Court of Appeal File No. COA-24-CV-0550
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 THE RESPONDENT, MARIA ATHANASOULIS

September 30, 2024

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DATE: 20010709
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COURT OF APPEAL FOR ONTARIO

McMURTRY C.J.O. (In Chambers)

B E T W E E N :	)
	)
JOSEPH PATRICK AUTHORSON, by his Litigation Guardian, LENORE MAJOROS	) John Spencer and Dale Yurka) for the appellant
	)
(Respondents)	)
	)
and	)
	)
THE ATTORNEY GENERAL OF CANADA	) David Greenaway and
	) Peter Sengbrush
(Appellant)	) for the respondents
	)
	)
	) Michael Koch, Clare Roughneen
	) and Brian Forbes
	) for the moving party,
	) The National Council of Veteran
	) Associations in Canada
	)
	) Heard: June 27, 2001
	)

[1] The applicant for intervenor status in this appeal, The National Council of Veteran Associations in Canada ("NCVA") is an umbrella organization comprised of 37 associations, which represent collectively the interests of more than 200,000 military veterans across Canada. The NCVA has brought this motion under Rule 13.03(2) seeking leave to intervene in this appeal as a friend of the court.

[2] The appeal is from the judgment of Brockenshire J. granting summary judgment to a class of disabled veterans, their dependants and descendants who claimed that the Crown owed a fiduciary duty to pay them interest on surplus statutory benefits being retained and administered by Veterans Affairs Canada (formerly the Department of Veterans Affairs).

[3] The moving party has for many years played a significant role in the development of legislation that affects veterans. It is beyond dispute that the NCVA has acted as an effective advocate and lobbying voice for Canada's veterans on Parliament Hill. It submits that because of its long-term involvement with veterans' issues, it can put into perspective the history and nature of the relationship between veterans and the government, as well as the nature of the statutory scheme that governs that relationship, and thereby assist in understanding the issues on this appeal.

[4] The respondents oppose the motion, and submit that the NCVA does not have a useful contribution to make to the legal issues on the appeal, in that it would only support and repeat the issues that the Attorney General has raised. The respondents submit that the issues in which the NCVA proposes to intervene involve the interpretation of federal legislation and issues that are in the nature of private law, not matters of general public policy.

[5] The appellant takes no position in respect of the motion.

[6] I am guided in the exercise of my discretion on this motion by the reasons of Dubin C.J.O. in *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd* (1990), 74 O.R. (2d) 164 (C.A.) ("*Peel*") who stated the test to be applied on motions such as this, as follows, at p. 167:

Although much has been written as to the proper matters to be considered in determining whether an application for intervention should be granted, in the end, in my opinion, the matters to be considered are the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

[7] In *Peel*, Chief Justice Dubin noted that in constitutional cases, including cases decided under the *Canadian Charter of Rights and Freedoms*, there has been a relaxation of the rules heretofore governing the disposition of motions for leave to intervene. This approach ensures that the court will have the benefit of various perspectives of the historical and sociological context, as well as policy and other considerations that bear on the validity of legislation.

[8] In contrast, Ontario courts have interpreted Rule 13 more narrowly in conventional, non-constitutional litigation. (See for example, *Peixeiro v. Haberman* (1994), 20 O.R. (3d) 666 at 670 (Gen. Div.)). Intervention of third parties into essentially private disputes should be carefully considered as any intervention can add to the costs and complexity of litigation, regardless of an agreement to restrict submissions.

[9] Many appeals will fall somewhere in between the constitutional and strictly private litigation continuum, depending on the nature of the case and the issues to be adjudicated. In my view, the burden on the moving party should be a heavier one in cases that are closer to the "private dispute" end of the spectrum.

[10] The NCVA submits that this appeal "rises above" a purely private dispute because it involves the relationship between the Crown and veterans and their dependants. In this appeal, however, the NCVA does not seek to intervene in the issues relating to the impact of the *Charter* and the *Bill of Rights* on the federal legislative scheme.

[11] While the case involves a claim against funds that the Crown administers, under statute, and in the context of an action under the *Class Proceedings Act, 1992*, it retains significant elements of private litigation.

[12] The main issues on this appeal are matters of statutory interpretation, including the application of the *Charter* and the *Bill of Rights*, and issues of trusts and fiduciary law. The plaintiffs claim that the Crown, during the time the government administered the pensions, did not invest the funds and did not pay interest but at all times owed the plaintiffs a fiduciary duty to do both. The Crown argues that it owes no fiduciary duty to these plaintiffs and that the plaintiffs had no right in law to claim for such interest or to demand that the funds be invested for their benefit.

[13] The position of the NCVA is that an extension of the Crown's obligation, to the descendants of veterans, goes beyond the group that was contemplated by the relevant legislation and such an obligation contravenes public policy. The practical result of the judgment would be the diversion of public funds and government resources to persons who were not intended to benefit under the statutory benefits scheme established by Parliament.

[14] The issues on which the NCVA seeks leave to intervene as stated above are not, strictly speaking, constitutional issues and do not require the sort of public-policy analysis that is called for in cases of a constitutional nature. Moreover, the NCVA has not demonstrated that it can bring any particular legal expertise to these issues.

[15] Accordingly, the second component of the *Peel* test does not favour NCVA's motion.

[16] The NCVA argues that it can bring to this appeal its special knowledge and unique perspective concerning the application of the statutory scheme of pensions and other benefits to veterans. The organization and its member associations have,

for example, represented the interests of veterans before parliamentary committees and in the legislative process for approximately eighty years. The NCVA has developed extensive public-policy knowledge and practical experience with respect to the administration of programs and benefits that Veterans Affairs Canada administers.

[17] However, the moving party's assertion in relation to this appeal that the effect of the judgment on appeal would be the diversion of public funds and resources from other worthy initiatives being advanced by the NCVA on behalf of veterans, is entirely speculative.

[18] While I recognize the valuable contributions that the NCVA has made and, continues to make in the political and legislative process, in speaking for the interests of veterans and their dependants, I am not persuaded that the NCVA has any special contribution to make in relation to the interpretation of the legislation and the scope of any fiduciary duty on the federal government in the circumstances of this action.

[19] Having considered the submissions on behalf of the proposed intervenor, I am satisfied that the public interest and that of the veterans will be fully and adequately represented by counsel for the Attorney General of Canada.

[20] I therefore conclude that the National Council of Veteran Associations should not be granted leave to intervene as a friend of the court on this appeal.

[21] Given the nature of the moving party and its member associations as non-profit and mostly voluntary groups who work tirelessly for the benefit of those who have served their country, I do not think this is an appropriate case for an award of costs.

Released: July 9, 2001
"McMurtry C.J.O."
"RRM"

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Estate of Bennett et al. v. Islamic Republic of Iran et al.; Attorney General of Canada, Intervenor; Sherri Wise, Proposed Intervenor

[Indexed as: Bennett Estate v. Islamic Republic of Iran]

Ontario Reports

Court of Appeal for Ontario,

Hoy A.C.J.O., Laskin and Tulloch JJ.A.

October 11, 2013

117 O.R. (3d) 716 | 2013 ONCA 623

Case Summary

Civil procedure — Parties — Intervenors — Appellant having commenced action in British Columbia against Iran under Justice for Victims of Terrorism Act — Appellant moving for leave to intervene in action to enforce judgment obtained by respondents in United States against Iran for damages for state-sponsored terrorism — Appellant fearing that no funds would be left to satisfy her judgment or judgments of other Canadians if U.S. judgment was recognized — Appellant satisfying two criteria under rule 13.01(1) as she had contingent interest in subject matter of proceeding and might be adversely affected by recognition of U.S. judgment — Appellant having useful contribution to make as she raised issues (including limitations issue) that were not raised by other parties — Justice for Victims of Terrorism Act, S.C. 2012, c. 1 — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 13.01(1).

The appellant had commenced an action in British Columbia against Iran and the Iranian Ministry of Information and Security ("MOIS") under the *Justice for Victims of Terrorism Act*. The respondents had obtained a significant judgment in the United States in 2007 against Iran and MOIS for damages for state-sponsored terrorism, and brought an action in Ontario for recognition and enforcement of that judgment. The appellant moved for leave to intervene in that action under rule 13.01(1) of the Rules of Civil Procedure. The motion was dismissed. The appellant appealed.

Held, the appeal should be allowed.

The appellant satisfied two of the criteria in rule 13.01(1): she had a contingent interest in the subject matter of the proceeding; and she might be adversely affected by a judgment recognizing the American judgment. Moreover, the appellant had a useful contribution to make, as she was raising issues (including a limitation period argument) that were not raised by the other parties.

Cases referred to

Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd. (1990), 74 O.R. (2d)

164, [1990] O.J. No. 1378, 46 Admin. L.R. 1, 45 C.P.C. (2d) 1, 2 C.R.R. (2d) 327, 22 A.C.W.S. (3d) 292 (C.A.) [page717]

Statutes referred to

Justice for Victims of Terrorism Act, S.C. 2012, c. 1, s. 2, s. 4(4), (5)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 13.01(1), (a), (b)

APPEAL from the order of D.M. Brown J. of the Superior Court of Justice dated September 30, 2013 dismissing the motion for leave to intervene in an action to recognize a foreign judgment.

Mark J. Freiman and *Domenico Magisano*, for proposed intervenor (appellant).

John Adair, for plaintiffs (respondents).

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[1] BY THE COURT: -- The appellant, Dr. Sherri Wise, appeals the motion judge's dismissal of her motion pursuant to rule 13.01(1) [of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194] for leave to intervene as an added party in an action to recognize a foreign judgment pursuant to s. 4(4) of the *Justice for Victims of Terrorism Act*, S.C. 2012, c. 1, s. 2 ("*JVTA*").

The Background

[2] The background, briefly, is as follows.

[3] The appellant is a Canadian citizen and the victim of a 1997 terrorist bombing in Israel. In 2012, the *JVTA* was enacted, allowing victims of terrorism to sue perpetrators of terrorism and their supporters, and the appellant commenced an action in British Columbia against the Islamic Republic of Iran and the Iranian Ministry of Information and Security ("MOIS") for the damages that she sustained in that terrorist bombing.

[4] The respondents are American citizens and obtained a significant judgment in the United States in 2007 against Iran and MOIS under American legislation permitting its citizens to recover damages for state-sponsored terrorist attacks for damages suffered as a result of a different terrorist attack. The American legislation was enacted before the *JVTA*: the respondents were in a position to secure a judgment before the appellant.

[5] The appellant learned that the respondents were seeking to have their American judgment recognized in Canada pursuant to s. 4(5) of the *JVTA*. Neither Iran nor the MOIS defended the respondents' action for recognition of their American judgment, and have been noted in default. The Attorney General of Canada was, however, granted intervenor status on consent. [page718]

[6] The appellant fears that the American judgment is so significant that if recognized and enforced against Iran's assets in Canada no funds will remain to satisfy her judgment, or the judgments of other Canadians, and the *JVTA* will not provide what she submits is the intended, meaningful remedy for Canadian victims of terrorism sponsored by Iran. At the outset of the September 30, 2013 hearing of the respondents' motion to recognize their American judgment, she accordingly sought leave to intervene as a party on, and an adjournment of, the respondents' motion. She seeks to make an argument not advanced by the Attorney General, namely, that, properly interpreted, the *JVTA* does not suspend the limitation period normally applicable to an action to recognize a foreign judgment and the respondents' action to enforce their American judgment is accordingly statute-barred.

[7] The motion judge dismissed her motion, with reasons to follow, and proceeded to hear the motion to recognize the American judgment. The motion judge ordered that the hearing of that motion continue on October 31, 2013 on two discrete issues, with the parties to file factums on those issues by October 25, 2013.

[8] In his reasons for dismissing the appellant's motion, released on October 1, 2013, he determined that the appellant had not met any of the three criteria enumerated in rule 13.01(1). He wrote further, as follows:

> Although I have directed that the motion continue on October 31, 2013 to hear further submissions on two discrete issues, most issues raised by the motion already have been canvassed in the written and oral submissions. With the greatest respect to Dr. Wise and her counsel, I do not see what "value added" she could have brought to the hearing. Accordingly, her lack of any legal interest in the issues raised by the [American action], when coupled with the lack of assistance she could give to the Court, made any further delay of the hearing of this motion unacceptable.

The Parties' Positions

[9] The appellant argues that the motion judge erred in concluding that the appellant had not met any of the criteria enumerated in rule 13.01(1); granting the appellant intervenor status would result in further delay; and the appellant would not make a useful contribution to the hearing. If this appeal is allowed, the appellant would file a factum by the October 25, 2013 date applicable to the parties, addressing principally the limitation period issue, and not seek to alter the October 31, 2013 date set for the continuation of the motion, or supplement the record before the motion judge. [page719]

[10] The respondents argue that the motion judge correctly concluded that the appellant did not satisfy any of the criteria in rule 13.01(1), and that, in any event, his conclusion that the appellant would not make a useful contribution to the resolution of the motion is entitled to deference. Moreover, the respondents submit that the argument that the appellants seek to advance would inevitably require the respondents to file further evidence about the extent of Iran's assets in Canada and lead to further delay.

Analysis and Conclusion

[11] In our view, the motion judge mischaracterized the nature of the respondents' interest and, as a result, erred in concluding that the appellant did not satisfy any of the criteria in rule 13.01(1).

[12] In concluding that the appellant had not demonstrated that she had "an interest in the subject matter of the proceeding", within the meaning of rule 13.01(1)(a), the motion judge wrote:

> Counsel was not able to take me to any case law in which a plaintiff who had not yet obtained judgment was considered to possess a sufficient interest to enable it to intervene in enforcement proceedings already underway by an existing judgment creditor of a debtor.

[13] Similarly, in concluding that the appellant had not established that she "may be adversely affected by a judgment in the proceeding", within the meaning of rule 13.01(1)(b), the motion judge commented that counsel had not taken him to any case law which would require an unsecured judgment creditor to put its enforcement proceedings in abeyance in order to allow a contingent claimant to "catch up".

[14] With respect, until such time as the respondents succeed in having their American judgment recognized in Canada, they are not judgment creditors in Canada. Their interest is more akin to the contingent interest of the appellant. Moreover, the appellant does not seek a stay of the respondents' action.

[15] A person only needs to satisfy one of the criteria in rule 13.01(1) in order to be able to move for leave to intervene. In our view, the appellant satisfied two. She both has a contingent interest in the subject matter of the proceeding (rule 13.01(1)(a)) and *may* be adversely affected by a judgment recognizing the American judgment (rule 13.01(1)(b)). The appellant provided evidence from the Canadian government suggesting that Iran's assets in Canada may not be sufficient to satisfy any judgment other than the respondents'. [page720]

[16] As the respondents argue, if one of the criteria in rule 13.01(1) entitling a person who is not a party to a proceeding to intervene as an added party is made out, the motion judge then has the discretion to grant intervenor status, and the motion judge's decision to deny intervenor status is entitled to deference. In *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164, [1990] O.J. No. 1378 (C.A.), at para. 10, Dubin C.J.O. indicated that "the nature of the case, the issues which arise and likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties" are considerations in determining whether intervenor status should be granted. Respectfully, in this instance, deference is displaced because the motion judge mischaracterized the nature of the case as a private commercial one between a judgment creditor and a contingent creditor. In this case, important public issues are at play.

[17] We do not agree that the respondents will not make a useful contribution to the resolution of the motion before the motion judge for recognition of the American judgment. The *JVTA* is new legislation, enacted with the important public objective of impairing the functioning of terrorist groups. Its interpretation is a matter of first instance. No other party seeks to make the arguments that the appellant advances, especially the limitation period argument. If the appellant is not granted intervenor status, either those arguments will not be made or, if

considered and disposed of by the motion judge on his own initiative, there will be no avenue of appeal if the motion judge determination that the American judgment should be recognized.

[18] We are not persuaded that the limitation or public policy arguments that the appellant seeks to advance will necessitate the filing of further evidence by the respondent and result in further delay.

[19] Accordingly, this appeal is allowed. The appellant shall be entitled to file a factum, not exceeding 20 pages. Her factum shall be filed by October 25, 2013. The time allocated to counsel for the appellant for argument on October 30, 2013 shall be as determined by the motion judge.

[20] If the parties are unable to agree on the issue of costs, they shall be entitled to make brief written submissions.

Appeal allowed.

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CITATION: YG Limited Partnership (Re), 2022 ONSC 6138
COURT FILE NO.: BK-21-02734090-0031
DATE: 20221101

SUPERIOR COURT OF JUSTICE – ONTARIO
IN BANKRUPTCY AND INSOLVENCY
(COMMERCIAL LIST)

RE: 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.

BEFORE: Kimmel J.

COUNSEL: *Robin Schwill and Chenyang Li*, for the Proposal Trustee, KSV Restructuring Inc.

Jason Berall, for the Proposal Sponsor, Concord Properties Developments Corp.

Alexander Soutter, for Yonge SL LPs

Shaun Laubman, for Chi Long LPs

Mark Dunn and Sarah Stothart, for Maria Athanasoulis

HEARD: October 17, 2022

ENDORSEMENT
(FUNDING MOTION)

Overview

[1] YG Limited Partnership and YSL Residences Inc. (together, "YSL" or the "Debtor") filed Notices of Intention to Make a Proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"), which were procedurally consolidated pursuant to an Order dated May 14, 2021. The Debtor companies are special purpose entities established to hold the assets for a large real estate development in downtown Toronto known as the "YSL Project".

[2] This court approved an Amended Third Proposal dated July 15, 2021 (the "Proposal") on July 16, 2021. Under the Proposal, the moving party, KSV Restructuring Inc. (the "Proposal Trustee"), was authorized to deal with various claims against the Debtor, some of which were disputed.

[3] In the Proposal, Concord Properties Developments Corp. (the "Sponsor") covenanted in sections 10.2 and 11.1 to indemnify the Proposal Trustee for "all Administrative Fees and

Expenses (defined below) *reasonably incurred* [and not covered by the reserve established on the Proposal Implementation Date by the Sponsor in respect of the reasonably estimated additional Administrative Fees and Expenses anticipated to be incurred in connection with the administration of Distributions, resolution of any unresolved Claims … and the Proposal Trustee's discharge]". [emphasis added]

[4] "Administrative Fees and Expenses" are defined in the Proposal as "the fees, expenses and disbursements incurred by or on behalf of the Proposal Trustee, the solicitors for the Proposal Trustee, the solicitors of the Company both before and after the Filing Date."

[5] The Proposal Trustee brings this motion to compel the Sponsor to provide funding for the Proposal Trustee's continuing work towards the determination and/or resolution of the outstanding proofs of claim against the Debtor.[1] Jurisdictional questions have been raised within the motion.

[6] For reasons given orally at the hearing, I declined to grant the contested adjournment of this motion that the Sponsor asked for at the outset.

[7] For the reasons that follow, I have concluded that the Sponsor is not obligated to fund phase 2 of the Arbitration that was intended to determine the Athanasoulis Claim (as those terms are later defined herein). The Sponsor is obligated to indemnify the Proposal Trustee for its Administrative Fees and Expenses reasonably incurred to determine that claim itself, with the benefit of the Award from phase 1 of the Arbitration. The specific orders and directions arising from this ruling are detailed in this endorsement.

Background to the Motion

[8] As of October 2022, most of the claims filed against the Debtor had been settled or accepted by the Proposal Trustee. The largest claim, by far, filed against the Debtor is made by Maria Athanasoulis. This claim is comprised of $1 million for wrongful dismissal damages and $18 million in damages for alleged breaches of an oral profit-sharing agreement by which she alleges YSL must pay her 20% of the profits earned on the YSL Project (the "Athanasoulis Claim").

[9] The Athanasoulis Claim is one of three disputed claims by various stakeholders that the Proposal Trustee says have increased the professional costs associated with the Proposal and prevented the Proposal Trustee from completing the administration of these proceedings.

[10] As of the end of July 2022, the Proposal Trustee's Administrative Fees and Expenses totalled just under $1.2 million, excluding Harmonized Sales Tax. Included in that total were the costs of phase 1 of an arbitration held from February 22-25, 2022 (the "Arbitration") before William G. Horton ("the Arbitrator"). The Proposal Trustee and Ms. Athanasoulis both

[1] The motion originally sought the determination of the Sponsor's obligation to fund certain past expenses incurred by the Proposal Trustee; however, these expenses have been funded through previous advances from the Sponsor and the Sponsor advised that it is not seeking to "claw-back" monies previously advanced nor challenge the use of funds by the Proposal Trustee to date. Thus, the practical implication of this motion is only to deal with future funding obligations of the Sponsor.

participated in the Arbitration. It resulted in a partial award dated March 28, 2022 (the "Arbitration Award") that included findings that:

a. The Debtor had entered into an oral profit sharing agreement with Ms. Athanasoulis;

b. Ms. Athanasoulis was an employee of YSL; and

c. Ms. Athanasoulis was constructively dismissed by YSL in December 2019.

[11] The Proposal Trustee says that it agreed to arbitrate the Athanasoulis Claim because the existence of the oral profit sharing agreement upon which it was based, as well as Ms. Athanasoulis' status with the Debtors (and other entities within the same corporate group referred to as the Cresford Group), were disputed by the Debtor's representative(s) and the determination of those questions would turn on credibility assessments. In these circumstances, the Proposal Trustee believed that the determination of whether Ms. Athanasoulis had a profit sharing agreement, what its terms were and whether she was an employee who was constructively dismissed, could be best determined through a hearing with *viva voce* evidence.

[12] The Sponsor was told on December 1, 2021 "that arrangements are being made with [Mr.] Horton to arbitrate the claim in late February, which is the earliest available date."

[13] The terms of appointment of the arbitrator were signed by the Proposal Trustee and Ms. Athanasoulis on December 9, 2021 (the "Agreement to Arbitrate"). By its terms, the parties agreed to:

a. appoint Mr. Horton to serve as sole arbitrator of their dispute relating to the Athanasoulis Claim; and

b. bifurcate the Athanasoulis Claim such that the Arbitration shall initially resolve only the liability of YSL (in phase 1). In the event the Arbitrator finds that YSL is liable to Ms. Athanasoulis, the parties agreed to schedule an additional hearing before the Arbitrator to determine the quantum of YSL's liability (in phase 2).

[14] The Sponsor did not receive a copy of the Agreement to Arbitrate at that time and was not privy to its specific terms.

[15] The Proposal Trustee was advised on March 31, 2022 that "[w]e received the decision in the fact finding phase just the other day or so. Arbitrator Horton found an enforceable 20% profit sharing agreement to exist."

[16] A few weeks later, the Proposal Trustee provided the Sponsor an updated budget. With only approximately $210,000 remaining from the original reserve established under s. 10.1 of the Proposal, the Proposal Trustee requested additional net funds of approximately $1.485 million in respect of Administrative Fees and Expenses anticipated to be incurred in connection with the resolution of the remaining three claims and to administer the distributions.

[17] Some limited partners of YSL (the Yonge SL LPs and Chi Long LPs, collectively the "LPs") questioned the Proposal Trustee's handling of certain disputed claims, including the Athanasoulis Claim. The LPs are entitled to any remaining cash in the $30.9 million "Affected Creditors Cash Pool" established by the Sponsor, after proven claims are paid out. That cash pool is only to be used by the Proposal Trustee to satisfy proven claims. Therefore, the determination of the Athanasoulis Claim could impact the LPs' recovery from the Affected Creditors Cash Pool.

[18] At a case conference on May 24, 2022, the LPs asked the court to schedule motions they proposed to bring. Their motions were described at that time to be directed to the Proposal Trustee's authority to arbitrate the Athanasoulis Claim and to determine whether the Athanasoulis' Claim is subordinate to the LPs' entitlements. They also requested that the court order a stay of phase 2 of the Arbitration of the Athanasoulis Claim. At that time, the authority of the Proposal Trustee to enter into the Agreement to Arbitrate was being challenged by at least one of the LPs.

[19] Instead of scheduling that motion, the court urged the parties to work out an arrangement that would allow the LPs' priority claims to be added to, and determined in, the existing Arbitration under an expanded comprehensive arbitration process (the "consolidated arbitration process").[2]

[20] At a further case conference on June 8, 2022, the parties updated the court about their ongoing discussions since the last case conference. The LPs indicated that they would be prepared to have their priority issues determined in a consolidated arbitration process. The Sponsor expressed concerns about the added cost of adding the LPs priority issues into the existing Arbitration process. The Sponsor asked for two conditions: i) that there be an attempt to settle through mediation before embarking upon stage 2 of the Arbitration and/or any consolidated arbitration process, and ii) that the LPs undertake to pay the Proposal Trustee's expenses associated with the next phase of the consolidated arbitration process. The LPs did not agree to either of these conditions.

[21] The court once again urged the parties to continue collaborating and refining the issues for a potential consolidated arbitration process and to try to reach an agreement about the additional cost of this expanded arbitration of all issues, in the face of the alternative of parallel proceedings and the added cost and delay that would ensue if the LPs' proposed motion was scheduled. The court summarized the outstanding issues to be addressed (or not to be addressed) in the context of a potential consolidated arbitration process and some of the terms that were under consideration, as had been identified by the parties at that time, in an endorsement dated June 8, 2022 as follows:

> a. The enforceability of the contract as found by Mr. Horton regarding Ms. Athanasoulis' claim and the quantum of any damages she may have suffered.

[2] This reference to a "potential consolidated arbitration process" is not intended to resolve the dispute between Ms. Athanasoulis (and the Proposal Trustee), on the one hand, and the LPs on the other, about whether they did in fact reach an agreement to consolidate all issues into an arbitration. That issue was not squarely put before the court on this motion.

b. Whether any claim for damages by Ms. Athanasoulis is in the nature of debt or equity.

c. Any claim for damages that the LPs may assert against Ms. Athanasoulis.

d. The Arbitration will not consider any claims between Ms. Athanasoulis and Cresford Capital/Dan Casey.

e. The LPs will reserve their rights with respect to whether Mr. Horton's decision at phase 1 of the Arbitration regarding enforceability is rendered *res judicata*.

f. At the conclusion of the Arbitration the Proposal Trustee will make a determination as to whether Ms. Athanasoulis' claim is provable, will value it and determine its priority.

g. The parties' rights to appeal are preserved under the *BIA*.

The court directed counsel to return for a further case conference on July 29, 2022.

[22] On July 4, 2022 the Sponsor advised that it would be withdrawing funding from the Proposal Trustee. It objected to funding the estimated $1.485 million in additional funding that the Proposal Trustee and indicated would be needed by it and its external counsel to complete the administration of these proceedings.[3]

[23] By the July 29, 2022 case conference, the Sponsor had been provided with a copy of the Arbitration Award and the Agreement to Arbitrate. The parties continued to have differing views on whether the Proposal Sponsor was obligated to fund the Proposal Trustee's fees and expenses for phase 2 of the Arbitration. Accordingly, the Proposal Trustee's funding motion was scheduled.

[24] Although no formal stay was ordered, phase 2 of the Arbitration has not been rescheduled, pending the outcome of this motion, since the Proposal Trustee requires funds to participate in it. The Proposal Trustee and Ms. Athanasoulis anticipate that the phase 2 proceeding contemplated by the Agreement to Arbitrate will require additional fact and expert evidence. The original schedule had set aside two weeks in September, 2022 for phase 2 of the Arbitration, before any consideration of including the LPs' claims.

[25] In the intervening timeframe, the Proposal Trustee and Ms. Athanasoulis did attend a mediation to try to come to a resolution of the Athanasoulis Claim, but that mediation was not successful.

[3] This estimate assumed that the three remaining disputed claims would be adjudicated in the manner indicated by the Proposal Trustee, with no further procedural motions. Also included in this budget were estimated Administrative Fees and Expenses associated with the phase 2 of the Arbitration. The amount for this portion of the future fees was initially estimated to be approximately $500,000, but that estimate is now approximately $700,000. However, other disputed claims have been resolved such that the overall estimate for future funding that the Proposal Trustee anticipates remains at an estimated $1.485 million.

[26] On October 13, 2022, shortly before the return of this funding motion, the LPs provided a draft notice of motion indicating their intention to bring a motion for declarations that: (a) any claim by Ms. Athanasoulis to the proceeds of the YSL Project under any profit-sharing arrangement is subordinate to their entitlement to such proceeds; and (b) Ms. Athanasoulis' profit-sharing claim is unenforceable against the Debtors. The LPs' assertions are based primarily on alleged representations and promises made to them by Ms. Athanasoulis.

[27] The Proposal Trustee's Notice of Motion on this motion seeks an order declaring that:

a. The Proposal Trustee's Administrative Fees and Expenses have been reasonably incurred.

b. The Sponsor remains bound by the Proposal.

c. The Sponsor is required to fund the Administrative Fees and Expenses of the Proposal Trustee pursuant to the Proposal.

d. The commencement and continuation of Arbitration to determine the Athanasoulis Claim was a valid exercise of the Proposal Trustee's power under the Proposal or the *BIA*.

[28] The Sponsor does not dispute that it remains bound by the Proposal to fund Administrative Fees and Expenses reasonably incurred. It disagrees on whether the Proposal requires it to fund the Proposal Trustee's fees and expenses that will be incurred in respect of phase 2 of the Arbitration.

[29] The court does not technically need to deal with the Proposal Trustee's request for a declaration that its Administrative Fees and Expenses have been reasonably incurred up until now. The Sponsor is no longer seeking to claw-back prior expenses that the Proposal Trustee has already been paid from the initial funding reserve. This includes fees and expenses associated with phase 1 of the Arbitration.

[30] During the hearing, and considering the most up to date positions, the Proposal Trustee re-stated the issues to be decided on this motion:

a. Whether the commencement and continuation of Arbitration to determine the Athanasoulis Claim was a valid exercise of the authority granted to the Proposal Trustee under the Proposal or the *BIA* (the "Jurisdiction Question" below), and therefore are any Administrative Fees and Expenses associated with it reasonably incurred?

b. If not, and in the alternative, is the question of whether the Sponsor is obligated to fund the Administrative Fees and Expenses of the Proposal Trustee and its counsel associated with phase 2 of the Arbitration *res judicata* and has this court already ruled that phase 2 of the Arbitration should proceed in some fashion, either with or without the added issues raised by the LPs?

c. Should there be any other order made at this time regarding the approval of the fees of the Proposal Trustee and its counsel?

d. Should the Sponsor pay the Proposal Trustee's costs of this motion, which are rolled up in its defence of the reasonableness and appropriateness of the Arbitration process?

Analysis

The Positions of the Parties

[31] The focus of the analysis is on the question of whether any Administrative Fees and Expenses associated with completing phase 2 of the Arbitration would be "reasonably incurred," such that the Sponsor is obligated to indemnify the Proposal Trustee for them under s. 11.01 of the Proposal.

[32] The Sponsor argues that the Proposal Trustee should have either allowed or disallowed the Athanasoulis Claim without resorting to arbitration. The Sponsor says the Proposal Trustee should determine and value that claim on its own, with such input from Ms. Athanasoulis and others as it deems appropriate. This process, the Sponsor postulates, could be completed more efficiently and at a significantly lesser cost than through the Arbitration.

[33] The Proposal Trustee argues that, even with the benefit of hindsight, a process outside of the Arbitration resulting in an allowance or disallowance of the Athanasoulis Claim would not necessarily have been more cost effective or timely. It postulates that both parties would have inevitably challenged the Proposal Trustee's decision regarding the determination of the Athanasoulis Claim under s. 37 of the *BIA*. Either Ms. Athanasoulis would appeal a decision against her to the court, or the LPs would further challenge a ruling that favoured Ms. Athanasoulis. The Proposal Trustee believes that these appeals or challenges to the court under s. 37 of the *BIA* would have the potential to involve the same evidentiary input, time and expense as the Arbitration.

[34] The Proposal Trustee likens the Arbitration to the appointment of a claims officer to adjudicate the Athanasoulis Claim and urges the court to permit that process to now run its course through phase 2 of the Arbitration.

[35] The Proposal Trustee also maintains that it was reasonable to have entered into the Agreement to Arbitrate and that it cannot now renege and disallow the Athanasoulis Claim simply because the Sponsor does not like the outcome of phase 1. The Sponsor counters that if the Agreement to Arbitrate, the terms of which it only had full disclosure of in July 2022, improperly delegates to the Arbitrator the Proposal Trustee's responsibility for determining and valuing the Athanasoulis Claim and was entered into without authorization or jurisdiction, then it is invalid *ab initio* and unenforceable.

[36] Ms. Athanasoulis supports the Proposal Trustee's position and adds that she is an innocent third party. Having contracted with the Proposal Trustee for an arbitration in two phases and having herself invested significant time and expense on phase 1, it would be unfair to her to now return to square one for the determination and valuation of her claim.

[37] Ms. Athanasoulis further argues that there is no principled distinction between the jurisdiction to arbitrate phase 1 vs. phase 2 of the Arbitration. She contends that the Sponsor's withdrawal of its objection to paying the fees and expenses for phase 1 is a concession that arbitrating in phase 1 was authorized and within the jurisdiction of the Proposal Trustee, and thus phase 2 must be as well.

[38] The LPs still intend to argue that they are not bound by any findings in the Arbitration or its outcome, and that the Athanasoulis Claim is subordinate to theirs. Neither of those arguments are before the court now. However, should the court find that the Proposal Trustee lacked the authority or jurisdiction to arbitrate the Athanasoulis Claim, that would make their intended motion less complicated and possibly moot, depending on the Proposal Trustee's timing and ultimate determination of the Athanasoulis Claim.

The Issues

A) The Jurisdiction Question

i) Contractual and Statutory Framework

[39] Section 3.02 of the Proposal provides that the Proposal Trustee will assess claims in accordance with s. 135 of the *BIA*.

[40] Section 135 of the *BIA* provides that:

> (1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.
>
> (1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

ii) Relevant Jurisprudence Relied Upon by the Parties

[41] The Sponsor objects to providing additional funding for phase 2 of the Arbitration on the grounds that the Arbitration falls outside the Proposal Trustee's mandate under the Proposal, which is to determine and resolve disputed claims in accordance with s.135 of the *BIA*. The Sponsor maintains that because the Proposal Trustee improperly delegated that decision-making function to the Arbitrator and assumed the role of adversary, rather than the decision-maker, any Administrative Fees and Expenses associated with phase 2 of the Arbitration will not be reasonably incurred.

[42] The Sponsor relies upon the recent decision of this court *In the Matter of the Proposal to Creditors of Conforti Holdings Limited*, 2022 ONSC 3264, leave to appeal refused, 2022 ONCA 651. In *Conforti*, the court declined to relieve a trustee of its responsibility under s. 135 of the *BIA* to determine a particular claim through a single claims process under the supervision of the

Bankruptcy Court and declined to approve the trustee's suggestion that it be determined, instead, by a foreign court.

[43] This court held in *Conforti* that s. 135(1.1) of the *BIA* contains mandatory language that "unambiguously" requires the Proposal Trustee itself to determine and value claims. *Conforti* confirms, at para. 42, that:

> The regime under the *BIA* provides for a summary procedure for (i) determination by the trustee of whether a contingent or unliquidated claim is a provable claim, and, if so, (ii) for the trustee to value it. [...] Insolvency proceedings under the *BIA* are subject to court supervision, and the court is able to give directions for the timely and efficient determination of claims.

[44] This is not the first time a trustee's "mandatory statutory duty to review claims and value unliquidated or contingent claims" has been recognized: see *Asian Concepts Franchising Corporation (Re)*, 2018 BCSC 1022, 62 C.B.R. (6th) 123, at para. 99.

[45] Unlike in *Conforti*, the Proposal Trustee says it is not seeking to dispense with any obligation to determine the Athanasoulis Claim. It says it still intends to go through the motions of that determination but wishes to do so with the benefit of the Arbitrator's decision in phases 1 and 2.

[46] The Proposal Trustee also seeks to distinguish *Conforti* on the grounds that it has a very broad discretion under s. 135 of the *BIA* to obtain or require further evidence in support of a claim and has the power under s. 30 to bring, institute or defend any action or legal proceeding relating to the property of the bankrupt and to compromise any claim made by or against the estate. The Proposal Trustee argues that this permits a trustee to arbitrate a claim; or, at the very least, that this permits the Proposal Trustee to use an arbitration process to assist in the development of the evidence and facts that will be needed to determine and value a claim.

[47] The Proposal Trustee defends the Arbitration process as fair, reasonable and transparent. It emphasizes the importance of its role in ensuring all stakeholder interests are protected (as was envisioned in *Asian Concepts*, at paras. 55-56, 98, for example). The Proposal Trustee's contends that its decision to gather facts in respect of the Athanasoulis Claim by way of Arbitration was a reasonable decision and that it was an appropriate process to achieve a fair determination of the merits of the Athanasoulis Claim because it tested the potentially relevant evidence. It maintains that there is no single correct way to value a claim and that a trustee's decision should be afforded deference: see *Galaxy Sports Inc. (Re)*, 2004 BCCA 284, 29 B.C.L.R. (4th) 362, at paras. 39-43.

iii) The Agreement to Arbitrate – is it Beyond the Scope of s. 135 of the *BIA*?

[48] In theory, the Proposal Trustee does have a broad discretion under s. 135 of the *BIA* that might justify its participation in adversarial proceedings that could inform the eventual determination of claims. The Proposal Trustee seeks to characterize what the Arbitrator was asked to do as a fact finding exercise: to determine whether Ms. Athanasoulis was an employee who was constructively dismissed and whether she had an oral profit sharing agreement. The issue here is

whether the Agreement to Arbitrate in this case—which was not before the court and had not been disclosed to the Sponsor or the LPs until sometime in July, 2022—went beyond a fact finding exercise.

[49] Although no determination need be made on this point, the Proposal Trustee's participation in phase 1 of the Arbitration may have been sound in the sense that the necessary parties and information were before the Arbitrator to enable him to make determinations about the existence of the oral profit sharing agreement and a finding of constructive dismissal. The Proposal Trustee can consider and take into account these inputs from the Arbitration in its determination and valuation of the Athanasoulis Claim.

[50] Since the Sponsor is no longer challenging the right of the Proposal Trustee to be indemnified for the Administrative Fees and Expenses incurred in respect of phase 1 of the Arbitration, the issue now before the court is whether the Proposal Trustee is acting within the scope of s. 135 of the *BIA* by engaging in phase 2 of the Arbitration to determine whether to allow the Athanasoulis Claim, and if so in what amount.

[51] The Proposal Trustee concedes that the Arbitrator's determination of the damages question in phase 2 of the Arbitration would be both informative and probative, and that the Proposal Trustee's determination of the Athanasoulis Claim would be heavily influenced by the Arbitrator's decision. The suggestion that the Proposal Trustee could, after the Arbitration, still determine and value the Athanasoulis Claim in a manner inconsistent with the decision of the Arbitrator on liability and damages is difficult to reconcile with the words of the Agreement to Arbitrate and the intended binding nature of arbitrations under s. 37 of the *Arbitration Act 1991*, S.O. 1991, c. 17.

[52] I find that phase 2 of the Agreement to Arbitrate goes beyond a fact finding exercise. By its very terms, the Agreement to Arbitrate contemplates an eventual ruling from the Arbitrator on "damages" (the quantum of the Debtors' liability) at the end of phase 2. On their face, the terms of the Agreement to Arbitrate contemplate a final adjudication by the Arbitrator. That amounts to an improper delegation to the Arbitrator by the Proposal Trustee of its ultimate responsibility to determine and value the Athanasoulis Claim.

[53] It was suggested that the court would be effectively ordering, or approving, the Proposal Trustee to breach the Agreement to Arbitrate if the Sponsor's position with respect to the funding of phase 2 of the Arbitration is accepted. I do not see it that way. If the Proposal Trustee did not have the authority to agree to phase 2 of the Arbitration as was provided for in the Agreement to Arbitrate because it amounted to an improper delegation of its responsibility to the Arbitrator, then that aspect of the Agreement to Arbitrate is unenforceable as against the Proposal Trustee. Further, as a practical matter, if the Sponsor is not required to fund the Administrative Fees and Expenses associated with phase 2 of the Arbitration, it cannot proceed.

[54] I also do not accept the assertion that just because the Sponsor is no longer challenging its obligation to fund the Proposal Trustee's Administrative Fees and Expenses incurred in connection with phase 1 of the Arbitration, that the court is bound to accept that entering into the Agreement to Arbitrate was a valid exercise of the Proposal Trustee's discretion and a valid delegation of its responsibility to the Arbitrator in all respects, or that the Sponsor is estopped from asserting that

any aspect of the Agreement to Arbitrate exceeded the Proposal Trustee's authority under s. 135 of the *BIA*.

iv) Would the Cost of this Arbitration be a Reasonably Incurred Expense?

[55] One of the other grounds upon which the Sponsor argued that the anticipated Administrative Fees and Expenses for phase 2 of the Arbitration would not be reasonably incurred was because they would be the product of a complex, lengthy and expensive process that is not in keeping with the summary and efficient adjudication of claims envisioned by the *BIA*, especially one that might not have resulted in a final resolution of the Athanasoulis Claim without the willing participation of the LPs,[4] leaving the LPs' priorities and other enforceability issues to be determined through some other process.

[56] Section 135 of the *BIA* is intended to be a summary procedure for the determination of claims, animated by the objectives of speed, economy and informality: see *Conforti*, at para. 43 and *Asian Concepts*, at para. 53.

[57] The decision on the Jurisdiction Question renders it unnecessary to decide whether the anticipated budgeted cost of phase 2 of the Arbitration represents anticipated reasonably incurred Administrative Fees and Expenses that the Sponsor should be required to fund. The court will not order the Sponsor to fund this aspect of the Arbitration that involves the ultimate determination of this claim by someone other than the Proposal Trustee as that would not be a determination of the Athanasoulis Claim in accordance with s. 135 of the *BIA*.

v) Section 135 *BIA* Determination of the Athanasoulis Claim

[58] The Proposal Trustee has identified various aspects of what had been expected to be resolved through the anticipated phase 2 Arbitration that will still require factual inputs and findings for the Proposal Trustee to make its determination of the Athanasoulis Claim. For example, to determine the meaning of "profits" under the oral profit sharing agreement, and when and how they should be calculated, expert valuation evidence may be required. This was part of the justification for the Arbitration process envisioned, and has not been resolved by the court's finding that the process agreed to went too far by improperly delegating the ultimate issue to be decided by the Proposal Trustee to the Arbitrator.

[59] Further, whether the Athanasoulis Claim is a provable claim under s. 135 of the *BIA* depends on whether the claim is in debt or equity, which in turn may require further evidence and inputs from other stakeholders, like the LPs. Not only would the LPs potentially have relevant information, but they also have a direct interest in these determinations.

[60] The Proposal Trustee has the power under s. 135 of the *BIA* to seek additional information and documents from the claimant: see *Urbancorp Cumberland 2 GP Inc.*, 2022 ONSC 2430, at

[4] As previously indicated, there is a dispute about whether the LPs agreed to arbitrate their priority and enforceability challenges to the Athanasoulis Claim. The court was not asked to determine whether the LPs had in fact agreed to arbitrate their issues in the expanded phase 2 of the Arbitration. I do not need to decide this question to decide the funding motion.

paras. 23, 26. It remains open to the Proposal Trustee under s. 135 of the *BIA* to receive and consider expert input from Ms. Athanasoulis and other stakeholders.

[61] The broad discretion afforded to the Proposal Trustee also allows it to seek out its own expert input, as well as information and input from the LPs and other stakeholders in respect of the issues it must decide.

[62] In these circumstances, the Proposal Trustee will need to carry out its responsibilities under s. 135 of the *BIA*, get the factual and other inputs it requires from witnesses, other stakeholders, experts and the like and determine whether the Athanasoulis Claim has been proven and, if so, at what amount it should be valued.

[63] The Proposal Trustee complains that the Sponsor has not spelled out an alternative process to the Arbitration for doing this.

[64] In the absence of any proposed alternative, the Proposal Trustee is entirely unencumbered and may determine its own process for how it wishes to do this, which will be afforded significant deference. According to the Court of Appeal in *Galaxy*, at paras. 39 and 44,

a. the Proposal Trustee is entitled to evaluate the Athanasoulis Claim in accordance with s. 135(1.1) with significant discretion, taking into account factors that may appear in the *BIA*;

b. there is no one "correct" answer to the valuation of the Athanasoulis Claim;

c. the Proposal Trustee's valuation of the Athanasoulis Claim will be scrutinized on a "reasonableness" standard; and

d. the Proposal Trustee can use its knowledge and expertise to consider whether, as a factual matter, the valuation as to the full amount of the Athanasoulis Claim is appropriate.

[65] The Proposal Trustee is concerned that this may lead to *de novo* appeals or challenges (by either Ms. Athanasoulis or the LPs) and could end up being as much or more expensive than the anticipated cost of phase 2 of the Arbitration. There is no crystal ball that can foretell this.

[66] The Sponsor says that it will not micromanage this aspect of the Proposal Trustee's determination of the Athanasoulis Claim. While the Sponsor does not expect that this alternative process will end up costing as much as the current estimate for phase 2 of the Arbitration, it is prepared to accept the possibility that it does. The Sponsor has said it will pay for the Proposal Trustee to develop and follow a process to determine and value the Athanasoulis Claim in accordance with s. 135 of the *BIA*.

[67] The Proposal Trustee must determine how to 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. The goal is not the gold standard of coming up with a process that cannot be challenged.

[68] The Proposal Trustee may choose to invite expert evidence and inputs from Ms. Athanasoulis and then determine if it needs its own expert to review and comment upon what is provided. It may choose to share that plan with the other stakeholders participating in this motion and seek their input. If it chooses to share its plan 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.

[69] In any event, the parties will eventually need to come back on a scheduling appointment to determine the sequencing and timing of the LPs' priorities and enforceability motion, but only after that motion (with supporting evidence) has been served and the parties have met and conferred amongst themselves to consider the appropriate timing and sequencing of all that needs to occur.

[70] Whatever process the Proposal Trustee may adopt, the Sponsor remains obligated under the Proposal to indemnify the Proposal Trustee for the Administrative Fees and Expenses reasonably incurred going forward to the final determination of the Athanasoulis Claim.

B) The *Res Judicata* and Estoppel Argument(s)

i) Res Judicata

[71] There can be no finding of *res judicata* with respect to the issues raised on this funding motion regarding the Sponsor's obligation to fund phase 2 of the Arbitration.

[72] The Proposal Trustee and Ms. Athanasoulis argue that Gilmore J. held, at two separate case conferences in May and June 2022, that arbitration was an appropriate way to proceed, and that issue estoppel prevents the court from revisiting this in the context of this funding motion. I disagree.

[73] There are three requirements for invoking issue estoppel: (i) the same question has or could have been decided in a prior proceeding; (ii) the decision giving rise to estoppel is final; and (iii) the parties to the decision giving rise to estoppel are the same as the parties to the subsequent proceeding in which estoppel is claimed: see *The Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2019 ONCA 354, 145 O.R. (3d) 759, at para. 25. It is the first requirement upon which the *res judicata* argument fails in this case.

[74] The Proposal Trustee argues that the endorsement of Gilmore J. arising out of the June 8, 2022 case conference requires an arbitration of the Athanasoulis Claim because it was stated in the endorsement that the "arbitration must prevail" and the Sponsor never sought to appeal that declaration.

[75] I do not read the June 8, 2022 endorsement as ordering an arbitration. Rather, it was the court's strong preference that the parties agree to expand the Arbitration to address the issues raised by the LPs and avoid a parallel, costly and time consuming motion process to determine the priority

and enforceability issues. I am not aware of any authority upon which the court can order unwilling parties to arbitrate a dispute; that is a matter of private agreement. The court was simply strongly encouraging the parties to make such an agreement, building upon the arbitration process already in place.

[76] Nor do I agree with the implicit suggestion that the same question about the authority of the Proposal Trustee to enter into the Agreement to Arbitrate and to delegate its responsibility for determining and valuing the Athanasoulis Claim to the Arbitrator has been or could have been previously decided by Gilmore J. at the earlier case conferences. Leaving aside the nature of those case conferences and the typical procedural scope of directions from the court, it is clear that is not what Gilmore J. understood to be happening. To the contrary, her June 8, 2022 endorsement records that:

> At the conclusion of the arbitration the Proposal Trustee will make a determination as to whether Ms. Anathasoulis' [*sic*] claim is provable and will value it and determine its priority.

[77] At that time, the court did not have the Agreement to Arbitrate with the full description of the issues being submitted to arbitration and cannot be taken to have made any meaningful assessment as to whether the statement that there was still something left for the Proposal Trustee to determine at the end of the Arbitration was a fair characterization of what had been agreed to. The court did not previously order the parties to arbitrate, nor did it make any finding that phase 2 of the Arbitration could be conducted in a manner consistent with s. 135 of the *BIA*. There is no *res judicata*.

ii) Other Estoppel Considerations

[78] That said, it was prudent of the Sponsor to drop its opposition to the Proposal Trustee's request for approval of the expenses associated with phase 1 of the Arbitration, already incurred and paid. Regardless of the court's determination of the threshold Jurisdiction Question in relation specifically and only to phase 2 of the Arbitration, the Sponsor would have faced other obstacles in attempting to claw back from the Proposal Trustee Administrative Fees and Expenses incurred and paid for out of the initial reserve, including for phase 1 of the Arbitration.

[79] These obstacles would include the Sponsor's inaction and failure to ask any questions or raise any complaint about, or object to phase 1 of the Arbitration proceeding while it was ongoing. However, the Sponsor's concession obviates the need for any ruling on this.

iii) The Timing of Objections and Related Considerations

[80] Ms. Athanasoulis is understandably concerned about having engaged in phase 1 of a two phase arbitration process in good faith and now facing objections to the jurisdiction or authority of the Proposal Trustee to have entered into the Agreement to Arbitrate.

[81] Unfortunately, the Sponsor and the LPs did not have a copy of the Agreement to Arbitrate until July, 2022. Their concerns were raised in a timely manner upon learning more about the scope of the Arbitration and its anticipated cost. The fact that this discovery also coincided with

their learning that the phase 1 outcome favoured Ms. Athanasoulis does not automatically lead to the inference that their objections are disingenuous.

[82] In any event, no one is suggesting that the work done in phase 1 of the Arbitration is lost. It will be one of the inputs that the Proposal Trustee will use to determine and value the Athanasoulis Claim. All parties agree on this.

[83] While I do not go so far as to accept the suggestion by the Sponsor and LPs that Ms. Athanasoulis knowingly took on the risk of this challenge and outcome, the Sponsor and LPs were left out of the process and cannot be precluded from raising the legal objections that have ultimately dictated the outcome of this motion on the Jurisdiction Question, as it relates to phase 2 of the Arbitration.

C) Fee Approvals

[84] Gilmore J.'s endorsement scheduled this funding motion to determine the Proposal Trustee's entitlement to be indemnified for the costs of the Arbitration. The indemnity reimbursements taken up until now from the reserve fund are no longer at issue. The relief sought by the Proposal Trustee for the approval of its past activities and fees might have been warranted if the challenge to entitlement to indemnification for expenses incurred in phase 1 of the Arbitration was still at issue.

[85] However, this is no longer at issue. There is no immediate reason or need to attempt to deal with the broader requests for general approval of the activities and fees of the Proposal Trustee and its counsel.

[86] The Sponsor is right that, in general, such requests should be supported by fee affidavits: see *Jethwani v. Damji*, 2017 ONSC 1702, 46 C.B.R. (6th) 96, at paras. 8-11.

[87] For the same reason, it is also inappropriate to grant the requested charge over all past and future distributions to the Sponsor. This issue was not fully argued and I was not taken to the evidence or authority that I would need to consider to make such an order.

[88] Instead, the Proposal Trustee may now wish to prepare a new budget and request additional reserve funding for the indemnity obligations of the Sponsor. If the Sponsor does not agree to supplement the reserve, the parties can arrange to come back for a case conference for further consideration of the questions of up front funding and/or security for future funding to be provided by the Sponsor.

D) Costs

[89] Despite having found that the contemplated phase 2 of the Arbitration goes beyond the scope of what the Proposal Trustee was authorized to agree to, given the original position of the Sponsor that it was also challenging its obligation to fund expenses for phase 1 and given the added complications introduced by the LPs, I consider it to have been reasonable for the Proposal Trustee to have brought this motion for directions.

[90] The Proposal Trustee's and its counsel's costs of this motion were reasonably incurred as part of the administration of distributions and the resolution of unresolved claims such that those costs should be indemnified by the Sponsor under the s. 11.1 of the Proposal on the basis that they were reasonably incurred Administrative Fees and Expenses.

[91] Ms. Athanasoulis has asked to be awarded some reasonable costs thrown away in the event the Arbitration is not proceeding to phase 2. She spent $300,000 on phase 1 (in line with the Proposal Trustee's disclosed legal costs for phase 1) and had started working with her expert on phase 2. I understand that there was an agreement that each side would bear their own costs of the Arbitration.

[92] I agree that if Ms. Athanasoulis had actually incurred costs thrown away of the Arbitration, that are now wasted, she might be entitled to an award for her trouble: see *Caldwell v. Caldwell*, 2015 ONSC 7715, 70 R.F.L. (7th) 397, at paras. 10-12.

[93] However, given that the phase 1 Arbitration findings will be the factual predicate upon which the determination of her claim will proceed and that it is reasonable to expect that Ms. Athanasoulis will require expert input, regardless of the procedure, to have her claim determined by the Proposal Trustee, I am not convinced that she has suffered any costs thrown away.

[94] The parties are just now pivoting to a different process for the final determination of the Athanasoulis Claim, but the onus is still on her to prove it. It is difficult to see how she has wasted the cost of whatever work she did in furtherance of her quest to persuade the Arbitrator to decide in her favour the same issue that the Proposal Trustee will now take into consideration when determining her claim. All the work should be usable to support the proof of her claim to the Proposal Trustee.

[95] As such, no costs thrown away are awarded to Ms. Athanasoulis.

Final Disposition

[96] The court's decision on each of the issues on this funding motion, as re-stated by the Proposal Trustee, is as follows:

a. The continuation of phase 2 of the Arbitration provided for in the Agreement to Arbitrate the Athanasoulis Claim is not a valid exercise of the authority granted to the Proposal Trustee under the Proposal or s. 135 of the *BIA*. Therefore, the court makes no order requiring the Sponsor to fund (and/or indemnify the Proposal Trustee for) the budgeted Administrative Fees and Expenses associated with phase 2 of the Arbitration (of approximately $700,000).

b. The questions of whether phase 2 of the Arbitration was a procedure that the Proposal Trustee had the jurisdiction to engage in, and the Sponsor's obligation to fund the Administrative Fees and Expenses of the Proposal Trustee associated therewith, are not barred by *res judicata* or any other estoppel or laches.

c. The Sponsor is required to indemnify the Proposal Trustee for all of the reasonably incurred Administrative Fees and Expenses in relation to the determination and valuation of the Athanasoulis Claim, including for phase 1 of the Arbitration and for whatever procedure the Proposal Trustee, in its discretion, determines appropriate to receive the further evidence and positions of Ms. Athanasoulis and other interested stakeholders and any expert inputs deemed necessary.

d. The Proposal Trustee should first determine how it intends to proceed in light of the court's decision on this motion, and may prepare a budget for the anticipated Administrative Fees and Expenses associated with this exercise, or seek indemnification after the fact, as it deems appropriate.

e. If asked to do so and the Sponsor is not prepared to top up the reserve for the funding of the Proposal Trustee's anticipated Administrative Fees and Expenses to complete the determination and valuation of the Athanasoulis Claim, the parties may request a case conference before me so that the court can provide further directions in this regard and any related issues. The parties are directed to confer about these issues before scheduling a case conference so that the appropriate amount of court time is reserved.

f. If the LPs are proceeding with their proposed motion, they shall serve their motion record(s) with supporting evidence and, after that, the parties shall confer about the timetabling and sequencing of those motions and then seek a scheduling appointment (if all agree) or a longer case conference (if all do not agree) for directions, timetabling and a motion hearing date if determined appropriate.

g. There have been no costs demonstrated to have been thrown away as a result of the court's ruling on this motion, and none are awarded.

h. The costs of the Proposal Trustee and its counsel for this motion were reasonably incurred and may be paid out of the remaining reserve fund and/or a claim for reimbursement by the Sponsor for those costs may be made under the Proposal.

[97] This endorsement and the orders and directions contained in it shall have the immediate effect of a court order without the necessity of the formal issuance and entry of an order.

KIMMEL J.

Date: November 1, 2022

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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 OF APPEAL FOR ONTARIO

CITATION: YG Limited Partnership and YSL Residences Inc. (Re), 2023 ONCA 504
DATE: 20230720
DOCKET: COA-23-CV-0288

Huscroft, Miller and Paciocco JJ.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.

Deborah Palter and Alexander Souter, for the appellants, YongeSL Investment Limited Partnership, 2124093 Ontario Inc., SixOne Investment Ltd., E&B Investment Corporation and TaiHe International Group Inc.

Robin Schwill and Matthew Milne-Smith, for the respondent, KSV Restructuring Inc.

Mark Dunn, Sarah Stothart, Carlie Fox, and Brittni Tee, for the respondent, Maria Athanasoulis

Heard: June 30, 2023

On appeal from the order of Justice Jessica Kimmel of the Superior Court of Justice, dated February 10, 2023.

REASONS FOR DECISION

[1] The Proposal Trustee, KSV Restructuring Inc., administering an approved *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 proposal relating to a failed condominium development, brought a motion for directions "establishing the process for any appeal from the Proposal Trustee's notice of determination of the proof of claim filed by Maria Athanasoulis against [the debtors]". The motion judge issued an order providing directions. The appellants, the Limited Partners of the debtor, YG Limited Partnership – namely YongeSL Investment Limited Partnership, 2124093 Ontario Inc., SixOne Investments Ltd., E&B Investment Corporation, and TaiHe International Group Inc. (the "Limited Partners") – have appealed the order providing directions because of "orders" the motion judge made relating to their standing at the anticipated Athanasoulis appeal. The motion judge made no orders in respect of standing. The appeal is therefore premature and is dismissed. We will elaborate.

[2] The Proposal Trustee brought the motion for directions because the resolution of the Athanasoulis claim was proving to be problematic. An earlier attempt by the Proposal Trustee to resolve the Athanasoulis claim resulted in litigation and was set aside. Moreover, the Limited Partners wanted to dispute the Athanasoulis claim, which was for approximately $19 million. They were claiming standing in any such appeal because its outcome would determine whether they would receive any residue from the YG Limited Partnership estate after creditors were paid.

[3] Apart from establishing a scheduling order, the motion judge's order addressed the Limited Partners' anticipated participation in an anticipated appeal of the decision the Proposal Trustee was expected to make relating to the Athanasoulis claim. But the motion judge did not determine the standing that the Limited Partners would have during the anticipated appeal. The directions that the motion judge provided relating to standing were explicitly made "subject to the discretion of the judge hearing the appeal". Therefore, until the appeal is undertaken, it is not yet resolved whether the Limited Partners will be given any standing at the appeal hearing, or if so, whether that standing will be limited. This appeal is therefore premature.

[4] We are not persuaded by the Limited Partners' submissions to the contrary. The possibility that the motion judge's comments about the anticipated process could influence the appeal judge's ultimate standing determination is not a basis for appeal. The motion judge's underlying conclusion that standing rights are discretionary does not provide a basis for appeal, either. Even if that conclusion is incorrect, the appeal judge is not bound by it and will be free to provide a right to standing if the law allows.

[5] Given that the Limited Partners' appeal of the motion judge's order is premature, it is dismissed. There is therefore no need to address the merits of the submissions advanced in support of that appeal.

[6] The Limited Partners will pay costs to the respondent, Maria Athanasoulis, in the amount of $15,000 inclusive of applicable taxes and disbursements. No costs were sought by KSV Restructuring Inc., and none will be awarded.

"Grant Huscroft J.A."

"B.W. Miller J.A."

"David M. Paciocco J.A."

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COURT OF APPEAL FOR ONTARIO

CITATION: YG Limited Partnership and YSL Residences Inc. (Re), 2023 ONCA 505
DATE: 20230720
DOCKET: COA-22-CV-0451

Huscroft, Miller and Paciocco JJ.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.

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

Haddon Murray, for the respondent, CBRE Limited

Robin Schwill and Matthew Milne-Smith, for the respondent, KSV Restructuring Inc.

Heard: June 30, 2023

On appeal from the order of Justice Peter J. Osborne of the Superior Court of Justice, dated November 22, 2022, with reasons at 2022 ONSC 6548.

PACIOCCO J.A.:

OVERVIEW

[1] YongeSL Investment Limited Partnership, 2124093 Ontario Inc., SixOne Investments Ltd., E&B Investment Corporation, and TaiHe International Group Inc. are the limited partners of YG Limited Partnership (the “Limited Partners”). At the conclusion of the oral hearing, we dismissed the appeal by the Limited Partners

from the order of a motion judge denying them standing to appear at an appeal motion brought by a creditor of YG Limited Partnership pursuant to s. 135(4) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), relating to the denial by a Proposal Trustee of the creditor's proof of claim. The following reasons explain that decision.

THE MATERIAL FACTS

[2] YSL Residences Inc. ("YSL") was the registered owner of "the YSL project", a condominium development, acting as bare trustee for YG Limited Partnership. The general partner of YG Limited Partnership is 9615334 Canada Inc. ("the General Partner"). Both YSL and the YG Limited Partnership were members of the Cresford Group, a real estate development enterprise.

[3] On April 30, 2021, as a result of financial difficulties with the YSL project, YSL and YG Limited Partnership filed notices of intention to make a joint liquidation proposal pursuant to s. 50(1) of the *BIA*. Although KSV Restructuring Inc. ("the Proposal Trustee", and a respondent in this appeal) and the General Partner supported the initial proposal, the Limited Partners, who together had filed two applications challenging the proposal, were given standing by Dunphy J. to do so at the sanction hearing, pending on June 23, 2021 (the "Dunphy J. decision"). The Limited Partners succeeded in that challenge and the proposal was denied.

[4] A second proposal transferring the YSL project to Concord Properties Development Corp. (“Concord”) was subsequently approved. Under the terms of that proposal, Concord agreed to pay $30.9 million to the Proposal Trustee to fund creditors. Article 5.05 of the approved proposal provides that the Limited Partners are entitled to any residual funds held by the Proposal Trustee after final distribution to the creditors.

