damages. First, she says that the damages crystallized on the date of the breach, and that the judge erred in awarding damages assessed at a date three months after the closing. Second, she says that the judge erred in relying on an assessment by the BC Assessment Authority, which was prepared for the purposes of municipal taxation, as evidence of the value of the property.

[53] Ms. Liang points out that the normal rule for damages in breach of contract is that damages are assessed as of the date of the breach. There are exceptions to the rule. In particular, where a party is entitled to specific performance and is awarded damages in lieu thereof, there will be a basis to assess damages as of the date of trial rather than as of the date of the breach: *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415.

[54] In the case before us, Mr. Dosanjh accepted Ms. Liang's repudiation of the contract on September 15, 2011. As a matter of law, he was not entitled, thereafter, to seek specific performance. The trial judge, nonetheless, held that it would be fair to assess damages as of January 2012, because Mr. Dosanjh could not be expected to find another residence immediately.

[55] In my view, the presumption that contract damages are to be assessed as of the date of the breach is not so easily displaced. It is important that the law in this area be predictable, and such predictability is not served by allowing judges unbounded discretion as to the date for assessment of damages.

[56] In the case before us, there was no evidence of an unusual rise in real estate prices in Burnaby between September 19, 2011 (the date that acceptance of the repudiation was communicated) and January 2012. There was also very limited evidence of any efforts made by Mr. Dosanjh to find an appropriate residence in Burnaby. In the circumstances, it cannot be said that the ordinary rule that damages are assessed at the date of breach was displaced.

[57] A more serious difficulty with the assessment of damages was the trial judge's reliance on the assessment to determine the property value.

[58] In deciding to admit the assessment as evidence, the trial judge referred to a number of family law cases in which assessments had been used by the trial court to determine the value of real property. She purported to rely on the opening words of Rule 11-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, as providing her discretion to admit the evidence.

[59] There is some difficulty in relying on family law cases for the proposition that assessments should be admissible evidence to determine the value of real property. While the rules of evidence are applicable to family law proceedings, they are often applied in a relaxed manner. I agree with the recent observations of Kent J. in *Walker v. Maxwell*, 2014 BCSC 2357:

> [64] Of course, one of the stark realities of family law litigation is that the parties are often unrepresented by counsel and/or are unable to afford the substantial cost of experts and the procuring of expert evidence.
>
> [65] Evidence in family law cases is subject to the same rules applicable to any other area of civil law. In reality, however, the technical yields to the practical and the strict rules of evidence are often ignored or accorded only slight deference.

[60] While trial courts have, with some frequency, admitted property assessments as evidence of property value in family law cases, they have generally done so either with the agreement of the parties, or, alternatively, where no other evidence of value has been tendered (e.g. *Chung v. La*, 2011 BCSC 1547). Where proper expert evidence of value has been tendered, the courts have been reluctant to consider property assessments as evidence (see, for example, *Hall v. Mougan*, 2009 BCSC 645).

[61] In family law cases, a court is often faced with having to assess the value of real property in a situation where neither side is clearly subject to any burden of proof. Rather, the court is simply required to estimate the value of property for the purpose of dividing a family asset. It is not surprising, in such situations, that a court

may "grasp at straws" in an attempt to reach a just result. It is simply a matter of doing the best job possible with limited evidence.

[62] It seems to me that different considerations arise in non-family cases, where one party or the other will generally bear the onus of producing evidence of property value.

[63] It is not necessary, in this case, to make any pronouncement as to the scope for admission of property assessments as evidence of property value in family law cases, and I will refrain from doing so. In my view, however, there is, absent agreement, no scope for using assessments in place of expert opinion evidence in cases such as the present one.

[64] The trial judge erred in her reliance on the opening words of Rule 11-7. The relevant provisions of the rule are as follows:

> 11-7 (1) Unless the court otherwise orders, opinion evidence of an expert, other than an expert appointed by the court under Rule 11-5, must not be tendered at trial unless
>
> > (a) that evidence is included in a report of that expert that has been prepared and served in accordance with Rule 11-6, and
> >
> > (b) any supplementary reports required under Rule 11-5 (11) or 11-6 (5) or (6) have been prepared and served in accordance with Rule 11-6 (5) to (7).
>
> …
>
> (6)At trial, the court may allow an expert to provide evidence, on terms and conditions, if any, even though one or more of the requirements of this Part have not been complied with, if
>
> > (a) facts have come to the knowledge of one or more of the parties and those facts could not, with due diligence, have been learned in time to be included in a report or supplementary report and served within the time required by this Part,
> >
> > (b) the non-compliance is unlikely to cause prejudice
> >
> > > (i) by reason of an inability to prepare for cross-examination, or
> > >
> > > (ii) by depriving the party against whom the evidence is tendered of a reasonable opportunity to tender evidence in response, or
> >
> > (c) the interests of justice require it.

[65] Rules 11-6 sets out special requirements for expert opinion evidence. It is designed to ensure that adequate notice is given of the intention to adduce expert evidence, and to ensure that expert reports are presented in a particular form. Rule 11-7 allows the court to dispense with the requirements of Rule 11-6 in certain limited circumstances (see *Perry v. Vargas*, 2012 BCSC 1537 and *XY, LLC v. Zhu*, 2013 BCCA 352).

[66] In those limited circumstances, Rule 11-7 allows a judge to admit opinion evidence at trial where the evidence, though otherwise admissible, fails to meet the requirements of Rule 11-6. Nothing in Rule 11-7 purports to allow a judge to admit into evidence an expert opinion that does not meet the requirements of *R. v. Mohan*, [1994] 2 S.C.R. 9.

[67] The basic difficulty with the property assessment as evidence of property value is that the court had no basis on which to evaluate its cogency. The court was not able to determine how the assessor went about making the assessment, and had no basis for determining what weight to give it. This was a particular problem in this case, as the court had no basis for determining the effect of the recent use of the property to grow marijuana on the property value.

[68] I acknowledge, again, that these sorts of difficulties have not always been seen as precluding the admission of assessments as evidence of value in family law cases (see, for example, *Dykman v. Dykman*, 2011 BCSC 883). Whatever discretion a court may have to admit such evidence in a family law case, however, it did not have that discretion in the case before us.

[69] As the trial judge observed, there was some evidence before her to the effect that the market value of the property in September 2011 was substantially higher than the contract price. The evidence of how much higher, however, was minimal. Given that the assessment report was not admissible, the trial judge was faced with a formidable (perhaps impossible) task in trying to determine the quantum of damages.

[70] Fortunately, the parties, recognizing the problem, agree that if the assessment is found to be inadmissible, it is appropriate for this Court to remit the matter to the trial court for a new hearing on the issue of quantum of damages. Given the agreement of the parties on this issue, I would remit the matter of quantum of damages for a new hearing.

Conclusion

[71] In my view, the judge was correct in finding that Mr. Dosanjh was entitled to accept Ms. Liang's repudiation of the contract, and that he did so in a timely manner. I would not disturb her finding that Ms. Liang is liable in damages.

[72] I am, however, of the view that this case did not present a basis for assessing the damages on a date other than the date of breach. I am also of the view that the judge erred in relying on contested evidence of property value in the form of a property assessment.

[73] Given the position taken by the parties, I would allow the appeal to the extent of returning the matter to the trial court for an assessment of the amount of damages suffered by Mr. Dosanjh.

"The Honourable Mr. Justice Groberman"

I agree:

"The Honourable Mr. Justice Lowry"

I agree:

"The Honourable Madam Justice Bennett"

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*May 27, 28, 29, 30, *Nov. 27.

COLONIAL FASTENER COMPANY, LTD., AND G. E. PRENTICE MANUFACTURING COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

LIGHTNING FASTENER COMPANY, LTD. (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Damages for infringement—Matters and items of damages—Sale of product of infringing machine—Invention for manufacturing stringers to be used in fasteners—Loss caused from sales of completed articles (fasteners) made from stringers made on infringing machines—Damages for loss of profit on sales lost—Damages by way of royalty—Damages for loss from reduction in sale price—Pleadings—Raising question of right under s. 47 (6) of Patent Act (R.S.C. 1927, c. 150) on assessment of damages after judgment, when facts relied on not pleaded and proved in the action for infringement.

The sale of the product of an infringing machine is not too remote upon which to found a claim in damages, under s. 32 of the *Patent Act* (R.S.C. 1927, c. 150), by the owner of the patent of the machine infringed.

The object of the patented invention was to manufacture stringers to be used in fasteners.

Held: Plaintiff (owner of the patent) could not be properly compensated for infringement by reference only to the manufacturer's cost and sale price of the stringers and without regard to the cost and sale price of the completed articles (fasteners); the stringers were of importance only in their use in fasteners and what plaintiff lost was sales of fasteners; the principle set forth in *Meters Ld.* v. *Metropolitan Gas Meters Ld.*, 28 R.P.C. 157, should be applied; plaintiff was entitled to damages for loss sustained by reason of defendant's sales of fasteners from stringers made on infringing machines.

Held, further: On the evidence (and applying the "broad axe" referred to by Lord Shaw in *Watson* v. *Pott,* 31 R.P.C. 104), had defendant not sold such fasteners, plaintiff would have sold 60 per cent. of the number actually sold by defendant; and plaintiff was entitled by way of damages to the profit it would have made on what it would have sold as aforesaid. It was so entitled, even were it shown that in the period of infringement it did not manufacture stringers on its patented machine; it was deprived of the opportunity of using its patented machine to produce stringers for the said 60 per cent. As to the 40 per cent. of defendant's sales which plaintiff would not have made, plaintiff was entitled to damages by way of royalty (*Watson* v. *Pott,* 31 R.P.C. 104, at 120; *United Horse Shoe & Nail Co.* v. *Stewart,* 5 R.P.C. 260, at 267).

*Present at the hearing:—Rinfret, Cannon, Crocket, Kerwin and Hudson JJ. Cannon J., through illness, took no part in the judgment.

Damages were awarded also for loss to plaintiff by reason of reduction by defendant in the sale price of such fasteners (forcing reduction by plaintiff) (*American Braided Wire Co.* v. *Thomson*, 7 R.P.C. 152); but not where plaintiff was the first to act, even were plaintiff induced to act by its representatives having been told, falsely, by prospective or actual customers that they could purchase more cheaply from defendant—a claim for damages in such a case was too remote.

In the interval between lapse of plaintiff's patent for non-payment of fees and publication of notice of application to restore it, defendant shipped into Canada fasteners (not taken into account in plaintiff's statement of damages) made in the United States on machines identical with machines held to constitute infringement of the patent. On an assessment of damages, after judgment had been given for plaintiff in an action for infringement, defendant claimed that by virtue of the operation of s. 47 (6) of the *Patent Act*, it obtained the right to use the invention in Canada. *Held*, that the facts should have been pleaded and proved in the patent action as a defence, and it was now too late to raise the question on the assessment of damages.

APPEAL by the defendants, and cross-appeal by the plaintiff, from the judgment of Maclean J., President of the Exchequer Court of Canada (1), confirming, subject to a certain reduction in the amount of damages, the report of the Registrar of that Court (2) as to the damages which the plaintiff was entitled to recover from the defendants by reason of infringement of patent.

The action was for damages and other relief for alleged infringement of the plaintiff's patent, which was for machines and methods for producing straight and curved fastener stringers. By the judgment of the Exchequer Court of Canada (Maclean J. (3)), it was adjudged that the plaintiff's letters patent were valid, and infringed by the defendants; and (besides injunction, etc.) a reference was directed to the Registrar of the Court as to the damages recoverable by reason of the infringements, or as to the profits made by the defendants by reason of the infringements, as the plaintiff might elect before the Registrar. (The plaintiff subsequently elected to take damages.) This judgment was reversed by the judgment of the Supreme Court of Canada (4); but was restored by the judgment of the Judicial Committee of the Privy Council (5), subject to a variation that the declaration of validity made and the injunction and other relief granted be limited to certain claims.

(1) [1936] Ex. C.R. 1.
(2) [1936] Ex. C.R. 1, at 12-38.
(3) [1932] Ex. C.R. 89.
(4) [1933] Can. S.C.R. 363.
(5) (1934) 51 R.P.C. 349.

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COLONIAL FASTENER CO. LTD. ET AL. v. LIGHTNING FASTENER CO. LTD.

By the report of the Registrar of the Exchequer Court of Canada as to damages (1), he recommended that judgment be rendered for the plaintiff in the sum of $50,663.26. The report of the Registrar was confirmed by the judgment of Maclean J., President of the Exchequer Court of Canada (2), subject to the variation that the amount of damages which the plaintiff should recover be reduced by the sum of $3,117.56 allowed by the Registrar as damage due to forced reduction in plaintiff's selling price.

The defendants appealed to the Supreme Court of Canada; and the plaintiff cross-appealed (against said disallowance of $3,117.56, and for increased damages).

By the judgment of this Court, now reported, the defendants' appeal was dismissed with costs; the cross-appeal was allowed to the extent of the said sum of $3,117.56, also with costs; the order of the President of the Exchequer Court in respect of the costs of the reference and of the costs of the appeals to him to stand.

S. A. Hayden K.C. and *James Woods Walker* for the appellants.

O. M. Biggar K.C. for the respondent.

The judgment of Rinfret, Crocket, Kerwin and Hudson JJ. (Cannon J., through illness, took no part in the judgment) was delivered by

KERWIN, J.—This is an appeal by the defendants and cross-appeal by the plaintiff from the judgment of the Exchequer Court (2) which, with one deduction, affirmed the report of the Registrar of that Court as to the damages suffered by the plaintiff by reason of the defendants' infringement of claims 1, 2, 3, 7, 8, 10 and 19 of the plaintiff's patent of invention. By an order of His Majesty in Council, approving the report of the Judicial Committee of the Privy Council, the original judgment of the Exchequer Court in this action (which had been reversed in this Court) was restored, subject to the variation that the declaration of validity made and injunction and other relief granted were limited to these claims.

The patent was for a new and useful improvement in a machine and method for producing fastener stringers.

(1) [1936] Ex. C.R. 1, at 12-38. (2) [1936] Ex. C.R. 1.

Claim 1 may be taken as representative of the machine claims held valid and is as follows:

A machine for making fasteners having means for feeding a tape step by step, means for feeding fastener members into position to be compressed on to said tape, and means for compressing the fastener members thereon.

Claim 19, dealing with the method, reads:

19. The method of making fasteners consisting in affixing jaw members in spaced groups on a continuous stringer in predetermined number and spacing, and cutting the stringer so that pairs of said groups co-operate in forming a fastener.

While the terminology used is not always exact throughout, it will be noted that the patent was granted for a machine and method for making fastener stringers. A fastener stringer consists of a row (of predetermined length) of metal elements fastened to the edge of a tape. Later the tape is cut between each row, two rows are connected by a sliding member, top and bottom stops are attached, and the other edge of each of the two lengths of tape is sewn to each side of an opening which is desired to be closed. The completed article is known as a fastener and its commercial importance lies in the uses to which it may be adapted. The patent is not on the fastener.

One of the defendants, G. E. Prentice Manufacturing Company, is a manufacturer of fasteners in the United States of America. It made stringers for some of these fasteners on machines of the type held in this action to be an infringement, and in 1927 commenced shipping its product to Canada. In 1930 it shipped to Canada three infringing machines and leased them to its co-defendant, Colonial Fastener Company, Limited. Since then the Prentice Company has continued to ship fasteners into Canada, but in greatly reduced quantities, and the Colonial Company has manufactured fastener stringers on the infringing machines leased by them from the Prentice Company and for which they paid the latter a rental, and a royalty based upon the sale of the total number of fasteners in which were incorporated the fastener stringers so made. No claim is made in this action against the Prentice Company in connection with any stringers that may have been made on similar machines in the United States and used in fasteners shipped by it into Canada.

After securing particulars of the number and output of the three infringing machines, the plaintiff elected to claim

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damages. The plaintiff has its head office at St. Catharines, Ontario, and has been manufacturing and selling fasteners since 1925. It claims that every sale by defendants of a completed fastener, the stringers for which had been made on the infringing machines, meant a loss to it for which it is entitled to compensation, while the defendants contend:

(*a*) That by the law of Canada the sale of the product of an infringing machine is not a wrongful act and that it is too remote upon which to found a claim in damages;

(*b*) That even if that be not so, the stringers are the only product and that the sale price of the completed fasteners should not be considered;

(*c*) That in any event the plaintiff, in fact, would not have sold all the fasteners that the defendants did and, in law, is not entitled to claim damages for any proportion of the defendants' sales.

It appears convenient to dispose now of (*a*) and (*b*), leaving (*c*) for consideration later.

(*a*) Admittedly the law in England is quite clear that the sale of the product of an infringing machine entitles the owner of the patent to damages for such sale. *United Horse Shoe and Nail Co.* v. *Stewart* (1). But it is urged that in England the Patent Act does not define the extent of the patent monopoly or the acts constituting infringement: that these continue according to the common law and that by the grant, "Our subjects" are commanded "that they do not at any time during the continuance of the said term of fourteen years either directly or indirectly make use of or put in practice the said invention, or any part of the same." Emphasis is placed on the words "directly or indirectly" and it is pointed out that they do not appear in section 32 of the *Patent Act,* R.S.C. 1927, c. 150. Section 32 is as follows:

32. Every person who, without the consent in writing of the patentee, makes, constructs or puts in practice any invention for which a patent has been obtained under this Act or any previous Act, or who procures such invention from any person not authorized by the patentee or his legal representatives to make or use it, and who uses it, shall be liable to the patentee or his legal representatives in an action of damages for so doing; and the judgment shall be enforced, and the damages and costs that are adjudged shall be recoverable, in like manner as in other cases in the court in which the action is brought.

(1) (1888) 5 R.P.C. 260, at 267.

I cannot find any difference in meaning between that wording and the phraseology of the English form of grant. If the damages claimed are not too remote, the wrongdoers must, as in every case of tort, compensate the injured party for such damages as he may have suffered. In my view the sale of the product of an infringing machine is not too remote.

Collette v. *Lasnier* (1), cited by counsel for the defendants, has no application. In that case there was no allegation or proof that the plaintiff suffered any loss or damage. He claimed baldly that defendants had realized a profit over and above the profits that would have been made without using the patented machine and demanded that extra profit as his damages. The Superior Court of Quebec granted the plaintiff as damages what the Court deemed to be the amount of such extra profit and the Court of Appeal affirmed that award. In this Court the lack of evidence of any loss or damage suffered by the plaintiff was pointed out, but rather than send the case back for a new assessment, the Court fixed the sum of one hundred dollars as the amount which the plaintiff should recover. This decision is not contrary to the views I have expressed.

(*b*) As to this branch of the defendants' contention, it suffices to remark that when one bears in mind that the object of the patentee's invention was, as expressed in his claims and specifications, to manufacture stringers to be used in fasteners, the plaintiff could not properly be compensated by reference only to the manufacturer's cost and sale price of stringers and without regard to the cost and sale price of the completed article. As has been pointed out previously, the stringers are of importance only in their use in fasteners and what the plaintiff lost was sales of fasteners. The principle set forth in *Meters Ld.* v. *Metropolitan Gas Meters Ld.* (2) should be applied. There the Court of Appeal had to consider the amount of damages the plaintiff was entitled to where the defendant infringed plaintiff's patents, one of which related to a particular kind of cam and spindle for opening the gas valve in a prepayment gas meter, and the other of which was for a particular kind of crown wheel in a like meter. It had been shewn before the Master and Eve J., to whom an appeal had been taken, that

(1) (1886) 13 Can. S.C.R. 563 (2) (1911) 28 R.P.C. 157.

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the plaintiff would have sold many more meters but for the defendant's intervention, and it was, therefore, awarded 13s. 4d. for the loss of profit on each of such meters. The Court of Appeal confirmed the judgment and made it clear that they agreed with the Master and with Eve J. that the proper method of assessing the damages was to take the profit on the sale price of the meters and not merely to consider the parts upon which the plaintiff held patents. Adopting this principle, the defendants' contention fails.

One other general defence raised by the defendant G. E. Prentice Manufacturing Company may be mentioned. The patent had been allowed to lapse for non-payment of fees on April 5th, 1927, and notice of the application to restore it was not published until June 11th of the same year. During the interval the defendant G. E. Prentice Manufacturing Company shipped into Canada fasteners made in the United States on machines identical with the machines held to constitute infringements of the patent. That defendant continued to make similar shipments from time to time, and it was urged that by virtue of the operation of subs. 6 of s. 47 of the *Patent Act*, R.S.C. 1927, c. 150, the Company obtained the right to use the invention in Canada. Subsection 6 is as follows:

> 6. In any case where a patent which has become void is restored and revived as aforesaid and during the period when such patent was void and before publication of notice of hearing on an application for its restoration and revival as aforesaid, any person has commenced lawfully to construct, manufacture, use or sell in Canada the invention covered by such patent, such person may continue to construct, manufacture, use or sell such invention in as full and ample a manner as if such patent had not been restored and revived.

None of the fasteners included in any of these shipments so made by the Company from the United States were taken into account in the plaintiff's statement of damages. Without dealing with the plaintiff's submission that this defendant cannot rely on the manufacture in the United States as giving it the right to manufacture in Canada, I agree with the Registrar and President of the Exchequer Court that the facts should have been pleaded and proved in the patent action as a defence, and that it is now too late to raise the question on the assessment of damages.

Before referring to the items in the plaintiff's statement of damages, it should be mentioned that included therein is a claim for loss in connection with stringers made by

defendants on two machines, or as they are called in the statement, " divided machines "; that is, instead of all the operations required to produce a stringer being on one machine the operations were divided between two machines. However, it is clear that what the Privy Council held the defendants had infringed was " the general mechanical idea of combining in this class of work all the necessary operations in one machine " (1), and not a method carried out by two machines. The plaintiff points to Claim 19 and to the following remarks of Lord Tomlin (2):

> There remains for consideration Claim 19. This is a method claim. It is said to be anticipated by Aaronson's Patent; but, even if the method is limited to fixing members on to stringers, the claim is for something which had never been done before, namely, producing stringers fitted with identical members so that a pair of stringers can co-operate to form a complete fastener. Their Lordships think that this is a novel claim with ample subject-matter and is valid and has been infringed.

But this language must not be divorced from the remainder of the judgment. This shows that the monopoly the plaintiff secured was on *a* machine of the type indicated; with means for producing the results mentioned,—but always on one machine (1). Read thus, Lord Tomlin's remarks as to Claim 19 are clear and unambiguous and the plaintiff's cross-appeal on this branch of the case fails.

Omitting all reference to the " divided machines " and the figures relating thereto used by the plaintiff in its statement, this summary so far as pertinent to the case at bar would now appear as follows:

(1)	Loss due to sales made by defendant of fasteners made in Canada on machines calculated on the price actually obtained by the plaintiff.....	$87,593 72
(2)	Loss due to first cut in minimum price calculated on defendant's sales.....	15,161 32
(3)	Loss due to second cut in minimum price calculated on defendant's sales...	5,042 44
(4)	Loss due to elimination of 5c. flat charge calculated on fasteners over 7½" lengths sold by defendant	1,210 50
(5)	Loss due to first cut in minimum price calculated on plaintiff's actual sales of fasteners up to 7½".....	26,632 55

(1) 51 R.P.C. 349, at 367. (2) 51 R.P.C. 349, at 368.

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(6) Loss due to second reduction of minimum price calculated on plaintiff's actual sales of fasteners up to 7½"... 4,636 54

(7) Loss due to elimination of 5c. per piece on plaintiff's actual sales of fasteners over 7½" 4,081 95

Item 1. The defendants admitted making and selling 742,901 fasteners from stringers made on infringing machines. I have already pointed out that the plaintiff is entitled to damages for any loss it sustained by reason of these sales. The first problem is to determine whether the plaintiff would have made all these sales and even a cursory examination of the evidence would indicate that this is clearly a case where the broad axe referred to by Lord Shaw in *Watson* v. *Pott* (1) should be applied. I have read all the evidence and, without attempting to analyse it, which the Registrar has done with great ability and in detail, I cannot find that he omitted to take into consideration all proper elements and I agree with his conclusion, affirmed by the President, that the plaintiff would have sold sixty per cent. of the total number. It is contended that in the period during which infringement is shown the plaintiff did not manufacture stringers on its patented machine, but even if that were taken as proved, it does not operate in ease of the defendants. The plaintiff was deprived of the opportunity of using its patented machine to produce stringers for the 445,740 fasteners (i.e., 60 per cent. of 742,901), and, as I conclude it would have sold that number, it is entitled by way of damages to that profit on the sale of each of such fasteners that the evidence discloses. This disposes of defendants' contention (*c*) referred to above.

The Registrar found the plaintiff's loss of profit to be 10 cents per fastener. Not only did the defendants appeal, alleging that there was no basis upon which the allowance could be justified, but the plaintiff cross-appealed, alleging in turn that its calculation of its loss of profit was 11·79 cents per fastener; that the Registrar had found no fault with the correctness of its figures, and that the President, beyond adopting the Registrar's figure, had made no reference to the point. Even if the mathematical accuracy of

(1) (1914) 31 R.P.C. 104.

the plaintiff's statement of costs of manufacture be admitted, one must not lose sight of the contents of the plaintiff's letter to the Minister of Finance and of the methods of manufacture actually in use by it when its costs were compiled. These considerations serve to reduce the plaintiff's figures but at the same time leave them as a basis of computation. I might have adopted another figure, one probably a little lower in view of the matters mentioned, but I cannot say that there is sufficient to warrant interference with the Registrar's estimate, and the appeal and cross-appeal on this branch are dismissed.

As to the forty per cent. of the defendants' sales which the plaintiff would not have made, it is still entitled to damages by way of royalty. As Lord Watson points out in *United Horse Shoe and Nail Company* v. *Stewart* (1), "Every sale of goods manufactured, without licence, by patent machinery, is and must be treated as an illegal transaction in a question with the patentee." In *Watson* v. *Pott* (2), Lord Shaw said:

> If with regard to the general trade which was done, or would have been done by the respondents within their ordinary range of trade, damages be assessed, these ought, of course, to enter the account and to stand. But in addition there remains that class of business which the respondents would not have done; and in such cases it appears to me that the correct and full measure is only reached by adding that a patentee is also entitled, on the principle of price or hire, to a royalty for the unauthorized sale or use of every one of the infringing machines in a market which the infringer, if left to himself, might not have reached. Otherwise, that property which consists in the monopoly of the patented articles granted to the patentee has been invaded, and indeed abstracted, and the law, when appealed to, would be standing by and allowing the invader or abstractor to go free. In such cases a royalty is an excellent key to unlock the difficulty, and I am in entire accord with the principle laid down by Lord Moulton in *Meters Ltd.* v. *Metropolitan Gas Meters Ld.* (3). Each of the infringements was an actionable wrong, and although it may have been committed in a range of business or of territory which the patentee might not have reached, he is entitled to hire or royalty in respect of each unauthorized use of his property. Otherwise, the remedy might fall unjustly short of the wrong.

Under this subdivision the plaintiff has been allowed a royalty of 1 cent per fastener, i.e., 1 cent × 40 per cent. of 742,901 or a total of $2,971.60. Both parties have appealed as to this allowance, the plaintiff contending that it should be at least 2·3 cents per fastener, and the defendants contending that it was overly generous to the plaintiff.

(1) (1888) 5 R.P.C. 260, at 267. (2) (1914) 31 R.P.C. 104, at 120.
(3) (1911) 28 R.P.C. 157, at 163.

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I agree that the Registrar was correct in disregarding, on the one hand, the evidence that a departmental store had paid a royalty of 5 cents, as the fasteners there had been used on rather expensive articles; and in disregarding, on the other hand, the evidence of Mr. Prentice that in the United States he had granted licences and had been offered licences at the rate of $\frac{2}{3}$ cent per fastener, as the purchasing power of the public is much greater in the United States than in Canada. The main contention on the part of the plaintiff is that the Registrar in that part of his report which appears at the top of p. 754 of the Appeal Case before this Court, erred in stating that the Colonial Fastener Company, Limited, had paid its co-defendant, G. E. Prentice Manufacturing Company, Limited, a royalty of $12,737.02 on 742,901 fastener stringers. It would appear that the Registrar did err in that respect. It is undoubted that a royalty was paid, and, according to the evidence, it was fifteen per cent. of the gross sales price for the greater part of the time and ten per cent. for the remainder; but these percentages were of the gross sale price of the completed fasteners and not merely of fastener stringers.

Appendix I to the plaintiff's factum shows, with references to the pages where the evidence is to be found, that the total sum received from the sale of the fastener stringers, as mentioned by the Registrar, $84,930.50, is practically correct. This figure is obtained from Appendix I by adding to the total under Column 3 under the heading " Unitary Machines " the sum of $5,557.21, which appears opposite Period VI in the third column under the heading " Divided Machines." Although nothing is being allowed in connection with the product of these " divided machines," in this instance it is necessary to accept the plaintiff's calculations with reference to Period VI in order to arrive at the Registrar's total. In any event this does not prejudice either party. References are also given under column 5 in Appendix I to the evidence which indicates the amount of royalty paid according to defendants' own figures and this shows a total of $17,194.33 or $18,746.78, depending upon whether the total figures for Period VI are separated or kept intact. Adopting the former the rate of royalty per fastener would figure out to about 2·3 cents and not $1\frac{3}{4}$ cents, which the Registrar's calculation showed.

It is suggested that, having estimated the royalty paid by the Colonial Company to the Prentice Company at $1\frac{3}{4}$ cents per fastener, the Registrar unconsciously allowed this figure to be a guide to his final estimate that a fair royalty for the defendants to pay the plaintiff would be 1 cent per fastener. However, it must be remembered that, for the rental and royalty received by it from its co-defendant, the Prentice Company gave certain other services; and that while patentees may endeavour to impose all that the traffic will bear, in the instant case, the plaintiff, if it had adopted a system of licensing by demanding a royalty on each fastener, would have been obliged to set a figure in proportion to the sale price of a completed fastener. The rate adopted is one I would have accepted if the matter had come before me in the first instance.

In the result, therefore, the allowance of $47,545.70 under Item I in the plaintiff's statement remains undisturbed.

The remaining items deal with alleged damages due to reductions at different times by the defendants in the sale price of fasteners. Such a claim, if made out, is valid. *American Braided Wire Co.* v. *Thomson* (1). The evidence, however, fully warrants the finding that, in connection with the first reduction, the plaintiff was the first to act. It is then contended that, granting this to be so, the plaintiff was induced to such a course by reason of its representatives having been told, falsely, by prospective or actual customers that they could purchase more cheaply from the defendants. This claim, however, is too remote and Items 2 and 5 must be disregarded.

The second reduction was first made by defendants and, as damages under the headings in plaintiff's statement referring thereto, the Registrar allowed the sum of $3,117.56. The President disallowed this, as he considered that no "safe deduction can be made, in this case, from the fact that the defendants at any time sold their product at prices below that of the plaintiff, and which compelled the plaintiff to meet the reduction." After anxious consideration I have concluded that the plaintiff is entitled to something under this heading,—and not merely a nominal sum. After making every allowance for the effect of competition from

(1) (1890) 7 R.P.C. 152.

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imported fasteners, it must be admitted that any domestic manufacturer was in a privileged position to fill quickly the requirements of customers. It is true that there was a third concern in Canada producing fasteners, but the Registrar has allowed for this and I think I cannot do better than quote his remarks:

> On the whole, the United Carr Manufacturing Co. being in the same locality as plaintiff and the importations being lower in price, I have decided to divide the total losses to plaintiff in the ratio of 25 per cent; 37½ per cent and 37½ per cent, and would charge the defendants with 25 per cent of the losses.
>
> Now the figures involved are those numbered 3, 4, 6 and 7 on pages 3 and 4 hereof, namely,
>
> (3) $5042·44; (4) $1210·50—$6252·94 and
>
> (6) $4636·54; (7) $4081·95—$8718·49.
>
> These must be divided into two; first, the losses based on defendant's sales, namely, Nos. 3 and 4, $6252·94; and second, those based on plaintiff's own sales, namely, Nos. 6 and 7, $8718·49, for the following reason:
>
> In reference to losses from forced reductions based on defendant's sales the 25 per cent thereof to be charged against defendant must be taken on 60 per cent of the said sales, because it is only on 60 per cent of defendant's sales that plaintiff is entitled to get loss of profit; as on 40 per cent it is to be paid a royalty which is not affected by the reduction in prices. Now 60 per cent of $6252·94 is $3751·76 and 25 per cent of $3751·76 is $937·94, for which defendant is responsible regarding its own sales, and 25 per cent of $8718·49 is $2179·62 *re* plaintiff's sales, making a total of $3117·56 which I find plaintiff is entitled to recover from the defendants as damages resulting from the said forced reduction in price.

I believe that the Registrar has correctly appreciated the evidence and has properly applied the relevant principles. I do not say that I would have necessarily divided the total losses to the plaintiff in the same proportions, but on the whole I think the sum allowed is fair and reasonable under all the circumstances and that it should stand. The plaintiff's cross-appeal in this connection should be allowed.

There remains for determination one claim not included in the itemized statement. Plaintiff's counsel described this as " the loss sustained by reason of the disturbance of the market consequent upon the defendants' intervention," and argued that in addition to the substantial sums claimed in the itemized statement, the plaintiff should receive a further large amount. The plaintiff company at the outset adopted a restrictive sales policy. It considered that in order to induce manufacturers of articles to which the fasteners might be attached, to experiment with something that was new and untried, a campaign of education and persuasion had first to be undertaken together with the offer of a special

inducement. That inducement was that the plaintiff would supply only certain manufacturers with fasteners to be applied to specified purposes. In this way it was considered that the Company would be able to persuade some manufacturers not merely to try the new experiment but also to push the sales of their own product, which, of course, would result in additional sales of fasteners. It was argued that the effect of the defendants' intervention was to disrupt this scheme and that the plaintiff found it necessary to follow the defendants' example and sell to any manufacturer. However, the fact must not be lost sight of that there was no patent on fasteners and that stringers for them could be made in different ways. Besides the defendants' competition there was considerable importation from other countries and I am satisfied upon the evidence that without the defendants' intervention the plaintiff would not have been able to continue the policy it adopted at the outset. One of its own witnesses stated that the policy was deemed to be a satisfactory one at the outset, while two independent witnesses called by the defendants considered that the policy was not workable at any time. The plaintiff has been allowed all the damages to which it is fairly entitled in order to place it in the position it would have occupied if defendants had not infringed. There is nothing upon which to base any such claim as is here advanced and the plaintiff's cross-appeal on this point fails.

The net result is that the appeal is dismissed *in toto* and the cross-appeal allowed to the extent of $3,117.56. The Registrar recommended that the plaintiff be allowed the costs of the reference since it was entitled to damages and the defendants had contested each claim. That recommendation is adopted. Before the President the defendants succeeded in reducing the amount allowed by $3,117.56; the plaintiff failed to secure any higher amount, and no order was made as to the costs of the appeals to the President. The plaintiff was obliged to appeal from that judgment in order to recover its position before the Registrar, and the appeal to this Court should, therefore, be dismissed with costs and the cross-appeal (to the extent indicated) allowed with costs. But, in view of the many matters on which the

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plaintiff failed, the President's order as to the costs of the appeals to him might well stand.

Appeal dismissed with costs.
Cross-appeal (to the extent indicated) allowed with costs.

Solicitors for the appellants: *McCarthy & McCarthy.*
Solicitor for the respondent: *Harold G. Fox.*

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Federal Court of Appeal | Cour d'appel fédérale

Date: 20181123

Docket: A-64-15

Citation: 2018 FCA 217

CORAM: **GAUTHIER J.A.**
GLEASON J.A.
LASKIN J.A.

BETWEEN:

APOTEX INC.

Appellant

and

ELI LILLY AND COMPANY AND ELI LILLY CANADA INC.

Respondents

Heard at Toronto, Ontario, on September 17-18, 2018.

Judgment delivered at Ottawa, Ontario, on November 23, 2018.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: GLEASON J.A.
LASKIN J.A.

Federal Court of Appeal | Cour d'appel fédérale

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REASONS FOR JUDGMENT

GAUTHIER J.A.

I. INTRODUCTION

[1] This is the latest in a long saga of proceedings opposing generic drug producer Apotex Inc. and global pharmaceutical giant Eli Lilly and Company and its Canadian subsidiary, Eli Lilly Canada Inc. [together, Lilly]. Here, Apotex appeals the judgment of Zinn J. of the Federal

Court (2014 FC 1254) [Damages Decision]. In that decision, the Federal Court was tasked with assessing the damages suffered by Lilly as a result of the infringement of eight Canadian patents for the processes relating to the making of a key intermediate compound (referred to as "7-ACCA") required to make cefaclor, a cephalosporin antibiotic used to treat certain bacterial infections.

[2] Liability for the infringement was attributed to Apotex in 2009 following a trial spanning 67 days between April and December 2008 (2009 FC 991) [Liability Decision]. The Federal Court found that the patents at issue were valid and that they had been infringed by Apotex as a result of its importation and use of cefaclor produced by South Korean drug maker Kyong Bo Chemical Ltd. [Kyong Bo] and Lupin Laboratories Ltd. of India [Lupin] before June 1998. That decision was later confirmed by this Court in 2010 (2010 FCA 240), and leave to appeal to the Supreme Court of Canada was refused in May 2011.

[3] In the decision under appeal before us, the Federal Court ordered Apotex to pay Lilly $31,234,000.00 in damages pursuant to subsection 55(1) of the *Patent Act*, R.S.C. 1985, c. P-4 [Patent Act]. Lilly was also awarded $75,040,649.00 in prejudgment interest as damages for the time value of the money lost in the 17 years before the reference trial on damages took place, bringing the total award to $106,274,649.00.

[4] Though the parties raised many issues given the amounts involved, I do not agree with Apotex that new questions of law requiring the consideration of new policy concerns are at play.

The facts of this case are so unusual that it would be unwise to use them as a backdrop for stating general principles of law. As the adage goes, “hard facts” often make “bad law”.

[5] I realize that much time has been spent and resources deployed, including those of the judiciary, in these proceedings. Still, for the reasons that follow, I propose that the appeal be allowed, but solely on the question of interest granted as damages.

II. OVERVIEW AND BACKGROUND FACTS

A. *General facts*

[6] Four of the cefaclor process patents at issue during the liability phase of the proceedings were filed in 1979. They were subsequently issued to Lilly between October 1982 and July 1983. The first patent issued expired in October 1999, and the last in July 2000. The other four relevant patents were issued to Shionogi & Co. Ltd. [Shionogi], a Japanese pharmaceutical company, between February 1981 and April 1983. The first of these expired in February 1998, while the last expired in April 2000. Lilly became the owner of the Shionogi patents by way of assignment in 1995 (see Liability Decision at paras. 3-4).

[7] Litigation between Apotex and Lilly over the process patents began in 1993, when Apotex filed a Notice of Compliance [NOC] submission for its own generic version of cefaclor (known as “Apo-Cefaclor”) with Health Canada. Lilly subsequently commenced an application under the then recently enacted *Patented Medicines (Notice of Compliance) Regulations*,

SOR/93-133 [PMNOC Regulations], seeking an order prohibiting Apotex from selling its cefaclor product in Canada.

[8] In a decision dated September 12, 1995, Simpson J. dismissed Lilly's application (see *Eli Lilly and Co. v. Apotex Inc.* (1995), 101 F.T.R. 33 (T.D.)). She held that the claims in the eight patents at issue did not relate to substances that were medicines in themselves as per the criteria set out in section 2 of the PMNOC Regulations at that time. It is in that context that Simpson J. made the following statement:

> **9** The uncontradicted expert evidence before me discloses that there is no commercially viable means of producing Cefaclor without using at least two of the Intermediates. Canadian Patents 1,097,611 and 1,146,536 contain the claims for those crucial intermediates. Apotex has not suggested that it has developed a non-infringing process. It is, therefore, reasonable to infer that Apotex plans to infringe the Patents by copying Lilly's production methodology if it is not prohibited from manufacturing the Intermediates by a prohibition order made in this application. In that event, it will be open to Lilly to seek remedies for infringement at common law.
>
> [Emphasis added.]

[9] The decision was later confirmed on appeal: *Eli Lilly and Co. v. Apotex Inc*. (1996), 199 N.R. 4 (F.C.A.), leave to appeal to S.C.C. refused, 25477 (January 30, 1997).

[10] In light of the above, it was expected that Apotex would obtain an NOC with respect to cefaclor. As he indicated in an affidavit dated November 13, 2003, counsel for Apotex, Mr. Harry B. Radomski, advised Apotex in late 1996 to prepare to face an infringement action brought by Lilly should it enter the market with its generic version of cefaclor (Exhibit TX-641 at para. 4, Appeal Book, vol. 58, tab 256 at pp. 17191-204).

[11] On January 17, 1997, Apotex obtained its NOC for capsules of cefaclor, and another NOC was issued for the sale of cefaclor in oral suspension form on March 6, 1998. Promptly after obtaining the first NOC, Apotex began selling its various capsules of cefaclor on the Canadian market. As predicted, Lilly commenced an infringement action. Its first action was launched on January 23, 1997, but was subsequently discontinued. The action that eventually led to the liability trial in 2008 was commenced on June 18, 1997. That action specifically referred to the "Kyong Bo process" – the process used by the manufacturer Kyong Bo for the production of Apotex's generic cefaclor. This was the only process Lilly knew Apotex was using at the time. However, Apotex had in fact two suppliers of cefaclor: Kyong Bo and Lupin.

[12] Apotex received its first commercial batch of cefaclor from Kyong Bo on November 25, 1996, ordered its last batch on June 16, 1997, and received this last batch on September 9, 1997. This portion of the total cefaclor received by Apotex is referred to as "Kyong Bo cefaclor".

[13] Apotex received its first commercial batch of cefaclor produced by Lupin on May 23, 1997, ordered its last batch on April 3, 1997, and received this last batch on November 20, 1997. This portion is referred to as "Lupin 1 cefaclor".

[14] Both the Kyong Bo (Shionogi patents) and Lupin 1 (Lilly patents) portions of cefaclor were found to be infringing by the Federal Court in 2009 following the liability trial.

[15] In addition to the 9,126 kg of Kyong Bo and Lupin 1 cefaclor referred to above, Apotex imported a third portion. On March 13, 1998, Apotex entered into a contract with Lupin for the

supply of an additional 7,500 kg of cefaclor [1998 Agreement]. Notably, the 1998 Agreement involved cefaclor made by a new process (referred to as Process "E" in the Liability Decision). This process was developed after exchanges with Apotex (particularly its in-house counsel, Ms. Brigitte Fouillade) in order to design around the processes patented by Lilly and Shionogi. As a result, Lupin undertook to "use only the teachings" of the purportedly expired patents detailed in Appendix A of the 1998 Agreement when producing these 7,500 kg of cefaclor (Exhibit TX-1656, Appeal Book, vol. 57, tab 246 at pp. 15290-91; Liability Decision at para. 788). The process detailed in Appendix A (hereinafter the "Lupin 2 process") was to be kept confidential, and was intended solely for the purposes of production for Apotex. This third portion is referred to as "Lupin 2 cefaclor".

[16] Apotex imported its first batch of Lupin 2 cefaclor in June 1998, and received all 7,500 kg by October 22, 1998.

[17] The Federal Court held that Lilly had not established infringement of the Lilly and Shionogi patents in regard to the Lupin 2 process (see Liability Decision at paras. 228-29). In that sense – and only for the purposes of the proceedings before the Court in 2008 –, the Lupin 2 process was described as a legal process in the reasons dealing with Apotex's counterclaim, which the Federal Court also dealt with in 2008. As will be discussed, it now appears that one of the patents listed in the 1998 Agreement, Canadian patent 1,218,646 [646 Patent] relating to Step VI of the Lupin 2 process, did not expire until 2004 (see Exhibit RX-207, Appeal Book, vol. 53, tab 220 at p. 15292).

[18] I also note that the initial NOC that Apotex received on January 17, 1997, was based on submissions which described Kyong Bo as its supplier and provided some detail regarding the Kyong Bo process. When Apotex decided to buy Lupin 1 cefaclor as well, it notified Health Canada through a Notifiable Change filed in April 1997 that it wanted to add Lupin as a supplier (Facts Agreed to by the Parties at p. 10, Appeal Book, vol. 2, tab I at p. 557). Health Canada requested details regarding the Lupin 1 process, which were duly provided. On June 25, 1997, Health Canada confirmed that it had no objection to the change (see Liability Decision at para. 227; see also Parra Direct Examination, Lilly's Day Book for Re-Hearing, vol. 1, tab 30, Appeal Book, vol. 76, tab 378 at pp. 22586-87). However, Apotex did not update its file with Health Canada after the Lupin 2 process was developed for use pursuant to the 1998 Agreement. Although Lilly argued emphatically that this omission was relevant to the issues to be determined at both the liability and reference stages, I do not intend to discuss the matter further; indeed, it was held to be irrelevant in the Liability Decision at paragraph 74. Considering my other conclusions, I find it unnecessary to address it in this appeal.

B. *Liability Decision (2009 FC 991)*

[19] Having found Kyong Bo and Lupin 1 cefaclor to be infringing, the Federal Court granted Lilly the right to elect either an accounting of Apotex's profits as a remedy, or an award of all damages sustained by reason of sales lost as a result of the infringement by Apotex of the eight Lilly and Shionogi patents (Liability Decision at p. 324). As per the bifurcation order dated November 29, 1999, such damages would be assessed by reference (i.e. after a separate trial).

[20] The Federal Court also awarded Lilly "pre-judgment interest on the award of damages (if elected), not compounded, at a rate to be calculated separately for each year since infringing activity began at the average annual bank rate established by the Bank of Canada" (Liability Decision at p. 325, para. 4; see also para. 674). Notably, under paragraph 36(4)*(f)* of the *Federal Courts Act*, R.S.C. 1985, c. F-7 [FC Act], this award would only apply if no interest was awarded by the reference judge as part of the damages (see para. 27 below).

C. *Damages Decision (2014 FC 1254)*

[21] The Damages Decision under appeal was issued on December 23, 2014, following an 18-day trial during the months of September and October 2014. What follows is meant to be a brief overview of the Federal Court's findings. They will be developed in greater detail in the analysis.

[22] First, a word on the form and length of the Federal Court's reasons, which span 48 pages. It appears that the structure of the Damages Decision follows that of the main issues as put forth by the parties before the Federal Court at trial. Considering the voluminous amount of evidence in the record, as well as the fact that the parties fought vigorously on almost every relevant factual issue, the reasons are comparatively brief. To my mind, the Damages Decision was drafted with only the parties as the intended audience, as it contains little reference to the many controversies regarding the evidence as a whole. Indeed, the reasons assume that the reader is particularly familiar with the evidentiary record.

[23] Second, the substance. Since Lilly elected an award of damages under subsection 55(1) of the Patent Act rather than an accounting of profits, the Federal Court applied the framework

established by the Supreme Court in *Clements v. Clements*, 2012 SCC 32 [*Clements*], given that patent infringement is a statutory tort. The guiding question was thus: "But for the infringing product being on the market, what would the patentee's position have been?" (Damages Decision at para. 20). The Federal Court noted that, in this "but-for" world, Lilly had the burden of proving the causal connection between its lost sales and infringing ones made by Apotex. Lilly also had to prove on the balance of probabilities that, *but for* the sales of the infringing product, it would have made additional sales. Finally, it had to prove the volume of those additional sales and the profit that it would have realized on them (Damages Decision at para. 33).

[24] However, using the authorities available to it at the time, the Federal Court concluded that the defence of a "non-infringing alternative" (or NIA) raised by Apotex was not available to an infringer in Canada (Damages Decision at para. 57).

[25] Still, given the framework adopted, the Federal Court had to determine when Apotex would have entered the market in the "but-for" world. It found that Apotex would not have been in the cefaclor market prior to April 19, 2000, when the last of the Shionogi patents expired. In other words, the Federal Court found that it is only from that date forward that Apotex would have entered the market with non-infringing cefaclor (see Damages Decision at paras. 62-63, 70-71; see also paras. 27-35 for discussion on causation). In doing so, it accepted Lilly's position that there was a fundamental difference between the actions one takes to enter the market and those taken to remain in it. Apotex did not persuade the Federal Court that in the "but-for" world it would have had sufficient incentive to enter the market as opposed to remaining in it, as it in fact did when it ordered the Lupin 2 cefaclor (Damages Decision at para. 68).

[26] Next, the Federal Court awarded Lilly a royalty of $1,500.00 per kg for each sale made by Apotex in breach of the patents that Lilly could not have made (Damages Decision at paras. 101-03). The Federal Court thereby rejected Apotex's expert evidence which was based on the assumption that an NIA could have been available to Apotex at the relevant time – that is, when initial infringement occurred. It is in that context that the Federal Court ruled that such a premise was not supported by the evidence; in other words, Lupin 2 cefaclor could not have been available to Apotex. This had not been proven as a fact (Damages Decision at para. 100).

[27] Finally, in regard to prejudgment interest, the Federal Court held that Lilly was not required to prove exactly what use it would have made of the profit it lost as a result of Apotex's actions. The Federal Court also concluded that, "in today's world", there is a presumption that a plaintiff such as Lilly would have generated compound interest on the funds owed to it, and that Apotex also did so in the period during which it withheld the funds (Damages Decision at para. 118). The Federal Court found that Lilly would have invested in its business, and it was awarded prejudgment interest compounded annually at Lilly Canada's historical average annual profit margin on sales for the years 1997 through 2012 (Damages Decision at paras. 122, 125; Expert Report of Stephen Foerster, Exhibit RX-115, Appeal Book, vol. 34, tab 26 at p. 9862).

III. ISSUES

[28] The standards of review applicable to the issues raised in this appeal are as described by the Supreme Court in *Housen v. Nikolaisen*, 2002 SCC 33. The standard of review to be applied to questions of law is correctness, while findings of fact and inferences of fact are to be reviewed on the basis of palpable and overriding error. Findings of mixed fact and law are to be reviewed

on the same deferential standard unless an extricable legal error can be demonstrated, in which event the correctness standard applies.

[29] As such, I will frame the issues in the analysis as follows:

1) Did the Federal Court err in finding that no NIA defence was available to Apotex?

2) Did the Federal Court err in finding that Apotex would not have entered the market until April 2000 in the "but-for" world (causation)?

3) Did the Federal Court err in determining the reasonable royalty rate?

4) Did the Federal Court err when it held that Lilly was entitled to interest as damages?

IV. ANALYSIS

A. *Preliminary Comments*

[30] Before tackling the analysis, it is opportune to lay some groundwork. Two issues need to be addressed from the get-go: 1) the importance of Lupin 2 cefaclor for the majority of the issues to be addressed; and 2) the relevance of certain additional facts relating to the actual world and evidence before the Federal Court.

(1) The relevance of Lupin 2 cefaclor

[31] Except for the last issue, all the questions before us to some extent involve evaluating the availability of Lupin 2 cefaclor. It is thus useful to recall the role the notion of an NIA plays in the various hypothetical scenarios that the Federal Court, as trier of fact, had to construct in order to assess damages.

[32] First, as noted by the Federal Court, Lilly had to prove that its damages were caused by the wrongful conduct, i.e. the infringement of the patents at issue (subsection 55(2) of the Patent Act). Using the principles it properly referred to, the Federal Court had to construct a fictional, hypothetical situation on the basis of all the evidence before it. The fiction in question concerned the landscape of the cefaclor market in Canada – and Lilly's position within it – had Apotex not infringed the patents. This exercise was necessary for assessing what sales Lilly effectively lost because of Apotex's wrongful conduct. As noted above, this is sometimes referred to as the "but-for" world (causation).

[33] The parties agreed that, in respect of cefaclor sold by Apotex that Lilly would not have sold in the "but-for" world (such as product exported by Apotex), the damages would be limited to a royalty at a rate to be determined by the Court.

[34] Regarding the sales actually lost in the "but-for" world, replicating a fictionalized version of the Canadian cefaclor market, the experts agreed on many of its components relevant to the calculation of the damages according to various scenarios. Many of the differences were identified and dealt with by the Federal Court. These are not at issue. Still, there remained three main issues for the Federal Court to determine. The first and second concerned whether Lilly would have had exclusivity in this market, and if so, until when. The third related to the actual size of the market, notably in regard to the level of demand for the product.

[35] Lilly asserted that it would indeed have had exclusivity until all its patents expired. It argued that, but for the use of infringing material and subsequent initiation of its legal

proceedings, Apotex (or any other generic drug manufacturer) would not have entered the market before the expiry of all the patents at issue. Particularly, Apotex would not have sold the Lupin 2 cefaclor at all because it was not commercially viable to do so. Later on, Lilly admitted that once the last Shionogi patent expired in April 2000, the Shionogi process would have provided an NIA to make cefaclor. This NIA would have been available to Apotex and any other generic drug manufacturer as of April 19, 2000. It is in that context that the Federal Court had to also determine when Apotex would have been in a position to actually sell its products in the various provinces (the formulary issue will not require any comment to determine this appeal).

[36] Apotex strenuously contested the position of Dr. Iain Cockburn, Lilly's expert, to the effect that, in the particular circumstances of this case, it was unlikely that Apotex would have entered the cefaclor market with Lupin 2, given the nature of the product, including its economics. In Dr. Cockburn's view (also in that of Mr. Raymond Sims, another expert for Lilly), Lupin 2 cefaclor was not a viable option in an economic sense. To explain why Apotex nevertheless ordered such a commercially non-viable product in the actual world, Dr. Cockburn explained what, in his view, was an important distinction between entering this market and remaining in it (see Exhibit RX-88, Appeal Book, vol. 28, tab 93 at pp. 8380-84; Cockburn Direct Examination at pp. 70, 93, 97, 102, Lilly's Day-Book for Re-Hearing, vol. 1, tabs 20-22, 36, Appeal Book, vol. 54, tab 228 at pp. 15553, 15547, 15554-55; Sims Cross-Examination at pp. 78-79, Lilly Day-Book for Re-Hearing, vol. 1, tab 38, Appeal Bool, vol. 54, tab 234 at p. 15957).

[37] The availability of an NIA was also important to Apotex in relying on additional and different hypotheses in the "but-for" world. In doing so, Apotex advanced a positive defence: Apotex sought to establish that it could have entered the market with Lupin 2 cefaclor well before it actually did sell such product in 1999; it could thus have captured the sales that Lilly would have lost before Apotex's actual use of Lupin 2 cefaclor began. While this defence would not absolve Apotex of liability for the infringement that actually took place, it would reduce the quantum of damages to a reasonable royalty for the period at issue.

[38] Apotex suggested various dates at which such an NIA could and would have been available. However, I will only discuss the dates argued before us: October 1997 and July 1998. These are described in Apotex's relevant outline, which was filed at the beginning of the appeal hearing (Apotex's Outline of Argument – Part III at p. 4). I understand that this outline reflects Apotex's final position on this question.

[39] Finally, with respect to royalties, the Federal Court had to contemplate a hypothetical negotiation between the parties which would have taken place at the beginning of the infringing period. Here again, the Federal Court had to consider whether or not an NIA would have been available at the relevant time, since this would have an impact on the rate of royalty.

[40] Otherwise, the Federal Court did not find it necessary to expressly deal with some of the issues raised by the parties, such as whether a true NIA (i.e. an economically viable alternative or one that did not infringe patents other than those at issue in the Liability Decision) would have been available. Considering its finding that Apotex would not have used Lupin 2 cefaclor prior to

April 2000, and that it was not established on the evidence that Lupin 2 cefaclor could have been available as of January 1997, one can understand how it was not readily apparent to the Federal Court to rule on the matter of the true NIA.

[41] While it would certainly have made our task easier had the Federal Court done so, at any rate, considering the parties' litigious behaviour, an appeal would have been unavoidable.

[42] The fact remains for this Court that many findings of fact and mixed fact and law relating to various hypothetical scenarios were effectively made by the Federal Court in this case, and we are in large part bound by them on appeal. And indeed, these findings address important issues that are relevant to the first question before us, especially as it is now well established in our Court's jurisprudence that an NIA defence can be raised by an infringer, provided that the infringer establishes that a true NIA could and would have been available to it (*Apotex Inc. v. Merck & Co., Inc.*, 2015 FCA 171 [*Lovastatin*]; see also *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161; *Apotex Inc. v. ADIR*, 2017 FCA 23; *AFD Petroleum Ltd. v. Frac Shack Inc.*, 2018 FCA 140).

[43] In other words, even though Apotex asks this Court to make the necessary inferences of fact to determine that an NIA could and would have been available to it as of October 1997, or at least by July 1998, we can only consider doing so if it also successfully establishes that the Federal Court's relevant findings of fact or mixed fact and law are tainted by a palpable and overriding error.

(2) Additional background relating to the actual world

[44] As mentioned, the reasons for the Damages Decision before us are not very detailed, and, in order to better understand them in the context of the arguments and evidence, it is important to summarize pertinent previously established or undisputed facts relating to the actual world, in addition to those listed at paragraphs 6-18 above. I thus take note of the following:

a) It is not disputed that, at all relevant times, there was no publicly known and viable alternative process to make 7-ACCA, the key intermediate compound necessary for producing cefaclor, other than the ones disclosed in the Lilly and Shionogi patents (see Liability Decision at paras. 709, 798; Liability Trial Transcript, vol. 39 at pp. 75-76, Appeal Book, vol. 80, tab 398 at p. 24227);

b) At the time that Apotex sought a compulsory licence for the patents covering cefaclor itself (1986-1988), Lilly filed an objection stating that, in order to make cefaclor, Apotex would also need a licence to make 7-ACCA. Apotex refused to seek that licence at that time – more than ten years before its entry in the market (Liability Decision at paras. 773-75);

c) In its Notice of Allegation pursuant to section 5 of the PMNOC Regulations served on Lilly on May 6, 1993, Apotex addressed all the patents listed in the form IV that was filed with Health Canada for cefaclor (this included the Lilly and the Shionogi Patents) (Liability Decision at para. 776). After the filing of Lilly's NOC application, Apotex knew that Lilly had presented expert evidence as to the importance or relevance of these patents before the Federal Court. Indeed, Simpson J.'s decision expressly references that fact (see paragraph 8 above);

d) Apotex presented expert evidence to the effect that there were no publicly known and commercially viable processes to make cefaclor other than the Lilly and Shionogi patents in the context of its own counterclaim before the Federal Court in 2008. This opinion was based on research first conducted on behalf of Apotex by Dr. Robert McClelland in 1997 or 1999 (probably 1997, considering the evidence he gave during direct examination: see Appeal Book, vol. 80, tab 401 at p. 24478, particularly the reference to the Shionogi process (Kyong-Bo cefaclor)) and again in 2003 (Liability Decision at paras. 709-10). Dr. McClelland acknowledged that anyone undertaking such research in 1985 would have come to the same conclusion;

e) Unbeknownst to the parties, Lupin had tried to design around the Lilly patents at some time in 1995, but discontinued its efforts, having concluded that the two avenues it tried would not be practically viable because of their inefficiencies and the resulting costs (see Exhibit Satpute-2, Appeal Book, vol. 69, tab 338 at pp. 20930-31);

f) In 1996, Apotex was advised by its own counsel that it would be sued for infringement if it entered the market with a cefaclor product (see para. 10 above);

g) Except for one letter in December 1996 addressed to Kyong Bo, which only dealt with the Lilly patents, Apotex did not inquire about the legality of the processes used by its suppliers before ordering and/or using the Kyong Bo and Lupin 1 cefaclor in the products it started to sell in January 1997 (see paras. 12, 13 above; Liability Decision at para. 828);

h) Before entering the market, Apotex knew that Lilly had entered into an agreement to supply Pharmascience Inc. [Pharmascience], another generic drug manufacturer and Apotex's competitor, with cefaclor products should any other generic drug manufacturer enter the market with infringing cefaclor (Exhibit TX-1684, Appeal Book, vol. 69, tab 343 at pp. 21033-86). Pharmascience, which had an NOC since 1995, did enter the market at about the same time as Apotex did in January 1997 (see Liability Trial Transcript, vol. 39 at pp. 37-39, Appeal Book, vol. 80, tab 398 at p. 24218; Facts Agreed to by the Parties at p. 3, Appeal Book, vol. 2, tab I at p. 550);

i) Apotex did not try to design around the patents at issue until years after having been advised that there were no other commercially viable processes for making cefaclor. Sometime in July 1997, Ms. Fouillade, Apotex's in-house counsel since 1996, was asked to look into the matter by Dr. Bernard Sherman, the then Chairman and Chief Executive Officer of Apotex. She concluded in September and October 1997 that both Lupin 1 and Kyong Bo cefaclor were made with processes which infringed the Lilly and Shionogi patents (Liability Decision at paras. 787-91, 831);

j) Despite Ms. Fouillade having concluded that Lupin 1 and Kyong Bo cefaclor were infringing, Apotex continued to forcefully deny any infringement of the patents before the Federal Court (Liability Decision at para. 710);

k) In her correspondence with Lupin and its representatives, Ms. Fouillade consistently noted that it was urgent to find a solution. Still, no order was placed for Lupin 2 cefaclor before March 1998 (see e.g. Exhibit Glopec-20 (Confidential), Appeal Book, vol. 57, tab 250 at p. 17173; Exhibit Glopec-23, Appeal Book, vol. 73, tab 353 at pp. 22171-73; Exhibit Glopec-26, Appeal Book, vol. 67, tab. 324 at pp. 20790-31; Exhibit Glopec-27, Appeal Book, vol. 67, tab 325 at pp. 20792-93).

l) Although Apotex had what it believed to be non-infringing cefaclor (Lupin 2 cefaclor) available to it as of June 1998, it continued to use infringing material until it had almost exhausted its stock of infringing material in 1999. No product was formulated with Lupin 2 cefaclor before December 1998;

m) Albeit in the context of Apotex's counterclaim against Lilly and Shionogi (where it alleged to have suffered damages because Shionogi had assigned its patents to Lilly in 1995), Dr. Sherman, who took all the important decisions regarding which products Apotex would put on the market, testified that in a "but-for" world where no such assignment had taken place, the "most likely scenario" would have been that Apotex

would have used cefaclor made according to the Shionogi patents (like Kyong Bo) without first obtaining a licence. This assignment was served on Apotex in January 1997 (Liability Decision at para. 750);

n) As mentioned, Lupin and Apotex entered into the 1998 Agreement for the production of 7,500 kg of Lupin 2 cefaclor. Although the Agreement does not include cefaclor's price, it was made on the basis that Apotex was willing to pay a very high premium (at least a 40% increase on the cost of Kyong Bo and Lupin 1 cefaclor, the only active pharmaceutical ingredient (API) in its products; but see Lilly's Day-Book for Re-Hearing, tab 15, Exhibit RX-142, Appeal Book, vol. 36, tab 155 at p. 10742). The prices paid were as follows: Kyong Bo cefaclor was $860.00 U.S.; Lupin 1 cefaclor was $1,050.00 U.S.; and Lupin 2 cefaclor was $1,500.00 U.S.;

o) In fact, the 646 Patent, whose teachings were among those which Lupin was bound to use at step VI of the process to produce 7-ACCA, did not expire until 2004. The infringement of this patent was not before the Federal Court in the liability phase, as this patent was not included in the action at the time of trial. Throughout this trial, Lilly's position was that the Lupin 2 process could not have been used because it was too inefficient to be commercially viable (Liability Decision at paras. 245-46);

p) During the liability phase, Dr. Sherman and Apotex always maintained that they were entitled to assume that Lupin had abided by the terms of the 1998 Agreement in using the new, allegedly non-infringing Lupin 2 process for the production of cefaclor (see e.g. Liability Decision at para. 234). Indeed, Dr. Sherman expressly said that it was not his practice to enter into a contract with a supplier, but that he found it appropriate to do so here;

q) It appears that Apotex maintained this position during the reference phase because, when cross-examined, Apotex's expert, Mr. Roy Weinstein (who was dealing with the rate of royalties), acknowledged that he was told to assume that Lupin 2 process was non-infringing (Damages Trial Transcript, vol. 82 at pp. 88-91, Appeal Book, vol. 54, tab 239 at p. 16361; Exhibit RX-207, Appeal Book, vol. 53, tab 220 at p. 15292; Damages Decision at para. 100);

r) Ultimately, for a variety of reasons (such as the higher price of Lupin 2 cefaclor, rate of exchange and amount of free goods granted by the competition, particularly Pharmascience), Apotex lost more than $5,000,000.00 on the sale of its products made using Lupin 2 cefaclor (Exhibit RX-142, Appeal Book, vol. 36, tab 155 at pp. 10739-43). There was contradictory evidence as to whether or not Apotex could have expected to incur such a loss at different points in time, including June 1998, January 1999 and April 1999. Apotex filed expert evidence to contest the calculations of Dr. Cockburn in regard to the commercial viability of products made with Lupin 2 cefaclor which were based on the actual results achieved on sales of products made with Lupin 2 cefaclor that did not start before 1999. Schedule 14 of the report of Apotex's expert included seven different scenarios (Expert Report of Andrew Harington, Appeal Book, vol. 41, tab 170, at pp. 12401-09); and

s) In any event, Apotex's main position was that such calculations would have been irrelevant to its decision to enter the market in January 1997, given that it never conducted a cost-profit analysis before entering. Dr. Sherman did not testify during the reference phase as to why it was important for Apotex to come to market with cefaclor. However, he had acknowledged at the liability phase in 2008 that in the mid and late 1990s the demand for cefaclor was in fact in decline and the drug was not a major product for Apotex (Damages Decision at paras. 12, 808). Apotex relied solely on the testimony of Mr. Gordon Fahner, who was Director of Finance at the relevant time and became Vice-President – Finance sometime in 2003, to establish that under the leadership of the late Dr. Sherman, Apotex as an organization did not conduct profit analysis for its individual products; rather, it made its business decisions (i.e. Dr. Sherman's decisions) with the objective of having the largest portfolio of products possible in mind (see Damages Trial Transcript, vol. 80 at pp. 194-96, Appeal Book, vol. 54, tab 237 at p. 16251; Damages Decision at para. 68: "as many pharmaceutical products in the marketplace as possible"). Various experts debated the application of concepts such as the "first mover effect" (timing of entry and known presence of Pharmascience) in this case as well as the economic value of the portfolio approach with respect to cefaclor.

[45] It is against this backdrop that I now turn to the issue of the NIA defence.

B. *Did the Federal Court err in finding that no NIA defence was available to Apotex?*

[46] As mentioned, the Federal Court did not have the benefit of this Court's most recent jurisprudence on the issue of the NIA defence before releasing its decision. Thus, as in *Lovastatin*, I find that the Federal Court erred when it concluded that the NIA defence was not available in Canada. However, as was also the case in *Lovastatin*, I conclude that this error is not determinative because, on the evidentiary record before it, the Federal Court could not but conclude that the defence was unavailable in this case.

(1) General principles regarding the NIA defence

[47] *Lovastatin* may well have been the first case where an NIA defence was accepted in the context of a claim for damages resulting from patent infringement (as opposed to an accounting of profit). But our Court's acceptance of the NIA defence was based on general principles of Canadian common law (see e.g. *AlliedSignal Inc. v. Du Pont Canada Inc.* (1998), 78 C.P.R. (3d) 129 at pp. 140-41 (F.C.T.D.) [*AlliedSignal*], aff'd (1999) 86 C.P.R. (3d) 324 (F.C.A.)), as they had been applied by the Supreme Court in *Monsanto Canada Inc. v. Schmeiser*, 2004 SCC 34 (see also for the discussion on the burden of proof: *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [1991] 3 S.C.R. 3).

[48] I underline the roots of our conception of the NIA defence because it is important to understand that our Court did not simply import an American law concept in a wholesale fashion. The Court in *Lovastatin* may indeed have referred to American authorities in order to better ground the concept. But one must be careful not to construe references to American jurisprudence lending support for the NIA defence as a blind incorporation of, or strict adherence to, the reasoning adopted by American courts. American courts view the purpose of their patent legislation differently, and emphasize the promotion of strong competition. Further, American statutes provide for "treble damages" (as a punitive award) when, among other things, infringement is committed with knowledge of the existing patent (see 35 U.S.C. § 284). These factors may result in a more lenient approach in the application of the NIA defence. In effect, the threat of a treble damages award certainly curtails potential abuses.

[49] With this in mind, I underscore that the objective of the NIA "defence" is to help ascertain the real value of inventions for which a patentee such as Lilly was granted a monopoly.

Inasmuch as overcompensation is inappropriate in our law, so is undercompensation. Thus, the goal is not to enable an infringer to breach the bargain made on behalf of the Canadian public when a patent is issued. Nor is the defence a means by which one can infringe at the lowest possible cost. This is particularly important to keep in mind when one assesses the rate of royalty that would apply when this defence is accepted. In my view, it is only when an appropriate rate is set that one can consider that accepting such a defence does not amount to a compulsory licence system in disguise.

[50] The rationale of just compensation underpins why the infringer bears the burden of establishing all facts required before a court considers the effect of legitimate competition on the calculation of damages resulting from infringement.

[51] Some of the facts which the infringer must establish were identified in *Lovastatin* as follows:

> **[73]** When considering the effect of legitimate competition from a defendant marketing a non-infringing alternative, a court is required to consider <u>at least</u> the following questions of fact:
>
> i) Is the alleged non-infringing alternative a true substitute and thus a real alternative?
>
> ii) Is the alleged non-infringing alternative a true alternative in the sense of being economically viable?
>
> iii) At the time of infringement, does the infringer have a sufficient supply of the non-infringing alternative to replace the non-infringing sales? Another way of framing this inquiry is could the infringer have sold the non-infringing alternative?
>
> iv) Would the infringer actually have sold the non-infringing alternative?
>
> [Emphasis added.]

[52] Notably in *Lovastatin*, Apotex, which sought to rely on the NIA defence, had conceded some principles that our Court found relevant to mention because of their general application, namely:

> 1) the real world informs our construction of the "but-for" world;
>
> 2) conduct in the real world is "very important" to what would have happened in the "but-for" world;
>
> 3) findings of fact from the liability decision are relevant to constructing the "but-for" world; and
>
> 4) "brazen" infringement in the real world makes it very difficult to prove that the defendant would have deployed the non-infringing alternative in the "but-for" world.
>
> (*Lovastatin* at para. 90)

[53] Interestingly, Apotex relied on these four principles to support its argument in the case at bar. Apotex also acknowledged at the hearing before us that the findings made by the Federal Court in the Liability Decision, including those made when rejecting its counterclaim, were relevant when constructing the "but-for" world.

(2) Application of the general principles to the case at bar

(a) *Legitimate NIA*

[54] Armed with these principles, I now turn to the very first issue to be considered by any court when determining whether an NIA defence is available: "Is the alleged NIA a true alternative to the inventions at issue?" In non-pharmaceutical cases, this is a very important question that usually turns on whether the product at issue would be considered a true substitute

by the consumer. However, in pharmaceutical cases where generic products are bioequivalents of the original product, this aspect is not an issue.

[55] Until this appeal, the lawfulness of an NIA on which a defendant was relying had never been at issue at the reference stage. That is not to say, however, that it is not an issue that may be validly raised. It goes without saying that to be a real alternative, an NIA must be lawful, that is to say, non-infringing. This applies to more than just the patent(s) in suit in the proceedings.

[56] An unusual feature of this case is that, as mentioned, it was never argued at the liability phase that the Lupin 2 process infringed the patents in suit. Indeed, Lilly always maintained that such a process could not have been used as a matter of fact: because the process was so inefficient, it could not have been used by Lupin to make the 7-ACCA required to fulfil the 1998 Agreement. Thus, the only thing the Federal Court determined in the Liability Decision is that neither the Lupin 1 process nor the Kyong Bo process were in fact used to make the cefaclor supplied under the 1998 Agreement, and that Lilly had not established that the Lupin 2 process infringed on the patents in suit (Liability Decision at paras. 228-29).

[57] Still, at the reference phase of these proceedings, Lilly argued that Apotex had failed to establish that the Lupin 2 process was a lawful process. Its argument was two-fold:

> 1) Apotex had failed to establish that the Lupin 2 process was effectively used, and that it did not infringe the patents at issue; and
>
> 2) *prima facie*, the Lupin 2 process (at Step VI) infringed the 646 Patent referred to in Appendix A to the 1998 Agreement, which was incorrectly believed to have expired.

[58] The Federal Court dealt with only the first part of this two-part argument at paragraph 61 of the Damages Decision. I agree with the Federal Court that it was not open to Lilly to seek to reopen the question of whether the Lupin 2 process infringed on the patents in suit. Such an issue had to be raised and determined at the liability stage, and the burden to do so rested on Lilly.

[59] However, it appears that the Federal Court did not find it necessary to deal with the second part of the argument in light of its findings that the NIA defence was not available in law. It also did not have to do so in the "but-for" world (causation) in light of its factual finding as to when Apotex would have entered the market.

[60] Nor did the Federal Court at the liability phase in 2008-2009 ever have to address Lilly's argument regarding whether the Lupin 2 process infringed another patent (the 646 Patent), because it did not constitute part of the allegations underlying the action. The Federal Court then simply did not have jurisdiction to determine this issue.

[61] Now, at the hearing before us, Apotex failed to provide any meaningful response to the argument regarding the Lupin 2 process and the 646 Patent even though the matter was expressly raised. Yet, knowing that Apotex's counsel rarely leave any stone unturned, I carefully reviewed Apotex's Outline of Argument – Part III, as well as its memorandum of fact and law and the written submissions before the Federal Court, to see if it had been addressed therein. It was surprising to find that this issue – which is essential to the consideration of the Lupin 2 process as legitimate competition – is only mentioned at the last bullet on the last page of the aforementioned outline. It is worth reproducing the bullet in its entirety:

> […] Lilly presented no credible basis for this purported "infringement" – Lilly rests on the evidence of Apotex's expert *economist*, Mr. Weinstein, who was asked in cross-examination to assess infringement of an organic chemistry process patent.
>
> (Apotex's Outline of Augment – Part III at p. 7)

[62] I agree that Lilly could have done more to drive the issue home; the 646 Patent itself is not even in evidence except for the cover page showing the relevant date at which it was in force. However, I do not believe that it was incumbent upon it to do so insofar as the NIA defence is concerned. Lilly did not have the burden of establishing that a process, which it believed could not possibly have been used until Mr. Satpute's testimony was accepted by the Court in the Liability Decision, in fact infringed the 646 Patent.

[63] Furthermore, I do not accept that Lilly relied solely on the evidence of Mr. Weinstein as Apotex alleges in its outline quoted above. Lilly only used the opportunity of this witness's cross-examination to point out to the Federal Court that the factual assumption on which this expert opinion was based had not been established, and that this would undermine the value of his evidence. This point was in fact accepted by the Federal Court (Damages Decision at para. 100).

[64] That said, I agree that the process described in the 1998 Agreement (Lupin 2) does, on its face, appear to infringe the 646 Patent.

[65] Again, because of another unusual circumstance of this case (namely the terms of the 1998 Agreement), the issue of the legitimacy of the Lupin 2 process was clearly at play based on

the evidentiary record before the Federal Court. Indeed, Apotex expressly dictated what process Lupin was bound to use by reference to patents which Ms. Fouillade appears to have incorrectly assumed to be all expired. Thus, as soon as it was established that the 646 Patent was still in force until 2004, the legitimacy of the process set out in Appendix A of the 1998 Agreement, which Apotex and its expert assumed to have been used, became an issue. Apotex had to explain or produce evidence explaining why, despite the reference to this unexpired patent, the NIA on which it sought to rely on was in fact lawful.

[66] Even though it appears that Apotex advised Lupin's representative that it had yet to be sued on October 1, 1997 (see Exhibit Glopec-27, Appeal Book, vol. 67, tab 325 at pp. 20792-93), it is clear from the correspondence that the 1998 Agreement was drafted by Apotex with knowledge that it would be used as part of its defence in the present proceedings. In effect, in her correspondence, Ms. Fouillade insisted that only processes covered by expired patents should be used. For example, even if the improvement patents referred to by Lupin would have increased the yield (Step III-B), she maintained in Appendix A that only the teachings of the main patent (Canadian Patent 1,056,372 or 372 Patent) could be used in the 1998 Agreement. Without cogent explanations from Apotex, it makes little sense to refer to a process patent such as the 372 Patent or 646 Patent (entitled "Deesterification to Acids") if the process covered by such patent(s) was not the one to be used.

[67] So, what exactly is meant by the reference to the "teachings" of the 646 Patent? Could it be referring to information that would not necessarily imply *de facto* infringement of the unexpired patent?

[68] Recall that Apotex strived to control precisely what steps would be used by Lupin to make 7-ACCA. It even named the reagents Lupin was authorized to use. In this context, the reference to the 646 Patent could not be considered as simply referring to unspecified general information mentioned in the said patent. The 646 Patent process covers the same chemical process that had to be performed at Step VI of the overall process leading to the 7-ACCA. *Prima facie*, this process would be infringing on this unexpired patent.

[69] Hence, in the absence of evidence as to how the reference to the 646 Patent in the Appendix would have been understood by Apotex and Lupin as referring to something other than the process covered by the said patent, the Federal Court would not have been in a position to conclude that the Lupin 2 process was established as a true alternative: a legitimate NIA.

[70] Before concluding on this issue, I ought to close the loop by noting that no inference could, in my view, be made from the fact that Lilly never sued Apotex over the 646 Patent. By the time the Liability Decision was issued, more than six years had elapsed since the Lupin 2 cefaclor was imported and used by Apotex. Before that date, Lilly believed – and probably still does – that the Lupin 2 process was not used as Apotex had alleged.

[71] Bearing this in mind, the unlawfulness of the Lupin 2 process was not Lilly's main argument. Both parties focused their efforts on the other aspects relevant to the availability of an NIA defence. I will now address those other aspects. I will first comment on the economic viability of an NIA, and then on whether, in October 1997 or July 1998, the Lupin 2 process,

instead of the infringing Kyong Bo or Lupin 1, could and would have been used by Apotex to enter the market.

(b) *Economic viability of the NIA*

[72] The economic viability of the Lupin 2 process was the subject of much debate before the Federal Court and again before us. In my view, economic viability is not something that is assessed solely from the subjective perspective of an infringer such as Apotex. But obviously, the subjective perspective of the infringer may be relevant to the question of whether the infringer "would" have used the NIA.

[73] However, as I noted earlier, the court's goal is to assess the real value of the patented invention(s). Such value cannot be assessed on a purely subjective basis. Evidently, the court must be satisfied that the NIA invoked was *objectively* an economically viable substitute at the relevant time. To say otherwise would mean that the value of a patent could be artificially reduced by an infringer who behaves in an unorthodox manner, or whose adoption of a substitute is motivated by reasons other than economic ones.

[74] Such a consideration could not be relevant to the assessment of damages under subsection 55(1) of the Patent Act. If it were, a patent would have little value, and it would be an incentive to keep one's invention secret.

[75] In *Grain Processing Corp. v. American Maize-Products Co.*, 185 F. 3d 1341 (Fed. Cir. 1999), a case on which Apotex relied heavily in *Lovastatin* and before us, the question of

whether a substitute process was available was raised in respect of a process that increased the cost by only 2.3%. In the present matter, the increased costs were raised by at least 40%, if not more (see Exhibit RX-142, Appeal Book, vol. 36, tab 155 at p. 10742).

[76] As mentioned, at the reference phase, there was contradictory evidence before the Federal Court as to what Apotex could have "expected" in terms of profitability at various dates. The best scenarios were presented by Apotex's expert, Mr. Harington, in schedule 14 of his report (Exhibit RX-157, Appeal Book, vol. 41, tab 170 at pp. 12402-09; also summarized at p. 12085). For our purposes, the most relevant scenarios are scenarios 4 (June 4, 1998) and 5 (January 1, 1999) (at pp. 12405-06).

[77] In scenario 5, it is clear that Apotex would have expected losses on all of its cefaclor products, given that the price on entry at that time was 70%, and that it could not have broken even on any of its products. In scenario 4, Apotex would have expected to lose money on its 500 mg capsules and 375 mg suspensions, and pursuant to Mr. Harington's figures, it would barely have broken even on its 250 mg capsules and suspensions.

[78] I note, however, that, in this last scenario, the regulated price used by Mr. Harington was disputed. He used a price pegged at 75% of the original's price, whereas in May 1998, an amendment to the applicable regulations had been published in The Ontario Gazette setting the price of the first generic in the market at 60% and, later on, in November 1998, at 70%. Mr. Fahner and Apotex's experts testified that in June 1998 Apotex could nevertheless have expected to be allowed 75%. Importantly, none of these calculations included any free goods. Although

there was a dispute as to the amount of free goods that could be expected versus those actually introduced into the market because of Pharmascience's aggressive marketing, Mr. Fahner did not specify what quantity of free goods would be customary. Thus, even on the best scenario, it is unlikely that products made with Lupin 2 cefaclor would have been viewed as commercially viable *per se*. I understand that most if not all the experts agreed that, unless there were other valid economic reasons to market this product, a rational generic drug manufacturer entering a market where this drug had not been genericized – and where another three years remained before one of the patented processes in suit could be used – would not view the Lupin 2 cefaclor as commercially viable.

[79] In effect, when its reasons are read in the context of the evidentiary record, it is implicit that the Federal Court was not satisfied that Apotex's decision could have been based on the economic viability of its products made with Lupin 2 cefaclor. It just was not an attractive substitute. Instead, the Federal Court referred to the explanation given by Mr. Fahner to determine if, in the "but-for" world, there would be enough incentive for Apotex to enter the market using Lupin 2 cefaclor. As mentioned earlier, the Federal Court found that this was not so, and found – as a fact – that Apotex would not have entered the market on that basis.

[80] Finally, the only thoroughly objective evidence regarding the commercial viability of the Lupin 2 process stems from Lupin itself. As a manufacturer and international supplier of cefaclor, Lupin had tried the routes which Ms. Fouillade included in the 1998 Agreement at Step V-A and B, and concluded that they were not "practical and feasible" (Exhibit Satpute-2, Appeal Book, vol. 57, tab 254 at p. 17183). I note that this was so even when Lupin did not include the

additional 10% loss in yield at Step III, on which Ms. Fouillade insisted by referring to the 372 Patent in the 1998 Agreement.

[81] In these circumstances, I am not satisfied that there was sufficient evidence for the Federal Court to conclude that Lupin 2 cefaclor was an objectively commercially viable substitute. It follows that the Federal Court would not have been justified in considering its effects in the context of an NIA defence.

(3) Could a defence based on Lupin 2 be otherwise available as a matter of fact?

[82] Assuming for the purpose of this exercise that the Lupin 2 process was lawful as well as an economically viable substitute, I turn to the issue of whether an NIA could have been available in October 1997, the first date put forth by Apotex.

[83] The Federal Court found that when infringement first started, it was not established on the evidence that the Lupin 2 process "could" have been used to provide the amount of material necessary for Apotex to enter the market (Damages Decision para. 100). It also noted that, at the relevant time, Lupin 2 was not known to either party (Damages Decision at para. 102).

[84] First, Apotex has not persuaded me that the Federal Court made a palpable and overriding error in concluding as it did. Second, I am satisfied that the evidentiary record was also insufficient for the Federal Court to conclude that Lupin could have produced the Lupin 2 cefaclor required for Apotex to enter the market in October 1997.

[85] There was little, if any evidence that addressed the actual capacity of Lupin to produce the required amount of cefaclor in 1996 and 1997. There were only two witnesses from Lupin, the only supplier from which any evidence was adduced as to the ability of using a process other than the patented ones. Both were heard during the liability trial. Mr. Rejeev Patil worked in the regulatory department at Lupin, and had no knowledge or information with respect to this issue (Liability Decision at paras. 44-45). Mr. Vilas Satpute worked at the relevant time (1996 to 1999) at the Lupin facilities in Ankleshwai, where four compounds were produced – ethambutol, vitamin B-6 and two intermediate compounds known as 7-ADCA and 7-ACCA. As stated, 7-ACCA was the key intermediate compound to make cefaclor (Liability Decision at paras. 46-48).

[86] As Apotex included in its compendium some extracts of Mr. Satpute's testimony to support its position, I have re-read the transcripts of his testimony, which I had heard first-hand during the liability phase of this proceeding. My review confirms that Mr. Satpute had no real memory of what quantities of 7-ACCA were actually produced on-site between 1996 and 1999. He only remembered Apotex's order that required about 6,000 kg of 7-ACCA (to produce about 7,500 kg of Lupin 2 cefaclor) because it was one of the biggest orders Lupin had ever received, and because it required a change in the process for making 7-ACCA, before and after that order was completed. He only had some vague memory of some batches being made before March 13, 1998, either in January or February.

[87] It was thus open to the Federal Court to conclude that this evidence was insufficient to establish that Lupin could have produced Lupin 2 cefaclor much earlier than it actually did. There was no evidence as to the number of orders on hand at the time and the capacity of the

plant to produce both for Apotex and for its other clients. This is especially a concern if a different process would have been required to produce the 7-ACCA on order for other customers (the Lupin 2 process was to be used only for Apotex; see also Liability Decision at para. 233).

[88] Furthermore, cefaclor itself was manufactured at a different Lupin plant: the Mandideep facility, where four APIs were manufactured. There was no evidence whatsoever as to this plant's level of occupation or its capacity to produce an additional 7500 kg in 1996 and 1997. A finding in favour of Apotex would require making an inference that the Federal Court did not appear to have been willing to make. It is certainly not one that I believe could be made on the basis of this record and the representations made before us.

[89] Apotex also argued that the NIA could and would have been available to it as of July 1998. This is essentially the same period that the Federal Court reviewed under the heading "V-When would Apotex have entered the Market" (see particularly Damages Decision at paras. 59, 63). Indeed, the reference to July 1998 is simply a refinement of Apotex's argument submitted before the Federal Court (June 1998). It takes into account that, in addition to having received some cefaclor at that time, Apotex would have required an additional three weeks to formulate its product in order to enter the market.

[90] That said, I agree that, based on the quantities of Lupin 2 cefaclor produced by Lupin in the actual world, it would have been open to the Federal Court, as the trier of fact, to conclude that Apotex had met its burden regarding its capacity to obtain Lupin 2 cefaclor to enter the market (i.e. "could" have done so by July 1998). However, as mentioned earlier, the Federal

Court found as a fact that Apotex "would" not have entered the market at that time with Lupin 2 cefaclor (Damages Decision at para. 70).

[91] I have not been persuaded that this essential finding of fact, which will be discussed in more detail in the next section of my reasons, is tainted by a reviewable error. This is especially so considering that it was undisputed that Apotex had the burden to establish this preliminary fact in order to benefit from an NIA defence.

[92] In conclusion, I find that the Federal Court was ultimately correct to conclude that the NIA defence was not available to Apotex in this case.

C. *Did the Federal Court err in determining when Apotex would have entered the market?*

[93] As mentioned earlier, the Federal Court made it very clear that its task was to determine the amount of all the damages sustained by the patentee by reason of the infringement. This is in effect what subsection 55(1) of the Patent Act requires – no more, no less (Damages Decision at paras. 11, 16).

[94] To do so, the Federal Court used the approach set out by the Supreme Court in *Clements* and appropriately referred to the "but-for" world as a legal fiction. As noted by the Federal Court, it is in this fictional world that the Court had to determine the following question: "But for the infringing product being on the market, what would the patentee's position have been?" (Damages Decision at para. 20). The Federal Court made the most significant difference of opinion as to the specific characteristics of this "but-for" world equally clear: the debate centred

on whether Apotex was entitled to raise an NIA defence in order to reduce the loss in respect of sales, even where the infringer had not employed the NIA in the actual world (Damages Decision at par. 21).

[95] As we know, the Court rejected that defence. Hence, it needed only to apply the general principles it had previously set out.

[96] In regard to the burden of proof and the approach to be taken in doing so, the Federal Court stated at paragraph 33:

> Apotex is correct in saying that Lilly must prove the causal connection between its lost sales and the infringing sales made by Apotex. It must prove on the balance of probabilities that but for the sales of the infringing product, it would have made additional sales; and it must prove the number of those additional sales and the profit that it would have realized on them. I also agree with the submission of Apotex that damages for lost profits have been denied where the causal link between the infringement and the lost sales has not been established…

[97] As I stated earlier, the Federal Court could have described in more detail all the evidence that was before it regarding the actual world, as well as the expert evidence produced in relation to the "but-for" world. Instead, the Federal Court focused its attention on what it considered to be more determinative issues. With this in mind, I find it appropriate to quote the following statements of our Court in *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161, which are particularly apposite:

> **[68]** Faced with an allegation that a first-instance court did not apply proper principles, an appellate court must assess what the first-instance court did by reviewing in a holistic, organic and fair way the reasons offered by the court against the record it was considering. Often first-instance courts do not describe the principles that bear upon a case in a perfectly precise or encyclopedic way. Yet, in many such cases, a holistic, organic and fair review of their reasons against the record shows they brought to bear all correct principles.

> **[69]** It must be remembered that judges' reasons—particularly after long complex trials involving many issues—are often the product of synthesis and distillation. When it comes time to draft reasons in a complex case, trial judges "are not trying to draft an encyclopedia memorializing every last [relevant] morsel." Rather, they are trying to "distill and synthesize masses of information, separating the wheat from the chaff," in the end "expressing only the most important…findings and justifications for them": *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 at para. 50.

[98] With the objective of performing a holistic, organic and fair review of the Federal Court's reasons, my reading of the Damages Decision indicates that the Federal Court accepted Lilly's theory and expert evidence in deciding that entering a non-genericized market is not the same as deciding to remain in a market that has *already* been genericized (Damages Decision at para. 63).

[99] To my mind, it is also clear that, based on the weight it gave to the evidence in the record regarding Apotex's actual behaviour before it entered the market in January 1997, the Federal Court felt that more compelling evidence would have been required from Apotex to convince it that Apotex would have actually developed the Lupin 2 process before it entered into the market in June 1998, as opposed to January 1997.

[100] As noted by the Federal Court, when Apotex made the decision to enter the market in January 1997, it was aware, and indeed should have been mindful of the statement made by Simpson J. in her 1995 NOC decision (see para. 8 above). Furthermore, there was evidence that Apotex was not looking to secure a non-infringing supply source and that it was not really interested in doing so at that stage (Damages Decision at paras. 66-67).

[101] As referred to earlier, Apotex's argument relied on what did happen in the actual world, but only insofar as what happened after its infringement occurred. By then, the genericization of the cefaclor market was well underway and competition with Pharmascience was fierce. In this context, the Federal Court appears to have given little weight to what Apotex did between July 1997 (which marks the beginning of Ms. Fouillade's inquiries) and March 1998. This is so because it accepted that the steps taken toward the eventual decision to order Lupin 2 cefaclor in March 1998, as well as the decision itself, were not a proper proxy for what would have happened in the "but-for" world. Again, for the Federal Court, the decision to maintain one's place in this market was not the same as the decision to enter it. The Federal Court found, as a fact, that Apotex did have an incentive during this timeframe to find a non-infringing alternative, but that this incentive did not exist when it had actually entered the market in 1997 (Damages Decision at para. 64). It is in that context that the Federal Court was looking for persuasive evidence from Apotex to the effect that, had it not used the infringing process in 1997, it would have sought out a non-infringing process *before* June 1998 (Damages Decision at para. 65). The Federal Court found that there was no such persuasive evidence regarding whether Apotex had the desire to enter the market as opposed to remaining in it through lawful means (Damages Decision at para. 68).

[102] It is worth reproducing the part of paragraph 68 of the Damages Decision which deals with Apotex's evidence that it was not motivated by the profitability (and was thus not influenced by the non-profitability) of its cefaclor products:

> […] Apotex offered evidence that it does not conduct a profitability analysis on its individual products before marketing them, so entering the market with a legal cefaclor product could not have been motivated by any direct financial incentive. Other than its general desire to have as many pharmaceutical products in the

> marketplace as possible, it offered no evidence that its wish to add cefaclor to its portfolio would have prompted it to seek out a non-infringing method prior to patent expiry.
>
> [Emphasis added.]

[103] I ought to mention that, before us, Apotex argued that the Federal Court accepted Mr. Fahner's evidence (to the effect that Apotex simply sought to expand its portfolio of products) as evidence of Apotex's only motivation in January 1997 or anytime thereafter. I cannot agree that this is so. Mr. Fahner, who was Director of Finance at the relevant time, was not involved in the actual decision to enter the cefaclor market and later to remain in it. He testified as to the general business approach taken by Apotex as an organization. Surely, if the profitability of individual products was never a goal, Apotex's entire portfolio could be worth nothing. We know that this could not be the case. This raises the question as to why Apotex emphasized its cefaclor business, given that the product was at the end of its success cycle and that three years still remained before the patented processes could be (lawfully) used.

[104] In my view, the Federal Court does not speak to the weight it gave to the evidence presented in regard to Apotex's motivations or business rationale; nor does it say whether the evidence was even credible. Rather, I understand the Federal Court to simply say that, even if it were accepted, this evidence does not go to whether Apotex's general business approach would have prompted Apotex to seek out a non-infringing method.

[105] If one takes this evidence as establishing Dr. Sherman's actual motivation when he made the decision to enter the market in January 1997, it certainly was not sufficient to prompt him to seek a non-infringing method before doing so.

[106] Apotex, moreover, argued that the Federal Court made an extricable error by reversing and elevating the burden of proof. In its view, the Federal Court erred by incorrectly seeking persuasive evidence from Apotex when the burden should have rested on Lilly.

[107] Apotex also submitted that the Federal Court made palpable and overriding errors by: 1) giving insufficient weight to Apotex's conduct from September 1997 to June 1998; and 2) failing to properly consider all the evidence it presented. It states that the Federal Court had no basis in the evidence to support the distinction made between a decision to enter and a decision to remain in the market in the particular circumstances of this case. Relying mostly on the evidence of Mr. Fahner and Dr. Aidan Hollis, Apotex argues that, but for its fundamental error in respect of the burden of proof, the Federal Court could only have concluded that Apotex would have entered the market in June 1998 with Lupin 2 cefaclor.

[108] I have not been persuaded that the Federal Court made an extricable error of law. I agree that, when read on its own, the phrase "the burden remains on Apotex to prove on the balance of probability that it would have come to market with non-infringing cefaclor prior to the expiry of the patent" seems problematic (Damages Decision at para. 62). But these words have to be read together with the Federal Court's express mention that Lilly *did* in fact bear the burden of establishing its loss in the "but-for" world (causation). The problem lies with the structure of the relevant portion of these reasons rather than its substance. It would have been clearer for the Federal Court to restate that the burden rested on Lilly, and that it accepted Lilly's view and evidence regarding whether it would have been the sole player in the "but-for" world's cefaclor market (Damages Decision at paras. 63-64, 71). It is then that the burden shifted to Apotex to

establish that it would have come to (entered) market in June 1998, a time at which it did not in fact enter the market with Lupin 2 cefaclor (in the actual world).

[109] Additionally, in my view, the issue of who had the burden in the "but-for" world's framework of causation could not have played any significant role once the Court accepted as a fact that the decision to enter the market was different from the one taken by Apotex when it entered into the 1998 Agreement and remained in the market with Lupin 2 cefaclor at some point in 1999. This is a fact that the Federal Court clearly accepted.

[110] I now turn to the next argument, which directly challenges this last finding. I have carefully considered all the arguments and evidence put forth by Apotex in the many pages of its outline (Part II) devoted to establishing palpable and overriding errors by the trier of fact. I have also considered the evidence referred to by Lilly. Of course, this evidence was considered while keeping in mind the factual background referred to in my reasons and reflected in the Liability Decision. I have come to the conclusion that Apotex is simply asking us to reweigh all the evidence and become the trier of fact. It is worth repeating that this is not our role, and I am fully satisfied that there was sufficient evidence supporting the Federal Court's findings of fact.

[111] I note that Apotex included in its outline an argument that it did not submit to the Federal Court. According to Apotex, the Federal Court should have considered that, when Apotex added its suspension products in 1998, it in fact made a decision akin to a decision to enter the market. One could hardly fault the Federal Court for not expressly engaging with this argument given that it had not been presented to it. As mentioned recently in another patent case, *Bombardier*

Recreational Products Inc. v. Arctic Cat, Inc., 2018 FCA 172 at paragraph 94, a party must put their best foot forward before the trier of fact; it is inopportune to formulate fresh views of the evidence on appeal.

[112] I now come to Apotex's last argument, which it also did not make as such before the Federal Court, except for the portion grounded on the language of the Liability Decision. In Apotex's view, it is an error of law to award damages for sales displaced by non-infringing products because such sales are beyond the scope of the Patent Act, are too remote, and are not contemplated in the Liability Decision.

[113] I am unmoved by Apotex's attempt to characterize the damages granted in respect of certain sales as damages resulting from non-infringing acts. As mentioned above, the Federal Court correctly set out its task as identifying the loss suffered by the patentee by reason of the infringement, and its conclusions are meant to represent all the damages suffered by reason of the infringement within the meaning of subsection 55(1) of the Patent Act.

[114] I understand Apotex's strategy insofar as the characterization of this argument is concerned; i.e. it was meant to provoke the natural reaction of any patent law jurist to forcefully defend anyone's right to use non-infringing products before or after the expiry of a patent. But once the initial, almost emotional reaction wanes, all these jurists will agree (including those representing Apotex) that, in Canada, there are instances where legal sales are indeed captured by damages because they result from illegal sales. In effect, the loss of certain sales can be claimed as a loss within the meaning of subsection 55(1) of the Patent Act – even if they are

sales of non-infringing products (the ramp-up or springboard effect) or sales of non-infringing components of products – where the court finds that, as a fact, those lost sales arose as a result of the sales of infringing products or because of infringing components (see e.g. *Colonial Fastener Co. Ltd. v. Lighting Fastener Co. Ltd.*, [1937] S.C.R. 36 at p. 41; *Beloit Canada Ltd. v. Valmet-Dominion Inc.*(1997), 73 C.P.R. (3d) 321 at p. 366 (F.C.A.); *Bourgault Industries Ltd. v. Flexi-Coil Ltd.* (1998), 80 C.P.R. (3d) 1 at para. 183 (F.C.T.D.), aff'd (1999) 86 C.P.R. (3d) 221 (F.C.A.), leave to appeal to S.C.C. refused, 27273 (March 23, 2000); *Jay-Lor International Inc. v. Penta Farm Systems Ltd.*, 2007 FC 358 at para. 198; *Merck & Co., Inc. v. Apotex Inc.*, 2013 FC 751 at paras. 200-05 [*Merck*], aff'd 2015 FCA 171, leave to appeal to S.C.C. refused, 36655 (April 14, 2016)). There is no absolute bar in Canada with respect to damages for sales of non-infringing products or components.

[115] As mentioned, Apotex does not dispute that this is so, but it nonetheless seeks to distinguish the cases cited above by saying that they were consistent with the principle of remoteness, whereas the present case is not.

[116] At the hearing before us, Apotex focused particularly on an American case: *DSU Med. Corp. v. JMS Co., Ltd.*, 296 F. Supp. 2d 1140 (N.D. Cal. 2003) [*DSU*], affirmed in the appellate decision affirming the final trial decision, including the evidentiary rulings, 471 F. 3d 1293 (C.A. Fed. Cir. 2006).

[117] I note that Apotex acknowledged that, despite its exhaustive search of American case law, *DSU* was the only piece of jurisprudence that it could find to support its view. It was agreed that this case had never been referred to or cited for the specific proposition advanced by Apotex.

[118] In *DSU*, the U.S. District Court declared inadmissible an expert opinion because the proffered methodology requiring *inter alia* "hypothesized terms in hypothesized contracts was not grounded on an established legal principle and was far too remote factually to be within the line drawn for legally compensable patent injury". It found that a future long-term contract, which expressly contemplated the purchase of a true non-infringing substitute (another type of injection needle), could not result in a compensable loss.

[119] In Apotex's view, the same line should be drawn here as a matter of policy. According to it, the Federal Court should have excluded all sales lost to sales of Lupin 2 cefaclor products on the basis of their being too remote to be compensable.

[120] But, as noted earlier at paragraph 112, Apotex never raised any issue relating to remoteness before the Federal Court. Instead, it relied on the fact that, in the Liability Decision, the Federal Court referred to sales *directly* lost as a result of Apotex's infringement. It underlined that, in a similar situation which prevailed in *Merck*, the Federal Court had set aside all non-infringing sales, stating that the matter had been dealt with at the liability stage (see *Merck* at para. 117).

[121] The Federal Court reviewed this argument at paragraph 15 of its reasons. I agree that the argument based on a literal interpretation of the wording used in the Liability Decision (see para. 652) has no merit. The Federal Court at the liability stage did not have jurisdiction to restrict the scope of the damages set out at subsection 55(1) of the Patent Act. It was simply not its task. The words used had to be construed in the context of what the Court had to decide and the fact that it was left to the reference stage to determine what sales were lost by reason of the infringement. I simply cannot accept the interpretation proposed by Apotex.

[122] That said, the Federal Court is presumed to be fully cognizant of the legal principles applicable to the assessment of damages in patent infringement actions. Indeed, here, it is evident that it was so cognizant. For example, the Federal Court expressly referred to page 452 of a leading British case, *Gerber Garment Technology, Inc. v. Lectra Systems Ltd.*, [1997] R.P.C. 443 (C.A. Civ.) [*Gerber*], which sets out the principles that also apply in Canada, including that of remoteness. *Gerber* is a well-established authority that has been referred to in legal doctrine and case law. It expressly deals with convoyed goods (*Gerber* at pp. 453-55) which are also accepted in Canada as potential damages resulting from the infringement despite the fact that they are not *per se* within the monopoly granted by the patent.

[123] In patent cases, especially those in the pharmaceutical field, foreseeability and, more generally, remoteness, are rarely an issue. Thus, when remoteness is an issue, it should be raised as soon as possible. Otherwise, one could conclude that this was not a live issue or that the argument was waived.

[124] Furthermore, inasmuch as remoteness involves a question of law, it is informed by and intrinsically linked to the facts of each case. The legal conclusion is dependent on the court's findings of fact. It is those facts that help determine how close to the centre the claimed loss falls inside the ripple effects of the wrongful conduct.

[125] To my mind, the effect here (considering that no sale of Lupin 2 product would have occurred before July 2000) is direct and well within the bounds of the wrongful conduct's consequences.

[126] Again, I highlight that the circumstances of this case are quite singular. This is why I stated at the very beginning of my reasons that, in my view, it would be unwise to attempt to draw a line in the sand and define a policy more precise than that already developed by the Supreme Court. Therefore, I do not intend to comment further on *DSU,* for I do not think that this case should be relied on to solve the problem before us.

[127] In the unusual circumstances of this case, I cannot conclude that the Federal Court erred by granting damages that are too remote to be compensable. Considering the Federal Court's findings of fact, the granting of damages for those sales effectively lost by reason of the infringement was fair and proportionate with regard to the wrongful conduct.

D. *Did the Federal Court err in determining the reasonable royalty rate?*

[128] I now turn to the issue regarding the royalty rate.

[129] It appears from the post-trial computation provided to the Federal Court (Appeal Book, vol. 83, tab 418) that Lilly was granted royalties on 1,147 kg of bulk cefaclor at the rate of $1,500 CAN/kg, amounting to a total royalty award of $1,720,000.00. The total award was based on the Federal Court's acceptance of calculations by Mr. Harington, the forensic accounting expert presented by Apotex, regarding the amount of cefaclor which would be subject to a royalty. This amount was composed of the total volume of infringing material imported and accepted by Apotex prior to April 19, 2000, minus the deductions made by Mr. Harington in his report, such as product allotted to experimental use (187 kg) (see Exhibit RX-157, Appeal Book, vol. 41, tab 170 at p. 12068).

[130] Having reviewed Mr. Harington's report, it is not clear to me what the material subject to royalties would exactly encompass. According to Apotex's representations at the hearing before us, this amount would include 344 kg of cefaclor exported by Apotex, as well as cefaclor imported but somehow never accounted for as a lost sale because of wastage and other reasons, many of which remain unclear. Nonetheless, I do not find it relevant to comment any further on the debate that took place before us in that respect, as it is unnecessary for a determination of this appeal (Appeal Book, vol. 83, tab 418 at p. 25572 (confidential)).

[131] As mentioned, the parties were in agreement – and this was well understood by the Federal Court – that a patentee is entitled to a reasonable royalty in regard to sales made by the infringer that the patentee would not have made. In that respect, the statutory tort created pursuant to section 55 of the Patent Act is akin to the tort of trespass: even if the owner of the property (here the incorporeal intellectual property established by the granting of the patent) may

not be able to establish that it actually suffered a loss, it is entitled to a form of compensation sometimes referred to as a user fee (see e.g. *Stoke-on-Trent City Council v. W & J Wass Ltd.*, [1988] 3 All ER 394 at pp. 398-99 (C.A. Civ.)).

[132] It is in the context of determining the reasonable royalty rate that a court needs to contemplate fictional negotiations between the parties. The fictional licensing negotiation, which to some extent mimics the real world negotiations, is a one-time negotiation that takes place before the first act of infringement (*Merck* at para. 157).

[133] Apotex argued that, since the negotiation is meant to apply to infringing material that would not have resulted in sales by Lilly, the Court should consider the date of the first infringement to which such royalty would apply, as opposed to the date of the very first act of infringement. At the hearing before us, when asked to find and confirm what date was actually relevant in its view, Apotex acknowledged that the first sale to which the royalty should apply was in January 1997. This is also the period when Apotex first entered the market and made its first sale. There is thus no need to discuss the issue further.

[134] To construct the hypothetical one-time negotiation, it is usually necessary to consider licencing practices and methodologies that are commonly accepted and applied based on the evidence adduced. Though some methodologies have been preferred in different cases, there is no single correct methodology, and the choice of one in particular depends on the specific circumstances of the case and the evidence before the court (see e.g. *General Tire and Rubber Co. v. Firestone Tyre and Rubber Co. Ltd.*, [1975] 2 All ER 173 at pp. 178-80 (H.L.); see also

AlliedSignal at para. 203). It is for this reason that it is not persuasive to argue that the Federal Court erred in law because it did not adopt the same methodology used in another case.

[135] In the present matter, both sides presented expert evidence. Apotex relied on Mr. Roy Weinstein, and Lilly, on Mr. Raymond S. Sims. Mr. Harington's role was more limited, consisting mainly of applying the rate suggested by Mr. Weinstein to the quantities as well as the other calculations of the loss made in his report (see Exhibit RX-157, Appeal Book, vol. 41, tab 170 at p. 12067).

[136] Further, Apotex points to what it qualifies as a fundamental error in the Federal Court's analysis. It argues that the Federal Court did not imbue the parties to the hypothetical negotiations with the knowledge that they were negotiating over infringing sales which Lilly would never make (Apotex's Outline of Argument – Part IV at p. 4). In its view, the fictional negotiation should reflect the fact that an NIA was available to Apotex, such that Lilly would have understood that it was granting a licence to Apotex to make sales of cefaclor that Lilly would not have otherwise made.

[137] I do not agree that the Federal Court made an extricable legal error. Indeed, it is clear from paragraph 99 of the Federal Court's reasons that it knew that it had to consider all relevant facts and circumstances including "the availability of alternatives to the patented process".

[138] Conversely, the Federal Court's ultimate conclusions were based on its evaluation of the evidence before it, including that of Apotex's expert, Mr. Weinstein. At paragraphs 99 and 101

of its reasons, the Federal Court noted that Mr. Weinstein's approach was too simplistic and that it did not take into consideration all the relevant facts and circumstances of the situation at hand. It also rejected this expert opinion on the basis that its conclusion assumed that an NIA was available as of January 1997. As mentioned earlier, the Federal Court was not satisfied that it had been established that such an NIA "could" have been available at that time.

[139] In fact, on the evidentiary record before it, the Federal Court could not have found that Lupin could produce the required amount of Lupin 2 cefaclor at any time before Apotex entered the market. There was simply no evidence in that respect.

[140] Hence, there is nothing that would justify our Court interfering with the Federal Court's assessment of Mr. Weinstein's evidence. Here again, and for reasons already explained in paragraphs 84-91 above, Apotex has not established that the Federal Court made a palpable and overriding error in reaching its conclusion with respect to the capacity of Lupin to make Lupin 2 cefaclor as of January 1997.

[141] The other arguments raised by Apotex in regard to the royalty rate itself all concern the fact that, in Apotex's view, the amount of the royalty does not make economic sense. Essentially, Apotex invites us to reweigh the expert evidence as well as the other evidence that was before the Federal Court. Needless to say – yet again – it is certainly not our Court's role to do so.

[142] As said before, the exercise performed by the Federal Court in order to reconstruct a hypothetical negotiation does not need to be perfect. Indeed, damages in infringement cases are

notoriously difficult to compute; this is particularly so in the formulation of "but-for" worlds which include more than one hypothetical scenario. It is in this context that, to quote a decision of the House of Lords in an early twentieth century patent case, achieving restoration by way of compensation through "the exercise of a sound imagination and the practice of the broad axe" becomes appropriate (*Watson, Laidlaw & Co. Ltd. v. Pott, Cassels and Williamson* (1914), 31 R.P.C. 104 at p. 118 (H.L.); see also this Court's endorsement of the "broad axe" principle in *Teva Canada Limited v. Janssen Inc.*, 2018 FCA 33 at paras. 32-36, leave to appeal to S.C.C. refused, 38033 (November 11, 2018)).

[143] With this in mind, I have not been persuaded that it was not open to the Federal Court to reach the conclusion that it did in the special circumstances of this case. The rate chosen was indeed high, but there was no NIA available at the relevant time, and the premium Apotex appeared to be ready to pay when it ordered Lupin 2 cefaclor in the actual world was equally very high. There was no evidence that Apotex had even tried to negotiate in order to reduce the amount of this premium after it was first suggested by Lupin.

E. *Did the Federal Court err when it held that Lilly was entitled to interest as damages?*

[144] I now tackle the last issue, relating to the granting of interest as a head of damages. As I will explain, this issue was incorrectly decided by the Federal Court. In particular, the Federal Court erred by relying on a presumption that relieved Lilly from proving its loss regarding compound interest *per se*.

(1) Statutory framework

[145] Before dealing with the arguments before us, it is useful to recall the interplay of section 36 of the FC Act and subsection 55(1) of the Patent Act in order to understand the distinction between the findings relating to interest in the Liability Decision and those in the Damages Decision. Subsection 36(2) and paragraphs 36(4)(*b*) and (*f*) of the FC Act, as well as subsection 55(1) of the Patent Act are reproduced in the annex to these reasons.

[146] Section 36 of the FC Act deals with the awarding of prejudgment interest by the Federal Court. Subsection 36(2) governs prejudgment interest awarded for a cause of action arising, as in this case, in more than one province or outside a province. For its part, subsection 36(5) of the FC Act confers discretion on the Federal Court to, "if it considers it just to do so, having regard to changes in market interest rates, the conduct of the proceedings or any other relevant consideration, disallow interest or allow interest". However, subsection 36(4) sets out limitations and circumstances in which interest shall not be awarded under subsection 36(2). Particularly, paragraph 36(4)(*b*) provides that a party is entitled to simple rather than compound interest (*Apotex Inc. v. Merck & Co.*, 2006 FCA 323 at paras. 137-144). Paragraph 36(4)(*f*) provides that "interest shall not be awarded […] where interest is payable by a right other than under this section".

[147] These provisions are not unusual. They are almost identical to those found in the various statutes applicable to other courts in Canada, the United Kingdom and Australia. Such provisions were at play in all the cases to which I will refer in my analysis, such as: *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43 [*Bank of America*]; *Hungerfords v. Walker*, [1989] HCA 8 [*Hungerfords*]; and *Sempra Metals Ltd. (formerly Metallgesellschaft Ltd.) v. Inland*

Revenue Commissioners, [2007] UKHL 34 [*Sempra*]. As noted in this case law and in the Liability Decision, these provisions are not considered impediments to the granting of compound interest when faced with breach of contract or tort (see e.g. *Sempra* at para. 100; *Parabola Investments Ltd. v. Browallia Cal Ltd.*, [2010] EWCA Civ 486 at para. 54). The interest thus becomes part of the total damages awarded under common law, or, as in this case, under subsection 55(1) of the Patent Act.

[148] At the liability phase of Lilly's action for infringement, the Federal Court was not tasked with assessing the damages; in effect, even Lilly's right to elect its form of compensation was contested. Rather, the arguments focused on Lilly's substantive right to seek compound interest *per se*. However, it was not disputed that interest, compound or otherwise, was available in the context of an accounting of profit (Liability Decision at p. 325, para. 5).

[149] In the context of a bifurcated proceeding, unless it is agreed that the discretion under subsection 36(2) is to be exercised at the reference stage, the Court must exercise this discretion at the liability stage without knowing whether paragraph 36(4)(*b*) applies, as the Court does not know if interest will be awarded as damages. Thus, the Federal Court in the Liability Decision had to at least determine if it was possible at law for interest as damages to be granted in this matter (paragraph 36(4)(*f*)). It was satisfied that, where full compensation requires an award of compound interest under subsection 55(1) (claim for damages), it was open to the Federal Court to include such an award in the Damages Decision.

[150] Thus, when the Federal Court exercised the discretion under subsection 36(2), the award of prejudgment interest on the award of damages (if elected) in the Liability Decision (at p. 325, para. 4) was expressly said not to apply if Lilly was awarded any other interest as part of its damages at the reference stage.

[151] The Liability Decision was not reversed on appeal and is final. In light of this, in my view, it was not open to Apotex to argue that subsection 55(1) of the Patent Act does not allow for the granting of compound interest.

[152] Thus, in the Damages Decision before us under appeal, the Federal Court had to assess whether full compensation required an award of interest as damages arising from the wrongful conduct at issue. Although the Federal Court could conclude that no further interest award was in fact necessary to fully compensate Lilly, it was not limited in any way to award any interest (simple or compound) it felt appropriate on the evidence before it.

(2) The award of interest

[153] To address the aforementioned issue, evidence was presented to the Federal Court in an attempt to justify the claim for interest as damages: two factual witnesses testified for Lilly and expert evidence on both sides (reports and testimonies) was presented, along with voluminous financial data (such as Form 10-Ks filed with the U.S. Securities and Exchange Commission, as well as financial statements). Had the Federal Court granted compound interest as damages solely on the basis of its assessment of the above-mentioned evidence, Apotex may have had a

difficult task to establish that our Court should intervene, as it would have had to persuade us that the Federal Court's assessment was tainted by a palpable and overriding error.

[154] However, this is not what happened.

[155] First, the Federal Court began by stating that, in order to establish Lilly's right to compound interest, it was not required to prove exactly what use it would have made of the profits lost as a result of the infringer's actions (Damages Decision at para. 118). But after adopting a passage from S.M. Waddams in *The Law of Damages*, 3rd ed. (Aurora, Ont.: Canada Law Book, 1997, as cited at paragraph 37 of *Bank of America*), which indicated that there is no reason why, in principle, compound interest should not be awarded, the Federal Court went on to say:

> I would go further and say that in today's world, there is a presumption that a plaintiff would have generated compound interest on the funds otherwise owed to it, and also that the defendant did so during the period in which it withheld the funds.
>
> [Emphasis added.]

[156] I agree with Apotex: this is not the state of the law in Canada, or, for that matter, in other commonwealth countries such as the United Kingdom, Australia or New Zealand.

[157] There may well be a presumption in some cases where equity applies: see e.g. *Whitefish Lake Band of Indians v. Canada (Attorney General)*, 2007 ONCA 744 at paragraph 49. But even if it were so, common law clearly differs from equity on this point. Neither *Bank of America* nor *Sempra* – nor any other case in Canada or elsewhere – has alluded to such a general presumption

regarding compound interest. This is so whether such interest is simply reflecting the time value of money owed or intended to compensate a specific opportunity lost.

[158] On the contrary, it appears clearly from *Bank of America* at paragraphs 53-55 and *Sempra* at paragraphs 94-97, as well as in the jurisprudence before us applying those two cases, that a loss of interest must be proved in the same way as any other form of loss or damage.

[159] The Federal Court may have felt, in view of the numerous statements by courts – notably the highest courts in Canada, the United Kingdom and Australia – that it is unrealistic or even unfair not to grant compound interest in today's world (see *Bank of America* at para. 44; *Sempra* at paras. 51-52; *Hungerfords* (referred to in *Bank of America*) at paras. 36, 39, 41). It was indeed open to the Federal Court to explicitly say so. However, like our Court, the trier of fact cannot simply ignore the law as set out by the Supreme Court. There is no doubt: until the Supreme Court modifies the state of the common law on this question, Lilly has to prove its claimed loss in regards to the time value of the money.

[160] Even if our Court had, in this instance, the benefit of a more exhaustive and diverse body of jurisprudence on the issue than the Federal Court did at the time, the fact remains that, in the absence of any evaluation by the trier of fact of the evidence put forth by the parties, it would be unwise and inappropriate to decide this issue on appeal.

[161] Although the case law features various illustrations as to the type of evidence required in given cases, none of these are, to my mind, conclusive in the context of this case. It will be

incumbent upon the Federal Court to evaluate if there is sufficient evidence to satisfy the burden of proof taking into account all the circumstances including among others the size and type of the companies involved, the relative size of the amount lost for such large corporations, the long delay involved, including its potential impact on the availability of more specific evidence, and what inferences can be drawn, etc. This exercise goes much beyond what an appellate court should do.

[162] I also note that the rate adopted by the Federal Court was challenged before us. The basis on which the Federal Court arrived at this rate, applicable to all damages on the basis of the annual rate of profit on sales of the Canadian plaintiff, is not readily apparent to me. Lilly did not find any clear precedent where a similar rate was used. I fail to understand why this scenario was the most appropriate. As the Federal Court will have to reconsider the portion of the claim relating to the time value of the money in this case, it will be important for it to explain in more detail its finding as to the rate applicable, if any. I note, furthermore, that Apotex has already paid the damages award in full to Lilly. Thus, should the new award be less than the last one, the Federal Court will need to determine the rate of interest applicable to the amount to be reimbursed by Lilly.

[163] Finally, with respect to the tax issue raised by Apotex, I understand that Lilly's position was that tax would be paid on the award. The Federal Court did not make any specific deduction to account for tax because it would have required it to speculate. It also found that failure to make such a deduction for tax would not result in overcompensation in this case (Damages Decision at para. 119). Apotex does not agree and argued that it was not its burden to establish

the impact of taxation. I agree with Apotex that, logically, interest should only be earned on the net amount that could be used by Lilly. But I am not in a position to evaluate if this would effectively result in overcompensation in this case. Also, this may be a moot issue if the Federal Court on reconsideration is not satisfied with the evidence that compound interest should be awarded, absent the application of the presumption on which it relied. In short, the Federal Court, in its reconsideration of the award of interest as a whole, shall give this factor the weight it believes appropriate. I would also expect a fuller explanation as to the role of the burden of proof in this respect.

V. Conclusion

[164] In view of the foregoing, I propose that the appeal be dismissed except with respect to the portion of the award dealing with damages in the form of interest. The matter should be remitted to Zinn J. for reconsideration of this issue only. Considering the result of the appeal, I also propose that each party bear its own costs.

"Johanne Gauthier"
J.A.

"I agree
Mary J.L. Gleason J.A."

"I agree
J.B. Laskin J.A."

APPENDIX

Patent Act, R.S.C., 1985, c. P-4

[…]	**[…]**
Legal Proceedings in Respect of Patents	**Procédures judiciaires relatives aux brevets**
[…]	**[…]**
Infringement	**Contrefaçon**
[…]	**[…]**
Liability for patent infringement	**Contrefaçon et recours**
55 (1) A person who infringes a patent is liable to the patentee and to all persons claiming under the patentee for all damage sustained by the patentee or by any such person, after the grant of the patent, by reason of the infringement.	**55 (1)** Quiconque contrefait un brevet est responsable envers le breveté et toute personne se réclamant de celui-ci du dommage que cette contrefaçon leur a fait subir après l'octroi du brevet

Federal Courts Act, R.S.C. 1985, c. F-7

[…]	**[…]**
Prejudgment interest — cause of action outside province	**Intérêt avant jugement — Fait non survenu dans une seule province**
36 (2) A person who is entitled to an order for the payment of money in respect of a cause of action arising outside a province or in respect of causes of action arising in more than one province is entitled to claim and have included in the order an award of interest on the payment at any rate that the Federal Court of Appeal or the Federal Court considers reasonable in the circumstances, calculated	**36 (2)** Dans toute instance devant la Cour d'appel fédérale ou la Cour fédérale et dont le fait générateur n'est pas survenu dans une province ou dont les faits générateurs sont survenus dans plusieurs provinces, les intérêts avant jugement sont calculés au taux que la Cour d'appel fédérale ou la Cour fédérale, selon le cas, estime raisonnable dans les circonstances et :
(a) where the order is made on a liquidated claim, from the date or dates the cause of action or causes of action arose to the date of the order; or	a) s'il s'agit d'une créance d'une somme déterminée, depuis la ou les dates du ou des faits générateurs jusqu'à la date de l'ordonnance de paiement;
(b) where the order is made on an unliquidated claim, from the date the person entitled	**b)** si la somme n'est pas déterminée, depuis la date à laquelle le créancier a avisé

gave notice in writing of the claim to the person liable therefor to the date of the order.

[…]

Exceptions

36 (4) Interest shall not be awarded under subsection (2)

[…]

(b) on interest accruing under this section;

[…]

(f) where interest is payable by a right other than under this section.

par écrit le débiteur de sa demande jusqu'à la date de l'ordonnance de paiement.

[…]

Exceptions

36 (4) Il n'est pas accordé d'intérêts aux termes du paragraphe (2) :

[…]

b) sur les intérêts accumulés aux termes du présent article;

[…]

f) si le droit aux intérêts a sa source ailleurs que dans le présent article.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE ZINN DATED JANUARY 23, 2015, NO. T-1321-97	
DOCKET:	A-64-15
STYLE OF CAUSE:	APOTEX INC. v. ELI LILLY AND COMPANY AND ELI LILLY CANADA INC.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 17-18, 2018
REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	GLEASON J.A. LASKIN J.A.
DATED:	NOVEMBER 23, 2018

APPEARANCES:

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Anthony G. Creber Marc Richard Adam Heckman	FOR THE RESPONDENTS

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36

Federal Court Cour fédérale

Date: 20160531

Dockets: T-2175-04
T-2056-11

Citation: 2016 FC 593

Toronto, Ontario, May 31, 2016

PRESENT: The Honourable Mr. Justice Hughes

Docket: T-2175-04

BETWEEN:

JANSSEN INC. AND DAIICHI SANKYO COMPANY, LIMITED

Plaintiffs
(Defendants by Counterclaim)

and

TEVA CANADA LIMITED

Defendant
(Plaintiff by Counterclaim)

Docket: T-2056-11

AND BETWEEN:

JANSSEN-ORTHO LLC, JANSSEN PHARMACEUTICALS, INC., and OMJ PHARMACEUTICALS, INC.

Plaintiffs

and

TEVA CANADA LIMITED and DAIICHI SANKYO COMPANY, LIMITED

Defendants

PUBLIC JUDGMENT AND REASONS

[1] This decision relates to the determination of damages and quantification thereof arising out of a Judgment of this Court in Action No. T-2175-04 dated October 17, 2006, in which I determined that Claim 4 of Canadian Patent No. 1,304,080 was valid and had been infringed by the Defendant, Novopharm Limited, now Teva Canada Limited. I granted an injunction and damages but not profits. That decision, Reasons cited at 2006 FC 1234, was affirmed by the Federal Court of Appeal on June 7, 2007 (Docket No. A-500-06, Reasons cited as 2007 FCA 217). Leave to appeal was refused by the Supreme Court of Canada on December 6, 2007 (Docket No. 32200).

[2] For the purposes of this decision, the operative part of my previous Judgment, following a declaration as to validity and infringement of Claim 4 and an award of damages (as subsequently affirmed aforesaid), is as follows:

> 3. *The Defendant may, at its election, do one of the following in respect of levofloxacin containing products in its possession, custody or control as of the date of issue of this Judgment:*
>
> *a. Sell them in the normal course of business in accordance with paragraph 2 above, provided that all unsold product at the end of the thirty (30) day period shall be treated in the manner provided in one of b) or c) below;*
>
> *b. Destroy them and provide an appropriate affidavit of a responsible officer of the Defendant to that effect; or*
>
> *c. Deliver them up to the Plaintiffs at a place and manner as the Plaintiffs may direct provided that if such delivery is to take place outside of*

the Greater Toronto area it shall be at Plaintiffs' expense;

4. *The Plaintiffs are entitled to receive from the Defendant all damages sustained by them by reason of the activities of the Defendant which infringe claim 4 of the Patent. A separate trial, preceded by discovery if requested, shall be held as to the quantum of damages and interest as awarded herein. Any monies paid as set out in paragraph 2 above shall be taken into consideration by way of set off or otherwise, in the final calculation of damages.*

5. *The Plaintiffs are entitled to pre-judgment interest on the award of damages, not compounded, at a rate to be calculated separately for each year since infringing activity began at the average annual bank rate established by the Bank of Canada as the minimum rate at which it makes short term advances to the banks listed in Schedule 1 of the Bank Act, RSC 1985, c. B-1;*

6. *The Plaintiffs are entitled to post judgment interest, not compounded, at the rate of five percent (5%) per annum. This interest shall commence upon the final assessment of the monetary damage amount, prior to that, pre-judgment interest shall prevail;*

[3] The following is an Index to the topics covered in these Reasons, by paragraph number:

I. THE PARTIES

[4] The Plaintiff in Action No. T-2175-04 is Janssen Inc. (previously Janssen-Ortho Inc.) and is referred to herein as Janssen Canada. It was found, in my previous Reasons at paragraph 3, to be a Canadian Company which is licensee of the Plaintiff, Daiichi Sankyo Company, Limited, hence is a person claiming under the patent at issue.

[5] Daiichi Sankyo Company, Limited, referred to herein as Daiichi, was found in my previous Reasons at paragraph 2 to be a Japanese company and owner of the patent at issue. Daiichi, as an owner of that patent, is also a named Defendant in Action No. T-2056-11. By letter to the Court dated November 9, 2012, Daiichi's solicitors stated that it does not intend to participate in this proceeding, that it has settled its damage claim against Teva Canada Limited, and that Daiichi will abide by the outcome decided by the Court herein.

[6] The other Defendant in Action No. T-2056-11, and only Defendant in T-2175-04, is Teva Canada Limited. At the time of my earlier decision in T-2175-04, it was known as Novopharm Limited. I found in my previous Reasons at paragraph 4 that it was a Canadian-based corporation which had, since about December 2004, been marketing and selling levofloxacin products in Canada. I will generally refer to this party as Teva although sometimes it may be referred to as Novopharm.

[7] The Plaintiffs in Action No. T-2056-11, are three Janssen-related companies. Janssen-Ortho LLC is a Delaware limited liability company and is sometimes referred to in the evidence as JOLLC. Janssen Pharmaceuticals, Inc. is Pennsylvania corporation and is sometimes referred to in the evidence as JPI or Janssen US. OMJ Pharmaceuticals, Inc. is a Delaware corporation and is sometimes referred to in the evidence as OMJ. Collectively, JOLLC and OMJ are sometimes referred to as Janssen Puerto Rico.

II. PATENT AT ISSUE

[8] The patent at issue is Canadian Patent No. 1,304,080 which will be referred to as the 080 Patent. The application for that patent was filed in the Canadian Patent Office on June 19, 1986, thus the patent is governed by the provisions of the "old" (pre-October 1, 1989) *Patent Act*, RSC 1985, c. P-4. The patent was issued and granted to Daiichi on June 23, 1992, and expired seventeen (17) years from that date; that is, on June 23, 2009.

[9] Claim 4 of the 080 Patent was held by my previous Judgment to be valid and infringed by Teva by its sale, offering for sale, and other dealings in levofloxacin containing products in Canada. On October 17, 2006, I enjoined Teva from further sale and other dealings in levofloxacin containing products in Canada subject to a thirty (30) day sell-off period to permit it to dispose of such products subject to payment to Janssen. Teva took advantage of this sell-off period and has already paid Janssen in respect of such products. The expert witnesses have taken this payment into account in their calculations.

[10] After the patent expired on June 23, 2009, Teva as well as any other person, was able to sell and otherwise deal in levofloxacin containing products in Canada free from a claim for infringement of the 080 Patent.

III. JANSSEN'S PRODUCTS

[11] Janssen Inc. has sold and otherwise dealt with levofloxacin containing products in Canada since about 1998. They have been provided at various times in tablet form having strengths of 250 mg, 500 mg and 750 mg under the name LEVAQUIN.

[12] Janssen Inc. also sold and otherwise dealt with levofloxacin containing intravenous solution products in Canada but is not claiming damages in respect thereof in this action.

IV. TEVA / NOVOPHARM PRODUCTS

[13] The Defendant, Teva/Novopharm, introduced its generic levofloxacin containing tablets into the Canadian market in December 2004, and continued to sell and distribute them until the injunction was granted by this Court on October 17, 2006, subject to the thirty day sell-off period aforesaid. These tablets were sold in 250 mg and 500 mg strengths under the name Novo-levofloxacin.

V. THE EVIDENCE / WITNESSES

[14] The evidence adduced at trial is common to both actions, T-2175-04 and T-2056-11.

a) Agreed Evidence

[15] Counsel have done a commendable job in agreeing to many facts. These are set out in Exhibits A1, A2, A3, A40, and A43. They have also agreed as to several documents, the proof of which may be dispensed with, although the truth of the contents of some of them may be disputed. These documents are contained in seven volumes, each document is provided with a numbered tab; these volumes are collectively marked as Exhibit A4 supplemented by electronically recorded documents in a USB key, Exhibit A14. A booklet containing Notices to Admit and Responses thereto served by each party upon the other was entered as Exhibit A66.

b) Plaintiffs Janssen's Evidence

[16] Janssen called three expert witnesses all of whom submitted Reports which were deemed to have been read into the Record; they were:

1. Dr. Jerry Rosenblatt, Town of Mount Royal, Quebec. His Report and Reply were marked as Exhibits P5 and P6. The parties agreed that he could be called as an expert witness and agreed as to his qualifications as follows:

> *He is an expert in the marketing of pharmaceutical products in Canada and the data analysis and forecasting of pharmaceutical sales and market share in Canada including the impact of generic entry.*

I found him to be straightforward and professional in his evidence. Some of his opinions were based on what he was told by Dr. Chan as to the state of the marketplace in Canada.

2. Farley Cohen, Toronto, Ontario. His reports and schedules to those reports were marked as Exhibits P7, P8, P9, P10 and P11. The parties agreed that he could be called as an expert witness and agreed as to his qualifications as follows:

> *... expert chartered account and chartered business valuator with a specialist designation in investigative and forensic accounting and expertise in the quantification of economic damages, lost profits, and income determination.*

Again, I found him to be straightforward and professional in his evidence. Some of his opinions were based on those of Dr. Rosenblatt and Dr. Chan.

3. Dr. Charles Chan, North York, Ontario. His Report and Reply report were marked as Exhibits P19 and P20. The parties agreed that he could be called as an expert witness but disagreed as to his qualifications. Janssen's Counsel proposed his expertise as follows:

> *...as an expert on the following basis: a medical doctor with a specialist certification in respiratory medicine and expertise regarding respiratory tract diseases, antiinfectives, and prescribing practice including expertise on the Canadian antibiotic guidelines.*

Teva's Counsel did not agree as to his expertise respecting prescribing practice and expertise on Canadian antibiotic guidelines. Having heard Dr. Chan, I accept Janssen's statement as to his qualifications. I have some difficulties with respect to his evidence. While Dr. Chan has a depth of knowledge and years of experience with respect to many of the drugs at issue, he could not answer even simple questions from his own Counsel or cross-examining Counsel without going into long, complex, and often

irrelevant answers. He is undoubtedly a person not used to being challenged as to his opinions as he frequently accused cross-examining Counsel as trying to deceive him or misstate the facts or his answers. I treat Dr. Chan's evidence with caution.

[17] Janssen called seven fact witnesses; they were:

1. Rod Curtis, Markham, Ontario. He is Chief Financial Officer of Janssen's medical operations in Canada. He gave evidence as to the corporate structure of Janssen in Canada and elsewhere in the Western Hemisphere.

2. Jeff Smith, Flemington, New Jersey. He is Vice President, Business Development of Janssen Pharmaceuticals Inc. He has been with Janssen and its predecessors for about three decades and gave evidence as to the evolution of its corporate structure. He provided a corporate chart, Exhibit P17. While I accept his evidence, for what it was, it was not backed up by any documents. I am not surprised that he could not identify documents such as invoices. However, he could not identify more "high level" documents such as apparent license agreements and letters of agreement.

3. John Stewart, Holland Landing, Ontario. He is Business Unit Director of Janssen Inc., and has been involved at the senior level in Janssen Inc. and its predecessors in marketing its levofloxacin products in Canada. He gave his evidence in a straightforward manner in dealing with the marketing strategy and decisions of Janssen in respect of its levofloxacin products in Canada.

4. Seth Fischer, Bridgewater, New Jersey. He was with the Johnson & Johnson organization including various Ortho-McNeil entities for many years in the 1990's and 2000's. He has left the Johnson & Johnson organization and is presently employed by a

different organization in California. He gave evidence respecting the launch of levofloxacin products in the United States and Canada, and the relationship between various Johnson & Johnson entities and Daiichi. He identified several agreements between these entities and Daiichi and e-mail exchanges in respect thereof. He gave his evidence in a straightforward manner.

5. Lindsey Villacis, Flemington, New Jersey. She is a Senior Financial Analyst with the Johnson & Johnson group. She gave evidence as to the documents relating to manufacture and sale of the levofloxacin containing products within the Johnson & Johnson group of companies and, in particular, sales to the Canadian organization. She addressed many sales related documents found in Exhibit P37 but was unable to identify certain documents put to her in cross-examination. She was a straightforward, if careful, witness.

6. Carlos Fernandini, Bayamon, Puerto Rico. He is a Senior Finance Manager of Johnson-Ortho Puerto Rico. He gave evidence as to the shipment of levofloxacin (sometimes called the active pharmaceutical ingredient or API) from Daiichi to the Puerto Rico manufacturing facility and, from there, to Janssen Inc. in Canada. He identified several documents related to these transactions. His evidence was straightforward. He was unable to identify certain documents put to him in cross-examination.

7. Bob Roarty, Flemington, New Jersey. He is Director, Global Finance with the Janssen supply chain division of Johnson & Johnson, New Jersey. He gave evidence as to the physical flow of goods and related paperwork, from Daiichi through Puerto Rico, and then to Canada. This evidence is illustrated in charts entered as Exhibits P39 and

P17. His evidence was straightforward; he identified certain documents in his evidence in chief but could not identify others put to him in cross-examination.

[18] At the conclusion of the evidence of the Plaintiffs' witnesses, Plaintiffs' Counsel tendered an affidavit of Cheewooi Lim, a Japanese resident, who is with the Business Development and Licensing Department at Daiichi. Defendant's Counsel objected to the filing of this affidavit since Lim was not presented for cross-examination and apparently, is precluded from giving sworn evidence in Japan in a non-Japanese proceeding. I entered the affidavit into evidence as Exhibit P41 but indicated that I would give it little, if any, weight.

[19] The Plaintiffs introduced a portion of their Examination for Discovery of the Defendant as Exhibit P42 which was deemed to have been read into the Record.

c) Defendant Teva's Evidence

[20] The Defendant Teva did not call any fact witnesses but did call four expert witnesses. The parties agreed that these four witnesses could be called as experts, and agreed as to the scope of their expertise (Exhibit A45). Their reports were marked as Exhibits and were deemed to be read into the Record. These experts were:

1. Alan Mak, Toronto, Ontario. The parties have agreed as to his expertise:

   ...an expert in litigation and forensic accounting.

   Mr. Mak was provided with a number of assumptions and data and asked to calculate Janssen's losses (gains) consequent upon Teva's entry into the levofloxacin market with a generic product. His reports were marked as Exhibits D46, D47, and D48.

Mr. Mak gave his evidence in a straightforward manner. The opinions and conclusions that he reached however are dependent upon the assumptions that he was asked to make.

2. Dr. Paul Grootendorst, Oakville, Ontario. The parties have agreed as to his expertise:

...an expert in health and pharmaceutical economics.

Dr. Grootendorst was provided with a number of assumptions and data and asked to provide his opinion as to the market share Janssen's levofloxacin products, LEVAQUIN, would have had in the "but for" world had Teva not entered with a generic. His reports were entered as Exhibits D52, D53, with corrections as D54.

His opinions are dependent upon the assumptions which he was given and others that he made. His evidence was given in a frank and straightforward manner.

3. Dr. Lea Katsanis, Westmount, Quebec. The parties have agreed as to her expertise:

...an expert in pharmaceutical marketing.

Her report was marked as Exhibit D55. She gave evidence as to the likely market share that Janssen's Levaquin would have received in the "but for" world had Teva not entered the marketplace concluding that it would have been a declining share. I accept that she was endeavouring to give reasonable opinions although, in cross-examination, she tended to be overly loquacious or confused. When I asked her to compare Dr.Grootendorst's conclusion with hers, she said that they were about the same but that Dr. Grootendorst may have been working with more data than she had.

4. Dr. Andrew Simor, Toronto, Ontario. . The parties have agreed as to his expertise:

> *…an expert in medical microbiology and the treatment of infectious diseases.*

He gave evidence as to the use and recommendations for use (guidelines) of anti-infection drugs including macrolides and quinolones. His reports are marked as Exhibits D58 (2 volumes) and D59. He gave his evidence in a straightforward and candid manner.

[21] The Defendant entered into evidence four volumes of excerpts from its discovery of the Plaintiff in Action No. T-2175-04 as Exhibit D61, and a supplemental volume in the same action as Exhibit D62. Documents referred to in those excerpts were marked as Exhibit D63.

[22] Excerpts from the Defendant's Examination for Discovery of the Plaintiffs in Action No. T-2056-11 were marked as Exhibit D64, and documents referred to as Exhibit D65.

[23] All of this discovery material was deemed to have been read into the Record and, in accordance with the understanding in both these actions, all of these discovery excerpts and documents are applicable equally to both actions.

VI. GLOSSARY

[24] The following is a glossary of some of the terms used in evidence:

1. **Fluoroquinolones** were sometimes referred to in the evidence as **quinolones**. They include medications with generic names ending in –floxacin such as ciprofloxacin (CIPRO), levofloxacin (LEVAQUIN), moxifloxacin (AVELOX), and gatifloxacin (TEQUIN).

2. **Respiratory fluoroquinolones** are a subset of the fluoroquinolones. These are fluoroquinolones that may be used to treat a range of bacteria that cause Respiratory Tract Infections (RTI's) such as S. pneumoniae. Of the fluoroquinolones in the evidence, levofloxacin (LEVAQUIN), moxifloxacin (AVELOX), and gatifloxacin (TEQUIN) are respiratory fluoroquinolones. While ciprofloxacin (CIPRO) is not a respiratory fluoroquinolone, it was used to treat some RTI's in the 2000's.
3. **Macrolides** are a group of antibiotics also used in the treatment of RTI's. They have generic names ending in –omycin and include erythromycin, clarithromycin (BIAXIN BID or BIAXIN XL), and azithromycin (ZITHROMAX).
4. **Beta-lactams** or **β-lactams** are another class of antibiotics. An old example of a beta-lactam is penicillin. Of the drugs in this class, a common element is a molecular structure known as a beta-lactam ring. During the proceedings, mention was made of several of these antibiotics including amoxicillin, cefuroxime, and ceftriaxone.
5. **Combination therapy with beta-lactam and a macrolide** is a combination of one drug from each class that can be used together for the treatment of RTI's.
6. **API** or **active pharmaceutical ingredient** is the active medicinal ingredient in a drug. It is combined with other ingredients, often called excipients, to make the final product (e.g., a tablet). Levofloxacin is an API made by Daiichi and shipped to Puerto Rico where it is mixed with other ingredients (excipients) and made into tablets.
7. **A respiratory tract infection (RTI)** is an infection anywhere along the respiratory tract from the nose to the lungs. They are usually caused by a virus or bacteria and include colds, sinusitis, influenza, bronchitis, and pneumonia.

8. **Community-acquired pneumonia** or **CAP** is one of the more common RTI's. It is a pneumonia developed by someone who has not had contact with a hospital or other medical institution. **Hospital-acquired pneumonia** or **HAP** is a pneumonia developed by someone who has had contact with a hospital or other institution.

VII. ISSUES

[25] There are four issues that the Court must address in these proceedings; the first three are proposed by Janssen, and the fourth by Teva who agrees with the three proposed by Janssen. They are:

1. Does Janssen US have standing to claim damages as a result of Teva's infringement of the 080 Patent?
2. What is the quantum of damages suffered by each of Janssen Canada and Janssen US?
3. How is the pre-judgment interest, if any, awarded to Janssen US to be calculated?
4. Should Janssen Canada have taken steps to mitigate its damages and, if so, when and to what extent?

VIII. ISSUE NO. 1 – STANDING OF JANSSEN US

[26] The 080 Patent is owned by Daiichi and Daiichi has settled its claim against Teva. Janssen Inc., the Plaintiff in Action No. T-2175-04, has a claim for damages against Teva which

claim is contested only as to the quantum of damages, and not its right to damages which right was settled in the earlier decision in this case.

[27] There are three Plaintiffs in Action No. T-2056-11; of these, two, Janssen-Ortho LLC and OMJ Pharmaceuticals Inc. (collectively known as Janssen Puerto Rico), make no claim for damages. That leaves only Janssen Pharmaceuticals, Inc. (JPI or Janssen US) as the entity making a claim for damages in that action.

[28] The claim by Janssen US for damages rests on the provisions of section 55(1) of the *Patent Act* (the provisions are the same in the pre- and post- October 1989 versions of that *Act*) which state that an infringer is liable for all damages sustained not only by a patentee, but also by all persons "claiming under" the patentee.

55 (1) A person who infringes a patent is liable to the patentee and to all persons claiming under the patentee for all damage sustained by the patentee or by any such person, after the grant of the patent, by reason of the infringement.	*55 (1) Quiconque contrefait un brevet est responsable envers le breveté et toute personne se réclamant de celui-ci du dommage que cette contrefaçon leur a fait subir après l'octroi du brevet.*

[29] Who constitutes a person "claiming under" a patentee has generated a good deal of jurisprudence in Canadian Courts. By way of contrast, the United Kingdom *Patents Act 1977*, c. 37, sections 33, 61, 67 and 68, give a right to take action for infringement and to claim remedies not only to the proprietor (owner) of a patent but also to an exclusive licensee provided that the licensee has, within six months, registered the particulars of the licence with the Patent Office. This brings a good deal of certainty to the situation.

[30] The leading case in Canada is the decision of the Supreme Court in *Armstrong Cork Ltd. Canada v Domco Industries Ltd.*, [1982] 1 SCR 907. That case proceeded on an Agreed Statement of Facts. The patent owner (Congoleum) granted to Domco a restricted non-exclusive licence under a patent directed to etched pattern floor coverings. The licence provided that the patentee itself would not enter the Canadian market for three years and would not give a licence to anyone else for five years. The issue was whether Domco was a person "claiming under" the patentee. Martland J., for the Court, reviewed prior decisions including that of the Privy Council in *Spun Rock Wools Ltd. v Fiberglas Canada Ltd.*, [1947] AC 313, and the Federal Court of Appeal in *American Cyanamid Co. v Novopharm Ltd.*, [1972] FC 739. In *Fiberglas*, the Privy Council, at pages 320 to 321, stated that "licensees" were entitled to sue for damages under section 55 of the *Patent Act*. On the facts of that case, however, the "licensee" was an exclusive licence and Counsel sought to distinguish that decision on that basis. Martland J. rejected that submission and stated that there was no valid reason to exclude a non-exclusive licensee from the provisions of the *Patent Act* respecting persons "claiming under" the patentee. He wrote at pages 917 to 920:

> *While it is true that the licensee actually under consideration in the Fiberglas case was said to be "the exclusive sub-licensee" (or "exclusive licensee") under the patent, no information is given in any of the judgments as to the precise nature of the licence, and nothing in the reasons for judgment on this point turned on the distinction between an exclusive licensee and a non-exclusive licensee or a bare licensee. Both Mr. Justice Davis in this Court delivering his and Mr. Justice Taschereau's judgment and Lord Simonds in the Judicial Committee used the general word "licensee"*
>
> *in delivering their judgments. It cannot be supposed that they did so intending that only an exclusive licensee was being considered, particulary when Lord Simonds defined the issue of law as being: "Here the question is whether a licensee is a person claiming under the patentee" (p. 320).*

Armstrong sought to distinguish an exclusive licence from a non-exclusive licence on the basis that the former was a grant of a part of the monopoly and that such a licensee was practically an assignee of the patent for the term of the licence with all the beneficial rights of the patentee. It is difficult to reconcile this reasoning with what was said in Heap v. Hartley (supra) (applied by this Court in the Electric Chain Co. case) in the passage which I have already quoted. I repeat from that passage the following portion which is apt in relation to Armstrong's submission:

> *Now he puts his case in a two-fold manner. He says: "In the first place, as exclusive licensee, I am in the position of an assign of the letters patent for that district and for that term, and as an assign of letters patent, I have a right to restrain any person who is infringing within the district." That argument appears to be based on an entire error with regard to the nature of a license. An exclusive license is only a license in one sense; that is to say, the true nature of an exclusive license is this. It is a leave to do a thing, and a contract not to give leave to anybody else to do the same thing. But it confers like any other license, no interest or property in the thing.*

In my opinion, the reasons which led this Court and the Privy Council to the conclusion reached in the Fiberglas case are as applicable to a nonexclusive licensee as to an exclusive licensee. If an exclusive licensee is a person claiming under the patentee within s. 57(1), and the Fiberglas case so holds, there is no valid basis, under the wording of the subsection, to exclude its application to a non-exclusive licensee, and there is no valid basis for interpreting the Fiberglas case as holding otherwise.

It was also contended on behalf of Armstrong that a non-exclusive licensee has no rights which can be infringed and therefore has no claim against the infringer of a patent. This was the view of Jackett C.J. in the American Cyanamid case. He was of the opinion that the non-exclusive licensee had only a right to use the patent, which right was not affected by its infringement.

This was the legal position, even in respect of an exclusive licensee, prior to the enactment of s. 55 of the 1935 Act. Section 55 was enacted to meet this difficulty and, in my opinion, it has overcome the problem. Section 55(1), by its terms, imposes a liability upon the infringer of a patent to the patentee and also to all persons claiming under him for all damages sustained by the

> *patentee or any such person by reason of such infringement. It is the infringement of the patent which gives rise to a liability. If that infringement causes damage to the patentee or to any person claiming under him, the infringer must compensate for the damage sustained by reason of the infringement of the patent. A licensee relying on this subsection is not claiming against the infringer for infringement of his rights under the licence, he is claiming for the damage he has sustained in consequence of the infringement of the patent.*
>
> *On this point, I adopt the reasons of Sweet D.J. in the American Cyanamid case which have already been quoted.*
>
> *Armstrong contended that the meaning of the word "damages" in s. 57(1) meant loss resulting from interference with the legal rights of the claimant. "Damages", it was said, refers to pecuniary recompense given by process of law to a person for an actionable wrong that another has done to him.*
>
> *The meaning of the word "damages" must be ascertained in respect of its use in this specific statutory provision. In section 57(1) it is provided in terms that an infringer of a patent is liable for all damages sustained by reason of his infringe-*
>
> *ment by a patentee or by any person claiming under him. This is a statutory obligation to pay damages and it applies in favour of any person who comes within the provisions of the subsection. In my opinion, Domco does come within the terms of the subsection.*

[31] The Federal Court of Appeal considered whether a party was a person "claiming under" a patentee in *Signalisation de Montréal Inc. v Services de Béton Universels Ltée* [1993] 1 FC 341(CA). In that case, the owner of a patent directed to machines that moved highway barriers granted an exclusive license to an entity known as Barrier. In turn, Barrier appointed the Plaintiff Signalisation as its exclusive representative in Quebec. Hugessen J.A. took a broad view as to who was a person "claiming under" the patentee. He wrote at paragraphs 24 and 25:

> *24 In my view, a person "claiming under" the patentee is a person who derives his rights to use the patented invention, at whatever degree, from the patentee. The right to use an invention is one the monopoly to which is conferred by a patent.9 When a*

breach of that right is asserted by a person who can trace his title in a direct line back to the patentee that person is "claiming under" the patentee. It matters not by what technical means the acquisition of the right to use may have taken place. It may be a straightforward assignment or a licence. It may, as I have indicated, be a sale of an article embodying the invention. It may also be a lease thereof. What matters is that the claimant asserts a right in the monopoly and that the source of that right may be traced back to the patentee. That is the case with the appellant here.

25 In my view, the appellant has the status to assert a claim for damages under section 55 of the Patent Act and has done so inter alia in the paragraphs in the statement of claim reproduced and summarized above. That statement of claim should not have been struck out.

[32] Décary J.A. disagreed, writing at paragraphs 44 to 46:

44 Nor is it impossible that the appellant may have some ground for bringing action itself against the respondent on the basis of some form of liability in tort.

45 Whether or not there is, or was, any possibility of a contractual remedy against Energy or Barrier or of a remedy in tort against the respondent, it is not for this Court to extend the statutory remedy provided by Parliament. As Judson J. pointed out in Commissioner of Patents v. Farbwerke Hoechst Aktiengesellschaft Vormals Meister Lucius & Bruning, [1964] S.C.R. 49, at page 57:

> *There is no inherent common law right to a patent. An inventor gets his patent according to the terms of the Patent Act, no more and no less.*

The same is true of a person who claims under the patentee. That person is the person whom the Patent Act recognizes as such, and no one else. To accept the appellant's arguments would, in my opinion, be to interpret subsection 55(1) of the Act as if the words "claiming under the patentee" did not appear, and as if it were sufficient for damages to have been incurred as a result of the infringement of a patent in order for the injured party to have a remedy under that subsection.

> *46 I therefore conclude that a mere contract of purchase of a patented product does not make the purchaser a person claiming under the patentee within the meaning of subsection 55(1) of the Act.*

[33] Létourneau J.A. agreed with Hugessen J.A. and responded to Décary J.A. in writing at paragraph 51:

> *51 Nor do I believe as my colleague Décary J.A. suggests that the words "persons claiming under the patentee" in subsection 55(1) are more limited than the word "person" in subsections 60(1) and (2) of the Act. In subsection 60(1), it has to be an interested person and therefore it is not unqualified. In subsection 60(2), it has to be a person who uses or proposes to use a process or a person who makes, uses or sells an article that might constitute an infringement of a patent. Likewise in subsection 55(1), it has to be a person who claims under the patentee, that is to say a person who as a user, an assignee, a licensee or a lessee had a title or a right which may be traced back to the patentee.*

[34] The final words used by Létourneau J.A. are instructive; a person "claiming under" who, as a user, an assignee, a licensee or lessee, had a title or a right that may be traced back to the patentee, thus can be a person claiming under the patentee.

[35] There have been a number of more recent decisions of the Courts where consideration was given to whether a person was one "claiming under" a patentee. Some of these decisions dealt with circumstances not unlike those of the present case where it was agreed that, despite the lack of a written agreement, the claimant was part of a family or group of entities all dealing in some way with the patented goods.

[36] In *AstraZeneca Canada Inc. v Apotex Inc.*, 2014 FC 638 (aff'd 2015 FCA 158, leave to appeal to SCC granted March 10, 2016), Justice Rennie (as he then was) made a careful review of the evidence and concluded that one of the Plaintiffs, AstraZeneca Canada Inc., had standing as a person "claiming under". He wrote at paragraphs 10 and 23 to 24:

> *[10] In my view, AstraZeneca Canada has standing. More specifically, AstraZeneca Canada qualifies as a person claiming under the patentee because there is an implied license between AstraZeneca and AstraZeneca Canada regarding the sale of Nexium. However, prior to elaborating on this finding, it is important to note the factual background underlying Apotex's surprisingly technical standing defence against its alleged infringement.*
>
> ...
>
> *[23] In this case, there is something more. Indeed, a number of facts support the finding that AstraZeneca Canada's right of use can be traced back to AstraZeneca Aktiebolag:*
>
> > *1. AstraZeneca Canada and AstraZeneca Aktiebolag are both indirect subsidiaries of a common parent, AstraZeneca PLC, located in Sweden;*
> >
> > *2. AstraZeneca Aktiebolag, the owner of the '653 patent, is the principal source of supply to AstraZeneca Canada and globally;*
> >
> > *3. AstraZeneca Canada sought and obtained regulatory approval to sell Nexium in Canada. The information in support of the regulatory filing derived from AstraZeneca Aktiebolag – the holder of the master regulatory file for Nexium;*
> >
> > *4. AstraZeneca Canada and AstraZeneca Aktiebolag entered into a Formulation, Packaging and Distribution Agreement (Distribution Agreement) in December 2000. In the Distribution Agreement, AstraZeneca Canada is defined as the "Distributor," and is granted non-exclusive rights to the "Products" which are defined to include Nexium. This agreement addresses intellectual property rights in articles 24.1 and 24.2:*
> >
> > *24 INTELLECTUAL PROPERTY RIGHTS*

24.1 All intellectual property rights relating to the Products shall remain the property of ASTRAZENECA at all times. The Distributor shall not acquire any intellectual property rights relating to the Products and shall only have permission to use such rights granted to the Distributor under this Agreement.

24.2 The Distributor will inform ASTRAZENECA of any infringement or suspected infringement of any of ASTRAZENECA's intellectual property rights in the Market which comes to the notice of the Distributor. ASTRAZENECA will take all reasonable steps, at its own expense, to prosecute infringers. The Distributor will give ASTRAZENECA all reasonable assistance in such prosecution [emphasis added].

5. From 2001-2008 AstraZeneca Canada packaged Nexium which it received from AstraZeneca Aktiebolag in bulk tablets, prior to sale in Canada. In 2008, AstraZeneca Canada's packaging facility in Mississauga was closed. The letter agreement between AstraZeneca Canada and AstraZeneca Aktiebolag dated December 12, 2007 stated that after closure, Nexium would be supplied by AstraZeneca Aktiebolag to AstraZeneca Canada in finished packaged form, and that AstraZeneca Canada would continue to act as the distributor. Accordingly, after 2008, AstraZeneca Canada received pre-packaged Nexium from AstraZeneca Aktiebolag for sale in Canada. Thus, AstraZeneca Canada has always received its supply of Nexium (pre-packaged or in bulk) from AstraZeneca Aktiebolag, except for a three month period in 2001 and a six month period in 2012, during which AstraZeneca UK was the source of supply.

6. According to the evidence of Ms. Elaine Campbell, CEO of AstraZeneca Canada, AstraZeneca Canada has obtained the consent of AstraZeneca Aktiebolag to file Form IV patent lists under the PMNOC Regulations;

7. Ms. Campbell testified that all of AstraZeneca Canada's legal costs in respect of this litigation were being paid by AstraZeneca Aktiebolag.

> *[24] When assessed against this factual landscape, AstraZeneca Canada's right to use the patent may be traced back to AstraZeneca Aktiebolag, the patentee. All rights of use of Nexium by AstraZeneca Canada are derivative, by an implied agreement, from AstraZeneca Aktiebolag. While there is no express licence and no plea of licence, the conduct of the parties is consistent with a finding of an implied licence granted by AstraZeneca Aktiebolag. The Distribution Agreement grants AstraZeneca Canada permission to use AstraZeneca Aktiebolag's intellectual property rights "insofar as is necessary to exercise the rights granted" under the Distribution Agreement. These rights include the right to sell Nexium and the obligation to assist AstraZeneca Aktiebolag in the civil prosecution of possible infringement by others. Commencement of an infringement action by AstraZeneca Canada falls within a reasonable interpretation of sections 24.1 and 24.2, and implicit to that is an acknowledgment of a right to recover damages on behalf of the patentee for infringement. Consequently, AstraZeneca Canada is a person claiming under the patentee as required by section 55(2) of the Patent Act and has standing in this trial.*

[37] *In Eli Lilly and Company v Apotex Inc.*, 2009 FC 991 (aff'd 2010 FCA 240), Justice Gauthier (was she then was) also reviewed the facts thoroughly and concluded that one of the Plaintiffs, Lilly Canada, had standing. She wrote at paragraphs 76 to 83:

> *[76] Lilly Canada does not disagree with the above-noted statements, it simply says that in this case it has not only established, through the testimony of Mr. Pytynia (Transcript Volume 7, pp. 56-63; 83-84) that Lilly Canada is a wholly owned subsidiary, but also that it had an express licence to both the Lilly and Shionogi Patents at issue in this case. It has also been admitted that Lilly Canada has been selling Ceclor® (cefaclor) in Canada since 1980. Lilly Canada made specific references to various exhibits filed during the hearing to support its position, particularly an agreement executed and effective as of January 1, 1991 between Lilly U.S. and Lilly Canada (TX-109) where:*
>
> > *Lilly represents and warrants that for Canada, it has the exclusive right to grant licenses to enable the licensee to make, have made, use and sell certain products, including the right to use within Canada, certain patents, trademarks*
> >
> > *[…]*

> *relating to such products and to their preparation, manufacture, processing and packaging.*

[77] In the said agreement, Lilly U.S. appoints Lilly Canada as its authorized distributor of all Lilly U.S. products in Canada (which includes Ceclor®) and at s. 1.2:

> *Lilly further grants to Lilly Canada a non-exclusive sublicense (without right of further sublicense except as further granted in writing by Lilly) under the Canadian patent applications and patents listed in Schedule "A"*
>
> *[…]*
>
> *to make, have made, use or sell, and/or import Lilly Products whose preparation is covered by the patent applications and patents.*

[78] At pp. 8 and 9 of Schedule A, the four Lilly patents at issue here are listed. Normally, it should thus not be contentious that Lilly Canada has proper standing pursuant to subs. 55(1) of the Patent Act, at least in respect of those patents.

[79] Apotex, however, says that on January 1, 1995, the 1991 agreement was amended (TX-110) to delete the various schedules which, according to Mr. Pytynia, was done to avoid having to keep them up to date which was found to be difficult. According to Apotex, the result of this amendment is simply that licences to the Lilly or Shionogi patents were no longer granted to Lilly Canada.

[80] This, according to Apotex, makes particular sense[23] in respect of the Shionogi patents, given that none of the material purchased by Lilly Canada was made by the processes protected thereunder and that Lilly Canada never actually made, purchased or sold any of the actual compounds claimed in the patents in suit. Apotex also discards the impact of the General Supply and Distribution Agreement, filed as TX-112, on the basis that Lilly Canada's role as distributor appears to be based on an agreement that says nothing about patent rights, nor does it characterize Lilly Canada as an agent and expressly disclaims any other rights flowing between the parties.

[81] The Court agrees with the plaintiff that such an interpretation of the 1991 agreement as amended through time leads to an absurd result and is simply incorrect. The January 1, 1995 agreement expressly states:

> *WHEREAS the parties desire to maintain the rights, licenses and sublicenses granted by the AGREEMENT while also recognizing that the parties will receive full compensation under the Master Supply and Distribution and Manufacturing or other Agreements.*

[82] It is also worth noting that the 1991 agreement was further amended on April 9, 1998 (TX-113) giving Lilly Canada the right to further sub-licence a third party under some of the patents covered by the agreement, in conformity with s. 1.2 of the 1991 agreement. More particularly, the amendment refers to the licence granted under the 1991 agreement for cefaclor and:

> *grants to Lilly Canada the right to sub-license the following licenses granted to it under the [1991] License Agreement (collectively, the "Licenses") for cefaclor: (i) licenses granted under patent rights of Lilly U.S. (including, without limitation, the patents listed in Schedule A hereto).*

Said schedule made specific reference to three of the Lilly Patents in suit (the only ones missing are the '007 and '026, the latter having expired by that time).

[83] Having considered all of the evidence, the Court is satisfied that Lilly Canada has properly established its standing based on an express licence from the patentee.

[38] In *Apotex Inc. v Sanofi-Aventis*, 2011 FC 1486 (rev'd on other grounds, 2013 FCA 186), Justice Boivin (as he then was) reviewed the factual circumstances of the case and concluded that a "Partnership" had standing. He wrote at paragraphs 46 to 48 and 55 to 57:

> *[46] Against this background, the Court now turns to the evidence put before it in connection with the rights conferred to the Partnership.*
>
> *D. The Evidence before the Court*
>
> *[47] During the trial, Dr. Thierry Saugier, Vice-President Alliance and Partnership at Sanofi-Aventis, was called by Sanofi to testify as to the standing of the Partnership. Dr. Saugier testified that, since April 2006, he has managed group of alliances for*

Sanofi-Aventis, including the alliance referred to the Territory B Partnership and the Territory A Partnership.

[48] In particular, Dr. Saugier testified that, in order to structure the alliance, Sanofi granted an exclusive licence for clopidogrel to the Partnership, as can be seen in the Partnership Agreements which are still in effect today. The various agreements produced into evidence indeed support Dr. Saugier's oral testimony as to the rights granted thereunder.

...

[55] The Court believes that such a list could not, on a practical point of view, be amended each time a development occurred in connection with products under research or in a process of a patent application. The terms and scope of the agreement at issue are such that [...] must be interpreted to encompass newly developed compounds. To conclude otherwise would fly in the face of the very purpose of the Partnership Agreements, which was to allow the Partnership to carry out all activities related to the development, manufacturing, sourcing and commercialization of clopidogrel in the specified territory known as Territory B, would otherwise be defeated.

[56] Finally, the Court recalls that counsel for Apotex questioned Dr. Saugier in connection with the absence of manufacturing facilities, employees and registered place of business in Canada in order to demonstrate the lack of standing. In light of the breadth of the Partnership Agreements, the Court finds this line of questioning to be of no assistance for the purposes of the standing issue.

E. Conclusion on Standing

[57] In sum, considering the broad meaning of "persons claiming under" a patentee as referred to under ss 55(1) of the Patent Act, and based on the Court's review of the Partnership Agreements and the testimony given in that regard, the Court finds that the Partnership has a "credible and legally sufficient basis" for claiming under a patentee in the circumstances. Indeed, the evidence clearly shows that the Partnership was granted an exclusive licence for clopidogrel products through the various Agreements as of 1997. It follows that the Partnership has standing to bring the action at issue for any infringement that it alleges to have occurred prior to December 6, 2007.

[39] In *Apotex Inc. v Wellcome Foundation Ltd.*, [2001] 1 FC 495, the Federal Court of Appeal held that, since both the patentee and the person "claiming under" were before the Court and both were asserting that the person "claiming under" had standing, the Court would not deny that standing. Rothstein J.A. wrote at paragraph 99:

> *[99] It is perhaps not uncalled for to observe that this is not a case in which the alleged licensee is alone in advancing its claim for patent infringement. Here, the patentee is also before the Court as a co-plaintiff supporting the claim of GWI. It is difficult to conceive of what more is necessary to prove the existence of a licence than to have the licensor and licensee both attesting to the validity of the licence. Where both the patentee and the person claiming under the patentee are before the Court, are affiliated as being owned by the same parent and have an identity of interest in the litigation--with the patentee supporting the person claiming under the patentee--it is, to say the least, surprising that technical questions of status to sue would be advanced as a defence to infringement.*

[40] In circumstances involving parties who are very similar to those before the Court here, Justice Reed of this Court considered standing in *Kirin-Amgen Inc. v Hoffmann-LaRoche Ltd.* (1999), 87 C.P.R. (3d) 1 (aff'd 11 CPR(4th)78). She wrote at paragraphs 89 to 94:

> ***89*** *Kirin-Amgen is the owner of the '047 patent. That patent issued on May 27, 1997, and as noted, was divided from a more comprehensive patent application that had been filed on December 12, 1984. On September 30, 1985, Kirin-Amgen licensed Ortho Pharmaceutical Corporation (now known as Ortho-McNeil Pharmaceutical Inc.) and its affiliates to use and sell in a number of countries, including Canada, products made in the United States of America that are within the scope of the broader patent application. A written agreement to that effect exists. The recombinant EPO used in the EPREX product that is sold in Canada is made in Puerto Rico, a commonwealth of the United States.*
>
> ***90*** *In 1986 Ortho Pharmaceutical Corporation gave Janssen-Ortho's predecessor a mandate to market and sell EPREX in Canada. No written licence documenting that agreement can be found. No written notice to Kirin-Amgen of that sub-licence has*

been found. Nevertheless, it appears that Kirin-Amgen has had notice that Janssen-Ortho's predecessor and now Janssen-Ortho had been sub-licensed to use and sell the EPREX product in Canada. The EPREX product was launched on the Canadian market in 1990. Since that time, Janssen-Ortho has been paying royalties, first to what was then the Ortho Pharmaceutical Corporation, and more recently to Ortho Biotech Inc. The royalties are then paid to Kirin-Amgen.

91 *The rights acquired from Kirin-Amgen in 1985 were subsequently assigned by Ortho Pharmaceutical Corporation (renamed Ortho-McNeil Pharmaceutical Inc.) to Ortho Biotech Inc. under an Asset Transfer Agreement effective January 1, 1998. Kirin-Amgen consented to this assignment.*

92 *Since no written document could be found of the 1986 agreement between Ortho Pharmaceutical Corporation and Janssen-Ortho's predecessor, a written licence agreement was signed by Ortho Biotech, Ortho McNeil, and Janssen-Ortho on November 20, 1998 confirming that Janssen has been sub-licensed since 1986 by Ortho-McNeil's predecessor Ortho Pharmaceuticals to use and sell products containing erythropoietin in Canada. In the agreement, Ortho Biotech also grants to Janssen-Ortho a non-exclusive right to use and sell licensed products containing erythropoietin as provided in the product licence agreement signed between Kirin-Amgen and Ortho Pharmaceuticals on September 30, 1985. Written notice of this agreement was given to Kirin-Amgen (Exhibit D-6).[para93] It is also necessary to note that the Ortho companies are all affiliated. Johnson & Johnson a New Brunswick, New Jersey corporation owns 100% of the voting stock of Janssen-Ortho. It also owns either directly or indirectly 100% of the voting stock of Ortho-McNeil Pharmaceutical Inc. and Ortho Biotech Inc.*

94 *Counsel for the plaintiffs argues that applying the test articulated in Apotex Inc. v. Wellcome Foundation Ltd. (1998), 79 C.P.R. (3d) 193 (F.C.T.D.) at 300 - 301, (which test is: can the right asserted by the claimant be traced back to the patentee), leads to the conclusion that Janssen-Ortho is a person "claiming under" the patentee for the purpose of section 55 of the Patent Act. I agree.*

[41] In *Jay-Lor International Inc. v Penta Farms Systems Ltd.*, 2007 FC 358, Justice Snider of this Court reviewed the authorities and in particular, the Reasons of Justice Wetston of this

Court, in *Apotex Inc. v Wellcome Foundation Ltd.* (1998), 79 C.P.R (3d) 193, and concluded that the ability of a person to claim under a patentee depends on whether the party can trace an interest under the patent; it does not necessarily require the existence of an express licensee. She wrote at paragraphs 32 to 38:

> *[32] More recently, in Apotex Inc. v. Wellcome Foundation Ltd., 79 C.P.R. (3d) 193, 145 F.T.R. 161, [1998] F.C.J. No. 382 (F.C.T.D.) (QL), aff'd on this point 2000, 10 C.P.R. (4th) 65 (F.C.A.), 262 N.R. 137, (referred to as Wellcome), the court considered the relationship between the two related companies who had brought an action for infringement and provided some helpful analysis on the issue of the right to assert rights under s. 55(1) of the Patent Act. In that case, Glaxo Wellcome Inc. (GWI) claimed that it was entitled to bring an infringement action because it was exclusively licensed by the Wellcome Foundation Ltd. to import, manufacture, use and sell the invention described in the patent. Wellcome was listed as the owner of the patent. Although, no written licence was produced to establish GWI as a licensee, GWI maintained that the licence was implied.*
>
> *[33] The arguments of the plaintiffs in Wellcome were very similar to those made by the Defendants in this case. The plaintiffs asserted that GWI failed to meet its onus to establish that it had an entitlement to sue under s. 55(1) of the Patent Act. They argued that a licence, like any other contract, must be proven according to its terms and effects.*
>
> *[34] In Wellcome, at paras. 360-361, Justice Wetston provided the following comments on the interpretation of s. 55(1):*
>
> > *Canadian jurisprudence has provided a broad interpretation of "persons claiming under" the patentee. A range of interests is held to have been contemplated, including the exclusive licensee, the non-exclusive licensee, the purchaser of a patented articles and sales agents. This interpretation is embodied in Signalisation de Montréal Inc. v. Services de Béton Universels Ltée et al. (1992), 46 C.P.R. (3d) 199 (F.C.A.) per Hugessen J.A. at p. 211:*
> >
> > > *It matters not by what technical means the aquisition of the right to use might have taken place. It may be a straightforward assignment*

> *of a licence. It may, as I have indicated, be a sale of an article embodying the invention. It may also be a lease thereof. What matters is that the claimant asserts a right in the monopoly and that the source of that right may be traced back to the patentee.*

[35] In the Wellcome case, Justice Wetston did not find that a parent/subsidiary relationship exist between GWI and Wellcome. However, the two companies were under the ownership, common care and control of Glaxo Wellcome plc. The evidence was that licences were seldom written. Based upon his review of the facts of the case, Justice Wetston concluded, at para. 367, that "GWI is indeed able to trace an interest under the patent to the patentee in virtue of the corporate practices with respect to implied licensing within the group of companies under the care and control of Glaxo Wellcome plc".

[36] In sum, what I can take from the Wellcome case and other jurisprudence is that the ability of a party to claim under a patentee depends on whether the party can trace an interest under the patent to the patentee and does not necessarily require the existence of an express licence. Where no express licence exists, each case will be determined on its facts.

[37] In the case before me, I am satisfied, on a balance of probabilities, that JAY-LOR Fabricating has met the burden of demonstrating that it can trace an interest under the patent to JAY-LOR International. The key facts supporting this conclusion can be summarized as follows:

- *Both JAY-LOR Fabricating and JAY-LOR International are under the same control of Mr. Tamminga;*
- *No other licence has been granted – either explicitly or by implication – to any third party; and*
- *The two companies have structured their affairs in a manner consistent with a licensee-licensor relationship.*

[38] In conclusion, I am satisfied on this point that JAY-LOR Fabricating has standing to bring this action.

[42] Lastly, I turn to the decision of Justice Snider in *Les Laboratories Servier v Apotex Inc.*, 2008 FC 825 (affirmed without discussion on this point, 2009 FCA 222). She determined that the mere existence of a corporate affiliation is not conclusive of a right as a person "claiming under" a patentee; there must be something more. She concluded that an entity which did not operate "in Canada" was not a person "claiming under" the patentee. She wrote at paragraphs 70, 81 and 82 and 88 to 91:

> *[70] The test for who qualifies as a person claiming under a patentee is not simply whether the patentee has consented to the person being joined as a plaintiff in an action; nor is it enough to demonstrate that two parties are related. In each case, the facts must demonstrate a credible and legally sufficient basis for claiming under a patentee (Jay-Lor International Inc. v. Penta Farm Systems Ltd. (2007), 59 C.P.R. (4th) 228 at paras. 31, 36 (F.C.) [Jay-Lor]).*
>
> ...
>
> *[81] Mr. Langourieux confirmed that none of the non-ADIR Foreign Plaintiffs manufacture, offer for sale or import any of the compounds claimed in the '196 Patent into Canada. He also agreed that each local affiliate in a particular country has the focus of promoting, marketing, and registering the product in its specific jurisdiction. For example, Servier UK promotes, markets, sells and distributes the medicines of Groupe Servier in the U.K. market only. I have seen no evidence that Servier Canada sells perindopril in the United Kingdom. For that purpose, Servier UK exists. Servier Australia promotes, markets, sells and distributes the Servier products in the Australian and New Zealand markets. Manufacturing of the active ingredient (the API) in COVERSYL is done by Oril Industries in France. Thus the evidence shows that the affiliated companies within Groupe Servier do not operate as a single entity; each has its own sphere of operation and its own responsibilities within Groupe Servier. Nevertheless, the non-ADIR Foreign Plaintiffs may still be able to satisfy s. 55(1) of the Patent Act, through a licence or other such arrangement.*
>
> *[82] As noted above, the mere existence of a corporate affiliation is not conclusive evidence of a right under s. 55(1) of the Patent Act. There must be something more. That something more has consistently been described in the jurisprudence as a "licence" or some other arrangement (for example, a lease, an*

assignment, or a sale) that would give the affiliate the right to use the patent.

...

[88] As shown by the evidence, none of the non-ADIR Foreign Plaintiffs operates in Canada. In final argument, counsel for Servier tried to counter Apotex's arguments on the use of the patent by the non-ADIR Foreign Plaintiffs through the following hypothetical:

> *It is wholly conceivable that if Servier Australia ran out of perindopril and Servier Canada had too much of it, that Servier Australia would purchase perindopril from Canada, or even in Canada.*
>
> *My friends' position would either prevent that situation from happening, because Servier Australia would not have a licence in Canada, or would make everybody stop, negotiate a sublicence under the '196 Patent, or bring in Adir to award Servier Australia a licence under the Canadian patent.*
>
> *That is nonsensical . . . when we view the manner in which the Servier group of companies views itself and operates.*

[89] There are two problems with this line of reasoning. First, this argument is not based on any evidence that this has ever happened in the history of Groupe Servier; it is totally speculative. Secondly, it is not at all "nonsensical" to require affiliates to enter into some type of document to reflect legal rights.

[90] Further, none of these Plaintiffs has ever needed a licence in respect of the '196 Patent because none of their foreign activities relating to the manufacture, use or sale of perindopril can constitute an infringement of the '196 Patent.

[91] Quite clearly, the non-ADIR Foreign Plaintiffs do not use the '196 Patent in Canada or elsewhere. They do not need a licence from ADIR in respect of that patent. It is a stretch to say that the non-ADIR Foreign Plaintiffs are parties to an implied licence for the '196 Patent when no such licence is required.

[43] From all this jurisprudence, I determine that for a Court to conclude that a party is a person "claiming under" the patentee for the purposes of section 55(1) of the *Patent Act*:

- the person must be one who, as a user, an assignee, a licensee or lessee has a title or a right that can be traced back to the patentee (*Signalisation*);
- it does not matter whether a licensee is exclusive or non-exclusive (*Domco*);
- the licence must be proved but it need not exist in writing (*Jay-Lor*);
- the claim must be one in respect of a use in Canada and not elsewhere in the corporate chain (*Servier*).

[44] I will now review the evidence in this case.

[45] The parties agree that Daiichi, the patentee, has entered into a written license agreement with an entity called Johnson & Johnson, a New Jersey corporation [J&J], effective as of May 28, 1991 with respect to levofloxacin. That agreement is in evidence at Tab 298 of Exhibit 4. It is agreed that this agreement applies to the 080 Patent. That licence, Article 2.1, grants J&J a licence to manufacture finished products containing levofloxacin and to sell them in Canada, among other countries, in exchange for payment of certain royalties as set out in Article 6.00. Article 7 provided that Daiichi will supply all of J&J's requirements for levofloxacin [the API]. Article 11.00 provides that J&J shall notify Daiichi of any infringement, and Daiichi shall take action in respect thereof assisted by J&J. Article 21.00 provides that any modification to the agreement shall be confirmed in writing. Article 2.3 is important in this case and I reproduce it in full since it relates to sublicenses to J&J subsidiaries:

> *2.3 J&J has the right to sublicense to J&J's Subsidiaries in each country of the Territory any or all of the license herein*

> *granted upon the terms and conditions of this Agreement, provided, however, that the right of sublicense to manufacture the Finished Preparation from the Compound shall be granted to one J&J's Subsidiaries in each country of the Territory. No sublicense agreement entered into pursuant to this paragraph shall be deemed to relieve J&J of its responsibility hereunder, including without limitation the responsibility of insuring that proper payment is made to DAIICHI of all amounts that may become due and owing under this Agreement. Furthermore, J&J shall have the right to appoint distributors and to sublicense such distributors in each of the countries in Territory B to sell the Finished Preparation subject to the terms and conditions of this Agreement. In the event that J&J intends to grant a sublicense pursuant to this paragraph, J & J shall obtain DAIICHI's prior written consent on the contents of such sublicense agreement, which consent shall not be withheld unreasonably.*

[46] A number of written amendments and supplements to the licence agreement have been put in evidence. None of them directly relate to Janssen Pharmaceuticals, Inc. (or its predecessors) nor do any of them deal in any specific way with Canada.

[47] There is no written agreement in evidence directly between Daiichi and Janssen Pharmaceuticals, Inc., or any of its predecessors.

[48] Through the evidence of Seth Fischer there was introduced Exhibit P35 which included an e-mail from a Daiichi executive to Fischer who was at the time a senior executive at a Johnson & Johnson subsidiary. That e-mail, according to Fischer, was in response to a letter sent by Fischer to Daiichi, a draft of which was, according to Fischer, "something like" Exhibit P36. That draft said, in part:

> *Changes in the U.S. Tax Laws affecting the tax status of our manufacturing operations for Levaquin in Puerto Rico became effective as of today, December 1. While highly technical in nature, those changes will have no substantive effect on the way we*

manufacture Levaquin. However, we have concluded that we should document a form of sub-license from Johnson & Johnson to our wholly owned Puerto Rican based subsidiary, Janssen Ortho LLC, so that we have a written record for its rights to manufacture Levaquin. Such sublicenses are contemplated by our License Agreement with you in Section 2.3 of the 1991 Agreement.

I enclose for your review a draft of the proposed manufacturing sub-license from Johnson & Johnson to Janssen Ortho LLC.

My people tell me that Section 2.3 is somewhat ambiguous as to whether a sub-license to our subsidiary requires consent from Daiichi, or whether the consent requirement in Section 2.3 is limited to agreements for the appointment of third party distributors.

I will very appreciate your confirming that you agree that the consent requirement in Section 2.3 does not apply to a sub-license to our subsidiary, or in any event confirm that you have no objection to the enclosed sub-license.

[49] The responding Daiichi e-mail, Exhibit 35, said in part:

Dear Seth,

I was forwarded your e-mail addressed to Dr. Une.

Our understanding of the Agreement Section 2.3 is that the consent requirement shall apply to both the sub-license to Johnson & Johnson's subsidiaries and third party distributers.

However, in view of the reality and our previous communication records, it is expressly understood that you have granted a manufacturing sub-license to your subsidiaries (in this case, Janssen Ortho LLC) of Levaquin in the Territory, and we have already agreed with you on such sub-license.

Therefore, notwithstanding Section 2.3, there is no need to give our written consent on a sub-license agreement for Janssen Ortho LLC.

Nevertheless, if Daiichi were to comment on the draft of sub-license agreement, I would like to share the same understanding with you that this sub-license agreement dose not seem to fit into the License Agreement (e.g. Article 1.6 or Article 2).

> *I simply assume the reason being that this agreement was drafted as an "comprehensive contract" between Johnson & Johnson and its subsideries, in response to the changed Tax Laws, not limited to Levaquin.*
>
> *In short, as long as Johnson & Johnson's obligations stipulated in the License Agreement are fulfilled by Johnson & Johnson and its subsideries, we do not think this sub-license agreement should create any problems on our side.*

[50] The evidence of Jeff Smith in that he, and others in the Ortho-McNeill branch of the J&J organization, had frequent meetings and communications with Daiichi in Japan and the United States, and that Daiichi was well aware as to how the J&J organization was making and selling levofloxacin finished products through one or more of its related companies.

[51] The affidavit of Lim, Exhibit P41, to which I attach little weight, is largely hearsay and of little assistance in any event.

[52] Addressed in evidence by the witnesses Smith and Roarty were charts, the first of which is Exhibit P17, showing the corporate history of Janssen US, and Exhibit P38, providing an overview of the Levaquin supply chain. The evidence, as far as it goes, as shown in those charts was not seriously challenged in cross-examination.

[53] Exhibit P17 shows that Janssen Pharmaceuticals, Inc. merged with Ortho-McNeil Inc. on December 31, 2007, with the merged corporation continuing under the name Ortho-McNeil-Janssen Pharmaceuticals, Inc. That entity changed its name on June 22, 2011 to Janssen Pharmaceuticals, Inc., the current Plaintiff that we call Janssen US.

[54] Exhibit P38 shows that Johnson & Johnson [J&J] is the parent company of Janssen Puerto Rico, Janssen U.S. and Janssen Canada. It shows that Daiichi supplies levofloxacin to Janssen Puerto Rico who manufactures finished levofloxacin tablets in Puerto Rico (Gurabo), and ships them directly to Janssen Canada. However, the paperwork flow showing the sales transactions is one wherein Janssen Puerto Rico sells these tablets to Janssen U.S. who then sells them to Janssen Canada. The price at which Janssen U.S. sells to Janssen Canada is sometimes referred to as the transfer price. Janssen US's claim for damages is based on alleged loss of sales to Janssen Canada at the transfer price less costs such as payments to Janssen Puerto Rico for the product and other expenses.

[55] In addition to the documents I have already referred to, there were introduced into evidence several business records reflecting transactions as to the levofloxacin products within the J&J companies as well as to Janssen Canada customers. Many of these were excerpted from a system called SAP which is a vast computerized programme into which data such as sales and transfer of products can be entered, stored and excerpted. This data does not reflect information such as where title to the product may pass.

[56] Copies of some invoices and the like were entered into evidence such as Exhibit P37 through the witness Lindsey Villacis, an executive with Janssen Supply Group in New Jersey. Neither she, nor any other fact or expert witness, could advise the Court as to when and where title passed in respect of the levofloxacin product. I provide an excerpt of Ms. Villacis' cross-examination at page 853 of the transcript:

> *Q. When you speak of title passing in Gurabo, that is the title passing to Janssen Canada in Gurabo?*

A. I can't speak to which specific legal entity that it passes at the point of shipping, but I can speak to the fact that financial ownership changes at the end of the month. At the time, Janssen-Ortho Inc. owns the product.

Q. It is just the finances you can speak to, not so much telling this court where title passes?

A. True. Yes.

Q. You can't tell me at what point in the process title moved from one party to another, from LEVAQUIN going from Puerto Rico to Canada?

A. I cannot tell you that. I can tell you that it starts in Gurabo, and at the end of the process, it ends with Janssen-Ortho Inc.

[57] Fernandini, an executive with Janssen Puerto Rico, at pages 886 to 888 of his cross-examination, said:

Q. You don't know who had title to the product at any point?

A. Title of the product, when this is Janssen-Ortho LLC, we have the burden of the risk of having that API in Gurabo. If material is rejected or damaged, Janssen-Ortho was responsible for the material.

Q. They also had title to the finished product there in Gurabo?

A. Once it is in Gurabo, it is Gurabo inventory.

Q. When they put it on the plane to ship it to Canada, the title-

A. Depending on the terms and conditions, I don't remember. We need to see the terms and conditions.

Q. You can't tell me who has title after?

A. No. It is in transit. It depends on the terms.

...

Q. You don't know if it had an impact on the title?

A. But the title was Janssen-Ortho. All the time, it was Janssen-Ortho LLC.

Q. When you told me that Janssen-Ortho LLC had title to the product in Puerto Rico, it had title at least until it was put on the plane to go to Canada?

A. Yes.

[58] Roarty, an executive with Johnson & Johnson, in cross-examination said at pages 910 to 911:

Q. At the time LEVAQUIN – you understand LEVAQUIN was manufactured in Puerto Rico?

A. Yes.

Q. At the time LEVAQUIN was shipped out the door and put on a plane, it was not owned by Janssen Pharmaceuticals Inc. or any previous incarnation of Janssen Pharmaceutical Inc.; right?

A. I don't believe so. It would have been owned by either OMJ Pharmaceuticals or Janssen-Ortho LLC, depending on when.

Q. They would have owned it as it got onto the plane, and at some point later possibly, the SAP entry is entered into the system?

A. I never was involved in those transaction[s]. I don't know the exact sequence or when title passed or things like that.

Q. It was owned by Janssen-Ortho LLC or OMJ Pharmaceuticals Inc. while it is in transit, and then it lands in Canada?

A. I am not sure who owned it while it is in transit.

Q. You can only tell me who owned it when it got on the plane?

A. I believe it would have been owned by the manufacturer.

Q. Who is Janssen-Ortho LLC?

A. Correct.

Q. That is true in the period of 2005 to 2006, etc.?

A. After 2006, I believe, it was Janssen-Ortho LLC. Prior to that, it was OMJ Pharmaceuticals.

Q. You wouldn't be able to tell me who owned the LEVAQUIN when the plane landed in Canada?

A. I am not sure if it was owned by Canada at that point or the U.S. or Puerto Rico.

Q. That is because you just don't know?

A. That is correct.

[59] Teva argues that Janssen US cannot be a person "claiming under" the patentee, Daiichi, since there is no clear evidence that Janssen US "used" the patented invention in Canada. Teva argues that Janssen US bears the burden of demonstrating that it had, even if for a moment, title to the levofloxacin containing tablets in Canada whereby, save for a licence from Daiichi, it would be infringing on the 080 Patent. Teva argues that the evidence falls far short of proving, even on a civil burden, that Janssen US had title to the tablets in Canada, hence "used" the invention in Canada.

[60] Janssen argues that it is unnecessary to show that Janssen US "used" the invention in Canada whether by having title to the tablets in Canada or otherwise. It is sufficient, Janssen argues, to demonstrate that Janssen US was part of the chain whereby the tablets flowed through the licence from Daiichi to J&J through unwritten licences, to Janssen Puerto Rico, then to Janssen US and finally, to Janssen Canada; it was part of a chain licensed, not in writing, but by implication and acquiescence, by Daiichi.

[61] In my determination, Janssen's argument is consistent with the state of the law as it exists in Canada, at least at the level of this Court, today. Janssen US has proven to my satisfaction that it has the licence or permission, by acquiescence, of Daiichi, to be involved in the chain of the sale of tablets made in Puerto Rico by Janssen Puerto Rico, through Janssen US to Janssen Canada. It is immaterial whether Janssen US had title, even momentarily, to the tablets in Canada.

[62] The matter was faced squarely by Polowin J. of the Ontario Superior Court in *Roche Palo Alto LLC v Apotex Inc.* (2005), 44 C.P.R. (4th) 431. She wrote at paragraph 37:

> *37 Subsection 55(1) of the Patent Act sets out no geographical restriction. Further, the Signalisation case, supra, supports that the court must view broadly those who can claim under a patent. The claim to damages on the part of Allergan Sales and Allergan Ireland arises from the alleged infringement by Apotex of the 614 Patent which is a Canadian patent. The elements of the cause of action of patent infringement are set out in the Statement of Claim. Allergan Ireland has been the exclusive manufacturer of ketorolac ophthalmic products under the 614 Patent sold to Allergan Canada for sale in Canada. Allergan Sales is the licensor of technical know-how to Allergan Ireland with respect to these products and has entered into a royalty agreement in this regard. As such, both Allergan Sales and Allergan Ireland allege that they have been damaged by the infringement of the 614 Patent.*

[63] While not binding upon me, I agree with the interpretation given by that Court, of section 55(1) of the *Patent Act* and the *Signalisation* case.

[64] The case of *AlliedSignal Inc. v DuPont Canada Inc.* (1998), 78 C.P.R. (3d) 129 (FCTD) (aff'd 86 C.P.R. (3d) 324 (FCA)), demonstrates the Canadian *Patent Act* permits recovery of damages in respect of activity outside Canada. A United States patentee selling to customers in

the United States could recover damages for loss of sales where a Canadian infringer sold Canadian made product to United States customers. Heald D.J., in determining a reference to damages, wrote at paragraph 33:

> *33 In conclusion, the right to claim lost profits is not circumscribed by the territorial limitations of the Patent Act to profits made on sales within Canada. The patentee has a right to be compensated for all damages flowing from the infringement of the patent within Canada, which may include profits lost on sales outside Canada. Furthermore, lost profits are merely a useful measure to help determine an appropriate and fair level of compensation. In the case at bar, the plaintiff is entitled to lost profits on those sales, whether in Canada or the United States, that it proves it would have made but for the presence of the defendant's DARTEK (R) film in the market.*

[65] The decision of Justice Reed in *Kirin Amgen*, previously referred to, while not specifically addressing the point, came to the same result in allowing a US corporation that was part of the J&J chain of companies engaged in the manufacture and sale of goods, to participate in a claim for damages without specifically demonstrating that it had title to the product, even for a moment, in Canada.

[66] I also rely on the decision of the Federal Court of Appeal in *Apotex Inc. v Wellcome Foundation Ltd.*, previously referred to, where Rothstein J.A. wrote that since the patentee and the person "claiming under" were before the Court both urging that the person had status, the Court would not deny that status. The present case is different in that the patentee, Daiichi, has not actually participated in this proceeding. Nonetheless, Daiichi clearly knows of this proceeding and has taken no steps to object to the status of Janssen US.

[67] I distinguish the decision of Justice Snider in *Les Laboratories Servier, supra,* in that she found particularly at paragraph 81 that each of the foreign entities had to own a sphere of operation and its own responsibilities within Group Servier, thus those entities not operating in a Canadian sphere could not be considered as persons "claiming under" the patentee. In the case before me, the J&J group of companies are operating as a team whereby licensed tablets ultimately found their way to Canada.

[68] Thus I conclude that, in the circumstances of this case, Janssen US is a person "claiming under" the patentee, Daiichi, for the purposes of having standing to claim damages for infringement by Teva of the 080 Patent in these proceedings.

IX. ISSUE NO. 2 – QUANTUM OF DAMAGES

a) Quantifying Damages Generally

[69] The quantification of general damages by a Court is said to be the exercise of a sound imagination and the practice of a broad axe in seeking to restore a plaintiff by monetary means to the condition that it would have been had the infringement not occurred. The words of Lord Shaw in *Watson, Laidlaw & Co. Ltd. v Pott Cassels, and Williamson* (1914), 31 R.P.C. 104 over a hundred years ago are still appropriate today. He wrote at pages 117 to 118:

> *In my opinion, the case does raise sharply an important question as to the assessment of damages in patent cases, and with that question I proceed to deal. It is probably a mistake in language to treat the methods usually adopted in ascertaining the measure of damages in patent cases as principles. They are the practical working rules which have seemed helpful to Judges in arriving at a true estimate of the compensation which ought to be awarded*

> *against an infringer to a patentee. In the case of damages in general, there is one principle which does underlie the assessment. It is what may be called that of restoration. The idea is to restore the person who has sustained injury and loss to the condition in which he would have been had he not so sustained it. In the cases of financial loss, injury to trade, and the like, caused either by breach of contract or by tort, the loss is capable of correct appreciation in stated figures. In a second class, of cases, restoration being in point of fact difficult, as in the case of loss of reputation, or impossible, as in the case of loss of life, faculty, or limb, the task of restoration under the name of compensation calls into play inference, conjecture, and the like. This is necessarily accompanied by those deficiencies which attach to the conversion into money of certain elements which are very real, which go to make up the happiness and usefulness of life, but which were never so converted or measured. The restoration by way of compensation is therefore accomplished to a large extent by the exercise of a sound imagination and the practice of the broad axe. It is in such cases, my Lords, whether the result has been attained by the verdict of a jury or the finding of a single Judge, that the greatest weight attaches to the decision of the Court of first instance. The reasons for this are not far to seek-such as the value of testimony at firsthand, down to even the nuances of its expression, and they include, of course, the attitude and demeanour of the witnesses themselves. In all these cases, however, the attempt which justice makes is to get back to the status quo ante in fact, or to reach imaginatively, by the process of compensation, a result in which the same principle is followed. In Patent cases the principle of restoration is in all instances to some extent, and in many instances to the entire extent dependent upon the same principle of restoration.*

[70] Reference to the principle of a broad axe as expressed by Lord Shaw in *Watson, Laidlaw* was made by Kerwin J. of the Supreme Court of Canada in *Colonial Fastener Co. Ltd. v Lightning Fastener Co. Ltd.*, [1937] SCR 36 at page 44.

[71] A similar thought was expressed by Lord Buckley in *Meters Ltd. v Metropolitan Gas Meters Ltd* (1911), 28 RPC 157 (Eng CA) at page 161:

> *Therefore, in a case such as the present, where licences are not granted to anyone who asks for them for a fixed sum, it is a matter which is to be dealt with in the rough-doing the best one can, not attempting or professing to be minutely accurate-having regard to all the circumstances of the case, and saying what upon the whole is the fair thing to be done.*

b) Facts, Assumptions and Fun with Numbers

[72] Many of the underlying facts including numbers have been agreed upon between the parties. The application of those facts in arriving at a reasonable calculation of damages by the parties creates a difference as much as tenfold. Janssen asserts that it is owed up to eight figures in dollars in damages; Teva argues that it saved Janssen seven figures in dollars. Much depends on the assumptions made and applied by the experts put forward by the parties.

[73] Given certain assumptions, the application to agreed facts and numbers can lead to remarkable differences. An illustration is given in Dr. Rosenblatt's Reply Report, Trial Exhibit P6 at paragraphs 7 and 8 where graphs are presented which illustrate, in Figure 1, how it can be seen that sales of levofloxacin were rising over a period whereas, in Figure 2, it seems that sales are declining. The difference is slight but the results are significantly different. The Figures each show a "trend line" generated by a computer for sales over a certain number of years. Figure 1 is for the period 1/2000 to 11/2004 whereas Figure 2 is for the period of 1/2001 to 11/2004; in other words, Figure 2 starts a year later than Figure 1.

Figure 1

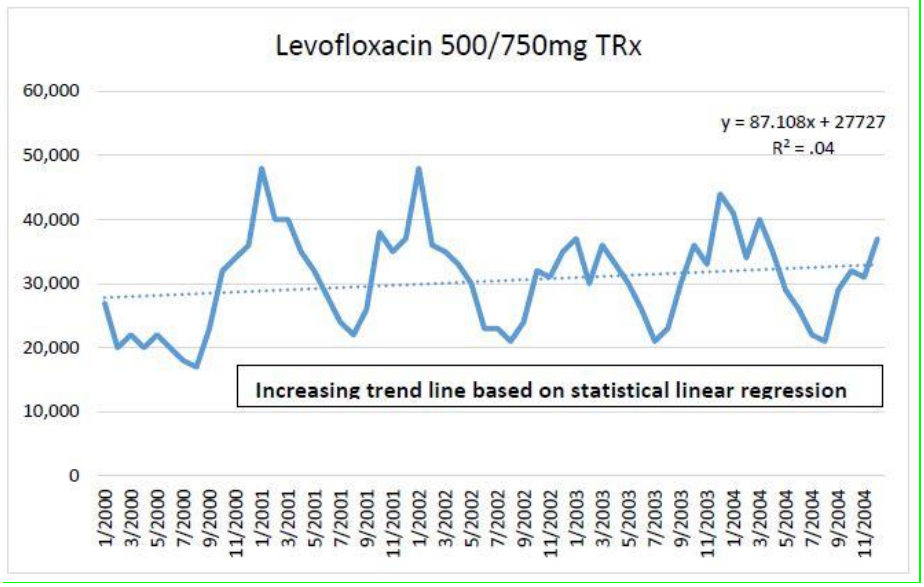
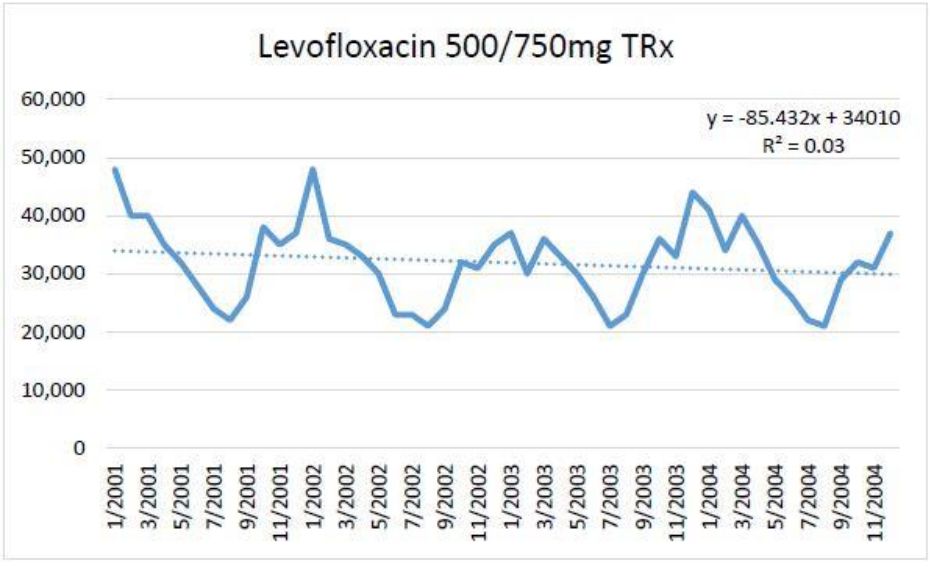


Figure 2



c) Positions and Concessions

[74] Prior to and during trial, the parties took certain positions and made certain concessions worthy of note, some of which are mentioned elsewhere in these Reasons. The following are of note:

1. Janssen Puerto Rico, the Plaintiffs Janssen-Ortho LLC and OMJ collectively in Action No. T-2056-11, have withdrawn any claim for damages. They remain as Plaintiffs in that action only because, as the matter approached trial, it was too late to remove them. As a practical matter, Janssen US, that is Janssen Pharmaceuticals, Inc., is the only actively participating Plaintiff in that action;
2. Janssen US is not claiming damages for any period prior to December 19, 2005 but is claiming for a period up to December 31, 2010 notwithstanding that the 080 Patent expired June 23, 2009;
3. Janssen Canada, a Plaintiff in Action No. T-2175-04, is seeking damages for the period December 1, 2004 to December 31, 2010;
4. Teva sold 250 mg and 500 mg strength levofloxacin tablets in Canada. It never sold 750 mg strength;
5. Sales of Teva's 250 mg strength levofloxacin tablets are to be considered, for damage purposes, on a one-for-one substitution basis with Janssen's LEVAQUIN 250 mg strength tablets;
6. Daiichi's claim for damages has been satisfied and it played no active part in these proceedings;
7. Following the injunction that I granted on October 17, 2006, Teva took advantage of the thirty (30) day sell off period that I permitted, and made a payment to Janssen in that respect. The parties have all deducted that payment in the submissions in respect of damages.

d) The Marketplace as it Existed in Fact

[75] There was a debate between the experts as to how to define the relevant marketplace. I will begin by speaking in broad terms. We are speaking of drugs used as antibiotics in the treatment of infection, particularly respiratory tract infections (RTI's) and to some degree, urinary tract infections (UTI's).

[76] In the 1950's, a class of drugs known as macrolides were developed for the treatment of several bacterial infections. The quinolone class of macrolides developed in the 1950's was a particularly significant class which proved effective against bacteria defined as gram-negative; however, quinolones were not found to be effective against other types of bacteria known as gram-positive.

[77] In the 1980's, certain types of quinolones known as fluoroquinolones were developed; among the most popular was ciprofloxacin or CIPRO. This drug however proved to be effective only in respect of a particular group of patients infected with particular gram-negative bacteria. Nonetheless, CIPRO continues to be used by doctors in treating patients to this day including the use of a variant known as CIPRO XL.

[78] Also introduced in the 1990's for the treatment of RTI's, were drugs known as ZITHROMAX (azithromycin) and BIAXIN (clarithromycin), a later version of which was introduced as BAIXIN XL. These drugs, particularly BIAXIN XL, continue in use to this day.

[79] In the late 1990's, a particular group of fluoroquinolones were introduced known as respiratory fluoroquinolones. The first of these was levofloxacin (LEVAQUIN) which is the subject of these proceedings. Others coming later were moxifloxacin (AVELOX) and gatifloxacin (TEQUIN). Other fluoroquinolones were introduced into the marketplace but were short-lived and play no role in the considerations in these proceedings.

[80] Janssen Canada launched its LEVAQUIN in Canada in late 1997 or early 1998. It was available in tablets of 250 mg and 500 mg strength, as well as intravenous (IV) formulations which IV formulations form no part of these proceedings. The 500 mg tablets were used to treat RTI's and the 250 mg tablets were used to treat UTI's.

[81] AVELOX (moxifloxacin), a product competitive in the marketplace with LEVAQUIN, was introduced in late 2000 and continues in use to this day. In the period from 2000 to 2010, there were no generic versions of this drug in the Canadian marketplace.

[82] TEQUIN (gatifloxacin), another product competitive in the marketplace with LEVOQUIN, was introduced in late 2001. Concerns as to the safety of this product began to emerge in 2004, and it was ultimately withdrawn in June 2006. There was no generic version of this product.

[83] On or about November 29, 2004, Teva launched its generic version of LEVAQUIN under the name Novo-levofloxacin in 250 mg and 500 mg strength tablets. It withdrew from the market by reason of the injunction granted by this Court on October 17, 2006 subject to the thirty

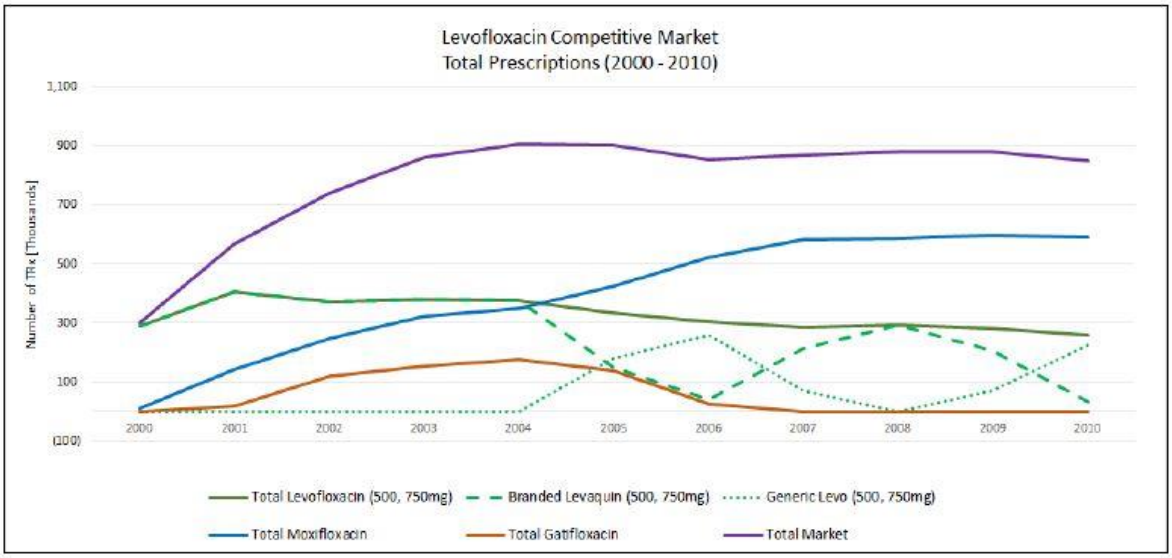
(30) day sell-off previously discussed. This was the only generic levofloxacin product on the marketplace until after the expiry of the 080 Patent.

[84] In about early 2003, Janssen Canada introduced LEVAQUIN tablets in 750 mg strength which it continued to sell at least until the end of 2010. Teva did not market a tablet of that strength during the relevant period nor did any other competitor of Janssen.

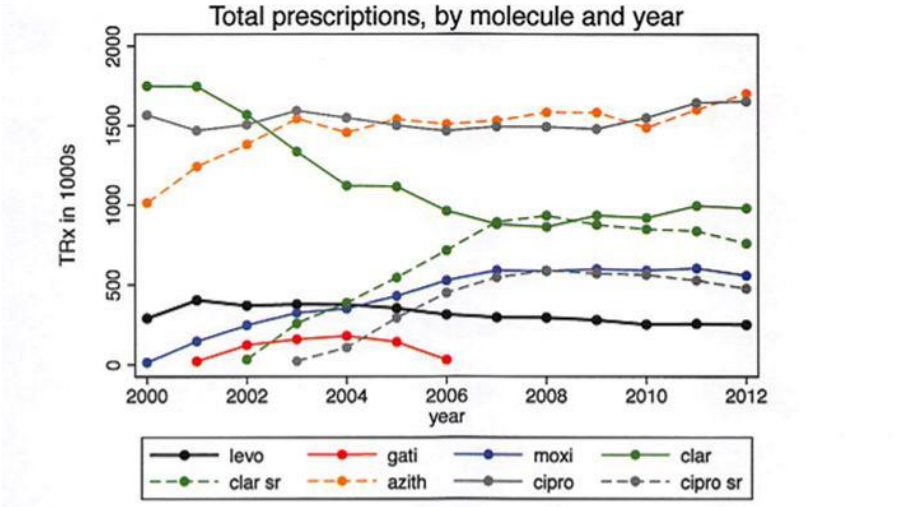
[85] The customers of levofloxacin and other antibiotics have been gathered into two or perhaps three groups in the evidence. One group is direct sales to hospitals; another group is called retail that is sales directly or indirectly to drug stores and the like. A third group includes government and educational groups whose classification is subject to some dispute in these proceedings.

[86] I provide by way of illustration graphs prepared by experts from each of the parties showing the number of prescriptions written for some these drugs. The graph prepared by Rosenblatt, a Janssen expert, illustrates the total respiratory fluoroquinolone market and breaks out sales of levofloxacin (brand and generic), moxifloxacin (AVELOX) and gatifloxacin (TEQUIN) over the period from 2000 to 2010.

Figure 1b – Retail Prescription Trends in the Levofloxacin Competitive Market in Canada



[87] The graph prepared by Dr. Grootendorst, a Teva expert, includes, in addition, other drugs including ciprofloxacin (CIPRO) and clarithromycin (BIAXIN) and extends the time period to 2012.



source IMS Compuscript
Note: levo = levofloxacin, gati = gatifloxacin, moxi = moxifloxacin, clar = regular release formulation of clarithromycin, clar sr = sustained release formulation of clarithromycin, azith = azithromycin, cipro = regular release formulation of ciprofloxacin, cipro sr = sustained release formulation of ciprofloxacin.

[88] While there were some disputes concerning these graphs, they are sufficient to illustrate that the number of prescriptions for levofloxacin (Janssen plus Teva) declined since about 2004, that gatifloxacin declined since 2004 and disappeared in 2006, and that moxifloxacin gained from 2000 to 2006, and then levelled off. The market for other drugs such ciprofloxacin and clarithromycin remained strong.

e) Scenarios

[89] Janssen, through its expert witness, Dr. Rosenblatt, presented two scenarios as to what might have happened in the marketplace "but for" the entry of Teva's generic levofloxacin product. He called them Scenario A and Scenario B which he described at paragraphs 51(a) of Report, Exhibit P5, as follows:

> *51. In the paragraphs that follow I provide But For prescription volume estimates based on two different market scenarios. The major assumption common to both scenarios is that the total number of prescriptions in the Damages Period in the Levofloxacin Competitive Market does not change from what actually occurred during this time period. The two scenarios are defined below:*
>
> *51(a) The two "But For" Scenarios are:*
>
> > *51a(i) **Scenario A** – For this scenario I have assumed that LEVAQUIN®, by virtue of having sales efforts at levels similar to those in the period immediately preceding the Damages Period, would have captured 51.8% of the actual combined levofloxacin (500mg and 750mg strength) and AVELOX® market. As of December 2004, at the start of the Damages Period, the LEVAQUIN® share of the combined levofloxacin (500mg & 750mg) and AVELOX® market was 51.8%. I believe this is the most likely scenario.*

> *51a(ii)* ***Scenario B*** *– For this scenario I have been asked to assume that LEVAQUIN®, would have maintained pre-Damages Period selling efforts and all other market factors would have remained stable. In other words, I have been asked to ignore actual prescription data for TEQUIN® and AVELOX®. A statistical forecast model (exponential smoothing, detailed in Schedule E) estimates that the average level of prescription volume between 2000 and 2004 would have occurred between 2005 and 2010; this is a very conservative scenario and assumes no growth at all for the levofloxacin molecule, even with continued promotion. I do not believe this is a likely scenario.*
>
> [Emphasis in the original]

[90] Teva, through its witness Mak, presented six different scenarios as set out in paragraph 7 of his Sur-Reply Report, Exhibit D47:

> *7. I have revised my calculations as explained herein. The results of the economic loss scenarios that I have considered are summarized as follows:*
>
> ***Scenario 1:*** *Lost volumes based upon Teva's ex factory sales, with alternative assumptions regarding advertising and promotion ("A&P") expenses and loss periods for price erosion. Estimated losses (net benefit), with prejudgment interest, range from* ***$[redacted] to $[redacted]****, after deducting the $[redacted] that Teva has already paid to Janssen Canada.*
>
> ***Scenario 2:*** *Same as Scenario 1, but lost volumes for 500mg tablets are based on TRx (dispensed prescription) data. Estimated losses (net benefit), with prejudgment interest, range from* ***$[redacted] to $[redacted]****, after deducting the $[redacted] that Teva has already paid to Janssen Canada.*
>
> *Scenario 2.1: Same as Scenario 2, but lost volumes for 500mg tablets are based on ex factory volumes recognized according to the months in which TRx is sold (dispensed prescription). Estimated losses (net benefit), with prejudgment interest, range from* ***$[redacted] to $[redacted]****, after deducting the $[redacted] that Teva has already paid to Janssen Canada.*
>
> ***Scenario 3:*** *Based upon Scenario A of the CHS Report, but adjusted for corrected TRx volumes and with alternative*

> *assumptions regarding A&P expenses and loss periods for price erosion. No permanent loss of market share is assumed for the LEVO 2 plaintiffs. Estimated losses (net benefit), with prejudgment interest, range from* ***$[redacted] to $[redacted],*** *after deducting the $[redacted] that Teva has already paid to Janssen Canada.*
>
> ***Scenario 4:*** *Same as Scenario 3, but permanent loss of market share is assumed for the LEVO 2 plaintiffs. Estimated losses (net benefit), with prejudgment interest, range from* ***$[redacted] to $[redacted],*** *after deducting the $[redacted] that Teva has already paid to Janssen Canada.*
>
> ***Scenario 5:*** *Based upon Scenario B of the CHS Report, with the same adjustments made in Scenario 3. Estimated losses (net benefit), with prejudgment interest, range from* ***$[redacted] to $[redacted],*** *after deducting the $[redacted] that Teva has already paid to Janssen Canada.*
>
> ***Scenario 6:*** *Same as Scenario 5, but permanent loss of market share is assumed for the LEVO 2 plaintiffs. Estimated losses (net benefit), with prejudgment interest, range from $****[redacted] to $[redacted],*** *after deducting the $[redacted] that Teva has already paid to Janssen Canada.*
>
> [Emphasis in the original]

f) The "But for" Marketplace

[91] The Court must engage in an attempt to reconstruct what would have been the sales of Janssen's LEVAQUIN tablets in the Canadian marketplace "but for" the entry, for a period, by Teva with a generic Levaquin product.

[92] Janssen's expert, Cohen, considered the two scenarios presented by Dr. Rosenblatt; Scenario A and B, and endeavoured to recreate the marketplace in the "but for" world, and arrive at a calculation of damages suffered by each of Janssen Canada and Janssen US. He also prepared a Scenario C which served to illustrate some of his rebuttal to Teva's expert, Mak. Scenario C may be disregarded as any attempt by Janssen to put forth its damage claim; only

Scenarios A and B need to be considered for that purpose. The following is a chart setting out these various scenarios and the claim made for damages:

[redacted]

[93] Teva's expert, Mak, presented six scenarios based on the assumptions he was given by a number of Teva witnesses including Dr. Simor, Dr. Grootendorst and Dr. Katsanis. He prepared charts setting out a number of scenarios based on several different assumptions. I set out his Scenario 1 as an illustration:

[redacted]

[94] The differences between the scenarios presented by the experts are greater than might have been expected. For instance, Janssen postulates damages of $[redacted] dollars in one of its scenarios whereas Teva postulates that Janssen actually saved some $[redacted] in one of its scenarios.

[95] At the end of his examination and cross-examination, I put the following questions to Teva's expert, Mak, and received the following answers at pages 1010 and 1011 of the trial transcript:

> *JUSTICE HUGHES: I will ask some questions of the witness. Mr. Mak, I am looking at the various scenarios, but I take it that they culminate in Exhibit D-48 in terms of various adjustments you made, having a look at the opinions of others, and so forth.*
>
> *THE WITNESS: That is correct.*
>
> *JUSTICE HUGHES: Looking at tab C of Exhibit D-48, am I correct in concluding that, in terms of a grand total, you say that as a result of Teva being on the marketplace the plaintiffs, Janssen and others, are ahead by $4 million?*

THE WITNESS: Yes. As a result of Teva being on the marketplace and not spending -

JUSTICE HUGHES: They would be better off if the generic came in even earlier. They would have more money in pocket. Is that what you are saying?

THE WITNESS: Possibly if they were able to avoid this additional spending.

JUSTICE HUGHES: When I take a look at Mr. Cohen's analysis, for instance, P-9. I don't know if you have it in front of you, but you may want to get P-9 in front of him. It is his reply report, and he takes into account various things.

If you turn to page 4, he has a chart. We will forget about pre-judgment interest. He has scenarios. The one he prefers is the one that results in a profit loss, that is Janssen is out of pocket almost $20 million. Is that right.

THE WITNESS: That is right.

JUSTICE HUGHES: I am having trouble getting my head around the fact that you say Janssen actually benefited by Teva being in the marketplace by over $4 million and Mr. Cohen saying there was a loss of almost $20 million. What is the biggest difference or differences between the two of you?

THE WITNESS: The lost volumes. The biggest difference or source difference in terms of dollars has to do with how we each defined lost volumes. Whether you accept that [h]as being Teva's volumes as in my scenarios or the levofloxacin competitive market as in Mr. Cohen and Dr. Rosenblatt's scenarios.

[96] In argument, Counsel addressed a number of factors that they said contributed to the differences in the scenarios presented by the experts as a quantification of damages.

i) What Would Have Been the Normal Course of Events

[97] In the ideal marketing world, a drug company would introduce a new product and promote it heavily, largely through visits by sales representatives to doctors, hospitals and others, in order to acquaint potential buyers and prescribers as to the benefits of the drug. This phase would be followed by a maintenance phase where promotion such as this would continue but at a more moderate pace. The last phase would be the harvest phase where the life of the patent protection would be nearing an end; promotion would lessen to reduce costs and maximize profits.

[98] John Stewart explained this marketing strategy in his direct examination:

> *Q. I would like to move into a new area. I want to talk to you about a life cycle of a patented drug at Janssen. How does Janssen structure the promotional efforts for a patented product?*
>
> *A. How do we – over the life cycle?*
>
> *Q. Yes.*
>
> *A. There are four phases typical to product development and promotion. It begins with the pre-launch phase where the workup is done to develop the overall strategy and tactics and complete understanding of the marketplace. Once we receive approval from Health Canada, we shift into the growth phase. This is where we apply a lot of investment to accelerate the growth of the brand.*
>
> *At a certain point in time – very individual to the brands – we hit what we call a peak share. Our share has been maximized and starts to level off. We shift into what we call a maintenance phase where the question we are answering is: What resources do we need to put against the brand to hold that level of market share or that level of sales?*
>
> *That carries through to the end of our patent life where we go into the harvest stage which is four to six months before the patent expires. We take all resources off it to maximize our profitability.*

Q. Let me back up a little bit and have you explain in a little more detail. Tell me what happens during the pre-launch phase. When does it begin, and what work is done?

A. One year or two years in advance of the anticipated approval by Health Canada, we invest in a marketing director, sometimes a product director or sometimes a product manager as well. Their role is to completely dig into the marketplace and understand what is it had size of the market, who are the competitors, what are the issues in the marketplace, where will our brand fit in, develop the strategies and tactics, make recommendations on sales force size, what programs are needed, etc. – everything that is going to get us to the point that, at approval, we are ready to launch this product.

Q. On approval, what happens next?

A. At approval, we will launch the product at a sales meeting. The representatives have their goals objectives set and they go. It is a heavy invest on both the dollars and manpower to accelerate the growth. Oftentimes, those investments exceed the revenue coming in and that is by design to make sure we move up as fast as we can to that peak share.

Q. On approval, what is that phase of growth called?

A. That is the growth phase.

Q. How long does a growth phase typically last?

A. It can depend. It can be three years. It can be five years. It depends on the brand, the market circumstances, etc. There is no standard prediction as to what that might look like.

Q. How does Janssen decide when the growth phase is going to come to an end?

A. Essentially, it is when you look at the growth curve in terms of the sales revenue or the market share or both. When that starts to level out or slow down where the investment isn't driving incremental growth, the decision is made or the question is asked – we have spent a lot of money and lost a lot of money throughout that growth period. The question is asked: What resources can we apply against it, a reduced amount of resources to hold that level of revenue through to the end of the life cycle?

Q. What do you do with the human resources who were involved in promotion during the growth phase? Are they still necessarily in the maintenance phase?

A. There are resources necessarily in the maintenance phase. You need sales representatives and promotion dollars but to a lot smaller scale.

Q. What type of sales and marketing efforts are undertaken during the maintenance phase?

A. Essentially, in the maintenance phase, the physician are completely aware of your brand. They have utilized it. There isn't a lot of information they need to put in front to make them – to feel comfortable prescribing it. They have built these habits, and they are continuing to prescribe.

Essentially there are core selling materials just to reinforce the advantages of our brand. There are samples because clinicians like to have samples to trial the product with patients sometimes, patient support materials, that kind of thing.

Q. You mentioned earlier that the fourth phase was called the harvest phase. Can you tell us about the harvest phase?

A. It is quite straightforward. It is when the decision is made that we are going to pull all resources off the brand. As the word denotes, we are going to harvest the profit there. At the end of the day, we look at the brand over its entire life cycle, and hopefully, we have generated a positive ROI across the entire life cycle.

Q. When does the life cycle typically end?

A. It ends at your patent expiration.

Q. How is a decision made to move from maintenance to harvest?

A. General timing is maybe four to six months in advance.

Q. In advance of what?

A. Sorry. In advance of the patent expiration. If there are opportunity to move people to new opportunities, new growth opportunities, it may be six month or four months. Generally, as we approach the end of the patent life, we are making those decisions.

> *Q. Still in a general sense, what effect, if any, does genericization have on the planned life cycle of a Janssen drug?*
>
> *A. It means you immediately go into the harvest phase since you are going to cut off all your investment in the brand.*
>
> *Q. Why do you do that?*
>
> *A. The erosion model of your business once a generic to launch is well established. Within 12 month, you may have 10 to 20 percent of your revenue left. Any incremental investment you are putting in during that phase is doing nothing but actually driving demand for the generic version.*
>
> *Q. Do you change the amount of human resources on a project?*
>
> *A. Absolutely. We cancel all the spending. We will redeploy people to other roles in the organization. Hopefully, we can do that versus the other which would be having to terminate people.*

ii) *Competition – Other Molecules*

[99] Janssen's levofloxacin product LEVAQUIN was the first respiratory fluoroquinolone to be introduced into the Canadian market and for a period of time, had that particular market to itself subject to different existing non-respiratory fluoroquinolones such as CIPRO. A year or two later, other products, also respiratory fluoroquinolones but different molecules, came into the market, moxifloxacin (AVELOX) and gatifloxacin (TEQUIN). Janssen had to fight for market share of this particular market which it did on the terms of its "proven safety record".

[100] John Stewart explained this at pages 674 and 675 of the trial transcript:

> *Q. When moxifloxacin and gatifloxacin entered the market, did that change the way that Janssen promoted LEVAQUIN?*

> *A. Yes, in terms of now we have two people vying for the fluoroquinolone decision, but it did not change our focus which was to display the macrolides in the treatments paradigm for those higher risk patients.*
>
> *Q. How did Janssen position LEVAQUIN versus the other fluoroquinolones?*
>
> *A. In the early going, it is not our position to immediately start attacking the other fluoroquinolones. It is their job to say why they are superior to LEVAQUIN. When the conversation came up, the products were more alike than they were different.*
>
> *They were all highly effective, but the two things that stood out for us was our safety record for LEVAQUIN – moxifloxacin had QT prolongation which is a heart-arrhythmia type side effect that is not a good thing, and gatifloxacin had issues with hyper- and hypoglycemia so glucose fluctuations which are not good either. We differentiated based on the proven safety record of LEVAQUIN.*

iii) Disruptions in the Market

[101] In the time period of 2004 to 2006, there were two disruptions experienced in the fluoroquinolone market. One was the disappearance of gatifloxacin (TEQUIN) due to safety concerns. The other was the introduction by Teva of its generic levofloxacin and subsequent removal of that product by reason of this Court's injunction. The issue before the Court now is, if Teva's generic had not been in market, what would Janssen's sales, and therefore profits, have been.

[102] When Teva's generic levofloxacin entered the market, Janssen's promotion of its LEVAQUIN tablets essentially stopped, as explained by John Stewart, transcript pages 694 to 698; why promote a product when the competition will get the greatest share of the market?

[103] When TEQUIN was withdrawn, it is clear that AVELOX, which was being promoted by its drug company (Bayer), gained a share of the TEQUIN market. Would LEVAQUIN also have gained a share of that market and in which proportion? Would doctors or hospitals abandon the respiratory fluoroquinolone class of drugs entirely and go to other drugs such as CIPRO or BIAXIN?

g) Findings as to What the "But for" World Would have Been

[104] There were a variety of different assumptions that help create the different Scenarios A and B of Rosenblatt and 1 through 6 of Mak, which I will consider in more detail.

[105] There were differences between Drs. Chan and Simor as to what doctors who wrote prescriptions for antibiotics such as LEVAQUIN would have been likely to have done in respect of prescribing that drug, or another in the "but for" world had Teva's generic product not entered the marketplace. Among the matters in controversy were:

- the effect of sales representatives (detail persons) in visiting doctors and promoting the product. Having considered all the evidence, I am satisfied that, in the initial stages of a launch of product, these visits have an effect. Once a product is established, such visits have a lesser effect;
- the habitual or persistence level whereby doctors tend to prescribe what they are familiar with and seems to work best for their patients. I am satisfied that there is a significant effect in this regard;

- the effect of guidelines published for hospitals or doctors as to what should or may be prescribed. I am satisfied that guidelines have an effect but do not create dictatorial terms as to what should be prescribed;
- switching once Tequin disappeared from the market. I am satisfied that most doctors would have switched to levofloxacin or moxifloxacin but some may have switched to other products such as CIPRO or one of the macrolides;
- the relevant comparator market is the respiratory fluoroquinolone class;
- spending on promotion, research and development by Janssen if Teva's generic product had not been present. I am satisfied that promotional spending would have continued but, given that the patent term was nearing an end, the spending would probably have diminished. As to research spending, I prefer Janssen's estimate as Teva puts too much emphasis on an abnormally large spending by Janssen in one year; and
- introduction of Janssen's 750 mg LEVAQUIN tablet probably took sales from its 500 mg tablet but also from AVELOX (moxifloxacin).

[106] Taking all the evidence presented by each of the parties, I am satisfied that Scenario A presented by Janssen's expert witness Rosenblatt best represents what would have happened in the "but for" world. However, I find that there are some changes to be made to some of the assumptions that underlie that scenario; they are changes to the damage period, to hospital sales percentage, and whether educational institute/government sales should be included as hospital sales. I will consider what those changes should be as well as set out what I find to be appropriate assumptions underlying Scenario A.

h) Damage Period

[107] The Plaintiffs Janssen calculated their losses over a period commencing when Teva entered the marketplace in December 2004, until December 2010. The patent expired on June 23, 2009.

[108] Teva, through its expert, Mak, calculated its numbers based on the period Teva was on the market but, in the case of hospital price suppression, included various options varying from the date Janssen regained exclusivity up to a few months after the expiry of the patent in order to deal with fulfillment of contracts.

[109] As Justice Snider held in *Merck & Co., Inc. v Apotex Inc.*, 2013 FC 751 at paragraph in 183, a claimant is entitled to damages sustained after the grant of the patent has expired in respect of losses that were incurred as a result of the infringer's activity during the period when the patent was in force. She wrote:

> *[183] There is nothing in the Patent Act that limits damages to those sustained during the life of the patent. Section 55(1) states that the infringer is liable "for all damages sustained by the patentee [or licensee] after the grant of the patent, by reason of the infringement". Merck is entitled to its damages for infringing sales even though those sales actually would take place during the post-expiry period.*

[110] In this case, it would be reasonable to presume that some time would extend beyond the date that the patent expired. Prescriptions would have to be filled, contracts complied with, and other existing obligations incurred during a period of price suppression when the patent was in force would have to be fulfilled.

[111] However, I find no reasonable basis in the Record to support an extended date of damages up to December 2010, nor can I find any reasonable basis to find that damages cease upon expiry of the patent or one month thereafter.

[112] Under the circumstances, I must apply the "broad axe" principle and find that losses due to prescription (retail) sales would terminate about two months after the patent expires, that is August 31, 2009, and that hospital losses would terminate about a year after the patent expired, that is as of June 30, 2010.

[113] Teva's expert, Mak, made calculations that included a one-month lag at the beginning of the damages period in considering TRx data, that is, data relating to sales by pharmacies to patients, on the basis that pharmacies keep inventory on hand which would have been sold by Janssen to the pharmacy or wholesaler approximately one month before the pharmacy sold the product to the patient. Because Janssen's losses occur when they sell the tablet and not when the pharmacy sells the tablet, this lag was intended to compensate when using TRx data.

[114] Janssen's expert, Cohen, agrees that there is a lag when you follow the product, but says that prescription sales are a good surrogate for *ex-factory* sales because they match closely (see Chart 1 on page 11 of his Reply report, Exhibit P9). Even though the same physical tablet is not being sold immediately from the factory to the patient, the numbers match well enough that they can be used for economic modeling. Cohen says there is therefore no need to build this lag into the model even when TRx data is used.

[115] I am persuaded by Cohen's analysis for to say otherwise would be to create a one month window in the middle of Janssen's exclusivity period where they effectively have no sales. Further, because the TRx data matches *ex-factory* sales closely, it is a reasonable surrogate for the "broad axe" approach.

i) Hospital Sales - Price Suppression

[116] The law is clear that if, due to activities of an infringer, the patentee or person claiming under the patentee had to reduce prices because of the entry into the market of an infringer offering the product at a lower price, a claim for damages can be made for price suppression. As Heald D. J. wrote in *AlliedSignal Inc. v Du Pont Canada Inc.* (1998), 78 C.P.R. (3d) 129 (FCTD, aff'd 86 CPR (3d)324 (FCA)) at paragraph 23:

> *23 In addition to lost profits due to lost sales, the patentee may also claim lost profits due to price suppression if it can establish that it necessarily reduced its prices because of the competition of the infringer: Colonial Fastener Co. v. Lighting Fastener Co.,12 American Braided Wire Co. v. Thomson.*

[117] The evidence is that Janssen Canada reduced its prices to hospitals by [redacted]% when Teva entered the marketplace with its generic levofloxacin, and could not raise them after Teva was forced to withdraw. As Janssen's witness John Stewart said at pages 698 to 699, 703 to 704 and 758 of the trial transcript:

> *Q. Did the presence of Novopharm in the market have an effect on Janssen hospital pricing?*
>
> *A. Yes, to the extent that, once you have lost all your opportunity to partner with the hospitals and specialists, you don't have anything left except a generic strategy. The only thing you*

have left to try to leverage to try to hold on to your business is lower your price and compete on price.

In [redacted] of 20[redacted], we lowered our hospital prices another [redacted] percent universally across the board so all hospitals had an opportunity to save money because we also had no resources to go out and differentiate between the hospitals on a pricing standpoint. This was a blanket drop in the price as a result.

Q. Before Novo-levofloxacin came to the market, did Janssen intend to lower its hospital prices?

A. There was no plan to implement that 30 percent reduction across the board strategy.

...

Q. In the period after Novopharm left the market, did that have an effect on Janssen's hospital prices for LEVAQUIN?

A. There was no change to our hospital pricing.

Q. How come?

A. You have established relationships and listings based on the hospital prices that have been offered for the last two years plus. We are not going to rock that boat and change it on these customers. It is not the way we operate.

...

Q. Your told Mr. Wilcox when he was asking you about the price drops in the hospitals -- pardon me, Mr. Markwell -- that after you had lowered the hospital prices in 2006 when you regained the market, you didn't want to raise them because you didn't want to rock the boat, yes?

A. Yes.

Q. By that, you meant you could alienate customers and they would buy the product from someone else?

A. We were coming into the market with other hospital antiinfectives that was the future of our antiinfective franchise at the time. Why would you want to upset the customer by nickel and diming then on one when you want to come in later then asking them to list enough?

[118] The actual changes to the hospital prices are part of the agreed evidence.

j) Hospital Sales – Diamond, Non-Diamond and Educational Institution/Government

[119] Janssen's claim for damages for price suppression is in respect of "hospital sales". In answer to the question put to Janssen on discovery paraphrased as:

> *Advise as to whether there is a claim for damages for price suppression and/or erosion for sales other than Hospital Sales as a result of the market entry of Novo-levofloxacin*

the answer provided by Counsel in writing was (Trial Exhibit D61):

> *There is not. The only claim for damages for price suppression and/or erosion is for hospital sales.*

[120] The question is what are "hospital sales"?

[121] The evidence shows that Janssen Canada divided its customers into groups including "Diamond" hospitals (which were the larger or more influential hospitals), "Non-Diamond" hospitals and "Education Institution/Government". The latter was explained by Janssen's representative on discovery, Park (Exhibit D61, questions 3331 to 3333) as follows:

> *Q. Okay. And what about "Educational Institute…"*
>
> *Maybe I will pause.*
>
> *"Drug Wholesaler", that would not include any sales going to hospitals? Or it could?*
>
> *A. It could, if there were a smaller hospital that ---*
>
> *Hospitals can order directly through Janssen or they can go through a wholesaler.*

So they can go through either.

Q. Okay.

The next line is "Educational Institution/Government"…

A. Yes. That could have been any Provincial Government or the National Government that make significant purchases for epidemics or for the concern over whatever it is: Anthrax, or whatever.

It looks like there is…

I think I saw something that lined up with that number, "53,722", before.

It was a large Government purchase.

Q. Okay. And then "Hospital".

A. "Hospital" would be those that order directly to Janssen for Levaquin.

[122] The evidence is that Cohen included Educational Institution/Government sales as Non-Diamond hospital sales when determining the hospital price suppression, thus excluding them when calculating the retail price. Mak did not. The difference in the two approaches would benefit Janssen Canada by about $[redacted].

[123] I am concerned that, on discovery, Janssen provided an answer that could be considered to be misleading. No correction or clarification was ever made in respect of that answer. While the answer could be interpreted as somewhat ambiguous, Janssen should have clarified the ambiguity. Even at trial, no effort was made to clarify the answer.

[124] I find that sales to Educational Institute/Government should be excluded from hospital sales with an apparent reduction to Janssen's damage claim of about $300,000.

k) Hospital Sales - Percentage

[125] The evidence shows that hospitals are demanding as to price and generally require, and receive, a discounted price on drugs. By way of example at page 93 of the trial transcript, Dr. Rosenblatt suggested that a tablet sold at five dollars ($5.00) at retail (meaning to wholesalers) would be sold at four dollars ($4.00) per tablet directly to hospitals. However, not all sales that ultimately end up in hospitals are direct sales to hospitals, some hospitals some of the time may purchase from retailers/wholesalers (Rosenblatt, Reply Exhibit P6 paragraph 35, Grootendorst, transcript page 1097, Stewart, transcript page 679). The higher the number of sales made indirectly to hospitals, e.g. through retailers/wholesales, the higher the profit margins to Janssen since the tablets involved would be those sold by Janssen at the higher price to retailers/wholesalers.

[126] Both Dr. Rosenblatt and Dr. Grootendorst, the experts for each of the parties who addressed this issue, agreed that there was no precise way in which to determine the percentage of indirect sales to hospitals. Dr. Rosenblatt used a figure of [redacted]%. Dr. Grootendorst used a figure of [redacted]%. The higher figure would favour Janssen.

[127] Dr. Rosenblatt explained and justified his selection of [redacted]% in his Report (Exhibit P5, paragraph 66) and his Reply (Exhibit P6, paragraph 35) as well as in his examination and cross-examination at trial (transcript pages 90 to 95 and 183). The facts were substantiated by the testimony of John Stewart (transcript page 679) and discovery read-ins (Exhibits D61 and D62).

[128] Dr. Grootendorst relied on a [redacted]% figure in his Report (Exhibit D52, paragraph 170). In cross-examination at trial (trial transcript pages 1096 to 1098), he agreed that he was given this figure by Counsel for Teva and that his own calculations, at least for the year 2004, would yield a figure of about [redacted]%.

[129] In closing argument, Janssen's Counsel agreed that the figure of [redacted]% was high estimate but argued that the [redacted]% estimate put forth by Teva was far too low.

[130] In respect of this issue, I must apply the "broad axe" approach. The median between [redacted]% and [redacted]% is [redacted]% but, on the evidence, a higher figure is more probable as I favour Dr. Rosenblatt's approach more than the approach of Dr. Grootendorst which finds its genesis on a figure given by Counsel.

[131] I find that an appropriate figure to use for these sales to hospitals is [redacted]%.

l) Royalty Paid to Janssen Puerto Rico

[132] Mak debited [redacted]% and [redacted]% royalty expenses paid to one of the Janssen Puerto Rico companies in respect of sales made in the 2006 to 2010 period. These royalties should only be applied when considering the year 2010 as there is no evidence that they were paid in any of the previous years.

X. ISSUE NO. 3 – PRE-JUDGMENT INTEREST

[133] In my previous Judgment in Court File No. T-2175-04 at paragraph 5, I awarded the Plaintiffs, Janssen Canada and Daiichi pre-judgement interest, not compounded, at the average established bank rate. That Judgment was not varied on appeal and is binding upon Janssen Canada.

[134] Janssen US argues that, if it can establish that it lost profits as a result of the infringement, and that those profits would have generated income on a regular basis over the period of deprivation, then it has also sustained the damage of that lost income on those profits; exact proof of how those lost profits would have been used is not required. It relies on the decision of Justice Zinn of this Court in *Eli Lilly and Company v Apotex Inc.*, 2014 FC 1254, particularly at paragraphs 115 to 119 where he wrote:

> *[115] In conclusion Apotex has taken a far too narrow view of the judgment in Bank of America. It is true that the Supreme Court of Canada stated that "equity has been recognized as one right by which interest may be awarded other than as specifically stated" in the relevant court's statute, and that "the common law right in contract law to be awarded expectation damages is another such right;" however, the Supreme Court did not state that these were the only other "rights" available to support an award of compound interest.*
>
> *[116] Interest may be payable by a right under another statutory provision. Justice Gauthier implicitly recognized this when she wrote that Lilly could be awarded compound prejudgment interest "as an element of compensation." The source for "compensation" is subsection 55(1) of the Patent Act which provides that the infringer is liable to the patentee "for all damage sustained" by reason of the infringement. If the patentee can establish that it lost profits as a result of the infringement and that those profits would have generated income on a regular basis over the period of deprivation of those profits, then the patentee has also sustained the damage of the lost income from those profits.*

[117] Apotex submits that Lilly has failed to prove any such loss. It has failed to prove that it would have invested the lost profits and reinvested any income from it or that it would have paid down existing debt.

[118] In my view, the patentee is not required to prove exactly what use it would have made of the profit it has lost as a result of the infringer's actions. This is after all, a hypothetical scenario because it did not have the funds in hand. I subscribe to the view expressed by S. M. Waddams in The Law of Damages (3rd ed 1997), at 437, cited at para 37 of Bank of America:

> *[T]here seems in principle no reason why compound interest should not be awarded. Had prompt recompense been made at the date of the wrong the plaintiff would have had a capital sum to invest; the plaintiff would have received interest on it at regular intervals and would have invested those sums also. By the same token the defendant will have had the benefit of compound interest.*

I would go further and say that in today's world there is a presumption that a plaintiff would have generated compound interest on the funds otherwise owed to it and also that the defendant did so during the period in which it withheld the funds.

[119] Apotex argues that an award of compound interest will over compensate Lilly because it permits pre-tax dollars to be compounded rather than after-tax dollars. It says that "an award of simple interest obviates the need to take such tax considerations – which considerations may be quite complex – into account and permits a more facile calculation." The ease of calculation is not a relevant consideration in determining damages. Other than to state that the calculation may result in some windfall to the patentee, Apotex has offered no evidence to support any informed reduction in the award of compound interest over the 12 years period under consideration. Any discounting of compound interest by the court on this record would be nothing more than mere speculation. In any event, while the failure to consider that interest would have been earned on after-tax dollars may generate a higher award to Lilly, this is off-set in whole or part by the fact compound interest does not precisely account for the three factors the Supreme Court identified for the depreciation of the value of money: (i) opportunity cost, (ii) risk, and (iii) inflation.

[135] That decision is currently under appeal. I do note that the decision was that plaintiff in that case was awarded compound interest and not the profits that it alleged would have been generated.

[136] Janssen US relies on the evidence of Smith in direct examination at pages 448 to 449 of the transcript. I repeat that portion of his evidence:

> *Q. I have a few questions to ask you. It is about financial issues at Ortho-McNeil. Did you have any financial accountability at Ortho-McNeil for Ortho-McNeil-Janssen Pharmaceuticals?*
>
> *A. Sure. I was accountable for the commercial profit and loss statement for the business. So yes.*
>
> *Q. If those companies had extra profits would you have left that extra profit to sit in a bank to earn interest at a bank rate?*
>
> *A. No. For sure not. It is still true today. It was true then. We never have enough resource to take advantage of all the opportunities that we have. We are always prioritizing things we invest in. We don't have enough money in all the things that are potentially there for us to invest in.*
>
> *As a company that has shareholders and publicly held, we are accountable to grow that business every year and hopefully increase profits every year. We are always challenged on making decisions on doing an extra clinical trial on a brand that might help it be more successful or be more available to patients, to doing more pure sales and marketing effort, to again licensing in another important molecule that could be of benefit to patients over the long haul. We are always making those trade-offs. If we had extra money, it wouldn't be in the bank. It would be reinvested in the business for sure.*
>
> *Q. Would that have been true for the time period starting in December 2005 and moving forward?*
>
> *A. Absolutely.*
>
> *Q. Would that be true for any additional profits you might have received in respect of LEVAQUIN?*

> *A. I don't think it is respected to the particular product the profits come from. Profits would have been reinvested no matter what product they came from. If there was extra profits from LEVAQUIN, we would have reinvested in the business for sure.*

[137] Teva argues that, at least in this case, the terms of my previous Judgment applicable to Janssen Canada should apply equally to Janssen US; that Judgment was not altered on appeal nor did Janssen Canada even challenge that portion of the Judgment on appeal. In any event, Teva argues, the evidence of Smith is vague and inconclusive; the US income tax returns of Janssen US in evidence before me show a profit in some years and losses in other years; there is no evidence specific to the LEVAQUIN product.

[138] I agree with Teva. The terms of my previous Judgment respecting Janssen Canada and pre-judgment interest should apply equally to Janssen US. The decision of Zinn J. in *Eli Lilly* appears to consider lost profit arising from damages for lost sales is somehow reflected in an award of compound interest. Perhaps the Court of Appeal will clarify the situation. In any event, I am not satisfied that the evidence in this case, that of Smith and the tax returns, suggests that a claim for lost profits or compound interest in respect of damages is warranted.

XI. ISSUE NO. 4 - MITIGATION

[139] It is clear Canadian law that a party seeking to recover damages in a lawsuit bears the duty of taking all reasonable steps to mitigate those damages. Justice Estey of the Supreme Court of Canada wrote in *Asamera Oil Corporation Ltd. v Sea Oil & General Corporation*, [1979] 1 SCR 633 at page 661 in quoting Lord Haldane in *British Westinghouse Electric and*

Manufacturing Company, Limited v. Underground Electric Railways Company of London, Limited, [1912], AC 673 at page 689:

> *The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. In the words of James L.J. in Dunkirk Colliery Co. v. Lever, "The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise that in the ordinary course of business."*

[140] Karakatsanis J. of the Supreme Court of Canada wrote in *Southcott v Toronto Catholic School Board* , 2012 SCC 51 at paragraph 24 that where it is alleged that a plaintiff failed to mitigate, the burden is on the defendant to prove that the plaintiff failed to make reasonable efforts to mitigate and that mitigation was possible.

[141] There are two evidentiary matters to consider. The first is to determine what was actually done. The second is to determine whether something more or different ought to have been done.

[142] First, as to what was actually done. My decision enjoining Teva from continuing to sell levofloxacin tablets, subject to the thirty day (30) day sell-off period, came out on October 17, 2006. The matter was appealed and affirmed by the Federal Court of Appeal on June 7, 2007. Leave to appeal to the Supreme Court of Canada was sought and refused on December 6, 2007. Thus, the matter of validity and infringement was not finally determined until December 6, 2007.

[143] The evidence on discovery given by Janssen, as read into evidence at trial by Teva, is that, as far as the hospital group of customers was concerned, Janssen as a practical matter could not raise its prices as it was bound by an existing contract. I repeat pages 544 to 545 of Park's discovery:

> *MR. KLEE: And then I would like to know the basis for the statement that the "price reductions must remain in place even after the Injunction has taken place, to avoid alienating customers…"*
>
> *THE WITNESS: It is a 3-Year Contract. Once we get the new (sic) Patent back, it wouldn't make any difference to a hospital. It is a 3-Year Deal. And then you would, at that point in time, renegotiate, after the Terms of the Contract were over, relative to what is going on in the new marketplace…*

[144] This position was affirmed at trial during the examination-in-chief of John Stewart. I repeat part of what he said at pages 703 to 704 of the trial transcript:

> *Q. In the period after Novopharm left the market, did that have an effect on Janssen's hospital prices for LEVAQUIN?*
>
> *A. There was no change to our hospital pricing.*
>
> *Q. How come?*
>
> *A. You have established relationships and listings based on the hospital prices that have been offered for the last two years plus. We are not going to rock that boat and change it on these customers. It is not the way we operate.*

[145] As far as the so-called retail customers such as doctors, the evidence is that Janssen started to revise its marketing plans for LEVAQUIN in April 2006 but did not reassign its marketing team to LEVAQUIN until later in 2007. John Stewart explained the reason why at pages 702 to 703 of the trial transcript.

> *Q. Do you know why Janssen didn't reassign people to LEVAQUIN until the third cycle in 2007?*
>
> *A. As stated previously, these things don't turn on a dime. You don't have the people in the organization and may have to hire them for the specialty role in particular. Then you have to retain absolutely everybody because there is turn over and change in our sales forces.*
>
> *You have to prepare all the selling materials. You have to get caught up on the issues in the marketplace. It is not a turnkey operation. There is a lot of work that goes into developing strategies and tactics. You tend don't do this in the middle of a cycle. It is in the beginning of cycle 1 or cycle 2. In this case, it is prepared for cycle 3. That is a reasonable amount of time.*

[146] This is what was actually done. There is no evidence from Teva as to what ought to have been done. There are only assertions by Teva's lawyers in argument as to what ought to have been done and when. The Court has no evidence from any marketing person from Teva or any other evidence to suggest that the steps actually taken by Janssen were too late or inadequate.

[147] Given the evidence that I have, I cannot conclude that the steps taken by Janssen were insufficient to mitigate the damages incurred.

XII. COSTS

[148] The parties have asked for an opportunity to make submissions as to costs once they are apprised of my decision. Therefore, I ask that I receive submissions as to costs from the Plaintiffs within twenty (20) days from the release of this Judgment and from the Defendant within twenty (20) days thereafter.

XIII. CONCLUSIONS

[149] I have sent these Reasons in draft to Counsel for each of the parties and asked that they, working with their experts, Cohen and Mak, prepare an agreed upon set of figures that result from these changes to some of the assumptions underlying Scenario A. They have done so and have submitted an agreed set of numbers which include pre-Judgment interest calculated in accordance with the terms of these Reasons and my previous Judgment up to the last day of May, 2016. It is understood that, in agreeing to these numbers, the parties are reserving their rights to challenge any or all of my findings herein. The damages together with pre-Judgment interest are calculated individually for each of Janssen Canada and Janssen US.

[150] I have determined that Janssen Pharmaceuticals, Inc. (Janssen US) has standing as a person "claiming under" Daiichi, the patentee of the 080 Patent, to make a claim for damages herein.

[151] Janssen US is entitled to pre-Judgment interest on the same terms as expressed in paragraph 5 of my previous Judgment dated October 17, 2006, respecting Janssen Canada.

[152] It has not been shown that Janssen Canada failed to mitigate its damages.

[153] Janssen Canada is entitled to be paid damages by Teva in the sum of $5,498,270.00 inclusive of pre-Judgement interest as aforesaid and Janssen US is entitled to be paid damages in the sum of $13,342,949.00, inclusive of pre-Judgment interest.

JUDGMENT

FOR THE REASONS PROVIDED HEREIN:

THIS COURT'S JUDGMENT is that:

1. Teva Canada Limited shall pay Janssen Inc. damages, inclusive of pre-Judgment interest, in the sum of $ 5,498,270.00.
2. Teva Canada Limited shall pay Janssen Pharmaceuticals, Inc. damages, inclusive of pre-Judgment interest, in the sum of $ 13,342,949.00.
3. Costs will be the subject of a subsequent Judgment once the submissions of the parties have been received in accordance with the timetable set out in the Reasons, and considered.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2175-04
STYLE OF CAUSE:	JANSSEN INC. AND DAIICHI SANKYO COMPANY, LIMITED V TEVA CANADA LIMITED
AND DOCKET:	T-2056-11
STYLE OF CAUSE:	JANSSEN-ORTHO LLC, JANSSEN PHARMACEUTICALS, INC., AND OMJ PHARMACEUTICALS, INC. V TEVA CANADA LIMITED AND DAIICHI SANKYO COMPANY, LIMITED
PLACE OF HEARING:	TORONTO, ONTARIO
DATES OF HEARING:	APRIL 4, 5, 6, 7, 8, 11, 12, 14, 15 AND 21, 2016
PUBLIC JUDGMENT AND REASONS:	HUGHES J.
DATED:	MAY 31, 2016

APPEARANCES:

Peter Wilcox Jason Markwell Marian Wolsanski Greg Beach Stephanie Anderson Stefanie Di Giandomenico Benjamin Reingold	FOR THE PLAINTIFF(S)
Marcus Klee Jonathan M. Giraldi Aleem Abdulla Abbas Kassam	FOR THE DEFENDANT

SOLICITORS OF RECORD:

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Aitken Klee LLP Barristers and Solicitors Ottawa, Ontario	FOR THE DEFENDANT

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Her Majesty The Queen in Right of the Province of Newfoundland and Labrador *Appellant*

v.

AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc., Ad Hoc Committee of Bondholders, Ad Hoc Committee of Senior Secured Noteholders and U.S. Bank National Association (Indenture Trustee for the Senior Secured Noteholders) *Respondents*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Alberta, Her Majesty The Queen in Right of British Columbia, Ernst & Young Inc., as Monitor, and Friends of the Earth Canada *Interveners*

Indexed as: Newfoundland and Labrador *v.* AbitibiBowater Inc.

2012 SCC 67

File No.: 33797.

2011: November 16; 2012: December 7.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bankruptcy and Insolvency — Provable claims — Contingent claims — Corporation filing for insolvency protection — Province issuing environmental protection orders against corporation and seeking declaration that orders not "claims" under Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"), and not subject to claims procedure order — Whether environmental protection orders are monetary claims that

Sa Majesté la Reine du chef de la province de Terre-Neuve-et-Labrador *Appelante*

c.

AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc., comité ad hoc des créanciers obligataires, comité ad hoc des porteurs de billets garantis de premier rang et U.S. Bank National Association (fiduciaire désigné par l'acte constitutif pour les porteurs de billets garantis de premier rang) *Intimés*

et

Procureur général du Canada, procureur général de l'Ontario, procureur général de la Colombie-Britannique, procureur général de l'Alberta, Sa Majesté la Reine du chef de la Colombie-Britannique, Ernst & Young Inc., en sa qualité de contrôleur, et Les Ami(e)s de la Terre Canada *Intervenants*

Répertorié : Terre-Neuve-et-Labrador *c.* AbitibiBowater Inc.

2012 CSC 67

N^o^ du greffe : 33797.

2011 : 16 novembre; 2012 : 7 décembre.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver et Karakatsanis.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Faillite et insolvabilité — Réclamations prouvables — Réclamations éventuelles — Demande de protection contre l'insolvabilité par une société — Ordonnances environnementales émises par la province contre la société et demande, par la province, d'un jugement déclarant que les ordonnances ne constituent pas des « réclamations » aux termes de la Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985,

can be compromised in corporate restructuring under CCAA — Whether CCAA is ultra vires or constitutionally inapplicable by permitting court to determine whether environmental order is a monetary claim.

A was involved in industrial activity in Newfoundland and Labrador (the "Province"). In a period of general financial distress, it ended its last operation there, filed for insolvency protection in the United States and obtained a stay of proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The Province subsequently issued five orders under the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2, requiring A to submit remediation action plans for five industrial sites it had occupied, three of which had been expropriated by the Province, and to complete the remediation actions. The Province also brought a motion for a declaration that a claims procedure order issued under the *CCAA* in relation to A's proposed reorganization did not bar the Province from enforcing the environmental protection orders. The Province argued that the environmental protection orders were not "claims" under the *CCAA* and therefore could not be stayed and subject to a claims procedure order. It further argued that Parliament lacked the constitutional competence under its power to make laws in relation to bankruptcy and insolvency to stay orders that were validly made in the exercise of a provincial power. A contested the motion, arguing that the orders were monetary in nature and hence fell within the definition of the word "claim" in the claims procedure order. The *CCAA* court dismissed the Province's motion. The Court of Appeal denied the Province leave to appeal.

Held (McLachlin C.J. and LeBel J. dissenting): The appeal should be dismissed.

Per Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.: Not all orders issued by regulatory bodies are monetary in nature and thus provable claims in an insolvency proceeding, but some may be, even if the amounts involved are not quantified

ch. C-36 (« LACC »), et qu'elles ne sont pas assujetties à l'ordonnance relative à la procédure de réclamations — Les ordonnances environnementales constituent-elles des réclamations pécuniaires pouvant faire l'objet d'une transaction dans le cadre d'une restructuration sous le régime de la LACC? — La LACC est-elle ultra vires ou constitutionnellement inapplicable en permettant au tribunal de déterminer si une ordonnance environnementale constitue une réclamation pécuniaire?

A a poursuivi des activités industrielles à Terre-Neuve-et-Labrador (la « province »). Dans une période de grandes difficultés financières, elle a mis un terme à ses activités dans la province, elle a présenté une demande de protection contre l'insolvabilité aux États-Unis et elle a obtenu une suspension des procédures en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). La province a par la suite prononcé cinq ordonnances environnementales en vertu de l'*Environmental Protection Act*, S.N.L. 2002, ch. E-14.2, contraignant A à présenter des plans de restauration pour cinq sites industriels qu'elle avait occupés, dont trois avaient été expropriés par la province, et à réaliser les plans de restauration approuvés. La province a également demandé par requête un jugement déclarant qu'une ordonnance relative à la procédure de réclamations rendue aux termes de la *LACC* dans le cadre de la réorganisation proposée de A n'empêchait pas la province d'exécuter les ordonnances environnementales. La province a plaidé que les ordonnances environnementales ne constituent pas des « réclamations » au sens de la *LACC* et que leur exécution ne peut donc être suspendue ni être assujettie à une ordonnance relative à la procédure de réclamations. Elle a de plus fait valoir que le pouvoir du Parlement de légiférer en matière de faillite et d'insolvabilité ne lui confère pas la compétence constitutionnelle pour suspendre l'application des ordonnances prononcées dans l'exercice valide de pouvoirs provinciaux. A a contesté la requête et a soutenu que les ordonnances étaient de nature pécuniaire et qu'elles étaient donc visées par la définition du terme « réclamation » utilisé dans l'ordonnance relative à la procédure de réclamations. Le juge chargé d'appliquer la *LACC* a rejeté la requête de la province et la Cour d'appel a rejeté la demande d'autorisation d'appel de la province.

Arrêt (la juge en chef McLachlin et le juge LeBel sont dissidents) : Le pourvoi est rejeté.

Les juges Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver et Karakatsanis : Les ordonnances des organismes administratifs ne sont pas toutes de nature pécuniaire, et donc des réclamations prouvables dans le cadre de procédures d'insolvabilité, mais

at the outset of the proceedings. In the environmental context, the *CCAA* court must determine whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to the regulatory body that issued the order. In such a case, the relevant question is not simply whether the body has formally exercised its power to claim a debt. A *CCAA* court does not assess claims or orders on the basis of form alone. If the order is not framed in monetary terms, the *CCAA* court must determine, in light of the factual matrix and the applicable statutory framework, whether it is a claim that will be subject to the claims process.

There are three requirements orders must meet in order to be considered claims that may be subject to the insolvency process in a case such as the one at bar. First, there must be a debt, a liability or an obligation to a creditor. In this case, the first criterion was met because the Province had identified itself as a creditor by resorting to environmental protection enforcement mechanisms. Second, the debt, liability or obligation must be incurred as of a specific time. This requirement was also met since the environmental damage had occurred before the time of the *CCAA* proceedings. Third, it must be possible to attach a monetary value to the debt, liability or obligation. The present case turns on this third requirement, and the question is whether orders that are not expressed in monetary terms can be translated into such terms.

A claim may be asserted in insolvency proceedings even if it is contingent on an event that has not yet occurred. The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative. In the context of an environmental protection order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim. If there is sufficient certainty in this regard, the court will conclude that the order can be subject to the insolvency process.

certaines peuvent l'être en dépit du fait qu'elles ne sont pas quantifiées dès le début des procédures. En matière environnementale, le tribunal chargé de l'application de la *LACC* doit déterminer s'il y a suffisamment de faits indiquant qu'il existe une obligation environnementale de laquelle résultera une dette envers l'organisme administratif qui a prononcé l'ordonnance. En pareil cas, la question pertinente ne se résume pas à déterminer si l'organisme a formellement exercé son pouvoir de réclamer une dette. Le tribunal qui évalue une réclamation ou une ordonnance ne se limite pas à un examen de sa forme. Si l'ordonnance n'est pas formulée en termes pécuniaires, le tribunal doit déterminer, en fonction des faits en cause et du cadre législatif applicable, si elle constitue une réclamation qui sera assujettie au processus de réclamation.

Pour qu'elles constituent des réclamations pouvant être assujetties au processus applicable en matière d'insolvabilité dans une affaire telle celle en l'espèce, les ordonnances doivent satisfaire à trois conditions. Premièrement, il doit s'agir d'une dette, d'un engagement ou d'une obligation envers un créancier. En l'espèce, il a été satisfait à la première condition puisque la province s'est présentée comme créancière en ayant recours aux mécanismes d'application en matière de protection de l'environnement. Deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance à un moment précis. Il a également été satisfait à cette condition puisque les dommages environnementaux sont survenus avant que les procédures en vertu de la *LACC* ne soient entamées. Troisièmement, il doit être possible d'attribuer une valeur pécuniaire à cette dette, cet engagement ou cette obligation. La présente affaire est centrée sur cette troisième condition, et la question est de savoir si des ordonnances qui ne sont pas formulées en termes pécuniaires peuvent être formulées en de tels termes.

Il est possible de faire valoir une réclamation dans le cadre de procédures d'insolvabilité même si elle dépend d'un événement non encore survenu. Le critère retenu par les tribunaux pour décider si une réclamation éventuelle sera incluse dans le processus d'insolvabilité est celui qui consiste à déterminer si l'événement non encore survenu est trop éloigné ou conjectural. Dans le contexte d'une ordonnance environnementale, cela signifie qu'il doit y avoir des indications suffisantes permettant de conclure que l'organisme administratif qui a eu recours aux mécanismes d'application de la loi effectuera en fin de compte des travaux de décontamination et présentera une réclamation pécuniaire. Si cela est suffisamment certain, le tribunal conclura que l'ordonnance peut être assujettie au processus d'insolvabilité.

Certain indicators can guide the *CCAA* court in this assessment, including whether the activities are ongoing, whether the debtor is in control of the property, and whether the debtor has the means to comply with the order. The court may also consider the effect that requiring the debtor to comply with the order would have on the insolvency process. The analysis is grounded in the facts of each case. In this case, the *CCAA* court's assessment of the facts, particularly its finding that the orders were the first step towards performance of the remediation work by the Province, leads to no conclusion other than that it was sufficiently certain that the Province would perform remediation work and therefore fall within the definition of a creditor with a monetary claim.

Subjecting such orders to the claims process does not extinguish the debtor's environmental obligations any more than subjecting any creditor's claim to that process extinguishes the debtor's obligation to pay a debt. It merely ensures that the Province's claim will be paid in accordance with insolvency legislation. Full compliance with orders that are found to be monetary in nature would shift the costs of remediation to third party creditors and replace the polluter-pay principle with a "third-party-pay" principle. Moreover, to subject environmental protection orders to the claims process is not to invite corporations to restructure in order to rid themselves of their environmental liabilities. Reorganization made necessary by insolvency is hardly ever a deliberate choice, and when the risks corporations engage in materialize, the dire costs are borne by almost all stakeholders.

Because the provisions on the assessment of claims in insolvency matters relate directly to Parliament's jurisdiction, the ancillary powers doctrine is not relevant to this case. The interjurisdictional immunity doctrine is also inapplicable, because a finding that a claim of an environmental creditor is monetary in nature does not interfere in any way with the creditor's activities; its claim is simply subject to the insolvency process.

Per McLachlin C.J. (dissenting): Remediation orders made under a province's environmental protection

Certains indicateurs permettent de guider le tribunal dans cette analyse, notamment si les activités se poursuivent, si le débiteur exerce un contrôle sur le bien et s'il dispose des moyens de se conformer à l'ordonnance. Il est également possible pour le tribunal de prendre en compte les conséquences qu'entraînerait sur le processus d'insolvabilité le fait d'exiger du débiteur qu'il se conforme à l'ordonnance. L'analyse est fondée sur les faits propres à chaque cas. En l'espèce, l'appréciation des faits par le tribunal, plus particulièrement sa constatation que les ordonnances constituaient la première étape en vue de la décontamination des sites par la province, ne permet de tirer aucune conclusion autre que celle suivant laquelle il était suffisamment certain que la province exécuterait des travaux de décontamination et qu'elle était par conséquent visée par la définition d'un créancier ayant une réclamation pécuniaire.

Le fait d'assujettir ces ordonnances au processus de réclamations n'éteint pas les obligations environnementales qui incombent au débiteur, pas plus que le fait de soumettre à ce processus les réclamations des créanciers n'éteint l'obligation du débiteur de payer ses dettes. Le fait d'assujettir une ordonnance au processus de réclamation vise simplement à faire en sorte que le paiement au créancier sera fait conformément aux dispositions législatives applicables en matière d'insolvabilité. Le respect intégral des ordonnances dont la nature pécuniaire est reconnue transférerait le coût de la décontamination aux tiers créanciers et substituerait au principe du pollueur-payeur celui du « tiers-payeur ». En outre, l'assujettissement des ordonnances environnementales à la procédure de réclamations n'équivaut pas à convier les sociétés à se réorganiser dans le but d'échapper à leurs obligations environnementales. Une réorganisation rendue nécessaire par l'insolvabilité de la société peut difficilement être assimilée à un choix délibéré, et lorsque les risques auxquels s'exposent les sociétés se concrétisent, la quasi-totalité des personnes ayant des intérêts dans la société en supportent les terribles coûts.

L'application de la doctrine des pouvoirs accessoires n'est pas pertinente en l'espèce car les dispositions régissant l'évaluation des réclamations en matière d'insolvabilité sont directement reliées à la compétence du législateur fédéral. La doctrine de la protection des compétences exclusives ne s'applique pas non plus parce qu'une conclusion selon laquelle un créancier œuvrant dans le domaine de l'environnement détient une réclamation pécuniaire ne modifie en rien les activités de ce créancier; sa réclamation est simplement assujettie au processus d'insolvabilité.

La juge en chef McLachlin (dissidente) : Les ordonnances exigeant la décontamination émises aux termes

legislation impose ongoing regulatory obligations on the corporation required to clean up the pollution. They may only be reduced to monetary claims which can be compromised under *CCAA* proceedings in narrow circumstances where a province has done the remediation work, or where it is "sufficiently certain" that it will do the work. This last situation is regulated by the provisions of the *CCAA* for contingent or future claims. The test is whether there is a likelihood approaching certainty that the province will do the work. "Likelihood approaching certainty" recognizes that the government's decision is discretionary and may be influenced by competing political and social considerations, which are not normally subject to judicial consideration. Insofar as this determination touches on the division of powers, I am in substantial agreement with Deschamps J.

Apart from the orders related to the work done or tendered for on the Buchans property, the orders for remediation in this case are not claims that can be compromised. The *CCAA* maintains the fundamental distinction between regulatory obligations under the general law aimed at the protection of the public and monetary claims that can be compromised in *CCAA* restructuring or bankruptcy. The *CCAA* judge never asked himself the critical question of whether it was "sufficiently certain" that the Province would do the work itself. His failure to consider that question requires this Court to answer it in his stead. There is nothing on the record to support the view that the Province will move to remediate the properties. It has not been shown that the contamination poses immediate health risks which must be addressed without delay. It has not been shown that the Province has taken any steps to do any work. And it has not been shown that the Province has set aside or even contemplated setting aside money for this work. The Province retained a number of options, including leaving the sites contaminated, or calling on Abitibi to remediate following its emergence from restructuring. There is nothing in the record that makes it more probable, much less establishes "sufficient certainty", that the Province will opt to do the work itself.

d'une loi provinciale sur la protection de l'environnement imposent des exigences réglementaires continues à la personne morale requise de remédier à la pollution. Ces ordonnances ne peuvent être converties en réclamations pécuniaires pouvant faire l'objet de transactions dans le cadre de procédures engagées aux termes de la *LACC* que dans certaines circonstances particulières, lorsqu'une province a exécuté les travaux ou lorsqu'il est « suffisamment certain » qu'elle exécutera les travaux. Cette deuxième situation est prévue par les dispositions de la *LACC* relatives aux réclamations éventuelles ou futures. Le critère consiste à déterminer s'il existe une probabilité proche de la certitude que la province exécutera les travaux. Une « probabilité proche de la certitude » reconnaît que la décision du gouvernement est discrétionnaire et peut être influencée par des considérations politiques et sociales concurrentes qui sont normalement soustraites à l'examen judiciaire. Dans la mesure où cette décision touche le partage des pouvoirs, je souscris pour l'essentiel à l'opinion exprimée par la juge Deschamps.

À l'exception des ordonnances relatives aux travaux sur le site de Buchans déjà exécutés ou à l'égard desquels des appels d'offres ont été lancés, les ordonnances exigeant la décontamination en l'espèce ne constituent pas des réclamations pouvant faire l'objet de transactions dans le cadre d'une restructuration. La *LACC* établit une distinction fondamentale entre les exigences réglementaires découlant d'une loi d'application générale visant la protection du public, d'une part, et les réclamations pécuniaires pouvant faire l'objet d'une transaction dans le cadre d'une restructuration engagée sous le régime de la *LACC* ou en matière de faillite, d'autre part. Le juge de première instance ne s'est jamais posé la question cruciale de savoir s'il était « suffisamment certain » que la province exécuterait elle-même les travaux. Le fait qu'il n'ait pas examiné cette question oblige notre Cour à y répondre à sa place. Aucune preuve au dossier ne laisse croire que la province entreprendra la décontamination des sites. Il n'a pas été démontré que la contamination pose pour la santé des risques immédiats exigeant la prise de mesures dans les plus brefs délais. Il n'a pas été démontré que la province a pris quelque mesure que ce soit pour réaliser des travaux. Et il n'a pas été démontré que la province a prévu des sommes d'argent pour ces travaux ou qu'elle a même songé à en prévoir. La province a conservé un certain nombre de choix, notamment laisser les sites contaminés, ou demander à Abitibi d'exécuter les travaux lorsqu'elle aura complété sa restructuration. Rien au dossier n'indique qu'il est plus probable, et encore moins qu'il est « suffisamment certain », que la province choisira d'exécuter elle-même la décontamination.

Per LeBel J. (dissenting): The test proposed by the Chief Justice according to which the evidence must show that there is a "likelihood approaching certainty" that the Province would remediate the contamination itself is not the established test for determining where and how a contingent claim can be liquidated in bankruptcy and insolvency law. The test of "sufficient certainty" described by Deschamps J. best reflects how both the common law and the civil law view and deal with contingent claims. Applying that test, the appeal should be allowed on the basis that there is no evidence that the Province intends to perform the remedial work itself.

Cases Cited

By Deschamps J.

Distinguished: *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45; **referred to:** *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Canada v. McLarty*, 2008 SCC 26, [2008] 2 S.C.R. 79; *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75; *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624.

By McLachlin C.J. (dissenting)

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. (1991), 81 Alta. L.R. (2d) 45; *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534; *Shirley (Re)* (1995), 129 D.L.R. (4th) 105; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Air Canada, Re [Regulators' motions]* (2003), 28 C.B.R. (5th) 52; *General Chemical Canada Ltd., Re*, 2007 ONCA 600, 228 O.A.C. 385; *Strathcona (County) v. PriceWaterhouseCoopers Inc.*, 2005 ABQB 559, 47 Alta. L.R. (4th) 138; *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75; *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

Statutes and Regulations Cited

Abitibi-Consolidated Rights and Assets Act, S.N.L. 2008, c. A-1.01.

Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof, S.C. 1992, c. 27, s. 9.

Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, S.C. 1997, c. 12.

Le juge LeBel (dissident) : Le critère que propose la Juge en chef, selon lequel la preuve doit démontrer une « probabilité proche de la certitude » que la province se chargerait de la décontamination, ne constitue pas le critère établi pour déterminer si, et de quelle façon, une réclamation éventuelle peut être liquidée en droit de la faillite et de l'insolvabilité. Le critère de ce qui est « suffisamment certain » qu'énonce la juge Deschamps reflète mieux la façon dont la common law et le droit civil envisagent et traitent les réclamations éventuelles. En appliquant ce critère, il y aurait lieu d'accueillir le pourvoi puisqu'aucune preuve ne confirme l'intention de la province d'exécuter elle-même les travaux de décontamination.

Jurisprudence

Citée par la juge Deschamps

Distinction d'avec l'arrêt : *Panamericana de Bienes y Servicios S.A. c. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45; **arrêts mentionnés :** *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453; *Canada c. McLarty*, 2008 CSC 26, [2008] 2 R.C.S. 79; *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75; *Cie pétrolière Impériale ltée c. Québec (Ministre de l'Environnement)*, 2003 CSC 58, [2003] 2 R.C.S. 624.

Citée par la juge en chef McLachlin (dissidente)

Panamericana de Bienes y Servicios S.A. c. Northern Badger Oil & Gas Ltd. (1991), 81 Alta. L.R. (2d) 45; *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534; *Shirley (Re)* (1995), 129 D.L.R. (4th) 105; *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453; *Air Canada, Re [Regulators' motions]* (2003), 28 C.B.R. (5th) 52; *General Chemical Canada Ltd., Re*, 2007 ONCA 600, 228 O.A.C. 385; *Strathcona (County) c. PriceWaterhouseCoopers Inc.*, 2005 ABQB 559, 47 Alta. L.R. (4th) 138; *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75; *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1; *R. c. Imperial Tobacco Canada Ltée*, 2011 CSC 42, [2011] 3 R.C.S. 45; *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235.

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Abitibi-Consolidated Rights and Assets Act, S.N.L. 2008, ch. A-1.01.

Code civil du Québec, L.Q. 1991, ch. 64, art. 1497, 1508, 1513.

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Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des

Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005, S.C. 2007, c. 36, s. 65.

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Civil Code of Québec, S.Q. 1991, c. 64, arts. 1497, 1508, 1513.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 2(1) "claim", 11, 11.1, 11.8(5), (7), (8), (9), 12(1), (2).

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David R. Wingfield, *Paul D. Guy* and *Philip Osborne*, for the appellant.

compagnies et la Loi de l'impôt sur le revenu, L.C. 1997, ch. 12.

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Loi modifiant la Loi sur la faillite et la Loi de l'impôt sur le revenu en conséquence, L.C. 1992, ch. 27, art. 9.

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3, art. 2 « créancier », « réclamation prouvable en matière de faillite », 14.06(8), 121(1), (2), 135(1.1).

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POURVOI contre une décision de la Cour d'appel du Québec (le juge Chamberland), 2010 QCCA 965, 68 C.B.R. (5th) 57, 52 C.E.L.R. (3d) 1, [2010] Q.J. No. 4579 (QL), 2010 CarswellQue 4782, qui a rejeté la requête de l'appelante pour permission d'en appeler d'un jugement du juge Gascon, 2010 QCCS 1261, 68 C.B.R. (5th) 1, 52 C.E.L.R. (3d) 17, [2010] Q.J. No. 4006 (QL), 2010 CarswellQue 2812. Pourvoi rejeté, la juge en chef McLachlin et le juge LeBel sont dissidents.

David R. Wingfield, *Paul D. Guy* et *Philip Osborne*, pour l'appelante.

Sean F. Dunphy, *Nicholas McHaffie*, *Joseph Reynaud* and *Marc B. Barbeau*, for the respondents.

Christopher Rupar and *Marianne Zoric*, for the intervener the Attorney General of Canada.

Josh Hunter, *Robin K. Basu*, *Leonard Marsello* and *Mario Faieta*, for the intervener the Attorney General of Ontario.

R. Richard M. Butler, for the intervener the Attorney General of British Columbia.

Roderick Wiltshire, for the intervener the Attorney General of Alberta.

Elizabeth J. Rowbotham, for the intervener Her Majesty The Queen in Right of British Columbia.

Robert I. Thornton, *John T. Porter* and *Rachelle F. Moncur*, for the intervener Ernst & Young Inc., as Monitor.

William A. Amos, *Anastasia M. Lintner*, *Hugh S. Wilkins* and *R. Graham Phoenix*, for the intervener the Friends of the Earth Canada.

The judgment of Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ. was delivered by

[1] DESCHAMPS J. — The question in this appeal is whether orders issued by a regulatory body with respect to environmental remediation work can be treated as monetary claims under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

[2] Regulatory bodies may become involved in reorganization proceedings when they order the debtor to comply with statutory rules. As a matter of principle, reorganization does not amount to a licence to disregard rules. Yet there are circumstances in which valid and enforceable orders will be subject to an arrangement under the *CCAA*. One such circumstance is where a regulatory body

Sean F. Dunphy, *Nicholas McHaffie*, *Joseph Reynaud* et *Marc B. Barbeau*, pour les intimés.

Christopher Rupar et *Marianne Zoric*, pour l'intervenant le procureur général du Canada.

Josh Hunter, *Robin K. Basu*, *Leonard Marsello* et *Mario Faieta*, pour l'intervenant le procureur général de l'Ontario.

R. Richard M. Butler, pour l'intervenant le procureur général de la Colombie-Britannique.

Roderick Wiltshire, pour l'intervenant le procureur général de l'Alberta.

Elizabeth J. Rowbotham, pour l'intervenante Sa Majesté la Reine du chef de la Colombie-Britannique.

Robert I. Thornton, *John T. Porter* et *Rachelle F. Moncur*, pour l'intervenante Ernst & Young Inc., en sa qualité de contrôleur.

William A. Amos, *Anastasia M. Lintner*, *Hugh S. Wilkins* et *R. Graham Phoenix*, pour l'intervenant Les Ami(e)s de la Terre Canada.

Version française du jugement des juges Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver et Karakatsanis rendu par

[1] LA JUGE DESCHAMPS — La question soulevée dans le présent pourvoi est de savoir si des ordonnances d'un organisme administratif relatives à des travaux de décontamination peuvent être traitées comme des réclamations pécuniaires aux termes de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »).

[2] Un organisme administratif peut être appelé à intervenir dans le cadre de procédures de réorganisation lorsqu'il prononce une ordonnance intimant au débiteur de se conformer à une règle prescrite par la loi. En principe, une réorganisation ne permet pas à une personne d'ignorer ses obligations légales. Par ailleurs, en certaines circonstances, une ordonnance valable et exécutoire sera assujettie

makes an environmental order that explicitly asserts a monetary claim.

[3] In other circumstances, it is less clear whether an order can be treated as a monetary claim. The appellant and a number of interveners posit that an order issued by an environmental body is not a claim under the *CCAA* if the order does not require the debtor to make a payment. I agree that not all orders issued by regulatory bodies are monetary in nature and thus provable claims in an insolvency proceeding, but some may be, even if the amounts involved are not quantified at the outset of the proceeding. In the environmental context, the *CCAA* court must determine whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to the regulatory body that issued the order. In such a case, the relevant question is not simply whether the body has formally exercised its power to claim a debt. A *CCAA* court does not assess claims — or orders — on the basis of form alone. If the order is not framed in monetary terms, the court must determine, in light of the factual matrix and the applicable statutory framework, whether it is a claim that will be subject to the claims process.

[4] The case at bar concerns contamination that occurred, prior to the *CCAA* proceedings, on property that is largely no longer under the debtor's possession and control. The *CCAA* court found on the facts of this case that the orders issued by Her Majesty the Queen in right of the Province of Newfoundland and Labrador ("Province") were simply a first step towards remediating the contaminated property and asserting a claim for the resulting costs. In the words of the *CCAA* court, "the intended, practical and realistic effect of the EPA Orders was to establish a basis for the Province to

à un arrangement conclu en vertu de la *LACC*. C'est le cas notamment lorsqu'un organisme administratif prononce une ordonnance environnementale qui est explicitement formulée en termes pécuniaires.

[3] En d'autres circonstances, il est plus difficile de savoir si une ordonnance peut être traitée comme une réclamation pécuniaire. L'appelante et certains des intervenants affirment qu'une ordonnance émise par un organisme de protection de l'environnement ne constitue pas une réclamation au sens de la *LACC* si elle n'exige pas du débiteur qu'il lui paye un montant d'argent. Je conviens que les ordonnances des organismes administratifs ne constituent pas toutes des réclamations pécuniaires, et donc des réclamations prouvables dans le cadre de procédures d'insolvabilité, mais certaines peuvent l'être en dépit du fait qu'elles ne sont pas quantifiées dès le début des procédures. En matière environnementale, le tribunal chargé de l'application de la *LACC* doit déterminer s'il y a suffisamment de faits indiquant qu'il existe une obligation environnementale de laquelle résultera une dette envers l'organisme administratif qui a prononcé l'ordonnance. En pareil cas, la question pertinente ne se résume pas à déterminer si l'organisme a formellement exercé son pouvoir de réclamer une dette. Lorsque le tribunal évalue une réclamation (ou une ordonnance) il ne se limite pas à un examen de sa forme. Si l'ordonnance n'est pas formulée en termes pécuniaires, le tribunal doit déterminer, en fonction des faits en cause et du cadre législatif applicable, si elle constitue une réclamation qui sera assujettie au processus de réclamation.

[4] Le présent pourvoi a trait à des dommages environnementaux survenus avant que les procédures sous le régime de la *LACC* ne soient engagées, des dommages causés à des terrains qui, en majeure partie, ne sont plus en la possession du débiteur ni sous son contrôle. Le tribunal de première instance a conclu, selon les faits en l'espèce, que les ordonnances émises par Sa Majesté la Reine du chef de la province de Terre-Neuve-et-Labrador (« province ») ne constituaient que la première étape en vue de restaurer les sites contaminés et de réclamer les coûts engagés. Comme l'a exprimé le juge de

recover amounts of money to be eventually used for the remediation of the properties in question" (2010 QCCS 1261, 68 C.B.R. (5th) 1, at para. 211). As a result, the *CCAA* court found that the orders were clearly monetary in nature. I see no error of law and no reason to interfere with this finding of fact. I would dismiss the appeal with costs.

I. Facts and Procedural History

[5] For over 100 years, AbitibiBowater Inc. and its affiliated or predecessor companies (together, "Abitibi") were involved in industrial activity in Newfoundland and Labrador. In 2008, Abitibi announced the closure of a mill that was its last operation in that province.

[6] Within two weeks of the announcement, the Province passed the *Abitibi-Consolidated Rights and Assets Act*, S.N.L. 2008, c. A-1.01 ("*Abitibi Act*"), which immediately transferred most of Abitibi's property in Newfoundland and Labrador to the Province and denied Abitibi any legal remedy for this expropriation.

[7] The closure of its mill in Newfoundland and Labrador was one of many decisions Abitibi made in a period of general financial distress affecting its activities both in the United States and in Canada. It filed for insolvency protection in the United States on April 16, 2009. It also sought a stay of proceedings under the *CCAA* in the Superior Court of Quebec, as its Canadian head office was located in Montréal. The *CCAA* stay was ordered on April 17, 2009.

[8] In the same month, Abitibi also filed a notice of intent to submit a claim to arbitration under NAFTA (the *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*,

première instance, [TRADUCTION] « les ordonnances avaient pour effet attendu, pratique et réaliste d'établir le fondement d'une réclamation permettant à la province de récupérer des sommes d'argent qui seraient utilisées pour procéder aux travaux de décontamination » (2010 QCCS 1261, 68 C.B.R. (5th) 1, par. 211). Par conséquent, pour le tribunal, les ordonnances étaient clairement de nature pécuniaire. Je ne vois aucune erreur de droit ni aucune raison de modifier ces conclusions de fait. Je suis d'avis de rejeter le pourvoi avec dépens.

I. Faits et historique judiciaire

[5] Pendant plus d'une centaine d'années, AbitibiBowater Inc., et ses auteurs ou sociétés filiales (ensemble, « Abitibi ») ont poursuivi des activités industrielles à Terre-Neuve-et-Labrador. En 2008, Abitibi a annoncé la fermeture de la dernière des scieries qu'elle exploitait dans cette province.

[6] Dans les deux semaines qui ont suivi cette annonce, la province a adopté l'*Abitibi-Consolidated Rights and Assets Act*, S.N.L. 2008, ch. A-1.01 (« *Abitibi Act* »), qui transférait immédiatement à la province la plus grande partie des biens d'Abitibi situés à Terre-Neuve-et-Labrador et privait la société de tous recours judiciaires en relation avec cette expropriation.

[7] La fermeture de sa scierie à Terre-Neuve-et-Labrador est l'une des nombreuses décisions prises par Abitibi dans une période où de grandes difficultés financières touchaient ses activités au Canada et aux États-Unis. Le 16 avril 2009, elle a présenté une demande de protection contre l'insolvabilité aux États-Unis. Elle a également demandé à la Cour supérieure du Québec, à Montréal, où elle a son siège social au Canada, une suspension des procédures en vertu de la *LACC*. La suspension a été ordonnée le 17 avril 2009.

[8] Au cours du même mois, Abitibi a aussi déposé un avis d'intention de soumettre une plainte à l'arbitrage en vertu de l'ALENA (*Accord de libre-échange nord-américain entre le gouvernement du Canada, le gouvernement des États-Unis d'Amérique et le gouvernement des États-Unis du Mexique*,

Can. T.S. 1994 No. 2) for losses resulting from the *Abitibi Act*, which, according to Abitibi, exceeded $300 million.

[9] On November 12, 2009, the Province's Minister of Environment and Conservation ("Minister") issued five orders (the "*EPA* Orders") under s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 ("*EPA*"). The *EPA* Orders required Abitibi to submit remediation action plans to the Minister for five industrial sites, three of which had been expropriated, and to complete the approved remediation actions. The *CCAA* judge estimated the cost of implementing these plans to be from "the mid-to-high eight figures" to "several times higher" (para. 81).

[10] On the day it issued the *EPA* Orders, the Province brought a motion for a declaration that a claims procedure order issued under the *CCAA* in relation to Abitibi's proposed reorganization did not bar the Province from enforcing the *EPA* Orders. The Province argued — and still argues — that non-monetary statutory obligations are not "claims" under the *CCAA* and hence cannot be stayed and be subject to a claims procedure order. It further submits that Parliament lacks the constitutional competence under its power to make laws in relation to bankruptcy and insolvency to stay orders that are validly made in the exercise of a provincial power.

[11] Abitibi contested the motion and sought a declaration that the *EPA* Orders were stayed and that they were subject to the claims procedure order. It argued that the *EPA* Orders were monetary in nature and hence fell within the definition of the word "claim" in the claims procedure order.

R.T. Can. 1994 n^{o} 2) relativement à des pertes découlant de l'application de l'*Abitibi Act*, lesquelles totalisaient, selon Abitibi, une somme supérieure à 300 millions de dollars.

[9] Le 12 novembre 2009, le ministre provincial de l'Environnement et de la Conservation (« ministre ») a prononcé, en vertu de l'art. 99 de l'*Environmental Protection Act*, S.N.L. 2002, ch. E-14.2 (« *EPA* »), cinq ordonnances (les « ordonnances *EPA* ») contraignant Abitibi à présenter au ministre des plans de restauration pour cinq sites industriels, dont trois avaient été expropriés, et à réaliser les plans de restauration approuvés. Le juge chargé de l'instance instituée sous le régime de la *LACC* a évalué les coûts de la mise en œuvre de ces plans à une somme se situant [TRADUCTION] « entre cinquante et cent millions de dollars », ou « plusieurs fois plus élevée » (par. 81).

[10] Le jour même où elle émettait les ordonnances *EPA*, la province a demandé par requête un jugement déclarant qu'une ordonnance relative à la procédure de réclamations rendue aux termes de la *LACC* dans le cadre de la réorganisation proposée d'Abitibi n'empêchait pas la province d'exécuter les ordonnances *EPA*. La province a soutenu — et soutient toujours — que des obligations légales de nature non pécuniaire ne constituent pas des « réclamations » au sens de la *LACC* et que leur exécution ne peut donc être suspendue ni être assujettie à une ordonnance relative à la procédure de réclamations. Elle fait de plus valoir que le pouvoir du Parlement de légiférer en matière de faillite et d'insolvabilité ne lui confère pas la compétence constitutionnelle pour suspendre l'application des ordonnances prononcées dans l'exercice valide de pouvoirs provinciaux.

[11] Abitibi a contesté la requête et a demandé un jugement déclarant que les ordonnances *EPA* avaient été suspendues et qu'elles étaient assujetties à l'ordonnance relative à la procédure de réclamations. Abitibi a soutenu que les ordonnances *EPA* étaient de nature pécuniaire et qu'elles étaient donc visées par la définition du terme « réclamation » utilisé dans l'ordonnance relative à la procédure de réclamations.

[12] Gascon J. of the Quebec Superior Court, sitting as a *CCAA* court, dismissed the Province's motion. He found that he had the authority to characterize the orders as "claims" if the underlying regulatory obligations "remain[ed], in a particular fact pattern, truly financial and monetary in nature" (para. 148). He declared that the *EPA* Orders were stayed by the initial stay order and were not subject to the exception found in that order. He also declared that the filing by the Province of any claim based on the *EPA* Orders was subject to the claims procedure order, and reserved to the Province the right to request an extension of time to assert a claim under the claims procedure order and to Abitibi the right to contest such a request.

[12] Le juge Gascon de la Cour supérieure du Québec, siégeant aux termes de la *LACC*, a rejeté la requête de la province. Il a statué qu'il avait le pouvoir de qualifier les ordonnances de « réclamations » si les obligations légales sous-jacentes [TRADUCTION] « demeur[aient], dans une situation factuelle particulière, de nature véritablement financière et pécuniaire » (par. 148). Il a déclaré que les ordonnances *EPA* avaient été suspendues en vertu de l'ordonnance de suspension initiale et qu'elles n'étaient pas visées par l'exception énoncée dans cette ordonnance. Il a également déclaré que la présentation, par la province, de toute réclamation fondée sur les ordonnances *EPA* était assujettie à l'ordonnance relative à la procédure de réclamations; il a réservé à la province le droit de demander par requête une prorogation du délai pour présenter une réclamation en vertu de la procédure de réclamations et a confirmé le droit d'Abitibi de contester une telle requête.

[13] In the Court of Appeal, Chamberland J.A. denied the Province leave to appeal (2010 QCCA 965, 68 C.B.R. (5th) 57). In his view, the appeal had no reasonable chance of success, because Gascon J. had found as a fact that the *EPA* Orders were financial or monetary in nature. Chamberland J.A. also found that no constitutional issue arose, given that the Superior Court judge had merely characterized the orders in the context of the restructuring process; the judgment did not "'immunise' Abitibi from compliance with the EPA Orders" (para. 33). Finally, he noted that Gascon J. had reserved the Province's right to request an extension of time to file a claim in the *CCAA* process.

[13] En Cour d'appel, le juge Chamberland a rejeté la demande d'autorisation d'appel présentée par la province (2010 QCCA 965, 68 C.B.R. (5th) 57). À son avis, l'appel n'avait aucune chance raisonnable de succès parce que le juge Gascon avait conclu, comme question de faits, que les ordonnances *EPA* étaient de nature financière ou pécuniaire. Le juge Chamberland a également estimé qu'aucune question constitutionnelle ne se posait, car le juge de la Cour supérieure n'avait fait que qualifier les ordonnances dans le contexte du processus de restructuration; le jugement ne [TRADUCTION] « "soustrayait" pas Abitibi à son obligation de se conformer aux ordonnances *EPA* » (par. 33). Enfin, il a fait remarquer que le juge Gascon avait réservé à la province le droit de demander la prorogation de délai pour produire une réclamation en vertu de la *LACC*.

II. Positions of the Parties

II. Thèses des parties

[14] The Province argues that the *CCAA* court erred in interpreting the relevant *CCAA* provisions in a way that nullified the *EPA*, and that the interpretation is inconsistent with both the ancillary powers doctrine and the doctrine of interjurisdictional immunity. The Province further submits

[14] La province soutient que le tribunal de première instance a commis l'erreur d'interpréter les dispositions applicables de la *LACC* de façon à invalider l'*EPA* et que cette interprétation est incompatible tant avec la doctrine des pouvoirs accessoires qu'avec celle de la protection des compétences

that, in any event, the *EPA* Orders are not "claims" within the meaning of the *CCAA*. It takes the position that "any plan of compromise and arrangement that Abitibi might submit for court approval must make provision for compliance with the *EPA* Orders" (A.F., at para. 32).

[15] Abitibi contends that the factual record does not provide a basis for applying the constitutional doctrines. It relies on the *CCAA* court's findings of fact, particularly the finding that the Province's intent was to establish the basis for a monetary claim. Abitibi submits that the true issue is whether a province that has a monetary claim against an insolvent company can obtain a preference against other unsecured creditors by exercising its regulatory power.

III. Constitutional Questions

[16] At the Province's request, the Chief Justice stated the following constitutional questions:

1. Is the definition of "claim" in s. 2(1) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, *ultra vires* the Parliament of Canada or constitutionally inapplicable to the extent this definition includes statutory duties to which the debtor is subject pursuant to s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2?

2. Is s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, *ultra vires* the Parliament of Canada or constitutionally inapplicable to the extent this section gives courts jurisdiction to bar or extinguish statutory duties to which the debtor is subject pursuant to s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2?

3. Is s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, *ultra vires* the Parliament of Canada or constitutionally inapplicable to the extent this section gives courts jurisdiction to

exclusives. La province fait de plus valoir que, de toute façon, les ordonnances *EPA* ne constituent pas des « réclamations » au sens de la *LACC*. Elle soutient que [TRADUCTION] « tout plan de transaction et d'arrangement qu'Abitibi pourrait soumettre à l'approbation du tribunal doit prévoir qu'[Abitibi] doit se conformer aux ordonnances *EPA* » (m.a., par. 32).

[15] Abitibi soutient que l'application des doctrines constitutionnelles ne trouve aucun fondement dans les faits du dossier. Elle appuie sa position sur les conclusions de fait tirées par le tribunal de première instance, plus particulièrement celles où le tribunal conclut que l'intention de la province était d'établir le fondement d'une réclamation pécuniaire. Abitibi plaide que la véritable question est de savoir si, par l'exercice de son pouvoir de réglementation, une province ayant une réclamation pécuniaire à faire valoir contre une entreprise insolvable peut obtenir une préférence à l'encontre d'autres créanciers non garantis.

III. Questions constitutionnelles

[16] À la demande de la province, la Juge en chef a formulé les questions constitutionnelles suivantes :

1. La définition d'une « réclamation » énoncée au par. 2(1) de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36, outrepasse-t-elle les pouvoirs du Parlement du Canada ou est-elle constitutionnellement inapplicable dans la mesure où elle englobe les obligations légales auxquelles le débiteur est assujetti en application de l'art. 99 de l'*Environmental Protection Act*, S.N.L. 2002, ch. E-14.2?

2. L'article 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36, outrepasse-t-il les pouvoirs du Parlement du Canada ou est-il constitutionnellement inapplicable dans la mesure où il confère aux tribunaux la compétence pour libérer le débiteur des obligations légales auxquelles il est ou pourrait être assujetti en application de l'art. 99 de l'*Environmental Protection Act*, S.N.L. 2002, ch. E-14.2?

3. L'article 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36, outrepasse-t-il les pouvoirs du Parlement du Canada ou est-il constitutionnellement inapplicable dans la mesure

review the exercise of ministerial discretion under s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2?

[17] I note that the question whether a *CCAA* court has constitutional jurisdiction to stay a provincial order that is *not* a monetary claim does not arise here, because the stay order in this case did not affect non-monetary orders. However, the question may arise in other cases. In 2007, Parliament expressly gave *CCAA* courts the power to stay regulatory orders that are not monetary claims by amending the *CCAA* to include the current version of s. 11.1(3) (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36, s. 65) (the "2007 amendments"). Thus, future cases may give courts the opportunity to consider the question raised by the Province in an appropriate factual context. The only constitutional question that needs to be answered in this case concerns the jurisdiction of a *CCAA* court to determine whether an environmental order that is not framed in monetary terms is in fact a monetary claim.

[18] Processing creditors' claims against an insolvent debtor in an equitable and orderly manner is at the heart of insolvency legislation, which falls under a head of power attributed to Parliament. Rules concerning the assessment of creditors' claims, such as the determination of whether a creditor has a monetary claim, relate directly to the equitable and orderly treatment of creditors in an insolvency process. There is no need to perform a detailed analysis of the pith and substance of the provisions on the assessment of claims in insolvency matters to conclude that the federal legislation governing the characterization of an order as a monetary claim is valid. Because the provisions relate directly to Parliament's jurisdiction,

où il confère aux tribunaux la compétence pour réviser l'exercice du pouvoir discrétionnaire conféré au ministre par l'art. 99 de l'*Environmental Protection Act*, S.N.L. 2002, ch. E-14.2?

[17] Je souligne que la question de savoir si, aux termes de la *LACC*, un tribunal a compétence constitutionnelle pour suspendre l'application d'une ordonnance provinciale qui *ne* constitue *pas* une réclamation pécuniaire ne se pose pas en l'espèce parce que l'ordonnance de suspension en cause ne visait pas ces ordonnances. La question pourrait toutefois se poser dans d'autres affaires. En 2007, par l'ajout du par. 11.1(3) de la *LACC*, le législateur fédéral a explicitement conféré aux tribunaux compétents aux termes de la *LACC* le pouvoir de suspendre l'application des ordonnances d'un organisme administratif qui ne constituent pas des réclamations pécuniaires (*Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies, la Loi sur le Programme de protection des salariés et le chapitre 47 des Lois du Canada (2005)*, L.C. 2007, ch. 36, art. 65) (les « modifications de 2007 »). Ainsi, les tribunaux auront l'occasion d'analyser la question soulevée par la province lorsque le contexte factuel s'y prêtera. La seule question constitutionnelle qui requiert une réponse en l'espèce a trait à la compétence d'un tribunal, aux termes de la *LACC*, de déterminer si une ordonnance environnementale qui n'est pas formulée en termes pécuniaires constitue, en fait, une réclamation pécuniaire.

[18] Le traitement équitable et ordonné des réclamations présentées par des créanciers contre un débiteur insolvable se situe au cœur même de la législation en matière d'insolvabilité, un domaine de compétence attribué au législateur fédéral. L'établissement de règles relatives à l'évaluation des réclamations des créanciers, comme celle permettant de déterminer si un créancier fait valoir une réclamation pécuniaire, concerne directement le traitement équitable et ordonné des créanciers dans le cadre d'un processus établi en matière d'insolvabilité. Il n'est pas nécessaire d'analyser en détail le caractère véritable des dispositions régissant l'évaluation des réclamations en matière d'insolvabilité pour conclure à la validité du texte législatif fédéral

the ancillary powers doctrine is not relevant to this case. I also find that the interjurisdictional immunity doctrine is not applicable. A finding that a claim of an environmental creditor is monetary in nature does not interfere in any way with the creditor's activities. Its claim is simply subjected to the insolvency process.

[19] What the Province is actually arguing is that courts should consider the form of an order rather than its substance. I see no reason why the Province's choice of order should not be scrutinized to determine whether the form chosen is consistent with the order's true purpose as revealed by the Province's own actions. If the Province's actions indicate that, in substance, it is asserting a provable claim within the meaning of federal legislation, then that claim can be subjected to the insolvency process. Environmental claims do not have a higher priority than is provided for in the *CCAA*. Considering substance over form prevents a regulatory body from artificially creating a priority higher than the one conferred on the claim by federal legislation. This Court recognized long ago that a province cannot disturb the priority scheme established by the federal insolvency legislation (*Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453). Environmental claims are given a specific, and limited, priority under the *CCAA*. To exempt orders which are in fact monetary claims from the *CCAA* proceedings would amount to conferring upon provinces a priority higher than the one provided for in the *CCAA*.

IV. Claims Under the *CCAA*

[20] Several provisions of the *CCAA* have been amended since Abitibi filed for insolvency

permettant d'établir qu'une ordonnance constitue une réclamation pécuniaire. L'application de la doctrine des pouvoirs accessoires n'est pas pertinente en l'espèce car les dispositions en cause sont directement reliées à la compétence du législateur fédéral. J'estime également que la doctrine de la protection des compétences exclusives ne s'applique pas en l'espèce. Une conclusion selon laquelle un créancier œuvrant dans le domaine de l'environnement détient une réclamation pécuniaire ne modifie en rien les activités de ce créancier. La réclamation de ce dernier est simplement assujettie au processus d'insolvabilité.

[19] Ce que soutient en fait la province, c'est que les tribunaux devraient examiner la forme des ordonnances plutôt que leur substance. Je ne vois aucune raison empêchant l'examen du choix par la province d'un type d'ordonnance donnée afin de déterminer si la forme choisie concorde avec l'objectif véritable qui se dégage des gestes qu'elle a posés. Si ces gestes indiquent qu'elle fait effectivement valoir une réclamation prouvable au sens de la législation fédérale, alors cette réclamation peut être assujettie au processus d'insolvabilité. Les réclamations en matière d'environnement ne bénéficient pas d'un rang supérieur à celui prévu par les dispositions de la *LACC*. Privilégier l'examen de la substance d'une ordonnance plutôt que de sa forme permet d'éviter qu'un organisme administratif obtienne de façon artificielle une priorité de rang supérieure à celle que la législation fédérale attribue à la réclamation. Notre Cour a depuis longtemps reconnu qu'une province ne pouvait perturber les priorités établies par le régime fédéral d'insolvabilité (*Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453). La *LACC* établit une priorité précise et limitée à l'égard des réclamations en matière environnementale. Le fait de soustraire aux procédures d'insolvabilité les ordonnances qui sont en fait des réclamations pécuniaires équivaudrait à accorder aux provinces une priorité d'un rang supérieur à celui prévu par la *LACC*.

IV. Réclamations sous le régime de la *LACC*

[20] Plusieurs dispositions de la *LACC* ont été modifiées depuis qu'Abitibi a présenté une demande

protection. Except where otherwise indicated, the provisions I refer to are those that were in force when the stay was ordered.

[21] One of the central features of the *CCAA* scheme is the single proceeding model, which ensures that most claims against a debtor are entertained in a single forum. Under this model, the court can stay the enforcement of most claims against the debtor's assets in order to maintain the *status quo* during negotiations with the creditors. When such negotiations are successful, the creditors typically accept less than the full amounts of their claims. Claims have not necessarily accrued or been liquidated at the outset of the insolvency proceeding, and they sometimes have to be assessed in order to determine the monetary value that will be subject to compromise.

[22] Section 12 of the *CCAA* establishes the basic rules for ascertaining whether an order is a claim that may be subjected to the insolvency process:

12. (1) [Definition of "claim"] For the purposes of this Act, "claim" means any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act.*

(2) [Determination of amount of claim] For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:

(*a*) the amount of an unsecured claim shall be the amount

. . .

(iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor; . . .

de protection contre l'insolvabilité. À moins d'indication contraire de ma part, les dispositions que je cite sont celles qui étaient en vigueur lorsque la suspension des procédures a été ordonnée.

[21] Une des caractéristiques principales du régime créé par la *LACC* est de traiter la presque totalité des réclamations contre un débiteur suivant une procédure unique devant un même tribunal. En vertu de ce modèle, le tribunal peut ordonner la suspension de la plupart des mesures d'exécution engagées contre les actifs du débiteur de façon à maintenir le statu quo durant la négociation avec les créanciers. Lorsque la négociation réussit, les créanciers consentent habituellement à recevoir moins que le plein montant de leurs réclamations, lesquelles ne sont pas nécessairement exigibles ou liquidées dès le début des procédures d'insolvabilité. Ces réclamations doivent parfois être évaluées afin d'établir la valeur pécuniaire qui fera l'objet du compromis.

[22] L'article 12 de la *LACC* énonce les règles de base pour déterminer si une ordonnance constitue une réclamation pouvant être assujettie au processus applicable en matière d'insolvabilité :

12. (1) [Définition de « réclamation »] Pour l'application de la présente loi, « réclamation » s'entend de toute dette, tout engagement ou toute obligation d'un genre quelconque qui, s'il n'était pas garanti, constituerait une dette prouvable en matière de faillite au sens de la *Loi sur la faillite et l'insolvabilité.*

(2) [Détermination du montant de la réclamation] Pour l'application de la présente loi, le montant représenté par une réclamation d'un créancier garanti ou chirographaire est déterminé de la façon suivante :

a) le montant d'une réclamation non garantie est le montant :

. . .

(iii) dans le cas de toute autre compagnie, dont la preuve pourrait être établie en vertu de la *Loi sur la faillite et l'insolvabilité*, mais si le montant ainsi prouvable n'est pas admis par la compagnie, ce montant est déterminé par le tribunal sur demande sommaire par la compagnie ou le créancier;

[23] Section 12 of the *CCAA* refers to the rules of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). Section 2 of the *BIA* defines a claim provable in bankruptcy:

"claim provable in bankruptcy", "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a creditor;

[24] This definition is completed by s. 121(1) of the *BIA*:

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

[25] Sections 121(2) and 135(1.1) of the *BIA* offer additional guidance for the determination of whether an order is a provable claim:

121. . . .

(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

135. . . .

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

[26] These provisions highlight three requirements that are relevant to the case at bar. First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. I will examine each of these requirements in turn.

[23] L'article 12 de la *LACC* renvoie aux règles de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »). L'article 2 de la *LFI* définit ainsi une réclamation prouvable en matière de faillite :

« réclamation prouvable en matière de faillite » ou « réclamation prouvable » Toute réclamation ou créance pouvant être prouvée dans des procédures intentées sous l'autorité de la présente loi par un créancier.

[24] Cette définition est complétée par le par. 121(1) de la *LFI* :

121. (1) Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date à laquelle il devient failli, ou auxquels il peut devenir assujetti avant sa libération, en raison d'une obligation contractée antérieurement à cette date, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

[25] Les paragraphes 121(2) et 135(1.1) de la *LFI* donnent des indications additionnelles lorsqu'il s'agit de déterminer si une ordonnance constitue une réclamation prouvable :

121. . . .

(2) La question de savoir si une réclamation éventuelle ou non liquidée constitue une réclamation prouvable et, le cas échéant, son évaluation sont décidées en application de l'article 135.

135. . . .

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

[26] Ces dispositions font ressortir trois conditions pertinentes à la présente affaire. Premièrement, on doit être en présence d'une dette, d'un engagement ou d'une obligation envers un *créancier*. Deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance *avant que le débiteur ne devienne failli*. Troisièmement, il doit être possible d'attribuer une *valeur pécuniaire* à cette dette, cet engagement ou cette obligation. Je vais examiner chacune de ces conditions à tour de rôle.

[27] The *BIA*'s definition of a provable claim, which is incorporated by reference into the *CCAA*, requires the identification of a creditor. Environmental statutes generally provide for the creation of regulatory bodies that are empowered to enforce the obligations the statutes impose. Most environmental regulatory bodies can be creditors in respect of monetary or non-monetary obligations imposed by the relevant statutes. At this first stage of determining whether the regulatory body is a creditor, the question whether the obligation can be translated into monetary terms is not yet relevant. This issue will be broached later. The only determination that has to be made at this point is whether the regulatory body has exercised its enforcement power against a debtor. When it does so, it identifies itself as a creditor, and the requirement of this stage of the analysis is satisfied.

[28] The enquiry into the second requirement is based on s. 121(1) of the *BIA*, which imposes a time limit on claims. A claim must be founded on an obligation that was "incurred before the day on which the bankrupt becomes bankrupt". Because the date when environmental damage occurs is often difficult to ascertain, s. 11.8(9) of the *CCAA* provides more temporal flexibility for environmental claims:

11.8 . . .

(9) A claim against a debtor company for costs of remedying any environmental condition or environmental damage affecting real property of the company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.

[29] The creditor's claim will be exempt from the single proceeding requirement if the debtor's corresponding obligation has not arisen as of the time limit for inclusion in the insolvency process. This could apply, for example, to a debtor's statutory obligations relating to polluting activities that continue after the reorganization, because in such cases,

[27] La définition de réclamation prouvable établie par la *LFI* et incorporée par renvoi à la *LACC* exige qu'une personne ait qualité de créancier. Les lois régissant l'environnement pourvoient généralement à la création d'un organisme chargé de voir au respect des obligations qui y sont prévues. La plupart des organismes administratifs peuvent agir à titre de créanciers en relation avec les obligations pécuniaires ou non pécuniaires imposées par ces lois. À cette première étape qui consiste à déterminer si un organisme administratif est un créancier, il n'est pas encore pertinent de décider si l'obligation peut être formulée en termes pécuniaires. Cette question sera abordée à un stade ultérieur. À cette étape, la seule question à trancher est de savoir si l'organisme administratif a exercé, à l'encontre d'un débiteur, son pouvoir de faire appliquer la loi. Lorsqu'il le fait, il s'identifie alors comme créancier et la condition de cette étape est espectée.

[28] L'examen de la seconde condition repose sur le par. 121(1) de la *LFI* qui impose que la réclamation ait pris naissance dans un délai donné. Celle-ci doit se fonder sur une obligation « contractée antérieurement à cette date [la date à laquelle le failli devient failli] ». Comme il est souvent difficile d'établir la date à laquelle un dommage lié à l'environnement est survenu, le par. 11.8(9) de la *LACC* prévoit une certaine flexibilité pour ce qui est des réclamations en matière d'environnement :

11.8 . . .

(9) La réclamation pour les frais de réparation du fait ou dommage lié à l'environnement et touchant un bien immeuble de la compagnie débitrice constitue une réclamation, que la date du fait ou dommage soit antérieure ou postérieure à celle où des procédures sont intentées au titre de la présente loi.

[29] La réclamation du créancier sera exemptée de l'exigence découlant de la procédure unique si l'obligation correspondante du débiteur n'a pas pris naissance dans le délai fixé pour que la réclamation soit incluse dans le processus d'insolvabilité. À titre d'exemple, cela pourrait s'appliquer aux obligations que la loi impose à un débiteur concernant

the damage continues to be sustained after the reorganization has been completed.

[30] With respect to the third requirement, that it be possible to attach a monetary value to the obligation, the question is whether orders that are not expressed in monetary terms can be translated into such terms. I note that when a regulatory body claims an amount that is owed at the relevant date, that is, when it frames its order in monetary terms, the court does not need to make this determination, because what is being claimed is an "indebtedness" and therefore clearly falls within the meaning of "claim" as defined in s. 12(1) of the *CCAA*.