[5] As events transpired, the extent of recovery for the Limited Partners, if any, came to depend upon the claims of three creditors, including a real estate broker, CBRE Limited (“CBRE”), a respondent in this appeal. The Limited Partners would recover up to $16.038 million if all three claims were denied. CBRE’s proof of claim was for approximately $1.2 million. If allowed, it would reduce the Limited Partners potential recovery by that amount.

[6] The Proposal Trustee initially disallowed CBRE’s proof of claim because of insufficient proof, on the understanding that CBRE would appeal the disallowance and the appeal determination would resolve the claim on a more complete evidentiary record. CBRE brought an appeal motion under s. 135(4) of the *BIA*. Based on affidavits CBRE filed on the appeal, the Proposal Trustee changed its position, but concluded that the most expeditious way to approve the claim would be to permit CBRE’s appeal to proceed unopposed.

[7] The Limited Partners, whose interest lay in CBRE's proof of claim failing, sought to oppose CBRE's appeal at the appeal hearing, arguing that they had the right to appear and do so. In the alternative, they sought relief pursuant to s. 37 of the *BIA*. The motion judge denied the Limited Partners standing to appear at CBRE's motion, held that the Limited Partners were not "persons aggrieved" within the meaning of s. 37 of the *BIA*, and allowed CBRE's appeal.

THE ISSUES

[8] The Limited Partners appealed that decision, arguing:

1. The motion judge erred in denying the Limited Partners standing, and
2. The motion judge erred in concluding that CBRE had proven its claim.

[9] As indicated, at the end of the oral hearing, we dismissed the Limited Partners' appeal for reasons to follow. Since we are upholding the motion judge's decision that the Limited Partners lacked standing at CBRE's appeal hearing, it is unnecessary to consider ground of appeal 2, which addresses the merits of an appeal decision that the Limited Partners are not entitled to participate in.

ANALYSIS

[10] With respect to the standing issue raised in ground of appeal 1, we were not persuaded by the Limited Partners' primary submission that based on general common law principles of standing the motion judge erred by denying them the

right to standing, as their economic interests would be affected by the CBRE appeal decision.

[11] It is not clear that the claimed common law "right" of standing exists. The authorities relied upon by the Limited Partners do not say so. *Ivandaeva Total Image Salon Inc. v. Hlembizky* (2003), 63 O.R. (3d) 769 (C.A.), at para. 27, involved an interpretation of rule 37.14(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which permits a party who "is affected by" an *ex parte* or registrar's order to move to set the order aside. *Fontaine v. Canada (Attorney General)*, 2018 ONCA 1023, at para. 21, spoke of the standing that the Canadian judicial system "generally" gives to those "who will be subject to an order of the court". The Limited Partners were not subject to the order under appeal. Rule 13.01(1), which the Limited Partners did not invoke, empowers courts to grant leave to intervene to parties that claim to have "an interest in the subject matter of the proceedings", a judicial power that would arguably be unnecessary if persons whose interests are affected by an order already have a right to standing. In any event, we need not resolve the contours of the common law right to standing in this case because even if the claimed right exists, the Limited Partners cannot avail themselves of that right in the circumstances of this case.

[12] First, in *Ivandaeva*, at para. 27, in describing the basis for standing Borins J.A. stipulated that "the order must be one that directly affects the rights of the moving party in respect of the proprietary or economic interests of the party." The

Limited Partners do not have a direct economic interest in CBRE's claim. By virtue of its constating partnership agreement and the *Limited Partnership Act*, R.S.O. 1990, c. L. 16, ss. 8-12, the business of a limited partnership is managed by its general partner. This is the price limited partners pay for their limited liability: *Kucor Construction & Developments & Associates v. Canada Life Assurance Co.* (1999), 41 O.R. (3d) 577 (C.A.), at pp. 588-91. The limited partners therefore enjoy the economic benefits from the partnership through their contractual relationship with the general partner, and not through direct legal rights tenable against debtors or creditors of the partnership. As a result, the direct economic interest at stake during CBRE's appeal belonged to the partnership, an economic interest that is to be exercised by the General Partner even where the outcome of the appeal could ultimately inure to the financial benefit of the Limited Partners. Simply put, even if the general common law principles of standing relied upon by the Limited Partners do exist and are tenable in the appeal of a creditor's proof of claim arising out of the *BIA*, the Limited Partners lacked the direct economic interest in the outcome of the proceedings that would be required to support their standing claim.

[13] Second, and in any event, we are persuaded that the general standing principles that the Limited Partners invoke do not apply during proof of claim appeals under s. 135(4) of the *BIA*. Although the *BIA* does not speak explicitly to "standing" at proof of claim appeals, s. 135(4) is explicit in granting the authority to appeal the disallowance of a "claim" to "the person to whom the notice was

provided." Subsection 135(3) stipulates, in material part, that the notice of disallowance contemplated by s. 135(4) is provided to "the person whose claim …was disallowed" by the trustee. Under the terms of s. 135(4) it is therefore CBRE that has standing to address the disallowance of its claim, not the Limited Partners.

[14] We are not persuaded by the Limited Partners' argument that s. 135(4) is relevant only to who can bring an appeal. We are satisfied that the Legislature intended that equity owners of the debtor, such as limited partners, would not have a right of standing, for two reasons.

[15] First, as the Proposal Trustee argued before us, by design, the *BIA* processes, including the process for appealing proof of claim decisions, are "between the trustee, the creditor claimant and the debtor." This not only reflects the relevant direct interests at stake in the material claim it also safeguards the mission of "the *BIA* to provide summary and expeditious procedures to determine the questions that arise in bankruptcy with a minimum cost": *Re McEwen*, 2021 ONCA 566, at para. 1; *Romspen Investments Corporation v. Courtice Auto Wreckers Limited*, 2017 ONCA 301, 138 O.R. (3d) 373, at para. 70, leave to appeal refused, [2018] S.C.C.A. No. 37636; *Canada (A.G.) v. Rassell*, 1999 ABCA 232, 237 A.R. 137. If equity owners had automatic rights of standing in creditor claim appeals, it would impose notice requirements and have time implications that are contrary to the interest in the prompt and effective disposition of *BIA* claims.

[16] Second, when the *BIA* is read as a whole, it becomes clear that the right of standing the Limited Partners claim was not intended. Section 135(5), addressing the right of appeal where a proof of claim is allowed, limits the right of appeal to "the creditor or the debtor", in other words, the parties to the debt, which, as the motion judge found, would exclude the Limited Partners. If equity owners of a debtor nonetheless had a right of standing to participate in such appeals, it would be an irrationally fickle right. They could not appeal a trustee's decision approving a creditor's claim because of s. 135(5) but could, fortuitously, join in an appeal by another if that appeal happens to be launched.

[17] When considering the statute as a whole, s. 37 of the *BIA* is also important. To the extent that the *BIA* contemplates conferring standing on others to participate in the processes between the trustee, debtors and creditors, s. 37 provides the mechanism, limiting the right to apply to a person "aggrieved by any act or decision of the trustee". Section 37 is therefore the legislative provision available to fulfil the function of the common law standing principles the Limited Partners seek to invoke, by providing a statutory mechanism for interested persons to participate. Given that the statute sets out the parameters for such participation, the common law principles cannot be used in preference to the statutory regime that has been created. It bears repeating in this regard, that "as is often observed, the *BIA* is a complete code governing the bankruptcy process": *Re McEwen*, at para. 1.

[18] We also reject the Limited Partners' submission that the motion judge's assessment of standing was tainted by a mistaken belief that the CBRE appeal was brought under s. 135(5) instead of s. 135(4). We accept that the motion judge misspoke at one point by describing the appeal as having been brought under s. 135(5), but he recognized explicitly on more than one occasion that the appeal was brought under s. 135(4). We are satisfied from his reasons that he considered standing under s. 135(5) for completeness, and to consider the impact of the statute as a whole on the Limited Partners' submissions, as I have done. In any event, his ultimate decision did not rest on his analysis of s. 135(5).

[19] Therefore, the motion judge did not err in denying the Limited Partners their right of standing arising from their economic interest in the outcome. No such right exists.

[20] We also rejected the Limited Partners' submission that the motion judge erred in finding that the Limited Partners could not seek relief under s. 37 because they are not "aggrieved by any act or decision of the trustee". That determination is a decision of mixed fact and law, reviewable on a "palpable and overriding error" standard. The Limited Partners failed to persuade us that the motion judge erred in law in making this determination or committed a palpable and overriding error. Indeed, the outcome he arrived at is in keeping with recognition that any interest the Limited Partners can assert in the outcome of the appeal is indirect, and

tenable through the General Partner who they empowered to act on their behalf in managing claims made by creditors of the Limited Partnership.

[21] We also rejected the Limited Partners' submission that the motion judge erred by not observing the principles of judicial comity in not following the Dunphy J. decision. It is unnecessary to explore the reach and effect of the principles of judicial comity or to comment on whether Dunphy J. was correct in effectively granting the Limited Partners standing at the sanction hearing. The Dunphy J. decision does not address the same issue that was before the motion judge. Justice Dunphy was not conducting a creditor's proof of claim appeal but rather a sanction hearing that would determine the underlying validity of a proposal that would ground the entire bankruptcy proceeding, where issues paralleling those raised by the Limited Partners in related proceedings needed resolution. In any event, Dunphy J. permitted the Limited Partners to participate in the sanction hearing in part because he recognized that they would not have standing in later proceedings. In this material sense the Dunphy J. decision supports the motion judge's decision.

[22] Finally, none of what wI have said is affected by the fact that the potential recovery of the Limited Partners was specifically identified in the approved proposal. Even if express provision had not been made in the proposal for their recovery rights, the Limited Partners would have partnership rights in any equity remaining in the partnership assets after creditors have been paid. Put simply, the

Limited Partners would have had an indirect economic interest in the resolution of creditor claims, even if not mentioned in the proposal. The mention in the proposal cannot be taken to elevate their standing.

CONCLUSION

[23] We therefore denied ground 1 of the appeal, an outcome that prevents the Limited Partners from advancing ground 2 of the appeal, and we dismissed this appeal.

[24] Costs of the appeal of $20,000 are payable by the Limited Partners to CBRE Limited, inclusive of HST and disbursements. No costs were sought by the Proposal Trustee, and none will be awarded.

Released: July 20, 2023 “G.H.”

“David M. Paciocco J.A.”
“I agree. B.W. Miller J.A.”
“I agree. Grant Huscroft J.A.”

7

Northstone Power Corp. v. R.J.K. Power Systems Ltd., ABCA 2002 201

Date: 20020910
Docket: 0201–0143 AC

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MADAM JUSTICE CONRAD
THE HONOURABLE MR. JUSTICE O'LEARY
THE HONOURABLE MR. JUSTICE WITTMANN

BETWEEN:

NORTHSTONE POWER CORP.

Applicant
(Respondent)

- and -

R.J.K. POWER SYSTEMS LTD.
and R.J.K. MOBILE MECHANICS INC.

Respondents
(Appellants)

AND BETWEEN:

THE CREDITORS OF NORTHSTONE POWER CORP.

Interested Parties

APPEAL FROM THE ORDER OF
MR. JUSTICE FORSYTH
DATED APRIL 19th, 2002

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

COUNSEL:

R. S. Van De Mosselaer
J. Blacker
For the Applicant

J. K. Phillips
For the Respondent, Northstone Power Corp.
D. Legeyt
For the Respondent, the Trustee

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

WITTMANN, J.A. (for the Court):

[1] In this matter, the bankruptcy judge approved a proposal by Northstone after deciding R.J.K. Power and R.J.K. Mobile, ("R.J.K."), between them asserting lien claims for the sum of approximately 2.3 million dollars, were not entitled to vote at the creditors' meeting. The claim of R.J.K. was disallowed in its entirety by the Trustee pursuant to s. 135 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ("*B. I. A.*").

[2] The bankruptcy judge held that R.J.K. should not have been entitled to vote at the creditors' meeting, based on the ruling of the Trustee. No appeal was taken by R.J.K. from the decision of the bankruptcy judge on the entitlement of R.J.K. to vote at the creditors' meeting. No appeal of the Trustee's ruling had been filed at the time of the creditors' meeting. The appeal from the Trustee's ruling on the entitlement of R.J.K. to vote was taken by R.J.K. to the Registrar and then adjourned. Northstone, in the meantime, applied for a determination by another bankruptcy judge as to the validity of the R.J.K. claims after the R.J.K. claims were disallowed by the Trustee. The proceedings before the Registrar and before the other bankruptcy judge await the decision of this Court. The decision not to proceed with either proceeding is by agreement between counsel.

[3] R.J.K. appealed to this Court stating that the bankruptcy judged erred in not adjourning the approval application, pending the final determination of the validity of the R.J.K. claims. Alternatively, R.J.K. argues that the bankruptcy judge erred in not dismissing the application for approval pending more information on the value of the Elmsworth plant, the reviewable transactions issues, and the final determination of the R.J.K. claims.

[4] Our standard of review is mandated by the characterization of the function the bankruptcy judge was performing when he allegedly erred. If he made an error of principle or of law, the standard of review is correctness. If he made an error of fact, his decision is subject to review on the palpable and overriding error standard. If he erred in the exercise of his discretion, he must not fail to take into account relevant factors, or fail to exclude irrelevant factors, or to give proper weight to a relevant factor resulting in an unreasonable decision.

[5] With respect to the first ground, that is, the failure to adjourn, we find no error in principle in refusing to adjourn. Much was made in argument by the very able submissions of counsel for R.J.K. that the status of R.J.K. as a creditor, which if ultimately determined sufficiently in R.J.K.'s favour would grant them an effective veto, made it manifestly unfair and inequitable in the circumstances not to await the final outcome of the appeal or determination of R.J.K.'s status. But against this, the bankruptcy judge had before him the evidence of the other votes in the lien holder class, not all of whom were subcontractors to R.J.K., who voted 94.1 per cent to accept Northstone's proposal.

[6] In addition, the bankruptcy judge had a report from the Trustee indicating at best minimal value for the Elmsworth plant, that is a liquidation value of $250,000, and a negative value as a going concern or on a rebuilt basis.

[7] Perhaps another bankruptcy judge would insist on an independent formal appraisal or follow some other like process. The view put forward by R.J.K. is that this ought to have happened. R.J.K. however, called no evidence of this nature as to value, nor did they request an examination under oath of the Trustee to test the valuations put forward. At best, they expressed concern over the cost of the build out accepted by the Trustee as 3.9 million dollars. They suggested the cost may in fact be less, but there is no evidence as to the effect of less cost on value.

[8] Absent an error of law on the issue of an adjournment, we must defer to the discretion of the bankruptcy judge on the issue of the adjournment unless he made an error allowing us to intervene according to the standard of review. We find no such error in this context.

[9] Similarly, we find no ground upon which to interfere with the decision to approve the proposal. The bankruptcy judge was alive to the issue of the validity of the R.J.K. claims and indicated he was not deciding whether a claim existed or its value. In stepped reasons he then found “that as a result of the overwhelming vote of those entitled to vote approving the proposal” he was being asked for Court approval.

[10] He then reviewed case authority and s. 59 of the *B. I. A.*, and the report of the Trustee. He found that “it is clear that rejection of the proposal would not benefit, and in fact would be adverse to all other creditors of Northstone”, referring to all other creditors but for the possible status of R.J.K. as creditor. In addition, he closed by stating “I have carefully considered those matters which I must consider in deciding whether or not to approve the proposal and I am satisfied that under the circumstances of this case, the proposal should be approved”.

[11] On the record before us, the bankruptcy judge was entitled to make these findings as a matter of fact, and in the proper exercise of his discretion, to approve the proposal. We cannot interfere with these findings in the context of the proper standard of review.

[12] The appeal is dismissed.

APPEAL HEARD on June 24, 2002

MEMORANDUM FILED at Calgary, Alberta,

this 10th day of September, 2002

WITTMANN, J.A.

8

COURT OF APPEAL FOR ONTARIO

CITATION: Mundo Media Ltd. (Re), 2022 ONCA 607
DATE: 20220822
DOCKET: M53436

Thorburn J.A. (Motion Judge)

In the Matter of Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, and in the matter of Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

BETWEEN

Royal Bank of Canada

Applicant

and

Mundo Media Ltd., Mundo Inc., 2538853 Ontario Ltd., 2518769 Ontario Ltd., 2307521 Ontario Inc., 36 Labs, LLC., Active Signal Marketing, LLC, Find Click Engage, LLC, FLI Digital, Inc., Mundo Media (US), LLC, M Zone Marketing Inc., Appthis Holdings, Inc., Movil Wave S.A.R.L., Mundo Media (Luxembourg) S.A.R.L., and Mogenio S.A.

Respondents

Matthew P. Gottlieb, Bradley Vermeersch and Xin Lu (Crystal) Li, for the moving party SPay Inc.

Scott McGrath, Rachel Nicholson and Stuart Clinton, for the responding party Ernst & Young Inc., solely in its capacity as the court-appointed receiver of Mundo Media Ltd. and its subsidiaries

Heard: July 25, 2022 by video conference

ENDORSEMENT

OVERVIEW

[1] The issue to be decided on this motion is whether the moving party, SPay Inc. ("SPay"), should be granted leave to appeal the motion judge's decision not to stay the receiver's motion for judgment.

[2] On April 9, 2019, Mundo Media Ltd. ("Mundo") was placed in receivership by the Ontario Superior Court of Justice pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "*BIA*"). The responding party, Ernst & Young Inc., is the court-appointed receiver and manager of all assets belonging to Mundo and its subsidiaries (the "receiver").

[3] The receiver brought a motion for an order directing SPay to pay US$4,124,000 to Mundo for a number of unpaid invoices, pursuant to contractual agreements between Mundo and SPay or its predecessor. These agreements were signed in 2017, prior to the receivership.

[4] SPay sought to stay the receiver's motion on the basis that the agreements contain an international commercial arbitration clause which requires all disputes to be resolved by arbitration in New York pursuant to New York law.

[5] The motion judge refused SPay's request. He held that the arbitration provisions in the agreements were rendered inoperative by the "single proceeding model" in Ontario.

[6] The single proceeding model applies to insolvency proceedings. This model favours litigation concerning an insolvent company to be dealt with in a single jurisdiction rather than fragmented across separate proceedings. A creditor "who cannot claim to be a 'stranger to the bankruptcy', has the burden of demonstrating 'sufficient cause'" to have the proceedings fragmented across multiple jurisdictions: *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, 2001 SCC 92, [2001] 3 S.C.R. 978, at para. 76.

[7] The motion judge held that SPay is not a "stranger" to the insolvency proceeding as it will seek to set off some or all of the monies owing to Mundo. As such, it is part of the single proceeding model.

[8] SPay claims that the proposed appeal should be allowed to proceed as it meets the three-prong test for granting leave to appeal: (i) there is a real prospect of success as SPay is a stranger to the bankruptcy and its set-off does not render it an interested party to the proceeding; (ii) the proposed appeal involves an issue of public importance that will provide guidance to receivers, third parties and insolvency courts in addressing the enforceability of international arbitration agreements with third parties where a defence of set-off is raised by the third party; and (iii) the short time required to hear the appeal will not prejudice the receiver.

[9] The receiver claims the chances of success are unlikely as SPay's intended set-off of Mundo's single largest account receivable is in substance a claim such that it should be part of one proceeding along with all other creditors of Mundo, as contemplated by the single proceeding model. The receiver further claims that this appeal does not involve a matter of general importance; rather, the decision below is rooted in the motion judge's specific findings of fact, to which deference is owed. Moreover, the receiver claims that allowing the motion for leave to appeal would result in undue delay and additional costs.

[10] For the reasons that follow, the motion for leave to appeal is dismissed.

BACKGROUND FACTS

[11] The moving party, SPay, is a sports management technology company incorporated in Delaware and headquartered in Texas. It provides an integrated technology platform for sports league management, payment administration, sports recruiting, event support and sponsorship.

[12] Mundo is an advertising technology company that provided online marketing services to clients. It carried on business in Canada, the United States and Luxembourg.

[13] In or around March 2017, Mundo began to provide SPay's predecessor, Stack Media, Inc. with services, the terms of which were set out in a Publisher

Agreement and a Maintenance and Support Agreement, both executed in July 2017. Each agreement contains an identical arbitration clause which requires all disputes, including the arbitrability of the dispute, to be determined by arbitration in New York. The substantive law of the contracts is New York law.

[14] On April 9, 2019, as a result of Mundo's substantial decline in revenue, the Superior Court of Justice appointed the receiver. The receiver was authorized to take all necessary steps to collect Mundo's accounts receivable.

[15] The receiver claims that SPay owed Mundo US$4,124,000 as of the date of the appointment order. According to the receiver, this is Mundo's biggest account receivable.

[16] SPay claims that certain amounts were incurred by Stack Media Inc. before SPay bought that corporation's assets, and that the remaining amount owing, if any, would be set off against the amount that Mundo owes to SPay. SPay has not commenced any set-off proceedings against Mundo.

[17] On May 10, 2021, after making efforts to collect the account receivable for two years, the receiver brought a motion directing SPay to pay Mundo US$4,124,000. The receiver filed no evidence on the motion.

[18] On June 30, 2021, SPay moved to stay the receiver's motion in favour of arbitration in New York pursuant to the arbitration clauses in the agreements and

the *UNCITRAL Model Law on International Commercial Arbitration*, adopted by the United Nations Commission on International Trade Law on June 21, 1985, as amended on July 7, 2006 (the "*UNCITRAL Model Law*"). The *UNCITRAL Model Law* is incorporated by reference in the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sch. 5 (the "*ICAA*"), giving it the force of law in Ontario: s. 5.

[19] The *ICAA* requires the court to refer a matter to arbitration upon a party's request, unless there are grounds on which the court should refuse the stay. A stay must be granted unless there is some cogent reason to ignore the express terms of the arbitration clause, such as "the agreement is null and void, inoperative or incapable of being performed": *ICAA*, at Schedule 2, art. 8.

[20] The motion judge framed the substantive issue to be determined on the motion as follows:

> [D]oes the fact that claims by and against Mundo are being administered by the court-appointed Receiver in insolvency proceedings in Ontario under the BIA mean that the arbitration agreements between SPay and [Mundo] are rendered null and void, inoperative or incapable of being performed? The answer to this question, in my view, turns on the applicability of the single proceeding model to the circumstances of this case.

[21] SPay argued that the single proceeding model is only meant to centralize claims by creditors *against* a debtor, not claims *by* a debtor against third parties. SPay filed expert evidence that under New York law the arbitration clauses in the agreements would be enforced even if the plaintiff was bankrupt, and that a receiver is generally bound by arbitration agreements executed prior to an appointment order. SPay claimed that it was not a creditor, as a set-off is a defence rather than a claim against the debtor. As such, SPay asserted that the single proceeding model should not apply to it.

THE MOTION JUDGE'S REASONS

[22] There was no dispute that the receivership proceedings were properly commenced in Ontario, or that the receiver's claim related to monies owed to Mundo and the prosecution of proceedings to recover same.

[23] The motion judge held that it would be impracticable to have an arbitrator in New York decide the question of whether a receiver appointed by an Ontario court is bound by an arbitration clause in the context of insolvency proceedings. The motion judge explained that the receiver is an officer of the Ontario court and answers only to that court.

[24] The motion judge then addressed whether the arbitration clauses in the agreements were rendered null and void, inoperative or incapable of being

performed by virtue of the single proceeding model. He noted that "the single proceeding model … is not strictly limited to claims against a debtor; it also applies to claims advanced by the debtor against a third party." He further noted that, in cases where the third party is not a stranger to the bankruptcy, courts have invoked the single proceeding model to allow a claim by a debtor against a third party to be commenced in the jurisdiction where the bankruptcy occurred, referring to *Re: Essar Steel Algoma Inc. Et al,* 2016 ONSC 595, 33 C.B.R. (6th) 313, at para. 31, and *Montréal, Maine & Atlantic Canada Co.*, 2013 QCCS 5194, at para. 29.

[25] The motion judge held that the "determining factor" in deciding whether a party is a stranger to the proceeding "is the degree of connection of the claim to the insolvency proceedings."

[26] The motion judge held that SPay was not a stranger to the proceeding because: (i) the receiver was seeking to realize on a significant Mundo asset for the benefit of all creditors; (ii) SPay "intends to assert … its own claim against Mundo by way of the defence of set-off"; and (iii) "nothing turns on whether the money SPay claims to be owed under the Publisher Agreement is a counterclaim or set-off. It is in substance a claim against Mundo."

[27] For these reasons, on April 26, 2022, the motion judge dismissed the motion to stay the receiver's claim to collect against SPay, holding as follows:

> Requiring the Receiver to commence arbitration proceedings in New York would be unfair to Mundo's creditors and inconsistent with the object of the BIA to, among other things, enhance efficiency and consistency and avoid the chaos and inefficiency of multiple proceedings and of potentially sending the Receiver "scurrying to multiple jurisdictions".

THE TEST TO BE MET ON LEAVE TO APPEAL

[28] SPay requires leave of this court to pursue an appeal pursuant to s. 193(e) of the *BIA*. Sections 193(a)-(d) of the *BIA* provide that an appeal lies to the Court of Appeal from an order of the court in specified scenarios, barring which there is no automatic right to appeal. Instead, leave to appeal may be granted by a judge of the Court of Appeal "in any other case", pursuant to s. 193(e) of the *BIA*. Thus, leave is required in this case and a single judge of this court can determine whether leave should be granted.

[29] On a motion for leave to appeal under s. 193(e) of the *BIA*, the moving party must satisfy three criteria, as set out by Blair J.A. in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at para. 29.

[30] First, the proposed appeal must be *prima facie* meritorious; that is, the proposed appeal must raise "legitimately arguable points … so as to create a realistic possibility of success on the appeal": see *Ravelston Corp. (Re)* (2005), 24

C.B.R. (5th) 256 (Ont. C.A.), at para. 29. This can include a finding that the decision "(a) appears to be contrary to law, (b) amounts to an abuse of judicial power or (c) involves an obvious error causing prejudice for which there is no remedy": *Pine Tree Resorts*, at para. 31. Of course, this assessment needs to be conducted against the backdrop of s. 243 of the *BIA*, which has been interpreted to give supervising judges a broad mandate to resolve issues in bankruptcy: see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at paras. 57-58. Commercial list judges with experience in insolvency proceedings are alive to the legal and business realities faced by debtors, creditors and the receiver, and substantial deference is therefore owed to their decisions: see *Romspen Investment Corporation v. Courtice Auto Wreckers Limited*, 2017 ONCA 301, 138 O.R. (3d) 373, at para. 84, leave to appeal refused, [2017] S.C.C.A. No. 238, referring to *Royal Crest Lifecare Group Inc. (Re)* (2004), 181 O.A.C. 115 (C.A.), at para. 23, leave to appeal refused, [2004] S.C.C.A. No. 104, and *Grant Forest Products Inc. v. The Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426, at paras. 97-99.

[31] Second, the proposed appeal must raise an issue or issues of general importance.

[32] Third, the proposed appeal must not unduly delay the progress of the proceedings: *Cosa Nova Fashions Ltd. v. The Midas Investment Corporation*, 2021 ONCA 581, 95 C.B.R. (6th) 240, at para. 37, citing *Marchant Realty Partners Inc. v. 2407553 Ontario Inc.*, 2021 ONCA 375, 90 C.B.R. (6th) 39, at para. 12, *Pine Tree Resorts, at para. 29, and McEwen (Re)*, 2020 ONCA 511, 452 D.L.R. (4th) 248, at para. 76.

ANALYSIS AND CONCLUSION

[33] In determining whether SPay's proposed grounds of appeal are *prima facie* meritorious, the first question is whether the motion judge erred in holding that, as a matter of law, the issue of arbitrability should be decided by the motion judge rather than an arbitrator.

[34] SPay claims that, as a general rule, mandatory arbitration provisions shall apply absent "very clear language" to the contrary: *Automatic Systems Inc. v. Bracknell Corp.* (1994), 18 O.R. (3d) 257 (C.A.), at p. 266; see also *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, at paras. 84-85, and *Uber Technologies Inc. v. Heller*, 2020 SCC 16, 447 D.L.R. (4th) 179, at para. 34, citing *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35, [2007] 2 S.C.R. 921, at para. 11.

[35] However, the receiver is appointed by the court and the receiver's authority emanates solely from the court order. As a matter of law therefore, only the court can determine the receiver's powers and obligations, which includes determining whether the receiver has the authority to prosecute the debt through the single proceeding model.

[36] The court must therefore assess the limits on the receiver's powers pursuant to the court order, including whether the presence of an arbitration clause precludes the receiver from asserting claims by the debtor against third parties not involved in the insolvency proceeding under the agreement in which that clause is found: see *Canada (Attorney General) v. Reliance Insurance Co.* (2007), 87 O.R. (3d) 42 (S.C.), at pp. 51-54; *Luscar Ltd. v. Smoky River Coal Ltd.*, 1999 ABCA 179, 175 D.L.R (4th) 703, at para. 33, leave to appeal requested but application for leave discontinued, [1999] S.C.C.A. No. 381.

[37] Moreover, although article 8 of Schedule 2 to the *ICAA* requires a stay in favour of the arbitration agreement, the legislation expressly provides room for courts to "find[] that the agreement is … inoperative". This express carve-out, read in conjunction with the broad discretion that courts exercise under s. 243 of the *BIA* in supervising bankruptcy matters, enables bankruptcy courts to preclude the operation of the *ICAA* by virtue of the operation of the single proceeding model.

[38] As such, I find the first ground of the proposed appeal is not *prima facie* meritorious.

[39] The second ground of the proposed appeal is whether SPay is a stranger to the insolvency proceeding such that the arbitration between the debtor (Mundo) and the third party (SPay) should be permitted to proceed. As noted by the motion judge, "The answer to this question, in my view, turns on the applicability of the single proceeding model to the circumstances of this case."[1]

[40] The single proceeding model is a judicial construct used to group all claims against a debtor. The objective of the single proceeding model is to bring efficiency to the insolvency process and maximize returns for the benefit of all creditors: see *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 22, citing Roderick J. Wood, *Bankruptcy and Insolvency Law* (Toronto: Irwin Law, 2009), at pp. 2-3; *Rompsen Investment Corporation*, at para. 70.

1 The receiver also argued before the motion judge that the decision in *Petrowest Corporation v. Peace River Hydro Partner*s, 2020 BCCA 339, 43 B.C.L.R. (6th) 8, leave to appeal granted and appeal heard and reserved January 19, 2022, [2021] S.C.C.A. No. 30, was dispositive of SPay's motion. The motion judge considered that decision and said that he was "not persuaded by the logic and reasoning" in it. After noting that the decision was under appeal at the Supreme Court of Canada, and that he was not bound by it, he declined to follow it. Neither party has resurrected an argument that relies on *Petrowest* and, as such, I make no comment on its applicability to this case.

[41] The advantages of the single proceeding model were outlined by Deschamps J. in *Century Services*, at para. 22:

> The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, … the *BIA* allow[s] a court to order all actions against a debtor to be stayed while a compromise is sought. [Emphasis added.]

[42] In *Essar Steel*, at paras. 31 and 33, Newbould J. outlined the considerations to be taken into account when applying the single proceeding model to third parties:

> [In this case, the] issues are completely interwoven and it would make no sense to require [the applicants] to litigate its claim against [the moving parties] in the United States when [the moving parties'] claim against [the applicants] must be dealt with in this Court in Ontario. The claim of [the applicants] against [the moving parties] is an asset of the applicants to be dealt with in this Court.
>
> …
>
> For the single control model to apply, the [third party] … must not be a stranger to the insolvency proceedings. [Emphasis added; footnotes omitted.]

See also: *Montréal, Maine & Atlantic Canada Co.*, at para. 29.

[43] SPay claims that it is a stranger to this proceeding because: (i) it has not filed a claim against Mundo; and (ii) it proposes to assert a set-off rather than make a claim. A set-off is a defence, SPay submits, and there is no suggestion that the monies SPay claims it is owed exceed the amount payable by SPay to Mundo. SPay states that it does not intend to issue a claim against Mundo, file a proof of claim or receive a distribution from the estate: see *P.I.A. Investments Inc. v. Deerhurst Ltd. Partnership* (2000), 20 C.B.R. (4th) 116 (Ont. C.A.), at para. 32; *Thorne v. College of the North Atlantic*, 2022 NLCA 31, at para. 15.

[44] SPay does not dispute that, had it commenced an action against Mundo, SPay would then be a creditor subject to the single proceeding model.

[45] The question then is, what difference does it make, if any, that the third party seeks to reduce or eliminate the amount payable to the debtor by way of a set-off but does not issue a claim seeking those same monies from the debtor?

[46] Canadian jurisprudence distinguishes between a set-off defence and a claim, and further, between legal and equitable set-off: *P.I.A. Investments Inc.*, at para 32. However, the form of a proceeding may be less significant in the context of bankruptcy as the treatment of the bankrupt estate's largest account receivable is inextricably interwoven with the bankruptcy proceeding.

[47] As noted by Zarnett J.A. of this court, “Although equitable set-off is a defence, ... [i]t is a way of raising, as a defence, a plaintiff’s liability to take into account a loss it occasioned to the defendant in reduction of the plaintiff’s claim. It is often referred to as a ‘claim for equitable set-off’”: *3113736 Canada Ltd. v. Cozy Corner Bedding Inc.*, 2020 ONCA 235, 150 O.R. (3d) 83, at para. 37.

[48] It would seem therefore that the format of the proceeding is not determinative. The fact that a claim is made by a third party by way of a set-off to recover monies from a debtor may be of great significance to all creditors in the single proceeding model; this is particularly so where the debtor’s largest account receivable is at stake. To approach this matter differently would defeat the purpose of the “single proceeding model”, which is intended to “avoid the inefficiency and chaos” of a decentralized receivership process: *Century Services*, at para. 22.

[49] In this case, SPay is a third party to the insolvency proceeding, but is also Mundo’s largest debtor. The receiver claims that SPay owes Mundo US$4,124,000 as of the date of the appointment order. SPay’s proposed set-off may, if successful, eliminate all debt owing by SPay to Mundo.

[50] SPay is not a stranger to bankruptcy because the outcome of its proposed set-off will determine both the amount of Mundo’s single biggest account receivable and the size of the bankrupt’s estate, thereby affecting all other

creditors. As noted by the Supreme Court, the most significant debtor of a bankrupt estate is "[f]ar from being a 'stranger' to the bankruptcy": *Sam Lévy*, at para. 49.

[51] Whether SPay initiates a claim or claims a set-off, it will inevitably step into the shoes of Mundo's creditor, and should therefore be treated in the same way as all other unsecured creditors under a single proceeding. The form of proceeding does not change SPay's substantive role in this regard as a creditor of Mundo. SPay should not be entitled to use the form of proceeding to obtain priority where none is otherwise warranted as this would violate the basic principle of equal treatment in bankruptcy. As noted by the motion judge, if SPay's dispute with Mundo is not brought within the single proceeding model, the purpose of this model, to avoid the chaos and inefficiency of a decentralized receivership process, would be defeated.

[52] I appreciate that the single proceeding model is typically used as a 'shield' to protect debtors from having to defend claims in multiple proceedings or jurisdictions, rather than as a 'sword' to enable receivers to pursue claims against a third party. However, I see nothing in the jurisprudence precluding this result. On the contrary, the motion judge identified two decisions – *Essar Steel* and *Montréal, Maine & Atlantic Canada Co.* – which employed the single proceeding model in the very manner contested by the moving party. The motion judge's decision is

also in keeping with the purpose of the single proceeding model as outlined by the Supreme Court in *Century Services* – to promote efficiency and maximize returns for creditors – and accords with the jurisprudence that parties should not be allowed to contract out of the single proceeding model where one party may make claims that will seriously adversely affect all creditors. I see no principled reason for drawing the distinction urged by the moving party.

[53] I note that the motion judge did not state that set-offs always, or even often, render a third party part of the single proceeding model. Rather, he held that "claims by a debtor against a third party *may* be required to be heard in the insolvency proceedings", and that "[t]he determining factor is the degree of connection of the claim to the insolvency proceedings". The "dominating considerations" for the motion judge in this case were that "the Receiver is seeking to realize on a significant Mundo asset for the benefit of all creditors and that SPay intends to assert, in whatever forum is ordered, its own claim against Mundo by way of the defence of set-off."

[54] Therefore, the motion judge's conclusions rest on findings of fact about the specific situation in which these parties find themselves, having regard to the vast amount of this account receivable relative to Mundo's other debtors. The motion judge's findings of fact, upon which he based his decision that there is a strong

connection between SPay's dispute with Mundo and the receivership, are findings to which deference is owed.

[55] For these reasons, I do not find that the second proposed ground of appeal is *prima facie* meritorious.

[56] SPay certainly articulates issues that may be characterized as issues of some importance, namely: (i) when the single proceeding model renders an arbitration clause in an international commercial agreement inoperative; (ii) when a party is a "stranger" to the single model proceeding; and (iii) whether a determination of arbitrability by an arbitrator would be impracticable. Nonetheless, in this case, I see no error in the motion judge's articulation of the law. More importantly, on this point, the issues of concern raised by SPay are really about the application of the law to the specific facts in this case, and are not necessarily issues of more general importance. This is especially true in light of the infrequency with which these issues arise, as evidenced by the scarcity of available jurisprudence with comparable facts.

[57] Moreover, allowing the appeal to proceed would result in undue delay, additional litigation costs and deterioration of the assets of the receivership. The receiver has been trying to pursue its largest account receivable since May 24, 2019, after dealing with multiple counsel purporting to act for SPay. The receiver

served its motion record on May 10, 2021. Since then, there have been other delays as a result of limited court resources, flowing in part from the COVID-19 pandemic.

[58] For these reasons, the motion for leave to appeal is dismissed. Costs of this motion are awarded to the responding party in the amount of $15,000, as agreed upon by the parties.

[59] I would like to thank counsel for their excellent advocacy.

"J.A. Thorburn J.A."

9

Ontario Supreme Court
Ben-Israel v. Vitacare Medical Products Inc.
Date: 1997-11-06

Ben-Israel

and

Vitacare Medical Products Inc. et al.

Court File No. 90-CU-003097

Ontario Court (General Division) Beaulieu J.

Heard: October 21, 22, 23, 24, 25 and 28, 1996

Judgment rendered: November 6, 1997

Bernard B. Gasee, for plaintiff.

Janet E. Gross, for defendants.

BEAULIEU J.:—

Introduction and Contextual Background

[1] This an action to recover damages for breach of contract, breach of confidence and breach of fiduciary duty, in the context of an arm's length, commercial customer/manufacturer relationship. A claim for passing off was withdrawn. An injunction against the defendants was also requested in the statement of claim, but was not pursued at trial. The plaintiff alleges that there existed between himself and the defendant manufacturers a verbal non-competition agreement, and that the defendants breached this agreement by manufacturing and marketing a product virtually identical to his, using remarkably similar packaging, and targeting the same retailers. He also alleges that the defendants had a duty not to compete against him using confidential information supplied by him, regarding his product and his business and that, because of the nature of their relationship and the power the defendants had to use this information against him, they owed him a fiduciary duty as well.

[2] The defendants filed a counterclaim requesting injunctions against the plaintiff interfering with their business relations with customers, and claiming damages for slander. The counterclaim was dismissed on consent near the end of the trial.

[3] The plaintiff has a degree in chiropractory and is licensed to practice in Ontario. While he was a student, and after, he did extensive research into pillows and cushions. He also

became active in Medline computer system with respect to information on pillows and cushions in Europe, South East Asia and other countries. His main interest was in designing and rebuilding things. He eventually went into business as a sole proprietorship, Aquarius Products.

[4] The defendants Vitacare Medical Products Inc. and Vitafoam Corporation are effectively under the same ownership, with Vitacare Medical and another branch, Engineer Foam Inc., fabricating foam for industrial enterprises.

[5] The parties came into initial contact sometime in the mid 1980s. One of the main difficulties in this case is that neither party, for apparently different reasons, were great believers in formal arrangements. The determination of the issues will therefore be based on the credibility of the witnesses primarily when seen in context of their testimony, the related documentary evidence where it exists, and the evidence as a whole.

[6] For the most part the plaintiff dealt with therapeutic products. Around 1987 he became more involved with mass-merchandising concepts, starting with K-Mart. His approach was to design the component and order from suppliers. He designed the pillow which is the major product in question in this case. He then designed a way of inserting it into a cloth cover which in turn was covered by a plastic bag with printed cardboard insert. He approached K-Mart with a view to testing the possibility of sales to major retailers. Their representative (Mr. Keba) expressed interest but indicated that the packaging needed more attention.

[7] To the best of the plaintiff’s knowledge there was no therapeutic pillow marketed by mass merchandising up to that time. He went to Concepts Inc. who produced an original drawing, a picture, script etc. He used the insert with the first order from K-Mart and, except for the addition of a bar code and address later on, there have been no changes in either the English or French versions which have been used since that time.

[8] The plaintiff first dealt with the defendants regarding foam for tables. Around 1981 or 1982 he requested that they cut foam for his pillows. A couple of years later he went to Woodbridge Foam Corporation because Vita could not mould his low back cushion. In other words the defendants Vita cut the foam but Woodbridge Foam moulded it. This arrangement went on for approximately one year.

[9] In 1985 Woodbridge Foam took a sample of the plaintiff's mould of the low-back cushion to their customer and proceeded to get it produced themselves. After seeking legal advice, which he accepted, the plaintiff dropped the possibility of legal action because of the anticipated expenses.

[10] After the experience with Woodbridge he determined that anyone with whom he dealt from then on would have to give him full assurances that they would not use his ideas and compete with him as Woodbridge had.

[11] He then went to Vita and gave them a sample of the foam pillow which had previously been moulded by Woodbridge Foam. The plaintiff says that in his very first personal contact with Vita he gave specific instructions that they were not to compete with him on the same item. He received assurances to the effect that "We are in the business of manufacturing foam for our customers. We are not in the business of competing with them." He says that he specifically requested that the defendants' representatives were not to approach his customers. The defendants indicated that their market was limited to home care and health stores.

[12] The plaintiff's main contact initially and throughout approximately five years was Mr. Rowlands. The latter reaffirmed the promise that "We will not compete with you." Through Rowlands, at the plaintiff's request, arrangements were made to meet the senior owners and partners, Irving and Mel Himell. The plaintiff described the meeting as being cordial and he left with a feeling or reassurance that they would not step on his toes. Rowlands knew the plaintiff was selling to various stores including Hy & Zel, K-Mart, Woolco and Consumers Distributing. Sales were very brisk. Rowlands was also aware of the volume of the plaintiff's sales through his personal and regular contact with the plaintiff and the delivery orders. The relationship between the two men was described as cordial, close and warm. The plaintiff says that he told Rowlands about K-Mart and the insert with pride and enthusiasm. There were no secrets, no problems with deliveries, and Rowlands was privy to the plaintiff's pricing and general approach.

[13] Things went according to plans and agreement until early 1990 when the plaintiff became aware that the defendants had not only approached his customers but had produced a pillow, insert and packaging that were virtually identical to his. Indeed when he first saw it, by accident at the Canadian Chiropractic School graduation night, he thought it was his own.

On closer view, he was shocked to discover that it was not. However, the layout, colours, picture, language, etc. were virtually the same.

[14] In addition to this discovery the plaintiff also was informed by Mr. Keba at K-Mart that a sales representative of the defendants had approached them. The plaintiff felt betrayed by Rowlands, a friend and confidant for over five years. He was angry and requested an immediate meeting with the principals of Vita.

[15] On February 27, 1990, the plaintiff attended a meeting at the defendants' head office. He was alone but the defendants' contingent included the two Himells, Rowlands, and their lawyer, Caplan. Despite the potential problems raised by the incidents at the College and K-Mart, the plaintiff perceived the meeting to be positive. Mel Himell appeared to be genuinely upset and indignant that his representative had called upon K-Mart. Rowlands defended the move because if they had not their own competitor would have. The plaintiff perceived Mel Himell to be admonishing Rowlands. The plaintiff reaffirmed and underlined the fact that Vita had no business being at K-mart pursuant to their agreement. The two pillows were then displayed (Exhibit 1, the plaintiff's; Exhibit 28 the defendants'). Mel Himell seemed shocked at the demonstration. He gave the impression that he was truly unaware of the situation.

[16] Discussion ensued regarding K-Mark, Woolco, Consumers, and the fact that the defendants were not to be there according to the initial and long-standing agreement.

[17] Unfortunately, no one, including the lawyer, took any notes, although the plaintiff prepared his record and impressions after returning to his office. The result of the meeting was that the defendants agreed to cease and desist their contacts with the plaintiff's identified customers and that this would be confirmed in writing.

[18] The plaintiff left the meeting feeling good because of the defendants' promise to clear up the situation. However, his positive feelings lasted only until the lawyer finally produced a document that not only did not reflect the essential points of the meeting but included new conditions precedent to their undertaking not to pursue their contacts with the plaintiff's customers. These conditions, the plaintiff says, were simply never raised at the meeting.

[19] The plaintiff says that other issues that *were* raised were initiated by Irving Himell. The latter discussed the possibility of the plaintiff endorsing some of the defendants' products with a royalties aspect. The defendants also expressed interest in the plaintiff's designs and new

products. These matters were for future discussions and unrelated to the issue of honouring their previous commitment and rectifying the present problem. It was clear that they had agreed not to compete with him, to stay away from his customers and not to use the offensive insert. It is the plaintiff's recollection that not only did no one take notes for the defendants but that the lawyer merely stood through the meeting and at times absented himself.

[20] Further attempts were made to clear up the difficulties, including a meeting between Mel Himell and the plaintiff on May 29, 1990. By that time the written material from the defendants bore little resemblance, if any, to the earlier agreement at the meeting. The plaintiff says that the lawyer clearly attempted to distort and minimize the effect of the original verbal agreement. Mel Himell, in the course of the May meeting, allegedly told the plaintiff, "You have to give me permission to sell to Woolco." The February and March meetings and the agreements discussed at that time were essentially not denied in May, nor was the fact that the original understanding had been breached, but the defendant said, "Yes, but you have to give me permission to sell to them because the buyer, Mr. James, has said that he is not going to buy our other products unless we sell him the pillows as well." The plaintiff says that he would require some form of compensation before he could consider such permission. The resulting impasse was never resolved and this litigation ensued.

[21] Needless to say the defendants deny the existence of any non-competition agreement at any time. Their position is that such an agreement is unheard of in such a highly competitive dog-eat-dog industry. They also say that there was nothing really unique or special about the plaintiff's pillow. They go so far as to say that the coincidental similarity of the insert is basically as a result of their use of "company colours"! As will be seen when dealing with the main issues of this case, I found the plaintiff and his witnesses to be more credible than those of the defendants. The latter impressed me as generally demonstrating a condescending, evasive and manipulative mind-set. That mind-set seems to have prevailed particularly when the plaintiff was not only becoming increasingly successful but had the temerity to assert his rights under their prior agreement. This was so even though they knew from the very beginning of the plaintiff's negative experience with Woodbridge and the resulting elevated importance of honesty and good faith.

Issues

[22] There are four major issues to be resolved in this case:

1. Was there a non-competition agreement or contract between the parties? If so, what was the extent of it and was it breached?

2. Was there a duty of confidence owed by the defendant to the plaintiff? If so, to what information did it relate and was it breached?

3. Was there a fiduciary duty owed by the defendant to the plaintiff? If so, how did it arise and was it breached?

4. What is an appropriate remedy in the circumstances, and what is the quantum of damages, if any?

1. Non-Competition Agreement

[23] There was no written non-competition agreement, but as there was no written contract between the parties at all this cannot be determinative. There can be no doubt that there was a contract, for the defendants to produce foam pillows for the plaintiff, and the question is whether non-competition was a term of that contract. The plaintiff asserts that there was a non-competition agreement, made orally at the outset of their dealings, and reconfirmed periodically.

[24] I believe the testimony of the plaintiff in this regard. He appears credible, logical and cautious. Despite his characteristic tendency to verbosity and repetition, his description of the course of events rings truer than that of the defendants. Given his previous negative experience with Woodbridge, it is natural and reasonable that he would have made non-competition a term of an agreement with any new supplier of foam for his products. Although there is a marked lack of correspondence, notes or other documentation in this case, I find that the circumstances as a whole, and certain pieces of evidence, strongly support the plaintiff's position, to a large extent because the plaintiff at least followed up the major meetings, with responses that pointed out perceived inaccurate representations of what transpired at those meetings. In addition, at the later key meetings, the plaintiff was always outnumbered anywhere from two to three to one including the defendants' lawyer. I accept the plaintiff's evidence that the latter took no notes, that no one took notes and that all persons were not constantly in the room. This *modus operandi* on the part of the defendants impressed me as a pattern that started with the two major defendant brothers and accelerated to having others, including their lawyer, when the plaintiff later became more demanding of clarification. Thus, the initial meeting with the defendants, in my view, reflects what the

plaintiff was to unfortunately discover as time went on. The defendants were not afraid to take advantage of this entrepreneur.

[25] I accept the plaintiff's evidence that the defendants said that they were selling to a supplier, not to chiropractors, when the plaintiff first found a Vitacare pillow for sale at a chiropractors' conference and confronted them about it. There is also the apology by the defendant, through Rowlands, to the plaintiff for approaching Hy & Zel's, which was done through their recently-acquired subsidiary Baymar, and an admission that such an approach would be wrong had it been done directly. Finally, there is the letter from Vitacare to the plaintiff after the February 27th, 1990 meeting, in which they expressly agreed not to approach the plaintiff's three largest clients, subject to conditions which the plaintiff asserts were not discussed at the meeting. All of this supports the plaintiff's contention that the defendants had agreed not to sell to chiropractors, not to sell to mass merchandisers generally, and not to sell to his specific clients.

[26] I therefore believe the plaintiff and find that there was indeed a non-competition agreement between Aquarius and Vitacare, regarding the double contoured pillow. It remains to be determined, however, when this agreement arose, and whether this agreement was intended to cover all sales of posture pillows by the defendant, any sales other than those to the defendants' current customers, if any, or only sales to customers identified by the plaintiff as his, namely chiropractors and mass distributors.

[27] There is little room for doubt that the matter was discussed early on in the parties' business relationship, given the plaintiff's negative experience with his previous supplier, and his desire to prevent a similar occurrence. I believe that the plaintiff was given assurances by everyone with whom he dealt at Vitacare, including his initial contact and Rowlands, and the two brothers Himell. I further believe and find that he was entitled to rely on these assurances, as they formed a fundamental condition for him to deal with a supplier, and he made that quite clear, using the account of what happened with his previous supplier to underscore the importance of this condition. Any reasonable person, upon hearing his demand for non-competition, would realize that he considered this to be a fundamental term of their business arrangement. I find and believe that the rather colourful language used by the Himells, reassuring that they would not "screw" him, can only reaffirm the trust that he placed in them and their acceptance of his offer to deal on his terms.

[28] I believe that this non-competition agreement commenced when Aquarius first began dealing with Vitacare for the manufacture of the double contoured foam pillow in 1985. The latest that this agreement could have come into effect was at the meeting in late 1985 or early 1986, when the defendant's principals, Irving and Mel Himell, confirmed the agreement with the plaintiff. At that meeting the Himells reassured him to the effect that they manufactured foam for their customers, and did not compete with them. Vitacare had at that time a bigger pillow, and said that their market was limited to home care and health stores.

[29] There was therefore an agreement not to compete with the plaintiff's pillow, nor to approach the plaintiff's customers. I am satisfied that this agreement was breached. Both the agreement and the breach have been proven on the balance of probabilities. The defendants modified their pillow to be indistinguishable from the plaintiff's after they began manufacturing for him, using an insert that was the same colour scheme and used virtually the same illustrations and information, and directly approached the exact customers that he had periodically requested that they not approach, namely the chiropractic field and the mass-retailers Hy & Zel's, K-mart, Woolco and Consumers Distributing. The stark similarity of Exhibits 1 and 28, the plaintiff's and the defendants' subsequent pillow, is so striking that even the plaintiff perceived the defendants' pillow as his own when he first saw it on public display. The defendants' attempts at explanations, such as company colours, etc., rang extremely hollow. I found the defendant witnesses generally and, particularly Rowlands and Mel Himell, to be evasive, contradictory, condescending to the plaintiff and basically not credible. Their demeanour and evidence confirmed the plaintiff's description of persons who had effectively taken advantage of a sole business proprietor and were prepared to use their superior corporate clout to keep him under control. This attitude is relevant to the other issues. The reality of this case is that the plaintiff has established the agreement in issue which I have determined after careful and reasoned consideration of the evidence as a whole.

[30] In the absence of a precise date, I conclude that since the agreement arose as early as mid-1985, and no later than mid-1986, fixing the date at January 1, 1986 is appropriate for the purpose of calculating any damages.

2. Duty of Confidence

[31] Canadian intellectual property legislation has developed to protect the proprietary interests of those who create or develop information. The *Patent Act,* R.S.C. 1985, c. P-4, and

the *Copyright Act,* R.S.C. 1985, c. C-42, are two examples of statutes designed to protect the creative process and to regulate who will benefit from the use and disclosure of original and confidential information. Since the plaintiff did not seek to register any of his products neither of these statutes apply, and he is therefore relying on the equitable concept of duty of confidence.

[32] In *Pharand Ski Corp. v. Alberta* (1991), 37 C.P.R. (3d) 288 at p. 333 (Alta. Q.B.), Mason J. conducts a comprehensive survey and analysis of the origin, content and application of the duty of confidence. I need not repeat it here, but I am left with no doubt that Vitacare owed the plaintiff a duty of confidence, and that the defendant breached that duty.

[33] La Forest J., writing for the majority of the Supreme Court of Canada, in *Lac Minerals Ltd. v. International Corona Resources Ltd.,* [1989] 2 S.C.R. 574, 26 C.P.R. (3d) 97, said the following [at p. 635] on this issue:

> The test for whether there has been a breach of confidence… consists in establishing three elements: that the information conveyed was confidential, that it was communicated in confidence, and that it was misused by the party to whom it was communicated.

[34] The information in question in the present case is the design of the pillow and the insert, as well as the customer list, quantities and pricing of the plaintiff's pillow. The plaintiff stated that all of these pieces of information were confidential, and that they were communicated in confidence. I believe the plaintiff when he says that, although there were similar pillows available prior to his, he did considerable research, including clinical research, in order to design a pillow superior to those then on the market. He made changes in size, shape, contouring, foam density and covering. He also hired a design firm to redesign the external packaging, in order to make the product more saleable. I also believe him when he says that the Himells, in his first meeting with them, assured him that they would not disclose his information to his competitors or anybody else and that they had a different market.

[35] The defendants argue that the plaintiff never conveyed any confidential information to them, as all of the information was previously in the public domain. However, the case of *Saltman Engineering Co. v. Campbell Engineering Co.,* [1963] 3 All E.R. 413*n*, 65 R.P.C. 203 (C.A.), which is often quoted as the modern source of the statement of the duty of confidence,

makes a notable qualification to the restriction of the duty to information which is not public knowledge. In that case, the defendant company, who was contracted by the plaintiffs to manufacture certain leather punches from drawings of tools provided solely for that purpose, used those drawings to construct tools so that they could manufacture identical punches and sell them as their own. Lord Greene M.R. stated that:

> The information, to be confidential, must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker on materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.
>
> What the defendants did in this case was to dispense in certain material respects with the necessity of going through the process which had been gone through in compiling these drawings, and thereby to save themselves a great deal of labour and calculation and careful draughtsmanship… That, in my opinion, was a breach of confidence.

[36] The circumstances in the present case are very similar—the plaintiff used information that was public knowledge, and made something new of it. He invested his time, effort, ingenuity and money to produce a marketable product, and while it was open to the defendants to do this work, it was the plaintiff who actually did so, and the defendants, noting the plaintiff's success, decided to take advantage of their newly-gained knowledge.

[37] Also relevant is Megarry J.'s oft-quoted comment in *Coco v. A.N. Clark (Engineers) Ltd.,* [1969] R.P.C. 41:

> In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture *or the manufacture of articles by one party for the other,* I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence [Emphasis added.] [Page 48.]

[38] Far from proving that no obligation of confidence existed, the Himells had actually agreed to keep the plaintiff's information confidential. Obviously they meant that they would not disclose anything about the plaintiff's business to others, but this agreement shows that whether they regarded the information as confidential or not, they knew that the plaintiff regarded and had imparted it as such.

[39] Finally, in the same line of cases, a "springboard test" was articulated by Roxburgh J. in *Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd.,* [1969] R.P.C. 128 (C.A.), as follows:

> …a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication, and springboard it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public… The possessor of the confidential information still has a long start over any member of the public… It is, in my view, inherent in the principle upon which the *Saltman* case rests that the possessor of such information must be placed under a special disability in the field of competition to ensure that he does not get an unfair start.

[40] The receipt of confidential information in circumstances of confidence establishes a duty not to use that information for any purpose other than that for which it was conveyed, and not to use it to the detriment of the confider. The relevant question to be asked is what the receiver of the information is entitled to do with it, not what they are prohibited from doing with it, and the onus falls on the confidee to show that the use of the confidential information was not prohibited. This onus was not met in this case, especially in light of the fact that the defendants had been expressly forbidden from competing with the plaintiff in this market. The only use to which the defendants were entitled to put the plaintiff's information was the manufacture of the pillow for the plaintiff. In this role, the defendants were under a "special disability" with regard to the use of that information, in order to prevent them from doing exactly what they did—get an unfair start in the market, and use the information to the detriment of the plaintiff who supplied the information.

[41] The defendants in this case did receive confidential information, imparted in circumstances of confidence, and used it as a springboard to produce and sell their own product. They used the plaintiff's pillow and the information and layout of his insert, both of which had taken time, effort, research and money to develop. They also knew who his

customers were, and that he had opened up the mass-merchandiser market for therapeutic pillows. They had a good idea of the quantity the plaintiff was selling, to whom, and at what price, because of orders placed with them, some for direct delivery to the retailer, and through discussions between the plaintiff and Rowlands. This information was used to the detriment of the plaintiff, as Vitacare's pillow was sold to the plaintiff's customers, and efforts were made to sell to more of the plaintiff's customers, at prices known to Vitacare to be lower than the plaintiff's, thus reducing his share of the market, reducing his profits and jeopardizing his business. It bears repetition that the defendants' pillow, without reasonable explanation, was virtually identical in colour scheme, printed material, design and packaging.

3. Fiduciary Duty

[42] A fiduciary duty imposes the highest duty in law on the party holding the duty—the fiduciary—to act altruistically for the sole benefit of the beneficiary, to the fiduciary's own detriment if necessary. The traditional categories of relationship in which a fiduciary duty exists are agent to principal, lawyer to client, trustee to beneficiary, business partner to partner, and director to corporation. In all of these situations, a fiduciary duty exists because the fiduciary has assumed a position, and taken on a responsibility, in which the beneficiary's interest is dependent upon the fiduciary's actions. There are, however, other situations in which the duty arises, based on the particular situation and relationship of the parties. In *Frame v. Smith,* [1987] 2 S.C.R. 99, quoted with approval in *Lac Minerals, supra,* Wilson J. stated [at p. 136] that:

> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[43] Courts have been extremely reluctant to impose or recognize a fiduciary duty in the context of an arm's length commercial relationship, given that the essence of such relationships is the profit motive and competition. The Supreme Court of Canada has yet to

be unanimous in finding a fiduciary duty in such circumstances, even when the defendant is in such a professional position that the plaintiff has relied heavily on their advice, such as in the case of financial advisors. There must exist very compelling reasons to impose this high duty, such as the absolute reliance of the one party on the other, and the inability, for whatever reason, of choosing not to rely on their actions or advice. There is special reluctance to impose this duty when, as in this case, a contract or duty of confidence has been breached, and the remedy available is at least equivalent.

[44] In *Hodgkinson v. Simms,* [1994] 3 S.C.R. 377, 57 C.P.R. (3d) 1, in which the majority of the Supreme Court of Canada found a fiduciary duty to exist in the particular circumstances of reliance on an accountant's investment advice, La Forest J. first quoted with approval Dickson J. (as he then was) in *Guerin v. The Queen* (1984), 13 D.L.R. (4th) 321 (S.C.C.) at 341:

> …where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary.
>
> La Forest J. then goes on to explain that:
>
> …outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party. [Pages 409-410.]

[45] He also says later:

> Commercial interactions between parties at arm's length normally derive their social utility from the pursuit of self-interest, and the courts are rightly circumspect when asked to enforce a duty… that vindicates the very antithesis of self-interest… [Page 414.]

[46] Looking at the relationship between Aquarius and Vitacare, I can see no reason to impose a fiduciary duty. It was, in effect, an arm's length commercial relationship. There was no agreement or undertaking that Vitacare would act *on behalf of* the plaintiff, and the defendant certainly never agreed to relinquish its own self-interest. The agreement I found to exist was simply that the defendant would not act *against* the plaintiff's interests. As in most commercial cases, the breaches that occurred here were those of contract and confidence.

Both of these areas of law provide adequate remedies without trying to stretch the concept of fiduciary duty to include standard commercial transactions.

4. Remedy

[47] The plaintiff has elected to claim for damages alone, as opposed to an injunction against the defendants, or an accounting of their profits. He stated that he is not seeking an injunction because it would unreasonably interfere with the clients, and he feels that adequate compensation for his losses can be achieved with an award of damages. The testimony of the defendants was that they did not make a profit on their sales of posture pillows. This strongly suggests that they were using the pillow as a "loss leader". In light of this, an accounting of profits would not be a suitable remedy, as it would not restore the plaintiff to the position in which he would have been had the breaches not occurred. I agree that damages is the most appropriate remedy in this case.

[48] There is some debate over a court's jurisdiction to award certain remedies, depending on the equitable or legal origin of the claim. Under the common law, damages may be awarded for breach of contract, but only equitable remedies, such as injunctions, specific performance or a constructive trust, may be awarded for breach of an equitable duty. Since this case involves both a legal breach, of contract, and an equitable breach, of confidence, it does not seem necessary to differentiate whether the remedy is to come from law or equity or both, and the fusion of law and equity is making these distinctions less relevant in any event. However, section 99 of the *Courts of Justice Act,* R.S.O. 1990, c. C.43, expands the range of possible remedies, such that regardless of the jurisdictional origin of the action, in law or in equity, damages are available:

> 99. A court that has jurisdiction to grant an injunction or order specific performance may award damages in addition to, or in substitution for, the injunction or specific performance.