[31] However, orders, which are used to address various types of environmental challenges, may come in many forms, including stop, control, preventative, and clean-up orders (D. Saxe, "Trustees' and Receivers' Environmental Liability Update" (1998), 49 C.B.R. (3d) 138, at p. 141). When considering an order that is not framed in monetary terms, courts must look at its substance and apply the rules for the assessment of claims.

[32] Parliament recognized that regulatory bodies sometimes have to perform remediation work (see House of Commons, *Evidence of the Standing Committee on Industry*, No. 16, 2nd Sess., 35th Parl., June 11, 1996). When one does so, its claim with respect to remediation costs is subject to the insolvency process, but the claim is secured by a charge on the contaminated real property and certain other related property and benefits from a priority (s. 11.8(8) *CCAA*). Thus, Parliament struck a balance between the public's interest in enforcing environmental regulations and the interest of third-party creditors in being treated equitably.

ses activités polluantes qui se poursuivent après la réorganisation, parce qu'en pareilles circonstances, des dommages sont encore causés après que la réorganisation ait été complétée.

[30] En ce qui concerne la troisième condition, soit qu'il doit être possible d'attribuer à l'obligation une valeur pécuniaire, la question est de savoir si des ordonnances qui ne sont pas formulées en termes pécuniaires peuvent être formulées en de tels termes. Je souligne que lorsqu'un organisme administratif réclame une somme qui est due à la date pertinente, il formule ainsi son ordonnance en termes pécuniaires. Le tribunal n'a alors aucune détermination à faire à cette étape car ce qui est réclamé est une « dette » et est, par conséquent, clairement visé par la définition d'une « réclamation » prévue au par. 12(1) de la *LACC*.

[31] Toutefois, parce qu'elles sont utilisées pour traiter divers enjeux environnementaux, les ordonnances peuvent se présenter sous plusieurs formes et peuvent viser notamment la cessation ou le contrôle d'une activité, la prévention et la décontamination (D. Saxe, « Trustees' and Receivers' Environnmental Liability Update » (1998), 49 C.B.R. (3d) 138, p. 141). Lorsqu'ils analysent une ordonnance qui n'est pas formulée en des termes pécuniaires, les tribunaux doivent en examiner la substance et appliquer les règles régissant l'évaluation des réclamations.

[32] Le législateur fédéral reconnaît que les organismes administratifs doivent à l'occasion exécuter des travaux de décontamination (voir Chambre des communes, *Témoignages du Comité permanent de l'industrie*, nº 16, 2e sess., 35e lég., 11 juin 1996). En pareil cas, la réclamation relative aux frais de décontamination est assujettie à la procédure de réclamations en matière d'insolvabilité mais elle est garantie par une charge réelle grevant l'immeuble contaminé et certains immeubles connexes et bénéficie d'un rang prioritaire (par. 11.8(8) *LACC*). Ainsi, le législateur a établi un équilibre entre l'intérêt du public à l'égard de l'application de la réglementation environnementale et les intérêts des tiers créanciers qui doivent être traités de façon équitable.

[33] If Parliament had intended that the debtor always satisfy all remediation costs, it would have granted the Crown a priority with respect to the totality of the debtor's assets. In light of the legislative history and the purpose of the reorganization process, the fact that the Crown's priority under s. 11.8(8) of the *CCAA* is limited to the contaminated property and certain related property leads me to conclude that to exempt environmental orders would be inconsistent with the insolvency legislation. As deferential as courts may be to regulatory bodies' actions, they must apply the general rules.

[33] Si le législateur fédéral avait eu l'intention d'obliger le débiteur à supporter dans tous les cas tous les coûts des travaux de décontamination, il aurait accordé à l'État une priorité applicable à la totalité des actifs du débiteur. Compte tenu de l'historique des dispositions législatives et des objectifs du processus de réorganisation, le fait que la priorité de l'État aux termes du par. 11.8(8) de la *LACC* soit limitée au bien contaminé et à certains biens liés m'amène à conclure qu'une exemption à l'égard des ordonnances environnementales serait incompatible avec la législation en matière d'insolvabilité. Aussi respectueux soient-ils des mesures prises par les organismes administratifs, les tribunaux sont tenus d'appliquer les règles générales.

[34] Unlike in proceedings governed by the common law or the civil law, a claim may be asserted in insolvency proceedings even if it is contingent on an event that has not yet occurred (for the common law, see *Canada v. McLarty*, 2008 SCC 26, [2008] 2 S.C.R. 79, at paras. 17-18; for the civil law, see arts. 1497, 1508 and 1513 of the *Civil Code of Québec*, S.Q. 1991, c. 64). Thus, the broad definition of "claim" in the *BIA* includes *contingent* and *future* claims that would be unenforceable at common law or in the civil law. As for unliquidated claims, a *CCAA* court has the same power to assess their amounts as would a court hearing a case in a common law or civil law context.

[34] Contrairement à l'approche qui prévaut dans le contexte des procédures régies par la common law ou le droit civil, il est possible de faire valoir une réclamation dans le cadre de procédures d'insolvabilité même si elle dépend d'un événement non encore survenu (en common law, voir *Canada c. McLarty*, 2008 CSC 26, [2008] 2 R.C.S. 79, par. 17-18; en droit civil, voir les art. 1497, 1508 et 1513 du *Code civil du Québec*, L.Q. 1991, ch. 64). Ainsi, la définition générale de « réclamation » de la *LFI* englobe des réclamations éventuelles et *futures* qui seraient inexécutoires en common law ou en droit civil. En ce qui concerne les réclamations non liquidées, le tribunal chargé de l'application de la *LACC* a le même pouvoir d'évaluer leur montant qu'un tribunal saisi d'une affaire sous le régime de la common law ou du droit civil.

[35] The reason the *BIA* and the *CCAA* include a broad range of claims is to ensure fairness between creditors and finality in the insolvency proceeding for the debtor. In a corporate liquidation process, it is more equitable to allow as many creditors as possible to participate in the process and share in the liquidation proceeds. This makes it possible to include creditors whose claims have not yet matured when the corporate debtor files for bankruptcy, and thus avert a situation in which they would be faced with an inactive debtor that cannot satisfy a judgment. The rationale is slightly different in the context of a corporate proposal or reorganization. In such cases, the broad approach serves not only to

[35] C'est pour assurer l'équité entre les créanciers ainsi que, pour le débiteur, le caractère définitif de la procédure d'insolvabilité que la *LFI* et la *LACC* englobent un large éventail de réclamations. Dans le cadre de la liquidation d'une société, il est plus équitable de permettre au plus grand nombre possible de créanciers de participer au processus et de se partager le produit de la liquidation. Cela permet d'inclure les créanciers dont les réclamations ne sont pas venues à échéance lorsque le débiteur corporatif devient failli, et ainsi éviter que, ayant cessé ses activités, le débiteur ne puisse pas satisfaire à un jugement rendu en leur faveur. L'approche est quelque peu différente dans

ensure fairness between creditors, but also to allow the debtor to make as fresh a start as possible after a proposal or an arrangement is approved.

[36] The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative (*Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75). In the context of an environmental order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim to have its costs reimbursed. If there is sufficient certainty in this regard, the court will conclude that the order can be subjected to the insolvency process.

[37] The exercise by the *CCAA* court of its jurisdiction to determine whether an order is a provable claim entails a certain scrutiny of the regulatory body's actions. This scrutiny is in some ways similar to judicial review. There is a distinction, however, and it lies in the object of the assessment that the *CCAA* court must make. The *CCAA* court does not review the regulatory body's exercise of discretion. Rather, it inquires into whether the facts indicate that the conditions for inclusion in the claims process are met. For example, if activities at issue are ongoing, the *CCAA* court may well conclude that the order cannot be included in the insolvency process because the activities and resulting damages will continue after the reorganization is completed and hence exceed the time limit for a claim. If, on the other hand, the regulatory body, having no realistic alternative but to perform the remediation work itself, simply delays framing the order as a claim in order to improve its position in relation to other creditors, the *CCAA* court may conclude

le contexte d'une proposition concordataire présentée par une société ou d'une réorganisation. Dans ces cas, l'objectif que sous-tend une interprétation large est non seulement de garantir l'équité entre créanciers, mais aussi de permettre au débiteur de prendre un nouveau départ dans les meilleures conditions possibles à la suite de l'approbation d'une proposition ou d'un arrangement.

[36] Le critère retenu par les tribunaux pour décider si une réclamation éventuelle sera incluse dans le processus d'insolvabilité est celui qui consiste à déterminer si l'événement non encore survenu est trop éloigné ou conjectural (*Confederation Treasury Service Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75). Dans le contexte d'une ordonnance environnementale, cela signifie qu'il doit y avoir des indications suffisantes permettant de conclure que l'organisme administratif qui a eu recours aux mécanismes d'application de la loi effectuera en fin de compte des travaux de décontamination et présentera une réclamation pécuniaire afin d'obtenir le remboursement de ses débours. Si cela est suffisamment certain, le tribunal conclura que l'ordonnance peut être assujettie au processus d'insolvabilité.

[37] Lorsqu'il détermine si une ordonnance constitue une réclamation prouvable, le tribunal chargé de l'application de la *LACC* doit, dans une certaine mesure, examiner les actes posés par l'organisme administratif. Cet examen se rapproche à certains égards de celui d'un contrôle judiciaire. La différence se situe, toutefois, au niveau de l'objet de l'évaluation que doit faire le tribunal. Son examen ne porte pas sur l'exercice du pouvoir discrétionnaire par l'organisme administratif. Il doit plutôt déterminer si le contexte factuel indique que les conditions requises pour que l'ordonnance soit incluse dans le processus de réclamations sont respectées. Par exemple, si le débiteur continue d'exercer les activités faisant l'objet de l'intervention de l'organisme administratif, il est fort possible que le tribunal conclue que l'ordonnance ne peut être incorporée au processus d'insolvabilité parce que ces activités et les dommages en découlant se poursuivront après la réorganisation et qu'elles excéderont donc le délai prescrit pour la production d'une

that this course of action is inconsistent with the insolvency scheme and decide that the order has to be subject to the claims process. Similarly, if the property is not under the debtor's control and the debtor does not, and realistically will not, have the means to perform the remediation work, the *CCAA* court may conclude that it is sufficiently certain that the regulatory body will have to perform the work.

[38] Certain indicators can thus be identified from the text and the context of the provisions to guide the *CCAA* court in determining whether an order is a provable claim, including whether the activities are ongoing, whether the debtor is in control of the property, and whether the debtor has the means to comply with the order. The *CCAA* court may also consider the effect that requiring the debtor to comply with the order would have on the insolvency process. Since the appropriate analysis is grounded in the facts of each case, these indicators need not all apply, and others may also be relevant.

[39] Having highlighted three requirements for finding a claim to be provable in a *CCAA* process that need to be considered in the case at bar, I must now discuss certain policy arguments raised by the Province and some of the interveners.

[40] These parties argue that treating a regulatory order as a claim in an insolvency proceeding extinguishes the debtor's environmental obligations, thereby undermining the polluter-pay principle discussed by this Court in *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624, at para. 24. This objection

réclamation. Par contre, si l'organisme administratif, n'ayant aucune solution réaliste autre que celle d'effectuer lui-même les travaux de décontamination, ne fait que retarder la production d'une réclamation pécuniaire dans le but d'améliorer sa position par rapport à celle des autres créanciers, le tribunal pourrait conclure que cette démarche n'est pas compatible avec le régime d'insolvabilité et décider que l'ordonnance doit être traitée dans le cadre du processus de réclamations. De même, si le débiteur n'exerce aucun contrôle sur le bien et ne dispose pas, ni ne disposera, de façon réaliste, des moyens pour effectuer les travaux de décontamination, le tribunal pourrait conclure de façon suffisamment certaine que l'organisme administratif devra exécuter les travaux.

[38] Il est ainsi possible de discerner, grâce au libellé des dispositions et à leur contexte, certains indicateurs qui permettent de guider le tribunal au moment de déterminer si l'ordonnance constitue une réclamation prouvable, notamment si les activités se poursuivent, si le débiteur exerce un contrôle sur le bien et s'il dispose des moyens de se conformer à l'ordonnance. Il est également possible pour le tribunal de prendre en compte les conséquences qu'entraînerait sur le processus d'insolvabilité le fait d'exiger du débiteur qu'il se conforme à l'ordonnance. Puisque l'analyse qu'il convient de réaliser est fondée sur les faits propres à chaque cas, il n'est pas nécessaire que tous ces indicateurs soient présents, et d'autres peuvent également devenir pertinents.

[39] Après avoir souligné les trois conditions qui permettent en l'espèce de conclure qu'une ordonnance constitue une réclamation prouvable dans le cadre d'un processus régi par la *LACC*, il me faut examiner certains arguments de principe que la province et certains intervenants ont fait valoir.

[40] Ils ont plaidé que le fait d'assimiler une ordonnance d'un organisme administratif à une réclamation dans le cadre de procédure en insolvabilité éteint les obligations environnementales auxquelles le débiteur est tenu, minant par le fait même le principe du pollueur-payeur examiné par notre Cour dans l'arrêt *Cie pétrolière Impériale*

demonstrates a misunderstanding of the nature of insolvency proceedings. Subjecting an order to the claims process does not extinguish the debtor's environmental obligations any more than subjecting any creditor's claim to that process extinguishes the debtor's obligation to pay its debts. It merely ensures that the creditor's claim will be paid in accordance with insolvency legislation. Moreover, full compliance with orders that are found to be monetary in nature would shift the costs of remediation to third-party creditors, including involuntary creditors, such as those whose claims lie in tort or in the law of extra-contractual liability. In the insolvency context, the Province's position would result not only in a super-priority, but in the acceptance of a "third-party-pay" principle in place of the polluter-pay principle.

[41] Nor does subjecting the orders to the insolvency process amount to issuing a licence to pollute, since insolvency proceedings do not concern the debtor's future conduct. A debtor that is reorganized must comply with all environmental regulations going forward in the same way as any other person. To quote the colourful analogy of two American scholars, "Debtors in bankruptcy have — and should have — no greater license to pollute in violation of a statute than they have to sell cocaine in violation of a statute" (D. G. Baird and T. H. Jackson, "Comment: *Kovacs* and Toxic Wastes in Bankruptcy" (1984), 36 *Stan. L. Rev.* 1199, at p. 1200).

[42] Furthermore, corporations may engage in activities that carry risks. No matter what risks are at issue, reorganization made necessary by insolvency is hardly ever a deliberate choice. When the risks materialize, the dire costs are borne by almost all stakeholders. To subject orders to the claims process is not to invite corporations to restructure

ltée c. Québec (Ministre de l'Environnement), 2003 CSC 58, [2003] 2 R.C.S. 624, par. 24. Cet argument démontre une mauvaise compréhension de la nature des procédures en matière d'insolvabilité. Le fait d'assujettir une ordonnance au processus de réclamations n'éteint pas les obligations environnementales qui incombent au débiteur, pas plus que le fait de soumettre à ce processus les réclamations des créanciers n'éteint l'obligation du débiteur de payer ses dettes. Le fait d'assujettir une ordonnance au processus de réclamation vise simplement à faire en sorte que le paiement au créancier sera fait conformément aux dispositions législatives applicables en matière d'insolvabilité. De plus, le respect intégral des ordonnances dont la nature pécuniaire est reconnue transférerait le coût de la décontamination aux tiers créanciers, y compris aux créanciers involontaires, par exemple les créanciers en responsabilité délictuelle ou extra-contractuelle. Dans un contexte d'insolvabilité, la position de la province aurait comme résultat de lui accorder non seulement une super-priorité, mais aussi de reconnaître l'application d'un principe du « tiers-payeur » plutôt que celui du pollueur-payeur.

[41] Par ailleurs, l'assujettissement des ordonnances au processus d'insolvabilité n'autorise pas une personne à polluer, car la procédure en insolvabilité ne touche pas les actes que le débiteur posera dans le futur. Le débiteur réorganisé doit se conformer pour l'avenir à la réglementation environnementale, comme le ferait toute autre personne. Pour citer une analogie haute en couleurs de deux universitaires américains, [TRADUCTION] « [l]es débiteurs en faillite n'ont pas — et ne devraient pas avoir — une autorisation plus étendue de polluer en violation d'une loi qu'ils n'en ont de vendre de la cocaïne » (D. G. Baird et T. H. Jackson, « Comment : *Kovacs* and Toxic Wastes in Bankruptcy » (1984), 36 *Stan. L. Rev.* 1199, p. 1200).

[42] En outre, il arrive que des sociétés exercent des activités comportant des risques. Peu importe les risques en cause, une réorganisation rendue nécessaire par l'insolvabilité de la société peut difficilement être assimilée à un choix délibéré. Lorsque les risques se concrétisent, la quasi-totalité des personnes ayant des intérêts dans la société en

in order to rid themselves of their environmental liabilities.

[43] And the power to determine whether an order is a provable claim does not mean that the court will necessarily conclude that the order before it will be subject to the *CCAA* process. In fact, the *CCAA* court in the case at bar recognized that orders relating to the environment may or may not be considered provable claims. It stayed only those orders that were monetary in nature.

[44] The Province also argues that courts have in the past held that environmental orders cannot be interpreted as claims when the regulatory body has not yet exercised its power to assert a claim framed in monetary terms. The Province relies in particular on *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45 (C.A.), and its progeny. In *Panamericana*, the Alberta Court of Appeal held that a receiver was personally liable for work under a remediation order and that the order was not a claim in insolvency proceedings. The court found that the duty to undertake remediation work is owed to the public at large until the regulator exercises its power to assert a monetary claim.

[45] The first answer to the Province's argument is that courts have never shied away from putting substance ahead of form. They can determine whether the order is in substance monetary.

[46] The second answer is that the provisions relating to the assessment of claims, particularly those governing contingent claims, contemplate instances in which the quantum is not yet established when the claims are filed. Whether, in the

supportent les terribles coûts. L'assujettissement des ordonnances à la procédure de réclamations n'équivaut pas à convier les sociétés à se réorganiser dans le but d'échapper à leurs obligations environnementales.

[43] Et le pouvoir de déterminer si une ordonnance constitue une réclamation prouvable ne signifie pas que le tribunal jugera nécessairement que l'ordonnance sera soumise au processus de réorganisation. En fait, le tribunal en l'espèce a reconnu que les ordonnances environnementales pouvaient être ou ne pas être considérées comme des réclamations prouvables. Il n'a rendu une ordonnance de suspension qu'à l'égard des ordonnances de nature pécuniaire.

[44] La province plaide aussi que selon la jurisprudence, les ordonnances environnementales ne peuvent pas être assimilées à des réclamations lorsque l'organisme administratif n'a pas encore exercé son pouvoir de faire valoir une réclamation formulée en termes pécuniaires. La province s'appuie particulièrement sur l'arrêt *Panamericana de Bienes y Servicios S.A. c. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45 (C.A.), et les jugements rendus dans sa foulée. Dans l'arrêt *Panamericana*, la Cour d'appel de l'Alberta a tenu le séquestre personnellement responsable de l'exécution des travaux ordonnés et a statué que l'ordonnance ne constituait pas une réclamation visée par les procédures en insolvabilité. La cour a conclu que l'obligation d'entreprendre les travaux de décontamination est due au public en général jusqu'à ce que l'organisme administratif exerce son pouvoir de faire valoir une réclamation pécuniaire.

[45] La première réponse à cet argument de la province est que les tribunaux n'ont jamais hésité à privilégier le fond à la forme. Les tribunaux peuvent déterminer si, en substance, l'ordonnance est de nature pécuniaire.

[46] La seconde réponse est que les dispositions concernant l'évaluation des réclamations, en particulier celles régissant les réclamations éventuelles, n'exigent pas que la valeur pécuniaire soit établie au moment où elles sont produites. Un

regulatory context, an obligation always entails the existence of a correlative right has been discussed by a number of scholars. Various theories of rights have been put forward (see W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (new ed. 2001); D. N. MacCormick, "Rights in Legislation", in P. M. S. Hacker and J. Raz, eds., *Law, Morality, and Society: Essays in Honour of H. L. A. Hart* (1977), 189). However, because the Province issued the orders in this case, it would be recognized as a creditor in respect of a right no matter which of these theories was applied. As interesting as the discussion may be, therefore, I do not need to consider which theory should prevail. The real question is not to whom the obligation is owed, as this question is answered by the statute, which determines who can require that it be discharged. Rather, the question is whether it is sufficiently certain that the regulatory body will perform the remediation work and, as a result, have a monetary claim.

[47] The third answer to the Province's argument is that insolvency legislation has evolved considerably over the two decades since *Panamericana*. At the time of *Panamericana*, none of the provisions relating to environmental liabilities were in force. Indeed, some of those provisions were enacted very soon after, and seemingly in response to, that case. In 1992, Parliament shielded trustees from the very liability imposed on the receiver in *Panamericana* (*An Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof*, S.C. 1992, c. 27, s. 9, amending s. 14 of the *BIA*). The 1997 amendments provided additional protection to trustees and monitors (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, S.C. 1997, c. 12). The 2007 amendments made it clear that a *CCAA* court has the power to determine that a regulatory order may be a claim and also provided criteria for staying regulatory orders (s. 65, amending the *CCAA* to include the current version of s. 11.1). The purpose of these amendments was to balance the creditor's

certain nombre d'auteurs ont examiné la question de savoir si, dans un contexte réglementaire, l'existence d'une obligation implique toujours en corrélation celle d'un droit. Diverses théories relatives aux droits ont été avancées (voir W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (nouvelle éd. 2001); D. N. MacCormick, « Rights in Legislation », dans P. M. S. Hacker et J. Raz, dir., *Law, Morality, and Society : Essays in Honour of H. L. A. Hart* (1977), 189). Toutefois, comme en l'espèce la province a prononcé les ordonnances, elle serait reconnue comme créancière d'un droit en vertu de l'une ou l'autre de ces théories. Par conséquent, malgré l'intérêt que peut susciter ce débat, il n'est pas nécessaire de déterminer la théorie qui prévaut. La véritable question n'est pas de savoir à qui est due l'obligation, puisque la loi y répond en indiquant qui peut en exiger l'exécution. La question est plutôt de savoir s'il est suffisamment certain que l'organisme administratif effectuera les travaux de décontamination et pourra ainsi faire valoir une réclamation pécuniaire.

[47] La troisième réponse à l'argument soulevé par la province est que la législation en matière d'insolvabilité a considérablement évolué au cours des deux décennies écoulées depuis l'arrêt *Panamericana*. À l'époque où l'arrêt *Panamericana* a été prononcé, aucune des dispositions concernant les obligations liées à l'environnement n'était en vigueur. Certaines des dispositions ont été adoptées très peu de temps après cette décision et, semble-t-il, en réponse à celle-ci. En 1992, le législateur a permis aux syndics d'échapper à la responsabilité même que l'arrêt *Panamericana* avait retenue contre le séquestre (*Loi modifiant la Loi sur la faillite et la Loi de l'impôt sur le revenu en conséquence*, L.C. 1992, ch. 27, art. 9, modifiant l'art. 14 de la *LFI*). Une protection additionnelle a été accordée au syndic et au contrôleur avec les modifications adoptées en 1997 (*Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et la Loi de l'impôt sur le revenu*, L.C. 1997, ch. 12). Les modifications apportées en 2007 ont précisé que le tribunal chargé d'appliquer la *LACC* a

need for fairness against the debtor's need to make a fresh start.

[48] Whether the regulatory body has a contingent claim is a determination that must be grounded in the facts of each case. Generally, a regulatory body has discretion under environmental legislation to decide how best to ensure that regulatory obligations are met. Although the court should take care to avoid interfering with that discretion, the action of a regulatory body is nevertheless subject to scrutiny in insolvency proceedings.

V. Application

[49] I now turn to the application of the principles discussed above to the case at bar. This case does not turn on whether the Province is the creditor of an obligation or whether damage had occurred as of the relevant date. Those requirements are easily satisfied, since the Province had identified itself as a creditor by resorting to *EPA* enforcement mechanisms and since the damage had occurred before the time of the *CCAA* proceedings. Rather, the issue centres on the third requirement: that the orders meet the criterion for admission as a pecuniary claim. The claim was contingent to the extent that the Province had not yet formally exercised its power to ask for the payment of money. The question is whether it was sufficiently certain that the orders would eventually result in a monetary claim. To the *CCAA* judge, there was no doubt that the answer was yes.

le pouvoir de décider qu'une ordonnance d'un organisme administratif peut constituer une réclamation; ces modifications ont de plus établi des critères applicables à la suspension de ces ordonnances (art. 65, modifiant la *LACC* par l'ajout de l'art. 11.1). Ces modifications visaient à établir un équilibre entre le besoin de traiter les créanciers de façon équitable et celui de permettre au débiteur de prendre un nouveau départ.

[48] La détermination qu'une ordonnance d'un organisme administratif constitue une réclamation éventuelle doit être fondée sur les faits de chaque affaire. La législation en matière d'environnement accorde généralement à un organisme administratif un pouvoir discrétionnaire de décider de la meilleure façon d'assurer le respect des obligations découlant de la réglementation. Quoique le tribunal doive se garder de s'ingérer dans l'exercice du pouvoir discrétionnaire de ces organismes, les mesures qu'ils prennent peuvent néanmoins faire l'objet d'un examen dans le cadre de procédures engagées sous le régime fédéral de l'insolvabilité.

V. Application

[49] J'aborde maintenant l'application des principes énoncés ci-dessus à l'affaire dont notre Cour est saisie. En l'espèce, le débat n'est pas centré sur la question de savoir si la province est créancière d'une obligation ou si des dommages étaient survenus à la date pertinente. Il est facile de répondre à ces questions étant donné que la province s'est elle-même présentée comme créancière en ayant recours aux mécanismes d'application de l'*EPA* et que les dommages sont survenus avant que les procédures en vertu de la *LACC* ne soient entamées. Le débat porte plutôt sur la troisième condition, celle qui consiste à savoir si les ordonnances satisfont au critère d'admissibilité à titre de réclamation pécuniaire. La réclamation était éventuelle dans la mesure où la province n'avait pas formellement exercé son pouvoir de demander paiement d'une somme d'argent. La question est de savoir s'il était suffisamment certain que l'ordonnance mènerait éventuellement à la production d'une réclamation pécuniaire. Pour le juge de première instance, une réponse affirmative ne faisait pas de doute.

[50] The Province's exercise of its legislative powers in enacting the *Abitibi Act* created a unique set of facts that led to the orders being issued. The seizure of Abitibi's assets by the Province, the cancellation of all outstanding water and hydroelectric contracts between Abitibi and the Province, the cancellation of pending legal proceedings by Abitibi in which it sought the reimbursement of several hundreds of thousands of dollars, and the denial of any compensation for the seized assets and of legal redress are inescapable background facts in the judge's review of the *EPA* Orders.

[51] The *CCAA* judge did not elaborate on whether it was sufficiently certain that the Minister would perform the remediation work and therefore make a monetary claim. However, most of his findings clearly rest on a positive answer to this question. For example, his finding that "[i]n all likelihood, the pith and substance of the EPA Orders is an attempt by the Province to lay the groundwork for monetary claims against Abitibi, to be used most probably as an offset in connection with Abitibi's own NAFTA claims for compensation" (para. 178), is necessarily based on the premise that the Province would most likely perform the remediation work. Indeed, since monetary claims must, both at common law and in civil law, be mutual for set-off or compensation to operate, the Province had to have incurred costs in doing the work in order to have a claim that could be set off against Abitibi's claims.

[52] That the judge relied on an implicit finding that the Province would most likely perform the work and make a claim to offset its costs is also shown by the confirmation he found in the declaration by the Premier that the Province was attempting to assess the cost of doing remediation work Abitibi had allegedly left undone and that in the Province's assessment, "at this point in

[50] En adoptant l'*Abitibi Act*, ayant ainsi recours à son pouvoir législatif, la province mettait en place un contexte factuel unique qui menait à l'émission des ordonnances. La saisie par la province des actifs d'Abitibi, l'annulation de tous les contrats d'approvisionnement en eau et d'hydroélectricité conclus entre Abitibi et la province, l'annulation des recours intentés par Abitibi pour obtenir le remboursement de plusieurs centaines de milliers de dollars et le refus de toute indemnité et de tous recours en justice à l'égard des actifs saisis tissent un contexte factuel dont le juge ne peut faire abstraction dans son examen des ordonnances *EPA*.

[51] Le juge de première instance n'a pas fait une analyse distincte du critère suivant lequel le tribunal doit être suffisamment certain que le ministre exécuterait les travaux de décontamination et ferait, par conséquent, valoir une réclamation pécuniaire. Cependant, la plupart de ses conclusions reposent manifestement sur un constat positif à cet égard. Par exemple, le constat que [TRADUCTION] « [s]elon toute vraisemblance, le caractère véritable des ordonnances *EPA* [consiste] pour la province à tenter de jeter les bases de réclamations pécuniaires contre Abitibi, dans le but de les utiliser tout probablement à titre compensatoire au regard des demandes d'indemnisation d'Abitibi fondées sur l'ALÉNA » (par. 178) repose nécessairement sur la prémisse que la province allait fort probablement exécuter les travaux de décontamination. En effet, puisque les réclamations pécuniaires, en common law comme en droit civil, doivent être réciproques pour opérer compensation, la province devait avoir engagé des dépenses en exécutant des travaux, ce qui établissait la base de la réclamation qu'elle ferait valoir pour compenser celle d'Abitibi.

[52] Un autre fait illustre que le juge de première instance a implicitement conclu que la province allait fort probablement exécuter les travaux et produire une réclamation pour compenser ses coûts est qu'il en a trouvé une confirmation dans la déclaration du premier ministre selon laquelle la province tentait d'évaluer ce qu'il en coûterait pour réaliser les travaux de décontamination qu'Abitibi n'aurait

time, there would not be a net payment to Abitibi" (para. 181).

[53] The *CCAA* judge's reasons not only rest on an implicit finding that the Province would most likely perform the work, but refer explicitly to facts that support this finding. To reach his conclusion that the *EPA* Orders were monetary in nature, the *CCAA* judge relied on the fact that Abitibi's operations were funded through debtor-in-possession financing and its access to funds was limited to ongoing operations. Given that the *EPA* Orders targeted sites that were, for the most part, no longer in Abitibi's possession, this meant that Abitibi had no means to perform the remediation work during the reorganization process.

[54] In addition, because Abitibi lacked funds and no longer controlled the properties, the timetable set by the Province in the *EPA* Orders suggested that the Province never truly intended that Abitibi was to perform the remediation work required by the orders. The timetable was also unrealistic. For example, the orders were issued on November 12, 2009 and set a deadline of January 15, 2010 to perform a particular act, but the evidence revealed that compliance with this requirement would have taken close to a year.

[55] Furthermore, the judge relied on the fact that Abitibi was not simply designated a "person responsible" under the *EPA*, but was intentionally targeted by the Province. The finding that the Province had targeted Abitibi was drawn not only from the timing of the *EPA* Orders, but also from the fact that Abitibi was the only person designated in them, whereas others also appeared to be responsible — in some cases, primarily responsible — for the contamination. For example, Abitibi was ordered to do remediation work on a site it had surrendered more than 50 years before the orders were issued; the expert report upon which the orders were based made no distinction between Abitibi's activities on the property, on which its source of power had been horse power, and subsequent activities by others who had used fuel-powered vehicles

pas exécutés, et que selon l'estimation de la province, [TRADUCTION] « à l'heure actuelle, aucun paiement net ne serait versé à Abitibi » (par. 181).

[53] Les motifs du juge de première instance reposent non seulement sur une constatation implicite que la province exécuterait fort probablement les travaux, mais ils renvoient expressément aux faits qui appuient cette constatation. Pour conclure que les ordonnances *EPA* étaient de nature pécuniaire, le juge s'est fondé sur le fait qu'Abitibi pouvait mener ses opérations grâce à un financement de débiteur-exploitant et qu'elle n'avait accès à ces fonds que pour ses activités courantes. Étant donné que les ordonnances visaient des sites que, pour la plupart, Abitibi ne possédait plus, cela signifiait qu'Abitibi ne disposait d'aucune ressource pour exécuter les travaux pendant la réorganisation.

[54] De plus, parce qu'Abitibi ne disposait pas des fonds et n'exerçait plus aucun contrôle sur les biens, l'échéancier fixé par la province dans les ordonnances *EPA* était non seulement irréaliste, mais suggérait que la province n'avait jamais vraiment eu l'intention qu'Abitibi exécute les travaux qu'elle lui ordonnait de faire. Par exemple, les ordonnances en date du 12 novembre 2009 exigeaient que certains travaux particuliers soient terminés le 15 janvier 2010 alors que la preuve démontre qu'il aurait fallu presque un an pour exécuter ces travaux.

[55] En outre, le juge s'est appuyé sur le fait qu'Abitibi n'était pas simplement désignée comme [TRADUCTION] « personne responsable » aux termes de l'*EPA*, mais qu'elle était intentionnellement visée par la province. Il a fait cette constatation non seulement en raison du choix du moment où les ordonnances ont été prononcées, mais aussi parce qu'Abitibi y était la seule personne désignée alors que d'autres semblaient également responsables — et en certains cas, principalement responsables — de la contamination. Par exemple, la province a ordonné à Abitibi d'effectuer des travaux de décontamination d'un site qu'elle avait abandonné plus de 50 ans avant le prononcé des ordonnances alors que le rapport d'expert sur lequel les ordonnances étaient fondées ne distinguait aucunement les activités d'Abitibi, qui avait utilisé des chevaux,

there. In the judge's opinion, this finding of fact went to the Province's intent to establish a basis for performing the work itself and asserting a claim against Abitibi.

[56] These reasons — and others — led the *CCAA* judge to conclude that the Province had not expected Abitibi to perform the remediation work and that the "intended, practical and realistic effect of the EPA Orders was to establish a basis for the Province to recover amounts of money to be eventually used for the remediation of the properties in question" (para. 211). He found that the Province appeared to have in fact taken some steps to liquidate the claims arising out of the *EPA* Orders.

[57] In the end, the judge found that there was definitely a claim that "might" be filed, and that it was not left to "the subjective choice of the creditor to hold the claim in its pocket for tactical reasons" (para. 227). In his words, the situation did not involve a "detached regulator or public enforcer issuing [an] order for the public good" (para. 175), and it was "the hat of a creditor that best fi[t] the Province, not that of a disinterested regulator" (para. 176).

[58] In sum, although the analytical framework used by Gascon J. was driven by the facts of the case, he reviewed all the legal principles and facts that needed to be considered in order to make the determination in the case at bar. He did at times rely on indicators that are unique and that do not appear in the analytical framework I propose above, but he did so because of the exceptional facts of this case. Yet, had he formulated the question in the same way as I have, his conclusion, based on his objective findings of fact, would have been the same. Earmarking money may be a strong indicator that a province will perform remediation work, and actually commencing the work is the first step towards the creation of a debt, but these are not the

et les activités subséquentes d'autres personnes qui y avaient utilisé des véhicules alimentés au mazout. Ce fait, pour le juge, illustrait l'intention de la province d'établir un fondement pour exécuter elle-même les travaux et présenter une réclamation contre Abitibi.

[56] Ces motifs — et d'autres — ont amené le juge de première instance à conclure que la province ne s'attendait pas à ce qu'Abitibi exécute les travaux de décontamination et que [TRADUCTION] « les ordonnances *EPA* avaient pour effet voulu, pratique et réaliste de jeter les bases qui permettraient à la province de recouvrer les sommes d'argent devant éventuellement être employées pour la décontamination des terrains en question » (par. 211). Il a conclu que la province semblait avoir en fait pris des mesures en vue de liquider les réclamations découlant des ordonnances *EPA*.

[57] En fin de compte, le juge a conclu qu'il existait véritablement une réclamation qui « pourrait » être présentée, et qu'on ne pouvait laisser au bon vouloir du créancier [TRADUCTION] « le choix subjectif de la garder en réserve pour des raisons tactiques » (par. 227). Pour reprendre ses propres mots, il ne s'agissait pas d'un cas où « un organisme de réglementation ou d'application de la loi a émis de manière objective une ordonnance dans l'intérêt public » (par. 175), mais que « la province a agi plus comme un créancier que comme un organisme administratif désintéressé » (par. 176).

[58] En somme, bien que le cadre analytique utilisé par le juge Gascon a été dicté par les faits de l'affaire, il a examiné tous les principes juridiques et les faits qu'il était tenu de prendre en compte pour statuer sur la question qui se posait. À l'occasion, il s'est appuyé sur des indicateurs singuliers qui ne figurent pas dans le cadre analytique que j'ai déjà proposé, mais cela s'explique par les faits exceptionnels en l'espèce. Or, s'il avait formulé la question comme je l'ai posée, sa conclusion, appuyée sur ses constatations de fait objectives, aurait été la même. Le fait de prévoir un budget peut constituer un indicateur clair qu'une province exécutera des travaux de décontamination, et le fait que ces travaux soient entrepris constitue la première étape de

only considerations that can lead to a finding that a creditor has a monetary claim. The *CCAA* judge's assessment of the facts, particularly his finding that the *EPA* Orders were the first step towards performance of the remediation work by the Province, leads to no conclusion other than that it was sufficiently certain that the Province would perform remediation work and therefore fall within the definition of a creditor with a monetary claim.

la constitution d'une dette, mais ces considérations ne sont pas les seules qui permettent de conclure qu'un créancier fait valoir une réclamation pécuniaire. L'appréciation des faits par le juge de première instance, plus particulièrement sa constatation que les ordonnances constituaient la première étape en vue de la décontamination des sites, ne permet de tirer aucune conclusion autre que celle suivant laquelle il était suffisamment certain que la province exécuterait des travaux de décontamination et qu'elle était par conséquent visée par la définition d'un créancier ayant une réclamation pécuniaire.

VI. Conclusion

VI. Conclusion

[59] In sum, I agree with the Chief Justice that, as a general proposition, an environmental order issued by a regulatory body can be treated as a contingent claim, and that such a claim can be included in the claims process if it is sufficiently certain that the regulatory body will make a monetary claim against the debtor. Our difference of views lies mainly in the applicable threshold for including contingent claims and in our understanding of the *CCAA* judge's findings of fact.

[59] En somme, je suis d'accord avec la Juge en chef pour dire qu'en règle générale, une ordonnance environnementale d'un organisme administratif peut être traitée comme une réclamation éventuelle et qu'une telle réclamation peut être incluse au processus de réclamation s'il est suffisamment certain que l'organisme administratif fera valoir une réclamation pécuniaire contre le débiteur. Nos divergences de vues portent principalement sur le critère applicable pour que les réclamations éventuelles soient incluses et sur la façon dont nous interprétons les constatations de fait tirées par le juge de première instance.

[60] With respect to the law, the Chief Justice would craft a standard specific to the context of environmental orders by requiring a "likelihood approaching certainty" that the regulatory body will perform the remediation work. She finds that this threshold is justified because "remediation may cost a great deal of money" (para. 86). I acknowledge that remediating pollution is often costly, but I am of the view that Parliament has borne this consideration in mind in enacting provisions specific to environmental claims. Moreover, I recall that in this case, the Premier announced that the remediation work would be performed at no net cost to the Province. It was clear to him that the *Abitibi Act* would make it possible to offset all the related costs.

[60] En ce qui concerne le droit, la Juge en chef établirait une norme propre au contexte des ordonnances environnementales qui exigerait une « probabilité proche de la certitude » que l'organisme administratif réalisera les travaux de restauration. Elle estime que ce critère s'impose parce que « les travaux de restauration peuvent être très coûteux » (par. 86). Je reconnais que les travaux de décontamination sont souvent coûteux, mais je crois que cette considération a été prise en compte par le législateur fédéral lors de l'adoption des dispositions particulières visant les réclamations en matière environnementale. De plus, je rappelle qu'en l'instance, le premier ministre a annoncé que les travaux de décontamination seraient réalisés sans coût net pour la province. Il était évident pour lui que l'adoption de l'*Abitibi Act* permettrait de compenser tous les coûts afférents.

[61] Thus, I prefer to take the approach generally taken for all contingent claims. In my view, the *CCAA* court is entitled to take all relevant facts into consideration in making the relevant determination. Under this approach, the contingency to be assessed in a case such as this is whether it is sufficiently certain that the regulatory body will perform remediation work and be in a position to assert a monetary claim.

[62] Finally, the Chief Justice would review the *CCAA* court's findings of fact. I would instead defer to them. On those findings, applying any legal standard, be it the one proposed by the Chief Justice or the one I propose, the Province's claim is monetary in nature and its motion for a declaration exempting the *EPA* Orders from the claims procedure order was properly dismissed.

[63] For these reasons, I would dismiss the appeal with costs.

The following are the reasons delivered by

THE CHIEF JUSTICE (dissenting) —

1. Overview

[64] The issue in this case is whether orders made under the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 ("*EPA*"), by the Newfoundland and Labrador Minister of Environment and Conservation ("Minister") requiring a polluter to clean up sites (the "*EPA* Orders") are monetary claims that can be compromised in corporate restructuring under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). If they are not claims that can be compromised in restructuring, the Abitibi respondents ("Abitibi") will still have a legal obligation to clean up the sites following their emergence from restructuring. If they are such claims, Abitibi will have emerged from restructuring free of the obligation, able to recommence business without remediating the

[61] Par conséquent, je préfère retenir la méthode généralement suivie en matière de réclamations éventuelles. À mon avis, le tribunal chargé de l'application de la *LACC* peut prendre en compte l'ensemble des faits pertinents en vue de rendre la décision appropriée. Suivant cette approche, l'éventualité qu'il faut évaluer dans une affaire comme celle-ci est de savoir s'il est suffisamment certain que l'organisme administratif exécutera les travaux de décontamination et sera en mesure de faire valoir une réclamation pécuniaire.

[62] Enfin, la Juge en chef réviserait les conclusions de fait du juge de première instance. Pour ma part, je m'en remets à ces conclusions. Quelle que soit la norme juridique appliquée, soit celle proposée par la Juge en chef ou celle que je propose, au vu de ces conclusions, la réclamation de la province est de nature pécuniaire et sa requête demandant de déclarer que les ordonnances *EPA* n'étaient pas assujetties à l'ordonnance relative à la procédure de réclamations a été à juste titre rejetée.

[63] Pour ces motifs, je suis d'avis de rejeter le pourvoi avec dépens

Version française des motifs rendus par

LA JUGE EN CHEF (dissidente) —

1. Aperçu

[64] Il s'agit en l'espèce de savoir si des ordonnances du ministre de l'Environnement et de la Conservation (le « ministre ») de Terre-Neuve-et-Labrador, émises en vertu de l'*Environmental Protection Act*, S.N.L. 2002, ch. E-14.2 (« *EPA* »), obligeant un pollueur à décontaminer des sites (les « ordonnances *EPA* ») constituent des réclamations pécuniaires qui peuvent faire l'objet d'une transaction dans le cadre d'une restructuration d'entreprise engagée sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). Si elles ne constituent pas des réclamations pécuniaires pouvant faire l'objet d'une transaction, les intimées du groupe Abitibi (« Abitibi ») auront encore l'obligation légale de décontaminer les sites lorsque leur

properties it polluted, the cost of which will fall on the Newfoundland and Labrador public.

restructuration sera terminée. Dans le cas contraire, Abitibi sera dégagée de cette obligation; elle pourra reprendre ses activités à l'issue de la restructuration sans avoir à décontaminer les sites qu'elle a pollués et la population de Terre-Neuve-et-Labrador devra supporter le coût de la décontamination.

[65] Remediation orders made under a province's environmental protection legislation impose ongoing regulatory obligations on the corporation required to clean up the pollution. They are not monetary claims. In narrow circumstances, specified by the *CCAA*, these ongoing regulatory obligations may be reduced to monetary claims, which can be compromised under *CCAA* proceedings. This occurs where a province has done the work, or where it is "sufficiently certain" that it will do the work. In these circumstances, the regulatory obligation would be extinguished and the province would have a monetary claim for the cost of remediation in the *CCAA* proceedings. Otherwise, the regulatory obligation survives the restructuring.

[65] Les ordonnances exigeant la décontamination émises aux termes d'une loi provinciale sur la protection de l'environnement imposent des exigences réglementaires continues à la personne morale requise de remédier à la pollution. Ces ordonnances ne constituent pas des réclamations pécuniaires. En certaines circonstances particulières prévues par la *LACC*, ces exigences réglementaires continues peuvent être converties en réclamations pécuniaires, lesquelles peuvent faire l'objet de transactions dans le cadre de procédures engagées aux termes de la *LACC*. Cette situation se produit lorsqu'une province a exécuté les travaux, ou lorsqu'il est « suffisamment certain » qu'elle exécutera les travaux. Dans ces circonstances, l'exigence réglementaire serait éteinte et la province pourrait produire, dans le cadre de procédures engagées sous le régime de la *LACC*, une réclamation pécuniaire couvrant le coût des travaux de décontamination. Autrement, l'exigence réglementaire subsiste après la restructuration.

[66] In my view, the orders for remediation in this case, with a minor exception, are not claims that can be compromised in restructuring. On one of the properties, the Minister did emergency remedial work and put other work out to tender. These costs can be claimed in the *CCAA* proceedings. However, with respect to the other properties, on the evidence before us, the Minister has neither done the clean-up work, nor is it sufficiently certain that he or she will do so. The Province of Newfoundland and Labrador ("Province") retained a number of options, including requiring Abitibi to perform the remediation if it successfully emerged from the *CCAA* restructuring.

[66] À mon avis, les ordonnances exigeant la décontamination en l'espèce, à une exception près, ne constituent pas des réclamations pouvant faire l'objet de transactions dans le cadre d'une restructuration. Dans un des sites, la ministre de l'époque a effectué d'urgence la décontamination et a lancé un appel d'offres pour d'autres travaux. Le coût de ces travaux peut faire l'objet d'une réclamation dans les procédures engagées sous le régime de la *LACC*. Toutefois, en ce qui concerne les autres sites, selon les éléments de preuve dont nous disposons, le ministre en poste n'a pas effectué les travaux de décontamination et il n'est pas suffisamment certain qu'il le fera. La province de Terre-Neuve-et-Labrador (« province ») a conservé un certain nombre de solutions, dont celle d'obliger Abitibi à décontaminer les sites si elle réussit sa restructuration engagée sous le régime de la *LACC*.

[67] I would therefore allow the appeal and grant the Province the declaration it seeks that Abitibi is still subject to its obligations under the *EPA* following its emergence from restructuring, except for work done or tendered for on the Buchans site.

2. The Proceedings Below

[68] The *CCAA* judge took the view that the Province issued the *EPA* Orders, not in order to make Abitibi remediate, but as part of a money grab. He therefore concluded that the orders were monetary and financial in nature and should be considered claims that could be compromised under the *CCAA* (2010 QCCS 1261, 68 C.B.R. (5th) 1). The Quebec Court of Appeal denied leave to appeal on the ground that this "factual" conclusion could not be disturbed (2010 QCCA 965, 68 C.B.R. (5th) 57).

[69] The *CCAA* judge's stark view that an *EPA* obligation can be considered a monetary claim capable of being compromised simply because (as he saw it) the Province's motive was money, is no longer pressed. Whether an *EPA* order is a claim under the *CCAA* depends on whether it meets the requirements for a claim under that statute. That is the only issue to be resolved. Insofar as this determination touches on the division of powers, I am in substantial agreement with my colleague Deschamps J., at paras. 18-19.

3. The Distinction Between Regulatory Obligations and Claims Under the *CCAA*

[70] Orders to clean up polluted property under provincial environmental protection legislation are regulatory orders. They remain in effect until the

[67] Je suis par conséquent d'avis d'accueillir le pourvoi et d'accorder à la province le jugement déclaratoire sollicité portant qu'Abitibi reste assujettie à ses obligations en vertu de l'*EPA* au terme de cette période de restructuration, à l'exception des travaux sur le site de Buchans déjà exécutés ou à l'égard desquels des appels d'offres ont été lancés.

2. Les décisions des juridictions inférieures

[68] Le juge de première instance a adopté le point de vue selon lequel la province avait émis les ordonnances *EPA*, non pas pour obliger Abitibi à réparer les dommages causés, mais pour lui soutirer de l'argent. Il a donc conclu que les ordonnances étaient de nature pécuniaire et financière, et qu'elles devraient être considérées comme des réclamations pouvant faire l'objet de transactions sous le régime de la *LACC* (2010 QCCS 1261, 68 C.B.R. (5th) 1). La Cour d'appel du Québec a refusé l'autorisation d'interjeter appel de cette décision au motif que rien ne permettait de modifier cette conclusion « de fait » (2010 QCCA 965, 68 C.B.R. (5th) 57).

[69] Le point de vue peu nuancé du juge de première instance, selon lequel une obligation découlant de l'*EPA* peut être considérée comme une réclamation pécuniaire susceptible de faire l'objet d'une transaction du simple fait (à son avis) que la province n'était motivée que par l'argent, n'est plus en cause. Pour répondre à la question de savoir si une ordonnance émise sous le régime de l'*EPA* constitue une réclamation au sens de la *LACC*, il faut déterminer si elle satisfait aux conditions d'existence d'une réclamation établies par cette loi. Il s'agit de la seule question à trancher. Dans la mesure où la décision sur ce point touche le partage des pouvoirs, je souscris pour l'essentiel à l'opinion exprimée par ma collègue la juge Deschamps aux par. 18-19.

3. La distinction entre une exigence réglementaire et une réclamation au titre de la *LACC*

[70] Les ordonnances exigeant la décontamination des sites pollués émises en vertu des lois provinciales sur l'environnement sont des ordonnances

property has been cleaned up or the matter otherwise resolved.

[71] It is not unusual for corporations seeking to restructure under the *CCAA* to be subject to a variety of ongoing regulatory orders arising from statutory schemes governing matters like employment, energy conservation and the environment. The corporation remains subject to these obligations as it continues to carry on business during the restructuring period, and remains subject to them when it emerges from restructuring unless they have been compromised or liquidated.

[72] The *CCAA*, like the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), draws a fundamental distinction between ongoing regulatory obligations owed to the public, which generally survive the restructuring, and monetary claims that can be compromised.

[73] This distinction is also recognized in the jurisprudence, which has held that regulatory duties owed to the public are not "claims" under the *BIA*, nor, by extension, under the *CCAA*. In *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45, the Alberta Court of Appeal held that a receiver in bankruptcy must comply with an order from the Energy Resources Conservation Board to comply with well abandonment requirements. Writing for the court, Laycraft C.J.A. said the question was whether the *Bankruptcy Act* "requires that the assets in the estate of an insolvent well licensee should be distributed to creditors leaving behind the duties respecting environmental safety . . . as a charge to the public" (para. 29). He answered the question in the negative:

The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the

de nature réglementaire. Elles demeurent en vigueur jusqu'à ce que le site ait été décontaminé ou que l'affaire soit réglée d'une autre façon.

[71] Il n'est pas inhabituel pour les sociétés qui cherchent à se restructurer sous le régime de la *LACC* d'être assujetties à diverses ordonnances réglementaires continues découlant de régimes législatifs régissant des domaines tels que l'emploi, la conservation de l'énergie et l'environnement. La société demeure assujettie à ces exigences alors qu'elle continue d'exercer ses activités pendant la période de restructuration, et elle y demeure assujettie au terme de cette période de restructuration, à moins que ces exigences n'aient fait l'objet d'une transaction ou qu'elles n'aient été liquidées.

[72] La *LACC*, à l'instar de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »), établit une distinction fondamentale entre les exigences réglementaires continues établies en faveur du public, lesquelles continuent de s'appliquer après la restructuration, et les réclamations pécuniaires qui peuvent faire l'objet d'une transaction.

[73] Cette distinction est aussi reconnue dans la jurisprudence, selon laquelle les obligations réglementaires établies en faveur du public ne sont pas des « réclamations » aux termes de la *LFI* ni, par extension, aux termes de la *LACC*. Dans l'arrêt *Panamericana de Bienes y Servicios S.A. c. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45, la Cour d'appel de l'Alberta a statué qu'un séquestre doit se conformer à une ordonnance de l'Energy Resources Conservation Board lui enjoignant de respecter des exigences en matière d'abandon de puits. Le juge en chef Laycraft, au nom de la cour, a affirmé que la question à trancher était de savoir si la *Loi sur la faillite* [TRADUCTION] « exige que les actifs se trouvant dans le patrimoine d'un titulaire de permis de puits soient distribués aux créanciers en laissant à la charge du public les obligations en matière de sécurité environnementale » (par. 29). Il a répondu par la négative :

[TRADUCTION] L'obligation est établie comme une obligation à caractère public qui doit être respectée par

citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed. [Emphasis added; para. 33.]

l'ensemble des citoyens de la collectivité à l'égard de leurs concitoyens. Lorsque le citoyen visé par l'ordonnance s'y conforme, le résultat n'est pas perçu comme le recouvrement d'une somme d'argent par un agent de la paix ou l'autorité publique, ni comme l'exécution d'un jugement ordonnant le paiement d'une somme d'argent; d'ailleurs, cela ne constitue pas non plus l'objectif de l'ensemble du processus. Il faut plutôt y voir l'application d'une loi générale. L'organisme d'application de la loi ne devient pas un « créancier » du citoyen à qui incombe l'obligation. [Je souligne; par. 33.]

[74] The distinction between regulatory obligations under the general law aimed at the protection of the public and monetary claims that can be compromised in *CCAA* restructuring or bankruptcy is a fundamental plank of Canadian corporate law. It has been repeatedly acknowledged: *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534 (B.C.S.C.); *Shirley (Re)* (1995), 129 D.L.R. (4th) 105 (Ont. Ct. (Gen. Div.)), at p. 109; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 146, *per* Iacobucci J. (dissenting). As Farley J. succinctly put it in *Air Canada, Re [Regulators' motions]* (2003), 28 C.B.R. (5th) 52 (Ont. S.C.J.), at para. 18: "Once [the company] emerges from these CCAA proceedings (successfully one would hope), then it will have to deal with each and every then unresolved [regulatory] matter."

[74] La distinction entre les exigences réglementaires découlant d'une loi d'application générale visant la protection du public, d'une part, et les réclamations pécuniaires pouvant faire l'objet d'une transaction dans le cadre d'une restructuration engagée sous le régime de la *LACC* ou en matière de faillite, d'autre part, constitue un élément important du droit canadien des sociétés. Cette distinction a maintes fois été reconnue : *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534 (C.S.C.-B.); *Shirley (Re)* (1995), 129 D.L.R. (4th) 105 (C. Ont. (Div. gén.)), p. 109; *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, par. 146, le juge Iacobucci (dissident). Comme l'a dit succinctement le juge Farley dans *Air Canada, Re [Regulators' motions]* (2003), 28 C.B.R. (5th) 52 (C.S.J. Ont.), par. 18 : [TRADUCTION] « À l'issue des procédures engagées en vertu de la LACC — souhaitons qu'elles soient couronnées de succès — [la société] aura alors à régler chacun des dossiers non résolus [en matière réglementaire]. »

[75] Recent amendments to the *CCAA* confirm this distinction. Section 11.1(2) now explicitly provides that, except to the extent a regulator is enforcing a payment obligation, a general stay does not affect a regulatory body's authority in relation to a corporation going through restructuring. The *CCAA* court may only stay specific actions or suits brought by a regulatory body, and only if such action is necessary for a viable compromise to be reached and it would not be contrary to the public interest to make such an order (s. 11.1(3)).

[75] Des modifications apportées récemment à la *LACC* confirment cette distinction. Le paragraphe 11.1(2) prévoit maintenant expressément que, sauf dans la mesure où un organisme de réglementation fait respecter une obligation de paiement, une suspension générale ne porte aucunement atteinte aux pouvoirs de celui-ci à l'égard d'une société en restructuration. Le tribunal chargé d'appliquer la *LACC* ne peut ordonner une suspension qu'à l'égard de certaines actions ou poursuites intentées par un organisme administratif, et seulement si cette mesure est nécessaire à la conclusion d'une transaction viable et si une telle ordonnance ne serait pas contraire à l'intérêt public (par. 11.1(3)).

[76] Abitibi argues that another amendment to the *CCAA*, s. 11.8(9), treats ongoing regulatory duties owed to the public as claims, and erases the distinction between the two types of obligation: see *General Chemical Canada Ltd., Re*, 2007 ONCA 600, 228 O.A.C. 385, *per* Goudge J.A., relying on s. 14.06(8) of the *BIA* (the equivalent of s. 11.8(9) of the *CCAA*). With respect, this reads too much into the provision. Section 11.8(9) of the *CCAA* refers only to the situation where a government has performed remediation, and provides that the *costs of the remediation* become a claim in the restructuring process even where the environmental damage arose after *CCAA* proceedings have begun. As stated in *Strathcona (County) v. PriceWaterhouseCoopers Inc.*, 2005 ABQB 559, 47 Alta. L.R. (4th) 138, *per* Burrows J., the section "does not convert a statutorily imposed obligation owed to the public at large into a liability owed to the public body charged with enforcing it" (para. 42).

[76] Abitibi plaide qu'en vertu d'une autre modification apportée à la *LACC*, le par. 11.8(9), les exigences réglementaires continues établies en faveur du public sont considérées comme des réclamations, et que cette modification élimine la distinction entre les deux types d'obligations : voir *General Chemical Canada Ltd., Re*, 2007 ONCA 600, 228 O.A.C. 385, le juge Goudge, citant le par. 14.06(8) de la *LFI* (la disposition équivalente au par. 11.8(9) de la *LACC*). Avec égards, cette interprétation de la disposition est trop large. Le paragraphe 11.8(9) de la *LACC* vise uniquement la situation où un gouvernement a exécuté des travaux de réparation du dommage, et prévoit que les *frais de réparation* constituent une réclamation dans le cadre du processus de restructuration, même si les dommages ont été causés à l'environnement après l'introduction des procédures au titre de la *LACC*. Comme l'a déclaré le juge Burrows dans *Strathcona (County) c. PriceWaterhouseCoopers Inc.*, 2005 ABQB 559, 47 Alta. L.R. (4th) 138, la disposition [TRADUCTION] « ne convertit pas une exigence imposée par la loi et établie en faveur du public en général en une dette envers l'organisme public chargé d'appliquer la loi » (par. 42).

4. When Does a Regulatory Obligation Become a Claim Under the *CCAA*?

[77] This brings us to the heart of the question before us: When does a regulatory obligation imposed on a corporation under environmental protection legislation become a "claim" provable and compromisable under the *CCAA*?

[78] Regulatory obligations are, as a general proposition, not compromisable claims. Only financial or monetary claims provable by a "creditor" fall within the definition of "claim" under the *CCAA*. A "creditor" is defined as "a person having a claim": s. 2, *BIA*. Thus, the identification of a "creditor" hangs on the existence of a "claim". Section 12(1) of the *CCAA* defines "claim" as "any indebtedness, liability or obligation . . . that . . . would be a debt provable in bankruptcy", which is

4. Quand une exigence réglementaire devient-elle une réclamation au titre de la *LACC*?

[77] Ceci nous amène au cœur de la question dont nous sommes saisis : quand une exigence réglementaire imposée à une société en vertu d'une loi sur la protection de l'environnement devient-elle une « réclamation » prouvable et pouvant faire l'objet d'une transaction aux termes de la *LACC*?

[78] En règle générale, les exigences réglementaires ne sont pas des réclamations pouvant faire l'objet d'une transaction. Seules les réclamations financières ou pécuniaires prouvables par un « créancier » correspondent à la définition de « réclamation » au sens de la *LACC*. Un « créancier » est défini comme étant une « [p]ersonne ayant une réclamation » : art. 2, *LFI*. Ainsi, l'identification d'un « créancier » repose sur l'existence d'une « réclamation ». Le paragraphe 12(1) de la *LACC* définit une « réclamation »

accepted as confined to obligations of a financial or monetary nature.

[79] The *CCAA* does not depart from the proposition that a claim must be financial or monetary. However, it contains a scheme to deal with disputes over whether an obligation is a monetary obligation as opposed to some other kind of obligation.

[80] Such a dispute may arise with respect to environmental obligations of the corporation. The *CCAA* recognizes three situations that may arise when a corporation enters restructuring.

[81] The first situation is where the remedial work has not been done (and there is no "sufficient certainty" that the work will be done, unlike the third situation described below). In this situation, the government cannot claim the cost of remediation: see s. 102(3) of the *EPA*. The obligation of compliance falls in principle on the monitor who takes over the corporation's assets and operations. If the monitor remediates the property, he can claim the costs as costs of administration. If he does not wish to do so, he may obtain a court order staying the remediation obligation or abandon the property: s. 11.8(5) *CCAA* (in which case costs of remediation shall not rank as costs of administration: s. 11.8(7)). In this situation, the obligation cannot be compromised.

[82] The second situation is where the government that has issued the environmental protection order moves to clean up the pollution, as the legislation entitles it to do. In this situation, the government has a claim for the cost of remediation that is compromisable in the *CCAA* proceedings. This is because the government, by moving to clean up the pollution, has changed the outstanding regulatory

comme étant « toute dette, tout engagement ou toute obligation [. . .] qui [. . .] constituerait une dette prouvable en matière de faillite », une définition dont la portée reconnue se limite aux obligations de nature financière ou pécuniaire.

[79] La *LACC* ne s'écarte pas du principe selon lequel une réclamation doit être financière ou pécuniaire. Elle prévoit cependant un régime permettant de régler les différends portant sur la question de savoir si une obligation est de nature pécuniaire, par opposition à une obligation d'une autre nature.

[80] Les obligations environnementales qui incombent à une personne morale peuvent engendrer un tel différend. La *LACC* reconnaît trois situations susceptibles de se présenter lorsqu'une personne morale s'engage dans un processus de restructuration.

[81] La première situation est celle où les travaux de restauration du site n'ont pas été exécutés (et il n'est pas « suffisamment certain » que les travaux seront exécutés, contrairement à la troisième situation exposée ci-après). En pareil cas, le gouvernement ne peut réclamer le coût de la restauration : voir le par. 102(3) de l'*EPA*. En principe, l'obligation de se conformer à la loi incombe au contrôleur qui prend en charge l'actif et les activités de la société. Si le contrôleur exécute les travaux de restauration du site, il peut réclamer les frais en tant que frais d'administration. S'il ne désire pas le faire, il peut obtenir de la cour une ordonnance suspendant l'exigence de restauration ou il peut abandonner l'immeuble : par. 11.8(5) de la *LACC* (dans ce cas, les frais de restauration ne font pas partie des frais d'administration : par. 11.8(7)). En pareil cas, l'obligation ne peut faire l'objet d'une transaction.

[82] La deuxième situation est celle où le gouvernement qui a émis l'ordonnance environnementale prend des mesures de décontamination, ce que la législation l'autorise à faire. En pareil cas, le gouvernement peut produire, pour le coût de la décontamination, une réclamation qui pourra faire l'objet d'une transaction dans le cadre des procédures engagées sous le régime de la *LACC*. Il en est ainsi

obligation owed to the public into a financial or monetary obligation owed by the corporation to the government. Section 11.8(9), already discussed, makes it clear that this applies to damage after the *CCAA* proceedings commenced, which might otherwise not be claimable as a matter of timing.

parce que le gouvernement, en prenant des mesures pour décontaminer le site, a transformé l'exigence réglementaire non exécutée établie en faveur du public en une obligation financière ou pécuniaire à laquelle la société est tenue envers le gouvernement. Le paragraphe 11.8(9), examiné précédemment, prévoit clairement que cette situation s'applique aux dommages survenus après que les procédures ont été engagées au titre de la *LACC*; en l'absence d'une telle précision, ces dommages ne pourraient faire l'objet d'une réclamation compte tenu du moment choisi pour agir.

[83] A third situation may arise: the government has not yet performed the remediation at the time of restructuring, but there is "sufficient certainty" that it will do so. This situation is regulated by the provisions of the *CCAA* for contingent or future claims. Under the *CCAA*, a debt or liability that is contingent on a future event may be compromised.

[83] Une troisième situation peut se présenter : le gouvernement n'a pas encore exécuté des travaux de restauration au moment de la restructuration, mais il est « suffisamment certain » qu'il le fera. Cette situation est prévue par les dispositions de la *LACC* relatives aux réclamations éventuelles ou futures. Aux termes de la *LACC*, une dette ou un engagement qui dépend d'un événement futur peut faire l'objet d'une transaction.

[84] It is clear that a mere possibility that work will be done does not suffice to make a regulatory obligation a contingent claim under the *CCAA*. Rather, there must be "sufficient certainty" that the obligation will be converted into a financial or monetary claim to permit this. The impact of the obligation on the insolvency process is irrelevant to the analysis of contingency. The future liabilities must not be "so remote and speculative in nature that they could not properly be considered contingent claims": *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75, at para. 4.

[84] Il est évident qu'une simple possibilité que les travaux soient exécutés ne suffit pas pour transformer une exigence réglementaire en une réclamation éventuelle au titre de la *LACC*. Pour en arriver à ce résultat, il faut plutôt qu'il soit « suffisamment certain » que l'exigence sera convertie en une réclamation financière ou pécuniaire. L'incidence de l'exigence sur le processus d'insolvabilité n'est pas pertinente pour l'analyse du caractère éventuel de la réclamation. Les engagements futurs ne doivent pas être [TRADUCTION] « si lointains et hypothétiques qu'ils ne puissent être considérés à bon droit comme des réclamations éventuelles » : *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75, par. 4.

[85] Where environmental obligations are concerned, courts to date have relied on a high degree of probability verging on certainty that the government will in fact step in and remediate the property. In *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J.), Farley J. concluded that a contingent claim was established where the money had already been earmarked in the budget for the remediation project. He observed that

[85] Lorsque des exigences environnementales sont en cause, les tribunaux se sont jusqu'à ce jour fondés sur un haut degré de probabilité, proche de la certitude, que le gouvernement prendra réellement des mesures et exécutera les travaux de restauration. Dans *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1 (C.S.J. Ont.), le juge Farley a conclu que la preuve d'une réclamation éventuelle était établie parce que les fonds avaient

"there appears to be every likelihood to a certainty that every dollar in the budget for the year ending March 31, 2002 earmarked for reclamation will be spent" (para. 15 (emphasis added)). Similarly, in *Shirley (Re)*, Kennedy J. relied on the fact that the Ontario Minister of the Environment had already entered the property at issue and commenced remediation activities to conclude that "[a]ny doubt about the resolve of the [Ministry's] intent to realize upon its authority ended when it began to incur expense from operations" (p. 110).

déjà été dédiés au projet de restauration dans le budget. Il a fait remarquer qu'[TRADUCTION] « il semble fortement probable et presque certain que chaque dollar dédié aux réclamations figurant au budget établi pour l'année se terminant le 31 mars 2002 sera dépensé » (par. 15 (je souligne)). De même, dans *Shirley (Re)*, le juge Kennedy s'est fondé sur le fait que les employés du ministère de l'Environnement de l'Ontario se trouvaient déjà sur le terrain en cause et avaient commencé les travaux de restauration pour conclure que [TRADUCTION] « [t]ous doutes quant à la détermination du [ministère] d'exercer son droit se sont estompés lorsque l'opération a commencé à lui occasionner des dépenses » (p. 110).

[86] There is good reason why "sufficient certainty" should be interpreted as requiring "likelihood approaching certainty" when the issue is whether ongoing environmental obligations owed to the public should be converted to contingent claims that can be expunged or compromised in the restructuring process. Courts should not overlook the obstacles governments may encounter in deciding to remediate environmental damage a corporation has caused. To begin with, the government's decision is discretionary and may be influenced by any number of competing political and social considerations. Furthermore, remediation may cost a great deal of money. For example, in this case, the *CCAA* court found that at a minimum the remediation would cost in the "mid-to-high eight figures", and could indeed cost several times that (para. 81). In concrete terms, the remediation at issue in this case may be expected to meet or exceed the entire budget of the Minister ($65 million) for 2009. Not only would this be a massive expenditure, but it would also likely require the specific approval of the legislature and thereby be subject to political uncertainties. To assess these factors and determine whether all this will occur would embroil the *CCAA* judge in social, economic and political considerations — matters which are not normally subject to judicial consideration: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 74. It is small wonder, then, that courts assessing whether it is "sufficiently certain" that a government will clean up pollution created

[86] Une bonne raison explique pourquoi il convient d'interpréter l'expression « suffisamment certain » comme exigeant une « probabilité proche de la certitude » lorsqu'il s'agit de déterminer si des exigences environnementales continues établies en faveur du public devraient être converties en réclamations éventuelles qui peuvent être rayées ou faire l'objet d'une transaction dans le cadre du processus de restructuration. Les tribunaux ne devraient pas oublier les obstacles auxquels les gouvernements peuvent se heurter lorsqu'ils décident de réparer les dommages environnementaux causés par une société. D'abord, la décision du gouvernement est discrétionnaire, et elle peut être influencée par nombre de considérations politiques et sociales concurrentes. En outre, les travaux de restauration peuvent être très coûteux. En l'espèce, par exemple, le juge de première instance a conclu que ces travaux pourraient coûter au minimum [TRADUCTION] « entre cinquante et cent millions de dollars », et même plusieurs fois cette somme (par. 81). En termes concrets, le coût des travaux en cause en l'espèce pourrait atteindre ou dépasser le budget total du ministre (65 millions de dollars) pour l'exercice 2009. Il s'agirait non seulement d'une dépense énorme, mais il faudrait probablement aussi l'approbation explicite de l'assemblée législative, avec les incertitudes politiques que cela comporte. L'évaluation de ces facteurs et l'appréciation de la possibilité que tout ce qui précède se produise entraîneraient le juge chargé d'appliquer la *LACC* dans des considérations d'ordre

by a corporation have insisted on proof of likelihood approaching certainty.

[87] In this case, as will be seen, apart from the Buchans property, the record is devoid of any evidence capable of establishing that it is "sufficiently certain" that the Province will itself remediate the properties. Even on a more relaxed standard than the one adopted in similar cases to date, the evidence in this case would fail to establish that remediation is "sufficiently certain".

5. The Result in This Case

[88] Five different sites are at issue in this case. The question in each case is whether the Minister has already remediated the property (making it to that extent an actual claim), or if not, whether it is "sufficiently certain" that he or she will remediate the property, permitting it to be considered a contingent claim.

[89] The Buchans site posed immediate risks to human health as a consequence of high levels of lead and other contaminants in the soil, groundwater, surface water and sediment. There was a risk that the wind would disperse the contamination, posing a threat to the surrounding population. Lead has been found in residential areas of Buchans and adults tested in the town had elevated levels of lead in their blood. In addition, a structurally unsound dam at the Buchans site raised the risk of contaminating silt entering the Exploits and Buchans rivers.

[90] The Minister quickly moved to address the immediate concern of the unsound dam and put

social, économique et politique — des questions normalement soustraites à l'examen judiciaire : *R. c. Imperial Tobacco Canada Ltée*, 2011 CSC 42, [2011] 3 R.C.S. 45, par. 74. Il n'est donc pas étonnant que les tribunaux, lorsqu'il s'agit d'apprécier s'il est « suffisamment certain » qu'un gouvernement procédera à la décontamination causée par une société, s'en soient tenus à la preuve d'une probabilité proche de la certitude.

[87] En l'espèce, comme nous le verrons, à l'exclusion du site de Buchans, le dossier est dénué d'éléments de preuve susceptibles d'établir qu'il est « suffisamment certain » que la province exécutera elle-même les travaux de décontamination. Même si l'on applique une norme plus souple que celle retenue jusqu'à ce jour dans des affaires semblables, la preuve en l'espèce n'établirait pas qu'il est « suffisamment certain » que les sites seront décontaminés.

5. L'issue du présent pourvoi

[88] En l'espèce, cinq sites différents sont en cause. La question dans chaque cas est de savoir si le ministre a déjà décontaminé les sites — il aurait alors une réclamation — ou, si tel n'est pas le cas, s'il est « suffisamment certain » qu'il exécutera les travaux de restauration, ce qui permettrait de considérer le coût de la décontamination comme une réclamation éventuelle.

[89] Le site de Buchans posait un risque immédiat à la santé pour les humains en raison de la forte concentration de plomb et d'autres contaminants présente dans le sol, l'eau souterraine et de surface ainsi que dans des sédiments. Il y avait un risque que le vent disperse la contamination, ce qui aurait représenté une menace pour la population environnante. On a trouvé du plomb dans des zones résidentielles de Buchans et les tests de sang ont révélé chez des adultes résidant dans la ville des concentrations élevées de plomb. De plus, un barrage en mauvais état situé sur le site de Buchans augmentait le risque de contamination du limon se déversant dans les rivières Exploits et Buchans.

[90] La ministre de l'époque a rapidement pris des mesures pour régler le problème immédiat du

out a request for tenders for other measures that required immediate action at the Buchans site. Money expended is clearly a claim under the *CCAA*. I am also of the view that the work for which the request for tenders was put out meets the "sufficiently certain" standard and constitutes a contingent claim.

[91] Beyond this, it has not been shown that it is "sufficiently certain" that the Province will do the remediation work to permit Abitibi's ongoing regulatory obligations under the *EPA* Orders to be considered contingent debts. The same applies to the other properties, on which no work has been done and no requests for tender to do the work initiated.

[92] Far from being "sufficiently certain", there is simply nothing on the record to support the view that the Province will move to remediate the remaining properties. It has not been shown that the contamination poses immediate health risks, which must be addressed without delay. It has not been shown that the Province has taken any steps to do any work. And it has not been shown that the Province has set aside or even contemplated setting aside money for this work. Abitibi relies on a statement by the then-Premier in discussing the possibility that the Province would be obliged to compensate Abitibi for expropriation of some of the properties, to the effect that "there would not be a net payment to Abitibi": R.F., at para. 12. Apart from the fact that the Premier was not purporting to state government policy, the statement simply does not say that the Province would do the remediation. The Premier may have simply been suggesting that outstanding environmental liabilities made the properties worth little or nothing, obviating any net payment to Abitibi.

[93] My colleague Deschamps J. concludes that the findings of the *CCAA* court establish that it was

barrage en mauvais état et a lancé un appel d'offres relatif aux autres mesures nécessitant une intervention immédiate sur le site de Buchans. Il est clair que les sommes d'argent dépensées constituent une réclamation au sens de la *LACC*. J'estime également que les travaux à l'égard desquels des appels d'offres ont été lancés satisfont à la norme de ce qui est « suffisamment certain » et qu'ils constituent une réclamation éventuelle.

[91] Quant au reste, on n'a pas établi qu'il soit « suffisamment certain » que la province exécutera les travaux de décontamination de façon à pouvoir considérer comme des dettes éventuelles les exigences réglementaires continues que les ordonnances *EPA* ont imposées à Abitibi. La même conclusion s'applique à l'égard des autres sites, où aucun travail n'a été réalisé et pour lesquels aucun appel d'offres n'a été lancé pour l'exécution des travaux.

[92] Il n'est pas « suffisamment certain » que la province entreprenne la décontamination des autres sites : aucune preuve au dossier ne laisse entrevoir cette possibilité. Il n'a pas été démontré que la contamination pose pour la santé des risques immédiats exigeant la prise de mesures dans les plus brefs délais. Il n'a pas été démontré que la province a pris quelque mesure que ce soit pour réaliser des travaux. Et il n'a pas été démontré que la province a prévu des sommes d'argent pour ces travaux ou qu'elle a même songé à en prévoir. Abitibi se fonde sur une déclaration du premier ministre de l'époque, qui examinait la possibilité que la province soit tenue de verser à Abitibi une indemnité pour l'expropriation de certains terrains, selon laquelle [TRADUCTION] « aucun montant net ne serait versé à Abitibi » : m.i., par. 12. Mis à part le fait que le premier ministre ne prétendait pas établir une politique gouvernementale, sa déclaration n'indique aucunement que la province exécuterait la décontamination. Le premier ministre indiquait peut-être simplement qu'en raison des exigences environnementales non respectées, les terrains ne valaient plus rien ou presque et qu'il serait inutile de verser quoi que ce soit à Abitibi.

[93] Ma collègue la juge Deschamps conclut que les constatations du juge de première instance

"sufficiently certain" that the Province would remediate the land, converting Abitibi's regulatory obligations under the *EPA* Orders to contingent claims that can be compromised under the *CCAA*. With respect, I find myself unable to agree.

[94] The *CCAA* judge never asked himself the critical question of whether it was "sufficiently certain" that the Province would do the work itself. Essentially, he proceeded on the basis that the *EPA* Orders had not been put forward in a sincere effort to obtain remediation, but were simply a money grab. The *CCAA* judge buttressed his view that the Province's regulatory orders were not sincere by opining that the orders were unenforceable (which if true would not prevent new *EPA* orders) and by suggesting that the Province did not want to assert a contingent claim, since this might attract a counterclaim by Abitibi for the expropriation of the properties (something that may be impossible due to Abitibi's decision to take the expropriation issue to NAFTA (the *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, Can. T.S. 1994 No. 2), excluding Canadian courts). In any event, it is clear that the *CCAA* judge, on the reasoning he adopted, never considered the question of whether it was "sufficiently certain" that the Province would remediate the properties. It follows that the *CCAA* judge's conclusions cannot support the view that the outstanding obligations are contingent claims under the *CCAA*.

[95] My colleague concludes:

[The *CCAA* judge] did at times rely on indicators that are unique and that do not appear in the analytical framework I propose above, but he did so because of the exceptional facts of this case. Yet, had he formulated the

établissent qu'il est « suffisamment certain » que la province décontaminerait les terrains, transformant ainsi les exigences réglementaires que les ordonnances *EPA* imposent à Abitibi en réclamations éventuelles pouvant faire l'objet d'une transaction sous le régime de la *LACC*. Avec égards, je ne puis souscrire à cette conclusion.

[94] Le juge de première instance ne s'est jamais posé la question cruciale de savoir s'il était « suffisamment certain » que la province exécuterait elle-même les travaux. Essentiellement, il a tenu pour acquis que les ordonnances *EPA* n'avaient pas été émises avec l'intention sincère d'obtenir la décontamination des sites, mais qu'il s'agissait simplement d'une manœuvre pour soutirer de l'argent. Le juge a renforcé son point de vue selon lequel les ordonnances réglementaires émises par la province étaient dépourvues de sincérité en exprimant l'avis qu'elles n'étaient pas susceptibles d'exécution (ce qui, si cela s'avérait exact, n'empêcherait pas que de nouvelles ordonnances soient émises). Le juge a également laissé entendre que la province ne voulait pas produire une réclamation éventuelle, ce qui aurait pu provoquer le dépôt d'une demande reconventionnelle d'Abitibi pour l'expropriation des propriétés (un résultat qui peut s'avérer impossible étant donné la décision d'Abitibi de soumettre la question de l'expropriation à l'ALÉNA (*Accord de libre-échange nord-américain entre le gouvernement du Canada, le gouvernement des États-Unis d'Amérique et le gouvernement des États-Unis du Mexique*, R.T. Can. 1994 n^{o} 2), en écartant la juridiction des tribunaux canadiens). Quoi qu'il en soit, il est évident que dans son raisonnement, le juge de première instance n'a jamais examiné la question de savoir s'il était « suffisamment certain » que la province décontaminerait les sites. Il s'ensuit que les conclusions du juge ne peuvent soutenir le point de vue selon lequel les obligations non exécutées constituent des réclamations éventuelles au sens de la *LACC*.

[95] Ma collègue conclut comme suit :

À l'occasion, [le juge] s'est appuyé sur des indicateurs singuliers qui ne figurent pas dans le cadre analytique que j'ai déjà proposé, mais cela s'explique par les faits exceptionnels en l'espèce. Or, s'il avait formulé la question

question in the same way as I have, his conclusion, based on his objective findings of fact, would have been the same. . . . The *CCAA* judge's assessment of the facts . . . leads to no conclusion other than that it was sufficiently certain that the Province would perform remediation work and therefore fall within the definition of a creditor with a monetary claim. [Emphasis added; para. 58.]

[96] I must respectfully confess to a less sanguine view. First, I find myself unable to decide the case on what I think the *CCAA* judge would have done had he gotten the law right and considered the central question. In my view, his failure to consider that question requires this Court to answer it in his stead on the record before us: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 35. But more to the point, I see no objective facts that support, much less compel, the conclusion that it is "sufficiently certain" that the Province will move to itself remediate any or all of the pollution Abitibi caused. The mood of the regulator in issuing remediation orders, be it disinterested or otherwise, has no bearing on the likelihood that the Province will undertake such a massive project itself. The Province has options. It could, to be sure, opt to do the work. Or it could await the result of Abitibi's restructuring and call on it to remediate once it resumed operations. It could even choose to leave the sites contaminated. There is nothing in the record that makes the first option more probable than the others, much less establishes "sufficient certainty" that the Province will itself clean up the pollution, converting it to a debt.

[97] I would allow the appeal and issue a declaration that Abitibi's remediation obligations under the *EPA* Orders do not constitute claims compromisable under the *CCAA*, except for work done or tendered for on the Buchans site.

comme je l'ai posée, sa conclusion, appuyée sur ses constatations de fait objectives, aurait été la même. [. . .] L'appréciation des faits par le juge [. . .] ne permet de tirer aucune conclusion autre que celle suivant laquelle il était suffisamment certain que la province exécuterait des travaux de décontamination et qu'elle était par conséquent visée par la définition d'un créancier ayant une réclamation pécuniaire. [Je souligne; par. 58.]

[96] Avec égards, je dois avouer que je ne partage pas la certitude de ma collègue à ce titre. Premièrement, j'estime ne pas pouvoir trancher le pourvoi en me fondant sur ce que je crois qu'aurait fait le juge de première instance s'il avait alors saisi correctement le droit et examiné la question réellement en jeu. À mon avis, le fait qu'il n'ait pas examiné cette question oblige notre Cour à y répondre à sa place au vu du dossier : *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 35. Mais, plus précisément, je ne vois pas de faits objectifs qui appuient, et encore moins qui imposent, la conclusion selon laquelle il est « suffisamment certain » que la province entreprendra elle-même de décontaminer un site ou tous les sites pollués par Abitibi. L'humeur de l'organisme de réglementation qui ordonne la décontamination, qu'il soit ou non désintéressé, n'a aucune incidence sur la probabilité que la province entreprenne elle-même un projet d'une telle ampleur. Des choix s'offrent à la province. Elle pourrait certes choisir d'exécuter les travaux. Ou elle pourrait attendre le résultat de la restructuration d'Abitibi et lui demander d'exécuter les travaux d'assainissement une fois qu'elle aura repris ses activités. Elle pourrait même choisir de laisser les sites contaminés. Rien au dossier n'indique que le premier choix est plus susceptible d'être retenu que les autres, et encore moins qui établisse qu'il est « suffisamment certain » que la province exécutera elle-même la décontamination, convertissant ainsi l'opération en une créance.

[97] Je suis d'avis d'accueillir le pourvoi et de déclarer que les obligations de décontaminer les sites qui incombent à Abitibi aux termes des ordonnances *EPA* ne constituent pas des réclamations pouvant faire l'objet d'une transaction aux termes de la *LACC*, à l'exception des travaux exécutés sur le site de Buchans ou à l'égard desquels des appels d'offres ont été lancés.

The following are the reasons delivered by

[98] LeBel J. (dissenting) — I have read the reasons of the Chief Justice and Deschamps J. They agree that a court overseeing a proposed arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), cannot relieve debtors of their regulatory obligations. The only regulatory orders that can be subject to compromise are those which are monetary in nature. My colleagues also accept that contingent environmental claims can be liquidated and compromised if it is established that the regulatory body would remediate the environmental contamination itself, and hence turn the regulatory order into a monetary claim.

[99] At this point, my colleagues disagree on the proper evidentiary test with respect to whether the government would remediate the contamination. In the Chief Justice's opinion, the evidence must show that there is a "likelihood approaching certainty" that the province would remediate the contamination itself (para. 86). In my respectful opinion, this is not the established test for determining where and how a contingent claim can be liquidated in bankruptcy and insolvency law. The test of "sufficient certainty" described by Deschamps J., which does not look very different from the general civil standard of probability, better reflects how both the common law and the civil law view and deal with contingent claims. On the basis of the test Deschamps J. proposes, I must agree with the Chief Justice and would allow the appeal.

[100] First, no matter how I read the *CCAA* court's judgment (2010 QCCS 1261, 68 C.B.R. (5th) 1), I find no support for a conclusion that it is consistent with the principle that the *CCAA* does not apply to purely regulatory obligations, or that the court had evidence that would satisfy the test of "sufficient certainty" that the province of Newfoundland and

Version française des motifs rendus par

[98] Le juge LeBel (dissident) — J'ai pris connaissance des motifs de la Juge en chef et de la juge Deschamps. Elles s'entendent pour affirmer qu'un tribunal qui supervise un arrangement proposé aux termes de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »), ne peut soustraire les débiteurs aux exigences réglementaires qui leurs sont imposées. Seules peuvent faire l'objet d'une transaction les ordonnances réglementaires de nature pécuniaire. Mes collègues reconnaissent également que les réclamations environnementales éventuelles peuvent être liquidées ou faire l'objet d'une transaction s'il est établi que l'organisme administratif se chargerait de la décontamination, transformant ainsi l'ordonnance réglementaire en une réclamation pécuniaire.

[99] Sur ce, mes collègues diffèrent d'opinion quant au critère de preuve applicable pour déterminer si le gouvernement entend effectuer la décontamination. De l'avis de la Juge en chef, la preuve doit démontrer une « probabilité proche de la certitude » que la province se chargerait de la décontamination (par. 86). À mon humble avis, il ne s'agit pas du critère établi pour déterminer si, et de quelle façon, une réclamation éventuelle peut être liquidée en droit de la faillite et de l'insolvabilité. Le critère de ce qui est « suffisamment certain » qu'énonce la juge Deschamps ne semble pas différer beaucoup de la norme générale de probabilité en matière civile et reflète mieux la façon dont la common law et le droit civil envisagent et traitent les réclamations éventuelles. Cependant, en appliquant le critère que propose la juge Deschamps, je dois souscrire aux motifs de la Juge en chef et je suis d'avis d'accueillir le pourvoi.

[100] Tout d'abord, sans égard à la façon d'envisager le jugement du tribunal chargé d'appliquer la *LACC* (2010 QCCS 1261, 68 C.B.R. (5th) 1), rien à mon sens ne permet de conclure qu'il soit conforme au principe selon lequel la *LACC* ne s'applique pas aux exigences purement réglementaires, ou que la preuve faite devant le tribunal respecterait le critère

Labrador ("Province") would perform the remedial work itself.

[101] In my view, the *CCAA* court was concerned that the arrangement would fail if the Abitibi respondents ("Abitibi") were not released from their regulatory obligations in respect of pollution. The *CCAA* court wanted to eliminate the uncertainty that would have clouded the reorganized corporations' future. Moreover, its decision appears to have been driven by an opinion that the Province had acted in bad faith in its dealings with Abitibi both during and after the termination of its operations in the Province. I agree with the Chief Justice that there is no evidence that the Province intends to perform the remedial work itself. In the absence of any other evidence, an offhand comment made in the legislature by a member of the government hardly satisfies the "sufficient certainty" test. Even if the evidentiary test proposed by my colleague Deschamps J. is applied, this Court can legitimately disregard the *CCAA* court's finding as the Chief Justice proposes, since it did not rest on a sufficient factual foundation.

[102] For these reasons, I would concur with the disposition proposed by the Chief Justice.

Appeal dismissed with costs, McLachlin C.J. *and* LeBel J. *dissenting.*

Solicitors for the appellant: WeirFoulds, Toronto; Attorney General of Newfoundland and Labrador, St. John's.

Solicitors for the respondents AbitibiBowater Inc., Abitibi-Consolidated Inc. and Bowater Canadian Holdings Inc.: Stikeman Elliott, Toronto.

Solicitors for the respondent the Ad Hoc Committee of Bondholders: Goodmans, Toronto.

Solicitors for the respondents the Ad Hoc Committee of Senior Secured Noteholders and the U.S. Bank National Association (Indenture Trustee

voulant qu'il soit « suffisamment certain » que la province de Terre-Neuve-et-Labrador (« province ») exécuterait elle-même les travaux de décontamination.

[101] À mon avis, le tribunal de première instance craignait un échec de l'arrangement si les sociétés du groupe Abitibi intimées (« Abitibi ») ne pouvaient se libérer des exigences réglementaires relatives à la pollution. Le tribunal voulait écarter l'incertitude qui aurait assombri l'avenir de ces sociétés après leur réorganisation. De plus, sa décision semble motivée par l'opinion suivant laquelle la province avait traité de mauvaise foi avec Abitibi dès que cette dernière eût cessé ses activités dans cette province. Je suis d'accord avec la Juge en chef pour conclure qu'aucune preuve ne confirme l'intention de la province d'exécuter elle-même les travaux de décontamination. En l'absence de tout autre élément de preuve, une remarque faite en passant par un ministre devant l'assemblée législative peut difficilement satisfaire au critère de ce qui est « suffisamment certain ». Même si l'on applique le critère de preuve que propose ma collègue la juge Deschamps, notre Cour peut légitimement écarter les conclusions du tribunal de première instance comme le propose la Juge en chef car elles ne reposent sur aucun fondement factuel suffisant.

[102] Pour ces motifs, je suis d'avis de souscrire au dispositif que propose la Juge en chef.

Pourvoi rejeté avec dépens, la juge en chef McLachlin *et le juge* LeBel *sont dissidents.*

Procureurs de l'appelante : WeirFoulds, Toronto; procureur général de Terre-Neuve-et-Labrador, St. John's.

Procureurs des intimées AbitibiBowater Inc., Abitibi-Consolidated Inc. et Bowater Canadian Holdings Inc. : Stikeman Elliott, Toronto.

Procureurs de l'intimé le comité ad hoc des créanciers obligataires : Goodmans, Toronto.

Procureurs des intimés le comité ad hoc des porteurs de billets garantis de premier rang et U.S. Bank National Association (fiduciaire

for the Senior Secured Noteholders): Borden Ladner Gervais, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the interveners the Attorney General of British Columbia and Her Majesty The Queen in Right of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener Ernst & Young Inc., as Monitor: Thornton Grout Finnigan, Toronto.

Solicitors for the intervener the Friends of the Earth Canada: Ecojustice, University of Ottawa, Ottawa; Fasken Martineau DuMoulin, Toronto.

désigné par l'acte constitutif pour les porteurs de billets garantis de premier rang) : Borden Ladner Gervais, Toronto.

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Ottawa.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur des intervenants le procureur général de la Colombie-Britannique et Sa Majesté la Reine du chef de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

Procureur de l'intervenant le procureur général de l'Alberta : Procureur général de l'Alberta, Edmonton.

Procureurs de l'intervenante Ernst & Young Inc., en sa qualité de contrôleur : Thornton Grout Finnigan, Toronto.

Procureurs de l'intervenante Les Ami(e)s de la Terre Canada : Ecojustice, Université d'Ottawa, Ottawa; Fasken Martineau DuMoulin, Toronto.

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Orphan Well Association and Alberta Energy Regulator *Appellants*

v.

Grant Thornton Limited and ATB Financial (formerly known as Alberta Treasury Branches) *Respondents*

and

Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, Ecojustice Canada Society, Canadian Association of Petroleum Producers, Greenpeace Canada, Action Surface Rights Association, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers' Association *Interveners*

Orphan Well Association et Alberta Energy Regulator *Appelants*

c.

Grant Thornton Limited et ATB Financial (auparavant connue sous le nom d'Alberta Treasury Branches) *Intimées*

et

Procureure générale de l'Ontario, procureur général de la Colombie-Britannique, procureur général de la Saskatchewan, procureur général de l'Alberta, Ecojustice Canada Society, Association canadienne des producteurs pétroliers, Greenpeace Canada, Action Surface Rights Association, Association canadienne des professionnels de l'insolvabilité et de la réorganisation et Association des banquiers canadiens *Intervenants*

INDEXED AS: ORPHAN WELL ASSOCIATION *v.* GRANT THORNTON LTD.

2019 SCC 5

File No.: 37627.

2018: February 15; 2019: January 31.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté and Brown JJ.

RÉPERTORIÉ : ORPHAN WELL ASSOCIATION *c.* GRANT THORNTON LTD.

2019 CSC 5

N° du greffe : 37627.

2018 : 15 février; 2019 : 31 janvier.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Gascon, Côté et Brown.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law — Division of powers — Federal paramountcy — Bankruptcy and insolvency — Environmental law — Oil and gas — Oil and gas companies in Alberta required by provincial comprehensive licensing regime to assume end-of-life responsibilities with respect to oil wells, pipelines, and facilities — Provincial regulator administering licensing regime and enforcing end-of-life obligations pursuant to statutory powers — Trustee in bankruptcy of oil and gas company not taking responsibility for company's unproductive oil and gas assets and seeking to walk away from environmental liabilities

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit constitutionnel — Partage des compétences — Prépondérance fédérale — Faillite et insolvabilité — Droit de l'environnement — Pétrole et gaz — Sociétés pétrolières et gazières de l'Alberta tenues par le régime provincial complet de délivrance de permis d'assumer des responsabilités de fin de vie à l'égard de puits de pétrole, de pipelines et d'installations — Organisme de réglementation provincial administrant le régime d'octroi de permis et assurant le respect des obligations de fin de vie en vertu des pouvoirs que lui confère la loi — Syndic de faillite d'une société pétrolière et gazière refusant d'assumer la

associated with them or to satisfy secured creditors' claims ahead of company's environmental liabilities — Whether regulator's use of powers under provincial legislation to enforce bankrupt company's compliance with end-of-life obligations conflicts with trustee's powers under federal bankruptcy legislation or with the order of priorities under such legislation — If so, whether provincial regulatory regime inoperative to extent of conflict by virtue of doctrine of federal paramountcy — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 14.06 — Oil and Gas Conservation Act, R.S.A. 2000, c. O-6, s. 1(1)(cc) — Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12, s. 134(b)(vi) — Pipeline Act, R.S.A. 2000, c. P-15, s. 1(1)(n).

In order to exploit oil and gas resources in Alberta, a company needs a property interest in the oil or gas (typically, a mineral lease with the Crown, which Canadian courts classify as a *profit à prendre*), surface rights and a licence issued by the Alberta Energy Regulator ("Regulator"). Under provincial legislation, the Regulator will not grant a licence to extract, process or transport oil and gas in Alberta unless the licensee assumes end-of-life responsibilities for plugging and capping oil wells to prevent leaks, dismantling surface structures and restoring the surface to its previous condition. These end-of-life obligations are known as "abandonment" and "reclamation".

The Licensee Liability Rating Program is one means by which the Regulator seeks to ensure that end-of-life obligations will be satisfied by licensees. As part of this program, the Regulator assigns each company a Liability Management Rating ("LMR"), which is the ratio between the aggregate value attributed by the Regulator to a company's licensed assets and the aggregate liability attributed by the Regulator to the eventual cost of abandoning and reclaiming those assets. For the purpose of calculating the LMR, all the licences held by a given company are treated as a package. A licensee's LMR is calculated on a monthly basis and, where it dips below the prescribed ratio, the licensee is required to bring its LMR back up to the prescribed level by paying a security deposit, performing end-of-life obligations, or transferring licences with the Regulator's approval. If either the transferor or the transferee would have a post-transfer LMR below 1.0,

responsabilité des biens pétroliers et gaziers inexploités de la société et tentant de se soustraire aux engagements environnementaux associés à ces biens ou d'acquitter les réclamations des créanciers garantis avant les engagements environnementaux de la société — L'exercice par l'organisme de réglementation des pouvoirs que lui confère la législation provinciale pour contraindre la société faillie à respecter les obligations de fin de vie entre-t-il en conflit avec les pouvoirs accordés au syndic par la loi fédérale sur la faillite ou avec l'ordre de priorités fixé par cette loi? — Dans l'affirmative, le régime de réglementation provincial est-il inopérant dans la mesure du conflit par application de la doctrine de la prépondérance fédérale? — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, c. B-3, art. 14.06 — Oil and Gas Conservation Act, R.S.A. 2000, c. O-6, art. 1(1)(cc) — Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12, art. 134(b)(vi) — Pipeline Act, R.S.A. 2000, c. P-15, art. 1(1)(n).

Pour exploiter des ressources pétrolières et gazières en Alberta, une société a besoin d'un intérêt de propriété sur le pétrole ou le gaz (habituellement un bail d'exploitation minière avec la Couronne que les tribunaux canadiens qualifient de profit à prendre), des droits de surface et d'un permis délivré par l'Alberta Energy Regulator (« organisme de réglementation »). Selon la législation provinciale, l'organisme de réglementation n'accordera pas le permis voulu pour extraire, traiter ou transporter du pétrole et du gaz en Alberta à moins que le titulaire de permis n'assume les responsabilités de fin de vie consistant à obturer et à fermer les puits de pétrole afin d'éviter les fuites, à démanteler les structures de surface ainsi qu'à remettre la surface dans son état antérieur. Ces obligations de fin de vie sont appelées l'« abandon » et la « remise en état ».

Le Programme d'évaluation de la responsabilité du titulaire de permis constitue un moyen par lequel l'organisme de réglementation vise à s'assurer que les titulaires de permis rempliront les obligations de fin de vie. Dans le cadre de ce programme, l'organisme de réglementation attribue à chaque société une cote de gestion de la responsabilité (« CGR »), qui représente le rapport entre la valeur totale attribuée par l'organisme de réglementation aux biens d'une société qui sont visés par des permis et la responsabilité totale que l'organisme de réglementation attribue aux coûts éventuels de l'abandon et de la remise en état de ces biens. Pour les besoins du calcul de la CGR, tous les permis détenus par une société donnée sont traités comme un tout. La CGR d'un titulaire de permis est calculée sur une base mensuelle et, lorsqu'elle tombe sous le ratio prescrit, le titulaire de permis doit la ramener en versant un dépôt de garantie, en exécutant les obligations

the Regulator will normally refuse to approve the licence transfer.

The insolvency of an oil and gas company licensed to operate in Alberta engages Alberta's comprehensive licensing regime, which is binding on companies active in the oil and gas industry, and the *Bankruptcy and Insolvency Act* ("*BIA*"), federal legislation that governs the administration of a bankrupt's estate and the orderly and equitable distribution of property among its creditors. Alberta's *Environmental Protection and Enhancement Act* ("*EPEA*") ensures that a licensee's regulatory obligations will continue to be fulfilled when it is subject to insolvency proceedings by including the trustee of a licensee in the definition of "operator" for the purposes of the duty to reclaim and by providing that an order to perform reclamation work may be issued to a trustee. However, it expressly limits a trustee's liability in relation to such an order to the value of the assets in the bankrupt estate, absent gross negligence or wilful misconduct. The *Oil and Gas Conservation Act* ("*OGCA*") and the *Pipeline Act* take a more generic approach: they simply include trustees in the definition of "licensee". As a result, every power which these Acts give the Regulator against a licensee can theoretically also be exercised against a trustee. The Regulator has delegated the authority to abandon and reclaim "orphans" — oil and gas assets and their sites left behind in an improperly abandoned or unreclaimed state by defunct companies at the close of their insolvency proceedings — to the Orphan Well Association ("OWA"), an independent non-profit entity. The OWA has no power to seek reimbursement of its costs, but it may be reimbursed up to the value of any security deposit held by the Regulator to the credit of the licensee of the orphans once it has completed its environmental work.

Redwater, a publicly traded oil and gas company, was first granted licences by the Regulator in 2009. Its principal assets are 127 oil and gas assets — wells, pipelines and facilities — and their corresponding licences. A few of its licensed wells are still producing and profitable, but the majority are spent and burdened with abandonment and reclamation liabilities that exceed their value. In 2013, ATB Financial, which had full knowledge of the

de fin de vie ou en transférant des permis avec l'approbation de l'organisme de réglementation. Si le cédant ou le cessionnaire devait avoir une CGR inférieure à 1,0 après le transfert, l'organisme de réglementation refusera normalement d'approuver le transfert de permis.

L'insolvabilité d'une société pétrolière et gazière autorisée à exercer ses activités en Alberta met en jeu le régime complet de délivrance de permis de l'Alberta qui lie les sociétés actives dans l'industrie pétrolière et gazière, ainsi que la *Loi sur la faillite et l'insolvabilité* (« *LFI* »), une loi fédérale qui régit l'administration de l'actif d'un failli ainsi que la répartition ordonnée et équitable des biens entre ses créanciers. L'*Environmental Protection and Enhancement Act* (« *EPEA* ») de l'Alberta garantit que les obligations réglementaires d'un titulaire de permis continuent d'être respectées pendant qu'il fait l'objet d'une procédure d'insolvabilité en incluant le syndic d'un titulaire de permis dans la définition d'« exploitant » pour l'application de l'obligation de remettre en état et en prévoyant la possibilité qu'une ordonnance de remise en état soit adressée à un syndic. Cependant, faute de négligence grave ou d'inconduite délibérée, elle limite expressément la responsabilité du syndic à l'égard d'une telle ordonnance à la valeur des éléments de l'actif du failli. L'*Oil and Gas Conservation Act* (« *OGCA* ») et la *Pipeline Act* adoptent une approche plus générique : elles incluent simplement le syndic dans la définition de « titulaire de permis ». En conséquence, tout pouvoir que ces lois confèrent à l'organisme de réglementation à l'encontre d'un titulaire de permis peut, en théorie, s'exercer également contre un syndic. L'organisme de réglementation a délégué à l'Orphan Well Association (« OWA »), une entité indépendante sans but lucratif, le pouvoir d'abandonner et de remettre en état les « orphelins » — les biens pétroliers et gaziers ainsi que leurs sites délaissés sans que les processus en question n'aient été correctement effectués par les sociétés liquidées à la fin de leur procédure d'insolvabilité. L'OWA n'a pas le pouvoir de demander le remboursement de ses frais, mais elle peut être remboursée jusqu'à concurrence de la valeur du dépôt de garantie détenu, le cas échéant, par l'organisme de réglementation au profit du titulaire de permis associé au puits orphelin une fois ses travaux environnementaux terminés.

Redwater, une société pétrolière et gazière cotée en bourse, s'est vu octroyer ses premiers permis par l'organisme de réglementation en 2009. Son actif est principalement composé de 127 biens pétroliers et gaziers — puits, pipelines et installations — et des permis correspondants. Quelques-uns des puits autorisés de Redwater sont encore productifs et rentables, mais la majorité est tarie et grevée de responsabilités relatives à l'abandon et à la remise en

end-of-life obligations associated with Redwater's assets, advanced funds to Redwater and, in return, was granted a security interest in Redwater's present and after-acquired property. In mid-2014, Redwater began to experience financial difficulties. Grant Thornton Limited ("GTL") was appointed as its receiver in 2015. At that time, Redwater owed ATB approximately $5.1 million and had 84 wells, 7 facilities and 36 pipelines, 72 of which were inactive or spent, but, since Redwater's LMR did not drop below the prescribed ratio until after it went into receivership, it never paid any security deposits to the Regulator.

Upon being advised of Redwater's receivership, the Regulator notified GTL that it was legally obligated to fulfill abandonment obligations for all licensed assets prior to distributing any funds or finalizing any proposal to creditors. The Regulator warned that it would not approve the transfer of any of Redwater's licences unless it was satisfied that both the transferee and the transferor would be in a position to fulfill all regulatory obligations, and that the transfer would not cause a deterioration in Redwater's LMR. GTL concluded that it could not meet the Regulator's requirements because the cost of the end-of-life obligations for the spent wells would likely exceed the sale proceeds for the productive wells. Based on this assessment, GTL informed the Regulator that it was taking possession and control only of Redwater's 17 most productive wells, 3 associated facilities and 12 associated pipelines ("Retained Assets"), and that it was not taking possession or control of any of Redwater's other licensed assets ("Renounced Assets"). GTL's position was that it had no obligation to fulfill any regulatory requirements associated with the Renounced Assets. In response, the Regulator issued orders under the *OGCA* and the *Pipeline Act* requiring Redwater to suspend and abandon the Renounced Assets ("Abandonment Orders"). The Regulator imposed short deadlines, as it considered the Renounced Assets an environmental and safety hazard.

The Regulator and the OWA then filed an application for a declaration that GTL's renunciation of the Renounced Assets was void, and for orders requiring GTL to comply with the Abandonment Orders and to fulfill the end-of-life obligations associated with Redwater's licensed properties.

état qui excèdent leur valeur. En 2013, ATB, qui avait pleinement connaissance des obligations de fin de vie associées aux biens de Redwater, lui a avancé des fonds et, en contrepartie, s'est vu accorder une sûreté sur ses biens actuels et futurs. Au milieu de 2014, Redwater a commencé à éprouver des difficultés financières. Grant Thornton Limited (« GTL ») a été nommé séquestre de Redwater en 2015. À cette époque, Redwater devait environ 5,1 millions de dollars à ATB et comptait 84 puits, 7 installations et 36 pipelines, dont 72 étaient inactifs ou taris, mais, comme la CGR de Redwater n'est tombée sous le ratio prescrit qu'après la mise sous séquestre de cette dernière, elle n'a jamais versé de dépôt de garantie à l'organisme de réglementation.

Après avoir été informé de la mise sous séquestre de Redwater, l'organisme de réglementation a avisé GTL qu'il était légalement tenu de remplir les obligations d'abandon pour tous les biens visés par des permis avant de distribuer des fonds ou de finaliser toute proposition aux créanciers. L'organisme de réglementation a averti qu'il n'approuverait pas le transfert de l'un ou l'autre permis de Redwater à moins d'être convaincu que le cessionnaire et le cédant seraient en mesure de s'acquitter de toutes les obligations réglementaires, et que le transfert n'occasionnerait pas une détérioration de la CGR de Redwater. GTL a conclu qu'il ne pouvait pas satisfaire aux exigences de l'organisme de réglementation car le coût des obligations de fin de vie des puits taris dépasserait probablement le produit de la vente des puits productifs. Sur la base de cette évaluation, GTL a informé l'organisme de réglementation qu'il prenait possession et contrôle seulement des 17 puits les plus productifs de Redwater, ainsi que de 3 installations et de 12 pipelines connexes (« biens conservés »), et qu'il ne prenait pas possession ou contrôle de tous les autres éléments d'actif de Redwater visés par des permis (« biens faisant l'objet de la renonciation »). Selon GTL, il n'était aucunement tenu de satisfaire aux exigences réglementaires en lien avec les biens faisant l'objet de la renonciation. L'organisme de réglementation a réagi en rendant des ordonnances au titre de l'*OGCA* et de la *Pipeline Act* enjoignant à Redwater de suspendre l'exploitation des biens faisant l'objet de la renonciation et de les abandonner (« ordonnances d'abandon »). L'organisme de réglementation a imposé des délais serrés parce qu'il considérait les biens faisant l'objet de la renonciation comme un danger pour l'environnement et la sécurité.

L'organisme de réglementation et l'OWA ont alors déposé une demande en vue d'obtenir un jugement déclaratoire portant que l'abandon par GTL des biens faisant l'objet de la renonciation était nul, de même qu'une ordonnance obligeant GTL à se conformer aux ordonnances

The Regulator did not seek to hold GTL liable for these obligations beyond the assets remaining in the Redwater estate. GTL brought a cross-application seeking approval to pursue a sales process excluding the Renounced Assets and an order directing that the Regulator could not prevent the transfer of the licences associated with the Retained Assets on the basis of, *inter alia*, the LMR requirements, failure to comply with the Abandonment Orders, refusal to take possession of the Renounced Assets or Redwater's outstanding debts to the Regulator. A bankruptcy order was issued for Redwater and GTL was appointed as trustee. GTL invoked s. 14.06(4)(a)(ii) of the *BIA* in relation to the Renounced Assets.

The chambers judge and a majority of the Court of Appeal agreed with GTL and held that the Regulator's proposed use of its statutory powers to enforce Redwater's compliance with abandonment and reclamation obligations during bankruptcy conflicted with the *BIA* in two ways: (1) it imposed on GTL the obligations of a licensee in relation to the Redwater assets disclaimed by GTL, contrary to s. 14.06(4) of the *BIA*; and (2) it upended the priority scheme for the distribution of a bankrupt's assets established by the *BIA* by requiring that the provable claims of the Regulator, an unsecured creditor, be paid ahead of the claims of Redwater's secured creditors. The dissenting judge in the Court of Appeal would have allowed the Regulator's appeal on the basis that there was no conflict between Alberta's environmental legislation and the *BIA*.

Held (Moldaver and Côté JJ. dissenting): The appeal should be allowed.

Per Wagner C.J. and Abella, Karakatsanis, Gascon and Brown JJ.: The Regulator's use of its statutory powers does not create a conflict with the *BIA* so as to trigger the doctrine of federal paramountcy. Section 14.06(4) of the *BIA* is concerned with the personal liability of trustees, and does not empower a trustee to walk away from the environmental liabilities of the estate it is administering. Furthermore, the Regulator is not asserting any claims provable in the bankruptcy, and the priority scheme in the *BIA* is not upended. Thus, no conflict is caused by GTL's status as a licensee under Alberta legislation. Alberta's

d'abandon et à remplir les obligations de fin de vie associées aux biens de Redwater visés par des permis. L'organisme de réglementation n'a pas cherché à tenir GTL responsable de ces obligations au-delà des éléments qui faisaient encore partie de l'actif de Redwater. GTL a présenté une demande reconventionnelle visant à obtenir l'autorisation de poursuivre un processus de vente excluant les biens faisant l'objet de la renonciation ainsi qu'une ordonnance interdisant à l'organisme de réglementation d'empêcher le transfert des permis associés aux biens conservés en raison, notamment, des exigences relatives à la CGR, du non-respect des ordonnances d'abandon, du refus de prendre possession des biens faisant l'objet de la renonciation ou des dettes en souffrance de Redwater envers l'organisme de réglementation. Une ordonnance de faillite a été rendue à l'égard de Redwater, et GTL a été nommé syndic. GTL a invoqué le sous-al. 14.06(4)a)(ii) de la *LFI* à l'égard des biens faisant l'objet de la renonciation.

Le juge siégeant en cabinet et les juges majoritaires de la Cour d'appel ont donné raison à GTL et décidé que l'utilisation proposée par l'organisme de réglementation des pouvoirs que lui confère la loi pour contraindre Redwater à respecter les obligations d'abandon et de remise en état au cours de la faillite était incompatible avec la *LFI* de deux façons : (1) elle imposait à GTL les obligations d'un titulaire de permis relativement aux biens de Redwater auxquels GTL avait renoncé, ce qui est contraire au par. 14.06(4) de la *LFI*; (2) elle renversait le régime de priorité établi par la *LFI* pour le partage des biens d'un failli en exigeant que le paiement de ses réclamations prouvables, en tant que créancier ordinaire, soit effectué avant celui des réclamations des créanciers garantis de Redwater. La juge dissidente de la Cour d'appel aurait accueilli l'appel de l'organisme de réglementation au motif qu'il n'y avait pas de conflit entre la législation environnementale de l'Alberta et la *LFI*.

Arrêt (les juges Moldaver et Côté sont dissidents) : Le pourvoi est accueilli.

Le juge en chef Wagner et les juges Abella, Karakatsanis, Gascon et Brown : L'utilisation par l'organisme de réglementation des pouvoirs que lui confère la loi ne crée pas de conflit avec la *LFI* de façon à mettre en jeu la doctrine de la prépondérance fédérale. Le paragraphe 14.06(4) de la *LFI* intéresse la responsabilité personnelle du syndic et il ne l'investit pas du pouvoir de se soustraire aux engagements environnementaux liant l'actif qu'il administre. De plus, l'organisme de réglementation ne fait valoir aucune réclamation prouvable en matière de faillite, et le régime de priorité de la *LFI* n'est pas renversé. Donc, le statut

regulatory regime can coexist with and apply alongside the *BIA*.

Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy. They must, for example, comply with non-monetary obligations that are binding on the bankrupt estate, that cannot be reduced to provable claims, and the effects of which do not conflict with the *BIA*, notwithstanding the consequences this may have for the bankrupt's secured creditors. Given the procedural nature of the *BIA*, the bankruptcy regime relies heavily on the continued operation of provincial laws but, where there is a genuine conflict between provincial laws concerning property and civil rights and federal bankruptcy legislation, the *BIA* prevails. The *BIA* as a whole is intended to further two purposes: the equitable distribution of the bankrupt's assets among his or her creditors and the bankrupt's financial rehabilitation. As Redwater is a corporation that will never emerge from bankruptcy, only the former purpose is relevant here.

The Abandonment Orders and the LMR requirements are based on valid provincial laws of general application — exactly the kind of valid provincial laws upon which the *BIA* is built. There is no conflict between the Alberta regulatory scheme and s. 14.06 of the *BIA*, because, under s. 14.06(4), a trustee's disclaimer of real property when there is an order to remedy any environmental condition or damage affecting that property protects the trustee from personal liability, while the ongoing liability of the bankrupt estate is unaffected. This interpretation is supported by the plain language of the section, the Hansard evidence, a previous decision of this Court and the French version of the section. The same concept is also found in both s. 14.06(1.2) and s. 14.06(2), which also specifically state that the trustee is not personally liable — it is impossible to coherently read s. 14.06(2) as referring to personal liability and yet read s. 14.06(4) as somehow referring to the liability of the bankrupt estate.

Even assuming that GTL had successfully disclaimed in this case, no operational conflict or frustration of purpose would result from the fact that the Regulator requires GTL, as a licensee, to expend estate assets on abandoning the Renounced Assets. Furthermore, no conflict would be caused by continuing to include the Renounced Assets in the calculation of Redwater's LMR. Finally, given the

de GTL en tant que titulaire de permis au sens de la loi albertaine n'est à l'origine d'aucun conflit. Le régime de réglementation de l'Alberta peut coexister et s'appliquer conjointement avec la *LFI*.

La faillite n'est pas un permis de faire abstraction des règles, et les professionnels de l'insolvabilité sont liés par les lois provinciales valides au cours de la faillite. Par exemple, ils doivent respecter les obligations non pécuniaires liant l'actif du failli qui ne peuvent être réduites à des réclamations prouvables et dont les effets n'entrent pas en conflit avec la *LFI*, sans égard aux répercussions que cela peut avoir sur les créanciers garantis du failli. Étant donné la nature procédurale de la *LFI*, le régime de faillite repose en grande partie sur l'application continue des lois provinciales mais, en cas de conflit véritable entre les lois provinciales concernant la propriété et les droits civils et la législation fédérale sur la faillite, la *LFI* l'emporte. La *LFI* dans son ensemble est censée favoriser l'atteinte de deux objectifs : le partage équitable des biens du failli entre ses créanciers et la réhabilitation financière du failli. Puisque Redwater est une société qui ne s'extirpera jamais de la faillite, seul le premier objectif est pertinent en l'espèce.

Les ordonnances d'abandon et exigences relatives à la CGR reposent sur des lois provinciales valides d'application générale et elles représentent exactement le genre de loi provinciale valide sur lequel se fonde la *LFI*. Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et l'art. 14.06 de la *LFI* parce que, suivant le par. 14.06(4), la renonciation du syndic à un bien réel en cas d'ordonnance de réparation de tout fait ou dommage lié à l'environnement et touchant ce bien dégage le syndic de toute responsabilité personnelle, alors que la responsabilité continue de l'actif du failli n'est pas touchée. Cette interprétation est étayée par le texte clair de l'article, les débats parlementaires, un arrêt de notre Cour et la version française de l'article. On retrouve également le même concept aux par. 14.06(1.2) et (2), lesquels disposent expressément que le syndic est dégagé de toute responsabilité personnelle. Il est impossible d'interpréter de manière cohérente le par. 14.06(2) comme mentionnant la responsabilité personnelle tout en interprétant le par. 14.06(4) comme renvoyant d'une façon ou d'une autre à la responsabilité de l'actif du failli.

À supposer même que GTL ait renoncé avec succès à des biens en l'espèce, l'organisme de réglementation ne cause aucun conflit d'application ni n'entrave la réalisation d'un objet fédéral en exigeant de GTL, à titre de titulaire de permis, qu'il se serve d'éléments de l'actif pour abandonner les biens faisant l'objet de la renonciation. En outre, il n'y aurait aucun conflit du fait que ces biens soient

restraint with which the doctrine of paramountcy must be applied, and given that the Regulator has not attempted to hold GTL personally liable as a licensee for the costs of abandonment, no conflict with s. 14.06(2) or s. 14.06(4) of the *BIA* is caused by the mere theoretical possibility of personal liability under the *OGCA* or the *Pipeline Act*.

The end-of-life obligations binding on GTL are not claims provable in the Redwater bankruptcy. Not all environmental obligations enforced by a regulator will be claims provable in bankruptcy. The test set out by the Court in *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443 ("*Abitibi*"), must be applied to determine whether a particular regulatory obligation amounts to a claim provable in bankruptcy: (1) there must be a debt, a liability or an obligation to a creditor; (2) the debt, liability or obligation must be incurred before the debtor becomes bankrupt; and (3) it must be possible to attach a monetary value to the debt, liability or obligation. Only the first and third parts of the test are at issue in the instant case.

With respect to the first part of the test, *Abitibi* should not be taken as standing for the proposition that a regulator is always a creditor when it exercises its statutory enforcement powers against a debtor. A regulator exercising a power to enforce a public duty is not a creditor of the individual or corporation subject to that duty. Here, it is not disputed that, in seeking to enforce Redwater's end-of-life obligations, the Regulator is acting in a *bona fide* regulatory capacity and does not stand to benefit financially. It is clear that the Regulator acted in the public interest and for the public good in issuing the Abandonment Orders and enforcing the LMR requirements and that it is, therefore, not a creditor of Redwater. The public is the beneficiary of those environmental obligations; the province does not stand to gain financially from them. Strictly speaking, this is sufficient to dispose of this aspect of the appeal.

As it may prove helpful in future cases, under the third part of the test, a court must determine whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed

toujours inclus dans le calcul de la CGR de Redwater. Enfin, vu la retenue avec laquelle il faut appliquer la doctrine de la prépondérance, et vu que l'organisme de réglementation n'a pas tenté de tenir GTL personnellement responsable, en tant que titulaire de permis, des frais d'abandon, aucun conflit avec les par. 14.06(2) ou (4) de la *LFI* n'est causé par la simple possibilité théorique de responsabilité personnelle en application de la *OGCA* ou de la *Pipeline Act*.

Les obligations de fin de vie incombant à GTL ne sont pas des réclamations prouvables dans la faillite de Redwater. Les obligations environnementales appliquées par un organisme de réglementation ne sont pas toutes des réclamations prouvables en matière de faillite. Il faut appliquer le critère énoncé par la Cour dans *Terre-Neuve-et-Labrador c. AbitibiBowater Inc.*, 2012 CSC 67, [2012] 3 R.C.S. 443 (« *Abitibi* »), pour déterminer si une obligation réglementaire précise équivaut à une réclamation prouvable en matière de faillite : (1) on doit être en présence d'une dette, d'un engagement ou d'une obligation envers un créancier; (2) la dette, l'engagement ou l'obligation doit avoir pris naissance avant que le débiteur ne devienne failli; et (3) il doit être possible d'attribuer une valeur pécuniaire à cette dette, cet engagement ou cette obligation. Seules les première et troisième parties du critère sont en litige dans la présente affaire.

Pour ce qui est de la première partie du critère, l'arrêt *Abitibi* ne doit pas être considéré comme soutenant la thèse qu'un organisme de réglementation est toujours un créancier lorsqu'il exerce les pouvoirs d'application qui lui sont dévolus par la loi à l'encontre d'un débiteur. L'organisme de réglementation exerçant un pouvoir pour faire respecter un devoir public n'est pas un créancier de la personne ou de la société assujettie à ce devoir. En l'espèce, personne ne conteste qu'en cherchant à assurer le respect des obligations de fin de vie incombant à Redwater, l'organisme de réglementation agit de bonne foi à titre d'autorité de réglementation et il n'est pas en mesure d'obtenir un avantage financier. Il est clair que l'organisme de réglementation a agi dans l'intérêt public et pour le bien public en rendant les ordonnances d'abandon et en assurant le respect des exigences relatives à la CGR, et qu'il n'est donc pas un créancier de Redwater. C'est le public qui bénéficie de ces obligations environnementales; la province n'est pas en mesure d'en bénéficier financièrement. Cela suffit, à proprement parler, pour trancher cet aspect du pourvoi.

Comme cela pourrait se révéler utile à l'avenir, à la troisième partie du critère, le tribunal doit décider s'il y a suffisamment de faits indiquant qu'il existe une obligation environnementale de laquelle résultera une dette envers un

to a regulator. In determining whether a non-monetary regulatory obligation of a bankrupt is too remote or too speculative to be included in the bankruptcy proceeding, the court must apply the general rules that apply to future or contingent claims. It must be sufficiently certain that the contingency will come to pass — in other words, that the regulator will enforce the obligation by performing the environmental work and seeking reimbursement. In the instant case, the Abandonment Orders and the LMR requirements fail to satisfy this part of the test. It is not established by the evidence that it is sufficiently certain that the Regulator will perform the abandonments and advance a claim for reimbursement. This claim is too remote and speculative to be included in the bankruptcy process. Furthermore, the Regulator's refusal to approve licence transfers unless and until the LMR requirements have been satisfied does not give it a monetary claim against Redwater.

In crafting the priority scheme of the *BIA*, Parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation. Thus, the *BIA* explicitly contemplates that environmental regulators will extract value from the bankrupt's real property if that property is affected by an environmental condition or damage. Although the nature of property ownership in the Alberta oil and gas industry meant that s. 14.06(7) was unavailable to the Regulator, the Abandonment Orders and the LMR replicate the effect of s. 14.06(7) in this case. Furthermore, Redwater's only substantial assets were affected by environmental conditions or damage. Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the *BIA* — rather, it facilitates them.

Per Moldaver and Côté JJ. (dissenting): GTL and ATB have satisfied their burden of demonstrating a genuine inconsistency between federal and provincial law under both branches of the paramountcy test, namely operational conflict and frustration of purpose. Accordingly, the appeal should be dismissed.

organisme de réglementation. Pour établir si une obligation réglementaire non pécuniaire du failli est trop éloignée ou trop conjecturale pour être incluse dans la procédure de faillite, le tribunal doit appliquer les règles générales qui visent les réclamations futures ou éventuelles. Il doit être suffisamment certain que l'éventualité se concrétisera ou, en d'autres termes, que l'organisme de réglementation fera respecter l'obligation en exécutant les travaux environnementaux et en sollicitant le remboursement de ses frais. Dans le cas présent, les ordonnances d'abandon et les exigences relatives à la CGR ne satisfont pas à cette partie du critère. La preuve n'établit pas qu'il est suffisamment certain que l'organisme de réglementation procédera à l'abandon et présentera une demande de remboursement. Cette réclamation est trop éloignée et conjecturale pour être incluse dans la procédure de faillite. En outre, le refus de l'organisme de réglementation d'approuver les transferts de permis jusqu'à ce que les exigences relatives à la CGR aient été satisfaites ne lui donne pas une réclamation pécuniaire contre Redwater.

Au moment d'élaborer le régime de priorité de la *LFI*, le Parlement voulait permettre aux organismes de réglementation d'imposer une charge prioritaire sur le bien réel du failli touché par un fait ou dommage lié à l'environnement en vue de financer la décontamination. Ainsi, la *LFI* envisage explicitement la possibilité que des organismes de réglementation tirent une valeur des biens réels du failli touchés par un fait ou dommage lié à l'environnement. Bien que l'organisme de réglementation n'ait pu se prévaloir du par. 14.06(7), compte tenu de la nature de la propriété des biens dans l'industrie pétrolière et gazière de l'Alberta, les ordonnances d'abandon et la CGR reproduisent l'effet du par. 14.06(7) en l'espèce. De plus, les seuls biens de valeur de Redwater étaient touchés par un fait ou dommage lié à l'environnement. Les ordonnances d'abandon et exigences relatives à la CGR n'avaient donc pas pour objet de forcer Redwater à s'acquitter des obligations de fin de vie avec des biens étrangers au fait ou dommage lié à l'environnement. Autrement dit, la reconnaissance que les ordonnances d'abandon et exigences relatives à la CGR ne sont pas des réclamations prouvables en l'espèce facilite l'atteinte des objets de la *LFI* au lieu de la contrecarrer.

Les juges Moldaver et Côté (dissidents) : GTL et ATB se sont acquittés de leur fardeau de démontrer qu'il existe une incompatibilité véritable entre la loi fédérale et la loi provinciale selon les deux volets du test de la prépondérance, à savoir le conflit d'application et l'entrave à la réalisation d'un objet fédéral. Par conséquent, il y a lieu de rejeter le pourvoi.

Because Alberta's statutory regime does not recognize the disclaimers by trustees of assets encumbered by environmental liabilities as lawful by virtue of the fact that receivers and trustees are regulated as licensees who cannot disclaim assets, there is an unavoidable conflict between federal and provincial law. Alberta's legislation governing the oil and gas sector should therefore be held inoperative to the extent that it does not recognize the legal effect of GTL's disclaimers. An operational conflict arises where it is impossible to comply with both laws. An operational conflict analysis is an exercise in statutory interpretation: the Court must ascertain the meaning of each competing enactment in order to determine whether dual compliance is possible. This interpretation exercise takes place within the guiding confines of cooperative federalism, which operates as a straightforward interpretive presumption — one that supports, rather than supplants, the modern approach to statutory interpretation. Courts should favour an interpretation of the federal legislation that allows the concurrent operation of both laws; however, where the proper meaning of the provision cannot support a harmonious interpretation, it is beyond a court's power to create harmony where Parliament did not intend it.

In the instant case, reliance on cooperative federalism must not result in an interpretation of s. 14.06(4) of the *BIA* that is inconsistent with its language, context and purpose. The natural meaning which appears when s. 14.06(4) is simply read through is that it assumes and incorporates a pre-existing common law right to disclaim property in the context of bankruptcy and insolvency. This right is in keeping with the fundamental objective of trustees, which is the maximization of recovery for creditors as a whole by realizing the estate's valuable assets. It enables trustees to administer the estate in the most efficient manner and to avoid significant costs of administration that would reduce creditor recovery. Section 14.06(4) expresses the disclaimer right in unqualified terms and emphasizes that a trustee may not be held liable whenever that right is exercised. Parliament did not intend to condition the right to disclaim property on the actual existence of a risk of personal liability. Although the opening words of s. 14.06(4) refer to the personal liability of the trustee, when the words of the provision are 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, their meaning becomes apparent. Avoiding personal liability is not the only effect of the appropriate exercise of this power. By properly disclaiming certain properties, the trustee is relieved of

Étant donné que le régime législatif albertain ne reconnaît pas la légalité des renonciations des syndics à des biens grevés d'engagements environnementaux en raison du fait que les séquestres et les syndics sont réglementés comme des titulaires de permis qui ne peuvent renoncer à des biens, il y a un conflit inévitable entre la loi fédérale et la loi provinciale. La loi albertaine régissant l'industrie pétrolière et gazière devrait donc être déclarée inopérante dans la mesure où elle ne reconnaît pas l'effet juridique des renonciations de GTL. Il y a conflit d'application lorsqu'il est impossible de respecter les deux lois. L'analyse relative au conflit d'application relève de l'interprétation des lois : la Cour doit déterminer le sens de chaque loi concurrente afin de décider s'il est possible de respecter les deux lois. Cette démarche d'interprétation s'effectue à l'intérieur du cadre directeur du fédéralisme coopératif, lequel fait office de simple présomption en matière d'interprétation — qui appuie, sans la supplanter, la méthode moderne d'interprétation des lois. Les tribunaux doivent favoriser une interprétation de la loi fédérale permettant une application concurrente des deux lois; cependant, lorsque le sens qu'il convient de donner à la disposition ne peut appuyer une interprétation harmonieuse, un tribunal n'a pas le pouvoir de créer l'harmonie là où le Parlement n'a pas eu l'intention de le faire.

En l'espèce, le recours au principe du fédéralisme coopératif ne doit pas donner lieu à une interprétation du par. 14.06(4) de la *LFI* qui est incompatible avec son libellé, son contexte et son objet. Le sens naturel qui se dégage de la simple lecture du par. 14.06(4) dans son ensemble est qu'il présume et incorpore un droit préexistant en common law de renoncer à des biens dans le contexte de la faillite et de l'insolvabilité. Ce droit est en accord avec l'objectif fondamental poursuivi par les syndics : maximiser le recouvrement au bénéfice de l'ensemble des créanciers par la réalisation des éléments de valeur de l'actif. Il permet aux syndics d'administrer l'actif le plus efficacement possible et leur épargne des frais considérables d'administration qui réduiraient le recouvrement pour les créanciers. Le paragraphe 14.06(4) exprime le droit de renonciation en des termes qui ne comportent aucune restriction et fait ressortir que le syndic ne peut être tenu responsable quand ce droit est exercé. Le Parlement ne voulait pas rendre le droit de renoncer à un bien tributaire de l'existence d'un risque de responsabilité personnelle. Bien que le début du par. 14.06(4) parle de la responsabilité personnelle du syndic, lorsqu'on lit les termes de la disposition dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'économie de la loi, l'objet de la loi et l'intention du législateur, leur sens devient apparent. La protection contre

any liabilities associated with the disclaimed property and loses the ability to sell it for the benefit of the estate. The disclaimer right allows the trustee not to realize assets that would provide no value to the estate's creditors and whose realization would therefore undermine the trustee's objective of maximizing recovery. However, s. 14.06(4) does not relieve the estate of its liabilities or environmental obligations once a trustee exercises the disclaimer power. The disclaimed property ultimately reverts to the estate at the conclusion of the bankruptcy proceedings, as is the case with unrealized assets. Whether the estate has sufficient assets capable of satisfying those liabilities at that point in time is a separate question that is unrelated to the underlying fact of ongoing liability.

In accordance with the predominant and well-established modern approach to statutory interpretation, courts must read statutory provisions in their entire context, as parts of a coherent whole. In s. 14.06(4) of the *BIA*, Parliament has expressly referred to this disclaimer power and spelled out the particular effects flowing from its proper exercise. By doing so, it has purposefully incorporated the disclaimer power into its statutory scheme to achieve its desired purpose. Courts must read statutory provisions in their entire context, and Parliament is presumed to craft sections and subsections of legislation as parts of a coherent whole. The immediate statutory context surrounding s. 14.06(4), specifically, ss. 14.06(2), (5), (6) and (7), as well as the Hansard evidence, confirms that a trustee's right to disclaim property is not limited to protecting itself from personal liability.

The power to disclaim assets provided to trustees by s. 14.06(4) of the *BIA* was available to GTL on the facts of this case. The statutory conditions to the exercise of this power were met: the Abandonment Orders clearly relate to the remediation of an environmental condition. Additionally, the right of disclaimer is applicable in the context of the statutory regime governing the oil and gas industry. In delineating what interests may be disclaimed by a trustee under s. 14.06(4), Parliament used exceptionally broad language: the trustee is permitted to disclaim "any interest" in "any real property". GTL sought to disclaim *profits à prendre* and surface leases, which can be characterized as real property interests.

The requirement by the Regulator that GTL satisfy Redwater's environmental liabilities ahead of the estate's

toute responsabilité personnelle n'est pas le seul effet de l'exercice régulier de ce pouvoir. En renonçant à bon droit à certains biens, le syndic est dégagé de toute responsabilité associée aux biens faisant l'objet de la renonciation et ne peut plus vendre les biens au profit de l'actif. Le droit de renonciation permet au syndic de ne pas réaliser des biens qui ne seraient pas profitables aux créanciers de l'actif et compromettraient par le fait même son objectif de maximiser le recouvrement. Cependant, le par. 14.06(4) ne décharge pas l'actif de ses obligations ou engagements environnementaux une fois que le syndic exerce le pouvoir de renonciation. Le bien visé par une renonciation retourne ultimement dans l'actif du failli à l'issue du processus de faillite, comme c'est le cas pour les biens non réalisés. La question de savoir si les éléments d'actif sont suffisants pour satisfaire à ces engagements à ce moment précis est une question distincte qui n'a aucun rapport avec le fait sous-jacent de la responsabilité continue.

D'après la méthode prédominante et bien établie d'interprétation des lois, les tribunaux doivent lire les dispositions législatives dans leur contexte global, comme un tout cohérent. Au paragraphe 14.06(4) de la *LFI*, le Parlement a mentionné expressément ce pouvoir de renonciation et exposé les effets particuliers découlant de son exercice approprié. Il a incorporé ainsi à dessein à son régime législatif le pouvoir de renonciation pour en réaliser l'objectif visé. Les tribunaux doivent lire les dispositions législatives dans leur contexte global, et le Parlement est présumé rédiger les articles et paragraphes d'une loi comme un tout cohérent. Le contexte immédiat du par. 14.06(4), plus précisément les par. 14.06(2), (5), (6) et (7), ainsi que les débats parlementaires, confirme que le droit du syndic de renoncer à des biens ne se limite pas à se prémunir contre une responsabilité personnelle.

Le pouvoir de renoncer à des biens que confère aux syndics le par. 14.06(4) de la *LFI* pouvait être exercé par GTL à la lumière des faits de la présente affaire. Les conditions statutaires préalables à l'exercice de ce pouvoir étaient réunies : les ordonnances d'abandon se rapportent clairement à la réparation d'un fait lié à l'environnement. En outre, le droit de renonciation s'applique dans le contexte du régime législatif régissant l'industrie pétrolière et gazière. En décidant des intérêts auxquels peut renoncer un syndic en vertu du par. 14.06(4), le Parlement a utilisé des mots exceptionnellement larges : il est permis au syndic de renoncer à « tout intérêt » sur « le bien réel ». GTL a tenté de renoncer aux profits à prendre et aux droits de surface, qui peuvent être qualifiés d'intérêts sur des biens réels.

L'exigence de l'organisme de réglementation voulant que GTL acquitte les engagements environnementaux de

other debts contravenes the *BIA*'s priority scheme. The Province's licensing scheme therefore should be held inoperative under the second prong of the paramountcy test, frustration of purpose. Even where dual compliance with both federal and provincial law is, strictly speaking, possible, provincial legislation or provisions will be rendered inoperative to the extent that they have the effect of frustrating a valid federal legislative purpose. The focus of the analysis is on the effect of the provincial legislation or provision, not its purpose. In the instant case, if the environmental claims asserted by the Regulator (i.e., the Abandonment Orders) are provable in bankruptcy, the Regulator will not be permitted to assert those claims outside the bankruptcy process and ahead of Redwater's secured creditors because this would frustrate the purpose of the federal priority scheme.

In *Abitibi*, the Court established a three-part test, rooted in the language of the *BIA*, to determine whether a claim is provable in bankruptcy. The first prong of the *Abitibi* test asks whether the debt, liability or obligation at issue is owed by a bankrupt entity to a creditor. The language of *Abitibi* admits of no ambiguity, uncertainty or doubt: the only determination that has to be made is whether the regulatory body has exercised its enforcement power against a debtor. Most environmental regulatory bodies can be creditors, and government entities cannot systematically evade the priority requirements of federal bankruptcy legislation under the guise of enforcing public duties. In the instant case, the first prong is satisfied. There is no doubt that the Regulator exercised its enforcement power against a debtor when it issued orders requiring Redwater to perform the environmental work on the non-producing properties. It is neither appropriate nor necessary in this case to attempt to redefine the first prong of the *Abitibi* test by narrowing the broad definition of "creditor" as the majority does.

There is no dispute that the second prong of the *Abitibi* test, which requires that the debt, liability or obligation be incurred before the debtor becomes bankrupt, is satisfied. The third prong asks whether it is sufficiently certain that the regulator will perform the work and make a claim for reimbursement. In this case, it is sufficiently certain that either the Regulator or its delegate, the OWA, will ultimately perform the abandonment and reclamation work and assert a monetary claim for reimbursement. Therefore, the final prong of the *Abitibi* test is satisfied. The chambers

Redwater avant les autres dettes de l'actif contrevient au régime de priorité établi par la *LFI*. Le régime provincial de délivrance de permis devrait donc être déclaré inopérant suivant le second volet du critère de la prépondérance, l'entrave à la réalisation d'un objet fédéral. Même lorsqu'il est à proprement parler possible de se conformer à la fois à la loi fédérale et à la loi provinciale, la loi ou les dispositions provinciales seront néanmoins rendues inopérantes dans la mesure où elles ont pour effet d'entraver la réalisation d'un objet valide d'une loi fédérale. L'analyse est axée sur l'effet de la loi ou de la disposition provinciale, et non sur son objet. En l'espèce, si les réclamations environnementales que fait valoir l'organisme de réglementation (c.-à-d. les ordonnances d'abandon) sont prouvables en matière de faillite, il n'est pas autorisé à faire valoir ces réclamations en dehors du processus de faillite et avant les créanciers garantis de Redwater, car cela entraverait la réalisation de l'objet du régime de priorité fédéral.

Dans *Abitibi*, la Cour a établi un test à trois volets, fondé sur le libellé de la *LFI*, pour déterminer si une réclamation est prouvable en matière de faillite. Le premier volet du test *Abitibi* pose la question de savoir si la dette, l'engagement ou l'obligation en cause sont dus par une entité faillie à un créancier. Le texte de cet arrêt ne laisse place à aucune ambiguïté, incertitude ou doute à cet égard : la seule question à trancher est de savoir si l'organisme de réglementation a exercé, à l'encontre d'un débiteur, son pouvoir de faire appliquer la loi. La plupart des organismes de réglementation environnementaux peuvent agir à titre de créanciers, et les entités gouvernementales ne sauraient systématiquement se soustraire aux exigences en matière de priorité de la loi fédérale sur la faillite sous le couvert de l'obligation de faire respecter les devoirs publics. Dans la présente affaire, il est satisfait au premier volet. Il ne fait aucun doute que l'organisme de réglementation a exercé son pouvoir d'appliquer la loi à l'encontre d'une débitrice lorsqu'il a rendu les ordonnances enjoignant à Redwater d'accomplir les travaux environnementaux sur les biens inexploités. Il n'est ni approprié ni nécessaire en l'espèce d'essayer de redéfinir ce volet du test *Abitibi* en restreignant le large sens attribué par la majorité au mot « créancier ».

Personne ne conteste qu'il est satisfait au second volet du test *Abitibi*, lequel exige que la dette, l'engagement ou l'obligation ait pris naissance avant que le débiteur ne devienne failli. Le troisième volet pose la question de savoir s'il est suffisamment certain que l'organisme de réglementation exécutera les travaux et présentera une demande de remboursement. En l'espèce, il est suffisamment certain que l'organisme de réglementation ou sa délégataire, l'OWA, effectuera ultimement les travaux d'abandon et de remise en état et fera valoir une réclamation pécuniaire

judge made three critical findings of fact that easily support this conclusion. First, he found that GTL was not in possession of the disclaimed properties and, in any event, had no ability to perform any kind of work on these assets because the environmental liabilities exceeded the value of the estate itself and Redwater had no working interest participants that would step in to perform the work. As a result, he concluded that there was no other party who could be compelled to carry out the work. Second, in light of the fact that neither GTL nor Redwater's working interest participants would (or could) undertake this work, the chambers judge found as a fact that the Regulator will ultimately be responsible for the abandonment costs, since it has the power to seek recovery of abandonment costs and has actually performed the work on occasion, and has expressly stated an intention to seek reimbursement for the costs of abandoning the renounced assets. Third, the chambers judge found that the Regulator's only realistic alternative to performing the remediation work itself was to deem the renounced assets to be orphan wells. In this circumstance, he found that the legislation and evidence shows that if the Regulator deems a well an orphan, then the OWA will perform the work. In light of these factual determinations, the chambers judge rightly concluded that the sufficient certainty standard of *Abitibi* was satisfied because at a minimum, either the Regulator or the OWA will complete the abandonment work.

The majority elevates form over substance in concluding that the sufficient certainty standard is not satisfied when a regulatory body's delegate, as opposed to the regulatory body itself, performs the work. Considering the salient features of the OWA and its relationship with the Regulator, one must conclude that they are inextricably intertwined. When the Regulator exercises its statutory powers to declare a property an "orphan" under s. 70(2) of Alberta's *Oil and Gas Conservation Act*, it effectively delegates the abandonment work to the OWA. The majority's alternative conclusion that it is not sufficiently certain that even the OWA will perform the abandonment work would permit the Regulator to benefit from strategic gamesmanship by manipulating the timing of its intervention in order to escape the insolvency regime and strip Redwater of its assets.

afin d'obtenir un remboursement. Il est donc satisfait au dernier volet du test *Abitibi*. Le juge en cabinet a tiré trois conclusions de fait cruciales qui appuient aisément cette conclusion. Premièrement, il a conclu que GTL n'était pas en possession des biens visés par les renonciations et, de toute façon, qu'il ne peut pas exécuter de travaux sur ces biens parce que les engagements environnementaux dépassaient la valeur de l'actif même et Redwater ne comptait aucun participant en participation directe qui se chargerait d'exécuter les travaux. Il a donc conclu qu'il n'existe aucune autre partie susceptible d'être contrainte d'exécuter les travaux. Deuxièmement, compte tenu du fait que ni GTL ni les participants en participation directe de Redwater ne voudraient (ou ne pourraient) entreprendre ces travaux, le juge en cabinet a tiré la conclusion de fait selon laquelle l'organisme de réglementation sera en fin de compte responsable des frais d'abandon, car il a le pouvoir de tenter de recouvrer les frais d'abandon et a réellement exécuté les travaux à l'occasion. Il a aussi expressément manifesté l'intention de demander le remboursement des frais liés à l'abandon des biens faisant l'objet de la renonciation. Troisièmement, le juge en cabinet a conclu que la seule solution réaliste qui s'offre à l'organisme de réglementation autre que celle d'effectuer lui-même les travaux de décontamination était de considérer les biens faisant l'objet de la renonciation comme des puits orphelins. Il a conclu qu'en pareil cas, les dispositions législatives et les éléments de preuve démontrent que, si l'organisme de réglementation considère un puits comme orphelin, l'OWA exécutera les travaux. À la lumière de ces conclusions de fait, le juge en cabinet a eu raison de conclure qu'il était satisfait à la norme de certitude suffisante énoncée dans *Abitibi* parce qu'à tout le moins, l'organisme de réglementation ou l'OWA mènerait à terme les travaux d'abandon.

La majorité fait passer la forme avant le fond en concluant qu'il n'est pas satisfait à la norme de certitude suffisante lorsque le délégataire de l'organisme de réglementation, et non l'organisme de réglementation lui-même, effectue les travaux. Vu les caractéristiques saillantes de l'OWA et de sa relation avec l'organisme de réglementation, force est de constater qu'ils sont inextricablement liés. Lorsque l'organisme de réglementation exerce le pouvoir de déclarer un bien « orphelin » que lui confère le par. 70(2) de l'*Oil and Gas Conservation Act* de l'Alberta, il délègue effectivement l'exécution des travaux d'abandon à l'OWA. La conclusion subsidiaire de la majorité selon laquelle il n'est pas suffisamment certain que même l'OWA exécutera les travaux d'abandon permettrait à l'organisme de réglementation de tirer profit de manœuvres stratégiques en manipulant le moment de son intervention afin de se soustraire au régime d'insolvabilité et de dépouiller Redwater de ses biens.

Since it is sufficiently certain that the Regulator (or the OWA, as its delegate) will complete the abandonment and reclamation work, all three prongs of the *Abitibi* test are satisfied. The Regulator's Abandonment Orders constitute "claims provable in bankruptcy". It would undermine the *BIA*'s priority scheme and therefore frustrate an essential purpose of the *BIA* if the Regulator could assert those claims outside the bankruptcy process — and ahead of the estate's secured creditors — whether by compelling GTL to carry out those orders or by making the sale of Redwater's valuable assets conditional on the fulfillment of those obligations.

Cases Cited

By Wagner C.J.

Applied: *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 Alta. L.R. (2d) 45; *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443; **approved:** *Nortel Networks Corp., Re*, 2013 ONCA 599, 368 D.L.R. (4th) 122; *Strathcona (County) v. Fantasy Construction Ltd. (Trustee of)*, 2005 ABQB 559, 256 D.L.R. (4th) 536; **distinguished:** *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327; *Northstar Aerospace Inc., Re*, 2013 ONCA 600, 8 C.B.R. (6th) 154; **referred to:** *Berkheiser v. Berkheiser*, [1957] S.C.R. 387; *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624; *Peters v. Remington*, 2004 ABCA 5, 49 C.B.R. (4th) 273; *Garner v. Newton* (1916), 29 D.L.R. 276; *Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536; *GMAC Commercial Credit Corp. — Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601; *New Skeena Forest Products Inc. v. Don Hull & Sons Contracting Ltd.*, 2005 BCCA 154, 251 D.L.R. (4th) 328; *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781; *M. v. H.*, [1999] 2 S.C.R. 3; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686; *R. v. Elshaw*, [1991] 3 S.C.R. 24; *AbitibiBowater Inc., Re*, 2010 QCCS 1261, 68 C.B.R. (5th) 1; *Strathcona (County) v. Fantasy Construction Ltd. (Trustee of)*, 2005 ABQB

Comme il est suffisamment certain que l'organisme de réglementation (ou l'OWA, sa délégataire) achèvera les travaux d'abandon et de remise en état, il est satisfait aux trois volets du test *Abitibi*. Les ordonnances d'abandon de l'organisme de réglementation constituent des « réclamations prouvables en matière de faillite ». Ce serait saper le régime de priorités établi par la *LFI* et entraver la réalisation d'un objet essentiel de la *LFI* que de permettre à l'organisme de réglementation de faire valoir ces réclamations en dehors du processus de faillite — et en priorité par rapport aux créanciers garantis de l'actif — que ce soit en obligeant GTL à exécuter ces ordonnances ou en faisant dépendre la vente des biens de valeur de Redwater de l'acquittement de ces obligations.

Jurisprudence

Citée par le juge en chef Wagner

Arrêts appliqués : *Panamericana de Bienes y Servicios S.A. c. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 Alta. L.R. (2d) 45; *Terre-Neuve-et-Labrador c. AbitibiBowater Inc.*, 2012 CSC 67, [2012] 3 R.C.S. 443; **arrêts approuvés :** *Nortel Networks Corp., Re*, 2013 ONCA 599, 368 D.L.R. (4th) 122; *Strathcona (County) c. Fantasy Construction Ltd. (Trustee of)*, 2005 ABQB 559, 256 D.L.R. (4th) 536; **distinction d'avec les arrêts :** *Alberta (Procureur général) c. Moloney*, 2015 CSC 51, [2015] 3 R.C.S. 327; *Northstar Aerospace Inc., Re*, 2013 ONCA 600, 8 C.B.R. (6th) 154; **arrêts mentionnés :** *Berkheiser c. Berkheiser*, [1957] R.C.S. 387; *Cie pétrolière Impériale ltée c. Québec (Ministre de l'Environnement)*, 2003 CSC 58, [2003] 2 R.C.S. 624; *Peters c. Remington*, 2004 ABCA 5, 49 C.B.R. (4th) 273; *Garner c. Newton* (1916), 29 D.L.R. 276; *Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111; *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453; *Saskatchewan (Procureur général) c. Lemare Lake Logging Ltd.*, 2015 CSC 53, [2015] 3 R.C.S. 419; *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161; *Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3; *Québec (Procureur général) c. Canadian Owners and Pilots Association*, 2010 CSC 39, [2010] 2 R.C.S. 536; *Société de crédit commercial GMAC — Canada c. T.C.T. Logistics Inc.*, 2006 CSC 35, [2006] 2 R.C.S. 123; *Hypothèques Trustco Canada c. Canada*, 2005 CSC 54, [2005] 2 R.C.S. 601; *New Skeena Forest Products Inc. c. Don Hull & Sons Contracting Ltd.*, 2005 BCCA 154, 251 D.L.R. (4th) 328; *Ocean Port Hotel Ltd. c. Colombie-Britannique (General Manager, Liquor Control and Licensing Branch)*, 2001 CSC 52, [2001] 2 R.C.S. 781; *M. c. H.*, [1999] 2 R.C.S. 3; *R. c. Sappier*, 2006 CSC 54, [2006] 2 R.C.S. 686; *R. c. Elshaw*, [1991] 3 R.C.S. 24; *AbitibiBowater Inc., Re*, 2010 QCCS 1261, 68 C.B.R.

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By Côté J. (dissenting)

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Responsible Energy Development Act, S.A. 2012, c. R-17.3, ss. 2(1)(a), 2(2)(h), 3(1), 28, 29.

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Ken Lenz, *c.r.*, *Patricia Johnston*, *c.r.*, *Keely R. Cameron*, *Brad Gilmour* et *Michael W. Selnes*, pour les appelants.

Kelly J. Bourassa, *Jeffrey Oliver*, *Tom Cumming*, *Ryan Zahara*, *Danielle Maréchal*, *Brendan MacArthur-Stevens* and *Chris Nyberg*, for the respondents.

Josh Hunter and *Hayley Pitcher*, for the intervener the Attorney General of Ontario.

Gareth Morley, *Aaron Welch* and *Barbara Thomson*, for the intervener the Attorney General of British Columbia.

Richard James Fyfe, for the intervener the Attorney General of Saskatchewan.

Robert Normey and *Vivienne Ball*, for the intervener the Attorney General of Alberta.

Adrian Scotchmer, for the intervener Ecojustice Canada Society.

Lewis Manning and *Toby Kruger*, for the intervener the Canadian Association of Petroleum Producers.

Nader R. Hasan and *Lindsay Board*, for the intervener Greenpeace Canada.

Christine Laing and *Shaun Fluker*, for the intervener Action Surface Rights Association.

Caireen E. Hanert and *Adam Maerov*, for the intervener the Canadian Association of Insolvency and Restructuring Professionals.

Howard A. Gorman, *Q.C.*, and *D. Aaron Stephenson*, for the intervener the Canadian Bankers' Association.

The judgment of Wagner C.J. and Abella, Karakatsanis, Gascon and Brown JJ. was delivered by

THE CHIEF JUSTICE —

I. Introduction

[1] The oil and gas industry is a lucrative and important component of Alberta's and Canada's economy. The industry also carries with it certain

Kelly J. Bourassa, *Jeffrey Oliver*, *Tom Cumming*, *Ryan Zahara*, *Danielle Maréchal*, *Brendan MacArthur-Stevens* et *Chris Nyberg*, pour les intimées.

Josh Hunter et *Hayley Pitcher*, pour l'intervenante la procureure générale de l'Ontario.

Gareth Morley, *Aaron Welch* et *Barbara Thomson*, pour l'intervenant le procureur général de la Colombie-Britannique.

Richard James Fyfe, pour l'intervenant le procureur général de la Saskatchewan.

Robert Normey et *Vivienne Ball*, pour l'intervenant le procureur général de l'Alberta.

Adrian Scotchmer, pour l'intervenante Ecojustice Canada Society.

Lewis Manning et *Toby Kruger*, pour l'intervenante l'Association canadienne des producteurs pétroliers.

Nader R. Hasan et *Lindsay Board*, pour l'intervenante Greenpeace Canada.

Christine Laing et *Shaun Fluker*, pour l'intervenante Action Surface Rights Association.

Caireen E. Hanert et *Adam Maerov*, pour l'intervenante l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation.

Howard A. Gorman, *c.r.*, et *D. Aaron Stephenson*, pour l'intervenante l'Association des banquiers canadiens.

Version française du jugement du juge en chef Wagner et des juges Abella, Karakatsanis, Gascon et Brown rendu par

LE JUGE EN CHEF —

I. Introduction

[1] L'industrie pétrolière et gazière est une composante lucrative et importante de l'économie albertaine et canadienne. Cette industrie entraîne

unavoidable environmental costs and consequences. To address them, Alberta has established a comprehensive cradle-to-grave licensing regime that is binding on companies active in the industry. A company will not be granted the licences that it needs to extract, process or transport oil and gas in Alberta unless it assumes end-of-life responsibilities for plugging and capping oil wells to prevent leaks, dismantling surface structures and restoring the surface to its previous condition. These obligations are known as "reclamation" and "abandonment" (*Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("*EPEA*"), s. 1(ddd), and *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6 ("*OGCA*"), s. 1(1)(a)).

[2] The question in this appeal is what happens to these obligations when a company is bankrupt and a trustee in bankruptcy is charged with distributing its assets among various creditors according to the rules in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). Redwater Energy Corporation ("Redwater") is the bankrupt company at the centre of this appeal. Its principal assets are 127 oil and gas assets — wells, pipelines and facilities — and their corresponding licences. A few of Redwater's licensed wells are still producing and profitable. The majority of the wells are spent and burdened with abandonment and reclamation liabilities that exceed their value.

[3] The Alberta Energy Regulator ("Regulator") and the Orphan Well Association ("OWA") are the appellants in this Court. (For simplicity, I will refer to the Regulator when discussing the appellants' position, unless otherwise noted.) The Regulator administers Alberta's licensing regime and enforces the abandonment and reclamation obligations of licensees. The Regulator has delegated to the OWA, an independent non-profit entity, the authority to abandon and reclaim "orphans", which are oil and gas assets and their sites left behind in an improperly abandoned or unreclaimed state by defunct companies at the close of their insolvency proceedings. The Regulator says that, one way or another, the

également certains coûts et certaines conséquences inévitables pour l'environnement. Pour y faire face, l'Alberta a mis en place un régime complet de délivrance de permis du berceau à la tombe qui lie les sociétés actives dans l'industrie. Une société n'obtiendra pas les permis dont elle a besoin pour extraire, traiter ou transporter du pétrole et du gaz en Alberta, à moins qu'elle n'assume les responsabilités de fin de vie consistant à obturer et à fermer les puits de pétrole afin d'éviter les fuites, à démanteler les structures de surface ainsi qu'à remettre la surface dans son état antérieur. Ces obligations sont appelées la [TRADUCTION] « remise en état » et l'« abandon » (*Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (« *EPEA* »), al. 1(ddd) et *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6 (« *OGCA* »), al. 1(1)(a)).

[2] La question en l'espèce est de savoir ce qu'il advient de ces obligations lorsqu'une société est en faillite et qu'un syndic de faillite est chargé de répartir ses biens entre divers créanciers conformément aux règles prévues dans la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, c. B-3 (« *LFI* »). Redwater Energy Corporation (« Redwater ») est la société en faillite au cœur du présent pourvoi. Son actif est principalement composé de 127 biens pétroliers et gaziers — puits, pipelines et installations — et des permis correspondants. Quelques-uns des puits autorisés de Redwater sont encore productifs et rentables. La majorité est tarie et grevée de responsabilités relatives à l'abandon et à la remise en état qui excèdent leur valeur.

[3] L'Alberta Energy Regulator (« organisme de réglementation ») et l'Orphan Well Association (« OWA ») sont les appelants devant notre Cour (pour simplifier, je les appellerai l'organisme de réglementation au moment d'analyser la position des appelants, sauf indication contraire). L'organisme de réglementation administre le régime de délivrance de permis de l'Alberta et assure le respect, par les titulaires de permis, des obligations relatives à l'abandon et à la remise en état. L'organisme de réglementation a délégué à l'OWA, une entité indépendante sans but lucratif, le pouvoir d'abandonner et de remettre en état les « orphelins » — les biens pétroliers et gaziers ainsi que leurs sites délaissés ou non réclamés sans

remaining value of the Redwater estate must be applied to meet the abandonment and reclamation obligations associated with its licensed assets.

[4] Redwater's trustee in bankruptcy, Grant Thornton Limited ("GTL"), and Redwater's primary secured creditor, Alberta Treasury Branches ("ATB"), oppose the appeal. (For simplicity, I will refer to GTL when discussing the respondents' position, unless otherwise noted.) GTL argues that, since it has disclaimed Redwater's unproductive oil and gas assets, s. 14.06(4) of the *BIA* empowers it to walk away from those assets and the environmental liabilities associated with them and to deal solely with Redwater's producing oil and gas assets. Alternatively, GTL argues that, under the priority scheme in the *BIA*, the claims of Redwater's secured creditors must be satisfied ahead of Redwater's environmental liabilities. Relying on the doctrine of paramountcy, GTL says that Alberta's environmental legislation regulating the oil and gas industry is constitutionally inoperative to the extent that it authorizes the Regulator to interfere with this arrangement.

[5] The chambers judge (2016 ABQB 278, 37 C.B.R. (6th) 88) and a majority of the Court of Appeal (2017 ABCA 124, 47 C.B.R. (6th) 171) agreed with GTL. The Regulator's proposed use of its statutory powers to enforce Redwater's compliance with abandonment and reclamation obligations during bankruptcy was held to conflict with the *BIA* in two ways: (1) it imposed on GTL the obligations of a licensee in relation to the Redwater assets disclaimed by GTL, contrary to s. 14.06(4) of the *BIA*; and (2) it upended the priority scheme for the distribution of a bankrupt's assets established by the *BIA* by requiring that the "provable claims" of the Regulator, an unsecured creditor, be paid ahead of the claims of Redwater's secured creditors.

que les processus en question n'aient été correctement effectués par les sociétés liquidées à la fin de leur procédure d'insolvabilité. L'organisme de réglementation affirme que, d'une façon ou d'une autre, la valeur restante de l'actif de Redwater doit être utilisée pour satisfaire aux obligations d'abandon et de remise en état qui sont associées à ses biens visés par des permis.

[4] Le syndic de faillite de Redwater, Grant Thornton Limited (« GTL »), et le principal créancier garanti de Redwater, Alberta Treasury Branches (« ATB »), s'opposent au pourvoi (pour simplifier, je les appellerai GTL au moment d'analyser la position des intimées, sauf indication contraire). GTL soutient que, comme il a renoncé aux biens pétroliers et gaziers inexploités de Redwater, le par. 14.06(4) de la *LFI* l'investit du pouvoir de les délaisser et de se soustraire aux engagements environnementaux qui s'y rattachent et de s'occuper uniquement des biens pétroliers et gaziers productifs de Redwater. GTL soutient subsidiairement que, d'après le régime de priorité établi dans la *LFI*, il faut acquitter les réclamations des créanciers garantis de Redwater avant de respecter ses engagements environnementaux. Invoquant la doctrine de la prépondérance, GTL affirme que la législation environnementale de l'Alberta réglementant l'industrie pétrolière et gazière est constitutionnellement inopérante dans la mesure où elle autorise l'organisme de réglementation à se mêler de cet arrangement.

[5] Le juge siégeant en cabinet (2016 ABQB 278, 37 C.B.R. (6th) 88) et les juges majoritaires de la Cour d'appel (2017 ABCA 124, 47 C.B.R. (6th) 171) ont donné raison à GTL. L'utilisation proposée par l'organisme de réglementation des pouvoirs que lui confère la loi pour contraindre Redwater à respecter les obligations d'abandon et de remise en état au cours de la faillite a été jugée incompatible avec la *LFI* de deux façons : (1) elle imposait à GTL les obligations d'un titulaire de permis relativement aux biens de Redwater auxquels GTL avait renoncé, ce qui est contraire au par. 14.06(4) de la *LFI*; (2) elle renversait le régime de priorité établi par la *LFI* pour le partage des biens d'un failli en exigeant que le paiement de ses « réclamations prouvables », en tant que créancier ordinaire, soit effectué avant celui des réclamations des créanciers garantis de Redwater.

[6] Martin J.A., as she then was, dissented. She would have allowed the Regulator's appeal on the basis that there was no conflict between Alberta's environmental legislation and the *BIA*. Martin J.A. was of the view that: (1) s. 14.06 of the *BIA* did not operate to relieve GTL of Redwater's obligations with respect to its licensed assets; and (2) the Regulator was not asserting any provable claims, so the priority scheme in the *BIA* was not upended.

[7] For the reasons that follow, I would allow the appeal. Although my analysis differs from hers in some respects, I agree with Martin J.A. that the Regulator's use of its statutory powers does not create a conflict with the *BIA* so as to trigger the doctrine of federal paramountcy. Section 14.06(4) is concerned with the personal liability of trustees, and does not empower a trustee to walk away from the environmental liabilities of the estate it is administering. The Regulator is not asserting any claims provable in the bankruptcy, and the priority scheme in the *BIA* is not upended. Thus, no conflict is caused by GTL's status as a licensee under Alberta legislation. Alberta's regulatory regime can coexist with and apply alongside the *BIA*.

II. Background

A. *Alberta's Regulatory Regime*

[8] The resolution of the constitutional questions and the ultimate outcome of this appeal depend on a proper understanding of the complex regulatory regime which governs Alberta's oil and gas industry. I will therefore describe that regime in considerable detail.

[9] In order to exploit oil and gas resources in Alberta, a company needs three things: a property interest in the oil or gas, surface rights and a licence issued by the Regulator. In Alberta, mineral rights are typically reserved from ownership rights in land.

[6] La juge d'appel Martin, maintenant juge de notre Cour, n'était pas d'accord. Elle aurait accueilli l'appel de l'organisme de réglementation au motif qu'il n'y avait pas de conflit entre la législation environnementale de l'Alberta et la *LFI*. La juge Martin a estimé que : (1) l'art. 14.06 de la *LFI* n'a pas eu pour effet de libérer GTL des obligations de Redwater à l'égard de ses biens visés par des permis; (2) l'organisme de réglementation ne faisait valoir aucune réclamation prouvable, de sorte que le régime de priorité de la *LFI* n'était pas renversé.

[7] Pour les motifs qui suivent, j'accueillerais le pourvoi. Bien que mon analyse diffère de la sienne à certains égards, je conviens avec la juge Martin que l'utilisation par l'organisme de réglementation des pouvoirs que lui confère la loi ne crée pas de conflit avec la *LFI* de façon à mettre en jeu la doctrine de la prépondérance fédérale. Le paragraphe 14.06(4) intéresse la responsabilité personnelle du syndic et il ne l'investit pas du pouvoir de se soustraire aux engagements environnementaux liant l'actif qu'il administre. L'organisme de réglementation ne fait valoir aucune réclamation prouvable en matière de faillite, et le régime de priorité de la *LFI* n'est pas renversé. Donc, le statut de GTL en tant que titulaire de permis au sens de la loi albertaine n'est à l'origine d'aucun conflit. Le régime de réglementation de l'Alberta peut coexister et s'appliquer conjointement avec la *LFI*.

II. Contexte

A. *Le régime de réglementation de l'Alberta*

[8] Le règlement des questions constitutionnelles et l'issue finale du présent pourvoi reposent sur une compréhension adéquate du régime complexe de réglementation qui régit l'industrie pétrolière et gazière de l'Alberta. Je vais donc décrire ce régime de façon très détaillée.

[9] Pour exploiter des ressources pétrolières et gazières en Alberta, une société a besoin de trois choses : un intérêt de propriété sur le pétrole ou le gaz, des droits de surface et un permis délivré par l'organisme de réglementation. En Alberta, les droits miniers sont

About 90 percent of Alberta's mineral rights are held by the Crown on behalf of the public.

[10] A company's property interest in the oil or gas it seeks to exploit typically takes the form of a mineral lease with the Crown (but occasionally with a private owner). The company also needs surface rights so it can access and occupy the physical land located above the oil and gas and place the equipment needed to pump, store and haul away the oil and gas. Surface rights may be obtained through a lease with the landowner, who is often a farmer or rancher (but is occasionally the Crown). Where a landowner does not voluntarily grant surface rights, Alberta law authorizes the Surface Rights Board to issue a right of entry order in favour of an "operator", that is, the person having the right to a mineral or the right to work it (*Surface Rights Act*, R.S.A. 2000, c. S-24, ss. 1(h) and 15).

[11] Canadian courts characterize a mineral lease that allows a company to exploit oil and gas resources as a *profit à prendre*. It is not disputed that a *profit à prendre* is a form of real property interest held by the company (*Berkheiser v. Berkheiser*, [1957] S.C.R. 387). A *profit à prendre* is fully assignable and has been defined as "a non-possessory interest in land, like an easement, which can be passed on from generation to generation, and remains with the land, regardless of changes in ownership" (F. L. Stewart, "How to Deal with a Fickle Friend? Alberta's Troubles with the Doctrine of Federal Paramountcy", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2017* (2018), 163 ("Stewart"), at p. 193). Solvent and insolvent companies alike will often hold *profits à prendre* in both producing and unproductive or spent wells. There are a variety of potential "working interest" arrangements whereby several parties can share an interest in oil and gas resources.

généralement soustraits des droits de propriété sur les terres. Environ 90 p. 100 des droits miniers de l'Alberta sont détenus par la Couronne au nom du public.

[10] L'intérêt de propriété d'une société dans le pétrole ou le gaz qu'elle cherche à exploiter prend généralement la forme d'un bail d'exploitation minière avec la Couronne (mais parfois avec un propriétaire privé). La société a également besoin de droits de surface, afin de pouvoir accéder au terrain physique situé au-dessus du pétrole et du gaz, de l'occuper, ainsi que d'installer l'équipement nécessaire pour pomper, stocker et transporter le pétrole de même que le gaz. On obtient les droits de surface au moyen d'un bail avec le propriétaire foncier, dans bien des cas un agriculteur ou un éleveur (mais parfois la Couronne). Lorsqu'un propriétaire foncier n'accorde pas volontairement des droits de surface, la loi albertaine autorise le Surface Rights Board (Conseil des droits de surface) à rendre une ordonnance d'accès aux terres en faveur d'un [TRADUCTION] « exploitant », soit la personne qui a droit à une substance minérale ou le droit de la travailler (*Surface Rights Act*, R.S.A. 2000, c. S-24, al. 1h) et art. 15).

[11] Les tribunaux canadiens qualifient le bail d'exploitation minière permettant à une société d'exploiter des ressources pétrolières et gazières de profit à prendre. Il n'est pas contesté qu'un profit à prendre constitue une forme d'intérêt détenue par la société sur un bien réel (*Berkheiser c. Berkheiser*, [1957] R.C.S. 387). Un profit à prendre est entièrement cessible et il a été défini comme [TRADUCTION] « un intérêt foncier sans possession, comme une servitude, qui peut être transmis de génération en génération et qui reste avec la terre, indépendamment des changements de propriétaire » (F. L. Stewart, « How to Deal with a Fickle Friend? Alberta's Troubles with the Doctrine of Federal Paramountcy », dans J. P. Sarra et B. Romaine, dir., *Annual Review of Insolvency Law 2017* (2018), 163 (« Stewart »), p. 193). Les sociétés, qu'elles soient solvables ou insolvables, détiennent souvent des profits à prendre tant dans les puits productifs que dans les puits inexploités ou épuisés. Il existe une foule d'ententes potentielles de « participation directe » par lesquelles plusieurs parties peuvent partager un intérêt dans des ressources pétrolières et gazières.

[12] The third thing a company needs in order to access and exploit Alberta's oil and gas resources, and the one most germane to this appeal, is a licence issued by the Regulator. The *OGCA* prohibits any person without a licence from commencing to drill a well or undertaking any operations preparatory or incidental to the drilling of a well, and from commencing to construct or operate a facility (ss. 11(1) and 12(1)). The *Pipeline Act*, R.S.A. 2000, c. P-15, similarly prohibits the construction of pipelines without a licence (s. 6(1)). The *profit à prendre* in an oil and gas deposit may be bought and sold without regulatory approval. However, it is of little practical use on its own, as, without the licence associated with a well, the purchaser cannot "continue any drilling operations, any producing operations or any injecting operations" (*OGCA*, s. 11(1)), and, without the licence associated with a facility, the purchaser cannot "continue any construction or operation" (*OGCA*, s. 12(1)).

[13] The three relevant licensed assets in the Alberta oil and gas industry are wells, facilities and pipelines. A "well" is defined, *inter alia*, as "an orifice in the ground completed or being drilled . . . for the production of oil or gas" (*OGCA*, s. 1(1)(eee)). A "facility" is broadly defined and includes any building, structure, installation or equipment that is connected to or associated with the recovery, development, production, handling, processing, treatment or disposal of oil and gas resources (*OGCA*, s. 1(1)(w)). A "pipeline" is defined as "a pipe used to convey a substance or combination of substances", including associated installations (*Pipeline Act*, s. 1(1)(t)).

[14] The licences a company needs to recover, process and transport oil and gas are issued by the Regulator. The Regulator is not an agent of the Crown. It is established as a corporation by s. 3(1) of the *Responsible Energy Development Act*, S.A. 2012, c. R-17.3 ("*REDA*"). It exercises a wide range of powers under the *OGCA* and the *Pipeline Act*. It also acts as the regulator in respect of energy resource

[12] La troisième chose — celle qui se rapporte le plus au présent pourvoi — dont une société a besoin pour avoir accès aux ressources pétrolières et gazières de l'Alberta ainsi que pour les exploiter, c'est un permis délivré par l'organisme de réglementation. L'*OGCA* interdit à toute personne non titulaire d'un permis de commencer le forage d'un puits, y compris les activités préparatoires ou accessoires à cette fin, ou d'amorcer la construction ou l'exploitation d'une installation (par. 11(1) et 12(1)). La *Pipeline Act*, R.S.A. 2000, c. P-15, interdit également la construction de pipelines sans permis (par. 6(1)). Le profit à prendre dans des gisements de pétrole et de gaz peut être acheté et vendu sans approbation réglementaire. Cependant, cela n'a qu'une utilité pratique restreinte en soi, puisque, sans le permis associé à un puits, l'acheteur ne peut pas [TRADUCTION] « poursuivre une opération de forage, d'exploitation ou d'injection » (*OGCA*, par. 11(1)), et sans le permis associé à une installation, l'acheteur ne peut pas [TRADUCTION] « poursuivre la construction ou l'exploitation » (*OGCA*, par. 12(1)).

[13] Les trois biens visés par des permis pertinents dans l'industrie pétrolière et gazière de l'Alberta sont les puits, les installations et les pipelines. Le « puits » est défini, entre autres, comme [TRADUCTION] « un orifice dans le sol complété ou en cours de forage pour la production de pétrole ou de gaz » (*OGCA*, al. 1(1)(eee)). L'« installation » est définie au sens large et englobe tous les bâtiments, structures, installations et matériaux qui sont liés ou associés à la récupération, à la mise en valeur, à la production, à la manutention, au traitement ou à l'élimination de ressources pétrolières et gazières (*OGCA*, al. 1(1)(w)). Le « pipeline » est défini comme [TRADUCTION] « un tuyau utilisé pour transporter une substance ou une combinaison de substances », y compris les installations connexes (*Pipeline Act*, al. 1(1)(t)).

[14] Les permis dont une société a besoin pour récupérer, traiter ainsi que transporter le pétrole et le gaz sont délivrés par l'organisme de réglementation. Ce dernier n'est pas un mandataire de la Couronne. Il est constitué en société par le par. 3(1) de la *Responsible Energy Development Act*, S.A. 2012, c. R-17.3 (« *REDA* »). L'organisme de réglementation exerce un large éventail de pouvoirs en vertu de l'*OGCA*

activities under the *EPEA*, Alberta's more general environmental protection legislation (*REDA*, s. 2(2)(h)). The Regulator's mandate is set out in the *REDA* and includes "the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta" (s. 2(1)(a)). The Regulator is funded almost entirely by the industry it regulates, and it collects its budget through an administration fee (Stewart, at p. 219; *REDA*, ss. 28 and 29; *Alberta Energy Regulator Administration Fees Rules*, Alta. Reg. 98/2013).

et de la *Pipeline Act*. Il agit également à titre d'organisme de réglementation des activités liées aux ressources énergétiques sous le régime de l'*EPEA*, la loi albertaine plus générale sur la protection de l'environnement (*REDA*, al. 2(2)(h)). Le mandat de l'organisme de réglementation est énoncé dans la *REDA* et comprend [TRADUCTION] « la mise en valeur efficiente, sûre, ordonnée et respectueuse de l'environnement des ressources énergétiques en Alberta » (al. 2(1)(a)). L'organisme de réglementation est financé presque entièrement par l'industrie qu'il réglemente et il recueille ses recettes budgétaires au moyen de frais administratifs (Stewart, p. 219; *REDA*, art. 28 et 29; *Alberta Energy Regulator Administration Fees Rules*, Alta. Reg. 98/2013).

[15] The Regulator has a wide discretion when it comes to granting licences to operate wells, facilities and pipelines. On receiving an application for a licence, the Regulator may grant the licence subject to any conditions, restrictions and stipulations, or it may refuse the licence (*OGCA*, s. 18(1); *Pipeline Act*, s. 9(1)). Licences to operate a well, facility or pipeline are granted subject to obligations that will one day arise to abandon the underlying asset and reclaim the land on which it is situated.

[15] L'organisme de réglementation jouit d'un large pouvoir discrétionnaire lorsqu'il s'agit de délivrer des permis d'exploitation de puits, d'installations et de pipelines. À la réception d'une demande de permis, l'organisme de réglementation peut accorder le permis sous réserve de certaines conditions, restrictions et stipulations, ou il peut refuser le permis (*OGCA*, par. 18(1); *Pipeline Act*, par. 9(1)). Les permis d'exploitation d'un puits, d'une installation ou d'un pipeline sont accordés sous réserve d'obligations qui se manifesteront un jour d'abandonner le bien sous-jacent et de remettre en état le terrain sur lequel il est situé.

[16] "Abandonment" refers to "the permanent dismantlement of a well or facility in the manner prescribed by the regulations or rules" made by the Regulator (*OGCA*, s. 1(1)(a)). Specifically, the abandonment of a well has been defined as "the process of sealing a hole which has been drilled for oil or gas, at the end of its useful life, to render it environmentally safe" (*Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 Alta. L.R. (2d) 45 ("*Northern Badger*"), at para. 2). The abandonment of a pipeline refers to its "permanent deactivation . . . in the manner prescribed by the rules" (*Pipeline Act*, s. 1(1)(a)). "Reclamation" includes "the removal of equipment or buildings", "the decontamination of buildings . . . land or water", and the "stabilization, contouring, maintenance, conditioning or reconstruction of the surface of the land" (*EPEA*, s. 1(ddd)). A further duty

[16] Le terme [TRADUCTION] « abandon » désigne « le démantèlement permanent d'un puits ou d'une installation de la manière prescrite par les règlements ou les règles » pris par l'organisme de réglementation (*OGCA*, al. 1(1)(a)). Plus précisément, l'abandon d'un puits a été défini comme [TRADUCTION] « l'obturation d'un trou qui a été foré pour le pétrole ou le gaz, à la fin de sa vie utile, afin de le rendre sûr sur le plan environnemental » (*Panamericana de Bienes y Servicios S.A. c. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 Alta L.R. (2d) 45 (« *Northern Badger* »), par. 2). L'abandon d'un pipeline fait référence à sa [TRADUCTION] « mise hors service permanente [. . .] de la manière prescrite par les règles » (*Pipeline Act*, al. 1(1)(a)). La remise en état comprend [TRADUCTION] « l'enlèvement des bâtiments et de l'équipement », « la décontamination des bâtiments, du terrain ou de l'eau », ainsi que

binding on those active in the Alberta oil and gas industry is remediation, which arises where a harmful or potentially harmful substance has been released into the environment (*EPEA*, ss. 112 to 122). As the extent of any remediation obligations that may be associated with Redwater assets is unclear, I will not refer to remediation separately from reclamation, unless otherwise noted. As has been done throughout this litigation, I will refer to abandonment and reclamation jointly as end-of-life obligations.

[17] A licensee must abandon a well or facility when ordered to do so by the Regulator or when required by the rules or regulations. The Regulator may order abandonment when "the Regulator considers that it is necessary to do so in order to protect the public or the environment" (*OGCA*, s. 27(3)). Under the rules, a licensee is required to abandon a well or facility, *inter alia*, on the termination of the mineral lease, surface lease or right of entry, where the Regulator cancels or suspends the licence, or where the Regulator notifies the licensee that the well or facility may constitute an environmental or safety hazard (*Oil and Gas Conservation Rules*, Alta. Reg. 151/71, s. 3.012). Section 23 of the *Pipeline Act* requires licensees to abandon pipelines in similar situations. The duty to reclaim is established by s. 137 of the *EPEA*. This duty is binding on an "operator", a broader term which encompasses the holder of a licence issued by the Regulator (*EPEA*, s. 134(b)). Reclamation is governed by the procedural requirements set out in regulations (*Conservation and Reclamation Regulation*, Alta. Reg. 115/93).

[18] The Licensee Liability Rating Program, which was, at the time of Redwater's insolvency, set out in *Directive 006: Licensee Liability Rating (LLR) Program and License Transfer Process* (March 12,

la « stabilisation, l'établissement des courbes de niveau, l'entretien, le conditionnement ou la reconstruction de la surface du terrain » (*EPEA*, al. 1(ddd)). Une autre obligation qui incombe à ceux qui œuvrent dans l'industrie pétrolière et gazière de l'Alberta est celle de la décontamination, qui prend naissance lorsqu'une substance nocive ou potentiellement nocive a été rejetée dans l'environnement (*EPEA*, art. 112 à 122). Puisque l'on ne connaît pas l'étendue des obligations de décontamination, s'il en est, qui peuvent être associées aux biens de Redwater, je ne traiterai pas la décontamination séparément de la remise en état, sauf indication contraire. Comme cela a été fait tout au long du présent litige, je qualifierai conjointement l'abandon et la remise en état d'obligations de fin de vie.

[17] Le titulaire de permis doit abandonner un puits ou une installation lorsque l'organisme de réglementation le lui ordonne, ou lorsque les règles ou les règlements l'exigent. L'organisme de réglementation peut ordonner l'abandon lorsqu'il [TRADUCTION] « l'estime nécessaire pour protéger le public ou l'environnement » (*OGCA*, par. 27(3)). Selon les règles, le titulaire de permis est tenu d'abandonner un puits ou une installation, notamment, à la résiliation du bail d'exploitation minière, du bail de surface ou de l'accès aux terres, lorsque l'organisme de réglementation annule ou suspend le permis, ou lorsqu'il avise le titulaire de permis que le puits ou l'installation peut constituer un danger pour l'environnement ou la sécurité (*Oil and Gas Conservation Rules*, Alta. Reg. 151/71, art. 3.012). L'article 23 de la *Pipeline Act* oblige les titulaires de permis à abandonner des pipelines dans des situations semblables. L'obligation de remise en état est prévue par l'art. 137 de l'*EPEA*. Cette obligation s'impose à un « exploitant », terme plus large qui englobe le titulaire d'un permis délivré par l'organisme de réglementation (*EPEA*, al. 134(b)). La remise en état est régie par les exigences procédurales fixées dans le règlement (*Conservation and Reclamation Regulation*, Alta. Reg. 115/93).

[18] Le Programme d'évaluation de la responsabilité du titulaire de permis, qui était, au moment de l'insolvabilité de Redwater, établi dans la *Directive 006 : Licensee Liability Rating (LLR) Program and*

2013) ("Directive 006") is one means by which the Regulator seeks to ensure that end-of-life obligations will be satisfied by licensees rather than being offloaded onto the Alberta public. As part of this program, the Regulator assigns each company a Liability Management Rating ("LMR"), which is the ratio between the aggregate value attributed by the Regulator to a company's licensed assets and the aggregate liability attributed by the Regulator to the eventual cost of abandoning and reclaiming those assets. For the purpose of calculating the LMR, all the licences held by a given company are treated as a package, without any segregation or parcelling of assets. A licensee's LMR is calculated on a monthly basis and, where it dips below the prescribed ratio (1.0 at the time of Redwater's insolvency), the licensee is required to pay a security deposit. The security deposit is added to the licensee's "deemed assets" and must bring its LMR back up to the ratio prescribed by the Regulator. If the required security deposit is not paid, the Regulator may cancel or suspend the company's licences (*OGCA*, s. 25). As an alternative to posting security, the licensee can perform end-of-life obligations or transfer licences (with approval) in order to bring its LMR back up to the prescribed level.

License Transfer Process (12 mars 2013) (« Directive 006 ») constitue un moyen par lequel l'organisme de réglementation vise à s'assurer que les titulaires de permis rempliront les obligations de fin de vie, au lieu que celles-ci soient en fin de compte assumées par le public albertain. Dans le cadre de ce programme, l'organisme de réglementation attribue à chaque société une cote de gestion de la responsabilité (« CGR »), qui représente le rapport entre la valeur totale attribuée par l'organisme de réglementation aux biens d'une société qui sont visés par des permis et la responsabilité totale que l'organisme de réglementation attribue aux coûts éventuels de l'abandon et de la remise en état de ces biens. Pour les besoins du calcul de la CGR, tous les permis détenus par une société donnée sont traités comme un tout, sans isolement ou morcellement des biens. La CGR d'un titulaire de permis est calculée sur une base mensuelle et, lorsqu'elle tombe sous le ratio prescrit (1,0 à l'époque de l'insolvabilité de Redwater), le titulaire de permis est tenu de verser un dépôt de garantie. Le dépôt de garantie est ajouté aux [TRADUCTION] « biens réputés » du titulaire de permis, qui doit ramener sa CGR au ratio prescrit par l'organisme de réglementation. Si le dépôt de garantie requis n'est pas payé, l'organisme de réglementation peut annuler ou suspendre les permis de la société (*OGCA*, art. 25). Comme solution de rechange au versement d'une garantie, le titulaire de permis peut exécuter les obligations de fin de vie ou transférer des permis (avec approbation), afin de ramener sa CGR au niveau prescrit.

[19] Licences can be transferred only with the Regulator's approval. The Regulator uses the Licensee Liability Rating Program to ensure that end-of-life obligations will not be negatively affected by licence transfers. Upon receipt of an application to transfer one or more licences, the Regulator assesses how the transfer, if approved, would affect the LMR of both the transferor and the transferee. At the time of Redwater's insolvency, if both the transferor and the transferee would have a post-transfer LMR equal to or exceeding 1.0, the Regulator would approve the transfer, absent other concerns. Following the chambers judge's decision in this case, the Regulator implemented changes to its policies, including the requirement that transferees have an LMR of 2.0 or

[19] Les permis ne peuvent être transférés qu'avec l'approbation de l'organisme de réglementation. Ce dernier utilise le Programme d'évaluation de la responsabilité du titulaire de permis pour éviter que les transferts de permis aient un effet néfaste sur les obligations de fin de vie. À la réception d'une demande de transfert d'un ou de plusieurs permis, l'organisme de réglementation évalue la façon dont le transfert, s'il est approuvé, influerait sur la CGR du cédant et du cessionnaire. À l'époque de l'insolvabilité de Redwater, si le cédant et le cessionnaire devaient avoir, après le transfert, des CGR égales ou supérieures à 1,0, l'organisme de réglementation approuverait le transfert en l'absence d'autres préoccupations. Après la décision du juge siégeant en cabinet dans

higher immediately following any licence transfer: Alberta Energy Regulator, *Licensee Eligibility — Alberta Energy Regulator Measures to Limit Environmental Impacts Pending Regulatory Changes to Address the Redwater Decision*, June 20, 2016 (online). For the purposes of this appeal, I will be referring to the regulatory regime as it existed at the time of Redwater's insolvency.

[20] As discussed in greater detail below, if either the transferor or the transferee would have a post-transfer LMR below 1.0, the Regulator would refuse to approve the licence transfer. In such a situation, the Regulator would insist on certain remedial steps being taken to ensure that neither LMR would drop below 1.0. Although Directive 006, as it was in the 2013 version, required both the transferee and transferor to have a post transfer LMR of at least 1.0, during this litigation, the Regulator stated that, when licensees are in receivership or bankruptcy, its working rule is to approve transfers as long as they do not cause a deterioration in the transferor's LMR, even where its LMR will remain below 1.0 following the transfer. The explanation for this working rule is that it helps to facilitate purchases. The Regulator's position is that the Licensee Liability Rating Program continues to apply to the transfer of licences as part of insolvency proceedings.

[21] The *OGCA*, the *Pipeline Act* and the *EPEA* all contemplate that a licensee's regulatory obligations will continue to be fulfilled when it is subject to insolvency proceedings. The *EPEA* achieves this by including the trustee of a licensee in the definition of "operator" for the purposes of the duty to reclaim (s. 134(b)(vi)). The *EPEA* also specifically provides that an order to perform reclamation work (known as an "environmental protection order") may be issued to a trustee (ss. 140 and 142(1)(a)(ii)). The *EPEA* imposes responsibility for carrying out the

la présente affaire, l'organisme de réglementation a apporté des changements à ses politiques, y compris l'exigence selon laquelle les cessionnaires devaient avoir une CGR de 2,0 ou plus immédiatement après tout transfert de permis : Alberta Energy Regulator, *Licensee Eligibility — Alberta Energy Regulator Measures to Limit Environmental Impacts Pending Regulatory Changes to Address the Redwater Decision*, 20 juin 2016 (en ligne). Pour les besoins du présent pourvoi, je ferai référence au régime de réglementation tel qu'il existait à l'époque de l'insolvabilité de Redwater.

[20] Comme il est expliqué plus en détail ci-dessous, si le cédant ou le cessionnaire devait avoir une CGR inférieure à 1,0 après le transfert, l'organisme de réglementation refuserait d'approuver le transfert de permis. Dans une telle situation, l'organisme de réglementation insisterait pour que certaines mesures correctives soient prises afin de s'assurer qu'aucune des deux CGR ne descende en dessous de 1,0. Même si la Directive 006, dans sa version de 2013, exigeait que le cessionnaire ainsi que le cédant aient des CGR d'au moins 1,0 après le transfert, au cours de ce litige, l'organisme de réglementation a déclaré que, lorsque les titulaires de permis sont sous séquestre ou en faillite, sa règle pratique est d'approuver les transferts tant qu'ils n'entraînent pas une détérioration de la CGR du cédant, même si la CGR du cédant demeurerait inférieure à 1,0 après le transfert. L'explication donnée pour cette règle pratique est qu'elle vise à faciliter les achats. L'organisme de réglementation fait valoir que le Programme d'évaluation de la responsabilité du titulaire de permis continue de s'appliquer au transfert de permis dans le cadre de la procédure d'insolvabilité.

[21] L'*OGCA*, la *Pipeline Act* ainsi que l'*EPEA* envisagent toutes que les obligations réglementaires d'un titulaire de permis continuent d'être respectées pendant qu'il fait l'objet d'une procédure d'insolvabilité. L'*EPEA* y parvient en incluant le syndic d'un titulaire de permis dans la définition d'« exploitant » pour l'application de l'obligation de remettre en état (sous-al. 134(b)(vi)). L'*EPEA* prévoit aussi expressément la possibilité qu'une ordonnance de remise en état (appelée [TRADUCTION] « ordonnance de protection de l'environnement ») soit adressée à un syndic

terms of an environmental protection order on the person to whom the order is directed (ss. 240 and 245). However, absent gross negligence or wilful misconduct, a trustee's liability in relation to such an order is expressly limited to the value of the assets in the bankrupt estate (s. 240(3)). The *OGCA* and the *Pipeline Act* take a more generic approach to applying the various obligations of licensees to trustees in the insolvency context: they simply include trustees in the definition of "licensee" (*OGCA*, s. 1(1)(cc); *Pipeline Act*, s. 1(1)(n)). As a result, every power which these Acts give the Regulator against a licensee can theoretically also be exercised against a trustee.

[22] Despite this, Alberta's regulatory regime does contemplate the possibility that some of a licensee's end-of-life obligations will remain unfulfilled when the insolvency process has run its course. The Regulator may designate wells, facilities, and their sites as "orphans" (*OGCA*, s. 70(2)(a)). A pipeline is defined as a "facility" for the purposes of the orphan regime (*OGCA*, s. 68(d)). Directive 006 stated that "a well, facility, or pipeline in the LLR program is eligible to be declared an orphan where the licensee of that licence becomes insolvent or defunct" (s. 7.1). An "orphan fund" has been established for the purpose of paying for, *inter alia*, the abandonment and reclamation of orphans (*OGCA*, s. 70(1)). The orphan fund is financed by an annual industry-wide levy paid by licensees of wells, facilities and unreclaimed sites (s. 73(1)). The amount of the levy is prescribed by the Regulator based on the estimated cost of abandoning and reclaiming orphans in a given fiscal year (s. 73(2)).

[23] The Regulator has delegated its statutory authority to abandon and reclaim orphans to the OWA (*Orphan Fund Delegated Administration Regulation*,

(art. 140 et sous-al. 142(1)(a)(ii))). L'*EPEA* impose la responsabilité d'exécuter une ordonnance de protection de l'environnement à la personne visée par l'ordonnance (art. 240 et 245). Cependant, faute de négligence grave ou d'inconduite délibérée, la responsabilité du syndic à l'égard d'une telle ordonnance est expressément limitée à la valeur des éléments de l'actif du failli (par. 240(3)). L'*OGCA* et la *Pipeline Act* adoptent une approche plus générique pour appliquer les diverses obligations d'un titulaire de permis aux syndics dans le contexte de l'insolvabilité; elles incluent simplement le syndic dans la définition de [TRADUCTION] « titulaire de permis » (*OGCA*, al. 1(1)(cc); *Pipeline Act*, al. 1(1)(n)). En conséquence, tout pouvoir que ces lois confèrent à l'organisme de réglementation à l'encontre d'un titulaire de permis peut, en théorie, s'exercer également contre un syndic.

[22] Malgré cela, le régime de réglementation de l'Alberta envisage la possibilité qu'une partie des obligations de fin de vie d'un titulaire de permis demeure insatisfaite à la fin du processus d'insolvabilité. L'organisme de réglementation peut désigner des puits, des installations et leurs sites comme [TRADUCTION] « orphelins » (*OGCA*, al. 70(2)(a)). Un pipeline est défini comme une « installation » pour l'application du régime relatif aux orphelins (*OGCA*, al. 68(d)). La Directive 006 disposait qu'un [TRADUCTION] « puits, une installation ou un pipeline visé par le Programme d'évaluation de la responsabilité du titulaire de permis peut être déclaré orphelin lorsque le titulaire de ce permis devient insolvable ou est liquidé » (art. 7.1). Un « fonds pour les puits orphelins » a été créé dans le but de payer, entre autres choses, l'abandon et la remise en état des puits orphelins (*OGCA*, par. 70(1)). Le fonds pour les puits orphelins est financé au moyen d'une redevance annuelle, à l'échelle de l'industrie, payée par les titulaires de permis de puits et d'installations ainsi que de sites non remis en état (par. 73(1)). Le montant de la redevance est prescrit par l'organisme de réglementation en fonction du coût estimatif de l'abandon et de la remise en état des puits orphelins au cours d'un exercice donné (par. 73(2)).

[23] L'organisme de réglementation a délégué le pouvoir que lui confère la loi d'abandonner et de remettre en état les puits orphelins à l'OWA (*Orphan*

Alta. Reg. 45/2001), a non-profit organization overseen by an independent board of directors. It is funded almost entirely through the industry-wide levy described above, 100 percent of which is remitted to it by the Regulator. The OWA has no power to seek reimbursement of its costs. However, once it has completed its environmental work, it may be reimbursed up to the value of any security deposit held by the Regulator to the credit of the licensee of the orphans. In recent years, the number of orphans in Alberta has increased rapidly. For example, the number of new orphan wells increased from 80 in the 2013-14 years to 591 in the 2014-15 years.

Fund Delegated Administration Regulation, Alta. Reg. 45/2001), un organisme sans but lucratif supervisé par un conseil d'administration indépendant. Cette entité est presque entièrement financée par la redevance décrite ci-dessus qui a été établie dans toute l'industrie, et la totalité de cette redevance est remise à l'OWA par l'organisme de réglementation. L'OWA n'a pas le pouvoir de demander le remboursement de ses frais. Toutefois, une fois ses travaux environnementaux terminés, l'OWA peut être remboursée jusqu'à concurrence de la valeur du dépôt de garantie détenu, le cas échéant, par l'organisme de réglementation au profit du titulaire de permis associé au puits orphelin. Au cours des dernières années, le nombre de puits orphelins a augmenté rapidement en Alberta. Par exemple, le nombre de nouveaux puits orphelins est passé de 80 en 2013-2014 à 591 en 2014-2015.

[24] At issue in this appeal is the applicability during bankruptcy of two powers conferred on the Regulator by the provincial legislation. Both are designed to ensure that licensees satisfy their end-of-life obligations.

[24] Ce qui est en cause dans le présent pourvoi, c'est l'applicabilité, durant la faillite, de deux pouvoirs conférés à l'organisme de réglementation par la législation provinciale. Les deux sont conçus pour garantir que les titulaires de permis remplissent les obligations de fin de vie qui leur incombent.

[25] The first power at issue in this appeal is the Regulator's power to order a licensee to abandon licensed assets, which is accompanied by statutory powers for the enforcement of such orders. Where a well or facility has not been abandoned in accordance with a direction of the Regulator or the rules or regulations, the Regulator may authorize any person to abandon the well or facility or may do so itself (*OGCA*, s. 28). Where the Regulator or the person it has designated performs the abandonment, the costs of doing so constitute a debt payable to the Regulator. An order of the Regulator showing these costs may be filed with and entered as a judgment of the Alberta Court of Queen's Bench and then enforced according to the ordinary procedure for enforcement of judgments of that court (*OGCA*, s. 30(6)). A similar scheme applies with respect to pipelines (*Pipeline Act*, ss. 23 to 26).

[25] Le premier pouvoir en cause dans le présent pourvoi est celui dont dispose l'organisme de réglementation d'ordonner à un titulaire de permis d'abandonner des biens visés par des permis, auquel s'ajoutent les pouvoirs que la loi confère pour faire exécuter de telles ordonnances. Lorsqu'il y a eu délaissement d'un puits ou d'une installation sans que le processus d'abandon ait été effectué conformément aux directives de l'organisme de réglementation, ou aux règles et règlements, l'organisme peut autoriser toute personne à effectuer ce processus à l'égard du puits ou de l'installation, ou s'en charger lui-même (*OGCA*, art. 28). Quand l'organisme de réglementation ou la personne qu'il a désignée procède à l'abandon, les frais liés à cette opération constituent une dette payable à l'organisme de réglementation. Une ordonnance de l'organisme de réglementation indiquant ces frais peut être déposée à la Cour du Banc de la Reine de l'Alberta, inscrite comme un jugement de cette cour, puis exécutée conformément à la procédure ordinaire d'exécution des jugements de cette cour (*OGCA*, par. 30(6)). Un régime semblable s'applique aux pipelines (*Pipeline Act*, art. 23 à 26).

[26] A licensee that contravenes or fails to comply with an order of the Regulator, or that has an outstanding debt to the Regulator in respect of abandonment or reclamation costs, is subject to a number of potential enforcement measures. The Regulator may suspend operations, refuse to consider licence applications or licence transfer applications (*OGCA*, s. 106(3)(a), (b) and (c)), or require the payment of security deposits, generally or as a condition of granting any further licences, approvals or transfers (*OGCA*, s. 106(3)(d) and (e)). Where a licensee contravenes the Act, regulations or rules, any order or direction of the Regulator, or any condition of a licence, the Regulator may prosecute the licensee for a regulatory offence and a fine may be imposed as a penalty, although the licensee can raise a due diligence defence (*OGCA*, ss. 108 and 110). A similar scheme applies with respect to pipelines (*Pipeline Act*, ss. 51 to 54) and the *EPEA* contains similar debt-creating provisions with respect to environmental protection orders. The *EPEA* also provides for the prosecution of regulatory offences in cases of non-compliance, with an available due diligence defence. However, as noted, a trustee's liability in relation to environmental protection orders is capped at estate assets, unless the trustee is guilty of gross negligence or wilful misconduct (*EPEA*, ss. 227 to 230, 240 and 245).

[26] Le titulaire de permis qui contrevient ou ne se conforme pas à une ordonnance de l'organisme de réglementation, ou qui a une dette impayée envers ce dernier relativement aux frais d'abandon ou de remise en état, est assujetti à un certain nombre de mesures d'exécution potentielles. L'organisme de réglementation peut suspendre les activités, refuser d'étudier des demandes de permis ou de transfert de permis (*OGCA*, al. 106(3)(a), (b) et (c)), ou exiger le paiement des dépôts de garantie, de façon générale ou comme condition à l'octroi d'autres permis, approbations ou transferts (*OGCA*, al. 106(3)(d) et (e)). Lorsqu'un titulaire de permis contrevient à la Loi, aux règlements ou aux règles, à toute ordonnance ou directive de l'organisme de réglementation ou à toute condition d'un permis, l'organisme de réglementation peut intenter une poursuite contre le titulaire de permis pour infraction réglementaire, et ce dernier est passible d'une amende en guise de pénalité, bien qu'il puisse invoquer la défense de diligence raisonnable (*OGCA*, art. 108 et 110). Un régime semblable s'applique aux pipelines (*Pipeline Act*, art. 51 à 54). L'*EPEA* contient elle aussi des dispositions similaires relatives à la création de dettes et afférentes aux ordonnances de protection de l'environnement, en plus de prévoir la poursuite d'infractions réglementaires en cas d'inobservation, avec la possibilité d'invoquer une défense de diligence raisonnable. Toutefois, comme il a été mentionné, la responsabilité du syndic en ce qui concerne les ordonnances de protection de l'environnement se limite aux éléments de l'actif, sauf s'il est responsable de négligence flagrante ou d'inconduite délibérée (*EPEA*, art. 227 à 230, 240 et 245).

[27] The second power at issue in this appeal is the Regulator's power to impose conditions on a licensee's transfer of its licence(s). As when it initially grants a licence, the Regulator has broad powers to consent to the transfer of a licence subject to any conditions, restrictions and stipulations or to reject the transfer (*OGCA*, s. 24(2)). Under Directive 006 and its 2016 replacement, the Regulator can reject a transfer even where both parties would have the required LMR after the transfer or where a security deposit is available to be posted in compliance with LMR requirements. In particular, the Regulator may determine that it is not in the public interest to

[27] Le second pouvoir en cause dans le présent pourvoi est celui que possède l'organisme de réglementation d'imposer des conditions au transfert, par un titulaire, d'un ou de plusieurs de ses permis. Tout comme au moment où il octroie un permis au départ, l'organisme de réglementation jouit de vastes pouvoirs pour consentir au transfert d'un permis sous réserve de conditions, restrictions et stipulations, ou pour rejeter le transfert (*OGCA*, par. 24(2)). Suivant la Directive 006 et le texte qui l'a remplacée en 2016, l'organisme peut rejeter un transfert, même si les deux parties auraient la CGR requise après le transfert, ou même quand un dépôt de garantie

approve the licence transfer based on the compliance history of one or both parties or their directors, officers or security holders, or based on the risk posed by the transfer to the orphan fund.

[28] Where a proposed transaction would cause the transferor's LMR to deteriorate below 1.0 (or simply to deteriorate, in the case of an insolvent transferor), the Regulator insists that one of the following conditions be met before it will approve the transaction: (i) that the transferor perform abandonment, reclamation, or both, thus reducing its deemed liabilities, or (ii) that the transferor post a security deposit, thus increasing its deemed assets. Alternatively, the transaction may be structured to avoid any deterioration of the transferor's LMR by "bundling" the licences for spent wells with the licences for producing wells. A transaction in which the licenses for spent wells are retained while the licences for producing wells are transferred will almost always cause a considerable deterioration in a company's LMR.

[29] During this appeal, there was significant discussion of other regulatory regimes which Alberta *could* have adopted to prevent environmental costs associated with the oil and gas industry from being offloaded onto the public. What Alberta *has* chosen is a licensing regime which makes such costs an inherent part of the value of the licensed assets. This regime has the advantage of aligning with the polluter-pays principle, a well-recognized tenet of Canadian environmental law. This principle assigns polluters the responsibility for remedying environmental damage for which they are responsible, thereby incentivizing companies to pay attention to the environment in the course of their economic activities (*Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624, at para. 24). The Licensee Liability Rating Program essentially requires licensees to apply the value derived from oil and gas assets during the productive portions of the life cycle of

peut être versé conformément aux exigences relatives à la CGR. Plus particulièrement, l'organisme de réglementation peut décider qu'il n'est pas dans l'intérêt public d'approuver le transfert de permis compte tenu des antécédents de conformité de l'une des parties, ou des deux, ou de leurs administrateurs, dirigeants ou détenteurs de titres, ou encore du risque que présenterait le transfert à l'égard du fonds pour les puits orphelins.

[28] Lorsqu'une transaction proposée entraînerait une détérioration de la CGR du cédant en deçà de 1,0 (ou simplement une détérioration dans le cas d'un cédant insolvable), l'organisme de réglementation insiste sur le respect d'une des conditions suivantes avant d'approuver la transaction : (i) que le cédant effectue les processus d'abandon et/ou de remise en état, réduisant ainsi ses passifs réputés; (ii) que le cédant verse un dépôt de garantie, augmentant ainsi ses biens réputés. La transaction pourrait également être structurée de manière à éviter toute détérioration de la CGR du cédant par le « regroupement » des permis relatifs aux puits épuisés et de ceux liés aux puits productifs. Une transaction au cours de laquelle on conserve les permis des puits épuisés tandis que les permis des puits productifs sont transférés entraînerait presque toujours une détérioration considérable de la CGR d'une société.

[29] Au cours du présent pourvoi, il a été beaucoup question d'autres régimes de réglementation que l'Alberta aurait *pu* adopter pour éviter que les coûts environnementaux associés à l'industrie pétrolière et gazière ne soient passés au public. Ce que l'Alberta *a* choisi, c'est un régime de permis qui fait de ces coûts une partie inhérente de la valeur des biens visés par les permis. Ce régime a l'avantage de s'accorder avec le principe du pollueur-payeur, un précepte bien reconnu du droit canadien de l'environnement. Ce principe attribue aux pollueurs la charge de réparer les dommages environnementaux dont ils sont responsables, ce qui incite les sociétés à se soucier de l'environnement dans le cadre de leurs activités économiques (*Cie pétrolière Impériale ltée c. Québec (Ministre de l'Environnement)*, 2003 CSC 58, [2003] 2 R.C.S. 624, par. 24). Le Programme d'évaluation de la responsabilité des titulaires de permis exige essentiellement que les titulaires de permis

the assets to the inevitable cost of abandoning those assets and reclaiming their sites at the end of those life cycles.

[30] Ultimately, it is not the role of this Court to decide the best regulatory approach to the oil and gas industry. What is not in dispute is that, in adopting its current regulatory regime, Alberta has acted within its constitutional authority over property and civil rights in the province and over the "development, conservation and management of non-renewable natural resources . . . in the province" (*Constitution Act, 1867*, ss. 92(13) and 92A(1)(c)). Alberta has devised a complex regulatory apparatus to address important policy questions concerning when, by whom and in what manner the inevitable environmental costs associated with oil and gas extraction are to be paid. Its solution is a licensing regime that depresses the value of key industry assets to reflect environmental costs, backstopped by a levy on industry in the form of the orphan fund. Alberta intended that apparatus to continue to operate when an oil and gas company is subject to insolvency proceedings.

[31] However, the insolvency of an oil and gas company licensed to operate in Alberta also engages the *BIA*. The *BIA* is federal legislation that governs the administration of a bankrupt's estate and the orderly and equitable distribution of property among its creditors. It is validly enacted pursuant to Parliament's constitutional authority over bankruptcy and insolvency (*Constitution Act, 1867*, s. 91(21)). Just as Alberta's regulatory regime reflects its considered choice about how to address the important policy questions raised by the environmental risks of oil and gas extraction, the *BIA* reflects Parliament's considered choice about how to balance important policy objectives when a bankrupt's assets are, by definition, insufficient to meet all of its various obligations. To the extent that there is an operational conflict between the Alberta regulatory regime and the

appliquent la valeur dérivée des biens pétroliers et gaziers pendant les parties productives du cycle de vie des biens au coût inévitable de l'abandon de ces biens et de la remise en état de leurs sites à la fin de ce cycle de vie.

[30] En fin de compte, il ne revient pas à notre Cour de décider de la meilleure approche réglementaire pour l'industrie pétrolière et gazière. Ce qui n'est pas contesté, c'est qu'en adoptant son régime de réglementation actuel, l'Alberta a agi dans les limites de sa compétence constitutionnelle en matière de propriété et de droits civils dans la province ainsi que dans le domaine de l'« exploitation, [de la] conservation et [de la] gestion des ressources naturelles non renouvelables [. . .] de la province » (*Loi constitutionnelle de 1867*, par. 92(13) et al. 92A(1)c)). L'Alberta a mis au point un appareil réglementaire complexe pour régler d'importantes questions de politique concernant le moment où, par qui et de quelle manière les coûts environnementaux inévitables associés à l'extraction du pétrole et du gaz doivent être payés. Sa solution est un régime d'octroi de permis qui fait baisser la valeur des principaux éléments d'actif de l'industrie pour refléter les coûts environnementaux, lequel est soutenu par une redevance sur l'industrie sous forme de fonds pour les puits orphelins. L'Alberta voulait que cet appareil continue à fonctionner lorsqu'une société pétrolière et gazière fait l'objet d'une procédure d'insolvabilité.

[31] Par contre, l'insolvabilité d'une société pétrolière et gazière autorisée à exercer ses activités en Alberta met aussi en jeu la *LFI*, une loi fédérale qui régit l'administration de l'actif d'un failli ainsi que la répartition ordonnée et équitable des biens entre ses créanciers. Elle a été valablement promulguée dans l'exercice de la compétence constitutionnelle du Parlement en matière de banqueroute et de faillite (*Loi constitutionnelle de 1867*, par. 91(21)). Tout comme le régime de réglementation de l'Alberta témoigne de son choix réfléchi quant à la façon d'aborder les questions de politique importantes soulevées par les risques environnementaux liés à l'extraction du pétrole et du gaz, la *LFI* témoigne du choix réfléchi du Parlement concernant la manière d'équilibrer des objectifs de politique importants lorsque les biens d'un failli sont, de par leur nature, insuffisants

BIA, or that the Alberta regulatory regime frustrates the purpose of the *BIA*, the doctrine of paramountcy dictates that the *BIA* must prevail.

B. *The Relevant Provisions of the BIA*

[32] Here, I simply wish to note the sections of the *BIA* at issue in this appeal. These sections will determine whether the doctrine of paramountcy applies. I will discuss the purposes of the *BIA* and the various issues raised by s. 14.06 in greater detail below.

[33] The central concept of the *BIA* is that of a "claim provable in bankruptcy". Several provisions of the *BIA* form the basis for delineating the scope of provable claims. The first is the definition provided in s. 2:

claim provable in bankruptcy, ***provable claim*** or ***claim provable*** includes any claim or liability provable in proceedings under this Act by a creditor . . .

[34] "Creditor" is defined in s. 2 as "a person having a claim provable as a claim under this Act".

[35] The definition of "claim provable" is completed by 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 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.

[36] A claim may be provable in a bankruptcy proceeding even if it is a contingent claim. A "contingent claim is 'a claim which may or may not ever ripen into a debt, according as some future event does or does not happen'" (*Peters v. Remington*, 2004 ABCA

pour satisfaire à toutes ses obligations diverses. Et, pour autant qu'il y ait un conflit d'application entre le régime de réglementation de l'Alberta et la *LFI*, ou que le régime de réglementation de l'Alberta entrave la réalisation de l'objet de la *LFI*, la doctrine de la prépondérance commande que la *LFI* l'emporte.

B. *Les dispositions applicables de la Loi sur la faillite et l'insolvabilité*

[32] À ce stade-ci, je tiens simplement à souligner les articles de la *LFI* qui sont en cause dans le présent pourvoi. Ce sont ces articles qui détermineront si la doctrine de la prépondérance s'applique. J'analyserai plus en détail ci-après les objets de la *LFI* ainsi que les différentes questions soulevées par l'art. 14.06.

[33] Le concept central de la *LFI* est celui d'une « réclamation prouvable en matière de faillite ». Plusieurs dispositions de la *LFI* servent de fondement pour circonscrire la portée des réclamations prouvables. La première est la définition que l'on trouve à l'art. 2 :

réclamation prouvable en matière de faillite *ou* ***réclamation prouvable*** *Toute réclamation ou créance pouvant être prouvée dans des procédures intentées sous l'autorité* de *la présente loi par un créancier.*

[34] Le terme « créancier » est défini à l'art. 2 comme une « [p]ersonne titulaire d'une réclamation prouvable à ce titre sous le régime de la présente loi ».

[35] La définition de « réclamation prouvable » se termine au par. 121(1) :

Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date à laquelle il devient failli, ou auxquels il peut devenir assujetti avant sa libération, en raison d'une obligation contractée antérieurement à cette date, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

[36] Une réclamation peut être prouvable dans une procédure de faillite même s'il s'agit d'une réclamation éventuelle. Une [TRADUCTION] « réclamation éventuelle est "une réclamation qui peut ou non se transformer en une créance, selon qu'un événement

5, 49 C.B.R. (4th) 273, at para. 23, quoting *Garner v. Newton* (1916), 29 D.L.R. 276 (Man. K.B.), at p. 281). Sections 121(2) and 135(1.1) provide guidance on when a contingent claim will be a provable claim:

121 (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

. . .

135 (1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

[37] In *Newfoundland and Labrador v. Abitibi-Bowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443 ("*Abitibi*"), at para. 26, this Court interpreted the foregoing provisions of the *BIA* and articulated a three-part test for determining when an environmental obligation imposed by a regulator will be a provable claim for the purposes of the *BIA* and the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"):

First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. [Emphasis in original.]

[38] I will address the *Abitibi* test in greater detail below.

[39] Once bankruptcy has been declared, creditors of the bankrupt must participate in one collective bankruptcy proceeding if they wish to enforce their provable claims. Section 69.3(1) of the *BIA* thus provides for an automatic stay of enforcement of provable claims outside the bankruptcy proceeding, effective as of the first day of bankruptcy.

futur se produit ou non" » (*Peters c. Remington*, 2004 ABCA 5, 49 B.C.R. (4th) 273, par. 23, citant *Garner c. Newton* (1916), 29 D.L.R. 276, (B.R. Man.), p. 281. Les paragraphes 121(2) et 135(1.1) donnent des indications sur le moment où une réclamation éventuelle deviendra une réclamation prouvable :

121 (2) La question de savoir si une réclamation éventuelle ou non liquidée constitue une réclamation prouvable et, le cas échéant, son évaluation sont décidées en application de l'article 135.

. . .

135 (1.1) Le syndic décide si une réclamation éventuelle ou non liquidée est une réclamation prouvable et, le cas échéant, il l'évalue; sous réserve des autres dispositions du présent article, la réclamation est dès lors réputée prouvée pour le montant de l'évaluation.

[37] Dans l'arrêt *Terre-Neuve-et-Labrador c. AbitibiBowater Inc.*, 2012 CSC 67, [2012] 3 R.C.S. 443 (« *Abitibi* »), par. 26, notre Cour a interprété les dispositions précédentes de la *LFI* et a formulé un critère tripartite afin de décider quand une obligation environnementale imposée par un organisme de réglementation sera une réclamation prouvable pour l'application de la *LFI* et de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, c. C-36 (« *LACC* ») :

Premièrement, on doit être en présence d'une dette, d'un engagement ou d'une obligation envers un *créancier*. Deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance *avant que le débiteur ne devienne failli*. Troisièmement, il doit être possible d'attribuer une *valeur pécuniaire* à cette dette, cet engagement ou cette obligation. [En italique dans l'original.]

[38] J'aborderai le critère de l'arrêt *Abitibi* plus en détail ci-dessous.

[39] Une fois la faillite déclarée, les créanciers du failli doivent participer à l'unique procédure collective de faillite s'ils souhaitent faire valoir leurs réclamations prouvables. Le paragraphe 69.3(1) de la *LFI* prévoit donc une suspension automatique de l'exécution des réclamations prouvables en dehors de la procédure de faillite, à compter du premier jour de la faillite.

[40] The *BIA* establishes a comprehensive priority scheme for the satisfaction of the provable claims asserted against the bankrupt in the collective proceeding. Section 141 sets out the general rule, which is that all creditors rank equally and share rateably in the bankrupt's assets. However, the rule set out in s. 141 applies "[s]ubject to [the *BIA*]". Section 136(1) lists the claims of preferred creditors and the order of priority for their payment. It also states that this order of priority is "[s]ubject to the rights of secured creditors". Under s. 69.3(2), the stay of proceedings does not prevent secured creditors from realizing their security interest. The *BIA* therefore sets out a priority scheme for paying claims provable in bankruptcy, with secured creditors being paid first, preferred creditors second and unsecured creditors last (see *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at paras. 32-35).

[41] Essential to this appeal is s. 14.06 of the *BIA*, which deals with various environmental matters in the bankruptcy context. I will now reproduce s. 14.06(2) and s. 14.06(4), the two portions of the s. 14.06 scheme that are directly implicated in this appeal. The balance of s. 14.06 can be found in the appendix at the conclusion of these reasons.

[42] Section 14.06(2) reads as follows:

(2) Notwithstanding anything in any federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

(a) before the trustee's appointment; or

(b) after the trustee's appointment unless it is established that the condition arose or the damage occurred as a result of the trustee's gross negligence or wilful misconduct or, in the Province of Quebec, the trustee's gross or intentional fault.

[40] La *LFI* établit un régime de priorité complet pour l'acquittement des réclamations prouvables présentées contre le failli dans la procédure collective. L'article 141 énonce la règle générale, à savoir que tous les créanciers ont un rang égal et une part proportionnelle des biens du failli. Toutefois, la règle énoncée à l'art. 141 s'applique « [s]ous réserve des autres dispositions de [la *LFI*] ». Le paragraphe 136(1) énumère les réclamations des « créanciers privilégiés » et fixe l'ordre de priorité dans lequel ils doivent recevoir leur paiement. Cet ordre établi par le par. 136(1) l'est « [s]ous réserve des droits des créanciers garantis ». Selon le par. 69.3(2), la suspension des procédures n'empêche pas les créanciers garantis de réaliser leur garantie. La *LFI* instaure donc un régime de priorité pour le versement des réclamations prouvables en matière de faillite, les créanciers garantis étant payés en premier, les créanciers privilégiés en deuxième et les créanciers non garantis en dernier (voir *Alberta (Procureur général) c. Moloney*, 2015 CSC 51, [2015] 3 R.C.S. 327, par. 32-35).

[41] L'article 14.06 de la *LFI*, qui traite de diverses questions environnementales dans le contexte de la faillite, est essentiel pour statuer sur le présent pourvoi. Je vais maintenant reproduire les par. 14.06(2) et 14.06(4), les deux parties du régime prévu à l'art. 14.06 qui sont directement en cause dans le présent pourvoi. Le reste de l'art. 14.06 se trouve en annexe à la fin des présents motifs.

[42] Voici le texte du par. 14.06(2) :

(2) Par dérogation au droit fédéral et provincial, le syndic est, ès qualités, dégagé de toute responsabilité personnelle découlant de tout fait ou dommage lié à l'environnement survenu avant ou après sa nomination, sauf celui causé par sa négligence grave ou son inconduite délibérée ou, dans la province de Québec, par sa faute lourde ou intentionnelle.

[43] Section 14.06(4) reads as follows:

(4) Notwithstanding anything in any federal or provincial law but subject to subsection (2), where an order is made which has the effect of requiring a trustee to remedy any environmental condition or environmental damage affecting property involved in a bankruptcy, proposal or receivership, the trustee is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, or during the period of the stay referred to in paragraph (b), the trustee

(i) complies with the order, or

(ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property, or any right in any immovable, affected by the condition or damage;

(b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a), within ten days after the order is made or within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, by

(i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the trustee to contest the order, or

(ii) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(c) if the trustee had, before the order was made, abandoned or renounced or been divested of any interest in any real property, or any right in any immovable, affected by the condition or damage.

[44] As I will discuss, a main point of contention between the parties is the very different interpretations they ascribe to s. 14.06(4) of the *BIA*. I note that s. 14.06(4)(a)(ii), which is relied upon by GTL, refers to a trustee who "abandons, disposes of or otherwise releases any interest in any real property".

[43] Voici le texte du par. 14.06(4) :

(4) Par dérogation au droit fédéral et provincial, mais sous réserve du paragraphe (2), le syndic est, ès qualités, dégagé de toute responsabilité personnelle découlant du non-respect de toute ordonnance de réparation de tout fait ou dommage lié à l'environnement et touchant un bien visé par une faillite, une proposition ou une mise sous séquestre administrée par un séquestre, et de toute responsabilité personnelle relativement aux frais engagés par toute personne exécutant l'ordonnance :

a) si, dans les dix jours suivant l'ordonnance ou dans le délai fixé par celle-ci, dans les dix jours suivant sa nomination si l'ordonnance est alors en vigueur ou pendant la durée de la suspension visée à l'alinéa b) :

(i) il s'y conforme,

(ii) il abandonne, après avis à la personne ayant rendu l'ordonnance, tout droit sur l'immeuble en cause ou tout intérêt sur le bien réel en cause, en dispose ou s'en dessaisit;

b) pendant la durée de la suspension de l'ordonnance qui est accordée, sur demande présentée dans les dix jours suivant l'ordonnance visée à l'alinéa a) ou dans le délai fixé par celle-ci, ou dans les dix jours suivant sa nomination si l'ordonnance est alors en vigueur :

(i) soit par le tribunal ou l'autorité qui a compétence relativement à l'ordonnance, en vue de permettre au syndic de la contester,

(ii) soit par le tribunal qui a compétence en matière de faillite, en vue d'évaluer les conséquences économiques du respect de l'ordonnance;

c) si, avant que l'ordonnance ne soit rendue, il avait abandonné tout droit sur l'immeuble en cause ou tout intérêt sur le bien réel en cause ou y avait renoncé, ou s'en était dessaisi.

[44] Comme je l'expliquerai, un point de discorde important entre les parties tient aux interprétations fort différentes qu'elles donnent au par. 14.06(4) de la *LFI*. Je remarque que le sous-al. 14.06(4)a)(ii), sur lequel s'appuie GTL, parle du syndic qui « abandonne [. . .] tout intérêt sur le bien réel en cause, en dispose

The word "disclaim" is used in these reasons, as it has been throughout this litigation, as a shorthand for these terms.

[45] I turn now to a brief discussion of the events of the Redwater bankruptcy.

C. *The Events of the Redwater Bankruptcy*

[46] Redwater was a publicly traded oil and gas company. It was first granted licences by the Regulator in 2009. On January 31 and August 19, 2013, ATB advanced funds to Redwater and, in return, was granted a security interest in Redwater's present and after-acquired property. ATB lent funds to Redwater with full knowledge of the end-of-life obligations associated with its assets. In mid-2014, Redwater began to experience financial difficulties. Upon application by ATB, GTL was appointed receiver for Redwater on May 12, 2015. At that time, Redwater owed ATB approximately $5.1 million.

[47] Upon being advised of the receivership, the Regulator sent GTL a letter dated May 14, 2015, setting out its position. The Regulator noted that the *OGCA* and the *Pipeline Act* included both receivers and trustees in the definition of "licensee". The Regulator stated that it was not a creditor of Redwater and that it was not asserting a "provable claim in the receivership". Accordingly, notwithstanding the receivership, Redwater remained obligated to comply with all regulatory requirements, including abandonment obligations for all licensed assets. The Regulator stated that GTL was legally obligated to fulfill these obligations prior to distributing any funds or finalizing any proposal to creditors. It warned that it would not approve the transfer of any of Redwater's licences unless it was satisfied that both the transferee and the transferor would be in a position to fulfill all regulatory obligations. It requested confirmation that GTL had taken possession of Redwater's licensed properties and that it was taking steps to comply with all of Redwater's regulatory obligations.

ou s'en dessaisit ». Dans les présents motifs, le mot « renoncer » sert à raccourcir ces termes, comme cela a été le cas tout au long du litige qui nous occupe.

[45] Je vais maintenant procéder à une brève analyse des faits entourant la faillite de Redwater.

C. *Les faits entourant la faillite de Redwater*

[46] Redwater était une société pétrolière et gazière cotée en bourse. L'organisme de réglementation lui a octroyé ses premiers permis en 2009. Le 31 janvier et le 19 août 2013, ATB a avancé des fonds à Redwater et, en contrepartie, s'est vu accorder une sûreté sur les biens actuels et futurs de Redwater. ATB a prêté des fonds à Redwater en pleine connaissance des obligations de fin de vie associées à ses biens. Au milieu de 2014, Redwater a commencé à éprouver des difficultés financières. Sur demande d'ATB, GTL a été nommé séquestre de Redwater le 12 mai 2015. À cette époque, Redwater devait environ 5,1 millions de dollars à ATB.

[47] Après avoir été informé de la mise sous séquestre, l'organisme de réglementation a envoyé à GTL une lettre datée du 14 mai 2015 exposant sa position. L'organisme de réglementation a fait remarquer que l'*OGCA* et la *Pipeline Act* incluaient à la fois les séquestres et les syndics dans la définition d'un « titulaire de permis ». L'organisme de réglementation a déclaré qu'il n'était pas un créancier de Redwater et qu'il ne faisait pas valoir une [TRADUCTION] « réclamation prouvable dans le cadre de la mise sous séquestre ». Ainsi, malgré la mise sous séquestre, Redwater demeurait tenue de se conformer à toutes les exigences réglementaires, y compris les obligations d'abandon, pour tous les biens visés par des permis. L'organisme de réglementation a déclaré que GTL était légalement tenu de remplir ces obligations avant de distribuer des fonds ou de finaliser toute proposition aux créanciers. L'organisme de réglementation a averti qu'il n'approuverait pas le transfert de l'un ou l'autre permis de Redwater à moins d'être convaincu que le cessionnaire et le cédant seraient en mesure de s'acquitter de toutes les obligations réglementaires. Il a demandé la confirmation que GTL avait pris possession des biens de Redwater visés par des permis et qu'il prenait des mesures pour se conformer à toutes les obligations réglementaires de Redwater.

[48] At the time it ran into financial difficulties, Redwater was licensed by the Regulator for 84 wells, 7 facilities and 36 pipelines, all in central Alberta. The vast majority of its assets were these oil and gas assets. At the time GTL was appointed receiver, 19 of the wells and facilities were producing and the remaining 72 were inactive or spent. There were working interest participants in several of the wells and facilities. Redwater's LMR did not drop below 1.0 until after it went into receivership, so it never paid any security deposits to the Regulator.

[49] By September 2015, Redwater's LMR had dropped to 0.93. The net value of its deemed assets and its deemed liabilities was negative $553,000. The 19 producing wells and facilities for which Redwater was the licensee would have had an LMR of 2.85 and a deemed net value of $4.152 million. The remaining 72 wells and facilities for which Redwater was the licensee would have had an LMR of 0.30 and a deemed net value of negative $4.705 million. Given that Redwater was in receivership, the Regulator's position was that it would approve the transfer of Redwater's licences only if the transfer did not cause a deterioration in its LMR.

[50] In its Second Report to the Alberta Court of Queen's Bench dated October 3, 2015, GTL explained why it had concluded that it could not meet the Regulator's requirements. GTL had concluded that the cost of the end-of-life obligations for the spent wells would likely exceed the sale proceeds for the productive wells. It viewed a sale of the non-producing wells — even if bundled with producing wells — as unlikely. If such a sale were possible, the purchase price would be reduced by the end-of-life obligations, negating the benefit to the estate. Based on this assessment, by letter dated July 3, 2015, GTL informed the Regulator that it was taking possession and control only of Redwater's 17 most productive wells (including a leaking well that was subsequently abandoned), 3 associated facilities and 12 associated

[48] À l'époque où elle a connu des difficultés financières, Redwater avait des permis délivrés par l'organisme de réglementation concernant 84 puits, 7 installations et 36 pipelines, tous situés dans le centre de l'Alberta. La grande majorité de ses éléments d'actif étaient ces biens pétroliers et gaziers. Au moment de la nomination de GTL comme séquestre, 19 des puits ou installations étaient productifs, tandis que les 72 autres étaient inactifs ou taris. Il y avait des participants en participation directe dans plusieurs puits et installations. La CGR de Redwater n'est tombée en dessous de 1,0 qu'après la mise sous séquestre de celle-ci et, en conséquence, Redwater n'a jamais versé de dépôt de garantie à l'organisme de réglementation.

[49] En septembre 2015, la CGR de Redwater avait chuté à 0,93. La valeur nette de ses biens réputés moins ses passifs réputés était égale à un montant négatif de 553 000 $. Les 19 puits et installations productifs pour lesquels Redwater était titulaire de permis avaient une CRG de 2,85 et une valeur nette réputée de 4,152 millions de dollars. Les 72 autres puits ou installations pour lesquels Redwater était titulaire de permis auraient eu une CGR de 0,30 et une valeur nette réputée négative de 4,705 millions de dollars. Puisque Redwater était sous séquestre, l'organisme de réglementation a mentionné qu'il n'approuverait le transfert des permis de Redwater que si cela n'occasionnait pas une détérioration de sa CGR.

[50] Dans son Deuxième rapport à la Cour du Banc de la Reine de l'Alberta daté du 3 octobre 2015, GTL a expliqué pourquoi il avait conclu qu'il ne pouvait pas satisfaire aux exigences de l'organisme de réglementation. D'après GTL, le coût des obligations de fin de vie des puits taris dépasserait probablement le produit de la vente des puits productifs. Il considérait comme improbable la vente des puits inexploités, même s'ils étaient regroupés avec les puits productifs. Si une telle vente était possible, le prix d'achat serait réduit au regard des obligations de fin de vie, annulant ainsi le bénéfice pour l'actif. Sur la base de cette évaluation, par lettre datée du 3 juillet 2015, GTL a informé l'organisme de réglementation qu'il prenait possession et contrôle seulement des 17 puits les plus productifs de Redwater (y compris un puits

pipelines ("Retained Assets"), and that, pursuant to para. 3(a) of the Receivership Order, it was not taking possession or control of any of Redwater's other licensed assets ("Renounced Assets"). GTL's position was that it had no obligation to fulfill any regulatory requirements associated with the Renounced Assets.

[51] In response, on July 15, 2015, the Regulator issued orders under the *OGCA* and the *Pipeline Act* requiring Redwater to suspend and abandon the Renounced Assets ("Abandonment Orders"). The orders required abandonment to be carried out immediately where there were no other working interest participants and, by September 18, 2015, where there were other working interest participants. The Regulator stated that it considered the Renounced Assets an environmental and safety hazard and that s. 3.012(d) of the *Oil and Gas Conservation Rules* required a licensee to abandon wells or facilities so considered. In issuing the Abandonment Orders, the Regulator also relied on ss. 27 to 30 of the *OGCA* and ss. 23 to 26 of the *Pipeline Act*. If the Abandonment Orders were not complied with, the Regulator threatened to abandon the assets itself and to sanction Redwater through the use of s. 106 of the *OGCA*. The Regulator further stated that, once abandonment had taken place, the surface would need to be reclaimed and reclamation certificates obtained in accordance with s. 137 of the *EPEA*.

[52] On September 22, 2015, the Regulator and the OWA filed an application for a declaration that GTL's renunciation of the Renounced Assets was void, an order requiring GTL to comply with the Abandonment Orders, and an order requiring GTL to "fulfill the statutory obligations as licensee in relation to the abandonment, reclamation and remediation" of all of Redwater's licensed properties (A.R., vol. II, at p. 41). The Regulator did not seek to hold GTL

qui fuyait et qui a été abandonné par la suite), ainsi que de 3 installations et de 12 pipelines connexes (« biens conservés »), et qu'en vertu du par. 3a) de l'ordonnance de mise sous séquestre, il ne prenait pas possession ou contrôle de tous les autres éléments d'actif de Redwater visés par des permis (« biens faisant l'objet de la renonciation »). Selon GTL, il n'était aucunement tenu de satisfaire aux exigences réglementaires en lien avec les biens faisant l'objet de la renonciation.

[51] Le 15 juillet 2015, l'organisme de réglementation a réagi en rendant des ordonnances au titre de l'*OGCA* et de la *Pipeline Act* enjoignant à Redwater de suspendre l'exploitation des biens faisant l'objet de la renonciation et de les abandonner (« ordonnances d'abandon »). Les ordonnances exigeaient que l'abandon soit effectué sur-le-champ dans les cas où il n'y avait pas d'autres participants en participation directe, et, au plus tard le 18 septembre 2015, dans ceux où il y avait d'autres participants en participation directe. L'organisme de réglementation a déclaré qu'il considérait les biens faisant l'objet de la renonciation comme un danger pour l'environnement et la sécurité, et que l'al. 3.012(d) des *Oil and Gas Conservation Rules* obligeait le titulaire de permis à abandonner ces puits ou installations. Lorsqu'il a rendu les ordonnances d'abandon, l'organisme de réglementation s'est également fondé sur les art. 27 à 30 de l'*OGCA* et sur les art. 23 à 26 de la *Pipeline Act*. Si les ordonnances d'abandon n'étaient pas respectées, l'organisme de réglementation menaçait d'effectuer lui-même le processus d'abandon des biens et de sanctionner Redwater par l'application de l'art. 106 de l'*OGCA*. L'organisme a ajouté qu'une fois qu'il y avait eu abandon, la surface devait être remise en état et il fallait obtenir des certificats de remise en état conformément à l'art. 137 de l'*EPEA*.

[52] Le 22 septembre 2015, l'organisme de réglementation et l'OWA ont déposé une demande en vue d'obtenir un jugement déclaratoire portant que l'abandon par GTL des biens faisant l'objet de la renonciation était nul, une ordonnance obligeant GTL à se conformer aux ordonnances d'abandon, de même qu'une ordonnance enjoignant à GTL de [TRADUCTION] « remplir les obligations légales en tant que titulaire de permis concernant l'abandon,

liable for these obligations beyond the assets remaining in the Redwater estate. GTL brought a cross-application on October 5, 2015, seeking approval to pursue a sales process excluding the Renounced Assets. GTL sought a court order directing that the Regulator could not prevent the transfer of the licences associated with the Retained Assets on the basis of, *inter alia*, the LMR requirements, failure to comply with the Abandonment Orders, refusal to take possession of the Renounced Assets or any outstanding debts owed by Redwater to the Regulator. GTL did not seek to foreclose the possibility that the Regulator might have some other valid reason to reject a proposed transfer.

[53] A bankruptcy order was issued for Redwater on October 28, 2015, and GTL was appointed as trustee. GTL sent another letter to the Regulator on November 2, 2015, this time invoking s. 14.06(4)(a)(ii) of the *BIA* in relation to the Renounced Assets. The Abandonment Orders remain outstanding.

D. *Judicial History*

(1) Court of Queen's Bench of Alberta

[54] The chambers judge concluded that s. 14.06 of the *BIA* was designed to permit trustees to disclaim property where this was a rational economic decision in light of the environmental condition affecting the property. Personal liability of the trustee was not a condition precedent to the power to disclaim. The chambers judge accordingly found an operational conflict between s. 14.06 of the *BIA* and the definition of "licensee" in the *OGCA* and the *Pipeline Act*. Under s. 14.06 of the *BIA*, GTL could renounce assets and not be responsible for the associated environmental obligations. However, under the *OGCA* and the *Pipeline Act*, GTL could not renounce licensed assets because the definition of "licensee"

la remise en état et la décontamination » de tous les biens de Redwater visés par des permis (A.R., vol. II, p. 41). L'organisme de réglementation n'a pas cherché à tenir GTL responsable de ces obligations au-delà des éléments qui faisaient encore partie de l'actif de Redwater. Le 5 octobre 2015, GTL a présenté une demande reconventionnelle visant à obtenir l'autorisation de poursuivre un processus de vente excluant les biens faisant l'objet de la renonciation. GTL a demandé au tribunal de rendre une ordonnance interdisant à l'organisme de réglementation d'empêcher le transfert des permis associés aux biens conservés en raison, notamment, des exigences relatives à la CGR, du non-respect des ordonnances d'abandon, du refus de prendre possession des biens faisant l'objet de la renonciation ou des dettes en souffrance de Redwater envers l'organisme de réglementation. GTL n'a pas cherché à exclure la possibilité que l'organisme de réglementation ait un autre motif valable de rejeter un transfert proposé.

[53] Le 28 octobre 2015, une ordonnance de faillite a été rendue à l'égard de Redwater, et GTL a été nommé syndic. GTL a envoyé une autre lettre à l'organisme de réglementation le 2 novembre 2015, dans laquelle il invoquait cette fois le sous-al. 14.06(4)a)(ii) de la *LFI* à l'égard des biens faisant l'objet de la renonciation. Les ordonnances d'abandon sont toujours pendantes.

D. *Historique judiciaire*

(1) La Cour du Banc de la Reine de l'Alberta

[54] Le juge siégeant en cabinet a conclu que l'art. 14.06 de la *LFI* visait à permettre aux syndics de renoncer à un bien lorsqu'il s'agissait d'une décision économique rationnelle compte tenu du fait lié à l'environnement et touchant le bien. La responsabilité personnelle du syndic n'était pas une condition préalable au pouvoir de renonciation. Le juge siégeant en cabinet a donc conclu à un conflit d'application entre l'art. 14.06 de la *LFI* et la définition de « titulaire de permis » que l'on trouve dans l'*OGCA* et la *Pipeline Act*. En vertu de l'art. 14.06 de la *LFI*, GTL pouvait renoncer aux biens et ne pas être responsable des obligations environnementales qui y étaient associées. Cependant, aux termes de l'*OGCA*

included receivers and trustees, so GTL remained liable for environmental obligations.

[55] Applying the test from *Abitibi*, the chambers judge concluded that, although in a "technical sense" it was not sufficiently certain that the Regulator or the OWA would carry out the Abandonment Orders and assert a monetary claim to have its costs reimbursed, the situation met what was intended by the Court in *Abitibi* because the Abandonment Orders were "intrinsically financial" (para. 173). Forcing GTL, as a "licensee", to comply with the Abandonment Orders would therefore frustrate the *BIA*'s overall purpose of equitable distribution of the bankrupt's assets, as the Regulator's claim would be given a super priority to which it was not entitled, ahead of the claims of secured creditors. It would also frustrate the purpose of s. 14.06, by which Parliament had legislated as to environmental claims in bankruptcy and had specifically chosen not to give them a super priority. The conditions imposed by the Regulator on transfers of the licences for the Retained Assets further frustrated s. 14.06 by including the Renounced Assets in the calculation for determining the approval of a sale.

[56] The chambers judge approved the sale procedure proposed by GTL. He declared that the *OGCA* and the *Pipeline Act* were inoperative to the extent that they conflicted with the *BIA* by deeming GTL to be the "licensee" of the Renounced Assets; that GTL was entitled to disclaim the Renounced Assets pursuant to s. 14.06(4)(a)(ii) and (c), and was not subject to any obligations in relation to those assets; that the Abandonment Orders were inoperative to the extent that they required GTL to comply or to provide security deposits; and that Directive 006 was inoperative to the extent it conflicted with s. 14.06 of the *BIA*. Lastly, he declared that the Regulator, in exercising its discretion to approve a transfer of the

et de la *Pipeline Act*, GTL ne pouvait renoncer aux biens visés par des permis parce que la définition de « titulaire de permis » comprenait le séquestre et le syndic, si bien que GTL demeurait responsable des obligations environnementales.

[55] Appliquant le critère de l'arrêt *Abitibi*, le juge siégeant en cabinet a conclu que, bien qu'au [TRADUCTION] « sens technique », il n'était pas suffisamment certain que l'organisme de réglementation ou l'OWA exécuteraient les ordonnances d'abandon et feraient valoir une réclamation pécuniaire pour obtenir le remboursement de leurs frais, la situation répondait à l'intention de la Cour dans *Abitibi* car les ordonnances d'abandon étaient « intrinsèquement financières » (par. 173). Forcer GTL en tant que « titulaire de permis » à se conformer aux ordonnances d'abandon irait donc à l'encontre de l'objectif global de la *LFI* de partage équitable des biens du failli, puisque l'organisme de réglementation se verrait accorder, pour sa réclamation, une superpriorité à laquelle il n'avait pas droit, avant les réclamations des créanciers garantis. Cela entraverait aussi la réalisation de l'objet de l'art. 14.06, par lequel le Parlement a légiféré sur les réclamations environnementales en cas de faillite et a expressément fait le choix de ne pas leur accorder une superpriorité. Les conditions imposées par l'organisme de réglementation sur les transferts de permis relatifs aux biens conservés ont contrecarré davantage l'article 14.06 en incluant les biens faisant l'objet de la renonciation dans le calcul pour décider de l'approbation d'une vente.

[56] Le juge siégeant en cabinet a approuvé la procédure de vente proposée par GTL. Il a déclaré que l'*OGCA* et la *Pipeline Act* étaient inopérantes dans la mesure où elles entraient en conflit avec la *LFI*, en considérant GTL comme le « titulaire des permis » relatifs aux biens faisant l'objet de la renonciation, que GTL avait le droit de renoncer à ces biens au titre du sous-al. 14.06(4)a)(ii) et de l'al. 14.06(4)c), et qu'il n'était assujetti à aucune obligation à l'égard de ces biens, que les ordonnances d'abandon étaient inopérantes dans la mesure où elles obligeaient GTL à s'y conformer ou à fournir des dépôts de garantie et que la Directive 006 était inopérante dans la mesure où elle entrait en conflit avec l'art. 14.06 de la *LFI*.

licences for the Retained Assets, could not consider the Renounced Assets for the purpose of calculating Redwater's LMR before or after the transfer, nor could it consider any other issue involving the Renounced Assets.

(2) Court of Appeal of Alberta

(a) *Majority Reasons*

[57] Slatter J.A., for the majority, dismissed the appeals. He stated that the constitutional issues in the appeals were complementary to the primary issue, which was the interpretation of the *BIA*. Section 14.06 did not exempt environmental claims from the general bankruptcy regime, other than the super priority in s. 14.06(7), which would rarely, if ever, have any application to oil and gas wells. Section 14.06(4) did not "limit the power of the trustee to renounce . . . properties to those circumstances where it might be exposed to personal liability" (para. 68). Additionally, the word "order" in s. 14.06(4) had to be given a wide meaning.

[58] Slatter J.A. identified the essential issue as "whether the environmental obligations of Redwater meet the test for a provable claim" (para. 73). He agreed with the chambers judge that the third branch of the *Abitibi* test was met, but concluded that that test had been met "in both a technical and substantive way" (para. 76). The Regulator's policies essentially stripped away from the bankrupt estate enough value to meet environmental obligations. Requiring the depositing of security, or diverting value from the bankrupt estate, clearly met the standard of "certainty". The Regulator's policies required that the full value of the bankrupt's assets be applied first to environmental liabilities, creating a super priority for environmental claims. Slatter J.A. concluded that, "[n]otwithstanding their intended effect as conditions of licensing, the Regulator's policies [had] a direct effect on property, priorities, and the Trustee's right to renounce

Enfin, il a déclaré que l'organisme de réglementation, dans l'exercice de son pouvoir discrétionnaire d'approuver un transfert des permis relatifs aux biens conservés, ne pouvait pas tenir compte des biens faisant l'objet de la renonciation pour le calcul de la CGR de Redwater, avant ou après le transfert, ni tenir compte de toute autre question liée aux biens faisant l'objet de la renonciation.

(2) La Cour d'appel de l'Alberta

a) *Les motifs majoritaires*

[57] Le juge Slatter, au nom des juges majoritaires, a rejeté les appels. Il a déclaré que les questions constitutionnelles des appels étaient complémentaires à la question principale, l'interprétation de la *LFI*. L'article 14.06 n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue au par. 14.06(7), qui s'appliquerait rarement, voire jamais, aux puits de pétrole et de gaz. Le paragraphe 14.06(4) n'a pas [TRADUCTION] « limité le pouvoir du syndic de renoncer [. . .] aux biens dans des circonstances où il pourrait s'exposer à une responsabilité personnelle » (par. 68). En outre, il fallait donner un sens large au mot « ordonnance » qui figure au par. 14.06(4).

[58] Le juge Slatter a décidé que la question essentielle était de savoir [TRADUCTION] « si les obligations environnementales de Redwater satisf[aisaient] au critère de la réclamation prouvable » (par. 73). Il était d'accord avec le juge siégeant en cabinet quant au respect du troisième volet du critère d'*Abitibi*, mais il a conclu que ce critère avait été respecté « tant sur le plan technique que sur le fond » (par. 76). Les politiques de l'organisme de réglementation ont essentiellement privé l'actif du failli d'une valeur suffisante pour respecter les obligations environnementales. Exiger le dépôt d'une garantie, ou détourner la valeur de l'actif du failli, répond clairement à la norme de « certitude ». Les politiques de l'organisme de réglementation exigeaient que la pleine valeur des biens du failli soit d'abord appliquée aux engagements environnementaux, créant ainsi une superpriorité pour les réclamations environnementales. Le juge Slatter a estimé que, « [n]onobstant leur effet

assets, all of which [were] governed by the *BIA*" (para. 86).

[59] In terms of constitutional analysis, Slatter J.A. concluded that the role of GTL as a "licensee" under the *OGCA* and the *Pipeline Act* was "in operational conflict with the provisions of the *BIA*" that exempted trustees from personal liability, allowed them to disclaim assets and established the priority of environmental claims (para. 89). It also frustrated the *BIA*'s purpose of "managing the winding up of insolvent corporations and settling the priority of claims against them" (para. 89). As such, the Regulator could not "insist that the Trustee devote substantial parts of the bankrupt estate in satisfaction of the environmental claims in priority to the claims of the secured creditor" (para. 91).

(b) *Dissenting Reasons*

[60] Martin J.A. dissented. In contrast to the majority, she stressed the constitutional dimensions of the case, in particular the need for co-operative federalism in the area of the environment, and noted that the doctrine of paramountcy should be applied with restraint. She concluded that the Regulator was not asserting a provable claim within the meaning of the *Abitibi* test. It was not enough for a regulatory order to be "intrinsically financial" for it to be a claim provable in bankruptcy (para. 185, quoting the chambers judge's reasons, at para. 173). There was not sufficient certainty that the ordered abandonment work would be done, either by the Regulator or by the OWA, and there was "no certainty at all that a claim for reimbursement would be made" (para. 184). Martin J.A. was also of the view that the Regulator was not a creditor of Redwater — or, if it was a creditor in issuing the Abandonment Orders, it was at least not one in enforcing the conditions for the transfer of licences. The Regulator had to be able to maintain control over the transfer of licences during

prévu en tant que conditions associées aux permis, les politiques de l'organisme de réglementation ont eu un effet direct sur les biens, les priorités et le droit du Syndic de renoncer à des biens, qui étaient tous régis par la *LFI* » (par. 86).

[59] Sur le plan de l'analyse constitutionnelle, le juge Slatter a conclu que le rôle de GTL en tant que « titulaire de permis » au sens de l'*OGCA* et de la *Pipeline Act* était [TRADUCTION] « en conflit d'application avec les dispositions de la *LFI* » qui dégageaient les syndics de toute responsabilité personnelle, qui leur permettaient de renoncer à des biens et qui établissaient la priorité des réclamations environnementales (par. 89). Ce rôle entravait également la réalisation de l'objet de la *LFI* consistant à « gérer la liquidation des sociétés insolvables et à régler la priorité des réclamations à leur encontre » (par. 89). Ainsi, l'organisme de réglementation ne pouvait pas « insister pour que le syndic consacre une partie substantielle de l'actif du failli à l'acquittement des réclamations environnementales, par priorité sur les réclamations du créancier garanti » (par. 91).

b) *Les motifs dissidents*

[60] La juge Martin a exprimé sa dissidence. Contrairement aux juges majoritaires, elle a souligné les dimensions constitutionnelles de l'affaire, en particulier la nécessité d'un fédéralisme coopératif dans le domaine de l'environnement, et a fait remarquer que la doctrine de la prépondérance devait être appliquée avec retenue. Elle a conclu que l'organisme de réglementation ne faisait pas valoir de réclamation prouvable au sens du critère d'*Abitibi*. Il ne suffisait pas qu'une ordonnance réglementaire soit [TRADUCTION] « intrinsèquement financière » pour qu'il s'agisse d'une réclamation prouvable en matière de faillite (par. 185, citant les motifs du juge siégeant en cabinet, par. 173). Il n'était pas suffisamment certain que les travaux d'abandon ordonnés soient accomplis, soit par l'organisme de réglementation soit par l'OWA, et il n'y avait « aucune certitude qu'une demande de remboursement soit présentée » (par. 184). La juge Martin estimait elle aussi que l'organisme de réglementation n'était pas un créancier de Redwater — ou, s'il était un créancier au moment de rendre les ordonnances

a bankruptcy, and there was no reason why such regulatory requirements could not coexist with the distribution of the bankrupt's estate.

[61] With regard to s. 14.06, Martin J.A. accepted the Regulator's argument that s. 14.06(4) allowed a trustee to renounce real property in order to avoid personal liability but did not prevent the assets of the bankrupt estate from being used to comply with environmental obligations. However, she went beyond this. In her view, s. 14.06(4) to (8) were enacted together as a statutory compromise. Martin J.A. concluded that a trustee's power to disclaim assets under s. 14.06 simply had no applicability to Alberta's regulatory regime. The ability to renounce under s. 14.06(4) had to be read in conjunction with the other half of the compromise — the Crown's super priority over the debtor's real property established by s. 14.06(7). Licence conditions were not the sort of "order" contemplated by s. 14.06(4), nor were licences the kind of "real property" contemplated by that provision. The balance struck by s. 14.06 was not effective when there was no "real property of the debtor" in which the Crown could take a super priority (para. 210).

[62] As there was no entitlement under the *BIA* to renounce the end-of-life obligations imposed by Alberta's regulatory regime, there was no operational conflict in enforcing those obligations under provincial law. Nor was there any frustration of purpose. The Regulator was not asserting any claims provable in bankruptcy: "The continued application of [Alberta's] regulatory regime following bankruptcy did not determine or reorder priorities among creditors, but rather value[d] accurately the assets available for distribution" (para. 240).

d'abandon, il ne l'était pas dans l'application des conditions de transfert des permis. L'organisme de réglementation devait être en mesure de conserver la maîtrise du transfert des permis pendant une faillite, et il n'y avait aucune raison pour que de telles exigences réglementaires ne puissent pas coexister avec le partage de l'actif du failli.

[61] En ce qui concerne l'article 14.06, la juge Martin a retenu l'argument de l'organisme de réglementation selon lequel le par. 14.06(4) permettait à un syndic de renoncer aux biens réels afin d'éviter d'engager sa responsabilité personnelle, mais n'empêchait pas que l'on se serve des éléments de l'actif du failli pour se conformer aux obligations environnementales. Cependant, elle est allée plus loin. Selon elle, les par. 14.06(4) à (8) ont été adoptés ensemble à titre de compromis d'ordre législatif. La juge Martin a conclu que le pouvoir du syndic de renoncer aux biens en vertu de l'art. 14.06 n'était tout simplement pas applicable dans le régime de réglementation de l'Alberta. La faculté de renoncer en vertu du par. 14.06(4) devait être interprétée en corrélation avec l'autre moitié du compromis, la superpriorité de la Couronne sur les biens réels du débiteur établie par le par. 14.06(7). Les conditions relatives aux permis n'étaient pas le genre d'« ordonnance » envisagé par le par. 14.06(4), ni les permis le genre de « bien réel » envisagé par cette disposition. L'équilibre atteint par l'art. 14.06 n'était pas solide lorsqu'il n'y avait pas de [TRADUCTION] « bien réel du débiteur » à l'égard duquel la Couronne pouvait prendre une superpriorité (par. 210).

[62] Comme il n'y avait aucun droit, aux termes de la *LFI*, de renoncer aux obligations de fin de vie imposées par le régime de réglementation [de l'Alberta], aucun conflit d'application ne résultait de l'exécution de ces obligations sous le régime du droit provincial. Et il n'existait pas non plus d'entrave à la réalisation d'un objet fédéral. L'organisme de réglementation ne faisait valoir aucune réclamation prouvable en matière de faillite : [TRADUCTION] « L'application continue du régime de réglementation [de l'Alberta] après la faillite n'a pas fixé ou réarrangé les priorités parmi les créanciers, mais a plutôt donné lieu à une évaluation juste des biens pouvant être répartis » (par. 240).

III. Analysis

A. *The Doctrine of Paramountcy*

[63] As I have explained, Alberta legislation grants the Regulator wide-ranging powers to ensure that companies that have been granted licences to operate in the Alberta oil and gas industry will safely and properly abandon oil wells, facilities and pipelines at the end of their productive lives and will reclaim their sites. GTL seeks to avoid being subject to two of those powers: the power to order Redwater to abandon the Renounced Assets and the power to refuse to allow a transfer of the licences for the Retained Assets due to unmet LMR requirements. There is no doubt that these are valid regulatory powers granted to the Regulator by valid Alberta legislation. GTL seeks to avoid their application during bankruptcy by virtue of the doctrine of federal paramountcy, which dictates that the Alberta legislation empowering the Regulator to use the powers in dispute in this appeal will be inoperative to the extent that its use of these powers during bankruptcy conflicts with the *BIA*.

[64] The issues in this appeal arise from what has been termed the "untidy intersection" of provincial environmental legislation and federal insolvency legislation (*Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111, at para. 8). Paramountcy issues frequently arise in the insolvency context. Given the procedural nature of the *BIA*, the bankruptcy regime relies heavily on the continued operation of provincial laws. However, s. 72(1) of the *BIA* confirms that, where there is a genuine conflict between provincial laws concerning property and civil rights and federal bankruptcy legislation, the *BIA* prevails (see *Moloney*, at para. 40). In other words, bankruptcy is carved out from property and civil rights but remains conceptually part of it. Valid provincial legislation of general application continues to apply in bankruptcy until Parliament legislates pursuant to its exclusive jurisdiction in relation to bankruptcy and insolvency. At that point,

III. Analyse

A. *La doctrine de la prépondérance fédérale*

[63] Comme je l'ai expliqué, la législation albertaine accorde à l'organisme de réglementation des pouvoirs étendus pour s'assurer que les sociétés qui ont obtenu des permis d'exploitation dans l'industrie pétrolière et gazière de l'Alberta abandonneront, de façon appropriée et sécuritaire, les puits de pétrole, installations et pipelines à la fin de leur vie productive, et remettront en état leurs sites. GTL cherche à éviter d'être assujetti à deux de ces pouvoirs : celui d'ordonner à Redwater d'abandonner les biens faisant l'objet de la renonciation et celui de refuser de permettre le transfert des permis relatifs aux biens conservés à cause du non-respect des exigences relatives à la CGR. Il s'agit là sans aucun doute de pouvoirs réglementaires valables accordés à l'organisme de réglementation par une loi albertaine valide. GTL cherche à éviter leur application au cours de la faillite en invoquant la doctrine de la prépondérance fédérale, selon laquelle la loi de l'Alberta habilitant l'organisme de réglementation à utiliser les pouvoirs qui sont en litige dans le cadre du présent pourvoi est inopérante dans la mesure où son exercice de ces pouvoirs pendant la faillite entre en conflit avec la *LFI*.

[64] Les questions en litige dans le présent pourvoi découlent de ce qu'on a appelé [TRADUCTION] l'« intersection désordonnée » de la législation provinciale sur l'environnement et de la législation fédérale sur l'insolvabilité (*Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111, par. 8). Les questions de prépondérance se posent souvent dans le contexte de l'insolvabilité. Étant donné la nature procédurale de la *LFI*, le régime de faillite repose en grande partie sur l'application continue des lois provinciales. Toutefois, le par. 72(1) de la *LFI* confirme qu'en cas de conflit véritable entre les lois provinciales concernant la propriété et les droits civils et la législation fédérale sur la faillite, la *LFI* l'emporte (voir *Moloney*, par. 40). En d'autres termes, la faillite est issue de la propriété et des droits civils, mais elle en fait toujours partie conceptuellement. Les lois provinciales valides d'application générale continuent de s'appliquer dans le domaine de la faillite jusqu'à ce

the provincial law becomes inoperative to the extent of the conflict (see *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 3).

[65] Over time, two distinct forms of conflict have been recognized. The first is *operational conflict*, which arises where compliance with both a valid federal law and a valid provincial law is impossible. Operational conflict arises "where one enactment says 'yes' and the other says 'no', such that 'compliance with one is defiance of the other'" (*Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 18, quoting *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191). The second is *frustration of purpose*, which occurs where the operation of a valid provincial law is incompatible with a federal legislative purpose. The effect of a provincial law may frustrate the purpose of the federal law, even though it does "not entail a direct violation of the federal law's provisions" (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 73). The party relying on frustration of purpose "must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose" (*Lemare*, at para. 26, quoting *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536, at para. 66).

[66] Under both branches of paramountcy, the burden of proof rests on the party alleging the conflict. This burden is not an easy one to satisfy, as the doctrine of paramountcy is to be applied with restraint. Conflict must be defined narrowly so that each level of government may act as freely as possible within its respective sphere of constitutional authority. "[H]armonious interpretations of federal and provincial legislation should be favoured over an interpretation that results in incompatibility . . . [i]n the absence of 'very clear' statutory language to the contrary" (*Lemare*, at paras. 21 and 27). "It is presumed that Parliament intends its laws to co-exist with provincial laws" (*Moloney*, at para. 27). As this Court found in *Lemare*, at paras. 22-23, the application of the

que le Parlement légifère en vertu de sa compétence exclusive en matière de faillite et d'insolvabilité. La loi provinciale devient alors inopérante dans la mesure du conflit (voir *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, par. 3).

[65] Au fil du temps, deux formes distinctes de conflit ont été reconnues. La première est le *conflit d'application*, qui survient lorsqu'il est impossible de se conformer en même temps à une loi fédérale valide et à une loi provinciale valide. Il y a conflit d'application lorsqu'« une loi dit "oui" et l'autre dit "non", de sorte que "l'observance de l'une entraîne l'inobservance de l'autre" » (*Saskatchewan (Procureur général) c. Lemare Lake Logging Ltd.*, 2015 CSC 53, [2015] 3 R.C.S. 419, par. 18, citant *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161, p. 191). La seconde est l'*entrave à la réalisation d'un objet fédéral*, qui se produit lorsque l'application d'une loi provinciale valide est incompatible avec l'objet d'une loi fédérale. L'effet d'une loi provinciale peut contrecarrer la réalisation de l'objet de la loi fédérale, « sans toutefois entraîner une violation directe de ses dispositions » (*Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3, par. 73). La partie qui invoque l'entrave à la réalisation d'un objet fédéral « doit d'abord établir l'objet de la loi fédérale pertinente et ensuite prouver que la loi provinciale est incompatible avec cet objet » (*Lemare*, par. 26, citant *Québec (Procureur général) c. Canadian Owners and Pilots Association*, 2010 CSC 39, [2010] 2 R.C.S. 536, par. 66).

[66] Aux deux volets de la prépondérance, la charge de la preuve incombe à la partie qui allègue l'existence du conflit. Il n'est pas facile de s'en acquitter, puisque la doctrine de la prépondérance doit être appliquée avec retenue. Le conflit doit être défini de façon étroite pour que chaque ordre de gouvernement puisse agir aussi librement que possible dans sa sphère de compétence constitutionnelle respective. « [L]es tribunaux doivent donner aux lois provinciale et fédérale une interprétation harmonieuse plutôt qu'une interprétation qui donne lieu à une incompatibilité [. . .] [e]n l'absence d'un texte législatif "clair" à cet effet » (*Lemare*, par. 21 et 27). « On présume que le Parlement a l'intention de faire coexister ses lois avec les lois provinciales » (*Moloney*, par. 27).

doctrine of paramountcy should also give due weight to the principle of co-operative federalism. This principle allows for interplay and overlap between federal and provincial legislation. While co-operative federalism does not impose limits on the otherwise valid exercise of legislative power, it does mean that courts should avoid an expansive interpretation of the purpose of federal legislation which will bring it into conflict with provincial legislation.

[67] The case law has established that the *BIA* as a whole is intended to further "two purposes: the equitable distribution of the bankrupt's assets among his or her creditors and the bankrupt's financial rehabilitation" (*Moloney*, at para. 32, citing *Husky Oil*, at para. 7). Here, the bankrupt is a corporation that will never emerge from bankruptcy. Accordingly, only the former purpose is relevant. As I will discuss below, the chambers judge also spoke of the purposes of s. 14.06 as distinct from the broader purposes of the *BIA*. This Court has discussed the purpose of specific provisions of the *BIA* in previous cases — see, for example, *Lemare*, at para. 45.

[68] GTL has proposed two conflicts between the Alberta legislation establishing the disputed powers of the Regulator during bankruptcy and the *BIA*, either of which, it says, would have provided a sufficient basis for the order granted by the chambers judge.

[69] The first conflict proposed by GTL results from the inclusion of trustees in the definition of "licensee" in the *OGCA* and the *Pipeline Act*. GTL says that s. 14.06(4) releases it from all environmental liability associated with the Renounced Assets after a valid "disclaimer" is made. But as a "licensee", it can be required by the Regulator to satisfy all of Redwater's statutory obligations and liabilities, which disregards the "disclaimer" of the Renounced Assets. GTL further notes the possibility that it may be held personally liable as a "licensee". In response, the Regulator says that s. 14.06(4) is concerned primarily with protecting trustees from personal liability in relation to environmental orders, and does not affect the ongoing responsibilities of the bankrupt

Comme le conclut notre Cour aux par. 22 et 23 de l'arrêt *Lemare*, l'application de la doctrine de la prépondérance devrait également tenir dûment compte du principe du fédéralisme coopératif. Ce principe permet l'interaction ainsi que le chevauchement entre les lois fédérales et provinciales. Bien que le fédéralisme coopératif n'impose pas de limites à l'exercice par ailleurs valide du pouvoir législatif, cela signifie que les tribunaux devraient éviter de donner à l'objet de la loi fédérale une interprétation large qui le mettrait en conflit avec la loi provinciale.

[67] La jurisprudence a établi que la *LFI* dans son ensemble est censée favoriser l'atteinte de « deux objectifs : le partage équitable des biens du failli entre ses créanciers et la réhabilitation financière du failli » (*Moloney*, par. 32, citant *Husky Oil*, par. 7). En l'espèce, la faillie est une société qui ne s'extirpera jamais de la faillite. Donc, seul le premier objectif est pertinent. Comme je vais l'expliquer ci-dessous, le juge siégeant en cabinet a également affirmé que l'objet de l'art. 14.06 se distinguait des objets plus larges de la *LFI*. Notre Cour a analysé l'objet de certaines dispositions de la *LFI* dans des décisions antérieures (voir, par exemple, *Lemare*, par. 45).

[68] GTL a relevé deux conflits entre la législation albertaine établissant les pouvoirs contestés de l'organisme de réglementation pendant la faillite et la *LFI*, et l'un ou l'autre aurait constitué, selon lui, un fondement suffisant pour l'ordonnance rendue par le juge siégeant en cabinet.

[69] Le premier conflit avancé par GTL découle de l'ajout des syndics à la définition de « titulaire de permis » qui figure dans l'*OGCA* et la *Pipeline Act*. GTL affirme que le par. 14.06(4) le soustrait à tout engagement environnemental associé aux biens faisant l'objet d'une « renonciation » valide. Toutefois, comme il est « titulaire de permis », l'organisme de réglementation peut l'obliger à s'acquitter de toutes les obligations et de tous les engagements légaux de Redwater, faisant ainsi abstraction de la « renonciation » aux biens en cause. GTL souligne en outre la possibilité qu'il soit tenu personnellement responsable en tant que « titulaire de permis ». L'organisme de réglementation réplique que le par. 14.06(4) a pour objectif premier de mettre les syndics à l'abri de toute

estate. Thus, as long as a trustee is protected from personal liability, no conflict arises from its status as a "licensee" or from the fact that the bankrupt estate remains responsible under provincial law for the ongoing environmental obligations associated with "disclaimed" assets.

[70] The second conflict proposed by GTL is that, even if s. 14.06(4) is only concerned with a trustee's personal liability, the Regulator's use of its statutory powers effectively reorders the priorities in bankruptcy established by the *BIA*. Such reordering is said to be caused by the fact that the Regulator requires the expenditure of estate assets to comply with the Abandonment Orders and to discharge or secure the environmental liabilities associated with the Renounced Assets before it will approve a transfer of the licences for the Retained Assets (in keeping with the LMR requirements). These end-of-life obligations are said by GTL to be unsecured claims held by the Regulator, which cannot, under the *BIA*, be satisfied in preference over the claims of Redwater's secured creditors. In response, the Regulator says that, on the proper application of the *Abitibi* test, these environmental regulatory obligations are not provable claims in bankruptcy. Accordingly, says the Regulator, the provincial laws requiring the Redwater estate to satisfy these obligations prior to the distribution of its assets to secured creditors do not conflict with the priority scheme in the *BIA*.

[71] I will consider each alleged conflict in turn.

B. *Is There a Conflict Between the Alberta Regulatory Scheme and Section 14.06 of the BIA?*

[72] As a statutory scheme, s. 14.06 of the *BIA* raises numerous interpretive issues. As noted by Martin J.A., the only matter concerning s. 14.06 on

responsabilité personnelle à l'égard des ordonnances environnementales et que cette disposition n'a aucune incidence sur les responsabilités continues de l'actif du failli. Ainsi, tant qu'un syndic est à l'abri de toute responsabilité personnelle, son statut de « titulaire de permis » et le fait que l'actif d'un failli demeure responsable, aux termes du droit provincial, des obligations environnementales continues associées aux éléments le composant et faisant l'objet de la renonciation ne sont à l'origine d'aucun conflit.

[70] Le second conflit allégué par GTL est que, même si le par. 14.06(4) ne porte que la responsabilité personnelle d'un syndic, l'exercice par l'organisme de réglementation des pouvoirs que lui confère la loi réarrange de fait les priorités établies par la *LFI* en matière de faillite. Un tel réarrangement serait imputable au fait que l'organisme de réglementation exige la dépense d'éléments d'actif pour respecter les ordonnances d'abandon ainsi que pour libérer ou garantir les engagements environnementaux associés aux biens faisant l'objet de la renonciation avant d'approuver un transfert des permis liés aux biens conservés (conformément aux exigences relatives à la CGR). Ces obligations de fin de vie sont considérées par GTL comme étant une créance ordinaire de l'organisme de réglementation, que la *LFI* ne permet pas d'acquitter de préférence aux réclamations des créanciers garantis de Redwater. L'organisme de réglementation réplique que, si l'on applique correctement le critère d'*Abitibi*, ces obligations réglementaires environnementales ne sont pas des réclamations prouvables en matière de faillite. En conséquence, selon l'organisme de réglementation, les lois provinciales exigeant que l'actif de Redwater satisfasse à ces obligations avant le partage, entre les créanciers garantis, des éléments dont il est composé n'entre pas en conflit avec le régime de priorité de la *LFI*.

[71] J'examinerai chacun des conflits allégués, l'un après l'autre.

B. *Y a-t-il un conflit entre le régime de réglementation albertain et l'art. 14.06 de la LFI?*

[72] En tant que régime législatif, l'art. 14.06 de la *LFI* soulève de nombreuses questions d'interprétation. Comme l'a fait remarquer la juge Martin, le seul

which all the parties to this litigation can agree is that it "is not a model of clarity" (C.A. reasons, at para. 201). Given the confusion caused by attempts to interpret s. 14.06 as a coherent scheme during this litigation, Parliament may very well wish to re-examine s. 14.06 during its next review of the *BIA*.

[73] At its core, this appeal raises the issue of whether there is a conflict between specific Alberta legislation and the *BIA*. GTL submits that there is such a conflict. It argues that, because it "disclaimed" the Renounced Assets under s. 14.06(4) of the *BIA*, it should cease to have any responsibilities, obligations or liability with respect to them. And yet, it notes, as a "licensee" under the *OGCA* and the *Pipeline Act*, it remains responsible for abandoning the Renounced Assets. Furthermore, those assets continue to be included in the calculation of Redwater's LMR. GTL suggests an additional conflict with s. 14.06(2) of the *BIA* based on its possible exposure, as a "licensee", to personal liability for the costs of abandoning the Renounced Assets.

[74] I have concluded that there is no conflict. Various arguments were advanced during this appeal concerning the disparate elements of the s. 14.06 scheme. However, the provision upon which GTL in fact relies in arguing that it is entitled to avoid its responsibilities as a "licensee" under the Alberta legislation is s. 14.06(4). As I have noted, GTL and the Regulator propose very different interpretations of s. 14.06(4). However, s. 14.06(4) is clear and unambiguous when read on its own: where it is invoked by a trustee, the result is that "the trustee is not personally liable" for failure to comply with certain environmental orders or for the costs incurred by any person in carrying out the terms of such orders. The provision says nothing about the liability of the "bankrupt" or the "estate" — distinct concepts referenced many times throughout the *BIA*. Section 14.06(4), on its own wording, does not support the interpretation urged upon this Court by GTL.

point concernant l'art. 14.06 sur lequel toutes les parties au présent litige ont pu s'entendre est le fait que ce [TRADUCTION] « n'est pas un modèle de clarté » (motifs de la Cour d'appel, par. 201). Vu la confusion semée par les tentatives d'interpréter l'art. 14.06 comme un régime cohérent lors du présent litige, le Parlement pourrait fort bien vouloir réexaminer cet article durant sa prochaine étude de la *LFI*.

[73] Fondamentalement, le présent pourvoi porte sur la question de savoir s'il existe un conflit entre une loi albertaine en particulier et la *LFI*. GTL soutient que oui et affirme que, comme il a « renoncé » aux biens faisant l'objet de la renonciation en vertu du par. 14.06(4) de la *LFI*, il peut cesser d'assumer toute responsabilité ou obligation ou tout engagement à l'égard de ces biens. Pourtant, aux dires de GTL, en tant que « titulaire de permis », il reste chargé de les abandonner. De plus, ceux-ci sont toujours inclus dans le calcul de la CGR de Redwater. GTL prétend qu'il y a un autre conflit avec le par. 14.06(2) de la *LFI* du fait que sa responsabilité personnelle comme « titulaire de permis » peut être engagée relativement aux frais d'abandon des biens faisant l'objet de la renonciation.

[74] J'ai conclu à l'absence de conflit. Différents arguments ont été présentés lors du pourvoi au sujet des éléments disparates du régime instauré par l'art. 14.06. Cependant, la disposition qu'invoque en fait GTL pour affirmer avoir le droit d'échapper à ses responsabilités en tant que « titulaire de permis » en application de la législation albertaine est le par. 14.06(4). Rappelons que GTL et l'organisme de réglementation proposent des interprétations fort différentes du par. 14.06(4). Toutefois, à la simple lecture de ses termes, le par. 14.06(4) est clair et sans équivoque : lorsqu'il est invoqué par un syndic, « le syndic est dégagé de toute responsabilité personnelle » découlant du non-respect de certaines ordonnances environnementales ou relativement aux frais engagés par toute personne exécutant ces ordonnances. La disposition ne dit rien à propos de la responsabilité du « failli » ou de l'« actif », des notions distinctes mentionnées à maintes reprises dans la *LFI*. Le texte même du par. 14.06(4) n'étaye pas l'interprétation que GTL nous exhorte à retenir.

[75] In my view, s. 14.06(4) sets out the result of a trustee's "disclaimer" of real property when there is an order to remedy any environmental condition or damage affecting that property. Regardless of whether "disclaimer" is understood as a common law power or as a power deriving from some other statutory source, the result of a trustee's "disclaimer" of real property where an environmental order has been made in relation to that property is that the trustee is protected from personal liability, while the ongoing liability of the bankrupt estate is unaffected. The interpretation of s. 14.06(4) as being concerned with the personal liability of the trustee and not with the liability of the bankrupt estate is supported not only by the plain language of the section, but also by the Hansard evidence, a previous decision of this Court and the French version of the section. Furthermore, not only is the plain meaning of the words "personally liable" clear, but the same concept is also found in both s. 14.06(1.2) and s. 14.06(2), which specifically state that the trustee is not personally liable. In particular, in my view, it is impossible to coherently read s. 14.06(2) as referring to personal liability and yet read s. 14.06(4) as somehow referring to the liability of the bankrupt estate.

[76] Given that s. 14.06(4) dictates that "disclaimer" only protects trustees from personal liability, then, even assuming that GTL successfully "disclaimed" in this case, no operational conflict or frustration of purpose results from the fact that the Regulator requires GTL, as a "licensee", to expend estate assets on abandoning the Renounced Assets. Furthermore, no conflict is caused by continuing to include the Renounced Assets in the calculation of Redwater's LMR. Finally, given the restraint with which the doctrine of paramountcy must be applied, and given that the Regulator has not attempted to hold GTL personally liable as a "licensee" for the costs of abandonment, no conflict with s. 14.06(2) or s. 14.06(4) is caused by the mere theoretical possibility of personal liability under the *OGCA* or the *Pipeline Act*.

[75] À mon avis, le par. 14.06(4) expose le résultat d'une « renonciation » du syndic à un bien réel en cas d'ordonnance de réparation de tout fait ou dommage lié à l'environnement et touchant ce bien. Que l'on voit la « renonciation » comme un pouvoir reconnu par la common law ou un pouvoir découlant d'une quelconque autre source législative, la « renonciation » d'un syndic à des biens réels en réaction à une ordonnance environnementale visant ces biens dégage le syndic de toute responsabilité personnelle, alors que la responsabilité continue de l'actif du failli n'est pas touchée. L'idée que le par. 14.06(4) vise la responsabilité personnelle du syndic, et non celle de l'actif du failli, est étayée non seulement par le texte clair de l'article, mais également par les débats parlementaires, un arrêt de notre Cour et la version française de l'article. De plus, non seulement le sens ordinaire des mots « responsabilité personnelle » est-il clair, mais on retrouve également le même concept aux par. 14.06(1.2) et (2), lesquels disposent expressément que le syndic est dégagé de toute responsabilité personnelle. En particulier, il me paraît impossible d'interpréter de manière cohérente le par. 14.06(2) comme mentionnant la responsabilité personnelle tout en interprétant le par. 14.06(4) comme renvoyant d'une façon ou d'un autre à la responsabilité de l'actif du failli.

[76] Comme le par. 14.06(4) dispose que la « renonciation » dégage uniquement le syndic de toute responsabilité personnelle, à supposer même que GTL ait « renoncé » avec succès à des biens en l'espèce, l'organisme de réglementation ne cause aucun conflit d'application ni n'entrave la réalisation d'un objet fédéral en exigeant de GTL à titre de « titulaire de permis » qu'il se serve d'éléments de l'actif pour abandonner les biens faisant l'objet de la renonciation. En outre, il n'y a aucun conflit du fait que ces biens soient toujours inclus dans le calcul de la CGR de Redwater. Enfin, vu la retenue avec laquelle il faut appliquer la doctrine de la prépondérance, et vu que l'organisme de réglementation n'a pas tenté de tenir GTL personnellement responsable en tant que « titulaire de permis » des frais d'abandon, aucun conflit avec les par. 14.06(2) ou (4) n'est causé par la simple possibilité théorique de responsabilité personnelle en application de la *OGCA* ou de la *Pipeline Act*.

[77] In what follows, I will begin by interpreting s. 14.06(4) and explaining why, based on its plain wording and other relevant considerations, the provision is concerned solely with the personal liability of the trustee, and not with the liability of the bankrupt estate. I will then explain how, despite their superficial similarity, s. 14.06(4) and s. 14.06(2) have different rationales, and I will demonstrate that, on a proper understanding of the scheme crafted by Parliament, s. 14.06(4) does not affect the liability of the bankrupt estate. To conclude, I will demonstrate that there is no operational conflict or frustration of purpose between the Alberta legislation and s. 14.06 of the BIA in this case, with particular reference to the question of GTL's protection from personal liability.

(1) The Correct Interpretation of Section 14.06(4)

(a) *Section 14.06(4) Is Concerned With the Personal Liability of Trustees*

[78] I have concluded that s. 14.06(4) is concerned with the personal liability of trustees, and not with the liability of the bankrupt estate. I emphasize here the well-established principle that, "[w]hen 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" (*Canadian Western Bank*, at para. 75, quoting *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at p. 356).

[79] Section 14.06(4) says nothing about the "bankrupt estate" avoiding the applicability of valid provincial law. In drafting s. 14.06(4), Parliament could easily have referred to the liability of the bankrupt estate. Parliament chose instead to refer simply to the personal liability of a trustee. Notably, s. 14.06(7) and s. 14.06(8) both refer to a "debtor in a bankruptcy". Parliament's choice in this regard cannot be ignored. I agree with Martin J.A. that there is no basis on which to read the words "the trustee is not personally liable" in s. 14.06(4) as encompassing the liability of the bankrupt estate. As noted by Martin J.A., it

[77] Dans les paragraphes qui suivent, je vais d'abord interpréter le par. 14.06(4) et expliquer pourquoi, compte tenu de sa formulation claire et d'autres considérations pertinentes, la disposition ne concerne que la responsabilité personnelle du syndic, et non la responsabilité de l'actif du failli. Je vais ensuite expliquer en quoi, malgré leur similitude superficielle, la raison d'être du par. 14.06(4) diffère de celle du par. 14.06(2), et démontrer que, si l'on comprend bien le régime conçu par le Parlement, le par. 14.06(4) n'influe pas sur la responsabilité de l'actif du failli. Pour conclure, je démontrerai qu'il n'y a aucun conflit d'application ni aucune entrave à la réalisation d'un objet fédéral entre la législation albertaine et l'art. 14.06 de la *LFI* dans la présente affaire, particulièrement en ce qui a trait à la protection de GTL contre toute responsabilité personnelle.

(1) L'interprétation juste du par. 14.06(4)

a) *Le paragraphe 14.06(4) s'attache à la responsabilité personnelle du syndic*

[78] J'ai conclu que le par. 14.06(4) s'attache à la responsabilité personnelle du syndic et non à la responsabilité de l'actif du failli. Je souligne ici le principe bien établi selon lequel « [c]haque fois qu'on peut légitimement interpréter une loi fédérale de manière qu'elle n'entre pas en conflit avec une loi provinciale, il faut appliquer cette interprétation de préférence à toute autre qui entraînerait un conflit » (*Banque canadienne de l'Ouest*, par. 75, citant *Procureur général du Canda c. Law Society of British Columbia*, [1982] 2 R.C.S. 307, p. 356).

[79] Le paragraphe 14.06(4) est muet à propos de « l'actif du failli » qui évite l'applicabilité d'une loi provinciale valide. Lorsqu'il a rédigé le par. 14.06(4), le Parlement aurait pu aisément parler de la responsabilité de l'actif du failli. Le Parlement a plutôt choisi de mentionner uniquement la responsabilité personnelle du syndic. Fait à noter, les par. 14.06(7) et (8) parlent tous deux du « débiteur ». Ce choix du Parlement ne peut être ignoré. Je conviens avec la juge d'appel Martin qu'il n'y aucune raison de considérer que les mots « le syndic est [. . .] dégagé de toute responsabilité personnelle » figurant

is apparent from the express language chosen by Parliament that s. 14.06(4) was motivated by and aimed at concerns about the protection of trustees, not the protection of the full value of the estate for creditors. Nothing in the wording of s. 14.06(4) suggests that it was intended to extend to estate liability.

[80] The Hansard evidence leads to the same conclusion. Jacques Hains, Director, Corporate Law Policy Directorate, Department of Industry Canada, noted the following during the 1996 debates preceding the enactment of s. 14.06(4) in 1997:

> The aim is to provide a better definition of the liability of insolvency professionals and practitioners in order to encourage them to accept mandates where there may be problems related to the environment. It is hoped that this will reduce the number of abandoned sites both for the benefit of the environment and the safeguard of businesses and jobs.

(Standing Committee on Industry, *Evidence*, No. 16, 2nd Sess., 35th Parl., June 11, 1996, at 15:49-15:55, as cited in C.A. reasons, at para. 197.)

Several months later, Mr. Hains stated:

> What Parliament tried to do in 1992 was to provide a relief to insolvency practitioners . . . because they were at risk when they accepted a mandate to liquidate an insolvent business. Under environmental laws, therefore, they could have been subject to personal liability to clean up the environment. I am speaking of personal liability here, meaning "out of their own pockets."

(*Proceedings of the Standing Committee on Banking, Trade and Commerce*, No. 13, 2nd Sess., 35th Parl., November 4, 1996, at p. 15)

Mr. Hains proceeded to explain how the 1997 amendments were intended to improve on the 1992 reforms to the *BIA* that had included the original version of s. 14.06(2) (as discussed further below), but he gave

au par. 14.06(4) visent la responsabilité de l'actif du failli. Comme l'a signalé la juge Martin, il ressort des termes exprès choisis par le Parlement que le 14.06(4) découlait du souci de protéger les syndics et se voulait une réponse à ce souci, et non de protéger la pleine valeur de l'actif au bénéfice des créanciers. Le texte du par. 14.06(4) ne porte aucunement à croire qu'il devait s'étendre à la responsabilité de l'actif.

[80] Les débats parlementaires mènent à la même conclusion. Jacques Hains, directeur de la Direction de la politique des lois commerciales au ministère d'Industrie Canada, a souligné ce qui suit pendant les débats tenus en 1996 avant l'adoption du par. 14.06(4) l'année suivante :

> L'objectif est de mieux définir la responsabilité des professionnels de l'insolvabilité, des praticiens de façon à les encourager à accepter des mandats où il pourrait peut-être y avoir des problèmes en matière d'environnement, de façon à réduire le nombre de sites abandonnés au pays, pour le bénéfice de l'environnement et la sauvegarde des entreprises et des emplois qui en dépendent.

(Comité permanent de l'industrie, *Témoignages*, nº 16, 2e sess., 35e lég., 11 juin 1996, entre 15 h 49 et 15 h 55, cité dans les motifs de la Cour d'appel, par. 197.)

Plusieurs mois plus tard, M. Hains a mentionné que :

> [L]es dispositions [ont été] adoptées par le Parlement en 1992 en vue d'alléger le fardeau de ceux qui travaillent dans le domaine de l'insolvabilité [. . .] parce que le mandat de liquider une entreprise insolvable leur impose des risques. En vertu du droit environnemental, par conséquent, ils auraient pu être tenus personnellement responsables d'un accident environnemental et obligés de verser les dommages-intérêts.

(*Délibérations du comité sénatorial permanent des Banques et du commerce*, nº 13, 2e sess., 35e lég., 4 novembre 1996, p. 16)

M. Hains a ensuite expliqué en quoi les modifications de 1997 visaient à améliorer la réforme de la *LFI* en 1992 qui comprenait la première version du par. 14.06(2) (comme nous le verrons plus loin), mais

no indication that the focus had somehow shifted away from a trustee's "personal liability".

[81] Prior to the enactment of the 1997 amendments, G. Marantz, Legal Advisor to the Department of Industry Canada, noted that they were intended to "provide the trustee with protection from being chased with deep-pocket liability" (Standing Committee on Industry, *Evidence*, No. 21, 2nd Sess., 35th Parl., September 25, 1996, at 17:15, as cited in C.A. reasons, at para. 198). I agree with the Regulator that the legislative debates give no hint of any intention by Parliament to immunize bankrupt estates from environmental liabilities. The notion that s. 14.06(4) was aimed at encouraging trustees in bankruptcy to accept mandates, and not at limiting estate liability, is further supported by the fact that the provision was inserted under the general heading "Appointment and Substitution of Trustees".

[82] Furthermore, in drafting s. 14.06(4), Parliament chose to use exactly the same concept it had used earlier in s. 14.06(2): by their express wording, where either provision applies, a trustee is not "personally liable". This cannot have been an oversight given that s. 14.06(4) was added to the *BIA* some five years after the enactment of s. 14.06(2). Since both provisions deal expressly with the protection of trustees from being "personally liable", it is very difficult to accept that they could be concerned with different kinds of liability. By their wording, s. 14.06(2) and s. 14.06(4) are clearly both concerned with the same concept. Indeed, if one interprets s. 14.06(4) as extending to estate liability, then there is no principled reason not to interpret s. 14.06(2) in the same way. However, it is undisputed that this was not Parliament's intention in enacting s. 14.06(2).

[83] Similarly, Parliament has also chosen to use the same concept found in both s. 14.06(4) and s. 14.06(2) in a third part of the 14.06 scheme, namely s. 14.06(1.2). This provision states that a trustee carrying on the business of a debtor or continuing the employment of a debtor's employees is

il n'a pas laissé entendre que l'accent n'était plus mis sur la « responsabilité personnelle » du syndic.

[81] Avant l'adoption des modifications de 1997, Gordon Marantz, conseiller juridique au ministère d'Industrie Canada, a fait remarquer qu'elles visaient à « empêcher le syndic d'être poursuivi pour de fortes sommes » (Comité permanent de l'industrie, *Témoignages*, nº 21, 2e sess., 35e lég., 25 septembre 1996, à 17 h 15, cité dans les motifs de la Cour d'appel, par. 198)). Je conviens avec l'organisme de réglementation que les débats législatifs ne donnent aucun indice d'une intention du Parlement de mettre les biens des faillis à l'abri de toute responsabilité environnementale. L'idée que le par. 14.06(4) avait pour objectif d'inciter les syndics de faillite à accepter des mandats, et non de limiter la responsabilité de l'actif, est étayée davantage par l'insertion de la disposition sous la rubrique générale « Nomination et remplacement des syndics ».

[82] De plus, au moment de rédiger le par. 14.06(4), le Parlement a décidé d'utiliser la même notion qu'il avait employé précédemment au par. 14.06(2) : de par leur libellé explicite, lorsque l'une ou l'autre disposition s'applique, le syndic est dégagé de toute « responsabilité personnelle ». Il ne peut s'agir d'une erreur, car le par. 14.06(4) a été inséré dans la *LFI* quelque cinq ans après l'adoption du par. 14.06(2). Puisque les deux dispositions visent expressément à protéger les syndics contre toute « responsabilité personnelle », il est très difficile d'accepter qu'elles puissent concerner différents types de responsabilité. D'après leurs termes, le par. 14.06(2) et le par. 14.06(4) traitent manifestement du même concept. En effet, si l'on considère que le par. 14.06(4) s'étend à la responsabilité de l'actif, il n'y a aucune raison de principe de ne pas donner la même interprétation au par. 14.06(2). Toutefois, personne ne conteste que ce n'était pas l'intention qu'avait le Parlement au moment d'adopter le par. 14.06(2).

[83] Dans le même ordre d'idées, le Parlement a aussi choisi d'utiliser la même notion figurant aux par. 14.06(4) et 14.06(2) dans une troisième partie du régime établi par l'art. 14.06, soit le par. 14.06(1.2). Selon cette disposition, le syndic qui continue l'exploitation de l'entreprise du débiteur ou lui succède

not "personally liable" in respect of certain enumerated liabilities, including as a successor employer. Although this provision is not directly raised in this litigation, by its own terms, it clearly does not and cannot refer to the liability of the bankrupt estate. Again, it is difficult to conceive of how Parliament could have specified that a trustee is not "personally liable", using the ordinary, grammatical sense of that phrase, in both s. 14.06(1.2) and s. 14.06(2), but then intended the phrase to be read in a completely different and illogical manner in s. 14.06(4). All three provisions refer to the personal liability of a trustee, and all three must be interpreted consistently. Indeed, I note that the concept of a trustee being "not personally liable" is also used consistently in other parts of the *BIA* unrelated to the s. 14.06 scheme — see, for example, s. 80 and s. 197(3).

comme employeur est dégagé de toute « responsabilité personnelle » à l'égard de certains engagements énumérés, notamment comme successeur de l'employeur. Bien qu'elle n'ait pas été directement soulevée en l'espèce, cette disposition, de par ses propres termes, ne traite manifestement pas et ne peut traiter de la responsabilité de l'actif du failli. Là encore, il est difficile de concevoir comment le Parlement aurait pu préciser qu'un syndic est « dégagé de toute responsabilité personnelle » suivant le sens ordinaire et grammatical de cette expression au par. 14.06(1.2) et au par. 14.06(2), et souhaiter par la suite que l'on donne à cette expression une interprétation tout à fait différente et illogique au par. 14.06(4). Les trois dispositions traitent toutes de la responsabilité personnelle d'un syndic et il faut les interpréter uniformément. En effet, je signale que l'idée selon laquelle le syndic est « dégagé de toute responsabilité personnelle » est aussi reprise systématiquement dans d'autres parties de la *LFI* étrangères au régime de l'art. 14.06, par exemple l'art. 80 et le par. 197(3).

[84] This interpretation of s. 14.06(4) is also bolstered by the French wording of s. 14.06. The French versions of both s. 14.06(2) and s. 14.06(4) refer to a trustee's protection from personal liability "*ès qualités*". This French expression is defined by *Le Grand Robert de la langue française* (2nd ed. 2001) dictionary as referring to someone acting "*à cause d'un titre, d'une fonction particulière*", which, in English, would mean acting by virtue of a title or specific role. The *Robert & Collins* dictionary (online) translates "*ès qualités*" as in "one's official capacity". In using this expression in s. 14.06(4), Parliament is therefore stating that, where "disclaimer" properly occurs, a trustee, is not personally liable, in its capacity as trustee, for orders to remedy any environmental condition or damage affecting the "disclaimed" property. These provisions are clearly not concerned with the concept of estate liability. The French versions of s. 14.06(2) and s. 14.06(4) thus utilize identical language to describe the limitation of liability they offer trustees. It is almost impossible to conceive of Parliament using identical language in two such closely related provisions and yet intending different meanings. Accordingly, a trustee is not personally liable in its

[84] L'interprétation qui précède du par. 14.06(4) est également renforcée par la version française de l'art. 14.06. Les versions françaises des par. 14.06(2) et (4) indiquent que le syndic est, « ès qualités », dégagé de toute responsabilité personnelle. Selon le dictionnaire *Le Grand Robert de la langue française* (2e éd. 2001), cette expression française désigne la personne qui agit « à cause d'un titre, d'une fonction particulière »; en anglais, elle désigne la personne agissant « *by virtue of a title or specific role* ». Dans le dictionnaire *Robert & Collins* (en ligne), cette expression décrit la personne qui agit en « *one's official capacity* ». En utilisant cette expression au par. 14.06(4), le Parlement prévoit ainsi qu'en cas de « renonciation » valide, le syndic est, ès qualités, dégagé de toute responsabilité personnelle à l'égard d'ordonnance de réparation de tout fait ou dommage lié à l'environnement et touchant le bien auquel il a été « renoncé ». Ces dispositions ne portent manifestement pas sur la notion de responsabilité de l'actif. Les versions françaises des par. 14.06(2) et (4) emploient donc les mêmes mots pour décrire la limitation de responsabilité qu'elles offrent aux syndics. Il est presque impossible de concevoir que le Parlement emploie les mêmes termes dans deux

official capacity as representative of the bankrupt estate where it invokes s. 14.06(4).

[85] Prior to this litigation, the case law on s. 14.06 was somewhat scarce. However, this Court has considered the s. 14.06 scheme once before, in *GMAC Commercial Credit Corp. — Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123. In that case, comments made by both the majority and the dissenting judge support my conclusion that s. 14.06(4) is concerned only with the personal liability of trustees. Abella J., writing for the majority, explained that "where Parliament has intended to confer immunity on trustees or receivers from certain claims, it has done so explicitly" (para. 67). As examples of this principle, she referred to 14.06(1.2) and, most notably for our purposes, to s. 14.06(4), which she described as follows: "trustee immune in certain circumstances from environmental liabilities" (para. 67). In her dissent, Deschamps J. explained that a "trustee is not personally bound by the bankrupt's obligations" (para. 91). She noted that trustees are protected by the provisions that confer immunity upon them, including s. 14.06 (1.2), (2) and (4).

[86] Although the dissenting reasons focus on the source of the "disclaimer" power in s. 14.06(4), nothing in this case turns on either the source of the "disclaimer" power or on whether GTL successfully "disclaimed" the Renounced Assets. I would note that, while the dissenting reasons rely on a purported common law power of "disclaimer", the Court has been referred to no cases — and the dissenting reasons have cited none — demonstrating the existence of a common law power allowing trustees to "disclaim" *real property*. In any case, regardless of the source of the "disclaimer" power, nothing in s. 14.06(4) suggests that, where a trustee does "disclaim" real property, the result is that it is simply free to walk away from the environmental orders applicable to it. Quite the contrary — the provision is clear that, where an environmental order has been made,

dispositions aussi intimement liées et leur attribue pourtant des sens différents. En conséquence, le syndic est dégagé de toute responsabilité personnelle en sa qualité officielle de représentant de l'actif du failli lorsqu'il invoque le par. 14.06(4).

[85] Avant le présent litige, la jurisprudence sur l'art. 14.06 était relativement peu abondante. Notre Cour a cependant examiné le régime de l'art. 14.06 une fois auparavant, dans *Société de crédit commercial GMAC — Canada c. T.C.T. Logistics Inc.*, 2006 CSC 35, [2006] 2 R.C.S. 123. Dans cet arrêt, les commentaires de la majorité et de la juge dissidente étayent ma conclusion selon laquelle le par. 14.06(4) ne porte que sur la responsabilité personnelle des syndics. La juge Abella a expliqué, au nom des juges majoritaires, que « lorsque le législateur a voulu protéger les syndics ou les séquestres contre certains recours, il l'a fait explicitement » (par. 67). À titre d'exemples de manifestation de ce principe, elle a cité le par. 14.06(1.2) et, notamment pour les fins qui nous occupent, le par. 14.06(4), qu'elle a décrits ainsi : « protection du syndic dans certaines circonstances contre les ordonnances en matière environnementale » (par. 67). Dans ses motifs dissidents, la juge Deschamps a expliqué que le « [syndic] n'est pas tenu personnellement aux obligations du failli » (par. 91). Elle a signalé que les syndics étaient protégés par les dispositions qui leur conférait une immunité, dont les par. 14.06 (1.2), (2) et (4).

[86] Bien que les motifs dissidents mettent l'accent sur la source du pouvoir de « renonciation » prévu au par. 14.06(4), la présente affaire ne porte aucunement sur la source de ce pouvoir ou sur la question de savoir si GTL a « renoncé » avec succès aux biens faisant l'objet de la renonciation. Je me contente de signaler brièvement que, même si les juges dissidents s'appuient sur un supposé pouvoir de « renonciation » en common law, les parties n'ont renvoyé à la Cour aucune décision — et les juges dissidents n'en ont cité aucune — attestant l'existence d'un pouvoir en common law qui permet au syndic de « renoncer » à un *bien réel*. Quoi qu'il en soit, peu importe la source de ce pouvoir, rien dans le par. 14.06(4) ne donne à penser que le syndic « renonçant » à des biens réels peut tout simplement se soustraire aux ordonnances

the result of an act of "disclaimer" is the cessation of personal liability. No effect of "disclaimer" on the liability of the bankrupt estate is specified. Had Parliament intended to empower trustees to walk away entirely from assets subject to environmental liabilities, it could easily have said so.

[87] Additionally, as I have mentioned, s. 14.06(4)'s scope is not narrowed to a "disclaimer" in its formal sense. Under s. 14.06(4)(a)(ii), a trustee is not personally liable for an environmental order where the trustee "abandons, disposes of or otherwise releases any interest in any real property". This appeal does not, however, require us to decide what constitutes abandoning, disposing of or otherwise releasing real property for the purpose of s. 14.06(4), and I therefore leave the resolution of this question for another day. Nor does this appeal require us to decide the effects of a successful divestiture under s. 20 of the *BIA*. Section 20 of the *BIA* was not raised or relied upon by GTL as providing it with the authority to walk away from all responsibility, obligation or liability regarding the Renounced Assets.

[88] The dissenting reasons argue that certain other parts of the s. 14.06 scheme make the most sense if s. 14.06(4) limits estate liability. Other than s. 14.06(2), none of these provisions is in issue in this litigation, and none of them was relied on by GTL. Regardless, in view of the clear and unambiguous wording of s. 14.06(4), less weight should be given to its statutory context. This is particularly so given that the proposed alternative interpretation would require the Court to read words such as "personally" out of the subsection. As has been noted, when the words of a provision are precise and unequivocal, their ordinary meaning plays a dominant role in the interpretive process (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10). Ultimately, the consequences of a trustee's "disclaimer" are clear — protection from personal liability, not from estate liability. There is no ambiguity on the face of s. 14.06(4). This Court has no

environnementales qui s'appliquent à eux. Bien au contraire, la disposition prévoit clairement que, si une ordonnance environnementale a été rendue, la « renonciation » emporte la cessation de la responsabilité personnelle. On ne fait état d'aucun effet de la renonciation sur la responsabilité de l'actif du failli. Si le Parlement avait voulu investir les syndics du pouvoir de délaisser entièrement les biens visés par des engagements environnementaux, il aurait pu le faire aisément.

[87] En outre, comme je l'ai mentionné, le par. 14.06(4) ne vise pas uniquement la « renonciation » au sens formel. D'après le sous-al. 14.06(4)(a)(ii), le syndic est dégagé de toute responsabilité personnelle à l'égard d'une ordonnance environnementale lorsqu'il « abandonne [. . .] tout intérêt sur le bien réel en cause, en dispose ou s'en dessaisit ». Le présent pourvoi ne nous oblige cependant pas à décider ce qui constitue l'abandon, la disposition ou le dessaisissement d'un bien réel pour l'application du par. 14.06(4), et je remets le règlement de ce point à une autre occasion. Le pourvoi ne nous oblige pas non plus à décider des effets d'une renonciation réussie en vertu de l'art. 20 de la LFI. GTL n'a pas invoqué cet article ni soutenu qu'il lui accordait le pouvoir d'abandonner toute responsabilité ou obligation ou tout engagement applicable aux biens faisant l'objet de la renonciation.

[88] D'après les juges dissidents, d'autres parties du régime de l'art. 14.06 sont plus sensées si le par. 14.06(4) limite la responsabilité de l'actif. À l'exception du par. 14.06(2), aucune de ces dispositions n'était en litige dans la présente affaire et aucune d'elles n'a été invoquée par GTL. Quoi qu'il en soit, étant donné le libellé clair et sans équivoque de ce paragraphe, le poids à accorder à son contexte législatif est amoindri. Cela est d'autant plus vrai que l'autre interprétation proposée obligerait la Cour à écarter des mots comme « personnelle » du paragraphe. Tel qu'il a été mentionné, lorsque le libellé d'une disposition est précis et sans équivoque, le sens ordinaire des mots joue un rôle primordial dans le processus d'interprétation (*Hypothèques Trustco Canada c. Canada*, 2005 CSC 54, [2005] 2 R.C.S. 601, par. 10). En dernière analyse, les conséquences de la « renonciation » du syndic sont claires : l'immunité contre la responsabilité personnelle, et non celle de l'actif.

option other than to accede to the clear intention of Parliament.

[89] I turn now to the relationship between s. 14.06(2) and (4).

(b) *How Section 14.06(4) Is Distinguishable From Section 14.06(2)*

[90] In this case, GTL relied solely on s. 14.06(4) in purporting to "disclaim" the Renounced Assets. However, as I will explain, GTL is fully protected from personal liability for the environmental liabilities associated with those assets whether it is understood as having "disclaimed" the Renounced Assets or not. However, it cannot simply "walk away" from the Renounced Assets in either case.

[91] Regardless of whether GTL can access s. 14.06(4) (in other words, regardless of whether it has "disclaimed"), it is already fully protected from personal liability in respect of environmental matters by s. 14.06(2). Section 14.06(2) protects trustees from personal liability for "any environmental condition that arose or environmental damage that occurred", unless it is established that the condition arose or the damage occurred after the trustee's appointment and as a result of their gross negligence or wilful misconduct. In this case, it is not disputed that the environmental condition or damage leading to the Abandonment Orders arose or occurred prior to GTL's appointment. Section 14.06(2) provides trustees with protection from personal liability as broad as that provided by s. 14.06(4). Although, on the face of the provisions, there are two ways in which s. 14.06(4) may appear to offer broader protection, neither of them withstands closer examination.

[92] First, the Regulator submits that the protection offered by s. 14.06(4) should be distinguished from that offered by s. 14.06(2) on the basis that the former is concerned with orders while the latter is concerned with environmental obligations generally. I agree with the dissenting reasons that a persuasive distinction cannot be drawn between liability for an environmental condition or environmental damage

Le paragraphe 14.06(4) ne souffre à première vue d'aucune ambiguïté. Notre Cour n'a d'autre choix que d'accéder à l'intention manifeste du Parlement.

[89] Je passe maintenant au rapport entre les par. 14.06(2) et (4).

b) *La manière dont le par. 14.06(4) se distingue du par. 14.06(2)*

[90] En l'espèce, GTL s'est fondé uniquement sur le par. 14.06(4) pour prétendre « renoncer » aux biens faisant l'objet de la renonciation. Or, comme je l'expliquerai, que l'on considère ou non que GTL a « renoncé » aux biens en question, il est entièrement protégé contre toute responsabilité personnelle à l'égard des engagements environnementaux associés à ces biens. Toutefois, il ne peut tout simplement pas les « délaisser » dans un cas comme dans l'autre.

[91] Que GTL puisse ou non se prévaloir du par. 14.06(4) (autrement dit, qu'il ait « renoncé » ou non aux biens en question), il est déjà entièrement à l'abri de toute responsabilité personnelle en matière environnementale par application du par. 14.06(2). Ce paragraphe dégage les syndics de toute responsabilité personnelle découlant de « tout fait ou dommage lié à l'environnement », sauf celui causé par sa négligence grave ou son inconduite délibérée après sa nomination. En l'espèce, personne ne conteste que le fait ou dommage lié à l'environnement à l'origine des ordonnances d'abandon est survenu avant la nomination de GTL. Le paragraphe 14.06(2) offre aux syndics une protection contre toute responsabilité personnelle aussi large que celle fournie par le par. 14.06(4). Bien qu'à la lecture des dispositions, le par. 14.06(4) semble offrir de deux manières une protection plus large, aucune d'entre elles ne résiste à un examen plus approfondi.

[92] En premier lieu, l'organisme de réglementation soutient qu'il y a lieu de distinguer la protection offerte par le par. 14.06(4) de celle accordée par le par. 14.06(2) car le premier concerne les « ordonnances » tandis que le deuxième intéresse les obligations environnementales en général. Je conviens avec les juges dissidents qu'il est impossible d'établir une distinction convaincante entre la responsabilité d'un

(purportedly covered by s. 14.06(2)) and liability for failure to comply with an order to remedy such a condition or such damage (purportedly covered by s. 14.06(4)). As the dissenting reasons note, "[t]his distinction is entirely artificial" (para. 212). The underlying liability addressed through environmental orders is the liability provided for in s. 14.06(2): an "environmental condition that arose or environmental damage that occurred". Second, on the face of s. 14.06(4), no exceptions are carved out for gross negligence or wilful misconduct post-appointment, unlike in s. 14.06(2). However, s. 14.06(4) is expressly made "subject to subsection (2)". I agree with the dissenting reasons that the only possible interpretation of this proviso is that, where the trustee has caused an environmental condition or environmental damage through its wilful misconduct or gross negligence, the trustee will still be personally liable, regardless of its reliance on s. 14.06(4).

[93] It follows that s. 14.06(4) does not provide trustees with protection from personal liability any broader than the protection provided by s. 14.06(2). Despite this, in my view, Parliament had good reasons for enacting s. 14.06(4) in 1997. The first was to make it clear to trustees that they had complete protection from personal liability in respect of environmental conditions and damage (absent wilful misconduct or gross negligence), especially in situations where they have "disclaimed". The Hansard evidence shows that one of the impetuses for the 1997 reforms was the desire of trustees for further certainty. The second was to clarify the effect of a trustee's "disclaimer", on the liability of the *bankrupt estate* for orders to remedy an environmental condition or damage. In other words, s. 14.06(4) makes it clear not just that a trustee who "disclaims" real property is exempt from personal liability under environmental orders applicable to that property, but also that the liability of the bankrupt estate is unaffected by such "disclaimer".

fait ou dommage lié à l'environnement (prétendument visé par le par. 14.06(2)) et celle découlant du non-respect d'une ordonnance de réparation du fait ou dommage en question (prétendument visé par le par. 14.06(4)). Comme l'indiquent les motifs dissidents, « [c]ette distinction est tout à fait artificielle » (par. 212). La responsabilité sous-jacente sur laquelle portent les ordonnances environnementales découle du « fait ou dommage lié à l'environnement » et est prévue au par. 14.06(2). En second lieu, à la lecture du par. 14.06(4), celui-ci ne prévoit aucune exception pour négligence grave ou inconduite délibérée après la nomination, contrairement au par. 14.06(2). Le paragraphe 14.06(4) s'applique toutefois expressément « sous réserve du paragraphe (2) ». Je suis d'accord avec les juges dissidents pour dire que, d'après la seule interprétation que l'on peut donner à cette disposition, le syndic ayant causé un fait ou un dommage lié à l'environnement par son inconduite délibérée ou sa négligence grave engagerait toujours sa responsabilité personnelle même s'il invoque le par. 14.06(4).

[93] Ainsi, le par. 14.06(4) n'offre pas aux syndics une protection contre la responsabilité personnelle plus large que celle fournie par le par. 14.06(2). Malgré cela, j'estime que le Parlement avait de bonnes raisons d'adopter le par. 14.06(4) en 1997. La première était de préciser aux syndics qu'ils étaient entièrement dégagés de toute responsabilité personnelle à l'égard des faits et dommages liés à l'environnement (en l'absence d'inconduite délibérée ou de négligence grave), surtout dans des cas où ils ont « renoncé » à des biens. Les débats parlementaires indiquent que la réforme de 1997 prenait sa source notamment dans le vœu des syndics d'obtenir une certitude accrue. La réforme visait aussi à clarifier l'effet qu'a la « renonciation » d'un syndic sur la responsabilité de l'*actif du failli* relativement aux ordonnances de réparation d'un fait ou dommage lié à l'environnement. En d'autres termes, il ressort du par. 14.06(4) non seulement que le syndic « renonçant » à des biens réels échappe à toute responsabilité personnelle à l'égard des ordonnances environnementales qui visent ces biens, mais aussi que pareille renonciation n'a aucune incidence sur la responsabilité de l'actif du failli.

[94] In 1992, Parliament turned its attention to the potential liability of trustees in the environmental context and enacted s. 14.06(2). The provision originally stated that trustees were protected from personal liability for any environmental condition that arose or any environmental damage that occurred "(a) before [their] appointment . . . or (b) after their appointment except where the condition arose or the damage occurred as a result of their failure to exercise due diligence". The Hansard evidence demonstrates that trustees were unhappy with the original language of s. 14.06(2). As Mr. Hains explained, they complained that the due diligence standard was "too vague. No one knows what it does and it may vary from one case to another. With the vagueness of the standard and what may be required to satisfy it, and with the risk of personal liability, the trustees were not even interested in investigating how they might exercise due diligence" (*Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, No. 13, 2nd Sess., 35th Parl., November 4, 1996, at pp. 15-16).

[95] As a result, Parliament made reforms to the *BIA* in 1997. These reforms not only changed the standard of protection offered to trustees by s. 14.06(2) by adopting the current language, but also introduced s. 14.06(4). As is evident from their shared language, the provisions were intended to work together to clarify a trustee's protection from personal liability for any environmental condition or damage. Section 14.06(4) provided the certainty that trustees had been seeking in the years prior to 1997. For the first time, it explicitly linked the concept of "disclaimer" to the scheme protecting trustees from environmental liability. Whether it is understood as a common law power or as a reference to other statutory provisions, the concept of "disclaimer" predates s. 14.06(4) itself, as well as the 1992 version of s. 14.06(2). "Disclaimer" is also applicable in other contexts, such as in relation to executory contracts, as discussed in *New Skeena Forest Products Inc. v. Don Hull & Sons Contracting Ltd.*, 2005 BCCA 154, 251 D.L.R. (4th) 328.

[94] En 1992, le Parlement s'est penché sur la responsabilité potentielle des syndics en matière environnementale et a édicté le par. 14.06(2). Cette disposition prévoyait au départ que le syndic était dégagé de toute responsabilité personnelle découlant d'un fait ou dommage lié à l'environnement survenu « a) avant sa nomination [. . .]; ou b) après sa nomination, sauf d'un fait ou dommage causé par son omission d'agir avec la prudence voulue ». Il appert des débats parlementaires que les syndics étaient insatisfaits du libellé initial du par. 14.06(2). Comme l'explique M. Hains, ils se sont plaints que la norme de diligence raisonnable était « trop vague. Nul ne sait comment l'interpréter, et les interprétations peuvent varier d'une affaire à l'autre. Étant donné le libellé trop vague de la norme, le fait que l'on ignore ce qu'il faut faire pour y satisfaire et le risque de responsabilité personnelle, les syndics ne cherchaient même pas à savoir de quelle manière ils pourraient faire preuve de diligence raisonnable. » (*Délibérations du comité sénatorial permanent des Banques et du commerce*, nº 13, 2e sess., 35e lég., 4 novembre 1996, p. 15-16).