[49] Thus, regardless of whether the breach is one of contract, duty of confidence or fiduciary duty, the appropriate and available remedy in this case is damages. The plaintiff should be restored to the position he would have been in had the breach not occurred.

[50] Plaintiffs have a duty to mitigate their damages. I am satisfied that this plaintiff made every effort to do so in this case. He repeatedly contacted the defendants to voice his

concerns about their actions, lowered his price to K-Mart in order not to lose them as customers entirely, and made efforts to renegotiate with Consumers Distributing, Woolco and Hy & Zel's, unfortunately to no avail. He cannot be held at fault for continuing to deal with the defendants for as long as he did. The defendants have alleged that this was acquiescence on his part. The plaintiff testified that he thought that they had a good relationship, that he could still trust them, and that they could work things out. He further explains his final purchase from Vitacare, in 1990, as necessary to fill an existing order from a customer. All of this, in my view, has a ring of reasonable commercial sense in the circumstances in which the plaintiff found himself.

Contract

[51] As pointed out by the defendants, damages for breach of contract are limited to those that are referable to the ordinary consequences of the breach and would flow in the usual course from the breach. Damages must be reasonably within the contemplation of both parties at the time the contract was made. Since the plaintiff's damages are from loss of profits attributable to the defendants entering the market with a virtually identical product and targeting that product at the very customers who were already purchasing the plaintiff's product, and since the contract that was breached was one of non-competition, it was reasonably foreseeable, and indeed unavoidable, that the exact consequences that did follow from the breach would so follow. These consequences are loss of profit to the plaintiff for an indefinite period of time, from loss of certain large customers—Hy & Zel's, Consumers Distributing, Woolco—from extra competition in the market to chiropractors, and from having to lower his price to K-Mart specifically and to possible future customers generally.

[52] A decline in sales does not necessarily mean that it has been caused by the actions of the defendant. The defendants argue that they were not the only ones in competition with the plaintiff in this market, and they testify that the demand for this type of pillow levelled off or declined in the 1990s. While I believe both of these statements to be true, it is also a fact that the actions of the defendants in specifically approaching the very retailers and distributors that they knew to be customers of the plaintiff had a direct negative effect on his sales and pricing and therefore on his profits over the short and long terms. The lost sales and profits can be directly causally linked to the actions of the defendants.

[53] Damages are to be compensatory, in that they are intended to provide compensation to the plaintiff for losses suffered due to the actions of the defendant. Once a breach has been found, there is no requirement that the damages be calculated with absolute precision, as this would be impossible to do in a loss of profits case, where so many variables can affect future sales. Professor Waddams quotes Lord Watson in *United Horse-Shoe & Nail Co. v. Stewart* (1888), 13 App. Cas. 401 (H.L.), still the authority on this point: “That must always be more or less matter of estimate, because it is impossible to ascertain, with arithmetical precision, what in the ordinary course of business would have been the amount of the [plaintiffs’] sales and profits” (in Waddams, S.M., *The Law of Damages,* looseleaf edition (Aurora, Ont.: Canada Law Book Inc., December, 1996), p. 5-41).

[54] The plaintiff has claimed for both compensatory damages and punitive damages. In a breach of contract case, punitive damages will only be awarded in very exceptional circumstances. Pitch, H.D., and Snyder, in *Damages for Breach of Contract,* 2nd ed. (looseleaf edition) (Toronto, Carswell, 1989), pp. 4-29-4-31, sum up the state of the law before 1989:

> Punitive damages are awarded by the court to punish a defendant whose conduct has been particularly high-handed, reprehensible or outrageous. Canadian courts have traditionally been reluctant to award punitive damages in contract actions since the usual objective in an action for breach of contract is to compensate the plaintiff rather than punish the defendant. However, in recent years the courts had indicated a greater willingness to award punitive damages as an additional remedy in breach of contract situations as a means of censuring a defendant whose conduct had been particularly outrageous.

[55] In 1989 the Supreme Court of Canada released their decision in *Vorvis v. Insurance Corp. of British Columbia,* [1989] 1 S.C.R. 1085, a wrongful dismissal case, which, in the words of Pitch and Snyder, “virtually emasculated” the right to claim and recover punitive damages in breach of contract cases. The majority of the court said, at 1107:

> In an action based on breach of contract, the only link between the parties for the purpose of defining their rights and obligations is the contract. Where the defendant had breached the contract, the remedies open to the plaintiff must arise from that contractual relationship, that “private law”, which the parties agreed to accept. The injured plaintiff

then is not entitled to be made whole; he is entitled to have that which the contract provided for him or compensation for its loss.

[56] They go on to say, however, that punitive damages may still be available where the conduct complained of 1) constitutes an independent actionable wrong (which has been pleaded), 2) was the cause of damage, and 3) was "malicious", "harsh", "vindictive" or "reprehensible". Punitive or exemplary damages are therefore still available in exceptional cases. Applying this test in *Foxcroft v. Pilot Insurance Co.* (1992), 8 O.R. (3d) 600, the Ontario Divisional Court held that breach of an equitable duty, in that case a fiduciary duty, could constitute such an independent actionable wrong. In *Independent Order of Foresters v. Prime Air Freight Inc.* (1991), 4 B.L.R. (2d) 60 (Ont. Ct. (Gen. Div.)), the defendant freight company agreed to deliver the plaintiff's goods, but destroyed them with the intent to defraud the plaintiff instead. Haley J. assessed damages against the three defendants for conspiracy to defraud. Conspiracy was an actionable wrong independent from the breach of contract, and the damages claimed arose from the wrong. Punitive damages of $5,000 were awarded against the defendant company, and solicitor-client costs were granted.

Breach of Confidence

[57] In *Pharand Ski Corp. v. Alberta, supra,* Mason J. states [at p. 309] that:

> There has been, at law, a long-recognized obligation of confidence, the breach of which gives rise to a number of remedies including damages, compensatory or nominal, an accounting for profits earned from the breach, the issuance of an injunction to protect privacy, even an *in rem* remedy, the constructive trust. The nature of the remedy is dependent upon the jurisdictional basis applicable to the nature of the confidence and the breach. The obligation of confidence can arise both in private as well as public law: see *United Kingdom (Attorney-General) v. Observer Ltd.* (1988), 99 N.R. 241, particularly at pp. 244-5, and *LAC Minerals Ltd. v. International Corona Resources Ltd…*

[58] As in a breach of contract case, the objective of awarding damages is to monetarily restore the plaintiff to the position in which they would have been had the breach not occurred. Although it may not be strictly necessary to prove detrimental use of the confidential information in a breach of confidence case, the detriment to the confider will affect the nature and quantum of remedy available. I am satisfied that, in this case, the confidential information was used to the detriment of the plaintiff, and that he should therefore be fairly compensated

for it. In *ICAM Technologies Corp. v. EBCO Industries Ltd.* (1991), 6 B.L.R. (2d) 98, 36 C.P.R. (3d) 504 (B.C.S.C.), which followed *Pharand,* Maczko J. addresses the assessment of damages for breach of confidence (at para. 70):

> Depending on the position of a particular plaintiff, the damages may be calculated in a number of ways. For example, the appropriate measure may be any one of or a combination of the following considerations:
>
> (a) the confider's loss of profit;
>
> (b) the value of a consultant's fee;
>
> (c) the depreciation and value of information in consequence of a breach of confidence;
>
> (d) the development costs incurred in acquiring the information;
>
> (e) capitalization of an appropriate royalty;
>
> (f) the market value on information as between a willing buyer and a willing seller.

[59] The most applicable of these to the current case are (a), (b) and (d). The loss of profit issue involves the same considerations as for breach of contract. A consultant's fee is applicable for the time and energy the plaintiff put into the design of the pillow and the development of the mass-merchandiser market. The costs incurred by the plaintiff in hiring a design company to produce the insert should be reimbursed by the defendant, since they have admitted that they did no work of their own, but only "looked at existing material", and the result was an insert remarkably similar, indeed vitually identical, to that of the plaintiff.

Breach of Fiduciary Duty

[60] Having decided that there was no fiduciary duty owed in this case, and therefore no breach, it is unnecessary to address the question of remedy. I will note, however, that the Supreme Court of Canada recently stated in the case of *Hodgkinson v. Simms, supra,* that:

> It is well established that the proper approach to damages for breach of a fiduciary duty is restitutionary. On this approach, the appellant is entitled to be put in as good a position as he would have been in had the breach not occurred.

[61] As such, had a fiduciary duty been found to have been breached, the principles applied to the calculation of damages would have been essentially the same as that for the breaches of contract and duty of confidence as set out above.

Assessment of Damages

[62] The plaintiff has submitted that he lost sales of 7,500 pillows annually to his previous customers, starting in 1990, due to the actions of the defendants. This figure was not challenged. At an average profit rate of $7.50 per pillow, that amounts to an annual loss of $56,250. This is much more reasonable than the $63,750 per year put forward by the plaintiff, as he probably would have had to lower his price somewhat due to increasing competition from other companies in any event. While the damages to the plaintiff will probably go on indefinitely, they cannot be quantified beyond the first few years after the breach, and I believe that the allowable time period for him to recover the annual loss of $56,250 is limited to the years of 1990, 1991 and 1992, for a total of $168,750.

[63] The plaintiff also states that due to the defendants' efforts to undercut him by their approach to K-Mart, he was forced to lower his price to that customer, on the 2,500 pillows per year that he sells to them, by approximately $3.00 per pillow, all of which was taken out of his profits. This results in a loss of $7,500 annually. Again, he would probably have been forced to lower his prices by external market forces not attributable to the defendants; he should recover this amount for the years of 1990 and 1991 only, for a total of $15,000. Although exact figures were not available for all customers for all relevant time periods, enough was provided to satisfy me that these numbers are fair in the particular circumstances of this case. Any doubts are to be exercised in favour of the plaintiff.

[64] It is difficult to put a dollar value on the time and effort that the plaintiff put into developing his pillow, the cotton cover, and the mass-merchandiser market, given that these efforts took place over a number of years. However, between $50,000 and $100,000 would not be an unreasonable consulting fee, had the defendants hired someone to do this work for them. The plaintiff should therefore recover the sum of $75,000. He also paid $5,060 to the design company that created the insert for him, and should be reimbursed this amount by the defendants as well.

[65] While I find that the defendants' conduct in this case was irresponsible and basically unfairly manipulative and condescending, I am not prepared to find that it was particularly high-handed, reprehensible or outrageous, such as to invite punitive damages. The independent actionable wrong in this case is the breach of confidence, which was pleaded and proved, and which was a direct cause of the damage suffered. The defendants breached the non-competition agreement with the plaintiff, they lulled him into trusting them by repeatedly reassuring him that they would not compete, and, most unacceptable of all, they used his own confidential information to compete with his product. However, the courts should interfere as little as possible with commercial relations. The defendants' conduct and treatment of the plaintiff, which were still evident in the defendant witnesses' demeanour, cannot be condoned. However, I decline to make a specific award for punitive damages.

Conclusion

[66] I find in favour of the plaintiff. A breach of contract and a breach of the duty of confidence did occur, regarding the defendant's competition with the plaintiff's therapeutic foam pillow, and their use of the plaintiff's confidential information. Damages are awarded in the amount of $263,810, with prejudgment interest on that amount calculated pursuant to s. 128 of the *Courts of Justice Act.*

[67] The plaintiff will have his costs after assessment or as agreed upon by the parties. It is my understanding that the senior master in Toronto can now entertain requests for assessments to be brought on without undue delay and that this matter could be expedited. In the circumstances, I would urge the parties to avail themselves of this opportunity.

Judgment for plaintiff.

10

SUPREME COURT OF CANADA

CITATION: C.M. Callow Inc. *v.* Zollinger, 2020 SCC 45

APPEAL HEARD: December 6, 2019
JUDGMENT RENDERED: December 18, 2020
DOCKET: 38463

BETWEEN:

C.M. Callow Inc.
Appellant

and

Tammy Zollinger, Condominium Management Group, Carleton Condominium Corporation No. 703, Carleton Condominium Corporation No. 726, Carleton Condominium Corporation No. 742, Carleton Condominium Corporation No. 765, Carleton Condominium Corporation No. 783, Carleton Condominium Corporation No. 791, Carleton Condominium Corporation No. 806, Carleton Condominium Corporation No. 826, Carleton Condominium Corporation No. 839 and Carleton Condominium Corporation No. 877
Respondents

- and -

Canadian Federation of Independent Business and Canadian Chamber of Commerce
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

REASONS FOR JUDGMENT: (paras. 1 to 120) Kasirer J. (Wagner C.J. and Abella, Karakatsanis and Martin JJ. concurring)

CONCURRING REASONS: (paras. 121 to 182)	Brown J. (Moldaver and Rowe JJ. concurring)
DISSENTING REASONS: (paras. 183 to 238)	Côté J.

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

C.M. Callow Inc. *Appellant*

v.

Tammy Zollinger,
Condominium Management Group,
Carleton Condominium Corporation No. 703,
Carleton Condominium Corporation No. 726,
Carleton Condominium Corporation No. 742,
Carleton Condominium Corporation No. 765,
Carleton Condominium Corporation No. 783,
Carleton Condominium Corporation No. 791,
Carleton Condominium Corporation No. 806,
Carleton Condominium Corporation No. 826,
Carleton Condominium Corporation No. 839 and
Carleton Condominium Corporation No. 877 *Respondents*

and

Canadian Federation of Independent Business and
Canadian Chamber of Commerce *Interveners*

Indexed as: C.M. Callow Inc. *v.* Zollinger

2020 SCC 45

File No.: 38463.

2019: December 6; 2020: December 18.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contracts — Breach — Performance — Duty of honest performance — Clause in winter maintenance agreement permitting unilateral termination of contract without cause upon 10 days' notice — Contract terminated by condominium corporations with required notice to contractor — Contractor suing for breach of contract — Trial judge finding that statements and conduct by condominium corporations actively deceived contractor and led it to believe contract would not be terminated — Trial judge awarding damages for breach of contract — Whether exercise of termination clause constituted breach of duty of honest performance.

In 2012, a group of condominium corporations ("Baycrest") entered into a two-year winter maintenance contract and into a separate summer maintenance contract with C.M. Callow Inc. ("Callow"). Pursuant to clause 9 of the winter maintenance contract, Baycrest was entitled to terminate that agreement if Callow failed to give satisfactory service in accordance with its terms. Clause 9 also provided that if, for any other reason, Callow's services were no longer required, Baycrest could terminate the contract upon giving 10 days' written notice.

In early 2013, Baycrest decided to terminate the winter maintenance agreement but chose not to inform Callow of its decision at that time. Throughout the

spring and summer of 2013, Callow had discussions with Baycrest regarding a renewal of the winter maintenance agreement. Following those discussions, Callow thought that it was likely to get a two-year renewal of the winter maintenance contract and that Baycrest was satisfied with its services. During the summer of 2013, Callow performed work above and beyond the summer maintenance contract at no charge, which it hoped would act as an incentive for Baycrest to renew the winter maintenance agreement.

Baycrest informed Callow of its decision to terminate the winter maintenance agreement in September 2013. Callow filed a statement of claim for breach of contract, alleging that Baycrest acted in bad faith. The trial judge held that the organizing principle of good faith performance and the duty of honest performance were engaged. She was satisfied that Baycrest actively deceived Callow from the time the termination decision was made to September 2013, and found that Baycrest acted in bad faith by withholding that information to ensure Callow performed the summer maintenance contract and by continuing to represent that the contract was not in danger despite knowing that Callow was taking on extra tasks to bolster the chances of the winter maintenance contract being renewed. She awarded damages to Callow in order to place it in the same position as if the breach had not occurred. The Court of Appeal set aside the judgment at first instance, holding that the trial judge erred by improperly expanding the duty of honest performance beyond the terms of the winter maintenance agreement. Further, it held that any deception in the communications during the summer of 2013 related to a new contract not yet in existence, namely the renewal that

Callow hoped to negotiate, and therefore was not directly linked to the performance of the winter contract.

Held (Côté J. dissenting): The appeal should be allowed and the judgment of the trial judge reinstated.

Per Wagner C.J. and Abella, Karakatsanis, Martin and **Kasirer** JJ. : The duty to act honestly in the performance of the contract precluded the active deception by Baycrest by which it knowingly misled Callow into believing that the winter maintenance agreement would not be terminated. By exercising the termination clause dishonestly, it breached the duty of honesty on a matter directly linked to the performance of the contract, even if the 10-day notice period was satisfied. Accordingly, the Court of Appeal should not have interfered with the conclusions of the trial judge.

The duty of honest performance in contract, formulated in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, applies to all contracts and requires that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. In determining whether dishonesty is connected to a given contract, the relevant question is whether a right under that contract was exercised, or an obligation under that contract was performed, dishonestly. While the duty of honest performance is not to be equated with a positive obligation of disclosure, in circumstances where a contracting party lies to or knowingly misleads

another, a lack of a positive obligation of disclosure does not preclude an obligation to correct a false impression created through that party's own actions.

The organizing principle of good faith recognized in *Bhasin* is not a free-standing rule, but instead manifests itself through existing good faith doctrines. While the duty of honest performance and the duty to exercise discretionary powers in good faith are distinct, like each of the different manifestations of the organizing principle, they should not be thought of as disconnected from one another. The duty of honest performance shares a common methodology with the duty to exercise contractual discretionary powers in good faith by fixing on the wrongful exercise of a contractual prerogative. Each of the specific legal doctrines derived from the organizing principle rest on a requirement of justice that a contracting party have appropriate regard to the legitimate contractual interests of their counterparty. They need not subvert their own interests to those of the counterparty by acting as a fiduciary or in a selfless manner. This requirement of justice reflects the notion that the bargain, the rights and obligations agreed to, is the first source of fairness between parties to a contract. Those rights and obligations must be exercised and performed honestly and reasonably and not capriciously or arbitrarily where recognized by law.

The duty of honesty as contractual doctrine has a limiting function on the exercise of an otherwise complete and clear right since the duty, irrespective of the intention of the parties, applies to the performance of all contracts, and by extension, to all contractual obligations and rights. Instead of constraining the decision to

terminate in and of itself, the duty of honest performance attracts damages where the manner in which the right was exercised was dishonest. This focus on the manner in which the termination right was exercised should not be confused with whether the right could be exercised. No contractual right, including a termination right, can be exercised dishonestly and, as such, contrary to the requirements of good faith.

The requirements of honesty in performance can go further than prohibiting outright lies. Whether or not a party has knowingly misled its counterparty is a highly fact-specific determination, and can include lies, half-truths, omissions, and even silence, depending on the circumstances. One can mislead through action, by saying something directly to its counterparty, or through inaction, by failing to correct a misapprehension caused by one's own misleading conduct.

The duty of honest performance is a contract law doctrine, not a tort and therefore a nexus with the contractual relationship is required. A breach must be directly linked to the performance of the contract. The framework for abuse of rights in Quebec is useful to illustrate the required direct link between dishonesty and performance from *Bhasin*. Authorities from Quebec serve as persuasive authority and comparison between the common law and civil law as they evolve in Canada is a particularly useful and familiar exercise for the Court. Like in the Quebec civil law, no contractual right may be exercised dishonestly and therefore contrary to the requirements of good faith. The direct link exists when the party performs their obligation or exercises their right under the contract dishonestly. While the duty of

honest performance has similarities with civil fraud and estoppel, it is not subsumed by them. Unlike estoppel and civil fraud, the duty of honest performance does not require a defendant to intend that the plaintiff rely on their representation or false statement.

The duty of honest performance attracts damages according to the ordinary contractual measure. The ordinary approach is to award contractual damages corresponding to the expectation interest. That is, damages should put the injured party in the position that it would have been in had the duty been performed. Although reliance damages, which are the ordinary measure of damages in tort, and expectation damages will be the same in many if not most cases, they are conceptually distinct, and there is no basis to hold that a breach of the duty of honest performance should in general be compensated by way of reliance damages.

In the instant case, Baycrest knowingly misled Callow in the manner in which it exercised clause 9 of the winter maintenance agreement and this wrongful exercise of the termination clause amounts to a breach of contract. Even though Baycrest had what was, on its face, an unfettered right to terminate the winter maintenance agreement on 10 days' notice, the right had to be exercised in keeping with the duty to act honestly. Baycrest's deception was directly linked to this contract, because its exercise of the termination clause was dishonest. It may not have had a free-standing obligation to disclose its intention to terminate, but it nonetheless had an obligation to refrain from misleading Callow in the exercise of that clause. Baycrest had to refrain from false representations in anticipation of the notice period. If someone

is led to believe that their counterparty is content with their work and their ongoing contract is likely to be renewed, it is reasonable for that person to infer that the ongoing contract is in good standing and will not be terminated early. Having failed to correct Callow's misapprehension that arose due to these false representations, Baycrest breached its duty of good faith in the exercise of its right of termination. Damages thus flow for the consequential loss of opportunity. While damages are to be measured against a defendant's least onerous means of performance, the least onerous means of performance in this case would have been to correct the misrepresentation once Baycrest knew Callow had drawn a false inference. Had it done so, Callow would have had the opportunity to secure another contract for the upcoming winter.

Per Moldaver, **Brown** and Rowe JJ.: As a universally applicable minimum standard, all contracts must be performed honestly. Contracting parties may therefore not lie to, or otherwise knowingly mislead, each other about matters directly linked to performance. If a plaintiff suffers loss in reliance on its counterparty's misleading conduct, the duty of honest performance serves to make the plaintiff whole. It does not, however, impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract. The dividing line between (1) actively misleading conduct, and (2) permissible non-disclosure has been clearly demarcated by cases addressing misrepresentation and the same settled principles apply to the duty of honest performance, although it also applies (unlike misrepresentation) to representations made after contract formation.

There is, in the context of misrepresentation, a rich law accepting that sometimes silence or half-truths amount to a statement. Although contracting parties have no duty to disclose material information, a contracting party may not create a misleading picture about its contractual performance by relying on half-truths or partial disclosure. Representations need not take the form of an express statement. So long as it is clearly communicated, it may comprise other acts or conduct on the part of the defendant. The entire context, which includes the nature of the parties' relationship, is to be considered in determining, objectively, whether the defendant made a representation to the plaintiff. The question is whether the defendant's active conduct contributed to a misapprehension that could be corrected only by disclosing additional information. Contracting parties are required to correct representations that are subsequently rendered false, or which the representor later discovers were erroneous. The question of whether a representation has been made is a question of mixed fact and law, subject to appellate review only for palpable and overriding error.

The legal aim in remedying a breach of contract is to give the innocent party the full benefit of the bargain by placing it in the position it would have occupied had the contract been performed. But the justification for awarding expectation damages does not apply to breach of the duty of honest performance. In such cases, the issue is not that the defendant has failed to perform the contract, thereby defeating the plaintiff's expectations. It is, rather, that the defendant has performed the contract, but has also caused the plaintiff loss by making dishonest extra-contractual misrepresentations concerning that performance, upon which the plaintiff relied to its

detriment. The plaintiff's complaint is not lost value of performance, but detrimental reliance on dishonest misrepresentations. The interest being protected is not an expectation interest, but a reliance interest. And just as these are unrelated interests, an expectation measure of damage is unrelated to the breach of the duty of honest performance.

Much like estoppel and civil fraud, the duty of honest performance vindicates the plaintiff's reliance interest. A contracting party that breaches this duty will be liable to compensate its counterparty for any foreseeable losses suffered in reliance on the misleading representations. The duty of honest performance is not subsumed by estoppel and civil fraud; rather, it protects the reliance interest in a distinct and broader manner since the defendant may be held liable even where it does not intend for the plaintiff to rely on the misleading representation. Irrespective of the defendant's intention, all a plaintiff need show is that, but for its reliance on the misleading representation, it would not have sustained the loss.

Disposing of the present case is a simple matter of applying the Court's decision in *Bhasin*; Callow's claim should be resolved by applying only the duty of honest performance. There is no basis for disturbing the trial judge's conclusions. Baycrest's conduct did not fall on the side of innocent non-disclosure. The trial judge found that active communications between the parties deceived Callow. Baycrest identifies no palpable and overriding error to justify overturning these conclusions. The

proper measure of damages represents the loss Callow suffered in reliance on Baycrest's misleading representations.

The majority relies on the civilian concept of "abuse of rights" in its analysis. In so doing, it departs from the Court's accepted practice in respect of comparative legal analysis. The principles that apply to this appeal are determinative and settled. Canada's common law and civil law systems have adopted very different approaches to the place of good faith in contract law. The majority's reliance on the civilian doctrine of abuse of a right distorts the analysis in *Bhasin* and elides the distinction between honest performance and good faith in the exercise of a contractual discretion.

Courts should draw on external legal concepts only where domestic law does not provide an answer or where it is necessary to modify or otherwise develop an existing legal rule. Courts may also look to the experience of other legal systems in considering whether a potential solution to a legal problem will result in negative consequences, or to observe that a domestic legal concept mirrors one found in another system. Even where comparative analysis is appropriate, it must be undertaken with care and circumspection. The golden rule in using concepts from one of Canada's legal systems to modify the other is that the proposed solution must be able to completely and coherently integrate into the adopting system's structure.

Per **Côté** J. (dissenting): The appeal should be dismissed. Callow's recourse cannot be based on a breach of the duty of honest performance. Although

Baycrest's conduct may not be laudable, it does not fall within the category of active dishonesty prohibited by that duty.

The duty of honest performance is described in *Bhasin* as a simple requirement not to lie or knowingly mislead about matters directly linked to performance of the contract. The requirement that parties not lie is straightforward; however, the kind of conduct covered by the requirement that they not otherwise knowingly mislead each other is not. The law imposes neither a duty of loyalty or of disclosure nor a requirement to forego advantages flowing from the contract on a contracting party. Absent a duty to disclose, it is far from obvious when exactly one's silence will knowingly mislead the other contracting party or at what point a permissible silence turns into a non-permissible silence that may constitute a breach of contract. In any event, the duty of honest performance should remain clear and easy to apply.

The obligations flowing from the duty of honest performance are negative obligations. Extending the duty beyond that scope would detract from certainty in commercial dealings. Therefore, silence cannot be considered dishonest within the meaning of *Bhasin* unless there is a positive obligation to speak. Such an obligation does not arise simply because a party to a contract realizes that his counterparty is operating under a mistaken belief. Absent a duty of disclosure, a party to a contract has no obligation to correct his counterparty's mistaken belief unless the party's active conduct has materially contributed to it. What constitutes a material contribution will

obviously depend upon the context, which includes the nature of the parties' relationship as well as the relevant provisions of the contract. Parties that prefer not to disclose certain information — which they are entitled not to do — are not required to adopt a new line of conduct in their contractual relationship simply because they chose silence over speech.

In the context of a right to terminate a contract without cause, a party that intends to end an agreement does not have to convey hints in order to alert his counterparty that their business relationship is in danger. No obligation to speak arises when a party becomes aware of his counterparty's mistaken belief that the contract will not be terminated unless the party has taken positive action that materially contributed to that belief. If one party leads another to believe that their contract will be renewed, it follows that the other party can reasonably expect their business relationship to be extended rather than terminated. But an inference to that effect cannot be drawn in the abstract. In order to infer that one party, through discussions about renewal, led the other party to think that there was no risk their existing agreement would be terminated, the inference-drawing process must obviously take into account the nature of the risk at stake and what was actually communicated during those discussions. Otherwise, the inference would entail a palpable and overriding error that would be subject to appellate review.

In the present case, Baycrest bargained for a right to terminate its winter agreement for any reason and at any time upon giving 10 days' notice. In her

assessment of Baycrest's conduct, the trial judge did not ask herself if Baycrest lied or otherwise knowingly misled Callow about the exercise of its right to terminate the winter agreement for any other reason than unsatisfactory services. She wrongfully insisted on addressing alleged performance issues despite the fact that the winter agreement could be terminated even if Callow's services were satisfactory. The trial judge also did not consider that the active deception had to be directly linked to the performance of the contract. It is clear that the representations she found had been made by Baycrest were not directly linked to the performance of the winter agreement. The trial judge's misunderstanding of the applicable legal principles vitiated the fact-finding process.

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By Kasirer J.

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APPEAL from a judgment of the Ontario Court of Appeal (Lauwers, Huscroft and Trotter JJ.A.), 2018 ONCA 896, 429 D.L.R. (4th) 704, 86 B.L.R. (5th) 53, [2018] O.J. No. 5855 (QL), 2018 CarswellOnt 18697 (WL Can.), setting aside a decision of O'Bonsawin J., 2017 ONSC 7095, [2017] O.J. No. 6176 (QL), 2017 CarswellOnt 18587 (WL Can.). Appeal allowed, Côté J. dissenting.

Brandon Kain, *Adam Goldenberg*, *Vivian Ntiri* and *Miriam Vale Peters*, for the appellant.

Anne Tardif, *Rodrigue Escayola* and *David Plotkin*, for the respondents.

Catherine Beagan Flood and *Nicole Henderson*, for the intervener the Canadian Federation of Independent Business.

Jeremy Opolsky and *Winston Gee*, for the intervener the Canadian Chamber of Commerce.

The judgment of Wagner C.J. and Abella, Karakatsanis, Martin and Kasirer JJ. was delivered by

KASIRER J. —

I. Introduction

[1] This appeal concerns a clause in a commercial winter maintenance agreement that permitted the clients to terminate the contract unilaterally, without cause, upon giving the contractor 10 days' notice. The dispute does not turn on whether the clause represented a fair bargain between the parties. There is also no issue about the meaning of the termination clause. The dispute turns rather on the manner in which the respondents (collectively "Baycrest") exercised the termination clause. Acknowledging that 10 days' notice was given the appellant, C.M. Callow Inc. ("Callow"), argues that Baycrest exercised the termination clause contrary to the requirements of good faith set forth by this Court in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, in particular the duty to perform the contract honestly.

[2] In *Bhasin*, Cromwell J. recognized a general organizing principle of good faith, which means that "parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily" (para. 63). This organizing principle, he explained, "is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in

different situations" (para. 64). The organizing principle of good faith manifests itself through "existing doctrines" addressing "the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance" (para. 66).

[3] In this appeal, the applicable good faith doctrine is the duty of honesty in contractual performance. As Cromwell J. explained in *Bhasin*, at para. 73, the duty of honesty applies to all contracts as a matter of contractual doctrine, and means "simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract". Callow says Baycrest's failure to exercise its right to terminate in keeping with the mandatory duty of honest performance amounted to a breach of contract. It points to the trial judge's findings that Baycrest withheld the information that the contract was in danger of termination. Baycrest then continued to represent that the contract was not in danger and knowingly declined to correct the false impression it had created and under which Callow was operating. This dishonesty continued for several months, "in anticipation of the notice period" wrote the trial judge and, claims Callow, resulted in it foregoing the opportunity to bid on other winter contracts and thereby justifies an award of damages (2017 ONSC 7095, at para. 67 (CanLII)).

[4] Baycrest, for its part, recalling that Cromwell J. explicitly stated in *Bhasin* that the duty of honest performance does not amount to a duty to disclose, argues that its silence did not constitute dishonesty. It also says the alleged dishonesty was not

connected to the contract in place at the time because, in its submission, the impugned communications related to the possibility of a future contract not yet executed. The Court of Appeal agreed and overturned the trial judge's decision (2018 ONCA 896, 429 D.L.R. (4th) 704).

[5] I respectfully disagree with the Court of Appeal on whether the manner in which the termination clause was exercised ran afoul of the minimum standard of honesty. The duty to act honestly in the performance of the contract precludes active deception. Baycrest breached its duty by knowingly misleading Callow into believing the winter maintenance agreement would not be terminated. By exercising the termination clause dishonestly, it breached the duty of honesty on a matter directly linked to the performance of the contract, even if the 10-day notice period was satisfied and irrespective of their motive for termination. For the reasons that follow, I would allow the appeal and restore the judgment of the Ontario Superior Court of Justice.

II. Background

[6] Baycrest includes 10 condominium corporations managed by Condominium Management Group and a designated property manager. Each corporation has its own board of directors to manage its affairs and, collectively, they established a Joint Use Committee ("JUC"). The JUC makes decisions regarding the joint and shared assets of the condominiums. In 2010, the condominium corporations entered into a two-year winter maintenance agreement with Callow, a corporation owned and operated by Christopher Callow. Pursuant to the terms of the agreement,

Callow provided winter services, including snow removal, to the condominium corporations.

[7] At the conclusion of the two-year term in 2012, the corporations entered into two new agreements with Callow. Joseph Peixoto — president of one of the condominium corporations, and representative on the JUC — negotiated the main pricing terms with Mr. Callow for the renewal of the winter maintenance contract, which also added a separate summer maintenance services contract.

[8] At issue in this appeal is the winter maintenance agreement, which had a new two-winter term from November 1, 2012 to April 30, 2014. Pursuant to clause 9, the corporations were entitled to terminate the winter maintenance agreement if Callow failed to give satisfactory service in accordance with the terms of this Agreement. Moreover, clause 9 provided that "if for any other reason [Callow's] services are no longer required for the whole or part of the property covered by this Agreement, then the [condominium corporations] may terminate this contract upon giving ten (10) days' notice in writing to [Callow]" (A.R., vol. III, at p. 10).

[9] During the first winter of the two-winter term, there were complaints from occupants of various condominiums, many of which related to snow removal from individual parking stalls. In January 2013, Mr. Callow attended a JUC meeting to address the concerns. The minutes reflected the positive nature of this meeting, recording that "[t]he Committee confirmed that [Callow] has been diligent in addressing this issue as best as could be expected considering the nature of the storms

recently experienced" (A.R., vol. III, at p. 35). After the meeting, the property manager at the time also sent a follow-up email to the JUC members: "I know that your Board has been generally satisfied with the snow removal — so there is nothing outstanding to report here" (p. 39).

[10] A few months later — still in the first year of the agreement — respondent Tammy Zollinger became the property manager. About three weeks after Ms. Zollinger's arrival, another JUC meeting was held, this time without Mr. Callow present. During the meeting, Ms. Zollinger advised the JUC to terminate the winter maintenance agreement with Callow "due to poor workmanship in the 2012-13 winter" (A.R., vol. III, at p. 43). The minutes went on to indicate that Ms. Zollinger had reviewed the contract and advised the JUC members that they could terminate the contract with Callow with no financial penalty. Ms. Zollinger further advised that she would get quotes from other snow removal contractors. The JUC voted to terminate the winter maintenance agreement shortly thereafter, "in either March or April" of 2013 (trial reasons, at para. 51). Baycrest chose not to inform Mr. Callow of its decision to terminate the winter maintenance agreement at that time.

[11] Although only one winter of the two-winter term had been completed, Callow began discussions throughout the spring and summer of 2013 with Baycrest regarding a renewal of the winter maintenance agreement. Specifically, Mr. Callow had various exchanges with two condominium corporations' board members, one of whom was Mr. Peixoto. Following these conversations, wrote the trial judge, "Mr. Callow

thought that he was likely to get a two-year renewal of his winter maintenance services contract and they were satisfied with his services" (para. 41).

[12] Meanwhile, Callow continued to fulfill its obligations under the winter and summer maintenance agreements including, pursuant to the latter arrangement, finishing "spring cleanup", cutting grass on a weekly basis and conducting garbage pick-up. Furthermore, during the summer of 2013, Callow "performed work above and beyond [its] summer maintenance services contract" (para. 42), even doing what Mr. Callow described as some "freebie" work, which he hoped would act as an incentive for Baycrest to renew the winter maintenance agreement at the end of the upcoming winter.

[13] Conversations between Callow and Mr. Peixoto continued into July 2013, at which time Callow decided to improve the appearance of two gardens. In an email dated July 17, 2013, Mr. Peixoto wrote to another condominium corporation board member regarding this "freebie" work, writing in part: "It's nice he's doing it but I am sure it's an attempt at us keeping him. Btw, I was talking to him last week as well and he is under the impression we're keeping him for winter again. I didn't say a word to him cuz I don't wanna get involved but I did tell [Ms. Zollinger] that [Mr. Callow] thinks we're keeping him for winter" (A.R., vol. III, at p. 73).

[14] Baycrest did not inform Callow about the decision to terminate the winter maintenance agreement until September 12, 2013. At that point, Ms. Zollinger advised Callow by way of email "that Baycrest will not be requiring your services for the winter

contract for the 2013/2014 season, as per section 9 of the contract, Baycrest needs to provide the contractor with 10 days' notice" (A.R., vol. III, at p. 49).

[15] Callow consequently filed a statement of claim for breach of contract, alleging that Baycrest acted in bad faith by accepting free services while knowing Callow was offering them in order to maintain their future contractual relationship. Moreover, Callow alleged that Baycrest knew or ought to have known that Callow would not seek other winter maintenance contracts in reliance on the representations that Callow was providing satisfactory service and the contract would not be prematurely terminated. Accordingly, "[a]s a result of these misrepresentations and/or bad faith conduct, [Mr. Callow on behalf of Callow] did not bid on other tenders for winter maintenance contracts. [Baycrest is] now liable for Callow's damages for loss of opportunity" (A.R., vol. I, p. 45, at para. 30). Finally, Callow alleged that Baycrest was unjustly enriched by the free services it provided in the summer of 2013.

[16] Callow sought damages in the amount of $81,383.68 for breach of contract, an amount equivalent to the one year remaining on the winter maintenance agreement, damages for intentional interference with contractual relations, inducing breach of contract, and negligent misrepresentation. It also asked for damages in the amount of $5,000.00 for unjust enrichment, an amount equivalent to the "freebie" work, and pre- and post-judgment interest and costs on a substantial indemnity basis.

III. Prior Decisions

A. *Ontario Superior Court of Justice (O'Bonsawin J.)*

[17] In her review of the circumstances of the dispute, the trial judge commented on the testimony of several key witnesses, concluding that Mr. Callow was a credible witness. In contrast, she found that Baycrest's witnesses — including a former property manager, as well as Ms. Zollinger and Mr. Peixoto — had "provided many exaggerations, over-statements and constantly provided comments contrary to the written evidence" (para. 11). The trial judge thus preferred Mr. Callow's version of events to that of Baycrest.

[18] At trial, Baycrest advanced two main submissions. First, it argued that, as a matter of simple contractual interpretation, clause 9 clearly and unambiguously states that it could terminate the contract for any reason by providing Callow with 10 days' notice in writing. Second, even though no cause had to be shown to invoke clause 9, Baycrest nonetheless argued that the evidence before the trial judge demonstrated that Callow's level of service did not comply with the contractual specifications and was not to its complete satisfaction.

[19] The trial judge dismissed both arguments. First, she found that Callow's work met the requisite standard. While there were complaints about Callow's work, she observed that "a significant portion related to the clearing of parking stalls, which was the fault of owners/tenants who did not move their vehicles". "Was the quality of Callow's work below standard?" asked the trial judge, "The evidence leads me", she wrote, "to answer no" (para. 55).

[20] Second, the trial judge held that this was not a simple contractual interpretation case. In her view, the organizing principle of good faith performance and the duty of honest performance were engaged. The trial judge explained that, as Cromwell J. noted in *Bhasin*, the duty of honest performance should not be confused with a duty of disclosure. "However," she wrote, "contracting parties must be able to rely on a minimum standard of honesty" to ensure "that parties will have a fair opportunity to protect their interests if the contract does not work out" (para. 60, citing *Bhasin*, at para. 86). For the purposes of drawing a distinction between the failure to disclose a material fact and active dishonesty, the trial judge observed that "[u]nless there is active deception, there is no unilateral duty to disclose information before the notice period" (para. 61).

[21] The trial judge was satisfied that Baycrest "actively deceived" Callow from the time the termination decision was made in March or April 2013 to the time when notice was given on September 12, 2013. Specifically, she found that Baycrest "acted in bad faith by (1) withholding the information to ensure Callow performed the summer maintenance services contract; and (2) continuing to represent that the contract was not in danger despite [Baycrest's] knowledge that Callow was taking on extra tasks to bolster the chances of renewing the winter maintenance services contract" (para. 65). Given the active communications between the parties during the summer of 2013, "which deceived Callow", the trial judge "[did] not accept [Baycrest's] argument that no duty was owed to disclose the decision to terminate the contract before the notice" (para. 66). "The minimum standard of honesty", she concluded, "would have been to

address the alleged performance issues, to provide prompt notice, or to refrain from any representations in anticipation of the notice period" (para. 67).

[22] The trial judge tied Baycrest's dishonesty to the way in which it delayed invocation of the 10-day notice period set out in clause 9, while it actively deceived Callow that the contract was not in jeopardy. Her reasons relied upon, by analogy, the law recognizing a duty to exercise good faith in the manner of dismissal when terminating an employee. She noted that Baycrest "intentionally withheld the information in bad faith" (para. 69). She expressly acknowledged that exercising a termination clause is not, in itself, evidence of a breach of good faith. However, in this case, Baycrest deliberately deceived Callow about termination, which was a breach of the duty of honest performance.

[23] By reason of this contractual breach, the trial judge awarded damages to Callow, in order to place it in the same position as if the breach had not occurred. These damages amounted to $64,306.96, a sum equivalent to the value of the winter maintenance agreement for one year, minus expenses that Callow would typically incur; a further amount of $14,835.14, representing the value of one year of a lease of equipment that Callow would not have leased if it had known the winter maintenance was to be terminated; and $1,600.00 for the final invoice for the summer work, which Baycrest had failed to pay to Callow. Costs were awarded to Callow.

[24] The trial judge was also satisfied that Baycrest was unjustly enriched due to the "freebie" work performed by Callow during the summer of 2013. She declined,

however, to award damages for the unjust enrichment since Callow failed to provide evidence of its expenses.

B. *Court of Appeal for Ontario (Lauwers, Huscroft and Trotter JJ.A.)*

[25] Baycrest appealed, arguing that the trial judge erred in two respects. First, it alleged she erred by improperly expanding the duty of honest performance beyond the terms of the winter maintenance agreement. Second, it argued the trial judge erred in assessing damages.

[26] The Court of Appeal unanimously agreed with Baycrest on the first point, and set aside the judgment at first instance. The Court of Appeal recognized, as the trial judge had found, that the "[d]irectors of two of the condominium corporations and members of the JUC were aware that Mr. Callow was performing 'freebie' work, and knew he was under the impression that the contracts were likely to be renewed" (para. 5). Nonetheless, the court stressed that *Bhasin* was a modest, incremental step, and good faith is to be applied in a manner so as to avoid commercial uncertainty. As such, the duty of honesty "does not impose a duty of loyalty or of disclosure or to require a party to forego advantages flowing from the contract" (para. 12, citing *Bhasin*, at para. 73).

[27] The Court of Appeal further emphasized that Callow had made two concessions in its factum. First, Callow acknowledged that Baycrest was not contractually required to disclose its decision to terminate the winter maintenance

agreement prior to the 10-day notice period. Second, Callow acknowledged that the failure to provide notice on a more timely basis was not, in and of itself, evidence of bad faith. Because there is "no unilateral duty to disclose information relevant to termination", the court reasoned Baycrest "[was] free to terminate the winter contract with [Callow] provided only that [it] informed him of [its] intention to do so and gave the required notice. That is all that [Callow] bargained for, and all that he was entitled to" (para. 17). While the trial judge's findings "may well suggest a failure to act honourably," the Court of Appeal expressed its view that the findings "do not rise to the high level required to establish a breach of the duty of honest performance" (para. 16).

[28] In any event, the Court of Appeal said that any deception in the communications during the summer of 2013 related to a new contract not yet in existence, namely the renewal that Callow hoped to negotiate. Accordingly, in its view, any deception could not be said to be directly linked to the performance of the winter contract (para. 18).

[29] Given the Court of Appeal's conclusion, it did not address damages.

IV. Analysis

A. *Overview of the Appeal*

[30] This appeal presents this Court with an opportunity to clarify what constitutes a breach of the duty of honest performance where it manifests itself in connection with the exercise of a seemingly unfettered, unilateral termination clause. Pointing to what it calls Baycrest's active deception in the exercise of the clause, Callow says this conduct was a breach of the duty of honest performance recognized in *Bhasin*.

[31] Before this Court, Callow does not dispute the meaning of clause 9. Nor does Callow's argument on appeal concern the adequacy of the bargain struck with Baycrest or whether the termination was unjustified. Callow is not saying, for instance, that it should have been afforded more notice because the 10-day period was unfair in the circumstances. I recognize that, at trial, there was some question as to whether the termination was fitting given Callow's work record. Indeed, the trial judge found in Callow's favour on this point, concluding that it had provided satisfactory services. But the suggestions that Callow was terminated for some improper purpose or motive, or even that the termination was unreasonable, need not be determined on this appeal. The narrow question addressed here is whether Baycrest failed to satisfy its duty not to lie or knowingly deceive Callow about matters directly linked to the performance of the winter maintenance agreement, specifically by exercising the termination clause as it did.

[32] In the present circumstances, Callow says Baycrest misled Mr. Callow about the possible renewal of the winter maintenance agreement and, as a result, it

knowingly deceived him into thinking it was satisfied with Callow's performance of the agreement then in force for the upcoming winter season. Callow says it mistakenly inferred, as a consequence of this dishonesty, that there was no danger of the existing winter contract being terminated pursuant to clause 9 of the contract. This, Callow submits, was to the full knowledge of Baycrest, who failed to correct its false impression which amounted to a breach of the duty of honest performance. In short, Callow says this deceitful conduct meant the exercise of the termination clause was wrongful in that it was breached even if, strictly speaking, the required notice was given. This should give rise, claims Callow, to compensatory damages on the ordinary measure as the trial judge had ordered: damages for lost profits, wasted expenditures and an unpaid invoice.

[33] In addition to the duty of honest performance, Callow invokes a free-standing duty to exercise contractual discretionary powers in good faith, which, it argues, Cromwell J. also recognized in *Bhasin* and which would justify the same award in damages. Furthermore, in the event the Court disagrees that there has been a breach of one or another of those existing duties, Callow submits, alternatively, that this Court should recognize a new duty of good faith, which would prohibit "active non-disclosure".

[34] In answer, Baycrest notes the concessions made by Callow before the Court of Appeal, specifically that clause 9 on its face did not require it to give more notice. Baycrest agrees with the Court of Appeal that whatever communications took place

between the parties, those communications concerned a future contract and were not directly related to the performance of the winter contract then in force. The agreement granted Baycrest an unqualified right to terminate the contract on notice for any reason, which is precisely what occurred. Recalling that the duty to act honestly in performance is not a duty of disclosure and does not impose a duty of loyalty akin to that of a fiduciary, Baycrest says that Callow seeks to have it subvert its own interest by requiring it to inform Callow of its intention to end the winter maintenance agreement before the stipulated 10 days' notice. The Court of Appeal was thus correct in concluding that the bargain struck by the parties entitled Baycrest to end the contract as it did. In a similar vein, with respect to the duty to exercise discretionary powers in good faith, Baycrest says that because it respected the terms of the contract, the issue of abuse of contractual discretion does not arise on the facts of this case.

[35] In any event, Baycrest emphasizes the conclusion reached by the Court of Appeal that any discussions in the spring and summer of 2013 that may have misled Callow were connected to pre-contractual negotiations. Thus, any dishonesty cannot be said to be directly linked to the performance of the winter maintenance agreement.

[36] The appeal should be allowed. I respectfully disagree with the Court of Appeal on two main points.

[37] First, *Bhasin* is clear that even though Baycrest had what was, on its face, an unfettered right to terminate the winter maintenance agreement on 10 days' notice, the right had to be exercised in keeping with the duty to act honestly, i.e. Baycrest could

not "lie or otherwise knowingly mislead" Callow "about matters directly linked to the performance of the contract". According to the Court of Appeal, any dishonesty was about a renewal, which was in turn connected to pre-contractual negotiations to which the duty as stated in *Bhasin* does not apply. I respectfully disagree. In my view, the Court of Appeal may have erroneously framed the trial judge's findings at paragraph 6, writing that she found that Baycrest had represented "that the winter contract was not in danger of non-renewal" (emphasis added). Referring instead to the ongoing winter services agreement, the trial judge had found Baycrest misrepresented "that the contract was not in danger despite [Baycrest's] knowledge that Callow was taking on extra tasks to bolster the chances of renewing the winter maintenance services contract" (para. 65). In determining whether dishonesty is connected to a given contract, the relevant question is generally whether a right under that contract was exercised, or an obligation under that contract was performed, dishonestly. As I understand it, the trial judge's finding was that the dishonesty in this case was related not to a future contract but to the termination of the winter maintenance agreement. If someone is led to believe that their counterparty is content with their work and their ongoing contract is likely to be renewed, it is reasonable for that person to infer that the ongoing contract is in good standing and will not be terminated early. This is what the trial judge found. Simply said, Baycrest's alleged deception was directly linked to this contract because its exercise of the termination clause in this contract was dishonest.

[38] Second, the Court of Appeal erred when it concluded that the trial judge's findings did not amount to a breach of the duty of honest performance. While the duty

of honest performance is not to be equated with a positive obligation of disclosure, this too does not exhaust the question as to whether Baycrest's conduct constituted, as a breach of the duty of honesty, a wrongful exercise of the termination clause. Baycrest may not have had a free-standing obligation to disclose its intention to terminate the contract before the mandated 10 days' notice, but it nonetheless had an obligation to refrain from misleading Callow in the exercise of that clause. In circumstances where a party lies to or knowingly misleads another, a lack of a positive obligation of disclosure does not preclude an obligation to correct the false impression created through its own actions.

[39] In light of these points, it is my view that this is not a simple contractual interpretation case bearing on the meaning to be given to clause 9. Nor is this a case involving passive failure to disclose a material fact. Instead, as recognized by the Court of Appeal, "[n]ot only did [Baycrest] fail to inform [Callow] of [its] decision to terminate, . . . [it] actively deceived Callow as to [its] intentions and accepted the 'freebie' work [it] performed, in the knowledge that this extra work was performed with the intention/hope of persuading [Baycrest] to award [Callow] additional contracts once the present contracts expired" (para. 15 (emphasis added)). While Baycrest was not required to subvert its legitimate contractual interests to those of Callow in respect of the existing winter services agreement, it could not, as it did, "undermine those interests in bad faith" (*Bhasin*, at para. 65).

[40] For the reasons that follow, this dispute can be resolved on the basis of the first ground of appeal relating to the duty of honest performance. Baycrest knowingly misled Callow in the manner in which it exercised clause 9 of the agreement and this wrongful exercise of the termination clause amounts to a breach of contract under *Bhasin*. In the circumstances, I find it unnecessary to answer Callow's argument that, irrespective of the question of honesty, Baycrest breached a duty to exercise a discretionary power in good faith. Nor is it necessary to extend *Bhasin* to recognize a new duty of good faith relating to what Callow has described as "active non-disclosure" of information germane to performance.

B. *The Duty of Honest Performance*

(1) The Dishonesty Is Directly Linked to the Performance of the Contract

[41] I turn first to Callow's submission that the Court of Appeal erred in concluding that the dishonesty was not connected to the contract "then in effect" (C.A. reasons, at para. 18). As I will endeavour to explain, while Baycrest had the right to terminate, it breached the duty of honest performance in exercising the right as it did.

[42] Callow relies on the duty of honest performance in contract formulated in *Bhasin*. This duty, which applies to all contracts, "requires the parties to be honest with each other in relation to the performance of their contractual obligations" (para. 93). While this formulation of the duty refers explicitly to the performance of contractual

obligations, it applies, of course, both to the performance of one's obligations and to the exercise of one's rights under the contract. Cromwell J. concluded, at paragraphs 94 and 103, that the finding that the non-renewal clause had been exercised dishonestly made out a breach of the duty:

> The trial judge made a clear finding of fact that Can-Am "acted dishonestly toward Bhasin in exercising the non-renewal clause": para. 261; see also para. 271. There is no basis to interfere with that finding on appeal. It follows that Can-Am breached its duty to perform the Agreement honestly.
>
> . . .
>
> As the trial judge found, this dishonesty on the part of Can-Am was directly and intimately connected to Can-Am's performance of the Agreement with Mr. Bhasin and its exercise of the non-renewal provision. I conclude that Can-Am breached the 1998 Agreement when it failed to act honestly with Mr. Bhasin in exercising the non-renewal clause. [Emphasis added.]

This same framework for analysis applies to this appeal. The trial judge here made a clear finding of fact that Baycrest acted dishonestly toward Callow by representing that the contract was not in danger even though a decision to terminate the contract had already been made (paras. 65 and 67). There is no basis to interfere with that finding on appeal. As I will explain, it follows that Baycrest deceived Callow and thereby breached its duty of honest performance.

[43] I begin by recognizing the debate as to the extent to which good faith, beyond the duty of honesty, should substantively constrain a right to terminate, in particular one found in a contract (see, e.g., W. Courtney, "Good Faith and

Termination: The English and Australian Experience" (2019), 1 *Journal of Commonwealth Law* 185, at p. 189; M. Bridge, "The Exercise of Contractual Discretion" (2019), 135 *L.Q.R.* 227, at p. 247). For some, the right to terminate is in the nature of an "absolute right" insulated from judicial oversight, unlike the exercise of contractual discretion (see E. Peel, *The Law of Contract* (15th ed. 2020), at para. 18-088). To this end, I recall that Cromwell J. observed that "[c]lassifying the decision not to renew the contract as a contractual discretion would constitute a significant expansion of the decided cases under that type of situation" (*Bhasin*, at para. 72). I need not and do not seek to resolve this debate in this case. I emphasize that Cromwell J. himself recognized that, regardless of this debate, the non-renewal clause could not be exercised dishonestly (para. 94). Whatever the full range of circumstances to which good faith is relevant to contract law in common law Canada, it is beyond question that the duty of honesty is germane to the performance of this contract, in particular to the way in which the unilateral right to terminate for convenience set forth in clause 9 was exercised.

[44] As a further preliminary matter, I recall that the organizing principle of good faith recognized by Cromwell J. is not a free-standing rule, but instead manifests itself through existing good faith doctrines, and that this list may be incrementally expanded where appropriate. In this case, Callow invokes two existing doctrines: the duty of honest performance and the duty to exercise discretionary powers in good faith. In my view, properly understood, the duty to act honestly about matters directly linked to the performance of the contract — the exercise of the termination clause — is

sufficient to dispose of this appeal. No expansion of the law set forth in *Bhasin* is necessary to find in favour of Callow. Rather, this appeal provides an opportunity to illustrate this existing doctrine that, I say respectfully, was misconstrued by the Court of Appeal.

[45] While these two existing doctrines are indeed distinct, like each of the different manifestations of the organizing principle, they should not be thought of as disconnected from one another. Cromwell J. explained that good faith contractual performance is a shared "requirement of justice" that underpins and informs the various rules recognized by the common law on obligations of good faith contractual performance (*Bhasin*, at para. 64). The organizing principle of good faith was intended to correct the "piecemeal" approach to good faith in the common law, which too often failed to take a consistent or principled approach to similar problems and, instead, develop the law in this area in a "coherent and principled way" (paras. 59 and 64).

[46] By insisting upon the thread that ties the good faith doctrines together — expressed through the organizing principle — courts will put an end to the very piecemeal and incoherent development of good faith doctrine in the common law against which Cromwell J. sought to guard. While the duty of honest performance might bear some resemblance to the law of misrepresentation, for example, in a way that good faith in other settings may not, *Bhasin* encourages us to examine how other existing good faith doctrines, distinct but nonetheless connected, can be used as helpful

analytical tools in understanding how the relatively new duty of honest performance operates in practice.

[47] The specific legal doctrines derived from the organizing principle rest on a "requirement of justice" that a contracting party, like Baycrest here in respect of the contractual duty of honest performance, have appropriate regard to the legitimate contractual interests of their counterparty (*Bhasin*, at paras. 63-64). It need not, according to *Bhasin*, subvert its own interests to those of Callow by acting as a fiduciary or in a selfless manner that would confer a benefit on Callow. To be sure, this requirement of justice reflects the notion that the bargain, the rights and obligations agreed to, is the first source of fairness between parties to a contract. But by the same token, those rights and obligations must be exercised and performed, as stated by the organizing principle, honestly and reasonably and not capriciously or arbitrarily where recognized by law. This requirement of justice, rooted in a contractual ideal of corrective justice, ties the existing doctrines of good faith, including the duty to act honestly, together. The duty of honest performance is but an exemplification of this ideal. Here, based on its failure to perform clause 9 honestly, Baycrest committed a breach of contract, a civil wrong, for which it has to answer.

[48] When, in *Bhasin*, Cromwell J. recognized a duty to act honestly in the performance of contracts, he explained that this duty "should not be thought of as an implied term, but a general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance" (para. 74). Characterizing this

new duty as a matter of contractual doctrine was appropriate, Cromwell J. wrote, "since parties will rarely expect that their contracts permit dishonest performance of their obligations" (para. 76). The duty therefore applies even where — as in our case — the parties have expressly provided for the modalities of termination given that the duty of good faith "operates irrespective of the intentions of the parties" (para. 74). No contractual right, including a termination right, can be exercised dishonestly and, as such, contrary to the requirements of good faith.

[49] Cromwell J.'s choice of language is telling. It is not enough to say that, temporally speaking, dishonesty occurred while both parties were performing their obligations under the contract; rather, the dishonest or misleading conduct must be directly linked to performance. Otherwise, there would simply be a duty not to tell a lie, with little to limit the potentially wide scope of liability.

[50] The duty of honest performance is a contract law doctrine, setting it apart from other areas of the law that address the legal consequences of deceit with which it may share certain similarities. One could imagine analyzing the facts giving rise to a duty of honest performance claim through the lens of other existing legal doctrines, such as fraudulent misrepresentation giving rise to rescission of the contract or the tort of civil fraud (see, e.g., B. MacDougall, *Misrepresentation* (2016), at §1.144-1.145). However, in *Bhasin*, Cromwell J. wrote explicitly that while the duty of honest performance has similarities with civil fraud and estoppel "it is not subsumed by them" (para. 88). For instance, unlike estoppel and civil fraud, the duty of honest performance

does not require a defendant to intend that the plaintiff rely on their representation or false statement. Cromwell J. explicitly defined the duty as a new and distinct doctrine of contract law, not giving rise to tort liability or tort damages but rather resulting in a breach of contract when violated (paras. 72-74, 90, 93 and 103). We are not asked by the parties to depart from this approach.

[51] In light of *Bhasin*, then, how is the duty of honest performance appropriately limited? The breach must be directly linked to the performance of the contract. Cromwell J. observed a contractual breach because Can-Am "acted dishonestly toward Bhasin in exercising the non-renewal clause" (para. 94). He pointed, in particular, to the trial judge's conclusion that Can-Am "acted dishonestly with Mr. Bhasin throughout the period leading up to its exercise of the non-renewal clause" (para. 98; see also para. 103). Accordingly, it is a link to the performance of obligations under a contract, or to the exercise of rights set forth therein, that controls the scope of the duty. In a comment on *Bhasin*, Professor McCamus underscored this connection: "Cromwell J was of the view that the new duty of honesty could be breached in the context of the exercise of a right of non-renewal. That was the holding in *Bhasin*" ("The New General 'Principle' of Good Faith Performance and the New 'Rule' of Honesty in Performance in Canadian Contract Law" (2015), 32 *J.C.L.* 103, at p. 115). While the abuse of discretion was not the basis of the damages awarded in *Bhasin*, the duty of honest performance shares a common methodology with the duty to exercise contractual discretionary powers in good faith by fixing, at least in circumstances like ours, on the wrongful exercise of a contractual prerogative.

[52] Importantly, Callow does not seek to bar Baycrest from exercising the termination clause here; like in *Bhasin*, it only seeks damages flowing from the fact that the clause was exercised dishonestly. In other words, Callow's argument, properly framed, is that Baycrest could not exercise clause 9 in a manner that breached the duty of honesty, however absolute that right appeared on its face.

[53] Good faith is thus not relied upon here to provide, by implication, a new contractual term or a guide to interpretation of language that was somehow an unclear statement of parties' intent. Instead, the duty of honesty as contractual doctrine has a limiting function on the exercise of an otherwise complete and clear right because the duty, irrespective of the intention of the parties, applies to the performance of all contracts and, by extension, to all contractual obligations and rights. This means, simply, that instead of constraining the decision to terminate in and of itself, the duty of honest performance attracts damages where the manner in which the right was exercised was dishonest.

[54] The issue, then, is not whether the clause was properly interpreted, or whether the bargain itself is inadequate. Moreover, what is important is not the failure to act honestly in the abstract but whether Baycrest failed to act honestly in exercising clause 9. Stated simply, no contractual right can be exercised in a dishonest manner because, pursuant to *Bhasin*, that would be contrary to an imperative requirement of good faith, i.e. not to lie or knowingly deceive one's counterparty in a matter directly linked to the performance of the contract.

[55] This argument invites this Court to explain if and how Baycrest wrongfully exercised the termination clause, quite apart from any notice requirement. I would add that this focus on the *manner* in which the termination right was exercised should not be confused with *whether* the right could be exercised. Callow does not allege that Baycrest did not have the right to terminate the agreement — this entitlement to do so on 10 days' notice, pursuant to clause 9, is not at issue here. However, according to Callow, that right was exercised dishonestly, in breach of the duty in *Bhasin*, obliging Baycrest to pay damages as a consequence of its behaviour. Accordingly, I would draw the same distinction made by Cromwell J. in *Bhasin* regarding the exercise of the non-renewal clause at issue in that case: Can-Am acted dishonestly towards Mr. Bhasin in exercising the non-renewal clause as it did, and was liable for damages as a result, but it was not precluded from exercising its prerogative not to renew the contract.

[56] In service of its argument that Baycrest breached the duty of honest performance in its exercise of clause 9 of the contract, Callow points to references in *Bhasin* to Quebec law (at paras. 32, 35, 41, 44, 82 and 85) and in particular to Cromwell J.'s reference to the theory of the abuse of contractual rights set forth in arts. 6, 7 and 1375 of the *Civil Code of Québec* ("*C.C.Q.*" or "*Civil Code*") (para. 83). Callow observes that the requirement not to abuse contractual rights is recognized as a feature of good faith performance in Quebec. It submits that the allusion to the doctrine of abuse of rights was an indication of the requirements of good faith in *Bhasin* and argues that the same framework can usefully illustrate how the common law duty of honesty constrains the termination clause in this case.