[95] En conséquence, le Parlement a réformé la *LFI* en 1997. Cette réforme a non seulement modifié la norme visant la protection que le par. 14.06(2) offre aux syndics par l'adoption du texte actuel, mais elle a aussi introduit le par. 14.06(4). Comme le montrent à l'évidence les termes qu'ils ont en commun, les dispositions étaient censées s'appliquer ensemble pour clarifier l'immunité de responsabilité personnelle dont bénéficient les syndics à l'égard de tout fait ou dommage lié à l'environnement. Le paragraphe 14.06(4) leur offre la certitude qu'ils recherchaient avant 1997. Pour la première fois, il établissait en termes exprès un lien entre la notion de « renonciation » et le régime dégageant les syndics de toute responsabilité environnementale. Qu'on le voit comme un pouvoir de common law ou un renvoi à d'autres dispositions légales, le concept de « renonciation » précède le par. 14.06(4) lui-même ainsi que la version de 1992 du par. 14.06(2). Il peut aussi y avoir « renonciation » dans différents contextes, tel celui des contrats exécutoires étudiés dans *New Skeena Forest Products Inc. c. Don Hull & Sons Contracting Ltd.*, 2005 BCCA 154, 251 D.L.R. (4th) 328.

[96] Prior to 1997, the effects of a "disclaimer" of real property on environmental liability was unclear. In particular, it was unclear what effect "disclaimer" might have on the liability of the bankrupt estate, given that environmental legislation imposed liability based on the achievement of the status of owner, party in control or licensee (see J. Klimek, *Insolvency and Environment Liability* (1994), at p. 4-19). By enacting s. 14.06(4), Parliament clarified that the effect of the "disclaimer" of real property was to limit the personal liability of the trustee for orders to remedy any environmental condition or damage, but not to limit the liability of the bankrupt estate. Parliament could have merely updated the language of s. 14.06(2) in 1997, but this would have left the question of "disclaimer" and estate liability unaddressed. Knowledge of the impact of "disclaimer" could be important to a trustee who is deciding whether to accept a mandate. Section 14.06(4) thus went a considerable way towards resolving the vagueness of which trustees had complained prior to 1997.

[97] A notable aspect of the scheme crafted by Parliament is that s. 14.06(4) applies "[n]otwithstanding anything in any federal or provincial law". In enacting s. 14.06(4), Parliament specified the effect of the "disclaimer" of real property solely in the context of *environmental orders*. The effect of "disclaimer" on liability in other contexts was not addressed. Parliament was concerned with orders to remedy any environmental condition or damage, where, liability frequently attaches based on the status of owner, party in control, or licensee. Parliament did not want trustees to think that they could avoid the estate's environmental liability through the act of "disclaiming". Accordingly, it used specific language indicating that the effect of the "disclaimer" of real property on orders to remedy an environmental condition or damage is merely that the trustee is not personally liable. It is possible that the effect of "disclaimer" on the liability of the bankrupt estate might be different in other contexts.

[96] Avant 1997, on ne savait pas quels effets la « renonciation » à des biens réels avait sur la responsabilité environnementale. Plus précisément, on ne connaissait pas l'effet que pouvait avoir la renonciation sur la responsabilité de l'actif du failli, vu que la législation environnementale imposait une responsabilité fondée sur l'acquisition du statut de propriétaire, de partie en possession du bien ou de titulaire de permis (voir J. Klimek, *Insolvency and Environment Liability* (1994), p. 4-19). En adoptant le par. 14.06(4), le Parlement a précisé que la « renonciation » à des biens réels avait pour effet de limiter la responsabilité personnelle du syndic, et non celle de l'actif du failli, aux ordonnances de réparation de tout fait ou dommage lié à l'environnement. Le Parlement aurait pu se contenter d'actualiser le texte du par. 14.06(2) en 1997, mais cela aurait laissé en suspens la question de la « renonciation » et de la responsabilité de l'actif. La connaissance de l'incidence de la « renonciation » pourrait avoir de l'importance pour le syndic qui décide d'accepter ou non un mandat. Le paragraphe 14.06(4) a donc dissipé considérablement l'imprécision dont se plaignaient les syndics avant 1997.

[97] Un aspect digne de mention du régime conçu par le Parlement est l'application du par. 14.06(4) « [p]ar dérogation au droit fédéral et provincial ». En adoptant ce paragraphe, le Parlement a précisé l'effet de la « renonciation » à des biens réels uniquement dans le contexte des *ordonnances environnementales*. L'effet de la « renonciation » sur la responsabilité dans d'autres contextes n'a pas été abordé. Le Parlement se souciait des ordonnances de réparation de tout fait ou dommage lié à l'environnement où la responsabilité est fréquemment engagée en raison du statut de propriétaire, de partie ayant le contrôle du bien ou de titulaire de permis. Le Parlement ne voulait pas que les syndics croient pouvoir échapper à la responsabilité environnementale de l'actif par la « renonciation ». Il a donc utilisé des termes précis pour indiquer que le seul effet de la « renonciation » à des biens réels sur des ordonnances de réparation d'un fait ou dommage lié à l'environnement est que le syndic est dégagé de toute responsabilité personnelle. Il se peut que la « renonciation » ait un effet différent sur la responsabilité de l'actif du failli dans d'autres contextes.

[98] Section 14.06(4) thus makes it clear that "disclaimer" by the trustee has no effect on the bankrupt estate's continuing liability for orders to remedy any environmental condition or damage. The liability of the bankrupt estate is, of course, an issue with which s. 14.06(2) is absolutely unconcerned. Thus, it can be seen that s. 14.06(4) and s. 14.06(2) are not in fact the same — they may provide trustees with the same protection from personal liability, but only the former has any relevance to the question of estate liability. Section 14.06(2) protects trustees without having to be invoked by them — it does not speak to the results of a trustee's "disclaimer".

[99] Where a trustee has "disclaimed" real property, it is not personally liable under an environmental order applicable to that property, but the bankrupt estate itself remains liable. Of course, the fact that the bankrupt estate remains liable even where a trustee invokes s. 14.06(4) does not necessarily mean that the trustee must comply with environmental obligations in priority to all other claims. The priority of an environmental claim depends on the proper application of the *Abitibi* test, as I will discuss below.

[100] Accordingly, regardless of whether GTL is properly understood as having "disclaimed", the result is the same. Given that the environmental condition or damage arose or occurred prior to GTL's appointment, it is fully protected from personal liability by s. 14.06(2). However, "disclaimer" does not empower a trustee to simply walk away from the "disclaimed" assets when the bankrupt estate has been ordered to remedy any environmental condition or damage. The environmental liability of the bankrupt estate remains unaffected.

[101] I offer the following brief comment on the balance of the s. 14.06 scheme, although, as mentioned, none of those provision is actually in issue before this Court. The dissenting reasons argue that interpreting s. 14.06(4) as being concerned solely with the personal liability of trustees creates interpretive issues with the balance of the s. 14.06 scheme.

[98] Le paragraphe 14.06(4) établit donc clairement que la « renonciation » du syndic n'a aucun effet sur la responsabilité continue de l'*actif du failli* pour ce qui est des ordonnances de réparation de tout fait ou dommage lié à l'environnement. Bien entendu, il n'est absolument pas question de la responsabilité de l'actif du failli au par. 14.06(2). Ainsi, on constate que les par. 14.06(4) et (2) sont effectivement différents : ils fournissent peut-être aux syndics la même protection contre la responsabilité personnelle, mais seul le premier se rapporte à la responsabilité de l'actif. Le paragraphe 14.06(2) protège les syndics sans qu'ils aient à l'invoquer; il est muet sur les résultats de la « renonciation » d'un syndic.

[99] Le syndic ayant « renoncé » à des biens réels est dégagé de toute responsabilité personnelle à l'égard d'une ordonnance environnementale applicable à ces biens, mais l'actif du failli lui-même demeure responsable. Bien sûr, le fait que la responsabilité de l'actif du failli demeure engagée même lorsque le syndic invoque le par. 14.06(4) ne veut pas nécessairement dire que le syndic doit respecter les obligations environnementales et qu'elles ont priorité sur toutes les autres réclamations. La priorité d'une réclamation environnementale dépend de la bonne application du critère d'*Abitibi*, comme je l'expliquerai plus loin.

[100] En conséquence, peu importe si l'on considère que GTL a « renoncé » ou non à des biens, le résultat est le même. Puisque le fait ou dommage lié à l'environnement est survenu avant la nomination de GTL, ce dernier est entièrement protégé contre toute responsabilité personnelle par le par. 14.06(2). En revanche, la « renonciation » n'habilite pas le syndic à tout simplement délaisser les biens faisant l'objet de la renonciation quand on l'enjoint à réparer un fait ou dommage lié à l'environnement. La responsabilité environnementale de l'actif du failli demeure inchangée.

[101] J'aimerais faire de brèves observations sur le reste du régime de l'art. 14.06 même si, comme je l'ai mentionné, aucune de ces dispositions n'est de fait en litige devant notre Cour. Les juges dissidents soutiennent que l'on créerait des problèmes d'interprétation avec le reste du régime de l'art. 14.06 si on interprétait le par. 14.06(4) comme visant uniquement

In my view, this is not a reason to ignore the plain meaning of s. 14.06(4). No principle of statutory interpretation requires that the plain meaning of a provision be contorted to make its scheme more coherent. This Court has been tasked with interpreting s. 14.06(4), and, in my view, the wording of s. 14.06(4) admits of only one interpretation.

(2) There Is No Operational Conflict or Frustration of Purpose Between Section 14.06(2) and Section 14.06(4) of the *BIA* and the Alberta Regulatory Scheme

[102] The operational conflicts between the *BIA* and the Alberta legislation alleged by GTL arise from its status as a "licensee" under the *OGCA* and the *Pipeline Act*. As I have just demonstrated, s. 14.06(4) does not empower a trustee to walk away from all responsibilities, obligations and liabilities with respect to "disclaimed" assets. Rather, it clarifies a trustee's protection from environmental personal liability and makes it clear that a trustee's "disclaimer" does not affect the environmental liability of the bankrupt estate. Regardless of whether GTL effectively "disclaimed" the Renounced Assets, it cannot walk away from them. In light of the proper interpretation of s. 14.06(4), no operational conflict is caused by the fact that, under Alberta law, GTL, as a "licensee", remains responsible for abandoning the Renounced Assets utilizing the remaining assets of the Redwater estate. Likewise, no operational conflict is caused by the fact that the end-of-life liabilities associated with the Renounced Assets continue to be included in the calculation of Redwater's LMR.

[103] Thus, regardless of whether it has effectively "disclaimed", s. 14.06(2) fully protects GTL from personal liability in respect of environmental matters affecting the Redwater estate. GTL notes that, on the face of the *OGCA* and the *Pipeline Act*, there is nothing specifically preventing the Regulator from holding it personally liable as a "licensee" for the costs of carrying out the Abandonment Orders. GTL submits that the mere possibility that it may

la responsabilité personnelle des syndics. À mon avis, ces difficultés ne justifient pas que l'on fasse abstraction du sens clair du par. 14.06(4). Aucun principe d'interprétation législative ne requiert que l'on déforme le sens clair d'une disposition pour en rendre le régime plus cohérent. Notre Cour s'est vu confier la tâche d'interpréter le par. 14.06(4) et j'estime que son libellé ne permet qu'une seule interprétation.

(2) Il n'y a pas de conflit d'application ni d'entrave à la réalisation d'un objet fédéral entre les par. 14.06(2) et (4) de la *LFI* et le régime de réglementation de l'Alberta

[102] Les conflits d'application entre la *LFI* et la législation albertaine allégués par GTL résultent de sa qualité de « titulaire de permis » au sens de l'*OGCA* et de la *Pipeline Act*. Comme je viens de le démontrer, le par. 14.06(4) n'investit pas le syndic du pouvoir de se soustraire à l'ensemble des responsabilités, obligations ou engagements à l'égard de biens auxquels il a été « renoncé ». Il clarifie plutôt l'exonération de responsabilité personnelle dont jouit le syndic et précise que sa « renonciation » n'a aucune incidence sur la responsabilité environnementale de l'actif du failli. Que GTL ait bel et bien « renoncé » ou non aux biens faisant l'objet de la renonciation, il ne peut les délaisser. Vu l'interprétation qu'il convient de donner au par. 14.06(4), aucun conflit d'application n'est imputable au fait que, suivant le droit albertain, GTL demeure, en qualité de « titulaire de permis », tenu d'abandonner les biens faisant l'objet de la renonciation et d'utiliser les autres éléments de l'actif de Redwater. De même, le fait que les obligations de fin de vie associées aux biens faisant l'objet de la renonciation sont toujours prises en compte dans le calcul de la CGR de Redwater ne donne lieu à aucun conflit d'application.

[103] Donc, qu'il ait « renoncé » effectivement ou non aux biens, GTL est entièrement protégé par le par. 14.06(2) contre toute responsabilité personnelle à l'égard de questions environnementales touchant l'actif de Redwater. GTL signale qu'à première vue, l'*OGCA* et la *Pipeline Act* n'empêchent aucunement en termes exprès l'organisme de réglementation de le tenir personnellement responsable, à titre de « titulaire de permis », du coût d'exécution

be held personally liable for abandonment under the Alberta legislation creates an operational conflict with the protection from personal liability provided by s. 14.06(2) of the *BIA*.

[104] There is no possibility of trustees facing personal liability for reclamation or remediation — they are specifically protected from such liability by the *EPEA*, absent wilful misconduct or gross negligence. GTL is correct that its potential personal liability for abandonment as a "licensee" is not similarly capped at estate assets under the *OGCA* and the *Pipeline Act*. The Regulator submits that "[w]hile the definition of a licensee does not explicitly provide that the receiver's liability is limited to assets in the insolvency estate, such federal requirements are obviously read in to the provision and [are] explicitly included in other legislation administered by the [Regulator], namely the [*EPEA*]" (A.F., at para. 104 (footnote omitted)). For its part, GTL says that it is no answer that the Regulator's practice is to impose liability only up to the value of the estate because, as ATB argues, without a specific statutory provision, "[p]ractices can change without notice" (ATB's factum, at para. 106).

[105] I reject the proposition that the inclusion of trustees in the definition of "licensee" in the *OGCA* and the *Pipeline Act* should be rendered inoperative by the mere theoretical possibility of a conflict with s. 14.06(2). Such an outcome would be inconsistent with the principle of restraint which underlies paramountcy, as well as with the principles of cooperative federalism. The inclusion of trustees in the definition of "licensee" is an important part of the Alberta regulatory regime. It confers on them the privilege of operating the licensed assets of bankrupts while also ensuring that insolvency professionals are regulated during the lengthy periods of time when they manage oil and gas assets.

des ordonnances d'abandon. Toujours selon GTL, la simple possibilité que la législation albertaine l'oblige à effectuer l'abandon crée un conflit d'application avec l'exonération de responsabilité personnelle qu'accorde le par. 14.06(2) de la *LFI*.

[104] Les syndics ne peuvent être personnellement tenus de remplir des obligations de remise en état ou de décontamination — ils sont expressément exonérés de cette responsabilité par l'*EPEA* en l'absence d'inconduite délibérée ou de négligence grave de leur part. GTL a raison de dire que son éventuelle obligation, en tant que « titulaire de permis », de procéder à l'abandon n'est pas, de façon similaire, limitée aux éléments de l'actif en application de l'*OGCA* et de la *Pipeline Act.* L'organisme de réglementation fait valoir que, [TRADUCTION] « [b]ien que la définition de "titulaire de permis" ne prévoit pas explicitement que la responsabilité du séquestre se limite aux éléments de l'actif du failli, cette exigence fédérale figure manifestement par interprétation dans la disposition et est explicitement prévue dans une autre loi, à savoir [l'*EPEA*], qu'applique [l'organisme de réglementation] » (m.a., par. 104 (note en bas de page omise)). Pour sa part, GTL affirme que la pratique de l'organisme de réglementation de n'imposer une responsabilité que jusqu'à concurrence de la valeur de l'actif ne constitue pas une réponse valable, étant donné que, comme le prétend ATB, faute d'une disposition légale expresse, [TRADUCTION] « [l]es pratiques peuvent changer sans préavis » (mémoire d'ATB, par. 106).

[105] Je rejette la proposition selon laquelle l'ajout des syndics à la définition de « titulaire de permis » dans l'*OGCA* et la *Pipeline Act* devrait être déclaré inopérant en raison de la simple possibilité théorique de conflit avec le par. 14.06(2). Une telle issue serait incompatible avec le principe de la retenue qui sous-tend celui de la prépondérance fédérale, ainsi qu'avec le principe du fédéralisme coopératif. L'ajout des syndics à la définition de « titulaire de permis » constitue un aspect important du régime de réglementation albertain. Il leur confère le privilège d'exploiter les biens des faillis qui sont visés par des permis, tout en s'assurant que les professionnels de l'insolvabilité sont encadrés au cours des longues périodes pendant lesquelles ils gèrent les biens pétroliers et gaziers.

[106] Importantly, the situation in this case is completely different from the one before the Court in *Moloney*. In that case, Gascon J. rejected the argument that there was no operational conflict because the bankrupt could voluntarily pay a provincial debt post discharge or could choose not to drive. He noted that "the test for operational conflict cannot be limited to asking whether the respondent can comply with both laws by renouncing the protection afforded to him or her under the federal law or the privilege he or she is otherwise entitled to under the provincial law" (para. 60). In the instant case, GTL retains both the protection afforded to it under the federal law (no personal liability) and the privilege to which it is entitled under the provincial law (ability to operate the bankrupt's assets in a regulated industry). GTL is not being asked to forego doing anything or to voluntarily pay anything. Nor is it urged that the Regulator could avoid conflict by declining to apply the impugned law during bankruptcy, as in *Moloney*, at para. 69. This is not a situation in which the Regulator might decline to apply the provincial law, but a situation in which the provincial law can be — and has been — applied during bankruptcy without conflict.

[107] According to the evidence in this case, the *OGCA* and the *Pipeline Act* have included trustees in the definition of "licensee" for 20 years now, and, in that time, the Regulator has never attempted to hold a trustee personally liable. The Regulator does not look beyond the assets remaining in the bankrupt estate in seeking compliance with the bankrupt's environmental obligations. If the Regulator were to attempt to hold GTL personally liable under the Abandonment Orders, this would create an operational conflict between the *OGCA* and the *Pipeline Act*, and s. 14.06(2) of the *BIA*, rendering the former two Acts inoperative to the extent of the conflict. As it stands, however, GTL can both be protected from personal liability by s. 14.06(2) and comply with the Alberta regime in administering the Redwater estate as a "licensee".

[106] Fait important, la situation en l'espèce est complètement différente de celle dont a été saisie notre Cour dans *Moloney*. Dans cette affaire, le juge Gascon a rejeté l'argument selon lequel il n'y avait pas de conflit d'application parce que le failli pouvait volontairement payer une dette provinciale postérieure à la libération ou choisir de ne pas conduire. Le juge Gascon a signalé que « l'analyse relative au conflit d'application ne saurait se limiter à la question de savoir si l'intimé peut se conformer aux deux lois en renonçant soit à la protection que lui offre la loi fédérale, soit au droit dont il bénéficie en vertu de la loi provinciale » (par. 60). Dans l'affaire qui nous occupe, GTL conserve à la fois la protection que lui confère la loi fédérale (aucune responsabilité personnelle) et le privilège auquel il a droit en vertu de la loi provinciale (faculté d'exploiter l'actif du failli dans une industrie réglementée). On ne demande pas à GTL de renoncer à faire quelque chose ni de payer volontairement quoi que ce soit. On ne soutient pas non plus que l'organisme de réglementation puisse éviter le conflit en refusant d'appliquer les mesures législatives contestées pendant la faillite (comme dans *Moloney*, par. 69). Nous ne sommes pas en présence d'une situation où l'organisme de réglementation pourrait refuser d'appliquer la loi provinciale, mais d'une situation où la loi provinciale peut être appliquée — et l'a été — pendant la faillite sans qu'il y ait de conflit.

[107] Selon la preuve produite en l'espèce, les définitions de « titulaire de permis » dans l'*OGCA* et la *Pipeline Act* incluent depuis une vingtaine d'années les syndics et, durant cette période, l'organisme de réglementation n'a jamais essayé d'engager la responsabilité personnelle d'un syndic. L'organisme de réglementation ne va pas au-delà des éléments qui font encore partie de l'actif du failli en recherchant le respect de ses obligations environnementales. Si l'organisme de réglementation devait tenter d'obliger personnellement GTL à se conformer aux ordonnances d'abandon, cela engendrerait un conflit d'application entre, d'une part, l'*OGCA* et la *Pipeline Act* et, d'autre part, le par. 14.06(2) de la *LFI*, ce qui rendrait les deux premières lois inopérantes dans la mesure de ce conflit. Or, à l'heure actuelle, GTL peut à la fois être dégagé de toute responsabilité personnelle en vertu du par. 14.06(2) et respecter le régime albertain en administrant l'actif de Redwater à titre de « titulaire de permis ».

[108] The suggestion, in the dissenting reasons, that the Regulator is seeking to hold GTL personally liable is untrue. No one disputes that significant value remains in the Redwater estate. Although the Regulator's entitlement is, of course, dependent on the priorities established by the *BIA*, the history of this regulatory system demonstrates that there are ways for the Regulator to access that value without holding GTL personally liable. It is not this Court's role to mandate a particular mechanism for the Regulator to achieve that end. Even if this was not the case, the fact that Redwater's assets have already been sold and are currently being held in trust means that personal liability is no longer a concern. There is no operational conflict.

[109] I turn now to frustration of purpose. The chambers judge identified a number of purposes of s. 14.06 in his reasons. GTL relies on three of them, namely: "limit[ing] the liability of insolvency professionals, so that they will accept mandates despite environmental issues"; "reduc[ing] the number of abandoned sites in the country"; and "permit[ing] receivers and trustees to make rational economic assessments of the costs of remedying environmental conditions, and giv[ing] receivers and trustees the discretion to determine whether to comply with orders to remediate property affected by these conditions" (chambers judge's reasons, at paras. 128-29).

[110] The burden is on GTL to establish the specific purposes of s. 14.06(2) and s. 14.06(4) if it wishes to demonstrate a conflict. This has been described as a "high" burden, requiring "[c]lear proof of purpose" (*Lemare*, at para. 26). In my view, based on the plain wording of s. 14.06(2) and s. 14.06(4) (a "trustee is not personally liable") and the Hansard evidence, it is evident that the purpose of these provisions is to protect trustees from personal liability in respect of environmental matters affecting the estates they are administering.

[108] La suggestion faite dans les motifs dissidents selon laquelle l'organisme de réglementation tente d'engager la responsabilité personnelle de GTL est inexacte. Personne ne conteste que l'actif de Redwater a toujours une grande valeur. Bien que le droit de l'organisme de réglementation soit naturellement tributaire des priorités établies par la *LFI*, l'historique du régime de réglementation en cause démontre que l'organisme de réglementation dispose de moyens pour obtenir cette valeur sans engager la responsabilité personnelle de GTL. Il n'appartient pas à notre Cour de prescrire un mécanisme en particulier à cette fin. Même si ce n'était pas le cas, le fait que les biens de Redwater ont déjà été vendus et qu'ils sont actuellement détenus en fiducie signifie que la responsabilité personnelle ne pose plus problème. Il n'y a pas de conflit d'application.

[109] Je me penche maintenant sur l'entrave à la réalisation d'un objet fédéral. Le juge siégeant en cabinet a relevé dans ses motifs un certain nombre d'objets de l'art. 14.06. GTL s'appuie sur trois d'entre eux, à savoir : [TRADUCTION] « limiter la responsabilité des professionnels de l'insolvabilité, afin qu'ils acceptent des mandats en dépit des problèmes environnementaux »; « réduire le nombre de sites délaissés dans le pays »; et « permettre aux séquestres et aux syndics de procéder à des évaluations économiques rationnelles des coûts de réparation des faits liés à l'environnement, et donner aux séquestres ainsi qu'aux syndics le pouvoir discrétionnaire de déterminer s'il y a lieu de se conformer aux ordonnances de décontamination des biens touchés par ces faits » (motifs du juge siégeant en cabinet, par. 128-129).

[110] Il incombe à GTL d'établir les objectifs précis des par. 14.06(2) et (4) s'il souhaite démontrer qu'il y a conflit. Notre Cour a qualifié ce fardeau d'« élevé » et ajouté qu'il faut « une preuve claire de l'objet » (*Lemare*, par. 26). À mon avis, compte tenu du libellé clair des par. 14.06(2) et (4) (« le syndic est, ès qualité, dégagé de toute responsabilité personnelle ») et des débats parlementaires, l'objectif de ces dispositions est manifestement de dégager les syndics de toute responsabilité personnelle à l'égard de questions environnementales touchant l'actif qu'ils administrent.

[111] This purpose is not frustrated by the inclusion of trustees in the definition of "licensee" in the *OGCA* and the *Pipeline Act*. The Regulator's position is that it would never attempt to hold a trustee personally liable. Trustees have been considered licensees under these Acts for over 20 years, and they have yet to face the scourge of personal liability. To find an essential part of Alberta's regulatory regime inoperative based on the theoretical possibility of frustration of purpose would be inconsistent with the principles of paramountcy and cooperative federalism. To date, Alberta's regulatory regime has functioned as intended without frustrating the purpose of s. 14.06(2) or s. 14.06(4) of the *BIA*.

[112] In arguing that s. 14.06 has the broader goals of reducing the number of abandoned sites (in the non-technical sense of "abandoned") and encouraging trustees to accept mandates, GTL relies on what it calls "the available extrinsic evidence and the actual words and structure of that section" (GTL's factum, at para. 91). In my view, the arguments it advances are insufficient for GTL to meet its high burden and demonstrate that the purpose of s. 14.06(2) and s. 14.06(4) should be defined as including these broader objectives. Reducing the number of unaddressed sites and encouraging trustees to accept mandates may be positive side effects of s. 14.06(2) and s. 14.06(4), but it is a stretch to see them as the purpose of the provisions. Like the provision at issue in *Lemare*, it is more plausible that they serve a "simple and narrow purpose" (para. 45).

[113] Regardless, even if it is assumed that such broader goals are part of the purpose of s. 14.06(2) and s. 14.06(4), the evidence does not show that they are frustrated by the inclusion of trustees in the statutory definition of "licensee". Relying on statements made by GTL in the Second Report, ATB asserts that, if trustees continue to be considered licensees and if environmental claims continue to be binding on estates, then, in situations akin to that of the Redwater insolvency, trustees will refuse to accept appointments. The fact that, prior to this litigation, it had been settled in Alberta since at least

[111] Cet objectif n'est pas été entravé par l'ajout des syndics à la définition de « titulaire de permis » dans l'*OGCA* et la *Pipeline Act*. L'organisme de réglementation a soutenu qu'il n'essaierait jamais d'engager la responsabilité personnelle d'un syndic. Les syndics sont considérés comme des « titulaires de permis » dans ces lois depuis plus de 20 ans et ils n'ont pas encore été confrontés au fléau de la responsabilité personnelle. Déclarer inopérante une partie essentielle du régime de réglementation de l'Alberta en raison de la possibilité théorique d'entrave à un objectif fédéral irait à l'encontre des principes de la prépondérance fédérale et du fédéralisme coopératif. Jusqu'à présent, le régime de réglementation albertain fonctionne de la manière prévue sans entraver l'objectif des par. 14.06(2) ou (4) de la *LFI*.

[112] Pour soutenir que l'art. 14.06 a comme objectif général de réduire le nombre de sites abandonnés (au sens non technique du terme) et d'encourager les syndics à accepter des mandats, GTL se fonde sur ce qu'il appelle [TRADUCTION] « la preuve extrinsèque disponible et le libellé de cette disposition » (mémoire de GTL, par. 91). À mon avis, les arguments qu'il avance ne lui permettent pas de s'acquitter du fardeau élevé qui lui incombe et de démontrer que l'objectif des par. 14.06(2) et (4) devrait être défini de manière à inclure ces objectifs généraux. Réduire le nombre de sites délaissés et encourager les syndics à accepter des mandats peuvent être des effets secondaires positifs des par. 14.06(2) et (4), mais il serait exagéré de dire qu'il s'agit des objectifs de ces dispositions. Comme dans le cas de la disposition en litige dans *Lemare*, il est plus plausible que ces dispositions aient un « simple et restreint » (par. 45).

[113] Quoi qu'il en soit, même si l'on tient pour acquis que les par. 14.06(2) et (4) ont de tels objectifs généraux, la preuve ne démontre pas que la réalisation de ces objectifs est entravée par l'ajout des syndics à la définition légale de « titulaire de permis ». S'appuyant sur des affirmations de GTL dans le Deuxième rapport, ATB prétend que, si les syndics sont toujours considérés comme des « titulaires de permis » et les réclamations environnementales continuent de lier l'actif, les syndics refuseront la nomination dans des situations semblables à celle de l'insolvabilité de Redwater. À cette prétention

Northern Badger that certain ongoing environmental obligations in the oil and gas industry continue to be binding on bankrupt estates must be weighed against this bald allegation. It was also well established that the Regulator would never attempt to hold insolvency professionals personally liable for such obligations. As noted by the Canadian Association of Petroleum Producers, there is nothing to suggest that this well-established state of affairs has led insolvency professionals to refuse to accept appointments or has increased the number of orphaned sites. There is no reason why the Regulator and trustees cannot continue to work together collaboratively, as they have for many years, to ensure that end-of-life obligations are satisfied, while at same time maximizing recovery for creditors.

sommaire il faut opposer le fait qu'avant le présent litige, il était établi en Alberta, depuis au moins l'arrêt *Northern Badger*, que certaines obligations environnementales continues dans l'industrie pétrolière et gazière liaient toujours l'actif du failli. Il était aussi bien établi que l'organisme de réglementation n'aurait jamais essayé de tenir les professionnels de l'insolvabilité personnellement responsables de telles obligations. Comme l'a fait remarquer l'Association canadienne des producteurs pétroliers, rien n'indique que cet état de fait bien établi a conduit les professionnels de l'insolvabilité à refuser la nomination ou augmenté le nombre de sites orphelins. Il n'y a aucune raison pour laquelle l'organisme de réglementation et les syndics ne peuvent pas poursuivre leur collaboration, comme ils le font depuis de nombreuses années, pour assurer le respect des obligations de fin de vie tout en maximisant le recouvrement au profit des créanciers.

(3) Conclusion on Section 14.06 of the *BIA*

[114] There is no conflict between the Alberta legislation and s. 14.06 of the *BIA* that makes the definition of "licensee" in the former inapplicable insofar as it includes GTL. GTL continues to have the responsibilities and duties of a "licensee" to the extent that assets remain in the Redwater estate. Nonetheless, GTL submits that, even if it cannot walk away from the Renounced Assets by invoking s. 14.06(4), the environmental obligations associated with those assets are unsecured claims of the Regulator for the purposes of the *BIA*. GTL says that the order of priorities in the *BIA* requires it to satisfy the claims of Redwater's secured creditors before the Regulator's claims, which rank equally with the claims of other unsecured creditors. According to GTL, the Regulator's attempts to use its statutory powers to prioritize its environmental claims conflict with the *BIA*. I will now consider this alleged conflict, which turns on the *Abitibi* test.

(3) Conclusion sur l'art. 14.06 de la *LFI*

[114] Il n'y a aucun conflit entre la législation albertaine et l'art. 14.06 de la *LFI* par suite duquel la définition de « titulaire de permis » dans la première est inapplicable dans la mesure où elle vise GTL. Ce dernier conserve les responsabilités et obligations d'un « titulaire de permis » tant qu'il reste des éléments dans l'actif de Redwater. GTL plaide néanmoins que, même s'il ne peut délaisser les biens faisant l'objet de la renonciation en invoquant le par. 14.06(4), les obligations environnementales qui y sont associés sont des réclamations non garanties de l'organisme de réglementation pour l'application de la *LFI*. GTL affirme que l'ordre de priorités fixé dans la *LFI* l'oblige à acquitter les réclamations des créanciers garantis de Redwater avant celles de l'organisme de réglementation, lesquelles occupent le même rang que les réclamations des autres créanciers ordinaires. D'après GTL, les tentatives de l'organisme de réglementation d'utiliser les pouvoirs que lui accorde la loi pour faire primer ses réclamations environnementales entrent en conflit avec la *LFI*. Je vais maintenant me pencher sur ce conflit allégué, qui fait intervenir le critère d'*Abitibi*.

C. *The Abitibi Test: Is the Regulator Asserting Claims Provable in Bankruptcy?*

[115] The equitable distribution of the bankrupt's assets is one of the purposes of the *BIA*. It is achieved through the collective proceeding model. Creditors of the bankrupt wishing to enforce a claim provable in bankruptcy must participate in the collective proceeding. Their claims will ultimately have the priority assigned to them by the *BIA*. This ensures that the bankrupt's assets are distributed fairly. This model avoids inefficiency and chaos, thus maximizing global recovery for all creditors. For the collective proceeding model to be viable, creditors with provable claims must not be allowed to enforce them outside the collective proceeding.

[116] It is well established that a provincial law will be rendered inoperative in the context of bankruptcy where the effect of the law is to conflict with, reorder or alter the priorities established by the *BIA*. Both Martin J.A. and the chambers judge dealt with the altering of bankruptcy priorities under the frustration of purpose branch of paramountcy. In my view, it could also be plausibly advanced that a provincial law that has the effect of reordering bankruptcy priorities is in operational conflict with the *BIA* — such was the conclusion in *Husky Oil*, at para. 87. For the purposes of this appeal, there is no need to decide which would be the appropriate branch of the paramountcy analysis. Under either branch, the Alberta legislation authorizing the Regulator's use of its disputed powers will be inoperative to the extent that the use of these powers during bankruptcy alters or reorders the priorities established by the *BIA*.

[117] GTL says that this is precisely the effect of the obligations imposed on the Redwater estate by the Regulator through the use of its statutory powers, even if it cannot walk away from the Renounced Assets by invoking s. 14.06(4). Parliament has assigned a particular rank to environmental claims

C. *Le critère d'Abitibi : L'organisme de réglementation fait-il valoir des réclamations prouvables en matière de faillite?*

[115] La répartition équitable des biens du failli est l'un des objectifs de la *LFI*. Elle est réalisée par le truchement du modèle de la procédure collective. Les créanciers du failli souhaitant faire valoir une réclamation prouvable en matière de faillite doivent participer à la procédure collective. Leurs réclamations recevront en fin de compte la priorité qui leur a été attribuée par la *LFI*. Cela assure la répartition équitable des biens du failli. Ce modèle évite l'inefficacité et le chaos, maximisant ainsi le recouvrement global au profit de tous les créanciers. Pour que le modèle de la procédure collective soit viable, les créanciers ayant des réclamations prouvables ne doivent pas être autorisés à les faire valoir en dehors de la procédure collective.

[116] Il est bien établi qu'une loi provinciale devient inopérante dans le contexte d'une faillite si elle a pour effet d'entrer en conflit avec l'ordre de priorité établi par la *LFI*, de le réarranger ou de le modifier. La juge Martin et le juge siégeant en cabinet ont tous les deux traité de la modification des priorités en matière de faillite en fonction du volet « entrave à la réalisation d'un objet fédéral » de la doctrine de la prépondérance. À mon avis, il pourrait aussi être plausiblement avancé qu'une loi provinciale ayant pour effet de réarranger les priorités en matière de faillite est en conflit d'application avec la *LFI*; telle était la conclusion dans *Husky Oil*, au par. 87. Pour les besoins du présent pourvoi, il n'est pas nécessaire de décider quel serait le bon volet de l'analyse relative à la prépondérance. Dans l'un ou l'autre volet, la loi albertaine autorisant l'organisme de réglementation à exercer ses pouvoirs contestés sera inopérante, dans la mesure où l'exercice de ces pouvoirs pendant la faillite modifie ou réarrange les priorités établies par la *LFI*.

[117] GTL affirme que, même si le fait d'invoquer le par. 14.06(4) ne lui permet pas de délaisser les biens faisant l'objet de la renonciation, les obligations imposées à l'actif de Redwater par l'organisme de réglementation au moyen de l'exercice des pouvoirs que lui confère la loi font exactement cela. Le

that are provable in bankruptcy. It is accepted that the limited super priority for environmental claims created by s. 14.06(7) of the *BIA* does not apply here, and accordingly, says GTL, the Regulator is an ordinary creditor as regards its environmental claims — in other words, neither a secured nor a preferred creditor. The Regulator's environmental claims are thus to be paid rateably with those of Redwater's other ordinary creditors under s. 141 of the *BIA*. GTL argues that, to comply with the Abandonment Orders or LMR requirements, the Redwater estate will have to expend funds prior to distributing its assets to the secured creditors, and that this amounts to the Regulator using its statutory powers to create for itself a priority in bankruptcy to which it is not entitled.

[118] However, only claims provable in bankruptcy must be asserted within the single proceeding. Other claims are not stayed upon bankruptcy and continue to be binding on the estate. In *Abitibi*, this Court clearly stated that not all environmental obligations enforced by a regulator will be claims provable in bankruptcy. As a matter of principle, bankruptcy does not amount to a licence to disregard rules. The Regulator says that it is not asserting any claims provable in the bankruptcy, so the Redwater estate must comply with its environmental obligations, to the extent that assets are available to do so.

[119] The resolution of this issue turns on the proper application of the *Abitibi* test for determining whether a particular regulatory obligation amounts to a claim provable in bankruptcy. To reiterate:

> First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. [Emphasis in original; para. 26.]

Parlement a attribué un rang donné aux réclamations environnementales qui sont prouvables en matière de faillite. Il est admis que la superpriorité limitée créée par le par. 14.06(7) de la *LFI* pour les réclamations de cette nature ne s'applique pas en l'espèce et, en conséquence, affirme GTL, l'organisme de réglementation est un créancier ordinaire à l'égard de ces réclamations, c'est-à-dire qu'il n'est ni un créancier garanti ni un créancier privilégié. Les réclamations environnementales de l'organisme de réglementation doivent donc être acquittées au prorata avec celles des autres créanciers ordinaires de Redwater en application de l'art. 141 de la *LFI*. GTL soutient que, pour respecter les ordonnances d'abandon ou les exigences relatives à la CGR, il devra dépenser des fonds avant de partager ses biens entre les créanciers garantis. Cela équivaut, pour l'organisme de réglementation, à utiliser les pouvoirs que lui confère la loi pour se créer une priorité en matière de faillite à laquelle il n'a pas droit.

[118] Toutefois, on doit faire valoir uniquement les réclamations prouvables en matière de faillite dans le cadre de la procédure unique. Les réclamations non prouvables ne sont pas suspendues à la faillite et elles lient toujours l'actif. Dans l'arrêt *Abitibi*, notre Cour a clairement déclaré que les obligations environnementales appliquées par un organisme de réglementation ne sont pas toutes des réclamations prouvables en matière de faillite. En principe, la faillite n'équivaut pas à une autorisation de faire fi des règles. L'organisme de réglementation dit qu'il ne fait valoir aucune réclamation prouvable dans la faillite et que l'actif de Redwater doit respecter ses obligations environnementales dans la mesure des biens dont il dispose.

[119] Le règlement de cette question requiert que l'on applique correctement le critère d'*Abitibi* pour déterminer si une obligation réglementaire précise équivaut à une réclamation prouvable en matière de faillite. Il y a lieu de réitérer ce critère :

> Premièrement, on doit être en présence d'une dette, d'un engagement ou d'une obligation envers un *créancier*. Deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance *avant que le débiteur ne devienne failli*. Troisièmement, il doit être possible d'attribuer une *valeur pécuniaire* à cette dette, cet engagement ou cette obligation. [En italique dans l'original; par. 26.]

[120] There is no dispute that in this appeal, the second part of the test is met. Accordingly, I will discuss only the first and the third parts of the test.

[121] In this Court, the Regulator, supported by various interveners, raised two concerns about how the *Abitibi* test has been applied, both by the courts below and in general. The first concern is that the "creditor" step of the *Abitibi* test has been interpreted too broadly in cases such as the instant appeal and *Nortel Networks Corp., Re*, 2013 ONCA 599, 368 D.L.R. (4th) 122 ("*Nortel* CA"), and that, in effect, this step of the test has become so pro forma as to be practically meaningless. The second concern has to do with the application of the "monetary value" step of the *Abitibi* test by the chambers judge and Slatter J.A. This step is generally called the "sufficient certainty" step, based on the guidance provided in *Abitibi*. The argument here is that the courts below went beyond the test established in *Abitibi* by focusing on whether Redwater's regulatory obligations were "intrinsically financial". Under *Abitibi*, the sufficient certainty analysis should have focused on whether the Regulator would ultimately perform the environmental work and assert a monetary claim for reimbursement.

[122] In my view, both concerns raised by the Regulator have merit. As I will demonstrate, *Abitibi* should not be taken as standing for the proposition that a regulator is always a creditor when it exercises its statutory enforcement powers against a debtor. On a proper understanding of the "creditor" step, it is clear that the Regulator acted in the public interest and for the public good in issuing the Abandonment Orders and enforcing the LMR requirements and that it is, therefore, not a creditor of Redwater. It is the public, not the Regulator or the General Revenue Fund, that is the beneficiary of those environmental obligations; the province does not stand to gain

[120] Il est incontestable que, dans le présent pourvoi, la deuxième partie du critère est respectée. En conséquence, je ne traiterai que des première et troisième parties.

[121] Devant notre Cour, l'organisme de réglementation, avec l'appui de divers intervenants, a soulevé deux préoccupations quant à la façon dont le critère d'*Abitibi* avait été appliqué, tant par les tribunaux d'instance inférieure que par les cours en général. La première préoccupation concerne le fait que l'étape « créancier » du critère a reçu une interprétation trop large dans des affaires analogues à celle en l'espèce et *Nortel Networks Corp., Re*, 2013 ONCA 599, 368 D.L.R. (4th) 122 (« *Nortel* CA ») et qu'en réalité, cette étape du critère est si aisément franchie qu'elle n'est appliquée que pour la forme et qu'elle n'a pratiquement plus de sens. La seconde préoccupation a trait à l'application de l'étape « valeur pécuniaire » du critère d'*Abitibi* par le juge siégeant en cabinet et le juge Slatter. Cette étape reçoit généralement le nom de « certitude suffisante », compte tenu des directives données dans *Abitibi*. On soutient par là que les tribunaux d'instance inférieure sont allés au-delà du critère établi dans l'arrêt *Abitibi* en se concentrant sur la question de savoir si les obligations réglementaires de Redwater étaient « intrinsèquement financières ». Suivant l'arrêt *Abitibi*, l'analyse de la certitude suffisante aurait dû être axée sur la question de savoir si l'organisme de réglementation effectuerait lui-même, au bout du compte, les travaux environnementaux et ferait valoir une réclamation pécuniaire pour le remboursement.

[122] Les deux préoccupations exprimées par l'organisme de réglementation me paraissent fondées. Comme je vais le démontrer, l'arrêt *Abitibi* ne doit pas être considéré comme soutenant la thèse qu'un organisme de réglementation est toujours un créancier lorsqu'il exerce les pouvoirs d'application qui lui sont dévolus par la loi à l'encontre d'un débiteur. D'après le sens qu'il convient de donner à l'étape « créancier », il est clair que l'organisme de réglementation a agi dans l'intérêt public et pour le bien public en rendant les ordonnances d'abandon et en assurant le respect des exigences relatives à la CGR, et qu'il n'est donc pas un créancier de Redwater.

financially from them. Although this conclusion is sufficient to resolve this aspect of the appeal, for the sake of completeness, I will also demonstrate that the chambers judge erred in finding that, on these facts, there is sufficient certainty that the Regulator will ultimately perform the environmental work and assert a claim for reimbursement. To conclude, I will briefly comment on why the *effects* of the end-of-life obligations do not conflict with the priority scheme in the *BIA*.

C'est le public, et non l'organisme de réglementation ou le fonds d'administration du gouvernement, qui bénéficie de ces obligations environnementales; la province n'est pas en mesure d'en bénéficier financièrement. Bien que cette conclusion suffise pour trancher cet aspect du pourvoi, par souci d'exhaustivité, je vais aussi démontrer que le juge siégeant en cabinet a eu tort de conclure qu'au vu des faits de l'espèce, il est suffisamment certain que l'organisme de réglementation exécutera au bout du compte les travaux environnementaux et présentera une demande de remboursement. Pour conclure, je me prononcerai brièvement sur les raisons pour lesquelles les *effets* des obligations de fin de vie n'entrent pas en conflit avec le régime de priorité établi dans la *LFI*.

(1) The Regulator Is Not a Creditor of Redwater

(1) L'organisme de réglementation n'est pas un créancier de Redwater

[123] The Regulator and the supporting interveners are not the first to raise issues with the "creditor" step of the *Abitibi* test. In the six years since *Abitibi* was decided, concerns about the "creditor" step and the fact that, as it is commonly understood, it will seemingly be satisfied in all — or nearly all — cases have also been expressed by academic commentators, such as A. J. Lund, "Lousy Dentists, Bad Drivers, and Abandoned Oil Wells: A New Approach to Reconciling Provincial Regulatory Regimes with Federal Insolvency Law" (2017), 80 *Sask. L. Rev.* 157, at p. 178, and Stewart. This Court has not had an opportunity to comment on *Abitibi* since it was decided. However, the interpretation of the "creditor" step adopted by lower courts, including the majority of the Court of Appeal in this case, has focused on certain comments found at para. 27 of *Abitibi*, and the "creditor" step has accordingly been found to be satisfied whenever a regulator exercises its enforcement powers against a debtor (see, for example, C.A. reasons, at para. 60; *Nortel* CA, at para. 16).

[123] L'organisme de réglementation et les intervenants qui l'appuient ne sont pas les premiers à cerner des problèmes relativement à l'étape « créancier » du critère d'*Abitibi*. Pendant les six années qui ont suivi l'arrêt *Abitibi*, des problèmes au sujet de cette étape et le fait que, dans son acception courante, cette étape sera toujours — ou presque toujours — franchie ont aussi été énoncés par des commentateurs universitaires tels que A. J. Lund, « Lousy Dentists, Bad Drivers, and Abandoned Oil Wells : A New Approach to Reconciling Provincial Regulatory Regimes with Federal Insolvency Law » (2017), 80 *Sask L. Rev.* 157, p. 178, et M. Stewart. Notre Cour n'a pas eu l'occasion de commenter l'arrêt *Abitibi* depuis qu'il a été rendu. Par contre, l'interprétation de l'étape « créancier » retenue par des juridictions inférieures, notamment la majorité de la Cour d'appel en l'espèce, a mis l'accent sur certaines remarques faites au par. 27 de l'arrêt *Abitibi*. Sur cette base, ces tribunaux ont conclu que l'étape « créancier » est franchie chaque fois qu'un organisme de réglementation exerce à l'encontre d'un débiteur son pouvoir d'appliquer la loi (voir, par exemple, les motifs de la Cour d'appel, par. 60; *Nortel* CA, par. 16).

[124] GTL submits that these lower courts have correctly interpreted and applied the "creditor" step.

[124] Selon GTL, les juridictions inférieures susmentionnées ont bien interprété et appliqué l'étape

It further submits that, because of *Abitibi*, the 1991 Alberta Court of Appeal decision in *Northern Badger* is of no assistance in analyzing the creditor issue. Conversely, the Regulator forcefully argues that *Abitibi* must be understood in the context of its own unique facts and that it did not overrule *Northern Badger*. Relying on *Northern Badger*, the Regulator argues that a regulator exercising a power to enforce a public duty is not a creditor of the individual or corporation subject to that duty. Like Martin J.A., I agree with the Regulator on this point. If, as GTL urges and the majority of the Court of Appeal concluded, the "creditor" step is satisfied whenever a regulator exercises its enforcement powers against a debtor, then it is hard to imagine a situation in which the "creditor" step would not be satisfied by the actions of an environmental regulator. Stewart was correct to suppose that "[s]urely, the Court did not intend this result" (p. 189). For the "creditor" step to have meaning, "there must be situations where the other two steps could be met . . . but the order [or obligation] is still not a provable claim because the regulator is not a creditor of the bankrupt" (Attorney General of Ontario's factum, at para. 39).

[125] Before further explaining my conclusion on this point, I must address a preliminary issue: the fact that the Regulator conceded in the courts below that it was a creditor. It is well established that concessions of law are not binding on this Court: see *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781, at para. 44; *M. v. H.*, [1999] 2 S.C.R. 3, at para. 45; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686, at para. 62. As noted by L'Heureux-Dubé J., in dissent, but not on this point, in *R. v. Elshaw*, [1991] 3 S.C.R. 24, at p. 48, "the fact that an issue is conceded below means nothing in and of itself". Although concessions by the parties are often relied upon, it is ultimately for

« créancier ». Il ajoute qu'à la suite de l'arrêt *Abitibi*, l'arrêt *Northern Badger* rendu en 1991 par la Cour d'appel de l'Alberta n'est d'aucun secours pour analyser la question du créancier. À l'inverse, l'organisme de réglementation soutient avec vigueur qu'il faut situer l'arrêt *Abitibi* dans le contexte des faits qui lui sont propres, et qu'il n'a pas infirmé *Northern Badger*. Se fondant sur cet arrêt, l'organisme de réglementation plaide qu'un organisme de réglementation exerçant un pouvoir pour faire respecter un devoir public n'est pas un créancier de la personne ou de la société assujettie à ce devoir. À l'instar de la juge Martin, je partage l'avis de l'organisme de réglementation sur ce point. Si, comme l'exhorte GTL et le concluent les juges majoritaires de la Cour d'appel, l'étape « créancier » est franchie chaque fois qu'un organisme de réglementation exerce ses pouvoirs d'application à l'encontre d'un débiteur, il est difficile d'imaginer une situation où les actes d'un organisme de réglementation ne franchiraient pas l'étape « créancier ». Monsieur Stewart avait raison de supposer que [TRADUCTION] « la Cour ne souhaitait sûrement pas ce résultat » (p. 189). Pour que l'étape « créancier » ait un quelconque sens [TRADUCTION] « il doit y avoir des situations dans lesquelles les deux autres étapes du critère d'*Abitibi* sont franchies […], mais l'ordonnance [ou l'obligation] environnementale n'est toujours pas une réclamation prouvable car l'organisme de réglementation n'est pas un créancier du failli » (mémoire de la procureure générale de l'Ontario, par. 39).

[125] Avant d'expliquer davantage ma conclusion sur ce point, je dois traiter d'une question préliminaire : l'organisme de réglementation a concédé devant les juridictions inférieures qu'il était un créancier. Il est bien établi que les concessions de droit ne lient pas notre Cour : voir *Ocean Port Hotel Ltd. c. Colombie-Britannique (General Manager, Liquor Control & Licensing Branch)*, 2001 CSC 52, [2001] 2 R.C.S. 781, par. 44; *M. c. H.*, [1999] 2 R.C.S. 3, par. 45; *R. c. Sappier*, 2006 CSC 54, [2006] 2 R.C.S. 686, par. 62). Comme l'a fait remarquer la juge L'Heureux-Dubé (dissidente, mais non sur ce point) dans *R. c. Elshaw*, [1991] 3 R.C.S. 24, p. 48, « un aveu fait devant une instance inférieure ne signifie rien en soi ». Bien que l'on se fonde souvent

this Court to determine points of law. For several reasons, no fairness concerns are raised by disregarding the Regulator's concession in this case.

[126] First, in a letter to GTL dated May 14, 2015, the Regulator advanced the position that it was "not a creditor of [Redwater]", but, rather, had a "statutory mandate to regulate the oil and gas industry in Alberta" (GTL's Record, vol. 1, at p. 78). I note that this was the initial communication between the Regulator and GTL, only two days after the latter's appointment as receiver of Redwater's property. Second, the issue of whether the Regulator is a creditor was discussed in the parties' factums. Third, during oral arguments before this Court, the Regulator was questioned about its concession. Counsel made the undisputed point that higher courts are not bound by such concessions and took the position that, on the correct interpretation of *Abitibi*, the Regulator was not a creditor. Fourth, when the Regulator's status as a creditor was raised as an issue before this Court, opposing counsel did not argue that they would have adduced further evidence on the issue had it been raised in the courts below. Finally, a proper understanding of the "creditor" step of the *Abitibi* test is of fundamental importance to the proper functioning of the national bankruptcy scheme and of provincial environmental schemes throughout Canada. I conclude that this case is one in which it is appropriate to disregard the Regulator's concession in the courts below.

[127] Returning to the analysis, I note that the unique factual matrix of *Abitibi* must be kept in mind. In that case, Newfoundland and Labrador expropriated most of AbitibiBowater's property in the province without compensation. Subsequently,

sur les concessions des parties, il revient en fin de compte à notre Cour de statuer sur des points de droit. Pour plusieurs raisons, on ne suscite aucune préoccupation en matière d'équité en ne tenant pas compte de la concession faite par l'organisme de réglementation en l'espèce.

[126] Premièrement, dans une lettre adressée à GTL en date du 14 mai 2015, l'organisme de réglementation soutient qu'il était [TRADUCTION] « non pas un créancier de [Redwater] », mais avait plutôt « pour mandat légal de réglementer l'industrie pétrolière et gazière de l'Alberta » (dossier de GTL, vol. 1, p. 78). Je constate qu'il s'agissait de la première communication entre l'organisme de réglementation et GTL et qu'elle est survenue seulement deux jours après la nomination de ce dernier comme séquestre des biens de Redwater. Deuxièmement, les parties ont traité dans leurs mémoires de la question de savoir si l'organisme de réglementation est un créancier. Troisièmement, au cours de sa plaidoirie devant notre Cour, l'organisme de réglementation a été interrogé à propos de sa concession. L'avocate a signalé le point non contesté que les tribunaux supérieurs ne sont pas liés par de telles concessions, et a soutenu que, si l'on interprète correctement l'arrêt *Abitibi*, l'organisme de réglementation n'était pas un créancier. Quatrièmement, quand le statut de l'organisme de réglementation en tant que créancier a été évoqué devant notre Cour, les avocats des parties adverses n'ont pas prétendu qu'ils auraient présenté des éléments de preuve supplémentaires sur ce point s'il avait été soulevé devant les juridictions inférieures. Enfin, le sens qu'il convient de donner à l'étape « créancier » du critère d'*Abitibi* est d'une importance fondamentale pour le bon fonctionnement du régime national de faillite et des régimes environnementaux provinciaux partout au Canada. Je conclus qu'il est indiqué en l'espèce de ne pas tenir compte de la concession faite par l'organisme de réglementation devant les juridictions inférieures.

[127] Pour revenir à l'analyse, je signale qu'il ne faut pas oublier la matrice factuelle unique de l'arrêt *Abitibi*. Dans cette affaire, Terre-Neuve-et-Labrador a exproprié la plupart des biens d'AbitibiBowater dans la province, sans indemnisation. Par la suite,

AbitibiBowater was granted a stay under the *CCAA*. It then filed a notice of intent to submit a claim to arbitration under the *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, Can. T.S. 1994 No. 2 ("NAFTA"), for losses resulting from the expropriation. In response, Newfoundland's Minister of Environment and Conservation ordered AbitibiBowater to remediate five sites pursuant to the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 ("*EPA*"). Three of the five sites had been expropriated by Newfoundland and Labrador. The evidence led to the conclusion that "the Province never truly intended that Abitibi was to perform the remediation work", but instead sought a claim that could be used as an offset in connection with AbitibiBowater's NAFTA claim (*Abitibi*, at para. 54). In other words, the Province sought a financial benefit from the remediation orders.

AbitibiBowater s'est vu accorder une suspension en vertu de la LACC. Elle a ensuite déposé un avis d'intention de soumettre une réclamation à l'arbitrage au titre de l'*Accord de libre-échange nord-américain entre le gouvernement du Canada, le gouvernement des États-Unis mexicains et le gouvernement des États-Unis d'Amérique*, R.T. Can. 1994 nº 2 (« ALENA »), pour les pertes résultant de l'expropriation. En réponse, le ministre de l'Environnement et de la Conservation de Terre-Neuve a ordonné à AbitibiBowater de décontaminer cinq sites conformément à l'*Environmental Protection Act*, S.N.L. 2002, c. E-14.2 (« *EPA* »). Trois des cinq sites avaient été expropriés par la province. La preuve a mené à la conclusion que « la province n'avait jamais vraiment eu l'intention qu'Abitibi exécute les travaux [de décontamination] » (*Abitibi*, par. 54) et qu'elle cherchait plutôt à faire valoir une réclamation qui pourrait être utilisée à titre compensatoire au regard de la demande d'indemnisation d'AbitibiBowater fondée sur l'ALENA. Autrement dit, la province voulait tirer un avantage financier des ordonnances de décontamination.

[128] In this appeal, it is not disputed that, in seeking to enforce Redwater's end-of-life obligations, the Regulator is acting in a *bona fide* regulatory capacity and does not stand to benefit financially. The Regulator's ultimate goal is to have the environmental work actually performed, for the benefit of third-party landowners and the public at large. There is no colourable attempt by the Regulator to recover a debt, nor is there an ulterior motive on its part, as there was in *Abitibi*. The distinction between the facts of this appeal and those of *Abitibi* becomes even clearer when one examines the comprehensive reasons of the chambers judge in *Abitibi*. The crux of the findings of Gascon J. (as he then was) is found at paras. 173-76:

[128] En l'espèce, personne ne conteste qu'en cherchant à assurer le respect des obligations de fin de vie incombant à Redwater, l'organisme de réglementation agit de bonne foi à titre d'autorité de réglementation et il n'est pas en mesure d'obtenir un avantage financier. L'objectif ultime de l'organisme de réglementation est de faire exécuter les travaux environnementaux au profit des tiers propriétaires terriens et de la population en général. L'organisme de réglementation n'a pas fait de tentative déguisée de recouvrer une créance et il n'y avait pas de motif oblique de sa part, comme c'était le cas dans *Abitibi*. La distinction entre les faits du présent pourvoi et ceux de l'affaire *Abitibi* ressort encore plus clairement lorsqu'on examine les motifs exhaustifs du juge siégeant en cabinet dans *Abitibi*. Le cœur des conclusions du juge Gascon (maintenant juge de notre Cour) se trouve aux par. 173-176 :

. . . the Province stands as the direct beneficiary, from a monetary standpoint, of Abitibi's compliance with the EPA Orders. In other words, the execution in nature of the EPA Orders would result in a definite credit to the Province's

[TRADUCTION] . . . la province bénéficie directement, d'un point de vue financier, du respect par Abitibi des ordonnances fondées sur l'EPA. En d'autres termes, l'exécution en nature des ordonnances fondées sur l'EPA se traduirait

own "balance sheet". Abitibi's liability in that regard is an asset for the Province itself.

With all due respect, this is not regulatory in nature; it is rather purely financial in reality. This is, in fact, closer to a debtor-creditor relationship than anything else.

This is quite far from the situation of the detached regulator or public enforcer issuing order for the public good. Here, the Province itself derives the direct pecuniary benefit from the required compliance of Abitibi to the EPA Orders. The Province stands to directly gain in the outcome. None of the cases submitted by the Province bear any similarity to the fact pattern in the present proceedings.

From this perspective, it is the hat of a creditor that best fits the Province, not that of a disinterested regulator.

(*AbitibiBowater Inc., Re*, 2010 QCCS 1261, 68 C.B.R. (5th) 1)

[129] This Court recognized in *Abitibi* that the Province "easily satisfied" the creditor requirement (para 49). It was therefore not necessary to consider at any length how the "creditor" step should be understood or how it would apply in other factual situations. However, even at para. 27 of *Abitibi*, the paragraph relied on by the majority of the Court of Appeal, Deschamps J. made a point of noting that "[m]ost environmental regulatory bodies *can be* creditors in respect of monetary or non-monetary obligations imposed by the relevant statutes" (emphasis added). The interpretation of the "creditor" step adopted by the majority of the Court of Appeal and urged upon this Court by GTL leaves no room for a regulator that enforces obligations not to be a creditor, though this possibility was clearly contemplated by para. 27 of *Abitibi*. As noted above, GTL's interpretation leaves the "creditor" step with no independent work to perform.

par un crédit certain au propre « bilan » de la province. Le passif d'Abitibi à cet égard constitue un actif de la province elle-même.

Soit dit en tout respect, il ne s'agit pas d'une affaire de nature réglementaire; il s'agit plutôt en fait d'une affaire purement financière. Cela s'apparente effectivement davantage à une relation créancier-débiteur qu'à autre chose.

Nous sommes assez loin du cas de l'organisme de réglementation ou d'application de la loi qui a rendu de manière objective une ordonnance dans l'intérêt public. En l'espèce, la province elle-même tire directement l'avantage pécunaire du respect obligatoire, par Abitibi, des ordonnances EPA. La province peut tirer profit du résultat. Aucune des affaires soumises par la province ne ressemble un tant soit peu aux faits à l'origine de la présente instance.

Sous cet angle, la province a agi plus comme un créancier que comme un organisme de réglementation désintéressé.

(*AbitibiBowater Inc., Re*, 2010 QCCS 1261, 68 C.B.R. (5th) 1)

[129] Notre Cour a reconnu dans *Abitibi* qu'il était « facile [pour la province] de répondre » à l'exigence relative au créancier (par. 49). Il n'était donc pas nécessaire d'analyser en profondeur le sens de l'étape « créancier » ou la manière dont elle s'appliquerait dans d'autres situations factuelles. Or, même au par. 27 de l'arrêt *Abitibi*, le paragraphe sur lequel se fondent les juges majoritaires de la Cour d'appel, la juge Deschamps a pris soin de souligner que « [l]a plupart des organismes administratifs *peuvent agir* à titre de créanciers en relation avec les obligations pécuniaires ou non pécuniaires imposées par ces lois » (italiques ajoutés). L'interprétation de l'étape « créancier » qu'ont retenue les juges majoritaires de la Cour d'appel et que GTL nous a exhortés à faire nôtre exclut la possibilité qu'un organisme de réglementation faisant respecter des obligations ne soit pas un créancier, alors que cette possibilité a été clairement envisagée au par. 27 de l'arrêt *Abitibi*. Comme je l'ai mentionné ci-dessus, l'interprétation de GTL prive l'étape « créancier » de toute fonction indépendante.

[130] *Northern Badger* established that a regulator enforcing a public duty by way of non-monetary order is not a creditor. I reject the claim in the dissenting reasons that *Northern Badger* should be interpreted differently. First, I note that whether the Regulator has a contingent claim is relevant to the sufficient certainty test, which presupposes that the Regulator is a creditor. I cannot accept the proposition in the dissenting reasons that *Northern Badger* was concerned with what would become the third prong of the *Abitibi* test. In *Northern Badger*, Laycraft C.J.A. accepted that abandonment was a liability and identified the issue as "whether that liability is to the board so that it is the board which is the creditor" (para. 32). Second, the underlying scenario here with regards to Redwater's end-of-life obligations is exactly the same as in *Northern Badger* — a regulator is ordering an entity to comply with its legal obligations in furtherance of the public good. This reasoning from *Northern Badger* was subsequently adopted in cases such as *Strathcona (County) v. Fantasy Construction Ltd. (Trustee of)*, 2005 ABQB 794, 261 D.L.R. (4th) 221, at paras. 23-25, and *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534.

[131] I cannot agree with the suggestion by the majority of the Court of Appeal in this case that *Northern Badger* "is of limited assistance" in the application of the *Abitibi* test (para. 63). Rather, I agree with Martin J.A. that *Abitibi* did not overturn the reasoning in *Northern Badger*, but instead "emphasized the need to consider the substance of provincial regulation in assessing whether it creates a claim provable in bankruptcy" (para. 164). As Martin J.A. noted, even following *Abitibi*, the law continues to be that "public obligations are not provable claims that can be counted or compromised in the bankruptcy" (para. 174). *Abitibi* clarified the scope of *Northern Badger* by confirming that a regulator's environmental claims will be provable claims under certain circumstances. It does not stand for the

[130] L'arrêt *Northern Badger* a établi qu'un organisme de réglementation faisant respecter un devoir public au moyen d'une ordonnance non pécuniaire n'est pas un créancier. Je rejette la prétention faite dans les motifs dissidents selon laquelle *Northern Badger* devrait recevoir une interprétation différente. Premièrement, je souligne que le point de savoir si l'organisme de réglementation a une réclamation éventuelle relève du critère de la certitude suffisante, lequel suppose au préalable que l'organisme de réglementation est un créancier. Je ne peux accepter la proposition énoncée dans les motifs dissidents selon laquelle *Northern Badger* porte sur ce qui allait devenir le troisième volet du critère d'*Abitibi*. Dans *Northern Badger*, après avoir reconnu que l'abandon constituait une responsabilité, le juge d'appel Laycraft a dit qu'il s'agissait de savoir [TRADUCTION] « si cette responsabilité appartient à l'Office, ce qui fait de lui le créancier » (par. 32). Deuxièmement, le scénario sous-jacent en l'espèce quant aux obligations de fin de vie qui incombent à Redwater est exactement le même que dans *Northern Badger* : un organisme de réglementation ordonne à une entité de se conformer à ses obligations légales pour le bien public. Ce raisonnement exact tiré de *Northern Badger* a été adopté par la suite dans des décisions telles *Strathcona (County) c. Fantasy Construction Ltd. (Trustee of)*, 2005 ABQB 794, 261 D.L.R. (4th) 221, par. 23-25, et *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534.

[131] Je ne puis souscrire à l'opinion des juges majoritaires de la Cour d'appel en l'espèce selon laquelle *Northern Badger* [TRADUCTION] « n'est guère utile » dans l'application du critère d'*Abitibi* (par. 63). Je partage plutôt l'avis de la juge Martin voulant que l'arrêt *Abitibi* n'ait pas infirmé le raisonnement de *Northern Badger*, et qu'il ait au contraire « mis en relief le besoin de prendre en considération la teneur du règlement provincial pour déterminer s'il crée une réclamation prouvable en matière de faillite » (par. 164). Comme l'a signalé la juge Martin, même depuis l'arrêt *Abitibi*, l'état du droit reste inchangé : « les obligations publiques ne sont pas des réclamations prouvables qui peuvent être comptabilisées ou compromises dans la faillite » (par. 174). L'arrêt *Abitibi* a éclairci la

proposition that a regulator exercising its enforcement powers is always a creditor. The reasoning in *Northern Badger* was simply not applicable on the facts of *Abitibi*, given the actions of the Province as outlined above.

[132] In *Abitibi*, Deschamps J. noted that insolvency legislation had evolved in the years since *Northern Badger*. That legislative evolution did not, however, change the meaning to be ascribed to the term "creditor". In this regard, I agree with the conclusion in *Strathcona County v. Fantasy Construction Ltd. (Trustee of)*, 2005 ABQB 559, 256 D.L.R. (4th) 536, that the amendments to the *BIA* dealing with environmental matters in the years following *Northern Badger* cannot be interpreted as having overturned the reasoning in that case. As should be clear from the earlier discussion of s. 14.06, the amendments to the *BIA* do not speak to when a regulator enforcing an environmental claim is a creditor.

[133] The conclusion that the reasoning in *Northern Badger* continues to be relevant since *Abitibi* and the amendments to insolvency legislation also finds support in the writings of academic commentators. Stewart's position is that, while *Abitibi* discussed *Northern Badger*, it did not overturn it. He urges this Court to clarify that there remains "a distinction between a regulatory body that is a creditor because it is enforcing a debt, and a regulatory body that is not a creditor because it is enforcing the law" (p. 221). Similarly, Lund argues that a court should "consider the importance of the public interests protected by the regulatory obligation when deciding whether the debtor owes a debt, liability or obligation to a creditor" (p. 178).

portée de *Northern Badger* en confirmant que les réclamations environnementales d'un organisme de réglementation seront des réclamations prouvables dans certains cas. Il ne permet pas d'affirmer qu'un organisme de réglementation exerçant ses pouvoirs d'application est toujours un créancier. Le raisonnement de l'arrêt *Northern Badger* ne s'appliquait tout simplement pas aux faits de l'affaire *Abitibi*, étant donné les agissements de la province décrits précédemment.

[132] Dans *Abitibi*, la juge Deschamps a signalé que la législation en matière d'insolvabilité avait évolué au cours des années qui ont suivi *Northern Badger*. Cette évolution législative n'a en revanche pas modifié le sens à attribuer au terme « créancier ». À cet égard, je souscris à la conclusion du juge Burrows dans *Strathcona County c. Fantasy Construction Ltd. (Trustee of)*, 2005 ABQB 559, 256 D.L.R. (4th) 536, suivant laquelle les modifications en matière d'environnement qui ont été apportées à la *LFI* au cours des années suivant *Northern Badger* ne peuvent être interprétées comme ayant infirmé le raisonnement de cet arrêt. Tel qu'il devrait ressortir clairement de mon analyse précédente de l'art. 14.06, les modifications à la *LFI* ne traitent pas des cas où un organisme de réglementation faisant valoir une réclamation environnementale est un créancier.

[133] Les écrits de commentateurs universitaires appuient également la conclusion voulant que le raisonnement de l'arrêt *Northern Badger* conserve sa pertinence depuis *Abitibi* et les modifications à la loi sur l'insolvabilité. Monsieur Stewart estime que, même si l'arrêt *Abitibi* traite de *Northern Badger*, il ne l'a pas infirmé. Il exhorte notre Cour à préciser qu'il subsiste une distinction entre [TRADUCTION] « l'organisme de réglementation qui agit comme créancier car il recouvre une dette et celui qui n'est pas un créancier car il applique la loi » (p. 221). De même, M^me^ Lund fait valoir qu'un tribunal devrait [TRADUCTION] « prendre en considération l'importance que revêtent les intérêts publics protégés par l'obligation réglementaire au moment de décider si le débiteur a une dette, un engagement ou une obligation envers un créancier » (p. 178).

[134] For the foregoing reasons, *Abitibi* cannot be understood as having changed the law as summarized by Laycraft C.J.A. I adopt his comments at para. 33 of *Northern Badger*:

> The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding every citizen of the province. All who become licensees of oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of modern life . . . But the obligation of the citizen is not to the peace officer, or public authority which enforces the law. The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed.

[135] Based on the analysis in *Northern Badger*, it is clear that the Regulator is not a creditor of the Redwater estate. The end-of-life obligations the Regulator seeks to enforce against Redwater are public duties. Neither the Regulator nor the Government of Alberta stands to benefit financially from the enforcement of these obligations. These public duties are owed, not to a creditor, but, rather, to fellow citizens, and are therefore outside the scope of "provable claims". I do not intend to suggest, however, that a regulator will be a creditor only where it acts exactly as the province did in *Abitibi*. There may very well be situations in which a regulator's actions fall somewhere between those in *Abitibi* and those in the instant case. Notably, unlike some previous cases, the Regulator has performed no environmental work itself. I leave such situations to be addressed in future cases in which there are full factual records. Here, it is clear that the Regulator is seeking to enforce Redwater's public duties, whether by issuing the Abandonment Orders or by maintaining the LMR

[134] Pour les motifs qui précèdent, on ne peut juger que l'arrêt *Abitibi* a modifié le droit, comme l'a résumé le juge en chef Laycraft. Je fais miennes les remarques qu'il fait au par. 33 de *Northern Badger* :

> [TRADUCTION] Les dispositions légales qui exigent l'abandon de puits de pétrole et de gaz font partie du droit commun de l'Alberta et lient chaque citoyen de la province. Toutes les personnes qui acquièrent un permis d'exploitation de puits de pétrole ou de gaz doivent les respecter. Des obligations légales semblables lient les citoyens dans bien d'autres secteurs de la vie moderne [. . .] Mais l'obligation incombant au citoyen n'est pas envers l'agent de la paix ou l'autorité publique qui applique la loi. L'obligation est établie comme une obligation à caractère public qui doit être respectée par l'ensemble des citoyens de la collectivité à l'égard de leurs concitoyens. Lorsque le citoyen visé par l'ordonnance s'y conforme, le résultat n'est pas perçu comme le recouvrement d'une somme d'argent par un agent de la paix ou l'autorité publique, ni comme l'exécution d'un jugement ordonnant le paiement d'une somme d'argent; d'ailleurs, cela ne constitue pas non plus l'objectif de l'ensemble du processus. Il faut plutôt y voir l'application du droit commun. L'organisme d'application de la loi ne devient pas un « créancier » du citoyen à qui incombe l'obligation.

[135] Étant donné l'analyse effectuée dans *Northern Badger*, il est clair que l'organisme de réglementation n'est pas un créancier de l'actif de Redwater. Les obligations de fin de vie que l'organisme de réglementation veut imposer à Redwater sont de nature publique. Ni l'organisme de réglementation ni le gouvernement de l'Alberta ne peuvent bénéficier financièrement de l'exécution de ces obligations. Ces obligations à caractère public sont non pas envers un créancier, mais envers les concitoyens et échappent donc à la portée des « réclamations prouvables ». Je ne veux toutefois pas laisser entendre par là qu'un organisme de réglementation n'est un créancier que s'il se comporte d'une manière identique à la province dans *Abitibi*. Il peut fort bien exister des situations où les agissements d'un organisme de réglementation se situent quelque part entre ceux dans *Abitibi* et ceux en l'espèce. Signalons que, contrairement à certains cas antérieurs, l'organisme de réglementation n'a exécuté aucuns travaux environnementaux lui-même. Je laisse aux tribunaux disposant de dossiers factuels

requirements. The Regulator is not a creditor within the meaning of the *Abitibi* test.

[136] I reject the suggestion that the foregoing analysis somehow overrules the first prong of the *Abitibi* test. The facts in *Abitibi* were not comparable to the facts of this appeal. Although this Court discussed *Northern Badger* in *Abitibi*, it merely referenced the subsequent amendments to the *BIA*, and did not overturn the earlier decision. The Court was clear that the ultimate outcome "must be grounded in the facts of each case" (para. 48). The dissenting reasons claim that, given the foregoing analysis, it will be nearly impossible to find that regulators are ever creditors. *Abitibi* itself shows this not to be the case. Furthermore, as I have said, there may well be cases that fall between *Abitibi* and the present case. However, if *Abitibi* is read as requiring only a determination of whether the regulator has exercised an enforcement power, it will in fact be impossible for a regulator *not* to be a creditor. The dissenting reasons do not seriously deny this, merely suggesting that regulators can publish guidelines or issue licences. The Regulator does both, yet, under the approach taken in the dissenting reasons, it is powerless to take any practical steps in the public interest regarding its guidelines or licences without qualifying as a creditor. As I have explained, *Abitibi* clearly contemplates a place for regulators who are not creditors.

[137] Strictly speaking, this is sufficient to dispose of this aspect of the appeal. However, additional guidance on the sufficient certainty analysis may prove helpful in future cases. Accordingly, I turn now to a discussion of the "sufficient certainty" step and

complets le soin de résoudre pareilles situations à l'avenir. Dans la présente affaire, il est clair que l'organisme de réglementation cherche à faire respecter les devoirs à caractère public de Redwater, que ce soit en rendant les ordonnances d'abandon ou en maintenant les exigences relatives à la CGR. L'organisme de réglementation n'est pas un créancier au sens du critère d'*Abitibi*.

[136] Je rejette la thèse voulant que l'analyse qui précède écarte d'une façon ou d'une autre le premier volet du critère d'*Abitibi*. Les faits de l'affaire *Abitibi* n'étaient pas comparables à ceux de l'espèce. Bien que notre Cour ait examiné l'arrêt *Northern Badger* dans *Abitibi*, elle s'est contentée de mentionner les modifications subséquentes à la *LFI* et n'a pas infirmé l'arrêt antérieur. La Cour a été claire : l'issue finale « doit être fondée sur les faits de chaque affaire » (par. 48). Selon les motifs dissidents, vu l'analyse exposée précédemment, il sera presque impossible de juger que des organismes de réglementation sont des créanciers. L'arrêt *Abitibi* démontre lui-même que ce n'est pas le cas. De plus, comme je l'ai dit, il peut fort bien exister des cas qui se situent entre l'affaire *Abitibi* et celle qui nous occupe. Par contre, si l'on considère qu'*Abitibi* exige uniquement que le tribunal décide si l'organisme de réglementation a exercé un pouvoir d'application, il sera en fait impossible pour un organisme de réglementation de *ne pas* être un créancier. Les motifs dissidents ne nient pas sérieusement cette opinion et donnent seulement à penser que les organismes de réglementation peuvent publier des lignes directrices ou délivrer des permis. L'organisme de réglementation fait les deux mais, selon l'approche adoptée dans les motifs dissidents, il est dépourvu de moyens pour prendre quelque mesure concrète que ce soit dans l'intérêt public à propos de ses lignes directrices ou de permis sans avoir le statut de créancier. Comme je l'ai expliqué, l'arrêt *Abitibi* accorde clairement une place aux organismes de réglementation qui ne sont pas des créanciers.

[137] Cela suffit, à proprement parler, pour trancher cet aspect du pourvoi. Cependant, d'autres indications sur l'analyse de la certitude suffisante pourraient se révéler utiles à l'avenir. En conséquence, je passe maintenant à l'analyse de l'étape

of the reasons why the Abandonment Orders and the LMR conditions both fail on this step of the *Abitibi* test. *Abitibi* test.

(2) There Is No Sufficient Certainty That the Regulator Will Perform the Environmental Work and Advance a Claim for Reimbursement

[138] The "sufficient certainty" test articulated in paras. 30 and 36 in *Abitibi* essentially does no more than reorganize and restate the requirements of the relevant provisions of the *BIA*. Section 121(2) provides that contingent claims may be provable claims. In other words, contingent debts or liabilities owed by a bankrupt to a creditor may be, but are not necessarily, provable claims. Section 135(1.1) provides for the valuation of such a claim. A contingent claim must be capable of valuation under s. 135(1.1) — it cannot be too remote or speculative — in order to be a provable claim under s. 121(2).

[139] Before the third step of the *Abitibi* test can even be reached, a regulator must already have been shown to be a creditor. I have concluded that, on the facts of this case, the Regulator is not a creditor of Redwater. However, for the purpose of explaining how I differ from the chambers judge on the "sufficient certainty" analysis, I will proceed as if the Regulator were, in fact, a creditor of Redwater in respect of the Abandonment Orders and LMR requirements. These end-of-life obligations do not directly require Redwater to make a payment to the Regulator. Rather, they are obligations requiring Redwater to *do something*. As discussed in *Abitibi*, if the Regulator were in fact a creditor, end-of-life obligations would be its contingent claims.

[140] What a court must determine is whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to a regulator. In determining whether

de la « certitude suffisante » et des raisons pour lesquelles les ordonnances d'abandon et les conditions liées à la CGR ne franchissent pas cette étape du critère d'*Abitibi.*

(2) Il n'est pas suffisamment certain que l'organisme de réglementation exécutera les travaux environnementaux et présentera une demande de remboursement

[138] Le critère de la « certitude suffisante » énoncé aux par. 30 et 36 de l'arrêt *Abitibi* ne fait essentiellement que restructurer et reformuler les exigences des dispositions applicables de la *LFI*. Selon le par. 121(2), des réclamations éventuelles peuvent constituer des réclamations prouvables. Autrement dit, les dettes que devra peut-être le failli à un créancier peuvent constituer des réclamations prouvables, mais pas nécessairement l'être. Le paragraphe 135(1.1) prévoit l'évaluation d'une réclamation éventuelle, qui doit être évaluable suivant cette disposition; elle ne doit pas être trop éloignée ou conjecturale pour constituer une réclamation prouvable au sens du par. 121(2).

[139] Avant de pouvoir atteindre la troisième étape du critère d'*Abitibi*, il faut déjà avoir fait la démonstration que l'organisme de réglementation est un créancier. Au vu des faits de l'espèce, j'ai conclu que l'organisme de réglementation n'est pas un créancier de Redwater. Toutefois, afin d'expliquer pourquoi je me dissocie du juge siégeant au cabinet à l'égard de l'analyse de la « certitude suffisante », je vais procéder comme si l'organisme de réglementation était effectivement un créancier de Redwater en ce qui concerne les ordonnances d'abandon et les exigences de la CGR. Ces obligations de fin de vie n'exigent pas directement de Redwater qu'elle fasse un paiement à l'organisme de réglementation. Elles l'obligent plutôt à *faire quelque chose*. Comme l'indique l'arrêt *Abitibi*, si l'organisme de réglementation était en fait un créancier, les obligations de fin de vie constitueraient ses réclamations éventuelles.

[140] Ce que le tribunal doit décider, c'est s'il y a suffisamment de faits indiquant qu'il existe une obligation environnementale de laquelle résultera une dette envers un organisme de réglementation.

a non-monetary regulatory obligation of a bankrupt is too remote or too speculative to be included in the bankruptcy proceeding, the court must apply the general rules that apply to future or contingent claims. It must be sufficiently certain that the contingency will come to pass — in other words, that the regulator will enforce the obligation by performing the environmental work and seeking reimbursement.

[141] I will now discuss the Abandonment Orders and the LMR requirements in turn and demonstrate how they fail to satisfy the "sufficient certainty" step of the *Abitibi* test.

(a) *The Abandonment Orders*

[142] The Regulator has issued orders under the *OGCA* and the *Pipeline Act* requiring Redwater to abandon the Renounced Assets. Even if the Regulator were a creditor of Redwater, the Abandonment Orders would still have to be capable of valuation in order to be included in the bankruptcy process. In my view, it is not established either by the chambers judge's factual findings or by the evidence that it is sufficiently certain that the Regulator will perform the abandonments and advance a claim for reimbursement. The claim is too remote and speculative to be included in the bankruptcy process.

[143] The chambers judge acknowledged that it was "unclear" whether the Regulator would perform the abandonments itself or would deem the wells subject to the Abandonment Orders to be orphans (para. 173). He stated that, in the latter case, the OWA would probably carry out the abandonments, although it was not clear when they would be completed. Indeed, the chambers judge acknowledged that, given the OWA's resources, it could take as long as 10 years for it to get around to performing the required environmental work on the Redwater property. He nonetheless concluded that — even though the "sufficient certainty" step was not satisfied in a

Pour établir si une obligation réglementaire non pécuniaire du failli est trop éloignée ou trop conjecturale pour être incluse dans la procédure de faillite, le tribunal doit appliquer les règles générales qui visent les réclamations futures ou éventuelles. Il doit être suffisamment certain que l'éventualité se concrétisera ou, en d'autres termes, que l'organisme de réglementation fera respecter l'obligation en exécutant les travaux environnementaux et en sollicitant le remboursement de ses frais.

[141] Je vais maintenant analyser les ordonnances d'abandon de même que les exigences relatives à la CGR à tour de rôle et démontrer en quoi elles ne franchissent pas l'étape de la « certitude suffisante » du critère d'*Abitibi*.

a) *Les ordonnances d'abandon*

[142] L'organisme de réglementation a rendu, au titre de l'*OGCA* et de la *Pipeline Act*, des ordonnances enjoignant à Redwater d'abandonner les biens faisant l'objet de la renonciation. Même si l'organisme de réglementation était un créancier de Redwater, les ordonnances d'abandon doivent tout de même pouvoir faire l'objet d'une évaluation pour être incluses dans le processus de faillite. À mon avis, ni les conclusions de fait du juge siégeant en cabinet ni la preuve n'établissent qu'il est suffisamment certain que l'organisme de réglementation procédera à l'abandon et présentera une demande de remboursement. La réclamation est trop éloignée et conjecturale pour être incluse dans la procédure de faillite.

[143] Le juge siégeant en cabinet a reconnu qu'il n'était [TRADUCTION] « pas clair » si l'organisme de réglementation effectuerait lui-même le processus d'abandon ou s'il considérerait les puits assujettis aux ordonnances d'abandon comme orphelins (par. 173). Il a dit que, dans ce dernier cas, l'OWA se chargerait probablement de l'abandon, mais on ne savait pas quand cette tâche serait menée à terme. En effet, le juge siégeant en cabinet a admis qu'étant donné les ressources de l'OWA, cela pourrait lui prendre jusqu'à 10 ans avant qu'elle amorce les travaux environnementaux nécessaires sur la propriété de Redwater. Il a conclu néanmoins que, même

"technical sense" — the situation met what had been intended in *Abitibi*. That conclusion was at least partly based on his finding that the Abandonment Orders were "intrinsically financial" (para. 173).

si l'étape de la « certitude suffisante » n'a pas été franchie au « sens technique », la situation répondait à la norme voulue dans *Abitibi*. Cette conclusion reposait, du moins en partie, sur la sienne voulant que les ordonnances d'abandon soient « intrinsèquement financières » (par. 173).

[144] In my view, the chambers judge did not make a finding of fact that the Regulator would carry out the abandonments *itself*. As noted, he acknowledged that it was "unclear" whether the Regulator would perform the abandonments. This can hardly be deemed a finding of fact deserving of deference. In my view, considered as a whole, the evidence in this case leads to the conclusion that the Regulator will not abandon the Renounced Assets itself.

[144] À mon avis, le juge siégeant en cabinet n'a pas tiré la conclusion de fait que l'organisme de réglementation se chargerait *lui-même* des travaux d'abandon. Je le rappelle, il a reconnu qu'il n'était « pas clair » si l'organisme de réglementation s'en occuperait. On peut difficilement dire qu'il s'agit qu'une conclusion de fait qui commande la déférence. Prise dans son ensemble, la preuve en l'espèce me semble mener à la conclusion selon laquelle l'organisme de réglementation ne procèdera pas lui-même à l'abandon des biens auxquels il a été renoncé.

[145] The Regulator is not in the business of performing abandonments. It has no statutory duty to do so. Abandonment is instead an obligation of the licensee. The evidence of the Regulator's affiant was that the Regulator very rarely abandons properties on behalf of licensees and virtually never does so where the licensee is in receivership or bankruptcy. The affiant stated that the Regulator had no intention of abandoning Redwater's licensed assets. As noted by the chambers judge, it is true that, in its letter to GTL dated July 15, 2015, the Regulator threatened to perform the abandonments itself, but the Regulator subsequently took no steps to follow up on that threat. Even if this letter should be accorded any weight, the contradiction between it and the Regulator's subsequent affidavits at the very least makes it difficult to say with anything approaching sufficient certainty that the Regulator intends to carry out the abandonments. These facts distinguish this case from *Abitibi*, in which the restructuring judge's findings were based on the premise that the province would most likely perform the remediation work itself.

[145] Dans le cadre de ses activités, l'organisme de réglementation n'effectue pas lui-même les travaux d'abandon. Il n'est pas tenu par la loi de le faire. Il s'agit plutôt d'une obligation incombant au titulaire de permis. Dans son affidavit, le déposant de l'organisme de réglementation a déclaré que celui-ci procédait très rarement à l'abandon de biens au nom des titulaires de permis et qu'il ne le faisait pratiquement jamais dans le cas d'un titulaire de permis sous séquestre ou en faillite. Le déposant a déclaré que l'organisme de réglementation n'avait pas l'intention d'abandonner les biens de Redwater visés par des permis. Comme l'a signalé le juge siégeant en cabinet, il est vrai que, dans sa lettre adressée à GTL en date du 15 juillet 2015, l'organisme de réglementation a menacé d'effectuer lui-même ces processus, mais il n'a rien fait par la suite pour mettre cette menace à exécution. Même si l'on devrait accorder de l'importance à cette lettre, la contradiction entre elle et les affidavits subséquents de l'organisme de réglementation font en sorte à tout le moins qu'il est difficile de dire avec quoi que ce soit de comparable à une certitude suffisante que l'organisme de réglementation compte effectuer le processus d'abandon. Ces faits distinguent la présente affaire d'*Abitibi*, où les conclusions du juge chargé de la restructuration reposaient sur la prémisse que la province exécuterait fort probablement elle-même les travaux de décontamination.

[146] Below, I will explain why the OWA's involvement is insufficient to satisfy the "sufficient certainty" test. First, I note that any reliance the chambers judge placed on the intrinsically financial nature of the Abandonment Orders was an error. In this regard, I am in complete agreement with Martin J.A. Considering whether an order is intrinsically financial is an erroneous interpretation of the third step of the *Abitibi* test. It is too broad and would result in a provable claim being found even where the existence of a monetary claim in bankruptcy is merely speculative. Thus, in *Nortel* CA, Juriansz J.A. rightly rejected the argument that the *Abitibi* test did not require a determination that the regulator would perform the environmental work and claim reimbursement, and that it was sufficient for there to be an environmental order requiring an expenditure of funds by the bankrupt estate. He held the following, at paras. 31-32:

. . . As I read it, the Supreme Court's decision is clear: ongoing environmental remediation obligations may be reduced to monetary claims that can be compromised in CCAA proceedings only where the province has performed the remediation work and advances a claim for reimbursement, or where the obligation may be considered a contingent or future claim because it is "sufficiently certain" that the province will do the work and then seek reimbursement.

The respondents' approach is not only inconsistent with *AbitibiBowater Inc., Re*, it is too broad. It would result in virtually all regulatory environmental orders being found to be provable claims. As Deschamps J. observed, a company may engage in activities that carry risks. When those risks materialize, the costs are borne by those who hold a stake in the company. A risk that results in an environmental obligation becomes subject to the insolvency process only when it is in substance monetary and is in substance a provable claim.

[146] J'expliquerai ci-après pourquoi l'intervention de l'OWA est insuffisante pour satisfaire au critère de la « certitude suffisante ». Premièrement, je constate que le juge siégeant en cabinet a eu tort de tabler sur le caractère « intrinsèquement financier » des ordonnances d'abandon. Je suis entièrement d'accord avec la juge Martin sur ce point. Se demander si une ordonnance est « intrinsèquement financière » constitue une interprétation erronée de la troisième étape du critère d'*Abitibi*. Elle est trop large et conduirait à la conclusion qu'il y a une « réclamation prouvable » même lorsque l'existence d'une réclamation pécuniaire en matière de faillite ne relève que de la conjecture. Ainsi, dans l'arrêt *Nortel* CA, le juge Juriansz a rejeté à juste titre l'argument selon lequel le critère d'*Abitibi* n'exigeait pas qu'il soit décidé que l'organisme de réglementation exécuterait les travaux environnementaux et demanderait un remboursement, et qu'il suffisait qu'il y ait une ordonnance environnementale exigeant une dépense de fonds par l'actif du failli. Il a déclaré ce qui suit, aux par. 31-32 :

[TRADUCTION] . . . Selon moi, la décision de la Cour suprême est claire : les obligations continues de décontamination environnementale peuvent être réduites à des réclamations pécuniaires pouvant être compromises dans des procédures fondées sur la LACC seulement lorsque la Province a exécuté les travaux de décontamination et qu'elle présente une demande de remboursement, ou lorsque l'obligation peut être considérée comme une réclamation éventuelle ou future, parce qu'il est « suffisamment certain » que la Province fera le travail et cherchera ensuite à obtenir un remboursement.

L'approche des intimées n'est pas seulement incompatible avec celle de l'arrêt *Abitibi*, elle est trop large. Il en résulterait que pratiquement toutes les ordonnances réglementaires en matière d'environnement soient considérées comme des réclamations prouvables. Comme l'a fait remarquer la juge Deschamps, une société peut exercer des activités qui comportent des risques. Lorsque ces risques se matérialisent, les coûts sont supportés par ceux qui détiennent une participation dans la société. Un risque qui entraîne une obligation environnementale n'est soumis au processus d'insolvabilité que lorsqu'il est en substance pécuniaire et qu'il constitue en substance une réclamation prouvable.

[147] As the chambers judge correctly acknowledged, the fact that the Regulator would not conduct the abandonments itself does not mean that it would wash its hands of the Renounced Assets. Rather, if necessary, it would designate them as orphans pursuant to the *OGCA* and leave them for the OWA. I am not suggesting that a regulator can strategically avoid the "sufficient certainty" test simply by delegating environmental work to an arm's length organization. I would not decide, as the Regulator urges, that the *Abitibi* test *always* requires that the environmental work be performed by the regulator itself. However, the OWA's true nature must be emphasized. There are strong grounds to conclude that, given the particular features of this regulatory context, the OWA is not the regulator.

[148] The creation of the OWA was not an attempt by the Regulator to avoid the *BIA* order of priorities in bankruptcy. It is a non-profit organization with its own mandate and independent board of directors, and it operates as a financially independent entity pursuant to legally delegated authority. Although the OWA's board includes a representative of the Regulator and a representative of Alberta Environment and Parks, its independence is not in question. The OWA's 2014-2015 annual report indicates that five out of six voting directors represent industry. The OWA uses a risk assessment tool to prioritize when and how it will perform environmental work on the many hundreds of orphans in Alberta. There is no suggestion that the Regulator has any say in the order in which the OWA chooses to perform environmental work. The 2014-2015 annual report also states that, since 1992, 87 percent of the money collected and invested to fund OWA activities has been provided by industry via the orphan levy. The Regulator, at para. 99 of its factum, hints obliquely that additional provincial or federal funding may be forthcoming in the future, but even if it materializes, it will be almost entirely in the form of loans. I cannot accept the suggestion in the dissenting reasons

[147] Comme l'a reconnu à bon droit le juge siégeant en cabinet, ce n'est pas parce que l'organisme de réglementation n'effectuerait pas lui-même les travaux d'abandon qu'il se laverait les mains des biens faisant l'objet de la renonciation. Il les qualifierait plutôt, au besoin, d'orphelins conformément à l'*OGCA* et les confiera à l'OWA. Je ne prétends pas qu'un organisme de réglementation puisse stratégiquement éviter le critère de la « certitude suffisante » en déléguant simplement des travaux environnementaux à une organisation indépendante. Je ne déciderai pas, comme l'organisme de réglementation nous a exhortés à le faire, que le critère d'*Abitibi* exige *toujours* que les travaux environnementaux soient exécutés par l'organisme lui-même. Cependant, la véritable nature de l'OWA doit être soulignée. Il y a des motifs sérieux de conclure que, vu les caractéristiques propres à ce contexte réglementaire, l'OWA n'est pas l'organisme de réglementation.

[148] La création de l'OWA ne représentait pas une tentative de l'organisme de réglementation pour éviter l'ordre de priorité fixé en matière de faillite par la *LFI*. C'est un organisme sans but lucratif doté de son propre mandat et de son propre conseil d'administration indépendant, et il fonctionne comme une entité financièrement indépendante en vertu du pouvoir qui lui est délégué par la loi. Bien qu'un représentant de l'organisme de réglementation et un représentant d'Alberta Environment and Parks siègent au conseil d'administration de l'OWA, son indépendance n'est pas mise en question. Le rapport annuel 2014-2015 de l'OWA indique que cinq des six directeurs votants représentent l'industrie. L'OWA se sert d'un outil d'évaluation des risques pour décider, en ordre de priorité, quand et de quelle manière elle exécutera des travaux environnementaux sur les centaines de puits orphelins de l'Alberta. Personne ne prétend que l'organisme de réglementation a son mot à dire sur l'ordre dans lequel l'OWA décide d'exécuter des travaux environnementaux. Le rapport annuel 2014-2015 ajoute que, depuis 1992, 87 p. 100 de l'argent recueilli et investi pour financer les activités de l'OWA est fourni par l'industrie via la redevance pour les puits orphelins. Au paragraphe 99 de son mémoire, l'organisme de réglementation laisse

that the Regulator and the OWA are "inextricably intertwined" (para. 273).

[149] Even assuming that the OWA's abandonment of Redwater's licensed assets could satisfy the "sufficient certainty" test, I agree with Martin J.A. that it is difficult to conclude that there is sufficient certainty that the OWA will in fact perform the abandonments. I also agree with her view that there is no certainty that a claim for reimbursement will be advanced should the OWA ultimately abandon the assets.

[150] The dissenting reasons suggest that the facts of this appeal are more akin to those of *Northstar Aerospace Inc., Re*, 2013 ONCA 600, 8 C.B.R. (6th) 154, than to those of *Nortel* CA, arguing that the "sufficient certainty" test is satisfied because, as in *Northstar*, there is no purchaser to take on Redwater's assets and the debtor itself is insolvent, so only the OWA can perform the work. In my view, *Northstar* is easily distinguishable. In that case, the bankrupt had been voluntarily carrying out remediation prior to its bankruptcy. After it made its assignment into bankruptcy, the Ministry of the Environment ("MOE") took over the remediation activities itself, purporting to do so on a without prejudice basis. Jurianz J.A. found that the fact that the MOE had already undertaken remediation activities made it sufficiently certain that it would do so. As I will now demonstrate, the facts here are very different.

[151] At the beginning of this litigation, the OWA estimated that it would take 10 to 12 years to get through the backlog of orphans. By 2015, that backlog was increasing rapidly, and it may well have continued to increase at the same or an even greater speed in the intervening years, as submitted by the Regulator. If anything, this suggests the possibility of an even larger backlog. There is no indication that

entendre indirectement que la province ou le gouvernement fédéral pourrait accorder à l'avenir des fonds supplémentaires à l'OWA mais, même si cette possibilité se concrétise, les fonds seront presque entièrement consentis sous forme de prêts. Je ne peux accepter la proposition des juges dissidents selon laquelle l'organisme de réglementation et l'OWA sont « inextricablement liés » (par. 273).

[149] À supposer même que l'abandon par l'OWA des biens de Redwater visés par des permis puisse satisfaire au critère de la « certitude suffisante », je conviens avec la juge Martin qu'il est difficile de conclure à la certitude suffisante que l'OWA se chargera effectivement des travaux d'abandon et qu'il n'y a aucune certitude qu'une demande de remboursement sera présentée si l'OWA finit par abandonner les biens.

[150] Les motifs dissidents laissent croire que les faits de l'espèce s'apparentent davantage à ceux de l'affaire *Northstar Aerospace Inc., Re*, 2013 ONCA 600, 8 C.B.R. (6th) 154, qu'à ceux de *Nortel* CA, faisant valoir qu'il est satisfait au critère de la « certitude suffisante » car, tout comme dans *Northstar*, personne ne veut acheter les biens de Redwater et la débitrice elle-même est insolvable; en conséquence, seule l'OWA peut exécuter les travaux. Il me semble facile de distinguer l'affaire *Northstar* de celle qui nous occupe. Dans cette affaire, le failli effectuait de son plein gré des travaux de décontamination avant sa faillite. Après que le failli eu fait cession de ses biens, le ministre de l'Environnement (« ME ») a pris lui-même la relève des activités de décontamination et il entendait le faire sans préjudice. Selon le juge Jurianz, comme le ME avait déjà entrepris des activités de décontamination, il était suffisamment certain qu'il s'en occuperait. Comme je le démontrerai maintenant, les faits de l'espèce sont fort différents.

[151] Au début du présent litige, l'OWA a estimé qu'il lui faudrait de 10 à 12 ans pour résorber l'arriéré d'orphelins. Cet arriéré augmentait rapidement en 2015 et il peut fort bien avoir continué de croître tout aussi ou encore plus rapidement au cours des années suivantes, comme le soutient l'organisme de réglementation. Cela tend plutôt à établir que l'arriéré pourrait encore augmenter. Rien n'indique

the Renounced Assets would have a particularly high priority in the backlog. Even if the potential additional funding materializes, the Regulator submits that it will be a generation or more before the OWA can address its existing inventory of orphans.

[152] The dissenting reasons rely on the chambers judge's conclusion that the OWA would "probably" perform the abandonments eventually, while downplaying the fact that he also concluded that this would not "necessarily [occur] within a definite timeframe" (paras. 261 and 278, citing the chambers judge's reasons, at para. 173). Given the most conservative timeline — the 10 years discussed by the chambers judge — it is difficult to predict anything occurring with sufficient certainty. Much could change within the next decade, both in terms of government policy and in terms of the willingness of those in the Alberta oil and gas industry to discharge environmental liabilities. This is not at all the same situation as in *Northstar*, in which the MOE had already commenced environmental work.

[153] Perhaps more to the point, this lengthy timeline means that, should it ultimately perform the work, the OWA will not advance a claim for reimbursement. Advancement of a claim is an element of the test that is just as essential as performance of the work. The OWA itself has no ability to seek reimbursement of its costs from licensees and, although the costs of abandonment carried out by a person authorized by the Regulator constitute a debt payable to the Regulator under s. 30(5) of the *OGCA*, no evidence has been adduced that the Regulator has exercised its power to recover such costs in comparable cases. There is a good reason for this: the reality is that, by the time the OWA got around to abandoning any of Redwater's wells, the estate would be finalized and GTL long since discharged. In sum, the chambers judge erred in failing to consider whether the OWA can be treated as the regulator and in failing to appreciate that, even if it can, it is not sufficiently certain that the OWA will

qu'une priorité particulièrement grande serait accordée dans l'arriéré aux biens faisant l'objet de la renonciation. Même si la possibilité d'attribuer des fonds supplémentaires se concrétise, l'organisme de réglementation fait valoir que cela prendra une génération ou plus avant que l'OWA ne puisse s'occuper de son inventaire actuel d'orphelins.

[152] Les motifs dissidents se fondent sur la conclusion du juge siégeant en cabinet selon laquelle l'OWA effectuerait « probablement » le processus d'abandon, tout en minimisant le fait qu'il a également conclu que l'OWA ne le ferait pas « nécessairement dans un délai précis » (par. 261 et 278, citant les motifs du juge siégeant en cabinet, par. 173). Vu l'échéancier le plus conservateur — celui de 10 ans dont a parlé le juge siégeant en cabinet —, il est difficile de prédire quoi que ce soit avec une certitude suffisante. La donne pourrait changer considérablement au cours de la prochaine décennie, tant au chapitre de la politique gouvernementale qu'à celui de la volonté de l'industrie pétrolière et gazière de l'Alberta de s'acquitter de ses responsabilités environnementales. Il ne s'agit pas du tout de la même situation que dans *Northstar*, où le ME avait déjà amorcé les travaux environnementaux.

[153] Plus particulièrement, ce long échéancier garantit que, s'il finit par exécuter les travaux, l'OWA ne présentera pas de demande de remboursement. La présentation de la demande est un élément tout aussi essentiel du critère que l'exécution des travaux. L'OWA lui-même ne peut faire rembourser ses frais par les titulaires de permis et, même si les coûts des processus d'abandon effectués par la personne autorisée par l'organisme de réglementation constituent une dette payable à cet organisme suivant le par. 30(5) de l'*OGCA*, on n'a produit aucune preuve montrant que l'organisme de réglementation a exercé son pouvoir de recouvrer ces frais dans des cas analogues, et pour cause : le fait est qu'au moment où l'OWA en arriverait à abandonner l'un ou l'autre des puits de Redwater, la liquidation de l'actif serait terminée et GTL serait libéré depuis longtemps. En somme, le juge siégeant en cabinet a eu tort de ne pas se demander si l'OWA peut être assimilé à l'organisme de réglementation et en ne

in fact perform the abandonments and advance a claim for reimbursement.

[154] Accordingly, even if the Regulator had acted as a creditor in issuing the Abandonment Orders, it cannot be said with sufficient certainty that it would perform the abandonments and advance a claim for reimbursement.

(b) *The Conditions for the Transfer of Licenses*

[155] I will deal briefly with the LMR conditions for the transfer of licences. Much of the foregoing analysis with regard to the Abandonment Orders also applies to these conditions. As noted by Martin J.A., the requirement of regulatory approval for licence transfers is difficult to compare directly with the remediation orders at issue in *Abitibi*. However, this Court confirmed that the *Abitibi* test applies to a class of regulatory obligations that is broader than "orders" in *Moloney*, at paras. 54-55. The LMR conditions are a "non-monetary obligation" for the Redwater estate, since they must be satisfied before the Regulator will approve the transfer of any of Redwater's licences. However, it is notable that, even apart from the LMR conditions, licences are far from freely transferrable. The Regulator will not approve the transfer of licences where the transferee is not a licensee under the *OGCA*, the *Pipeline Act*, or both. The Regulator also reserves the right to reject a proposed transfer where it determines that the transfer is not in the public interest, such as where the transferee has outstanding compliance issues.

[156] In a sense, the factors suggesting an absence of sufficient certainty are even stronger for the LMR requirements than for the Abandonment Orders. There is a debt enforcement scheme under the *OGCA* and the *Pipeline Act* in respect of abandonment, but

considérant pas que, même s'il peut l'être, il n'est pas suffisamment certain qu'il effectuera dans les faits le processus d'abandon et présentera une demande de remboursement.

[154] En conséquence, même si l'organisme de réglementation avait agi comme un créancier en rendant les ordonnances, on ne saurait dire avec une certitude suffisante qu'il effectuerait les processus d'abandon et présenterait une demande de remboursement.

b) *Les conditions liées au transfert de permis*

[155] Je traiterai brièvement des conditions relatives à la CGR dont est assorti le transfert de permis. Une grande partie de l'analyse qui précède concernant les ordonnances d'abandon vaut tout autant pour ces conditions. Comme l'a souligné la juge Martin, il est difficile de comparer directement la nécessité d'obtenir une approbation réglementaire pour les transferts de permis et les ordonnances de décontamination en litige dans *Abitibi*. Or, notre Cour a confirmé aux par. 54-55 de *Moloney* que le critère d'*Abitibi* s'applique à une catégorie d'obligations réglementaires plus large que les « ordonnances ». Les conditions relatives à la CGR forment une « obligation non pécuniaire » de l'actif de Redwater, car elles doivent être remplies avant que l'organisme de réglementation n'approuve le transfert de tout permis de Redwater. Cependant, il convient de noter que, même mises à part les conditions relatives à la CGR, les permis sont loin d'être librement transférables. L'organisme n'approuvera pas le transfert des permis si le cessionnaire n'est pas un titulaire de permis au sens de l'*OGCA* ou de la *Pipeline Act* ou des deux. L'organisme de réglementation se réserve également le droit de rejeter un transfert proposé lorsqu'il juge que le transfert n'est pas dans l'intérêt public, comme dans un cas où le cessionnaire a des problèmes non résolus touchant à la conformité.

[156] En un sens, les facteurs laissant croire qu'il n'y a pas de certitude suffisante militent encore plus fortement en faveur des exigences relatives à la CGR que des ordonnances d'abandon. L'*OGCA* et la *Pipeline Act* prévoient un régime de recouvrement

there is no such scheme for the LMR requirements. The Regulator's refusal to approve licence transfers unless and until the LMR requirements have been satisfied does not give it a monetary claim against Redwater. It is true that compliance with the LMR requirements results in a reduction in the value of the bankrupt estate. However, as discussed earlier, not every obligation that diminishes the value of the bankrupt estate, and therefore the amount available to secured creditors, satisfies the "sufficient certainty" step. The question is not whether an obligation is intrinsically financial.

[157] Compliance with the LMR conditions prior to the transfer of licences reflects the inherent value of the assets held by the bankrupt estate. Without licences, Redwater's *profits à prendre* are of limited value at best. All licences held by Redwater were received by it subject to the end-of-life obligations that would one day arise. These end-of-life obligations form a fundamental part of the value of the licensed assets, the same as if the associated costs had been paid up front. Having received the benefit of the Renounced Assets during the productive period of their life cycles, Redwater cannot now avoid the associated liabilities. This understanding is consistent with *Daishowa-Marubeni International Ltd. v. Canada*, 2013 SCC 29, [2013] 2 S.C.R. 336, which dealt with the statutory reforestation obligations of holders of forest tenures in Alberta. This Court unanimously held that the reforestation obligations were "a future cost embedded in the forest tenure that serves to depress the tenure's value at the time of sale" (para. 29).

[158] The fact that regulatory requirements may cost money does not transform them into debt collection schemes. As noted by Martin J.A., licensing requirements predate bankruptcy and apply to all licensees regardless of solvency. GTL does not dispute the fact that Redwater's licences can be transferred only to other licensees nor that the Regulator retains the authority in appropriate situations to

de créances en matière d'abandon, mais il n'existe aucun régime de ce genre pour les exigences liées à la CGR. Le refus de l'organisme de réglementation d'approuver les transferts de permis jusqu'à ce que ces exigences aient été satisfaites ne lui donne pas une réclamation pécuniaire contre Redwater. Certes, le respect des exigences relatives à la CGR entraîne une diminution de la valeur de l'actif du failli. Toutefois, comme nous l'avons vu plus tôt, toute obligation qui diminue la valeur de l'actif du failli, et donc la somme que peuvent recouvrer les créanciers garantis, ne franchit pas nécessairement l'étape de la « certitude suffisante ». Il ne s'agit pas de savoir si une obligation est intrinsèquement financière.

[157] Le respect des conditions liées à la CGR avant le transfert des permis reflète la valeur inhérente des biens détenus par l'actif du failli. Sans les permis, les profits à prendre appartenant à Redwater ont, au mieux, peu de valeur. Tous les permis détenus par Redwater ont été reçus par elle, sous réserve d'obligations de fin de vie qui prendraient naissance un jour. Ces obligations constituent une part fondamentale de la valeur des biens visés par des permis, comme si les frais connexes avaient été payés d'emblée. Ayant reçu le bénéfice des biens faisant l'objet de la renonciation pendant la période productive de leur cycle de vie, Redwater ne peut plus éviter les engagements connexes. Cette interprétation concorde avec l'arrêt *Daishowa-Marubeni International Ltd. c. Canada*, 2013 CSC 29, [2013] 2 R.C.S. 336, qui portait sur les obligations légales de reboisement des détenteurs de tenures forestières en Alberta. Notre Cour a conclu à l'unanimité que les obligations relatives au reboisement constituaient « un coût futur inhérent à la tenure forestière qui a pour effet d'en diminuer la valeur au moment de la vente » (par. 29).

[158] La possibilité que des exigences réglementaires coûtent de l'argent ne les transforme pas en régimes de recouvrement de créances. Comme l'a fait remarquer la juge Martin, les exigences en matière de permis précèdent la faillite et s'appliquent à tous les titulaires de permis, peu importe leur solvabilité. GTL ne conteste pas le fait que les permis de Redwater ne peuvent être transférés qu'à

reject proposed transfers due to safety or compliance concerns. There is no difference between such conditions and the condition that the Regulator will not approve transfers where they would leave the requirement to satisfy end-of-life obligations unaddressed. All these regulatory conditions depress the value of the licensed assets. None of them creates a monetary claim in the Regulator's favour. Licensing requirements continue to exist during bankruptcy, and there is no reason why GTL cannot comply with them.

(3) Conclusion on the *Abitibi* test

[159] Accordingly, the end-of-life obligations binding on GTL are not claims provable in the Redwater bankruptcy, so they do not conflict with the general priority scheme in the *BIA*. This is not a mere matter of form, but of substance. Requiring Redwater to pay for abandonment before distributing value to creditors does not disrupt the priority scheme of the *BIA*. In crafting the priority scheme set out in the *BIA*, Parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation (see s. 14.06(7)). Thus, the *BIA* explicitly contemplates that environmental regulators will extract value from the bankrupt's real property if that property is affected by an environmental condition or damage. Although the nature of property ownership in the Alberta oil and gas industry meant that s. 14.06(7) was unavailable to the Regulator, the Abandonment Orders and the LMR replicate s. 14.06(7)'s effect in this case. Furthermore, it is important to note that Redwater's only substantial assets were affected by an environmental condition or damage. Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims

d'autres titulaires de permis, ni le fait que l'organisme de réglementation conserve le pouvoir, dans les situations qui s'y prêtent, de rejeter les transferts proposés en raison de préoccupations relatives à la sécurité ou à la conformité. Il n'y a aucune différence entre ces conditions et celle voulant que l'organisme de réglementation n'approuve pas les transferts qui laisseraient en suspens l'exigence de satisfaire aux obligations de fin de vie. Toutes ces conditions réglementaires font baisser la valeur des biens visés par des permis. Aucune ne donne naissance à une réclamation pécuniaire en faveur de l'organisme de réglementation. Les exigences en matière de permis subsistent pendant la faillite, et il n'y a aucune raison pour laquelle GTL ne peut s'y conformer.

(3) Conclusion sur le critère d'*Abitibi*

[159] En conséquence, les obligations de fin de vie incombant à GTL ne sont pas des réclamations prouvables dans la faillite de Redwater et n'entrent donc pas en conflit avec le régime de priorité général instauré dans la *LFI*. Ce n'est pas une simple question de forme, mais de fond. Obliger Redwater à payer l'abandon avant de répartir la valeur entre les créanciers ne perturbe pas le régime de priorité établi dans la *LFI*. Au moment d'élaborer ce régime, le Parlement voulait permettre aux organismes de réglementation d'imposer une charge prioritaire sur le bien réel du failli touché par un fait ou dommage lié à l'environnement en vue de financer la décontamination (voir le par. 14.06(7)). Ainsi, la *LFI* envisage explicitement la possibilité que des organismes de réglementation tire une valeur des biens réels du failli touchés par un fait ou dommage lié à l'environnement. Bien que l'organisme de réglementation n'ait pu se prévaloir du par. 14.06(7), compte tenu de la nature de la propriété des biens dans l'industrie pétrolière et gazière de l'Alberta, les ordonnances d'abandon et la CGR reproduisent l'effet du par. 14.06(7) en l'espèce. De plus, il importe de souligner que les seuls biens de valeur de Redwater étaient touchés par un fait ou dommage lié à l'environnement. Les ordonnances d'abandon et exigences relatives à la CGR n'avaient donc pas pour objet de forcer Redwater à s'acquitter des obligations de fin de vie avec des biens étrangers au fait

in this case does not interfere with the aims of the *BIA* — rather, it facilitates them.

[160] Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy. They must, for example, comply with non-monetary obligations that are binding on the bankrupt estate, that cannot be reduced to provable claims, and the effects of which do not conflict with the *BIA*, notwithstanding the consequences this may have for the bankrupt's secured creditors. The Abandonment Orders and the LMR requirements are based on valid provincial laws of general application — exactly the kind of valid provincial laws upon which the *BIA* is built. As noted in *Moloney*, the *BIA* is clear that "[t]he ownership of certain assets and the existence of particular liabilities depend upon provincial law" (para. 40). End-of-life obligations are imposed by valid provincial laws which define the contours of the bankrupt estate available for distribution.

[161] Finally, as noted earlier, the *BIA*'s general purpose of facilitating financial rehabilitation is not relevant for a corporation such as Redwater. Corporations with insufficient assets to satisfy their creditors will never be discharged from bankruptcy because they cannot satisfy all their creditors' claims in full (*BIA*, s. 169(4)). Thus, no conflict with this purpose is caused by the conclusion that the end-of-life obligations binding Redwater are not provable claims.

IV. Conclusion

[162] There is no conflict between Alberta's regulatory regime and the *BIA* requiring portions of the former to be rendered inoperative in the context of bankruptcy. Although GTL remains fully protected from personal liability by federal law, it cannot walk away from the environmental liabilities of the bankrupt estate by invoking s. 14.06(4). On a

ou dommage lié à l'environnement. Autrement dit, la reconnaissance que les ordonnances d'abandon et exigences relatives à la CGR ne sont pas des réclamations prouvables en l'espèce facilite l'atteinte des objets de la *LFI* au lieu de la contrecarrer.

[160] La faillite n'est pas un permis de faire abstraction des règles, et les professionnels de l'insolvabilité sont liés par les lois provinciales valides au cours de la faillite. À titre d'exemple, ils doivent respecter les obligations non pécuniaires liant l'actif du failli qui ne peuvent être réduites à des réclamations prouvables et dont les effets n'entrent pas en conflit avec la *LFI*, sans égard aux répercussions que cela peut avoir sur les créanciers garantis du failli. Les ordonnances d'abandon et exigences relatives à la CGR reposent sur des lois provinciales valides d'application générale et elles représentent exactement le genre de loi provinciale valide sur lequel se fonde la *LFI*. Tel qu'il est signalé dans *Moloney*, la *LFI* indique clairement que « [l]a propriété de certains biens et l'existence de dettes particulières relèvent du droit provincial » (par. 40). Les obligations de fin de vie sont imposées par des lois provinciales valides qui définissent les contours de l'actif du failli susceptible d'être partagé.

[161] Enfin, rappelons que l'objet général de la *LFI* de favoriser la réhabilitation financière ne concerne pas une société comme Redwater. Les sociétés n'ayant pas assez de biens pour satisfaire leurs créanciers ne seront jamais libérées de leur faillite puisqu'elles ne peuvent acquitter entièrement toutes les réclamations de leurs créanciers (*LFI*, par. 169(4)). Ainsi, la conclusion selon laquelle les obligations de fin de vie incombant à Redwater ne sont pas des réclamations prouvables n'est à l'origine d'aucun conflit avec cet objet.

IV. Conclusion

[162] Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la *LFI* en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite. Bien que GTL demeure entièrement dégagé de toute responsabilité personnelle par le droit fédéral, il ne peut se soustraire aux engagements environnementaux qui lient l'actif du

proper application of the *Abitibi* test, the Redwater estate must comply with ongoing environmental obligations that are not claims provable in bankruptcy.

[163] Accordingly, the appeal is allowed. In *Alberta Energy Regulator v. Grant Thornton Limited*, 2017 ABCA 278, 57 Alta. L.R. (6th) 37, Wakeling J.A. declined to stay the precedential effect of the Court of Appeal's decision. As he noted, the interests of the Regulator itself were already protected. Pursuant to earlier orders of the Alberta courts, GTL had already sold or renounced all of Redwater's assets, and the sale proceeds were being held in trust. Accordingly, the Regulator's request for an order that the proceeds from the sale of Redwater's assets be used to address Redwater's end-of-life obligations is granted. Additionally, the chambers judge's declarations in paras. 3 and 5-16 of his order are set aside.

[164] As the successful party in the appeal, the Regulator would normally be entitled to its costs. However, the Regulator specifically did not seek costs. Accordingly, there will be no order made as to costs.

The reasons of Moldaver and Côté JJ. were delivered by

Côté J. (dissenting) —

I. Introduction

[165] Redwater Energy Corporation ("Redwater") is a bankrupt oil and gas company. Its estate principally consists of two types of properties or assets: valuable, producing oil wells and facilities that are still capable of generating revenue; and value-negative, non-producing assets, including depleted wells that are subject to onerous environmental liabilities. Redwater's receiver and trustee in bankruptcy, Grant Thornton Limited ("GTL"), purports to have disclaimed ownership of the non-producing

failli en invoquant le par. 14.06(4). D'après une juste application du critère d'*Abitibi*, l'actif de Redwater doit respecter les obligations environnementales continues qui ne sont pas des réclamations prouvables en matière de faillite.

[163] En conséquence, le pourvoi est accueilli. Dans *Alberta Energy Regulator c. Grant Thornton Limited*, 2017 ABCA 278, 57 Alta. L.R. (6th) 37, le juge Wakeling a refusé de suspendre l'effet de précédent de l'arrêt rendu par la Cour d'appel. Comme il l'a fait remarquer, les intérêts de l'organisme de réglementation lui-même étaient déjà protégés. Conformément aux ordonnances rendues auparavant par les tribunaux albertains, GTL avait déjà vendu l'ensemble des biens de Redwater ou y avait renoncé et le produit de la vente a été détenu en fiducie. Ainsi, la Cour rend l'ordonnance demandée par l'organisme de réglementation selon laquelle le produit de la vente des biens de Redwater doit être utilisé pour satisfaire aux obligations de fin de vie de Redwater. En outre, les déclarations du juge siégeant en cabinet qui figurent aux par. 3 et 5-16 de son ordonnance sont annulées.

[164] Puisqu'il a gain de cause dans le cadre de ce pourvoi, l'organisme de réglementation aurait normalement droit aux dépens. Toutefois, il a expressément mentionné ne pas les demander. C'est pourquoi aucune ordonnance ne sera rendue à cet égard.

Version française des motifs des juges Moldaver et Côté rendus par

La juge Côté (dissidente) —

I. Introduction

[165] Redwater Energy Corporation (« Redwater ») est une société pétrolière et gazière en faillite. Son actif se compose principalement de deux types de biens : des puits de pétrole et des installations pétrolières de valeur productifs qui sont encore susceptibles de générer un revenu; et des biens inexploités ayant une valeur négative, notamment des puits taris auxquels se rattachent de lourds engagements environnementaux. Le séquestre et syndic de faillite de Redwater, Grant Thornton Limited (« GTL »),

assets. It did so in order to sell the valuable, producing wells separately — unencumbered by the liabilities attached to the disclaimed properties — and to distribute the proceeds of that sale to the estate's creditors.

[166] However, Alberta law does not recognize GTL's disclaimers as enforceable. Shortly after GTL's appointment as receiver, the Alberta Energy Regulator ("AER") issued "Abandonment Orders" for the disclaimed assets, directing Redwater and its working interest participants to carry out environmental work on those properties. Specifically, the AER sought to have GTL "abandon" the non-producing properties, which meant to render the wells environmentally safe according to the AER's directives. It later notified GTL that it would refuse to approve any sale of Redwater's valuable assets unless GTL did one of three things: sell the disclaimed properties in a single package with the producing wells and facilities; complete the abandonment and reclamation work itself; or post security to cover the environmental liabilities associated with the disclaimed properties.

[167] The evidence reveals that none of these options is economically viable. The net value of Redwater's 127 licensed properties is negative, so no rational purchaser would ever agree to buy them as a package. This is precisely why GTL opted to disclaim the burdensome properties in the first place. As to the remaining options, GTL cannot undertake or guarantee the abandonment and reclamation work because the environmental liabilities attached to the disclaimed assets exceed the estate's realizable value — and in any event, GTL could not access the funds necessary to satisfy these commitments until after a sale of the estate's valuable assets was completed. The effect of the AER's position, then, is to hamper GTL in its administration of the estate, preventing it from realizing *any* value for *any* of Redwater's creditors, including the AER. And the AER's position effectively leaves the valuable and producing wells in limbo, creating a real risk that

prétend avoir renoncé à la propriété des biens inexploités, et ce, afin de vendre séparément les puits de valeur productifs — non grevés des engagements se rattachant aux biens visés par les renonciations — et de répartir le produit de cette vente entre les créanciers de l'actif.

[166] Toutefois, la loi albertaine ne reconnaît pas de force exécutoire aux renonciations de GTL. Peu de temps après la nomination de GTL à titre de séquestre, l'Alberta Energy Regulator (« AER ») a rendu des « ordonnances d'abandon » à l'égard des biens visés par les renonciations, ordonnant à Redwater et à ses participants en participation directe d'exécuter des travaux environnementaux sur ceux-ci. En particulier, l'AER souhaitait que GTL « abandonne » les biens inexploités, ce qui signifie rendre les puits sûrs pour l'environnement, selon les directives de l'AER. Il a ensuite avisé GTL qu'il refuserait d'approuver toute vente des biens de valeur de Redwater à moins que GTL ne fasse l'une des trois choses suivantes : vendre les biens visés par les renonciations avec les puits et les installations productifs comme un tout unique; achever elle-même les travaux d'abandon et de remise en état; ou verser un dépôt de garantie pour couvrir les engagements environnementaux liés aux biens visés par les renonciations.

[167] La preuve révèle qu'aucune de ces possibilités n'est viable sur le plan économique. La valeur nette des 127 biens de Redwater qui sont visés par des permis est négative, de sorte qu'aucun acheteur sensé n'accepterait de les acquérir ensemble. C'est précisément pour cette raison que GTL a choisi de renoncer aux biens représentant un fardeau en premier lieu. Quant aux autres possibilités, GTL ne peut ni exécuter les travaux d'abandon et de remise en état ni en garantir l'exécution parce que les engagements environnementaux se rattachant aux biens visés par les renonciations dépassent la valeur de réalisation de l'actif et que, de toute façon, GTL ne pourrait obtenir les sommes nécessaires pour satisfaire à ces engagements qu'après avoir procédé à la vente des biens de valeur se trouvant dans l'actif. La position de l'AER a donc pour effet d'entraver GTL dans son administration de l'actif, l'empêchant de réaliser une *quelconque* valeur pour *l'un ou l'autre* des créanciers

they, too, will become "orphans" — assets that are unable to be sold to another company and are left entirely unrealized.

[168] According to Wagner C.J., GTL is without recourse because federal law enables it only to protect itself from personal liability and because the AER was entitled to assert its environmental liability claims outside of the bankruptcy process. I disagree on both points. In my view, two aspects of Alberta's regulatory regime conflict with the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). This result flows from a proper and accurate understanding of fundamental principles of constitutional and insolvency law.

[169] First, Alberta's statutes regulating the oil and gas industry define the term "licensee" as including receivers and trustees in bankruptcy. The effect of this definition is that insolvency professionals are subject to the same obligations and liabilities as Redwater itself — including the obligation to comply with the AER's Abandonment Orders and the risk of personal liability for failing to do so. The *BIA*, however, permits a trustee in bankruptcy to disclaim assets encumbered by environmental liabilities. This power was available to GTL in the circumstances of this case, and GTL validly disclaimed the non-productive assets. The result is that it is no longer subject to the environmental liabilities associated with those assets. Because Alberta's statutory regime does not recognize these disclaimers as lawful (by virtue of the fact that receivers and trustees are regulated as licensees, who cannot disclaim assets), there is an unavoidable operational conflict between federal and provincial law. Alberta's legislation governing the oil and gas sector should therefore be held inoperative to the extent that it does not recognize the legal effect of GTL's disclaimers.

de Redwater, y compris l'AER. La position de l'AER place de fait les puits de valeur productifs dans une situation incertaine, créant un risque réel qu'ils deviennent, eux aussi, des [TRADUCTION] « orphelins » — des biens qui ne peuvent être vendus à une autre société et dont la valeur demeure entièrement non réalisée.

[168] Selon le juge en chef Wagner, GTL est sans recours parce que la loi fédérale ne l'autorise qu'à se dégager de toute responsabilité personnelle, et que l'AER avait le droit de faire valoir ses réclamations environnementales en dehors du processus de faillite. Je suis en désaccord sur les deux points. À mon avis, deux aspects du régime de réglementation albertain entrent en conflit avec la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, c. B-3 (« *LFI* »). Une compréhension adéquate et fidèle des principes fondamentaux du droit constitutionnel et du droit de l'insolvabilité conduit à ce résultat.

[169] D'abord, les lois albertaines qui règlementent l'industrie pétrolière et gazière précisent que le terme [TRADUCTION] « titulaire de permis » vise les séquestres et syndics de faillite. Cette définition a pour effet d'assujettir les professionnels de l'insolvabilité aux mêmes obligations et responsabilités que Redwater elle-même — notamment l'obligation de se conformer aux ordonnances d'abandon de l'AER et le risque d'engager sa responsabilité personnelle pour ne pas l'avoir fait. La *LFI*, par contre, autorise le syndic de faillite à renoncer aux éléments d'actif grevés d'engagements environnementaux. GTL disposait de ce pouvoir dans les circonstances de l'espèce et elle a valablement renoncé aux biens inexploités. Elle n'est donc plus assujettie aux engagements environnementaux liés à ces biens. Étant donné que le régime législatif albertain ne reconnaît pas la légalité de ces renonciations (en raison du fait que les séquestres et les syndics sont réglementés comme des titulaires de permis, qui ne peuvent renoncer à des biens), il y a un conflit d'application inévitable entre la loi fédérale et la loi provinciale. La loi albertaine régissant l'industrie pétrolière et gazière devrait donc être déclarée inopérante dans la mesure où elle ne reconnaît pas l'effet juridique des renonciations de GTL.

[170] Second, the AER has required that GTL satisfy Redwater's environmental liabilities ahead of the estate's other debts, which contravenes the *BIA*'s priority scheme. Because the Abandonment Orders are "claims provable in bankruptcy" under the three-part test outlined by this Court in *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443 — from which this Court should not depart either explicitly or implicitly — the AER cannot assert those claims outside the bankruptcy process. To do so would frustrate an essential purpose of the *BIA*: distributing the estate's value in accordance with the statutory priority scheme. Nor can the AER achieve the same result indirectly by imposing conditions on the sale of Redwater's valuable assets. The province's licensing scheme effectively operates as a debt collection mechanism in relation to a bankrupt company: it prevents GTL from discharging its duties as trustee unless the AER's environmental claims are satisfied. As such, it should be held inoperative as applied to Redwater under the second prong of the paramountcy test, frustration of purpose.

[170] Ensuite, l'AER a exigé que GTL acquitte les engagements environnementaux de Redwater avant les autres dettes de l'actif, ce qui contrevient au régime de priorité établi par la *LFI*. Comme les ordonnances d'abandon sont des « réclamations prouvables en matière de faillite » selon le test à trois volets énoncé par la Cour dans l'arrêt *Terre-Neuve-et-Labrador c. AbitibiBowater Inc.*, 2012 CSC 67, [2012] 3 R.C.S. 443 — test dont notre Cour ne devrait pas s'écarter explicitement ou implicitement — l'AER ne peut faire valoir ces réclamations en dehors du processus de faillite. Agir ainsi entraverait la réalisation d'un objet essentiel de la *LFI* : le partage de la valeur de l'actif conformément au régime de priorités établi par la loi. L'AER ne peut pas non plus atteindre indirectement le même résultat en imposant des conditions à la vente des biens de valeur de Redwater. Le régime provincial de délivrance de permis sert en fait de mécanisme de recouvrement de créances à l'endroit d'une société en faillite : il empêche GTL de s'acquitter de ses obligations à titre de syndic si les réclamations environnementales de l'AER ne sont pas réglées. Par conséquent, il devrait être déclaré inopérant en ce qui concerne Redwater, suivant le second volet du critère de la prépondérance, l'entrave à la réalisation d'un objet fédéral.

II. Background

II. Contexte

[171] Redwater was a publicly traded oil and gas company that operated wells, pipelines and other facilities in central Alberta. In mid-2014, it suffered a number of financial setbacks following a series of acquisitions and unsuccessful drilling initiatives. As a result, it became unable to meet its obligations to its largest secured creditor, ATB Financial, which commenced enforcement proceedings.

[171] Redwater était une société pétrolière et gazière cotée en bourse qui exploitait des puits, des pipelines et d'autres installations dans le centre de l'Alberta. Au milieu de l'année 2014, elle a connu plusieurs déboires financiers à la suite d'une série d'acquisitions et d'initiatives de forage infructueuses. Elle n'a donc plus été en mesure de respecter ses obligations envers son plus important créancier garanti, ATB Financial, qui a introduit une procédure d'exécution.

[172] GTL was appointed as Redwater's receiver on May 12, 2015. Upon its appointment, but before taking possession of any AER-licensed properties, GTL carried out an analysis of the economic viability and marketability of Redwater's assets. It determined that only a portion of the company's properties was actually saleable and that it would not

[172] Le 12 mai 2015, GTL a été nommé séquestre de Redwater. Après sa nomination, mais avant de prendre possession de quelconque bien visé par un permis délivré par l'AER, GTL a procédé à une analyse de la viabilité économique et de la valeur commerciale des biens de Redwater. Elle a déterminé que seule une partie des biens de la

be in Redwater's best interests — or in the interests of its creditors — for GTL, as receiver, to take possession of the non-producing properties. It therefore informed the AER on July 3, 2015, that it would take possession of only 20 of Redwater's 127 licensed wells and facilities. On November 2, 2015, shortly after its appointment as trustee, GTL again disclaimed the same non-producing properties it had previously renounced in its capacity as receiver.

[173] According to GTL's assessment, Redwater's valuable assets were worth $4.152 million and would generate significant value for the estate's creditors if they were sold at auction. On the other hand, the net value of the non-producing properties was -$4.705 million, reflecting the extensive abandonment and reclamation liabilities owed to the AER. The net value of the estate as a whole was -$0.553 million. This was why, in GTL's business judgment, a sale of all the estate's assets together was simply not realistic.

[174] The AER responded to GTL's first disclaimer notice by issuing the Abandonment Orders which required Redwater to carry out environmental work on the non-producing properties that GTL had disclaimed. But the AER's enforcement efforts were not limited to the debtor's estate itself. In its initial application that spurred this litigation, the AER filed suit against GTL seeking three principal remedies: (1) a declaration that GTL's disclaimers were void and unenforceable; (2) an order compelling GTL, in its capacity as receiver, to comply with the Abandonment Orders issued in relation to a portion of Redwater's assets; and (3) an order compelling GTL to fulfill its obligations as licensee under Alberta's legislation, specifically in relation to the abandonment, reclamation and remediation of Redwater's licensed properties.

[175] The genesis of this litigation, then, was a clear and forceful effort by the AER to require GTL

société était réellement vendable, et qu'il ne serait pas dans l'intérêt supérieur de Redwater — ni dans l'intérêt de ses créanciers — que GTL, à titre de séquestre, prenne possession des biens inexploités. Elle a donc informé l'AER le 3 juillet 2015 qu'elle prendrait possession de seulement 20 des 127 puits et installations de Redwater visés par un permis. Le 2 novembre 2015, peu après sa nomination à titre de syndic, GTL a encore une fois renoncé aux biens inexploités auxquels elle avait déjà renoncé en sa qualité de séquestre.

[173] Selon l'estimation de GTL, les biens de valeur de Redwater valaient 4,152 millions de dollars et créeraient une valeur importante pour les créanciers de l'actif s'ils étaient vendus aux enchères. Par contre, la valeur nette des biens inexploités était de -4,705 millions de dollars, reflétant les engagements énormes relatifs à l'abandon et à la remise en état envers l'AER. La valeur nette de l'ensemble de l'actif était de -0,553 million de dollars. C'est pourquoi, selon le jugement d'affaire de GTL, une vente de l'ensemble des biens de l'actif n'était tout simplement pas réaliste.

[174] L'AER a répondu au premier avis de renonciation de GTL en rendant les ordonnances d'abandon qui obligeaient Redwater à exécuter des travaux environnementaux sur les biens inexploités auxquels GTL avait renoncé. Mais les mesures d'exécution prises par l'AER ne visaient pas uniquement l'actif de la débitrice en tant que tel. Dans sa demande initiale ayant donné naissance au présent litige, l'AER a intenté une poursuite contre GTL, sollicitant trois mesures de réparation principales : (1) un jugement déclaratoire portant que les renonciations de GTL sont nulles et non exécutoires; (2) une ordonnance obligeant GTL, en sa qualité de séquestre, à se conformer aux ordonnances d'abandon rendues à l'égard d'une partie des biens de Redwater; et (3) une ordonnance contraignant GTL à respecter les obligations que lui impose la loi albertaine en tant que titulaire de permis, concernant plus précisément l'abandon, la remise en état et la décontamination des biens de Redwater visés par des permis.

[175] Le présent litige tire donc son origine d'un effort manifeste et vigoureux de l'AER dans le but

to satisfy Redwater's environmental obligations. To understand why the AER took that approach, it is important to note that it had provincial law on its side. Under the *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6 ("*OGCA*") and the *Pipeline Act*, R.S.A. 2000, c. P-15 ("*PLA*"), the term "licensee" is defined to include receivers and trustees in bankruptcy (*OGCA*, s. 1(1)(cc); *PLA*, s. 1(1)(n)). As a result, insolvency professionals become subject to the same regulatory obligations as the insolvent debtor itself by effectively stepping into its shoes. They can therefore be compelled to carry out abandonment and reclamation work on the direction of the AER (*OGCA*, s. 27; *PLA*, s. 23; *Oil and Gas Conservation Rules*, Alta. Reg. 151/71 ("*OGCA Rules*"), s. 3.012); to reimburse anyone else who does abandonment work (*OGCA*, ss. 29 and 30; *PLA*, s. 25); to pay the orphan fund levy for any of the debtor's assets (*OGCA*, s. 74); to provide a security deposit, under certain circumstances, at the AER's request (*OGCA Rules*, s. 1.100(2)); and to pay a fine for failing to comply with an order made by the AER (*OGCA*, ss. 108 and 110(1); *PLA*, ss. 52(2) and 54(1)). These liabilities are all personal in nature. Other comparable legislation expressly limits the liability of insolvency professionals. For example, the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, states that the liability of a receiver or trustee under an environmental protection order "is limited to the value of the assets that the person is administering", absent "gross negligence or wilful misconduct" (s. 240(3)). Alberta's oil and gas statutory regime, however, does not include such a clause protecting receivers and trustees. And as the AER's initial application makes clear, the AER itself viewed these obligations as personal. This was why it sued GTL to compel it, among other things, to comply with its obligations as a licensee under provincial law.

d'obliger GTL à acquitter les obligations environnementales de Redwater. Pour comprendre pourquoi l'AER a agi de la sorte, il est important de souligner que l'AER avait la loi provinciale de son côté. Aux termes de l'*Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6 (« *OGCA* »), et de la *Pipeline Act*, R.S.A. 2000, c. P-15 (« *PLA* »), le terme [TRADUCTION] « titulaire de permis » est défini de façon à inclure les séquestres et les syndics de faillite (*OGCA*, al. 1(1)(cc); *PLA*, al. 1(1)(n)). Les professionnels de l'insolvabilité deviennent par le fait même assujettis aux mêmes obligations réglementaires que le débiteur insolvable lui-même, en se mettant de fait à sa place. Ils peuvent donc être contraints d'exécuter des travaux d'abandon et de remise en état sur ordre de l'AER (*OGCA*, art. 27; *PLA*, art. 23; *Oil and Gas Conservation Rules*, Alta. Reg. 151/71 (« Règles prises en vertu de l'*OGCA* »), art. 3.012), de rembourser n'importe qui d'autre effectue les travaux d'abandon (*OGCA*, art. 29 et 30; *PLA*, art. 25), de payer au fonds pour les puits orphelins la redevance requise à l'égard de n'importe lequel des biens du débiteur (*OGCA*, art. 74), de verser un dépôt de garantie, dans certaines circonstances, à la demande de l'AER (Règles prises en vertu de l'*OGCA*, par. 1.100(2)) et de payer une amende pour avoir omis de se conformer à une ordonnance de l'AER (*OGCA*, art. 108 et par. 110(1); *PLA*, par. 52(2) et 54(1)). Ces obligations sont toutes de nature personnelle. D'autres lois comparables limitent expressément la responsabilité des professionnels de l'insolvabilité. Par exemple, l'*Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, prévoit que la responsabilité du séquestre ou du syndic à l'égard d'une ordonnance de protection environnementale [TRADUCTION] « ne dépasse pas la valeur des biens qu'administre cette personne », en l'absence de « négligence grave ou d'inconduite délibérée » (par. 240(3)). Le régime législatif albertain en matière de pétrole et de gaz ne contient toutefois aucune disposition semblable visant à protéger les séquestres et les syndics. Et, comme il ressort de sa demande initiale, l'AER considérait lui-même ces obligations comme des obligations personnelles. C'est pourquoi il a poursuivi GTL afin de le contraindre, notamment, à respecter les obligations que lui impose la loi provinciale en tant que titulaire de permis.

[176] The AER also exercised its enforcement power in another capacity. In addition to issuing the Abandonment Orders, the AER imposed restrictions and conditions on the sale of Redwater's assets — conditions that effectively required GTL to satisfy those same obligations before a sale could be approved. Thus, even if GTL defied the AER's request to abandon the non-producing properties, it would still be unable to discharge its duties as receiver and trustee.

[177] Both the chambers judge and the majority of the Court of Appeal found in favour of GTL on each prong of the paramountcy test, concluding that there is an operational conflict and a frustration of purpose (2016 ABQB 278, 33 Alta. L.R. (6th) 221; 2017 ABCA 124, 50 Alta. L.R. (6th) 1). They agreed with GTL and ATB Financial that the provisions of Alberta's statutory regime permitting the AER to enforce compliance with Redwater's environmental abandonment and reclamation obligations were constitutionally inoperative during bankruptcy. The AER and the Orphan Well Association ("OWA") then appealed to this Court.

III. Analysis

[178] The *Constitution Act, 1867*, grants the federal government exclusive jurisdiction to regulate matters relating to bankruptcy and insolvency (s. 91(21)). In the exercise of that jurisdiction, Parliament enacted the *BIA*, "a complete code governing bankruptcy" (*Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 40; see also *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 85). The *BIA* outlines, among other things, the powers, duties and functions of receivers and trustees responsible for administering bankrupt or insolvent estates and the scope of claims that fall within the bankruptcy process (see *BIA*, ss. 16 to 38 and 121 to 154).

[179] Although the operation of the *BIA* "depends upon the survival of various provincial rights" (*Moloney*, at para. 40), this is true only to the extent that "substantive provisions of any [provincial] law or

[176] L'AER a également exercé son pouvoir de faire appliquer la loi à un autre titre. En plus de rendre les ordonnances d'abandon, l'AER a imposé des restrictions et conditions à la vente des biens de Redwater — conditions qui obligent en fait GTL à satisfaire auxdites obligations avant même qu'une vente puisse être approuvée. Par conséquent, même si GTL n'accédait pas à la demande de l'AER visant l'abandon des biens inexploités, il ne serait toujours pas en mesure de s'acquitter de ses obligations à titre de séquestre et de syndic.

[177] Le juge en cabinet et les juges majoritaires de la Cour d'appel ont tous donné raison à GTL quant à chacun des volets du test de la prépondérance, concluant qu'il existe un conflit d'application et une entrave à la réalisation d'un objet fédéral (2016 ABQB 278, 33 Alta. L.R. (6th) 221; 2017 ABCA 124, 50 Alta. L.R. (6th) 1). Ils ont convenu avec GTL et ATB Financial que les dispositions du régime législatif albertain permettant à l'AER d'assurer le respect des obligations d'abandon et de remise en état de Redwater étaient constitutionnellement inopérantes durant une faillite. L'AER et l'Orphan Well Association (« OWA ») se sont ensuite pourvus devant la Cour.

III. Analyse

[178] La *Loi constitutionnelle de 1867* confère au gouvernement fédéral la compétence exclusive pour réglementer la faillite et l'insolvabilité (par. 91(21)). Dans l'exercice de cette compétence, le Parlement a édicté la *LFI*, « un code complet en matière de faillite » (*Alberta (Procureur général) c. Moloney*, 2015 CSC 51, [2015] 3 R.C.S. 327, par. 40; voir aussi *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, par. 85). La *LFI* expose notamment les pouvoirs, obligations et attributions des séquestres et syndics chargés d'administrer l'actif du failli ou l'actif insolvable ainsi que la portée des réclamations qui relèvent du processus de faillite (voir *LFI*, art. 16 à 38 et 121 à 154).

[179] Quoique l'application de la *LFI* « dépend[e] de la subsistance de divers droits provinciaux » (*Moloney*, par. 40), ce n'est vrai que dans la mesure où « les dispositions de droit substantif d'une [. . .] loi ou

statute relating to property . . . are not in conflict with [the *BIA*]" (*BIA*, s. 72(1)). When a conflict arises, the *BIA* necessarily prevails (*Moloney*, at paras. 16 and 29; *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 16). This reflects the constitutional principle that federal laws are paramount (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 32).

[180] The respondents in this appeal — GTL and ATB Financial — posit two distinct conflicts between the federal and provincial legislation. First, they argue that the *BIA* grants receivers and trustees the power to disclaim any interest in any real property, even where they are not at risk of personal liability by virtue of their possession of the property. This disclaimer power enables trustees to renounce valueless and liability-laden property of a bankrupt in pursuit of their primary goal, which is to maximize global recovery for all creditors. The respondents argue that GTL validly disclaimed the non-producing assets and therefore cannot be held responsible for carrying out the Abandonment Orders; nor can the AER make any sale of Redwater's assets conditional on the fulfillment of obligations with respect to the disclaimed properties.

[181] Second, they argue that the AER's Abandonment Orders constitute "claims provable in bankruptcy". In their view, it would undermine the *BIA*'s priority scheme if the AER could assert those claims outside the bankruptcy process — and ahead of the estate's secured creditors — whether by compelling GTL to carry out those orders or by making the sale of Redwater's valuable assets conditional on the fulfillment of those obligations.

[182] In my view, GTL and ATB Financial have satisfied their burden of demonstrating a genuine inconsistency between federal and provincial law under both branches of the paramountcy test. In what follows, I first discuss the operational conflict that arises between Alberta's regulatory regime and s. 14.06(4) of the *BIA*. I then turn to the second

règle de droit [provinciale] concernant la propriété [. . .] [ne sont pas] incompatibles avec la [*LFI*] » (*LFI*, par. 72(1)). Lorsqu'il y a un conflit, la *LFI* doit prévaloir (*Moloney*, par. 16 et 29; *Saskatchewan (Procureur général) c. Lemare Lake Logging Ltd.*, 2015 CSC 53, [2015] 3 R.C.S. 419, par. 16). Cela reflète le principe constitutionnel selon lequel les lois fédérales sont prépondérantes (*Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3, par. 32).

[180] Les intimées en l'espèce — GTL et ATB Financial — plaident qu'il existe deux conflits distincts entre la législation fédérale et la législation provinciale. D'abord, ils soutiennent que la *LFI* confère aux séquestres et aux syndics le pouvoir de renoncer à tout intérêt sur un bien réel, même lorsque le séquestre ou le syndic ne risque pas d'engager sa responsabilité personnelle du fait qu'il est en possession du bien. Ce pouvoir de renonciation permet aux syndics de renoncer aux biens sans valeur et grevés d'engagements du failli en vue d'atteindre leur objectif premier : maximiser le recouvrement global pour tous les créanciers. Les intimées soutiennent que GTL a valablement renoncé aux biens inexploités et qu'il ne peut donc être tenu responsable de l'exécution des ordonnances d'abandon; l'AER ne peut pas non plus faire dépendre la vente des biens de Redwater de l'acquittement d'obligations à l'égard des biens faisant l'objet de la renonciation.

[181] Ensuite, ils soutiennent que les ordonnances d'abandon de l'AER constituent des « réclamations prouvables en matière de faillite ». À leur avis, ce serait saper le régime de priorités établi par la *LFI* que de permettre à l'AER de faire valoir ces réclamations en dehors du processus de faillite — et en priorité par rapport aux créanciers garantis de l'actif — que ce soit en obligeant GTL à exécuter ces ordonnances, ou en faisant dépendre la vente des biens de valeur de Redwater de l'acquittement de ces obligations.

[182] À mon avis, GTL et ATB Financial se sont acquittés de leur fardeau de démontrer qu'il existe une incompatibilité véritable entre la loi fédérale et la loi provinciale selon les deux volets du test de la prépondérance. Dans les paragraphes qui suivent, j'analyse d'abord le conflit d'application qui existe entre le régime de réglementation albertain et le

branch of the paramountcy analysis, frustration of purpose.

A. *Operational Conflict*

[183] The first branch of the paramountcy test is operational conflict. An operational conflict arises where "it is impossible to comply with both laws" (*Moloney*, at para. 18) — "where one enactment says 'yes' and the other says 'no'", or where "the same citizens are being told to do inconsistent things" (*Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191; see also *Lemare Lake*, at para. 18).

[184] In essence, an operational conflict analysis is an exercise in statutory interpretation: the Court must ascertain the meaning of each competing enactment in order to determine whether dual compliance is possible. Although this interpretation exercise takes place within the guiding confines of cooperative federalism, a concept that allows for some interplay and overlap between federal and provincial legislation, this Court recently set out the limits to this concept:

> [C]ooperative federalism may be used neither to "override nor [to] modify the division of powers itself" (*Rogers Communications Inc. v. Châteauguay (City)*, [2016 SCC 23, [2016] 1 S.C.R. 467] at para. 39), nor to impose "limits on the otherwise valid exercise of legislative competence" (*Quebec (Attorney General) v. Canada (Attorney General)*, [2015 SCC 14, [2015] 1 S.C.R. 693] at para. 19; *Reference re Securities Act*, [2011 SCC 66, [2011] 3 S.C.R. 837] at paras. 61-62). It cannot, therefore, be used to make *ultra vires* legislation *intra vires*. By fostering cooperation between Parliament and the legislatures within the existing constitutional boundaries, however, cooperative federalism works to support, rather than supplant, the division of legislative powers (see: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 22).

(*Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189, at para. 18)

[185] Properly understood, cooperative federalism operates as a straightforward interpretive

par. 14.06(4) de la *LFI*. J'examine ensuite le second volet de l'analyse relative à la prépondérance, l'entrave à la réalisation d'un objet fédéral.

A. *Conflit d'application*

[183] Le premier volet du test de la prépondérance est le conflit d'application. Il y a conflit d'application lorsqu'« il est impossible de respecter les deux lois » (*Moloney*, par. 18) — « lorsqu'une loi dit "oui" et que l'autre dit "non" », ou lorsque l'« on demande aux mêmes citoyens d'accomplir des actes incompatibles » (*Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161, p. 191; voir aussi *Lemare Lake*, par. 18).

[184] L'analyse relative au conflit d'application relève essentiellement de l'interprétation des lois : la Cour doit déterminer le sens de chaque loi concurrente afin de décider s'il est possible de respecter les deux lois. Bien que cette démarche d'interprétation s'effectue à l'intérieur du cadre directeur du fédéralisme coopératif, une notion qui permet une certaine interaction et un certain chevauchement entre la loi fédérale et la loi provinciale, notre Cour a récemment fixé les limites de cette notion :

> [L]e fédéralisme coopératif ne peut servir « ni [à] l'emporter sur le partage [des compétences] lui-même ni [à] le modifier » (*Rogers Communications Inc. c. Châteauguay (Ville)*, [2016 CSC 23, [2016] 1 R.C.S. 467] par. 39), pas plus qu'il ne peut imposer « des limites à l'exercice par ailleurs valide d'une compétence législative » (*Québec (Procureur général) c. Canada (Procureur général)*, [2015 CSC 14, [2015] 1 R.C.S. 693] par. 19; *Renvoi relatif à la Loi sur les valeurs mobilières*, [2011 CSC 66, [2011] 3 R.C.S. 837] par. 61-62). Il ne peut donc servir à rendre *intra vires* une loi *ultra vires*. En favorisant la coopération entre le Parlement et les législatures à l'intérieur des limites constitutionnelles existantes, le fédéralisme coopératif appuie le partage des compétences législatives au lieu de le supplanter : voir *Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3, par. 22.

(*Renvoi relatif à la réglementation pancanadienne des valeurs mobilières*, 2018 CSC 48, [2018] 3 R.C.S. 189, par. 18)

[185] Interprété correctement, le fédéralisme coopératif fait office de simple présomption en matière

presumption — one that supports, rather than supplants, the modern approach to statutory interpretation. This Court recognized as much in *Moloney*, where Gascon J. wrote that courts should "favour an interpretation of the federal legislation that allows the concurrent operation of both laws" on the basis of a presumption "that Parliament intends its laws to co-exist with provincial laws" (para. 27). But where "the proper meaning of the provision" — one that is not limited to "a mere literal reading of the provisions at issue" — cannot support a harmonious interpretation, it is beyond this Court's power to create harmony where Parliament did not intend it (para. 23; see also *Pan-Canadian Securities Regulation*, at para. 18; *Lemare Lake*, at paras. 78-79, per Côté J., dissenting, but not on this point).

[186] In my view, my colleague places undue reliance on the principle of cooperative federalism to narrow the scope of federal law and find a harmonious interpretation where no plausible one exists. Courts must be especially careful about using cooperative federalism to interpret legislative provisions narrowly in a case like this where Parliament expressly envisioned that the disclaimer right could come into conflict with provincial law. This is evident from the very first line of s. 14.06(4), which states that the disclaimer power applies "[n]otwithstanding anything in any federal or provincial law". The notion that judicial restraint should compel a different interpretation is therefore belied by the fact that Parliament considered, acknowledged and *accepted* the potential for conflict. To rely on judicial restraint, then, to avoid a conflict between federal and provincial law is to disregard Parliament's express instruction. Simply put, this is not a case where a drastic power is to be assumed from the statute; it is one where such a power is clearly provided for. In my view, reliance on cooperative federalism must never result in an interpretation of s. 14.06(4) that is inconsonant with its language, context and purpose.

d'interprétation — qui appuie, sans la supplanter, la méthode moderne d'interprétation des lois. La Cour l'a reconnu dans l'arrêt *Moloney*, où le juge Gascon a écrit que les tribunaux doivent « favoris[er] une interprétation de la loi fédérale permettant une application concurrente des deux lois » en se fondant sur la présomption « que le Parlement a voulu que ses lois coexistent avec les lois provinciales » (par. 27). Mais lorsque « le sens qu'il convient de donner à la disposition » — sens qui ne se limite pas à « une lecture littérale de la disposition en cause » — ne peut appuyer une interprétation harmonieuse, la Cour n'a pas le pouvoir de créer l'harmonie là où le Parlement n'a pas eu l'intention de le faire (*Moloney*, par. 23; voir aussi *Réglementation pancanadienne des valeurs mobilières*, par. 18; *Lemare Lake*, par. 78-79, la juge Côté, dissidente, mais non sur ce point).

[186] À mon avis, mon collègue se fonde indûment sur le principe du fédéralisme coopératif pour limiter la portée d'une loi fédérale et trouver une interprétation harmonieuse là où il n'en existe aucune qui soit plausible. Les tribunaux doivent être très prudents lorsqu'il s'agit de se fonder sur le fédéralisme coopératif pour interpréter étroitement des dispositions législatives dans un cas comme l'espèce, où le Parlement a expressément prévu que le droit de renonciation pouvait entrer en conflit avec le droit provincial. Cela ressort à l'évidence de la toute première ligne du par. 14.06(4), qui énonce que le pouvoir de renonciation s'applique « [p]ar dérogation au droit fédéral et provincial ». L'idée selon laquelle la retenue judiciaire devrait commander une interprétation différente est donc contredite par le fait que le Parlement a envisagé, reconnu et *accepté* la possibilité de conflit. Recourir à la retenue judiciaire pour éviter un conflit entre le droit fédéral et le droit provincial équivaut donc à faire fi de la directive expresse du Parlement. Autrement dit, il ne s'agit pas en l'espèce d'un cas où un pouvoir draconien doit être déduit de la loi; il s'agit d'un cas où un tel pouvoir est clairement prévu. À mon avis, le recours au principe du fédéralisme coopératif ne doit jamais donner lieu à une interprétation du par. 14.06(4) qui est incompatible avec son libellé, son contexte et son objet.

[187] It is undisputed in this appeal that Alberta law does not recognize GTL's disclaimers of assets licensed by the AER as enforceable to the extent that they relieve GTL of the obligation to satisfy the environmental liabilities associated with the assets. As receiver and trustee, GTL steps into Redwater's shoes as a "licensee" under provincial law; and, GTL submits, it can therefore, without the disclaimers, be held liable for the debtor's abandonment and reclamation obligations in the same manner as Redwater itself. The question, then, is whether the *BIA* permits GTL to disclaim these properties and what legal effect results from such disclaimer.

[188] Section 14.06 of the *BIA*, reproduced in full in the appendix, outlines a trustee's powers and duties with respect to environmental liabilities and the disclaimer of property. Specifically, s. 14.06(4) states that the trustee is "not personally liable for failure to comply" with an order requiring it to "remedy any environmental condition or environmental damage affecting property involved in a bankruptcy", provided that the trustee "abandons, disposes of or otherwise releases any interest in any real property . . . affected by the condition or damage" within the statutory timeframes. The timing of GTL's disclaimers is not at issue here.

[189] My colleague concludes that, regardless of whether GTL could have properly invoked the disclaimer power in this case, the effect of any such disclaimer would simply be to protect it from personal liability. He states that, in any event, the exercise of the disclaimer power was unnecessary in this case because GTL was already fully protected from personal liability through the operation of s. 14.06(2). Further, he argues, because the AER has not sought to hold GTL personally liable, there is no conflict between federal and provincial law on the facts of this case. With respect, I disagree with this approach to the language of the *BIA*, which does not properly account for fundamental principles of constitutional and insolvency law. I will begin by addressing the proper scope of the disclaimer power provided to trustees, explaining that the actual existence of a risk of personal liability is not a necessary condition for

[187] Il n'est pas contesté en l'espèce que la loi albertaine ne reconnaît pas de force exécutoire aux renonciations de GTL à des biens visés par un permis délivré par l'AER dans la mesure où elles soustraient GTL à l'obligation de respecter les engagements environnementaux liés aux biens. À titre de séquestre et de syndic, GTL remplace Redwater en tant que « titulaire de permis » selon la loi provinciale, et GTL soutient qu'il peut par conséquent, en l'absence des renonciations, être tenu responsable des obligations d'abandon et de remise en état de la débitrice au même titre que Redwater elle-même. Il s'agit donc de savoir si la *LFI* autorise GTL à renoncer à ces biens et quel est l'effet de cette renonciation en droit.

[188] L'article 14.06 de la *LFI*, reproduit intégralement en annexe, décrit les pouvoirs et responsabilités du syndic quant aux engagements environnementaux et à la renonciation aux biens. Plus précisément, le par. 14.06(4) prévoit que le syndic est « dégagé de toute responsabilité personnelle découlant du non-respect » d'une ordonnance l'obligeant à « répar[er] [. . .] tout fait ou dommage lié à l'environnement et touchant un bien visé par une faillite », pourvu que le syndic « abandonne [. . .] tout intérêt sur le bien réel en cause, en dispose ou s'en dessaisit » dans les délais prévus par la loi. Le moment des renonciations de GTL n'est pas en litige en l'espèce.

[189] Mon collègue conclut que, peu importe si GTL avait pu invoquer à juste titre le pouvoir de renonciation en l'espèce, cette renonciation a simplement pour effet de le dégager de toute responsabilité personnelle. Selon lui, en tout état de cause, il était inutile d'exercer le pouvoir de renonciation dans la présente affaire parce que GTL était déjà entièrement à l'abri de toute responsabilité personnelle par application du par. 14.06(2). Il soutient en outre que, comme l'AER n'a pas cherché à tenir GTL personnellement responsable, il n'y a aucun conflit entre la loi fédérale et la loi provinciale en l'espèce. Avec égards, je ne suis pas d'accord avec cette interprétation du libellé de la *LFI*, qui ne tient pas dûment compte des principes fondamentaux du droit constitutionnel et du droit de l'insolvabilité. Je commencerai par traiter de la portée que doit avoir le pouvoir de renonciation accordé aux syndics, en

the exercise of this power and that, while protection from personal liability is one effect of a valid disclaimer, it is not the only one. In my view, this interpretation makes s. 14.06(4) consistent with the remainder of the section and is therefore to be preferred. With respect, I do not accept that Parliament intended s. 14.06(4) simply to protect trustees from the exact same liability that it had already addressed through s. 14.06(2). Subsection (4) must have a meaningful role to play within Parliament's bankruptcy and insolvency regime; I reject the suggestion that Parliament crafted a superfluous provision. I will also deal briefly with the AER's argument that the disclaimer power is not available at all in the context of Alberta's oil and gas statutory regime. In my view, it is available in this context.

(1) The Power to Disclaim Under Section 14.06(4)

[190] The "natural meaning which appears when the provision is simply read through" (*Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735) is that s. 14.06(4) assumes and incorporates a pre-existing common law right to disclaim property in the context of bankruptcy and insolvency (see L. Silverstein, "Rejection of Executory Contracts in Bankruptcy and Reorganization" (1964), 31 *U. Chi. L. Rev.* 467, at pp. 468-72; *New Skeena Forest Products Inc. v. Don Hull & Sons Contracting Ltd.*, 2005 BCCA 154, 251 D.L.R. (4th) 328, at paras. 24-31; *Re Thompson Knitting Co., Ltd.*, [1925] 2 D.L.R. 1007 (Ont. S.C. (App. Div.), at p. 1008). This right is in keeping with the fundamental objective of court officers in insolvencies: the maximization of recovery for creditors as a whole by realizing the estate's valuable assets. By allowing trustees to disclaim assets with substantial liabilities, this power enables them to administer the estate in the most efficient manner and to avoid significant costs of administration that would reduce creditor recovery. Section 14.06(4)

expliquant que l'existence d'un risque de responsabilité personnelle ne constitue pas une condition essentielle à l'exercice de ce pouvoir et que, même si la protection contre toute responsabilité personnelle est un effet d'une renonciation valide, ce n'est pas le seul. À mon avis, cette interprétation fait en sorte que le par. 14.06(4) s'accorde avec le reste de l'article et il convient donc de la privilégier. Avec égards, je n'accepte pas que le Parlement voulait par ce paragraphe mettre simplement les syndics à l'abri de la même responsabilité, ce qu'il avait déjà fait au par. 14.06(2). Le paragraphe (4) doit avoir un rôle significatif à jouer dans le régime de faillite et d'insolvabilité du Parlement; je rejette la thèse selon laquelle le Parlement a conçu une disposition superflue. Je me pencherai aussi brièvement sur l'argument de l'AER selon lequel il n'est pas du tout possible d'exercer le pouvoir de renonciation dans le contexte du régime législatif de l'Alberta en matière de pétrole et de gaz. J'estime qu'il peut être exercé dans ce contexte.

(1) Le pouvoir de renonciation en vertu du par. 14.06(4)

[190] Le « sens naturel qui se dégage de la simple lecture de la disposition dans son ensemble » (*Lignes aériennes Canadien Pacifique Ltée c. Assoc. canadienne des pilotes de lignes aériennes*, [1993] 3 R.C.S. 724, p. 735) est que le par. 14.06(4) présume et incorpore un droit préexistant en common law de renoncer à des biens dans le contexte de la faillite et de l'insolvabilité (voir L. Silverstein, « Rejection of Executory Contracts in Bankruptcy and Reorganization » (1964), 31 *U. Chi. L. Rev.* 467, p. 468-472; *New Skeena Forest Products Inc. c. Don Hull & Sons Contracting Ltd.*, 2005 BCCA 154, 251 D.L.R. (4th) 328, par. 24-31; *Re Thompson Knitting Co., Ltd.*, [1925] 2 D.L.R. 1007 (C.S. Ont. (Div. app.), p. 1008). Ce droit est en accord avec l'objectif fondamental poursuivi par les officiers de la cour en insolvabilité : maximiser le recouvrement au bénéfice de l'ensemble des créanciers par la réalisation des éléments de valeur de l'actif. En permettant aux syndics de renoncer à des biens grevés d'engagements substantiels, ce pouvoir donne aux syndics la faculté d'administrer l'actif le plus efficacement

recognizes and supports this foundational principle of insolvency law.

[191] This reading offers the clearest and most obvious explanation for the manner in which the provision is drafted, in that it plainly describes a result or legal effect of disclaimer: a trustee "is not personally liable for failure to comply" with an environmental order "if . . . the trustee . . . abandons, disposes of or otherwise releases any interest in any real property" (s. 14.06(4)). We should interpret s. 14.06(4) as authorizing the act of disclaimer in light of the principle that "[t]he legislator does not speak in vain" (*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 37, citing *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838). If a trustee did not have the power to disclaim property, and if that power were not recognized and provided for in the statute, a provision describing the effect of such a disclaimer would serve no purpose.

[192] The AER submits that property may be disclaimed only where it is necessary for a trustee to avoid personal liability with respect to an environmental order. This interpretation entirely inverts the language of the provision, turning a stated *effect* of disclaimer into a necessary condition that circumscribes the exercise of the power. The operative clauses are neither written nor ordered in this manner. Rather, s. 14.06(4) expresses the disclaimer right in unqualified terms and emphasizes that a trustee may not be held liable whenever that right is exercised. If Parliament truly intended to condition the right to disclaim property on the actual existence of a risk of personal liability, "it is hard to conceive of a more convoluted and sibylline way of stating something that could be so easily expressed in clear and direct terms" (*Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at p. 124).

possible et leur épargne des frais considérables d'administration qui réduiraient le recouvrement au profit des créanciers. Le paragraphe 14.06(4) reconnaît et appuie ce principe fondamental du droit de l'insolvabilité.

[191] Cette interprétation offre l'explication la plus claire et la plus évidente de la façon dont la disposition est rédigée, en ce qu'elle décrit simplement un résultat ou effet juridique d'une renonciation : le syndic est « dégagé de toute responsabilité personnelle découlant du non-respect » d'une ordonnance environnementale « si [. . .] il abandonne [. . .] tout intérêt sur le bien réel en cause, en dispose ou s'en dessaisit » (al. 14.06(4)). Nous devons interpréter le par. 14.06(4) comme autorisant l'acte de renonciation à la lumière du principe selon lequel « le législateur ne parle pas pour ne rien dire » (*Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559, par. 37, citant *Procureur général du Québec c. Carrières Ste-Thérèse Ltée*, [1985] 1 R.C.S. 831, p. 838). Si le syndic n'avait pas le pouvoir de renoncer à des biens et si ce pouvoir n'était pas reconnu et prévu dans la loi, une disposition décrivant l'effet d'une telle renonciation n'aurait aucune utilité.

[192] L'AER soutient qu'il est possible de renoncer à un bien uniquement lorsque cela est nécessaire pour que le syndic échappe à toute responsabilité personnelle à l'égard d'une ordonnance environnementale. Cette interprétation inverse complètement le libellé de la disposition, transformant un *effet* énoncé de la renonciation en condition essentielle circonscrivant l'exercice du pouvoir. Les dispositions applicables ne sont ni rédigées ni ordonnées de cette façon. Le paragraphe 14.06(4) exprime plutôt le droit de renonciation en des termes qui ne comportent aucune restriction et fait ressortir que le syndic ne peut être tenu responsable quand ce droit est exercé. Si le Parlement avait vraiment voulu rendre le droit de renoncer à un bien tributaire de l'existence d'un risque de responsabilité personnelle, « il est difficile d'imaginer une façon plus compliquée et sibylline d'exprimer quelque chose qui pouvait être dit si facilement dans des termes clairs et directs » (*Mitchell c. Bande indienne Peguis*, [1990] 2 R.C.S. 85, p. 124).

[193] My colleague adopts a slightly different approach. Rather than accepting the argument that the risk of personal liability is a necessary condition to the exercise of the disclaimer power in s. 14.06(4), he concludes that protection from personal liability for non-compliance with environmental orders is the only consequence of a valid disclaimer. Therefore, he says, the bankrupt's estate is not relieved of its obligations under the environmental orders and the trustee can be compelled to expend the entirety of the estate's assets on compliance. With respect, this also cannot be the correct reading of the subsection. Nor do I believe that the brief references to s. 14.06(4) in *GMAC Commercial Credit Corp. — Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123 — a case in which this subsection was not directly in issue and this Court was not tasked with interpreting it in any meaningful way — provide much assistance in this case.

[193] Mon collègue adopte une approche légèrement différente. Au lieu d'accepter l'argument selon lequel le risque d'engager la responsabilité personnelle est une condition essentielle à l'exercice du pouvoir de renonciation prévu au par. 14.06(4), il conclut que la protection contre toute responsabilité personnelle pour non-respect d'ordonnance environnementale est l'unique conséquence d'une renonciation valide. Par conséquent, dit-il, l'actif du failli n'est pas déchargé des obligations que lui imposent les ordonnances environnementales et on peut contraindre le syndic à consacrer la valeur entière de l'actif au respect des ordonnances. Avec égards, il ne peut s'agir de la lecture correcte du par. 14.06(4). Je ne crois pas non plus que les brèves mentions de ce paragraphe dans *Société de crédit commercial GMAC — Canada c. T.C.T. Logistics Inc.*, 2006 CSC 35, [2006] 2 R.C.S. 123, une affaire où le par. 14.06(4) n'était pas directement en cause et où notre Cour n'avait pas à l'interpréter de façon significative, se révèlent fort utiles en l'espèce.

[194] I accept that the opening words of s. 14.06(4) refer to the personal liability of the trustee. However, when the words of the subsection are 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", as the courts are required to do (see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Bell ExpressVu*, at para. 26, quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87), their meaning becomes apparent.

[194] Certes, le début du par. 14.06(4) parle de la responsabilité personnelle du syndic. Cependant, lorsqu'on lit les termes du paragraphe « dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'[économie] de la loi, l'objet de la loi et l'intention du législateur », tel que doivent le faire les tribunaux (voir *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *Bell ExpressVu*, par. 26, citant E. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87), leur sens devient apparent.

[195] Section 14.06(4) both assumes and relies on the common law power of trustees to disclaim assets, a power that the majority of the Court of Appeal described as "commonplace" (para. 47). Even my colleague appears to accept that this disclaimer power "predates" s. 14.06(4) itself (at para. 95). Indeed, the majority of the Court of Appeal recognized that "[s]ection 14.06 does not appear to create a right in a trustee to abandon properties without value, but rather assumes that one exists upon bankruptcy" (para. 63). This is the only rational explanation for why Parliament made the effects of s. 14.06(4) available when the trustee "abandons, disposes of or otherwise releases any interest in any real property". While avoiding personal liability is one effect

[195] Le paragraphe 14.06(4) tient pour acquis et repose sur le pouvoir des syndics en common law de renoncer à des biens, un pouvoir dont l'exercice est [TRADUCTION] « monnaie courante », affirment les juges majoritaires de la Cour d'appel (par. 47). Même mon collègue semble accepter que ce pouvoir de renonciation « précède » le par. 14.06(4) lui-même (par. 95). En effet, les juges majoritaires de la Cour d'appel ont reconnu que « [l]'article 14.06 ne semble pas créer le droit du syndic d'abandonner des biens sans valeur; il en tient plutôt l'existence pour acquise en cas de faillite » (par. 63). C'est la seule explication logique pour laquelle le Parlement a laissé le par. 14.06(4) produire ses effets lorsque le syndic « abandonne [. . .] tout intérêt sur le bien

of the appropriate exercise of this power, it is not the only effect. Disclaimer operates to "determine, as from the date of the disclaimer, the rights, interests and liabilities" in the disclaimed property (R. Goode, *Principles of Corporate Insolvency Law* (4th ed. 2011), at p. 202). By properly disclaiming certain assets, the trustee is relieved of any liabilities associated with the disclaimed property and loses the ability to sell the property for the benefit of the estate. The author Frank Bennett, writing about the administration of the bankrupt's real property, explains that "[w]here the trustee disclaims its interest, the disclaimer releases and disclaims any and all right, title and interest to the property" (*Bennett on Creditors' and Debtors' Rights and Remedies* (5th ed. 2006), at p. 482 (footnote omitted)).

[196] The majority asserts that s. 14.06(4) does not allow a trustee to "walk away" from assets and the environmental liabilities associated with them (paras. 86, 100 and 102). However, *disclaiming* property does have precisely this effect. It permits the trustee not to realize assets that would provide no value to the estate's creditors and whose realization would therefore undermine the trustee's fundamental objective. A recognized purpose of the disclaimer power is to "avoid the continuance of liabilities in respect of onerous property which would be payable as expenses of the liquidation, to the detriment of unsecured creditors" (Goode, at p. 200 (footnote omitted)). These principles are no less valid in relation to valueless real property than they are in relation to unprofitable and burdensome executory contracts. Indeed, there has been no suggestion in this appeal, including from the AER and the OWA, that trustees can never disclaim onerous real property.

[197] This explanation of the disclaimer power is borne out by GTL's actions in the instant case. After assessing the economic viability and marketability of Redwater's assets, GTL determined that it would be most beneficial to Redwater's creditors as a whole if it disclaimed the non-producing, liability-laden assets.

réel en cause, en dispose ou s'en dessaisit ». Bien que la protection contre toute responsabilité personnelle soit un effet de l'exercice régulier de ce pouvoir, ce n'est pas le seul. La renonciation sert à [TRADUCTION] « déterminer, à partir de sa date, les droits, intérêts et engagements » sur le bien auquel le syndic a renoncé (R. Goode, *Principles of Corporate Insolvency Law* (4e éd. 2011), p. 202). En renonçant à bon droit à certains biens, le syndic est dégagé de toute responsabilité associée aux biens faisant l'objet de la renonciation et ne peut plus vendre les biens au profit de l'actif. Dans le contexte de l'administration des biens réels du failli, l'auteur Frank Bennett explique que [TRADUCTION] « [l]orsque le syndic renonce à son intérêt, la renonciation emporte dessaisissement de tout droit, titre et intérêt sur le bien en question » (*Bennett on Creditors' and Debtors' Rights and Remedies* (5e éd. 2006), p. 482 (note en bas de page omise)).

[196] Les juges majoritaires font valoir que le par. 14.06(4) n'autorise pas le syndic à « délaisser » des biens ou à se soustraire aux engagements environnementaux qui s'y rattachent (par. 86, 100 et 102). Or, c'est exactement ce qu'entraîne la *renonciation* à des biens. Elle permet au syndic de ne pas réaliser des biens qui ne seraient pas profitables aux créanciers de l'actif et compromettraient par le fait même son objectif principal. Le pouvoir de renonciation a pour objet reconnu [TRADUCTION] « [d']éviter la poursuite des engagements à l'égard de biens onéreux qui seraient payables aux dépens de la liquidation, et ce, au détriment des créanciers non garantis » (Goode, p. 200 (note en bas de page omise)). Ces principes valent tout autant dans le cas des biens réels sans valeur que dans celui des contrats exécutoires non rentables et contraignants. En fait, personne n'a laissé entendre en l'espèce, pas même l'AER ou l'OWA, que les syndics ne peuvent jamais renoncer à des biens réels onéreux.

[197] Cette explication du pouvoir de renonciation est confirmée par les agissements de GTL en l'espèce. Après avoir estimé la viabilité économique et la qualité marchande des biens de Redwater, GTL a décidé que ce qui serait le plus profitable aux créanciers de Redwater dans leur ensemble, ce serait qu'il renonce aux biens inexploités et grevés d'engagements.

[198] Parliament's recognition of this common law disclaimer power in s. 14.06(4) is not new. The power is also referred to in another section, albeit in a broader context. Section 20(1) of the *BIA*, provides trustees with the ability to "divest" themselves of "any real property or immovable of the bankrupt" generally. However, the disclaimer power itself does not derive from this section. Nor is a trustee required to invoke s. 20(1) in order to exercise the disclaimer power described in s. 14.06(4), which incorporates that power and spells out the particular effects of its exercise in the specific context of environmental remediation orders. In any event, this Court is not required in this appeal to comment on the full effects of s. 20(1).

[199] Under my colleague's interpretation, it is unclear why Parliament chose to enact the disclaimer mechanism. It is surely true that Parliament could have achieved the same outcome through the use of simpler language. Had it merely intended to protect trustees from personal liability for failure to comply with environmental orders, it could have easily done so directly — in fact, it had already done so in s. 14.06(2). There is no reason why Parliament would have attempted to achieve this relatively straightforward result through the convoluted mechanism of requiring trustees to disclaim property while at the same time not intending such disclaimer to have its "commonplace" common law effects. There is a reason why Parliament has referred to the power to disclaim in s. 14.06(4); we must give effect to this choice and to the words that Parliament has used.

[200] It follows, then, that I respectfully disagree that s. 14.06(4) only protects trustees from specific types of personal liability. But it does not follow that the *estate* is relieved of its liabilities once a trustee exercises the disclaimer power — a misconception that is pervasive in the AER's submissions and the majority's analysis. The disclaimed property ultimately reverts to the estate at the conclusion of the bankruptcy proceedings, as is the case with unrealized assets (see *BIA*, s. 40; see also Bennett, at

[198] La reconnaissance par le Parlement, au par. 14.06(4), de ce pouvoir de renonciation en common law n'a rien de nouveau. Le pouvoir est aussi mentionné dans une autre disposition, quoique dans un contexte plus général. Le paragraphe 20(1) de la *LFI* donne au syndic la possibilité de « renoncer » à « un immeuble ou [à] un bien réel du failli » en général. Le pouvoir de renonciation lui-même ne découle cependant pas de cette disposition. Le syndic n'est pas non plus obligé d'invoquer le par. 20(1) pour exercer le pouvoir de renonciation décrit au par. 14.06(4), lequel incorpore ce pouvoir et expose certains effets de son exercice dans le contexte précis des ordonnances de décontamination environnementale. Quoi qu'il en soit, notre Cour n'a pas à commenter en l'espèce tous les effets du par. 20(1).

[199] Suivant l'interprétation de mon collègue, la raison pour laquelle le Parlement a choisi d'instaurer le mécanisme de renonciation n'est pas claire. Il ne fait aucun doute que le Parlement aurait pu atteindre le même résultat en employant un langage plus simple. Si le Parlement comptait simplement protéger les syndics contre toute responsabilité personnelle découlant du non-respect d'ordonnances environnementales, il aurait pu aisément le faire directement; en fait, il l'avait déjà fait au par. 14.06(2). Il n'y a aucune raison pour laquelle le Parlement aurait tenté d'obtenir ce résultat relativement simple par le mécanisme alambiqué consistant à exiger des syndics qu'ils renoncent aux biens, tout en évitant que cette renonciation ait « couramment » des effets en common law. Il y a une raison pour laquelle le Parlement a mentionné le pouvoir de renonciation au par. 14.06(4); nous devons donner effet à ce choix et aux mots qu'il a utilisés.

[200] Par conséquent, avec égards, je ne suis pas d'accord pour dire que le par. 14.06(4) protège les syndics uniquement contre certains types de responsabilité personnelle. Mais cela ne signifie pas que l'*actif* est déchargé de ses engagements une fois que le syndic exerce son pouvoir de renonciation — une idée fausse qui est omniprésente dans les observations de l'AER et l'analyse de la majorité. Le bien visé par une renonciation retourne ultimement dans l'actif à l'issue du processus de faillite, comme c'est

p. 528). The estate remains liable for the remediation obligations attached to the land. Whether the estate has sufficient assets capable of satisfying those liabilities at that point in time is a separate question that is unrelated to the underlying fact of ongoing liability. In any case, the regulatory scheme continues to apply with respect to the retained assets. In referring repeatedly to the idea that disclaimer does not "immunize bankrupt estates from environmental liabilities" (para. 81), the majority misunderstands the impact and purpose of the disclaimer power. The estate itself is not relieved of environmental obligations. As I have noted, the trustee does not take possession of the bankrupt's assets in order to continue the life of the bankrupt indefinitely. The trustee's function is to realize on the estate's valuable assets and maximize global recovery for all creditors. Allowing the trustee to deal only with the value-positive assets to achieve this goal does not relieve the *estate* of its environmental obligations. As a result, the disclaimer power, and its incorporation into s. 14.06(4), is entirely consistent with the foundational principles of insolvency law.

[201] In s. 14.06(4), Parliament has expressly referred to this disclaimer power and spelled out the particular effects flowing from its proper exercise. By doing so, it has purposefully incorporated the disclaimer power into its statutory scheme to achieve its desired purposes.

[202] My interpretation of s. 14.06(4) finds ample support in the Hansard evidence. In the debates preceding the enactment of s. 14.06(4) in 1997, Jacques Hains, a director in the Department of Industry Canada who had been involved in drafting the amendments to the *BIA*, discussed the new options being provided to trustees when faced with an environmental remediation order:

First, he could decide to carry out the order and remedy the environmental damage, the costs to be charged as costs of administration from the bankrupt's assets.

le cas pour les biens non réalisés (voir *LFI*, art. 40; voir aussi Bennett, p. 528). L'actif demeure responsable des obligations de décontamination qui se rattachent au terrain. La question de savoir si les éléments d'actif sont suffisants pour satisfaire à ces engagements à ce moment précis est une question distincte qui n'a aucun rapport avec le fait sous-jacent de la responsabilité continue. Dans tous les cas, le régime de réglementation continue de s'appliquer aux biens conservés. En exprimant maintes fois l'idée que la renonciation ne met pas « les biens des faillis à l'abri de toute responsabilité environnementale » (par. 81), la majorité se méprend sur l'incidence et l'objet du pouvoir de renonciation. L'actif en soi n'est pas libéré des obligations environnementales. Comme je l'ai noté, le syndic ne prend pas possession des biens du failli en vue de poursuivre indéfiniment la vie du failli. Il a pour fonction de réaliser les biens de valeur de l'actif et de maximiser le recouvrement global au profit de tous les créanciers. Permettre au syndic de s'occuper uniquement des biens de valeur pour atteindre cet objectif ne libère pas l'*actif* de ses obligations environnementales. Ainsi, le pouvoir de renonciation et son incorporation au par. 14.06(4) s'accordent parfaitement avec les principes fondamentaux du droit de l'insolvabilité.

[201] Au paragraphe 14.06(4), le Parlement a mentionné expressément ce pouvoir de renonciation et exposé les effets particuliers découlant de son exercice approprié. Il a incorporé ainsi à dessein à son régime législatif le pouvoir de renonciation pour en réaliser les objectifs visés.

[202] Mon interprétation du par. 14.06(4) est amplement étayée par les débats parlementaires. Lors des débats qui ont précédé l'adoption du par. 14.06(4) en 1997, Jacques Hains, directeur au ministère d'Industrie Canada qui avait participé à la rédaction des modifications à la *LFI*, a discuté des nouvelles solutions qui s'offraient aux syndics aux prises avec des ordonnances de décontamination environnementale :

Premièrement, ils pourraient décider de se conformer à l'ordonnance et d'effectuer la dépollution, dont les coûts seraient des coûts d'administration des actifs du failli.

The second option would be to challenge this order to remedy before the appropriate courts; these two options are already to be found in environmental legislation.

The third option would be for the monitor to apply to the appropriate court for a period of stay to assess the economic viability of complying with the order, whether it is worth the trouble and whether the assets are sufficient to cover the clean up costs.

As a fourth option, if he considers that this course has absolutely no economic viability, he may give notification that he has renounced the real property to which the order applies. [Emphasis added.]

(Standing Committee on Industry, *Evidence*, No. 16, 2nd Sess., 35th Parl., June 11, 1996, at 15:45 to 15:50)

The above passage makes no reference to the personal liability of a trustee who is considering whether to invoke the "fourth option" and disclaim the property. Mr. Hains was clear that the decision to disclaim is based on the "economic viability" of complying with the remediation orders, specifically "whether the assets are sufficient to cover the clean up costs". This makes sense only in the context of the trustee's obligation to maximize economic recovery for creditors.

[203] Several months later, Mr. Hains reiterated this fourth option, explaining that, after assessing the economic viability of complying with the order and "knowing that the bill will be too expensive and will not be economically viable, the trustees are then out of it and can abandon that piece of property subject to the order" (*Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, No. 13, 2nd Sess., 35th Parl., November 4, 1996, at p. 13:68 (emphasis added)). This description plainly reflects the function of the disclaimer power, which does indeed allow trustees to "walk away" from liability-laden assets that will not contribute to maximizing creditor recovery.

[204] Mr. Hains' answers to questions from the House of Commons Standing Committee further

Comme deuxième option, ils pourraient contester devant les tribunaux compétents cette ordonnance de dépollution; ces deux options sont déjà prévues dans les lois en matière d'environnement.

La troisième option du praticien consisterait à demander à un tribunal compétent du temps de réflexion pour évaluer s'il est économique de se conformer à l'ordonnance ou non, si cela en vaut la peine et si les actifs sont suffisants pour couvrir les frais de dépollution.

Comme quatrième option, s'il croit que ce n'est absolument pas une décision économique, il pourra signifier qu'il abandonne les sites faisant l'objet de l'ordonnance. [Je souligne.]

(Comité permanent de l'industrie, *Témoignages*, nº 16, 2e sess., 35e lég., 11 juin 1996, entre 15 h 45 et 15 h 50)

Le passage précité ne mentionne aucunement la responsabilité personnelle du syndic qui se demande s'il y a lieu de se prévaloir de la « quatrième option » et de renoncer au bien. M. Hains a clairement affirmé que la décision de renoncer repose sur la viabilité « économique » du respect des ordonnances de décontamination, tout particulièrement sur la question de savoir « si les actifs sont suffisants pour couvrir les frais de dépollution ». Cela n'est logique que dans le contexte de l'obligation du syndic de maximiser le recouvrement au profit des créanciers.

[203] Plusieurs mois plus tard, M. Hains a répété cette quatrième option, expliquant qu'après avoir évalué s'il est économique de se conformer à l'ordonnance et « sachant que la facture sera trop élevée et que la proposition ne sera donc pas économiquement viable, le syndic peut s'en laver les mains et abandonner la propriété visée par l'ordonnance » (*Délibérations du comité sénatorial permanent des Banques et du commerce*, nº 13, 2e sess., 35e leg., 4 novembre 1996, p. 13:68 (je souligne)). Cette description traduit clairement la fonction du pouvoir de renonciation, qui permet au syndic de « délaisser » les biens grevés d'engagement qui ne contribuent pas à maximiser le recouvrement au profit des créanciers.

[204] Les réponses de M. Hains aux questions du Comité permanent de la Chambre des communes

confirms this interpretation of the disclaimer power. The following exchange is very telling:

Mr. Lebel [Member of Parliament for Chambly]: When a trustee decides to give up the land and realize[s] assets elsewhere, for example by making a profit from the sale of assets, having released himself from the obligation to clean up the land, he would be sharing a dividend realized from other profitable assets and telling the creditors to manage as best they can with the real property. If the creditors are not willing to touch it, he will then tell the government to clean it up. In such a case, each of the bankruptcy creditors would also . . . stand to earn a small dividend, as it is referred to in Bankruptcy Law.

Do you not think that your bill should require the trustee to carry out a clean-up from the assets of the bankruptcy before the dividends are distributed?

Mr. Hains: It's an excellent question that was put to me only three weeks ago by colleagues from the Department of the Environment of Quebec, whom I was meeting to discuss this subject. There were a number of matters of interest to them, particularly the one raised by Mr. Lebel. [Emphasis added.]

(Standing Committee on Industry, June 11, 1996, at 16:55)

Mr. Hains went on to reference various other features of the scheme to assuage Mr. Lebel's concerns and noted that provincial environmental agencies would be responsible for performing the remediation work. Significantly, at no point did Mr. Hains contradict Mr. Lebel's understanding of the bill's provisions. Nor did he take issue with the premise underlying the question: that the new legislation does not "require the trustee to carry out a clean-up from the assets of the bankruptcy" before they are distributed to creditors. Mr. Hains did not claim that provincial regulators might still enforce such a requirement.

[205] This exchange between Mr. Lebel and Mr. Hains clearly demonstrates the collective understanding of all parties that the proposed amendments, containing what would become s. 14.06(4), specifically *did not* require the trustee to expend

confirment elles aussi cette interprétation du pouvoir de renonciation. L'échange qui suit est fort éloquent :

M. Lebel [député de Chambly] : Lorsque le syndic décide de renoncer au terrain et réalise des actifs par ailleurs, par exemple en faisant un profit par la vente d'actifs, s'étant libéré de son obligation de dépolluer le terrain, il partage un dividende réalisé sur d'autres actifs rentables et dit aux créanciers de s'organiser avec le terrain. Si les créanciers ne veulent pas y toucher, il dit au gouvernement de le dépolluer. À ce moment-là, chacun des autres créanciers de la faillite ressort avec un petit dividende. C'est ainsi qu'on appelle cela en droit de la faillite.

Ne pensez-vous pas que votre projet de loi devrait forcer le syndic à faire la décontamination à même les actifs de la faillite avant de distribuer des dividendes?

M. Hains : C'est une excellente question qui m'a été posée il y a à peine trois semaines par des collègues du ministère de l'Environnement du Québec, que j'ai rencontrés pour parler de ce sujet-là. Il y avait des questions qui les intéressaient, notamment celle que M. Lebel soulève. [Je souligne.]

(Comité permanent de l'industrie, 11 juin 1996, à 16 h 55)

M. Hains a ensuite mentionné plusieurs autres caractéristiques du régime pour dissiper les préoccupations de M. Lebel et a fait remarquer que les organismes de réglementation environnementaux provinciaux devraient exécuter les travaux de décontamination. Fait important, M. Hains ne contredit jamais la conception que M. Lebel se fait des dispositions du projet de loi. Il ne conteste pas non plus la prémisse qui sous-tend la question : la nouvelle loi ne « force [. . .] pas le syndic à faire la décontamination à même les actifs de la faillite » avant leur répartition entre les créanciers. M. Hains ne prétend pas que les organismes de réglementation provinciaux peuvent toujours assurer le respect d'une telle exigence.

[205] Cet échange entre MM. Lebel et Hains démontre clairement que toutes les parties s'entendent pour dire que les modifications proposées, lesquelles contiennent ce qui allait devenir le par. 14.06(4), *n'*obligeaient *pas* expressément le syndic à dépenser

the estate's assets to comply with environmental remediation orders. The drafters of s. 14.06(4) thus turned their minds directly to this issue, and their understanding of the provision's effects was contrary to that proposed by the majority.

[206] Based on these references to Hansard, I cannot agree with the majority's statement that the legislative debates provide "no hint" of a parliamentary intention to relieve trustees of the obligation to expend estate assets on environmental remediation (para. 81). This intention was clearly expressed on multiple occasions.

[207] As courts must read statutory provisions in their entire context, and as Parliament is presumed to craft sections and subsections of legislation as parts of a coherent whole, it is important to carefully examine the other subsections of s. 14.06. This is true regardless of whether a party to litigation seeks to apply them or to put them directly in issue (majority reasons, at paras. 88 and 101). Significantly, the immediate statutory context surrounding s. 14.06(4) confirms that a trustee's right to disclaim property is not limited in the manner suggested by the AER or my colleague. Four provisions adjacent to s. 14.06(4) support this conclusion.

[208] First, s. 14.06(5) provides that a court may stay an environmental order "for the purpose of enabling the trustee to assess the economic viability of complying with the order". Assessing "economic viability" is, on its face, broader than assessing the risk of personal liability. This provision indicates that a trustee is entitled to disclaim assets based on a rational economic analysis geared toward maximizing the value of the estate, and not merely in order to protect itself from personal liability. Otherwise, there would be no reason for Parliament to permit a court to grant a stay for the purpose of assessing economic viability. This understanding is consistent with the fundamental principles of insolvency law and with the Hansard evidence, as noted above, as well as with one of the recognized justifications for the disclaimer power more generally: to allow a trustee

les biens de l'actif pour respecter les ordonnances de décontamination environnementale. Les rédacteurs du par. 14.06(4) se sont ainsi directement attardés à cette question et leur conception des effets de la disposition contredisait celle proposée par les juges majoritaires.

[206] Étant donné les extraits précédents des débats parlementaires, je ne peux souscrire à l'affirmation des juges majoritaires selon laquelle les débats législatifs ne donnent « aucun indice » d'une intention du Parlement de relever les syndics de l'obligation de consacrer des biens de l'actif à la décontamination environnementale (par. 81). Le Parlement a clairement manifesté cette intention à maintes reprises.

[207] Puisque les tribunaux doivent lire les dispositions législatives dans leur contexte global, et que le Parlement est présumé rédiger les articles et paragraphes d'une loi comme un tout cohérent, il importe d'examiner avec soin les autres paragraphes de l'art. 14.06. Il en est ainsi, peu importe qu'une partie au litige cherche à les appliquer ou à les mettre directement en cause (motifs des juges majoritaires, par. 88 et 101). Fait révélateur, le contexte immédiat du par. 14.06(4) confirme que le droit du syndic de renoncer à des biens n'est pas limité de la façon suggérée par l'AER ou mon collègue. Quatre dispositions adjacentes au par. 14.06(4) étayent cette conclusion.

[208] Premièrement, le par. 14.06(5) prévoit que le tribunal peut suspendre une ordonnance environnementale « [e]n vue de permettre au syndic d'évaluer les conséquences économiques du respect de l'ordonnance ». Évaluer les « conséquences économiques » a, à première vue, une portée plus large qu'évaluer le risque de responsabilité personnelle. Cette disposition indique que le syndic a le droit de renoncer à des biens en se fondant sur une analyse économique rationnelle visant à maximiser la valeur de l'actif, et non simplement afin de se prémunir contre une responsabilité personnelle. Sinon, le Parlement n'aurait aucune raison d'autoriser le tribunal à accorder une suspension en vue de permettre l'évaluation des conséquences économiques. Cette interprétation s'accorde avec les principes fondamentaux du droit de l'insolvabilité et les débats parlementaires, tel que

"to complete the administration of the liquidation without being held up by continuing obligations on the company under . . . continued ownership and possession of assets which are of no value to the estate" (Goode, at p. 200).

[209] Second, s. 14.06(7) grants the government a super priority for environmental claims in cases where it has already taken action to remedy the condition or damage. This provision would serve little purpose if a government regulator could assert a super priority for *all* environmental claims, as the AER effectively purports to do here by refusing to recognize GTL's disclaimers as lawful. It also suggests that Parliament specifically envisioned that the government could obtain a super priority and leapfrog other creditors, but *only* where the government itself has already remediated the environmental damage. An analogous argument was central to the reasoning in *Abitibi*, where this Court observed that the existence of a Crown priority limited to the contaminated property and certain related property under s. 11.8(8) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, undercut the argument that Parliament "intended that the debtor always satisfy all remediation costs" in circumstances where that express priority was inapplicable and where the Crown had no further priority with respect to the totality of the estate's assets (para. 33).

[210] Third, s. 14.06(6) provides that claims for costs of remedying an environmental condition or environmental damage cannot rank as costs of administration if the trustee has disclaimed the property in question. Again, if the AER could effectively assert a super priority by compelling GTL to use all of Redwater's assets to satisfy its outstanding environmental liabilities, this provision would be unnecessary, because the costs of environmental

je l'ai signalé précédemment, de même qu'avec l'une des justifications reconnues du pouvoir de renonciation de façon plus générale : permettre au syndic [TRADUCTION] « de mener à terme la liquidation sans être freiné par les obligations permanentes de la société [. . .] en conservant la propriété et la possession de biens qui n'augmentent en rien la valeur de l'actif » (Goode, p. 200).

[209] Deuxièmement, le par. 14.06(7) accorde au gouvernement une superpriorité à l'égard des réclamations environnementales dans les cas où il a déjà pris des mesures pour réparer le fait ou le dommage. Cette disposition serait fort peu utile si un organisme de réglementation gouvernemental pouvait faire valoir une superpriorité à l'égard de *toutes* les réclamations environnementales, comme l'AER a effectivement la prétention de le faire en l'espèce, en refusant de reconnaître la légalité des renonciations de GTL. Elle donne également à penser que le Parlement a expressément prévu que le gouvernement pouvait obtenir une superpriorité et devancer les autres créanciers, mais *seulement* lorsqu'il a lui-même déjà réparé le dommage lié à l'environnement. Un argument analogue a constitué l'élément central du raisonnement dans *Abitibi*, où la Cour a fait remarquer que l'existence d'une priorité de la Couronne portant uniquement sur les biens contaminés et certains biens connexes en vertu du par. 11.8(8) de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, c. C-36, mine l'argument selon lequel le Parlement a eu « l'intention d'obliger le débiteur à supporter dans tous les cas tous les coûts des travaux de décontamination » dans les situations où ce droit de priorité exprès était inapplicable et où la Couronne ne disposait d'aucune autre priorité sur l'ensemble des biens de l'actif (par. 33).

[210] Troisièmement, le par. 14.06(6) prévoit que les réclamations visant les frais de réparation du fait ou dommage lié à l'environnement ne peuvent faire partie des frais d'administration si le syndic a renoncé au bien en question. Encore une fois, si l'AER pouvait effectivement faire valoir une superpriorité en obligeant GTL à utiliser tous les biens de Redwater pour satisfaire aux engagements environnementaux non acquittés de celle-ci, cette disposition

remediation would rank *ahead* of administrative costs in the priority structure. Moreover, s. 14.06(6) highlights the potential for a direct conflict between federal and provincial law. A trustee cannot comply with the AER's instruction to pay environmental costs as part of its administration of the estate while simultaneously complying with the *BIA*'s requirement that such costs *not* be included in the trustee's administrative costs. This further raises the spectre of bankruptcy professionals being forced to expend their own funds under Alberta's regulatory regime — a notion that Parliament clearly rejected by amending the *BIA* in response to *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 D.L.R. (4th) 280 (see C.A. reasons, at para. 63). This is a risk that is not adequately addressed under my colleague's interpretation.

ne serait pas nécessaire parce que les frais de décontamination environnementale passeraient *avant* les frais d'administration dans l'ordre de priorité. De plus, le par. 14.06(6) fait ressortir la possibilité d'un conflit direct entre la loi fédérale et la loi provinciale. Le syndic ne peut pas obtempérer à la directive de l'AER lui indiquant de supporter les frais environnementaux dans le cadre de son administration de l'actif tout en respectant l'exigence de la *LFI* selon laquelle ces frais *ne* font *pas* partie des frais d'administration du syndic. Cela fait également apparaître le spectre de l'obligation pour les professionnels de la faillite de dépenser leurs propres fonds en application du régime de réglementation albertain, une idée que le Parlement a clairement rejetée en modifiant la *LFI* en réaction à l'arrêt *Panamericana de Bienes y Servicios S.A. c. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 D.L.R. (4th) 280 (voir motifs de la Cour d'appel, par. 63). C'est un risque auquel l'interprétation de mon collègue ne répond pas adéquatement.

[211] Fourth, s. 14.06(2) already deals with the circumstances in which a trustee can be held personally liable for a bankrupt's environmental liabilities. Under this provision, personal liability can arise only where environmental damage occurs as a result of the trustee's gross negligence or wilful misconduct. If a risk of personal liability is, in fact, a necessary condition to disclaim under s. 14.06(4), or if protection from personal liability is the only effect of disclaimer, this would mean that the disclaimer power is available or useful only in cases where the underlying environmental condition arises after the trustee's appointment and the trustee is responsible for gross negligence or wilful misconduct.

[211] Quatrièmement, le par. 14.06(2) traite déjà des circonstances dans lesquelles le syndic peut être tenu personnellement responsable des engagements environnementaux du failli. Selon cette disposition, la responsabilité personnelle du syndic ne peut être engagée que si le dommage lié à l'environnement est imputable à sa négligence grave ou à son inconduite délibérée. Si le risque de responsabilité personnelle constitue, en fait, une condition essentielle à la renonciation prévue par le par. 14.06(4), ou si la protection contre toute responsabilité personnelle est le seul effet de la renonciation, cela signifie que le pouvoir de renonciation ne peut être exercé ou n'est utile que dans les cas où le fait sous-jacent lié à l'environnement prend naissance après la nomination du syndic et où ce dernier est responsable de négligence grave ou d'inconduite délibérée.

[212] This obvious absurdity cannot be sidestepped by trying to distinguish between liability for environmental *damage* (purportedly covered by s. 14.06(2)) and liability for *a failure to comply with an order* to remedy such damage (purportedly covered by s. 14.06(4)). This distinction is entirely artificial. If the AER issues an abandonment order in relation to a licensed property, it effectively creates liability for

[212] On ne saurait contourner ce résultat manifestement absurde en tentant d'établir une distinction entre la responsabilité découlant d'un *dommage* lié à l'environnement (qui serait visée par le par. 14.06(2)) et la responsabilité découlant du *non-respect de toute ordonnance* de réparation de ce dommage (qui serait visée par le par. 14.06(4)). Cette distinction est tout à fait artificielle. Si l'AER rend une ordonnance

the underlying condition itself — liability that would still be encompassed by s. 14.06(2). This is evident from the marginal note for s. 14.06(2), "[l]iability in respect of environmental matters", which is capacious enough to include liability that flows from a failure to comply with an environmental order. In any event, it is difficult to imagine why Parliament would intend to immunize a trustee from personal liability for an environmental *condition*, but still hold the trustee liable for a failure to comply with an *order* to remedy that exact same condition — and then further, permit the trustee to avoid that very liability by disclaiming the property, but either not permit the trustee to disclaim that property in any other circumstance or make it pointless to do so. This convoluted reasoning not only misreads s. 14.06(4), but also rewrites s. 14.06(2) in the process. It effectively creates a sector specific exemption from bankruptcy law that would prohibit many receivers and trustees that operate in the oil and gas industry from disclaiming assets (see N. Bankes, *Majority of the Court of Appeal Confirms Chief Justice Wittmann's Redwater Decision*, May 3, 2017 (online)).

[213] I also cannot accept that Parliament enacted s. 14.06(4) simply to protect trustees from personal liability in the narrow subset of circumstances not already covered by s. 14.06(2) — namely where an environmental condition or environmental damage arises after a trustee's appointment and as a result of the trustee's gross negligence or wilful misconduct — for two main reasons. Firstly, the terms of the provision itself belie this theory. The opening lines of s. 14.06(4) expressly make the limitation of liability "subject to subsection (2)". This indicates that Parliament deliberately intended subs. (2) to supersede subs. (4) in the determination of liability. Thus, where a trustee has caused an environmental condition or environmental damage through its wilful misconduct or gross negligence, the trustee *will still be personally liable*, despite any valid disclaimer

d'abandon à l'égard d'un bien visé par un permis, il crée effectivement une responsabilité découlant du fait sous-jacent lui-même — une responsabilité qui serait toujours visée par le par. 14.06(2). Cela ressort clairement de la note marginale du par. 14.06(2), « [r]esponsabilité en matière d'environnement », qui est suffisamment vaste pour englober la responsabilité découlant du non-respect d'une ordonnance environnementale. Quoi qu'il en soit, il est difficile d'imaginer pourquoi le Parlement voudrait mettre le syndic à l'abri d'une responsabilité personnelle découlant d'un *fait* lié à l'environnement, tout en tenant néanmoins le syndic responsable du non-respect d'une *ordonnance* de réparation concernant exactement le même fait — pour ensuite permettre au syndic d'être dégagé de cette même responsabilité en renonçant au bien, mais en ne permettant pas au syndic de renoncer à ce bien dans d'autres circonstances ou en rendant inutile cette renonciation. Non seulement ce raisonnement alambiqué constitue-t-il une mauvaise interprétation du par. 14.06(4), mais il équivaut en même temps à une reformulation du par. 14.06(2). Cela revient en fait à créer une exemption sectorielle à l'application du droit de la faillite qui empêcherait les séquestres et les syndics qui exercent leurs activités dans l'industrie pétrolière et gazière de renoncer à des biens (voir N. Bankes, *Majority of the Court of Appeal Confirms Chief Justice Wittmann's Redwater Decision*, 3 mai 2017 (en ligne)).

[213] Je ne peux non plus accepter que le Parlement a adopté le par. 14.06(4) dans le simple but de protéger les syndics contre toute responsabilité personnelle dans le sous-ensemble restreint de circonstances qui ne sont pas déjà visées par le par. 14.06(2) — à savoir celles où un fait ou dommage lié à l'environnement survient après la nomination du syndic et à cause de sa négligence grave ou de son inconduite délibérée — pour deux raisons principales. Tout d'abord, le texte de la disposition contredit lui-même cette théorie. Les premières lignes du par. 14.06(4) limitent expressément la responsabilité « sous réserve du paragraphe (2) ». Le Parlement tenait donc à ce que le par. (2) l'emporte sur le par. (4) pour ce qui est de déterminer la responsabilité. Ainsi, le syndic ayant causé un fait ou dommage lié à l'environnement par son inconduite délibérée ou sa négligence grave

under subs. (4). Secondly, there is no evidence, or indeed any rationale, to explain why Parliament would have drafted s. 14.06(4) to protect trustees in such narrow circumstances, through the method of disclaiming property, and to shield them from liability where they cause environmental issues through their own wrongdoing.

[214] The majority of this Court accepts that, on its interpretation, no meaningful distinction can be drawn between the protection from personal liability provided by subs. (2) and that provided by subs. (4). Indeed, the majority appears to believe that such a distinction is not even necessary, accepting that "s. 14.06(4) does not provide trustees with protection from personal liability any broader than the protection provided by s. 14.06(2)" (para. 93). However, the effect of this interpretation is to render subs. (4) entirely meaningless and redundant. Trustees would have no reason to exercise their power to disclaim assets, as the only effect of doing so would be to protect them from personal liability from which they are already fully shielded by subs. (2). Section 14.06(4) would therefore serve no purpose whatsoever within Parliament's bankruptcy regime. I cannot understand the logic of Parliament explicitly referring to, and incorporating, the ability of trustees to disclaim assets — and specifically outlining one consequence of that power — simply to mandate that such an action has no meaningful effect. We must presume that Parliament does not speak in vain and did not craft a pointless provision (*Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 87). It is a trite principle of statutory interpretation that every provision of a statute should be given meaning:

> It is presumed that every feature of a legislative text has been deliberately chosen and has a particular role to play in the legislative design. The legislature does not include unnecessary or meaningless language in its statutes; . . . it does not make the same point twice.
>
> (R. Sullivan, *Statutory Interpretation* (3rd ed. 2016), at p. 43)

engagera toujours sa responsabilité personnelle, malgré toute renonciation dûment effectuée en vertu du par. (4). Ensuite, aucune preuve, ni raison en fait, n'explique pourquoi le Parlement aurait rédigé le par. 14.06(4) afin de protéger les syndics dans des situations aussi particulières, par la renonciation à des biens, et de les mettre à l'abri de leur responsabilité lorsqu'ils endommagent l'environnement par leurs propres actes répréhensibles.

[214] Les juges majoritaires reconnaissent que, d'après leur interprétation, on ne peut établir de distinction utile entre l'immunité de responsabilité personnelle accordée par le par. (2) et celle fournie par le par. (4). En effet, ils semblent croire que cette distinction n'est même pas nécessaire, acceptant que « le par. 14.06(4) n'offre pas aux syndics une protection contre la responsabilité personnelle plus large que celle fournie par le par. 14.06(2) » (par. 93). Cette interprétation a cependant pour effet de rendre le par. (4) tout à fait dénué de sens et redondant. Le syndic n'aurait aucune raison d'exercer son pouvoir de renoncer à des biens, car cette mesure ne servirait qu'à le protéger contre la responsabilité personnelle dont le par. (2) le met déjà entièrement à l'abri. Ainsi, le par. 14.06(4) n'aurait absolument aucune utilité dans le régime de faillite du Parlement. Je ne peux saisir la logique, pour le Parlement, de mentionner explicitement et d'incorporer le pouvoir du syndic de renoncer à ces biens — et d'énoncer en termes exprès une conséquence de ce pouvoir — simplement pour disposer que cette mesure n'a aucun effet utile. Nous devons présumer que le Parlement ne parle pas pour ne rien dire et qu'il n'a pas rédigé une disposition inutile (*Canada (Procureur général) c. JTI-Macdonald Corp.*, 2007 CSC 30, [2007] 2 R.C.S. 610, par. 87). Un principe reconnu d'interprétation législative veut que chaque disposition d'une loi reçoive un sens :

> [TRADUCTION] On présume que chaque caractéristique d'un texte de loi a été délibérément choisie et a un rôle précis à jouer dans le cadre législatif. Le législateur n'emploie pas de termes inutiles ou dénués de sens dans ses lois; [. . .] il ne dit pas la même chose deux fois.
>
> (R. Sullivan, *Statutory Interpretation* (3e éd. 2016), p. 43)

[215] This evident absurdity cannot be avoided by suggesting that s. 14.06(4) was created to clarify to trustees that they may be required to expend the entire value of a bankrupt estate to comply with environmental orders, despite valid disclaimers. If Parliament's intent was truly to undermine the disclaimer power in this way, it is difficult to conceive of a more convoluted, tortuous and unclear method to achieve this result than s. 14.06(4). Had Parliament simply sought to make clear to trustees that disclaimer would not allow them to relieve themselves from satisfying environmental liabilities, it could easily have done so directly rather than enacting a provision that describes protection from personal liability they do not actually face.

[216] Section 14.06, when read as a whole, indicates that subs. (4) does more than merely protect trustees from personal liability. My colleague has declined to even consider the remaining subsections of s. 14.06 that I have discussed, other than subs. (2). Nonetheless, he says that the plain meaning of a provision cannot be "contorted to make its scheme more coherent" (para. 101). The conclusion that would result from such an approach would be that Parliament simply intended to craft a largely incoherent framework. I disagree that we should reach this conclusion here. As Dickson J. (as he then was) stated in *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, at p. 676: "We should pay Parliament the respect of not assuming readily that it has enacted legislative inconsistencies or absurdities." A determination that Parliament designed s. 14.06 as an incoherent whole is inconsistent with the role of the courts in statutory interpretation, which is to read the words of a statute in their entire context, harmoniously with the scheme of the statute. As Ruth Sullivan has noted:

> It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work together dynamically,

[215] Il est impossible d'éviter cette absurdité évidente en affirmant que le par. 14.06(4) visait à préciser au syndic qu'il devait dépenser toute la valeur de l'actif d'un failli pour se conformer à des ordonnances environnementales en dépit de renonciations valides. Si le Parlement avait vraiment eu l'intention de miner ainsi le pouvoir de renonciation, il est difficile d'imaginer un moyen plus alambiqué, tortueux et vague d'atteindre ce résultat que le par. 14.06(4). Si le Parlement avait simplement voulu préciser au syndic que la renonciation ne leur permettrait pas d'être dégagés de l'obligation de respecter les engagements environnementaux, il lui aurait été facile de le faire directement, plutôt que d'adopter une disposition décrivant une immunité de responsabilité personnelle dont le syndic n'a pas besoin.

[216] Lu dans son ensemble, l'art. 14.06 indique que le par. (4) ne se borne pas à dégager les syndics de toute responsabilité personnelle. Mon collègue a même refusé d'examiner les autres paragraphes de l'art. 14.06 dont j'ai parlé, sauf le par. (2). Peu importe, dit-il, on ne peut « déforme[r] le sens clair d'une disposition pour en rendre le régime plus cohérent » (par. 101). Cette approche mènerait à la conclusion selon laquelle le Parlement voulait simplement concevoir un cadre incohérent en grande partie. Je suis en désaccord avec cette conclusion. Tel que l'a mentionné le juge Dickson (plus tard juge en chef) dans *Morgentaler c. La Reine*, [1976] 1 R.C.S. 616, p. 676 : « Nous devons avoir envers le Parlement la courtoisie de ne pas présumer aisément qu'il a édicté des incohérences ou des absurdités ». La conclusion que le Parlement a conçu l'art. 14.06 comme un tout incohérent est incompatible avec la tâche confiée aux tribunaux dans l'interprétation législative, laquelle consiste à lire les termes d'une loi dans leur contexte global en harmonie avec l'économie de la loi. Comme l'a fait remarquer Ruth Sullivan :

> [TRADUCTION] Les dispositions d'une loi sont présumées fonctionner ensemble, tant logiquement que téléologiquement, comme les diverses parties d'un tout. Les parties sont présumées s'assembler logiquement pour former un cadre rationnel, intrinsèquement cohérent; et parce que ce cadre a un objet, ses éléments sont aussi

each contributing something toward accomplishing the intended goal.

The presumption of coherence is also expressed as a presumption against internal conflict. It is presumed that the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, that each provision is capable of operating without coming into conflict with any other. [Footnote omitted.]

(*Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 337; see also *R. v. L.T.H.*, 2008 SCC 49, [2008] 2 S.C.R. 739, at para. 47.)

[217] Where it is possible to read the provisions of a statute — especially the various subsections of a single section — in a consistent manner, that interpretation is to be preferred over one that results in internal inconsistency. In my view, as I have set out above, it is possible to read s. 14.06(4) coherently with the remainder of the section. This is the interpretation that Parliament is presumed to have intended. In this case, I see no compelling reason to depart from this presumption.

[218] My colleague's analysis is reminiscent of the strictly textual or literal approach to statutory interpretation — the "plain meaning rule" — that this Court squarely rejected in *Rizzo*. This is apparent from the fact that he relies strictly on what he alleges to be the "clear and unambiguous" wording of s. 14.06(4), while discounting the context of the provision. With respect, I am of the view that the Court should rely on the predominant and well-established modern approach to statutory interpretation: the words of an Act must be "'read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament"' (*Rizzo*, at para. 21; *Bell ExpressVu*, at para. 26, both quoting Driedger, at p. 87).

[219] In *Rizzo*, Iacobucci J. explained that "statutory interpretation cannot be founded on the wording of the legislation alone" (para. 21). The Court of Appeal in *Rizzo*, which had adopted the plain

présumés s'appliquer ensemble de façon dynamique, chacun contribuant à la réalisation de l'objectif visé.

La présomption de cohérence se traduit également par une présomption d'absence d'incompatibilité intrinsèque. Il est présumé que l'ensemble des textes législatifs édictés par une législature ne comporte pas de contradictions ou d'incohérences et que chaque disposition peut être appliquée sans entrer en conflit avec une autre. [Note en bas de page omise.]

(*Sullivan on the Construction of Statutes* (6e éd. 2014), p. 337; voir aussi *R. c. L.T.H.*, 2008 CSC 49, [2008] 2 R.C.S. 739, par. 47.)

[217] Quand il est possible d'interpréter les dispositions d'une loi — surtout les divers paragraphes d'un même article — de façon cohérente, il faut privilégier cette interprétation à une interprétation qui donne lieu à une incohérence intrinsèque. À mon avis, et comme je l'ai déjà dit, il est possible de lire le par. 14.06(4) de façon cohérente avec le reste de l'article. Voilà l'interprétation que le Parlement est présumé avoir donnée à ce paragraphe. En l'espèce, je ne vois aucune raison impérieuse de s'écarter de cette présomption.

[218] L'analyse de mon collègue rappelle la méthode purement textuelle ou littérale d'interprétation des lois — la « règle du sens ordinaire » — que notre Cour a rejetée sans équivoque dans *Rizzo*. Cela ressort du fait qu'il se fonde strictement sur ce qu'il prétend être le texte « clai[r] et non ambig[u] » du par. 14.06(4), tout en ne tenant pas compte du contexte de la disposition. Avec égards, j'estime que la Cour devrait recourir à la méthode prédominante et bien établie d'interprétation des lois : il faut lire les termes d'une loi « dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'[économie] de la loi, l'objet de la loi et l'intention du législateur » (*Rizzo*, par. 21; *Bell ExpressVu*, par. 26, citant tous les deux Driedger, p. 87).

[219] Dans l'arrêt *Rizzo*, le juge Iacobucci a expliqué que « l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi » (par. 21). La Cour d'appel saisie de l'affaire *Rizzo*, qui avait retenu

meaning interpretation, "did not pay sufficient attention to the scheme of the [Act], its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized" (para. 23).

[220] In interpreting s. 14.06(4) of the *BIA*, the majority similarly relies on the supposed plain meaning of the words of the provision but does not pay sufficient attention to the scheme of s. 14.06 as a whole; nor does it appropriately recognize the context of the words.

[221] Even if we were to leave aside the wording of the provision itself and its immediate statutory context, a purposive interpretation would lead to the same result. Consider the consequences of the analysis of the AER or the analysis of my colleague in other cases like this, where an oil company's environmental liabilities exceed the value of its realizable assets. Insolvency professionals, knowing in advance that they can be compelled to funnel all of the estate's remaining assets toward those environmental liabilities (either because they cannot disclaim value-negative assets absent a risk of personal liability or because their disclaimer will be ineffective to prevent this), will never accept mandates in the first place. This is sensible business practice: if the estate's entire realizable value must go toward its environmental liabilities, leaving nothing behind to cover administrative costs, insolvency professionals will have nothing to gain — and much to lose — by stepping in to serve as receivers and trustees, irrespective of whether they are protected from personal liability. Debtors and creditors alike, knowing that this is the case, will have no reason to even petition for bankruptcy. The result is that *none* of a bankrupt estate's assets will be sold — not even an oil company's valuable wells — and the number of orphaned properties will increase. This is a far cry from the objectives of the 1997 amendments to the *BIA* as discussed in Parliament, which were to "encourage [insolvency professionals] to accept mandates" and to "reduce the number of abandoned sites" (Standing Committee on Industry, June 11, 1996, at 15:49). It is difficult to imagine that Parliament would have intended a construction

l'interprétation fondée sur le sens ordinaire, « n'a pas accordé suffisamment d'attention à l'économie de la [Loi], à son objet ni à l'intention du législateur; le contexte des mots en cause n'a pas non plus été pris en compte adéquatement » (par. 23).

[220] En interprétant le par. 14.06(4) de la *LFI*, la majorité s'appuie elle aussi sur le supposé sens ordinaire des mots de la disposition mais n'accorde pas suffisamment d'attention à l'économie de l'art. 14.06 dans son ensemble; elle ne prend pas non plus adéquatement en compte le contexte de ces mots.

[221] Même si nous faisions abstraction du libellé de la disposition elle-même et de son contexte législatif immédiat, une interprétation téléologique mènerait au même résultat. Considérons les conséquences de l'analyse de l'AER ou de celle de mon collègue dans d'autres cas comme celui qui nous occupe, où les engagements environnementaux de la société pétrolière excèdent la valeur de son actif réalisable. Les professionnels de l'insolvabilité, sachant d'avance qu'ils peuvent être contraints de canaliser tous les autres éléments d'actif vers ces engagements environnementaux (soit parce qu'ils ne peuvent renoncer à des biens ayant une valeur négative en l'absence du risque d'engager leur responsabilité personnelle, soit parce que leur renonciation n'empêchera pas cette éventualité de se produire), n'accepteront jamais de mandats au départ. Il s'agit là d'une pratique commerciale sensée : si toute la valeur réalisable de l'actif doit être dirigée vers ces engagements environnementaux, et qu'il ne reste rien pour couvrir les frais administratifs, les professionnels de l'insolvabilité n'auront rien à gagner — et beaucoup à perdre — en acceptant d'exercer les fonctions de séquestre et de syndic, indépendamment de la question de savoir s'ils sont protégés contre toute responsabilité personnelle. Les débiteurs tout comme les créanciers, sachant qu'il en est ainsi, n'auront aucune raison de même présenter une requête de mise en faillite. Il s'ensuit qu'*aucun* des biens de l'actif du failli ne sera vendu — pas même les puits de valeur de la société pétrolière — et que le nombre de biens orphelins augmentera. Cela est bien loin des objectifs des modifications apportées à la *LFI* en 1997 qui ont été débattues au Parlement

of s. 14.06(4) that explicitly undermines its stated purposes.

[222] The majority appears to accept that the purposes of s. 14.06(4) of the *BIA* included encouraging insolvency professionals to accept mandates in cases where there may be environmental liabilities (paras. 80-81). However, merely protecting trustees from personal liability in such cases will fail to achieve Parliament's desired result. As I have explained, even where prospective trustees face no risk of personal liability, they will be reluctant to accept mandates if provincial entities can require the entire value of a bankrupt's realizable estate to be applied to satisfy environmental obligations.

[223] Since I have explained that s. 14.06(4) provides trustees with the power to disclaim assets even where there is no risk of personal liability, it is now necessary to briefly consider whether this power was available to GTL on the facts of this case. Here, the statutory conditions to the exercise of this power were met. The Abandonment Orders clearly relate to the remediation of an "environmental condition" (or "tout fait . . . lié à l'environnement" in the French version of the *BIA*, which can be translated literally as "any fact . . . related to the environment"). Indeed, even the AER and the OWA have never contested this point. In response to such orders, GTL was therefore entitled to exercise the disclaimer power provided for in s. 14.06(4).

(2) Section 14.06(4) Applies to Alberta's Oil and Gas Industry

[224] The AER raised an additional argument that the right of disclaimer is entirely inapplicable in the context of the statutory regime governing the oil and gas industry due to the role played by third-party surface landowners and the nature of the property

et qui devaient « encourager [les professionnels de l'insolvabilité] à accepter des mandats » et « réduire le nombre de sites abandonnés » (Comité permanent de l'industrie, 11 juin 1996 à 15 h 49). Il est difficile d'imaginer que le Parlement aurait privilégié une interprétation du par. 14.06(4) qui nuit explicitement aux objectifs qu'il a énoncés.

[222] La majorité semble reconnaître que le par. 14.06(4) de la *LFI* a eu notamment pour objectif d'encourager les professionnels de l'insolvabilité à accepter des mandats dans des cas où il existe peut-être des engagements environnementaux (par. 80-81). Or, le simple fait de mettre les syndics à l'abri de la responsabilité personnelle en pareil cas ne permettra pas d'atteindre le résultat escompté par le Parlement. Comme je l'ai expliqué, même lorsque les syndics potentiels ne courent aucun risque d'engager leur responsabilité personnelle, ils seront réticents à accepter des mandats si des entités provinciales peuvent exiger que toute la valeur de l'actif réalisable d'un failli serve à acquitter des obligations environnementales.

[223] Ayant expliqué que le par. 14.06(4) confère aux syndics le pouvoir de renoncer à des biens même en l'absence d'un risque de responsabilité personnelle, je dois maintenant me demander brièvement si GTL disposait de ce pouvoir à la lumière des faits de la présente affaire. En l'espèce, les conditions statutaires préalables à l'exercice de ce pouvoir étaient réunies. Les ordonnances d'abandon se rapportent clairement à la réparation de « tout fait [. . .] lié à l'environnement » (dans la version française de la *LFI*) ou d'une « condition environnementale » (une traduction littérale du terme « *environmental condition* » dans la version anglaise de la *LFI*). En effet, même l'AER et l'OWA n'ont jamais contesté ce point. En réaction à de telles ordonnances, GTL pouvait donc exercer le pouvoir de renonciation prévu au par. 14.06(4).

(2) Le paragraphe 14.06(4) s'applique à l'industrie pétrolière et gazière de l'Alberta

[224] L'AER a également soutenu que le droit de renonciation ne s'applique aucunement dans le contexte du régime législatif régissant l'industrie pétrolière et gazière en raison du rôle joué par les tiers propriétaires de droits de surface et de la nature

interests involved which rendered the Crown's super priority under s. 14.06(7) impractical. Martin J.A. (as she then was), writing in dissent at the Alberta Court of Appeal, reached the same conclusion. With respect, I cannot agree. Parliament did not make the disclaimer power in s. 14.06(4) conditional on the availability of the Crown's super priority.

[225] In delineating what interests may be disclaimed by a trustee under s. 14.06(4), Parliament used exceptionally broad language. The trustee is permitted to disclaim "any interest" in "any real property". While Redwater's AER-issued licences may not be real property, all of the parties accept that *profits à prendre* and surface leases can be characterized as real property interests. In the context of this case, it is these interests that GTL truly sought to disclaim. The AER argued that s. 14.06(4) permits the disclaimer only of "true real property", meaning land currently or previously owned by the bankrupt, without any third-party landowners. This interpretation is not consistent with the actual language used by Parliament. Had Parliament intended to restrict the disclaimer power solely to fee simple interests, it could have stated this, rather than referring to "any interest in any real property".

[226] Further, the Alberta oil and gas industry is far from the only natural resource sector in which companies traditionally operate on the land of third parties, whether the Crown or private landowners. The potential liability of trustees would explode if the mere presence of these third-party landowners rendered the disclaimer power in s. 14.06(4) entirely inapplicable. The language of the section is clearly broad enough to capture the statutory regime governing Alberta's oil and gas sector.

(3) Conclusion on Operational Conflict

[227] In light of this interpretation of s. 14.06(4), I agree with both courts below that there is an operational conflict to the extent that Alberta's statutory

des droits de propriété en cause qui empêchaient la Couronne de se prévaloir de la superpriorité dont elle jouit en vertu du par. 14.06(7). La juge Martin (maintenant juge de notre Cour), dissidente en Cour d'appel de l'Alberta, est parvenue à la même conclusion. Avec égards, je ne peux partager son avis. Le Parlement n'a pas rendu le pouvoir de renonciation prévu au par. 14.06(4) conditionnel à la possibilité pour la Couronne de se prévaloir de sa superpriorité.

[225] En décidant des intérêts auxquels peut renoncer un syndic en vertu du par. 14.06(4), le Parlement a utilisé des mots exceptionnellement larges. Il est permis au syndic de renoncer à « tout intérêt » sur « le bien réel ». Bien que les permis réglementaires de Redwater ne soient peut-être pas des biens réels, toutes les parties reconnaissent que les profits à prendre et droits de surface peuvent être qualifiés d'intérêts sur des biens réels. Dans le contexte de la présente affaire, ce sont les droits auxquels GTL veut vraiment renoncer. L'AER a soutenu que le par. 14.06(4) autorise uniquement la renonciation à de « véritables biens réels », soit un terrain qui appartient ou appartenait au failli, sans tiers propriétaires fonciers. Cette interprétation ne s'accorde pas avec les mots employés par le Parlement. Si ce dernier avait voulu ne restreindre le pouvoir de renonciation qu'aux intérêts en fief simple, il aurait pu le dire plutôt que de parler de « tout intérêt sur le bien réel ».

[226] De plus, l'industrie pétrolière et gazière de l'Alberta est loin d'être le seul secteur de ressources naturelles où les sociétés exercent depuis longtemps leurs activités sur le terrain de tiers, qu'il s'agisse de la Couronne ou de propriétaires privés. La responsabilité potentielle des syndics exploserait si la simple présence de ces tiers propriétaires fonciers écartait complètement l'application du pouvoir de renonciation prévu au par. 14.06(4). Le texte du paragraphe est manifestement assez large pour embrasser le régime législatif régissant le secteur pétrolier et gazier de l'Alberta.

(3) Conclusion sur le conflit d'application

[227] Compte tenu de cette interprétation du par. 14.06(4), je suis d'accord avec les deux tribunaux d'instance inférieure pour dire qu'il y a un

regime holds receivers and trustees liable as "licensees" in relation to the disclaimed assets (see chambers judge reasons, at para. 181; C.A. reasons, at para. 57). This conflict is far from hypothetical. Under federal law, GTL is entitled to disclaim the bankrupt's assets affected by the Abandonment Orders. Under the *BIA*, GTL cannot be compelled to take action with respect to properties it has validly disclaimed, since the act of disclaimer relieves it of any rights, interests and liabilities in respect of the disclaimed properties. But under provincial law, the AER can order GTL to abandon the disclaimed assets, among other things (see para. 11). This is exactly what happened here. Not only did the AER order GTL to complete the work, but it also made the sale of Redwater's valuable assets conditional on GTL either abandoning the non-producing properties itself or packaging those properties with the estate's valuable assets for the purposes of any sale. In doing so, the AER impermissibly disregarded the effect of GTL's disclaimers. This remains the case, irrespective of whether GTL could (or would) ever be held personally liable for the costs of abandoning the properties above and beyond the entire value of the estate.

[228] My colleague claims that the AER "has never attempted to hold a trustee personally liable" (para. 107). What is clear is that, on the facts of this case, the AER directly sought to require GTL to perform or pay for the abandonment work itself, whether this is referred to as personal liability or not. It is critical to observe that this litigation began when the AER filed an application seeking to compel GTL to comply with its obligations as a licensee, including the obligation to abandon the non-producing properties. Practically speaking, this amounted to an effort to hold GTL personally liable. Where else would the money required to abandon the disclaimed properties have come from? The value of the estate as a whole was negative, and the AER refused to permit GTL to sell the valuable properties on their own. No purchaser would have agreed to buy all of the assets together. Therefore,

conflit d'application dans la mesure où le régime législatif albertain tient les séquestres et les syndics responsables en tant que « titulaires de permis » relativement aux biens faisant l'objet d'une renonciation (voir les motifs du juge en cabinet, par. 181; motifs de la Cour d'appel, par. 57). Ce conflit est loin d'être hypothétique. En vertu de la loi fédérale, GTL peut renoncer aux biens du failli touchés par les ordonnances d'abandon. Selon la *LFI*, GTL ne peut être contraint de prendre des mesures à l'égard des biens auxquels il a valablement renoncé puisque l'acte de renonciation le libère de tous les droits, intérêts et obligations à l'égard des biens visés par la renonciation. Mais selon la loi provinciale, l'AER peut notamment ordonner à GTL d'abandonner les biens ayant fait l'objet d'une renonciation (voir par. 11). C'est exactement ce qui s'est passé en l'espèce. Non seulement l'AER a-t-il ordonné à GTL de mener les travaux à terme, mais il a aussi rendu la vente des biens de valeur de Redwater conditionnelle à l'abandon des biens inexploités par GTL lui-même ou de la vente de ces biens avec les biens de valeur de l'actif comme un tout unique. En agissant ainsi, l'AER a indûment fait abstraction de l'effet des renonciations de GTL. Cela demeure vrai indépendamment de la question de savoir si GTL pouvait (ou allait) être tenue personnellement responsable des frais d'abandon des biens susmentionnés au-delà de la valeur totale de l'actif.

[228] Mon collègue prétend que l'AER « n'a jamais essayé d'engager la responsabilité personnelle d'un syndic » (par. 107). Ce qui est clair, c'est qu'à la lumière des faits de l'espèce, l'AER a directement tenté de contraindre GTL à exécuter ou à payer lui-même les travaux d'abandon, que l'on qualifie cela de responsabilité personnelle ou non. Il est primordial de faire remarquer que le présent litige a commencé lorsque l'AER a déposé une demande visant à contraindre GTL à respecter ses obligations en tant que titulaire de permis, notamment l'obligation d'abandonner des biens inexploités. Sur le plan pratique, cela constituait une tentative de tenir GTL personnellement responsable. Où d'autre aurait-on pris l'argent nécessaire à l'abandon des biens visés par les renonciations? La valeur de l'actif dans son ensemble était négative, et l'AER a refusé de permettre à GTL de vendre isolément les biens de

GTL had no way to recoup any value from the estate, as Redwater was bankrupt and no longer generating income. The *only* source of funds, in this scenario, was GTL itself. This is why the AER filed suit to compel GTL to carry out Redwater's abandonment obligations. As this makes clear, I cannot agree with the suggestion that the provincial regime has never been utilized to hold trustees personally liable in contravention of federal law. That is precisely what happened in this very case.

[229] This conclusion cannot be avoided by referring to the fact that, pursuant to orders of the Alberta courts, GTL has already sold the valuable Redwater assets and the proceeds are being held in trust pending the outcome of this appeal (see majority reasons, at para. 108). This is precisely the result the AER sought to prevent by precluding GTL from selling only the valuable properties, without the disclaimed ones. GTL was able to do so only as a direct result of this litigation.

[230] My colleague states that, if the AER "were to attempt to hold GTL personally liable under the Abandonment Orders, this would create an operational conflict between the *OGCA* and the *Pipeline Act*, and s. 14.06(2) of the *BIA*, rendering the former two Acts inoperative to the extent of the conflict" (para. 107). Thus, even on my colleague's interpretation of s. 14.06 — which I do not accept — an operational conflict does exist on the facts of this case, specifically as a result of the AER's application to the Alberta Court of Queen's Bench seeking to have GTL personally satisfy the environmental obligations associated with the disclaimed assets.

[231] All of that being said, creditors with provable claims can still seek payment in accordance with the *BIA*'s priority scheme (*Abitibi*, at para. 98). As I discuss below, the AER's environmental claims remain valid as against the Redwater estate, and it may pursue those claims through the normal bankruptcy

valeur. Personne n'aurait consenti à acheter les biens tous ensemble. GTL ne disposait par conséquent d'aucun moyen de recouvrer une quelconque valeur de l'actif, car Redwater était en faillite et ne générait plus aucun revenu. La *seule* source de fonds, dans ce scénario, était GTL lui-même. C'est pourquoi l'AER a intenté une poursuite visant à contraindre GTL à exécuter les obligations d'abandon de Redwater. Il est donc clair que je ne puis souscrire à l'idée que le régime provincial n'a jamais été utilisé pour tenir les syndics personnellement responsables en violation de la loi fédérale. C'est justement ce qui s'est passé dans la présente affaire.

[229] On ne peut éviter cette conclusion en invoquant le fait que, conformément aux ordonnances des tribunaux albertains, GTL a déjà vendu les biens de valeur de Redwater et que le produit de leur vente est détenu en fiducie en attendant l'issue du présent pourvoi (voir les motifs de la majorité, par. 108). C'est exactement le résultat que l'AER a cherché à prévenir en empêchant GTL de vendre uniquement les biens de valeur, sans les biens faisant l'objet de la renonciation. GTL n'est parvenu à le faire qu'à la suite du présent litige.

[230] Mon collègue dit que, si l'AER « devait tenter d'obliger personnellement GTL à se conformer aux ordonnances d'abandon, cela engenderait un conflit d'application entre, d'une part, l'*OGCA* et la *Pipeline Act* et, d'autre part, le par. 14.06(2) de la *LFI*, ce qui rendrait les deux premières lois inopérantes dans la mesure de ce conflit » (par. 107). Ainsi, même d'après l'interprétation donnée par mon collègue à l'art. 14.06 — que je ne retiens pas — il existe bel et bien un conflit d'application eu égard aux faits de l'espèce, surtout du fait de la demande présentée par l'AER à la Cour du Banc de la Reine de l'Alberta pour que GTL respecte personnellement les obligations environnementales associées aux biens faisant l'objet de la renonciation.

[231] Tout cela étant dit, les créanciers ayant des réclamations prouvables peuvent toujours demander un paiement conformément au régime de priorité établi par la *LFI* (*Abitibi*, par. 98). Comme je l'explique plus loin, les réclamations environnementales de l'AER demeurent valides à l'égard de l'actif de

process. Thus, even if s. 14.06(4) does not permit GTL to disclaim the non-producing wells and relieve itself of the environmental obligations associated with them, it is nevertheless the case that the AER cannot compel GTL to satisfy its claims ahead of those of Redwater's secured creditors.

B. *Frustration of Purpose*

[232] The second branch of the paramountcy test is frustration of purpose. Even where dual compliance with both federal and provincial law is, strictly speaking, possible, provincial legislation or provisions will nevertheless be rendered inoperative to the extent that they have the effect of frustrating a valid federal legislative purpose (*Moloney*, at para. 25; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, at pp. 154-55; *Canadian Western Bank*, at para. 73). The focus of the analysis is on the effect of the provincial legislation or provisions, not its purpose (*Moloney*, at para. 28; *Husky Oil*, at para. 39).

[233] This Court has repeatedly recognized that one of the purposes of the *BIA* is "the equitable distribution of the bankrupt's assets among his or her creditors" (*Moloney*, at para. 32; *Husky Oil*, at para. 7). It achieves this goal through a collective proceeding model — one that maximizes creditors' total recovery and promotes order and efficiency by distributing the estate's assets in accordance with a designated priority scheme (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 22). All claims that are "provable in bankruptcy" are subject to this priority scheme. Exercises of provincial power that have the effect of altering bankruptcy priorities are therefore inoperative because they frustrate Parliament's purpose of equitably distributing the estate's assets in accordance with the federal statutory regime (*Abitibi*, at para. 19; *Husky Oil*, at para. 32).

[234] The question here is whether the environmental claims asserted by the AER (i.e., the Abandonment Orders) are provable in bankruptcy. If they

Redwater, et il peut faire valoir ces réclamations dans le cadre du processus normal de faillite. Donc, même si le par. 14.06(4) n'autorise pas GTL à renoncer aux puits inexploités et à se libérer des obligations environnementales qui s'y rattachent, il n'en demeure pas moins que l'AER ne peut pas contraindre GTL à régler ses propres réclamations avant celles des créanciers garantis de Redwater.

B. *Entrave à la réalisation d'un objet fédéral*

[232] Le second volet du test de la prépondérance est l'entrave à la réalisation d'un objet fédéral. Même lorsqu'il est à proprement parler possible de se conformer à la fois à la loi fédérale et à la loi provinciale, la loi ou les dispositions provinciales seront néanmoins rendues inopérantes dans la mesure où elles ont pour effet d'entraver la réalisation d'un objet valide d'une loi fédérale (*Moloney*, par. 25; *Banque de Montréal c. Hall*, [1990] 1 R.C.S. 121, p. 154-155; *Banque canadienne de l'Ouest*, par. 73). L'analyse est axée sur l'effet de la loi ou des dispositions provinciales, et non sur son objet (*Moloney*, par. 28; *Husky Oil*, par. 39).

[233] La Cour a maintes fois reconnu que l'un des objets de la *LFI* est « le partage équitable des biens du failli entre ses créanciers » (*Moloney*, par. 32; *Husky Oil*, par. 7). Elle réalise cet objectif au moyen d'un modèle de procédure collective — modèle qui maximise le recouvrement intégral au profit des créanciers et fait régner l'ordre et l'efficacité en partageant les biens de l'actif conformément à un régime de priorité désigné (*Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, par. 22). Toutes les réclamations « prouvables en matière de faillite » sont assujetties à ce régime de priorité. Les exercices d'un pouvoir provincial ayant pour effet de modifier les priorités en matière de faillite sont donc inopérants parce qu'ils entravent la réalisation de l'objectif du Parlement d'assurer le partage équitable des biens de l'actif conformément au régime établi par la loi fédérale (*Abitibi*, par. 19; *Husky Oil*, par. 32).

[234] Il s'agit de savoir en l'espèce si les réclamations environnementales que fait valoir l'AER (c.-à-d. les ordonnances d'abandon) sont prouvables

are, then the AER is not permitted to assert those claims outside of the bankruptcy process and ahead of Redwater's secured creditors because this would frustrate the purpose of the federal priority scheme. Rather, it must abide by the *BIA* and seek recovery from the estate through the normal bankruptcy procedures (*Abitibi*, at para. 40).

[235] In *Abitibi,* this Court established a three-part test, rooted in the language of the *BIA*, to determine whether a claim is provable in bankruptcy: "First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation" (para. 26 (emphasis in original)). Since there is no dispute that Redwater's environmental obligations arose before it became bankrupt, I limit my analysis below to the first and third prongs of the *Abitibi* test: whether the liability is owed to a creditor, and whether it is possible to attach a monetary value to that liability.

[236] The first prong of the *Abitibi* test asks whether the debt, liability or obligation at issue is owed by a bankrupt entity to a creditor. Deschamps J., writing for a majority of the Court, suggested that this is not an exacting requirement: "The only determination that has to be made at this point is whether the regulatory body has exercised its enforcement power against a debtor. When it does so, it identifies itself as a creditor, and the requirement of this stage of the analysis is satisfied" (para. 27 (emphasis added)). Though I would not go so far as to suggest that the analysis under the first prong is merely perfunctory or pro forma, and circumstances may well exist where it is not satisfied, Deschamps J. made clear in *Abitibi* that "[m]ost environmental regulatory bodies can be creditors", again stressing that government entities cannot systematically evade the priority requirements of federal bankruptcy legislation under the guise of enforcing public duties (para. 27 (emphasis added)).

en matière de faillite. Si elles le sont, l'AER n'est pas autorisé à faire valoir ces réclamations en dehors du processus de faillite et avant les créanciers garantis de Redwater, car cela entraverait la réalisation de l'objet du régime de priorité fédéral. Il doit plutôt se conformer à la *LFI* et tenter de recouvrer de l'actif par le truchement de la procédure normale de faillite (*Abitibi*, par. 40).

[235] Dans *Abitibi*, la Cour a établi un test à trois volets, fondé sur le libellé de la *LFI*, pour déterminer si une réclamation est prouvable en matière de faillite : « Premièrement, on doit être en présence d'une dette, d'un engagement ou d'une obligation envers un *créancier*. Deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance *avant que le débiteur ne devienne failli*. Troisièmement, il doit être possible d'attribuer une *valeur pécuniaire* à cette dette, cet engagement ou cette obligation » (par. 26 (en italique dans l'original)). Comme personne ne conteste le fait que les obligations environnementales de Redwater ont pris naissance avant que cette dernière ne devienne faillie, je limiterai mon analyse ci-dessous aux premier et troisième volets du test établi dans *Abitibi* : la question de savoir si l'engagement est dû à un créancier, et celle de savoir s'il est possible d'attribuer une valeur pécuniaire à cet engagement.

[236] Le premier volet du test *Abitibi* pose la question de savoir si la dette, l'engagement ou l'obligation en cause sont dus par une entité faillie à un créancier. S'exprimant au nom des juges majoritaires, la juge Deschamps a laissé entendre qu'il ne s'agit pas d'une exigence rigoureuse : « [à] cette étape, la seule question à trancher est de savoir si l'organisme administratif a exercé, à l'encontre d'un débiteur, son pouvoir de faire appliquer la loi. Lorsqu'il le fait, il s'identifie alors comme créancier et la condition de cette étape est respectée » (par. 27 (je souligne)). Je n'irais pas jusqu'à dire que l'analyse à effectuer au premier volet est une simple analyse superficielle ou *pro forma* et il peut fort bien exister des cas où il n'est pas satisfait à ce volet, mais la juge Deschamps indique clairement dans *Abitibi* que « [l]a plupart des organismes administratifs [environnementaux] peuvent agir à titre de créanciers » (par. 27 (je souligne)), soulignant encore une

Even Martin J.A., writing in dissent at the Court of Appeal in this case, acknowledged that "*Abitibi* cast[s] the creditor net widely" (para. 186). The language of *Abitibi* admits of no ambiguity, uncertainty or doubt in this regard.

[237] The majority suggests that applying *Abitibi* on its own terms will make it "impossible for a regulator *not* to be a creditor" (para. 136 (emphasis in original)). Without seeking to speculate on all possible scenarios, I would simply note that there will be many obvious circumstances in which regulators are not even exercising enforcement powers against particular debtors and the analysis from *Abitibi* can be concluded at a very early stage. Provincial regulators do many things that do not qualify as enforcement mechanisms against specific parties. For example, a regulatory agency may publish guidelines for the benefit of all actors in a certain industry or it may issue a license or permit to an individual. In such cases, any discussion of frustrating federal purposes will not go far. However, as Deschamps J. expressly acknowledged, the first prong of the test will have very broad application. This Court should not feel compelled to limit its scope when *Abitibi* employed clear language in full recognition of its wide-ranging effects.

[238] Here, there is no doubt that the AER exercised its enforcement power against a debtor when it issued orders requiring Redwater to perform the environmental work on the non-producing properties. The reasoning is simple: Redwater owes a debt to the AER, and the AER has attempted to enforce that debt by issuing the Abandonment Orders, which require Redwater to make good on its obligation. If Redwater (or GTL, as the receiver and trustee) does not abide by those orders — to the detriment of the estate's other creditors — it can be held liable

fois que les entités gouvernementales ne sauraient systématiquement se soustraire aux exigences en matière de priorité de la loi fédérale sur la faillite sous le couvert de l'obligation de faire respecter les devoirs publics. Même la juge d'appel Martin, dans les motifs dissidents qu'elle a rédigés, a reconnu que [TRADUCTION] « l'arrêt *Abitibi* ratisse large en ce qui a trait à la qualité de créancier » (par. 186). Le texte de cet arrêt ne laisse place à aucune ambiguïté, incertitude ou doute à cet égard.

[237] Les juges majoritaires soutiennent que, si l'on applique tel quel l'arrêt *Abitibi*, cela « exclut la possibilité qu'un organisme de réglementation *ne* soit *pas* un créancier » (par. 136 (en italique dans l'original)). Sans vouloir conjecturer tous les scénarios possibles, je ferai simplement remarquer qu'il existe de nombreuses situations évidentes où des organismes de réglementation n'exercent même pas de pouvoirs d'application à l'encontre de débiteurs en particulier, et l'analyse tirée d'*Abitibi* peut être menée à terme très tôt. Les organismes de réglementation font bien des choses qui ne participent pas de mécanismes d'application à l'encontre de certaines parties. Par exemple, un organisme de réglementation peut publier des lignes directrices pour le bien de tous les acteurs d'une industrie donnée, ou encore délivrer une licence ou un permis à un particulier. Dans ces cas, toute analyse de l'entrave à la réalisation d'objets fédéraux sera brève. Or, comme l'a explicitement reconnu la juge Deschamps, le premier volet du test sera d'application très large. Notre Cour ne devrait pas se sentir contrainte d'en restreindre la portée alors que des termes clairs sont employés dans cet arrêt pour reconnaître sans réserve ses vastes effets.

[238] En l'espèce, il ne fait aucun doute que l'AER a exercé son pouvoir d'appliquer la loi à l'encontre d'une débitrice lorsqu'il a rendu les ordonnances enjoignant à Redwater d'accomplir les travaux environnementaux sur les biens inexploités. Le raisonnement est simple : Redwater a une dette envers l'AER, et l'AER a tenté de recouvrer cette créance en rendant les ordonnances d'abandon, qui enjoignent à Redwater d'honorer son obligation. Si Redwater (ou GTL, en tant que séquestre et syndic) ne respecte pas ces ordonnances — au détriment des autres

under provincial law. This is, by any definition, an exercise of enforcement power, which is precisely what *Abitibi* describes. In fact, the AER itself conceded this point *twice* — first before the Court of Queen's Bench, and again at the Court of Appeal (chambers judge reasons, at para. 164; C.A. reasons, at para. 73).

[239] The conclusion that I reach with respect to the AER's status as a creditor follows from a straightforward application of *Abitibi*. My colleague, however, seeks to reformulate this prong of the test. He suggests that a regulator is acting as a creditor only where it is not acting in the public interest and where the regulator itself, or the general revenue fund, is the beneficiary of the environmental obligation. He endorses the holding allegedly made in *Northern Badger* that "a regulator enforcing a public duty by way of non-monetary order is not a creditor" (para. 130).

[240] In my view, it is neither appropriate nor necessary in this case to attempt to redefine this prong of *Abitibi* and narrow the broad definition of "creditor" provided by Deschamps J. This Court should leave her clear description of the provable claim standard to stand on its own terms. Respectfully, I disagree with the manner in which the majority is attempting to reformulate the "creditor" analysis, for a number of reasons.

[241] Firstly, I do not believe that this case represents an appropriate opportunity to revisit the "creditor" stage of the *Abitibi* test. The AER conceded in both of the courts below that it was in fact a creditor of GTL. As a direct result of these concessions, neither the Alberta Court of Queen's Bench nor the majority of the Court of Appeal directly addressed this issue; instead, they merely provided cursory comments. This issue appears to have been raised for the first time by Martin J.A. in her dissenting judgment. However, even her analysis is relatively brief, comprising only three paragraphs and consisting mainly of the statement that the costs of

créanciers de l'actif — elle peut être tenue responsable en application de la loi provinciale. Il s'agit, par définition, de l'exercice d'un pouvoir d'appliquer la loi, ce qui est précisément ce que décrit l'arrêt *Abitibi*. En fait, l'AER a lui-même concédé ce point *à deux reprises* — la première fois devant la Cour du Banc de la Reine, et la deuxième fois devant la Cour d'appel (motifs du juge en cabinet, par. 164; motifs de la Cour d'appel, par. 73).

[239] La conclusion que je tire quant au statut de créancier de l'AER découle d'une application pure et simple de l'arrêt *Abitibi*. Mon collègue, en revanche, cherche à reformuler ce volet du critère. Il soutient qu'un organisme de réglementation agit comme créancier seulement lorsqu'il ne le fait pas dans l'intérêt public et lorsque l'organisme lui-même, ou le Trésor, est le bénéficiaire de l'obligation environnementale. Il fait sienne la conclusion qui aurait été tirée dans *Northern Badger* selon laquelle « un organisme de réglementation faisant respecter un devoir public au moyen d'une ordonnance non pécuniaire n'est pas un créancier » (par. 130).

[240] À mon sens, il n'est ni approprié ni nécessaire en l'espèce d'essayer de redéfinir ce volet du critère *Abitibi* et de restreindre le large sens attribué par la juge Deschamps au mot « créancier ». La Cour devrait s'en tenir à la description claire que fait la juge Deschamps de la norme de la réclamation prouvable. Avec égards, je ne puis me rallier à la façon dont les juges majoritaires tentent de reformuler l'analyse relative au « créancier », et ce, pour plusieurs raisons.

[241] Premièrement, je ne crois pas que la présente affaire soit une bonne occasion de revoir l'étape « créancier » du critère *Abitibi*. L'AER a concédé devant les deux tribunaux d'instance inférieure qu'il était en effet un créancier de GTL. Ces concessions ont pour conséquence directe que la question n'a été abordée directement ni par la Cour du Banc de la Reine de l'Alberta ni par les juges majoritaires de la Cour d'appel, qui se sont plutôt contentés de formuler de brefs commentaires. Cette question semble avoir été soulevée pour la première par la juge d'appel Martin dans ses motifs dissidents. Toutefois, même son analyse est relativement brève, ne compte

abandonment are "not owed to the Regulator, or to the province" (para. 185). While it is true that the parties briefly addressed this issue in their written and oral submissions to this Court, it was clearly not a substantial focus of their arguments. Without the benefit of considered reasons from the lower courts or thorough submissions on the continued application of the first prong of the test formulated in *Abitibi*, this Court should not attempt to significantly alter it.

[242] Secondly, the majority states that no fairness concerns are raised by disregarding the AER's concessions below. It makes this point predominantly because the issue was raised and argued before this Court and because of the AER's unilateral assertion in its letter to GTL in May 2015. However, it is important to note that the effect of the AER's concessions was that GTL and ATB Financial were no longer required to adduce any evidence on this issue (S. N. Lederman, A. W. Bryant and M. K. Fuerst, *The Law of Evidence in Canada* (5th ed. 2018), at p. 1387). This point is important given that the majority's reformulation of the "creditor" requirement under the first prong of the test is highly fact-specific and dependent on the circumstances of the particular case. As a direct result of the AER's concession in the Alberta Court of Queen's Bench, we cannot know what evidence GTL or ATB Financial could have adduced on this issue. Therefore, there may indeed be real prejudice occasioned to these parties by disregarding the AER's concession at this point in time.

[243] Thirdly, my colleague relies on the fact that the chambers judge in *Abitibi* found that the Province had already expropriated three of the five sites for which it issued remediation orders and was likely using the orders as a means to offset AbitibiBowater's NAFTA claims. While the chambers judge did in fact make these findings, they were inconsequential to Deschamps J.'s analysis on the "creditor" prong of the test. When applying the test to the facts of

que trois paragraphes et se limite principalement à l'affirmation portant que les coûts liés à l'abandon ne sont pas dûs à [TRADUCTION] « l'organisme de réglementation ou à la province » (par. 185). Bien que les parties aient abordé succinctement la question dans leurs observations écrites et leurs plaidoiries présentées à la Cour, ce n'était clairement pas au cœur de leur argumentaire. En l'absence de motifs réfléchis des tribunaux d'instance inférieure ou d'observations exhaustives sur l'application continue du premier volet du test formulé dans *Abitibi*, la Cour ne devrait pas tenter de le modifier substantiellement.

[242] Deuxièmement, selon les juges majoritaires, on ne soulève aucune préoccupation en matière d'équité en ne tenant pas compte de la concession faite par l'AER devant les tribunaux d'instance inférieure. La majorité apporte cette précision principalement parce que la question a été soulevée et débattue devant la Cour et en raison de l'affirmation unilatérale contenue dans la lettre de l'AER adressée à GTL en mai 2015. Il importe toutefois de noter que les concessions de l'AER ont eu pour effet que GTL et ATB Financial ne sont plus tenus de présenter de la preuve à cet égard (S. N. Lederman, A. W. Bryant et M. K. Fuerst, *The Law of Evidence in Canada* (5e éd. 2018), p. 1387). Il s'agit d'un point important étant donné que la reformulation, par les juges majoritaires, de l'exigence « créancier » au premier volet du test est largement tributaire des faits et dépend des circonstances de l'affaire en cause. La concession de l'AER devant la Cour du Banc de la Reine de l'Alberta a pour résultat direct qu'il nous est impossible de savoir quels éléments de preuve GTL ou ATB Financial aurait présentés à ce sujet. Par conséquent, ne pas tenir compte de la concession à ce moment-ci pourrait bien causer un véritable préjudice aux parties.

[243] Troisièmement, mon collègue s'appuie sur le fait que, dans *Abitibi*, le juge en cabinet a conclu que la Province avait déjà exproprié trois des cinq sites pour lesquels elle avait émis des ordonnances exigeant la décontamination et qu'elle utilisait vraisemblablement ces ordonnances pour compenser les réclamations d'AbitibiBowater fondées sur l'ALENA. Bien que le juge en cabinet soit effectivement arrivé à ces conclusions, celles-ci n'ont eu

Abitibi, she explained that the first prong was "easily satisfied" because "the Province had identified itself as a creditor by resorting to [*Environmental Protection Act*, S.N.L. 2002, c. E-14.2] enforcement mechanisms" (*Abitibi*, at para. 49). She placed no reliance on the fact that the Province might itself derive a financial benefit from its actions and was not enforcing a purely public duty. Her analysis was in no way based on a finding that the Province's actions were a "colourable attempt" to recover a debt or that they demonstrated an "ulterior motive" (majority reasons, at para. 128).

[244] Fourthly, in my view, it is incorrect to rely on *Northern Badger* in this case. That decision does not support my colleague's position in the manner he alleges. The issue in *Northern Badger* was also whether environmental remediation orders could be considered claims provable in bankruptcy. However, the crux of the dispute was whether "enforcing the requirement for the proper abandonment of oil and gas wells" (p. 57) gave rise to a provable claim because it would require the receiver to expend funds. Laycraft C.J.A. never addressed the question of whether the regulator could be said to have a contingent claim because it would complete the abandonment work itself and assert a claim for reimbursement. It was in the context of the regulator requiring the receiver to fulfill the abandonment obligations *itself* that the Alberta Court of Appeal discussed the enforcement of a public duty. It is important to carefully examine what the Court of Appeal actually said in this regard:

> The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding every citizen of the province. All who become licensees of oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of

aucune incidence sur l'analyse de la juge Deschamps relativement au volet « créancier » du test. Appliquant le test aux faits dans l'affaire *Abitibi*, elle a expliqué qu'il était « facile de répondre » au premier volet étant donné que « la province s'est elle-même présentée comme créancière en ayant recours aux mécanismes d'application de l'[*Environmental Protection Act*, S.N.L. 2002, c. E-14.2] » (*Abitibi*, par. 49). Elle n'a pas tenu compte du fait que la Province pourrait elle-même tirer un avantage financier de ses actions et qu'elle n'appliquait pas un devoir purement public. Son analyse ne reposait aucunement sur la conclusion suivant laquelle les mesures de la Province étaient une « tentative déguisée » de recouvrer une créance ou témoignaient de « motifs obliques » (motifs des juges majoritaires, par. 128).

[244] Quatrièmement, il me paraît incorrect de s'appuyer sur l'arrêt *Northern Badger* en l'espèce. Cet arrêt n'étaye pas la position de mon collègue comme il l'affirme. L'arrêt *Northern Badger* portait également sur la question de savoir si des ordonnances de décontamination environnementale pouvaient être considérées comme des réclamations prouvables en matière de faillite. Le nœud du litige consistait toutefois à établir si [TRADUCTION] « l'application de l'exigence concernant l'abandon de puits de pétrole et de gaz » (p. 57) donnait naissance en soi à une réclamation prouvable parce qu'elle exigerait du séquestre qu'il débourse des fonds. Le juge en chef Laycraft de la Cour d'appel n'a jamais abordé la question de savoir s'il était possible d'affirmer que l'organisme de réglementation pouvait faire valoir une réclamation éventuelle du fait qu'il achèverait lui-même les travaux et présenterait une demande de remboursement. C'est dans le contexte où l'organisme de réglementation exige du séquestre qu'il s'acquitte *lui-même* des obligations liées à l'abandon que la Cour d'appel de l'Alberta s'est prononcée sur l'exécution d'un devoir public par l'organisme de réglementation. Il est important d'examiner avec soin les propos tenus par la Cour d'appel à cet égard :

> [TRADUCTION] Les dispositions statutaires exigeant l'abandon des puits de pétrole et de gaz font partie des lois d'application générale de l'Alberta et lient tous les citoyens de la province. Quiconque devient titulaire de permis relativement à de tels puits y est assujetti. Les

modern life. Rules relating to health, or the prevention of fires, or the clearing of ice and snow, or the demolition of unsafe structures are examples which come to mind. But the obligation of the citizen is not to the peace officer, or public authority which enforces the law. The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed.

citoyens sont liés par des obligations statutaires similaires dans de nombreux domaines de la vie moderne. Notons, par exemple, les règles relatives à la santé, à la prévention des incendies, à l'enlèvement de la glace et de la neige ou à la démolition des structures non sécuritaires. Mais l'obligation qui incombe au citoyen n'incombe pas au policier ou à l'autorité publique qui applique la loi. L'obligation est établie comme une obligation à caractère public qui doit être respectée par l'ensemble des citoyens de la collectivité à l'égard de leurs concitoyens. Lorsque le citoyen visé par l'ordonnance s'y conforme, le résultat n'est pas perçu comme le recouvrement d'une somme d'argent par un agent de la paix ou l'autorité publique, ni comme l'exécution d'un jugement ordonnant le paiement d'une somme d'argent; d'ailleurs, cela ne constitue pas non plus l'objectif de l'ensemble du processus. Il faut plutôt y voir l'application d'une loi générale. L'organisme d'application de la loi ne devient pas un « créancier » du citoyen à qui incombe l'obligation.

It is true that this board has the power by statute to create in its own favour a statutory debt if it chooses to do so. It may, under Sections 91(1) and (2) of the *Oil and Gas Conservation Act* (discussed above) do the work of abandonment itself and become a creditor for the sums expended. But the Board has not done so in this case. Rather it is simply in the course of enforcing observance of a part of the general law of Alberta. [Emphasis added; paras. 33-34.]

Il est vrai que la loi autorise l'Office à créer une créance légale en sa faveur s'il le désire. En vertu des par. 91(1) et (2) de l'*Oil and Gas Conservation Act* (analysée précédemment), l'Office peut exécuter lui-même les travaux d'abandon et devenir créancier à l'égard des sommes dépensées. Mais il n'a pas procédé de cette façon en l'espèce. En réalité, il applique simplement une partie des lois d'application générale de l'Alberta. [Je souligne; par. 33-34.]

[245] As is evident from para. 34 of *Northern Badger*, quoted above, the Court of Appeal never stated in that case that a regulator is not — or cannot be — a creditor when it is acting to enforce a public duty. In *Abitibi*, when referring to *Northern Badger*, Deschamps J. explained that the Alberta Court of Appeal "found that the duty to undertake remediation work is owed to the public at large until the regulator exercises its power to assert a monetary claim" (*Abitibi*, at para. 44 (emphasis added)). Laycraft C.J.A. accepted that when the regulator fulfills an environmental obligation itself and asserts a claim for reimbursement, it does indeed "become a creditor for the sums expended". Even in this situation, the public is still the ultimate beneficiary of the remediation work. This is largely consistent with Deschamps J.'s formulation of the test for a provable claim. In fact, this Court simply extended this principle in *Abitibi*, concluding that a regulator may also be a creditor with a provable contingent claim

[245] Comme il ressort du par. 34 précité de l'arrêt *Northern Badger*, la Cour d'appel n'a jamais mentionné dans cette affaire qu'un organisme de réglementation n'a pas — ou ne peut avoir — le statut de créancier lorsqu'il fait respecter un devoir public. En parlant de *Northern Badger* dans l'arrêt *Abitibi*, la juge Deschamps a expliqué que la Cour d'appel de l'Alberta a « conclu que l'obligation d'entreprendre les travaux de décontamination est due au public en général jusqu'à ce que l'organisme administratif exerce son pouvoir de faire valoir une réclamation pécuniaire » (*Abitibi*, par. 44 (je souligne)). Le juge Laycraft a reconnu que l'organisme de règlementation qui s'acquitte lui-même d'une obligation environnementale et présente une demande de remboursement devient effectivement [TRADUCTION] « créancier à l'égard des sommes dépensées ». Même dans une telle situation, le public demeure l'ultime bénéficiaire des travaux de décontamination, ce qui cadre largement avec la norme de la réclamation

when it is sufficiently certain that the regulator will perform the remediation work and advance a claim for reimbursement. This is precisely the situation with the AER and the OWA here, as I will explain in more detail below. The Alberta Court of Appeal did not frame the issue in terms of the three-part test that would later be developed in *Abitibi*; it did not divide its analysis of whether a provable claim existed. However, viewed properly, Deschamps J. dealt with the concerns raised in *Northern Badger* under the third prong of the *Abitibi* test. It is not appropriate to duplicate these principles under the first prong as well, as the majority proposes. For this reason, it is misguided to rely on *Northern Badger* in this appeal to conclude that the AER is not a creditor.

[246] However, even if the majority were correct about the reasoning in *Northern Badger* with respect to whether regulators enforcing public duties can be creditors — which I do not concede — I do not accept its conclusion that *Abitibi* did not overturn that reasoning. The Court was well aware of the decision in *Northern Badger* and cited it directly. Despite this, Deschamps J., when formulating the first prong of the test, made no distinction between regulators acting in the public interest and regulators acting for their own benefit. Instead, she stated that "the only determination that has to be made" (para. 27) is whether the regulator is exercising its enforcement powers against a debtor. In referring to *Northern Badger*, she expressly noted that "[t]he real question is not to whom the obligation is owed, as this question is answered by the statute, which determines who can require that it be discharged" (paras. 27 and 46 (emphasis added)).

[247] Finally, and perhaps most importantly, suggesting that a regulator is not acting as a creditor

prouvable énoncée par la juge Deschamps. En fait, notre Cour a simplement élargi ce principe dans *Abitibi*, concluant que l'organisme de réglementation peut également avoir le statut de créancier relativement à une revendication éventuelle prouvable s'il est suffisamment certain qu'il exécutera les travaux de décontamination et présentera une demande de remboursement. Comme je l'expliquerai plus en détail, il s'agit précisément de la situation dans laquelle se trouvent l'AER et OWA en l'espèce. La Cour d'appel de l'Alberta n'a pas formulé la question sous l'angle du test à trois volets qui a été élaboré par la suite dans *Abitibi*; elle n'a pas divisé son analyse de la question de savoir s'il existait une réclamation prouvable. Toutefois, il est juste de considérer que la juge Deschamps a traité des préoccupations exprimées dans *Northern Badger* en fonction du troisième volet du test *Abitibi*. Il ne convient pas de reprendre ces principes au premier volet également, comme le propose la majorité. C'est pourquoi il est malavisé de se fonder sur l'arrêt *Northern Badger* en l'espèce pour conclure que l'AER n'est pas un créancier.

[246] Cependant, même si les juges majoritaires avaient raison quant au raisonnement dans l'arrêt *Northern Badger* à savoir si un organisme de réglementation faisant respecter un devoir public peut avoir le statut de créancier — ce que je ne concède pas — je ne retiens pas leur conclusion portant que l'arrêt *Abitibi* n'a pas écarté ce raisonnement. La Cour était bien au fait de la décision rendue dans *Northern Badger* et l'a citée textuellement. Malgré cela, lorsqu'elle a formulé le premier volet du test, la juge Deschamps n'a établi aucune distinction entre les organismes de réglementation qui agissent dans un intérêt public et ceux qui agissent dans leur propre intérêt. Elle a plutôt affirmé que « la seule question à trancher » (par. 27) est de savoir si l'organisme exerce ses pouvoirs d'application de la loi à l'encontre d'un débiteur. En mentionnant l'arrêt *Northern Badger*, elle a souligné expressément que « [l]a véritable question n'est pas de savoir à qui est due l'obligation, puisque la loi y répond en indiquant qui peut en exiger l'exécution » (par. 27 et 46 (je souligne)).

[247] Enfin, et fait peut-être plus important encore, laisser entendre qu'un organisme de réglementation

where its environmental enforcement activities are aimed at the public good and are for the benefit of the public effectively overrules the first prong of the *Abitibi* test. Under my colleague's approach, it is no longer the case that the *only* determination that has to be made at the creditor stage of the analysis is "whether the regulatory body has exercised its enforcement power against a debtor" (*Abitibi*, at para. 27). Instead, the court must consider whether the regulatory body is enforcing a public duty and whether it stands to benefit financially from the fulfillment of the obligation in question.

[248] Provincial regulators, in exercising their statutory environmental powers, will, in some sense, virtually always be acting in some public interest or for the benefit of some segment of the public. Under my colleague's reformulation of the first prong of the *Abitibi* test, it will be nearly impossible to find that regulators acting to protect environmental interests are ever creditors, outside the facts of *Abitibi* itself. As a result, provincial entities will be able to completely disregard the *BIA*'s priority scheme as long as they can plausibly point to some public interest that is furthered by their actions. Such a result strips *Abitibi* of its central holding and entitles provincial regulators to easily upend Parliament's purpose of providing an equitable recovery scheme in bankruptcy for all creditors.

[249] In my view, it is insufficient to simply note that the facts of *Abitibi* differ from those of the present appeal (majority reasons, at para. 136). Deschamps J.'s broad articulation of the first prong of the test was in no way made dependent upon the particular facts of *Abitibi*. She sought to provide a clear general framework for determining when a regulator will be classified as a creditor — a framework that the majority's reasons effectively rewrite.

[250] Further, it is worth noting that this Court in *Moloney* followed *Abitibi* in applying the broad

n'agit pas comme créancier quand ses activités de protection de l'environnement visent le bien public et profitent au public écarte dans les faits le premier volet du test *Abitibi*. Suivant l'approche de mon collègue, la question de savoir « si l'organisme [de réglementation] a exercé, à l'encontre d'un débiteur, son pouvoir de faire appliquer la loi » (*Abitibi*, par. 27) n'est plus la *seule* question à trancher à l'étape « créancier » de l'analyse. Le tribunal doit plutôt se demander si l'organisme de réglementation fait respecter un devoir public et s'il peut tirer un avantage financier de l'acquittement de l'obligation en question.

[248] Dans l'exercice des pouvoirs que la loi leur confie en matière d'environnement, les organismes de réglementation provinciaux agissent, en quelque sorte, toujours dans un intérêt public ou au bénéfice d'une partie de la population. Selon le premier volet du test *Abitibi* reformulé par mon collègue, il sera presque impossible de conclure que les organismes de réglementation protégeant les droits environnementaux sont des « créanciers » à l'extérieur du cadre de l'arrêt *Abitibi* lui-même. Par conséquent, les entités provinciales pourront totalement ignorer le régime de priorité de la *LFI* tant qu'elles sont en mesure de relever un quelconque intérêt public qui est servi par leurs actions. Pareil résultat vide l'arrêt *Abitibi* de sa conclusion centrale et permet aux organismes de réglementation provinciaux de faire obstacle aisément à l'objectif du Parlement d'instaurer un régime équitable de recouvrement des créances en matière de faillite au bénéfice de tous les créanciers.

[249] À mon avis, il ne suffit pas de noter simplement que les faits de l'affaire *Abitibi* diffèrent de ceux de l'espèce (motifs des juges majoritaires, par. 136). Les termes larges employés par la juge Deschamps pour formuler le premier volet du test n'étaient aucunement tributaires des faits propres à cette affaire. Elle a cherché à établir un cadre général clair indiquant dans quelles circonstances l'organisme de réglementation sera considéré comme un créancier, un cadre effectivement remanié dans les motifs de la majorité.

[250] En outre, il convient de souligner que, dans *Moloney*, la Cour a suivi l'arrêt *Abitibi* en

definition of "creditor". In *Moloney*, this Court concluded that the Province of Alberta was acting as a creditor even though the debt it was collecting was reimbursement for compensating a third party who had been injured by the debtor in a car accident (para. 55). I fail to see how any meaningful distinction can be drawn between that situation and a situation in which a regulator seeks reimbursement for the costs incurred to remedy environmental damage caused to the land of third parties by the debtor.

[251] "[G]reat care should be taken" before this Court overturns or overrules one of its prior decisions (*Teva Canada Ltd. v. TD Canada Trust*, 2017 SCC 51, [2017] 2 S.C.R. 317, at para. 65). It is "a step not to be lightly undertaken" (*Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at para. 24). In order to do so, "the Court must be satisfied based on compelling reasons that the precedent was wrongly decided and should be overruled" (*Craig*, at para. 25; see also *Teva*, at para. 65). The reasons for exercising such caution are clear and sound, namely to ensure "certainty, consistency and institutional legitimacy" and to recognize that "the public relies on our disciplined ability to respect precedent" (*Teva*, at para. 65). When this Court decides that it is necessary to depart from one of its past decision, it should be clear about what it is doing and why.

[252] Despite these clear admonitions against this Court too easily overturning its own precedents, that is precisely what the majority proposes to do in this case. Its approach effectively overrules the unequivocal definition of "creditor" provided in *Abitibi* — a considered decision rendered by a majority of this Court a mere six years ago. Not only does the majority fail to provide compelling reasons why Deschamps J.'s clear definition is wrong, but it also does not acknowledge that it is overturning a recent decision of this Court, rejecting the suggestion that this is the impact of its reasoning (para. 136). Further, this is being done without complete and robust submissions on the issue. Such an approach to our own precedents does not serve

appliquant la définition large de « créancier ». Dans cette affaire, la Cour a conclu que la province de l'Alberta agissait à titre de créancier même si la créance qu'elle cherchait à recouvrer était le remboursement d'une indemnité versée à une tierce partie blessée par le débiteur dans un accident de voiture (par. 55). Je ne vois pas en quoi il est possible d'établir quelque véritable distinction que ce soit entre cette situation et celle d'un organisme de réglementation qui chercherait à obtenir le remboursement des dépenses engagées pour réparer des dommages environnementaux causés au terrain d'un tiers par le débiteur.

[251] « [U]ne grande prudence s'impose » avant que notre Cour n'infirme ou n'écarte l'un de ses précédents (*Teva Canada Ltée c. TD Canada Trust*, 2017 CSC 51, [2017] 2 R.C.S. 317, par. 65). Cette étape ne peut être accomplie « à la légère » (*Canada c. Craig*, 2012 CSC 43, [2012] 2 R.C.S. 489, par. 24). Pour ce faire, la Cour doit « être convaincue, pour des raisons impérieuses, que la décision est erronée et qu'elle devrait être écartée » (*Craig*, par. 25; voir aussi *Teva*, par. 65). Il y de bonnes raisons qui, clairement, justifient de prendre une telle précaution, à savoir assurer « la certitude, la cohérence et la légitimité institutionnelle » et reconnaître que « le public s'attend à ce que nous respections scrupuleusement nos précédents » (*Teva*, par. 65). Lorsque la Cour juge nécessaire de s'écarter de l'un de ses précédents, sa décision et ce qui la motive devraient être clairs.

[252] Malgré ces mises en garde claires contre l'idée pour la Cour d'écarter trop aisément ses propres précédents, c'est précisément ce que les juges majoritaires proposent de faire en l'espèce. Leur approche revient, dans les faits, à infirmer la définition sans équivoque de « créancier » énoncée dans l'arrêt *Abitibi* — une décision réfléchie rendue par les juges majoritaires de la Cour il y a six ans à peine. En plus de ne fournir aucune raison impérieuse qui expliquerait en quoi la définition claire de la juge Deschamps est erronée, les juges majoritaires, dans leurs motifs, ne reconnaissent pas qu'ils écartent une décision récente de la Cour et rejettent la proposition que c'est là l'incidence de leur raisonnement (par. 136). Qui plus est, ils ont pris leur décision en l'absence d'observations complètes

the goals of certainty, consistency or institutional legitimacy.

[253] This Court should continue to apply the "creditor" prong of the test as it was clearly articulated in *Abitibi*. Deschamps J.'s definition ensures that provincial regulators are not able to easily appropriate for themselves a higher priority in bankruptcy and undermine Parliament's priority scheme. It advances the goals of orderliness and fairness in insolvency proceedings. Under that broad standard, the AER plainly acted as a creditor with respect to the Redwater estate. That is likely why it conceded this point in both of the courts below.

[254] Since there is no dispute that the second prong of the *Abitibi* test is satisfied, I turn next to the third prong, which asks whether it is sufficiently certain that the regulator will perform the work and make a claim for reimbursement. As explained in *Abitibi* in the context of an environmental order:

> With respect to the third requirement, that it be possible to attach a monetary value to the obligation, the question is whether orders that are not expressed in monetary terms can be translated into such terms. I note that when a regulatory body claims an amount that is owed at the relevant date, that is, when it frames its order in monetary terms, the court does not need to make this determination, because what is being claimed is an "indebtedness" and therefore clearly falls within the meaning of "claim" as defined in s. 12(1) of the *CCAA*.
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> . . .
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> The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative (*Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75). In the context of an environmental order, this means that there must be sufficient indications that the regulatory body that triggered the

et étoffées à ce sujet. Adopter une telle approche à l'égard de nos propres précédents ne permet pas d'atteindre les objectifs de certitude, de cohérence ou de légitimité institutionnelle.

[253] La Cour devrait continuer d'appliquer l'analyse relative au « créancier » telle qu'elle a été clairement formulée dans l'arrêt *Abitibi*. La définition de la juge Deschamps empêche les organismes de réglementation provinciaux de s'approprier facilement un rang supérieur en matière de faillite et de saper le régime de priorité du Parlement. Cette définition favorise l'atteinte des objectifs d'ordre et d'équité dans les procédures d'insolvabilité. Suivant ce critère général, l'AER a clairement agi comme créancier relativement à l'actif de Redwater, et c'est probablement pour cette raison qu'il a concédé ce point devant les deux tribunaux d'instance inférieure.

[254] Puisque personne ne conteste qu'il est satisfait au second volet du test *Abitibi*, je passe maintenant au troisième volet, qui pose la question de savoir s'il est suffisamment certain que l'organisme de réglementation exécutera les travaux et présentera une demande de remboursement. Comme l'explique l'arrêt *Abitibi*, dans le contexte d'une ordonnance environnementale :

> En ce qui concerne la troisième condition, soit qu'il doit être possible d'attribuer à l'obligation une valeur pécuniaire, la question est de savoir si des ordonnances qui ne sont pas formulées en termes pécuniaires peuvent être formulées en de tels termes. Je souligne que lorsqu'un organisme administratif réclame une somme qui est due à la date pertinente, il formule ainsi son ordonnance en termes pécuniaires. Le tribunal n'a alors aucune détermination à faire à cette étape car ce qui est réclamé est une « dette » et est, par conséquent, clairement visé par la définition d'une « réclamation » prévue au par. 12(1) de la *LACC*.
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> . . .
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> Le critère retenu par les tribunaux pour décider si une réclamation éventuelle sera incluse dans le processus d'insolvabilité est celui qui consiste à déterminer si l'événement non encore survenu est trop éloigné ou conjectural (*Confederation Treasury Service Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75). Dans le contexte d'une ordonnance environnementale, cela signifie qu'il doit y avoir

enforcement mechanism will ultimately perform remediation work and assert a monetary claim to have its costs reimbursed. If there is sufficient certainty in this regard, the court will conclude that the order can be subjected to the insolvency process. [Emphasis added; paras. 30 and 36.]

[255] In my view, it is sufficiently certain that either the AER or the OWA will ultimately perform the abandonment and reclamation work and assert a monetary claim for reimbursement. Therefore, the final prong of the *Abitibi* test is satisfied. The chambers judge made three critical findings of fact — each of which is entitled to deference on appeal (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 10) — that easily support this conclusion.

[256] First, Wittmann C.J. found that GTL was not in possession of the disclaimed properties and, in any event, "has no ability to perform any kind of work on these assets" because the environmental liabilities exceeded the value of the estate itself (para. 170; see also *Abitibi*, at para. 53 where the Court stated that: "Abitibi had no means to perform the remediation work"). He discounted the possibility that any of Redwater's working interest participants would step in to perform the work, even for the small number of Redwater's licensed assets for which such partners existed (chambers judge reasons, at para. 171). In sum, he concluded that "there is no other party who could be compelled to carry out the abandonment work" (para. 172).

[257] Two decisions of the Ontario Court of Appeal highlight why this is important. In *Nortel Networks Corp., Re*, 2013 ONCA 599, 6 C.B.R. (6th) 159, Juriansz J.A. found that the "sufficient certainty" standard was *not* satisfied in respect of certain sites because those sites had already been sold so the purchasers could be compelled to carry out the work on the basis that they were jointly and severally liable for the remediation obligations (paras. 39-40). But in *Northstar Aerospace Inc., Re*, 2013 ONCA 600, 8 C.B.R. (6th) 154, Juriansz J.A. found that the

des indications suffisantes permettant de conclure que l'organisme administratif qui a eu recours aux mécanismes d'application de la loi effectuera en fin de compte des travaux de décontamination et présentera une réclamation pécuniaire afin d'obtenir le remboursement de ses débours. Si cela est suffisamment certain, le tribunal conclura que l'ordonnance peut être assujettie au processus d'insolvabilité. [Je souligne; par. 30 et 36]

[255] À mon avis, il est suffisamment certain que l'AER ou l'OWA effectuera ultimement les travaux d'abandon et de remise en état et fera valoir une réclamation pécuniaire afin d'obtenir un remboursement. Il est donc satisfait au dernier volet du test *Abitibi*. Le juge en cabinet a tiré trois conclusions de fait cruciales — chacune d'elles commandant la déférence en appel (*Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 10) — qui appuient aisément cette conclusion.

[256] Premièrement, le juge en chef Wittmann a conclu que GTL n'était pas en possession des biens visés par les renonciations et, de toute façon, il [TRADUCTION] « ne peut pas exécuter de travaux sur les biens » parce que les engagements environnementaux dépassaient la valeur de l'actif même (par. 170; voir également *Abitibi*, par. 53, où la Cour a dit que : « Abitibi ne disposait d'aucune ressource pour exécuter les travaux »). Il a écarté la possibilité que les participants en participation directe de Redwater se chargent de le faire même à l'égard des quelques biens visés par des permis de Redwater pour lesquels de tels partenaires existaient (motifs du juge en cabinet, par. 171). Bref, il a conclu [TRADUCTION] « qu'il n'existe aucune autre partie susceptible d'être contrainte d'exécuter les travaux d'abandon » (par. 172).

[257] Deux décisions de la Cour d'appel de l'Ontario font ressortir pourquoi cela est important. Dans *Nortel Networks Corp., Re*, 2013 ONCA 599, 6 C.B.R. (6th) 159, le juge Juriansz a conclu qu'il *n'était pas* satisfait au critère de la « certitude suffisante » relativement à certains sites parce que ceux-ci avaient déjà été achetés. Les acheteurs pouvaient par conséquent être contraints d'exécuter les travaux parce qu'ils étaient solidairement responsables des obligations de décontamination (par. 39-40). Mais dans *Northstar Aerospace Inc., Re*, 2013 ONCA 600,

"sufficient certainty" standard *was* satisfied because there was no purchaser that could be compelled by the regulator to complete the work. While it is true that fresh evidence on appeal revealed that the Ministry of the Environment had commenced the remediation work, Juriansz J.A. found that the fact that there were no subsequent purchasers had grounded the application judge's implicit conclusion regarding sufficient certainty (paras. 16-17). The present case is like *Northstar*, which is perfectly applicable to the facts of this case: there is no purchaser to take on Redwater's assets, and the debtor itself is insolvent. The chambers judge in this case concluded that there was no other party who could be compelled to carry out the work.

[258] Second, in light of the fact that neither GTL nor Redwater's working interest participants would (or could) undertake this work, Wittmann C.J. found as a fact that "the AER will ultimately be responsible for [the abandonment] costs" (para. 171). He concluded that "the AER has the power [to seek recovery of abandonment costs] and has actually performed the work on occasion" (para. 168). In fact, in this very case, "the AER has expressly stated an intention to seek reimbursement for the costs of abandoning the renounced assets" (para. 172). This conclusion finds ample support in the record. In a cover letter sent with the Abandonment Orders on July 15, 2015, the AER unambiguously stated that if Redwater failed to abandon the disclaimed properties in accordance with its instructions, "the AER will, without further notice, use its process to have the properties abandoned" (GTL's Record, vol. I, at p. 102 (emphasis added)). The letter further stated that "[t]he AER will exercise all remedies available to it to recover the costs from the liable parties" (p. 102 (emphasis added)). The chambers judge did not err in relying on these unequivocal statements from the AER itself — to the effect that it *will* have the abandonment work performed and seek reimbursement — to conclude that sufficient certainty existed in this case.

8 C.B.R. (6th) 154, le juge Juriansz a conclu qu'il *était* satisfait au critère de la « certitude suffisante » parce qu'il n'y avait pas d'acheteur qui pouvait être contraint d'exécuter les travaux par l'organisme de réglementation. Certes, les éléments de preuve nouveaux déposés en appel révèlent que le ministère de l'Environnement avait amorcé les travaux de décontamination, mais le juge Juriansz a conclu que l'absence d'acheteurs subséquents justifiait la conclusion implicite du juge de première instance quant à la certitude suffisante (par. 16-17). La présente affaire s'apparente à *Northstar*, qui s'applique parfaitement aux faits de l'espèce : il n'y a aucun acheteur pour prendre en charge les biens de Redwater, et la débitrice elle-même est insolvable. Le juge en cabinet en l'espèce a conclu qu'il n'existe aucune autre partie qui pourrait être contrainte d'exécuter les travaux.

[258] Deuxièmement, compte tenu du fait que ni GTL ni les participants en participation directe de Redwater ne voudraient (ou ne pourraient) entreprendre ces travaux, le juge en chef Wittmann a tiré la conclusion de fait selon laquelle [TRADUCTION] « l'AER sera en fin de compte responsable des frais [d'abandon] » (par. 171). Il a conclu que « l'AER a le pouvoir [de tenter de recouvrer les frais d'abandon] et a réellement exécuté les travaux à l'occasion » (par. 168). Dans les faits, en l'espèce, « l'AER a expressément manifesté l'intention de demander le remboursement des frais liés à l'abandon des biens faisant l'objet de la renonciation » (par. 172). Cette conclusion est amplement étayée par le dossier. Dans la lettre du 15 juillet 2015 accompagnant les ordonnances d'abandon, l'AER a déclaré sans équivoque que, si Redwater ne procède pas à l'abandon des biens visés par les renonciations conformément aux directives de l'AER, [TRADUCTION] « l'AER utilisera, sans autre avis, sa procédure pour faire abandonner les biens » (dossier de GTL, vol. I, p. 102 (je souligne)). La lettre indiquait également que « [l']AER exercera tous les recours dont il dispose pour recouvrer les frais des parties responsables » (p. 102 (je souligne)). Le juge siégeant en cabinet n'a pas commis d'erreur en se fondant sur ces déclarations sans équivoque de l'AER lui-même — selon lesquelles il *fera* exécuter les travaux d'abandon et demandera un remboursement — pour conclure qu'il y avait une certitude suffisante en l'espèce.

[259] Although there is some contrary evidence in the record — principally, the remarks of an AER affiant, who stated that the AER would not abandon the properties — Wittmann C.J. did not commit any palpable and overriding error by giving more weight to the letter that the AER sent contemporaneously with the Abandonment Orders. Likewise, to the extent that the AER sent other correspondence stating that it was not a creditor and that it was not asserting a provable claim, Wittmann C.J. did not err in discounting these self-serving statements as insufficiently probative on the ultimate legal questions. There is therefore no basis to disturb these factual findings or to reweigh this evidence on appeal.

[260] Even if the AER's admission that it would abandon the properties itself is not sufficient on its own, Wittmann C.J. made a third critical finding of fact: the AER's only "realistic alternativ[e] to performing the remediation work itself" was to deem the renounced assets to be orphan wells (para. 172). In this circumstance, he found that "the legislation and evidence shows that if the AER deems a well an orphan, then the OWA will perform the work" (para. 166 (emphasis added)).

[261] In light of these factual determinations, Wittmann C.J. rightly concluded that the "sufficient certainty" standard of *Abitibi* was satisfied. He elaborated on the legal basis for that conclusion as follows:

> Does this situation meet the sufficient certainty criterion as described in *AbitibiBowater*? The answer is no in a narrow and technical sense, since it is unclear whether the AER will perform the work itself or if it will deem the properties subject to the orders, orphans. If so, the OWA will probably perform the work, although not necessarily within a definite timeframe. However, the situation does meet, in my opinion, what was intended by the majority of the Court in *AbitibiBowater*. . . . In the result, I find that although not expressed in monetary terms, the AER orders are in this case intrinsically financial. [para. 173]

[259] Bien qu'il y ait certains éléments de preuve contraires au dossier — notamment les propos d'un déclarant de l'AER selon lesquels l'AER ne procéderait pas à l'abandon des biens — le juge en chef Wittmann n'a pas commis d'erreur manifeste et dominante en accordant plus de poids à la lettre que l'AER a envoyée en même temps que les ordonnances d'abandon. De même, dans la mesure où l'AER a envoyé d'autres lettres dans lesquelles il déclarait ne pas être un créancier et ne pas faire valoir une réclamation prouvable, le juge en chef Wittmann n'a pas commis d'erreur en faisant abstraction de ces déclarations intéressées parce qu'elles n'étaient pas suffisamment probantes quant aux questions de droit ultimes. Il n'y a donc aucune raison de modifier ces conclusions de fait ou d'apprécier de nouveau ces éléments de preuve en appel.

[260] Même si la déclaration de l'AER selon laquelle il procéderait lui-même à l'abandon des biens n'est pas suffisante en soi, le juge en chef Wittmann a tiré une troisième conclusion de fait cruciale : la seule [TRADUCTION] « solution réaliste [qui s'offre à l'AER] autre que celle d'effectuer lui-même les travaux de décontamination » était de considérer les biens faisant l'objet de la renonciation comme des puits orphelins (par. 172). Il a conclu qu'en pareil cas, « les dispositions législatives et les éléments de preuve démontrent que, si l'AER considère un puits comme orphelin, l'OWA exécutera les travaux » (par. 166 (je souligne)).

[261] À la lumière de ces conclusions de fait, le juge en chef Wittmann a eu raison de conclure qu'il était satisfait à la norme de « certitude suffisante » énoncée dans *Abitibi*. Il a précisé ainsi le fondement juridique de cette conclusion :

> [TRADUCTION] La situation répond-elle au critère de la certitude suffisante décrit dans l'arrêt *AbitibiBowater*? Au sens strict et technique du terme, la réponse est non, car il n'est pas clair si l'AER effectuera lui-même les travaux ou s'il considérera les biens visés par les ordonnances comme orphelins. Dans l'affirmative, l'OWA exécutera probablement les travaux, mais pas nécessairement dans un délai précis. La situation correspond toutefois, à mon avis, à ce qu'ont voulu les juges majoritaires de la Cour dans *AbitibiBowater*. . . . Par conséquent, je conclus que, bien qu'elles ne soient pas formulées en termes pécuniaires, les ordonnances de l'AER sont, en l'espèce, intrinsèquement financières. [par. 173]

[262] My colleague does not specify the standard of review he applies in overturning Wittmann C.J.'s application of the third prong of the *Abitibi* test to this case. Nevertheless, he disagrees with the chambers judge and holds that the "sufficient certainty" standard is not satisfied. He offers two reasons for overruling Wittmann C.J.'s finding; but in doing so, he does not identify any palpable and overriding error (or, even under the non-deferential standard of correctness, *any* true error) in the chambers judge's ultimate conclusion.

[263] The first reason — the purported legal error of determining that the Abandonment Orders are "intrinsically financial" — is little more than a distraction. Even if this is an erroneous application of *Abitibi*, it is evident that Wittmann C.J. was of the view, *at a minimum*, that either the AER or the OWA would complete the abandonment work. And as I describe below, this alone is enough to satisfy the "sufficient certainty" standard. My colleague overemphasizes the import of this stray comment in the context of a thorough set of reasons that otherwise faithfully applies the correct standard. Any legal error on this basis, to the extent that one exists, does not displace the result that the chambers judge reached.

[264] The second reason is more substantial. According to Wagner C.J., whether the AER will perform the abandonment work itself or delegate that task to the OWA is dispositive, since it was the Province itself that undertook the reclamation work in *Abitibi*. Here, he suggests, "the OWA is not the regulator" (para. 147) and thus the involvement of the OWA "is insufficient to satisfy the 'sufficient certainty' test" (para. 146).

[265] Accepting, for a moment, the potential relevance of this distinction, I am of the view that any uncertainty as to whether the AER *would* delegate the reclamation work to the OWA is questionable. My colleague's emphasis on the self-serving remarks of an AER affiant and the fact that the AER took no immediate steps to perform the abandonment work

[262] Mon collègue ne précise pas la norme de contrôle qu'il applique en infirmant l'application par le juge en chef Wittmann du troisième volet du test *Abitibi* à la présente affaire. Néanmoins, il est en désaccord avec le juge en cabinet et conclut qu'il n'est pas satisfait au volet de la « certitude suffisante ». Il donne deux raisons pour infirmer la conclusion du juge en chef Wittmann; mais ce faisant, il ne relève aucune erreur manifeste et dominante (ni même une véritable erreur selon la norme de la décision correcte, qui ne commande aucune déférence) dans la conclusion ultime du juge en cabinet.

[263] La première raison, la prétendue erreur de droit consistant à décider que les ordonnances d'abandon sont [TRADUCTION] « intrinsèquement financières », n'est guère plus qu'une distraction. Même s'il s'agit d'une application erronée de l'arrêt *Abitibi*, il est manifeste que le juge en chef Wittmann a estimé, *au moins*, que l'AER ou l'OWA mènerait à terme les travaux d'abandon. Et comme je l'explique plus loin, cela suffit en soi pour satisfaire à la norme de « certitude suffisante ». Mon collègue surestime l'importance de ce commentaire isolé dans le contexte d'un ensemble de motifs étoffés où la norme appropriée est par ailleurs fidèlement appliquée. Toute erreur de droit de ce genre, dans la mesure où il en existe une, n'écarte en rien le résultat auquel est arrivé le juge en cabinet.

[264] La deuxième raison est plus sérieuse. Selon le juge en chef Wagner, la question de savoir si l'AER effectuera lui-même les travaux d'abandon ou s'il déléguera cette tâche à l'OWA est déterminante, car c'est la Province elle-même qui a procédé aux travaux de décontamination dans *Abitibi*. Dans l'affaire qui nous occupe, suggère-t-il, « l'OWA n'est pas l'organisme de réglementation » (par. 147) et, en conséquence, l'intervention de l'OWA « est insuffisante pour satisfaire au critère de la "certitude suffisante" » (par. 146).

[265] Acceptant pour un instant la pertinence éventuelle de cette distinction, j'estime que toute incertitude quant à la question de savoir si l'AER *déléguerait* l'exécution des travaux de décontamination à l'OWA est discutable. L'importance qu'accorde mon collègue aux propos intéressés d'un déclarant de l'AER et au fait que l'AER n'a rien fait sur-le-champ pour exécuter

itself amounts to little more than *post hoc* appellate fact finding, especially in light of the AER's own statement. Although Wittmann C.J. suggested that it was "unclear" whether the AER would complete this work itself, his other findings of fact and law — that the AER has the statutory power to perform the work, that it has actually done so in the past, and that it expressly stated its intention to seek reimbursement here — suggest otherwise. Regardless, Wittmann C.J.'s remark that the "sufficient certainty" standard was not satisfied "in a narrow and technical sense" must be read in this context: he was simply suggesting that there was some uncertainty as to "whether the AER will perform the work itself" as opposed to delegating the work to the OWA (para. 173). He was *not* implying — let alone concluding as a matter of law — that GTL had failed to prove the third prong of the *Abitibi* test. That reading would vastly overstate, and completely decontextualize, the meaning of a few isolated words in his reasons.

[266] The more important problem, though, is that any distinction between the performance of the abandonment work by the AER and its performance by the OWA is meaningless. Form is elevated over substance if it is concluded that the "sufficient certainty" standard is not satisfied when a regulatory body's delegate, as opposed to the regulatory body itself, performs the work. And despite my colleague's suggestion that a regulatory body cannot act strategically to evade *Abitibi*, that is precisely what his analysis permits.

[267] We are told that the "OWA's true nature" (majority reasons, at para. 147) — and therefore what purports to distinguish this case from impermissible examples of strategic delegation — rests on four factors: (1) the OWA is a non-profit organization; (2) it has an independent board of directors; (3) it has its own mandate and determines "when and how it will perform environmental work" (para. 148); and (4) it is "financially independent" (para. 148) as it is

lui-même les travaux d'abandon ne constitue rien de moins qu'une appréciation des faits après coup en appel, surtout compte tenu de la propre déclaration de l'AER. Bien que le juge en chef Wittmann ait affirmé qu'il n'était [TRADUCTION] « pas clair » si l'AER effectuerait lui-même les travaux, ses autres conclusions de fait et de droit — que la loi confère à l'AER le pouvoir d'exécuter les travaux, qu'il l'a réellement fait dans le passé et qu'il a expressément manifesté l'intention de demander un remboursement en l'espèce — indiquent le contraire. Quoi qu'il en soit, la remarque du juge en chef Wittmann selon laquelle il n'était pas satisfait à la norme de « certitude suffisante » « au sens strict et technique » doit être interprétée dans ce contexte : il voulait tout simplement dire qu'il y avait une certaine incertitude quant à savoir « si l'AER effectuera[it] lui-même les travaux » au lieu de déléguer les travaux à l'OWA (par. 173). Il *ne* sous-entendait *pas* — et concluait encore moins en droit — que GTL n'avait pas réussi à établir le troisième volet du test *Abitibi*. Cette interprétation exagère considérablement le sens de quelques mots isolés contenus dans ses motifs, et sort complètement ces mots de leur contexte.

[266] Le problème le plus important, cependant, c'est que toute distinction entre l'exécution des travaux d'abandon par l'AER et leur exécution par l'OWA est dénuée de sens. C'est faire passer la forme avant le fond que de conclure qu'il n'est pas satisfait à la norme de « certitude suffisante » lorsque le délégataire de l'organisme de réglementation, et non l'organisme de réglementation lui-même, effectue les travaux. Et malgré l'affirmation de mon collègue selon laquelle un organisme de réglementation ne saurait stratégiquement éviter l'arrêt *Abitibi*, c'est précisément ce que son analyse permet de faire.

[267] On nous dit que la « véritable nature de l'OWA » (motifs majoritaires, par. 147) — et, par conséquent, ce qui est censé distinguer la présente affaire des exemples inadmissibles de délégation stratégique — repose sur quatre facteurs : (1) l'OWA est un organisme sans but lucratif; (2) elle a un conseil d'administration indépendant; (3) elle dispose de son propre mandat et décide « quand et de quelle manière elle exécutera des travaux environnementaux »

funded "almost entirely" by a tax on the oil and gas industry (para. 23).

[268] The first point is true, but irrelevant. Why does an organization's non-profit status have any bearing on whether it is being used as a vehicle to avoid the "sufficient certainty" standard under *Abitibi*?

[269] The second point is not accurate. The AER appoints members of the OWA's board of directors, as does another provincial body, Alberta Environment and Parks — underscoring the extent to which the provincial government can influence the OWA's activities.

[270] The third point overstates the OWA's level of independence. The *Orphan Fund Delegated Administration Regulation*, Alta. Reg. 45/2001, gives the AER substantial power to influence the OWA's decision making. Section 3(2)(b) of the regulation expressly states that, in fulfilling its delegated powers, duties and functions, the OWA must act in accordance with "applicable requirements, guidelines, directions and orders of the [AER]". The regulation also mandates that the OWA provide information to the AER on request and regularly submit reports indicating or containing its budget, "goals, strategies and performance measures", activities for the previous year and financial statements (s. 6). The AER appears to be able to exercise substantial control and oversight over the OWA if it so chooses, including over the manner in which the OWA carries out its environmental work.

[271] The fourth point is also inaccurate and would probably be irrelevant even if it were accurate. The Province has provided funding to the OWA in the past, including a $30 million contribution in 2009 and an additional $50,000 in 2012, and it has announced that it will loan the OWA an additional $230 million (see A.F., at para. 99 (alluding to this loan); recall *Abitibi*, at para. 58 where the Court stated that: "Earmarking money may be a strong

(par. 148); (4) elle est « financièrement indépendante » (par. 148) et « presque entièrement » financée par une taxe imposée à l'industrie pétrolière et gazière (par. 23).

[268] Le premier point est exact, mais non pertinent. Pourquoi le statut d'organisme sans but lucratif aurait-il une incidence sur la question de savoir s'il est utilisé comme moyen d'éviter la norme de « certitude suffisante » fixée dans *Abitibi*?

[269] Le deuxième point est inexact. L'AER nomme les membres du conseil d'administration de l'OWA, comme le fait un autre organisme provincial, Alberta Environment and Parks — ce qui fait ressortir à quel point le gouvernement provincial peut influencer les activités de l'OWA.

[270] Le troisième point surestime l'indépendance de l'OWA. Le *Orphan Fund Delegated Administration Regulation*, Alta. Reg. 45/2001, accorde à l'AER le pouvoir important d'influencer la prise de décisions de l'OWA. L'alinéa 3(2)(b) du règlement dispose en termes exprès que, dans l'exercice des pouvoirs, obligations et attributions qui lui sont déléguées, l'OWA doit se conformer aux [TRADUCTION] « conditions, lignes directrices, directives et ordonnances applicables de [l'AER] ». Le règlement exige que l'OWA fournisse sur demande des renseignements à l'AER et dépose périodiquement des rapports décrivant son budget de même que ses « objectifs, stratégies, mesures du rendement », activités de l'année précédente et états financiers (art. 6). L'AER semble être à même d'exercer beaucoup d'emprise et de surveillance sur l'OWA, si tel est son désir, y compris sur la manière dont l'OWA effectue ses travaux environnementaux.

[271] Le quatrième point est lui aussi inexact et il n'aurait probablement aucune pertinence même s'il était exact. La Province a fourni des fonds à l'OWA dans le passé, notamment une contribution de 30 millions de dollars en 2009 et une somme supplémentaire de 50 000 $ en 2012, et elle a annoncé qu'elle prêtera une somme supplémentaire de 230 millions de dollars à l'OWA (voir le m.a., par. 99 (faisant allusion à ce prêt); rappelons ce que la Cour a affirmé

indicator that a province will perform remediation work").

[272] In any event, it is important to note the more salient features of the OWA and its relationship with the AER (and, more generally, with the provincial government). The OWA operates under legal authority delegated to it by the AER and in accordance with a Memorandum of Understanding it has signed with both the AER and Alberta Environment and Parks. The orphan fund itself is administered by the AER, which prescribes and collects industry contributions and remits the funds to the OWA. The OWA cannot increase the industry levy without first obtaining approval from the Alberta Treasury Board. In addition, the *OGCA* makes clear that abandonment costs incurred by any person authorized by the AER — which would include the OWA — constitute a debt payable to the AER (*OGCA*, s. 30(5)). The record shows that the AER has remitted abandonment costs to the OWA in the past, in the form of security deposits and amounts recovered through successful enforcement action against licensees.

[273] The AER and the OWA are therefore inextricably intertwined. We should see this arrangement for what it is: when the AER exercises its statutory powers to declare a property an "orphan" under s. 70(2) of the *OGCA*, it effectively delegates the abandonment work to the OWA. Treating the OWA's work as meaningfully different from abandonment activities carried out by the AER turns a blind eye to this reality and does nothing to further the underlying principles of paramountcy. To the contrary, it provides provincial regulators with an easy way to evade the test of *Abitibi* through strategic behaviour, thereby undermining the legitimate federal interest in enforcing the *BIA*'s priority scheme. It should not matter which body carries out the work (see C.A. reasons, at para. 78; *OGCA*, s. 70(1)(a)(ii)).

[274] The majority faults the chambers judge for "failing to consider whether the OWA can be treated as the regulator" (para. 153). However, the chambers

dans *Abitibi*, par. 58 : « [l]e fait de prévoir un budget peut constituer un indicateur clair qu'une province exécutera des travaux de décontamination »).

[272] Quoi qu'il en soit, il importe de souligner les caractéristiques plus saillantes de l'OWA et de sa relation avec l'AER (et, de façon plus générale, avec le gouvernement provincial). L'OWA agit en vertu du pouvoir légal qui lui est délégué par l'AER et conformément au protocole d'entente qu'elle a signé avec l'AER et Alberta Environment and Parks. Le fonds pour les puits orphelins est lui-même administré par l'AER, qui fixe et recueille les contributions de l'industrie et remet les fonds à l'OWA. L'OWA ne peut pas augmenter les prélèvements qu'elle effectue auprès de l'industrie sans d'abord obtenir l'approbation du Conseil du trésor de l'Alberta. De plus, l'*OGCA* indique clairement que les frais liés à l'abandon engagés par toute personne autorisée par l'AER — y compris l'OWA — constituent une dette payable à l'AER (*OGCA*, par. 30(5)). Le dossier révèle que l'AER a versé des frais d'abandon à l'OWA dans le passé, sous la forme de dépôts de garantie et de sommes recouvrées grâce à des mesures de recouvrement réussies à l'encontre des titulaires de permis.

[273] L'AER et l'OWA sont donc inextricablement liés. Il faut reconnaître cet arrangement pour ce qu'il est : lorsque l'AER exerce le pouvoir de déclarer un bien [TRADUCTION] « orphelin » que lui confère le par. 70(2) de l'*OGCA*, il délègue effectivement l'exécution des travaux d'abandon à l'OWA. Considérer les travaux de l'OWA comme significativement différents des activités d'abandon menées par l'AER ne tient pas compte de cette réalité et n'aide en rien à favoriser l'application des principes sous-jacents de la prépondérance. Au contraire, cela donne aux organismes de réglementation provinciaux un moyen facile d'échapper au test *Abitibi* par l'adoption d'un comportement stratégique, minant ainsi l'intérêt légitime du gouvernement fédéral à assurer le respect du régime de priorité établi par la *LFI*. Il importe peu de savoir qui effectue les travaux (voir les motifs de la Cour d'appel, par. 78; *OGCA*, sous-al. 70(1)(a)(ii)).

[274] La majorité reproche au juge en cabinet de « ne pas se demander si l'OWA [pouvait] être assimilé à l'organisme de réglementation » (par. 153).

judge cannot have erred by failing to appreciate a level of independence that simply does not exist.

[275] The majority also offers an alternative conclusion: it is not sufficiently certain that even the OWA will perform the abandonment work (para. 149). Whether the chambers judge's conclusion to the contrary amounts to a palpable and overriding error, or something else, we are not told.

[276] Again, such an approach would permit the AER to benefit from strategic gamesmanship by manipulating the timing of its intervention in order to escape the insolvency regime and strip Redwater of its assets. This arbitrary line-drawing exercise, in which a period of 10 years before the wells are abandoned is too long (but presumably some shorter time line would not be), has no basis in law. As Slatter J.A. convincingly observed in his reasons, the AER

> cannot insist that security be posted to cover environmental costs, but at the same time argue that it may be a long time before the Orphan Well Association actually does the remediation. If the Regulator takes security for remediating Redwater's orphan wells, those funds cannot be used for any other purpose. If security is taken, it is no answer that the security might be held for an indefinite period of time; the consequences to the insolvency proceedings and distribution of funds to the creditors are immediate and certain. Further, if security is taken, the environmental obligation has clearly been reduced to monetary terms. [Emphasis added; para. 79.]

[277] Moreover, the OWA's estimate of 10 to 12 years was put forward at the start of this litigation more than 3 years ago. Whether that estimate remains accurate after the province's proposed infusion of nearly a quarter of a billion dollars into the orphan fund (A.F., at para. 99)[1] — money that will undoubt-

[1] I am assuming that the AER's factum is accurate in referring to the existence and amount of this loan (which no other party contested).

Le juge en cabinet ne peut toutefois avoir fait erreur en n'appréciant pas une indépendance qui n'existe tout simplement pas.

[275] La majorité tire aussi une conclusion subsidiaire : il n'est pas suffisamment certain que même l'OWA exécutera les travaux d'abandon (par. 149). Quant à savoir si la conclusion contraire du juge en cabinet équivaut à une erreur manifeste et dominante, ou à quelque chose d'autre, on ne nous le dit pas.

[276] Là encore, une telle approche permettrait à l'AER de tirer profit de manœuvres stratégiques en manipulant le moment de son intervention afin de se soustraire au régime d'insolvabilité et de dépouiller Redwater de ses biens. Cet exercice de délimitation arbitraire, dans lequel une période de 10 ans avant que les puits fassent l'objet d'un abandon est trop longue (mais selon lequel une période plus courte ne le serait présumément pas), n'a aucun fondement en droit. Comme le juge Slatter l'a fait observer de manière convaincante dans ses motifs, l'AER

> [TRADUCTION] ne peut exiger qu'un dépôt de garantie soit versé pour couvrir les frais environnementaux, et en même temps faire valoir qu'il pourrait s'écouler beaucoup de temps avant que l'Orphan Well Association procède réellement à la décontamination. Si l'organisme de réglementation prend un dépôt de garantie afin de décontaminer les puits orphelins de Redwater, ces fonds ne peuvent être utilisés à aucune autre fin. Si un dépôt de garantie est pris, il ne suffit pas de répondre que ce dépôt pourrait être conservé pendant une période indéterminée; les conséquences pour la procédure d'insolvabilité et la distribution des fonds aux créanciers sont immédiates et certaines. De plus, si un dépôt de garantie est pris, l'obligation environnementale est clairement réduite à une obligation formulée en termes pécuniaires. [Je souligne; par. 79.]