[57] I agree that looking to Quebec law is useful here. The direct link between the dishonest conduct and the exercise of clause 9 was not properly identified by the Court of Appeal in this case and Quebec law helps illustrate the requirement that there be such a link from *Bhasin*. In my view, Baycrest's dishonest conduct is not a wrong independent of the termination clause but a breach of contract that, properly understood, manifested itself upon the exercise of clause 9. Through that direct link between the dishonesty and the exercise of the clause, the conduct is understood as contrary to the requirements of good faith. This emerges more plainly when considered in light of the civilian doctrine of contractual good faith alluded to in *Bhasin*, specifically the fact that, in Quebec "[t]he notion of good faith includes (but is not limited to) the requirement of honesty in performing the contract" (para. 83). Thus, like in Quebec civil law, no contractual right may be exercised dishonestly and therefore contrary to the requirements of good faith. Properly raised by Cromwell J., this framework for connecting the exercise of a contractual clause and the requirements of good faith is helpful to illustrate, for the common law, the link made in *Bhasin* that the Court of Appeal failed to identify here.

[58] Mindful no doubt of its unique vantage point which offers an occasion to observe developments in both the common law and the civil law in its work, this Court has often drawn on this country's bijural environment to inform its decisions, principally in private law appeals. While this practice has varied over time and has been most prevalent in civil law cases in which common law authorities are considered, the influence of bijuralism is not and need not be confined to appeals from Quebec or to

matters relating to federal legislation (see J.-F. Gaudreault-DesBiens, *Les solitudes du bijuridisme au Canada* (2007), at pp. 7-22). In its modern jurisprudence, this Court has recognized the value of looking to legal sources from Quebec in common law appeals, and has often observed how these sources resolve similar legal issues to those faced by the common law (see, e.g., *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, at pp. 1143-44; *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, at para. 138; see also *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, at para. 41). Used in this way, authorities from Quebec do not, of course, bind this Court in its disposition of a private law appeal from a common law province, but rather serve as persuasive authority, in particular, by shedding light on how the jurisdictionally applicable rules work. In my respectful view, it is uncontroversial that, when done carefully, sources of law may be used in this way (*Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, at para. 32, citing J.-L. Baudouin, "L'interprétation du Code civil québécois par la Cour suprême du Canada" (1975), 53 *Can. Bar Rev.* 715, at p. 726). As Robert J. Sharpe put it, writing extra-judicially, judges "should strive to maintain the coherence and integrity of the law as defined by the binding authorities, using persuasive authority to elaborate and flesh out its basic structure" (*Good Judgment: Making Judicial Decisions* (2018), at pp. 171-72).

[59] This does not mean the appropriate use of these sources is limited to cases where there is a gap in the law of the jurisdiction in which the appeal originates, in the sense that there is no answer to the legal problem in that law, or where a court

contemplates modifying an existing rule. Respectfully said, I am aware of no authority of this Court supporting so restrictive an approach and note that, while unresolved, there are serious debates in both the common law and the civil law as to what exactly a "gap" in the law might be (see, e.g., J. Gardner, "Concerning Permissive Sources and Gaps" (1988), 8 *Oxford J. Leg. Stud.* 457; J. E. C. Brierley, "Quebec's 'Common Laws' (*Droits communs*): How Many Are There?", in E. Caparros et al., eds., *Mélanges Louis-Philippe Pigeon* (1989), 109). Taking this approach would unduly inhibit the ability of this Court to understand the law better in reference to how comparable problems are addressed elsewhere in Canada. It would be wrong to disregard potentially helpful material in this way merely because of its origin.

[60] In private law, comparison between the common law and civil law as they evolve in Canada is a particularly useful and familiar exercise for this Court. This exercise of comparison between legal traditions for the purposes of "explanation" and "illustration" has been described as "worthwhile", "useful" and "helpful" (*Farber*, at para. 32 and 35; *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392, at para. 76; *Norsk*, at p. 1174, per Stevenson J. (concurring)). Principles from the common law or the civil law may serve as a "source of inspiration" for the other, precisely because these "two legal communities have the same broad social values" (*Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214, at para. 38). The common law and the civil law are not the only legal traditions relevant to the work of the Court; yet, the opportunity for dialogue between these legal traditions is arguably a special mandate for this Court given the breadth and responsibilities of its

bijural jurisdiction. This opportunity has been underscored in scholarly commentary, including in the field of good faith performance of contracts (e.g., L. LeBel and P.-L. Le Saunier, "L'interaction du droit civil et de la common law à la Cour suprême du Canada" (2006), 47 *C. de D.* 179, at p. 206; R. Jukier, "Good Faith in Contract: A Judicial Dialogue Between Common Law Canada and Québec" (2019), 1 *Journal of Commonwealth Law* 83).

[61] Writing extra-judicially, LeBel J. has observed that this exercise is part of the function of this Court, as a national appellate court, adding that [TRANSLATION] "because it has the ability to do so today, thanks to its institutional resources, the Supreme Court now assumes the symbolic responsibility of embracing a culture of dialogue between the two major legal traditions" ("Les cultures de la Cour suprême du Canada : vers l'émergence d'une culture dialogique?", in J.-F. Gaudreault-DesBiens et al., eds., *Convergence, concurrence et harmonisation des systèmes juridiques* (2009), 1, at p. 7). This Court's unique institutional capacity as the apex court of common law and civil law appeals in Canada allows it to engage in dialogue that makes it "more than a court of appeal for each of the provinces" (F. Allard, *The Supreme Court of Canada and its Impact on the Expression of Bijuralism* (2001), at p. 21). The opportunity for dialogue presents itself specifically in the context of the common law good faith doctrines. Pointing to the writing of LeBel J. and to how Quebec sources were deployed in *Bhasin*, one comparative law scholar wrote recently that while the distinctiveness of Canada's legal traditions must be "maintained and jealously protected, [this] need not prevent [them] from learning from [one another]" (R. Jukier,

"The Legacy of Justice Louis LeBel: The Civilian Tradition and Procedural Law" (2015), 70 *S.C.L.R.* (2d) 27, at p. 45). Professor Waddams has remarked that the reference to Quebec law in *Bhasin* is an "invitation" to consider civil law concepts, including abuse of rights, in the development of the common law relating to good faith (see "Unfairness and Good Faith in Contract Law: A New Approach" (2017), 80 *S.C.L.R.* (2d) 309, at pp. 330-31). This would be consistent with a broader pattern of "more pronounced reciprocal influence between traditions as comparative analysis becomes increasingly prominent in [this Court's] judgments" (Allard, at p. 22).

[62] Indeed, this Court has undertaken this exercise in some common law and civil law appeals in which good faith principles are engaged, including *Bhasin* itself (see also *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, [2015] 1 S.C.R. 500, at para. 30; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at paras. 75 and 96, citing *Farber*). Cromwell J. pointed to the comfort that can be drawn from the experience of the civil law of Quebec, for example, by those common lawyers who fear that a new duty of honest performance would "create uncertainty or impede freedom of contract" (*Bhasin*, at para. 82). Cromwell J. also pointed to substantive points of comparison in support of his analysis on the similarity between implied terms in the common law and good faith in Quebec as well as on the fact that good faith in Quebec law also includes a requirement of honesty in performing contracts (paras. 44 and 83). Strikingly, in one recent Quebec example that is especially relevant here, Gascon J., writing for a majority of this Court, quoted *Bhasin* on the degree to which the organizing principle of good faith exemplifies the notion that a

contracting party should have "appropriate regard" to the legitimate contractual interests of their counterparty. He noted that "[t]his statement applies equally to the duty of good faith in Quebec civil law" (*Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 SCC 46, [2018] 3 S.C.R. 101, at para. 117). I note this only as an instance of accepted judicial reasoning in this field, where comparisons are rightly said to be difficult. A majority of the Court nevertheless invoked a leading common law authority on good faith to illuminate the civil law's distinct treatment as both helpful and persuasive.

[63] In the same way, I draw on Quebec civil law in this appeal to illustrate what it means for dishonesty to be directly linked to contractual performance. As I will explain, the civil law framework of abuse of rights helps to focus the analysis of whether the common law duty of honest performance has been breached on what might be called the wrongful exercise of a contractual right.

[64] This appeal makes plain a need for clarification on the question of when dishonesty is directly linked to the performance of a contract. The Court of Appeal recognized the duty of honest performance, but concluded that the communications at issue were not directly linked to performance of the existing contract: "Communications between the parties may have led Mr. Callow to believe that there would be a new contract, but those communications did not preclude [Baycrest] from exercising their right to terminate the winter contract then in effect" (para. 18). The Court's reasons also conclude that Baycrest could exercise the termination clause

"provided only that [it] informed him of [its] intention to do so and gave the required notice. That is all [Callow] bargained for, and all that [it] was entitled to" (para. 17). The Court of Appeal apparently did not consider that the manner in which the termination right was exercised amounted to a breach of the duty to act honestly. This was, for the trial judge in the present appeal, the matter directly linked to the performance of the contract in the dispute with Callow.

[65] These diverging conclusions in this case are unsurprising given that this Court recognized the duty of honest performance as a "new" good faith doctrine relatively recently (*Bhasin*, at para. 93). Nevertheless, the reasons in *Bhasin* indicate how the required connection between the dishonesty and performance is made manifest. When Cromwell J. summarized the new duty, he suggested that it required honesty "about matters directly linked to the performance of the contract" and, later, "in relation to the performance of their contractual obligations" (paras. 73 and 92). But this latter formulation does not of course comprehensively describe the required link, not least of all because it speaks of honesty in the performance of an obligation, and says nothing about the exercise of a right. Yet, in applying the duty to the facts in *Bhasin*, this Court concluded that there was a breach of the duty on the basis of the trial judge's finding that Can-Am acted dishonestly in the exercise of the non-renewal clause (paras. 94 and 103).

[66] Further, I note that while the duty of honest performance has similarities with the pre-existing common law doctrines of civil fraud and estoppel, these doctrines

do not assist in our analysis of the required link to the performance of the contract. The duty of honest performance is a contract law doctrine (*Bhasin*, at para. 74). It is not a tort. It is its nature as a contract law doctrine that gives rise to the requirement of a nexus with the contractual relationship. While other areas of the law involving dishonesty may be useful to understand what it means to be dishonest, they provide no obvious assistance in determining what is and is not directly linked to the performance of a contract.

[67] In my view, the required direct link between dishonesty and performance from *Bhasin* is made plain, by way of simple comparison, when one considers how the framework for abuse of rights in Quebec connects the manner in which a contractual right is exercised to the requirements of good faith. Specifically, the direct link exists when the party performs their obligation or exercises their right under the contract dishonestly. When read together, arts. 6, 7 and 1375 *C.C.Q.* point to this connection by providing that no contractual right may be exercised abusively without violating the requirements of good faith. Article 7 in particular provides "[n]o right may be exercised with the intent of injuring another or in an excessive and unreasonable manner, and therefore contrary to the requirements of good faith." While the substantive content of this article is not relevant to the common law analysis, the framework is illustrative. This article shows how the requirements of good faith can be tied to the exercise of a right, including a right under a contract. It is the exercise of the right that is scrutinized to assess whether the action has been contrary to good faith.

[68] Under the civil law framework of abuse of rights, it is no answer to say that, because a right is unfettered on its face, it is insulated from review as to the manner in which it was exercised. Moreover, the doctrine of abuse of right does not preclude the holder from exercising the contractual right in question. As Professors Jobin and Vézina have written on abuse of contractual rights in Quebec, [TRANSLATION] "[t]he doctrine of abuse of right does not lead to the negation of the right as such; rather, it addresses the use made of the right by its holder" (J.-L. Baudouin and P.-G. Jobin, *Les* obligations (7th ed. 2013), by P.-G. Jobin and N. Vézina, at No. 156). It has been said that good faith in the civil law has a [TRANSLATION] "*limiting function*" in directing standards of ethical conduct to which parties must conform, as a matter of imperative law, when performing the contract: [TRANSLATION] "It [i.e. the limiting function of good faith] thus seeks to sanction a party's improper conduct in the exercise of the party's contractual prerogatives." (M. A. Grégoire, *Liberté, responsabilité et utilité : la bonne foi comme instrument de justice* (2010), at p. 225). That is what is at stake here: whether the ethical standard expressed in the common law duty to act honestly in performance, as a manifestation of the organizing principle of good faith recognized in *Bhasin*, limits the manner in which Baycrest can exercise its right to terminate the winter maintenance agreement. By focusing attention on the exercise of a particular right under a particular contract, a direct link to the performance of that contract is helpfully drawn.

[69] Thus, in *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122 — a Quebec case cited in *Bhasin*, at para. 85 — the contracting party's right to demand

repayment of the loan, as stipulated in the contract, was upheld (p. 169). The "abuse of right" identified by the Court was the manner in which the right was exercised. This is, as I have noted, broadly similar to *Bhasin*. There, Can-Am had a contractual right of non-renewal, but Can-Am nonetheless exercised that right in a dishonest manner, and thus breached the duty of honest performance (para. 94). This was a wrongful exercise of the right in that it was exercised contrary to the mandatory requirement of good faith performance.

[70] There are special reasons, of course, to be cautious in undertaking the comparative exercise to which Callow invites us here. One is that there are important differences between the civilian treatment of abuse of contractual rights and the current state of the common law. The *Civil Code* provides that no right may be exercised with the intent to injure another or in an excessive and unreasonable manner and therefore contrary to the requirements of good faith requiring that parties conduct themselves in good faith, in particular at the time an obligation is performed. Insofar as the organizing principle in *Bhasin* speaks to a related idea that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily, this principle, unlike Quebec law, is not a free-standing rule but rather a standard that underpins and manifests itself in more specific doctrines. Further, in *Bhasin*, positive law was only formally extended by recognizing a general duty of honesty in contractual performance.

[71] An additional reason is the common law's fabled reluctance to embrace the standard associated with the civilian idea of "abuse of rights", including abuse of contractual rights, a doctrine to which *Bhasin* alluded in para. 83 (see, e.g., the survey in H. C. Gutteridge, "Abuse of Rights" (1933), 5 *Cambridge L.J.* 22, at pp. 22 and 30-31).[1] Mindful of this, Cromwell J. recalled the "fundamental commitments of the common law of contract" to the "freedom of contracting parties to pursue their individual self-interest" and — importantly to the theory of abuse of rights — that the organizing principle he recognized "should not be used as a pretext for scrutinizing the motives of contracting parties" (para. 70). Others have observed that the civilian conception of legal rights — *droits subjectifs* in the French tradition — are conceptually different from "rights" in the common law, or even that the preoccupation with the "social" dimension of limits to rights, as opposed to a purely "economic" aspect of a freely-negotiated bargain, is peculiar to the civil law (see, e.g., F. H. Lawson, *Negligence in the Civil Law* (1950), at pp. 15-20). Still others have observed the differing techniques for the genesis of new rules of law according to the common law and civil law methods (see, e.g., P. Daly, "La bonne foi et la common law: l'arrêt *Bhasin* c. *Hrynew*", in J. Torres-Ceyte, G.-A. Berthold and C.-A. M. Péladeau, eds., *Le dialogue en droit civil* (2018), 89, at pp. 101-2). One should not lose sight of the fact

[1] Professor Gutteridge pointed in particular to the influence of *Mayor of Bradford v. Pickles*, [1895] A.C. 587 (H.L.) and, in the contractual setting, *Allen v. Flood*, [1898] A.C. 1 (H.L.), quoting from p. 46 of the latter judgment: ". . . any right given by contract may be exercised as against the giver by the person to whom it is granted, no matter how wicked, cruel, or mean the motive may be which determines the enforcement of the right".

that, as intellectual and historical traditions, the common law and the civil law represent, in many respects, distinctive ways of knowing the law.

[72] It is true that LeBel J., writing extra-judicially prior to this Court's decision in *Bhasin*, in which he concurred, noted that in the dialogue between the common law and the civil law in this Court's jurisprudence, good faith offered an example of [TRANSLATION] "coexistence" rather than "convergence" or "divergence" (LeBel, at pp. 12-15). Yet as he noted, comparison in this field that respects the "intellectual integrity" of distinctive traditions remains a viable part of the dialogue between common law and the civil law at this Court (p. 15). While the requirements of honest contractual performance in the two legal traditions may be rooted in distinct histories, they have come together to address similar issues, at least in the context of dishonest performance (*Bhasin*, at para. 83). The civil law provides a useful analytical guide to illustrating the relatively recent common law duty. Two reasons in particular underlie the usefulness of the comparative exercise here.

[73] First, I stress that I do not rely on the civil law here for the specific rules that would govern a similar claim in Quebec. Rather, within the constraints imposed on this Court by the precedent in *Bhasin* and the wider common law context, I draw on abuse of rights as a framework to understand the common law duty of honest performance. Second, there is no serious concern here that looking to Quebec law will throw the common law into a state of uncertainty. As Cromwell J. did in *Bhasin*, this Court can take comfort from the experience of Quebec to allay fears that applying this

general framework of wrongful exercise of rights will result in commercial uncertainty or inappropriately constrain freedom of contract. Notwithstanding their differences, the common law and the civil law in Quebec share, in respect of good faith, some of the "same broad social values" that justify comparison generally (*Bou Malhab*, at para. 38). As noted, this Court pointed to a shared concern for the proper compass of good faith in that it "does not require acting to serve [the other contracting party's] interests in all cases" and both anchor remedies in corrective, not distributive justice (*Churchill Falls*, at para. 117, citing *Bhasin*, at para. 65). As Professor Moore wrote, prior to his appointment as a judge [TRANSLATION] "the value of individual autonomy, and the fear that good faith is an imprecise concept, are not exclusive to the common law. They are discussed at length in civil law commentary and jurisprudence" ("Brèves remarques spontanées sur l'arrêt *Bhasin c. Hrynew*", in J. Torres-Ceyte, G.-A. Berthold and C.-A. M. Péladeau, eds., *Le dialogue en droit civil* (2018), 81, at p. 84). For these reasons, it is not inappropriate to illustrate the duty of honest performance using the framework of the wrongful exercise of a right. Dishonesty is directly linked to the performance of a given contract where it can be said that the exercise of a right or the performance of an obligation under that contract has been dishonest.

[74] Applying *Bhasin* to this case, and drawing on the illustration provided by the Quebec civil law sources Cromwell J. himself cites, I am of the respectful view that the Court of Appeal erred when it concluded that the dishonesty here was only about a future contract. Properly understood, the alleged dishonesty in this case was directly

linked to the performance of the contract because Baycrest's exercise of the termination right provided to it under the contract was dishonest.

[75] The termination right was exercised dishonestly according to the trial judge in our case, notwithstanding the fact that its terms — the 10-day notice — were otherwise respected. Pointing to the dishonest representations, regarding the danger to the contract and made in anticipation of the notice period, she held that the duty to act honestly was linked to the termination of the contract and the exercise of that right in the circumstances was a breach of contract. The trial judge did not deny the right of Baycrest to terminate the contract, but the manner in which it did so was wrongful — in breach of the duty of honesty — and for that it owed Callow damages. Importantly, this does not deny the existence of the termination right but fixes on the wrongful manner in which it was exercised.

(2) Baycrest's Conduct Constitutes Dishonesty

[76] The second issue to be resolved is whether Baycrest's conduct amounts to dishonesty within the meaning of the duty of honest performance in *Bhasin*. Callow takes issue with the Court of Appeal's conclusion that while the facts may have suggested a failure to act honourably, they did not rise to the level of a breach of this duty. To dispose of this appeal, then, we must determine what standard of honesty was expected of Baycrest in its exercise of clause 9.

[77] There is common ground that parties to a contract cannot outright lie or tell half-truths in a manner that knowingly misleads a counterparty. It is also agreed here that the failure to disclose a material fact, without more, would not be contrary to the standard. Beyond this, however, the parties continue to disagree about what might constitute knowingly misleading conduct as that idea was alluded to in *Bhasin*.

[78] Callow argues that while this Court in *Bhasin* held that the duty of honest performance does not impose a duty of disclosure, it left open the possibility that an omission to inform can nonetheless be knowingly misleading in certain circumstances. Callow acknowledges that the line between a misrepresentation and the innocent failure to disclose is not always easy to draw. But by "positively misleading" Mr. Callow that the winter maintenance agreement was likely to be renewed in 2014, he was led to infer, mistakenly and to the knowledge of Baycrest, that a decision had not been made to terminate the existing contract in 2013. Failing to correct this false impression, in Callow's view, was a breach of its obligation to act honestly in the performance of the winter maintenance agreement. It meant that clause 9 was not exercised in keeping with the obligatory duty to perform the contract honestly imposed in *Bhasin*.

[79] Baycrest submits that "active deception" — a term invoked by the trial judge, as well as both parties — requires actual dishonesty, in the sense that an outright lie is necessary. "Silence", said its counsel at the hearing, "can only constitute misrepresentation when there is a duty to speak". Since the duty of honest performance does not bring with it a duty of disclosure, "silence cannot constitute dishonesty or an

act of misrepresentation, whether done intentionally or, I suppose, accidentally" (transcript, at p. 37).

[80] Baycrest is right to say that the duty to act honestly "does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract" (*Bhasin*, at para. 73; see also A. Swan, J. Adamski and A. Y. Na, *Canadian Contract Law* (4th ed. 2018), at p. 347). Cromwell J. referred to *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985 (4th Cir. 1981), in support of his conclusion that the duty of honest performance is distinct from a free-standing duty to disclose information (para. 87). In *United Roasters*, the terminating party had decided in advance of the required notice period to terminate the contract. The court held that no disclosure of that intention was required other than what was stipulated in the contract. In Cromwell J.'s view, this made "it clear that there is no unilateral duty to disclose information relevant to termination" (para. 87).

[81] One might well understand that courts would shy away from imposing a free-standing positive duty to disclose information to a counterparty where it would serve to upset the corrective justice orientation of contract law. Whether or not a positive duty to cooperate of this character should be associated with the principle of good faith performance in the common law, a party to a contract has no general duty to subordinate their interests to that of the other party in the law as it now stands (see *Bhasin*, at para. 86). Requiring a party to speak up in service of the requirements of good faith where nothing in the parties' contractual relationship brings a duty to do so

could be understood to confer an unbargained-for benefit on the other that would stand outside the usual compass of contractual justice. Yet where the failure to speak out amounts to active dishonesty in a manner directly related to the performance of the contract, a wrong has been committed and correcting it does not serve to confer a benefit on the party who has been wronged. To this end, Cromwell J. clarified that the "situation is quite different . . . when it comes to actively misleading or deceiving the other contracting party in relation to performance of the contract" (para. 87). In such circumstances, contractual parties should be mindful to correct misapprehensions, lest a contractual breach of the *Bhasin* duty be found.

[82] By noting that liability flowed from active dishonesty and not a unilateral duty to disclose, Cromwell J. indicated that the duty of honesty is consonant with the ordinary principles of contractual justice: that *Bhasin* does not impose a duty to disclose or a fiduciary-type obligation means that performing a contract honestly is not a selfless or altruistic act. One might well say that performing one's own end of a bargain honestly is in keeping with the pursuit of self-interest as long as the law can be counted on to require the same honest conduct from one's counterparty. Whatever constraints it justifies on Baycrest's ability to terminate the contract based on values of honesty associated with good faith, it does not require it to confer a benefit on Callow in exercising that right. As Cromwell J. explained, having appropriate regard for the legitimate contractual interests of the contracting parties "does not require acting to serve those interests in all cases" (para. 65). This explains, to my mind, the limited character of the duty of honesty: it is not a device that allows a court, in the name of a

conception of good faith resting on distributive justice, to require the party that has to exercise a contractual right or power "to serve" the other party's interest at the expense of their own.

[83] This emphasis on the corrective justice foundation of the duty to act honestly in performance is, in my view, helpful to understanding why a facially unfettered right is nonetheless constrained by the imperative requirement of good faith explained in *Bhasin*. I recall that Cromwell J. sought to reassure those who feared commercial uncertainty resulting from the recognition of this new duty by explaining that the requirement of honest performance "interferes very little with freedom of contract" (para. 76). After all, the expectation that a contract would be performed without lies or deception can already be thought of as a minimum standard that is part of the bargain. I agree with the sentiment expressed by the Chief Justice of Alberta in a case that relied on *Bhasin* and *Potter*: "Companies are entitled to expect that the parties with whom they contract will be honest" in their contractual dealings (*IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing*, 2017 ABCA 157, 53 Alta. L.R. (6th) 96, at para. 4). In that sense, while the duty is one of mandatory law, in most cases it can be thought of as leaving the agreement and both parties' expectations — the first source of justice between the parties — in place. By extension, requiring that a party exercise a right under the contract in keeping with this minimum standard only precludes the commission of a wrong and thus repairing that breach, where damage resulted, may be thought of as consonant with the principles of corrective justice. Where a party has lied or otherwise knowingly misled the other

contracting party in respect of a matter that is directly linked to the performance of the contract, it amounts to breach of contract that must be set right, but the benefits of the bargain need not be otherwise reallocated between the parties involved.

[84] That said, I emphasize once again that it is unquestionable that the duty is imposed as a matter of contractual doctrine rather than by implication or interpretation, and, by virtue of its status as contractual doctrine, parties are "not free to exclude" the duty altogether (*Bhasin*, at para. 75). Even if the parties, as here, have agreed to a term that provides for an apparently unfettered right to terminate the contract for convenience, that right cannot be exercised in a manner that transgresses the core expectations of honesty required by good faith in the performance of contracts.

[85] This framework for measuring the wrongful exercise of the termination right does not turn on Baycrest's motive in exercising clause 9 beyond the observation that it did so dishonestly. The right of termination was, on its face, one without cause: Baycrest may have had legitimate grievances against Callow or some ulterior motive for its knowing deception — it is of no moment. The negative view that the property manager may have had of Callow, alluded to by the trial judge (at para. 14), is not the source of the breach of the duty of honest performance.

[86] Moreover, I note that Cromwell J. described the requirements of the duty of honesty negatively: while the duty of honest performance does not require parties to act angelically by subordinating their own interests to that of their counterparty (*Bhasin*, at para. 86), they must *refrain* from lying or knowingly misleading their

counterparty (para. 73). As a "negative" obligation — that is, in the absence of a recognized duty to act, the injunction it imposes is one not to act dishonestly — it sits more plainly with the ordinary objectives of corrective justice and what one scholar sees as the traditional posture of the common law in favour of contractual autonomy and individual freedom in private law. [TRANSLATION] "It is clear", wrote Professor Daly in a comment on the common law method consecrated in *Bhasin*, "that the duty of honesty recognized in *Bhasin* is a negative obligation — not to lie — rather than a positive obligation — to act in good faith" (pp. 101-2). This same orientation has been observed as animating the analogous contractual duty of good faith in the civil law. While positive obligations to cooperate in performance may be otherwise required by the law of good faith, scholars have observed that the notional equivalent of the duty of honest performance in Quebec civil law most typically imposes negative obligations — to refrain from lying, for example — in the measure of the abuse of a contractual right (Baudouin and Jobin, at No. 161). Care must be taken, I hasten to say, not to confuse the [TRANSLATION] "duty to act faithfully" recognized in this regard, with the fiduciary duty of loyalty that stands outside of good faith in both legal traditions.

[87] I would add that, as Cromwell J. made plain, the recognition of the duty to act honestly in performance does not necessarily mean that the ideal spoken to in the organizing principle of good faith set forth in *Bhasin* might not manifest itself otherwise. Even within the limited compass of corrective justice, circumstances may arise in which the organizing principle would encourage the view that contractual rights must be exercised in a manner that was neither capricious nor arbitrary, for example,

or that some duty to cooperate between the parties be imposed, though recognizing that, contrary to fiduciary duties, "good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first" (*Bhasin*, at para. 65). But for present purposes, it is not necessary to go that further step: I am of the view that where the exercise of a contractual right is undertaken dishonestly, the exercise is in breach of contract and this wrong must be corrected. That is what happened here.

[88] The question that remains is whether Baycrest lied to or knowingly misled Callow and thus breached the duty to act honestly.

[89] I recognize that in cases where there is no outright lie present, like the case before us, it is not always obvious whether a party "knowingly misled" its counterparty. Yet, Baycrest is wrong to suggest that nothing stands between the outright lie and silence. Elsewhere, as in the law of misrepresentation, for instance, one encounters examples of courts determining whether a misrepresentation was present, regardless of whether there was some direct lie (see A. Swan, "The Obligation to Perform in Good Faith: Comment on *Bhasin v. Hrynew*" (2015), 56 *Can. Bus. L.J.* 395, at p. 402). As Professor Waddams has written, "[a]n incomplete statement may be as misleading as a false one, and such half-truths have frequently been treated as legally significant misrepresentations." Ultimately, he wrote, "it is open to the court to hold that the concealment of the material facts can, when taken with general statements, true in themselves but incomplete, turn those statements into misrepresentations" (*The Law of*

Contracts (7th ed. 2017), at No. 441). Similarly, where a party makes a statement it believes to be true, but later circumstances affect the truth of that earlier statement, courts have found, in various contexts, that the party has an obligation to correct the misrepresentation (see *Xerex Exploration Ltd. v. Petro-Canada*, 2005 ABCA 224, 47 Alta. L.R. (4th) 6, at para. 58; see also C. Mummé, "*Bhasin v. Hrynew*: A New Era for Good Faith in Canadian Employment Law, or Just Tinkering at the Margins?" (2016), 32 *Intl J. Comp. Lab. L. & Ind. Rel.* 117, at p. 123).

[90] These examples encourage the view that the requirements of honesty in performance can, and often do, go further than prohibiting outright lies. Indeed, the concept of "misleading" one's counterparty — the term invoked separately by Cromwell J. — will in some circumstances capture forms of silence or omissions. One can mislead through action, for example, by saying something directly to its counterparty, or through inaction, by failing to correct a misapprehension caused by one's own misleading conduct. To me these are close cousins in the catalogue of deceptive contractual practices (see, e.g., *Yam Seng Pte Ltd. v. International Trade Corp. Ltd.*, [2013] E.W.H.C. 111, [2013] 1 All E.R. (Comm.) 1321 (Q.B.), at para. 141).

[91] At the end of the day, whether or not a party has "knowingly misled" its counterparty is a highly fact-specific determination, and can include lies, half-truths, omissions, and even silence, depending on the circumstances. I stress that this list is not closed; it merely exemplifies that dishonesty or misleading conduct is not confined

to direct lies. No reviewable error has been shown in the finding of dishonesty that took place in anticipation of the exercise of clause 9 here. I would not interfere with the trial judge's view here on a matter that is owed deference. Deference should be shown to the trial judge in reviewing her discretionary exercise of weighing the evidence, especially given credibility played a part in her analysis, as she explained.

[92] Reading the whole of the first instance judgment, I see no consequential error in the account given by the trial judge of the law on the duty of honest performance. She did not base her conclusions on some free-standing duty to disclose information. Instead, she examined whether Baycrest knowingly misled Callow as to the standing of the winter maintenance agreement, and thus wrongfully exercised its right of termination. Despite this, however, Baycrest argues that the trial judge erred in failing to recognize that its conduct did not reach the "much higher standard" spoken to in *Bhasin*. I disagree. No such error has been shown.

[93] It is helpful for our purposes to recall that on the facts in *Bhasin*, part of the dishonest conduct concerned the respondent Can-Am's plans to reorganize its activities in Alberta. Its plan contemplated invoking its contractual right of non-renewal to force a merger between Mr. Bhasin and his competitor, Mr. Hrynew. In effect, this reorganization would have given Mr. Bhasin's business to Mr. Hrynew. Can-Am, however, had said nothing of its plan to Mr. Bhasin. When Mr. Bhasin first heard of the merger plans he questioned an official of Can-Am about its intentions. "[T]he official 'equivocated'", Cromwell J. explained, "and did not tell him the truth that from

Can-Am's perspective this was a 'done deal'" (para. 100). Cromwell J. later concluded that "Can-Am's breach of contract consisted of its failure to be honest with Mr. Bhasin about its contractual performance and, in particular, with respect to its settled intentions with respect to renewal" (para. 108). Cromwell J. wrote: "The trial judge made a clear finding of fact that Can-Am 'acted dishonestly toward Bhasin in exercising the non-renewal clause'. There is no basis to interfere with that finding on appeal. It follows that Can-Am breached its duty to perform the Agreement honestly" (para. 94 (references omitted)).

[94] It is true that Baycrest remained silent about its decision to terminate Callow's contract and that clause 9, on its face, did not impose on it a duty to disclose its intention except for on the 10-day notice requirement. That said, it had to refrain, as the trial judge said, from "deceiv[ing] Callow" through a series of "active communications" (para. 66). When it failed to refrain from doing so in anticipation of exercising its termination right, it deceived Callow into thinking it would leave the existing winter services agreement intact.

[95] These "active communications", as I understand the trial judge's findings of fact, came in two forms. First, Mr. Peixoto made statements to Mr. Callow suggesting that a renewal of the winter maintenance agreement was likely. As the trial judge found, "[a]fter his discussions with Mr. Peixoto and Mr. Campbell, Mr. Callow thought that he was likely to get a two-year renewal of his winter maintenance services contract and [it was] satisfied with his services [under the existing agreement which

had one winter to run]. This assumption is also supported by the documentary evidence, especially by the private e-mails between Mr. Peixoto and Mr. Campbell" (para. 41).

[96] Baycrest attempts to recast the significance of this finding, arguing that Mr. Callow only had casual discussions with two of the JUC members — Mr. Peixoto and Mr. Campbell — about the possibility of a contract renewal. Such casual discussions, it says, cannot rise to the level of a lie. This position ignores the key finding in the trial judge's reasons that it was Mr. Peixoto — the JUC member who negotiated the main pricing terms with Callow for the winter maintenance agreement — who made statements to Mr. Callow suggesting that a renewal was likely (paras. 23 and 40-43). After making credibility findings against Mr. Peixoto, the trial judge found that he had "led Mr. Callow to believe that all was fine with the winter [contract]" and that Baycrest was "interested in a future extension of Callow's contracts" (para. 47). This dishonesty did not take place in the abstract: the trial judge found it to be relevant to the exercise of clause 9.

[97] The second form of "active communications" that deceived Callow was related to the "freebies" Callow had offered Baycrest in the summer of 2013. As the trial judge found, Callow performed this free work because Mr. Callow wanted to provide an incentive for Baycrest to renew the winter maintenance agreement. Baycrest, for its part, gladly accepted the services offered by Callow.

[98] Again, Baycrest attempts to recast the significance of these findings, arguing that "there is nothing inherently unlawful or unfair about accepting a

contractor's incentives offered in the hopes of securing a new contract or the renewal of an existing contract" (R.F., at para. 112). Whether or not that is the case, I again stress that Mr. Peixoto "understood that the work performed by Callow was a 'freebie' to add an incentive for the boards to renew his winter maintenance services contract" and "advised Mr. Callow that he would tell the other board members about this work" (trial reasons, at para. 43). These active communications by Baycrest suggested, deceptively, that there was hope for renewal and, perforce, the current contract would not be terminated.

[99] Considering Baycrest's conduct as a whole over those few months, it was certainly reasonable for Mr. Callow, who was led to believe that a renewal was likely, to infer that Baycrest had not decided to terminate the ongoing contract. Moreover, Baycrest knew Mr. Callow was under this false impression, as shown by the email sent by Mr. Peixoto on July 17, 2013 and, nonetheless, continued to give him the impression that a renewal was likely even though the decision to terminate him was made (see trial reasons, at para. 48). Upon realizing that Mr. Callow was under this false impression, Baycrest should have corrected the misapprehension; in the circumstances, its conduct misled Callow.

[100] I respectfully disagree with the idea that the deception in this case only concerned termination for unsatisfactory services and did not extend to termination for any other reason. The trial judge found that the dishonest conduct involved

representations that the contract was not in danger at all when Baycrest knew it would be terminated (para. 65).

[101] The Court of Appeal did not interfere with these findings, nor has Baycrest argued that the trial judge made any palpable and overriding errors. Accordingly, in light of the trial judge's findings of fact, I agree that Baycrest intentionally withheld information in anticipation of exercising clause 9, knowing that such silence, when combined with its active communications, had deceived Callow. By failing to correct Mr. Callow's misapprehension thereafter, Baycrest breached its contractual duty of honest performance. This is in stark contrast to *United Roasters*, where the defendant merely withheld its decision to terminate the agreement. Unlike in this case, the defendant there did not engage in a series of acts that it knew would cause the plaintiff to draw an incorrect inference and then fail to correct the plaintiff's misapprehension.

[102] In this sense, this case is broadly similar to *Dunning v. Royal Bank* (1996), 23 C.C.E.L. (2d) 71 (Ont. C.J. (Gen. Div.)), one of the examples of breaches of the duty to exercise good faith in the manner of dismissal provided by Iacobucci J. in support of his conclusions in *Wallace*. While it was decided in the distinctive good faith setting of the employment context, *Dunning* is an appropriate analogy to the present case because in *Bhasin* Cromwell J. explicitly recognized that "the duty of honesty was a key component of the good faith requirements which have been recognized in relation to termination of employment contracts" (*Bhasin*, at para. 73, citing *Wallace*, at para. 98; *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362, at para. 58).

It seems to me that if the duty of honest performance was a key component of the good faith requirements spoken to in *Wallace* and *Keays*, a similar framework applies, again bound together through the organizing principle. As Iacobucci J. explained, the employee's job in *Dunning* had been eliminated, but the employer told him another position would probably be found for him and the new assignment would necessitate a transfer. While the employee was being reassured about his future, the employer was contemplating his termination. Eventually, the employer chose to terminate the employee but withheld that information from the employee for some time, despite knowing the employee was in the process of selling his home in anticipation of the transfer. News of the termination only came after the employee had sold his home. Such conduct, Iacobucci J. observed, clearly violated the expected standard of good faith in the manner of dismissal.

[103] As *Dunning*, *Wallace* and *Keays* make plain, an employer has the right to terminate an employment contract without cause, subject to the duty to provide reasonable notice. However broad that right may be, however, an unhappy employee can allege a distinct contractual breach when the employer has mistreated them in the manner of dismissal. In the end, as Cromwell J. noted, "contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests" (*Bhasin*, at para. 86). When Baycrest deliberately remained silent, while knowing that Mr. Callow had drawn the mistaken inference the contract was in good standing because it was likely to be

renewed, it breached the duty to act honestly. In my view, the trial judge did not create a new duty of disclosure in correcting that wrong but rather sought to denounce the Baycrest's conduct. Remedying that with an order for damages to repair Baycrest's failure to exercise clause 9 in accordance with the requirements of the duty of honest performance did not confer a benefit on Callow; it merely set matters right on the usual measure of corrective justice following this breach of contract. Respectfully stated, it is therefore my view that the Court of Appeal erred in concluding that Baycrest's conduct was dishonourable but not dishonest.

[104] I would note, however, that I do agree in part with the Court of Appeal's observation that the trial judge went too far in concluding that "[t]he minimum standard of honesty would have been to address the alleged performance issues, to provide prompt notice, or to refrain from any representations in anticipation of the notice period" (trial reasons, at para. 67). In my respectful view, to impute these first two requirements would amount to altering the bargain struck between the parties substantively, a conclusion not sought by Callow before this Court. That said, I agree with the trial judge that, at a minimum, Baycrest had to refrain from false representations in anticipation of the notice period. Having failed to correct Mr. Callow's misapprehension that arose due to these false representations, I too would recognize a contractual breach on the part of Baycrest in the exercise of its right of termination in clause 9. Damages thus flow for the consequential loss of opportunity, a matter to which I now turn.

C. *Damages*

[105] Baycrest submits that Callow is not entitled to any damages for the breach. Baycrest argues that the trial judge erred in fixing the quantum of damages, first, by awarding Callow its expected profits over the full balance of the contract; second, by misapprehending the evidence relating to Callow's expenses; and, finally, by awarding both the loss of profit and the expenses incurred.

[106] On the first point, I note that the trial judge correctly proceeded on the premise that, "[d]ue to the breach of contract, [Callow] is entitled to be placed in the same position as if the breach had not occurred" (para. 79). Indeed, as Cromwell J. explained in *Bhasin*, breach of the duty of honest contractual performance supports a claim for damages according to the ordinary contractual measure (para. 88).

[107] The ordinary approach is to award contractual damages corresponding to the expectation interest (*Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, at para. 108). That is, damages should put Callow in the position that it would have been in had the duty been performed.

[108] While it has rightly been observed that reliance damages and expectation damages will be the same in many if not most cases, they are nevertheless conceptually distinct. As Professor Stephen Smith wrote: "Defendants are ordered to do what they promised to do, not to do whatever is necessary to ensure the claimant is not harmed by relying on the promise" (*Atiyah's Introduction to the Law of Contract*

(6th ed. 2006), at p. 405). Damages corresponding to the reliance interest are the ordinary measure of damages in tort (*PreMD Inc. v. Ogilvy Renault LLP*, 2013 ONCA 412, 309 O.A.C. 139, at para. 65). This measure may be appropriate where it would be difficult for the plaintiff to prove the position they would have been in had the contract been performed. Reliance damages in contract mean putting the injured party in the position it would have been in had it not entered into the contract at all (para. 66).

[109] I see no basis to hold that a breach of the duty of honest performance should in general be compensated by way of reliance damages. I recall that the duty of honest performance is a doctrine of contract law. Its breach is not a tort. Not only would basing damages in this case on the reliance interest set this contractual breach apart from the ordinary measure of contractual damages, but it would depart from the measure as it was applied in *Bhasin* (para. 108; see also MacDougall, at §1.130). In my respectful view, there is no basis to depart from *Bhasin* on this point which, in any event, was not argued by the parties. Further, I note that this view is shared by authors who have written that the duty of honest performance protects a party's expectation interest, rather than reliance interest (see, e.g., McCamus (2015), at pp. 112-13). Finally, while reliance damages and expectation damages coincide on the facts here, there is good reason to retain, in my view, the ordinarily applicable measure of contractual damages that seeks to provide the plaintiff with what they had expected. Professor Waddams has written that this can have a positive deterrent effect: "One of the legitimate arguments in favour of the current rule and against a rule measuring damages only by the plaintiff's reliance is that a rule protecting only reliance would fail to deter breach in a

large number of cases where the defendant calculated that the plaintiff's provable losses were less tha[n] the cost of performance" ("Breach of Contract and the Concept of Wrongdoing" (2000), 12 *S.C.L.R.* (2d) 1, at pp. 18-19).

[110] Baycrest nevertheless argues that the trial judge did not actually consider what position Callow would be in if it had fulfilled the duty and instead awarded the value of the balance of the winter maintenance agreement. In so doing, it argues, she fell into the same error as the trial judge in *Bhasin*, who simply awarded damages as though the contract had been renewed. Baycrest says that this Court has appropriately condemned this approach because the parties did not intend or presume a perpetual contract.

[111] Moreover, Baycrest points to *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, for the proposition that damages are assessed by that mode of performance which is least burdensome to the defendant. Callow, it is said, is entitled to no more than the minimum that Baycrest was obligated to do pursuant to the contract. Since clause 9 allowed it to terminate the winter maintenance agreement at any point on 10 days' notice, no damages should flow.

[112] In my view, *Hamilton* is of no assistance to Baycrest in this case. While Cromwell J. referenced this principle in *Bhasin*, he did so in the context of whether the Court should recognize a broad, free-standing duty of good faith, for which the appellant there had argued. Briefly stated, the appellant's position was that the respondent, Can-Am, would have been in breach of such a duty since it had attempted

to use the non-renewal clause to force Mr. Bhasin into a merger. Cromwell J. declined to recognize such a broad duty, reasoning that "Can-Am's contractual liability would still have to be measured by reference to the least onerous means of performance, which in this case would have meant simply not renewing the contract" (*Bhasin*, at para. 90; see also J. D. McCamus, *The Law of Contracts* (3rd ed. 2020), at pp. 23-25). Because no damages would have flowed from this breach, it was unnecessary for the Court to decide whether a broad, free-standing duty of good faith should be recognized.

[113] It bears emphasizing that, despite Cromwell J.'s comments related to *Hamilton*, he nonetheless awarded damages to the appellant flowing from the breach of the respondents' obligation to perform the contract honestly. Damages were awarded using the ordinary measure of contractual expectation damages, namely to put Mr. Bhasin in the position he would have been in had Can-Am not breached its obligation to behave honestly in the exercise of the non-renewal clause (*Bhasin*, at paras. 88 and 108). This resulted in Mr. Bhasin being compensated for the value of his business that eroded (paras. 108-10). As Professors O'Byrne and Cohen helpfully explain, "if Can-Am had dealt with Bhasin honestly on all fronts (though without requiring it to disclose its intention not to renew), Bhasin would have realized much sooner that his relationship with Can-Am was in tremendous jeopardy and reaching a breaking point. He could have taken proactive steps to protect his business, instead of seeing it 'in effect, expropriated and turned over to Mr. Hrynew'" ("The Contractual Principle of Good Faith and the Duty of Honesty in *Bhasin v. Hrynew*" (2015), 53 *Alta. L.R.* 1, at p. 8 (footnotes omitted)).

[114] How is it that damages were awarded for a breach of the duty of honest performance despite the principle outlined in *Hamilton*? While damages are to be measured against a defendant's least onerous means of performance, the least onerous means of performance in this case would have been to correct the misrepresentation once Baycrest knew Callow had drawn a false inference. Had it done so, Callow would have had the opportunity to secure another contract for the upcoming winter. As Callow explained at the hearing, "since this dishonesty caused Callow a loss by inducing it not to bid on other contracts during the summer of 2013 for the winter of 2013 to 2014, the condos are liable to it for damages" (transcript, at p. 5), which reflect its lost opportunity arising out of its abuse of clause 9.

[115] It may be true that the trial judge could have explained her rationale for awarding damages more plainly. But even if the trial judge fell into the same error that the trial judge in *Bhasin* committed, so as to award damages as though the contract had carried on, it was one of no consequence.

[116] As the trial judge found, Baycrest "failed to provide a fair opportunity for [Callow] to protect its interests" (para. 67). Had Baycrest acted honestly in exercising its right of termination, and thus corrected Mr. Callow's false impression, Callow would have taken proactive steps to bid on other contracts for the upcoming winter (A.F., at paras. 91-95). Indeed, there was ample evidence before the trial judge that Callow had opportunities to bid on other winter maintenance contracts in the summer of 2013, but chose to forego those opportunities due to Mr. Callow's misapprehension

as to the status of the contract with Baycrest. In any event, even if I were to conclude that the trial judge did not make an explicit finding as to whether Callow lost an opportunity, it may be presumed as a matter of law that it did, since it was Baycrest's own dishonesty that now precludes Callow from conclusively proving what would have happened if Baycrest had been honest (see *Lamb v. Kincaid* (1907), 38 S.C.R. 516, at pp. 539-40).

[117] In the result, I see no palpable and overriding error. I am satisfied that, if Baycrest's dishonesty had not deprived Callow of the opportunity to bid on other contracts, then Callow would have made an amount that was at least equal to the profit it lost under the winter maintenance agreement. The trial judge found that, once expenses are deducted, that award amounts to $64,306.96. I see no reason to interfere with her fact finding as to the estimation of expenses. Consequently, I see no basis for overturning this portion of the trial judge's award of damages.

[118] The trial judge also awarded Callow $14,835.14, representing the cost of leasing a piece of machinery for one year. Mr. Callow testified that he had leased the machinery specifically for the winter maintenance agreement, but would not have had he known the contract would be terminated (para. 81). Baycrest submits that the trial judge erred by awarding these expenses because it amounts to double recovery.

[119] I see no issue of double recovery in this case. The trial judge awarded the $64,306.96 as lost profit, not lost revenue. This is appropriate because Callow was not actually hired for the other contract on which it did not bid and therefore did not

necessarily have to undertake all the expenses that would have been required to fulfill that contract. However, as Callow had already committed to this expense, the lease of the machinery, it too should be compensated for along with the lost profit. The trial judge was entitled to decide this point as she did, having the advantage of measuring losses first hand. I see no reviewable error in the trial judge's approach on this issue.

V. Disposition

[120] I would allow the appeal, set aside the order of the Court of Appeal and reinstate the judgment of the trial judge, with costs throughout.

The reasons of Moldaver, Brown and Rowe JJ. were delivered by

BROWN J. —

I. Introduction

[121] This appeal invites us to affirm the scope and operation of the duty of honest performance, recognized in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, by clarifying the distinction between actively misleading conduct and innocent non-disclosure. Applying that distinction to the facts of this appeal, is a straightforward matter. As the trial judge found, the respondents (collectively, "Baycrest") represented to Callow (referring interchangeably in these reasons to the appellant and its principal)

that its contract would not be terminated (2017 ONSC 7095). By relying on Baycrest's representations, Callow lost the opportunity to secure other work for the contract's term. Callow's complaint therefore does not relate to Baycrest's *silence* but rather to its positive representations, which can clearly ground a claim based on the duty of honest performance.

[122] Given that Baycrest did not identify any palpable and overriding errors in the trial judge's findings, I agree with the majority that the appeal should be allowed and the trial judge's award restored. Regrettably, however, I am compelled to express my respectful objection to the majority's view that the doctrine of abuse of right in the civil law of Quebec is "useful" and "helpful" in understanding the application of *Bhasin* to this appeal (para. 57). Again respectfully, I see this digression as neither "useful" nor "helpful" to the judges and lawyers who must try to understand the common law principles of good faith as developed in this judgment. Indeed, it will only inject uncertainty and confusion into the law.

[123] This is not to suggest that comparative legal analysis is not an important tool or that its use should somehow be unduly limited at this Court. As the majority's reasons amply document, the Court has a longstanding tradition of looking to Quebec's civil law in developing the common law — whether to answer a question that the common law does not answer (that is, to fill a "gap") or where it is necessary to modify or otherwise develop existing rules. In addition, where concerns are raised about the effects of moving the common law in one direction or another, this Court has

considered the experience in Quebec and elsewhere, often for reassurance that the posited concerns are unfounded or overstated. What this Court has refrained from doing, however, is deploying comparative legal analysis that serves none of these purposes or, even worse, renders the law obscure to those who must know and apply it. But by invoking the civilian abuse of right framework to clarify when "[d]ishonesty is directly linked to the performance of a given contract" (para. 73) — a question requiring no "clarification" — the majority does exactly that.

[124] While, therefore, my objection is fundamentally methodological, it also speaks to the substantive consequences that follow. As the majority acknowledges, this appeal concerns the duty of honest performance, not the duty to exercise discretionary powers in good faith. And yet, its digression into the notion of "wrongful exercise of a right", in substance, pulls it into that very territory, since it ties *dishonesty* to *the manner in which contractual discretion is exercised*. Effectively, then, the majority's reliance on a civil law concept leads it to conflate, or at least obscure the distinction between what are distinct common law concepts. This is both unnecessary and undesirable, since the exercise of discretion — apart from being a matter of performance that may be misrepresented — has little to do with the duty of honest performance. Rather, the duty to exercise discretionary powers in good faith — or, expressed with the civilian terminology the majority adds, in a manner that is not "abusive" or "wrongful" — is a distinct concept that has no application to this appeal.

[125] Our aim in deciding this appeal should be to develop the common law's organizing principle of good faith carefully, and in a coherent manner, and more particularly in a manner that gives clear guidance by taking care to distinguish among the distinct doctrines identified by this Court in *Bhasin*. Respectfully, I say that the majority has not done so here.

II. Background

[126] Baycrest comprises ten condominium corporations with shared assets, for which decisions are made by a Joint Use Committee. In April 2012, Baycrest entered into two separate two-year agreements with Callow to provide summer landscaping and winter snow removal services. The terms of the winter service agreement stipulated that Baycrest could terminate the agreement, without cause, upon giving 10 days' notice.

[127] In March or April 2013, the Joint Use Committee voted to terminate the winter service agreement earlier than its scheduled expiry in April 2014. Baycrest opted not to tell Callow about its decision until September 2013, however, so as not to jeopardize his performance under the summer service agreement. Unaware of Baycrest's decision, Callow performed free work for Baycrest in the spring and summer of 2013 in the hope that Baycrest would renew both agreements. Callow also discussed the prospect of renewal with two Baycrest representatives, one of whom had negotiated Callow's existing agreements in 2012. These discussions led him to believe that he was likely to receive a two-year contract renewal in 2014 and, therefore, that

the winter service agreement was not in danger. Knowing that Callow was operating under this misapprehension, Baycrest nevertheless continued to withhold information about its termination decision.

[128] On September 12, 2013, Baycrest gave Callow notice that it was terminating the winter service agreement. Callow sued, claiming that Baycrest failed to perform the winter service agreement in good faith and was therefore liable for breach of contract. The trial judge held that Baycrest breached the duty of honest performance. She found that Baycrest's statements and conduct actively deceived Callow and led him to believe that the winter service contract would not be terminated. As a result, she awarded damages to place Callow in the position that it would have been in had the contract not been terminated. The Court of Appeal for Ontario reversed, stating that the duty of honest performance does not impose a requirement of disclosure (2018 ONCA 896, 429 D.L.R. (4th) 704). In its view, even if Baycrest had misled Callow, Callow bargained only for 10 days' notice of termination and that was the extent of its entitlement.

III. Analysis

A. *This Case Can Be Readily Decided by Applying the Common Law Principle of Good Faith*

[129] Disposing of this case is really a simple matter of applying this Court's decision in *Bhasin*. The first step in deciding a common law good faith claim is to

consider whether any established good faith doctrines apply. Callow bases its claim on two established doctrines: the duty of honest performance and the duty to exercise discretionary powers in good faith. As I will explain, however, Callow's claim should be resolved by applying only the duty of honest performance.

(1) The Duty of Honest Performance

[130] As a universally applicable minimum standard, all contracts must be performed honestly. Contracting parties may therefore not lie to, or otherwise knowingly mislead, each other about matters directly linked to performance (*Bhasin*, at paras. 73-74). If a plaintiff suffers loss in reliance on its counterparty's misleading conduct, the duty of honest performance serves to make the plaintiff whole. The duty of honest performance does not, however, "impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract" (*Bhasin*, at para. 73).

[131] The dividing line between (1) actively misleading conduct, and (2) permissible non-disclosure, is the central issue in this appeal. As that line has been clearly demarcated by cases addressing misrepresentation in other contexts, it is in my view worth affirming here that the same settled principles apply to the duty of honest performance. The duty of honest performance is, after all, broadly comparable to the doctrine of fraudulent misrepresentation, although it applies (unlike misrepresentation) to representations made *after* contract formation (B. MacDougall, *Misrepresentation* (2016), at pp. 63-64). It follows that those representations sufficient to ground a claim

for misrepresentation are analogous to the representations that will support a claim based on the duty of honest performance.

[132] The general rule, applicable to contracts other than those requiring utmost good faith, is that contracting parties have no duty to disclose material information (*Bhasin*, at paras. 73 and 86). Mere silence therefore cannot be considered actively misleading conduct (*Alevizos v. Nirula*, 2003 MBCA 148, 180 Man. R. (2d) 186, at para. 19). In some cases, however, silence on a particular topic is misleading in light of what *has* been said (*Xerex Exploration Ltd. v. Petro-Canada*, 2005 ABCA 224, 47 Alta. L.R. (4th) 6, at para. 56, citing *Opron Construction Co. v. Alberta* (1994), 151 A.R. 241 (Q.B.)). Again, no wheels need re-inventing here. There is, in the context of misrepresentation, "a rich law accepting that sometimes silence or half-truths amount to a statement" (MacDougall, at p. 67; see also A. Swan, "The Obligation to Perform in Good Faith: Comment on *Bhasin v. Hrynew*" (2015), 56 *Can. Bus. L.J.* 395, at p. 402). A contracting party therefore may not create a misleading picture about its contractual performance by relying on half-truths or partial disclosure (*Peek v. Gurney* (1873), L.R. 6 H.L. 377; *Alevizos*, at paras. 24-25; *Xerex*, at paras. 56-57). And contracting parties are required to correct representations that are subsequently rendered false, or which the representor later discovers were erroneous (*Xerex*, at para. 58; MacDougall, at pp. 118-19).

[133] Further, the representation need not take the form of an express statement. So long as it is clearly communicated, it may comprise other acts or conduct on the part

of the defendant (MacDougall, at p. 87). The question is whether the defendant's active conduct contributed to a misapprehension that could be corrected only by disclosing additional information. If so, the defendant must make that disclosure. Conversely, a contracting party is not required to correct a misapprehension to which it has not contributed (T. Buckwold, "The Enforceability of Agreements to Negotiate in Good Faith: The Impact of *Bhasin v. Hrynew* and the Organizing Principle of Good Faith in Common Law Canada" (2016), 58 *Can. Bus. L.J.* 1, at p. 13). The entire context, which includes the nature of the parties' relationship, is to be considered in determining, objectively, whether the defendant made a misrepresentation to the plaintiff (MacDougall, at p. 102; see, e.g., *Outaouais Synergest Inc. v. Lang Michener LLP*, 2013 ONCA 526, 116 O.R. (3d) 742, at paras. 84-87; *C.R.F. Holdings Ltd. v. Fundy Chemical International Ltd.* (1981), 33 B.C.L.R. 291 (C.A.), at p. 296). It follows that the question of whether a misrepresentation has been made is a question of mixed fact and law, subject to appellate review only for palpable and overriding error.

[134] In light of these principles — which, again, are well established and require nothing more than a statement by this Court of their application to the duty of honest performance — I cannot accept Baycrest's argument that its conduct fell on the side of innocent non-disclosure. Indeed, the trial judge found that "active communications between the parties between March/April and September 12, 2013 . . . deceived Callow" (para. 66 (CanLII)). Based on Baycrest's conduct and express statements, the trial judge found that Baycrest had represented that the winter service agreement was not in danger of termination (paras. 65 and 76). Further, the trial judge found that

Baycrest knew that its representations were misleading and nonetheless expressed its intention of keeping Callow in the dark (paras. 48 and 69). These findings are sufficient to support the conclusion that Baycrest breached the duty of honest performance. And Baycrest identifies no palpable and overriding error to justify overturning them.

[135] Nor do I accept Baycrest's argument that its representations related only to the renewal of a new winter agreement and not to the termination of Callow's existing agreement. As I have explained, whether Baycrest made an actionable representation about its performance must be determined in context, which included its conduct as I have described it. And it was open to the trial judge to conclude from that conduct that Callow reasonably inferred that the winter service agreement would not be terminated (see, e.g., *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, at pp. 128-32). Again, I see no basis for disturbing the trial judge's conclusion.

(2) The Duty to Exercise Discretionary Powers in Good Faith

[136] Callow also argues that Baycrest's decision to terminate the winter service agreement was a discretionary decision that it was required to make in good faith. He relies on the good faith duty that arises "where one party exercises a discretionary power under the contract", and which was affirmed by this Court in *Bhasin* (para. 47). As a preliminary matter, I note that not every decision that involves a degree of discretion is subject to this duty (*Bhasin*, at para. 72; J. T. Robertson, "Good Faith as an Organizing Principle in Contract Law: *Bhasin v Hrynew* — Two Steps Forward and One Look Back" (2015), 93 *Can. Bar Rev.* 809, at p. 859). The extent to which it applies

to unfettered termination rights remains unsettled, and I do not purport to resolve that controversy here (*Styles v. Alberta Investment Management Corp.*, 2017 ABCA 1, 44 Alta. L.R. (6th) 214, at para. 41; *Mohamed v. Information Systems Architects Inc.*, 2018 ONCA 428, 423 D.L.R. (4th) 174, at para. 19).

[137] This duty limits the exercise of certain contractual powers that may appear to grant one party unfettered discretion. For the purposes of this appeal, it is unnecessary to express a firm view on the standard that applies to a breach of this duty. It is sufficient to note that where a plaintiff relies on this duty, its complaint is *not* about dishonesty; rather, it is that the defendant was not entitled to make the decision that it made. The wrongful behavior is the very exercise of discretion, and the plaintiff therefore bases its claim on the *effect* of that decision (see, e.g., *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755 (C.A.); *Mesa Operating Ltd. Partnership v. Amoco Canada Resources Ltd.* (1994), 19 Alta. L.R. (3d) 38 (C.A.)). Damages are awarded based on the difference between the outcome that occurred and the outcome that would have occurred if the defendant had exercised its discretion in the least onerous, yet lawfully acceptable, manner.

[138] Callow, however, does not dispute that Baycrest was entitled to terminate the winter service agreement, as it did, without cause and by providing only 10 days' notice. Rather, Callow impugns *the dishonesty* that *preceded* Baycrest's exercise of discretion. Callow therefore seeks damages measured by considering what would have happened had Baycrest made the same decision, albeit without misrepresenting its

intentions. The applicable duty is therefore the duty of honest performance. In sum, the appeal at bar presents a case about dishonesty in the performance of a contract, and nothing more. Indeed, it represents *precisely* the sort of instance contemplated by Cromwell J.'s reference for this Court in *Bhasin*, at para. 73, to circumstances where a party "lie[s] or mislead[s] the other party about one's contractual performance". Conversely, it is *not* a case about the exercise of a discretionary power.

(3) Damages

[139] Having concluded that Baycrest breached the duty of honest performance, the remaining issue is whether the trial judge awarded the appropriate quantum of damages. While I reach the same result as the majority, I approach this question somewhat differently than it does. The majority would retain the expectation measure of damages for breach of the duty of honest performance. I say, however, that it follows from recognizing Baycrest's misleading conduct as a wrong independent of the termination provision that the proper measure of damages represents the loss Callow suffered in reliance on Baycrest's misleading representations (which I accept will often coincide with the expectation measure).

[140] The majority relies on Cromwell J.'s statement in *Bhasin* that a breach of the duty of honest contractual performance "supports a claim for damages according to the contractual rather than the tortious measure" (para. 88). But when the purpose of the expectation measure of damages for breach of contract is examined and contrasted with the legal framework developed in *Bhasin*, the actual claim in *Bhasin* and the

damages actually received, it becomes readily apparent that the reliance measure is precisely the measure that the *Bhasin* framework contemplates should be awarded. On this point, the majority's reasons represent *not* fidelity to *Bhasin*, but a regrettable departure that undermines the coherence between the interests sought to be protected in *Bhasin* and the remedy to be awarded.

[141] It has "long been settled and [is] indeed axiomatic" that the legal aim in remedying a breach of contract is to give the innocent party the full benefit of the bargain by placing it in the position it would have occupied had the contract been performed (P. Benson, *Justice in Transactions* (2019), at p. 5; see also *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3, at para. 27). Awarding a reliance measure — that is, compensating for losses sustained by the innocent party in reliance on the contract — would ignore the innocent party's right to performance that flows from its having pledged consideration therefor, thereby potentially depriving it of the benefit of the contract. Indeed, confining recovery to losses sustained in reliance on the agreement would create an incentive to breach agreements where the cost of performance outweighs the reliance measure of damage (S. M. Waddams, *The Law of Contracts* (7th ed. 2017), at para. 704; see also L. L. Fuller and W. R. Perdue Jr., "The Reliance Interest in Contract Damages" (1936), 46 *Yale L.J.* 52, at pp. 57-66).

[142] But the justification for awarding expectation damages does not apply to breach of the duty of honest performance. In such cases, the issue is *not* that the defendant has failed to perform the contract, thereby defeating the plaintiff's

expectations. It is, rather, that the defendant *has* performed the contract, but has also caused the plaintiff loss by making dishonest extra-contractual misrepresentations concerning that performance, *upon which the plaintiff relied* to its detriment. In short, the plaintiff's complaint is not lost value of performance, but detrimental reliance on dishonest misrepresentations. The interest being protected is not an expectation interest, but a reliance interest. And just as these are unrelated interests, an expectation measure of damage is unrelated to the breach of the duty of honest performance.

[143] The claim in *Bhasin* itself is illustrative. Bhasin contracted to sell financial products for Can-Am. The contract would renew automatically at the end of the initial term unless one of the parties gave six months' notice of non-renewal. Can-Am intended to force a takeover of Bhasin's business by his competitor, Hrynew, but misled him about its intention to do so. Can-Am also appointed Hrynew to audit Bhasin's business. When Bhasin protested this conflict of interest, Can-Am lied to him about the reason for Hrynew's appointment as auditor and the terms that would govern his access to Bhasin's confidential information. Ultimately, when Can-Am gave notice of non-renewal, Bhasin lost the value of his business. This Court found that, but for Can-Am's dishonesty in the period leading up to the non-renewal, he "would have been able to retain the value of his business rather than see it, in effect, expropriated and turned over to Mr. Hrynew" (para. 109). It awarded damages to compensate for the lost value of the business.

[144] Neither the claim, then, nor the damage award, related to Can-Am's failure to perform the contract with Bhasin. The theory of the judgment was that Bhasin lost the value of his business by relying on Can-Am's dishonest representations. The relief actually awarded was therefore measured by the difference between Bhasin's position and the position he would have occupied had Can-Am not been dishonest about its intention to force a takeover by way of cancelling his contract. Had Bhasin not relied on Can-Am's dishonesty, no damages could have been awarded on this basis, because the dishonesty would not have altered his position.

[145] The measure applied in *Bhasin* was, therefore, clearly not based on expected performance, and indeed it appears to have had nothing to do with placing Bhasin in the position he would have occupied had the contract been performed (K. Maharaj, "An Action on the Equities: Re-Characterizing *Bhasin* as Equitable Estoppel" (2017), 55 *Alta. L. Rev.* 199, at p. 215). Rather, it was directed solely towards making good the detriment that flowed from Bhasin's reliance on a dishonest misrepresentation — a measure characterized by one scholar as "very tort-like" (MacDougall, at p. 65). Much like estoppel and civil fraud, therefore, the duty of honest performance vindicates the plaintiff's *reliance* interest (Robertson, at p. 861; Maharaj, at pp. 215-18). A contracting party that breaches this duty will be liable to compensate its counterparty for any foreseeable losses suffered *in reliance* on the misleading representations.

[146] This is not to suggest that the duty of honest performance is "subsumed" by estoppel and civil fraud (Kasirer J.'s reasons, at para. 50). Rather, it is merely to observe that each of these legal devices protects the same interest. Indeed, far from being "subsumed" into estoppel and civil fraud, the duty of honest performance protects the reliance interest in a distinct and broader manner since, as this Court observed in *Bhasin*, the defendant may be held liable even where it does not *intend* for the plaintiff to rely on the misleading representation (para. 88). Irrespective of the defendant's intention, all a plaintiff need show is that, but for its reliance on the misleading representation, it would not have sustained the loss.

[147] Baycrest advances three arguments for reducing the trial award. First, it says that the ten day notice period defines its maximum exposure for damages because, irrespective of its dishonesty, its least onerous means of performance was to terminate the agreement. The trial judge therefore incorrectly awarded damages as if the winter contract had not been terminated.

[148] While Baycrest is correct to say that damages for breach of contract are measured against the defendant's least onerous means of performance (*Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 20), that principle does not assist Baycrest here. To perform the contract *honestly* (that is, without breaching the duty of honest performance), Baycrest was required *not to mislead* Callow about whether the contract would be terminated. It could have accomplished this by keeping silent about termination or, having misled Callow as to

the true state of affairs, by correcting Callow's misapprehension before he relied on the misleading conduct to his detriment. Had either of these possibilities occurred, Callow would have been able to seek other work for the 2013-14 winter season.

[149] Of course, we cannot say with certainty that Callow *would have secured* other work. He might have sat idle in any event, assuming that the winter service contract was in good standing. But this evidentiary difficulty is the product of Baycrest's dishonesty, and Baycrest should not be relieved from liability simply because Callow cannot definitively prove what would have occurred had it not been misled (*Wood v. Grand Valley Rway. Co.* (1915), 51 S.C.R. 283, at pp. 288-91; see also *Lamb v. Kincaid* (1907), 38 S.C.R. 516, at pp. 539-40). Callow gave evidence that it typically bid on winter contracts during the summer months and that it was too late to find replacement work by the time it was notified of termination. I agree with the majority that, based on the record, we can reasonably presume that Callow would have been able to replace the winter service agreement with a contract of similar value. While the trial judge erred by awarding damages as if the winter service agreement had not been terminated, I would, based on this presumption, award the same quantum of damages.

[150] Secondly, Baycrest says that the trial judge's award led to double recovery for Callow's expenses. But this is simply incorrect. The trial judge awarded Callow the *net* value of the winter service agreement ($64,306.96) — representing the gross contract value ($80,383.70) less Callow's expenses, which the trial judge approximated

at 20 percent ($16,076.74). She then added back the cost of an equipment lease, which Callow had already entered into in reliance on Baycrest's misleading representations. Though the trial judge did not say so expressly, the record shows that Callow's approximated expenses included the cost of leasing equipment. If Callow is not reimbursed for the leasing expenses that he incurred in reliance on Baycrest's misleading representations, those expenses would therefore be counted against him twice. Absent Baycrest's breach of contract, Callow would have obtained a similarly valued contract and ended the 2013-14 winter season with $64,306.96 in profit. The trial judge's approach ensured that Callow was restored to this position, and, accordingly, I see no basis for overturning this aspect of her award.

[151] Finally, Baycrest argues that the trial judge misapprehended the evidence relating to Callow's expenses. I am not convinced, however, that the trial judge did anything other than estimate Callow's expenses at 20 percent of the winter service contract's value, based on evidence that Callow gave regarding its expenses in previous years. Estimating the expenses was a decision that fell within the trial judge's remit as a fact-finder and should not be disturbed on appeal. Indeed, it is difficult to imagine how the trial judge could have proceeded differently, given that the winter services agreement was never performed and that we therefore cannot say with certainty what Callow's expenses would have been.

B. *"Abuse of Right", "Wrongful Exercise of a Right", and Comparative Analysis of Good Faith in the Law of Contract*

[152] With the exception of my discussion regarding damages, most of the foregoing is consistent, or at least not inconsistent, with the majority's reasons, and is sufficient to dispose of this appeal. But while acknowledging this (at para. 44: "the duty to act honestly about matters directly linked to the performance of the contract . . . is sufficient to dispose of this appeal"; "[n]o expansion of the law set forth in *Bhasin* is necessary to find in favour of Callow"), the majority nonetheless proceeds to delve into matters beyond the duty to act honestly. And in so doing, it does indeed expand upon (and, I say, confuse) the law set forth in *Bhasin*.

[153] More particularly, the majority says that this appeal presents an opportunity to resolve two issues: first, "what constitutes a breach of the duty of honest performance where it manifests itself in connection with the exercise of a seemingly unfettered, unilateral termination clause" (para. 30); and secondly, "when dishonesty is directly linked to the performance of a contract" (para. 64). These questions lead the majority to focus on whether the exercise of the termination provision was *itself* dishonest. It explains:

> . . . the duty of honesty as contractual doctrine has a limiting function on the exercise of an otherwise complete and clear right . . . . This means, simply, that instead of constraining the decision to terminate in and of itself, the duty of honest performance attracts damages where the manner in which the right was exercised was dishonest. [para. 53]

The majority finds support for this approach in Quebec civil law. Specifically, it contends that the "required direct link between dishonesty and performance" is "made plain" by considering "how the framework for abuse of rights in Quebec connects the

manner in which a contractual right is exercised to the requirements of good faith" (para. 67). It states that arts. 6, 7 and 1375 of the *Civil Code of Québec* "point to this connection by providing that no contractual right may be exercised abusively without violating the requirements of good faith" (para. 67).

[154] Both as a substantive and methodological matter, I cannot endorse this. First, in the circumstances of this particular appeal, the majority's resort to the civil law as a "source of inspiration" (para. 60) is inappropriate. As the majority acknowledges, the issues to which its analysis responds are fully addressed by *Bhasin* itself, and there is no indication that the principles outlined therein require further elaboration. Secondly, and relatedly, the majority's focus on the wrongful exercise of a right distorts the analysis mandated by *Bhasin* and undermines the independent character of the various common law good faith duties identified therein.

(1) Comparative Analysis

[155] The majority draws on the civilian concept of abuse of rights "as a framework to understand the common law duty of honest performance" (para. 73). Specifically, it finds that this framework "helps to focus the analysis of whether the common law duty of honest performance has been breached on what might be called the wrongful exercise of a contractual right" (para. 63).

[156] In considering the utility of the comparative exercise that the majority proposes, it must be borne in mind that the common law principles applicable to this

appeal are both determinative and settled. Drawing from civil law in these circumstances departs from this Court's accepted practice in respect of comparative legal analysis. Rather than permissibly drawing inspiration or comfort from the civil law in filling a gap in the common law or in modifying it, the majority's approach, I say respectfully, risks subsuming the common law's already-established and distinct conception of good faith into the civil law's conception. And to the extent it does so, it confuses matters significantly, the majority's assurances to the contrary notwithstanding.

[157] As Moldaver J. observed (in dissent, but not on this point) in *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433, at para. 113 (emphasis added), "[t]he coexistence of two distinct legal systems in Canada — the civil law system in Quebec and the common law system elsewhere — is a unique and defining characteristic of our country." The distinct common law and civil law traditions represent an integral component of Canadian legal heritage and identity (Hon. M. Bastarache, "Bijuralism in Canada", in *Bijuralism and Harmonization: Genesis* (2001), at p. 26; see also M. Samson, "Le droit civil québécois: exemple d'un droit à porosité variable" (2018-19), 50 *Ottawa L. Rev.* 257, at p. 257).

[158] Preserving this unique aspect of Canada's identity requires maintaining the distinct features of both the common law and civil law traditions. Indeed, this Court has gone so far as to describe its own composition as having been designed to ensure "that the common law and the civil law would evolve side by side, while each

maintained its distinctive character" (*Reference re Supreme Court Act*, at para. 85 (emphasis added)). It follows that, just as this Court decided in *Reference re Supreme Court Act* that the presence on this Court of at least three judges from Quebec "ensur[es] civil law expertise and the representation of Quebec's legal traditions", the integrity and distinct character of the common law is also ensured by the presence of judges from Canada's common law jurisdictions.

[159] It also follows from the distinct nature of Canada's two legal traditions that drawing from one tradition to influence the other is simply an exercise in comparative legal analysis (*Caisse populaire des Deux Rives v. Société mutuelle d'assurance contre l'incendie de la Vallée du Richelieu*, [1990] 2 S.C.R. 995, at p. 1016). As I have already recounted, this is what the majority claims it is doing here. But while comparison is an important tool, its uses are not unlimited. In particular, comparative analysis, in the sense of using law from another legal system to elucidate or develop the domestic legal system, is generally appropriate only where domestic law does not provide an answer to the problem facing the court, or where it is necessary to otherwise develop that law. Using law from other systems in other circumstances would either be superfluous, or would (to the extent of its use) have the undesirable effect of displacing established domestic jurisprudence (J.-L. Baudouin, "L'interprétation du Code civil québécois par la Cour suprême du Canada" (1975), 53 *Can. Bar Rev.* 715, at pp. 725-27; see also K. Zweigert and H. Kötz, *Introduction to Comparative Law* (3rd rev. ed. 1998), at pp. 17-18; T. Lundmark, *Charting the Divide between Common and Civil Law* (2012), at pp. 8-10). As Justice Sharpe writes extra-judicially about the use of authority

generally, which applies equally to comparative legal analysis, "[i]t is only where the case cannot readily be decided on the basis of binding authority that non-binding sources will have a material effect on the decision" (*Good Judgment: Making Judicial Decisions* (2018), at p. 171).

[160] These sources are not expressions of jurisdictional chauvinism. Rather, they express a posture of prudence and disciplined restraint in the deployment of comparative analysis in judgments. And for good reason. Seeking inspiration from external sources when it is unnecessary to do so may simply complicate a straightforward subject, thereby introducing uncertainty to a previously settled area of law (*Gilles E. Néron Communication Marketing Inc. v. Chambre des notaires du Québec*, 2004 SCC 53, [2004] 3 S.C.R. 95, at para. 56, citing J.-L. Baudouin and P. Deslauriers, *La responsabilité civile* (6th ed. 2003), at p. 193). Even something as seemingly innocuous as changing the terminology used to describe a concept — for example, the majority's reliance on the civil law device of abuse of right and references to the wrongful exercise of a right — can have substantive legal implications, affecting the coherence and stability of the resulting modified legal system. Language itself, after all, plays "a crucial role in the evolution of the law" (Bastarache, at p. 20; see also Lundmark, at pp. 74-86).

[161] This is not mere conjecture. The seemingly benign injection of civil law terminology into common law judgments has previously generated precisely that kind of instability. Substantial confusion in the common law of unjust enrichment arose in

Canada in the 1970s from the introduction of civil law terminology of "absence of juristic reasons for an enrichment" as if it were synonymous with the traditional requirement of "unjust factors" that had been "deeply ingrained" since Lord Mansfield's judgment in *Moses v. Macferlan* (1760), 2 Burr. 1005, 97 E.R. 676 (K.B.) (M. McInnes, "The Reason to Reverse: Unjust Factors and Juristic Reasons" (2012), 92 *B.U.L. Rev.* 1049, at pp. 1052 and 1054). As Professor McInnes explains:

> . . . without discussion or explanation, the Supreme Court of Canada began to use the civilian terminology (i.e., "absence of juristic reason for the enrichment") while continuing to apply the traditional unjust factors. Predictably, the Canadian law of unjust enrichment grew ever more confused as the court said one thing and did another. [Footnotes omitted; p. 1056.]

[162] The result was, to put it mildly, destabilizing. And predictably so. While Western legal systems are called upon to address the same kinds of disputes, each has developed different ways over the centuries to resolve them. The result is like two massive jigsaw puzzles that cover the same amount of ground. From a distance, each looks much the same as the other, but up close, it becomes apparent that the pieces are cut differently so that pieces from one cannot fit (or at least fit easily) into the other. And so it was when "juristic reasons" began to be spoken of in the Canadian common law of unjust enrichment. Conflicting lines of authorities continued to apply the common law requirement of unjust factors, while in other decisions courts ascribed legal significance to the introduction of civilian language — that is, they "took the civilian language at face value and ordered restoration when defendants could not justify the retention of their enrichments" (McInnes, at p. 1056 (footnote omitted)). In

the end, this Court had to settle the question in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, which it did by clarifying that the civilian terminology of "juristic reasons" applies. But coming even several decades after the uncertainty arose, we must acknowledge that this confirmation of the civil law terminological shift *itself* also effected substantive instability in the administration of the common law:

> In a stroke, lawyers and judges were required to alter fundamentally their conception of injustice. Liability now responds to the *absence* of any reason for the defendant's *retention*, rather than to the *presence* of some reason for the plaintiff's *recovery*. The transition has not been seamless, and it will be many years before practice settles into the level of consistency and certainty that litigants have the right to expect from a mature system of law. [Emphasis in original.]
>
> (McInnes, at p. 1057)

[163] This is not to suggest that *Garland* is wrongly decided, or that its authority in the common law of unjust enrichment is somehow undermined by its civilian inclination. Rather, it is simply to point out that there can be a heavy price to pay — typically, by unijural lawyers and their clients — when external legal concepts are introduced via a judgment on a purely domestic legal issue. Hence the restraint which this Court has (until now) shown, by introducing external legal concepts to a judgment only where it is necessary to do so — that is, to fill a gap where domestic law *does not* provide an answer, or where it is necessary to modify or otherwise develop an existing legal rule. In such circumstances, other legal systems may well reveal potential solutions that would not have been apparent from a narrow domestic focus (Zweigert and Kötz, at pp. 17-20; see also *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, at pp. 1140-47 (per McLachlin J., as she then

was)). This is what we mean when we say that Canada's two legal systems can serve as sources of "inspiration" (*Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214, at para. 38).

[164] We can also draw on the experience of other legal systems to assist our deliberations about whether an identified potential solution to a legal problem will result in negative consequences. Indeed, that was the limited use this Court made of Quebec law (and, for that matter, U.S. law) in *Bhasin*, at paras. 83-85, *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, at para. 34, and *Norsk*, at pp. 1174-75 (per Stevenson J., concurring). Similarly, this Court will sometimes observe that a legal concept developed within one system, using domestic sources, mirrors a concept found in another system (*Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, at para. 138 (per McLachlin C.J., dissenting in part); *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, at para. 41; *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392, at paras. 76-79; see also *Sport Maska Inc. v. Zittrer*, [1988] 1 S.C.R. 564, at p. 570 (per Beetz J., concurring)). When used in these ways, comparative sources are relied on to provide comfort that other legal systems have arrived at similar conclusions.

[165] But that is not this case. Here, no gaps are to be filled, and no domestic common law requires development (or even "clarification"). Rather, in service of what the majority describes as a "dialogue" between the civil law and common law, it uses the civil law device of abuse of right to drive an analysis which, I repeat, is neither

necessary to decide this appeal, nor helpful in its obscuring of the law. Further, this case engages an issue — the place of good faith in contract law — on which the Canadian common law and civil law systems have adopted very different approaches — each autonomous, and neither inherently superior to the other (see, generally, R. Jukier, "Good Faith in Contract: A Judicial Dialogue Between Common Law Canada and Québec" (2019), 1 *Journal of Commonwealth Law* 83). As the Hon. Louis LeBel observed:

> [TRANSLATION] The fact that the Court has maintained the specificity of the two legal traditions with respect to good faith shows the importance it attaches to respect for their conceptual autonomy. The dialogue between the two systems remains circumscribed by a judicial stance that, in general today, understands the importance and characteristics of the major legal traditions that make up Canadian bijuralism.
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> ("Les cultures de la Cour suprême du Canada: vers l'émergence d'une culture dialogique?", in J.-F. Gaudreault-DesBiens et al., eds., *Convergence, concurrence et harmonisation des systèmes juridiques* (2009), 1, at p. 15)

[166] Indeed, there are principled reasons for the distinct treatment of good faith as between the common law and civil law systems. As Professor Valcke observes, the common law also relies on other concepts, including the equitable doctrine of estoppel, to achieve similar outcomes as the doctrine of good faith ("*Bhasin v Hrynew*: Why a General Duty of Good Faith Would Be Out of Place in English Canadian Contract Law" (2019), 1 *Journal of Commonwealth Law* 65, at p. 77). At a more general level, the common law and civil law are premised on different understandings of legal rights (H. Dedek, "From Norms to Facts: The Realization of Rights in Common and Civil

Private Law" (2010), 56 *McGill L.J.* 77, at pp. 79-81) and of the role of the state in mitigating the effects of harsh bargains (M. Pargendler, "The Role of the State in Contract Law: The Common-Civil Law Divide" (2018), 43 *Yale J. Intl L.* 143, at p. 179).

[167] I acknowledge that the majority refers to "special reasons" to be "cautious in undertaking the comparative exercise to which Callow invites us here" (para. 70). But — and, again I stress, in an area of common law that admits of no lacuna or gap that needs filling, or that is in need of development — by applying the civilian doctrine of "abuse of right" as it does, caution is thrown to the wind, the independent character of the existing good faith doctrine, which *Bhasin* carefully preserved, is undermined, and the generally applicable rule that this Court rejected in *Bhasin* is at least implicitly embraced.

[168] To be clear, the majority's comparative methodology is not mere surplusage. Rather, its application is the only point of the exercise. As I have already recounted, the doctrine of abuse of rights is applied "to focus the analysis of whether the common law duty of honest performance has been breached on what might be called the wrongful exercise of a contractual right" (para. 63). Quebec civil law is cited as authority for the proposition that "no contractual right may be exercised abusively" (para. 67). This leads to another reason why comparative methodology is undesirable in this case, which requires me to speak plainly. The passages I have just cited from the majority's reasons, and indeed the very notion of "abuse of right", would not be

familiar, meaningful or even comprehensible to the vast majority of common law lawyers and judges. And yet, many of them would reasonably assume — as many did when the language of "juristic reasons" entered the common law lexicon of unjust enrichment — that there is legal significance in their use here, and that they must therefore familiarize themselves with these concepts or retain bijural assistance in order to competently represent their clients or adjudicate their cases. At the very least, common law lawyers applying the common law concepts under discussion here will presumably need to have an eye, as the majority does, to the *Civil Code of Québec*. How they would acquire the necessary familiarity, and the extent to which they must acquire it, is left unexplained.

[169] These are not idle concerns, and on this point there is a certain reality that we must bear in mind. Few common law lawyers and judges in most provinces are sufficiently versed in French to read the sources of civil law concerning the abuse of right. And of those who are, fewer still will be trained in the civil law so as to understand their substance.

[170] I confess that I am in no position to express a view on the correctness of the majority's proclamation that it, or this Court, is pursuing a "dialogue" between the civil and common legal systems. Indeed, it is not obvious to me what having such a "dialogue" means in the context of discharging our adjudicative responsibilities. But accepting that my colleagues understand themselves to be so engaged, I suggest with utmost respect that their dialogical pursuit should not occur at the expense of those who

must know, understand and apply an aspect of one of those legal systems that the majority now renders opaque. It really comes down to this: the majority's unnecessary digression into external legal concepts will create practical difficulties on the ground by making the common law governing contractual relationships less comprehensible and therefore less accessible to those who need to know it, thereby increasing costs for all concerned. At a time when many are striving to remove old barriers that impede access to justice, I would not erect new barriers in the form of legal expression that bears little to no resemblance to the training and experience of those who help citizens navigate the legal system.

[171] Even where a comparative analysis *is* appropriate, the analogy of the jigsaw puzzles must be borne in mind. It is simply not the case that "the common law and the civil law represent . . . distinctive ways of knowing the law" (Kasirer J.'s reasons, at para. 71 (emphasis added)). They are not different *theories* of law. They are different *systems* of law. And because legal rules must originate from the system within which that rule will operate, comparative analysis must be undertaken with care and circumspection. This Court's statement in *Caisse populaire des Deux Rives*, at p. 1004, is apposite:

> . . . apparent similarity of the fundamental rules should not cause us to forget that the courts have a duty to ensure that insurance law develops in a manner consistent with the rest of Quebec civil law, of which it forms a part. Accordingly, while the judgments of foreign jurisdictions, in particular Britain, the United States and France, may be of interest when the law there is based on similar principles, the fact remains that Quebec civil law is rooted in concepts peculiar to it, and while it may be necessary

> to refer to foreign law in some cases, the courts should only adopt what is consistent with the general scheme of Quebec law. [Emphasis added.]

[172] The direction that civil law developments must be consistent with the overall civil law of Quebec applies with equal force when considering potential modifications to the common law. Maintaining the distinct character of each of Canada's legal traditions requires administering each system according to its own scheme of rules, and by reference to its own authorities (*Colonial Real Estate Co. v. La Communauté des Soeurs de la Charité de l'Hôpital Général de Montréal* (1918), 57 S.C.R. 585, at p. 603; see also J. Dainow, "The Civil Law and the Common Law: Some Points of Comparison" (1967), 15 *Am. J. Comp. L.* 419, at pp. 434-35). It follows that any enrichment from another legal system must be incorporated only insofar as it conforms to the internal structure and organizing principles of the adopting legal system (F. Allard, *The Supreme Court of Canada and its Impact on the Expression of Bijuralism* (2001), at p. 9). Ultimately, the golden rule in using concepts from one of Canada's legal systems to modify the other is that the proposed solution must be able to completely and coherently integrate into the adopting system's structure (J.-L. Baudouin, "Mixed Jurisdictions: A Model for the XXIst Century?" (2003), 63 *La. L. Rev.* 983, at pp. 990-91).

[173] This is of practical concern here. Analytically jamming the civilian concept of abuse of right regarding the termination of a contract into the common law is not the tidy and discrete affair that the majority appears to suppose. This is because the obligation of good faith in civil law imposes more onerous duties on the party

terminating the contract than it does at common law. The Quebec Court of Appeal has explained the notion of abuse of right in the context of termination of a contract in the following way:

> [TRANSLATION] Up until now, the courts have sometimes sanctioned abuse of right in cases of malice. However, they have also sanctioned unilateral resiliation by a distributor for reasons found not to be within the spirit of the discretionary resiliation clause, or where the resiliation was improper, that is, without any valid reason, or without prior notice or without any sign of what was to come. These cases clearly illustrate the "moralization" of contractual relations by the doctrine of abuse of right: for it is not enough to resiliate a contract in a strictly lawful manner (in accordance with the language of a resiliation clause), it is also necessary to do so in a legitimate way. [Emphasis added.]
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> (*Birdair inc. v. Danny's Construction Co.*, 2013 QCCA 580, at para. 131 (CanLII), citing J.-L. Baudouin and P.-G. Jobin, *Les obligations* (6th ed. 2005), by P.-G. Jobin with the collaboration of N. Vézina, at para. 125)

[174] Even if we were to imagine that it *was* the exercise of the termination clause that led in this case to the breach of duty of honest contractual performance — which, as I shall explain below, it was not — *Bhasin* stipulates clearly that there is no duty to disclose information or intentions relevant to termination that flows from the common law duty of good faith. But under the civilian doctrine invoked by the majority, terminating a contract without disclosing intentions can constitute an abuse of right. While the majority acknowledges that it "do[es] not rely on the civil law here for the specific rules that would govern a similar claim in Quebec" (para. 73), this tends to affirm how inappropriate its comparative analysis is here. The majority either relies on a truncated and therefore distorted version of the civilian framework of abuse of right, or else opens the door to future "clarifications" (which would further undermine the

integrity of the common law duty of honest performance as stated in *Bhasin*). Even on its own terms, then, the majority's invocation of abuse of right raises more questions than it claims to answer.

[175] For all these reasons, I am of the respectful view that it is not appropriate to refer to, and rely upon, the doctrine of abuse of right in this case. This appeal calls upon this Court to straightforwardly apply the duty of honest performance, and nothing more. Transplanting the doctrine of abuse of right into the common law context is not only unnecessary here, doing so without reference to the broader context in which good faith operates in the common law will cause significant uncertainty.

(2) The Wrongful Exercise of a Right

[176] The majority's reliance on the civilian doctrine of abuse of a right leads me to a final, substantive criticism: in focusing on the wrongful exercise of a right, it distorts the analysis described in *Bhasin* and elides the distinction between honest performance and good faith in the exercise of a contractual discretion.

[177] The gravamen of a claim in honest performance is that a party made dishonest representations concerning contractual performance that caused its counterparty to suffer loss. It is *not* that a right was exercised in a way that was wrongful, abusive, or even dishonest. Here, for example, the complaint hinges on Baycrest's deceptive conduct *preceding* the exercise of the termination clause. By relying on Baycrest's misleading representations, Callow missed the opportunity to bid

on other contracts. The exercise of the termination clause is relevant only in the sense that it was the subject of the misrepresentation.

[178] I recognize that, in *Bhasin*, Cromwell J. stated that the defendant breached the duty of honest performance when it "failed to act honestly with [the plaintiff] in exercising the non-renewal clause" (para. 103). This phrasing, however, mirrored the trial judge's finding that the defendant "acted dishonestly toward Bhasin in exercising the non-renewal clause" (*Bhasin v. Hrynew*, 2011 ABQB 637, 526 A.R. 1, at para. 261, quoted in *Bhasin*, at para. 94). Elsewhere, Cromwell J. is clear that the breach "consisted of [the defendant's] failure to be honest with [the plaintiff] about its contractual performance and, in particular, with respect to its settled intentions with respect to renewal" (para. 108). This reflects the general framework that he describes, i.e., that the duty of honest performance "is a simple requirement not to lie or mislead the other party about one's contractual performance" (para. 73).

[179] Maintaining analytical clarity about the source of the breach — the dishonesty that preceded the termination, and not the termination itself — is important for two reasons. First, a breach of the duty of honest performance may arise from many aspects of performance. The general rule enunciated in *Bhasin* provides a clear standard that can be applied across different contexts, including to the facts of this appeal. There is no benefit in developing a separate analysis that responds narrowly to dishonesty concerning the exercise of a contractual right. Doing so will only make the law more confused and difficult to apply.

[180] Secondly, the source of the breach distinguishes the duty of honest performance from the duty to exercise contractual discretion in good faith. As discussed above, where a breach of the latter duty is alleged, the focus of the analysis is whether the defendant was entitled to exercise its discretion in the way that it did. By shifting the focus of the honest performance analysis to the manner in which a right was exercised, the majority blurs the boundaries between these two distinct duties. Indeed, it contends that "the duty of honest performance shares a common methodology with the duty to exercise contractual discretionary powers in good faith by fixing, at least in circumstances like ours, on the wrongful exercise of a contractual prerogative" (para. 51).

[181] We are bound by *Bhasin* to treat the duty of honest performance as conceptually distinct from the duty to exercise discretionary powers in good faith (*Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, at para. 65). This is not simply a matter of *stare decisis* and incremental legal development (although it is at least those things); there is also the practical concern that blurred and ambiguous treatment of these two duties has a meaningful impact on the outcome for contracting parties. Contrary to the majority's suggestion, the wrong at issue in each category of cases is distinct, and the damages available differ accordingly. The award for a breach of the duty of honest performance addresses the effect of the *dishonesty*. In contrast, the award for a breach of the duty to exercise discretion in good faith addresses the effect of the *exercise of discretion itself*. Placing both duties under the umbrella of the "wrongful exercise of a

contractual right" obscures these distinctions and thus represents an unfortunate departure from *Bhasin*.

IV. Conclusion

[182] I would allow the appeal, set aside the Court of Appeal decision, and reinstate the judgment of the trial judge with costs in this Court and the courts below.

The following are the reasons delivered by

CÔTÉ J. —

[183] What constitutes actively misleading conduct in the context of a contractual right to terminate without cause? Where should the line be drawn between active dishonesty and permissible non-disclosure of information relevant to termination? Does a party to a contract have an obligation to dissuade his counterparty from entertaining hopes regarding the duration of their business relationship? These are the questions raised by this appeal.

[184] In this case, the respondents ("Baycrest") bargained for a right to terminate *at any time* and *for any other reason than unsatisfactory services* upon giving 10 days' notice. Baycrest made the decision to terminate, but it chose to wait before sending the notice, as it did not want to jeopardize the performance of other work that was being

done by the appellant ("Callow", referring interchangeably to C.M. Callow Inc. and to its principal, Mr. Christopher Callow). In the meantime, Baycrest became aware that its counterparty was entertaining hopes of a renewal, although it did not say or do anything that materially contributed to those hopes. Baycrest did nothing to discourage them; such conduct may not be laudable, but it does not fall within the category of "active dishonesty" prohibited by the contractual duty of honest performance.

I. Issue on Appeal

[185] Both of my colleagues seem to agree on the following propositions.

[186] First, this case concerns solely the duty of honest performance and not the duty to exercise discretionary powers in good faith (these two duties were distinguished in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at paras. 47, 50 and 72-73).

[187] Second, the duty of honest performance "means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract" (*Bhasin*, at para. 73).

[188] Third, there is no duty to disclose information or one's intentions with respect to termination (*Bhasin*, at paras. 73 and 87).

[189] Fourth, there is no need to extend the law by recognizing a new duty of good faith relating to "active non-disclosure".

[190] I take it we all agree with these premises. Therefore, the issue, when properly framed, bears on the distinction referred to in *Bhasin* (at paras. 73 and 86-87) between actively misleading conduct and permissible non-disclosure. In the context of this case it comes down to this: did Baycrest lie or otherwise knowingly mislead Callow into thinking that there was no risk it would exercise its right to terminate the winter agreement for any other reason than unsatisfactory services? The answer to this question is no.

[191] Before turning to my analysis, I wish to express my substantial agreement with Justice Brown's observations insofar as they pertain to the role of external legal concepts. Justice Kasirer states at paragraph 44 of his reasons that "[n]o expansion of the law set forth in *Bhasin* is necessary" to dispose of this appeal. However, he then embarks on, and I say this respectfully, an unnecessary comparative exercise between the civil law and the common law under the pretext of "dialogue". I am perplexed by the virtues of "dialogue" in a case like this one where no gaps in the common law need to be filled and no rules need to be modified. I do not see why we should adopt such an approach, one that provides no palpable benefits and that is also arbitrary and unpredictable.

[192] That being said, I believe that the common law as it now stands does not support the result my colleagues arrive at. I am afraid that the unnecessary debate about comparative legal exercises may have diverted attention from the facts of this case as they are.

II. Ambit of the Duty of Honest Performance

A. *Context in Which the Duty Was Created*

[193] In *Bhasin*, the Court unanimously introduced the contractual duty of honest performance as a "new common law duty under the broad umbrella of the organizing principle of good faith performance of contracts" (para. 72). Cromwell J. stressed that this was no more than a "modest, incremental step" (para. 73; see also paras. 82 and 89), with the duty of honest performance being a "minimum standard" (para. 74).

[194] In Cromwell J.' opinion, the new duty would "interfer[e] very little with freedom of contract" (para. 76); so little that he thought such interference would be "more theoretical than real" (para. 81). On the subject of the organizing principle of good faith from which it grew, Cromwell J. stated:

> The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest . . . . The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties. [para. 70]

[195] Cromwell J. also expressed specific concerns relating to the clarity of the duty, its effect on commercial certainty and other practical implications (at paras. 59,

66, 70-71, 73, 79-80 and 86-87). He endeavoured to explain what the new duty was *not*:

> The duty of honest performance that I propose should not be confused with a duty of disclosure or of fiduciary loyalty. A party to a contract has no general duty to subordinate his or her interest to that of the other party. [Emphasis added; para. 86.]

[196] Turning to a positive description, he stressed that the duty of honest performance *was* a "simple requirement" not to lie or knowingly mislead about matters directly linked to performance of the contract (para. 73).

[197] The requirement that parties not lie is straightforward. But what kind of conduct is covered by the requirement that they not otherwise knowingly mislead each other? Absent a duty to disclose, it is far from obvious when exactly one's silence will "knowingly mislead" the other contracting party. Are we to draw sophisticated distinctions between "mere silence" and other types of silence, as Brown J. suggests? If that be so, I wonder how a contracting party — on whom, I note, the law imposes *neither* "a duty of loyalty or of disclosure" *nor* a requirement "to forego advantages flowing from the contract" (*Bhasin*, at para. 73) — is supposed to know at what point a permissible silence turns into a non-permissible silence that may constitute a breach of contract. With the greatest respect, I do not believe such casuistry is compatible with the "simple requirement" Cromwell J. meant to set out in *Bhasin*.

[198] As Cromwell J. put it, "a clear distinction can be drawn between a failure to disclose a material fact, even a firm intention to end the contractual arrangement, and active dishonesty" (para. 86 (emphasis added)). He added that "*United Roasters* makes it clear that there is no unilateral duty to disclose information relevant to termination. But the situation is quite different, as I see it, when it comes to actively misleading or deceiving the other contracting party in relation to performance of the contract" (para. 87 (emphasis added)). These words should be taken at face value. The duty of honest performance should remain "clear and easy to apply" (para. 80).

B. *Permissible Non-disclosure*

[199] It must be borne in mind that all obligations flowing from the duty of honest performance are "negative" obligations (P. Daly, "La bonne foi et la common law: l'arrêt *Bhasin c. Hrynew*", in J. Torres-Ceyte, G.-A. Berthold and C.-A. M. Péladeau, eds., *Le dialogue en droit civil* (2018), 89, at pp. 101-2; see also Kasirer J.'s reasons, at para. 86). Extending the duty beyond that scope would "detract from . . . certainty in commercial dealings" (*Bhasin*, at para. 80).

[200] Therefore, silence cannot be considered dishonest within the meaning of *Bhasin* unless there is a positive obligation to speak. Such an obligation does not arise simply because a party to a contract realizes that his counterparty is operating under a mistaken belief.

[201] Absent a duty of disclosure, that is, absent any kind of free-standing positive obligation flowing from the duty of honest performance, a party to a contract has no obligation to correct his counterparty's mistaken belief unless the party's active conduct has *materially* contributed to it (see, in a different context, T. Buckwold, "The Enforceability of Agreements to Negotiate in Good Faith: The Impact of *Bhasin v. Hrynew* and the Organizing Principle of Good Faith in Common Law Canada" (2016), 58 *Can. Bus. L.J.* 1, at pp. 12-13).

[202] What constitutes a material contribution will obviously depend upon the context, which includes the nature of the parties' relationship (see Brown J.'s reasons, at para. 133) as well as the relevant provisions of the contract. But the reason underlying this requirement is a practical one that is consistent with *Bhasin*'s emphasis on commercial expectations (at paras. 1, 34, 41, 60 and 62): parties that prefer not to disclose certain information — which they are entitled not to do — are not required to adopt a new line of conduct in their contractual relationship simply because they chose silence over speech.

[203] It cannot be that the law, on the one hand, allows contracting parties not to disclose information but, on the other hand, negates that possibility by imposing a standard of conduct that is at odds with the spontaneous attitudes — such as evasiveness and equivocation — parties might have when their conversations bear precisely on what they wish not to disclose.

[204] Even though parties who make that choice must be careful with what they say or do, especially if they become aware that their counterparties are operating under a mistaken belief, they should not be asked to behave as if their actions were being scrutinized under a microscope to determine whether they have contributed to that mistaken belief. Such a requirement would be unacceptable.

[205] In the context of a right to terminate a contract without cause, a party that intends to end an agreement does not have to convey hints in order to alert his counterparty that their business relationship is in danger. No duty of disclosure should mean no duty of disclosure.

[206] A party's awareness of his counterparty's mistaken belief will therefore not, in itself, trigger an obligation to speak unless the party has taken positive action that materially contributed to that belief. The active conduct and the mistaken belief must both pertain to contractual performance; otherwise, it could hardly be said that one has "knowingly misle[d] [the] other about matters directly linked to the performance of the contract" (*Bhasin*, at para. 73).

[207] In sum, the "minimum standard" of honesty imposed by the duty of honest performance has to be consistent with the other principles set out in *Bhasin*. It also has to be realistic and not overly formalistic. Absent a duty of disclosure, a party has no obligation to dissuade his counterparty from persisting in a mistaken belief. This does not mean that the party may induce or reinforce such a belief by significant positive

actions or representations. There is an obligation to correct this mistaken belief if the party's active conduct has *materially* contributed to it.

III. Analysis

[208] Callow and Baycrest entered into two two-year contracts: a winter agreement covering mostly snow removal services for the period from November 1, 2012 to April 30, 2014 and a summer maintenance services agreement for the period from May 1, 2012 to October 31, 2013. The winter agreement, which is at issue here, contained the following provision:

> 9. If the Contractor [i.e. Callow] fails to give satisfactory service to the Corporation [i.e. Baycrest] in accordance with the terms of this Agreement and the specifications and general conditions attached hereto or if for any other reason the Contractor's services are no longer required for the whole or part of the property covered by this Agreement, then the Corporation may terminate this contract upon giving ten (10) days' notice in writing to the Contractor, and upon such termination, all obligations of the Contractor shall cease and the Corporation shall pay to the Contractor any monies due to it up to the date of such terminations. [Emphasis added.]
>
> (A.R., vol. III, at p. 10)

[209] In March or April 2013, Baycrest decided to terminate the winter agreement. On September 12, 2013, it gave Callow 10 days' notice that it was terminating the contract. In the meantime, Baycrest had learned that Callow was performing free extra landscaping work and that he was under the impression the winter agreement would not be terminated (trial reasons, 2017 ONSC 7095, at para. 48 (CanLII)).

[210] It can easily be understood from these circumstances that Callow was "shocked" by the termination. Callow believed that, "if there was a problem, he would have expected [Baycrest] to bring it to his attention like [it] had done in the past" (trial reasons, at para. 49). Baycrest's behaviour was certainly discourteous and cavalier. Yet, that is not the question here. The question is whether Baycrest materially contributed to Callow's mistaken belief that the contract would not be terminated. If Baycrest did, then it had an obligation to correct that mistaken belief in accordance with its duty of honest performance. Otherwise, it had no obligation to disclose anything.

[211] Before our Court, Callow acknowledged that by entering into the winter agreement, he had taken the risk that Baycrest "may terminate [the contract], but only disclose the termination decision on 10 days' written notice" (transcript, at p. 11; see also C.A. reasons, 2018 ONCA 896, 429 D.L.R. (4th) 704, at para. 14). I am of the view that according to the terms of the winter agreement, Callow could have found himself in the exact same situation regardless of Baycrest's behaviour during the spring and summer of 2013. Such a possibility was in fact inherent in the contract he had bargained for.

[212] Callow essentially submits that Baycrest's active conduct led him to believe that the winter agreement was no longer at risk of being terminated despite the clear wording of the termination provision. He stresses the following points:

(1) Baycrest deliberately kept its decision secret because it did not want to jeopardize the performance of the summer agreement;

(2) Baycrest showed satisfaction with Callow's services;

(3) Callow had discussions with Mr. Peixoto and Mr. Campbell regarding the renewal of the winter agreement;

(4) Baycrest accepted Callow's "freebie" work; and

(5) Baycrest was aware of Callow's mistaken belief.

[213] In my view, the appeal should be dismissed.

[214] The trial judge's understanding of "active dishonesty" is tainted by an error of law. She did not consider the principle that, in order to amount to a breach of the duty of honest performance, any active dishonesty had to be "directly linked to the performance of the contract" (*Bhasin*, at para. 73). In assessing Baycrest's conduct, she did not inquire into whether Baycrest had "lie[d] or otherwise knowingly misle[d]" Callow about the exercise of its right to terminate the winter agreement for *any other reason* than unsatisfactory services. This explains why she wrongly insisted on, amongst other things, the need to "address the alleged performance issues" (para. 67)

despite the fact that the winter agreement could be terminated even if Callow's services were satisfactory.

[215] Furthermore, although the trial judge seems to have been aware that there was no duty of disclosure (para. 60), she nonetheless found that Baycrest had acted in bad faith by "withholding the information to ensure Callow performed the summer maintenance services contract" (para. 65; see also para. 76). She never asked herself whether Baycrest had explicitly or implicitly said or done anything that could have misled Callow into thinking that the contract was at no risk of being terminated for any other reason than unsatisfactory services. It is clear from reading the trial judge's reasons as a whole that the "representations" she found had been made by Baycrest (at paras. 65, 67 and 76) were not directly linked to the performance of the winter agreement. In sum, the trial judge's misunderstanding of the applicable legal principles vitiated the fact-finding process.

[216] Baycrest had bargained for a right to terminate its winter agreement *for any reason* and *at any time* upon giving 10 days' notice. Its duty of honest performance did not require it to "forego" this undeniable "advantag[e] flowing from the contract" (*Bhasin*, at para. 73). It had no obligation to tell Callow about its decision to terminate the winter agreement until 10 days before the termination was to take effect, as the contract stipulated. Even after Baycrest became aware of Callow's mistaken belief, it had no obligation to refuse the "freebie" work Callow was performing on his own initiative or to correct this mistaken belief he was operating under. Such an obligation

would have arisen only if Baycrest had contributed materially to that mistaken belief by inducing it or reinforcing it. In light of the evidence and the trial judge's findings, I am not convinced that Baycrest had done so.

[217] I do not have the same reading as my colleague Kasirer J. about certain of the trial judge's findings of fact (para. 100). These findings expressed in very broad terms should not be insulated from the reasons as a whole and from the evidence that was before the trial judge. For instance, my colleague writes that "Mr. Peixoto made statements to Mr. Callow suggesting that a renewal of the winter maintenance agreement was likely" (para. 95), and he considers that to be a "key finding" (para. 96). However, the trial judge's finding pertained to *what Callow had thought*, not to *what Baycrest had said* (trial reasons, at para. 41), which is something quite different. Indeed, as I demonstrate below, the evidence supporting this "key finding" shows that Callow's thoughts regarding a renewal of the winter agreement had nothing to do with what Baycrest said to him.

[218] I now turn to the application of the foregoing legal principles to the facts of this case.

A. *Discussions About Renewal*

[219] Callow argues that Baycrest materially contributed to his mistaken belief by discussing a possible renewal. Indeed, the renewal issue is central in this appeal. It is not disputed that unlike the contract at issue in *Bhasin*, the winter agreement did not

contemplate any automatic renewal; it only contemplated termination. Since renewal was not a term of the winter agreement, it cannot be considered "performance of the contract" within the meaning of *Bhasin*. For Callow's claim to succeed, any breach of the duty of honest performance must pertain to termination.

[220] Both of my colleagues accept Callow's submission that it can be inferred from the discussions about renewal that the winter agreement was not in danger of termination. I would agree with such a proposition in the following circumstances: if one party leads another to believe that their contract will be renewed, it follows that the other party can reasonably expect their business relationship to be extended rather than terminated. But an inference to that effect cannot be drawn in the abstract. In order to infer that one party, through discussions about renewal, led the other party to think that there was no risk their existing agreement would be terminated, the inference-drawing process must obviously take into account the nature of the risk at stake and what was actually communicated during those discussions. Otherwise, the inference would entail a palpable and overriding error that would be subject to appellate review (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 22-23).

[221] Here, s. 9 of the winter agreement contemplated that the agreement might be terminated (1) for unsatisfactory services, or (2) for any other reason than unsatisfactory services. Did Baycrest, by discussing renewal, communicate anything that might have led Callow to believe there was no risk the winter agreement would be

terminated for *any other reason* than unsatisfactory services? The trial judge described the discussions between the parties as follows:

> During the spring and summer of 2013, Callow performed regular weekly grass cutting, garbage pick-up and was in discussions with the condominium corporations' board members to renew the contract for the following summer and also the winter maintenance services contract for a further two years. At this time, Callow had only completed year one of a two-year contract. The contract was supposed to remain in place for the winter of 2013-2014.
>
> After his discussions with Mr. Peixoto and Mr. Campbell, Mr. Callow thought that he was likely to get a two-year renewal of his winter maintenance services contract and they were satisfied with his services. [Emphasis added; paras. 40-41.]

[222] The trial judge, who found Callow to be credible, relied on the following part of his testimony:

> **Q.** Now is probably a good time to — well tell me about these discussions. Let's hear what discussions were you having.
>
> **A.** Mostly with Joe [Peixoto], we discussed it, and he said "yeah, it looks good, I'm sure they'll be up for it, let me talk to them".
>
> **Q.** Up for what?
>
> **A.** A two-year renewal.
>
> **Q.** All right. Anyone else?
>
> **A.** Kyle Campbell I ran into once or twice on site and we had discussions as well too.
>
> **Q.** Okay, and what was your impression of —of — I mean I suppose you already answered....

> **A.** That I was likely going to be getting a two-year renewal, there was no reason not to, they were satisfied with the service, they were happy with it. [Emphasis added.]
>
> (A.R., vol. II, at pp. 67-68)

[223] Apparently not much importance was attached to the renewal issue at trial. The amended statement of claim did not even address this issue; it instead focused on Baycrest's knowledge, Callow's "freebie" work and the provision of satisfactory services. Even though the trial judge did consider renewal, I note that her findings in this regard bore on Callow's *mistaken belief* that the winter agreement was likely to be renewed (at para. 41); they did *not* bear on anything Baycrest actually did or said that would have misled Callow into that belief.

[224] What Callow thought is one thing; what Baycrest said or did is another. According to Callow himself, Mr. Peixoto did not propose anything on behalf of Baycrest. Mr. Peixoto's statement that "I'm sure they'll be up for it, let me talk to them" (A.R., vol. II, at p. 67) clearly meant that despite his favorable opinion, he was not the one making the decision and that Baycrest had not even considered the mere possibility of a renewal at the time. It certainly could not be inferred from this statement that a renewal was likely. Callow's testimony does not suggest that he was misled into believing that Baycrest was actually contemplating a renewal — Mr. Peixoto's response instead presupposes the contrary — nor does it suggest that Baycrest did or said anything to negate the risk Callow took that his contract might be terminated for any other reason than unsatisfactory services. Indeed, Callow insisted that he had

believed a renewal was likely because "there was no reason not to, they were satisfied with the service, they were happy with it" (A.R., vol. II, at p. 68).

[225] In his examination for discovery, Callow had given the same reason for thinking his winter agreement would be renewed, that is, because "there was no reason not to" (A.R., vol. II, at p. 49). He did *not* refer to his discussions with Mr. Peixoto or Mr. Campbell. When asked if anyone had told him that his contract would be renewed, he said he could not recall. The evidence does *not* establish that Mr. Peixoto or Mr. Campbell initiated the discussions about renewal. On the contrary, it suggests that Callow did. When cross-examined about his "freebie" work, Callow admitted that, although he was under the mistaken belief that his contract was likely to be renewed, he was in fact only "*hopeful*" that it would be. *Nowhere* in his testimony did he suggest that he had been given *any* information that could mislead him into believing that Baycrest was seriously contemplating a two-year renewal instead of termination.

[226] The trial judge referred to "active communications . . . between March/April and September 12, 2013, which deceived Callow" (para. 66), and to "representations in anticipation of the notice period" (para. 67; see also paras. 65 and 76). But those references must be read in light of the evidence and the reasons as a whole. Even though the trial judge made credibility findings against Mr. Peixoto and Mr. Campbell and credibility findings in favour of Callow, the evidence pertaining to renewal supports only a very limited number of inferences regarding termination.

[227] At most, it can be said that Mr. Peixoto and Mr. Campbell did not dissuade Callow from entertaining hopes when they had a chance to do so. But, and most importantly, they did not suggest that Baycrest was actually contemplating a continuation of their business relationship. If that had been the case, then I would agree that it might have been justifiable to infer that Callow had been led to believe there was no risk that his existing contract would be terminated before its term. But that was simply not the case here. In my view, the trial judge did not infer from the discussions about renewal that Baycrest had done or said anything to negate the risk that the winter agreement would be terminated for any other reason than unsatisfactory services. Had she made such an inference, it would be subject to appellate review, as it would not be supported by the evidence. Given the context discussed above, Mr. Peixoto's and Mr. Campbell's vague and evasive declarations did not materially contribute to Callow's mistaken belief that would have required Baycrest to disclose additional information.

B. *Baycrest's Satisfaction With Callow's Services*

[228] The trial judge placed great importance on the fact that Callow's services had been satisfactory and that Baycrest's conduct had given him no reason to think otherwise (paras. 22, 27, 29-30, 34-36, 39, 41, 46-47 and 55). I note there is no finding that Baycrest communicated any particular sign of satisfaction pertaining *to the performance of the winter agreement* past March 19, 2013. That being said, there is

nothing dishonest about Baycrest terminating the winter agreement after showing its satisfaction with the quality of Callow's work.

[229] Further, the parties had explicitly contemplated that Baycrest could terminate the winter agreement even if it was satisfied with Callow's performance, as the contract provided that Baycrest could exercise its termination right for any other reason than unsatisfactory services. Thus, positive feedback about Callow's services cannot justify Callow's mistaken belief that the contract would not be terminated.

C. *Callow's Mistaken Belief That the Winter Agreement Would Remain in Effect*

[230] The trial judge found that Baycrest had "continu[ed] to represent that the contract was not in danger" (paras. 65 and 76; see also para. 13). This finding was essentially grounded on the overall signs of satisfaction communicated by Baycrest, on its acceptance of the "freebie" work and on Callow's mistaken belief following the discussions pertaining to renewal. As I have already explained, nothing here required Baycrest to disclose its intent to terminate the winter agreement.

[231] What the trial judge *did not find* is also relevant. She did *not* find that Baycrest had decided to forego its right to terminate the winter agreement. She did *not* find that Baycrest had lied to Callow. She did *not* find that Baycrest had negated the risk taken by Callow that his contract would be terminated for any other reason than unsatisfactory services. Lastly, she did not clearly indicate why Callow so firmly

believed "that his winter maintenance services contract would remain in place during the following winter" (para. 13).

[232] Callow's belief that there was no risk Baycrest would exercise its termination right was based on two things. First, on the positive feedback he had received regarding his services. In his words, Baycrest was "happy with it". However, this is not very relevant in a context in which Baycrest could terminate the winter agreement for any other reason than unsatisfactory services. Second, and most importantly, Callow's mistaken belief was based on an erroneous interpretation of the winter agreement.

[233] At trial, Callow testified that he was aware of the termination clause, but that he thought the two-year term made it unenforceable:

> **Q.** . . . So, in that letter, there is a — a statement that the termination was in breach of the agreement. So, my question for you is, at that point in time what was your understanding, why was the termination in breach of the agreement?
>
> **A.** Because they asked me, and we entered into a two year agreement, to provide services both summer and winter; and I did so at a reduced rate. I upheld my end of the bargain which was to perform that work at that reduced rate. They — and which I might add, I was not paid for, the landscaping and the final aspect of it, they were supposed to pay me. They didn't do it. And I continued to fulfill my contractual obligations. I expected nothing less than the same from them.
>
> **Q.** So — so, when you — because you talk — but you knew that in the winter contract, there was that termination clause.
>
> **A.** They had a clause written in there. I didn't believe it be enforceable because we had a two year contract. That's the whole idea to a two year

> contract. You have contract for two years. I provide services for two years and they pay me for those services. [Emphasis added.]
>
> (A.R., vol. II, at p. 120; see also pp. 106-7.)

[234] Even though that was not the position he took in this Court, Callow's uninformed interpretation of the termination provision casts an important light on the reason why he did not believe there was a risk the winter agreement would be terminated for any other reason than unsatisfactory services. The evidence does not suggest that Baycrest said or did anything that could have negated that risk, nor does it suggest that Baycrest had anything to do with Callow's erroneous interpretation of the termination provision. I am therefore of the view that Baycrest was not required to correct Callow's mistaken belief by disclosing information it decided not to disclose.

IV. Conclusion

[235] The trial judge erred in concluding that Baycrest had to address performance issues or provide prompt notice prior to termination (para. 67). She did not inquire into whether Baycrest had made any representations that had misled Callow into thinking Baycrest would not terminate the winter agreement for any other reason than unsatisfactory services. In my view, the trial judge extended the ambit of the duty of honest performance in a way that was not consistent with the other principles set out in *Bhasin*.

[236] In sum, the narrow issue in this appeal comes down to this: Did Baycrest lie or otherwise knowingly mislead Callow into thinking that there was no risk it would exercise its right to terminate the winter agreement for any other reason than unsatisfactory services? There were no outright lies. Baycrest was aware of Callow's mistaken belief that his services would be required for the upcoming winter. But Baycrest never forewent the contractual advantage it had of being able to end the winter agreement at any time upon 10 days' notice. Nor did Baycrest say or do anything that materially contributed to Callow's mistaken belief that the winter agreement would not be terminated for any other reason than unsatisfactory services. Regardless of how its conduct is characterized, Baycrest had no obligation to correct Callow's mistaken belief.

[237] To be clear, the result I arrive at should not be interpreted as meaning that Baycrest's behaviour was appropriate or that Callow has no recourse. It means that Callow's recourse cannot be based on a breach of the duty of honest performance. The trial judge did in fact find that Baycrest had been unjustly enriched by the "freebie" work (at para. 77), but she stated that Callow had not provided evidence of his expenses. That question exceeds the scope of this appeal, however.

[238] I would therefore dismiss the appeal.

Appeal allowed with costs throughout, CÔTÉ J. *dissenting.*

Solicitors for the appellant: McCarthy Tétrault, Toronto; KMH Lawyers, Ottawa.

Solicitors for the respondents: Gowling WLG (Canada), Ottawa.

Solicitors for the intervener the Canadian Federation of Independent Business: Blake, Cassels & Graydon, Toronto.

Solicitors for the intervener the Canadian Chamber of Commerce: Torys, Toronto.

11

Her Majesty The Queen in Right of Alberta *Appellant*

v.

Elder Advocates of Alberta Society and James O. Darwish, Personal Representative of the Estate of Johanna H. Darwish, deceased *Respondents*

and

Attorney General of Canada and Attorney General of British Columbia *Interveners*

Indexed as: Alberta *v.* Elder Advocates of Alberta Society

2011 SCC 24

File No.: 33551.

2011: January 27; 2011: May 12.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Civil procedure — Pleadings — Motion to strike — Government alleged to have artificially inflated accommodation charges required of elderly patients in long-term care facilities to subsidize medical expenses properly the responsibility of government — Statement of claim alleging breach of fiduciary duty, negligence, unjust enrichment, bad faith exercise of discretion and breach of s. 15(1) of the Canadian Charter of Rights and Freedoms — Whether disputed claims disclose cause of action.

Fiduciary duty — Government — Government alleged to have artificially inflated accommodation charges required of elderly patients in long-term care facilities to subsidize medical expenses properly the responsibility of government — Whether principles of fiduciary duty applicable to private actors apply to

Sa Majesté la Reine du chef de l'Alberta *Appelante*

c.

Elder Advocates of Alberta Society et James O. Darwish, représentant personnel de la succession de Johanna H. Darwish, décédée *Intimés*

et

Procureur général du Canada et procureur général de la Colombie-Britannique *Intervenants*

Répertorié : Alberta *c.* Elder Advocates of Alberta Society

2011 CSC 24

N° du greffe : 33551.

2011 : 27 janvier; 2011 : 12 mai.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Procédure civile — Actes de procédure — Requête en radiation — Allégation que le gouvernement a artificiellement augmenté les frais d'hébergement imposés aux pensionnaires âgés des établissements de soins de longue durée en vue de financer les frais médicaux qui relèvent normalement du gouvernement — Déclaration alléguant le manquement à une obligation fiduciaire, la négligence, l'enrichissement injustifié, la mauvaise foi dans l'exercice d'un pouvoir discrétionnaire et la violation de l'art. 15(1) de la Charte canadienne des droits et libertés — Les allégations contestées révèlent-elles une cause d'action?

Obligation fiduciaire — Gouvernement — Allégation que le gouvernement a artificiellement augmenté les frais d'hébergement imposés aux pensionnaires âgés des établissements de soins de longue durée en vue de financer les frais médicaux qui relèvent normalement du gouvernement — Les principes relatifs à l'obligation

governments — Whether government owed fiduciary duty to patients.

Alberta is responsible for the cost of medical care required by the residents of nursing homes and auxiliary hospitals, but patients may be asked to contribute to the costs of their housing and meals through the payment of accommodation charges. A large class of elderly residents of Alberta's long-term care facilities alleges that the government artificially inflated the accommodation charges to subsidize the cost of medical expenses. They initiated a class action alleging that the Province of Alberta and the nine Regional Health Authorities who administered and operated Alberta's health care regime at the relevant times failed to ensure that the accommodation charges were used exclusively for that purpose. They claimed that this constituted a breach of fiduciary duty, negligence, bad faith and/or unjust enrichment, and made an equality claim under s. 15(1) of the *Canadian Charter of Rights and Freedoms*. At certification, Alberta challenged the claims of fiduciary duty and negligence. The certification judge struck out the plea of breach of fiduciary duty and partially limited the duty of care alleged in negligence. The Court of Appeal upheld the entitlement of the class to pursue the causes of action.

Held: The appeal should be allowed in part. The pleas of breach of fiduciary duty, negligence and bad faith in the exercise of discretion are struck from the statement of claim. The claim of unjust enrichment and the s. 15(1) *Charter* claim are allowed to proceed to trial.

In cases not covered by an existing category in which a fiduciary duty has been recognized, a claimant must show that (1) the alleged fiduciary has undertaken to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons is vulnerable to a fiduciary's control; and (3) a legal interest or a substantial practical interest of the beneficiary or beneficiaries stands to be adversely affected by the alleged fiduciary's exercise of discretion or control. Vulnerability alone is insufficient to support a fiduciary claim.

fiduciaire qui régissent les entités privées s'appliquent-ils aux gouvernements? — Le gouvernement a-t-il une obligation fiduciaire envers les patients?

L'Alberta prend à sa charge les frais des soins de santé prodigués aux pensionnaires des foyers de soins infirmiers et des hôpitaux de soins prolongés, mais on peut demander aux pensionnaires de payer des frais d'hébergement pour défrayer le coût de leur logement et de leurs repas. Un groupe important de pensionnaires âgés des établissements de soins de longue durée de l'Alberta allègue que le gouvernement a artificiellement augmenté les frais d'hébergement en vue de financer les frais médicaux. Ils ont intenté un recours collectif et allégué que la province de l'Alberta et les neuf autorités régionales de la santé qui administraient le régime de soins de santé de l'Alberta et en assuraient la mise en œuvre à l'époque en cause n'ont pas veillé à ce que les frais d'hébergement soient utilisés exclusivement à cette fin. Ils ont allégué que cela constituait un manquement à une obligation fiduciaire, de la négligence, de la mauvaise foi et de l'enrichissement injustifié, et ils ont présenté une demande fondée sur le droit à l'égalité garanti par le par. 15(1) de la *Charte canadienne des droits et libertés*. À l'étape de l'autorisation du recours collectif, l'Alberta a contesté les allégations d'obligation fiduciaire et de négligence. La juge saisie de la demande d'autorisation du recours a radié l'allégation relative au manquement à l'obligation fiduciaire, et a partiellement limité l'application de l'obligation de diligence procédant du droit de la négligence. La Cour d'appel a confirmé le droit du groupe d'invoquer les causes d'action.