[277] De plus, l'estimation de 10 à 12 ans de l'OWA a été mise de l'avant au début du présent litige il y a plus de 3 ans. La question de savoir si cette estimation demeure exacte après l'injection proposée par la province de près d'un quart de milliard de dollars dans le fonds pour les puits orphelins (m.a., par. 99)[1] — des

[1] Je suppose que le mémoire de l'AER est exact quand il fait état de l'existence et du montant de ce prêt (des faits qui n'ont pas été contestés par une autre partie).

edly speed up the OWA's abandonment efforts — is an open question. In any case, the changing factual context highlights the essential problem with the majority's approach: pinning the constitutional analysis on the timing of the OWA's intervention is arbitrary and irrational, as it causes the result to shift based on decisions made by the very actor that stands to benefit from a finding that the "sufficient certainty" standard is not satisfied.

[278] All that aside, the chambers judge's recognition that the OWA will "probably" abandon the properties should be enough (chambers judge reasons, at para. 173). Concluding otherwise is not justified, since it would mean applying a stricter certainty requirement than is called for by *Abitibi* itself. Deschamps J. expressly rejected an alternative standard — a "likelihood approaching certainty" — adopted by McLachlin C.J. in dissent (*Abitibi*, at para. 60). But here, dismissing as insufficient the chambers judge's conclusion that the OWA would "probably" complete the work essentially means requiring a "likelihood approaching certainty". Since *Abitibi* does not require absolute certainty, or even a likelihood approaching certainty, Wittmann C.J. did not err in concluding that the third prong was satisfied (see the *Oxford English Dictionary* (online), which defines "probably" as "with likelihood (though not with certainty)"; "almost certainly; as far as one knows or can tell; in all probability; most likely").

[279] After concluding that it is not sufficiently certain that the AER will abandon the sites, the majority goes on to find that the AER's licence transfer restrictions similarly do not satisfy the *Abitibi* test. This is so, it says, because the AER's refusal to approve a licence transfer does not give it a monetary claim against Redwater and because compliance with the Licensee Management Ratio ("LMR") conditions "reflects the inherent value of the assets held by the bankrupt estate" (para. 157). At the outset, I wish to

sommes qui accéléreront sans doute les efforts d'abandon de l'OWA — demeure sans réponse. Quoi qu'il en soit, le contexte factuel changeant met en lumière le problème fondamental que pose l'approche de la majorité : arrimer l'analyse constitutionnelle au moment de l'intervention de l'OWA est arbitraire et irrationnel, car cette approche a pour effet d'inverser le résultat en fonction de décisions prises par l'acteur même qui peut bénéficier de la conclusion selon laquelle il n'est pas satisfait à la norme de « certitude suffisante ».

[278] Mis à part tout ce qui précède, la reconnaissance par le juge en cabinet que l'OWA abandonnera [TRADUCTION] « probablement » les biens devrait suffire (motifs du juge en cabinet, par. 173). Il n'est pas justifié de conclure le contraire, car cela reviendrait à appliquer une norme plus stricte en matière de certitude que celle que commande l'arrêt *Abitibi* lui-même. La juge Deschamps a expressément rejeté la norme subsidiaire — une « probabilité proche de la certitude » — qu'a adoptée la juge en chef McLachlin dans ses motifs dissidents (*Abitibi*, par. 60). Mais en l'espèce, rejeter comme insuffisante la conclusion du juge en cabinet selon laquelle l'OWA mènerait « probablement » à terme les travaux revient essentiellement à exiger une « probabilité proche de la certitude ». Étant donné que l'arrêt *Abitibi* n'exige pas une certitude absolue, ni même une probabilité proche de la certitude, le juge en chef Wittmann n'a pas commis d'erreur en concluant qu'il était satisfait au troisième volet du test (voir l'*Oxford English Dictionary* (en ligne), qui définit [TRADUCTION] « probablement » comme « selon la vraisemblance (mais sans certitude) »; « presque certainement; pour autant que l'on sache ou que l'on puisse le dire; selon toute vraisemblance; vraisemblablement »).

[279] Après avoir conclu qu'il n'est pas suffisamment certain que l'AER abandonnera les sites, la majorité juge que les restrictions imposées par l'AER au transfert de permis ne satisfont pas non plus au test *Abitibi*. Il en est ainsi, dit-elle, parce que le refus de l'AER d'approuver le transfert d'un permis ne lui confère pas une réclamation pécuniaire contre Redwater et que le respect des conditions liées au ratio de gestion du titulaire de permis (« RGTP ») « reflète la valeur inhérente des biens détenus par

make clear that I have already concluded that, since GTL lawfully disclaimed the non-producing properties under s. 14.06(4) of the *BIA*, an operational conflict arises to the extent that the AER included those disclaimed properties in calculating Redwater's LMR for the purpose of imposing conditions on the sale of Redwater's assets. In the analysis that follows, I reach that same conclusion under the frustration of purpose aspect of the paramountcy test as well.

[280] I take issue with the majority's conclusion regarding the LMR conditions for two reasons. First, this approach elevates form over substance, disregarding Gascon J.'s admonition in *Moloney* that "[t]he province cannot do indirectly what it is precluded from doing directly" (para. 28; see also *Husky Oil*, at para. 41). Refusing to approve a sale of Redwater's assets unless GTL satisfies Redwater's environmental liabilities is no different, in substance, from directly ordering Redwater or GTL to undertake that work. This is because the AER achieves the exact same thing — the fulfillment of Redwater's environmental obligations — by making any sale conditional on GTL completing the work itself, posting security or packaging the non-producing assets into the sale, which reduces the sale price by the exact amount of those liabilities and ensures that the purchaser can be compelled, as the subsequent "licensee" under provincial law, to comply with the Abandonment Orders.

[281] The only difference between these two exercises of provincial power is the means by which the AER has opted to enforce the underlying obligations. The Abandonment Orders carry a threat of liability for non-compliance; imposing conditions on the sale of Redwater's assets, on the other hand, does not create a liability in a formal sense, but it does preclude any sale from occurring unless and until those obligations are satisfied. Since the trustee must sell the assets in order to carry out its mandate, the *effect* of imposing conditions on the sale of Redwater's assets

l'actif du failli » (par. 157). Tout d'abord, je tiens à préciser une chose : j'ai déjà conclu qu'étant donné que GTL a légalement renoncé aux bien inexploités en vertu du par. 14.06(4) de la *LFI*, il y a un conflit d'application dans la mesure où l'AER a inclus ces biens visés par les renonciations dans le calcul du RGTP de Redwater afin d'imposer des conditions à la vente des actifs de Redwater. Dans l'analyse qui suit, j'arrive également à la même conclusion en m'appuyant sur le second volet concernant l'entrave à la réalisation d'un objet fédéral du test de la prépondérance.

[280] Je suis en désaccord avec la conclusion de la majorité quant aux conditions relatives au RGTP pour deux raisons. D'abord, cette approche fait passer la forme avant le fond, ignorant la mise en garde du juge Gascon dans l'arrêt *Moloney* selon laquelle « [l]a province ne peut faire indirectement ce qu'il lui est interdit de faire directement » (par. 28; voir aussi *Husky Oil*, par. 41). Refuser d'approuver la vente des biens de Redwater à moins que GTL ne satisfasse aux obligations environnementales de Redwater n'est pas différent, au fond, que d'ordonner directement à Redwater ou à GTL de procéder à ces travaux. Il en est ainsi parce que l'AER atteint exactement le même résultat — le respect des obligations environnementales de Redwater — en faisant dépendre la vente de l'exécution des travaux par GTL lui-même, du versement par celle-ci d'un dépôt de garantie ou de l'inclusion des biens inexploités dans la vente, ce qui réduit le prix de vente du montant exact de ces engagements et permet de contraindre l'acheteur, en tant que « titulaire de permis » subséquent sous le régime de la loi provinciale, à se conformer aux ordonnances d'abandon.

[281] La seule différence entre ces deux exercices d'un pouvoir provincial est le moyen par lequel l'AER a choisi de faire exécuter les obligations sous-jacentes. Les ordonnances d'abandon comportent un risque de responsabilité pour non-respect; l'imposition de conditions à la vente des actifs de Redwater, par contre, ne crée pas formellement de responsabilité, mais empêche effectivement toute vente de se réaliser tant et aussi longtemps qu'il n'est pas satisfait à ces obligations. Étant donné que le syndic doit vendre les biens afin de remplir

is the same as that of issuing abandonment orders — and, as my colleague acknowledges, it is the effect of provincial action, not its intent or its form, that is central to the paramountcy analysis (para. 116; see also *Husky Oil*, at para. 40). In either case, then, the effect of the AER's action is to create a debt enforcement scheme — one that requires the environmental obligations owed to the AER to be discharged ahead of the bankrupt's other debts.

[282] Second, it is irrelevant to this analysis that the licensing requirements predate Redwater's bankruptcy and apply to all licensees. This is no different from *Abitibi*, where the obligation to close down and remediate the properties predated AbitibiBowater's bankruptcy and could also have been said to constitute an "inherent" limitation on the value of the regulatory licence. Yet the obligations at issue there were provable claims. So too here. Alberta is, of course, free to affect the priority of claims in non-bankruptcy contexts. For example, it can leverage its licensing power to condition the sale of assets by *solvent* corporations on the payment of outstanding debts to the province. But "once bankruptcy has occurred [the *BIA*] determines the status and priority of the claims" (*Husky Oil*, at para. 32, quoting A. J. Roman and M. J. Sweatman, "The Conflict Between Canadian Provincial Personal Property Security Acts and The Federal Bankruptcy Act: The War is Over" (1992), 71 *Can. Bar Rev.* 77, at p. 79).

[283] In this case, imposing conditions on the sale of Redwater's valuable assets *does* result in a monetary debt in the AER's favour, whether in the form of: (1) the posting of security; (2) actual completion of the environmental work; or (3) the sale of the non-producing properties to another entity that is then regulated as a "licensee" and, as such, can be compelled under provincial law to complete the work. In each case, the result is the same: the AER is conditioning any sale of Redwater's assets on its

son mandat, l'*effet* de l'imposition de conditions à la vente des biens de Redwater est le même que celui des ordonnances d'abandon — et, comme le reconnaît mon collègue, c'est l'effet de l'action provinciale, et non son intention ou sa forme, qui est au cœur de l'analyse relative à la prépondérance (par. 116; voir aussi *Husky Oil*, par. 40). L'effet de l'action de l'AER est donc, dans les deux cas, de créer un régime de recouvrement des créances — qui exige que les obligations environnementales envers l'AER soient acquittées avant les autres dettes du failli.

[282] Ensuite, le fait que les exigences en matière de permis précèdent la faillite et s'appliquent à tous les titulaires de permis n'est pas pertinent pour les besoins de la présente analyse. La situation n'est pas différente de celle dans l'affaire *Abitibi*, où l'obligation de fermer et de décontaminer les biens précédait la faillite d'AbitibiBowater et aurait également pu être considérée comme constituant une limite « inhérente » à la valeur du permis réglementaire. Pourtant, les obligations en cause dans cette affaire étaient des réclamations prouvables. C'est également le cas en l'espèce. Il est certes loisible à l'Alberta de modifier l'ordre de priorité des réclamations dans un contexte autre que celui d'une faillite. Par exemple, elle peut se servir de son pouvoir de délivrer des permis pour faire dépendre la vente des biens des sociétés *solvables* du paiement des dettes impayées envers la province. Mais « dès qu'il y a faillite, c'est [la *LFI*] qui détermine le statut et l'ordre de priorité des réclamations » (*Husky Oil*, par. 32, citant A. J. Roman et M. J. Sweatman, « The Conflict Between Canadian Provincial Personal Property Security Acts and the Federal Bankrupcy Act : The War is Over » (1992), 71 *R. du B. can.* 77, p. 79).

[283] En l'espèce, l'imposition de conditions à la vente des actifs de valeur de Redwater entraîne *bel et bien* une créance pécuniaire en faveur de l'AER, que ce soit sous forme : (1) de versement d'un dépôt de garantie; (2) d'achèvement réel des travaux environnementaux; ou (3) de vente des biens inexploités à une autre entité qui est alors réglementée comme « titulaire de permis » et qui peut ainsi être contrainte en application de la loi provinciale à mener à bien les travaux. Dans un cas comme dans l'autre, le résultat

ability to recover a pre-existing debt owed to it by the bankrupt.

[284] An approach which artificially separates the Abandonment Orders and the transfer requirements in order to treat them as analytically distinct under the *Abitibi* test would cause the paramountcy analysis to turn on irrelevant subtleties in the manner or form in which the province has chosen to exercise its power. The two measures must be seen in tandem as the AER's means of enforcing a debt against the Redwater estate. As I have described, there is no meaningful difference in the bankruptcy context between a formal abandonment order directing a trustee to engage in remediation work and a rigid licensing system that imposes the exact same obligations as a condition of sale — a sale that, if the trustee is to carry out its mandate, *must* occur. The only effect of the majority's analysis is to encourage regulators to collect on their debts in more creative ways. None of this serves the purposes of paramountcy; and, more critically, nothing in that analysis offers insolvency professionals (or regulators, for that matter) clear guidance as to the types of obligations that will or will not satisfy the *Abitibi* test.

[285] Since it is sufficiently certain that the AER (or the OWA, as its delegate) will complete the abandonment and reclamation work, all three prongs of the *Abitibi* test are satisfied. The Abandonment Orders are provable claims, and therefore the AER may not compel Redwater or its trustee to fulfill the obligations in question outside of the *BIA*'s priority scheme. Likewise, the AER may not condition the sale of Redwater's valuable assets on the performance of those same obligations.

[286] Towards the end of its analysis, the majority makes the point that the AER's enforcement actions in this case facilitate, rather than frustrate,

est le même : l'AER fait dépendre la vente des biens de Redwater de sa capacité de recouvrer une dette préexistante que lui devait le failli.

[284] Une approche qui différencie artificiellement les ordonnances d'abandon et les exigences relatives au transfert afin de leur réserver un traitement distinct sur le plan analytique en application du critère *Abitibi* ferait reposer l'analyse relative à la prépondérance sur des subtilités non pertinentes concernant la manière dont la province a choisi d'exercer son pouvoir ou la forme que prend ce choix. Les deux mesures doivent être considérées ensemble comme le moyen employé par l'AER pour recouvrer une créance à l'encontre de l'actif de Redwater. Comme je l'ai expliqué, il n'existe aucune différence significative dans le contexte de la faillite entre une ordonnance officielle d'abandon enjoignant au syndic de procéder à des travaux de décontamination et un système de délivrance de permis rigide qui impose exactement les mêmes obligations comme condition de la vente — une vente qui, si le syndic veut remplir son mandat, *doit* avoir lieu. Le seul effet qu'a l'analyse de la majorité est d'encourager les organismes de réglementation à trouver des façons plus ingénieuses de recouvrer leurs créances. Rien de tout cela ne sert les fins de la prépondérance; et, fait plus important, rien dans cette analyse ne donne aux professionnels de l'insolvabilité (ni aux organismes de réglementation, d'ailleurs) des indications claires quant aux types d'obligations qui peuvent ou non satisfaire au test *Abitibi*.

[285] Comme il est suffisamment certain que l'AER (ou l'OWA, sa délégataire) achèvera les travaux d'abandon et de remise en état, il est satisfait aux trois volets du test *Abitibi*. Les ordonnances d'abandon sont des réclamations prouvables, et l'AER ne peut donc contraindre Redwater ou son syndic à acquitter les obligations en cause à l'extérieur du régime de priorité établi par la *LFI*. De la même façon, l'AER ne peut faire dépendre la vente des biens de valeur de Redwater de l'exécution de ces mêmes obligations.

[286] Vers la fin de son analyse, la majorité soutient que les mesures d'application prises par l'AER en l'espèce favorisent, au lieu de contrecarrer, la

Parliament's intentions behind the *BIA* priority scheme due to the super priority for environmental remediation costs set out in s. 14.06(7) (para. 159). Respectfully, I completely reject this contention. No party attempted to argue that the super priority in subs. (7) was applicable on the facts of this case. Indeed, it is clear that it is not, as the majority itself acknowledges. I cannot accept that where Parliament has set out a particular super priority for the Crown for environmental remediation costs, secured against specific real property assets of the bankrupt, and where certain conditions are met, it somehow "facilitates" Parliament's priority scheme to, in effect, impose that super priority over other assets, in the absence of those statutory conditions being satisfied. It is wrong to rely on s. 14.06(7) to recognize an effective super priority for the AER in circumstances where the terms of that subsection are inapplicable. Doing so clearly undermines the detailed and comprehensive priority scheme that Parliament set out in the *BIA* to achieve its purposes. Had Parliament wished to extend a Crown super priority for environmental remediation costs beyond the circumstances in s. 14.06(7), it could have done so.

[287] As a final note, GTL and ATB Financial advance alternative arguments that some aspects of Alberta's statutory regime, including the definition of "licensee", frustrate the purposes of the 1997 amendments to the *BIA* — purposes that, they say, include protecting insolvency professionals from liability and reducing the number of orphaned sites.

[288] It is not strictly necessary for me to address these arguments, since I have already found that there is an operational conflict (the Alberta regime's failure to recognize the lawfulness of GTL's disclaimers) as well as a frustration of purpose on other grounds (interference with the *BIA*'s priority scheme). I would note, however, that GTL has stated that it would immediately seek a discharge if it were required to carry out the abandonment work, which would result

réalisation des intentions du Parlement qui sous-tendent le régime de priorité de la *LFI* en raison de la superpriorité prévue au par. 14.06(7) pour les frais de décontamination environnementale (par. 159). Avec égards, je rejette entièrement cette prétention. Aucune partie n'a tenté de faire valoir que la superpriorité visée au par. (7) s'appliquait aux faits de l'espèce. En effet, elle ne s'applique clairement pas, comme le reconnait elle-même la majorité. Je ne peux accepter que, dans les cas où le Parlement a conféré à la Couronne une superpriorité lorsque certaines conditions sont réunies pour les frais de décontamination environnementale et l'a garantie par une sûreté sur certains biens réels du failli, on « favorise » d'une façon ou d'une autre le régime de priorité du Parlement en imposant dans les faits cette superpriorité sur d'autres biens alors que ces conditions statutaires ne sont pas remplies. Il est erroné d'invoquer le par. 14.06(7) pour reconnaître à l'AER une superpriorité dans des situations où les conditions de ce paragraphe ne s'appliquent pas. Agir de la sorte sape clairement le régime de priorité détaillé et complet que le Parlement a établi dans la *LFI* pour réaliser ses objectifs. Si le Parlement avait souhaité étendre une superpriorité de la Couronne pour des frais de décontamination environnementale dans d'autres cas que ceux visés au par. 14.06(7), il aurait pu le faire.

[287] En terminant, GTL et ATB Financial font valoir des arguments subsidiaires selon lesquels certains aspects du régime de réglementation albertain, notamment la définition de « titulaire de permis », entravent la réalisation des objets des modifications apportées à la *LFI* en 1997 — objets qui, affirment-ils, comprennent la protection des professionnels de l'insolvabilité contre la responsabilité et la réduction du nombre de sites orphelins.

[288] Il n'est pas strictement nécessaire que j'examine ces arguments, car j'ai déjà conclu qu'il existe un conflit d'application (la non-reconnaissance par le régime albertain de la légalité des renonciations de GTL) ainsi qu'une entrave à la réalisation d'objet pour d'autres motifs (atteinte au régime de priorité établi par la *LFI*). Je tiens toutefois à souligner que GTL a déclaré qu'elle demanderait immédiatement une libération si elle était tenue d'exécuter les

in the remaining Redwater assets being surrendered to the OWA. The result in this circumstance, which does not appear to be acknowledged, or which appears to be ignored, in my colleague's reasons, would be *more* orphaned oil wells. To the extent, then, that the 1997 amendments were intended to reduce the number of orphaned properties, that purpose is also frustrated by preventing a receiver or trustee from disclaiming value-negative assets.

IV. Conclusion

[289] There is much to be said in the context of this appeal about which outcome will optimally balance environmental protection and economic development. On the one hand, enforcing the AER's remediation orders would effectively wipe out the estate's remaining value and leave all of its creditors (except the AER) without any recovery. It would also likely discourage insolvency professionals from accepting mandates in cases such as this one — potentially resulting in more orphaned properties across the province. On the other hand, permitting GTL to disclaim the non-producing wells and preventing the AER from enforcing environmental obligations before the estate's value is depleted would leave open the question of who, exactly, should foot the bill for remediating the affected land.

[290] Whatever the merits of these competing positions, in matters of statutory interpretation this Court is one of law, not of policy. As the majority recognizes, at para. 30, "it is not the role of this Court to decide the best regulatory approach to the oil and gas industry"; decisions on these matters are made — indeed, they *have been made* — by legislators, not judges. And the law in this case supports only one outcome. But this does not mean that the AER is without options to protect the public from bearing the costs of abandoning oil wells. It could adjust its LMR requirements to prevent other oil companies from reaching the point of bankruptcy with unfunded abandonment obligations (as it has already done since this litigation began). It could

travaux d'abandon, ce qui entraînerait la cession du reste des biens de Redwater à l'OWA. Il en résulterait, ce qui ne semble pas être reconnu ou paraît être passé sous silence dans les motifs de mon collègue, un nombre *plus élevé* de puits de pétrole orphelins. Dans la mesure où les modifications de 1997 étaient censées entraîner une réduction du nombre de biens orphelins, la réalisation de cet objet est également entravée en empêchant le séquestre ou le syndic de renoncer aux biens ayant une valeur négative.

IV. Conclusion

[289] Il y a beaucoup à dire, dans le contexte du présent pourvoi, sur l'issue qui établirait un équilibre optimal entre la protection de l'environnement et le développement économique. D'une part, faire exécuter les ordonnances de décontamination de l'AER aurait pour effet d'éliminer la valeur restante de l'actif et priverait tous ses créanciers (sauf l'AER) de tout recouvrement. En outre, cela découragerait vraisemblablement les professionnels de l'insolvabilité d'accepter des mandats dans des cas comme celui qui nous occupe, ce qui pourrait occasionner une augmentation du nombre de biens orphelins dans l'ensemble de la province. D'autre part, permettre à GTL de renoncer aux puits inexploités en empêchant l'AER de faire exécuter les obligations environnementales avant que l'actif soit épuisé laisserait sans réponse la question de savoir qui, exactement, devrait payer la facture de la décontamination des terrains concernés.

[290] Quel que soit le bien-fondé de ces positions opposées en matière d'interprétation statutaire, notre Cour est un tribunal de droit, et non de politique. Comme le reconnaît la majorité (par. 30), « il ne revient pas à notre Cour de décider de la meilleure approche réglementaire pour l'industrie pétrolière et gazière » : les décisions sur ces enjeux sont prises — et ont d'ailleurs *été prises* — par les législateurs, et non par les juges. Et le droit en l'espèce n'appuie qu'une seule issue. Mais cela ne veut pas dire qu'aucune solution ne s'offre à l'AER pour empêcher le public d'avoir à supporter les frais liés à l'abandon des puits de pétrole. Il pourrait ajuster ses exigences relatives à la RGTP afin d'éviter que d'autres sociétés pétrolières soient acculées à la faillite en raison

adopt strategies used in other jurisdictions, such as requiring the posting of security up-front so that abandonment costs are not borne entirely at the end of an oil well's life cycle. One of the interveners, the Canadian Bankers' Association, noted that such systems of up-front bonding are prevalent in American jurisdictions. The AER could work with industry to increase levies so that the orphan fund has sufficient resources to respond to the recent increase in the number of orphaned properties. It could seek judicial intervention in cases where it suspects that a company is strategically using insolvency as a voluntary step to avoid its environmental liabilities (*Sydco Energy Inc. (Re)*, 2018 ABQB 75, 64 Alta. L.R. (6th) 156, at para. 84). And, as I have noted, it can continue to apply the province's statutory regime to all assets of an insolvent or bankrupt debtor that are retained by a receiver or trustee, including wells and facilities that the receiver or trustee seeks to operate rather than sell.

d'obligations d'abandon non financées (comme il l'a déjà fait depuis que le présent litige a commencé). Il pourrait adopter les stratégies utilisées dans d'autres ressorts, comme exiger dès le début le versement d'un dépôt de garantie afin que les frais liés à l'abandon ne soient pas entièrement supportés à la fin du cycle de vie du puits de pétrole. L'une des intervenants, l'Association des banquiers canadiens, a fait remarquer que de tels systèmes de dépôts de garantie au départ abondent dans les États américains. L'AER pourrait collaborer avec l'industrie pour augmenter les prélèvements afin que le fonds pour les puits orphelins dispose de ressources suffisantes pour répondre à la récente augmentation du nombre de biens orphelins. Il pourrait solliciter l'intervention des tribunaux dans les cas où il soupçonne une société d'utiliser stratégiquement l'insolvabilité comme une mesure facultative lui permettant de se soustraire à ses engagements environnementaux (*Sydco Energy Inc. (Re)*, 2018 ABQB 75, 64 Alta. L.R. (6th) 156, par. 84). Et, comme je l'ai mentionné, il peut continuer d'appliquer le régime législatif provincial à tous les biens d'un débiteur insolvable ou en faillite qui sont conservés par un séquestre ou un syndic, y compris les puits et installations que le séquestre ou le syndic veut exploiter plutôt que de les vendre.

[291] The AER may not, however, disregard federal bankruptcy law in the pursuit of otherwise valid statutory objectives. Yet that is precisely what it has done here by effectively displacing the "polluter-pays" principle enacted by Parliament in favour of a "lender-pays" regime, in which responsibility for the bankrupt's environmental liabilities is transferred to the estate's creditors. Our paramountcy jurisprudence does not permit that result.

[291] L'AER ne peut pas, cependant, faire abstraction du droit fédéral de la faillite pour atteindre des objectifs statutaires par ailleurs valides. Or, c'est précisément ce qu'il a fait en l'espèce en écartant effectivement le principe du « pollueur-payeur » adopté par le Parlement en faveur d'un régime du « prêteur-payeur », dans le cadre duquel la responsabilité à l'égard des engagements environnementaux du failli passe aux créanciers de l'actif. Notre jurisprudence en matière de prépondérance n'admet pas ce résultat.

[292] For the foregoing reasons, I would dismiss the appeal and affirm the orders made by the chambers judge.

[292] Pour les motifs qui précèdent, je suis d'avis de rejeter le pourvoi et de confirmer les ordonnances rendues par le juge en cabinet.

APPENDIX

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

14.06 (1) No trustee is bound to assume the duties of trustee in matters relating to assignments, bankruptcy orders or proposals, but having accepted an appointment in relation to those matters the trustee shall, until discharged or another trustee is appointed in the trustee's stead, perform the duties required of a trustee under this Act.

(1.1) In subsections (1.2) to (6), a reference to a trustee means a trustee in a bankruptcy or proposal and includes

(a) an interim receiver;

(b) a receiver within the meaning of subsection 243(2); and

(c) any other person who has been lawfully appointed to take, or has lawfully taken, possession or control of any property of an insolvent person or a bankrupt that was acquired for, or is used in relation to, a business carried on by the insolvent person or bankrupt.

. . .

(2) Notwithstanding anything in any federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

(a) before the trustee's appointment; or

(b) after the trustee's appointment unless it is established that the condition arose or the damage occurred as a result of the trustee's gross negligence or wilful misconduct or, in the Province of Quebec, the trustee's gross or intentional fault.

(3) Nothing in subsection (2) exempts a trustee from any duty to report or make disclosure imposed by a law referred to in that subsection.

(4) Notwithstanding anything in any federal or provincial law but subject to subsection (2), where an order is made which has the effect of requiring a trustee to remedy

ANNEXE

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, c. B-3

14.06 (1) Le syndic n'est pas tenu d'assumer les fonctions de syndic relativement à des cessions, à des ordonnances de faillite ou à des propositions concordataires; toutefois, dès qu'il accepte sa nomination à ce titre, il doit accomplir les fonctions que la présente loi lui impose, jusqu'à ce qu'il ait été libéré ou qu'un autre syndic ait été nommé à sa place.

(1.1) Les paragraphes (1.2) à (6) s'appliquent également aux syndics agissant dans le cadre d'une faillite ou d'une proposition ainsi qu'aux personnes suivantes :

a) les séquestres intérimaires;

b) les séquestres au sens du paragraphe 243(2);

c) les autres personnes qui sont nommément habilitées à prendre — ou ont pris légalement — la possession ou la responsabilité d'un bien acquis ou utilisé par une personne insolvable ou un failli dans le cadre de ses affaires.

. . .

(2) Par dérogation au droit fédéral et provincial, le syndic est, ès qualités, dégagé de toute responsabilité personnelle découlant de tout fait ou dommage lié à l'environnement survenu avant ou après sa nomination, sauf celui causé par sa négligence grave ou son inconduite délibérée ou, dans la province de Québec, par sa faute lourde ou intentionnelle.

(3) Le paragraphe (2) n'a pas pour effet de soustraire le syndic à une obligation de faire rapport ou de communiquer des renseignements prévue par le droit applicable en l'espèce.

(4) Par dérogation au droit fédéral et provincial, mais sous réserve du paragraphe (2), le syndic est, ès qualités, dégagé de toute responsabilité personnelle découlant du

any environmental condition or environmental damage affecting property involved in a bankruptcy, proposal or receivership, the trustee is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, or during the period of the stay referred to in paragraph (b), the trustee

(i) complies with the order, or

(ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property, or any right in any immovable, affected by the condition or damage;

(b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a), within ten days after the order is made or within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, by

(i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the trustee to contest the order, or

(ii) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(c) if the trustee had, before the order was made, abandoned or renounced or been divested of any interest in any real property, or any right in any immovable, affected by the condition or damage.

(5) The court may grant a stay of the order referred to in subsection (4) on such notice and for such period as the court deems necessary for the purpose of enabling the trustee to assess the economic viability of complying with the order.

(6) If the trustee has abandoned or renounced any interest in any real property, or any right in any immovable, affected by the environmental condition or environmental

non-respect de toute ordonnance de réparation de tout fait ou dommage lié à l'environnement et touchant un bien visé par une faillite, une proposition ou une mise sous séquestre administrée par un séquestre, et de toute responsabilité personnelle relativement aux frais engagés par toute personne exécutant l'ordonnance :

a) si, dans les dix jours suivant l'ordonnance ou dans le délai fixé par celle-ci, dans les dix jours suivant sa nomination si l'ordonnance est alors en vigueur ou pendant la durée de la suspension visée à l'alinéa b) :

(i) il s'y conforme,

(ii) il abandonne, après avis à la personne ayant rendu l'ordonnance, tout droit sur l'immeuble en cause ou tout intérêt sur le bien réel en cause, en dispose ou s'en dessaisit;

b) pendant la durée de la suspension de l'ordonnance qui est accordée, sur demande présentée dans les dix jours suivant l'ordonnance visée à l'alinéa a) ou dans le délai fixé par celle-ci, ou dans les dix jours suivant sa nomination si l'ordonnance est alors en vigueur :

(i) soit par le tribunal ou l'autorité qui a compétence relativement à l'ordonnance, en vue de permettre au syndic de la contester,

(ii) soit par le tribunal qui a compétence en matière de faillite, en vue d'évaluer les conséquences économiques du respect de l'ordonnance;

c) si, avant que l'ordonnance ne soit rendue, il avait abandonné tout droit sur l'immeuble en cause ou tout intérêt sur le bien réel en cause ou y avait renoncé, ou s'en était dessaisi.

(5) En vue de permettre au syndic d'évaluer les conséquences économiques du respect de l'ordonnance, le tribunal peut en ordonner la suspension après avis et pour la période qu'il estime indiqués.

(6) Si le syndic a abandonné tout droit sur l'immeuble en cause ou tout intérêt sur le bien réel en cause ou y a renoncé, les réclamations pour les frais de réparation du

damage, claims for costs of remedying the condition or damage shall not rank as costs of administration.

(7) Any claim by Her Majesty in right of Canada or a province against the debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor is secured by security on the real property or immovable affected by the environmental condition or environmental damage and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage, and the security

(a) is enforceable in accordance with the law of the jurisdiction in which the real property or immovable is located, in the same way as a mortgage, hypothec or other security on real property or immovables; and

(b) ranks above any other claim, right, charge or security against the property, despite any other provision of this Act or anything in any other federal or provincial law.

(8) Despite subsection 121(1), a claim against a debtor in a bankruptcy or proposal for the costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor shall be a provable claim, whether the condition arose or the damage occurred before or after the date of the filing of the proposal or the date of the bankruptcy.

Appeal allowed, MOLDAVER *and* CÔTÉ JJ. *dissenting.*

Solicitors for the appellants: Bennett Jones, Calgary; Alberta Energy Regulator, Calgary.

Solicitors for the respondents: Blake, Cassels & Graydon, Calgary; Cassels Brock & Blackwell, Calgary; Gowling WLG (Canada), Calgary.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

fait ou dommage lié à l'environnement et touchant le bien ne font pas partie des frais d'administration.

(7) En cas de faillite, de proposition ou de mise sous séquestre administrée par un séquestre, toute réclamation de Sa Majesté du chef du Canada ou d'une province contre le débiteur pour les frais de réparation du fait ou dommage lié à l'environnement et touchant un de ses immeubles ou biens réels est garantie par une sûreté sur le bien en cause et sur ceux qui sont contigus à celui où le dommage est survenu et qui sont liés à l'activité ayant causé le fait ou le dommage; la sûreté peut être exécutée selon le droit du lieu où est situé le bien comme s'il s'agissait d'une hypothèque ou autre garantie sur celui-ci et, par dérogation aux autres dispositions de la présente loi et à toute règle de droit fédéral et provincial, a priorité sur tout autre droit, charge, sûreté ou réclamation visant le bien.

(8) Malgré le paragraphe 121(1), la réclamation pour les frais de réparation du fait ou dommage lié à l'environnement et touchant l'immeuble ou le bien réel du débiteur constitue une réclamation prouvable, que la date du fait ou dommage soit antérieure ou postérieure à celle de la faillite ou du dépôt de la proposition.

Pourvoi accueilli, les juges MOLDAVER *et* CÔTÉ *sont dissidents.*

Procureurs des appelants : Bennett Jones, Calgary; Alberta Energy Regulator, Calgary.

Procureurs des intimées : Blake, Cassels & Graydon, Calgary; Cassels Brock & Blackwell, Calgary; Gowling WLG (Canada), Calgary.

Procureur de l'intervenante la procureure générale de l'Ontario : Procureure générale de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General of Saskatchewan, Regina.

Procureur de l'intervenant le procureur général de la Saskatchewan : Procureur général de la Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Procureur de l'intervenant le procureur général de l'Alberta : Procureur général de l'Alberta, Edmonton.

Solicitor for the intervener Ecojustice Canada Society: Ecojustice Clinic at the University of Ottawa, Ottawa.

Procureur de l'intervenante Ecojustice Canada Society : Clinique Ecojustice à l'Université d'Ottawa, Ottawa.

Solicitors for the intervener the Canadian Association of Petroleum Producers: Lawson Lundell, Calgary.

Procureurs de l'intervenante l'Association canadienne des producteurs pétroliers : Lawson Lundell, Calgary.

Solicitors for the intervener Greenpeace Canada: Stockwoods, Toronto.

Procureurs de l'intervenante Greenpeace Canada : Stockwoods, Toronto.

Solicitor for the intervener Action Surface Rights Association: University of Calgary Public Interest Law Clinic, Calgary.

Procureur de l'intervenante Action Surface Rights Association : University of Calgary Public Interest Law Clinic, Calgary.

Solicitors for the intervener the Canadian Association of Insolvency and Restructuring Professionals: McMillan, Calgary.

Procureurs de l'intervenante l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation : McMillan, Calgary.

Solicitors for the intervener the Canadian Bankers' Association: Norton Rose Fulbright Canada, Calgary.

Procureurs de l'intervenante l'Association des banquiers canadiens : Norton Rose Fulbright Canada, Calgary.

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Court File No. M19800 (C24399)

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE BANKRUPTCY OF CONFEDERATION TREASURY SERVICES LIMITED, a corporation incorporated under the laws of the Province of Ontario having its head office in the City of Toronto, in the Municipality of Metropolitan Toronto, Province of Ontario, and

IN THE MATTER OF the Winding-Up Act, and

IN THE MATTER OF the Liquidation of Confederation Life Insurance Company

BEFORE: **CATZMAN, CARTHY and MOLDAVER JJ.A.**

COUNSEL: **Peter H. Griffin and Risa Kirshblum for Ernst & Young**

A. Sternberg for former directors and officers of Confederation Life Insurance Company and Confederation Treasury Services Limited

William G. Horton for the Rehabilitator of Confederation Life Insurance Company in the United States

R.N. Robertson and E. Lamek for the trustee of the estate of Confederation Treasury Services Limited, a bankrupt

HEARD: **December 19, 1996**

ENDORSEMENT

Ernst & Young ("E&Y") filed a proof of claim, dated February 21st, 1996, with the trustee of the estate of Confederation Treasury Services Limited ("the trustee"). In one of several orders made on April 8th, 1996, Farley J. granted a motion by the trustee disallowing E&Y's proof of claim. No appeal was taken from this order until its significance became apparent during the argument of the appeal from another order made by Farley J. on the same day. In that appeal, E&Y and the former directors and officers of Confederation Life Insurance Company and Confederation Treasury Services Limited ("the

directors and officers") sought an order that would entitle them to assert a claim against the trustee for relief arising out of their potential liability in an action now pending in Michigan. But only a creditor may seek such leave: see ss. 69 *ff.* of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 ("the *BIA*"). Section 2 of the *BIA* defines "creditor" to mean a person having a claim, preferred, secured or unsecured, provable as a claim under the *Act*, and defines "claim provable in bankruptcy", "provable claim" and "claim provable" to include any claim or liability provable in proceedings under the *Act* by a creditor. The trustee resisted the other appeal on a number of grounds, including the ground that, because E&Y's proof of claim had been disallowed, it was not a "creditor" entitled to the relief it sought.

E&Y immediately brought this motion for leave to extend the time to appeal from the order disallowing its proof of claim. The uncontradicted evidence of E&Y is that it always intended to appeal the whole of the disposition of Farley J. made on April 8th, 1996 which had the result of foreclosing its entitlement to assert a claim for contribution and indemnity from the trustee, and we are not satisfied that the trustee would suffer any prejudice from the granting of such leave. Leave to extend the time to appeal from the order disallowing the proof of claim is therefore granted.

We turn to the appeal itself. Section 121 of the *BIA* deems all debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the

bankrupt becomes bankrupt to be claims provable in proceedings under the Act. Section 121(2) makes specific reference to contingent claims and unliquidated claims. The claim of E&Y is, on its face, a contingent claim and, because E & Y is subject to a claim for treble damages in the Michigan proceedings, is not the same as the claim asserted against the trustee in Ontario by the Rehabilitator and exceeds that claim to the extent that any such damages may be awarded over and above the amount that may be awarded against the trustee.

In so far as the cases of *Claude Resources Inc. (Trustee of) v. Dutton* (1993), 22 C.B.R. (3d) 56 and *Re Wiebe* (1995), 30 C.B.R. (3d) 109, relied upon by the trustee, articulate as a test for a valid contingent claim the need for probability of liability arising from the court proceedings in question, we believe that they impose too high a threshold for the establishment of such a claim. While there may be claims so remote and speculative in nature that they could not properly be considered contingent claims, the claim of E&Y in the present case for contribution and indemnity in respect of the relief sought against it in the Michigan proceedings does not fall into that category and, in our view, constitutes a valid contingent claim within the contemplation of sec. 121 of the *BIA*.

Accordingly, the appeal from the order disallowing E&Y's proof of claim is allowed and, in its place, a declaration will issue that E&Y's contingent claim is a claim provable in the bankruptcy of Confederation Treasury Services Limited. Pursuant to s. 121(2) of the *BIA*, the matter is remitted to the Ontario Court (General Division) to value

E&Y's claim upon such evidence as may be adduced by the parties in respect of such valuation and E&Y's claim shall be deemed a proved claim to the amount of its valuation.

It has been common ground throughout the argument of these appeals that the directors and officers, who have not yet filed a proof of claim with the trustee, fall into the same category as E&Y with respect to the relief sought against them in the Michigan proceedings. Such a proof of claim, as and when it is filed by the directors and officers, is to be treated in the same manner as we have directed in respect of E&Y's proof of claim.

Having regard to the circumstances out of which the appeal from the disallowance of E&Y's proof of claim arose, we order that there should be no costs of this appeal except the usual order for payment of the costs of the trustee out of the estate of Confederation Treasury Services Limited.

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Ontario Supreme Court
Wiebe, Re
Date: 1995-02-06

Re bankruptcy of Peter Victor Wiebe

Ontario Court of Justice (General Division) [In Bankruptcy] Kozak J.

Judgment – February 6, 1995.

(Doc. 48-94B)

[1] February 6, 1995. KOZAK J.: – This is an application pursuant to R. 94 of the *Bankruptcy Act* for a determination as to whether the contingent claim of the Thunder Bay District Health Unit is a provable claim and, if so, the value of the said claim.

Factual Background

[2] The bankrupt, Peter Victor Wiebe, is a dentist who is licensed and duly qualified to carry on a private practice in the Province of Ontario. An assignment in bankruptcy was filed on his behalf on November 5, 1993. On November 25, 1993, a proof of claim was filed by the Thunder Bay District Health Unit in which the sum of $94,458.58 was shown as an unsecured debt owing by the bankrupt to the said creditor. The amount shown as being owing arises out of an agreement, in writing, dated January 2, 1992 under which the Thunder Bay District Health Unit advanced to Doctor Wiebe the sum of $94,458.58 for the purpose of becoming qualified as a Dental Director in Public Health so that the Health Unit could hire him as its Dental Director. In this regard I take it that Doctor Wiebe successfully completed the necessary courses to qualify himself to practice as a Dental Director in Dental Public Health in the Province of Ontario, and that he commenced employment with the Health Unit in that capacity on September 1, 1993. The affidavit material filed indicates that he continues to be so employed.

[3] Paragraph 5 of the agreement between Doctor Wiebe and the Health Unit states:

> Provided the Dentist successfully obtains the necessary qualifications and is employed by the Health Unit for the period September 1, 1993 to February 28, 1998 as its Dental Director then all monies loaned to him or paid on his behalf by the Health Unit shall be forgiven.

On the other hand, para. 3(d) states:

> Except in the occurrence of death or permanent disability in the event that the Dentist enters employment with the Health Unit but his employment is terminated before completing the required period of service of 54 months commencing September 1, 1993 to February 28, 1998 of such service, then all monies advanced to the Dentist or on his behalf pursuant to paragraph 2 shall forthwith be due and payable on demand by him to the Health Unit together with interest at the rate of 11 percent per annum calculated from the dates of the respective advances or payments on his behalf.

[4] On August 5, 1994 a discharge hearing took place at which time the bankrupt's discharge was ordered suspended for a period of four months and he was discharged on December 5, 1994. Subsequent to the discharge the trustee came into possession of an unexpected sum in the amount of $2,500 and now wishes to have this amount paid out to the unsecured creditors. Hence the need to have the contingent claim of the Thunder Bay Health Unit determined as a provable claim and valued.

Legal Considerations

[5] Section 121(1) makes it clear that only debts to which the debtor is liable before the date of the bankruptcy or those to which he may become subject before his discharge, by reason of an obligation incurred before the bankruptcy, share in the assets vested in the trustee.

[6] Rule 94(1) provides that when a contingent or unliquidated claim is filed with the trustee, he shall, unless he compromises the claim, apply to the Court to determine whether the claim is a provable claim and, if so, to value the claim.

[7] A provable claim must be one recoverable by legal process (*Farm Credit Corp. v. Holowach (Trustee of)* (1988), 68 C.B.R. (N.S.) 255 (Alta. C.A.)). To be a provable claim under s. 121(2), a claim must not be too remote and speculative. To establish that a contingent claim or unliquidated claim is a provable claim, a creditor must prove more than he has been sued, and that he has an indemnity agreement from the bankrupt. There has to be an element of probability of liability arising from the Court proceedings. If there are too many ifs about the action and the applicability of the indemnity agreement before a provable claim comes into being, the claim is not a provable claim under s. 121(2). See *Claude Resources Inc. (Trustee of) v. Dutton* (1993), 22 C.B.R. (3d) 56 (Sask. Q.B.).

Decision

[8] This is a case where the bankrupt has now been employed as the Dental Director of the Health Unit since September 1, 1993 and it

would appear that he is performing his job function in a satisfactory manner. According to the Trustee, there is no present intention, on the part of the bankrupt, to leave his current employment, nor is there any indication at the present time, on behalf of the Health Unit, to terminate the employment of the bankrupt. The parties are content with the present arrangement which has existed for the past 18 months, and it is anticipated that the status will prevail until February 28, 1998 at which time the loan to the bankrupt will be forgiven. And yet, the contingency that the bankrupt might leave his employment or be terminated by his employer prior to February 28, 1998 and thereby incur liability for the loan is not so speculative or remote a probability as to render the creditor's claim unprovable. There are any number of reasons as to why a person might leave a position such as this or be terminated for cause. The bankrupt might receive a better job offer, wish to return to private practice, or move to another area. On the other hand, there might be misconduct or misbehaviour on the part of the bankrupt in the performance of his duties that could result in his dismissal prior to the expiration of the 54 month period. There is a case to be made for the Court to consider some factor for the happening of the contingency in this case. Accordingly, it is the finding of this Court that the creditor, Thunder Bay District Health Unit, has proven its claim.

[9] As to the value of the said claim, the Court must look to what is reasonable in the circumstances. Given the current state of satisfaction of the parties, the tenure of the bankrupt on the job and the period remaining in the agreement, this Court values the claim at approximately ten percent of its face value which would be $9,500.

Order accordingly.

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Schnier v. The Attorney General of Canada
[Indexed as: Schnier v. Canada (Attorney General)]

Ontario Reports

Court of Appeal for Ontario,

Gillese, Blair and D.M. Brown JJ.A.

January 6, 2016

128 O.R. (3d) 537 | 2016 ONCA 5

Case Summary

Bankruptcy and insolvency — Discharge — Personal income tax debt — Amount of assessed personal income tax that was under appeal at time of bankrupt's discharge hearing not included in calculating bankrupt's personal income tax debt under s. 172.1(1) of Bankruptcy and Insolvency Act — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 172.1(1). [page538]

At the time of the bankrupt's discharge, he had unpaid income tax assessments totalling approximately $4.478 million. About $4.424 million of that amount was subject to outstanding appeals by the bankrupt to the Tax Court of Canada. If the full assessed amount was considered part of his personal income tax debt, s. 172.1 of the Bankruptcy and Insolvency Act would apply to his bankruptcy; if the appealed amounts were excluded, s. 172.1 would not apply. The registrar in bankruptcy held that s. 172.1 did not apply to the discharge application. She discharged the bankrupt, subject to a condition that he remit to the trustee the remaining surplus income payable, up to a maximum of $10,000. The motion judge dismissed the Attorney General's motion by way of appeal. The Attorney General appealed.

Held, the appeal should be dismissed.

In calculating the bankrupt's personal income tax debt under s. 172.1(1) of the Bankruptcy and Insolvency Act, the assessed amounts of personal income tax that were under appeal at the time of his discharge hearing were not to be included. The motion judge and the registrar correctly concluded that until the Tax Court of Canada had disposed of the bankrupt's appeals of the assessments, the portion of the Canada Revenue Agency's claim for the assessed amounts under appeal was a contingent one that the trustee could refuse to admit as a proven claim. The stipulation in s. 158 of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) that any unpaid amount assessed is "payable forthwith" upon the mailing of a notice of assessment must be understood within the larger context of the taxpayer's right under the Income Tax Act to object to an assessment and to appeal a minister's confirmation of an assessment to the Tax Court of Canada.

2713250 Canada inc. (Re), [2011] J.Q. no 16993, 2011 QCCS 6119, 2012EXP-83, J.E. 2012-61, EYB 2011-198510, 86 C.B.R. (5th) 204; Norris (Re) (1989), 69 O.R. (2d) 285, [1989] O.J.

No. 995, 60 D.L.R. (4th) 606, 34 O.A.C. 304, 75 C.B.R. (N.S.) 97, [1989] 2 C.T.C. 185, 89 D.T.C. 5493, 16 A.C.W.S. (3d) 161 (C.A.); Port Chevrolet Oldsmobile Ltd. (Re), [2004] B.C.J. No. 101, 2004 BCCA 37, 193 B.C.A.C. 114, 23 B.C.L.R. (4th) 335, 49 C.B.R. (4th) 146, [2004] G.S.T.C. 8, 128 A.C.W.S. (3d) 436, affg [2002] B.C.J. No. 3206, 2002 BCSC 1874, 49 C.B.R. (4th) 127, [2003] G.S.T.C. 168, consd

Other cases referred to

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Leung v. Canada, [1993] F.C.J. No. 942, [1994] 1 F.C. 482, 67 F.T.R. 1, [1993] 2 C.T.C. 284, 93 D.T.C. 5467, 42 A.C.W.S. (3d) 1104 (T.D.); Murphy v. Sally Creek Environs Corp. (Trustee of), [2010] O.J. No. 1773, 2010 ONCA 312, 261 O.A.C. 199, 67 C.B.R. (5th) 161, 188 A.C.W.S. (3d) 344; Newfoundland and Labrador v. AbitibiBowater Inc., [2012] 3 S.C.R. 443, [2012] S.C.J. No. 67, 2012 SCC 67, 438 N.R. 134, 2012EXP-4268, J.E. 2012-2270, EYB 2012-215017, 352 D.L.R. (4th) 399, 95 C.B.R. (5th) 200, 71 C.E.L.R. (3d) 1, 221 A.C.W.S. (3d) 264; Regina Shoppers Mall Ltd. v. Canada, [1991] F.C.J. No. 52, 126 N.R. 141, [1991] 1 C.T.C. 297, 91 D.T.C. 5101, 25 A.C.W.S. (3d) 748 (C.A.); Rizzo & Rizzo Shoes Ltd. (Re) (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 154 D.L.R. (4th) 193, 221 N.R. 241, J.E. 98-201, 106 O.A.C. 1, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 98 CLLC Â210-006, D.T.E. 98T-154, 76 A.C.W.S. (3d) 894; Royal Bank of Canada v. Central Capital Corp. (1996), 27 O.R. (3d) 494, [1996] O.J. No. 359, 132 D.L.R. (4th) 223, 88 O.A.C. 161, 26 B.L.R. (2d) 88, 38 C.B.R. (3d) 1, 61 A.C.W.S. (3d) 18 (C.A.); Terra Nova Properties Ltd. v. M.N.R., [1967] 2 Ex. C.R. 46, [1967] C.T.C. 82, 67 D.T.C. 5064 (Exch. Ct.); Wesbrook Management Ltd. v. Canada, [1996] F.C.J. No. 1466, 206 N.R. 23, [1997] 1 C.T.C. 124, 96 D.T.C. 6590, 67 A.C.W.S. (3d) 191 (C.A.) [page539]

Statutes referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 108 [as am.], (1) [as am.], 121 [as am.], (1), (2) [as am.], 135 [as am.], (1.1) [as am.], (3) [as am.], 136(1) [as am.], 170(1) [as am.], 172.1 [as am.], (1), (8) [as am.]

Excise Tax Act, R.S.C. 1985, c. E-15 [as am.]

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) [as am.], ss. 152(8) [as am.], 158 [as am.], 165(3) [as am.], Part XV [as am.], ss. 223(1) [as am.], (2), 223-225 [as am.], 225.1 [as am.], (2) [as am.], (3) [as am.], (5) [as am.], 225.2, 248(2) [as am.]

APPEAL from the order of T.J. McEwen J. of the Superior Court of Justice dated December 8, 2014 affirming a decision of the registrar in bankruptcy.

Kevin Dias and Maria Vujnovic, for appellant.

Fred Tayar, for respondent.

The judgment of the court was delivered by

D.M. BROWN J.A.: —

I. Overview

[1] Special rules govern discharge hearings in income tax-driven personal bankruptcies. Section 172.1 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA") provides that where the bankrupt has $200,000 or more of personal income tax debt and that personal income tax debt represents 75 per cent or more of the bankrupt's total unsecured proven claims, the timing of the discharge hearing, the discharge orders available to the court to make, and the factors the court must take into account in deciding the discharge application differ from those applied in a standard bankruptcy.

[2] At the time of his discharge hearing, the respondent bankrupt, Paul Schnier, had unpaid income tax assessments totalling approximately $4.478 million. About $4.424 million of that amount was subject to outstanding appeals he had filed in the Tax Court of Canada. If the full assessed amount was considered part of his personal income tax debt, s. 172.1 of the BIA would apply to his bankruptcy; if the appealed amounts were excluded, s. 172.1 would not apply.

[3] The registrar in bankruptcy held that s. 172.1 of the BIA did not apply to Mr. Schnier's application for discharge. Her order of July 18, 2014 (the "discharge order") discharged Mr. Schnier, subject to the condition that he remit to the trustee the remaining surplus income payable, up to a maximum of $10,000. [page540]

[4] By order dated December 8, 2014 (the "appeal order"), the motion judge dismissed the Attorney General's motion by way of appeal from the discharge order. The Attorney General now appeals to this court.

[5] Although the Attorney General asks that the appeal order be set aside, if it is, the Attorney General does not seek to vary the conditions of the discharge order made by the registrar. The relief sought by the Attorney General on this appeal is limited to a determination that s. 172.1 of the BIA applied to Mr. Schnier's discharge hearing.

[6] The issue then, on this appeal, is a narrow one: In calculating Mr. Schnier's personal income tax debt under BIA, s. 172.1(1), should the assessed amounts of personal income tax that were under appeal at the time of his discharge hearing be included?

[7] For the reasons set out below, I conclude the answer is no, and I would dismiss the appeal. Both the motion judge and the registrar correctly concluded that until the Tax Court of Canada had disposed of Mr. Schnier's appeals of the Canada Revenue Agency ("CRA") assessments, the portion of the CRA's claim for the assessed amounts under appeal was a contingent one that the trustee could refuse to admit as a proven claim. Accordingly, the motion judge and the registrar correctly held that s. 172.1 of the BIA did not apply to Mr. Schnier's

discharge hearing.

II. Background

[8] Mr. Schnier is a tax lawyer. His bankruptcy was driven by investments he made in two types of tax shelters. Between 1985 and 1991, Mr. Schnier invested in two yacht tax shelters. In the 1990s and early 2000s, he invested in four computer software tax shelters. Mr. Schnier claimed deductions from his income on those investments for either interest expenses or business losses. At the time Mr. Schnier made these investments, he believed that the tax shelters were permitted under the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) ("ITA"); he had made the investments after receiving opinions from independent tax lawyers and accountants.

[9] Beginning in 1989, Mr. Schnier received notices of reassessment in relation to the yacht tax shelters going back to the 1985 taxation year. He immediately served on the Minister of National Revenue notices of objection to all of the CRA reassessments.

[10] Section 165(3) of the ITA provides that upon receipt of a notice of objection, the minister "shall, with all due dispatch, reconsider the assessment and vacate, confirm or vary the [page541] assessment or reassess". That did not occur in this case. Inexplicably, the minister allowed Mr. Schnier's objections to languish for over two decades. During that time, Mr. Schnier repeatedly asked the CRA to deal with his file, to no avail. It was not until October 2011 that the minister confirmed the reassessments for the yacht tax shelters. Mr. Schnier promptly filed notices of appeal to the Tax Court of Canada in November 2011.

[11] The following month, Mr. Schnier made a proposal to his creditors under the BIA. At that time, he had been assessed $1,278,519.62 in income tax, plus penalties and interest, for a total of $4,478,703.19. Although Mr. Schnier increased the amount of his proposal to creditors over the course of the following creditors' meetings, the CRA rejected the proposal, resulting in his deemed assignment into bankruptcy on January 19, 2012.

[12] On February 1, 2012, the CRA filed a proof of claim in the bankruptcy in the amount of $4,478,703.19 (the "claim"). The CRA disclosed that of the amount claimed, $4,424,558.19 was under appeal.

[13] In January 2013, the minister confirmed the assessments for the computer software tax shelters. Mr. Schnier filed appeals from those assessments in April 2013.

[14] In its February 4, 2014 report on the bankrupt's application for discharge, the trustee noted that the Tax Court had not yet determined Mr. Schnier's appeals of the CRA assessments. As a result, the trustee reported that it was "unable to value the claim and has not admitted CRA's claim for the assessed amounts under appeal as it is contingent". Consequently, the trustee's July 9, 2014 claims register admitted only $71,170.40 of the claim, and recorded the remaining $4.424 million of the claim as a contingent claim which was not admitted by the trustee.

[15] The CRA opposed Mr. Schnier's application to be discharged from bankruptcy.

[16] The registrar was required to consider whether the rules governing tax-driven personal bankruptcies set out in BIA, s. 172.1 applied to Mr. Schnier's bankruptcy. The reason is that important differences exist in the discharge procedures for individual bankrupts who fall within s.

172.1 and those who do not:

(i) in a standard personal bankruptcy, the passage of time may result in the automatic discharge of a bankrupt; under s. 172.1, an application to the court for a discharge hearing must be made;

(ii) in a standard personal bankruptcy, the court may grant an absolute order of discharge; such an order is not available if s. 172.1 applies; [page542]

(iii) if a court suspends the discharge in a s. 172.1 bankruptcy, the court must require the bankrupt to file income and expense statements with the trustee each month and to file all returns of income required by law to be filed; and

(iv) a court must take into account the following factors in considering a s. 172.1 discharge application: the circumstances of the bankrupt at the time the personal income tax debt was incurred; the efforts, if any, made by the bankrupt to pay the personal income tax debt; whether the bankrupt made payments in respect of other debts while failing to make reasonable efforts to pay the personal income tax debt; and the bankrupt's financial prospects.

[17] In her July 18, 2014 reasons, the registrar considered that the CRA was a proven creditor to the extent of the claims admitted by the trustee -- about $71,170. The balance of the CRA's claim consisted of assessed amounts of tax that were subject to appeals pending in the Tax Court of Canada and constituted a contingent claim. The registrar concluded that, "at present, the CRA has a contingent liability that cannot support the applicability of s. 172.1 of the BIA". On appeal, the motion judge agreed with the registrar.

III. Issue on the Appeal

[18] At issue on this appeal is whether s. 172.1(1) of the BIA applied to Mr. Schnier's discharge hearing. The section provides that the special income tax-driven bankruptcy discharge rules apply "[i]n the case of a bankrupt who has $200,000 or more of personal income tax debt and whose personal income tax debt represents 75% or more of the bankrupt's total unsecured proven claims".

[19] The parties offer competing interpretations of what constitutes "personal income tax debt" for purposes of s. 172.1. The Attorney General argues that "personal income tax debt" includes unpaid assessed tax, notwithstanding any right the taxpayer has to file an objection or appeal. The Attorney General submits that in this case, all of the $4.4 million CRA claimed in its proof of claim were amounts payable as of the dates of assessment, and remained payable under the ITA notwithstanding Mr. Schnier's subsequent appeals.

[20] The Attorney General submits that its interpretation is consistent with the express language of the ITA, which I discuss in detail below. It acknowledges a pair of cases that take the contrary view: [page543] Port Chevrolet Oldsmobile Ltd. (Re), [2002] B.C.J. No. 3206, 2002 BCSC 1874, 49 C.B.R. (4th) 127, affd [2004] B.C.J. No. 101, 2004 BCCA 37; and 2713250 Canada inc. (Re), [2011] J.Q. no 16993, 2011 QCCS 6119. The Attorney General submits that those cases were wrongly decided and should not be followed by this court.

[21] For his part, Mr. Schnier argues that on a proper interpretation of the ITA, his unpaid assessed amounts of tax that were subject to appeal were contingent claims which the trustee in bankruptcy did not accept as proven claims and, therefore, did not constitute "personal income tax debt" for the purposes of BIA, s. 172.1(1). Mr. Schnier submits that Port Chevrolet (Re) and 2713250 Canada inc. (Re) were correctly decided and should be followed by this court.

IV. Standard of Review

[22] The applicable standard of review was set out by this court in Murphy v. Sally Creek Environs Corp. (Trustee of), [2010] O.J. No. 1773, 2010 ONCA 312, 67 C.B.R. (5th) 161, at paras. 68, 70 and 72. On an appeal of a discharge order made by a registrar in bankruptcy, the reviewing motion judge may only set aside the order if the registrar erred in principle or in law, failed to take into account a proper factor, took into account an improper factor that demonstrably led to a wrong conclusion, or made a palpable and overriding error in respect of a finding of fact. The same standard of review applies to a further appeal to this court, although the decision under appeal is that of the motion judge, not the registrar. A motion judge will commit an error of law if he or she does not adhere to the correct standard when reviewing the registrar's decision.

V. Analysis

[23] Since the issue on this appeal concerns the interpretation of a statutory provision, I start by considering the legislative context in which s. 172.1 of the BIA is situated. I then outline and analyze the Attorney General's arguments regarding the proper interpretation of "personal income tax debt" that draw upon the language of the ITA. Next, I consider the Attorney General's argument that this court should decline to follow Port Chevrolet (Re) and 2713250 Canada inc. (Re). I then address the Attorney General's concern that upholding the motion judge's decision could invite abuse of the bankruptcy process. Finally, I consider the Attorney General's argument that the trustee in this case failed to determine whether or not CRA's claim was provable. [page544]

A. The legislative context for the analysis

[24] Applying the basic principle of statutory interpretation, the words "personal income tax debt" in BIA, s. 172.1(1) must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the BIA, its object and the intention of Parliament: Rizzo & Rizzo Shoes Ltd. (Re) (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21.

[25] A bankruptcy under the BIA follows a single proceeding model. In general terms, the property of the bankrupt not subject to security interests is realized and collected by the trustee in bankruptcy and then distributed to creditors with proven claims in accordance with the priorities set out in the scheme of distribution found in BIA, s. 136(1).

[26] At the heart of this distribution scheme lies the concept of creditor claims provable in bankruptcy. Section 121(1) of the BIA describes what claims are provable in a bankruptcy:

> 121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

[27] Liquidated claims are not the only ones provable in a bankruptcy. Section 121(2) of the BIA specifically recognizes contingent claims as provable in a bankruptcy by providing that "[t]he determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135".

[28] In each bankruptcy, the trustee must examine and classify the claims filed by the bankrupt's creditors: BIA, s. 135. As part of that process, the trustee must consider whether the characteristics of a debt claimed by a creditor are those of a liquidated claim, future claim or contingent claim. If a trustee concludes that the debt claimed has the character of a contingent claim, the trustee must then determine whether the contingent claim is a provable claim. As BIA, s. 135(1.1) states:

> 135(1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

[29] As explained by the Supreme Court of Canada in Newfoundland and Labrador v. AbitibiBowater Inc., [2012] 3 S.C.R. 443, [2012] S.C.J. No. 67, 2012 SCC 67, at paras. 34 and 36, [page545] "a claim may be asserted in insolvency proceedings even if it is contingent on an event that has not yet occurred", and "[t]he criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative".

[30] This general legislative scheme for the examination and determination of creditor claims in a bankruptcy provides the critical context in which to determine the narrow issue raised by this appeal -- i.e., whether the assessed amounts of income tax that were under appeal at the time of Mr. Schnier's discharge hearing should be included when calculating his personal income tax debt under BIA, s. 172.1(1). That is so because whether s. 172.1 applies to a bankruptcy turns on how the trustee classifies a claim by the CRA for the payment of assessed amounts of income tax which remain subject to an appeal by the bankrupt taxpayer at the time of his discharge hearing. The arguments advanced by the parties about the proper interpretation of "personal income tax debt" in s. 172.1(1) must be assessed within the larger context of this legislative scheme.

B. "Amounts payable" within the meaning of ITA, s. 223(1)

[31] As noted, s. 172.1(1) of the BIA provides that the special discharge hearing rules apply "[i]n the case of a bankrupt who has $200,000 or more of personal income tax debt and whose personal income tax debt represents 75% or more of the bankrupt's total unsecured proven claims".

[32] Section 172.1(8) of the BIA defines "personal income tax debt" to mean "the amount payable, within the meaning of subsection 223(1) of the Income Tax Act . . . by an individual".

[33] Section 223(1) of the ITA defines an "amount payable" by a person as any or all of "an amount payable under this Act by the person".

[34] What are the fundamental characteristics of an "amount payable" under the ITA? The Attorney General argues that there are two. First, s. 158 of the ITA provides:

> 158. Where the Minister mails a notice of assessment of any amount payable by a taxpayer, that part of the amount assessed then remaining unpaid is payable forthwith by the taxpayer to the Receiver General.

[35] Second, s. 152(8) of the ITA deems an assessment to be "valid and binding". According to the Attorney General, when combined together these two characteristics of an unpaid assessed personal income tax debt are determinative of the analysis in this appeal. Even if a taxpayer appeals an assessment, the character of the tax debt remains one that is "payable [page546] forthwith" (s. 158) and "valid and binding" (s. 152(8)): in effect, a liquidated claim. As a result, the Attorney General submits, "personal income tax debt" within the meaning of BIA, s. 172.1(1) includes unpaid assessed amounts of income tax that are under appeal.

[36] I do not find that argument persuasive, for two reasons.

[37] First, the roles played by ss. 152(8) and 158 of the ITA in the characterization of an assessed tax debt must take into account the right of a taxpayer to appeal a notice of assessment to the Tax Court of Canada under Part I, Division J of the ITA.

[38] Section 152(8) of the ITA expressly provides that the valid and binding effect of an assessment is made subject to a taxpayer's right to appeal an assessment. The section states:

> 152(8) An assessment shall, subject to being varied or vacated on an objection or appeal under this Part and subject to a reassessment, be deemed to be valid and binding notwithstanding any error, defect or omission in the assessment or in any proceeding under this Act relating thereto.

(Emphasis added)

[39] As put by the Federal Court of Appeal in Wesbrook Management Ltd. v. Canada, [1996] F.C.J. No. 1466, [1997] 1 C.T.C. 124 (C.A.), at p. 129 C.T.C., when commenting on the effect of what is now s. 152(8): "Once . . . an assessment can no longer be varied or vacated on objection or appeal . . . the last assessment is deemed valid and binding on both the taxpayer and the Minister".[1]

[40] Section 248(2) of the ITA is to the same effect. It states that "the tax payable by a taxpayer under any Part of this Act by or under which provision is made for the assessment of tax means the tax payable by the taxpayer as fixed by assessment or reassessment subject to variation on objection or on appeal, if any, in accordance with the provisions of that Part" (emphasis added).

[41] Both ss. 152(8) and 248(2) indicate that until the objection or appeal process is concluded, the amount of tax the minister can compel a taxpayer to pay cannot be known. The assessed amount can change from time to time by virtue of judicial decisions or new

assessments: Terra Nova Properties Ltd. v. M.N.R., [1967] 2 Ex. C.R. 46, [1967] C.T.C. 82 (Exch. Ct.), at p. 51 Ex. C.R. [page547]

[42] The stipulation in s. 158 of the ITA that any unpaid amount assessed is "payable forthwith" upon the mailing of a notice of assessment must be understood within the larger context of the taxpayer's right under the ITA to object to an assessment and to appeal a minister's confirmation of an assessment to the Tax Court of Canada.

[43] Second, Part XV of the ITA places significant restrictions on the minister's ability to collect assessed amounts that are "payable forthwith" where a taxpayer has objected to or appealed those amounts.

[44] Usually, where an amount is payable under the ITA, s. 223(2) authorizes the minister to certify an amount payable that has not been paid "as an amount payable by the debtor". A certificate of an amount payable under ITA, s. 223(2) can be registered in the Federal Court and, when registered, has the same effect as if the certificate were a judgment obtained in the Federal Court against the tax debtor. Sections 223 through 225 then describe the different enforcement steps available to the minister to collect the amount payable: commencing legal proceedings in court; certifying the amount due under s. 223; using statutory garnishment remedies; and seizing the tax debtor's goods and chattels.

[45] However, when a taxpayer files an objection to or appeals an assessment, s. 225.1 places limits on the minister's ability to take steps to collect the assessed amounts. If a taxpayer has served a notice of objection to an assessment, the minister cannot take any of the statutory enforcement steps until 90 days after the minister has sent his notice of confirmation to the taxpayer (s. 225.1(2)). Similarly, if a taxpayer has appealed from an assessment to the Tax Court of Canada, the minister cannot take any of those steps before the day of mailing of a copy of the decision of that court to the taxpayer (s. 225.1(3)).[2]

[46] The rationale behind the limits s. 225.1 places on the minister's ability to collect is that it would be unfair to allow the minister to collect an assessed amount of tax until there is a final determination of the ultimate amount the taxpayer must pay.[3] [page548]

[47] In my view, the Attorney General takes far too narrow an approach to what constitutes an "amount payable" under ITA, s. 223(1), and therefore "personal income tax debt" in BIA, s. 172.1. The Attorney General's submission focuses on only some of the characteristics of an assessed income tax debt -- "payable forthwith" and "valid and binding notwithstanding any error, defect, or omission". It ignores the critical effect of sections 152(8), 225.1 and 248(2) of the ITA that enable a taxpayer to appeal an assessment and limit the collectability of that tax debt by the minister until the courts dispose of the appeal.

[48] When the provisions of the ITA are considered as a whole, the meaning of "amount payable" as used in ITA, s. 223(1) and BIA, s. 172.1(8) must take into account that where a taxpayer has appealed an assessment to the Tax Court of Canada, the actual amount of tax that the minister can compel the taxpayer to pay will not be known until the occurrence of a future event -- i.e., the determination of the taxpayer's appeal from the assessment. This is a hallmark of a contingent claim.

[49] Further, a creditor's inability to enforce a claim bears directly on the creditor's ability to prove its claim under the BIA. In order to be a provable claim within the meaning of BIA, s. 121,

a claim must be one recoverable by legal process: Royal Bank of Canada v. Central Capital Corp. (Re) (1996), 27 O.R. (3d) 494, [1996] O.J. No. 359 (C.A.), at pp. 532-33 O.R. The restraints placed by ITA, s. 225.1 on the enforceability of an assessed amount of tax that is under appeal are strong indicators that a claim based on those amounts would not be provable in a bankruptcy.

[50] Consequently, where amounts of income tax assessed against an individual bankrupt taxpayer remain under appeal at the time of his discharge hearing, the existence of the outstanding appeal entitles the trustee to classify the claim based on the unpaid assessed amounts as a contingent, unprovable one.

C. The jurisprudence

[51] Turning to the jurisprudence, the Attorney General advances two arguments: (i) support for its position can be found in the decision of this court in Norris (Re) (1989), 69 O.R. (2d) 285, [1989] O.J. No. 995 (C.A.); and (ii) the British Columbia and Quebec courts were wrong to conclude in Port Chevrolet (Re) and 2713250 Canada inc. (Re), respectively, that an unpaid assessed amount of tax under appeal is a contingent claim. [page549]

The decision in Norris (Re)

[52] The Attorney General submits that Norris (Re) stands for the principle that in carrying out its duties under the BIA, a trustee cannot ignore what Parliament has legislated with respect to tax debts. Applying that principle to the present case, the Attorney General argues that the trustee must give full recognition to assessed amounts under appeal because under the ITA a taxpayer becomes liable for an unpaid portion of an assessment when the notice of assessment is sent. That liability continues to exist until the assessment is varied or vacated on an objection or appeal.

[53] In my view, the principle in Norris (Re) does not extend as far as the Attorney General submits. That case involved the bankruptcy of an individual against whom an assessment had been issued under the ITA. Critically, unlike in the present case, the bankrupt had not filed a notice of objection to the assessment. The Crown filed a proof of claim in the bankruptcy for the assessed amount and provided the trustee with the notice of assessment. The trustee disallowed the claim. This court held, at p. 287 O.R., that the trustee's request for evidence to support the proof of claim was fully answered by the notice of assessment, and if the trustee in bankruptcy wished to question the validity of an assessment against the bankrupt, it was required to seek its remedy within the ITA by filing a notice of objection.

[54] In the present case, the trustee did not look behind the notice of assessment in order to ascertain the amount of Mr. Schnier's personal income tax debt. Instead, the trustee gave effect to the appeal and enforcement provisions of the ITA. Whether the tax debt was liquidated or contingent for purposes of the BIA depended upon whether the taxpayer had exercised the appeal rights granted by the ITA and, if he had, whether s. 225.1 of the ITA restrained the minister from taking steps to enforce and collect the assessed amount. The trustee took into account that no final determination of Mr. Schnier's appeal had been made under the ITA, with the result that it was unable to value the CRA's claim.

The decisions in Port Chevrolet (Re) and 2713250 Canada inc. (Re)

[55] More relevant to the facts of this case are two decisions dealing with the power of the chair of a meeting of creditors under s. 108 of the BIA to admit or reject a proof of claim for the purpose of voting: Port Chevrolet (Re) and 2713250 Canada inc. (Re). [page550]

[56] In the Port Chevrolet (Re) case, the Canada Customs Revenue Agency ("CCRA") had issued an assessment under the Excise Tax Act, R.S.C. 1985, c. E-15 to Port Chevrolet for about $16.4 million. The company filed a notice of intention to make a proposal under the BIA. The company also filed a notice of objection to the assessment. The CCRA filed a proof of claim in the amount of about $15.8 million the day before the meeting of creditors to vote on the company's proposal. The trustee disallowed CCRA's claim and valued it at nil, taking the view that it was unproven because it was based on an unresolved appeal and notice of objection. Relying on the trustee's disallowance, the chair of the creditors' meeting concluded that the CCRA claim was contingent and valued it at nil for voting purposes.

[57] The CCRA appealed the trustee's disallowance of its claim and the chair's decision that it had no right to vote at the meeting. The chambers judge dismissed the appeal on two grounds. First, the CCRA had failed to file a proof of claim in proper form: at para. 25. Second, the court rejected the CCRA's argument that provisions in the Excise Tax Act analogous to ss. 152(8) and 158 of the ITA created a valid and binding debt due from the moment of assessment regardless of the pending objection and appeal process: at paras. 35-36. The court stated, at para. 43:

> [I]f CCRA wishes to participate in concurrent proceedings under the Bankruptcy and Insolvency Act, then it is bound to comply with the Bankruptcy and Insolvency Act process with respect to proving its claim, and that compliance includes recognition of the trustee's powers to determine a claim is contingent and value it accordingly. I do not read Re Norris as precluding a trustee from exercising his discretion under s. 135(1.1).

[58] The British Columbia Court of Appeal affirmed the decision, but only in respect of the finding that the CCRA had failed to file a proof of claim in proper form. The BCCA specifically declined to consider the trustee's disallowance of the CCRA's contingent claim.

[59] A similar issue arose in a Quebec case involving a proposal made by 2713250 Canada Inc. under the BIA. The Agence du revenue du Québec ("ARQ") had issued two notices of assessment to the debtor company for which the company had filed notices of objection. The ARQ filed proofs of claim in the proposal proceedings based upon the full amount of the assessments. At two meetings of creditors, the proposal trustee held that the ARQ's claims were contingent and impossible to value because of the pending appeal of the notices of assessment. [page551] Therefore, the ARQ was ineligible to vote. The ARQ appealed the trustee's decisions.

[60] Gascon J., as he then was, dismissed the appeal, applying the reasoning of the chambers judge in the Port Chevrolet (Re) case. He held that in exercising the power conferred on it by BIA, s. 108(1), the trustee could conclude that the ARQ's claims were in fact contingent, unliquidated and not provable claims, due to the impossibility of valuing them with any certainty: at para. 86. Gascon J. then considered, and rejected, the ARQ's argument about the validity and binding nature of its notices of assessment, at paras. 88 through 94:

> Contrary to what the ARQ argues, the Court believes that in exercising the power ascribed to it by section 108(1), the Trustee was not legally bound to consider as valid, regardless of the situation, the notices of assessment on which the disputed proofs of claims are based.
>
> On the one hand, if the relevant tax laws establish a presumption of validity of those notices of assessment, that presumption is not irrebuttable. The objection process such tax laws authorize surely demonstrates this.
>
> On the other hand, the presumptions of validity established by tax laws are not incompatible with the exercise of the jurisdiction which the BIA confers on the Trustee pursuant to sections 108, 121 or 135 of the BIA.
>
> As the Court of Appeal for British Columbia points out in its analysis of the problem in Port Chevrolet, there are two possible solutions under such circumstances.
>
> The first is that in terms of a proof of claim filed under the BIA, one must give, without reservation, full faith and credit to any notice of assessment by the tax authorities, regardless whether it may eventually be set aside.
>
> The second is that we can reconcile the BIA and tax laws by drawing a distinction between, on the one hand, business judgment and a trustee's practice in exercising its powers under the BIA and, on the other hand, the "rebuttable" presumptions of validity of tax laws which subsist notwithstanding the prescribed objection and appeal processes.
> For its part, the Court prefers the second solution, which is much more respectful of the objectives of the BIA.

(Translation from French)

[61] Although the Port Chevrolet (Re) and 2713250 Canada Inc. (Re) cases both involved the exercise by trustees of their discretion in the context of admitting or rejecting proofs of claim for the purposes of voting under BIA, s. 108(1), in my view the reasoning in Port Chevrolet (Re), as adopted by 2713250 Canada inc. (Re), applies equally to the exercise of the trustee's general power to determine whether a contingent claim is a provable claim under ss. 121 and 135 of the BIA. Where a bankrupt taxpayer has appealed assessed amounts of income tax, it is open to a trustee to characterize a CRA proof of claim based on those [page552] assessments as a contingent claim. If the claim cannot be valued with any certainty prior to the disposition of the appeal, the trustee may treat the contingent claim as not provable in the bankruptcy.

[62] Such a result gives full recognition to the provisions of the ITA discussed earlier dealing with the calculation and enforcement of assessed amounts of income tax, while treating a proof of claim based on an appealed assessment in a manner harmonious with the general scheme of the BIA concerning creditors' proofs of claim.

[63] Such an interpretation is also consistent with the language of s. 172.1(1) of the BIA, which provides that the special discharge rules for tax-driven personal bankruptcies apply "in the case of a bankrupt who has $200,000 or more of personal income tax debt and whose personal income tax debt represents 75% or more of the bankrupt's total unsecured proven claims" (emphasis added). The use of the word "represents" signifies that in order for "personal income tax debt" to be capable of representing 75 per cent of a bankrupt's unsecured "proven claims", the "personal income tax debt" must possess the characteristics of a provable claim in

bankruptcy. Put another way, to qualify as "personal income tax debt" within the meaning of s. 172.1(1), the tax debt must be a proven claim.

[64] To hold otherwise would give unfair, preferential treatment to CRA proofs of claim based on assessed income tax amounts that remain under appeal at the time of a discharge hearing. If the full amount of the assessed amount under appeal was recognized as a claim provable in the bankruptcy, and the taxpayer's appeal of the assessment was later allowed and the assessed amount reduced or eliminated, the CRA would have obtained an unjustified advantage over other creditors in the bankruptcy proceeding.

D. Potential abuse of the bankruptcy process

[65] Against that conclusion, the Attorney General argues that to treat CRA claims for unpaid assessed income tax under appeal as contingent ones that may not be provable would render meaningless s. 172.1 of the BIA. A taxpayer who was subject to significant income tax assessments could abuse the bankruptcy process by appealing his assessment, then make an assignment in bankruptcy and fail to expedite the hearing of his tax appeal. That would allow a bankrupt to avoid the special discharge rules created by s. 172.1 for tax-driven bankruptcies.

[66] In my view, the motion judge correctly addressed this argument when he held that "an adjournment could have been [page553] sought before the [registrar] so the appeal could be heard and no attempt was made in this case". Indeed, had the CRA sought a brief adjournment of Mr. Schnier's discharge hearing, no dispute could have arisen about the applicability of s. 172.1 to his bankruptcy, as the following chronology of events discloses.

[67] Section 225.1(5) of the ITA states that where a taxpayer who has appealed to the Tax Court of Canada has agreed to delay his appeal until the court has decided related test cases, then the minister may take actions to enforce the assessments against the taxpayer at any time after the minister gives written notice to the taxpayer that the decision of the Tax Court of Canada in the test case has been mailed to the minister.

[68] In February 2012, Mr. Schnier had filed with the Tax Court of Canada his agreement to be bound in the lead test cases before that court concerning the deductibility of expenses relating to the yacht tax shelters. The Tax Court of Canada confirmed that it would hold his appeal in abeyance pending the resolution of the three lead test cases. The lead cases concerning the yacht tax shelters were dismissed on January 7, 2014, and an appeal from that dismissal to the Federal Court of Appeal was withdrawn on March 19, 2014. Both those events took place before Mr. Schnier's bankruptcy hearing.

[69] However, the Tax Court of Canada did not formally dismiss Mr. Schnier's appeal from the yacht tax shelter assessments until August 18, 2014, slightly more than a month after his discharge hearing was held. The record does not explain when the Tax Court of Canada mailed the minister the decision dismissing the lead test appeals concerning the yacht tax shelters or why the minister did not send a written notice of the decision to Mr. Schnier prior to his discharge hearing. From the transcript of the discharge hearing, it is apparent that the parties were aware the test cases had been resolved in favour of the CRA: appeal book, p. 56. Why, given those circumstances, the CRA did not ask for a short adjournment of the discharge hearing pending formal notice to Mr. Schnier of the dismissal of the lead test appeals pursuant to ITA, s. 225.1(5) was not explained in the record before us.

E. Whether the trustee disallowed any part of the claim

[70] Finally, in her factum, the Attorney General argued that the trustee had failed to determine whether or not the CRA's claim was provable. I disagree.

[71] Although the appeal record did not contain a notice of disallowance issued by the trustee under BIA, s. 135(3) in respect of [page554] the claim, appellant's counsel candidly conceded that there was no evidence before the court about what, if anything, the trustee did under s. 135.

[72] In any event, the evidence showed that the CRA was aware well before the discharge hearing that the trustee had disallowed that part of its claim covering the assessed amounts under appeal. The trustee's report under s. 170(1) on the bankrupt's application for discharge was dated February 4, 2014, some five months prior to the discharge hearing, and was signed by the inspectors, including one of the inspectors who was an employee of the CRA. The report clearly stated that the trustee was unable to value most of the CRA's claim and had not admitted the portion concerning the assessed amounts under appeal as it was contingent. The trustee's July 9, 2014 claims register also recorded that $4.385 million of the CRA claim had been classified as contingent and had not been admitted for dividend. Accordingly, the evidence before the registrar at the time of the discharge hearing was that the trustee had determined that only $71,170 of the CRA claim was provable in the bankruptcy.

F. Conclusion

[73] For the reasons set out above, I conclude that both the motion judge and the registrar were correct in concluding that until the Tax Court of Canada disposed of Mr. Schnier's appeals of the CRA's assessments, the CRA's claim in the bankruptcy for the assessed amount under appeal was a contingent one which the trustee could refuse to admit as a proven claim. Consequently, the motion judge and the registrar correctly concluded that s. 172.1 of the BIA did not apply to Mr. Schnier's discharge hearing.

VI. Disposition

[74] I would dismiss the appeal. The parties agreed that the successful party would be entitled to costs of the appeal on a partial indemnity basis in the amount of $15,000. I would therefore order the Attorney General of Canada to pay Mr. Schnier costs of $15,000, inclusive of HST and disbursements.

Appeal dismissed.

[page555]

Notes

1 Moreover, the case law interpreting s. 152(8) treats the section's purpose as a modest one, operating as a curative provision ensuring the validity of an administratively issued assessment despite any errors, defects or omissions: Regina Shoppers Mall Ltd. v. Canada, [1991] F.C.J. No. 52, [1991] 1 C.T.C. 297 (C.A.), at p. 301 C.T.C.; Leung v. Canada, [1993] F.C.J. No. 942, [1993] 2 C.T.C. 284 (T.D.), at p. 302 C.T.C.

2 Although ITA, s. 225.1 provides for certain exceptions to these bars to collection, none apply to the facts of the present case.

3 If reasonable grounds exist to believe that the collection of an assessed amount would be jeopardized by a delay in collection, ITA, s. 225.2 authorizes the minister to apply ex parte to the court for an order allowing him to take enforcement steps.

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David Matthews *Appellant*

v.

Ocean Nutrition Canada Limited *Respondent*

and

Canadian Association for Non-Organized Employees, Don Valley Community Legal Services, Law Students' Legal Advice Program, Canadian Association of Counsel to Employers and Parkdale Community Legal Services *Interveners*

Indexed as: Matthews *v.* Ocean Nutrition Canada Ltd.

2020 SCC 26

File No.: 38252.

2019: October 8; 2020: October 9.

Present: Wagner C.J. and Moldaver, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Employment law — Constructive dismissal — Duty to provide reasonable notice — Damages — Employee working for employer for approximately 14 years — Employer providing long term incentive plan according to which employee would receive bonus payment if company sold — Company sold soon after employee constructively dismissed — Whether damages for breach of duty to provide reasonable notice include incentive bonus.

Beginning in 1997, M, an experienced chemist, occupied several senior management positions with Ocean Nutrition Canada Limited ("Ocean"). As a senior executive, M was part of Ocean's long term incentive plan ("LTIP"), a contractual arrangement designed to reward employees for their previous contributions and to provide

David Matthews *Appelant*

c.

Ocean Nutrition Canada Limited *Intimée*

et

Canadian Association for Non-Organized Employees, Don Valley Community Legal Services, Law Students' Legal Advice Program, Association canadienne des avocats d'employeurs et Parkdale Community Legal Services *Intervenants*

Répertorié : Matthews *c.* Ocean Nutrition Canada Ltd.

2020 CSC 26

N° du greffe : 38252.

2019 : 8 octobre; 2020 : 9 octobre.

Présents : Le juge en chef Wagner et les juges Moldaver, Côté, Brown, Rowe, Martin et Kasirer.

EN APPEL DE LA COUR D'APPEL DE LA NOUVELLE-ÉCOSSE

Droit de l'emploi — Congédiement déguisé — Obligation de donner un préavis raisonnable — Dommages-intérêts — Employé au service de l'employeur pendant environ 14 ans — Régime d'intéressement à long terme créé par l'employeur prévoyant le versement d'une prime à l'employé en cas de vente de l'entreprise — Entreprise vendue peu de temps après le congédiement déguisé de l'employé — Est-ce que les dommages-intérêts accordés à l'égard du manquement à l'obligation de donner un préavis raisonnable doivent inclure la prime d'intéressement?

À partir de 1997, M, un chimiste expérimenté, a occupé plusieurs postes de direction chez Ocean Nutrition Canada Limited (« Ocean »). En tant que cadre supérieur, M participait au régime d'intéressement à long terme (« RILT ») d'Ocean, un arrangement contractuel visant à récompenser les employés pour leurs contributions antérieures au

an incentive to continue contributing to the company's success. Under the LTIP, a "Realization Event", such as the sale of the company, would trigger payments to employees who qualified under the plan. In 2007, Ocean hired a new Chief Operating Officer, who began a campaign to marginalize M in the company, limiting M's responsibilities and lying to M about his status and prospects with Ocean. Despite his problems with senior management, the LTIP was a key reason for which M wanted to stay with Ocean, anticipating Ocean would soon be sold. However, M eventually left Ocean in June 2011, taking a position with a new employer.

About 13 months after M's departure, Ocean was sold for $540 million. The sale constituted a Realization Event for the purposes of the LTIP. Since M was not actively employed on that date, Ocean took the position that M did not satisfy the terms of the plan, and he did not receive a payment. M filed an application against Ocean alleging that he was constructively dismissed, and that the constructive dismissal was carried out in bad faith and in breach of Ocean's duty of good faith. The trial judge concluded that Ocean constructively dismissed M, and that M was owed a reasonable notice period of 15 months. The trial judge also held that M would have been a full-time employee when the Realization Event occurred had he not been constructively dismissed, and that, because the terms of the LTIP did not unambiguously limit or remove his common law right to damages, M was entitled to damages equivalent to what he would have received under the LTIP. The Court of Appeal unanimously upheld the decision that M had been constructively dismissed and that the appropriate reasonable notice period was 15 months. However, a majority of the court found that M was not entitled to damages on account of the lost LTIP payment.

Held: The appeal should be allowed, the judgment of the Court of Appeal set aside and the trial judgment restored.

At common law, an employer has the right to prompt an employee to choose to leave their job in circumstances that amount to a dismissal subject to the duty to provide

succès de l'entreprise et à les inciter à continuer de le faire. Conformément au RILT, un « événement déclencheur », par exemple la vente de l'entreprise, entraînerait le versement des paiements prévus aux employés admissibles aux termes du régime. En 2007, Ocean a embauché un nouveau directeur de l'exploitation, qui a entamé une campagne de marginalisation de M au sein de l'entreprise, en limitant ses responsabilités et en lui mentant au sujet de son statut et de son avenir au sein d'Ocean. Malgré les problèmes que connaissait M avec la haute direction, le RILT était une raison déterminante pour laquelle il voulait continuer de travailler pour Ocean, car il s'attendait à ce que l'entreprise soit bientôt vendue. Cependant, M a finalement quitté Ocean en juin 2011, acceptant un poste chez un nouvel employeur.

Environ 13 mois après le départ de M, Ocean a été vendue pour la somme de 540 millions de dollars. Cette vente constituait, pour les besoins du RILT, l'événement déclencheur. Comme M ne travaillait plus activement pour l'entreprise au moment de la vente, Ocean a soutenu que M ne satisfaisait pas aux conditions du régime, et il n'a pas reçu de prime. M a présenté contre Ocean une requête dans laquelle il alléguait qu'il avait été congédié de façon déguisée, et que ce congédiement avait été effectué de mauvaise foi et en contravention à l'obligation d'Ocean d'agir de bonne foi. Le juge de première instance a conclu qu'Ocean avait congédié M de manière déguisée et que ce dernier avait droit à un préavis raisonnable de 15 mois. Le juge de première instance a également conclu que M aurait été un employé à temps plein de l'entreprise lorsque l'événement déclencheur s'est produit s'il n'avait pas fait l'objet d'un congédiement déguisé, et que, comme les modalités du RILT n'avaient pas pour effet de limiter ou de supprimer clairement son droit à des dommages-intérêts en vertu de la common law, M avait droit à des dommages-intérêts d'un montant équivalant au paiement qu'il aurait reçu en vertu du RILT. La Cour d'appel a confirmé à l'unanimité la décision portant que M avait fait l'objet d'un congédiement déguisé et que le préavis raisonnable approprié était de 15 mois. Toutefois, les juges majoritaires de la Cour d'appel ont conclu que M n'avait pas droit à des dommages-intérêts pour la perte du paiement prévu par le RILT.

Arrêt : Le pourvoi est accueilli, l'arrêt de la Cour d'appel est écarté et le jugement de première instance est rétabli.

Suivant la common law, un employeur a le droit de pousser un employé à quitter son emploi dans des circonstances qui équivalent à un congédiement, pourvu

reasonable notice. The obligation to provide reasonable notice does not, in theory, turn on the presence or absence of good faith. The contractual breach that arises from the employer's choice is simply the failure to provide reasonable notice, which leads to an award of damages in lieu thereof. A breach of the duty to exercise good faith in the manner of dismissal is a distinct contractual breach and is independent of any failure to provide reasonable notice. It can serve as a basis to answer for foreseeable injury that results from callous or insensitive conduct in the manner of dismissal. Damages arising out of the same dismissal are calculated differently depending on the breach invoked. The nature of the contractual breach of good faith is of a different order than that associated with the failure to provide reasonable notice.

Courts should ask two questions when determining whether the appropriate quantum of damages for breach of an implied term to provide reasonable notice includes bonus payments. First, courts should consider the employee's common law rights and examine whether, but for the termination, the employee would have been entitled to the bonus or benefit as part of their compensation during the reasonable notice period. Second, if so, courts should determine whether the terms of the employment contract or bonus plan unambiguously take away or limit that common law right. This approach accords with basic principles of damages for constructive dismissal, anchoring the analysis around reasonable notice. When an employee sues for damages for constructive dismissal, they are claiming for damages as compensation for the income, benefits, and bonuses they would have received had the employer not breached the implied term to provide reasonable notice. This approach respects the well-established understanding that the contract effectively remains alive for the purposes of assessing the employee's damages, in order to determine what compensation the employee would have been entitled to but for the dismissal. Damages for wrongful dismissal are designed to compensate the employee for the breach by the employer of the implied term in the employment contract to provide reasonable notice of termination. There is no such implied term of the contract to provide payment in lieu. The payment in lieu is not damages for a breach of the contract, but rather one component of the compensation provided for in the contract. If an employer

que cet employeur s'acquitte de son obligation de donner un préavis raisonnable. L'obligation de donner un préavis raisonnable ne dépend pas, en théorie, de la question de savoir s'il y a eu ou non bonne foi. Le manquement au contrat découlant de la décision de l'employeur est simplement le défaut de donner un préavis raisonnable, situation qui entraîne le paiement de dommages-intérêts tenant lieu de préavis. Un manquement à l'obligation d'agir de bonne foi dans la façon de congédier l'employé constitue une violation contractuelle distincte et est indépendant de tout manquement à l'obligation de donner un préavis raisonnable. Il peut servir de fondement permettant d'exiger réparation à l'égard d'un préjudice prévisible résultant d'un traitement brutal ou implacable de la part de l'employeur dans la façon dont il a congédié l'employé. Les dommages-intérêts découlant d'un même congédiement sont calculés différemment selon la violation reprochée. La nature du manquement à l'obligation contractuelle d'agir de bonne foi n'est pas du même ordre que dans le cas du défaut de donner un préavis raisonnable.

Les tribunaux devraient se poser deux questions lorsqu'ils sont appelés à décider si le montant des dommages-intérêts qu'il convient d'accorder pour manquement à l'obligation tacite de donner un préavis raisonnable doit inclure les primes. Premièrement, les tribunaux devraient considérer les droits dont dispose l'employé en vertu de la common law et se demander si, n'eût été son congédiement, l'employé aurait eu droit à la prime ou à l'avantage dans le cadre de ses conditions de rémunération pendant la période de préavis raisonnable. Deuxièmement, dans l'affirmative, les tribunaux devraient déterminer si les modalités du contrat de travail ou du régime de primes ont pour effet de supprimer ou de limiter clairement ce droit que confère la common law. Cette démarche est conforme aux principes fondamentaux applicables aux dommages-intérêts pour congédiement déguisé, l'analyse s'attachant à la question du préavis raisonnable. Lorsqu'un employé intente une action en dommages-intérêts pour congédiement déguisé, il sollicite des dommages-intérêts à titre de dédommagement pour le revenu, les prestations et les primes qu'il aurait touchés si l'employeur n'avait pas manqué à son obligation tacite de donner un préavis raisonnable. Cette démarche est compatible avec l'interprétation bien établie selon laquelle le contrat demeure effectivement en vigueur pour les besoins de l'évaluation du préjudice de l'employé en vue de calculer le montant de l'indemnité à laquelle ce dernier aurait eu droit n'eût été son congédiement. Les dommages-intérêts versés pour congédiement injustifié visent à indemniser l'employé à

fails to give proper notice or pay in lieu, the breach is in the failure to pay, not in the termination.

In the present case, in determining whether M's damages include an amount to compensate him for his lost LTIP payment, the focus should be on what damages were appropriately due for Ocean's failure to provide M with reasonable notice and not on whether the terms of the LTIP were plain and unambiguous. The issue is not whether M is entitled to the LTIP in itself, but rather what damages he is entitled to and, specifically, whether he was entitled to compensation for bonuses he would have earned had Ocean not breached the employment contract. It is uncontested that the Realization Event occurred during the notice period and therefore, but for M's dismissal, he would have received an LTIP payment during that period. In such circumstances, there is no need to ask whether the LTIP payment was integral to his compensation. On the first question, M is prima facie entitled to receive damages as compensation for the lost bonus. On the second question, the LTIP does not unambiguously limit or remove M's common law right. Had M been given proper notice, he would have been full-time or actively employed throughout the reasonable notice period. For the purpose of calculating wrongful dismissal damages, the employment contract is not treated as terminated until after the reasonable notice period expires. M should therefore be awarded the amount of the LTIP as part of his common law damages for breach of the implied term to provide reasonable notice. On the issue of good faith, it suffices to say that a contractual breach of good faith rests on a wholly distinct basis from that relating to the failure to provide reasonable notice.

l'égard de la violation par l'employeur de la condition implicite du contrat d'emploi selon laquelle ce dernier doit donner à l'employé un préavis raisonnable de cessation d'emploi. Le contrat ne comporte aucune condition implicite portant que l'employeur doit verser une indemnité tenant lieu de préavis. L'indemnité tenant lieu de préavis raisonnable ne constitue pas des dommages-intérêts pour violation du contrat, mais plutôt une portion de l'indemnité prévue au contrat. Si un employeur ne donne pas un préavis adéquat ou une indemnité en tenant lieu, la violation réside dans le non-paiement d'une indemnité et non dans le congédiement.

En l'espèce, afin de déterminer si les dommages-intérêts accordés à M doivent inclure une somme l'indemnisant pour la perte du paiement prévu par le RILT, il faut mettre l'accent sur le montant des dommages-intérêts qu'il convenait d'accorder à M parce qu'Ocean ne lui a pas donné un préavis raisonnable, et non sur la question de savoir si les modalités du RILT étaient claires et non ambiguës. Il ne s'agit pas de décider si M est admissible au RILT, mais plutôt de déterminer le montant des dommages-intérêts auquel il a droit et, plus précisément, s'il a droit d'être indemnisé pour les primes qu'il aurait touchées si Ocean n'avait pas contrevenu au contrat de travail. Il n'est pas contesté que l'événement déclencheur s'est produit pendant la période de préavis et que, par conséquent, n'eût été son congédiement, M aurait reçu le paiement prévu par le RILT durant cette période. Dans ces circonstances, il est inutile de se demander si ce paiement faisait partie intégrante de sa rémunération. En ce qui concerne la première question, M a droit, à première vue, de recevoir des dommages-intérêts à titre de dédommagement pour la prime qu'il a perdue. En ce qui a trait à la deuxième question, le RILT n'a pas pour effet de limiter ou de supprimer clairement le droit que confère la common law à M. Si un préavis adéquat avait été donné à M, ce dernier aurait été un employé à temps plein ou un employé actif de l'entreprise pendant la période de préavis raisonnable. Pour les besoins du calcul du montant des dommages-intérêts à verser en cas de congédiement injustifié, le contrat de travail est considéré comme étant résilié uniquement après l'expiration de la période de préavis raisonnable. Par conséquent, le montant de la prime prévue par le RILT doit être inclus dans les dommages-intérêts accordés à M, en vertu de la common law, pour le manquement à l'obligation tacite de lui donner un préavis raisonnable. Relativement à la question de bonne foi, qu'il suffise de dire qu'un manquement à l'obligation contractuelle d'agir de bonne foi repose sur des fondements entièrement distincts de ceux liés à l'omission de donner un préavis raisonnable.

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Howard Levitt, *Allyson Lee*, *Blair Mitchell* and *Saba Khan*, for the appellant.

Nancy F. Barteaux, *Q.C.*, *Mary B. Rolf* and *Kate E. Ross*, for the respondent.

Stacey Reginald Ball, *Nadine Côté* and *Sean O'Donnell*, for the intervener the Canadian Association for Non-Organized Employees.

Andrew Monkhouse and *Alexandra Monkhouse*, for the intervener Don Valley Community Legal Services.

Martin Sheard and *David McWhinnie*, for the intervener the Law Students' Legal Advice Program.

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Howard Levitt, *Allyson Lee*, *Blair Mitchell* et *Saba Khan*, pour l'appelant.

Nancy F. Barteaux, *c.r.*, *Mary B. Rolf* et *Kate E. Ross*, pour l'intimée.

Stacey Reginald Ball, *Nadine Côté* et *Sean O'Donnell*, pour l'intervenante Canadian Association for Non-Organized Employees.

Andrew Monkhouse et *Alexandra Monkhouse*, pour l'intervenant Don Valley Community Legal Services.

Martin Sheard et *David McWhinnie*, pour l'intervenant Law Students' Legal Advice Program.

Tim Lawson, *Brandon Kain* and *Adam Goldenberg*, for the intervener the Canadian Association of Counsel to Employers.

Christopher Rootham, *Andrew Montague-Reinholdt* and *John No*, for the intervener Parkdale Community Legal Services.

The judgment of the Court was delivered by

Kasirer J. —

I. Overview

[1] This appeal bears on the redress available to an employee who, by reason of the circumstances of his departure from a job he had held for many years, is treated in law as if he were dismissed. By extension, it concerns some of the proper contours of an employer's common law right to determine the composition of its workforce.

[2] Different complaints are often made by employees who sue for wrongful dismissal. This case is no exception: in his original application, the employee alleged he was dismissed "without notice" and that this dismissal was in breach of the employer's "duty of good faith". He asked for damages reflecting his entitlement to reasonable notice, including an incentive bonus that fell due during the period, as well as damages for the employer's dishonest conduct, including punitive damages and damages in the amount of the lost bonus should it be excluded by a contractual term.

[3] The fact that the employee was constructively dismissed and is entitled to notice is no longer in dispute. The parties continue to disagree, however, as to the remedies that should be afforded to the employee at common law. Specifically, the parties dispute whether the failure to provide damages

Tim Lawson, *Brandon Kain* et *Adam Goldenberg*, pour l'intervenante l'Association canadienne des avocats d'employeurs.

Christopher Rootham, *Andrew Montague-Reinholdt* et *John No*, pour l'intervenant Parkdale Community Legal Services.

Version française du jugement de la Cour rendu par

Le juge Kasirer —

I. Aperçu

[1] Le présent pourvoi porte sur les voies de recours qui s'offrent à un employé qui, en raison des circonstances de son départ d'un emploi qu'il a occupé pendant de nombreuses années, est considéré par le droit comme ayant été congédié. Par extension, le pourvoi porte également sur les paramètres applicables au droit des employeurs de déterminer la composition de leurs effectifs en common law.

[2] Divers griefs sont souvent soulevés lorsqu'un employé intente une action pour congédiement injustifié. La présente affaire ne fait pas exception : dans sa demande initiale, l'employé alléguait qu'il avait été congédié [traduction] « sans préavis » et que ce congédiement constituait un manquement à l'« obligation d'agir de bonne foi » qui incombait à son employeur. Il sollicitait des dommages-intérêts reflétant son droit à un délai de préavis raisonnable, y compris une prime d'intéressement devenue exigible pendant ce délai. Il demandait aussi des dommages-intérêts en raison de la conduite malhonnête de son employeur, y compris des dommages-intérêts punitifs et des dommages-intérêts correspondant à la prime qu'il perdrait si celle-ci était exclue par application d'une disposition contractuelle.

[3] Le fait que l'employé concerné a fait l'objet d'un congédiement déguisé et a droit à un préavis n'est plus en litige. Les parties continuent toutefois d'être en désaccord en ce qui concerne les réparations qui devraient lui être accordées en vertu de la common law. Plus précisément, les parties ne s'entendent

for reasonable notice includes the disputed bonus. Moreover, they are at odds as to the existence of the employer's alleged dishonest conduct and its eventual impact. The employee points this Court to the duty to act honestly in the performance of the contract, which, as this Court has recalled, "was a key component of the good faith requirements which have been recognized in relation to termination of employment contracts" (*Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 73, referencing *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 98; *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362, at para. 58).

[4] The parties' disagreement provides an occasion to clarify the duty to provide reasonable notice and to state clearly that a violation of a duty of good faith is a distinct contractual breach, with each alleged breach reflecting different considerations in respect of an employer's common law right of dismissal without cause in employment contracts having an indeterminate term. In making their respective cases, the employee and employer in this case call for significant changes to the law — respectively for an extension of good faith and a narrowing of the duty to provide reasonable notice — changes that, if existing principles are properly understood, are ultimately unnecessary to the disposition of the appeal.

[5] While I see the law as largely settled for the purpose of answering the employee's claim, the manner in which these complaints have been conflated in this case invites the Court to state plainly the different character of these paths of redress for breach of contract in employment. As in this instance, the complaints are sometimes intertwined at the expense of a proper understanding of the law of wrongful dismissal. In fairness to the parties here, this confusion is not altogether uncommon, since courts — even

pas sur la question de savoir si les dommages-intérêts tenant lieu de préavis raisonnable devraient inclure la prime litigieuse. Elles sont également en désaccord quant à l'existence de la conduite malhonnête reprochée à l'employeur et aux répercussions éventuelles de celle-ci. L'employé attire l'attention de notre Cour sur l'obligation qu'ont les parties à un contrat d'agir avec honnêteté dans l'exécution de celui-ci, obligation qui, comme notre Cour l'a rappelé, « constitu[e] un élément clef des exigences de bonne foi qui ont été reconnues en lien avec la résiliation des contrats de travail » (*Bhasin c. Hrynew*, 2014 CSC 71, [2014] 3 R.C.S. 494, par. 73, se référant à *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701, par. 98; *Honda Canada Inc. c. Keays*, 2008 CSC 39, [2008] 2 R.C.S. 362, par. 58).

[4] Ce désaccord donne à la Cour l'occasion d'apporter des précisions sur l'obligation de donner un préavis raisonnable et d'énoncer clairement que la violation d'une obligation d'agir de bonne foi constitue une violation contractuelle distincte, l'un et l'autre de ces manquements soulevant des considérations différentes en ce qui a trait au droit dont dispose un employeur, en vertu de la common law, de congédier sans motif un employé dans le cadre d'un contrat de travail à durée indéterminée. Lors de la présentation de leurs arguments, l'employé et l'employeur en l'espèce ont réclamé des changements importants au droit en la matière — respectivement l'élargissement de l'application de l'obligation d'agir de bonne foi et la restriction de la portée de l'obligation de donner un préavis raisonnable — changements qui, si les principes existants sont interprétés correctement, sont en définitive inutiles pour trancher le pourvoi.

[5] Bien que je considère que le droit applicable pour statuer sur les prétentions de l'employé est dans une large mesure déjà bien établi, la manière dont les griefs soulevés ont été enchevêtrés en l'espèce incite notre Cour à exposer clairement le caractère distinct de ces voies de recours en cas de violations de contrats de travail. Comme c'est le cas dans le présent pourvoi, les griefs sont parfois intimement liés, de telle sorte que les règles de droit applicables au congédiement injustifié ne sont pas interprétées

this Court — have at times conflated them when determining remedies for wrongful dismissal.

[6] For the reasons that follow, as a simple matter of the breach of the duty to provide reasonable notice, I respectfully disagree with the majority of the Court of Appeal's conclusion that the employee's damages do not include the incentive bonus. Given this conclusion, on the employee's own theory of the case, we need not provide a full answer to his allegations of dishonesty; this appeal can be resolved on settled employment law principles, despite the clear dishonest behaviour exhibited by the employer over a protracted period. But beyond clarification as to how courts should analyze claims for financial redress upon dismissal, the employee's complaint that he was mistreated nevertheless deserves some modest comments. In his notice of application, the employee sought a declaration that his termination was wrongful in that his employer's associated conduct was "oppressive", "unfair", and "carried out in bad faith" (A.R., at pp. 144-45). While he has made no detailed pleading on appeal for his original claim for punitive damages and, surprisingly perhaps, made no specific claim for damages for mental distress when he instituted proceedings that can flow when an employer fails to exercise good faith in the manner of dismissal, he remains insistent that the employer breached its obligations of good faith when he was lied to in the run up to the constructive dismissal.

correctement. En toute justice pour les parties au présent pourvoi, une telle confusion n'est pas rare, puisque des tribunaux — même notre Cour — les ont parfois amalgamés dans la détermination des réparations qu'il convenait d'accorder en cas de congédiement injustifié.

[6] Pour les motifs qui suivent, en ce qui concerne la simple question du manquement à l'obligation de donner un préavis raisonnable, je ne puis, avec égards, souscrire à la conclusion des juges majoritaires de la Cour d'appel selon laquelle les dommages-intérêts accordés à l'employé ne doivent pas inclure la prime d'intéressement. Compte tenu de cette conclusion, au vu de la position de l'employé quant aux événements en cause, il ne nous est pas nécessaire de répondre exhaustivement aux prétentions relatives à la malhonnêteté qu'il a formulées. Le présent pourvoi peut être tranché suivant les principes bien établis du droit de l'emploi, malgré la conduite malhonnête évidente manifestée par l'employeur sur une période prolongée. Toutefois, outre les précisions qui s'imposent quant à la manière dont les tribunaux doivent analyser les demandes de réparations pécuniaires formulées à la suite d'un congédiement, le grief de l'employé reprochant à l'employeur de l'avoir traité incorrectement mérite quelques brefs commentaires. Dans son avis de requête, l'employé sollicitait une déclaration portant que son congédiement était injustifié parce que son employeur avait eu à son endroit une conduite [TRADUCTION] « abusive », « injuste » et « entachée de mauvaise foi » (d.a., p. 144-145). Bien qu'il n'ait présenté aucun argument détaillé en appel à l'égard de sa demande initiale de dommages-intérêts punitifs et, fait surprenant peut-être, qu'il n'ait pas, lorsqu'il a intenté son action, sollicité précisément des dommages-intérêts au titre des souffrances morales susceptibles de découler du défaut d'un employeur d'agir de bonne foi lorsqu'il congédie un employé, il continuer d'affirmer avec insistance que son employeur a manqué à son obligation d'agir de bonne foi lorsqu'il lui a menti durant la période précédant son congédiement déguisé.

[7] Some of this doggedness on appeal is explained by the fact that the employee asked not just for money but also sued his employer for non-financial reasons. The trial judge explicitly noted that the employee's sense of self-worth was particularly tied up in his job. This Court has been resolute in asserting that employment is a source of personal fulfilment — that brand of human dignity that comes from work — and this often comes into sharpest focus when a job is unfairly taken away (see, e.g., *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 991). Recently in *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, [2015] 1 S.C.R. 500, at para. 84, my colleague Wagner J., prior to his appointment as Chief Justice, identified these considerations as rooted in the "non-monetary benefit all workers may in fact derive from the performance of their work".

[8] Some comment on this aspect of the employee's claim is in my view appropriate. Recognition that an employer has acted dishonestly, independent of any failure to provide notice or other financial loss, can vindicate an employee whose sense of dignity is unfairly shaken when a valued job is lost.

II. Background

[9] David Matthews, an experienced chemist, is one of a handful of individuals in the world with the skills needed to run a large-scale omega-3 facility. Beginning in 1997, Mr. Matthews occupied several senior management positions with Ocean Nutrition Canada Limited ("Ocean"). His expertise proved extremely valuable to the success of Ocean in the manufacture of omega-3 products. Sometime company President and Chief Executive Officer, Robert Orr, testified that "[e]veryone who has gotten any value created out of Ocean in large part owes that in

[7] La persistance avec laquelle l'employé est revenu sur ce point en appel s'explique en partie par le fait qu'il ne poursuit pas son employeur uniquement pour être indemnisé financièrement, mais également pour des raisons non financières. Le juge de première instance a expressément fait remarquer que l'estime de soi de l'employé était particulièrement liée à son travail. Notre Cour a déclaré sans ambages que l'emploi constitue pour les gens une source d'épanouissement personnel — à savoir cette forme de dignité humaine qui découle du travail — et que ce phénomène se manifeste souvent avec encore plus d'acuité lorsqu'une personne perd injustement son emploi (voir, p. ex., *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986, p. 991). Récemment, dans l'arrêt *Potter c. Commission des services d'aide juridique du Nouveau-Brunswick*, 2015 CSC 10, [2015] 1 R.C.S. 500, par. 84, mon collègue le juge Wagner, avant d'être nommé juge en chef, a indiqué que ces considérations sont enracinées dans « l'avantage non pécuniaire que tout salarié tire de l'exécution de son travail ».

[8] À mon sens, il convient de formuler quelques commentaires à l'égard de cet aspect de l'argumentation de l'employé. Reconnaître qu'un employeur a agi de façon malhonnête, indépendamment de l'existence de toute omission d'accorder un préavis raisonnable ou autre perte financière, peut permettre de restituer à un employé son sens de la dignité, qui a été injustement ébranlé lorsque celui-ci a perdu un emploi qui lui était cher.

II. Contexte

[9] David Matthews, un chimiste expérimenté, est l'une des rares personnes dans le monde qui possèdent les compétences nécessaires pour gérer une installation de fabrication de produits oméga-3 de grande envergure. À partir de 1997, M. Matthews a occupé plusieurs postes de direction chez Ocean Nutrition Canada Limited (« Ocean »). Son expertise s'est avérée extrêmement précieuse à Ocean, lui permettant de connaître du succès dans le domaine de la fabrication de produits oméga-3. L'ancien président-directeur général de l'entreprise, M. Robert

some measure to [Mr. Matthews]" (see 2017 NSSC 16, at para. 66 (CanLII)).

[10] Mr. Matthews was deeply invested in his job. The trial judge wrote: "I find that Matthews is an individual whose sense of identity and self-worth is highly connected to his work. He is a person who values honesty and integrity, and is willing to work hard in exchange for fair treatment and respect" (para. 292).

[11] Mr. Matthews' fortunes took a turn for the worse in 2007, when Ocean hired a new Chief Operating Officer, Daniel Emond. Frictions quickly developed between the two men. For whatever reason, the senior manager did not like Mr. Matthews, and did not consider him to be a valuable asset to Ocean. Mr. Emond was responsible for assigning responsibilities to Mr. Matthews, and he soon began what the trial judge characterized as a "campaign" to marginalize Mr. Matthews in the company (para. 296). This course of conduct went beyond decisions limiting Mr. Matthews' responsibilities, and included instances in which Mr. Emond "lied" to Mr. Matthews and Mr. Orr about his status and prospects with Ocean, "went behind [Mr. Matthews'] back", and "ignored Matthews' request to speak with him" relating to his role within the company (paras. 296-99). Indeed, the extensive findings of facts that the trial judge set out included repeated incidents of dishonesty attributed to senior management toward Mr. Matthews (paras. 291-326). While I will not repeat every detail, the following examples illustrate how Mr. Matthews was treated in the final years of his employment.

[12] The "first step in a campaign to push Matthews out of operations and minimize his influence" began in 2007, when Mr. Emond drastically reduced the number of people reporting to Mr. Matthews

Orr, a déclaré que [TRADUCTION] « [t]ous ceux qui ont tiré des bénéfices de l'existence d'Ocean le doivent pour la plupart dans une certaine mesure à [M. Matthews] » (voir 2017 NSSC 16, par. 66 (CanLII)).

[10] Monsieur Matthews était très investi dans son travail. En effet, le juge de première instance a écrit : [TRADUCTION] « Je suis d'avis que le sens de l'identité et l'estime de soi de M. Matthews sont étroitement liés à son travail. Il accorde une grande importance à l'honnêteté et à l'intégrité, et il est prêt à travailler fort pourvu qu'on le traite de façon équitable et avec respect » (par. 292).

[11] La situation de M. Matthews s'est détériorée en 2007 lorsque Ocean a embauché un nouveau directeur de l'exploitation, M. Daniel Emond. Il y a rapidement eu des frictions entre les deux hommes. Pour une raison quelconque, le directeur de l'exploitation n'aimait pas M. Matthews et ne le considérait pas comme un atout pour Ocean. Monsieur Emond, qui était chargé d'assigner à M. Matthews ses responsabilités, a rapidement entamé ce que le juge de première instance a qualifié de [TRADUCTION] « campagne » de marginalisation de M. Matthews au sein de l'entreprise (par. 296). Dans le cadre de cette campagne, M. Emond a non seulement pris des décisions limitant les responsabilités de M. Matthews, mais il a en outre [TRADUCTION] « menti » à quelques reprises à ce dernier et à M. Orr au sujet du statut et de l'avenir de M. Matthews au sein de l'entreprise, il « a agi dans [le] dos [de M. Matthews] » et il « a fait la sourde oreille à la demande de M. Matthews qui souhaitait discuter avec lui » de son rôle dans l'entreprise (par. 296-299). D'ailleurs, les abondantes conclusions de fait tirées par le juge de première instance font état d'actes répétés de malhonnêteté attribués à la haute direction envers M. Matthews (par. 291-326). Je n'entends pas relater de nouveau tous ces actes par le menu, mais les exemples suivants illustrent comment M. Matthews a été traité au cours des dernières années de son emploi.

[12] La [TRADUCTION] « première étape d'une campagne visant à écarter M. Matthews des opérations et à réduire au minimum son influence » a débuté en 2007 lorsque M. Emond a réduit de façon

(para. 296). Over the next four years, the trial judge observed that Mr. Matthews' responsibilities were reduced further, he became progressively more ostracized within the company, and Mr. Emond's conduct was characterized by dishonesty (e.g., see paras. 297-300). The trial judge explicitly found that Mr. Emond had "no qualms about leaving Matthews in a state of anxiety about his future", and that Mr. Matthews was left in a "prolonged state of anxiety and uncertainty" (paras. 317 and 341).

[13] At various times when confronted about decisions to transfer oversight away from Mr. Matthews or to change his reporting responsibilities, Mr. Emond would indeed lie to Mr. Matthews about his efforts to minimize the latter's role (see, e.g., paras. 296, 298 and 301). At one point, Mr. Emond wrote a letter to Mr. Matthews that purported to establish a reconciliation, acknowledging that their relationship had been "based on mistrust" and in which he undertook to be "more open and honest" with Mr. Matthews so he might be "respected by me" and by others in the company (see para. 114). The trial judge found that Mr. Emond's "use of the word 'honest' in the letter was intended to mean exactly that, with the implication being that he had been dishonest with Matthews in the past" (para. 301). These dishonest statements were relied upon by at least one other executive, who in turn developed "significant animosity" toward Mr. Matthews (paras. 286-87). Senior management also sought to exclude Mr. Matthews from various initiatives in which Mr. Matthews would normally participate, even if it was to the detriment of Ocean.

[14] In 2010, when Mr. Orr stepped away from running Ocean and became Chair of the Board of Directors, Mr. Matthews' situation worsened. Martin Jamieson assumed the role of President and Chief Executive Officer and, soon after his arrival, Mr. Matthews was placed under review. The trial

substantielle le nombre de personnes relevant de ce dernier (par. 296). Le juge de première instance a fait remarquer que, au cours des quatre années qui ont suivi, les responsabilités de M. Matthews ont été réduites encore plus, ce dernier devenant progressivement de plus en plus ostracisé au sein de l'entreprise, et M. Emond a adopté une conduite qui était entachée de malhonnêteté (voir, p. ex., par. 297-300). Le juge de première instance a explicitement conclu que M. Emond ne montrait [TRADUCTION] « aucun scrupule à laisser M. Matthews angoisser sur son avenir », et que M. Matthews a été plongé dans un « état prolongé d'angoisse et d'incertitude » (par. 317 et 341).

[13] À diverses occasions, lorsque M. Matthews l'a confronté au sujet des décisions qu'il prenait pour confier à d'autres certaines de ses tâches de supervision ou pour modifier ses responsabilités redditionnelles, M. Emond lui a effectivement menti à propos des efforts qu'il déployait pour réduire au minimum le rôle de celui-ci (voir, p. ex., par. 296, 298 et 301). À un certain moment, M. Emond a écrit à M. Matthews une lettre se voulant un effort de réconciliation, dans laquelle il reconnaissait que leur relation [TRADUCTION] « reposait sur la méfiance » et il s'engageait à être « plus ouvert et honnête » avec M. Matthews afin que ce dernier soit « respecté par [M. Emond] » et par d'autres dans l'entreprise (voir par. 114). Le juge de première instance a conclu qu'en [TRADUCTION] « utilisant le mot "honnête" M. Emond disait exactement ce qu'il voulait dire, ce qui impliquait qu'il avait été malhonnête avec M. Matthews par le passé » (par. 301). Au moins un autre cadre a cru à ces déclarations malhonnêtes et a par la suite développé une [TRADUCTION] « animosité considérable » envers M. Matthews (par. 286-287). La haute direction a également cherché à exclure celui-ci de divers projets auxquels il aurait généralement participé, et ce, même si son exclusion nuisait à Ocean.

[14] En 2010, lorsque M. Orr a quitté ses fonctions de président-directeur général d'Ocean et a assumé la présidence du conseil d'administration, la situation de M. Matthews s'est aggravée. Monsieur Martin Jamieson est alors devenu président-directeur général et, peu de temps après son entrée en fonction, la

judge found it had become clear that "Matthews' departure from [Ocean] was a possible consequence of the review" (para. 283). Around this time, Mr. Emond advised the Board of Directors there would soon be no place in the company for Mr. Matthews. When Mr. Orr informed him of these developments, Mr. Matthews' frustrations grew, as he was already suspicious that Ocean was conducting due diligence for a possible sale, a process in which he would normally have had a role but from which he found himself excluded.

[15] A potential sale of Ocean was significant, as it meant Mr. Matthews would be able to realize on Ocean's long term incentive plan ("LTIP"). The LTIP, a contractual arrangement providing for payment upon the sale of the company, proposed by Ocean and to which Mr. Matthews agreed in 2007, was designed for certain senior executives in service of two goals: to reward the participating employees for their previous contributions and provide an incentive to continue contributing to the company's success. Ocean's retention goal proved successful, as Mr. Matthews ended up staying longer than he would have otherwise. As the trial judge found, the LTIP was a "key reason" Mr. Matthews stayed with the company, particularly when his problems with senior management developed (para. 388).

[16] Mr. Matthews advised Mr. Emond that he wanted to stay in his role as he anticipated the company would soon be sold. Mr. Emond falsely told him he did not know what Ocean's plans were for him. He then sent an email to Mr. Jamieson, with the subject line "here we go again". It read in part:

Moreover [Matthews] also ask me if he is part of the restructuring???????? He said that he would like to stay as

place de M. Matthews dans l'entreprise a été examinée. Le juge de première instance a conclu qu'il était devenu évident que [TRADUCTION] « le départ de M. Matthews d'[Ocean] était une conséquence possible de cet examen » (par. 283). À cette époque, M. Emond a dit au conseil d'administration qu'il n'y aurait bientôt plus de place pour M. Matthews au sein de l'entreprise. Lorsque M. Orr a informé M. Matthews de ces propos, la frustration de ce dernier s'est accentuée, car il soupçonnait déjà Ocean d'avoir entamé un processus de diligence raisonnable en vue d'une possible vente, un processus dans lequel il aurait normalement dû jouer un rôle mais duquel il s'est retrouvé exclu.

[15] La possible vente d'Ocean était un événement important, car M. Matthews aurait alors pu obtenir la prime à laquelle il avait droit au titre du régime d'intéressement à long terme (« RILT ») d'Ocean. Le RILT — un arrangement contractuel prévoyant une forme de paiement en cas de vente de l'entreprise, qui avait été proposé par Ocean et signé par M. Matthews en 2007 — avait été conçu à l'intention de certains cadres supérieurs et visait deux objectifs : récompenser les employés parties au régime pour leurs contributions antérieures au succès de l'entreprise et les inciter à continuer de le faire. Ocean a réussi à atteindre son objectif de maintenir en poste son employé, puisque M. Matthews est demeuré au service de l'entreprise plus longtemps qu'il ne l'aurait fait autrement. Comme l'a conclu le juge de première instance, le RILT était une [TRADUCTION] « raison déterminante » dans la décision de M. Matthews de continuer de travailler pour l'entreprise, particulièrement lorsque ses problèmes avec la haute direction ont commencé (par. 388).

[16] Monsieur Matthews a informé M. Emond qu'il souhaitait conserver son rôle, car il s'attendait à ce que l'entreprise soit bientôt vendue. Monsieur Emond a faussement affirmé qu'il ne savait pas quelles étaient les intentions d'Ocean à son égard. Il a ensuite envoyé à M. Jamieson un courriel dont l'objet indiquait [TRADUCTION] « C'est reparti », et dans lequel il disait notamment ce qui suit :

De plus, [M. Matthews] m'a aussi demandé s'il fait partie de la restructuration???????? Il a dit qu'il aimerait rester

he believe the company will be sold to have is incentive on the sale?????? Anyway I manage to get myself out of it not sure he believe me but he got an answer. [Transcribed as in original.]

(See trial reasons, at para. 194.)

[17] A few months later, Mr. Matthews asked Mr. Jamieson whether Ocean was planning on terminating him. Mr. Jamieson told him the company had no such plans. Soon after, Mr. Matthews found himself meeting with the company's Vice President of Human Resources, discussing a possible termination package. Mr. Matthews advised the human resources representative that he would forfeit severance in order to protect his entitlement under the LTIP. In the end, however, negotiations over an "exit strategy" never came to fruition, as Mr. Matthews took a position with a new employer on June 22, 2011, officially leaving Ocean on June 24, 2011.

[18] About 13 months after Mr. Matthews' departure, Ocean was sold for $540 million. This constituted a "Realization Event" for the purposes of the LTIP, thus triggering payments to employees who qualified under the plan. But since Mr. Matthews was not actively employed on that date, Ocean took the position that he did not satisfy the terms of the plan. Accordingly, Mr. Matthews did not receive a payment. Notably, the trial judge found that Mr. Emond's mistreatment of Mr. Matthews was not motivated by a desire to deprive him of his LTIP entitlement, nor was there evidence of a company conspiracy to "get rid of Matthews in order to deprive him of his LTIP entitlement" (para. 325).

[19] Mr. Matthews filed an application against Ocean, alleging that his employer constructively dismissed him, behaved in a manner that was

parce qu'il croit que l'entreprise sera vendue et qu'il veut toucher sa prime en cas de vente?????? Quoi qu'il en soit j'ai réussi à m'en sortir je ne suis pas certain qu'il m'a cru mais il a eu une réponse. [Transcription de l'original.]

(Voir les motifs du jugement de première instance, par. 194.)

[17] Quelques mois plus tard, M. Matthews a demandé à M. Jamieson si Ocean prévoyait mettre fin à son emploi. Ce dernier lui a alors répondu que l'entreprise n'avait aucun plan de la sorte. Peu de temps après, M. Matthews a rencontré le vice-président des ressources humaines pour discuter d'un possible règlement forfaitaire de cessation d'emploi. Monsieur Matthews a dit au représentant des ressources humaines qu'il renoncerait à son indemnité de départ pour protéger ses droits au titre du RILT. Cependant, au bout du compte, les négociations sur une [TRADUCTION] « stratégie de départ » n'ont jamais abouti, étant donné que M. Matthews a accepté un poste chez un nouvel employeur le 22 juin 2011 et a quitté officiellement Ocean le 24 juin 2011.

[18] Environ 13 mois après le départ de M. Matthews, Ocean a été vendue pour la somme de 540 millions de dollars. Cette vente constituait, pour les besoins du RILT, [TRADUCTION] « [l']événement déclencheur », qui entraînait le versement des primes aux employés admissibles aux termes du régime. Toutefois, comme M. Matthews ne travaillait plus activement pour l'entreprise au moment de la vente, Ocean a soutenu qu'il ne satisfaisait pas aux conditions du régime. Monsieur Matthews n'a par conséquent pas reçu de prime. Fait notable, le juge de première instance a conclu que la conduite incorrecte de M. Emond envers M. Matthews n'était pas motivée par le désir de priver celui-ci du droit de recevoir le paiement prévu par le RILT, et qu'il n'y avait pas non plus de preuve que l'entreprise avait comploté pour [TRADUCTION] « se débarrasser de M. Matthews afin de le priver de ses droits au titre du RILT » (par. 325).

[19] Monsieur Matthews a présenté contre Ocean une requête dans laquelle il alléguait que son employeur l'avait congédié de façon déguisée et avait

"oppressive of, unfairly prejudicial to and in unfair disregard" of his interests, and, separately, that the constructive dismissal "was carried out in bad faith at law and in breach of the corporation's duty of good faith" (A.R., at p. 145). He sought the declaration alluded to earlier as well as loss of pay, bonuses and benefits, together with general damages, and compensation pursuant to an oppression remedy under s. 241(1) of the *Canada Business Corporation Act*, R.S.C. 1985, c. C-44. In light of Ocean's conduct that proceeded "in contum[e]lious disregard of [his] contractual entitlements" (A.R., at p. 145), Mr. Matthews also asked for punitive damages and solicitor and client costs.

agi d'une manière [TRADUCTION] « abusive, injustement préjudiciable et injustement indifférente » à l'égard de ses intérêts, puis il affirmait, dans une allégation distincte, que son congédiement déguisé « avait été effectué de mauvaise foi au sens de la loi et en contravention à l'obligation de la société d'agir de bonne foi » (d.a., p. 145). Il sollicitait la déclaration mentionnée plus tôt, des dommages-intérêts pour perte de revenus, de primes et d'avantages, des dommages-intérêts généraux ainsi qu'une indemnité à titre de réparation pour cause d'abus en vertu du par. 241(1) de la *Loi canadienne sur les sociétés par actions*, L.R.C. 1985, c. C-44. Compte tenu de la conduite d'Ocean, qui a manifesté [TRADUCTION] « une indifférence méprisante à l'égard [de ses] droits d'ordre contractuel » (d.a., p. 145), M. Matthews sollicitait également des dommages-intérêts punitifs et les dépens taxés sur la base procureur-client.

III. Prior Decisions

A. *Supreme Court of Nova Scotia (LeBlanc J.)*

[20] The trial judge concluded that Ocean constructively dismissed Mr. Matthews, and that Mr. Matthews was owed a reasonable notice period of 15 months. The trial judge relied upon this Court's decision in *Potter*, where Wagner J. explained that, typically, an employee's decision to leave their employment may be considered a constructive dismissal in two different ways. First, an employee may be prompted to leave because the employer substantially breached an express or implied term of the employment contract. Second, Wagner J. drew upon cases where "the employer's treatment of the employee made continued employment intolerable" (at para. 33), explaining that such cases will amount to constructive dismissal where the employer displayed, through its cumulative actions over time, that it no longer intended to be bound by the contract.

[21] The trial judge was satisfied that the test for constructive dismissal had been satisfied on either

III. Décisions des juridictions inférieures

A. *Cour suprême de la Nouvelle-Écosse (le juge LeBlanc)*

[20] Le juge de première instance a conclu qu'Ocean avait congédié M. Matthews de manière déguisée et que ce dernier avait droit à un préavis raisonnable de 15 mois. Le juge de première instance s'est appuyé sur l'arrêt *Potter* de notre Cour, dans lequel le juge Wagner a expliqué que, généralement, la décision d'un employé de quitter son emploi peut être considérée comme un congédiement déguisé dans deux situations différentes. Premièrement, un employé peut être poussé à quitter son emploi parce que son employeur a violé de manière substantielle une condition expresse ou tacite de son contrat de travail. Deuxièmement, s'appuyant sur d'autres affaires où « le comportement de l'employeur vis-à-vis du salarié avait rendu la situation intolérable au travail » (par. 33), le juge Wagner a expliqué que le départ de l'employé équivaudra à un congédiement déguisé lorsque l'employeur a manifesté, par l'effet cumulatif de ses actes antérieurs, son intention de ne plus être lié par le contrat.

[21] Le juge de première instance était convaincu qu'il y avait lieu de conclure au congédiement

branch articulated in *Potter*. With respect to the first branch, he concluded that it was an implied term that Mr. Matthews would be assigned work "which is substantially similar in terms of job duties, pay, responsibility and status" (para. 337, citing P. Barnacle, *Employment Law in Canada* (4th ed. (loose-leaf)), vol. 2, at §13.42). By unilaterally reducing Mr. Matthews' responsibilities in such a substantial manner, Ocean breached the employment contract.

[22] In terms of the second branch, the trial judge found that Ocean's senior manager "engaged in a course of conduct aimed at pushing Matthews out of operations and minimizing his influence and participation in the company", alluding to his findings of fact regarding Mr. Emond's deceit in respect of Mr. Matthews' future prospects with the company, as a result of which he "became increasingly ostracized" (para. 347). Given the behaviour, a reasonable person in Mr. Matthews' position would have felt that Ocean "had engaged in a course of conduct that evinced an intention [to] no longer . . . be bound by the contract" (para. 353).

[23] Relying on *Paquette v. TeraGo Networks Inc.*, 2016 ONCA 618, 352 O.A.C. 1, and *Lin v. Ontario Teachers' Pension Plan Board*, 2016 ONCA 619, 352 O.A.C. 10, the trial judge held that Mr. Matthews would have been a full-time employee when the Realization Event occurred had he not been constructively dismissed. Because the terms of the LTIP did not unambiguously limit or remove his common law right to damages, Mr. Matthews was entitled to damages equivalent to what he would have received under the LTIP.

[24] Given his conclusion on the LTIP, the trial judge wrote that it was unnecessary to decide whether Mr. Matthews was entitled to an equivalent amount pursuant to the oppression remedy (para. 418). The trial judge went on to reject Mr. Matthews' claim

déguisé suivant l'un ou l'autre des volets énoncés dans l'arrêt *Potter*. En ce qui concerne le premier volet, il a conclu qu'une condition tacite du contrat était que M. Matthews serait affecté à un poste [TRADUCTION] « dont les fonctions, la rémunération, les responsabilités et le statut seraient substantiellement similaires » (par. 337, citant P. Barnacle, *Employment Law in Canada* (4e éd. (feuilles mobiles)), vol. 2, §13.42). En réduisant unilatéralement les responsabilités de M. Matthews de manière aussi substantielle, Ocean a violé le contrat de travail.

[22] Pour ce qui est du deuxième volet, le juge de première instance a statué que le cadre supérieur d'Ocean [TRADUCTION] « a agi de façon à écarter M. Matthews des opérations et à réduire au minimum son influence et sa participation au sein de l'entreprise », se référant à ses conclusions de fait concernant la conduite trompeuse de M. Emond quant à l'avenir de M. Matthews dans l'entreprise, ce qui avait eu pour effet que ce dernier était « deven[u] de plus en plus ostracis[é] » (par. 347). Vu ce comportement, une personne raisonnable dans la situation de M. Matthews aurait estimé qu'Ocean [TRADUCTION] « agissait d'une manière démontrant [son] intention de ne plus être liée par le contrat » (par. 353).

[23] S'appuyant sur les arrêts *Paquette c. TeraGo Networks Inc.*, 2016 ONCA 618, 352 O.A.C. 1, et *Lin c. Ontario Teachers' Pension Plan Board*, 2016 ONCA 619, 352 O.A.C. 10, le juge de première instance a déclaré que M. Matthews aurait été un employé à temps plein de l'entreprise lorsque l'événement déclencheur s'est produit s'il n'avait pas été l'objet d'un congédiement déguisé. Comme les modalités du RILT n'avaient pas pour effet de limiter ou de supprimer clairement son droit à des dommages-intérêts en vertu de la common law, M. Matthews avait droit à des dommages-intérêts d'un montant équivalant au paiement qu'il aurait reçu en vertu du RILT.

[24] Compte tenu de sa conclusion au sujet du RILT, le juge de première instance a écrit qu'il était inutile de décider si M. Matthews avait droit à une somme équivalente à titre de réparation pour cause d'abus (par. 418). Le juge a également

for punitive damages, as he was not satisfied that Ocean's actions were directly motivated by a desire to deprive Mr. Matthews of his LTIP entitlement (para. 422).

[25] Based on his findings, the trial judge awarded Mr. Matthews lost earnings, $1,086,893.36 for the loss of the LTIP payment he would have received during the notice period, and other benefits, less an amount of $78,000 for mitigation of damages, representing monies paid to him by his new employer.

[26] The trial judge provided supplementary reasons regarding the quantum of damages during the reasonable notice period (2017 NSSC 123). A decision on costs was postponed pending a hearing on the matter. That was suspended while the case went to appeal.

B. *Court of Appeal of Nova Scotia (Farrar, Bryson and Scanlan JJ.A.)*

[27] The judges on appeal all agreed that Mr. Matthews' original claim for wrongful dismissal and for an oppression remedy had "morphed" into a case of constructive dismissal (2018 NSCA 44, 48 C.C.E.L. (4th) 171, at paras. 1 and 151). Accepting the trial judge's findings of fact, the Court of Appeal unanimously upheld his decision that Mr. Matthews had been constructively dismissed and that the appropriate reasonable notice period was 15 months. The judges differed, however, on the issue of damages and the relevance of good faith.

rejeté la demande de dommages-intérêts punitifs de M. Matthews, car il n'était pas convaincu que la conduite d'Ocean était directement motivée par le désir de priver M. Matthews de ses droits au titre du RILT (par. 422).

[25] Sur la base de ses conclusions, le juge de première instance a accordé à M. Matthews des dommages-intérêts pour sa perte de revenus, une somme de 1 086 893,36 $ pour la perte du paiement prévu par le RILT qu'il aurait reçu pendant la période de préavis et la perte d'autres avantages, moins une somme de 78 000 $ au titre de l'atténuation des dommages, qui correspondait à la rémunération que lui avait versée son nouvel employeur.

[26] Le juge de première instance a écrit des motifs supplémentaires relatifs au montant des dommages-intérêts qu'il convenait d'accorder pour la période de préavis raisonnable (2017 NSSC 123). La décision sur les dépens a été reportée jusqu'à la tenue d'une audience sur la question. Ce volet de l'affaire a été suspendu pendant la durée des procédures d'appel.

B. *Cour d'appel de la Nouvelle-Écosse (les juges Farrar, Bryson et Scanlan)*

[27] Les juges de la Cour d'appel étaient tous d'accord pour dire que l'action initiale de M. Matthews en congédiement injustifié et en réparation pour cause d'abus s'était [TRADUCTION] « transformée » en une action pour congédiement déguisé (2018 NSCA 44, 48 C.C.E.L. (4th) 171, par. 1 et 151). En acceptant les conclusions de fait du juge de première instance, la Cour d'appel a confirmé à l'unanimité la décision de celui-ci portant que M. Matthews avait fait l'objet d'un congédiement déguisé et que le préavis raisonnable approprié était de 15 mois. Les juges de la Cour d'appel ont toutefois différé d'opinions sur la question des dommages-intérêts et sur la pertinence de l'obligation d'agir de bonne foi.

(1) Majority Reasons (Farrar J.A., Bryson J.A. Concurring)

[28] The majority judges disagreed with the trial judge that Mr. Matthews was entitled to damages on account of the lost LTIP payment. The trial judge confused an employee's right to reasonable notice with an employee's ability to recover under an incentive plan. The proper question, they said, was "whether the employee qualifie[d] pursuant to the terms of the agreement" (para. 63).

[29] In their view, clause 2.03 of the LTIP was unambiguous, leading to the conclusion that Mr. Matthews' right to recover under the plan ceased the moment he left Ocean. They further held that clause 2.05 clearly stated that the LTIP could not be used for severance purposes, which, in their view, the trial judge had erroneously done. As was the case in *Styles v. Alberta Investment Management Corp.*, 2017 ABCA 1, 44 Alta. L.R. (6th) 214, the plain and unambiguous language of the LTIP therefore deprived Mr. Matthews of the opportunity to recover under the LTIP.

[30] The majority judges went on to comment on the dissenting reasons. First, they observed that "[t]his may have been a different case if the hearing judge had concluded that [Ocean] had orchestrated Matthews' termination to avoid any liability it might have under the [LTIP]", but this was rejected by the trial judge (paras. 89-90 and 114-16). In the majority's view, the dissenting judge ignored this key finding of fact. Second, the majority judges noted that it was open for the trial judge to award "additional damages as a result of the manner in which [Mr. Matthews] was treated", but "given his finding that there was no bad faith on the part of Ocean Nutrition, he could not and did not do so" (para. 122 (emphasis added)). Even though the majority judges found for Ocean in part and reversed one portion of

(1) Motifs de la majorité (le juge Farrar, avec l'accord du juge Bryson)

[28] Les juges majoritaires n'ont pas souscrit à l'opinion du juge de première instance suivant laquelle M. Matthews avait droit à des dommages-intérêts pour la perte du paiement prévu par le RILT. À leur avis, le premier juge avait confondu le droit d'un employé à un préavis raisonnable et la capacité d'un employé de toucher une prime en vertu d'un régime d'intéressement. La véritable question, selon les juges majoritaires, consistait plutôt à se demander [TRADUCTION] « si l'employé [était] admissible selon les modalités de l'entente » (par. 63).

[29] De l'avis des juges majoritaires, la clause 2.03 du RILT n'était pas ambiguë et permettait de conclure que M. Matthews a cessé d'avoir droit à la prime prévue par le régime dès qu'il a quitté Ocean. Ils ont en outre statué que la clause 2.05 indiquait clairement que le RILT ne pouvait pas être utilisé pour le calcul d'une indemnité de départ, ce qu'avait fait à tort le juge de première instance selon eux. Tout comme dans l'affaire *Styles c. Alberta Investment Management Corp.*, 2017 ABCA 1, 44 Alta. L.R. (6th) 214, le libellé clair et non ambigu du RILT privait donc M. Matthews de la possibilité de toucher une prime au titre de ce régime.

[30] Les juges majoritaires ont poursuivi en commentant les motifs de leur collègue dissident. Premièrement, ils ont fait remarquer que [TRADUCTION] « [l]'issue aurait été différente si le juge qui présidait l'audience avait conclu qu'[Ocean] avait orchestré la fin d'emploi de M. Matthews de manière à se soustraire à toute responsabilité qu'elle pourrait avoir aux termes du [RILT] », mais ce constat n'a pas été retenu par le juge de première instance (par. 89-90 et 114-116). De l'avis de la majorité, le juge dissident a fait abstraction de cette conclusion de fait cruciale. Deuxièmement, les juges majoritaires ont souligné qu'il était loisible au juge de première instance d'accorder [TRADUCTION] « des dommages-intérêts additionnels en raison de la manière dont [M. Matthews] avait été traité », mais

the judgment in first instance, it awarded no costs on appeal.

(2) Dissenting Reasons (Scanlan J.A.)

[31] Focusing principally on the allegations of mistreatment, the dissenting judge reasoned that the parties could not have "intended to agree that a rogue manager such as Emond could engineer the dismissal of a valued long-term employee through a series of lies, deceit and manipulation so as to result in that employee not being entitled to share in the value he was so essential in creating" (para. 148). Drawing on *Bhasin*, he held that "[t]here was an implied agreement that the LTIP and the employment contract would be performed with honesty and integrity" (para. 148). The dissenting judge explained his view that Mr. Emond's actions displayed the type of dishonesty contemplated in *Bhasin*:

> Neither party should be able to rely upon lies, deceit and manipulation to deny the other side of the benefits of the contractual relationship, even if that was not the primary goal of the party acting dishonestly. The hearing judge did not find that Ocean acted to intentionally deny Matthews' entitlement to the LTIP benefits, but my colleague says a consequence of Emond's action, which resulted in Matthews leaving, was the loss of the LTIP benefits. [para. 168]

The dissenting judge concluded that Ocean should therefore be held liable for any damages sustained as a result of that dishonesty.

[32] Justice Scanlan then presented a second path to recovery, again based on *Bhasin*. In his view, the

« comme il avait conclu à l'absence de mauvaise foi de la part d'Ocean Nutrition, il ne pouvait pas le faire et il ne l'a pas fait » (par. 122 (je souligne)). Même si les juges majoritaires ont partiellement statué en faveur d'Ocean et infirmé une partie du jugement rendu en première instance, ils n'ont pas adjugé de dépens en appel.

(2) Motifs dissidents (le juge d'appel Scanlan)

[31] S'attachant principalement aux allégations selon lesquelles M. Matthews avait été traité de façon incorrecte, le juge dissident a considéré que les parties ne pouvaient avoir eu [TRADUCTION] « l'intention de convenir qu'un directeur sans scrupules comme M. Emond puisse orchestrer le congédiement d'un employé estimé de longue date en usant de mensonges, de tromperies et de manipulations afin que cet employé n'ait pas le droit de toucher sa part d'une appréciation de valeur à laquelle il avait contribué de manière déterminante » (par. 148). Se fondant sur l'arrêt *Bhasin*, le juge dissident a déclaré [TRADUCTION] « [qu'il] existait un accord tacite portant que les modalités du RILT et du contrat de travail seraient exécutées avec honnêteté et intégrité » (par. 148). Il a expliqué ainsi son opinion selon laquelle les actes de M. Emond correspondaient au type d'actes malhonnêtes envisagés dans l'arrêt *Bhasin* :

> [TRADUCTION] Aucune partie ne devrait pouvoir user de mensonges, de tromperies et de manipulations pour refuser à l'autre les avantages découlant d'une relation contractuelle, et ce, même si ce n'était pas là l'objectif premier de la partie qui a agi malhonnêtement. Le juge qui présidait l'audience n'a pas conclu qu'Ocean avait agi intentionnellement afin de priver M. Matthews des avantages prévus par le RILT, mais mon collègue affirme qu'une des conséquences des actes de M. Emond, qui se sont traduits par le départ de M. Matthews, a été la perte de ces avantages. [par. 168]

Le juge dissident a conclu qu'Ocean devrait donc être tenue responsable de tout préjudice subi par M. Matthews en raison de cette malhonnêteté.

[32] Le juge Scanlan a ensuite exposé une autre voie permettant d'obtenir réparation, elle aussi

employment contract included an implied term of honest performance as part of the prohibition against unlawful dismissal without notice. Given that Ocean would benefit financially from Mr. Emond's deception, and by extension from Mr. Matthews' dismissal, the dissenting judge would have used the LTIP as a means to measure the damages for the constructive dismissal. This was appropriate since Ocean knew that a consequence of Mr. Matthews' dismissal was that his LTIP would be at risk, and that the sale of Ocean might soon occur. Consequently, the loss of opportunity to participate in the LTIP was a predictable loss. Based on these conclusions, he would "have awarded costs on this appeal to Matthews in the amount of 30% of appropriate trial costs" (para. 211).

fondée sur l'arrêt *Bhasin*. À son avis, le contrat de travail comprenait une condition tacite d'exécution honnête faisant partie de l'interdiction visant les congédiements illégaux sans préavis. Étant donné qu'Ocean tirerait un avantage pécuniaire de la tromperie de M. Emond, et, par extension, du congédiement de M. Matthews, le juge dissident aurait utilisé le RILT pour calculer le montant des dommages-intérêts pour le congédiement déguisé. Cette approche était appropriée, puisqu'Ocean savait que le congédiement de M. Matthews compromettrait les droits de ce dernier au titre du RILT, et qu'il était possible que la vente d'Ocean survienne sous peu. Par conséquent, la perte de l'occasion de toucher l'avantage prévu par le RILT était prévisible. Compte tenu de ces conclusions, le juge Scanlan aurait [TRADUCTION] « adjugé à M. Matthews des dépens en appel représentant 30 % du montant des dépens appropriés en première instance » (par. 211).

IV. Analysis

IV. Analyse

A. *Arguments on Appeal*

A. *Arguments en appel*

[33] On appeal, the parties continue to disagree as to the amount that should be paid to Mr. Matthews for damages, specifically whether he was entitled to compensation for the lost LTIP payment. This, in turn, reflects the disagreement between them as to the basis for awarding those damages — whether as a remedy for failure to provide reasonable notice or to act in good faith, or both. Respectfully stated, their arguments on appeal are confounding when placed side-by-side — not only do they address matters at cross-purposes but, at times, the parties seem to be speaking past one another.

[33] En appel, les parties ont continué d'exprimer leur désaccord quant au montant qui devrait être versé à M. Matthews au titre des dommages-intérêts, et, plus précisément, quant à la question de savoir si ce dernier avait droit d'être indemnisé pour la perte du paiement prévu par le RILT. Cette situation témoigne à son tour du désaccord qui existe entre les parties quant au fondement de l'octroi de dommages-intérêts — à savoir à titre de réparation pour l'absence de préavis raisonnable, pour le défaut d'agir de bonne foi, ou pour ces deux raisons. Avec égards, les arguments des parties en appel sont déroutants lorsque considérés côte à côte — non seulement ces arguments ne traitent-ils pas des mêmes questions, mais, par moment, les parties elles-mêmes semblent ne pas s'adresser l'une à l'autre.

[34] At the hearing, Mr. Matthews confined his arguments almost exclusively to the consequences of Ocean's alleged dishonesty. He argued that the majority of the Court of Appeal failed to recognize that Ocean, through its dishonest actions, breached the duty set forth in *Bhasin* "to ensure that the contract is performed in line with the organizing principle

[34] À l'audience, M. Matthews a limité ses arguments presque exclusivement aux conséquences de la malhonnêteté dont aurait fait preuve son employeur. Il a plaidé que les juges majoritaires de la Cour d'appel n'avaient pas tenu compte du fait que, par ses actes malhonnêtes, Ocean avait manqué à l'obligation formulée dans l'arrêt *Bhasin* [TRADUCTION] « de

of good faith and the duty of honest performance" (A.F., at para. 47). Relying on *Hadley v. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145, Mr. Matthews submitted that, as a remedy for this breach, he was entitled to an amount equivalent to the LTIP payment. Moreover, he urged this Court to recognize good faith as animating the whole of the performance of the employment contract. This is relevant given what Mr. Matthews described as a "four-year course of lying to him about the status of his employment" (transcript, at p. 9).

[35] Mr. Matthews offered, secondarily, two further bases for his claim. First, he said, the majority of the Court of Appeal misdirected itself in failing to consider damages for Ocean's breach of its obligation to provide him with reasonable notice. Moreover, in light of the supposed breach of the duty of honest performance, Mr. Matthews argued, Ocean should have been barred from relying on the exclusionary clauses. In any event, Mr. Matthews said the LTIP was misread and the majority should have deferred to the trial judge's interpretation of that contract. Second, Mr. Matthews invoked the doctrine of estoppel to support his argument that Ocean cannot rely upon the exclusion clause.

[36] By contrast, Ocean focused on defending the exclusion of the LTIP as a matter of contractual interpretation. Ocean submitted that the bonus was not integral to Mr. Matthews' compensation. Further, it agreed with the majority of the Court of Appeal that the trial judge had misinterpreted the LTIP and that, given its plain and unambiguous language, the bonus should have been excluded from any damage award.

veiller à ce que le contrat soit exécuté en conformité avec le principe directeur de bonne foi et l'obligation d'agir honnêtement dans l'exécution des obligations contractuelles » (m.a., par. 47). S'appuyant sur l'arrêt *Hadley c. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145, M. Matthews a affirmé qu'il avait droit à un montant correspondant au paiement prévu par le RILT à titre de réparation pour ce manquement. En outre, il a exhorté notre Cour à reconnaître que la bonne foi anime l'ensemble de l'exécution du contrat de travail. Cet argument est pertinent compte tenu de la situation que M. Matthews a décrite comme étant une [TRADUCTION] « campagne de quatre ans au cours de laquelle on lui a menti sur l'état de son emploi » (transcription, p. 9).

[35] À titre subsidiaire, M. Matthews a invoqué deux fondements additionnels au soutien de sa demande. Premièrement, il a affirmé que les juges majoritaires de la Cour d'appel se sont donné des directives erronées en omettant de considérer l'octroi de dommages-intérêts à l'égard du manquement d'Ocean de s'acquitter de son obligation de lui donner un préavis raisonnable. De plus, compte tenu du prétendu manquement à l'obligation d'exécution honnête, M. Matthews a fait valoir qu'Ocean n'aurait pas dû pouvoir invoquer les clauses d'exclusion. De toute façon, M. Matthews a déclaré que les juges majoritaires avaient mal interprété le RILT et qu'ils auraient dû s'en remettre à celle qu'en avait faite le juge de première instance. Deuxièmement, M. Matthews a invoqué la doctrine de la préclusion promissoire pour étayer son argument selon lequel Ocean ne pouvait pas appliquer la clause d'exclusion.

[36] En revanche, Ocean s'est attachée à défendre l'exclusion de M. Matthews du RILT comme étant une question d'interprétation contractuelle. Elle a fait valoir que la prime ne faisait pas partie intégrante de la rémunération de M. Matthews. De plus, à l'instar des juges majoritaires de la Cour d'appel, elle a exprimé l'avis que le juge de première instance a mal interprété le RILT et que, vu le libellé clair et non équivoque de ce document, la prime aurait dû être exclue de toute somme accordée au titre des dommages-intérêts.