Arrêt : Le pourvoi est accueilli en partie. Les allégations de manquement à une obligation fiduciaire, de négligence et de mauvaise foi dans l'exercice d'un pouvoir discrétionnaire sont radiées de la déclaration. L'autorisation d'instruire l'allégation d'enrichissement injustifié et la demande fondée sur le par. 15(1) de la *Charte* est accordée.

Dans une situation non visée par une catégorie existante de cas dans lesquels l'existence d'une obligation fiduciaire a été reconnue, le demandeur doit démontrer (1) que le fiduciaire s'est engagé à agir au mieux des intérêts du bénéficiaire ou des bénéficiaires; (2) qu'il existe une personne ou un groupe de personnes définies vulnérables au contrôle du fiduciaire; et (3) que l'exercice, par le fiduciaire, de son pouvoir discrétionnaire ou de son contrôle aura une incidence défavorable sur un intérêt juridique ou un intérêt pratique important du bénéficiaire ou des bénéficiaires. La vulnérabilité, à elle seule, ne suffit pas à justifier l'existence d'une obligation fiduciaire.

Since the government, as a general rule, must act in the interest of all citizens, governments will owe fiduciary duties only in limited and special circumstances. The interest affected must be a specific private law interest to which the person has a pre-existing distinct and complete legal entitlement, and the degree of control exerted by the government over the interest in question must be equivalent or analogous to direct administration of that interest. Generally speaking, a strong correspondence with one of the traditional categories of fiduciary relationship is a precondition to finding an implied fiduciary duty on the government. A general obligation to the public or sectors of the public cannot establish an undertaking to act in the alleged beneficiary's interest, and may make it difficult to show that a defined person or class of persons is vulnerable to the fiduciary's exercise of discretionary power. Nor can the requirements be satisfied simply when a public authority has been granted a discretionary power to affect a person's interest, when there is a general impact on a person's well-being, property or security, when an entitlement is contingent on future government action, or when there is a mere access to a benefit scheme. If the undertaking is alleged to flow from a statute, the language in the legislation must clearly support it.

Here, taking all the facts pleaded as true, the pleading of breach of fiduciary duty does not disclose a supportable cause of action. The claimants' state of vulnerability, as alleged in their pleadings, does not arise from their relationship with Alberta. Although their financial situation may be affected by the levy of accommodation charges, that alone is not enough to warrant a fiduciary duty. Nothing in the legislation or in the factual relationship pleaded supports an undertaking by Alberta to act with undivided loyalty toward the claimant class members in the setting, receipt and administration of the accommodation charges, and the claimants point to no analogous duty in private law. The *Alberta Health Care Insurance Act* imposes an obligation on the Province to provide medical care, but provides no direction amounting to a statutory undertaking to act in the best interests of residents of Alberta generally, or in the best interests of patients residing in long-term care facilities in particular. Nor does the statute impose any obligation on the government to take into account anyone's interests in determining the contribution that may be sought from patients. The legal or substantial practical interests that are alleged to be affected by the Crown's exercise of authority — the right to chronic care and the right to be assessed a reasonable fee for the receipt of care — are insufficient to attract a fiduciary duty. Deciding how to fund and implement insured

Puisqu'en règle générale le gouvernement doit agir dans l'intérêt de tous les citoyens, il aura des obligations fiduciaires seulement dans des circonstances retreintes et particulières. L'intérêt touché doit être un intérêt de droit privé précis sur lequel la personne exerçait déjà un droit distinct et absolu, et le niveau de contrôle exercé par le gouvernement sur l'intérêt en question doit être équivalent ou semblable à l'administration directe de cet intérêt. En règle générale, un lien étroit avec l'une des catégories habituelles de relation fiduciaire constitue une condition préalable pour conclure à l'existence d'une obligation fiduciaire implicite de l'État. Une obligation générale envers le public ou des secteurs du public ne saurait établir l'existence d'un engagement d'agir dans l'intérêt du bénéficiaire, et peut faire en sorte qu'il soit difficile de démontrer qu'une personne ou un groupe de personnes définies est vulnérable à l'exercice d'un pouvoir discrétionnaire du fiduciaire. Les conditions ne peuvent pas non plus être remplies simplement lorsqu'une autorité publique a été investie du pouvoir discrétionnaire d'influer sur les intérêts d'une personne lorsqu'il y a une incidence générale sur le bien-être, les biens ou la sécurité de cette dernière, lorsqu'un droit dépend d'une mesure ultérieure de l'État, ou lorsqu'il y a seulement un accès à un régime de prestations. S'il est allégué que l'engagement découle d'une loi, le libellé de la loi doit manifestement l'appuyer.

En l'espèce, si l'on considère que tous les faits invoqués sont vrais, l'allégation de manquement à une obligation fiduciaire ne révèle pas une cause d'action justifiable. La vulnérabilité des demandeurs, telle qu'alléguée dans leurs actes de procédure, ne résulte pas de leur relation avec l'Alberta. Bien que leur situation financière puisse être touchée par l'imposition des frais d'hébergement, ce facteur, à lui seul, ne suffit pas pour justifier une obligation fiduciaire. Aucune disposition législative ni quoi que ce soit dans les rapports de fait invoqués n'étaye un engagement de l'Alberta de faire preuve, envers les membres du groupe de demandeurs, d'une loyauté exclusive pour ce qui est de la fixation, de la perception et de l'administration des frais d'hébergement, et les demandeurs ne font référence à aucune obligation analogue en droit privé. La *Alberta Health Care Insurance Act* oblige la province à fournir des soins de santé, mais ne l'oblige pas à s'engager à agir au mieux des intérêts des résidents de l'Alberta en général, ou au mieux des intérêts des pensionnaires d'un établissement de soins de longue durée en particulier. La loi n'oblige pas non plus le gouvernement à tenir compte des intérêts de quiconque lorsqu'il détermine la contribution qui peut être demandée aux pensionnaires. L'intérêt juridique ou l'intérêt pratique essentiel, qui est décrit comme étant touché par l'exercice du pouvoir de l'État — le droit à des soins de longue durée et le

health care services requires constant balancing of competing interests between all segments of the population. The Crown would be unable to meet its obligations to the public at large if it were held to a fiduciary standard of conduct for one group among many. Moreover, the Province is not responsible for the class members, who will generally still be competent to manage their own affairs, or will be beneficiaries of duties owed by their own guardians and trustees. The plea of breach of fiduciary duty should be struck from the statement of claim.

The pleadings do not support a negligence claim. While the pleadings arguably evoke negligence in auditing, supervising, monitoring and administering the funds related to the accommodation charges, the legislative scheme does not impose a duty of care on Alberta. While the Minister has a general duty, under the *Alberta Health Care Insurance Act*, to provide insured health care services, the plaintiffs have failed to point to any duty to audit, supervise, monitor or administer the funds related to the accommodation charges. Similarly, the *Nursing Homes Act* and its regulations impose no positive duty on the Crown, but grant only permissive monitoring powers. The same is true of the *Regional Health Authorities Act* and the *Hospitals Act* and their accompanying regulations. Furthermore, in the absence of a statutory duty, the fact that Alberta may have audited, supervised, monitored and generally administered the accommodation fees objected to does not create sufficient proximity to impose a *prima facie* duty of care. The specific acts alleged fall under the rubric of administration of the scheme. The mere supplying of a service is insufficient, without more, to establish a relationship of proximity between the government and the claimants.

The allegation of bad faith, as pleaded, is bootstrapped to the duty of care claim, and cannot survive on its own when the plea of negligence is struck. The facts necessary to support an allegation that the plea of bad faith discloses the tort of misfeasance in a public office cannot be extricated from the pleas of negligence and fiduciary duty, and the issue was not raised before the courts below.

It is not plain and obvious that the claim for unjust enrichment does not disclose a cause of action. The

droit d'être facturé à un prix raisonnable pour recevoir des soins — n'est pas suffisant pour faire naître une obligation fiduciaire. Les décisions quant à la façon de financer et de mettre en œuvre des services de soins de santé assurés exigent le maintien constant de l'équilibre des intérêts opposés des différentes parties de la population. L'État ne serait pas en mesure de remplir ses obligations envers l'ensemble de la population s'il était astreint à une norme de conduite de nature fiduciaire envers un seul groupe parmi tant d'autres. Qui plus est, la province n'est pas responsable des membres du groupe, qui sont généralement encore capables de gérer leurs propres affaires ou seront bénéficiaires des obligations de leurs propres tuteurs et fiduciaires. L'allégation de manquement à une obligation fiduciaire doit être radiée de la déclaration.

Les actes de procédure n'étayent pas une allégation de négligence. Bien qu'on puisse soutenir que les actes de procédure évoquent la négligence dans la vérification, la supervision, le contrôle et la gestion des fonds associés aux frais d'hébergement, le régime législatif n'impose pas une obligation de diligence à l'Alberta. La *Alberta Health Care Insurance Act* impose au ministre l'obligation générale de fournir des services de soins de santé assurés, mais les demandeurs n'ont pu établir l'existence d'une obligation de vérifier, de superviser, de contrôler ou de gérer les fonds associés aux frais d'hébergement. Dans la même veine, la *Nursing Homes Act* et ses règlements d'application n'imposent à l'État aucune obligation positive, elle ne lui confère que des pouvoirs de contrôle facultatifs. Il en va de même pour la *Regional Health Authorities Act*, la *Hospitals Act* et leurs règlements d'application. De plus, en l'absence d'une obligation d'origine législative, le fait que l'Alberta peut avoir vérifié, supervisé, contrôlé et généralement géré les frais d'hébergement contestés ne crée pas un lien de proximité suffisant pour imposer une obligation de diligence *prima facie*. Les actes allégués relèvent de l'administration du régime. La simple prestation d'un service ne suffit pas, à elle seule, pour établir une relation de proximité entre le gouvernement et les demandeurs.

L'allégation de mauvaise foi, telle qu'elle est invoquée, est liée au manquement allégué à l'obligation de diligence et doit être écartée si l'allégation de négligence est radiée. Les faits nécessaires pour étayer l'argument que l'allégation de mauvaise foi révèle l'existence du délit de faute dans l'exercice d'une charge publique ne peuvent se dégager des allégations de négligence et d'obligation fiduciaire, et la question n'a pas été soulevée devant les tribunaux inférieurs.

Il n'est pas clair et évident que l'allégation d'enrichissement injustifié ne révèle aucune cause d'action.

claim stands on different legal footing than the claims for breach of fiduciary duty and negligence. While public law remedies are the proper route for claims relating to restitution of taxes levied under an *ultra vires* statute, it may be possible to sue for unjust enrichment in other circumstances. Here, the claim pleaded is not for taxes paid under an *ultra vires* statute, and it should be allowed to proceed to trial, where its propriety may be explored more fully in the context of the evidence adduced.

The claim that the imposition on the class members of an obligation to pay health care costs violates s. 15(1) of the *Charter* is not directly challenged by the Province. In light of the survival of the plea of unjust enrichment especially, the s. 15 claim should be permitted to proceed as part of the class action.

The action should not be decertified since a class proceeding remains the preferable procedure. The claim as pleaded does not require an individual assessment of the nexus between specific accommodation and meal charges in order to ground any potential liability to the class, and the *Class Proceedings Act* provides sufficient remedial flexibility to address any potential difficulties in assessing, awarding, and distributing damages.

Cases Cited

Distinguished: *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Authorson v. Canada (Attorney General)* (2000), 53 O.R. (3d) 221, aff'd (2002), 58 O.R. (3d) 417, rev'd on other grounds, 2003 SCC 39, [2003] 2 S.C.R. 40; *Brewer Bros. v. Canada (Attorney General)*, [1992] 1 F.C. 25; *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263; *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3; **referred to:** *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *Frame v. Smith*, [1987] 2 S.C.R. 99; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245; *Hogan v. Newfoundland (Attorney General)* (2000), 183 D.L.R. (4th) 225; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Sagharian (Litigation Guardian of) v. Ontario (Minister of Education)*, 2008 ONCA 411, 172 C.R.R. (2d) 105; *Harris v. Canada*, 2001 FCT 1408, [2002] 2 F.C. 484; *K.L.B. v. British*

L'allégation repose sur un fondement juridique différent des allégations de manquement à l'obligation fiduciaire ou de négligence. Bien que les recours de droit public constituent la démarche à suivre pour présenter une demande de restitution de taxes perçues en vertu d'une loi *ultra vires*, il est possible d'intenter une action en enrichissement injustifié dans d'autres circonstances. En l'espèce, on ne réclame pas des taxes payées en vertu d'une loi *ultra vires*, et il faudrait permettre que la demande fasse l'objet d'un procès où son bien-fondé pourra être examiné de façon plus approfondie en fonction de la preuve présentée.

La province ne conteste pas directement l'allégation que l'obligation faite aux membres du groupe de payer les frais de soins de santé contrevient au par. 15(1) de la *Charte*. Compte tenu du maintien de l'allégation d'enrichissement injustifié en particulier, il faut permettre que l'allégation fondée sur l'art. 15 soit examinée dans le cadre du recours collectif.

On ne doit pas annuler le recours parce qu'un recours collectif demeure la meilleure procédure. L'allégation, telle que formulée, n'exige pas que l'on apprécie individuellement le lien entre des frais d'hébergement et de repas précis pour qu'il soit possible de conclure à une quelconque responsabilité envers le groupe dans son ensemble, et la *Class Proceedings Act* prévoit, en matière de réparation, suffisamment de souplesse pour régler tout problème éventuel dans l'appréciation, l'octroi et la répartition des dommages-intérêts.

Jurisprudence

Distinction d'avec les arrêts : *Guerin c. La Reine*, [1984] 2 R.C.S. 335; *Authorson c. Canada (Attorney General)* (2000), 53 O.R. (3d) 221, conf. par (2002), 58 O.R. (3d) 417, inf. pour d'autres motifs, 2003 CSC 39, [2003] 2 R.C.S. 40; *Brewer Bros. c. Canada (Procureur général)*, [1992] 1 C.F. 25; *Succession Odhavji c. Woodhouse*, 2003 CSC 69, [2003] 3 R.C.S. 263; *Kingstreet Investments Ltd. c. Nouveau-Brunswick (Finances)*, 2007 CSC 1, [2007] 1 R.C.S. 3; **arrêts mentionnés :** *Hollick c. Toronto (Ville)*, 2001 CSC 68, [2001] 3 R.C.S. 158; *Hunt c. Carey Canada Inc.*, [1990] 2 R.C.S. 959; *Frame c. Smith*, [1987] 2 R.C.S. 99; *Lac Minerals Ltd. c. International Corona Resources Ltd.*, [1989] 2 R.C.S. 574; *Galambos c. Perez*, 2009 CSC 48, [2009] 3 R.C.S. 247; *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377; *Bande indienne Wewaykum c. Canada*, 2002 CSC 79, [2002] 4 R.C.S. 245; *Hogan c. Newfoundland (Attorney General)* (2000), 183 D.L.R. (4th) 225; *R. c. Sparrow*, [1990] 1 R.C.S. 1075; *Sagharian (Litigation Guardian of) c. Ontario (Minister of Education)*, 2008 ONCA 411, 172 C.R.R.

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Canadian Charter of Rights and Freedoms, ss. 1, 15, 24(1).

Class Proceedings Act, S.A. 2003, c. C-16.5, ss. 30 to 33.

Constitution Act, 1982.

Hospitalization Benefits Regulation, Alta. Reg. 244/90, s. 5(1)(d).

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Nursing Homes Act, R.S.A. 2000, c. N-7, ss. 1(a) "accommodation charge", 8, 10(2), 12, 19, 24.

Nursing Homes General Regulation, Alta. Reg. 232/85, s. 4.

Nursing Homes Operation Amendment Regulation, Alta. Reg. 260/2003, s. 2.

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Regional Health Authorities Act, R.S.A. 2000, c. R-10, ss. 5, 9, 13, 14, 21.

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Proclamation royale (1763), L.R.C. 1985, app. II, nº 1.

Regional Health Authorities Act, R.S.A. 2000, ch. R-10, art. 5, 9, 13, 14, 21.

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APPEAL from a judgment of the Alberta Court of Appeal (Conrad, Berger and Rowbotham JJ.A.), 2009 ABCA 403, 16 Alta. L.R. (5th) 1, 469 A.R. 270, 315 D.L.R. (4th) 59, [2010] 2 W.W.R. 197, 203 C.R.R. (2d) 344, 79 C.P.C. (6th) 19, 70 C.C.L.T. (3d) 30, 470 W.A.C. 270, [2009] A.J. No. 1336 (QL), 2009 CarswellAlta 1986, reversing in part a decision of Greckol J., 2008 ABQB 490, 94 Alta. L.R. (4th) 10, 453 A.R. 1, [2008] 11 W.W.R. 70, 59 C.C.L.T. (3d) 23, 59 C.P.C. (6th) 243, [2008] A.J. No. 909 (QL), 2008 CarswellAlta 1104. Appeal allowed in part.

G. Alan Meikle, *Q.C.*, *Ward K. Branch* and *Michael Sobkin*, for the appellant.

Allan A. Garber and *Nathan J. Whitling*, for the respondents.

Christine Mohr, for the intervener the Attorney General of Canada.

Anthony Fraser, for the intervener the Attorney General of British Columbia.

The judgment of the Court was delivered by

[1] THE CHIEF JUSTICE — It is a sad reality of life that as people age they may become unable to care for themselves and be obliged to live in special facilities providing greater or lesser degrees of assistance and medical care. In Alberta, chronic care for the elderly is provided through nursing homes and auxiliary hospitals. In principle, the government of Alberta is responsible for the costs of residents' medical care, but residents may be

Doctrine citée

Ellis, Mark Vincent. *Fiduciary Duties in Canada*. Toronto : Carswell, 1993 (loose-leaf updated 2011, release 1).

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POURVOI contre un arrêt de la Cour d'appel de l'Alberta (les juges Conrad, Berger et Rowbotham), 2009 ABCA 403, 16 Alta. L.R. (5th) 1, 469 A.R. 270, 315 D.L.R. (4th) 59, [2010] 2 W.W.R. 197, 203 C.R.R. (2d) 344, 79 C.P.C. (6th) 19, 70 C.C.L.T. (3d) 30, 470 W.A.C. 270, [2009] A.J. No. 1336 (QL), 2009 CarswellAlta 1986, qui a infirmé en partie une décision de la juge Greckol, 2008 ABQB 490, 94 Alta. L.R. (4th) 10, 453 A.R. 1, [2008] 11 W.W.R. 70, 59 C.C.L.T. (3d) 23, 59 C.P.C. (6th) 243, [2008] A.J. No. 909 (QL), 2008 CarswellAlta 1104. Pourvoi accueilli en partie.

G. Alan Meikle, *c.r.*, *Ward K. Branch* et *Michael Sobkin*, pour l'appelante.

Allan A. Garber et *Nathan J. Whitling*, pour les intimés.

Christine Mohr, pour l'intervenant le procureur général du Canada.

Anthony Fraser, pour l'intervenant le procureur général de la Colombie-Britannique.

Version française du jugement de la Cour rendu par

[1] LA JUGE EN CHEF — Une triste réalité sociale attend les personnes qui, lorsqu'elles avancent en âge, deviennent incapables de prendre soin d'elles-mêmes et doivent vivre dans des établissements spéciaux qui fournissent, dans une mesure plus ou moins grande, de l'aide et des soins de santé. En Alberta, des soins de longue durée sont prodigués aux personnes âgées dans des foyers de soins infirmiers et des hôpitaux de soins prolongés.

asked to contribute to the costs of their housing and meals through the payment of accommodation charges. In this case, 12,500 residents of Alberta's long-term care facilities ("LTCFs") sue as a class, alleging that the government artificially elevated the required resident contributions to subsidize medical expenses that are properly the responsibility of government.

En principe, le gouvernement de l'Alberta prend à sa charge les frais médicaux des pensionnaires, mais on peut demander aux pensionnaires de payer des frais d'hébergement pour défrayer le coût de leur logement et de leurs repas. En l'espèce, 12 500 pensionnaires d'établissements de soins de longue durée (« ESLD ») de l'Alberta intentent un recours collectif et allèguent que le gouvernement a artificiellement augmenté la contribution des pensionnaires en vue de financer les frais médicaux qui relèvent normalement du gouvernement.

[2] The class has filed a statement of claim in which it alleges that the government's conduct constitutes a breach of fiduciary duty, negligence, bad faith in the exercise of discretion and/or unjust enrichment. The class seeks the return of monies or damages equivalent to the amount of any overpayment of the permitted accommodation charges. It is on the basis of these allegations that the action was certified. The class also brings an equality claim under s. 15 of the *Canadian Charter of Rights and Freedoms*, which Alberta does not seek to have struck but argues should not proceed by way of class action.

[2] Le groupe a déposé une déclaration dans laquelle il allègue que, par sa conduite, le gouvernement a manqué à son obligation fiduciaire, a fait preuve de négligence et de mauvaise foi dans l'exercice d'un pouvoir discrétionnaire ou s'est enrichi de façon injustifiée. Le groupe demande le remboursement des sommes payées en sus des frais d'hébergement permis, ou des dommages-intérêts équivalant à ces sommes. L'action a été autorisée sur le fondement de ces allégations. Le groupe présente également une demande fondée sur le droit à l'égalité garanti par l'art. 15 de la *Charte canadienne des droits et libertés*. L'Alberta ne sollicite pas la radiation de cette dernière demande, mais prétend que le groupe n'est pas justifié de présenter cette demande dans le cadre d'un recours collectif.

[3] At certification, the Province of Alberta challenged the claims of fiduciary duty, negligence, and bad faith in the exercise of discretion. The certification judge struck out the plea of breach of fiduciary duty and partially limited the duty of care alleged in negligence (2008 ABQB 490, 94 Alta. L.R. (4th) 10). The Court of Appeal upheld the entitlement of the plaintiff class to pursue all three causes of action (2009 ABCA 403, 16 Alta. L.R. (5th) 1). The Crown in Right of Alberta now appeals to this Court, contending that all the claims should be struck out and the action decertified.

[3] À l'étape de l'autorisation du recours collectif, la province de l'Alberta a contesté les allégations d'obligation fiduciaire, de négligence et de mauvaise foi dans l'exercice d'un pouvoir discrétionnaire. La juge saisie de la demande d'autorisation du recours a radié l'allégation relative au manquement à l'obligation fiduciaire, et a partiellement limité l'application de l'obligation de diligence procédant du droit de la négligence (2008 ABQB 490, 94 Alta. L.R. (4th) 10). La Cour d'appel a confirmé le droit du groupe de demandeurs d'invoquer les trois causes d'action (2009 ABCA 403, 16 Alta. L.R. (5th) 1). La Couronne du chef de l'Alberta forme maintenant un appel devant notre Cour et prétend que toutes les allégations devraient être radiées et que l'autorisation accordée devrait être annulée.

[4] This is not a decision on the merits of the action, but on whether the causes of action pleaded are supportable at law. The question is whether the pleadings, assuming the facts pleaded to be true, disclose a supportable cause of action. If it is plain and obvious that the claim cannot succeed, it should be struck out.

[5] I conclude that the pleas of fiduciary duty, negligence and bad faith in the exercise of discretion disclose no cause of action and should be struck out in their entirety, but that the claim of unjust enrichment should survive. It follows that the certification of the class is upheld, and the unjust enrichment claim may proceed to trial, together with the claim for discrimination under s. 15(1) of the *Charter*.

I. Background

[6] Since this action is at a preliminary stage and the facts as pleaded are assumed true for our purposes, it is unnecessary to exhaustively review the factual and statutory background. Nevertheless, a brief overview is helpful to understand the context of the claims made.

[7] When this action was commenced, the Province of Alberta and nine Regional Health Authorities ("RHAs") administered and operated Alberta's health care regime under a number of interlocking statutes and regulations, including the *Alberta Health Care Insurance Act*, R.S.A. 2000, c. A-20, the *Nursing Homes Act*, R.S.A. 2000, c. N-7, and the *Hospitals Act*, R.S.A. 2000, c. H-12. The RHAs received block funding from the Province to deliver health care services, and the RHAs were responsible for managing the provision of health services: *Regional Health Authorities Act*, R.S.A. 2000, c. R-10, s. 5. Alberta Health Services is the successor to the nine former RHAs. Although this action was brought against the RHAs as well as the Crown in Right of Alberta, the RHAs took no part in this appeal, and an action remains pending

[4] La présente décision ne tranche pas le bien-fondé de l'action mais examine le caractère justifiable en droit des causes d'action invoquées. La question est celle de savoir si les actes de procédure, à supposer que les faits invoqués soient vrais, révèlent une cause d'action défendable. S'il est évident et manifeste que la demande ne peut être accueillie, elle devrait être radiée.

[5] Je conclus que les allégations relatives à l'obligation fiduciaire, à la négligence et à la mauvaise foi dans l'exercice d'un pouvoir discrétionnaire ne révèlent aucune cause d'action et devraient être radiées en entier, mais que l'allégation d'enrichissement injustifié devrait subsister. Ainsi, l'autorisation du recours collectif est confirmée et la réclamation fondée sur l'enrichissement injustifié peut être instruite conjointement avec la demande relative à la discrimination fondée sur le par. 15(1) de la *Charte*.

I. Contexte

[6] Puisque la présente action en est à l'étape préliminaire et que, pour les besoins du présent pourvoi, les faits invoqués sont tenus pour avérés, il est inutile d'examiner exhaustivement le contexte factuel et législatif. Un bref aperçu est néanmoins opportun pour comprendre le contexte des demandes.

[7] Lorsque cette action a été intentée, la province de l'Alberta et neuf autorités régionales de la santé (« ARS ») administraient le régime de soins de santé de l'Alberta et en assuraient la mise en œuvre en application de certaines lois et règlements interdépendants, dont la *Alberta Health Care Insurance Act*, R.S.A. 2000, ch. A-20, la *Nursing Homes Act*, R.S.A. 2000, ch. N-7, et la *Hospitals Act*, R.S.A. 2000, ch. H-12. Les ARS recevaient de la province du financement de base afin d'assurer des services de soins de santé, et il leur incombait de gérer la prestation de services de santé : *Regional Health Authorities Act*, R.S.A. 2000, ch. R-10, art. 5. Alberta Health Services est le successeur des neuf anciennes ARS. La présente action a été intentée contre les ARS et la Couronne du chef de l'Alberta, mais les ARS n'ont pas participé au

against them. The relief sought in this Court relates only to the Crown in Right of Alberta.

[8] Under the *Canada Health Act*, R.S.C. 1985, c. C-6, a province does not qualify for contribution from the federal government for health care expenditures if the province permits user charges under its health care insurance plan, with certain exceptions. For example, user charges for "accommodation or meals provided to an in-patient who . . . requires chronic care and is more or less permanently resident in a hospital or other institution" are allowed: *Canada Health Act*, s. 19(2). As a condition of funding, chronic care must be provided as an insured hospital service: *Canada Health Act*, s. 2.

[9] In Alberta, the Province must pay for "benefits in respect of health services provided to residents [of the province]", unless exempted by statute or regulation: *Alberta Health Care Insurance Act*, s. 4(1). Generally, persons attending hospitals in Alberta are not liable for services insured under the *Canada Health Act*. User charges are permitted for accommodation and meals: *Hospitals Act*, ss. 38(1) and 43(l).

[10] Nursing homes, or LTCFs, are regulated by the *Nursing Homes Act* and receive funding from both the Alberta government, by way of the RHAs, and the nursing home residents themselves. Nursing home operations — which are run by either private operators or the RHAs, not by the Province — may impose on residents an accommodation charge for housing and meals, not to exceed a maximum daily amount prescribed by regulation: *Nursing Homes Act*, ss. 8 and 24; *Nursing Homes Operation Regulation*, Alta. Reg. 258/85, s. 3(1). An "accommodation charge" is a "charge in respect of nursing home care payable by a resident for accommodation and meals in a nursing home

présent pourvoi et font l'objet d'une action actuellement en instance. La réparation sollicitée devant notre Cour vise uniquement la Couronne du chef de l'Alberta.

[8] Selon la *Loi canadienne sur la santé*, L.R.C. 1985, ch. C-6, une province n'a pas droit à la contribution du gouvernement fédéral pour des dépenses relatives aux soins de santé si elle permet l'imposition de frais modérateurs en vertu de son régime d'assurance-santé, sous réserve de certaines exceptions. Par exemple, les frais modérateurs « imposés pour l'hébergement ou les repas fournis à une personne hospitalisée qui [. . .] souffre d'une maladie chronique et séjourne de façon plus ou moins permanente à l'hôpital ou dans une autre institution » sont autorisés : *Loi canadienne sur la santé*, par. 19(2). Le financement est accordé pour les soins de longue durée s'ils sont prodigués à titre de service hospitalier assuré : *Loi canadienne sur la santé*, art. 2.

[9] En Alberta, la province doit payer pour [TRADUCTION] « les prestations à l'égard des services de soins de santé offerts aux résidents [de la province] », sauf disposition contraire d'une loi ou d'un règlement : *Alberta Health Care Insurance Act*, par. 4(1). En général, les personnes soignées dans des hôpitaux en Alberta n'ont pas à payer les services assurés en vertu de la *Loi canadienne sur la santé*. Des frais modérateurs peuvent être imposés pour l'hébergement et les repas : *Hospitals Act*, par. 38(1) et 43(l).

[10] Les foyers de soins infirmiers, ou les ESLD, sont régis par la *Nursing Homes Act* et reçoivent du financement tant du gouvernement de l'Alberta, par l'intermédiaire des ARS, que des pensionnaires. Ces foyers — tenus par des exploitants privés ou les ARS et non par la province — peuvent imposer aux pensionnaires des frais d'hébergement pour le logement et les repas, sans dépasser le montant quotidien maximal prescrit par règlement : *Nursing Homes Act*, art. 8 et 24; *Nursing Homes Operation Regulation*, Alta. Reg. 258/85, par. 3(1). Les [TRADUCTION] « frais d'hébergement » s'entendent des « frais relatifs aux soins de santé imposés aux pensionnaires pour l'hébergement et les repas

or an approved [hospital that provides nursing home care]": *Nursing Homes Act*, ss. 1(a) and 10(2). "Basic care" costs remain the fiscal responsibility of the Province: *Alberta Health Care Insurance Act*, ss. 3 and 4.

[11] Auxiliary hospitals, which also provide for the care of long-term or chronic patients, are funded and operated in the same way: *Hospitals Act*, ss. 1(c), 28(2) and 37, and Ministerial Order #1/2006. The accommodation charges paid by residents of auxiliary hospitals are governed by the *Hospitals Act*, s. 41, and the *Hospitalization Benefits Regulation*, Alta. Reg. 244/90, s. 5(1)(d).

[12] Collectively, these accommodation charges are the subject of the present action.

[13] The representative plaintiffs are James Darwish, in his capacity as the personal representative of the estate of his mother, Johanna Darwish, and the Elder Advocates of Alberta Society, a non-profit group. Mr. Darwish was his mother's guardian and trustee when she lived in an LTCF; he is now her executor. When preparing her estate tax returns, he was advised by the local RHA that approximately two thirds of the monthly accommodation charge his mother had been paying was for a "care component". He concluded that the remaining one third had been allotted to accommodation and meals. Mr. Darwish contends that the allocation for accommodation and meals that residents must pay is more than required, and in effect requires residents to subsidize medical care costs that are entirely the responsibility of the Province, and for which Alberta is not entitled to charge residents under the legislative scheme. Together with the Elder Advocates, he commenced an action to recover the amount of the overpayment.

[14] On August 1, 2003, Alberta's Minister of Health and Wellness promulgated the *Nursing*

offerts dans un foyer de soins infirmiers ou dans un [hôpital approuvé qui prodigue des soins infirmiers] » : *Nursing Homes Act*, al. 1a) et par. 10(2). Les frais relatifs aux « soins de base » relèvent de la province : *Alberta Health Care Insurance Act*, art. 3 et 4.

[11] Les hôpitaux de soins prolongés, qui dispensent également des soins de longue durée aux patients qui souffrent d'une malade chronique, sont subventionnés et gérés de la même façon : *Hospitals Act*, al. 1c), par. 28(2) et art. 37, et Ministerial Order #1/2006. Les frais d'hébergement payés par les pensionnaires des hôpitaux de soins prolongés sont régis par l'art. 41 de la *Hospitals Act* et par l'al. 5(1)d) du *Hospitalization Benefits Regulation*, Alta. Reg. 244/90.

[12] Collectivement, ces frais d'hébergement font l'objet du présent litige.

[13] Les représentants des demandeurs sont James Darwish, en sa qualité de représentant personnel de la succession de sa mère, Johanna Darwish, et la Elder Advocates of Alberta Society, un organisme à but non lucratif. M. Darwish était le tuteur et le fiduciaire de sa mère lorsqu'elle vivait dans un ESLD; il est maintenant son exécuteur. Lorsqu'il a préparé pour sa mère la déclaration d'impôt sur les biens transmis par décès, l'ARS de la région l'a informé qu'environ les deux tiers des frais d'hébergement mensuels que sa mère payait visaient une [TRADUCTION] « partie des soins ». Il a conclu que le dernier tiers avait été alloué à l'hébergement et aux repas. M. Darwish prétend que l'allocation pour l'hébergement et les repas que les pensionnaires doivent payer excède le montant prescrit et oblige les pensionnaires à financer les frais médicaux qui relèvent entièrement de la province. Il prétend également que le régime législatif n'autorise pas l'Alberta à facturer ces frais médicaux aux pensionnaires. Conjointement avec la société Elder Advocates, M. Darwish a intenté une action pour recouvrer le versement excédentaire.

[14] Le 1er août 2003, le ministre de la Santé et du Bien-être de l'Alberta a édicté l'art. 2 du *Nursing*

Homes Operation Amendment Regulation, Alta. Reg. 260/2003, s. 2, which raised the maximum accommodation charge payable by residents of the province's nursing homes and auxiliary hospitals. The plaintiffs' contention is that the Minister increased the permissible charge even though he was aware of a "past practice" on the part of LTCFs to apply the accommodation fees "to subsidize health care and off set care funding", and that, despite this knowledge, the Province instructed operators to charge the maximum allowable.

[15] The representative plaintiffs sought to certify a class action under the *Class Proceedings Act*, S.A. 2003, c. C-16.5, maintaining that the Crown and the RHAs have failed to ensure that the monies paid by the residents of LTCFs for "accommodation and meals" are used exclusively for that purpose. The pleadings allege that the Province is only allowed to charge for the *actual* cost of accommodation and meals, and not to use funds collected at the maximum level to subsidize basic care costs. They claim the residents of Alberta's chronic care facilities have been overcharged and seek return of the overpayment or damages.

II. The Decisions of the Alberta Courts

[16] The class consists of about 12,500 residents who are institutionalized in LTCFs in Alberta. More than half are 85 years of age or older, and all have some form of chronic disability or incapacity. They are not capable of living on their own and require varying degrees of care, including help with feeding, toileting and other fundamental aspects of daily life.

[17] The representative plaintiffs pleaded numerous causes of action: (i) breach of fiduciary duty; (ii) breach of duty of care; (iii) breach of contract; (iv) unjust enrichment; (v) *ultra vires*

Homes Operation Amendment Regulation, Alta. Reg. 260/2003, lequel a augmenté le montant maximum des frais d'hébergement que doivent payer les pensionnaires des foyers de soins infirmiers et des hôpitaux de soins prolongés de la province. Les demandeurs prétendent que le ministre a augmenté les frais admissibles même s'il savait que les ESLD avaient [TRADUCTION] « pris l'habitude » d'appliquer les frais d'hébergement « pour financer les soins de santé et pour compenser le financement pour les soins » et que, malgré cela, la province a enjoint aux exploitants de facturer le montant maximal permis.

[15] Les représentants des demandeurs ont sollicité l'autorisation d'un recours collectif en vertu de la *Class Proceedings Act*, S.A. 2003, ch. C-16.5, affirmant que la province et les ARS n'ont pas veillé à ce que les sommes payées par les pensionnaires des ESLD pour [TRADUCTION] « l'hébergement et les repas » soient utilisées exclusivement à cette fin. Les demandeurs allèguent que la province est uniquement autorisée à facturer le coût *réel* de l'hébergement et des repas, et non à utiliser les montants perçus au taux maximal afin de financer le coût des soins de base. Ils affirment que les pensionnaires des établissements de soins de longue durée de l'Alberta ont été facturés en trop et sollicitent le remboursement du versement excédentaire ou des dommages-intérêts.

II. Les décisions des tribunaux de l'Alberta

[16] Le groupe est composé d'environ 12 500 pensionnaires placés dans des ESLD en Alberta. Plus de la moitié sont âgés de 85 ans ou plus, et tous sont atteints d'une quelconque forme de maladie chronique ou d'une invalidité permanente. Ils ne sont pas en mesure de vivre seuls et nécessitent différents niveaux de soins, notamment de l'aide pour se nourrir, pour aller aux toilettes et pour d'autres aspects fondamentaux de la vie quotidienne.

[17] Les représentants des demandeurs ont invoqué de nombreuses causes d'action : (i) manquement à l'obligation fiduciaire; (ii) manquement à l'obligation de diligence; (iii) rupture de contrat;

action; (vi) *ultra vires* tax; and (vii) breach of s. 15(1) of the *Charter*. "[B]ad faith in the exercise of discretion" was also pleaded. I refer throughout to the pleas contained in the plaintiffs' Fresh Statement of Claim No. 2, issued March 1, 2010.

[18] The certification judge approved the class definition and 67 common questions (2008 ABQB 490, 94 Alta. L.R. (4th) 10). In deciding to certify those questions, Justice Greckol declined to certify others based on fiduciary duty and *ultra vires* tax, striking them from the claim as they were bound to fail. She also struck a claim for a duty of care with respect to *setting* the accommodation charges, but permitted the plea of negligence in monitoring the collection and management of accommodation charges to stand. Finding that the requirements of certification were made out, Greckol J. concluded that a class action was the preferable procedure.

[19] The Court of Appeal dismissed an appeal by the Province and permitted a cross-appeal by the representative plaintiffs (2009 ABCA 403, 16 Alta. L.R. (5th) 1). In unanimous reasons, the court reinstated the plaintiffs' claim that Alberta owed and had breached a fiduciary duty to the class. The Province now appeals to this Court.

III. Analysis

[20] The test for striking out pleadings is not in dispute. The question at issue is whether the disputed claims disclose a cause of action, assuming the facts pleaded to be true. If it is plain and obvious that a claim cannot succeed, then it should be struck out: see *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 25; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980.

[21] The issue we must decide on each of the disputed claims is whether this test is met and,

(iv) enrichissement injustifié; (v) mesure *ultra vires*; (vi) taxe *ultra vires*; et (vii) violation du par. 15(1) de la *Charte*. Ils ont également plaidé la [TRADUCTION] « mauvaise foi dans l'exercice d'un pouvoir discrétionnaire ». Je renvoie tout au long des présents motifs aux allégations figurant dans la deuxième nouvelle déclaration des demandeurs, déposée le 1er mars 2010.

[18] La juge saisie de la demande d'autorisation du recours collectif a approuvé la définition du groupe ainsi que 67 questions communes (2008 ABQB 490, 94 Alta. L.R. (4th) 10). Lorsqu'elle a décidé d'autoriser ces questions, la juge Greckol a refusé d'autoriser celles fondées sur l'obligation fiduciaire et sur la taxe *ultra vires*, les radiant de la demande parce que vouées à l'échec. Elle a également radié l'allégation d'obligation de diligence à l'égard de la *fixation* des frais d'hébergement, mais a autorisé l'allégation de négligence dans le contrôle de la perception et de la gestion des frais d'hébergement. En statuant que les demandeurs avaient respecté les exigences de l'autorisation, la juge Greckol a conclu qu'un recours collectif était la procédure qui convenait le mieux.

[19] La Cour d'appel a rejeté l'appel interjeté par la province et a accueilli un appel incident des représentants des demandeurs (2009 ABCA 403, 16 Alta. L.R. (5th) 1). À l'unanimité, la cour a rétabli l'allégation des demandeurs selon laquelle l'Alberta avait, envers le groupe, une obligation fiduciaire et ne l'a pas respectée. La province se pourvoit maintenant en appel devant notre Cour.

III. Analyse

[20] Le critère applicable à la radiation des actes de procédure n'est pas en litige. La question en litige est celle de savoir si les allégations contestées révèlent une cause d'action, à supposer que les faits invoqués soient vrais. S'il est manifeste et évident qu'une demande ne peut être accueillie, elle devrait être radiée : voir *Hollick c. Toronto (Ville)*, 2001 CSC 68, [2001] 3 R.C.S. 158, par. 25; *Hunt c. Carey Canada Inc.*, [1990] 2 R.C.S. 959, p. 980.

[21] La question que nous devons trancher relativement à chaque allégation contestée est celle de

separately, whether the class action should be decertified.

A. *The Claim for Breach of Fiduciary Duty*

[22] The question is whether the pleading of breach of fiduciary duty discloses a supportable cause of action, taking all the facts pleaded as true: *Hollick*, at para. 25; *Hunt*, at p. 991. Fiduciary duty is a doctrine originating in trust. It requires that one party, the fiduciary, act with absolute loyalty toward another party, the beneficiary or *cestui que trust*, in managing the latter's affairs.

[23] The plaintiff class argues that the categories of fiduciary duty are not closed and that basic principle supports their claim. The representative plaintiffs contend that they have pleaded sufficient facts to make it at least arguable that such a duty is owed to the vulnerable members of the class. In their view, fiduciary duty is a flexible principle aimed at protecting the vulnerable from abuses of power and should not be burdened by high hurdles or confined to limited categories.

[24] Alberta, by contrast, argues that it does not owe the plaintiff class a fiduciary duty on the facts pleaded. In its view, the doctrine that permits imposition of a fiduciary duty on a government is narrowly confined, and does not extend to a claim such as this. Together with the intervening Attorneys General of Canada and British Columbia, Alberta asks the Court to clarify the approach to identifying fiduciary duties owed by the government to its citizens and to hold that no duty lies in the circumstances before us.

[25] This case thus raises the question of when governments, as opposed to individuals, may be bound by a fiduciary duty. Fiduciary duty originated as a private law doctrine. In the past, state

savoir si ce critère est respecté, puis s'il y a lieu d'annuler le recours collectif.

A. *L'allégation de manquement à une obligation fiduciaire*

[22] La question est celle de savoir si l'allégation de manquement à une obligation fiduciaire révèle une cause d'action justifiable, si l'on considère que tous les faits invoqués sont vrais : *Hollick*, par. 25; *Hunt*, p. 991. L'obligation fiduciaire est une notion issue du droit des fiducies. Elle exige qu'une partie, le fiduciaire, fasse preuve de loyauté absolue envers une autre partie, le bénéficiaire ou le *cestui que trust*, dans la gestion des affaires de ce dernier.

[23] Le groupe de demandeurs prétend que les catégories d'obligations fiduciaires ne sont pas exhaustives et que ce principe fondamental appuie leur demande. Les représentants des demandeurs prétendent qu'ils ont invoqué suffisamment de faits pour faire valoir à tout le moins que l'obligation en question existe envers les membres vulnérables du groupe. À leur avis, l'obligation fiduciaire est un principe souple conçu pour la protection des personnes vulnérables contre l'abus de pouvoir et ne devrait pas présenter des obstacles insurmontables ni se confiner à des catégories limitées.

[24] À l'opposé, l'Alberta fait valoir qu'au vu des faits invoqués, elle n'a pas d'obligation fiduciaire envers le groupe de demandeurs. Selon elle, la doctrine qui permet l'imposition d'une obligation fiduciaire au gouvernement est étroitement circonscrite et ne s'applique pas à une demande comme celle visée en l'espèce. Conjointement avec les intervenants, le procureur général du Canada et le procureur général de la Colombie-Britannique, l'Alberta prie notre Cour de préciser la démarche permettant de reconnaître l'existence d'obligations fiduciaires du gouvernement envers ses citoyens et de conclure que le gouvernement n'a aucune obligation dans les circonstances de l'espèce.

[25] Cette affaire soulève ainsi la question de savoir à quel moment les gouvernements, par opposition aux personnes physiques, peuvent être liés par une obligation fiduciaire. L'obligation fiduciaire est

actors have been held to be under a fiduciary duty in limited circumstances, namely, in discharging the Crown's special responsibilities towards Aboriginal peoples and where the Crown is acting in a private capacity, as in its role as the public guardian and trustee. This claim does not fall within either of these situations.

[26] In my view, the same broad principles apply to private actors and governments, though they may play out differently where the alleged fiduciary is a public authority. I will therefore proceed by examining the requirements of imposing fiduciary duty generally, and then turn to examine how those requirements apply in the governmental context.

(1) The General Requirements for Imposition of a Fiduciary Duty

[27] The plaintiff class argues that, in addition to traditionally recognized categories like trustee or solicitor-client relationships, a fiduciary duty more broadly may arise whenever one person exercises power over another "vulnerable" person. They rely on *Frame v. Smith*, [1987] 2 S.C.R. 99, where Wilson J., in dissenting reasons later adopted and applied in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, outlined the hallmarks of a fiduciary duty:

> Relationships in which a fiduciary obligation has been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power. [p. 136]

issue d'une doctrine de droit privé. Dans le passé, on a conclu à l'existence d'une obligation fiduciaire des représentants de l'État dans des circonstances restreintes, à savoir lorsqu'ils s'acquittent des responsabilités particulières de l'État envers les peuples autochtones et lorsque l'État agit en son nom personnel, comme dans son rôle de tuteur et de curateur public. La présente allégation ne fait pas partie de l'une ou l'autre de ces situations.

[26] À mon avis, les mêmes principes généraux s'appliquent aux entités privées et aux gouvernements, bien qu'ils puissent produire des effets différents lorsque la partie que l'on dit être le fiduciaire est une autorité publique. Par conséquent, je procéderai à l'examen des conditions nécessaires à l'imposition d'une obligation fiduciaire en général, et j'examinerai ensuite comment ces conditions s'appliquent dans le contexte gouvernemental.

(1) Les conditions générales d'une obligation fiduciaire

[27] Le groupe de demandeurs prétend que, en plus des catégories traditionnellement reconnues, comme la relation fiduciaire ou la relation avocat-client, une obligation fiduciaire peut, en général, naître lorsqu'une personne exerce un pouvoir sur une autre personne « vulnérable ». Il s'appuie sur l'arrêt *Frame c. Smith*, [1987] 2 R.C.S. 99, où la juge Wilson, dont les motifs dissidents ont plus tard été adoptés et appliqués dans *Lac Minerals Ltd. c. International Corona Resources Ltd.*, [1989] 2 R.C.S. 574, a énoncé les caractéristiques d'une obligation fiduciaire :

> Les rapports dans lesquels une obligation fiduciaire a été imposée semblent posséder trois caractéristiques générales :
>
> (1) le fiduciaire peut exercer un certain pouvoir discrétionnaire.
>
> (2) le fiduciaire peut unilatéralement exercer ce pouvoir discrétionnaire de manière à avoir un effet sur les intérêts juridiques ou pratiques du bénéficiaire.
>
> (3) le bénéficiaire est particulièrement vulnérable ou à la merci du fiduciaire qui détient le pouvoir discrétionnaire. [p. 136]

[28] It is now clear that vulnerability alone is insufficient to support a fiduciary claim. As Cromwell J. explained in *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 67:

> An important focus of fiduciary law is the protection of one party against abuse of power by another in certain types of relationships or in particular circumstances. However, to assert that the protection of the vulnerable is the role of fiduciary law puts the matter too broadly. The law seeks to protect the vulnerable in many contexts and through many different doctrines.

Cromwell J. concluded, at para. 68, that

> 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. [Emphasis added.]

[29] As useful as the three "hallmarks" referred to in *Frame* are in explaining the source fiduciary duties, they are not a complete code for identifying fiduciary duties. It is now clear from the foundational principles outlined in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, and *Galambos*, that the elements outlined in the paragraphs that follow are those which identify the existence of a fiduciary duty in cases not covered by an existing category in which fiduciary duties have been recognized.

[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

[28] Il est désormais clair que la vulnérabilité, à elle seule, ne suffit pas à justifier l'existence d'une obligation fiduciaire. Le juge Cromwell a donné l'explication qui suit au par. 67 de l'arrêt *Galambos c. Perez*, 2009 CSC 48, [2009] 3 R.C.S. 247 :

> Le droit des fiducies se préoccupe notamment de la protection d'une partie contre l'exercice abusif du pouvoir par une autre partie dans certains types de relations ou dans des circonstances particulières. Toutefois, on donne une portée trop large au droit des fiducies si on affirme qu'il vise à protéger la partie ou les personnes vulnérables. Le droit vise à protéger les personnes vulnérables dans divers contextes et grâce à différentes doctrines.

Le juge Cromwell a conclu ce qui suit au par. 68 :

> . . . bien que la vulnérabilité au sens large découlant de facteurs étrangers à la relation soit une considération pertinente, il importe avant tout de savoir dans quelle mesure elle résulte de la relation : *Hodgkinson*, p. 406. [Je souligne.]

[29] Si utiles que puissent être les trois « caractéristiques » mentionnées dans l'arrêt *Frame* pour expliquer la source des obligations fiduciaires, elles ne constituent pas un code complet permettant de reconnaître les obligations fiduciaires. Il ressort maintenant clairement des principes fondamentaux énoncés dans les arrêts *Guerin c. La Reine*, [1984] 2 R.C.S. 335, *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377, et *Galambos*, que les éléments indiqués dans les paragraphes qui suivent sont ceux qui permettent de reconnaître l'existence d'une obligation fiduciaire dans les cas non visés par une catégorie existante de cas dans lesquels l'existence d'une obligation fiduciaire a été reconnue.

[30] D'abord, la preuve doit démontrer que le fiduciaire s'est engagé délibérément à agir au mieux des intérêts du bénéficiaire : *Galambos*, par. 66, 71 et 77-78, et *Hodgkinson*, le juge La Forest, p. 409-410. Comme le juge Cromwell l'a écrit dans *Galambos*, au par. 75 : « . . . il faut, dans tous les cas, un engagement du fiducial, exprès ou implicite, d'agir dans le respect du devoir de loyauté qui lui incombe. »

[31] L'existence et la nature de l'engagement reposent sur les normes relatives au rapport particulier :

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. As stated in *Galambos*, at para. 77:

> The fiduciary's undertaking may be the result of the exercise of statutory powers, the express or implied terms of an agreement or, perhaps, simply an undertaking to act in this way. In cases of *per se* fiduciary relationships, this undertaking will be found in the nature of the category of relationship in issue. The critical point is that in both *per se* and *ad hoc* fiduciary relationships, there will be some undertaking on the part of the fiduciary to act with loyalty. [Emphasis added.]

[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 que 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.

[35] In the traditional categories of fiduciary relationship, the nature of the relationship itself defines the interest at stake. However, a party

Galambos, par. 77. La partie invoquant l'obligation doit pouvoir démontrer que, relativement à l'intérêt juridique particulier en jeu, le fiduciaire a renoncé aux intérêts de toutes les autres parties en faveur de ceux du bénéficiaire.

[32] L'engagement peut découler de la relation entre les parties, d'une responsabilité imposée par une loi, ou d'une entente expresse que le fiduciaire agira en tant que fiduciaire des intérêts du bénéficiaire. Suivant l'arrêt *Galambos* au par. 77 :

> L'engagement du fiducial peut résulter de l'exercice de pouvoirs conférés par la loi, des conditions — expresses ou implicites — d'une entente, ou, peut-être, simplement de l'engagement d'agir ainsi. Lorsque la relation est en soi fiduciale, cet engagement sera fonction de la nature de la catégorie à laquelle la relation en question appartient. Le point central demeure qu'il y aura, tant dans les relations fiduciales en soi que dans les relations fiduciales *ad hoc*, un engagement du fiducial d'agir loyalement. [Je souligne.]

[33] Ensuite, l'obligation doit exister envers une personne ou un groupe de personnes définies, qui doivent être vulnérables par rapport au fiduciaire en ce sens que ce dernier exerce un pouvoir discrétionnaire sur eux. Les obligations fiduciaires n'existent pas en général; elles sont limitées à des relations précises entre des parties précises. En soi, les relations fiduciaires, historiquement reconnues, existent systématiquement dans les catégories de relations habituelles, comme celles entre le fiduciaire et le *cestui que trust*, l'exécuteur et le bénéficiaire, l'avocat et son client, le mandataire et le mandant, l'administrateur et la société, ainsi que le tuteur et le pupille ou le parent et l'enfant. À l'opposé, les relations fiduciaires *ad hoc* doivent être établies selon les circonstances de chaque cas.

[34] Enfin, pour établir l'existence d'une obligation fiduciaire, le demandeur doit démontrer que le pouvoir du fiduciaire peut avoir un effet sur les intérêts juridiques du bénéficiaire ou sur ses intérêts pratiques essentiels : *Frame*, la juge Wilson, p. 142.

[35] Dans les catégories habituelles de relation fiduciaire, la nature de la relation même définit l'intérêt en jeu. Toutefois, la partie cherchant à

seeking to establish an *ad hoc* duty must be able to point to an identifiable legal or vital practical interest that is at stake. The most obvious example is an interest in property, although other interests recognized by law may also be protected.

[36] In summary, for an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame*: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

(2) Fiduciary Duties in the Governmental Context

[37] The general principles discussed above apply not only to relationships between private actors, but also to cases where it is alleged that the government owes a fiduciary duty to an individual or class of individuals. However, the special characteristics of governmental responsibilities and functions mean that governments will owe fiduciary duties only in limited and special circumstances. As Dickson J., as he then was, wrote for the majority in *Guerin*, at p. 385:

> It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. As the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function. [Emphasis added.]

établir une obligation *ad hoc* doit être en mesure d'indiquer qu'un intérêt juridique ou un intérêt pratique essentiel identifiable est en jeu. L'exemple le plus évident est celui de l'intérêt à l'égard des biens, bien que d'autres intérêts reconnus par la loi puissent également être protégés.

[36] En bref, pour prouver l'existence d'une obligation fiduciaire *ad hoc*, le demandeur doit démontrer, en plus de la vulnérabilité découlant du rapport décrit par la juge Wilson dans l'arrêt *Frame* : (1) un engagement de la part du fiduciaire à agir au mieux des intérêts du bénéficiaire ou des bénéficiaires; (2) l'existence d'une personne ou d'un groupe de personnes définies vulnérables au contrôle du fiduciaire (le bénéficiaire ou les bénéficiaires); et (3) un intérêt juridique ou un intérêt pratique important du bénéficiaire ou des bénéficiaires sur lequel l'exercice, par le fiduciaire, de son pouvoir discrétionnaire ou de son contrôle pourrait avoir une incidence défavorable.

(2) Les obligations fiduciaires dans le contexte gouvernemental

[37] Les principes généraux précédemment analysés s'appliquent non seulement aux relations entre des particuliers, mais aussi dans les cas où il est allégué que le gouvernement a une obligation fiduciaire envers une personne ou un groupe de personnes. Or, les caractéristiques précises des responsabilités et des fonctions du gouvernement signifient que le gouvernement aura des obligations fiduciaires seulement dans des circonstances restreintes et particulières. Comme le juge Dickson (plus tard Juge en chef) l'a écrit au nom des juges majoritaires dans l'arrêt *Guerin*, à la p. 385 :

> Il nous faut remarquer que, de façon générale, il n'existe d'obligations de fiduciaire que dans le cas d'obligations prenant naissance dans un contexte de droit privé. Les obligations de droit public dont l'acquittement nécessite l'exercice d'un pouvoir discrétionnaire ne créent normalement aucun rapport fiduciaire. Comme il se dégage d'ailleurs des décisions portant sur les « fiducies politiques », on ne prête pas généralement à Sa Majesté la qualité de fiduciaire lorsque celle-ci exerce ses fonctions législatives ou administratives. [Je souligne.]

[38] Binnie J., for the Court, made the same point in *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 96: "The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting". *Guerin* exceptionally recognized that the Crown was under a fiduciary duty in the management of Indian lands for their benefit. But the Court there noted, at p. 385, that the fiduciary duty owed to the Aboriginal peoples of Canada is unique and grounded in analogy to private law:

> The mere fact, however, that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle. As was pointed out earlier, the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary. [Emphasis added.]

Noting the unique nature of the fiduciary duty owed by the Crown in the Aboriginal context, courts have suggested that this duty must be distinguished from other relationships: *Hogan v. Newfoundland (Attorney General)* (2000), 183 D.L.R. (4th) 225 (Nfld. C.A.), at paras. 66-67.

[39] In *R. v. Sparrow*, [1990] 1 S.C.R. 1075, the Court confirmed that the fiduciary duty owed by the Crown to Aboriginal peoples with respect to their lands is *sui generis*, at p. 1108:

> The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather

[38] Au nom de la Cour, le juge Binnie a réitéré ce principe dans *Bande indienne Wewaykum c. Canada*, 2002 CSC 79, [2002] 4 R.C.S. 245, au par. 96 : « La Couronne ne saurait être un fiduciaire ordinaire; elle agit en plusieurs qualités et représente de nombreux intérêts, dont certains sont immanquablement opposés ». L'arrêt *Guerin* a exceptionnellement reconnu une obligation fiduciaire de Sa Majesté lorsqu'elle gère les terres des Indiens pour leur bénéfice. Or, dans cette affaire, la Cour a indiqué à la p. 385 que l'obligation fiduciaire envers les peuples autochtones du Canada est unique et fondée par analogie sur le droit privé :

> Cependant, ce n'est pas parce que c'est à Sa Majesté qu'incombe l'obligation d'agir pour le compte des Indiens que cette obligation échappe à la portée du principe fiduciaire. Comme nous l'avons souligné plus haut, le droit des Indiens sur leurs terres a une existence juridique indépendante. Il ne doit son existence ni au pouvoir législatif ni au pouvoir exécutif. L'obligation qu'a Sa Majesté envers les Indiens en ce qui concerne ce droit n'est donc pas une obligation de droit public. Bien qu'il ne s'agisse pas non plus d'une obligation de droit privé au sens strict, elle tient néanmoins de la nature d'une obligation de droit privé. En conséquence, on peut à bon droit, dans le contexte de ce rapport *sui generis*, considérer Sa Majesté comme un fiduciaire. [Je souligne.]

Soulignant la nature unique de l'obligation fiduciaire de Sa Majesté dans le contexte autochtone, les tribunaux ont indiqué qu'il faut établir une distinction entre cette obligation et d'autres rapports : *Hogan c. Newfoundland (Attorney General)* (2000), 183 D.L.R. (4th) 225 (C.A.T.-N.), par. 66-67.

[39] Dans *R. c. Sparrow*, [1990] 1 R.C.S. 1075, la Cour a confirmé que l'obligation fiduciaire de Sa Majesté envers les peuples autochtones à l'égard de leurs terres est *sui generis*, à la p. 1108 :

> La nature *sui generis* du titre indien de même que les pouvoirs et la responsabilité historiques de Sa Majesté constituent la source de cette obligation de fiduciaire. À notre avis, l'arrêt *Guerin*, conjugué avec l'arrêt *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, justifie un principe directeur général d'interprétation du par. 35(1), savoir, le gouvernement a la responsabilité d'agir en qualité de fiduciaire à l'égard des peuples autochtones. Les rapports entre le gouvernement et les Autochtones sont de nature

than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship. [Emphasis added.]

Similarly, in *Wewaykum*, Binnie J. suggested that the fiduciary duty owed by the Crown to Aboriginal peoples is not restricted to instances where the facts raise "considerations 'in the nature of a private law duty'" (para. 74).

[40] The unique and historic nature of Crown-Aboriginal relations described in these cases negates the plaintiff class' assertion that they serve as a template for the duty of the government to citizens in other contexts. The same applies to the only other situation where a Crown fiduciary duty has been recognized — such as where the Crown acts as the public guardian and trustee.

[41] The special nature of the governmental context impacts on the requirements of a fiduciary relationship just discussed.

[42] First, the requirement of an undertaking to act in the alleged beneficiary's interest will typically be lacking where what is at issue is the exercise of a government power or discretion.

[43] The duty is one of utmost loyalty to the beneficiary. As Finn states, the fiduciary principle's function "is not to mediate between interests. It is to secure the paramountcy of *one side*'s interests . . . . The beneficiary's interests are to be protected. This is achieved through a regime designed to secure loyal service of those interests" (P. D. Finn, "The Fiduciary Principle", in T. G. Youdan, ed., *Equity, Fiduciaries and Trusts* (1989), 1, at p. 27 (underlining added); see also *Hodgkinson*, at p. 468, *per* Sopinka J. and McLachlin J. (as she then was), dissenting).

[44] Compelling a fiduciary to put the best interests of the beneficiary before their own is

fiduciaire plutôt que contradictoire et la reconnaissance et la confirmation contemporaines des droits ancestraux doivent être définies en fonction de ces rapports historiques. [Je souligne.]

De même, dans *Wewaykum*, le juge Binnie a indiqué que l'obligation fiduciaire de Sa Majesté envers les peuples autochtones n'est pas restreinte aux cas où les faits soulèvent des « considérations participant "de la nature d'une obligation de droit privé" » (par. 74).

[40] La nature unique et historique des relations entre Sa Majesté et les peuples autochtones décrites dans ces arrêts annule la prétention du groupe de demandeurs selon laquelle elles servent de modèle quant à l'obligation du gouvernement envers ses citoyens dans d'autres contextes. Il en est de même à l'égard de la seule autre situation où une obligation fiduciaire de l'État a été reconnue — soit lorsque celui-ci agit en qualité de tuteur et de curateur public.

[41] La nature particulière du contexte gouvernemental a une incidence sur les conditions d'une relation fiduciaire dont on vient de discuter.

[42] D'abord, la condition selon laquelle le fiduciaire doit s'engager à agir dans l'intérêt du bénéficiaire sera généralement absente si l'exercice d'un pouvoir discrétionnaire du gouvernement est en cause.

[43] L'obligation est une obligation de loyauté absolue envers le bénéficiaire. Comme l'indique Finn, le principe fiduciaire [TRADUCTION] « n'a pas pour fonction de concilier les intérêts. Il doit garantir la suprématie des intérêts de l'*une* des parties [. . .] Les intérêts du bénéficiaire doivent être protégés. Pour ce faire, il faut appliquer un régime conçu pour garantir que ces intérêts seront servis avec loyauté » (P. D. Finn, « The Fiduciary Principle », dans T. G. Youdan, dir., *Equity, Fiduciaries and Trusts* (1989), 1, p. 27 (je souligne); voir également l'arrêt *Hodgkinson*, p. 468, les juges Sopinka et McLachlin (maintenant Juge en chef), dissidents).

[44] Obliger un fiduciaire à faire passer les intérêts du bénéficiaire avant les siens est donc

thus essential to the relationship. Imposing such a burden on the Crown is inherently at odds with its duty to act in the best interests of society as a whole, and its obligation to spread limited resources among competing groups with equally valid claims to its assistance: *Sagharian (Litigation Guardian of) v. Ontario (Minister of Education)*, 2008 ONCA 411, 172 C.R.R. (2d) 105, at paras. 47-49. The circumstances in which this will occur are few. The Crown's broad responsibility to act in the public interest means that situations where it is shown to owe a duty of loyalty to a particular person or group will be rare: see *Harris v. Canada*, 2001 FCT 1408, [2002] 2 F.C. 484, at para. 178.

[45] If the undertaking is alleged to flow from a statute, the language in the legislation must clearly support it: *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403, at para. 40; *Authorson v. Canada (Attorney General)* (2000), 53 O.R. (3d) 221 (S.C.J.), at para. 28, aff'd (2002), 58 O.R. (3d) 417 (C.A.), at para. 73, rev'd on other grounds, 2003 SCC 39, [2003] 2 S.C.R. 40. The mere grant to a public authority of discretionary power to affect a person's interest does not suffice. A thorough examination of the provisions in issue is mandatory: *Guerin* addressed the *Indian Act*, R.S.C. 1952, c. 149, s. 18(1) (which confirms the Crown's duty to manage Indian lands for their use and benefit); *Authorson* dealt with the *Pension Act*, R.S.C. 1970, c. P-7, the *War Veterans Allowance Act*, R.S.C. 1985, c. W-3, s. 15(2), and the *Pension Act*, R.S.C. 1927, c. 157 (which set out the obligation of the government to hold and administer funds on behalf and for the benefit of incapable veterans and their dependants); and *K.L.B.* found that the language in the *Protection of Children Act*, R.S.B.C. 1960, c. 303, did not encompass the duty asserted.

[46] If the alleged undertaking arises by implication from the relationship between the parties, the content of the obligation owed by the government will vary depending on the nature

essentiel à la relation. Imposer un tel fardeau à l'État va naturellement à l'encontre de son obligation d'agir au mieux des intérêts de la société dans son ensemble et de répartir les ressources limitées entre les groupes opposés dont les demandes d'aide sont tout aussi valables : *Sagharian (Litigation Guardian of) c. Ontario (Minister of Education)*, 2008 ONCA 411, 172 C.R.R. (2d) 105, par. 47-49. Cela ne se produira que dans de rares circonstances. Vu la responsabilité générale de l'État d'agir dans l'intérêt public, son obligation de loyauté envers une personne ou un groupe en particulier ne sera démontrée que dans de rares cas : voir *Harris c. Canada*, 2001 CFPI 1408, [2002] 2 C.F. 484, par. 178.

[45] S'il est allégué que l'engagement découle d'une loi, le libellé de la loi doit manifestement l'appuyer : *K.L.B. c. Colombie-Britannique*, 2003 CSC 51, [2003] 2 R.C.S. 403, par. 40; *Authorson c. Canada (Attorney General)* (2000), 53 O.R. (3d) 221 (C.S.J.), par. 28, conf. (2002), 58 O.R. (3d) 417 (C.A.), par. 73, inf. pour d'autres motifs, 2003 CSC 39, [2003] 2 R.C.S. 40. Il ne suffit pas simplement de conférer à une autorité publique un pouvoir discrétionnaire ayant une incidence sur les intérêts d'une personne. Un examen minutieux des dispositions en litige est nécessaire : dans *Guerin*, les cours ont analysé le par. 18(1) de la *Loi sur les Indiens*, S.R.C. 1952, ch. 149 (lequel confirme l'obligation de Sa Majesté de gérer les terres indiennes à l'usage et au profit des Indiens); dans *Authorson*, les cours ont examiné la *Loi sur les pensions*, L.R.C. 1970, ch. P-7, le par. 15(2) de la *Loi sur les allocations aux anciens combattants*, L.R.C. 1985, ch. W-3, et la *Loi des pensions*, L.R.C. 1927, ch. 157 (laquelle énonce l'obligation du gouvernement de détenir et de gérer les fonds au nom et dans l'intérêt des anciens combattants inaptes et de leurs personnes à charge); et dans l'arrêt *K.L.B.*, la Cour a conclu que la *Protection of Children Act*, R.S.B.C. 1960, ch. 303, ne prévoyait pas l'obligation invoquée.

[46] Si l'engagement allégué découle, par déduction, de la relation entre les parties, le contenu de l'obligation de l'État variera en fonction de la nature de la relation et devrait être fixé en

of the relationship, and should be determined by focussing on analogous cases: *K.L.B.*, at para. 41.

[47] Generally speaking, a strong correspondence with one of the traditional categories of fiduciary relationship — trustee-*cestui que trust*, executor-beneficiary, solicitor-client, agent-principal, director-corporation, and guardian-ward or parent-child — is a precondition to finding an implied fiduciary duty on the government.

[48] In sum, while it is not impossible to meet the requirement of an undertaking by a government actor, it will be rare. The necessary undertaking is met with respect to Aboriginal peoples by clear government commitments from the *Royal Proclamation* of 1763 (reproduced in R.S.C. 1985, App. II, No. 1) to the *Constitution Act, 1982* and considerations akin to those found in the private sphere. It may also be met where the relationship is akin to one where a fiduciary duty has been recognized on private actors. But a general obligation to the public or sectors of the public cannot meet the requirement of an undertaking.

[49] For similar reasons, where the alleged fiduciary is the government, it may be difficult to establish the second requirement of a defined person or class of persons vulnerable to the fiduciary's exercise of discretionary power. The government, as a general rule, must act in the interest of all citizens: *Bennett v. British Columbia*, 2009 BCSC 1358 (CanLII), at paras. 61 and 71; and *Drady v. Canada*, 2007 CanLII 27970 (Ont. S.C.J.), at para. 28, aff'd 2008 ONCA 659, 300 D.L.R. (4th) 443, leave to appeal refused, [2009] 1 S.C.R. viii. It is entitled to make distinctions between different groups in the imposition of burdens or provision of benefits, subject to s. 15 of the *Charter*, which forbids discrimination. As stated in *Galambos*, the claimant must point to a deliberate forsaking of the interests of all others in favour of himself or his class. In the Aboriginal context, an exclusive duty in relation to Aboriginal lands is established by the special Crown responsibilities owed to this sector

nous intéressant à des cas analogues : *K.L.B.*, par. 41.

[47] En règle générale, un lien étroit avec l'une des catégories habituelles de relation fiduciaire — entre le fiduciaire et le *cestui que trust*, l'exécuteur et le bénéficiaire, l'avocat et son client, le mandataire et le mandant, l'administrateur et la société, le tuteur et le pupille ou le parent et l'enfant — constitue une condition préalable pour pouvoir conclure à l'existence d'une obligation fiduciaire implicite de l'État.

[48] En somme, bien qu'il ne soit pas impossible pour un représentant de l'État de remplir les conditions d'un engagement qu'il a pris, ce sera rarement le cas. Ces conditions sont remplies à l'égard des peuples autochtones compte tenu des obligations que la *Proclamation royale* de 1763 (reproduite dans L.R.C. 1985, app. II, n^{o} 1) et la *Loi constitutionnelle de 1982* imposent au gouvernement et des facteurs semblables à ceux que l'on trouve dans le secteur privé. Elles peuvent également l'être lorsque la relation est semblable à l'une de celles où l'obligation fiduciaire a été reconnue à l'égard des entités privées. Mais une obligation générale envers le public ou des secteurs du public ne peut remplir les conditions d'un engagement.

[49] Pour les mêmes raisons, lorsque le prétendu fiduciaire est l'État, il pourrait être difficile d'établir la deuxième condition, celle relative à la personne ou au groupe de personne définies qui sont vulnérables par rapport à l'exercice, par le fiduciaire, de son pouvoir discrétionnaire. En règle générale, le gouvernement doit agir dans l'intérêt de tous les citoyens : *Bennett c. British Columbia*, 2009 BCSC 1358 (CanLII), par. 61 et 71; et *Drady c. Canada*, 2007 CanLII 27970 (C.S.J. Ont.), par. 28, conf. 2008 ONCA 659, 300 D.L.R. (4th) 443, autorisation d'appel refusée, [2009] 1 R.C.S. viii. Il a le droit d'établir des distinctions entre différents groupes lorsqu'il impose un fardeau ou offre des prestations, sous réserve de l'art. 15 de la *Charte*, lequel interdit la discrimination. Comme l'indique l'arrêt *Galambos*, le demandeur doit démontrer que le fiduciaire a renoncé délibérément aux intérêts de toutes les autres parties en sa faveur ou en faveur de son groupe. Dans le contexte autochtone, une

of the population and none other. Similarly, where the government duty is in effect a private duty being carried out by government, this requirement may be established. Outside such cases, a specific class of persons to whom the government owes an exclusive duty of loyalty is difficult to posit.

[50] No fiduciary duty is owed to the public as a whole, and generally an individual determination is required to establish that the fiduciary duty is owed to a particular person or group. A fiduciary duty can exist toward a class — for example, adults in need of a guardian or trustee, or children in need of a guardian — but for a declaration that an individual is owed a duty, a person must bring himself within the class on the basis of his unique situation. Group duties have not often been found; thus far, only the Crown's duty toward Aboriginal peoples in respect of lands held in trust for them has been recognized on a collective basis.

[51] Finally, it may be difficult to establish the requirement that the government power attacked affects a legal or significant practical interest, where the alleged fiduciary is the government. It is not enough that the alleged fiduciary's acts impact generally on a person's well-being, property or security. The interest affected must be a specific *private law* interest to which the person has a pre-existing distinct and complete legal entitlement. Examples of sufficient interests include property rights, interests akin to property rights, and the type of fundamental human or personal interest that is implicated when the state assumes guardianship of a child or incompetent person. The entitlement must not be contingent on future government action. For example, in *Authorson*, the right to the funds had already fully vested in the veterans' hands *before* the Crown took on the responsibility for administration: *Authorson* (C.A.), at paras. 60, 73(b)

obligation exclusive relativement aux terres indiennes est établie par les responsabilités particulières de Sa Majesté envers cette partie de la population et aucune autre. De même, lorsque l'obligation de l'État est effectivement une obligation privée dont il s'acquitte, cette condition peut être établie. Sauf dans ces cas, il est difficile de démontrer l'existence d'un groupe de personnes précis envers qui le gouvernement a une obligation de loyauté exclusive.

[50] Il n'existe aucune obligation fiduciaire envers le public dans son ensemble et, généralement, il faut examiner chaque cas séparément pour établir l'existence d'une obligation fiduciaire envers une personne ou un groupe en particulier. Une obligation fiduciaire peut exister envers un groupe — par exemple, les adultes qui ont besoin d'un tuteur ou d'un curateur, ou les enfants qui ont besoin d'un tuteur — mais pour que l'on puisse reconnaître l'existence d'une obligation envers une personne, celle-ci doit établir son appartenance au groupe en raison de sa situation unique. On n'a pas souvent conclu à l'existence d'obligations envers des groupes; jusqu'à maintenant, la seule obligation reconnue collectivement est celle de Sa Majesté envers les peuples autochtones à l'égard des terres détenues en fiducie pour eux.

[51] Enfin, lorsque l'on affirme que le gouvernement est le fiduciaire, il peut être difficile d'établir la condition selon laquelle le pouvoir contesté du gouvernement a une incidence sur un intérêt juridique ou un intérêt pratique important. Il ne suffit pas que les mesures qu'aurait prises le fiduciaire aient une incidence d'un caractère général sur le bien-être, les biens ou la sécurité d'une personne. L'intérêt touché doit être un intérêt de *droit privé* précis sur lequel la personne exerçait déjà un droit distinct et absolu. À titre d'exemples de tels intérêts, mentionnons les droits de propriété, les intérêts analogues aux droits de propriété et les intérêts humains fondamentaux ou personnels du genre de ceux qui entrent en jeu lorsque l'État assume la tutelle d'un enfant ou d'une personne incapable. Le droit ne doit pas dépendre d'une mesure ultérieure de l'État. Par exemple, dans *Authorson*, le droit aux fonds avait entièrement été dévolu aux

and 73(h); in the Aboriginal context, see *Guerin*, at p. 385. In other circumstances, a statute that creates a complete legal entitlement might also give rise to a fiduciary duty on the part of government in relation to administering the interest.

[52] Access to a benefit scheme without more will not constitute an interest capable of attracting a fiduciary duty. Although the receipt of a statutory benefit may affect a person's financial welfare, absent evidence that the legislature intended otherwise, the entitlement is a creation of public law and is subject to the government's public law obligations in the administration of the scheme.

[53] Moreover, the degree of control exerted by the government over the interest in question must be equivalent or analogous to direct administration of that interest before a fiduciary relationship can be said to arise. The type of legal control over an interest that arises from the ordinary exercise of statutory powers does not suffice. Otherwise, fiduciary obligations would arise in most day to day government functions making general action for the public good difficult or almost impossible.

[54] It thus emerges that a rigorous application of the general requirements for fiduciary duty will of necessity limit the range of cases in which a fiduciary duty on the government is found. Claims against the government that fail to satisfy the legal requirements of a fiduciary duty should not be allowed to proceed in the speculative hope that they may ultimately succeed. The truism that the categories of fiduciary duty are not closed (as Dickson J. noted in *Guerin*, at p. 384) does not justify allowing hopeless claims to proceed to trial: see M. V. Ellis, *Fiduciary Duties in Canada* (looseleaf), at pp. 19-3 and 19-24.10. Plaintiffs suing for breach of fiduciary duty must be prepared to have

anciens combattants *avant* que Sa Majesté n'assume la responsabilité de l'administration de ces fonds : *Authorson* (C.A.), par. 60, 73b) et 73h); dans le contexte autochtone, voir *Guerin*, p. 385. Dans d'autres circonstances, une loi créant un droit absolu pourrait également donner naissance à une obligation fiduciaire de l'État relativement à l'administration de l'intérêt.

[52] L'accès à un régime de prestations à lui seul ne constituera pas un intérêt susceptible de donner naissance à une obligation fiduciaire. Bien qu'une prestation prévue par la loi puisse avoir une incidence sur le bien-être financier de la personne qui la reçoit, en l'absence de preuve d'une intention autre du législateur, le droit à une telle prestation est une création du droit public et est assujetti aux obligations de droit public du gouvernement dans l'administration du régime.

[53] De plus, avant que l'on puisse conclure à l'existence d'une relation fiduciaire, le niveau de contrôle exercé par le gouvernement sur l'intérêt en question doit être équivalent ou semblable à l'administration directe de cet intérêt. Relativement aux prestations prévues par la loi, il ne suffit pas que le type de contrôle juridique sur un intérêt soit celui qui découle de l'exercice habituel de pouvoirs conférés par la loi. Sinon, le gouvernement serait tenu à des obligations fiduciaires dans la plupart de ses fonctions quotidiennes, ce qui rendrait difficile ou presque impossible la prise de mesures générales pour le bien public.

[54] Il appert donc qu'une application rigoureuse des conditions générales pour imposer une obligation fiduciaire limitera forcément les cas où l'on peut conclure à l'existence d'une obligation fiduciaire de l'État. Les demandes présentées contre le gouvernement qui ne respectent pas les conditions juridiques d'une obligation fiduciaire ne devraient pas être jugées recevables dans l'espoir qu'elles puissent finalement être accueillies. Le truisme selon lequel les catégories d'obligation fiduciaire ne sont pas exhaustives (comme l'a indiqué le juge Dickson dans l'arrêt *Guerin*, p. 384) ne justifie pas que l'on autorise l'instruction des demandes vouées à l'échec : voir

their claims tested at the pleadings stage, as for any cause of action.

(3) Application to This Case

[55] I turn now to the application of these principles to the appeal before us. The core of the plaintiffs' pleading of fiduciary duty is found at para. 40 of the Fresh Statement of Claim No. 2:

> The Crown owed a fiduciary duty to the Class members with respect to the implementation and administration of the Accommodation Charge to ensure that the Accommodation Fee was fair, reasonable and justifiable, that the Accommodation Fee reflects the cost of accommodation and meals, that the Accommodation Fee was in their best interests, and that moneys paid pursuant to the Accommodation Charge would not be used to subsidize Health Care costs. [Emphasis added.]

See also paras. 32-42.

[56] The plaintiffs' pleadings emphasize the vulnerability of the class members:

> 34. The Class members are frail, elderly, and have chronic disabilities. They are incapable of caring for themselves or living on their own. They are among the most vulnerable members of our society. A physician has determined that each Class member requires long term care.

[57] However, vulnerability alone is insufficient to ground a fiduciary obligation, as discussed earlier. In this case, their state of vulnerability does not arise from their relationship with Alberta: *Galambos*, at paras. 67-68. Moreover, as Alberta points out, class members will generally still be competent to manage their own affairs, or will be beneficiaries of duties owed by their own guardians and trustees; the Province is not responsible for them. They are not being denied care and though their financial situation may be affected by the

M. V. Ellis, *Fiduciary Duties in Canada* (feuilles mobiles), p. 19-3 et 19-24.10. Dans les poursuites pour manquement à une obligation fiduciaire, les demandeurs doivent être prêts à accepter que leur réclamation soit examinée au stade du dépôt des actes de procédure, comme pour toute cause d'action.

(3) Application à l'espèce

[55] J'aborde maintenant l'application de ces principes au pourvoi dont nous sommes saisis. L'allégation d'obligation fiduciaire des demandeurs se trouve pour l'essentiel au par. 40 de la deuxième nouvelle déclaration :

> [TRADUCTION] Sa Majesté avait envers les membres du groupe une obligation fiduciaire relativement à la mise en œuvre et à l'administration des frais d'hébergement afin de s'assurer que ces frais soient justes, raisonnables et justifiables, qu'ils reflètent le coût de l'hébergement et des repas et qu'ils servent au mieux leurs intérêts, ainsi que de veiller à ce que les sommes versées au titre des frais d'hébergement ne servent pas à financer le coût des soins de santé. [Je souligne.]

Voir également les par. 32-42.

[56] Dans leurs allégations, les demandeurs mettent l'accent sur la vulnérabilité des membres du groupe :

> [TRADUCTION] 34. Les membres du groupe sont frêles, âgés et ont des affections chroniques. Ils ne sont pas capables de prendre soin d'eux-mêmes ou de vivre seuls. Ils comptent parmi les membres les plus vulnérables de notre société. Un médecin a déterminé que chaque membre du groupe requiert des soins de longue durée.

[57] Or, comme nous l'avons vu, la vulnérabilité à elle seule ne suffit pas pour établir une obligation fiduciaire. En l'espèce, la vulnérabilité des membres du groupe ne résulte pas de leur relation avec l'Alberta : *Galambos*, par. 67-68. De plus, comme le souligne l'Alberta, les membres du groupe seront généralement encore capables de gérer leurs propres affaires ou seront bénéficiaires des obligations de leurs propres tuteurs et fiduciaires; la province n'est pas responsable d'eux. Les soins ne leur sont pas refusés et bien que leur situation financière

levy of accommodation charges, that alone is not enough to warrant a fiduciary duty.

[58] The plaintiffs do not point to anything in the legislation, or in the factual relationship pleaded, that supports an undertaking by Alberta to act with undivided loyalty toward the claimant class members, in the setting, receipt and administration of the accommodation charges. The *Alberta Health Care Insurance Act* imposes an obligation on the Province to provide medical care, including chronic care, but provides no direction amounting to a statutory undertaking to act in the best interests of residents of Alberta generally, or in the best interests of residents residing in LTCFs in particular. Nor does the statute impose any obligation on the government to take into account anyone's interests in determining the contribution that may be sought from residents. There may be a trust relationship between *operators* and residents with respect to residents' property, but no similar trust relationship is established between the *Province* and residents: *Nursing Homes Act*, s. 8(1); *Nursing Homes General Regulation*, Alta. Reg. 232/85, s. 4; *Nursing Homes Operation Regulation*, ss. 8 and 9.

[59] Nor have the plaintiffs pleaded facts sufficient to establish an implied undertaking on the part of Alberta to act with undivided loyalty to the residents of LTCFs. They point to no analogous duty in private law. The facts pleaded do not assert any undertaking or any basis upon which such an undertaking could be posited.

[60] Indeed, it is not clear that the pleadings allege that the Crown, as distinguished from individual actors, is under a fiduciary duty. Although the action was brought against Her Majesty the Queen in Right of Alberta, the allegations in the pleadings are against the Minister of Seniors and Community Supports and the Department of Alberta Health and Wellness. This makes it difficult to determine the second and third requirements of an undertaking to a defined group in relation to any legal or vital practical interests. The separate pleas against the

puisse être touchée par l'imposition des frais d'hébergement, ce facteur, à lui seul, ne suffit pas pour justifier une obligation fiduciaire.

[58] Les demandeurs ne renvoient pas à une disposition législative, ni à quoi que ce soit dans les rapports de fait invoqués, qui étaye un engagement de l'Alberta de faire preuve, envers les membres du groupe de demandeurs, d'une loyauté exclusive pour ce qui est de la fixation, de la perception et de l'administration des frais d'hébergement. La *Alberta Health Care Insurance Act* oblige la province à fournir des soins de santé, dont des soins de longue durée, mais ne l'oblige pas à s'engager à agir au mieux des intérêts des résidents de l'Alberta en général, ou au mieux des intérêts des pensionnaires d'un ESLD en particulier. La loi n'oblige pas non plus le gouvernement à tenir compte des intérêts de quiconque lorsqu'il détermine la contribution qui peut être demandée aux pensionnaires. Il peut exister une relation fiduciaire entre les *exploitants* et les pensionnaires en ce qui a trait aux biens de ces derniers, mais aucune relation semblable n'est établie entre la *province* et les pensionnaires : *Nursing Homes Act*, par. 8(1); *Nursing Homes General Regulation*, Alta. Reg. 232/85, art. 4; *Nursing Homes Operation Regulation*, art. 8 et 9.

[59] Les demandeurs n'ont pas non plus invoqué suffisamment de faits pour établir que l'Alberta s'est engagée implicitement, envers les pensionnaires d'un ESLD, à agir avec une loyauté exclusive. Ils ne font référence à aucune obligation analogue en droit privé. Les faits invoqués n'établissent aucun engagement ni aucun fondement sur lequel un tel engagement pourrait être établi.

[60] En effet, les allégations n'indiquent pas clairement que l'État, par opposition à une personne physique, a une obligation fiduciaire. Bien que l'action ait été intentée contre Sa Majesté la Reine du chef de l'Alberta, les allégations dans les actes de procédure visent le ministre du Soutien aux aînés et aux collectivités ainsi que le ministère de la Santé et du Bien-être de l'Alberta. Ainsi, il est difficile de déterminer les deuxième et troisième conditions d'un engagement envers un groupe défini à l'égard d'un intérêt juridique ou d'un

RHAs may support a cause of action for breach of fiduciary duty, a matter not before us, but the pleas against the Crown do not. Absent pleadings fixing a specific undertaking on the Crown, how can we know to whom such a duty would be owed or indeed what duty is owed? Put simply, the pleadings against the Crown are too vague to permit the inference of a fiduciary duty on the Crown toward the plaintiff class.

[61] Apart from these difficulties, the legal or substantial practical interests alleged in the pleadings to be affected by the Crown's exercise of authority is insufficient to attract a fiduciary duty. The pleadings speak of the right to chronic care and the right to be assessed a reasonable fee for the receipt of care. The entitlement to chronic care flows exclusively from statute, and no one contests that Alberta continues to provide such care. The allegation, at base, is that the plaintiffs are paying more than their meal and accommodation cost, with the result that the Province is offsetting its obligation to meet medical costs and thus pocketing money it is not entitled to pocket. The situation is not unlike that in *Gorecki v. Canada (Attorney General)* (2006), 208 O.A.C. 368, where Sharpe J.A. wrote, at para. 6:

> I agree with the motion judge's conclusion that it is plain and obvious that the action cannot succeed on the allegations of breach of fiduciary duty. The relationship between the Crown and the appellant flows entirely from the terms of the [Canada Pension Plan] and the statutory definition of that relationship bears none of the hallmarks of a fiduciary duty. The CPP confers no discretion on the Crown to act for the benefit of the appellant. The Crown does not undertake to administer CPP funds for the appellant's benefit. The only duty that the CPP imposes on the Crown or that the Crown assumes is the public law duty to fulfill the statutory terms of the CPP. This cannot be the source of a fiduciary duty owed to the appellant.

intérêt pratique essentiel. Les allégations distinctes contre les ARS peuvent soutenir une cause d'action pour manquement à une obligation fiduciaire, une question dont nous ne sommes pas saisis, mais pas les allégations contre l'État. En l'absence d'allégations établissant que l'État a pris un engagement précis, comment pouvons-nous savoir qui bénéficierait d'une telle obligation ou même connaître la nature de l'obligation? Autrement dit, les allégations contre l'État sont trop vagues pour permettre d'inférer qu'il a une obligation fiduciaire envers les demandeurs.

[61] Outre ces difficultés, l'intérêt juridique ou l'intérêt pratique essentiel, que les demandeurs décrivent dans les actes de procédures comme étant touché par l'exercice du pouvoir de l'État n'est pas suffisant pour faire naître une obligation fiduciaire. Les allégations portent sur le droit à des soins de longue durée et sur le droit d'être facturé à un prix raisonnable pour recevoir des soins. Le droit aux soins de longue durée découle exclusivement des textes législatifs, et nul ne conteste que l'Alberta continue de prodiguer ces soins. À la base, les demandeurs allèguent qu'ils paient un montant supérieur aux frais de repas et d'hébergement, de sorte que la province compense son obligation de payer les frais médicaux et empoche ainsi de l'argent auquel elle n'a pas droit. La situation n'est pas différente de celle dans *Gorecki c. Canada (Attorney General)* (2006), 208 O.A.C. 368, où le juge Sharpe s'est exprimé ainsi au par. 6 :

> [TRADUCTION] Je conviens avec le juge des requêtes qu'il est évident et manifeste que l'action ne peut être accueillie sur le fondement des allégations de manquement à une obligation fiduciaire. La relation entre l'État et l'appelant découle entièrement des modalités du [Régime de pension du Canada], et la définition de cette relation prévue dans ses dispositions ne contient aucune caractéristique d'une obligation fiduciaire. Le RPC ne confère à l'État aucun pouvoir discrétionnaire d'agir dans l'intérêt de l'appelant. L'État ne s'engage pas à gérer les fonds du RPC dans l'intérêt de l'appelant. La seule obligation que le RPC impose à l'État ou que l'État assume est l'obligation de droit public de respecter les modalités du RPC. Cette obligation ne peut être à l'origine d'une obligation fiduciaire envers l'appelant.

[62] Finally, I note that the specific fiduciary duty that the plaintiffs seek to establish relates primarily to *setting* the accommodation charges by regulation. This is a *legislative* function of government. Where the government acts in the exercise of its legislative functions, courts have consistently held that a fiduciary duty does not arise: *Guerin*, at p. 385; *Wewaykum*, at para. 74. Deciding how to fund and implement insured health care services requires constant balancing of competing interests between all segments of the population, since everyone receives health care. The Crown would be unable to meet its obligations to the public at large if we were to hold it to a fiduciary standard of conduct for one group among so many others. This aspect of the claim is doomed to fail.

[63] In my view, the facts as pleaded, which are accepted as true for the purpose of the instant motion, do not establish a fiduciary duty on the Crown. Accordingly, I would strike the plea of breach of fiduciary duty.

B. *The Negligence Claim*

[64] The plaintiff class pleads that Alberta is in breach of a duty of care to its members to act with due care, i.e. without negligence. It pleads:

43. The Defendants owed the Class members a duty to exercise all reasonable care, skill, and diligence with respect to auditing, supervising, monitoring and administering (i) the Health Care benefits paid by the Crown to the Health Authorities, (ii) the Health Care benefits provided by the Health Authorities to Long Term Care Facilities and (iii) the Accommodation Fee paid by the Class members, to ensure that the Accommodation Fee was fair, just, and reasonable, to ensure that the Accommodation Fee reflected the actual cost of accommodation and meals, and that Accommodation Fees paid pursuant to the Accommodation Charge would not be used to subsidize Health Care costs. [Emphasis added.]

[62] Enfin, je souligne que l'obligation fiduciaire précise que les demandeurs cherchent à établir se rapporte principalement à la *fixation* par règlement des frais d'hébergement. Il s'agit d'une fonction *législative* du gouvernement. Lorsque le gouvernement agit dans l'exercice de ses fonctions législatives, les tribunaux ont systématiquement conclu que cela ne donne lieu à aucune obligation fiduciaire : *Guerin*, p. 385; *Wewaykum*, par. 74. Les décisions quant à la façon de financer et de mettre en œuvre des services de soins de santé assurés exigent le maintien constant de l'équilibre des intérêts opposés des différentes parties de la population, puisque tous ont droit aux soins de santé. L'État ne serait pas en mesure de remplir ses obligations envers l'ensemble de la population si nous devions lui imposer une norme de conduite de nature fiduciaire envers un seul groupe parmi tant d'autres. Cet aspect de la demande est voué à l'échec.

[63] À mon avis, les faits tels qu'ils sont invoqués, et qui sont tenus pour avérés pour les besoins de la requête en cause, n'établissent pas une obligation fiduciaire de l'État. Par conséquent, je suis d'avis de radier l'allégation de manquement à une obligation fiduciaire.

B. *L'allégation de négligence*

[64] Le groupe de demandeurs plaide que l'Alberta a manqué à son obligation envers les membres du groupe d'agir avec la diligence requise, c'est-à-dire sans négligence. Il allègue ce qui suit :

[TRADUCTION] 43. Les défendeurs ont envers les membres du groupe une obligation de faire preuve de diligence, d'habileté et de prudence raisonnables à l'égard de la vérification, de la supervision, du contrôle et de la gestion (i) des prestations pour soins de santé versées par l'État aux autorités de la santé, (ii) des prestations pour soins de santé fournies par les autorités de la santé à des établissements de soins de longue durée et (iii) des frais d'hébergement payés par les membres du groupe, pour s'assurer que les frais d'hébergement soient équitables, justes et raisonnables, qu'ils reflètent les coûts réels de l'hébergement et des repas et qu'ils ne servent pas à financer en partie le coût des soins de santé. [Je souligne.]

[65] I note at the outset that the claim of negligence sits uncomfortably with the general thrust of the plaintiff class' grievance. That grievance, viewed broadly, appears mainly concerned with deliberate legislative and policy decisions. Hints of this remain in the way the negligence claim is cast: the duty is said to be "to ensure" rather than merely to take reasonable care. That said, the pleadings arguably evoke negligence in "auditing, supervising, monitoring and administering the health care benefit". The duty of care asserted with respect to setting the accommodation fees has been struck and is not appealed. It is therefore unnecessary to consider whether this pleading raises a triable cause of action in negligence.

[66] The first and central question is whether the pleadings, assuming the facts alleged to be true, support a duty of care on Alberta to members of the plaintiff class. This requires us to determine first whether Alberta and the class members were in a relationship that gave rise to a *prima facie* duty of care, based on foreseeability and proximity. If a *prima facie* duty of care is established, the second step is to ask whether it is negated by policy considerations: see *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.); *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, at para. 30; and *Reference re Broome v. Prince Edward Island*, 2010 SCC 11, [2010] 1 S.C.R. 360, at para. 14.

[67] The claim raised in this case has not been previously recognized as giving rise to a duty of care. Therefore, we must examine whether it meets the foregoing requirements for imposing a duty of care in negligence: *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643, at para. 15.

[68] In this case, as in *Broome*, the plaintiff class relies on provincial statutory obligations as the

[65] Je fais remarquer d'emblée que l'allégation de négligence s'accorde mal avec la portée générale du grief des demandeurs. Ce grief, considéré dans son ensemble, semble porter principalement sur des décisions législatives délibérées et des décisions de politique générale. La façon dont l'allégation de négligence est formulée le laisse entendre, car il est indiqué que l'obligation impose à l'État de « s'assurer » plutôt que de simplement agir avec diligence raisonnable. Cela dit, on pourrait soutenir que l'allégation évoque la négligence dans « la vérification, la supervision, le contrôle et la gestion des prestations de soins de santé ». L'obligation de diligence invoquée à l'égard de la fixation des frais d'hébergement a été radiée et cette décision n'a pas été portée en appel. Par conséquent, il est inutile d'examiner si cette allégation de négligence soulève une cause d'action donnant matière à procès.

[66] La question initiale et primordiale est celle de savoir si les allégations, à supposer que les faits invoqués soient vrais, emportent une obligation de diligence de la part de l'Alberta envers les membres du groupe de demandeurs. Il faut d'abord se demander si l'Alberta et les membres du groupe entretenaient une relation ayant donné lieu à une obligation de diligence *prima facie*, fondée sur la prévisibilité et la proximité. Si une obligation de diligence *prima facie* est établie, la deuxième étape consiste à se demander si elle est écartée par des considérations de politique générale : voir *Anns c. Merton London Borough Council*, [1978] A.C. 728 (H.L.); *Ville de Kamloops c. Nielsen*, [1984] 2 R.C.S. 2; *Cooper c. Hobart*, 2001 CSC 79, [2001] 3 R.C.S. 537, par. 30; et *Renvoi relatif à Broome c. Île-du-Prince-Édouard*, 2010 CSC 11, [2010] 1 R.C.S. 360, par. 14.

[67] L'allégation soulevée en l'espèce n'a pas été reconnue précédemment comme donnant naissance à une obligation de diligence. Par conséquent, il nous faut examiner si elle remplit les conditions susmentionnées pour qu'une obligation de diligence soit reconnue : *Childs c. Desormeaux*, 2006 CSC 18, [2006] 1 R.C.S. 643, par. 15.

[68] En l'espèce, comme dans l'arrêt *Broome*, le groupe de demandeurs s'appuie sur les obligations

source of a private duty of care. The allegation, in essence, is that statutory and regulatory duties brought Alberta into a relationship of proximity with members of the class, whom it was reasonably foreseeable would be affected by failure to discharge these duties in a non-negligent manner. The *Cooper* analysis applies to claims grounded in statutory duties. As the Court, *per* Cromwell J., stated in *Broome*, at para. 13:

> [The *Anns/Kamloops*] test is the appropriate one even though the appellants mainly rely on statutory duties. Such duties do not generally, in and of themselves, give rise to private law duties of care. The *Anns/Kamloops* test determines whether public as well as private actors owe a private law duty of care to individuals enabling them to sue the public actors in a civil suit . . . .

[69] Determining whether a duty of care lies on the government proceeds by "review of the relevant powers and duties of the [government body] under the Act": *Cooper*, at para. 45. See also *Broome*, at para. 20; *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83, at para. 27.

[70] In this case, the legislative scheme does not impose a duty on the Crown to act in relation to the class members with respect to the accommodation charges. A review of the relevant provisions discloses a general duty on the Minister to provide insured health care services: *Alberta Health Care Insurance Act*, s. 3. However, the plaintiffs have failed to point to any duty to audit, supervise, monitor or administer the funds related to the accommodation charges in the provisions. The *Nursing Homes Act* imposes no positive duty on the Crown, but grants only permissive monitoring powers. Reporting requirements are discretionary (i.e. at the demand of the Minister). While they flow up the chain of command (i.e. the RHA or

que la loi impose à la province pour établir l'existence d'une obligation de diligence de droit privé. Essentiellement, ils allèguent que les obligations d'origine législative et réglementaire ont fait en sorte que l'Alberta entretient une relation de proximité avec les membres du groupe, et qu'il était raisonnablement prévisible que ces derniers soient touchés par le défaut du gouvernement de s'acquitter de ces obligations sans négligence. L'analyse prévue dans l'arrêt *Cooper* s'applique aux demandes fondées sur des obligations d'origine législative. Comme le juge Cromwell l'a affirmé au nom de notre Cour dans *Broome*, au par. 13 :

> C'est [le critère *Anns/Kamloops*] qu'il convient d'appliquer en l'espèce, même si les appelants invoquent principalement des obligations d'origine législative. De telles obligations n'engendrent généralement pas, à elles seules, des obligations de diligence de droit privé. Le critère *Anns/Kamloops* sert à déterminer si des entités publiques, comme des entités privées, ont envers des particuliers une obligation de diligence de droit privé habilitant ces derniers à poursuivre les entités publiques au civil . . .

[69] Pour déterminer si une obligation de diligence repose sur le gouvernement, il faut procéder à un « examen des attributions pertinentes que la Loi confère » à l'entité gouvernementale : *Cooper*, par. 45. Voir également *Broome*, par. 20; *Syl Apps Secure Treatment Centre c. B.D.*, 2007 CSC 38, [2007] 3 R.C.S. 83, par. 27.

[70] En l'espèce, le régime législatif n'impose pas à l'État l'obligation d'agir pour le bénéfice des membres du groupe à l'égard des frais d'hébergement. Un examen des dispositions pertinentes révèle que le ministre a l'obligation générale de fournir des services de soins de santé assurés : *Alberta Health Care Insurance Act*, art. 3. Or, les demandeurs n'ont pu appuyer sur les dispositions l'existence d'une obligation de vérifier, de superviser, de contrôler ou de gérer les fonds liés aux frais d'hébergement. La *Nursing Homes Act* n'impose à l'État aucune obligation positive, elle ne lui confère que des pouvoirs de contrôle facultatifs. Les exigences de rendre compte sont discrétionnaires (c.-à-d. à la demande du ministre). Bien

operator must report to the Minister), the *Minister* need not respond: *Nursing Homes Act*, ss. 12 and 19. The same is true of the Act's regulations (*Nursing Homes General Regulation* and *Nursing Homes Operation Regulation*) and the *Regional Health Authorities Act*, ss. 9, 13, 14 and 21, and accompanying regulations; as in the *Hospitals Act*, ss. 25-27 and 29, and its regulations. This case is distinguishable from *Brewer Bros. v. Canada (Attorney General)*, [1992] 1 F.C. 25 (C.A.), relied on by the plaintiffs, where the statute in question imposed on the public authority a *positive duty to act*.

[71] For these reasons, I conclude that the legislative scheme does not impose a duty of care on Alberta. However, the claimant class also argues that Alberta's conduct established a relationship of a sufficient proximity to support a duty of care. They rely generally on the fact that Alberta supervised, monitored and administered the accommodation fees. More particularly, they emphasize that Alberta directed the health authorities to charge the class members the maximum accommodation charge, without regard to the actual cost of accommodation and meals, and that information about the rates was communicated by the health authorities directly to the class members at the direction of Alberta. This, they argue, is sufficient to create a relationship of proximity.

[72] In the absence of a statutory duty, the fact that Alberta may have audited, supervised, monitored and generally administered the accommodation fees objected to does not create sufficient proximity to impose a *prima facie* duty of care. As stated in *Broome*, at para. 40:

> Even if the statute ought to be interpreted so that there was a duty to inspect the Home, on the record before me, the statute gives no direction as to the purpose or scope of such inspections, imposes no standards to be applied and requires no action to be taken as a result of

que ces exigences remontent la voie hiérarchique (c.-à-d. que l'ARS ou l'exploitant doit rendre compte au ministre), le *ministre* n'est pas tenu de répondre : *Nursing Homes Act*, art. 12 et 19. Il en va de même pour les règlements d'application de cette Loi (le *Nursing Homes General Regulation* et le *Nursing Homes Operation Regulation*), pour la *Regional Health Authorities Act*, art. 9, 13, 14 et 21, et ses règlements d'application, ainsi que pour la *Hospitals Act*, art. 25-27 et 29, et ses règlements d'application. Il y a lieu d'établir une distinction entre l'espèce et *Brewer Bros. c. Canada (Procureur général)*, [1992] 1 C.F. 25 (C.A.), sur lequel s'appuient les demandeurs, où la loi en question imposait à l'autorité publique une *obligation positive d'agir*.

[71] Pour ces motifs, je conclus que le régime législatif n'impose pas une obligation de diligence à l'Alberta. Toutefois, le groupe de demandeurs prétend également que par sa conduite, l'Alberta a établi un rapport suffisamment étroit pour donner naissance à une obligation de diligence. Les demandeurs invoquent, d'une façon générale, le fait que l'Alberta supervisait, contrôlait et gérait les frais d'hébergement. Plus précisément, ils insistent sur le fait que l'Alberta a ordonné aux autorités de la santé de facturer aux membres du groupe le montant maximum des frais d'hébergement, sans tenir compte des coûts réels de l'hébergement et des repas, et que les renseignements concernant les taux ont été transmis par les autorités de la santé directement aux membres du groupe sur l'ordre de l'Alberta. Selon eux, ces éléments sont suffisants pour faire naître une relation de proximité.

[72] En l'absence d'une obligation d'origine législative, le fait que l'Alberta peut avoir vérifié, supervisé, contrôlé et généralement géré les frais d'hébergement contestés ne crée pas un lien de proximité suffisant pour imposer une obligation de diligence *prima facie*. Comme la Cour l'a affirmé dans *Broome*, au par. 40 :

> Même dans l'hypothèse où il y aurait lieu de retenir l'interprétation selon laquelle il existait une obligation d'inspecter le Children's Home, la loi ne donne, d'après le dossier dont je suis saisi, aucune indication quant à l'objet ou à la portée de telles inspections, elle

an inspection. No authority is cited for the proposition that such a bare duty of inspection would be sufficient to support a finding of proximity between the Director and the children. [Emphasis added.]

ne prescrit aucune norme à appliquer et elle n'exige la prise d'aucune mesure à la suite de l'inspection. Aucune source n'est invoquée à l'appui de la proposition suivant laquelle une obligation d'inspection ainsi réduite au minimum pourrait permettre de conclure à l'existence d'un lien de proximité entre le directeur et les enfants. [Je souligne.]

The specific acts alleged — that Alberta directed the charges and that the health authorities communicated them to members of the claimant class — fall under the rubric of administration of the scheme. As in *Broome*, the mere supplying of a service is insufficient, without more, to establish a relationship of proximity between the government and the claimants.

Les actes allégués, à savoir que l'Alberta a fixé les frais et que les autorités de la santé ont transmis ce renseignement aux membres du groupe de demandeurs, relèvent de l'administration du régime. Comme dans l'arrêt *Broome*, la simple prestation d'un service ne suffit pas, à elle seule, pour établir une relation de proximité entre le gouvernement et les demandeurs.

[73] I therefore conclude that, assuming the facts pleaded to be true, the negligence claim is bound to fail at the first step of the *Anns/Cooper* inquiry. Absent a statutory obligation to do the things that the plaintiffs claim were done negligently, the necessary relationship of proximity between Alberta and the claimants cannot be made out.

[73] Par conséquent, à supposer que les faits invoqués soient vrais, je conclus que l'allégation de négligence est vouée à l'échec à la première étape du critère retenu dans les arrêts *Anns* et *Cooper*. En l'absence d'une obligation d'origine législative de prendre les mesures qui, selon les demandeurs, ont été prises négligemment, la relation de proximité nécessaire entre l'Alberta et les demandeurs ne peut être établie.

[74] Were the pleadings to satisfy the first step of the *Anns/Cooper* test, they would fail at the second step, which asks whether the *prima facie* duty of care is negated by policy considerations. Where the defendant is a public body, inferring a private duty of care from statutory duties may be difficult, and must respect the particular constitutional role of those institutions: *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957, *per* Laskin J., as he then was, for the Court. Related to this concern is the fear of virtually unlimited exposure of the government to private claims, which may tax public resources and chill government intervention. It is arguable that to impose a duty of care on the plaintiff class on the facts pleaded would open the door to a claim in negligence by *any* patient in the health care system with an entitlement to receive funding for health services, whether primary or extended. This raises the spectre of unlimited liability to an unlimited class, decried by Cardozo C.J. in *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931), at p. 444: see *Design Services Ltd. v.*

[74] Si les allégations franchissaient avec succès la première étape du critère *Anns/Cooper*, elles devraient être rejetées à la deuxième étape, où il faut se demander si l'obligation de diligence *prima facie* est écartée par des considérations de politique générale. Si le défendeur est une entité publique, il peut être difficile d'inférer une obligation de diligence de droit privé en se fondant sur des obligations d'origine législative. Cette inférence doit respecter le rôle constitutionnel particulier de ces institutions : *Welbridge Holdings Ltd. c. Greater Winnipeg*, [1971] R.C.S. 957, le juge Laskin (plus tard Juge en chef), s'exprimant au nom de la Cour. Se rattache à cette préoccupation la crainte que le gouvernement soit constamment exposé à des recours privés, ce qui peut grever les ressources publiques et freiner l'intervention du gouvernement. Il est possible de soutenir que l'imposition d'une obligation de diligence envers le groupe de demandeurs, au vu des faits allégués, autorisait à invoquer la négligence *tout* patient du système de santé ayant droit au financement des services de

Canada, 2008 SCC 22, [2008] 1 S.C.R. 737, at paras. 59-66.

[75] For these reasons, I would find that the pleadings do not disclose a duty of care and that the cause of action as pleaded is bound to fail. I would therefore strike the plea of negligence in its entirety.

C. *The Bad Faith Claim*

[76] The plaintiff class pleads that the instruction by the Minister of Health and Wellness to the LTCF operators to charge the maximum fee allowable under the regulations for accommodation and meals is a bad faith exercise of discretion. The plaintiffs say the Minister gave his instructions knowing full well of the past practice of certain LTCF operators of using surplus accommodation charges to subsidize basic care and operating costs properly the responsibility of the operator and the Province. This recklessness and breakdown of the orderly exercise of authority, they say, is sufficient to establish a distinct cause of action for bad faith.

[77] I agree with the Province's submissions that the allegation of bad faith, as pleaded, is bootstrapped to the duty of care claim, and cannot survive on its own when the plea of negligence is struck. The pleadings disclose the explicit link between bad faith and negligence:

Negligence: Breach of Duty of Care and Bad Faith

. . .

44. In breach of their duty of care, the Defendants, acting recklessly, arbitrarily, and in bad faith, failed to

santé, qu'ils soient primaires ou complémentaires. Cela évoque le risque d'une responsabilité illimitée envers un groupe indéterminé, ce que déplorait le juge en chef Cardozo dans *Ultramares Corp. c. Touche*, 174 N.E. 441 (N.Y. 1931), p. 444 : voir *Design Services Ltd. c. Canada*, 2008 CSC 22, [2008] 1 R.C.S. 737, par. 59-66.

[75] Pour ces motifs, je suis d'avis que les allégations ne révèlent pas une obligation de diligence et que la cause d'action telle qu'elle a été plaidée est vouée à l'échec. Par conséquent, je suis d'avis de radier en totalité l'allégation de négligence.

C. *L'allégation de mauvaise foi*

[76] Le groupe de demandeurs fait valoir qu'en demandant aux exploitants des ESLD de facturer, relativement à l'hébergement et aux repas, le montant maximum que permettaient les règlements, le ministre de la Santé et du Bien-être a fait preuve de mauvaise foi dans l'exercice de son pouvoir discrétionnaire. Les demandeurs affirment que le ministre a donné ses directives en sachant très bien que certains exploitants des ESLD avaient l'habitude d'employer le surplus des frais d'hébergement pour financer les soins de base et les frais d'exploitation qui sont normalement la responsabilité de l'exploitant et de la province. Selon eux, cette insouciance et ce dérèglement dans l'exercice du pouvoir est suffisant pour établir une cause d'action distincte fondée sur la mauvaise foi.

[77] Je souscris aux observations de la province selon lesquelles l'allégation de mauvaise foi, telle qu'elle est invoquée, est liée au manquement allégué à l'obligation de diligence et doit être écartée si l'allégation de négligence est radiée. Les allégations révèlent le lien explicite entre la mauvaise foi et la négligence :

[TRADUCTION]

Négligence : manquement à l'obligation de diligence et mauvaise foi

. . .

44. En violation de leur obligation de diligence et en agissant de façon imprudente, arbitraire et de mauvaise

exercise any, or any sufficient, care, skill, and diligence with respect to auditing, supervising, monitoring and administering (i) the Health Care benefits paid by the Crown to the Health Authorities, (ii) the Health Care benefits provided by the Health Authorities to Long Term Care Facilities and (iii) the Accommodation Fees paid by the Class members. In particular, the Defendants, acting recklessly, arbitrarily and in bad faith:

(a) Had no rational basis for determining what accommodation and meals consist of;

(b) Had no rational basis for calculating the actual cost of accommodation and meals or the Accommodation Fee;

(c) Had no rational basis for separating or distinguishing Health Care costs, which are the responsibility of the Defendants, from Accommodation Fees, which are the responsibility of the Class members;

(d) Failed to conduct any analysis to determine the actual cost of accommodation and meals and levied, either directly or through their agents, the maximum Accommodation Charge across the Province of Alberta (save for a very few exceptions[)];

(e) Failed to account or require an accounting to be provided to the Class members with respect to the disposition of monies paid by the Class members as Accommodation Fees;

(f) Failed to put in place any, or any proper, reporting, accounting and financial records and systems;

(g) Permitted or alternatively failed to prevent the Class members from being charged for Health Care costs which are the responsibility of the Defendants including but not limited to [a detailed list follows]; and

(h) By letter dated August 1, 2003, the Crown, by its Minister of Seniors and Community Supports, did unlawfully [list of particular actions omitted].

foi, les défendeurs n'ont fait aucunement preuve, ou n'ont pas fait suffisamment preuve, de diligence, d'habileté et de prudence dans la vérification, la supervision, le contrôle et la gestion (i) des prestations pour soins de santé versées par l'État aux autorités de la santé, (ii) des prestations pour soins de santé fournies par les autorités de la santé à des établissements de soins de longue durée et (iii) des frais d'hébergement payés par les membres du groupe. En particulier, les manquements suivants sont reprochés aux défendeurs, lesquels ont agi imprudemment, arbitrairement et de mauvaise foi :

a) ils ne se sont appuyés sur aucun fondement rationnel pour déterminer en quoi consistent l'hébergement et les repas;

b) ils ne se sont appuyés sur aucun fondement rationnel pour calculer le coût réel de l'hébergement et des repas ou les frais d'hébergement;

c) ils ne se sont appuyés sur aucun fondement rationnel pour séparer ou distinguer le coût de soins de santé, lesquels relèvent des défendeurs, des frais d'hébergement, lesquels relèvent des membres du groupe;

d) ils n'ont effectué aucune analyse pour déterminer le coût réel de l'hébergement et des repas et ont perçu, directement ou par l'intermédiaire de leurs mandataires, le montant maximum des frais d'hébergement dans la province de l'Alberta (à quelques exceptions près[)];

e) ils n'ont pas rendu compte ni exigé qu'on rende compte aux membres du groupe de l'utilisation faite des sommes payées par les membres du groupe à titre de frais d'hébergement;

f) ils n'ont mis en place aucun dossier ou système de déclaration, de comptabilité ou financier, ou n'ont pas mis en place un dossier ou système de déclaration, de comptabilité ou financier adéquat;

g) ils ont permis que l'on réclame aux membres du groupe le coût de soins de santé qui relèvent des défendeurs, y compris notamment [une liste détaillée suit] ou, subsidiairement, n'ont pas empêché que ces coûts leurs soient réclamés;

h) par lettre datée du 1er août 2003, l'État, par l'intermédiaire de son ministre du Soutien aux aînés et aux collectivités, a illégalement [liste des mesures particulières omise].

Policy Decisions: Breach of Duty of Care and Bad Faith

. . .

49. In breach of its duty of care and acting recklessly, arbitrarily and in bad faith, the Crown, pursuant to the Letters, did unlawfully and improperly direct and instruct the Predecessor Health Authorities and their agents to charge the maximum Accommodation Charge, notwithstanding the permissive and discretionary language of s. 3(1) of the *Nursing Homes Operation Regulation* and s. 8(2) of the *Nursing Homes Act*, as a result of which the Class members, save for a limited number of exceptions, were charged the maximum Accommodation Charge without regard to the actual cost of accommodation and meals.

50. In further breach of its duty of care and acting recklessly, arbitrarily and in bad faith, the Crown, pursuant to the Letters, unlawfully and improperly directed and instructed the Predecessor Health Authorities and their agents to charge the Class members for Health Care costs set out in paragraph 44(g) herein in circumstances where:

(a) Such costs are Health Care costs pursuant to the *Nursing Homes Act* and regulations, the *Hospitals Act* and regulations, and Ministerial Directive D-317;

(b) The Crown understood and has since acknowledged that such costs and services were the responsibility of the Defendants; and

(c) The Crown understood and has since acknowledged that such costs were included as part of the block funding for Health Care provided by the Crown to the Health Authorities.

51. As a result of the negligent, *ultra vires* and bad faith actions of the Defendants:

(a) There was no reasonable nexus between the Accommodation Fee and the cost of accommodation and meals;

(b) The Class members paid an Accommodation Fee that was contrary to the *Hospitals Act* and the *Nursing Homes Act*;

(c) The Class members' right and entitlement to publicly funded Health Care services and benefits was violated; [and]

Décisions de politique générale : manquement à une obligation de diligence et mauvaise foi

. . .

49. En violation de son obligation de diligence et en agissant de façon imprudente, arbitraire et de mauvaise foi, l'État a, conformément à ces lettres, illégalement et indûment demandé aux autorités de la santé prédécesseures et à leurs mandataires d'exiger le montant maximum des frais d'hébergement, malgré le libellé facultatif et discrétionnaire du par. 3(1) du *Nursing Homes Operation Regulation* et du par. 8(2) de la *Nursing Homes Act*, de sorte que les membres du groupe, à quelques exceptions près, ont dû payer le montant maximum des frais d'hébergement sans égard au coût réel de l'hébergement et des repas.

50. De plus, en violation de son obligation de diligence et en agissant de façon imprudente, arbitraire et de mauvaise foi, l'État a, conformément à ces lettres, illégalement et indûment demandé aux autorités de la santé prédécesseures et à leurs mandataires de facturer aux membres du groupe le coût des soins de santé fixés à l'alinéa 44g) ci-dessus dans les cas suivants :

a) lorsque ces coûts constituent des coûts de soins de santé prévus par la *Nursing Homes Act* et ses règlements d'application, par la *Hospitals Act* et ses règlements d'application, ainsi que par la directive ministérielle D-317;

b) lorsque, selon l'État — lequel l'a depuis reconnu —, ces coûts et services relevaient des défendeurs;

c) lorsque, selon l'État — lequel l'a depuis reconnu —, ces coûts faisaient partie du financement de base pour les soins de santé qu'il fournissait aux autorités de la santé.

51. En raison de la négligence, de la prise de mesures *ultra vires* et de la mauvaise foi des défendeurs :

a) il n'existait aucun lien raisonnable entre les frais d'hébergement et le coût de l'hébergement et des repas;

b) les membres du groupe ont payé des frais d'hébergement contraires à la *Hospitals Act* et à la *Nursing Homes Act*;

c) le droit des membres du groupe aux services de soins de santé et aux avantages en matière de santé financés par l'État a été enfreint;

(d) Under the guise of the Accommodation Charge, the Class members paid an Accommodation Fee that included the cost of Health Care services and benefits the Class members were entitled to receive at no cost as described in paragraph 41(i) herein.

52. As a result of the negligent and bad faith actions of the Defendants, the Class members have suffered damage and loss. [Emphasis added.]

[78] The law does not recognize a stand-alone action for bad faith. As the certification judge noted, at para. 408, the bad faith exercise of discretion by a government authority is properly a ground for judicial review of administrative action. In tort, it is an element of misfeasance in public office and, in employment law, relevant to the manner of dismissal. The simple fact of bad faith is not independently actionable.

[79] At the hearing, counsel for the plaintiffs sought to argue that we should read the plea of bad faith as disclosing the tort of misfeasance in public office: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263. Notwithstanding the difficulty of raising this interpretation of the pleadings for the first time in response during oral hearing, I do not see how this claim is sustainable at law: The facts necessary to support such an allegation cannot be extricated from the pleas of negligence and fiduciary duty, and a court is not obliged to divine causes of action apart from those deliberately pleaded and argued by a party. Misfeasance in a public office was not raised before the courts below, and I would not now accede to this submission.

[80] For these reasons, the plea of bad faith should be struck.

d) sous le couvert des frais d'hébergement, les membres du groupe ont payé des frais d'hébergement comprenant le coût des services de soin de santé et des avantages en matière de santé qu'ils avaient le droit de recevoir gratuitement, comme l'indique l'alinéa 41i) ci-dessus.

52. En raison de la négligence et de la mauvaise foi des défendeurs, les membres du groupe ont subi des dommages et des pertes. [Je souligne.]

[78] Le droit ne reconnaît pas la possibilité d'intenter une action indépendante pour mauvaise foi. Comme la juge saisie de la demande d'autorisation du recours collectif l'a indiqué au par. 408, lorsqu'une autorité gouvernementale fait preuve de mauvaise foi dans l'exercice de son pouvoir discrétionnaire, cet exercice peut, à juste titre, faire l'objet d'un contrôle judiciaire. En matière de responsabilité délictuelle, cet exercice constitue une faute dans l'exercice d'une charge publique et, en droit du travail, il est pertinent aux circonstances du congédiement. Le simple fait d'avoir agi de mauvaise foi ne donne pas lui-même ouverture à un droit d'action.

[79] À l'audience, l'avocat des demandeurs a cherché à plaider que nous devrions interpréter l'allégation de mauvaise foi comme révélant l'existence du délit de faute dans l'exercice d'une charge publique : *Succession Odhavji c. Woodhouse*, 2003 CSC 69, [2003] 3 R.C.S. 263. Malgré la difficulté que comporte le fait d'avoir soulevé cette interprétation des allégations pour la première fois en réponse durant l'audition, je ne vois pas comment cette demande peut être accueillie en droit : les faits nécessaires pour étayer une telle allégation ne peuvent se dégager des allégations de négligence et d'obligation fiduciaire, et le tribunal n'est pas obligé de deviner des causes d'action autres que celles délibérément invoquées et plaidées par une partie. La faute dans l'exercice d'une charge publique n'a pas été soulevée devant les tribunaux inférieurs, et je n'accepterais pas d'examiner une telle prétention aujourd'hui.

[80] Pour ces motifs, l'allégation de mauvaise foi devrait être radiée.

D. *The Unjust Enrichment Claim*

[81] The representative plaintiffs advanced a claim in restitution. Essentially, they plead that by overcharging them for accommodation and food, the government used their money to partially offset its obligations under the scheme, without being entitled to do so. The government, they plead, was thus unjustly enriched, and should be ordered to return the excess money thus obtained. They pleaded the following with respect to unjust enrichment:

Restitution

. . .

54. The Class members, with very limited exceptions, paid the maximum rates permitted by s. 3(1) of the *Nursing Homes Operation Regulation*, A.R. 258/85 as amended, such that the Class members experienced a deprivation equal to the amount of the Accommodation Fees.

55. The payment of the Accommodation Fees constituted a corresponding benefit to the Defendants in that the payments relieved the Defendants from inevitable expenses they were required to incur pursuant to the *Hospitals Act*, the *Nursing Homes Act*, and *Ministerial Directive D-317.*

56. There exists no juristic reason for the Class members' deprivation and the Defendants' corresponding benefit because:

(a) Section 19(2) of the *Canada Health Act*, R.S. 1985, c. C-6, s. 3(1) of the *Nursing Homes Operation Regulation* as amended, s. 8(2) of the *Nursing Homes Act*, ss. 5(1)(d) and 5(8) of the *Hospitalization Benefits Regulation*, and the Letters, are of no force or effect in that they violate s. 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") in that they authorize the imposition of Accommodation Charges upon the Class members which may not be imposed upon other patients solely on the basis of the Class members' age and/or mental and/or physical disabilities, are not justified under s. 1 of the *Charter*, and are of

D. *L'allégation d'enrichissement injustifié*

[81] Les représentants des demandeurs ont présenté une demande de restitution. Essentiellement, ils allèguent qu'en les facturant en trop pour l'hébergement et les repas, le gouvernement s'est servi de leur argent pour compenser partiellement ses obligations en vertu du régime de la santé, ce qu'il n'avait pas le droit de faire. Ils ont affirmé que le gouvernement s'était donc injustement enrichi et qu'on devrait lui ordonner de rembourser le surplus d'argent ainsi obtenu. Voici ce qu'ils ont invoqué à l'égard de l'enrichissement injustifié :

[TRADUCTION]

Restitution

. . .

54. Les membres du groupe, à de rares exceptions près, ont payé le montant maximal permis par le par. 3(1) du *Nursing Homes Operation Regulation*, A.R. 258/85 et ses modifications, de sorte que les membres du groupe ont subi un appauvrissement égal au montant des frais d'hébergement.

55. Le paiement des frais d'hébergement constituait un avantage correspondant pour les défendeurs en ce que les paiements leur ont permis de ne pas payer les dépenses qu'ils devaient inévitablement payer conformément à la *Hospitals Act*, à la *Nursing Homes Act* et à la *Ministerial Directive D-317.*

56. Aucun motif juridique ne justifie l'appauvrissement des membres du groupe et l'avantage correspondant qu'ont tiré les défendeurs, et ce, pour les raisons suivantes :

a) Le paragraphe 19(2) de la *Loi canadienne sur la santé*, L.R. 1985, ch. C-6, le par. 3(1) du *Nursing Homes Operation Regulation*, le par. 8(2) de la *Nursing Homes Act*, l'al. 5(1)*d*) et le par. 5(8) du *Hospitalization Benefits Regulation*, et les lettres, sont inopérants en ce qu'ils contreviennent à l'art. 15 de la *Charte canadienne des droits et libertés* (la « *Charte* »), puisqu'ils permettent l'imposition aux membres du groupe de frais d'hébergement qui ne peuvent pas être imposés à d'autres patients uniquement sur le fondement de l'âge ou des incapacités mentales ou physiques des membres du groupe, qui ne sont pas justifiables au

no force or effect by operation of s. 52 of the *Constitution Act, 1982*;

(b) Section 3(1) of the *Nursing Homes Operation Regulation* as amended, ss. 5(1)(d) and 5(8) of the *Hospitalization Benefits Regulation*, and the Letters are *ultra vires* and inoperative in that contrary to the *Nursing Homes Act*, and the *Hospitals Act*, they purport to authorize the imposition of charges or fees against the Class members for goods and services other than accommodation and meals, including but not limited to [list of specific goods and services omitted], all of which are the financial responsibility of the Defendants;

(c) The Letters are *ultra vires* and inoperative in that there was in fact no obligation on the part of the Long Term Care Facilities to impose the maximum Accommodation Charges, [and] there was no obligation on the part of the Class members to pay them;

(d) The Crown's Minister of Seniors and Community Supports had no lawful authority in August of 2003 with respect to setting and monitoring the Accommodation Charge; . . . . [Emphasis added.]