[37] Ocean had little to say on good faith, except to acknowledge that the employer had displayed some "bad conduct" and to assert that there was no finding, at trial or in the majority opinion on appeal, of bad faith (transcript, at p. 66). After proposing a fresh characterization of certain facts relating to the interaction between Ocean's representatives and Mr. Matthews to that end, Ocean urged this Court to hold that the majority judges on appeal were right to conclude there was no bad faith. In any event, Ocean argued that the common law does not recognize any duties of good faith on the employer during the performance of the contract that could serve as a basis for the payment of the bonus.

[38] In these reasons, I seek to explain my view, respectfully stated, that the majority of the Court of Appeal erred in not awarding Mr. Matthews the amount of the LTIP as part of his common law damages for breach of the implied term to provide reasonable notice. In considering all of the complaints made by Mr. Matthews, it bears recalling that he did not seek damages for mental distress,[1] and while he originally pleaded for punitive damages, he did not pursue that head of damages on appeal in this Court. Consequently, it is unnecessary in the circumstances, and perhaps even unwise given the method on which *Bhasin* rests, to resolve Mr. Matthews' allegations of dishonest treatment since I propose to award him the only remedy sought on appeal — an amount equivalent to his LTIP entitlement — on the basis of reasonable notice. That said, Ocean's alleged dishonest behaviour over a protracted period, but in the manner

[37] Ocean a peu dit sur la question de la bonne foi, si ce n'est qu'elle a reconnu que l'employeur s'était à certains moments [TRADUCTION] « mal conduit » et qu'elle a affirmé que ni le juge de première instance ni les juges majoritaires de la Cour d'appel n'avaient conclu à la mauvaise foi (transcription, p. 66). Après avoir proposé, au soutien de cette affirmation, une nouvelle qualification de certains faits liés aux interactions entre les représentants d'Ocean et M. Matthews, Ocean a demandé à notre Cour de statuer que les juges majoritaires de la Cour d'appel avaient eu raison de conclure à l'absence de mauvaise foi. Quoi qu'il en soit, Ocean a soutenu que la common law n'impose à l'employeur aucune obligation d'agir de bonne foi dans l'exécution du contrat qui pourrait servir de fondement justifiant le paiement de la prime en question.

[38] Je m'efforce, dans les présents motifs, d'expliquer, avec égards pour l'opinion contraire, mon point de vue selon lequel les juges majoritaires de la Cour d'appel ont fait erreur en n'incluant pas le montant de la prime prévue par le RILT dans les dommages-intérêts qui ont été accordés à M. Matthews, en vertu de la common law, pour le manquement à l'obligation tacite de lui donner un préavis raisonnable. Dans l'examen de l'ensemble des griefs invoqués par M. Matthews, il convient de rappeler que ce dernier n'a pas sollicité de dommages-intérêts pour souffrances morales[1], et que bien qu'il ait demandé des dommages-intérêts punitifs initialement, il n'a pas continué de réclamer ce chef de dommages-intérêts devant notre Cour. Par conséquent, il n'est pas nécessaire dans les circonstances, et il serait peut-être même peu judicieux vu la méthode suivie dans l'arrêt *Bhasin*, de statuer sur les allégations de malhonnêteté

[1] The term "aggravated damages" was used on occasion by the two parties throughout this appeal. I note, however, that in *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3, at paras. 52-54, this Court explained that this term is largely a misnomer, and that compensatory damages for a contractual breach of the duty of good faith spoken to in *Wallace* "are based on what was in the reasonable contemplation of the parties at the time of contract formation".

[1] L'expression [TRADUCTION] « dommages-intérêts majorés » a été employée à l'occasion par les deux parties tout au long du présent pourvoi. Je fais remarquer toutefois que, dans l'arrêt *Fidler c. Sun Life du Canada, compagnie d'assurance-vie*, 2006 CSC 30, [2006] 2 R.C.S. 3, par. 52-54, notre Cour a expliqué que cette expression est en grande partie inexacte, et que les dommages-intérêts compensatoires accordés pour le manquement à l'obligation contractuelle d'agir de bonne foi dont il a été question dans l'arrêt *Wallace* « sont fondés sur ce que les parties pouvaient raisonnablement envisager au moment de la formation du contrat ».

of dismissal nonetheless, attracts a brief comment. I come to this view for two reasons.

[39] The first pertains to the proper method of analyzing claims for wrongful dismissal, like that of Mr. Matthews, where the employee alleges a failure to provide reasonable notice as well as bad faith. So long as damages are appropriately made out and causation established, a breach of a duty of good faith could certainly give rise to distinct damages based on the principles in *Hadley*, approved in this setting in *Keays* (at paras. 55-56), including damages for mental distress. Punitive damages could also be available in certain circumstances. To this end, ensuring litigants take care that their pleadings are properly made out, and ensuring courts are following a methodologically coherent approach to constructive dismissal cases is certainly of value as it can affect the ultimate damage amount to be awarded to an employee plaintiff.

[40] It is apparent too from the pleadings here that there is a measure of uncertainty as to the impact of *Bhasin*, not just in Mr. Matthews' case but on employment law more generally. At a minimum, I believe this is an occasion to re-affirm two important principles stated in *Potter*. First, given the various submissions in this case, I would recall that the duty of honest performance — which Cromwell J. explained in *Bhasin* applies to all contracts, and means simply that parties "must not lie [to] or otherwise knowingly mislead" their counterparty "about matters directly linked to the performance of the

avancées par M. Matthews, étant donné que je propose de lui accorder la seule réparation sollicitée en appel — soit une somme équivalente au paiement auquel il a droit en vertu du RILT — sur la base du droit à un préavis raisonnable. Cela dit, quelques observations s'imposent à l'égard des allégations relatives à la conduite malhonnête qu'aurait eue Ocean pendant une période prolongée, mais néanmoins liée aux circonstances du congédiement. J'arrive à cette conclusion pour deux raisons.

[39] La première se rapporte à la méthode qu'il convient d'utiliser pour analyser les actions pour congédiement injustifié, comme celle de M. Matthews, lorsque l'employé prétend qu'on ne lui a pas donné un préavis raisonnable et qu'il y a eu mauvaise foi. Tant que la preuve du préjudice est apportée comme il se doit et que l'existence d'un lien de causalité est établie, un manquement à l'obligation d'agir de bonne foi pourrait certainement donner ouverture à des dommages-intérêts distincts selon les principes établis dans l'arrêt *Hadley*, qui ont été approuvés dans ce contexte dans l'arrêt *Keays* (par. 55-56), notamment des dommages-intérêts pour souffrances morales. Des dommages-intérêts punitifs pourraient également être accordés dans certaines circonstances. À cette fin, il est certes important que les parties s'assurent que leurs actes de procédure sont formulés adéquatement et que les tribunaux appliquent une approche cohérente sur le plan méthodologique lorsqu'ils instruisent des poursuites pour congédiement déguisé, car tout cela peut influer sur le montant des dommages-intérêts qui est accordé en définitive à l'employé demandeur.

[40] De plus, il ressort de l'argumentation des parties en l'espèce qu'une part d'incertitude plane en ce qui a trait à l'incidence de l'arrêt *Bhasin*, non seulement sur le pourvoi de M. Matthews, mais aussi sur le droit de l'emploi en général. Je crois que la présente affaire constitue à tout le moins une occasion de réaffirmer deux principes importants énoncés dans l'arrêt *Potter*. Premièrement, vu les divers arguments avancés par les parties, je tiens à rappeler que l'obligation d'exécution honnête — qui, comme l'a expliqué le juge Cromwell dans l'arrêt *Bhasin*, s'applique à tous les contrats et signifie simplement que

contract" — is applicable to employment contracts (*Bhasin*, at para. 33, see also para. 73; *Potter*, at para. 99). Second, given the four-year period of alleged dishonesty leading up to Mr. Matthews' dismissal, I would also reiterate that when an employee alleges a breach of the duty to exercise good faith in the manner of dismissal — a phrase introduced by this Court in *Wallace*, and reinforced in *Keays* — this means courts are able to examine a period of conduct that is not confined to the exact moment of termination itself. All this reflects, in my view, settled law.

les parties « ne doivent pas se mentir » les unes aux autres « ni s'induire intentionnellement en erreur au sujet des questions directement liées à l'exécution du contrat » — est applicable aux contrats de travail (*Bhasin*, par. 33, voir aussi par. 73; *Potter*, par. 99). Deuxièmement, je prends bonne note de la période de quatre ans au cours de laquelle il y aurait eu comportement malhonnête à l'endroit de M. Matthews avant son congédiement. En conséquence, je tiens également à réitérer que, dans les cas où un employé prétend qu'il y a eu manquement à l'obligation d'agir de bonne foi dans la façon de procéder au congédiement — formule introduite par notre Cour dans l'arrêt *Wallace*, puis réaffirmée dans l'arrêt *Keays* —, il s'ensuit que les tribunaux sont autorisés à examiner une conduite qui s'est échelonnée sur une certaine période et qui ne se limite pas au moment précis où il a été mis fin à l'emploi. À mon avis, tous ces aspects constituent des règles de droit bien établies.

[41] The second reason relates to the qualitatively different types of the contractual breaches alleged from the start by Mr. Matthews. This difference was addressed, in some measure, in *Keays* when it was determined that the breach in question should not, as was sometimes the case, simply bump-up the reasonable notice period.[2] To say that one has been treated dishonestly is quite unlike saying that one has been dismissed without notice. This is directly relevant to Mr. Matthews' call for the courts to declare that he was mistreated by Ocean.

[41] La deuxième raison se rapporte aux types qualitativement différents de manquements contractuels qui ont été invoqués par M. Matthews dès le départ. Dans une certaine mesure, cette différence a été considérée dans l'arrêt *Keays* où il a été jugé que le manquement en question ne devrait pas, comme c'était parfois le cas, servir simplement à allonger la durée de la période de préavis raisonnable[2]. Dire qu'un employé a été traité malhonnêtement est très différent de dire qu'il a été congédié sans préavis. Cette constatation est directement pertinente dans le cas de la demande adressée par M. Matthews aux tribunaux afin d'obtenir une déclaration portant qu'il a été traité de façon incorrecte par Ocean.

B. *The Appropriate Method of Analysis*

B. *Méthode d'analyse appropriée*

[42] Properly understood, the claim pursued here indeed rests on allegations of distinct contractual breaches of Mr. Matthews' employment contract.

[42] Interprétée adéquatement, l'action débattue en l'espèce repose en effet sur des allégations reprochant deux manquements distincts au contrat de travail de M. Matthews.

[2] K. Banks, "Progress and Paradox: The Remarkable yet Limited Advance of Employer Good Faith Duties in Canadian Common Law" (2011), 32 *Comp. Lab. L. & Pol'y J.* 547, at pp. 561-62.

[2] K. Banks, « Progress and Paradox : The Remarkable yet Limited Advance of Employer Good Faith Duties in Canadian Common Law » (2011), 32 *Comp. Lab. L. & Pol'y J.* 547, p. 561-562.

[43] Neither party disputes that, at common law, an employer has the right to terminate the employment contract without cause — or, in this case, prompt the employee to choose to leave their job in circumstances that amount to a dismissal — subject to the duty to provide reasonable notice, a right which, as this Court noted in *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, at para. 23, is reciprocal in the contract of employment. When breached, the obligation to provide reasonable notice does not, in theory, turn on the presence or absence of good faith: it is, in a manner of speaking, a "good faith" wrongful dismissal (see *Machtinger*, at p. 990). The contractual breach that arises from the employer's choice in this regard is simply the failure to provide reasonable notice, which leads to an award of damages in lieu thereof (*Wallace*, at para. 115, per McLachlin J., as she then was, dissenting, but not on this point). There is some dispute in the cases regarding how to determine what damages should be awarded in the event of a breach, which I will consider below, but this breach does not turn on whether or not the employer acted honestly or in good faith.

[44] Running parallel to the argument on reasonable notice, Mr. Matthews has alleged that his termination was also in breach of contract because it failed to meet the expected standard of good faith. Under rules recognized by this Court in *Bhasin* and *Potter*, an unhappy employee can allege dishonesty in the performance of the contract by the employer — i.e., a breach of the duty of honest performance, which Cromwell J. in *Bhasin* described as contractual doctrine — independently of any failure to provide reasonable notice. This Court has also recognized in *Wallace* and *Keays* that an unhappy employee can allege mistreatment — i.e., conduct that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive" — in the manner

[43] Ni l'une ni l'autre des parties ne contestent le fait, que suivant la common law, un employeur a le droit de résilier un contrat de travail sans motif — ou, comme c'est le cas en l'espèce, de pousser un employé à quitter son emploi dans des circonstances qui équivalent à un congédiement — pourvu que cet employeur s'acquitte de son obligation de donner un préavis raisonnable, droit qui, comme l'a souligné la Cour dans l'arrêt *Farber c. Cie Trust Royal*, [1997] 1 R.C.S. 846, par. 23, est réciproque en matière de contrat de travail. En cas de manquement à l'obligation de donner un préavis raisonnable, la question qui se pose n'est pas, en théorie, de savoir s'il y a eu ou non bonne foi; il s'agit, pour ainsi dire, d'un congédiement injustifié effectué de « bonne foi » (voir *Machtinger*, p. 990). Le manquement au contrat découlant de la décision de l'employeur à cet égard est simplement le défaut de donner un préavis raisonnable, situation qui entraîne le paiement de dommages-intérêts tenant lieu de préavis (*Wallace*, par. 115, la juge McLachlin (plus tard juge en chef), dissidente, mais non sur ce point). Il existe, dans la jurisprudence, un certain désaccord sur la façon de calculer le montant des dommages-intérêts qui devraient être accordés en cas de manquement, désaccord que j'aborderai plus loin; cependant, ce manquement ne dépend pas de la réponse à la question de savoir si l'employeur a agi avec honnêteté ou de bonne foi.

[44] Parallèlement à son argument fondé sur la question du préavis raisonnable, M. Matthews prétend que la façon dont on a mis fin à son emploi contrevenait également au contrat de travail en ce qu'on n'a pas respecté la norme de bonne foi attendue. En vertu des règles qui ont été reconnues par notre Cour dans les arrêts *Bhasin* et *Potter*, un employé mécontent peut alléguer que son employeur a agi de façon malhonnête dans l'exécution du contrat — c.-à-d., qu'il y a eu manquement à l'obligation d'exécution honnête, ce que le juge Cromwell dans *Bhasin* a qualifié de doctrine du droit des contrats — indépendamment de tout manquement à l'obligation de donner un préavis raisonnable. Notre Cour a également reconnu, dans les arrêts

of dismissal by the employer (*Wallace*, at para. 98; *Keays*, at para. 57). A breach of the duty to exercise good faith in the manner of dismissal is also independent of any failure to provide reasonable notice. It can serve as a basis to answer for foreseeable injury that results from callous or insensitive conduct in the manner of dismissal, a point to which I will return to at the conclusion of these reasons (*Wallace*, at para. 88).

[45] Importantly, damages arising out of the same dismissal are calculated differently depending on the breach invoked. Again, this is nothing but a reflection of settled law. In *Keays*, at para. 56, for example, Bastarache J. helpfully explained that "[t]he contract of employment is, by its very terms, subject to cancellation on notice or subject to payment of damages in lieu of notice without regard to the ordinary psychological impact of that decision". By contrast, he explained that failure to act in good faith during the manner of dismissal "can lead to foreseeable, compensable damages" based on the *Hadley* principle (para. 58). Contrary to what had been thought until that time, an extension of the notice period was not to be used to determine the proper amount to be paid (para. 59). This is because the nature of the contractual breach is of a different order than that associated with the failure to provide reasonable notice. Indeed, it is this fundamental difference that explains why principles of mitigation apply differently to mental distress damages flowing from a breach of the good faith obligation in the manner of dismissal (*Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, [2008] 1 S.C.R. 661, at para. 32).

Wallace et *Keays*, qu'un employé mécontent peut alléguer qu'il a été traité de façon incorrecte dans la façon dont on l'a congédié — c.-à-d., que l'employeur s'est comporté « de façon inéquitable ou [a fait] preuve de mauvaise foi en étant, par exemple, menteur [. . .], trompeur [. . .] ou trop implacable » (*Wallace*, par. 98; *Keays*, par. 57). Un manquement à l'obligation d'agir de bonne foi dans la façon de congédier l'employé est également indépendant de tout manquement à l'obligation de donner un préavis raisonnable. Il peut servir de moyen permettant d'exiger réparation à l'égard d'un préjudice prévisible résultant d'un traitement brutal ou implacable de la part de l'employeur dans la façon dont il a congédié l'employé, point sur lequel je reviendrai à la fin des présents motifs (*Wallace*, par. 88).

[45] Fait important, les dommages-intérêts découlant d'un même congédiement sont calculés différemment selon la violation reprochée. Je le répète, ce fait n'est que le reflet de la jurisprudence déjà établie. Dans l'arrêt *Keays*, par. 56, par exemple, le juge Bastarache a utilement expliqué que, « [s]uivant son libellé, le contrat d'emploi est susceptible de résiliation moyennant préavis ou paiement d'une indemnité en tenant lieu, indépendamment du préjudice psychologique normal causé par une telle mesure ». Par comparaison, il a précisé que si l'employeur n'agit pas de bonne foi lorsqu'il congédie un employé, « il y aura préjudice prévisible susceptible d'indemnisation » suivant le principe établi dans l'arrêt *Hadley* (par. 58). Contrairement à ce que l'on croyait avant cette affaire, il n'y a pas lieu d'allonger le préavis pour déterminer le juste montant de l'indemnité (par. 59). Il en est ainsi parce que la nature du manquement au contrat n'est pas du même ordre que dans le cas du défaut de donner un préavis raisonnable. En effet, cette distinction fondamentale permet d'expliquer pourquoi les principes relatifs à l'atténuation des dommages s'appliquent différemment aux dommages-intérêts pour souffrances morales imputables à un manquement à l'obligation d'agir de bonne foi dans la façon de procéder au congédiement (*Evans c. Teamsters Local Union No. 31*, 2008 CSC 20, [2008] 1 R.C.S. 661, par. 32).

[46] With this in mind, I turn now to examine the duty to provide reasonable notice, which as will become plain, is dispositive of this appeal.

(1) Duty to Provide Reasonable Notice

[47] In the case at bar, the only disagreement in respect of reasonable notice turns on whether Mr. Matthews' damages include an amount to compensate him for his lost LTIP payment.

[48] In my respectful view, the majority of the Court of Appeal erred by focusing on whether the terms of the LTIP were "plain and unambiguous" instead of asking what damages were appropriately due for Ocean's failure to provide Mr. Matthews with reasonable notice. The issue is not whether Mr. Matthews is entitled to the LTIP in itself, but rather what damages he is entitled to and whether he was entitled to compensation for bonuses he would have earned had Ocean not breached the employment contract. By focusing narrowly on the former question, the Court of Appeal applied an incorrect principle, resulting in what I see as an overriding error.

(a) *Redress for Breach of the Implied Term to Provide Reasonable Notice of Termination*

[49] Insofar as Mr. Matthews was constructively dismissed without notice, he was entitled to damages representing the salary, including bonuses, he would have earned during the 15-month period (*Wallace*, at paras. 65-67). This is so because the remedy for a breach of the implied term to provide reasonable notice is an award of damages based on the period of notice which should have been given, with the damages representing "what the employee would have earned in this period" (para. 115). Whether payments under incentive bonuses, such as the LTIP in this case, are to be included in these damages is a

[46] Gardant ces considérations à l'esprit, j'examinerai maintenant l'obligation de donner un préavis raisonnable, obligation qui, comme il ressortira clairement, permet de trancher le présent pourvoi.

(1) Obligation de donner un préavis raisonnable

[47] En l'espèce, le seul désaccord quant au préavis raisonnable porte sur la question de savoir si les dommages-intérêts accordés à M. Matthews doivent inclure une somme l'indemnisant pour la perte du paiement prévu par le RILT.

[48] Je suis respectueusement d'avis que les juges majoritaires de la Cour d'appel ont commis une erreur en s'attachant à la question de savoir si les modalités du RILT étaient [TRADUCTION] « claires et non ambiguës » au lieu de s'interroger sur le montant des dommages-intérêts qu'il convenait d'accorder à M. Matthews parce qu'Ocean ne lui a pas donné un préavis raisonnable. Il ne s'agit pas de décider si M. Matthews est admissible au RILT, mais plutôt de déterminer le montant des dommages-intérêts auquel il a droit et s'il a droit d'être indemnisé pour les primes qu'il aurait touchées si Ocean n'avait pas contrevenu au contrat de travail. En se concentrant sur la première question, la Cour d'appel a appliqué un mauvais principe, ce qui a à mon avis entraîné une erreur déterminante.

a) *Réparation pour manquement à l'obligation tacite de donner un préavis raisonnable de cessation d'emploi*

[49] Dans la mesure où M. Matthews a fait l'objet d'un congédiement déguisé sans préavis, il avait droit à des dommages-intérêts correspondant au salaire, y compris les primes, qu'il aurait touché durant la période de préavis de 15 mois (*Wallace*, par. 65-67). Il en est ainsi parce que la réparation en cas de manquement à l'obligation tacite de donner un préavis raisonnable consiste à accorder des dommages-intérêts fondés sur la période du préavis qui aurait dû être donné, dommages-intérêts correspondant « au montant que l'employé aurait gagné pendant cette période » (par. 115). La question de

common and recurring issue in the law of wrongful dismissal. To answer this question, the trial judge relied on *Paquette* and *Lin* from the Court of Appeal for Ontario. I believe he took the right approach.

[50] In *Paquette*, the employee participated in his employer's bonus plan, which stipulated that employees had to be "actively employed" on the date of the bonus payout. That language is broadly comparable to that found in the LTIP which, at clause 2.03, requires the claimant to be a "full-time employee" of the company. In *Paquette*, but for the employee's termination, the employee would have received the bonus within the reasonable notice period. The motion judge in that case, however, concluded that the employee was not entitled to the bonus because, while he may have been "notionally" employed during the reasonable notice period, he was not "actively" employed and so did not qualify under the terms of the plan.

[51] The employee's appeal was allowed. The Ontario Court of Appeal relied principally on its prior decision in *Taggart v. Canada Life Assurance Co.* (2006), 50 C.C.P.B. 163, concerning a similar question related to pension benefits. In that case, Sharpe J.A. rightly cautioned that courts should not ignore the legal nature of employees' claims. "The claim is not", he said, "for the pension benefits themselves. Rather, it is for common law contract damages as compensation for the pension benefits [the employee] would have earned had [the employer] not breached the contract of employment" (para. 16). Consequently, "a terminated employee is entitled to claim damages for the loss of pension benefits that would have accrued had the employee worked until the end of the notice period" (para. 13). With respect to the role of a bonus plan's contractual terms, Sharpe J.A. explained that "[t]he question at this

savoir si les sommes à verser au titre d'un régime d'intéressement, tel le RILT en l'espèce, doivent être incluses dans les dommages-intérêts est une question courante et récurrente dans le domaine du droit applicable au congédiement injustifié. Pour répondre à cette question, le juge de première instance s'est appuyé sur les arrêts *Paquette* et *Lin* de la Cour d'appel de l'Ontario. J'estime qu'il a choisi la bonne approche.

[50] Dans l'arrêt *Paquette*, l'employé participait au régime de primes établi par son employeur, lequel stipulait que les employés devaient être des [TRADUCTION] « employés actifs » à la date du versement des primes. Cette formulation est sensiblement comparable à celle utilisée dans le RILT qui, à la clause 2.03, requiert que l'intéressé soit un [TRADUCTION] « employé à temps plein » de l'entreprise. Dans l'arrêt *Paquette*, n'eût été son congédiement, l'employé aurait touché la prime à laquelle il avait droit pendant la période de préavis raisonnable. Cependant, dans cette affaire, le juge des motions a conclu que l'employé n'avait pas droit à la prime en question, parce que même s'il était [TRADUCTION] « théoriquement » un employé de l'entreprise pendant la période de préavis raisonnable, il n'était pas un employé « actif » et n'était donc pas admissible suivant les modalités du régime.

[51] L'appel de l'employé a été accueilli. La Cour d'appel de l'Ontario s'est appuyée principalement sur sa décision antérieure dans l'affaire *Taggart c. Canada Life Assurance Co.* (2006), 50 C.C.P.B. 163, qui portait sur une question similaire concernant les prestations de retraite. Dans cet arrêt, le juge d'appel Sharpe a, à juste titre, mis en garde les tribunaux de ne pas faire abstraction de la nature juridique des réclamations des employés. Comme il l'a indiqué, [TRADUCTION] « [l]a réclamation ne porte pas sur les prestations de retraite elles-mêmes. Elle vise plutôt l'obtention de dommages-intérêts contractuels en common law à titre de dédommagement pour les prestations de retraite auxquels [l'employé] aurait eu droit si [l'employeur] n'avait pas contrevenu au contrat de travail » (par. 16). Par conséquent, [TRADUCTION] « un employé congédié a le droit de réclamer des dommages-intérêts pour la perte de

stage is whether there is something in the language of the pension contract between the parties that takes away or limits that common law right" (para. 20).

[52] The Court of Appeal in *Paquette* built upon the approach in *Taggart*, proposing that courts should take a two-step approach to these questions. First, courts should "consider the [employee's] common law rights" (para. 30). That is, courts should examine whether, but for the termination, the employee would have been entitled to the bonus during the reasonable notice period. Second, courts should "determine whether there is something in the bonus plan that would specifically remove the [employee's] common law entitlement" (para. 31). "The question", van Rensburg J.A. explained, "is not whether the contract or plan is ambiguous, but whether the wording of the plan unambiguously alters or removes the [employee's] common law rights" (para. 31).

[53] I agree with van Rensburg J.A. that this is the appropriate approach. It accords with basic principles of damages for constructive dismissal, anchoring the analysis around reasonable notice. As the court recognized in *Taggart*, and reiterated in *Paquette*, when employees sue for damages for constructive dismissal, they are claiming for damages as compensation for the income, benefits, and bonuses they would have received had the employer not breached the implied term to provide reasonable notice (see also *Iacobucci v. WIC Radio Ltd.*, 1999 BCCA 753, 72 B.C.L.R. (3d) 234, at paras. 19 and 24; *Gillies v. Goldman Sachs Canada Inc.*, 2001 BCCA 683, 95 B.C.L.R. (3d) 260, at paras. 10-12 and 25; *Keays*, at paras. 54-55). Proceeding directly

prestations de retraite auxquelles il aurait eu droit s'il avait travaillé jusqu'à la fin de la période de préavis » (par. 13). En ce qui concerne le rôle des modalités contractuelles d'un régime de primes, le juge d'appel Sharpe a expliqué que [TRADUCTION] « [l]a question à cette étape consiste à décider s'il y a quelque chose dans le texte des modalités du régime de retraite existant entre les parties qui a pour effet de supprimer ou de limiter ce droit que confère la common law » (par. 20).

[52] Dans l'arrêt *Paquette*, la Cour d'appel s'est inspirée de l'approche adoptée dans l'arrêt *Taggart* et a proposé que les tribunaux appliquent une démarche en deux étapes à l'égard de ces questions. Premièrement, les tribunaux devraient [TRADUCTION] « considérer les droits dont dispose [l'employé] en vertu de la common law » (par. 30). En d'autres mots, les tribunaux devraient se demander si, n'eût été son congédiement, l'employé aurait eu le droit de toucher la prime en litige pendant la période de préavis raisonnable. Deuxièmement, les tribunaux devraient [TRADUCTION] « déterminer s'il y a quelque chose dans les modalités du régime de primes qui prive expressément [l'employé] des droits que lui confère la common law » (par. 31). Comme l'a expliqué la juge d'appel van Rensburg, [TRADUCTION] « [l]a question n'est pas de savoir si le contrat ou le régime est ambigu, mais plutôt de savoir s'il y a quelque chose dans le texte des modalités du régime qui modifie ou supprime clairement les droits reconnus à [l'employé] par la common law » (par. 31).

[53] Tout comme la juge van Rensburg, je suis d'avis qu'il s'agit de la démarche appropriée. Elle est conforme aux principes fondamentaux applicables aux dommages-intérêts pour congédiement déguisé, l'analyse s'attachant à la question du préavis raisonnable. Comme la cour l'a reconnu dans l'arrêt *Taggart*, et réitéré dans l'arrêt *Paquette*, lorsque des employés intentent une action en dommages-intérêts pour congédiement déguisé, ils sollicitent des dommages-intérêts à titre de dédommagement pour le revenu, les prestations et les primes qu'ils auraient touchés si l'employeur n'avait pas manqué à son obligation tacite de donner un préavis raisonnable (voir aussi *Iacobucci c. WIC Radio Ltd.*, 1999 BCCA 753, 72 B.C.L.R. (3d) 234, par. 19

to an examination of contractual terms divorces the question of damages from the underlying breach, which is an error in principle.

[54] Moreover, the approach in *Paquette* respects the well-established understanding that the contract effectively "remains alive" for the purposes of assessing the employee's damages, in order to determine what compensation the employee would have been entitled to but for the dismissal (see, e.g., *Nygard Int. Ltd. v. Robinson* (1990), 46 B.C.L.R. (2d) 103 (C.A.), at pp. 106-7, per Southin J.A., concurring; *Gillies*, at para. 17).

[55] Courts should accordingly ask two questions when determining whether the appropriate quantum of damages for breach of the implied term to provide reasonable notice includes bonus payments and certain other benefits. Would the employee have been entitled to the bonus or benefit as part of their compensation during the reasonable notice period? If so, do the terms of the employment contract or bonus plan unambiguously take away or limit that common law right?

(b) *Application to Mr. Matthews' Case*

[56] The first question is whether Mr. Matthews would have been entitled to the LTIP payment as part of his compensation during the reasonable notice period. Since the Realization Event was triggered within the 15-month reasonable notice period, Mr. Matthews argues that he is *prima facie* entitled to damages for the lost LTIP payment as part of his common law damages.

[57] Ocean argues that Mr. Matthews cannot satisfy the first stage of the analysis. It points this Court

et 24; *Gillies c. Goldman Sachs Canada Inc.*, 2001 BCCA 683, 95 B.C.L.R. (3d) 260, par. 10-12 et 25; *Keays*, par. 54-55). Procéder directement à l'examen des modalités contractuelles a pour effet de dissocier la question des dommages-intérêts du manquement sous-jacent, ce qui constitue une erreur de principe.

[54] En outre, la démarche suivie dans l'arrêt *Paquette* est compatible avec l'interprétation bien établie selon laquelle le contrat [TRADUCTION] « demeure [effectivement] en vigueur » pour les besoins de l'évaluation du préjudice de l'employé en vue de calculer le montant de l'indemnité à laquelle ce dernier aurait eu droit n'eût été son congédiement (voir, p. ex., *Nygard Int. Ltd. c. Robinson* (1990), 46 B.C.L.R. (2d) 103 (C.A.), p. 106-107, motifs concordants de la juge d'appel Southin; *Gillies*, par. 17).

[55] Les tribunaux devraient en conséquence se poser deux questions lorsqu'ils sont appelés à décider si le montant des dommages-intérêts qu'il convient d'accorder pour manquement à l'obligation tacite de donner un préavis raisonnable doit inclure les primes et certains autres avantages. L'employé aurait-il eu droit à la prime ou à l'avantage dans le cadre de ses conditions de rémunération pendant la période de préavis raisonnable? Dans l'affirmative, les modalités du contrat de travail ou du régime de primes ont-elles pour effet de supprimer ou de limiter clairement ce droit que confère la common law?

b) *Application au cas de M. Matthews*

[56] La première question consiste à se demander si M. Matthews aurait eu droit au paiement prévu par le RILT dans le cadre de ses conditions de rémunération pendant la période de préavis raisonnable. Comme l'événement déclencheur s'est produit pendant la période de préavis raisonnable de 15 mois, M. Matthews soutient qu'il a droit, à première vue, au titre des dommages-intérêts fondés sur la common law, à des dommages-intérêts pour la perte du paiement prévu par le RILT.

[57] Ocean affirme que M. Matthews n'est pas en mesure de satisfaire à la première étape de l'analyse.

to *Singer v. Nordstrong Equipment Limited*, 2018 ONCA 364, 47 C.C.E.L. (4th) 218, where the Court of Appeal for Ontario presented the first question by asking whether the bonus was "an integral part of his compensation package" (para. 21). Relying on this formulation, Ocean contends that, under the first step, Mr. Matthews has a common law entitlement to damages for all compensation and benefits that are integral to his compensation. Ocean maintains that the LTIP payment was not integral to Mr. Matthews' compensation since he did not have a vested right at the date of termination.

Elle invoque l'arrêt *Singer c. Nordstrong Equipment Limited*, 2018 ONCA 364, 47 C.C.E.L. (4th) 218, dans lequel la Cour d'appel de l'Ontario, à l'étape de la première question, s'est demandée si la prime [TRADUCTION] « faisait partie intégrante des conditions de rémunération [de l'intéressé] » (par. 21). S'appuyant sur cette formulation, Ocean prétend que, selon la première étape, la common law confère à M. Matthews le droit de recevoir des dommages-intérêts pour le salaire et les avantages qui font partie intégrante de sa rémunération. Elle soutient que le paiement prévu par le RILT ne faisait pas partie intégrante de la rémunération de M. Matthews, car ce dernier n'avait pas un droit acquis sur ce paiement lorsque son emploi a pris fin.

[58] The trial judge confronted this submission and concluded that Ocean was attempting to introduce an extra requirement into the analysis that is not supported by the jurisprudence (para. 387). I agree. The test of whether a benefit or bonus is "integral" to the employee's compensation assists in answering the question of what the employee would have been paid during the reasonable notice period (see, e.g., *Brock v. Matthews Group Ltd.* (1988), 20 C.C.E.L. 110 (Ont. H.C.J.), at p. 123, aff'd (1991), 34 C.C.E.L. 50 (C.A.); *Paquette*, at para. 17). Thus, in *Paquette* and *Singer*, where the bonuses at issue were discretionary, the Court of Appeal for Ontario considered this so-called "integral" test since there was doubt as to whether the employee would have received those discretionary bonuses during the reasonable notice period.

[58] Le juge de première instance s'est arrêté à cet argument et a conclu qu'Ocean cherchait à introduire dans l'analyse une exigence supplémentaire qui n'est pas étayée par la jurisprudence (par. 387). Je suis d'accord. Le critère qui consiste à déterminer si un avantage ou une prime fait « partie intégrante » de la rémunération d'un employé aide à répondre à la question de savoir ce qui aurait été payé à cet employé pendant la période de préavis raisonnable (voir, p. ex., *Brock c. Matthews Group Ltd.* (1988), 20 C.C.E.L. 110 (H.C.J. Ont.), p. 123, conf. par (1991), 34 C.C.E.L. 50 (C.A.); *Paquette*, par. 17). Ainsi, dans les arrêts *Paquette* et *Singer*, où les primes en litige étaient discrétionnaires, la Cour d'appel de l'Ontario a pris en compte ce critère, dit de la « partie intégrante », car un doute subsistait quant à la question de savoir si l'employé aurait touché ces primes discrétionnaires pendant la période de préavis raisonnable.

[59] This case is different. The purpose of damages in lieu of reasonable notice is to put the employee in the position they would have been in had they continued to work through to the end of the notice period. It is uncontested that the Realization Event occurred during the notice period. But for Mr. Matthews' dismissal, he would have received an LTIP payment during that period. In such circumstances, there is no need to ask whether the LTIP payment was "integral" to his compensation.

[59] La présente affaire est différente. Les dommages-intérêts tenant lieu de préavis raisonnable ont pour objet de rétablir l'employé dans la situation où il se serait trouvé s'il avait continué de travailler jusqu'à la fin de la période de préavis. Il n'est pas contesté que l'événement déclencheur s'est produit pendant cette période. Cependant, n'eût été son congédiement, M. Matthews aurait reçu le paiement prévu par le RILT durant cette période. Dans ces circonstances, il est inutile de se demander si ce paiement faisait « partie intégrante » de sa rémunération.

[60] Furthermore, in answer to a question from one of my colleagues at the hearing, counsel for Ocean conceded that Mr. Matthews may well have had an entitlement to the LTIP absent clauses 2.03 and 2.05. I am thus satisfied that, on this first step, Mr. Matthews is *prima facie* entitled to receive damages as compensation for the lost bonus.

[61] On the second step, the question is whether the terms of the LTIP unambiguously limit or remove Mr. Matthews' common law right. It should be mentioned that the parties took opposing positions on the applicable standard of review for questions related to the interpretation of the LTIP. Both parties relied on *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23. For his part, Mr. Matthews argued that the trial judge's interpretation should be reviewed for palpable and overriding error. Ocean, in contrast, said that the standard of review should be correctness, relying on the standard form contract exception described in *Ledcor*. Ocean stressed that there is no evidence that Mr. Matthews negotiated the relevant terms, and that the LTIP applies to multiple employees.

[62] I am careful to note that the trial judge did not find that this was a commonly-used standard form agreement. In *Ledcor*, the Court was tasked with interpreting a standard form agreement commonly used in the insurance industry, where "consistency [in interpretation] is particularly important" (para. 40). Justice Wagner explained that, given that standard form contracts are those that are so widely used that the "interpretation of the . . . contract could affect many people" (at para. 39), a standard form exception is appropriate. This case is different: the only relevant finding by the trial judge on this issue is that it was "a limited number of executives" that were affected by the LTIP (para. 61). In the end, however, it is not necessary to decide whether or not the LTIP was truly a standard form contract in this case,

[60] Qui plus est, en réponse à une question de l'un de mes collègues lors de l'audience, l'avocate d'Ocean a reconnu que M. Matthews aurait fort bien pu avoir droit au paiement prévu par le RILT en l'absence des clauses 2.03 et 2.05. Je suis donc convaincu que, au terme de la première étape, M. Matthews a droit, à première vue, de recevoir des dommages-intérêts à titre de dédommagement pour la prime qu'il a perdue.

[61] À la deuxième étape, la question consiste à se demander si les modalités du RILT ont pour effet de limiter ou de supprimer clairement le droit que confère la common law à M. Matthews. Il convient de mentionner que les parties ont avancé des thèses opposées en ce qui a trait à la norme de contrôle applicable aux questions liées à l'interprétation du RILT. Les deux parties ont invoqué l'arrêt *Ledcor Construction Ltd. c. Société d'assurance d'indemnisation Northbridge*, 2016 CSC 37, [2016] 2 R.C.S. 23. Pour sa part, M. Matthews a plaidé que l'interprétation du juge de première instance devait être contrôlée afin de déterminer si elle renferme des erreurs manifestes et déterminantes. À l'opposé, s'appuyant sur l'exception relative au contrat type qui est décrite dans l'arrêt *Ledcor*, Ocean a soutenu que la norme de contrôle applicable était celle de la décision correcte. Elle a insisté sur le fait qu'il n'y a aucune preuve indiquant que M. Matthews aurait négocié les modalités pertinentes du RILT, et que ce régime s'applique à de nombreux employés.

[62] Je prends bonne note du fait que le juge de première instance n'a pas conclu que le RILT était un contrat type couramment utilisé. Dans l'arrêt *Ledcor*, la Cour était appelée à interpréter un contrat type qui est couramment utilisé dans le secteur des assurances, où « la constance [dans l'interprétation] revêt une importance particulière » (par. 40). Le juge Wagner a expliqué que, comme les contrats types sont largement utilisés et que « l'interprétation du contrat [. . .] peut toucher de nombreuses personnes » (par. 39), il convient d'appliquer une exception à l'égard des contrats types. La présente affaire est différente : la seule conclusion pertinente qu'a tirée le juge de première instance sur ce point est [TRADUCTION] « [qu']un nombre limité de cadres supérieurs » étaient visés par le RILT (par. 61). En

since the trial judge did not consider one of the two main clauses at issue in this case, clause 2.05, which therefore must be interpreted in any event.

[63] Returning, then, to the main clauses at issue, which provide the following:

2.03 CONDITIONS PRECEDENT:

ONC shall have no obligation under this Agreement to the Employee unless on the date of a Realization Event the Employee is a full-time employee of ONC. For greater certainty, this Agreement shall be of no force and effect if the employee ceases to be an employee of ONC, regardless of whether the Employee resigns or is terminated, with or without cause.

2.05 GENERAL:

The Long Term Value Creation Bonus Plan does not have any current or future value other than on the date of a Realization Event and shall not be calculated as part of the Employee's compensation for any purpose, including in connection with the Employee's resignation or in any severance calculation.

[64] The question is not whether these terms are ambiguous but whether the wording of the plan unambiguously limits or removes the employee's common law rights (*Paquette*, at para. 31, citing *Taggart*, at paras. 12 and 19-22). Importantly, given that the LTIP is a "unilateral contract", in the sense that the parties did not negotiate its terms, the principle of contractual interpretation that clauses excluding or limiting liability will be strictly construed "applies with particular force" (*Taggart*, at para. 18, citing *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, at p. 459). As this Court recognized in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at para. 73, albeit in the commercial context, and cited here to underscore just this point,

définitive, cependant, il n'est pas nécessaire en l'espèce de décider si le RILT était véritablement un contrat type, étant donné que le juge de première instance a omis de tenir compte de l'une des deux principales clauses litigieuses dans la présente affaire, soit la clause 2.05, qu'il faudra en conséquence interpréter de toute façon.

[63] Je reviens donc aux principales clauses litigieuses, qui sont rédigées ainsi :

[TRADUCTION]

2.03 CONDITIONS PRÉALABLES

ONC n'a, aux termes de la présente entente, aucune obligation envers l'employé à moins que ce dernier ne soit un employé à temps plein d'ONC lorsque survient l'événement déclencheur. Il est entendu que la présente entente est nulle et sans effet si l'employé cesse d'être un employé d'ONC, que ce soit parce qu'il démissionne ou parce qu'il est congédié, avec ou sans motif.

2.05 GÉNÉRALITÉS

Le Régime de primes pour la création de valeur à long terme n'a aucune valeur actuelle ou future si ce n'est à la date de l'événement déclencheur et la prime calculée et versée à l'employé ne doit pas être considérée comme faisant partie de la rémunération de ce dernier à quelque fin que ce soit, y compris en cas de démission de l'employé ou de calcul de toute indemnité de départ.

[64] Il ne s'agit pas de déterminer si ces modalités sont ambiguës, mais de savoir si le texte du régime a pour effet de limiter ou de supprimer clairement les droits que confère la common law à l'employé (*Paquette*, par. 31, citant *Taggart*, par. 12 et 19-22). Fait important, comme le RILT est un [TRADUCTION] « contrat unilatéral », en ce sens que les parties n'ont pas négocié ses modalités, le principe d'interprétation des contrats selon lequel les clauses d'exonération ou de limitation de responsabilité doivent recevoir une interprétation stricte [TRADUCTION] « s'applique avec une vigueur singulière » (*Taggart*, par. 18, citant *Hunter Engineering Co. c. Syncrude Canada Ltée*, [1989] 1 R.C.S. 426, p. 459). Comme l'a reconnu notre Cour dans *Tercon Contractors Ltd. c. Colombie-Britannique (Transports et Voirie)*,

sophisticated parties are able to draft clear and comprehensive exclusion clauses when they are minded to do so.

[65] To this end, the provisions of the agreement must be absolutely clear and unambiguous. So, language requiring an employee to be "full-time" or "active", such as clause 2.03, will not suffice to remove an employee's common law right to damages. After all, had Mr. Matthews been given proper notice, he would have been "full-time" or "actively employed" throughout the reasonable notice period (*Paquette*, at para. 33, citing *Schumacher v. Toronto-Dominion Bank* (1997), 147 D.L.R. (4th) 128 (Ont. C.J. (Gen. Div.)), at p. 184; see also para. 47; *Lin*, at para. 89). Indeed, the trial judge and the majority of the Court of Appeal agreed that an "active employment" requirement is not sufficient to limit an employee's damages (trial reasons, at para. 398; C.A. reasons, at para. 66).

[66] Similarly, where a clause purports to remove an employee's common law right to damages upon termination "with or without cause", such as clause 2.03, this language will not suffice. Here, Mr. Matthews suffered an *unlawful* termination since he was constructively dismissed without notice. As this Court held in *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102, at p. 108, exclusion clauses "must clearly cover the exact circumstances which have arisen". So, in Mr. Matthews' case, the trial judge properly recognized that "[t]ermination without cause does not imply termination without notice" (para. 399; see also *Veer v. Dover Corp. (Canada) Ltd.* (1999), 120 O.A.C. 394, at para. 14; *Lin*, at para. 91). Yet, it bears repeating that, for the purpose of calculating wrongful dismissal damages, the employment contract is not treated as "terminated" until after the reasonable notice period expires. So,

2010 CSC 4, [2010] 1 R.C.S. 69, par. 73, décision rendue en contexte commercial, et qui est mentionnée en l'espèce uniquement pour souligner le point suivant : des parties expérimentées peuvent rédiger des clauses à la fois claires et exhaustives d'exonération lorsqu'elles entendent le faire.

[65] Pour cette raison, les dispositions de l'entente doivent être absolument claires et non ambiguës. Ainsi, une disposition exigeant qu'un employé soit un [TRADUCTION] « employé à temps plein » ou un « employé actif » de l'entreprise, comme l'exige la clause 2.03, ne sera pas suffisante pour supprimer le droit que confère la common law à un employé d'obtenir des dommages-intérêts. Après tout, si un préavis adéquat avait été donné à M. Matthews, ce dernier aurait été un « employé à temps plein » ou un « employé actif » de l'entreprise pendant la période de préavis raisonnable (*Paquette*, par. 33, citant *Schumacher c. Toronto-Dominion Bank* (1997), 147 D.L.R. (4th) 128 (C.J. Ont. (Div. gén.)), p. 184; voir également par. 47; *Lin*, par. 89). D'ailleurs, le juge de première instance et les juges majoritaires de la Cour d'appel ont reconnu qu'une condition stipulant que l'employé soit en situation [TRADUCTION] « [d']emploi actif » n'est pas suffisante pour limiter les dommages-intérêts auxquels un employé a droit (motifs de première instance, par. 398; motifs de la Cour d'appel, par. 66).

[66] De même, lorsqu'une clause vise à supprimer le droit qu'a un employé en vertu de la common law d'obtenir des dommages-intérêts lorsqu'il est congédié « avec ou sans motif », comme le prévoit la clause 2.03, une telle disposition ne sera pas suffisante. En l'espèce, M. Matthews a fait l'objet d'un congédiement *illégal* étant donné qu'il a été congédié de manière déguisée sans préavis. Comme l'a conclu notre Cour dans l'arrêt *Bauer c. Banque de Montréal*, [1980] 2 R.C.S. 102, p. 108, « il doit être évident que [les clauses d'exclusion] vise[nt] les circonstances exactes qui se présentent ». Par conséquent, dans le cas de M. Matthews, le juge de première instance a reconnu à juste titre [TRADUCTION] « [qu'un] congédiement sans motif n'implique pas un congédiement sans préavis » (par. 399; voir également *Veer c. Dover Corp. (Canada) Ltd.* (1999), 120 O.A.C. 394, par. 14; *Lin*, par. 91). Or, il

even if the clause had expressly referred to an unlawful termination, in my view, this too would not unambiguously alter the employee's common law entitlement.

[67] I therefore agree with the trial judge that clause 2.03 does not unambiguously limit or remove Mr. Matthews' common law right. In my respectful view, the majority of the Court of Appeal erred in concluding otherwise.

[68] As mentioned, it is true that the trial judge did not expressly consider clause 2.05. The dissenting judge suggested this clause only prevents Mr. Matthews from seeking the bonus as part of his severance, and not part of a claim for wrongful dismissal damages. The majority disagreed, arguing there is no functional difference between severance and damages (paras. 120-21).

[69] I respectfully disagree with the majority of the Court of Appeal on this point. The trial judge did not use the LTIP to calculate severance; rather, he determined the quantum of damages that Mr. Matthews was entitled to under the common law following the constructive dismissal. As the dissenting judge explained in detail, severance and damages are distinct legal concepts. The primary purpose of providing reasonable notice (or damages in lieu thereof) is to protect employees by providing them an opportunity to seek alternative employment (see *Wallace*, at para. 120, per McLachlin J. (as she then was) dissenting, but not on this point). Severance pay, by contrast, "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", and is often provided

convient de répéter que, pour les besoins du calcul du montant des dommages-intérêts à verser en cas de congédiement injustifié, le contrat de travail est considéré comme étant « résilié » uniquement après l'expiration de la période de préavis raisonnable. Par conséquent, même si la clause en question avait fait mention expressément d'un congédiement illégal, je suis d'avis qu'une telle disposition n'aurait pas non plus modifié clairement le droit que confère la common law à l'employé.

[67] Ainsi, à l'instar du juge de première instance, j'estime que la clause 2.03 n'a pas pour effet de limiter ou de supprimer clairement le droit que confère la common law à M. Matthews. Je suis respectueusement d'avis que les juges majoritaires de la Cour d'appel ont commis une erreur en tirant une conclusion différente.

[68] Comme je l'ai mentionné, il est vrai que le juge de première instance n'a pas explicitement examiné la clause 2.05. Le juge dissident a précisé que cette clause empêche seulement M. Matthews de demander que la prime fasse partie de son indemnité de départ, et non des dommages-intérêts pour congédiement injustifié qu'il réclame. Les juges majoritaires ont exprimé leur désaccord à cet égard, affirmant qu'il n'existe aucune différence, du point de vue de la fonction, entre une indemnité de départ et des dommages-intérêts (par. 120-121).

[69] Avec égards, je ne puis me rallier à l'opinion des juges majoritaires de la Cour d'appel sur ce point. Le juge de première instance n'a pas utilisé le RILT pour calculer l'indemnité de départ; il a plutôt déterminé le montant des dommages-intérêts auxquels M. Matthews avait droit en vertu de la common law par suite de son congédiement déguisé. Comme l'a expliqué en détail le juge dissident, l'indemnité de départ et les dommages-intérêts sont des concepts juridiques distincts. Le principal objectif d'un préavis raisonnable (ou de dommages-intérêts en tenant lieu) est de protéger l'employé en lui fournissant l'occasion de se chercher un autre emploi (voir *Wallace*, par. 120, la juge McLachlin (plus tard juge en chef), dissidente, mais non sur ce point). En revanche, l'indemnité de cessation d'emploi « vient indemniser les employés ayant beaucoup d'années

for in provincial employment standards legislation (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 26).

[70] Moreover, clause 2.05 must be read as a whole; it also states that the LTIP "does not have any current or future value other than on the date of a Realization Event". If Mr. Matthews had been properly given notice of termination, he would have remained a full-time employee on the date of the Realization Event, and thus would have received an LTIP payment. His damages reflect that lost opportunity.

[71] In reaching a different conclusion regarding the interpretation of clauses 2.03 and 2.05, the majority judges relied on *Styles* from the Court of Appeal of Alberta. Ocean urges this Court to do the same. While this is not the occasion to examine the law in Alberta in depth, I allow myself the following observations.

[72] At issue in *Styles* was a similar question to the one here: was the employee, upon being terminated without cause, entitled to receive a payment under his employer's contractual long-term incentive plan? Upon termination, the employer paid the employee a lump sum payment equal to three months' salary pursuant to the terms of his employment contract (*Styles v. Alberta Investment Corp.*, 2015 ABQB 621, [2016] 4 W.W.R. 593, at paras. 9 and 27, per Yungwirth J.). The bonus would not have vested until several *years* after the employee's termination (paras. 17-23). Consequently, the employee could not recover damages for a payment under the bonus in connection to the reasonable notice period. At a minimum, *Styles* is thus distinguishable from Mr. Matthews' case. The latter raises issues surrounding damages connected to the notice period, while the former does not.

de service pour ces années investies dans l'entreprise de l'employeur et pour les pertes spéciales qu'ils subissent lorsqu'ils sont licenciés », et elle est souvent prévue dans les lois provinciales sur les normes d'emploi (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 26).

[70] En outre, la clause 2.05 doit être considérée globalement; elle précise également que le RILT « n'a aucune valeur actuelle ou future si ce n'est à la date de l'événement déclencheur ». Si M. Matthews avait reçu un préavis de congédiement adéquat, il aurait toujours été un employé à temps plein de l'entreprise à la date de l'événement déclencheur et il aurait alors reçu le paiement prévu par le RILT. Les dommages-intérêts qui lui ont été accordés tiennent compte de cette occasion manquée.

[71] Pour arriver à une conclusion différente quant à l'interprétation des clauses 2.03 et 2.05, les juges majoritaires se sont appuyés sur l'arrêt *Styles* de la Cour d'appel de l'Alberta. Ocean exhorte notre Cour à faire de même. Bien que le présent pourvoi ne soit pas l'occasion d'examiner en profondeur les règles de droit applicables en Alberta, je me permets de faire les observations qui suivent.

[72] Dans l'arrêt *Styles*, la question en litige était similaire à celle qui se pose en l'espèce : après avoir été congédié sans motif, l'employé avait-il le droit de recevoir un paiement en vertu du régime d'intéressement à long terme de son employeur? Après le congédiement, l'employeur a versé à l'employé un paiement forfaitaire correspondant à trois mois de salaire conformément aux modalités de son contrat de travail (*Styles c. Alberta Investment Corp.*, 2015 ABQB 621, [2016] 4 W.W.R. 593, par. 9 et 27, la juge Yungwirth). La prime n'aurait été acquise au profit de l'employé que plusieurs *années* après son congédiement (par. 17-23). Par conséquent, l'employé ne pouvait pas obtenir des dommages-intérêts pour la prime qui lui aurait été versée pendant la période de préavis raisonnable. À tout le moins, l'affaire *Styles* se distingue donc de cette façon du cas de M. Matthews. En effet, la situation de ce dernier soulève des questions concernant les dommages-intérêts liés à la période de préavis, alors que ce n'est pas le cas dans l'arrêt *Styles*.

[73] It also bears noting that the Court of Appeal of Alberta in *Styles* suggested that *Paquette*, one of the cases I rely on here, is premised upon an erroneous reading of this Court's decision in *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315. In *Styles*, the Court of Appeal noted that "[t]he common law implies a term of reasonable notice, or pay in lieu, in those circumstances. The payment in lieu is not 'damages' for a breach of the contract, but rather one component of the compensation provided for in the contract. If an employer fails to give proper notice or pay in lieu, the breach is in the failure to pay, not in the termination" (para. 34 (footnote omitted)). The Court of Appeal then observed that "[t]here are decisions from other jurisdictions that treat termination as a breach, but they do not reflect the law of Alberta: see for example [*Paquette*]. *Paquette* relies on the *dictum* in [*Sylvester*], at para. 1, but para. 15 of that decision confirms that it is the non-payment that is the breach, not the termination itself" (para. 34, fn. 1).

[74] On my reading, this Court in *Sylvester* confirmed that "[d]amages for wrongful dismissal are designed to compensate the employee for the breach by the employer of the implied term in the employment contract to provide reasonable notice of termination" (para. 15 (emphasis added)). Authority elsewhere confirms this same idea: there is no such implied term of the contract to provide payment in lieu (see, e.g., *Love v. Acuity Investment Management Inc.*, 2011 ONCA 130, 277 O.A.C. 15, at para. 44).[3]

[73] Il convient également de souligner que la Cour d'appel de l'Alberta, dans l'affaire *Styles*, a indiqué que l'arrêt *Paquette*, l'un des arrêts sur lesquels je m'appuie en l'espèce, repose sur une interprétation erronée de la décision de notre Cour dans *Sylvester c. Colombie-Britannique*, [1997] 2 R.C.S. 315. Dans l'arrêt *Styles*, la Cour d'appel a fait remarquer [TRADUCTION] « [qu'il] existe en common law une condition tacite selon laquelle un préavis raisonnable, ou une indemnité en tenant lieu, doit être fourni dans ces circonstances. L'indemnité tenant lieu de préavis raisonnable ne constitue pas des "dommages-intérêts" pour violation du contrat, mais plutôt une portion de l'indemnité prévue au contrat. Si un employeur ne donne pas un préavis adéquat ou une indemnité en tenant lieu, la violation réside dans le non-paiement d'une indemnité et non dans le congédiement » (par. 34 (note en bas de page omise)). La Cour d'appel a ensuite souligné que, [TRADUCTION] « [d]ans certaines décisions rendues dans d'autres ressorts, le congédiement est considéré comme une violation, mais ces décisions ne reflètent pas le droit albertain : voir, par exemple [*Paquette*]. Dans cet arrêt, le tribunal s'appuie sur la remarque incidente formulée dans [*Sylvester*], au par. 1, mais le par. 15 de cette décision confirme que c'est le non-paiement qui constitue la violation, et non le congédiement lui-même » (par. 34, note 1).

[74] Selon mon interprétation, notre Cour a confirmé dans l'arrêt *Sylvester* que « [l]es dommages-intérêts versés pour congédiement injustifié visent à indemniser l'employé à l'égard de la violation par l'employeur de la condition implicite du contrat d'emploi selon laquelle ce dernier doit donner à l'employé un préavis raisonnable de cessation d'emploi » (par. 15 (je souligne)). Cette même idée est d'ailleurs confirmée par d'autres sources dans d'autres ressorts : le contrat ne comporte aucune condition implicite selon laquelle l'employeur doit verser une indemnité tenant lieu de préavis (voir, p. ex., *Love c. Acuity Investment Management Inc.*, 2011 ONCA 130, 277 O.A.C. 15, par. 44)[3].

[3] See D. D. Buchanan, "Defining Wrongful Dismissal: The Alberta Schism" (2019), 57 *Alta. L. Rev.* 95.

[3] Voir D. D. Buchanan, « Defining Wrongful Dismissal : The Alberta Schism » (2019), 57 *Alta. L. Rev.* 95.

[75] As explained by the Court of Appeal for British Columbia in *Dunlop v. B.C. Hydro & Power Authority* (1988), 32 B.C.L.R. (2d) 334, at pp. 338-39, there are three principal reasons why this is an important distinction. First, there are issues surrounding the complexity of an implied term to provide pay in lieu of notice, and whether such a term can readily be implied into an employment contract. Second, implying a term to provide pay in lieu of notice "would mean that if an employer elected to give pay in lieu of notice, the employer would be complying with the contract and not breaking it", and thus "the contract would require the full payment to be made immediately". Third, if the employer elected to invoke such an implied term and gave no notice of termination, "there would be no obligation on the part of the employee to mitigate damages by seeking other employment" since the term requires a payment in full without regard to the employee's actual losses. Ensuring that courts and litigants properly understand this distinction is thus important as it can profoundly affect employees' financial lives. To the extent that some cases suggest otherwise, I respectfully disagree.

[76] Finally, at this stage of the analysis, it may also be appropriate in certain cases to examine whether the clauses purporting to limit or take away an employee's common law right were adequately brought to the employee's attention (*Paquette*, at para. 18; *Taggart*, at paras. 20-23; *Poole v. Whirlpool Corp.*, 2011 ONCA 808, 97 C.C.E.L. (3d) 20, at paras. 5-6). This issue, however, does not arise on these facts. Moreover, as several interveners commented on in this appeal, it may be appropriate to question whether the clause at issue is compatible with minimum employment standards (*Machtinger*, at p. 1004). This issue was not canvassed by the courts below and, in the present circumstances, it is unnecessary to explore further.

[75] Comme l'a expliqué la Cour d'appel de la Colombie-Britannique dans l'arrêt *Dunlop c. B.C. Hydro & Power Authority* (1988), 32 B.C.L.R. (2d) 334, p. 338-339, il y a trois raisons principales pour lesquelles cette distinction est importante. Premièrement, il existe des difficultés liées à la complexité d'une condition implicite prévoyant le versement du salaire en lieu et place d'un préavis, et à la question de savoir s'il est facile de dégager implicitement une telle condition d'un contrat de travail. Deuxièmement, le fait de dégager l'existence d'une telle condition implicite [TRADUCTION] « signifierait que, si un employeur choisissait de verser le salaire au lieu de donner un préavis, il respecterait alors le contrat et ne le violerait pas », et, pour cette raison, « le contrat exigerait le plein paiement du salaire immédiatement ». Troisièmement, si l'employeur choisissait d'appliquer une telle condition implicite et ne donnait pas de préavis de cessation d'emploi, [TRADUCTION] « l'employé ne serait pas tenu de limiter son préjudice en cherchant un autre emploi », étant donné que cette condition requiert le plein paiement du salaire sans égard aux pertes réelles subies par l'employé. Il est donc important que les tribunaux et les parties comprennent bien cette distinction, car elle peut affecter profondément la situation financière des employés. Dans la mesure où certaines décisions suggèrent le contraire, je dois, avec égards, exprimer mon désaccord.

[76] Enfin, à cette étape de l'analyse, il peut également être opportun, dans certains cas, de se demander si les clauses visant à limiter ou supprimer le droit que confère la common law à un employé ont été adéquatement portées à son attention (*Paquette*, par. 18; *Taggart*, par. 20-23; *Poole c. Whirlpool Corp.*, 2011 ONCA 808, 97 C.C.E.L. (3d) 20, par. 5-6). Toutefois, cette question ne se soulève pas en l'espèce. De plus, comme l'ont fait remarquer plusieurs intervenants dans le cadre du présent pourvoi, il peut être approprié de se demander si la clause en litige est compatible avec les normes d'emploi minimales (*Machtinger*, p. 1004). Cette question n'a pas été examinée par les juridictions inférieures et, dans les circonstances de l'espèce, il n'est pas nécessaire de s'y attarder davantage.

[77] In sum, I agree with the trial judge that Mr. Matthews is entitled to receive damages equal to what he would have received pursuant to the LTIP, subject to mitigation.

(2) Good Faith

[78] Again, and I say so respectfully, the parties' arguments on good faith were confounding when placed side by side. Mr. Matthews focused largely on the duty of honest performance, and confirmed at the hearing that he is not seeking damages for mental distress flowing from a breach of the duty to exercise good faith in the manner of dismissal, noting that this "just doesn't get him there" in respect of the LTIP (transcript, at p. 17). Ocean, in contrast, defended the conclusion of the Court of Appeal that there was "no bad faith" in "the manner in which [Mr. Matthews] was treated", recalling specifically the trial judge's finding that Mr. Matthews had failed to show that Ocean had planned to terminate him in order to deprive him of his LTIP entitlement (see para. 122).

[79] Ocean is no doubt correct on this very last point. That said, and contrary to the succinct conclusion of the majority judges in the Court of Appeal, I share Mr. Matthews' view that the trial judge did make abundantly clear that the treatment experienced by Mr. Matthews from 2007 until the moment of his departure constituted dishonest conduct on the part of Ocean. He found, as a matter of fact, that Ocean's senior manager undertook a four-year "campaign", characterized by lies and dishonesty, to push Mr. Matthews out of operations (see, e.g., paras. 294, 296, 298 and 301).

[80] The trial judge did not, however, explicitly find a breach of contract resulting from this dishonesty.

[77] En résumé, je suis d'accord avec le juge de première instance pour conclure que M. Matthews a droit à des dommages-intérêts correspondant au paiement qu'il aurait reçu en vertu du RILT, déduction faite des sommes découlant de l'atténuation des dommages.

(2) Bonne foi

[78] Une fois de plus, je tiens à souligner, toujours avec égards, que les arguments des parties sur la bonne foi étaient déroutants lorsque considérés côte à côte. En effet, M. Matthews s'est essentiellement attaché à l'obligation d'exécution honnête, et il a confirmé, lors de l'audience, qu'il ne réclame pas de dommages-intérêts pour les souffrances morales susceptibles de découler d'un manquement à l'obligation d'agir de bonne foi dans la façon de procéder à un congédiement, faisant remarquer que cela [TRADUCTION] « ne le rapproche tout simplement pas de son objectif » en ce qui concerne le RILT (transcription, p. 17). Ocean, quant à elle, a défendu la conclusion de la Cour d'appel selon laquelle [TRADUCTION] « la manière dont [M. Matthews] avait été traité » n'avait été entachée d'« aucune mauvaise foi », rappelant précisément la conclusion du juge de première instance portant que M. Matthews n'avait pas été en mesure d'établir qu'Ocean avait planifié son renvoi afin de le priver de son droit au paiement prévu par le RILT (voir par. 122).

[79] Il ne fait aucun doute qu'Ocean a raison sur ce tout dernier point. Cela dit, contrairement à la conclusion succincte des juges majoritaires de la Cour d'appel, je partage l'opinion de M. Matthews selon laquelle le juge de première instance a très clairement indiqué que la façon dont il a été traité de 2007 jusqu'au moment de son départ constituait une conduite malhonnête de la part d'Ocean. Le juge a tiré une conclusion de fait portant que le cadre supérieur d'Ocean avait mené pendant quatre ans une « campagne » afin d'écarter M. Matthews des opérations et que cette période avait été marquée par la malhonnêteté et le mensonge (voir, p. ex., par. 294, 296, 298 et 301).

[80] Le juge de première instance n'a toutefois pas conclu explicitement que cette malhonnêteté avait

He did not speak to the duty of honest performance, likely because — given that the original pleadings were filed before *Bhasin*'s release — *Bhasin* was not pleaded at trial. Nor did he pursue an analysis, in accordance with *Wallace* and *Keays*, to determine whether this dishonesty amounted to a breach of the duty to exercise good faith in the manner of dismissal. One suspects this too reflected the character of the pleadings, since no compensatory damages for mental distress flowing from Mr. Matthews' treatment in the manner of his dismissal were pursued.

[81] On this latter point, I would take this opportunity to recall that, had the issue been properly placed before the trial judge, it was certainly within the trial judge's prerogative to tie the dishonesty that occurred over the four-year period to the "manner of dismissal". Due to the circumstances in *Wallace* and *Keays*, "in the manner of dismissal" was originally conceptualized as the *moment* of dismissal, suggesting to some degree that good faith must exist only at the very end of the employment relationship. Yet, circumstances of constructive dismissal show that this reading sometimes needs to be extended. Following *Potter*, an employee's constructive dismissal may be better understood as the consequence of conduct over a series of events in time, and not just a tipping point. On this reading, *Potter* extends the notion of "in the manner of dismissal" to encompass circumstances in which termination stems from an employee's decision to leave their job brought about, as here, by a series of events that predate the actual moment of the parting of ways between employer and employee (paras. 31-35). The constructive dismissal may, depending on the facts of a given case, reflect a choice to leave prompted by a series of changes to the employee's working conditions over time, absent any misconduct. Or a constructive dismissal may reflect a choice to leave where dishonest or like misconduct eventually pushes the employee out the door. In the latter circumstance, this suggests that, at least retrospectively, the duty is relevant to the performance of the contract prior to the moment of termination.

entraîné une violation du contrat. Il n'a pas traité de l'obligation d'exécution honnête, vraisemblablement parce que — comme les premiers actes de procédure ont été déposés avant que l'arrêt *Bhasin* ne soit rendu — cette décision n'a pas été plaidée au procès. Le juge de première instance n'a pas non plus procédé, sur la base des arrêts *Wallace* et *Keays*, à une analyse en vue de déterminer si cette conduite malhonnête constituait un manquement à l'obligation d'agir de bonne foi dans la façon de procéder au congédiement. On peut supposer que cela découle de la teneur des actes de procédure, en ce qu'aucune demande de dommages-intérêts compensatoires n'a été présentée pour les souffrances morales découlant du traitement réservé à M. Matthews par suite de la façon dont il a été congédié.

[81] Relativement à ce dernier point, je profite de l'occasion pour rappeler que, si la question avait été soumise adéquatement au juge de première instance, il lui aurait certes été loisible de rattacher les gestes malhonnêtes survenus au cours de la période de quatre ans aux « circonstances du congédiement ». Compte tenu des circonstances dans lesquelles les arrêts *Wallace* et *Keays* ont été rendus, l'expression « circonstances du congédiement » a initialement été interprétée comme visant le *moment* du congédiement, ce qui tendait dans une certaine mesure à suggérer que la bonne foi était requise uniquement à la toute fin de la relation d'emploi. Or, les situations de congédiement déguisé montrent que cette conception doit parfois être élargie. À la suite de l'arrêt *Potter*, il est sans doute plus juste de considérer le congédiement déguisé d'un employé comme étant la conséquence d'une série d'événements échelonnés dans le temps plutôt que comme un seul et unique moment décisif. D'après cette interprétation, l'arrêt *Potter* élargit la notion de « circonstances du congédiement » aux situations où une cessation d'emploi découle de la décision d'un employé de quitter son emploi en raison d'une suite d'événements survenus avant le moment concret où la relation employeur-employé a été rompue, comme c'est le cas en l'espèce (par. 31-35). Il peut arriver que, selon les faits propres à une affaire donnée, le congédiement déguisé reflète la décision d'un employé de quitter son emploi en raison de nombreuses modifications apportées aux conditions de son emploi au fil du

Indeed, there is no coherent reason why the measure of misconduct cannot be understood retrospectively in cases of wrongful dismissal "so long as it is 'a component of the manner of dismissal'" (*Doyle v. Zochem Inc.*, 2017 ONCA 130, 31 C.C.P.B. (2nd) 200, at para. 13, citing *Gismondi v. Toronto (City)* (2003), 64 O.R. (3d) 688 (C.A.), at para. 23).

[82] In recognizing this, *Potter* affirmed what courts were already doing: examining the employment relationship retrospectively, and thus implicitly finding that good faith is owed not merely at the very end of the relationship. As Professor England has observed, courts have frequently examined whether employers treated their employees with good faith in constructive dismissal cases by, for example, ensuring employees were safeguarded from bullying, intimidation, and harassment from managers and other employers (*Individual Employment Law* (2nd ed. 2008), at pp. 92-93). This extension in *Potter* thus allowed for a more flexible measure of conduct over the period leading up to the moment of actual termination of the employment contract.[4]

[83] I would not, however, say anything further on how *Bhasin*, on the one hand, and *Wallace* and *Keays*, on the other, apply to this case. It suffices to say that a contractual breach of good faith rests on a wholly distinct basis from that relating to the failure to provide reasonable notice. I say this on the basis of my proposed conclusion above, with respect to Mr. Matthews' financial claim for breach

[4] See C. Mummé, "*Bhasin v. Hrynew*: A New Era for Good Faith in Canadian Employment Law, or Just Tinkering at the Margins?" (2016), 32 *Int'l J. Comp. Lab. L. & Ind. Rel.* 117, at p. 122.

temps, sans qu'il y ait eu de conduite répréhensible. Par ailleurs, un congédiement déguisé peut également refléter la décision d'un employé de quitter son travail lorsqu'une conduite malhonnête ou une autre action répréhensible l'a finalement poussé à le faire. Dans ce dernier cas, on pourrait croire que, rétrospectivement à tout le moins, l'obligation s'applique à l'exécution du contrat avant sa résiliation. De fait, il n'existe aucune raison cohérente pour que la conduite répréhensible ne puisse pas être considérée rétrospectivement dans les affaires de congédiement injustifié, [TRADUCTION] « pourvu qu'elle constitue un "aspect des circonstances du congédiement" » de l'employé (*Doyle c. Zochem Inc.*, 2017 ONCA 130, 31 C.C.P.B. (2nd) 200, par. 13, citant *Gismondi c. Toronto (City)* (2003), 64 O.R. (3d) 688 (C.A.), par. 23).

[82] En reconnaissant ceci dans l'arrêt *Potter*, la Cour a confirmé ce que les tribunaux faisaient déjà, en ce qu'ils examinaient la relation d'emploi de façon rétrospective et concluaient ainsi implicitement que l'obligation d'agir de bonne foi ne s'applique pas uniquement à la toute fin de la relation. Comme l'a fait observer le professeur England, les tribunaux sont souvent appelés à se demander, dans les cas de congédiement déguisé, si les employeurs ont traité leurs employés de bonne foi, par exemple en veillant à ce que ceux-ci ne soient pas victimes d'intimidation ou de harcèlement de la part de gestionnaires ou de collègues (*Individual Employment Law* (2e éd. 2008), p. 92-93). Cet élargissement dans Potter des principes applicables a donc accordé plus de souplesse en étendant l'appréciation de la conduite à la période précédant le moment concret où le contrat de travail a été résilié[4].

[83] Je ne me prononcerai toutefois pas davantage sur la manière dont l'arrêt *Bhasin*, d'une part, et les arrêts *Wallace* et *Keays*, d'autre part, s'appliquent à la présente espèce. Qu'il suffise de dire qu'un manquement à l'obligation contractuelle d'agir de bonne foi repose sur des fondements entièrement distincts de ceux liés à l'omission de donner un préavis raisonnable. J'affirme cela en m'appuyant

[4] Voir C. Mummé, « *Bhasin v. Hrynew* : A New Era for Good Faith in Canadian Employment Law, or Just Tinkering at the Margins? » (2016), 32 *Int'l J. Comp. Lab. L. & Ind. Rel.* 117, p. 122.

of the implied duty to provide reasonable notice. At the hearing, counsel for Mr. Matthews acknowledged that, if he received damages to compensate him for his lost LTIP payment as part of his reasonable notice damages, he cannot now claim the same amount under the *Hadley* principle. While the breaches of contract are indeed distinct, they cannot be deployed to provide what amounts to double recovery. Moreover, Mr. Matthews drew the Court's attention to the anxiety caused by Ocean, but made no request for damages for mental distress. As noted, while he originally claimed for punitive damages at trial, he did not pursue this head of damages on appeal. Given that Mr. Matthews failed to press his claim with further detail or argument, even when questioned on point by members of the Court, I need not go further to decide whether some duty of good faith has been breached, since no further remedies are being sought.

sur la conclusion que j'ai proposée précédemment à l'égard de la demande de réparation pécuniaire présentée par M. Matthews pour manquement à l'obligation tacite de donner un préavis raisonnable. À l'audience, l'avocat de M. Matthews a reconnu que, si les dommages-intérêts qui sont accordés à ce dernier pour l'absence de préavis raisonnable incluent des dommages-intérêts le compensant pour la perte du paiement prévu par le RILT, M. Matthews ne saurait réclamer maintenant ce même paiement suivant le principe établi dans l'arrêt *Hadley*. Bien qu'il s'agisse de violations de contrat distinctes, elles ne peuvent être appliquées pour accorder une réparation qui équivaudrait à une double indemnité. Qui plus est, si M. Matthews a attiré l'attention de notre Cour sur l'angoisse causée par Ocean, il n'a pas demandé de dommages-intérêts pour souffrances morales. Comme il a été mentionné plus tôt, quoique M. Matthews ait initialement réclamé des dommages-intérêts punitifs au procès, il n'a pas fait valoir ce chef de réclamation en appel. Étant donné que M. Matthews n'a pas fourni de détails ou d'arguments supplémentaires à cet égard, même lorsqu'il a été interrogé sur ce point par des juges de notre Cour, il n'est pas nécessaire que je m'y attarde davantage pour décider s'il y a eu manquement à une obligation de bonne foi, aucune réparation additionnelle n'étant réclamée.

[84] Further, I note that Mr. Matthews and several interveners argue that the general organizing principle of good faith described in *Bhasin* manifests itself in various ways throughout the whole of the contractual performance. Ocean answers that any extension of good faith would be an unwieldy precedent.

[84] De plus, je souligne que M. Matthews et plusieurs intervenants prétendent que le principe directeur général de bonne foi décrit dans l'arrêt *Bhasin* se manifeste de diverses façons tout au long de l'exécution du contrat. Pour sa part, Ocean affirme que tout élargissement de l'obligation de bonne foi créerait un précédent peu facile à appliquer.

[85] Mr. Matthews' argument is a serious one. Not all mistreatment by an employer will result in a constructive dismissal — some employees, for financial or other reasons, might choose not to leave their job. It might be that, as argued by various parties in this appeal, a duty of good faith will one day bind the employer based on a mutual obligation of loyalty in a non-fiduciary sense during the life of the employment contract, owed reciprocally by both the employer and employee. I recognize, however, that

[85] L'argument de M. Matthews est important. Le traitement incorrect réservé à un employé par son employeur ne se traduit pas dans tous les cas par un congédiement déguisé — il peut arriver que, pour des raisons financières ou autres, l'employé concerné décide de ne pas quitter son emploi. Il se pourrait, comme l'ont soutenu diverses parties au présent pourvoi, que les employeurs soient un jour tenus pendant la durée du contrat de travail à un devoir de bonne foi basé sur une obligation mutuelle

whether the law should recognize this is a matter of fair debate.

[86] This is a dismissal case. In light of the comment in *Bhasin* (at para. 40) that the common law should develop in an incremental fashion, I would decline to decide whether a broader duty exists during the life of the employment contract in the absence of an appropriate factual record.

[87] Lastly, I recall that in his original application, Mr. Matthews sought a declaration that the termination of his employment reflected conduct on the part of Ocean that was oppressive and unfair, and that his dismissal was "carried out in bad faith at law and in breach of [Ocean's] duty of good faith". I recognize that, generally speaking, the mental distress that an employee might feel as a result of employer dishonesty is translated by law, in financial terms, as damages, and that, further, Mr. Matthews has declined to seek such damages here. Nevertheless, a proper acknowledgment that an employer's conduct was contrary to the expected standard of good faith can transcend the request for damages, and may be meaningful for an employee in a way that a mere finding that reasonable notice was provided cannot. One aspect of this relates to dignity in the workplace, and the non-financial value associated with fair treatment upon dismissal (J. Fudge, "The Limits of Good Faith in the Contract of Employment: From *Addis* to *Vorvis* to *Wallace* and Back Again?" (2007), 32 *Queen's L.J.* 529, at p. 548; G. Anderson, D. Brodie and J. Riley, *The Common Law Employment Relationship: A Comparative Study* (2017), at ch. 11). Indeed, this Court has been emphatic in recognizing that, in addition to whatever financial dimension work entails, a person's employment is "an essential component of [their] sense of identity, self-worth and emotional well-being" (*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 368). To this end, it is understandable that employees seek some recognition that they have been mistreated, reflecting that they feel it unfair, beyond

de loyauté, au sens non fiduciaire de ce terme, devoir liant réciproquement l'employeur et l'employé. Je reconnais toutefois que la question de savoir si ce principe devrait être reconnu en droit suscite des débats légitimes.

[86] Il s'agit en l'espèce d'une affaire de congédiement. Compte tenu de l'observation formulée dans l'arrêt *Bhasin* (par. 40) selon laquelle la common law doit évoluer de manière progressive, je m'abstiens, en l'absence d'un dossier factuel adéquat, de me prononcer sur l'existence d'une obligation de portée plus large pendant la durée du contrat de travail.

[87] Enfin, je rappelle que, dans sa demande initiale, M. Matthews sollicitait une déclaration indiquant que la cessation de son emploi résultait de la conduite abusive et injuste d'Ocean à son endroit, et que son congédiement avait été [TRADUCTION] « effectué de mauvaise foi au sens de la loi et en contravention à l'obligation [d'Ocean] d'agir de bonne foi ». Je reconnais que, de manière générale, les souffrances morales que pourrait éprouver un employé en raison de la conduite malhonnête de l'employeur se traduisent en droit, sur le plan financier, par des dommages-intérêts, et que, en outre, M. Matthews s'est abstenu de réclamer de tels dommages-intérêts en l'espèce. Néanmoins, une reconnaissance formelle que la conduite d'un employeur a contrevenu à la norme de la bonne foi attendue peut transcender la présentation d'une demande en dommages-intérêts, et pourrait avoir pour l'employé concerné une valeur significative que ne saurait avoir à ses yeux une simple conclusion qu'un préavis raisonnable a été donné. Cela découle notamment de la dignité à laquelle aspirent les employés au sein de leur milieu de travail et de la valeur non financière qu'ils associent au fait d'être traités équitablement en cas de congédiement (J. Fudge, « The Limits of Good Faith in the Contract of Employment : From *Addis* to *Vorvis* to *Wallace* and Back Again? » (2007), 32 *Queen's L.J.* 529, p. 548; G. Anderson, D. Brodie et J. Riley, *The Common Law Employment Relationship : A Comparative Study* (2017), ch. 11). D'ailleurs, notre Cour a clairement reconnu qu'en plus de la dimension financière qu'il présente, l'emploi est « une composante essentielle du sens de l'identité d'une

any compensatory matter, that they were forced to quit in such circumstances.

[88] Regrettably, Mr. Matthews gave no explanation as to what basis this Court would make a formal declaration in these circumstances. I would refrain from making a declaration of a contractual breach related to good faith in the formal sense. Nonetheless, I would observe that it is clear from the findings at trial Mr. Matthews was mistreated and lied to about the security of his future with the company in the years leading up to his constructive dismissal in a manner that contributed to making his job intolerable. Compensation during the reasonable notice period does not speak to this. While it may not result in further remedies in this case, it is not inappropriate to recall that the "non-monetary benefit" (*Potter*, at para. 84) derived from the performance of work can be wrongly taken from employees if, at dismissal, they are lied to or misled as to the reasons for termination.

V. Conclusion

[89] For the foregoing reasons, I would allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment of the Supreme Court of Nova Scotia, with costs throughout.

Appeal allowed with costs throughout.

Solicitors for the appellant: Levitt, Toronto; Mitchell & Ferguson, Associates, Halifax.

personne, de sa valorisation et de son bien-être sur le plan émotionnel » (*Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313, p. 368). Pour cette raison, il est compréhensible que des employés demandent qu'on reconnaisse qu'ils ont été traités de façon incorrecte, ce qui reflète le fait qu'ils estiment injuste, indépendamment des aspects financiers d'une telle situation, d'avoir été forcés de quitter leur emploi en pareilles circonstances.

[88] Malheureusement, M. Matthews n'a pas expliqué sur quel fondement notre Cour devrait s'appuyer pour prononcer une déclaration formelle dans les présentes circonstances. Je m'abstiendrais donc de prononcer formellement une déclaration portant qu'il y a eu manquement à l'obligation contractuelle d'agir de bonne foi. Je ferais néanmoins observer qu'il ressort clairement des conclusions tirées au procès que M. Matthews a été traité de façon incorrecte et qu'on lui a menti à l'égard de sa sécurité d'emploi future dans l'entreprise au cours des années ayant précédé son congédiement déguisé, et ce, d'une manière qui a contribué à créer une situation intolérable pour lui au travail. La rémunération versée pendant la période de préavis raisonnable ne tient pas compte de cela. Bien que l'observation susmentionnée ne se traduise pas par une réparation additionnelle en l'espèce, il n'est pas inapproprié de rappeler que « l'avantage non pécuniaire » (*Potter*, par. 84) qu'un salarié tire de l'exécution de son travail peut lui être retiré injustement si, en cas de congédiement, on lui ment et on le trompe quant aux raisons pour lesquelles on met fin à son emploi.

V. Conclusion

[89] Pour les motifs qui précèdent, je suis d'avis d'accueillir le pourvoi, d'écarter l'arrêt de la Cour d'appel et de rétablir le jugement de la Cour suprême de la Nouvelle-Écosse, le tout avec dépens devant toutes les cours.

Pourvoi accueilli avec dépens dans toutes les cours.

Procureurs de l'appelant : Levitt, Toronto; Mitchell & Ferguson, Associates, Halifax.

Solicitors for the respondent: Barteaux Durnford, Halifax.

Solicitors for the intervener the Canadian Association for Non-Organized Employees: Ball Professional Corporation, Toronto; CSuite Law, Toronto; SJO Legal Professional Corporation, Toronto.

Solicitors for the intervener Don Valley Community Legal Services: Monkhouse Law, Toronto.

Solicitors for the intervener the Law Students' Legal Advice Program: Tevlin Gleadle Curtis Employment Law Strategies, Vancouver.

Solicitors for the intervener the Canadian Association of Counsel to Employers: McCarthy Tétrault, Toronto.

Solicitors for the intervener Parkdale Community Legal Services: Nelligan O'Brien Payne, Ottawa; Parkdale Community Legal Services, Toronto.

Procureurs de l'intimée : Barteaux Durnford, Halifax.

Procureurs de l'intervenante Canadian Association for Non-Organized Employees : Ball Professional Corporation, Toronto; CSuite Law, Toronto; SJO Legal Professional Corporation, Toronto.

Procureurs de l'intervenant Don Valley Community Legal Services : Monkhouse Law, Toronto.

Procureurs de l'intervenant Law Students' Legal Advice Program : Tevlin Gleadle Curtis Employment Law Strategies, Vancouver.

Procureurs de l'intervenante l'Association canadienne des avocats d'employeurs : McCarthy Tétrault, Toronto.

Procureurs de l'intervenant Parkdale Community Legal Services : Nelligan O'Brien Payne, Ottawa; Parkdale Community Legal Services, Toronto.

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COURT OF APPEAL FOR ONTARIO

CITATION: Mikelsteins v. Morrison Hershfield Limited, 2019 ONCA 515
DATE: 20190620
DOCKET: C66315

Lauwers, Fairburn and Nordheimer JJ.A.

BETWEEN

Ivars Mikelsteins

Plaintiff (Respondent)

and

Morrison Hershfield Limited

Defendant (Appellant)

David Greenwood, for the appellant

James Heeney and Julia Burke, for the respondent

Heard: June 12, 2019

On appeal from the judgment of Justice Shaun Nakatsuru of the Superior Court of Justice, dated November 22, 2018, with reasons reported at 2018 ONSC 6952.

Nordheimer J.A.:

[1] The appellant Morrison Hershfield Limited ("MHL") appeals from the partial summary judgment awarding the respondent Ivars Mikelsteins, a former employee of MHL, an increase in the value of shares that he held in the parent

corporation of MHL, along with a share bonus, through the period of reasonable notice.

Background

[2] MHL is an employee-owned engineering firm that provides engineering and construction consulting services. Mr. Mikelsteins was employed by MHL for 31 years, most recently in the position of Director, Business Development. On October 26, 2017, Mr. Mikelsteins was notified in writing that his employment was being terminated without cause, effective immediately.

[3] Mr. Mikelsteins commenced an action for wrongful dismissal. He then brought a motion for summary judgment. In granting partial summary judgment, the motion judge awarded Mr. Mikelsteins damages for wrongful dismissal based on a notice period of 26 months. Since partial summary judgment was being awarded prior to the expiration of the notice period, the motion judge reserved to himself any challenge that MHL might wish to bring, in the future, regarding Mr. Mikelsteins' mitigation efforts. None of those determinations are being appealed.

[4] The motion judge also made a determination regarding the value that Mr. Mikelsteins was entitled to be paid for the shares that he held in MHL's parent corporation, along with his entitlement to a share bonus. Those determinations are the subject of this appeal.

[5] Mr. Mikelsteins was one of a select group of MHL employees who were eligible to purchase shares of MHL's parent corporation, Morrison Hershfield Group Inc. Those shares were governed by the terms and conditions of the Amended and Restated Morrison Hershfield Group Inc. Shareholders' Agreement, dated January 18, 2013 (the "Shareholders' Agreement"). At the time that his employment was terminated, Mr. Mikelsteins owned a total of 5,108 shares.

[6] Under the terms of the Shareholders' Agreement, Mr. Mikelsteins and other shareholders were eligible to receive annual "Share Bonuses". The share bonus payable in respect of each share is determined by an objective calculation based on the company's financial results. As a result, the total share bonus payable to each shareholder depends on the total number of shares that the shareholder had previously decided to purchase. The share bonus is not related to the shareholder's contributions as an employee of MHL. It is, in effect, a dividend.

[7] With respect to Mr. Mikelsteins' shareholdings, the motion judge determined that he was entitled to: (i) hold the shares until the end of the reasonable notice period (i.e. 26 months after he was notified of his termination and his association with MHL had ceased); and (ii) receive damages for the loss of the share bonus that would have been payable during such 26 month period.

[8] Article 3 of the Shareholders' Agreement deals with "Automatic Transfer Notices", and applies in situations where, among other things, a shareholder resigns, is terminated, becomes bankrupt, or dies. Article 3.2 applies in cases of termination, and states:

> A Shareholder whose association with the Corporation and its Affiliates ceases by reason of termination by the Corporation of his/her employment with the Corporation and its Affiliates shall, immediately after such termination, be deemed to have given a Transfer Notice covering all of the Shares held by him/her on a date which is 30 days from the date he/she is notified of such termination by the Corporation.

The Shareholders' Agreement proceeds to specify that a shareholder that is deemed to have given a Transfer Notice under Article 3 is entitled to the "Fair Value" of his or her shares (as that term is defined in the Shareholders' Agreement).

[9] MHL takes the position that Mr. Mikelsteins' association with it had ceased by reason of the termination of his employment on October 26, 2017, which became the "trigger" date for purposes of the above provision. In accordance with that position, MHL paid Mr. Mikelsteins the sum of $999,431.28 (representing the "Fair Value" of his shares on November 25, 2017, which is 30 days from October 26, 2017, the date of his termination).

[10] The motion judge disagreed with MHL's position. He concluded that Mr. Mikelsteins was entitled to receive payment for his shares with the value

calculated at the end of the reasonable notice period. The motion judge also concluded that Mr. Mikelsteins was entitled to the share bonus that would have accrued during the notice period. The motion judge reached this conclusion based on his view that the "basic principle to be applied is to put the person in the same position they would have been in if lawfully terminated": at para. 37. In so concluding, the motion judge relied on this court's decision in *Paquette v. TeraGo Networks Inc.,* 2016 ONCA 618, 352 O.A.C. 1.

Analysis

(i) The standard of review

[11] I start with the standard of review applicable to the motion judge's decision. MHL submits that the standard of review is correctness because the Shareholders' Agreement is a standard form contract (sometimes called a contract of adhesion). Mr. Mikelsteins submits that the standard of review is reasonableness because the interpretation of the Shareholders' Agreement involves a finding of mixed fact and law.

[12] I agree with MHL. The evidence is that the Shareholders' Agreement is a "take it or leave it" form of contract. An employee who is invited to become a party to the Shareholders' Agreement has no ability to negotiate the terms of that agreement. The Shareholders' Agreement is therefore fairly characterized as a contract of adhesion. Consequently, the factual matrix plays less of a role in the

interpretative exercise. Further, the interpretation of the Shareholders' Agreement will have implications for all of the other shareholders, both existing and future. It is important therefore that the Shareholders' Agreement be interpreted in a consistent manner. All of this leads to the conclusion that the proper standard of review is correctness. As Wagner J. said in *Ledcor Construction Ltd v. Northbridge Indemnity Insurance Co,* 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 46:

> Where, like here, the appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix specific to the particular parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review.

(ii) The proper valuation of the shares and approach to share bonus

[13] Turning to the central issue, in my view, the motion judge erred in concluding that Mr. Mikelsteins was entitled to compensation in respect of his shares calculated at the end of the notice period. He did so by improperly conflating Mr. Mikelsteins' entitlement to compensation arising from the breach of his contract of employment with Mr. Mikelsteins' contractual entitlements respecting his shares. Mr. Mikelsteins received his shares pursuant to the Shareholders' Agreement. It is the terms of the Shareholders' Agreement that determine Mr. Mikelsteins' rights with respect to those shares. The common law

relating to compensation for breaches of a contract of employment does not apply to Mr. Mikelsteins' entitlements regarding his shares.

[14] This fundamental distinction is why the cases relied upon by Mr. Mikelsteins, including *Paquette*, do not direct the proper result in this case. Rather, it is governed by the decisions of this court in cases such as *Evans v. Paradigm Capital Inc.,* 2018 ONCA 952, 51 C.C.E.L. (4th) 21 which, in turn, confirmed the conclusion reached in *Love v. Acuity Investment Management Inc.*, 2011 ONCA 130, 277 O.A.C. 15. In *Love*, where virtually the identical issue was raised, Goudge J.A. said, at para. 54:

> I therefore conclude that the appellant ceased to be an employee of the respondent on May 3, 2005, and that the trial judge erred in using the end of the notice period rather than his termination date as the trigger for the respondent's right to repurchase and for the valuation.

[15] The motion judge attempted to distinguish the decision in *Love* from the situation before him, on the basis of the specific wording of the terms of the agreement that were at issue in *Love*. In particular, the motion judge relied on the fact that the agreement in that case used the language "employment is terminated without cause" (emphasis added) whereas, in this case, the Shareholders' Agreement refers simply to "termination": at paras. 42-46. The respondent argues that the motion judge was correct to distinguish *Love* on that basis. I disagree.

[16] With respect, contractual rights differ from common law rights. Contractual rights depend on the terms of the contract to which the parties have agreed. The principle enunciated in *Love*, and reiterated in *Evans*, is that there is a difference between what a dismissed employee is entitled to as damages in lieu of notice upon termination of the employment contract and what the employee is entitled to under the terms of more specific contracts.

[17] Often, the terms of a dismissed employee's rights to pension payments (e.g. *Taggart v. Canada Life Assurance Co.*, [2006] O.J. No. 310 (C.A.), bonuses (e.g. *Lin v. Ontario Teachers' Pension Plan Board*, 2016 ONCA 619, 352 O.A.C. 10, or similar entitlements, fall to be determined by the remedies that arise from a breach of the contract of employment where the employer fails to give proper notice. In such cases, the dismissed employee will be entitled to the benefits he or she would have received during the notice period. That, however, is not this case.

[18] As pointed out in *Love*, the fact that a dismissed employee may be entitled to certain benefits during the notice period does not change the date when his or her employment ends. In this case, Mr. Mikelsteins' employment ended on October 26, 2017. His entitlements relating to his shares are separate and apart from the relief to which he is entitled arising from his contract of employment. His entitlements relating to his shares fall to be determined by the terms of the Shareholders' Agreement.

[19] In that regard, the terms of the Shareholders' Agreement are clear. Once the shareholder's "association with the Corporation and its Affiliates ceases by reason of termination by the Corporation of his/her employment with the Corporation" a process is triggered whereby the shareholder's shares will be repurchased either by the corporation or the existing shareholders. The Shareholders' Agreement expressly provides that the corporation becomes entitled to repurchase the shares 30 days from the date the shareholder is "notified of such termination" by deeming the shareholder to have delivered a Transfer Notice as at that date. Where the corporation elects to purchase the shares, this in turn fixes the valuation date for the shares.

[20] None of this turns on whether the employee has been terminated with or without cause. I note, for example, that the employee in *Evans* had not been terminated without reasonable notice but rather had taken the position that she had been constructively dismissed. Nonetheless, this court applied the principle from *Love* because the terms of the shareholders' agreement in that case "clearly required the appellant to tender her shares for redemption on termination of her employment": *Evans,* at para. 27.

[21] Similarly here, the Shareholders' Agreement uses the cessation of Mr. Mikelsteins' employment as the triggering event for the process to transfer his shares. The termination occurred on October 26, 2017. There is a very plain and obvious reason why a corporation, that is employee owned, and which has

terminated an employee who also happens to be a shareholder, would wish to commence the process of repurchasing the employee's shares the moment that employee is told of his or her dismissal, rather than at the end of the notice period. Understandably the corporation would not wish an employee to be able to exercise all of the rights of a shareholder once their employment is terminated.

[22] This conclusion also deals with the share bonus issue. Once it is concluded that the shares had to be transferred resulting from Mr. Mikelsteins' termination, he ceased to have any entitlement to any bonus arising from the shares that he no longer owned.

(iii) *Employment Standards Act, 2000*

[23] My conclusion regarding the shares requires me to address an alternative argument that is advanced by Mr. Mikelsteins – namely, that the terms of the Shareholders' Agreement violate the *Employment Standards Act, 2000,* S.O. 2000, c. 41 and therefore are null and void and of no effect. On this point, Mr. Mikelsteins relies on s. 60(1)(a) of the *Employment Standards Act*, which reads:

> During a notice period under section 57 or 58, the employer,
>
> (a) shall not reduce the employee's wage rate or alter any other term or condition of employment;

[24] The Shareholders' Agreement does not alter any term or condition of employment. Indeed, this alternative argument repeats the same error made by the motion judge which is the conflating of Mr. Mikelsteins' rights under his

contract of employment regarding his entitlement to reasonable notice, and his rights under the Shareholders' Agreement regarding his shares, and treating them as one and the same. They are not.

[25] Mr. Mikelsteins' entitlement respecting the shares that he owned is determined in accordance with the terms of the Shareholders' Agreement and only that agreement. The *Employment Standards Act* has no application. Mr. Mikelsteins received that to which he was contractually entitled when the appellant paid him for his shares.

Conclusion

[26] The appeal is allowed, paragraph 5 of the judgment is set aside and Mr. Mikelsteins' claim in that respect is dismissed. MHL is entitled to its costs of the appeal fixed in the agreed amount of $12,500, inclusive of disbursements and HST.

Released: "IN" June 20, 2019

"I.V.B. Nordheimer J.A."
"I agree. P. Lauwers J.A."
"I agree. Fairburn J.A."

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Law of Damages § 5:1

Law of Damages
S.M. Waddams

Part I. Compensatory Damages

Chapter 5. Damage to Economic Interests

§ 5:1. Contractual Benefits

One of the most significant of all economic interests is the benefit of a favourable contract. A person who has made a good bargain is treated by the law for many purposes as one who has a present right, the value of which is measured by the value of the promised performance. The primary manifestation of this approach is reflected in the measure of damages for breach of contract; the contract breaker is bound to make good the loss caused by the breach, a loss measured by the value of the performance promised. [1] The notion of an enforceable contract as a present valuable right affects many other branches of the law where the measure of damages naturally reflects the primary measure for breach of contract. [2] Thus, assignments of contractual rights are common and the measure of damages for wrongful failure to assign would be based upon the value of the contractual right. Actions for breach of warranty of authority and for inducing breach of contract also lead to damages measured by the value of the contract lost to the plaintiff.

It is commonly said that the measure of damages for breach of contract differs from that in tort in that contract damages, but not tort damages, give to the plaintiff the benefit of the bargain. [3] The most generally accepted formulations of compensatory principles, however, are wide enough to embrace both contract and tort. Thus, it is usually said that the object of compensatory damages is to put the party complaining in the position that would have been occupied "if the wrong had not been done" [4] or "if his rights had been observed". [5] It will be seen that these formulations are quite capable of supporting a rule of contract damages that gives to the promisee the benefit of the bargain, for if the wrong had not been done the contract would have been performed and the promisee would have received the benefit of performance.

It may be objected that there is an element of circularity in this. No wrong would have been done to the plaintiff if no contract had been made in the first place. To describe the wrong as the breaking of the contract rather than as the making of a contract that is not kept is to beg the question. Independent justification is still needed for a rule measuring compensation by the value of the contractual benefit. Several writers have indeed questioned the necessity and the desirability of maintaining the present rule, and the arguments will be discussed in the following paragraphs. [6] So far as the courts are concerned, the general rule continues to be asserted as the normal rule of contract damages that the promisee is entitled to the full value of the promised performance. In *Robinson v. Harman*, [7] Parke B. said: "The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed." [8] A very similar statement, from a Canadian Privy Council case frequently cited in Canadian courts, appears in *Wertheim v. Chicoutimi Pulp Co*:

> And it is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed … That is a ruling principle. It is a just principle. [9]

From time to time writers have asked whether this rule is indeed a just rule. It may be argued that the main social purpose of the law of contracts is to protect reliance, and that thought should be given to changing the present rule, at least in cases

where it is clear that the plaintiff has not altered position in reliance on the defendant's promise. Answers can be given to the various arguments that have been adduced in support of enforcement. First the argument that reasonable expectations ought to be protected is met by pointing out its circularity and its tendency to prove too much by being theoretically applicable beyond the realm of promises. [10] Professor Atiyah has written:

> To raise an expectation and then to decline to fulfil it is, in some measure, to worsen the position of the promisee, certainly an individual promisee. Prima facie this is something that should be avoided, other things being equal. But I am bound to say that it does appear to me to be a very weak ground for the enforcement of executory contracts, and one that could very easily be counterbalanced by proof that other things are not equal … it might well be thought by most people that the inconvenience to the promisor of being held to his contract would be enough to outweigh the prima facie desirability of not disappointing the promisee. [11]

A second argument, that enforcing all promises as a matter of principle even where there has been no reliance will better protect reliance when reliance occurs, can be met by proposing a change in the onus of proof. If the reason for enforcement is reliance, it can be argued that the promisee's position is sufficiently protected by a requirement that the promisor is bound unless reliance is disproved. [12]

The argument that contracts are deliberate allocations of risk can be met by pointing out that not all contracts can be so categorized. [13] The moral argument for enforceability can be met by pointing out that, from a moral point of view, no distinction can be drawn between purely gratuitous promises and executory promises that have not been relied on. [14]

In his later book, *The Rise and Fall of Freedom of Contract*, [15] Professor Atiyah returns to the same theme. He writes:

> Nevertheless, it remains true in current law, generally speaking, that expectations are the basis of the damages which will be awarded for breach of contract where such liability does exist. Even where there has been some element of reliance, or some benefit rendered, and where it might have been thought that the damages would be confined to the element of reliance or the value of the benefit, this is not generally the case. Doubtless, there are arguments for maintaining the traditional principle here (see Fuller and Perdue "The Reliance Interest in Contract Damages") though it might be better to recognize them frankly for what they are. Frequently, the best justification for awarding such expectation damages is not that the plaintiff's expectations in fact deserve such handsome protection, but that proof of the losses flowing from reliance would be too difficult or costly, and that if the damages are excessive by way of compensation, then this is a deserved penalty on the defendant anyhow. But in view of the declining belief in the idea that the law should actually deter parties from breaking their contracts, it would not be surprising if future developments tend to show a still further whittling down of expectation damages. [16]

Professor Atiyah concludes his book with this comment: "So too, the role of expectations, their relationship to promises, and their importance even where they arise without promises, must be reexamined … The task is one to which I hope to return." [17]

A change in the present rule would, however, raise a number of difficulties. First, if specific performance [18] is available to enforce some contracts without a need for reliance, it seems difficult to contemplate a measure of damages that is not in principle of equivalent value. If the *prima facie* measure of damages ceased to be the value of the promised performance, there would be increased incentive to claim specific performance, an argument that damages were never "adequate" compensation and an anomalous discrepancy in economic result between cases where specific performance was awarded and cases where damages were given. A change in the basic measure of damages, therefore, would require a corresponding narrowing of the circumstances in which specific enforcement is available.

Secondly, in the case of a formal contract, for example a gift promise under seal, it has generally been accepted that the appropriate measure of enforcement is the value of the promise. [19] It would be anomalous if formal contracts were fully enforceable but informal contracts only to the extent of reliance.

Thirdly, it must surely be conceded that completed exchanges, after execution, are final. The result of exchanges is often to confer a benefit on one of the parties. It is difficult to contemplate a rule permitting the rescission of executed transactions on the ground that one party has benefited to a greater extent than his reliance. If this is a sound position, it is hard to see why, in principle, parties should not agree in respect to a future planned exchange that the legal relationship between the two shall now be as though the exchange were actually effected. If this can be done expressly it can surely be done by implication, and arguably such an implication is a fair one in the case of the usual exchange transaction. If the parties do not intend to commit themselves to the full extent of the exchange they can always, under present law, make express provision. If the law normally only protected reliance, a new class of contracts would surely emerge where the promisor fully guaranteed performance. Following normal rules of contract construction such a guarantee could be implicit, as well as express, and this would bring us back to the present position. In other words, the argument is that the normal measure of contract damages simply reflects the usual implications of a contractual transaction.

This point is strengthened, it is submitted, by the existence of the doctrine of consideration as the normal test of contract enforcement. One of the reasons for allowing the promisee to recover the value of the promised performance is that the promisee has "bought" the right to it. The doctrine of consideration is, in essence, a test of when a promise has been "bought". It is widely acknowledged that some measure of enforcement should be and has been given to promises that have not been bought (*i.e.*, where there is no consideration), but it is in just those cases that, as has been argued elsewhere,[20] the measure of damages ought to be restricted to the protection of reliance. When the promisee has not bought the right to performance, there is much less reason to allow recovery of its value.

Fourthly, it would generally be conceded that risk allocation contracts ought to be enforced.[21] It does not seem that a ready means is available to distinguish "risk allocation" contracts from other contracts. Every agreed exchange can be said to allocate risks of error in assessing the comparative value of the properties to be exchanged. One of the simplest explanations of the theoretical basis of contract law is that it enables persons to make their future less uncertain; this explanation also provides a strong support for a remedial scheme that protects the promisee's expectations, for uncertainty about the future is only removed if the promisee can count on a legal remedy that will give the anticipated benefit of performance.

Lastly, Fuller and Perdue's argument that only a measure of expectation damages can adequately protect reliance does not seem fully to be met by putting the onus of proof upon the promisor to disprove reliance. A promisee who had made a beneficial bargain would know that reliance on performance of the promise was not safe until losses (not disprovable) or expenses equivalent to the contractual advantage had been incurred. Similarly, it would be profitable for the promisor to break a promise as long as the promisor calculated that it could be shown that such losses had not been incurred. These considerations would inhibit reliance and encourage the manufacture of otherwise unnecessary evidence of reliance for purposes of possible litigation. Furthermore, there is almost always reliance in the shape of foregone alternative opportunities that is very hard to measure. If a reversal of the onus of proof combined with consideration of the possibility that the promisee might have foregone other opportunities to contract will make it practically impossible for the promisor to disprove reliance, the present position will remain in substance unchanged in which case the present rule might as well be preserved. If, on the other hand, it is envisaged that reliance can be readily disproved on a showing that the promisee would probably not have found another opportunity to make a similar contract, it may be objected that reliance, in the form of a possibility (up to a probability of.49) of the promisee's making an alternative contract, will be left unprotected.

For these reasons there seems to be insufficient reason to advocate the judicial or legislative change of the present rule.

Footnotes

1 Simpson v. Hatzipetrakos (2009), 180 A.C.W.S. (3d) 253 (Ont. S.C.J.), citing this passage at para. 24; Gladu v. Robineau Estate, 2017 ONSC 37, citing this passage at para. 297, additional reasons 2017 ONSC 1525; 846-6718 Canada Inc. v. 1779042 Interior

Ltd, 2018 ONSC 1563, citing this passage at para. 241; Cineplex v. Cineworld, 2021 ONSC 8016, citing this passage at para. 157. For "negotiating damages" or damages for lost opportunity to bargain, see chapter 9, below. It was held in One Step (Support) Ltd. v. Morris-Garner, [2018] I.R.L.R. 661 (U.K. S.C.), that "negotiating damages" were compensatory in nature, though the amount of contemplated profit might, in some cases, be relevant to the assessment.

2 Agricultural Research Institute of Ontario v. Campbell-High (2002), 58 O.R. (3d) 321 (C.A.), supplementary reasons 117 A.C.W.S. (3d) 878 (Ont. C.A.), leave to appeal to S.C.C. refused [2003] 1 S.C.R. vii.

3 See McGregor on Damages, 20th ed. (London, Sweet & Maxwell, 2018), § 24-003.

4 Livingstone v. Rawyards Coal Co. (1880), 5 App. Cas. 25 (H.L.), at p. 39; Canadian Natural Resources Limited v. Husky Oil Operations Limited, 2020 ABCA 386, at para. 40, citing this passage.

5 Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd., [1949] 2 K.B. 528 (C.A.), at p. 539, *per* Asquith L.J.; Paziuk v. Rural Municipality of Ethelbert (1963), 44 D.L.R. (2d) 165 (Man. Q.B.), at p. 173; Vermilion & District Housing Foundation v. Binder Construction Limited, 2017 ABQB 365, citing this passage at para. 182.

6 See § 5:1, *infra*.

7 Robinson v. Harman (1848), 1 Ex 850, 154 E.R. 363.

8 Robinson v. Harman (1848), 1 Ex 850 at p. 855, 154 E.R. 363. See also Jorna & Craig Inc. v. Chiasson, 2020 NSCA 42, at para. 91, citing this passage.

9 Wertheim v. Chicoutimi Pulp Co., [1911] A.C. 301 (P.C.), at p. 307. Haack v. Martin, [1927] S.C.R. 413 at p. 416, [1927] 3 D.L.R. 19 at p. 21; Norquay v. G.T.P. Town & Dev. Co. (1915), 25 D.L.R. 59 (Alta. C.A.), at pp. 64–5; Ascent Financial Services Ltd. v. Blythman, [2008] 5 W.W.R. 638 (Sask. C.A.).

10 Atiyah, "Contracts, Promises and the Law of Obligations", 94 L.Q.R. 193 (1978), at pp. 214–15.

11 Atiyah, "Contracts, Promises and the Law of Obligations", 94 L.Q.R. 193 (1978), at pp. 215–16.

12 Atiyah, "Contracts, Promises and the Law of Obligations", 94 L.Q.R. 193 (1978), at p. 216.

13 Atiyah, "Contracts, Promises and the Law of Obligations", 94 L.Q.R. 193 (1978), at p. 217.

14 Atiyah, "Contracts, Promises and the Law of Obligations", 94 L.Q.R. 193 (1978), at pp. 218–20.

15 (Oxford, Clarendon Press, 1979).

16 The Rise and Fall of Freedom of Contract (Oxford, Clarendon Press, 1979), at pp. 763–4.

17 The Rise and Fall of Freedom of Contract (Oxford, Clarendon Press, 1979), at p. 779. In Promises, Morals, and Law (Oxford, Clarendon Press, 1981), Atiyah explores the philosophical bases for enforcement of promises.

18 See Sharpe, Injunctions and Specific Performance, looseleaf ed. (Toronto, Canada Law Book, 1999).

19 See Waddams, The Law of Contracts, 7th ed. (Toronto, Canada Law Book, 2017), pp. 121–124. In Promises, Morals, and Law (Oxford, Clarendon Press, 1981), at p. 212, Atiyah suggests that the theoretical case for enforcement of gratuitous promises is weak.

20 Waddams, The Law of Contracts, 7th ed. (Toronto, Canada Law Book, 2017), pp. 123–124.

21 See Atiyah, "Contracts, Promises and the Law of Obligations", 94 L.Q.R. 193 (1978), at p. 217.

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§6.10 The second general issue that permeates any discussion of the law of damages for breach of contract is confusion or disagreement over the basis for any award of damages. It is the argument of this book that any award of contract damages is based on the undertakings or promises made by the defendant, promisor (which, of course, have been breached) and on the allocation of the risk of loss between the parties inherent or expressed in that undertaking. The competing argument is that an award of damages is justified because the losses for which the plaintiff seeks compensation were reasonably foreseeable as a result of the defendant's breach. This argument puts the cart before the horse. Whether or not losses are foreseeable at all may well influence the drafting of a contract because the parties can decide to allocate the risks they can now foresee. A seller may say to a buyer that it will not — at least for the price that the buyer is prepared to pay — accept more than a very limited risk should something go wrong and that any other risk has to be borne by the buyer. The ability of the parties or their solicitors to foresee risks enables them, in the agreement they make, to allocate those risks; the liability of the seller is not based on what the parties should have foreseen or actually did foresee but on the obligations the seller was prepared to assume.[27] The same analysis applies to other kinds of contracts, contracts of carriage and storage, construction contracts, service contracts, *etc.*

§6.11 The third development, while having the potential to be a revolution in contract remedies, has not led to any significant change in the law. What had happened was the opening up to plaintiffs of the possibility of receiving, not compensation for their loss, but the profit that the defendant may have made from its breach of contract. This development occurred in a case which vividly demonstrates the truth of the aphorism that "hard cases make bad law"[28] and illustrates that a court that wants badly enough to "zap" a defendant can do terrible things to the law if it cannot find a better way.

§6.12 The combined effect of these three developments is that in an important sense the law of remedies for breach of contract is in a state of flux. The recent cases now offer plaintiffs' counsel new claims and new arguments. At the same time it is possible to see in some of the new developments in the Supreme Court of Canada indications that the Court is retreating from some of the more extreme positions it had taken only a short time before.

6.2 DAMAGES AS COMPENSATION

§6.13 The basic remedy for breach of contract is that the plaintiff, *i.e.*, the innocent party, is to be compensated for the loss caused by the breach.[29] This principle

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27 This issue is examined in section 6.2.6.2.

28 *Attorney-General v. Blake*, [2000] UKHL 45, [2001] 1 A.C. 268, [2000] 4 All E.R. 385, [2000] 3 W.L.R. 625 (H.L.).

29 It follows, of course, that the plaintiff has the burden of establishing (1) the existence of a contract between it and the defendant; (2) breach of that contract; and (3) if it wants damages, what those damages are. See, *e.g.*, *Toronto Transit Commission v. Aqua Taxi Ltd.* (1956), [1957] O.W.N. 65, 6 D.L.R. (2d) 721, [1955] O.J. No. 280 (Ont. H.C.). For detailed analysis and criticism of this principle, see David Winterton, *Money Awards in Contract Law* (Oxford: Hart Publishing, 2015). Briefly put, Winterton argues that the canonical (or "orthodox" as he calls it)

(which for convenience can be called the "compensation principle") is usually based on one or other of a few cases decided in the nineteenth century or early twentieth century, though the principle that the plaintiff should be compensated is far older.[30] For example, Parke B. (later Lord Wensleydale) said in 1848:

> The next question is: What damages is the plaintiff entitled to recover? The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.[31]

Much the same statement was made by Lord Atkinson over 60 years later:

> And it is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed ... That is a ruling principle. It is a just principle.[32]

§6.14 In the language of the interests protected by the law of contracts, the compensation principle corresponds to or protects the "expectation interest", *i.e.*, it purports to give the plaintiff what the contract was to provide.[33] Like the expectation interest, the compensation principle may include protection of the reliance and the restitution interests of the plaintiff.

§6.15 These statements of the compensation principle have an appearance of simplicity and justice; in fact, they mask a number of important and difficult issues. Many of these issues had for a long time been largely ignored, but recent

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statement by Parke B. obscures rather than illuminates the proper answer and that the answer depends on two distinct principles. The compensation principle as conventionally understood, Winterton claims, does not explain all monetary awards for breach of contract because courts sometimes quantify such awards not on the basis of the loss suffered by B but on affirming or vindicating its interest in receiving the contractual performance that A promised B regardless of any loss B might have suffered as result of A's unexcused failure to provide it. Or, to put it slightly different, that such awards can surpass any loss A has actually suffered as result of B's breach; and this proposition necessarily entails that loss is not the "fundamental normative criterion for quantification" of a monetary award for breach of contract.

30 A.W.B. Simpson, *A History of the Common Law of Contract* (Oxford: Clarendon Press, 1975), at 123.

31 *Robinson v. Harman* (1848), 1 Exch. 850, at 855, 154 E.R. 363, at 365, [1843-1860] All E.R. Rep. 383, at 385 (Exch.). This statement was adopted by the Supreme Court in *Haack v. Martin*, [1927] S.C.R. 413, at 416, [1927] 3 D.L.R. 19, at 21, [1927] S.C.J. No. 32 (S.C.C.).

32 *Wertheim v. Chicoutimi Pulp Co.*, [1911] A.C. 301, at 307 (P.C.).

33 The concept of the "expectation interest" has been briefly discussed in Chapter 1, section 1.52. English texts and judges have introduced the concept of the "performance interest". Daniel Friedmann, "The Performance Interest in Contract Damages" (1995) 111 L.Q.R. 628, is probably responsible for its spread. This interest is most commonly represented by orders of specific performance or injunctions which give the plaintiff *exactly* what the defendant promised, not what might be compensation for the defendant's failure to do what it undertook to do. There is no particular need to separate the performance interest from the expectation interest: the recognition that in some circumstances the plaintiff may have a right, for example, to an order of specific performance can be analyzed as simply the recognition of the expectation interest where there is no need to rely on the compensation principle to give the plaintiff what the contract was intended to give it. See, *e.g.*, *Chitty on Contracts*, 30th ed. (London: Sweet & Maxwell, 2008), at para. 26-003.

cases have begun to examine them.[34] The principal feature of these developments is not a challenge to the compensation principle, but a broadening of the concept of the plaintiff's "position" so that more aspects of it are considered by the principle. The results are interesting and potentially far-reaching, though it is too early to know what features the long-term development of the law will have.

§6.16 Actions against an insurer for the amount promised by an insurance policy, by a bank against a borrower on a loan agreement or on a guarantee, or by a seller for the price of goods sold are not claims for damages; they are claims for the amount that the defendant promised to pay in the events that have occurred. The effect of a judgment in favour of the plaintiff will be similar to the effect of the compensation principle, *i.e.*, the plaintiff will get what the contract was to have provided to it, but the compensation principle is not engaged and, for example, there can be no question of the plaintiff having to prove a loss, of the application of the limiting rules in *Hadley v. Baxendale*[35] or of mitigation. The amount the plaintiff will be awarded is determined by the contract: the plaintiff's claim will be characterized as a "liquidated" one. This characterization has procedural consequences. This difference in the remedies for breach of contract is often forgotten and when this event occurs it can have unfortunate consequences.[36]

6.2.1 The Compensation Principle

§6.17 The operation of the compensation principle can be seen in a simple case where the seller of goods (on a rising market) fails to deliver the goods to the buyer. The buyer obtains the goods from another seller and sues the original seller for the difference between the market and contract prices. A similar case would be the action of the seller against the buyer who (on a falling market) fails to take delivery. These cases are simple because it seems obvious what the buyer and

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34 Among the recent cases that raise important and difficult issues are *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415, 136 D.L.R. (4th) 1, 197 N.R. 379, 3 R.P.R. (3d) 1, [1996] S.C.J. No. 71 (S.C.C.) (the proper scope for specific performance); *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, [1999] 4 W.W.R. 86, 152 D.L.R. (4th) 1, [1997] S.C.J. No. 94 (S.C.C.) (the scope for damages for mental distress for wrongful dismissal), now probably no longer a relevant authority; *Ruxley Electronics and Construction Ltd. v. Forsyth*, [1995] UKHL 8, [1996] A.C. 344, [1995] 3 All E.R. 268, [1995] 3 W.L.R. 118 (H.L.); *Farley v. Skinner*, [2001] UKHL 49, [2002] 2 A.C. 732, [2001] 4 All E.R. 801, [2001] 3 W.L.R. 899 (H.L.) (the proper treatment of consumer contracts and claims for non-pecuniary damages); *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, 209 D.L.R. (4th) 257, 20 B.L.R. (3d) 165, [2002] S.C.J. No. 19 (S.C.C.) (the role of punitive damages for breach of contract); *Attorney-General v. Blake*, [2000] UKHL 45, [2001] 1 A.C. 268, [2000] 4 All E.R. 385, [2000] 3 W.L.R. 625 (H.L.) (the scope for awards measured, not by the plaintiff's loss, but by the defendant's gain); *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3, 271 D.L.R. (4th) 1, [2006] S.C.J. No. 30 (S.C.C.) (where the relation between the compensation principle and the limiting rule established by *Hadley v. Baxendale* (1854), 9 Exch. 341, 156 E.R. 145, [1843-1860] All E.R. Rep. 461 (Exch.) is explored); and *Keays v. Honda Canada Inc.*, 2008 SCC 39, [2008] 2 S.C.R. 362, 294 D.L.R. (4th) 577, [2008] S.C.J. No. 40 (S.C.C.) (limiting both the scope of *Wallace v. United Grain Growers Ltd.* and *Whiten v. Pilot Insurance Co.*).

35 *Ibid.*

36 See, *e.g.*, *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, 209 D.L.R. (4th) 257, 20 B.L.R. (3d) 165, [2002] S.C.J. No. 19 (S.C.C.), examined at length in section 6.4.2 below.

seller respectively lost, and the monetary award based on the difference between the contract and market prices seems to be the appropriate compensation.[37]

§6.18 The examples just given are simple because it was assumed that the buyer could immediately find another seller, *i.e.*, could obtain "cover", and that the seller could find another buyer without either of them incurring further losses. In their attempts to protect their clients from the risk of large damage claims, solicitors have tried to divide damages into classes. A seller might, for example, agree to be liable to return the price if the goods are defective, but disclaim responsibility for other costs incurred by the buyer in dealing with the defect in the goods. The terms used to describe the consequences of a promisor's breach are not terms of art but are now used (and probably were developed) to set limits on a promisor's contractual liability. One is likely to encounter in many kinds of agreements a distinction between "direct" and "indirect" damages, and descriptions of the latter as "consequential" or "incidental". In a contract of sale, the seller may agree to be liable for "direct" damages but not for "indirect" or "consequential" damages.[38] It is convenient to adopt a usage that corresponds to that frequently used by solicitors and by the courts. The term "direct" damages or "direct" loss or harm refers, for example, to the difference between the contract price and the market price in each of the examples. It is also referred to as a "loss in value", *i.e.*, the difference between what the promisee should have received and what it actually received.[39] The terms "consequential", "incidental"

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37 See, *e.g.*, the *Sale of Goods Act*, R.S.O. 1990, c. S.1, s. 48:

> 48(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against the buyer for damages for non-acceptance.
>
> (2) The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the buyer's breach of contract.
>
> (3) Where there is an available market for the goods in question, the measure of damages is, in the absence of evidence to the contrary, to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

Subsection 3 provides for the measure of damages to be the difference between the contract and market price; subsection 2 is a combination of the compensation principle and the limiting rule in *Hadley v. Baxendale*. See also: R.S.A. 2000, c. S-2, s. 50; R.S.B.C. 1996, c. 410, s. 53; C.C.S.M. c. S10, s. 51; R.S.N.L. 1990, c. S-6, s. 51; R.S.N.B. 1973, c. S-1, s. 47; R.S.N.S. 1989, c. 408, s. 51; R.S.P.E.I. 1988, c. S-1, s. 51; R.S.S. 1978, c. S-1, s. 49; R.S.N.W.T. 1988, c. S-2, s. 57; R.S.Y. 2002, c. 198, s. 47. See further Michael Bridge, "Markets and Damages in Sale of Goods Cases" (2016) 132 Law Q. Rev. 405.

38 It is useful to consider such clauses as allocating a risk of loss to the customer. That allocation may have been the topic of negotiations over the price or it may reflect the usual allocation in the industry: for obvious reasons manufacturers (and particularly software developers) will be unwilling to bear the risk that the failure of their product to work properly may cause the closure of their customer's business. Notice, *e.g.*, the standard disclaimer on any roll of photographic film (or, now, computer component, particularly software): the manufacturer will refund the price of a defective roll or component but will not be liable for any other losses.

39 See, *e.g.*, *Farnsworth on Contracts*, 3d ed. (New York: Aspen Publishers, 2004) Vol. III, at 203.

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THE LAW OF CONTRACT IN CANADA

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3. The quantification of damages

(a) Nominal and substantial damages

Once it has been determined that the defendant has breached a contract and is to be held liable for its harmful consequences, in accordance with what has been discussed earlier with respect to causation and remoteness, the court is faced with the issue of deciding the amount to be awarded the plaintiff by way of damages for breach of contract. The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.[231] This represents what has been referred to as[232] "the general intention of the law". It is both a ruling and a just principle.[233] It enshrines the idea that the purpose of damages is compensation of the victim of a breach of contract.[234]

In this respect, the tenor of this language indicates that there may be instances when an appropriate award will be nominal, not substantial, in recognition of the fact that the defendant has committed a breach of a contract,[235] justifying and supporting an action, without there having been any actual, calculable loss being incurred by the plaintiff for which he ought to be compensated.

That is a situation that arises when the plaintiff makes a profit out of the defendant's breach, by becoming free to do things which, otherwise, he would not have been able and allowed to do, thereby obtaining some financial advantage. Such

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231 *Robinson v. Harman* (1848), 1 Exch. 850 at 855 (Eng. Ex. Div.) *per* Parke B; *Sydney Steel Corp. v. Mannesmann Pipe & Steel Corp.* (1986) 75 N.S.R. (2d) 211 at 220 (N.S.T.D.); *Mettam Wright Associates Ltd. (Trustee of) v. United States Fire Insurance Co.* (1990), 9 R.P.R. (2d) 131 at 141 (N.S.T.D.) *per* Matheson J.; affirmed (1991), 102 N.S.R. (2d) 24 (N.S.C.A.); leave to appeal to S.C.C. refused (1991), 106 N.S.R. (2d) 360 (note) (S.C.C.).

232 *Wertheim v. Chicoutimi Pulp Co.* (1910), [1911] A.C. 301 at 307 (Quebec P.C.) *per* Lord Atkinson (P.C.), referred to with approval in *Cockburn v. Trusts & Guarantee Co.* (1917), 38 O.L.R. 396 at 401 (Ont. C.A.); affirmed (1917), 55 S.C.R. 264 at 268-269 *per* Anglin J.

233 *Wertheim v. Chicoutimi Pulp Co.*, above. Interest on damages can not be awarded at common law, unless the contract expressly or impliedly so provides: *Eaton v. R.*, [1972] F.C. 185 (Fed. T.D.); affirmed [1972] F.C. 1257 (Fed. C.A.). Some jurisdictions have statutory provisions which give a court power to award interest at its discretion, as in Ontario under the Courts of Justice Act, R.S.O. 1990, C.43, ss. 128, 130; *Savioli & Morgan Co. v. Vroom Construction Ltd.* (1975), 10 O.R. (2d) 381 (Ont. H.C.) and in Saskatchewan under the Queen's Bench Act, S.S. 1998, c.Q-101: *Harrand v. Saskatchewan Government Insurance Office* (1978), 88 D.L.R. (3d) 388 (Sask. Q.B.); affirmed [1979] 4 W.W.R. 478 (Sask. C.A.). For the power to award the interest on a debt see *Foundation Co. of Canada Ltd. v. Prince Albert Pulp Co.*, [1976] 4 W.W.R. 586 (S.C.C.). For the power to order payment of compound interest at common law and under statutory provisions referred to above, see *Bank of America Canada v. Mutual Trust Co.*, [2002] 2 S.C.R. 601.

234 The damages that may be awarded for the purpose of compensating the plaintiff have been classified in relation to three distinct possible interests of the plaintiff as (i) an expectation or expectancy interest, referring to what the plaintiff hoped to obtain by the contract; (ii) a reliance interest, referring to expenses incurred in reliance on the performance of the contract; (iii) a restitutionary interest, referring to what the plaintiff has given the defendant, by way of money, property or services, in furtherance of the performance of the contract: Fuller & Perdue, "The Reliance Interest in Contract Damages" (1936) 46 Yales L.J. 52, criticized by Crasnell, "Against Fuller and Perdue" (2000) 67 U. Chicago L.R. 99; *Bank of America Canada v. Mutual Trust Co.*, [2002] 2 S.C.R. 601.

235 *Métis National Council Secretariat Inc. v. Dumont* (2008), 305 D.L.R. (4th) 356 at 366-369 (Man. C.A.) and open up the issue of costs.

a plaintiff will be given only nominal damages.[236] If the plaintiff has lost nothing, or something quite trivial, as a result of the defendant's breach, only nominal damages may be recovered.[237] Indeed, if the plaintiff could have incurred a loss had the contract been completed, he might not be able to recover his expenses, in accordance with the "reliance" doctrine.[238] In *Prince Rupert Sawmills Ltd. v. M.C. Logging Ltd.*,[239] it was suggested that, where there is a breach of a contract to lend or borrow money, the loss to the plaintiff may be nominal, that is, the cost of obtaining an alternative loan, or may be substantial, for example, as where the failure to provide financing caused loss to the assets of the plaintiff's business.[240] Where there has been a breach of a contract under which a party was given an option to purchase, it has been pointed out that the loss to the injured party, whether the grantor or grantee of the option, may be more than nominal. The damages recoverable are not confined to the cost of performance but extend to the value of performance to the injured party.[241] While at first sight, therefore, the injured party may appear to have lost very little by the non-performance of the option contract, there may indeed be a substantial loss to him in consequence. If there is, then it is recoverable in accordance with the normal *Hadley v. Baxendale* principle.[242]

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236 *Cockburn v. Trusts & Guarantee Co.*, above; *Valpy v. Oakeley* (1851), 117 E.R. 1142; compare *Messineo v. Beale* (1976), 71 D.L.R. (3d) 31 (Ont. H.C.); affirmed (1978), 86 D.L.R. (3d) 713 (Ont. C.A.).

237 *Corkish v. Dixon* (1957), 21 W.W.R. 618 (B.C.S.C.); *State Vacuum Stores of Can. Ltd. v. Phillips*, [1954] 3 D.L.R. 621 (B.C.C.A.); *Gouzenko v. Harris* (1976), 72 D.L.R. (3d) 293 (Ont. H.C.) (where the plaintiff recovered his expenses, not the loss he alleged, because he could not prove that he had a good cause of action in libel which had been destroyed by the defendant solicitor's negligence). The plaintiff must prove what he has lost; *Tai Hing Cotton Mill Ltd. v. Kamsing Knitting Factory* (1978), [1978] 1 All E.R. 515 (P.C.). Failure to do so will lead to an award of nominal damages, such as the one dollar in *Place Concorde East Ltd. Partnership v. Shelter Corp. of Canada Ltd.* (2006), 270 D.L.R. (4th) 181 (Ont. C.A.). Nominal damages will be awarded if the plaintiff has helped to bring about his loss by his *own* failure to act: *Caines v. Bank of N.S.* (1978), 90 D.L.R. (3d) 271 (N.B.C.A.).

238 *Bowlay Logging Ltd. v. Domtar Ltd.* (1982), 135 D.L.R. (3d) 179 (B.C.C.A.); *C. & P. Haulage v. Middleton*, [1983] 3 All E.R. 94 (C.A.); *C.C.C. Films (London) Ltd. v. Impact Quadrant Films Ltd.*, [1984] 3 All E.R. 298; above, pp. 691-692.

239 (1967), 65 D.L.R. (2d) 300 (B.C.C.A.); *Sommerfeldt v. Petrovich* [1949] 4 D.L.R. 825 at 821 (Sask. C.A.) *per* Martin C.J.S.

240 *Gen. Securities Ltd. v. Don Ingram Ltd.*, [1940] S.C.R. 670; compare *Reid v. Garnet B. Hallowell Ltd.* (1978), 10 R.P.R. 308 (Ont. Master); *Accord Holdings Ltd. v. Excelsior Life Ins. Co.* (1982), 44 A.R. 368 (Alta. Q.B.); reversed in part (1985), 62 A.R. 234 (Alta. C.A.).

241 *Cotter v. Gen. Petroleums Ltd.* (1950), [1951] S.C.R. 154; *Cunningham v. Insinger*, [1924] S.C.R. 8; *Kinkel v. Hyman*, [1939] S.C.R. 364; *Sunshine Explorations v. Dolly Varden Mines Ltd.*, [1970] S.C.R. 2; *Erie County Natural Gas Co. v. Carroll*, [1911] A.C. 105 (P.C.).

242 For cases in which the breach of an option agreement led to damages representing the market value of the shares to be purchased, at the date they ought to have been delivered in pursuance of the option agreement, but were not, see *William v. Keyes*, [1971] 5W.W.R. 561 (B.C.S.C.); *McNeil v. Fultz* (1906), 38 S.C.R. 198; *W.C. Pitfield & Co. v. Jomac Gold Syndicate Ltd.*, [1938] O.R. 427 (Ont. C.A.). Note, however, the requirement of *mitigation* in such a case, and its effect upon the value of the shares on which the plaintiff's compensation is based: *Asamera Oil Corp. v. Sea Oil & General Corp.*; *Baud Corp., N.V. v. Brook* (1979), 89 D.L.R. (3d) 1 (S.C.C.); varied (1979), 97 D.L.R. (3d) 300 (S.C.C.); below, p. 732.

(b) Exemplary damages

Compensatory damages, whether based on expectation, reliance or restitution,[243] awarded under the principle referred to above,[244] and aggravated damages, which are also compensatory in nature, and are designed to provide extra compensation to a plaintiff who has suffered particularly serious or egregious harm by the defendant's breach of contract,[245] must be differentiated from exemplary damages which are intended to punish the defendant for his commission of a breach of contract not to compensate the plaintiff for any loss incurred by such breach.[246] The law has undergone development in regard to such damage since the decision of the House of Lords in *Addis v. Gramophone Co.*[247] in which the House of Lords laid down that in actions for breach of contract exemplary or punitive damages could not be awarded. The plaintiff was given the six months' notice which his employment required, but he was summarily replaced in breach of the service contract between the parties. In those circumstances, the House of Lords allowed the dismissed employee to recover the salary and commission that he would have earned in the relevant period, but would not award damages for wounded feelings or loss of reputation—which would have been in the nature of a penalty upon the employer in respect of the high-handed way in which the plaintiff was treated.[248] Prior to the decision of the Supreme Court of Canada in *Vorvis v. Insurance Corporation of British Columbia*[249] Canadian courts were divided on the question whether punitive damages could ever be awarded in cases of breach of contract. Some restated the older *Addis* principle on one of two grounds: (a) that damages are not to be awarded in a breach of contract case, especially one involving wrongful dismissal, for injured feelings, or (b) that vindic-

243 Above, note 234.

244 Above, note 231.

245 *Warrington v. Great-West Life Assurance Co.* (1996), 139 D.L.R. (4th) 18 at 36 *et seq.* (B.C.C.A.); additional reasons at [1997] I.L.R. I-3394 at 4303n (B.C.C.A.); *Eddie v. UNUM Life Insurance Co. of America* (1999), 177 D.L.R. (4th) 738 (B.C.C.A.), aggravated damages for improper denial of benefits which the plaintiff should have been paid. *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085 at 1107. Relevant factors are: high-handed conduct by defendant; humiliation and anxiety of the plaintiff; defendant's malice. Such damages, therefore, compensate for "intangible injuries", above p. 698; and, therefore, are inappropriate for corporations: *Thomas Management Ltd. v. Alberta (Minister of Environmental Protection)* (2006), 276 D.L.R. (4th) 430 (Alta. C.A.); *Pivotal Capital Advisory Group Ltd. v. NorAmera BioEnergy Corp.* (2008), 45 B.L.R. (4th) 287 at 316 (Alta. Q.B.); additional reasons at 2009 CarswellAlta 584 (Alta. Q.B.); affirmed (2010), 70 B.L.R. (4th) 37 (Alta. C.A.).

246 Cormier, "Punitive Damages in Ordinary Contracts" (1981), 42 Manitoba L.R. 93; Note: "Punitive Damages in Contract Actions—Are There Exceptions Swallowing the Rule?" (1980), 20 Washington L.J. 86; Sullivan, "Punitive Damages in the Law of Contracts: The Reality and Illusion of Legal Change" (1977), 61 Minn. L.R. 207. Venour, "Punitive Damages in Contract" (1988), 1 Can. J. of Law & Juris. 87; Feldthusen, "Symposium: Punitive Damages in Contract and Tort: Recent Developments in the Canadian Law of Punitive Damages" (1990), 16 Can. Bus. L.J. 241.

247 [1909] A.C. 488 (H.L.); see *Guildford v. Anglo-French S.S. Co.* (1883), 9 S.C.R. 303.

248 On damages for loss of reputation see *Ribeiro v. C.I.B.C.* (1992), 13 O.R. (3d) 278 (Ont. C.A.); *Francis v. Canadian Imperial Bank of Commerce* (1994), 21 O.R. (3d) 75 (Ont. C.A.).

249 (1989), 58 D.L.R. (4th) 193 (S.C.C.).

tive or punitive damages are inappropriate in contract cases.[250] Others awarded such damages in circumstances which suggest that the true basis of the claim was not a breach of contract but a tort or the infringement of some statutory right.[251] Some appear to have accepted that punitive or exemplary damages were available to an aggrieved plaintiff in an appropriate case, while denying such damages to the particular plaintiff in the case before the court, on the ground that the conduct of the defendant did not justify such an award.[252] Such damages, it was said,[253] could be awarded where "a contract has been breached in a high-handed, shocking and arrogant fashion so as to demand condemnation by the Court as a deterrent."

The issue was put to rest by the decision in *Vorvis v. Insurance Corp. of British Columbia.*[254] This was a wrongful dismissal case in which the plaintiff claimed damages for mental distress caused by termination of his employment and punitive damages. According to his evidence he was treated in a harsh, humiliating and distressing manner by his employer before the termination. His claims were rejected by the trial judge and the British Columbia Court of Appeal, and by the majority of the Supreme Court of Canada. McIntyre J., speaking for the majority, said that the only basis for the imposition of punishment was the finding of the commission of

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250 *Cardinal Const. Ltd. v. R.* (1981), 32 O.R. (2d) 575 (Ont. H.C.); affirmed (1981), 128 D.L.R. (3d) 662 (Ont. C.A.); *Edwards v. Harris-Intertype (Can.) Ltd.* (1983), 40 O.R. (2d) 558 (Ont. H.C.); affirmed (1984), 46 O.R. (2d) 286 (Ont. C.A.); *Cringle v. Nor. Union Ins. Co.* (1981), 124 D.L.R. (3d) 22 (B.C.S.C.); *Olson v. New Home Certification Program of Alta.* (1986), 44 Alta. L.R. (2d) 207 (Alta. Q.B.); *Wadden v. Guar. Trust Co. of Can.*, [1987] 2 W.W.R. 739 (Alta. Q.B.); *Alpine Resources Ltd. v. Bowtex Resources Ltd.* (1989), 66 Alta. L.R. (2d) 144 (Alta. Q.B.).

251 *Jennett v. Fed. Ins. Co.* (1976), 72 D.L.R. (3d) 20 (Ont. H.C.); *Cornell v. Pfizer C. & G. Inc.* (1981), 23 C.P.C. 286 (Ont. H.C.); *Captain Devs. Ltd. v. Nu-West Group Ltd.* (1982), 136 D.L.R. (3d) 502 (Out. H.C.); additional reasons at (1983), 27 R.P.R. 296 (Ont. H.C.); reversed (1984), 6 D.L.R. (4th) 179 (Ont. C.A.); leave to appeal to S.C.C. refused (1984), 55 N.R. 273 (S.C.C.); *Nantel v. Parisien* (1981), 22 R.P.R. 1 (Ont. H.C.); *Centennial Centre of Science & Technology v. VS Services Ltd.* (1982), 40 O.R. (2d) 253 at (Ont. H.C.) *per* Dupont J.

252 *Curry v. Advocate General Ins. Co. of Can.* (1986), 9 C.P.C. (2d) 247 (Ont. Master); *Chiusolo v. Royal Ins. Co. of Can.*, [1986] I.L.R. 1-2115 (Ont. H.C.); *Morrison Lamothe Inc. v. Bedok* (1986), 55 O.R. (2d) 129 (Ont. H.C.); *Draft Masonry (York) Co. v. PA Restoration Inc.* (1988), 48 R.P.R. 231 (Ont. Dist. Ct.); *Zarnett v. Adler* (1988), 30 C.L.R. 133 (Ont. H.C.). See also the cases cited by Craig J. in *Fazzari v. Pellizzari* (1988), 28 O.A.C. 38 at 40 (Ont. Div. Ct.).

253 *Brown v. Waterloo Regional Board of Police Commissioners* (1982), 37 O.R. (2d) 277 at 293 (Ont. H.C.) *per* Linden J.; reversed on other grounds (1983), 150 D.L.R. (3d) 729 (Ont. C.A.); followed and applied in *Lyons Estate v. Whitworth* (1987), 62 O.R. (2d) 602 (Ont. H.C.). Compare *Fazzari v. Pellizari* above, where the Ontario Divisional Court, by a majority, held that punitive damages were recoverable in an action for breach of contract.

In *Thompson v. Zurich Ins. Co.* (1983), 45 O.R. (2d) 744 at 752-753 (Ont. H.C.), Pennell J. thought that to differentiate tort and contract cases in respect of such damages was "mechanical", without sound and legitimate basis. However, he seemed to consider that punitive damages were most appropriate where a breach of contract merged with, and assumed the character of, a willful tort calculated rather than inadvertent and in a wanton and reckless disregard for the contractual rights of others. Compare Cherniak & Morse, "Aggravated, Punitive and Exemplary Damages in Canada" (1983) *Special Lectures of Law Society of Upper Canada* 151, especially at pp. 176-184.

254 Above, on which see the comments of Farley J. in *Taylor v. Pilot Insurance Co.* (1990), 75 D.L.R. (4th) 370 at 374 (Ont. Gen. Div.).

an actionable wrong that caused the injury complained of by the plaintiff.[255] This was illustrated by reference to *Robitaille v. Vancouver Hockey Club Ltd.*,[256] where the plaintiff was denied proper medical attention by the club by which he was employed. The question was whether the case before the court was of this nature. In this respect, while it was unusual to do so, punitive damages could be awarded in cases of breach of contract.[257] Unlike the situation in tort cases, it will be rare to find a contractual breach appropriate for an award of exemplary or punitive damages. The distinction between tort and contract cases turned on the fact that in contract what was involved was a "private arrangement" between the parties.[258] That distinction did not eliminate an award of punitive damages, but made it rare in contract cases. In such cases, said McIntyre J.,[259] punitive damages

> . . . may only be awarded in respect of conduct which is of such nature as to be deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature. . . . [I]n any case where such an award is made the conduct must be extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment.

The *Vorvis* case did not fall within this category.[260]

The dissenting judgment of Wilson J. and L'Heureux-Dubé J., relied heavily on the ideas propounded at first instance in *Brown v. Waterloo (Region) Commissioners of Police*[261] and in *Nantel v. Parisien.*[262] They were not perturbed by the notion that admitting the possibility of awarding such damages in contract cases would narrow the gap between tort and contract.[263] Nor did they agree that such damages could only be awarded where the misconduct in itself was an actionable wrong.[264] The correct approach was to assess the conduct in the context of all the circumstances and determine whether it was deserving of punishment because of its shockingly harsh, vindictive, reprehensible and malicious nature.[265] In the result, the

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255 (1989), 58 D.L.R. (4th) 193 at 206 (S.C.C.). See *Total E-com Home Delivery Inc. v. Smith* (2008), 262 N.S.R. (2d) 224 at 233 (N.S. S.C.); *Chudy v. Merchant Law Group* (2008), 300 D.L.R. (4th) 56 (B.C.C.A.); additional reasons at 88 B.C.L.R. (4th) 25 (B.C. C.A.); leave to appeal refused 396 N.R. 399 (note) (S.C.C.).

256 (1981), 124 D.L.R. (3d) 228 (B.C.C.A.).

257 *Vorvis v. Insurance Corp. of British Columbia*, above, at 207.

258 *Ibid.*, at 207-208.

259 *Ibid.*

260 Nor, subsequently, did *Delphinium Ltée v. 512842 N.B. Inc.* (2008), 296 D.L.R. (4th) 694 at 719-722 (N.B.C.A.) *per* Deschenes J.A. See also *Dix v. Canada (Attorney General)* (2002), 315 A.R. 1 (Alta. Q.B.); additional reasons at 7 Alta. L.R. (4th) 349 (Alta. Q.B.); *Nagy v. Canada* (2006), 397 A.R. 94 (Alta. C.A.); additional reasons at 72 Alta. L.R. (4th) 1 (Alta. C.A.); *Pivotal Capital Advisory Group Ltd. v. NorAmera BioEnergy Corp.* (2008), 45 B.L.R. (4th) 287 at 317 (Alta. Q.B.) *per* Lutz J.; additional reasons at 2009 CarswellAlta 584 (Alta. Q.B.); affirmed 26 Alta. L.R. (5th) 13 (Alta. C.A.).

261 (1982), 37 O.R. (2d) 277 (Ont. H.C.); reversed on other grounds (1983), 43 O.R. (2d) 113 (Ont. C.A.): above.

262 (1981), 22 R.P.R. 1 (Ont. H.C.).

263 *Vorvis v. Insurance Corp. of British Columbia*, above, at 222. In fact, there was no divergence between duties owed a neighbour under the law of tort and contractual duties breached by flagrant and deliberate misconduct meriting an award of punitive damages, *ibid.*, at 224.

264 *Ibid.*, at 223-224.

265 *Ibid.*, at 224.

minority held that the defendant's behaviour in this case justified an award of exemplary damages. The language of McIntyre and Wilson JJ. does not appear to differ too widely in its content or nature. The chief difference seems to be in the requirement by the majority of the commission of a separate actionable wrong that caused the injury complained of by the plaintiff, a requirement that led to the denial of such damages in *Nogas v. Bernpaul Enterprises Ltd.*,[266] despite the fact that the defendant had behaved in a high-handed manner.

In most of the cases since *Vorvis* in which that decision has been applied, punitive damages were not allowed.[267] However there is no doubt now that if the situation is one in which the conditions for an award of such damages can be met, a court will do so. The conditions under which such damages will be awarded have been restated by the Ontario Court of Appeal, following *Vorvis*, in two cases.[268] They are: (1) the defendant's behaviour must be egregious so as to offend the court's sense of decency: (2) the defendant must have committed an independent actionable wrong against the plaintiff: (3) such damages must serve a rational purpose because the compensatory damages are insufficient to express the court's repugnance at the actions of the defendant and to punish and deter. The points which should be covered in a case where punitive damages were claimed, by a judge in a charge to a jury or by a judge as a trier-of-fact as were set out by the Supreme Court of Canada in

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266 (2002), 23 C.L.R. (3d) 120 (Ont. S.C.J.); affirmed (2003), 25 C.L.R. (3d) 163 (Ont. C.A.).

267 *Thomas v. Chaleur Auto Sales Ltd.* (1989), 101 N.B.R. (2d) 383 (N.B.C.A.), where neither punitive nor aggravated damages were allowed, and it was pointed out that in a wrongful dismissal case such damages would not be allowed where the misconduct asserted to justify such damages preceded the dismissal; *Yamaha Can. Music Ltd. v. MacDonald & Oryall Ltd.* (1990), 46 B.C.L.R. (2d) 363 (B.C.C.A.), where there was no actionable wrong causing injury, because there was no harsh, vindictive reprehensible and malicious conduct deserving of condemnation and punishment (the language of McIntyre J.); *Andryechen v. Transit Ins. Co.*, [1992] I.L.R. 1-2830 (Ont. Gen. Div.), where the claim for punitive damages was based on the insurance company's conduct in defending the action for breach of an insurance policy by alleging fraud: in the circumstances this was reasonable, not malicious; *Dassen Gold Resources Ltd. v. Royal Bank* (1994), 23 Alta. L.R. (3d) 261 at 357-359 (Alta. Q.B.) *per* O'Leary J.; additional reasons at (1994), 25 Alta. L.R. (3d) 149 (Alta. Q.B.); affirmed (1997), 52 Alta. L.R. (3d) 193 (Alta. C.A.); leave to appeal to S.C.C. refused (1998), 227 N.R. 192 (note) (S.C.C.), a contract for a loan; *Doncrest Construction Co. v. Kohany* (1997), 36 C.L.R. (2d) 3 (Ont. Gen. Div.) a contract for performing renovations; *Wallace v. United Grain Growers Ltd.* (1997), 3 C.B.R. (4th) 1 (S.C.C.), wrongful dismissal action brought by undischarged bankrupt; *Stranges v. Allstate Insurance Co. of Canada* (2007), 47 C.C.L.I. (4th) 244 (Ont. S.C.J.); varied, 86 C.C.L.I. (4th) 27 (Ont. C.A.); *Johnson v. BFI Canada Inc.* (2010), 75 B.L.R. (4th) 1 (Man. C.A.).

Contrast some instances in which such damages were awarded: *Lobrutto v. University of St. Jerome's College* (1989), 44 C.P.C. (2d) 104 (Ont. H.C.); *Fleck v. Stewart* (1991), 17 R.P.R. (2d) 132 (Alta. Q.B.); *Francis v. Canadian Imperial Bank of Commerce* (1994), 21 O.R. (3d) 75 (Ont. C.A.); *Prism Hospital Software Inc. v. Hospital Medical Records Institute* (1994), 57 C.P.R. (3d) 129 (B.C.S.C.); *Elia v. Chater* (1998), 167 N.S.R. (2d) 166 (N.S.C.A.) where both punitive and aggravated damages were awarded. See also *Salah v. Timothy's Coffees of the World Inc.* (2009), 65 B.L.R. (4th) 235 (Ont. S.C.J.); additional reasons at 2010 (Ont. S.C.J.); affirmed 2010 268 O.A.C. 279 (Ont. C.A.).

268 *Marshall v. Watson Wyatt & Co.* (2002), 209 D.L.R. (4th) 411 (Ont. C.A.); additional reasons at (2002) (Ont. C.A.); *968703 Ontario Ltd. v. Vernon* (2002), 22 B.L.R. (3d) 161 (Ont. C.A.); additional reasons at (2002) (Ont. C.A.). For an illustration of the first condition, see *Boyd v. Wright Environmental Management Inc.* (2008), 303 D.L.R. (4th) 747 (Ont. C.A.); additional reasons at 78 C.C.E.L. (3d) 276 (Ont. C.A.).

Whiten v. Pilot Insurance Co.[269] In that case an award of punitive damages was clearly justified. The defendant insurance company had wrongly and deliberately accused the plaintiff of arson in connection with the destruction by fire of the plaintiff's property and, as a result, had stopped providing the plaintiff with funds to pay her rent. She sued the defendants and obtained a judgment. However, her legal costs virtually extinguished the amount she recovered. In such circumstances an award of exemplary or punitive damages was justified under the guidelines contained in *Vorvis* and its successors. An initial award at trial of one million dollars was reduced to 100,000 dollars by the majority of the Ontario Court of Appeal but restored by the majority of the Supreme Court.

(c) Assessment of substantial damages

(i) *The duty to assess*

Except when, as previously discussed,[270] damages will be nominal not substantial, the court must determine the actual quantum of damages to be awarded to a successful plaintiff for breach of contract, which is a question of fact in every case.[271] The court is bound to monetize the loss suffered by the plaintiff,[272] as long as that loss is attributable to the defendant by the application of the rules set out in *Hadley v. Baxendale.*[273] The difficulty, if not virtual impossibility, of making such an assessment of the plaintiff's loss accurately and with definition does not relieve the court of fulfillment of this duty.[274] Such difficulty should not deter the court from

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269 (2002), 209 D.L.R. (4th) 257 especially at 274-289 (S.C.C.) *per* Binnie J. The principle underlying any award of such damages were said, in *Katotikidis v. Mr. Submarine Ltd.* (2002), 29 B.L.R. (3d) 258 (Ont. S.C.J.), to be: whether misconduct would otherwise go unpunished; such damages must be proportionate to the harm caused; and whether any profit or advantage was gained by the defendant. See *Salah v. Timothy's Coffees of the World Inc.*, above. See also *Keays v. Honda Canada Inc.*, [2008] 2 S.C.R. 362; *Pivotal Capital Advisory Group Ltd. v. NorAmera BioEnergy Corp.* (2008), 45 B.L.R. (4th) 287 at 317 (Alta. Q.B.); additional reasons at 2009 CarswellAlta 584 (Alta. Q.B.), setting out the principles of such damages: affirmed (2010), 70 B.L.R. (4th) 37 (Alta. C.A.), applied in *Triple 3 Holdings Inc. v. Jan* (2004), 48 B.L.R. (3d) 296 (Ont. S.C.J.).

270 Above pp. 703-704.

271 *Cockburn v. Trusts & Guarantee Co.* (1917), 38 O.L.R. 396 at 399 (Ont. C.A.) *per* Hodgins J.A.; affirmed (1917), 55 S.C.R. 264.

272 *Miller v. Advanced Farming Systems Ltd.*, [1969] S.C.R. 845; *Alkok v. Grymek*, [1968] S.C.R. 452; *Hathaway v. McIntyre* (1951), 1 W.W.R. (N.S.) 460 (B.C.C.A.); *Williams v. Keyes*, [1971] 5 W.W.R. 561 (B.C.S.C.); *Cohnstaedt v. University of Regina*, [1995] 3 S.C.R. 451. Such loss may include potential or future loss. For example, where the defendant was bound to maintain the plaintiff for life, damages for breach of this obligation will include the loss during the prospective life expectancy of the plaintiff: *Zdan v. Hruden* (1912), 4 D.L.R. 255 (Man. C.A.); *Fedorowicz v. Skvarchuk* (1951) 3 W.W.R. (N.S.) 230 (Man. K.B.). The justification for this is that damages are a once-for-all assessment; the plaintiff must establish his or her total loss at the time of the action for breach of contract.

273 Above pp. 678-679.

274 *Penvidic Contracting Co. v. International Nickel Co. of Canada Ltd.* (1975), 53 D.L.R. (3d) 748 at 756-757 (S.C.C.); *Groves-Raffin Construction Ltd. v. Canadian Imperial Bank of Commerce* (1975), 64 D.L.R. (3d) 78 at 129 (B.C.C.A.) *per* Robertson J.A.

IN THE MATTER OF *THE BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.

Court of Appeal No. COA-24-CV-0468
Court File No. BK-21-02734090-0031

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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