[82] These pleadings mirror the test for unjust enrichment set out in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 30:

As a general matter, the test for unjust enrichment is well established in Canada. The cause of action has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment . . . .

The savings of an inevitable expense can constitute an enrichment of the defendant: *Garland*, at para. 31.

[83] The thrust of Alberta's argument on this point is that the claim of unjust enrichment is bound to fail because the doctrine does not apply to a public authority in a case such as this. Governments enact laws and regulations that require citizens to pay monies to government in a variety of situations, and as a general rule, the citizen should have no right to recover such payments. It argues that this position

regard de l'article premier de la *Charte* et qui sont inopérants par application de l'art. 52 de la *Loi constitutionnelle de 1982*;

b) Le paragraphe 3(1) du *Nursing Homes Operation Regulation*, l'al. 5(1)d) et le par. 5(8) du *Hospitalization Benefits Regulation*, et les lettres, sont *ultra vires* et inopérants en ce qu'ils sont contraires à la *Nursing Homes Act* et à la *Hospitals Act*, ils visent à autoriser l'imposition aux membres du groupe de frais pour des produits et services autres que l'hébergement et les repas, y compris notamment [liste des produits et services omise], qui relèvent tous des défendeurs;

c) Les lettres sont *ultra vires* et inopérantes en ce que les établissements de soins de longue durée n'avaient aucunement l'obligation d'exiger le montant maximal des frais d'hébergement, et les membres du groupe n'avait aucunement l'obligation de payer le montant maximal;

d) En août 2003, aucune loi n'accordait au ministre du Soutien aux aînés et aux collectivités un pouvoir à l'égard de la fixation et du contrôle des frais d'hébergement; . . . [Je souligne.]

[82] Ces allégations reflètent le critère applicable en matière d'enrichissement injuste énoncé au par. 30 de l'arrêt *Garland c. Consumers' Gas Co.*, 2004 CSC 25, [2004] 1 R.C.S. 629 :

En général, le critère applicable en matière d'enrichissement sans cause est bien établi au Canada. La cause d'action comporte trois éléments : (1) l'enrichissement du défendeur, (2) l'appauvrissement correspondant du demandeur et (3) l'absence de motif juridique justifiant l'enrichissement . . .

Les économies réalisées en ne payant pas une dépense inévitable peuvent constituer un enrichissement du défendeur : *Garland*, par. 31.

[83] À cet égard, l'Alberta affirme essentiellement que l'allégation d'enrichissement injuste est vouée à l'échec parce que la doctrine ne s'applique pas à une autorité publique dans un cas comme celui en l'espèce. Les gouvernements édictent des lois et des règlements qui obligent les citoyens à verser de l'argent au gouvernement dans diverses situations et, en règle générale, le citoyen ne devrait pas avoir

is justified in terms of public policy; governments should not be required to endlessly defend levies made under valid statutes and regulations.

[84] In reality, the situation is not so simple. As one writer delicately puts it, the application of restitutionary principles to public authorities in Canada "is a matter of some subtlety": P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (loose-leaf), at p. 22-1. Under the traditional common law doctrine, recovery from public authorities was recognized only on the grounds of *colore officii* (demands for unlawful payment from citizens by government officials for the receipt of benefits to which the citizen had a lawful entitlement) or duress (actual or implied). Payments made pursuant to *intra vires* statutory schemes were potentially recoverable; those made pursuant to *ultra vires* legislation were not necessarily so.

[85] The traditional doctrine, though workable in some circumstances, has been criticized on the ground that it produced inconsistent and inequitable results. A series of judicial decisions, responding to these concerns, has narrowed the ambit of the doctrine.

[86] It has been held that benefits received by the government because of a mistake of law may be recovered, so long as the mistake caused the payment in question: *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, at pp. 1200-1201, *per* La Forest J., for three of the six members of the Court, in *obiter*. Thus, where payments are made to a government under an *intra vires* law pursuant to an unlawful demand for payment which was based on a misinterpretation of the governing legislation, the payments may be subject to restitution.

[87] It has also been held that benefits received by the government pursuant to *ultra vires* legislation

le droit de recouvrer ces versements. L'Alberta prétend que cette position est justifiée eu égard à la politique générale de l'État; les gouvernements ne devraient pas être tenus de justifier indéfiniment la perception des frais effectuée conformément à des lois ou des règlements valides.

[84] En réalité, la situation n'est pas si simple. Comme l'indique habilement un auteur, au Canada, l'application aux autorités publiques des principes en matière de restitution [TRADUCTION] « est une question de subtilité » : P. D. Maddaugh et J. D. McCamus, *The Law of Restitution* (feuilles mobiles), p. 22-1. Selon la règle classique de la common law, le recouvrement d'une somme auprès des autorités publiques n'a été reconnu que sur le fondement du *colore officii* (les représentants du gouvernement demandent illégalement aux citoyens de payer des sommes pour recevoir des avantages auxquels ils ont légalement droit) ou de la contrainte (réelle ou implicite). Les paiements effectués conformément à des textes législatifs valides étaient potentiellement recouvrables; ceux effectués conformément à des lois *ultra vires* ne l'étaient pas nécessairement.

[85] La doctrine traditionnelle, bien qu'elle s'applique dans certaines circonstances, a suscité des critiques parce qu'elle engendre des résultats incohérents et inéquitables. En réponse à ces préoccupations, une série de décisions judiciaires a restreint la portée de la doctrine.

[86] Ainsi, notre Cour a conclu que les avantages dont profite le gouvernement en raison d'une erreur de droit peuvent être recouvrés, pourvu que le paiement en question soit attribuable à l'erreur : *Air Canada c. Colombie-Britannique*, [1989] 1 R.C.S. 1161, p. 1200-1201, le juge La Forest, au nom de trois des six membres de la Cour, en *obiter*. Le gouvernement peut donc être tenu de restituer les paiements qu'il a illégalement exigés en raison d'une mauvaise interprétation d'une loi valide.

[87] Notre Cour a également statué que les avantages reçus par le gouvernement conformément

may be recoverable where the payment is made under practical compulsion or actual duress: *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, at p. 587, *per* Major J., for the majority. In that decision, the Court left open the question of the recoverability of payments made under *ultra vires* legislation *in the absence of compulsion*: *Eurig Estate.*

[88] Again, courts have held that benefits conferred under an *agreement* with a public authority that is beyond the power of the state actor to make are recoverable in a restitutionary claim: *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575.

[89] Most recently, this Court in *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, *per* Bastarache J., held that taxes collected by public authorities on the basis of an *ultra vires* statute are recoverable where the law is found to be unconstitutional. Restitution is generally "available for the recovery of monies collected under legislation that is subsequently declared to be *ultra vires*": para. 12. Bastarache J. suggested that where the claim is for unconstitutional taxes, the claim should be brought under public law principles, and not the private law rules of unjust enrichment. However, he added that "[c]laims of unjust enrichment against the government may still be appropriate in certain circumstances": para. 34. Although the Court rejected Justice La Forest's *obiter* proposal in *Air Canada*, at pp. 1203-4, that recovery of payments made under *ultra vires* legislation should never be possible, Bastarache J. did not go so far as to embrace Justice Wilson's dissent on this point (at pp. 1214-15), which would have permitted recovery in cases where unjust enrichment is applied.

[90] Alberta argues that *Kingstreet* stands for the proposition that an action for unjust enrichment cannot be brought against the government. The only

à une loi invalide peuvent être recouvrables si le paiement résulte d'une obligation pratique ou de la contrainte : *Succession Eurig (Re)*, [1998] 2 R.C.S. 565, p. 587, le juge Major, au nom des juges majoritaires. Dans cet arrêt, la Cour ne s'est pas prononcée sur la possibilité de recouvrer des paiements effectués en vertu d'une loi *valide en l'absence de contrainte* : *Succession Eurig.*

[88] En outre, les tribunaux ont statué que les avantages conférés en vertu d'un *accord* conclu avec une autorité publique sont recouvrables dans une demande de restitution si cet accord outrepasse les pouvoirs de l'institution publique : *Pacific National Investments Ltd. c. Victoria (Ville)*, 2004 CSC 75, [2004] 3 R.C.S. 575.

[89] Tout récemment, dans *Kingstreet Investments Ltd. c. Nouveau-Brunswick (Finances)*, 2007 CSC 1, [2007] 1 R.C.S. 3, le juge Bastarache a conclu au nom de notre Cour que les taxes perçues par les autorités publiques sur le fondement d'une loi *ultra vires* sont recouvrables lorsque la loi est jugée inconstitutionnelle. Il est généralement possible « d'invoquer les règles relatives à la restitution pour recouvrer des sommes perçues en vertu de dispositions législatives ultérieurement déclarées *ultra vires* » : par. 12. Le juge Bastarache a indiqué que si la demande vise des taxes inconstitutionnelles, elle doit être intentée sur le fondement des principes de droit public et non des règles de droit privé en matière d'enrichissement injuste. Toutefois, il a ajouté que les « actions en enrichissement sans cause contre le gouvernement peuvent tout de même être indiquées dans certains cas » : par. 34. Bien que la Cour ait rejeté l'*obiter* du juge La Forest dans *Air Canada*, p. 1203-1204, selon lequel il ne devrait jamais être possible de recouvrer des sommes versées en vertu d'une loi *ultra vires*, le juge Bastarache n'est pas allé jusqu'à faire siens les motifs dissidents de la juge Wilson à cet égard (p. 1214-1215), qui aurait permis le recouvrement dans les cas d'enrichissement injustifié.

[90] L'Alberta prétend que selon l'arrêt *Kingstreet*, une action en enrichissement injustifié ne peut être intentée contre le gouvernement. Selon

recourse, it argues, is under public law principles, such as a claim for misfeasance in public office. The plaintiff class, in response, argues that Alberta interprets *Kingstreet* too narrowly. It fastens on Bastarache J.'s statement that "[c]laims of unjust enrichment against the government may still be appropriate in certain circumstances".

[91] In my view, *Kingstreet* stands for the proposition that public law remedies, rather than unjust enrichment, are the proper route for claims relating to restitution of taxes levied under an *ultra vires* statute, on the ground that the framework of unjust enrichment is ill-suited to dealing with issues raised by a claim that a measure is *ultra vires*. However, *Kingstreet* leaves open the possibility of suing for unjust enrichment in other circumstances. The claim pleaded in this case is not for taxes paid under an *ultra vires* statute. It is not therefore precluded by this Court's decisions in *Kingstreet*. The pleading should be allowed to go to trial, at which point the propriety of the claim for unjust enrichment may be explored more fully in the context of the evidence adduced.

[92] With respect to whether or not a juristic reason exists, Alberta argues that the regulation setting the maximum allowable accommodation charge is a complete answer to any claim in restitution. However, the claim that the regulation is itself invalid is a *Charter* claim, subject to *Charter* remedies.

[93] Alberta argues that the cause of action for unjust enrichment must fail because there is a nexus between the levy and the cost of making the service or benefit available, and therefore that the applicable regulations are not *ultra vires*. However, the sufficiency of the nexus is a matter of reasonableness: see *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7, [2008]

la province, la seule voie de recours relève des principes de droit public, par exemple une demande fondée sur la faute dans l'exercice d'une charge publique. Le groupe de demandeurs rétorque que l'Alberta interprète l'arrêt *Kingstreet* de manière trop restrictive. Il se fonde sur la déclaration du juge Bastarache selon laquelle les « actions en enrichissement sans cause contre le gouvernement peuvent tout de même être indiquées dans certains cas ».

[91] À mon sens, la Cour a indiqué dans l'arrêt *Kingstreet* que les recours de droit public, plutôt que l'action en enrichissement injustifié, constituent la démarche à suivre pour présenter une demande de restitution de taxes perçues en vertu d'une loi *ultra vires* parce que le cadre de l'enrichissement injustifié n'est pas approprié s'il faut traiter les questions que soulève le caractère *ultra vires* d'une mesure. Toutefois, l'arrêt *Kingstreet* n'écarte pas la possibilité d'une action en enrichissement injustifié dans d'autres circonstances. En l'espèce, on ne réclame pas des taxes payées en vertu d'une loi *ultra vires*. La décision de notre Cour dans l'arrêt *Kingstreet* ne fait donc pas obstacle à la demande. Il y a lieu de permettre que la demande fasse l'objet d'un procès, et le bien-fondé de l'allégation d'enrichissement injustifié pourra y être examiné de façon plus approfondie en fonction de la preuve présentée.

[92] Pour la question de savoir s'il existe un motif juridique, l'Alberta prétend que le règlement fixant le montant maximum des frais d'hébergement permis répond entièrement à toute demande de restitution. Toutefois, la prétention selon laquelle le règlement est lui-même invalide est fondée sur la *Charte* et assujettie aux réparations que prévoit la *Charte*.

[93] L'Alberta prétend que la cause d'action pour enrichissement injustifié doit être rejetée parce qu'il existe un lien entre la perception et ce qu'il en coûte pour fournir les services ou les avantages. La province prétend que les règlements applicables ne sont donc pas *ultra vires*. Toutefois, le caractère suffisant du lien est une question de raisonnabilité : voir *620 Connaught Ltd. c. Canada (Procureur*

1 S.C.R. 131, at para. 19, *per* Rothstein J., for the Court. It is better explored at trial than on a motion to strike.

[94] Finally, Alberta argues that the claim for unjust enrichment is simply another way of asserting breach of fiduciary duty and negligence, and therefore should be struck. I cannot accept this argument. The claim for unjust enrichment stands on different legal footing than the claims for breach of fiduciary duty or negligence. On the law just reviewed, it should be allowed to proceed. I further note that the restrictions set out in *Welbridge* on suing governments (as opposed to government actors) in tort do not apply to actions for restitution: *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762.

[95] In summary, the plaintiffs plead the three elements of unjust enrichment — benefit, deprivation, and absence of juristic reason for the deprivation. Whatever its chances of ultimate success, it is not plain and obvious that the claim does not disclose a cause of action, and it should be allowed to proceed to trial. As the trial judge correctly observed, at para. 443:

> I am satisfied that the cause of action based on unjust enrichment with the remedy of restitution is not hopeless, but rather analytically defensible, *albeit* novel, even dubious. I cannot say that it is "plain and obvious" that no claim exists; nor that the pleadings do not disclose a cause of action based on unjust enrichment with any hope of success. [Emphasis in original.]

[96] I would permit the plea of unjust enrichment to proceed.

E. *The Section 15(1) Claim of Discrimination*

[97] The plaintiffs plead that the imposition on the class members of an obligation to pay health

général), 2008 CSC 7, [2008] 1 R.C.S. 131, par. 19, le juge Rothstein au nom de la Cour. Il convient mieux d'examiner cette question au procès plutôt que dans le cadre d'une requête en radiation.

[94] Enfin, l'Alberta plaide que la réclamation pour enrichissement injustifié constitue simplement une autre façon d'invoquer le manquement à l'obligation fiduciaire et la négligence, et devrait donc être radiée. Je ne puis accepter cet argument. L'allégation d'enrichissement injustifié repose sur un fondement juridique différent des allégations de manquement à l'obligation fiduciaire ou de négligence et selon les principes de droit que nous venons d'examiner, elle devrait être conservée. Je signale en outre que les restrictions énoncées dans *Welbridge* en ce qui concerne les poursuites en responsabilité délictuelle contre les gouvernements (par opposition aux acteurs gouvernementaux) ne s'appliquent pas aux actions en restitution : *Peel (Municipalité régionale) c. Canada*, [1992] 3 R.C.S. 762.

[95] En résumé, les demandeurs plaident les trois éléments de l'enrichissement injustifié — l'avantage, l'appauvrissement et l'absence de motifs juridiques justifiant l'appauvrissement. Peu importe si la demande a des chances d'être accueillie ou non, il n'est pas clair et évident qu'elle ne révèle aucune cause d'action et il faudrait permettre qu'elle soit instruite. Comme la juge de première instance l'a fait observer à juste titre au par. 443 :

> [TRADUCTION] Je suis convaincue que la cause d'action fondée sur l'enrichissement injustifié ainsi que la demande de restitution ne sont pas vouées à l'échec; elles sont plutôt analytiquement défendables, *bien que* novatrices, voire discutables. Je ne saurais affirmer qu'il est « évident et manifeste » qu'il n'y a lieu à aucune réclamation, ni que les allégations ne révèlent aucune cause d'action fondée sur l'enrichissement injustifié qui pourrait être accueillie. [En italique dans l'original.]

[96] Je suis d'avis que l'allégation d'enrichissement injustifié peut être instruite.

E. *L'allégation de discrimination fondée sur le par. 15(1)*

[97] Les demandeurs font valoir que l'obligation faite aux membres du groupe de payer les frais

care costs violates s. 15(1) of the *Charter*. They say the charges were imposed solely on the basis of the class members' age, mental disability, physical disability, or some combination thereof, and the consequent infringement of their equality rights is not demonstrably justified under s. 1 of the *Charter*. They seek restoration of the accommodation charges and damages under s. 24(1) of the *Charter*, and a declaration that the listed provisions are of no force or effect to the extent of their inconsistency with s. 15(1).

de soins de santé contrevient au par. 15(1) de la *Charte*. Ils affirment que les frais ont été imposés uniquement sur le fondement de l'âge, de l'incapacité mentale et de la déficience physique des membres du groupe, ou d'une combinaison de ces facteurs, et que la violation de leur droit à l'égalité ne peut se justifier au regard de l'article premier de la *Charte*. Ils cherchent à obtenir le remboursement des frais d'hébergement ainsi que des dommages-intérêts sur le fondement du par. 24(1) de la *Charte* et sollicitent un jugement déclarant que les dispositions susmentionnées sont inopérantes dans la mesure où elles sont incompatibles avec le par. 15(1).

[98] My understanding is that the plea for relief under s. 15(1) is not directly challenged by the Province. Although the Province argues that a class action is not the preferable procedure for the *Charter* claim or its remedy, the Crown does not seek to strike the plea of discrimination itself; instead, it asks that we order it to proceed in another form. In light of my other conclusions, especially the survival of the plea of unjust enrichment, and without commenting on its merits, I would permit the s. 15 claim to proceed as part of the class action.

[98] Je crois comprendre que la province ne conteste pas directement la réparation sollicitée sur le fondement du par. 15(1). Bien que la province prétende qu'un recours collectif n'est pas la meilleure façon de procéder pour invoquer la *Charte* ou demander une réparation fondée sur la *Charte*, la province ne demande pas la radiation de l'allégation de discrimination elle-même; elle nous demande plutôt d'ordonner aux demandeurs de présenter leur demande sous une autre forme. Compte tenu de mes autres conclusions, en particulier le maintien de l'allégation d'enrichissement injustifié, et sans commenter sur le bien-fondé de l'allégation fondée sur l'art. 15, je suis d'avis de permettre que cette allégation soit examinée dans le cadre du recours collectif.

F. *Whether the Claim Should Be Decertified*

F. *Le recours doit-il être annulé?*

[99] Although the claims for unjust enrichment and breach of s. 15(1) of the *Charter* survive, Alberta nevertheless argues that the action should be decertified because a class proceeding is not the preferable procedure. Alberta submits that an individualized cost review would have to be conducted for each proposed class member, to determine whether particular charges for individual residents of specific LTCFs did not reflect the actual cost of accommodation and meals. Alberta argues that the charges will vary by time, regions, operator and resident, and — on the plaintiffs' theory — there is no wrong done unless it can be shown that the costs of accommodation and meals

[99] Bien que les allégations d'enrichissement injustifié et de violation du par. 15(1) de la *Charte* subsistent, l'Alberta prétend que le recours doit être annulé parce qu'un recours collectif n'est pas la procédure qui convient le mieux. L'Alberta prétend qu'un examen des coûts devrait être effectué pour chacun des membres du groupe afin de déterminer si des frais particuliers réclamés à des résidents de certains ESLD ne reflétaient pas les coûts réels de l'hébergement et des repas. L'Alberta prétend que les frais varient selon l'époque, les régions, l'exploitant et le résident et, selon la thèse des demandeurs, aucun tort n'a été causé sauf s'il peut être démontré que les coûts de l'hébergement et des repas pour

for a particular resident did not reflect the actual costs of providing those services.

[100] I would reject Alberta's argument: The common questions certified by the judge at first instance ask whether the accommodation charges, *as a practice carried out on a class-wide basis*, resulted in unjust enrichment. The claim as pleaded does not require an individual assessment of the nexus between *specific* accommodation and meal charges in order to ground any potential liability to the class. The *Class Proceedings Act* provides sufficient remedial flexibility — by means of the aggregate assessment of damages (ss. 30-33) — to address any potential difficulties in assessing, awarding, and distributing damages.

[101] For these reasons, I find that a class proceeding remains the preferable procedure and I decline to decertify the action.

IV. Conclusion

[102] Based on the foregoing, I would allow the appeal in part and strike the pleas of breach of fiduciary duty, negligence and bad faith. Without endorsing them, I would leave untouched the claim of discrimination under s. 15(1) of the *Charter* and the plea of unjust enrichment, along with any other pleas which survived in the lower courts and were not appealed to this Court. Certification of the class and the unaffected common questions will remain, since the action, in truncated form, survives.

[103] Costs will be in the cause.

Appeal allowed in part.

Solicitor for the appellant: Attorney General of Alberta, Edmonton.

Solicitors for the respondents: Parlee McLaws, Edmonton.

un pensionnaire donné ne reflétaient pas les coûts réels de la prestation de ces services.

[100] Je suis d'avis de rejeter l'argument de l'Alberta. Les questions communes autorisées par la juge en première instance portaient sur la question de savoir si les frais d'hébergement, *à titre de pratique appliquée dans l'ensemble du groupe*, ont occasionné un enrichissement injustifié. L'allégation, telle que formulée, n'exige pas que l'on apprécie individuellement le lien entre des frais d'hébergement et de repas *précis* pour qu'il soit possible de conclure à une quelconque responsabilité envers le groupe. La *Class Proceedings Act* prévoit, en matière de réparation, suffisamment de souplesse — grâce à l'évaluation globale des dommages (art. 30-33) — pour régler tout problème éventuel dans l'appréciation, l'octroi et la répartition des dommages-intérêts.

[101] Pour ces motifs, je conclus qu'un recours collectif demeure la meilleure procédure et je refuse d'annuler le recours.

IV. Conclusion

[102] Compte tenu de ce qui précède, je suis d'avis d'accueillir le pourvoi en partie et de radier les allégations relatives au manquement à l'obligation fiduciaire, à la négligence et à la mauvaise foi. Sans les approuver, je laisserais telles quelles l'allégation relative à la discrimination fondée sur le par. 15(1) de la *Charte* et l'allégation relative à l'enrichissement injustifié, ainsi que toute autre allégation qui n'a pas été radiée par les tribunaux inférieurs et n'a pas été portée en appel devant notre Cour. La détermination de la composition du groupe et les questions communes qui n'ont pas été touchées subsisteront, puisque l'action, bien que tronquée, subsiste.

[103] Les dépens suivront l'issue de la cause.

Pourvoi accueilli en partie.

Procureur de l'appelante : Procureur général de l'Alberta, Edmonton.

Procureurs des intimés : Parlee McLaws, Edmonton.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Toronto.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Vancouver.

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Voegtlin v. Paprotka,*
2013 BCSC 1613

Date: 20130903
Docket: 42276
Registry: Kamloops

Between:

**Marilee A. Voegtlin, Yuet-Ngor Loke, 525675 Alberta Ltd.,
Anna Cobbledick, Arlene G. McDonald, Erdon Investments Inc.,
G.J.S.J. Investments Inc., 555636 Alberta Ltd., Kelterra Investments Ltd.,
Kristen Frischbutter, Martin E. Hurrell, Thomas F. Moslow, Vince Yip,
Bruce J. Nicol, Thracian Horse Ltd., Debbie Hanson,
Jeannine Chanel Champagne Saliken, John G. Owen,
WRW Enterprises Ltd., Robert Lederman, Jan Przysowa,
Danny Debolt, James G. McLachlan, Erika Field, Victor Gosyatnikov,
Donald Butcher, David Bruneau, Mari Narayan and Roshni Narayan**

Plaintiffs

And:

**Dean Paprotka, Bob Embury, 1186342 Alberta Ltd.,
Skyevue Development Corporation, Skyevue Operations Corp.
and Strategic West Vencap Corporation**

Defendants

And:

Gowling Lafleur Henderson LLP and Jeffrey W. Bright

Third Parties

And:

**Citrine Investments Services Ltd.,
Arlene (Rene) Burke and Bob Embury**

Third Parties

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment

Counsel for the Plaintiffs:	J. Hogg, Q.C. S.T. MacIsaac Q.C. E.D. Gagné
Counsel for the Defendants Dean Paprotka, 1186342 Alberta Ltd., Skyevue Development Corporation and Skyevue Operations Corp.	M.M. Kirwin
Counsel for the Third Parties Gowling Lafleur Henderson LLP and Jeffrey W. Bright:	C.A.B. Ferris L. Duke
Counsel for the Third Parties, Citrine Investments Services Ltd. and Arlene Burke:	S.T. MacIsaac, Q.C. E.D. Gagné
No other appearances	
Place and Dates of Hearing:	Kamloops, B.C. April 23-27, 30; May 1-4, 7-11; August 7-9, 2012
Place and Date of Judgment:	Kamloops, B.C. September 3, 2013

Introduction

[1] This action concerns investments made by each of the plaintiffs in commercial property located in downtown Kelowna, through their purchase of units in a limited partnership. Most of the plaintiffs individually subscribed to a Subscription Agreement in early 2008, binding themselves to a Limited Partnership Agreement (the "LPA"). At that time, the subject property was occupied by a motel and a parking lot. The limited partnership intended to acquire the property; rezone it; and redevelop it, through constructing residential condominium towers.

The Parties

[2] The limited partnership went by the name of Skyevue Development Limited Partnership ("SDLP"). The general partner, the defendant Skyevue Development Corporation ("SDC"), was controlled by the project developer, the defendant Dean Paprotka, and the promoter, the defendant and third party Bob Embury ("Embury"), through corporations owned by them. Another company owned by Embury, the defendant Strategic West VenCap Corporation ("Strategic West"), served as initial limited partner.

[3] In May 2007, prior to the incorporation of SDC, a company owned by Paprotka – the defendant 1186342 Alberta Ltd. ("118") – had acquired the right to purchase the property (structured as an acquisition of shares of the company that held title – referred to herein as the "Share Purchase Agreement"), at a price of $6.5 million. The closing date was subsequently extended to April 30, 2008.

[4] In early 2008, Paprotka and Embury agreed to finance the acquisition and development of the property through a limited partnership, and formed SDC and SDLP for that purpose. They agreed that 118 would assign its interest in the purchase agreement to a subsidiary of the SDLP, the defendant Skyevue Operations Corp. ("SOC"), purportedly for $2 million plus GST.

[5] Embury was responsible for raising funds from investors through the sale of limited partnership units. To that end, Strategic West retained the third party Citrine Investment Services Ltd. ("Citrine") to market the project to prospective investors.

[6] Most of the plaintiffs purchased their limited partnership units in SDLP through dealing with the third party Arlene Burke ("Burke"), the principal of Citrine. Some of the plaintiffs dealt with another Citrine sales agent, or directly with Strategic West. None of the plaintiffs had direct dealings with Paprotka or 118, at the material times.

[7] The plaintiff Kelterra Investments Ltd. ("Kelterra") is a company incorporated by Burke, for the purpose of enabling investors to participate in real estate projects under "family and friends" exemptions from prospectus requirements in securities legislation. Through having Kelterra participate in SDLP, and having investors buy shares in Kelterra, Burke was able to attract investors who were only able to purchase smaller unit shares than the minimum investment required of a limited partner.

[8] Embury resigned from involvement in the project in February 2009. He is now an undischarged bankrupt, and Strategic West has been struck from the Registry of Companies in Alberta. Those parties have not defended the action, and Embury did not testify at trial.

[9] Paprotka resigned from involvement in the project in October 2009.

[10] The third party Jeffrey Bright ("Bright"), a lawyer then in practice with the third party Gowling Lafleur Henderson LLP ("Gowlings"), was retained to advise Strategic West on the structure of the transaction. Paprotka and 118 have also alleged a solicitor-client relationship with Bright and Gowlings. The third-party claim for contribution and indemnity brought by Paprotka against Bright and Gowlings has been severed from the main action. Bright and Gowlings defended the main action, as did Paprotka, SDC and SOC.

The Claim

[11] The plaintiffs' investment has not gone according to plan. The motel still occupies the property, the property has not been rezoned, and there has been no progress made towards any redevelopment. The property is encumbered by two sizeable mortgages.

[12] The first mortgage charge was placed on title to secure a loan made by Reliant Capital Limited ("Reliant") in the amount of $2.8 million. It became necessary for SOC to borrow that money from Reliant in April 2008 to acquire the property for the limited partnership, because Embury was only able to raise approximately $4.5 million before the April 30, 2008 closing date. The plaintiffs do not take issue with the priority of that mortgage.

[13] The second mortgage charge, in favour of 118 and in the amount of $2.1 million (the "118 Mortgage"), was placed on title at the direction of Paprotka on May 29, 2008 to secure payment of the $2 million plus GST purportedly owed to 118 by SOC as consideration for the assignment of the Share Purchase Agreement.

[14] There is also a third mortgage, which was placed on title by SOC in favour of SDC, also on May 29, 2008, to secure repayment of funds advanced by SDLP.

[15] The 118 Mortgage is the focus of the present action; the plaintiffs seek an order for its discharge. They also seek the return of monies paid to Paprotka by SDC. And, they seek damages for breach of fiduciary duty on the part of Paprotka, in respect of the position of the 118 mortgage on title having prevented the limited partnership from refinancing other mortgage debt.

[16] The plaintiffs say that the structure of the investment vehicle, and the character of the investment, differed considerably from what they had been led to believe and from what they reasonably expected. Some of the elements of a claim in negligent misrepresentation were pleaded, but that cause of action was not pursued at trial. Instead, those misrepresentations are said to form the factual matrix

underlying a claim that fiduciary duties were owed to the investors by Paprotka, and were breached.

[17] The plaintiffs say that there were two key breaches of fiduciary duty.

[18] First, they say that the property was worth no more than the $6.5 million paid by SOC to the vendors under the Share Purchase Transaction. The $2 million which Paprotka claimed to be owed to 118 in exchange for assigning its interest in the Share Purchase Agreement was, they say, a secret profit, which was not disclosed to the plaintiffs in any meaningful fashion.

[19] Second, they say that Paprotka's registering of the 118 Mortgage was for the exclusive benefit of 118, and was of no benefit to the partnership. Paprotka had never disclosed to the investors his intention to register a mortgage that secured his purported interest in priority to the interests of the limited partners, and had no right to do so.

Facts

[20] The following facts have been established through the testimony of the witnesses, through the voluminous documents filed in evidence, and through an extensive Agreed Statement of Facts.

[21] The subject property is comprised of five lots of land. There are four contiguous lots on Abbott Street, then occupied by a Travelodge motel. Those four lots are separated by a laneway from the fifth lot, facing onto Leon Avenue, which was used as a parking lot. That laneway was owned by the City of Kelowna. The lots were owned by 540546 BC Ltd., a company owned by a family (the "Vendors").

[22] In or about late 2006, Paprotka learned that the property might be available for purchase. He and some associates in an unrelated joint venture development undertook some investigation of what building densities could be achieved. At that time, the City of Kelowna was considering a comprehensive rezoning of the downtown that would allow for greater densities than were currently available.

Paprotka's associates did some preliminary architectural studies, and had some discussions with the City's planning staff.

[23] In mid-December 2006, Paprotka submitted to the Vendors an offer to purchase the five lots for $6.5 million. Negotiations then ensued, both as to price and as to whether the transaction would be structured as a sale of shares, or a sale of land. The Vendors indicated that there were other interested potential buyers. Eventually, Paprotka and the Vendors settled on sale of the shares of 540546 BC Ltd. to 118 for $6.5 million, with a closing date of October 30, 2007 (the "Share Purchase Transaction"). A Share Purchase Agreement was signed on May 16, 2007. It provided for an immediate deposit of $10,000, and a further deposit of $490,000 upon completion of the purchaser's due diligence.

[24] Paprotka then set out to find sources of financing. There were discussions with a number of parties, some as potential investors and others as potential purchasers on a re-sale. Paprotka was looking to sell a majority interest in development of the property for up to $14 million, while maintaining a minority interest. One party provided a signed letter of intent in June 2007, under which a two-thirds interest in development of the property would be acquired for $12 million. Another party submitted a proposed form of letter of intent in August 2007, under which the property would be acquired for a price of up to $12 million, and not less than $9 million. Nothing came of these discussions, and in October 2008 Paprotka was able to obtain from the Vendors an extension of the closing date, to April 30, 2008, at a cost of $120,000.

[25] In January 2008, Paprotka was put in touch with Embury, and the broad terms of an agreement fell into place relatively quickly, within the space of a few weeks. It was agreed that companies owned by Paprotka and Embury would form a joint venture. The property would be acquired by the joint venture for $8.5 million, a price which Paprotka had determined, through discussions with his associates, reflected its actual value. Financing would be raised through selling units in a limited partnership.

[26] Strategic West engaged the services of Citrine to market the project. Citrine was, at the time, working with Strategic West on two other projects, a development in Kelowna known as Skyreach, and a development in Cache Creek known as Golden Vine. By the end of January 2008 Citrine and Strategic West began to seek potential investors in SDLP through advertising. Some specifics of their marketing activities are discussed below.

[27] By way of a letter agreement signed by Embury and Paprotka, with an effective date of February 15, 2008, Strategic West and 118 set out "Commitment Terms" under which Strategic West would proceed to raise funds from limited partners. Strategic West committed to raising $4 million by February 28, an additional $3 million by April 15, and an additional $2 million by May 30; in all, Strategic West would be obligated to make its best efforts to raising a total of at least $9 million by May 30, 2008. Of those monies, $6.5 million plus closing costs would be applied on April 30, 2008 to purchase of the shares of the company that owned the property, and a further $2 million would be paid to 118 in consideration for bringing the project to Strategic West.

The Payne Appraisal

[28] As part of his due diligence, before committing to the project Embury retained Mr. Ernest Payne of Grover, Elliott & Co. Ltd. to appraise the property. Payne's appraisal report, dated February 5, 2008, gave an estimated value of $8.25 million as of January 28, 2008. This appraisal report was not admitted into evidence as an expert report for the proof of the opinions stated therein, nor for the proof of the truth or accuracy of factual statements set out therein. The document itself is, however, in evidence, and its contents therefore serve to provide context to any decisions made by Paprotka and Embury premised on an understanding of the property's value.

[29] Payne was asked by Embury to base his appraisal on the assumption that the five lots could be assembled as one contiguous parcel (i.e. that the laneway separating the four Abbott Street lots from the Leon Avenue parking lot could be

purchased from the City). The rationale for this assumption was stated by Payne in his report as follows:

> The municipal planning department has confirmed that their current recommendation to the municipal council is to allow owners and developers to purchase municipally owned land within the downtown redevelopment area … at market value to facilitate assembly and development of lands within the area under newly proposed comprehensive development zoning currently contemplated for this downtown area. Further, the municipal planning department has informed us that their recommendation to council is that sales of municipal land within this area will be allowed only if proposed development is consistent with the newly contemplated land use controls …
>
> Given that there is a reasonable future possibility to acquire the rear lane lands at fair market value in order to assemble and develop the subject lands as one under anticipated updated land use controls, it appears to be reasonable to assume that the lands are assembled as one. Given that the laneway would be acquired at fair market value at the time, the incorporation of these municipal lands would not add, nor subtract net value to the subject parcel …
>
> Therefore, for the purposes of this appraisal, we have assumed that the subject lands are assembled and available for development as a single contiguous land package and ignored the value of the separating lane, which would be required in order to accomplish this contiguous assembly. If, in the future the municipality does not approve the proposed zoning changes, or the municipal position regarding the acquisition of municipal lands changes materially from the current position, then the possibility of assembly could be reduced or eliminated, or the cost to assemble the subject lands could increase significantly above market value, thus invalidating this assumption …

[30] Payne also assumed that current market pricing was based on the assumption that rezoning would proceed:

> Currently, market participants are aware of the municipal initiatives in the area and the potential zoning changes, therefore recent sales rates reflect the anticipation of these potential changes. Should the municipality not proceed with the proposed zoning changes, or should the changes vary significantly from the currently stated plans, the market value of the property could vary significantly from this estimate. This appraisal assumes that market participants continue to perceive a reasonable and imminent probability of rezoning of properties in the area to allow for high-rise development yielding densities in the order of at least a 5.0 FSR [floor space ratio]. If the municipality changes their plans considerably or eliminates the probability of improved zoning regulations, the market values estimates contained herein would change significantly.

[31] Payne considered the "highest and best use" of the property to be:

> … for holding purposes pending rezoning approval and subsequent re-development, pursuant to the applicable land use controls.

[32] Payne arrived at his valuation through following the Direct Comparison Approach, comparing the subject property to the sales or listing prices of ten comparable "Index" properties. "Index 10", a single lot in the same block of Abbott Street, was deemed to be the most comparable. It had sold for $2 million in August 2007, equivalent to $277.78 per square foot of land and $55.56 per square foot of estimated buildable area. For direct comparison purposes, those values would be have to downgraded somewhat to reflect the superior holding income, proportionally, of Index 10; but such downgrading would be offset to a certain extent by a time adjustment, reflecting increases in value since Index 10 had sold, and reflecting the increased density afforded if the subject lots were assembled contiguously. Payne therefore felt the subject property would be valued at or near Index 10's rate of $278/sq. ft.

[33] He concluded that at a rate of $275, the combined 30,000 sq. ft. of the subject five lots, at a floor space ratio ("FSR") of 5.0, and if assembled contiguously, would have a value of $8.25 million.

[34] As a check on this figure, Payne also considered the prices per buildable square foot of the Index properties, in particular one, Index 4, that was closely comparable. Its buildable rate was $57.80. Payne believed that the buildable rate of the subject property would be in the range of $50 to $60 per square foot. The mid-point of that range, $55, would also yield a value of $8.25 million.

[35] At Embury's request, Payne subsequently prepared an addendum letter, dated February 14, 2008, which set out market values based on two alternative assumptions: that rezoning would allow FSR's of either 6.0, or 7.0. Payne noted that with increases in density, there is typically a decrease in the buildable rate per square foot. On that basis, he stated that an FSR of 6.0 or 7.0 would lead, respectively, to a buildable rate of $50 or $45 per square foot, yielding alternative values of either $9 million or $9.45 million.

Structure of the Property Acquisition and the LP

[36] By mid-February 2008, the structure of the property acquisition had been more or less finalized. It would proceed in seven steps:

1. A limited partnership – SDLP, consisting of a general partner, SDC, owned beneficially by Embury and Paprotka, and the limited partners – would lend $8.5 million to a wholly-owned subsidiary corporation, SPC;

2. SPC would lend $8.5 million to its wholly-owned subsidiary, SOC;

3. 118 would assign the Share Purchase Agreement to SOC, in return for which,

4. SOC would pay 118 the sum of $2 million plus GST;

5. SOC would pay $6.5 million to the Vendors for the shares of 540546;

6. SOC and 540546 would amalgamate; and

7. SOC would sell the land, buildings and parking lot to SPC, retaining the Travelodge franchise agreement, and would then rent the property from SPC and continue to run the Travelodge until redevelopment commenced.

[37] Accordingly, on February 19, 2008, SDC was incorporated, with Paprotka and Embury serving as directors; and, SDC as general partner, and Strategic West as initial limited partner, formed SDLP under the Alberta *Partnership Act*, RSA 2000, c P-3.

[38] A meeting was held at Gowlings' offices in Calgary on that same date, February 19, 2008, to review the structure of the limited partnership. In attendance were Bright and one of his colleagues from Gowlings; Embury, with a colleague from Strategic West; and Burke, with a colleague from Citrine. One of the purposes of the meeting was to ensure that the sales agents properly understood the nature of the investment, so that it could be accurately described to potential investors.

[39] Burke had been provided in advance of the February 19 meeting with copies of the three documents that were to be used in selling units to investors: the Subscription Agreement, the Limited Partnership Agreement, and a document entitled "Term Sheet". She testified that she did not read any of the documents prior to the meeting.

[40] Bright reviewed each of the documents in turn:

Partnership Documents

The Term Sheet

[41] The Term Sheet, on the letterhead of Strategic West, began with a disclaimer, warning that it was not a legally binding document:

> This term sheet is a summary of the terms and conditions contained in the Limited Partnership Agreement and the Subscription Agreement. The terms herein are not legally binding and are designed to provide general information only with respect to the terms and conditions contained in the formal agreements.

[42] It then disclosed the main features of the investment [with underlining added for emphasis]:

> **Overview**: General Partner seeks Limited Partners to form a limited partnership to purchase land and build a mixed use commercial and residential highrise tower in Kelowna near the waterfront, opposite a city park.
>
> . . .
>
> **Offering**: Limited Partnership Units
>
> Term: The limited partnership will be in effect through the construction of the tower, estimated at 36 months.
>
> **Investors requirement**: Must be an accredited investor to participate.
>
> . . .
>
> **Position**: The position is an ownership equity position through a limited partnership. Investors purchase partnership units that give the investor beneficial ownership of the property (land) in proportion to their investment via a wholly owned subsidiary corporation of the partnership.
>
> . . .
>
> **ROI**: Limited Partners share in the net income of the partnership, with maximum returns per annum of either 15%, 16%, 18% or 20%, depending on the class of units owned.

> **Investor Payments**: Quarterly distributions of partnership net income
>
> . . .
>
> **Use of Investor Funds**: Limited Partners' capital investment will be used at the discretion of the General Partner acting in the best interests of the partnership, according to law and pursuant to the terms of the partnership agreement.
>
> > Phase 1 - Purchase: Acquisition and assembly of the land and related business.
> >
> > Phase 2 - Development: Working capital to increase the land value through applications, rezoning and the design of a unique unprecedented mixed use high-rise building.
> >
> > Investor funds are used to purchase the property, increase the value of the property through rezoning and applications, pay for all development of the project and ensure all investors receive value for their investment. In some cases investor funds may be used to buy out investors who wish to leave the partnership.
>
> **Offering Size**: Total $12,000.000 (CAD)
> Phase 1: $8,500,000 (CAD), Phase 2: $3,500,000 (CAD)
> Minimum Investment $100,000 (CAD)

[43] Paprotka's planned $2 million profit on the acquisition of the property - which he was to obtain through assigning to the limited partnership, SDLP, 118's right to purchase the property - was described in the Term Sheet as follows:

> **Related Party**: Part of the acquisition cost of the property involves a significant finder's fee payment to a party which is now a related party pursuant to its involvement in the partnership as a co-owner of the General Partner. This payment reflects the equity present in the land as of date of purchase.

[44] The decision to characterize Paprotka's profit as a finder's fee had been made on the basis of advice from Paprotka's accountants. No reference was made to this profit in either the Subscription Agreement or the LPA. Draft copies of the Subscription Agreement and the LPA had been exchanged amongst Paprotka, Embury and Bright during the first two weeks of February, and on the evening of February 17 Embury wrote an email to Bright – cc'd to Paprotka – providing his comments on the latest draft. Embury stated:

> We need to disclose Deans spread of 2M (land price vs total price paid) and it does not appear to be in the sub agreement.

Later that night Bright replied, enclosing a draft of the Term Sheet. With respect to the finder's fee, he stated:

> this was to be in the term sheet I thought.

[45] In that February 17 draft of the Term Sheet, the "Related Party" paragraph did not include the final sentence indicating that the finder's fee reflected the equity in the land. That sentence was added in a revised draft Bright prepared on February 18, and was included in the Term Sheet reviewed at the meeting.

[46] No one recalls the finder's fee having been discussed at the February 19 meeting, in any detail. As noted above, Burke testified that she did not read any of the documents prior to the meeting.

[47] The Term Sheet also stated that the general partner would be authorized to mortgage the property to the partnership:

> **Susidiary**: The property will be acquired through a wholly owned subsidiary of the partnership. This subsidiary may grant a mortgage on the property to the partnership to protect the investment, which mortgage may be subordinated to construction or bank financing, or removed if necessary, at the sole discretion of the General Partner.

There was no obligation to place such a mortgage.

[48] The Term Sheet concluded with a warning:

> This Offering is suitable only to those investors who are willing to rely solely on the management of the Partnership and the General Partner and to risk a total loss of their entire investment. The Partnership does not currently have any assets, the investment in the units is speculative and involves a high degree of risk and there are certain risks inherent in any real estate based investment. This is a risk investment - there are no guarantees that the investment amounts will be repaid, or that the investment will yield any return. The reward for accepting these potential risks is the potential for the rate of return described.

The Subscription Agreement

[49] Each plaintiff was to sign a Subscription Agreement, agreeing to subscribe to Class A limited partnership units in SDLP. The Subscription Agreement defined the "Offering" as:

> … issuance and sale by the Partnership of up to an aggregate of 1,200 Class A, B, C, D and E Units.

It will be observed that the sale of 1,200 units at $10,000 each would raise $12 million, which was the total size of the Offering as described in the Term Sheet. The Subscription Agreement specifically provided, however, that the General Partner might adjust the size of the Offering in its sole discretion, without further notice to the subscriber.

[50] There was no requirement that the investor funds be held in escrow until the entire $8.5 million necessary for Phase 1 – "acquisition and assembly of the land and related business" – had been raised, nor that the funds be returned if $8.5 million could not be raised.

[51] The Subscription Agreement also set out a number of detailed representations and warranties made by the subscriber to the limited partnership, SDLP, and to the general partner, SDC, including that apart from the Term Sheet, the Limited Partnership Agreement, and certain financial documents, the subscriber was not relying on verbal or written representations; that the subscriber had such knowledge, or had received independent advice, in financial, business and legal affairs as to be capable of evaluating the merits and risks of the investment, and was able to bear the risk of loss of the entire investment; and that the subscriber was purchasing the units pursuant to an exemption from the governing prospectus requirement.

The Limited Partnership Agreement

[52] The LPA included the following terms:

> 2.2 Business: The business and purposes of the Partnership shall be to own, operate, develop, sell, subdivide or lease portions of the development comprising the Property in a manner intended to maximize returns and value of the Units and to conduct such other activities as may be necessary or incidental to the foregoing all on the terms and conditions set forth in this Agreement..
>
> 3.9 Borrowing from Outside Sources: After contributed sums have been accounted for and the General Partner determines that the Partnership

requires added capital to finance development of the Property, the General Partner shall exercise its best efforts to borrow from outside sources, from time to time, all sums of money required for such purposes.

6.1 Management of the Partnership: The General Partner shall, subject to this Agreement, and in a reasonable and prudent manner, acting in the best interests of the Partnership, have exclusive authority to manage, control, administer and operate the business and affairs of the Partnership …

6.2 Authority of the General Partner: In addition to the powers and authorities possessed by the General Partner pursuant to the Partnership Act, the General Partner is hereby granted the right, power and authority to do or to cause to be done on behalf of the Partnership all things which, in its sole judgment, are necessary, proper or desirable to carry on the business and purposes of the Partnership referred to in Section 2.2, including without limitation:

> (a) to borrow money in accordance with Section 3.9 and as security therefore to mortgage all or any part of the Property …

6.3 Duty of Care: The General Partner shall manage and operate the Partnership and the assets and undertaking thereof in a manner which would be considered reasonable and prudent in the management of like undertakings in Canada.

6.5 Transactions Involving Affiliates: The validity of any transaction, agreement or payment involving the Partnership and any Affiliate otherwise permitted by the terms of this shall not be affected by reason of the relationship between the General Partner and such Affiliate or the approval of the said transaction agreement or payment by directors of the General Partner all or some of whom are officers or directors of or are otherwise interested in or related to such Affiliate.

6.6 Safekeeping of Assets: The General Partner shall have a fiduciary responsibility for the safekeeping and use of all funds and assets of the Partnership, whether or not in its immediate possession or control, and the General Partner shall not employ or permit another to employ such funds or assets in any manner except for the exclusive benefit of the Partnership.

6.8 Restrictions on the General Partner: The General Partner shall not:

(a) be paid for providing to the Partnership any services in addition to those required of it under the terms of this Agreement unless the charges of the General Partner to the Partnership for such additional services are less than or equal to the best available competitive rates for services of a comparable quality for such services from persons who are in the business of providing such services …

6.10 Employment of Affiliates: Affiliate(s) may be employed by or retained by the Partnership to provide goods or services to the Partnership.

> 6.11 Conflict of Interest: The Limited Partners acknowledge that the General Partner's associates, affiliates and their respective directors and officers may be and are permitted to be engaged in and continue in other businesses in which the Partnership will not have an interest and which may be competitive with the activities of the Partnership and, without limitation, the General Partner's associates, affiliates and their respective directors and officers may be and are permitted to act as a partner, shareholder, director, officer, joint venturer, advisor or in any other capacity or role whatsoever of, with or to other entities, including limited partnerships, which may be engaged in all or some of the aspects of the business of the Partnership and may be in competition with the Partnership.
>
> 6.12 Consent to Conflict: Subject to the General Partner's express obligations hereunder, the Limited Partners agree that the activities and facts as set forth in Section 6.11, shall not constitute a conflict of interest or breach of fiduciary duty to the Partnership or the Limited Partners, the Limited Partners hereby consent to such activities and the Limited Partners waive, relinquish and renounce any right to participate in, and any other claim whatsoever with respect to, any such activities. …

[53] The February 19 meeting lasted between one and one-and-a-half hours. There are some conflicts in the evidence between Bright and Burke as to what was discussed. On the whole, I prefer the evidence of Bright. Burke's recall of events was demonstrated through cross-examination to be poor, and she contradicted herself on numerous points. The impression I was left with was that she left the February 19 meeting without a clear understanding of the limited partnership, and that she was in over her head. In particular, I accept Bright's testimony that he emphasized to the meeting's participants that this was not an interest-bearing investment with a guaranteed or fixed rate of return, and that there was the potential for the limited partners to earn income, but it should not be described to them as interest. There could potentially be no net income earned, and therefore no return to the investors.

[54] I also accept Bright's evidence that the Term Sheet was discussed, though not the finder's fee specifically. Burke did not ask any questions about the finder's fee. She knew that $8.5 million was to be raised for acquisition of the property, and she knew from her conversations with Embury that the property was being sold for $6.5 million, but she did not "put two and two together" and realize that the finder's fee was $2 million.

[55] All of those who attended the February 19 meeting were emailed copies of the documents afterwards by Bright, whose covering email stated that the documents were being provided for their use. It was clearly intended that the Term Sheet would be used in describing the project to prospective limited partnership investors.

The Sale of Limited Partnership Units

[56] Paprotka had no prior experience with limited partnerships. It appears that the idea of raising financing for this project through the sale of limited partnerships had been raised sometime after Paprotka and Embury had initiated their discussions, and originated either with Bright, who was initially retained to advise Strategic West, or with accountants at PriceWaterhouse Coopers, who advised Paprotka on the tax planning implications of the venture. Citrine's previous experience with Embury had consisted of promoting deals in which investor loans were secured with mortgages, although Burke testified that she had had some prior exposure to limited partnerships.

[57] Most of the plaintiff investors – either the individual plaintiffs or their spouses, or the individuals behind sole-shareholder corporate plaintiffs – testified at trial. There were some broad points of commonality in their evidence as to how they became involved in the project. As no claim of misrepresentation is being made, no findings need be made as to their reliance on statements made by Citrine or Strategic West in the marketing of the limited partnership units. However, a brief overview of some of the points of commonality in their evidence is germane to an understanding of the "factual matrix" which, according to the plaintiffs, underlies their claim of breach of fiduciary duty.

[58] As noted above, Citrine and Strategic West had begun to seek potential investors through advertising the project by the end of January 2008, prior to the structure of the limited partnership having been finalized. Many of the plaintiffs learned of the project through attending a marketing seminar at which Burke made a presentation. Others were attracted through advertising, and obtained further

information through telephone calls to Strategic West. Some learned through word of mouth. Some investors were mailed copies of promotional materials and documents for their review and signature. Others met with Burke, or another sales representative of Citrine, in their own homes.

[59] Before the end of January 2008, both Strategic West and Citrine had prepared promotional material (brochures describing the project, or sheets setting out "financial highlights") in which it was stated that the investors would enjoy a "fixed rate of return", and would have security in the form of a "first mortgage position on the property".

[60] In an email dated January 31, 2008, addressed to Burke and to a Ms. Moeller, one of Strategic West's sales staff, Embury sought to clarify the mortgage security. The Subject of the email was "Clarity of the raise and security". Embury wrote:

> The $8.5M pays for the land and associated costs, but we will have to raise another (projected) $4 million after this (with 6 to 8 months) to take the property through rezone and applications making the total LP participation projected at 12M. So the initial raise is 8.5 with 4 to follow.
>
> In addition the security is through the LP and is described in this manner. "[T]hrough the LP's ownership (units) each of the investors is an owner of the land. The ownership (investor) will have an interest in that mortgage by virtue of being an owner of the LP.
>
> In reality, the LP owns the property and if something were to happen and the project goes south, the "owners" would act to sell the land or develop the land.

[61] As she came to learn more of the terms of the deal, Burke updated her "financial highlights" sheet, including deleting the reference to a first position mortgage, and replacing it with a provision that the security would be "LP ownership of the property". On the evening of February 19, following the meeting at Gowlings, she sent an email to prospects she had met at a tradeshow earlier that month, providing highlights of the deal. In that email, she described the security being offered as "ownership on the property by the Limited Partnership". Burke acknowledged in her testimony that she understood the structure of the deal had changed since she and Embury had had their first discussions. However, she did

nothing to draw those changes to the attention of any prospective investors who might have been relying on the statements made in the earlier versions of her marketing material. Even though she understood that the security being offered was ownership, and not a loan, based on the conversations she had had with Embury in January she continued to believe that the investors would have "ownership equity with a mortgage". She conceded that the partnership documents contained no requirement for any such mortgage security.

[62] Burke agreed that Bright had said, during the February 19 meeting, that the sales agents were not to refer to the limited partners' right to receive distributions of net income as "interest". They were instead to use the phrase "distribution income". Notwithstanding Bright's clear instruction, her email to prospects sent that evening referred to:

> 18% per annum fixed return ***offered in this first closing only***, interest paid quarterly.
>
> [Emphasis in original]

Her other marketing materials continued to refer to a fixed rate of return.

[63] There is documentary evidence of Burke having told one investor in March that the investors' funds would be held in escrow "until ALL the money is raised". Burke testified that she had been told by Embury that the funds would be held in escrow until the entire $8.5 million was raised. There was, however, as noted above, no provision to that effect in the LPA or the Subscription Agreement. Given my concerns with Burke's level of comprehension of the deal's structure, I do not accept her uncorroborated evidence on this point. Even if Embury had described that as a feature of the investment in his initial discussions with Burke, she ought to have understood that the final structure of the investment made no such provision. And even if there had been such discussions between Embury and Burke, there is no evidence that Paprotka was ever party to them, and no evidence that Paprotka was ever aware of any such representation having been made to potential investors.

[64] Each of the plaintiff investors subscribed to and was issued units in SDLP. The following table sets forth in chronological order the name of each plaintiff investor who subscribed for Class "A" Units or Class "B" Units; the date on which each subscription agreement was signed, or the date on which funds were transferred; the amount invested; and a running aggregate total of all of the investments as of the dates of each subscription. Most plaintiffs purchased only the required minimum investment of 10 Class A units, at a total cost of $100,000. (Why it was that a few investors were permitted to purchase less than the minimum number was not explained.)

Date of Subscription Agreement	**Name of Plaintiff Investor**	**Amount Invested by Investor**	**Total Amount Invested to Date**
February 20th, 2008	Kristen Frischbutter	$100,000	$100,000
February 21st, 2008	Erdon Investments Ltd. (Ernie Lohrenz)	$200,000	$300,000
February 21st, 2008	Erika Field	$100,000	$400,000
February 22nd, 2008	Jan Pryzsowa	$130,000	$530,000
February 22nd, 2008	Robert Lederman	$100,000	$630,000
February 26th 2008	G.J.S.J. Investments Inc. (Gordon Glass)	$150,000	$780,000
February 26th, 2008	Martin E. Hurrell	$50,000	$830,000
February 26th, 2008	Arlene G. McDonald	$50,000	$880,000

February 27th, 2008	555636 Alberta Ltd. (Ivan Houde)	$200,000	$1,080,000
February 27th, 2008	525675 Alberta Ltd. (Mark Morrill)	$200,000	$1,280,000
Undated, unsigned (Funds wired February 25th, 2008)	James McLachlan	$500,000	$1,780,000
February 28th, 2008	Thomas Moslow	$100,000	$1,880,000
Undated, unsigned (Bank draft dated April 21st, 2008)	Jeannine Saliken	$100,000	$1,980,000
March 1st, 2008	Anna Cobbledick	$100,000	$2,080,000
March 1st, 2008	Kelterra Investments	$250,000	$2,330,000
March 1st, 2008	David A. Bruneau	$100,000	$2,430,000
March 4th, 2008	Mari & Roshi Narayan	$100,000	$2,530,000
March 4th, 2088	Vincent Yip	$100,000	$2,630,000
April 10th, 2008	WRW Enterprises Ltd. (Waldemar R. Walters)	$80,000	$2,710,000
April 10th, 2008	Yuet-Ngor Loke	$200,000	$2,910,000
April 14th, 2008	John G. Owen	$200,000	$3,110,000
April 15th, 2008	Bruce J. Nicol	$150,000	$3,260,000

April 16th, 2008	Debbie Hanson	$100,000	$3,360,000
Undated, unsigned; (Funds wired April 15th, 2008)	Danny & Cheryl DeBolt	$150,000	$3,510,000
April 18th, 2008	Thracian Horse Ltd. (Bryan Korolischuk)	$100,000	$3,610,000
April 18th, 2008	Kelterra Investments	$600,000	$4,210,000
April 23rd, 2008	Marilee Voegtlin	$100,000	$4,310,000
Undated, unsigned (Funds wired May 2nd, 2008)	Donald Butcher	$150,000	$4,460,000
Undated (Funds wired July 14th, 2008)	Victor Gosyatnikov (Pronin)	$70,000	$4,530,000
TOTAL:			**$4,530,000**

[65] About two-thirds of the plaintiffs purchased their units through Citrine, one-third through Strategic West.

[66] Almost none of the plaintiffs were properly accredited as sophisticated investors. They all initialled the Accredited Investor Certificate attached to the Subscription Agreement, warranting that they fell within one of accredited classes allowing for sale without a prospectus, but few of them who claimed to do so actually met the financial asset test.

[67] Most of the plaintiffs admitted that they did not review the LPA and the Subscription Agreement in any detail.

[68] All of the plaintiffs testified that they were attracted to the investment by the high rate of return offered. Most of the plaintiffs believed they would receive fixed or guaranteed quarterly payments. None of them questioned how a Travelodge could generate annual returns of 18% on $8 million. Burke did not discuss this with her investors; she acknowledged that she had no idea how such a return could be generated. A minority of the plaintiffs understood that 18% to 20% per annum was the maximum return they could expect.

[69] Some of the plaintiffs were attracted by the option of a buy-out after a full year of participation. No one, including Burke, seems to have turned their mind to the question of how they could be bought out if the partnership did not have sufficient means to do so.

[70] Most of the plaintiffs who purchased their units through Citrine were not given a copy of the Term Sheet. Although Burke acknowledged that the Term Sheet contained important information that was not disclosed in the LPA and the Subscription Agreement, she testified that she did not pay any attention to it because it was not legally binding.

[71] Shown, in cross-examination, a copy of a Strategic West brochure for the project which indicated that investors would receive "Quarterly Distribution of Net Income", and that readers should "*Please refer to the term sheet for further information*", Burke said that she had no idea that was how the project was being marketed.

[72] Those plaintiffs who were given a copy of the Term Sheet agreed that they understood a finder's fee was to be paid, and that they asked no questions concerning it. Most agreed with the concept of a finder's fee, but voiced objection in this case as to the reasonableness of the amount.

Closing the Share Purchase

[73] The closing of the Share Purchase Transaction was finalized on May 1, 2008. It proceeded much as planned, with three major changes, two of which are relevant to this claim.

[74] The two significant changes were in respect of funding the purchase. Paprotka and Embury, as directors of SPC, signed resolutions effective April 30, authorizing SPC to borrow $8.5 million from SDLP, and to provide SDLP with security in the form of a mortgage over the property securing a fixed charge, and a general security agreement over the assets of SPC. On the same date, SDLP as lender and SPC as borrower entered into a loan agreement, under which SDLP would lend $8.5 million, secured by the aforementioned security.

[75] However, as can be seen from the table set out above, SDLP had not raised sufficient funds by April 30, 2008 to fund the loan. In anticipation of this shortfall, Embury had agreed with Paprotka that Strategic West would be responsible for obtaining bridge financing, allowing the closing to proceed as scheduled. Embury continued to reassure Paprotka that the necessary capital would be secured from investors, and that financing was only a short-term measure. Accordingly, 540546 (which later became SOC by amalgamation) borrowed $2.8 million from Reliant, and granted a mortgage to secure repayment, at an interest rate of 12% per annum with a maturity date of May 1, 2009. These mortgage loan funds were transferred into Gowlings' trust account, and, at least in part, were used to fund the share purchase.

[76] The second consequence of the shortfall in investor participation was that there were no funds available to pay the $2 million (plus GST) finder's fee. SOC and 118 signed an assignment agreement, dated April 30, in which 118's interest in the Share Purchase Agreement was assigned. In fact, as will be discussed below, to different assignments were executed. Recognizing that no funds would be immediately available, Paprotka had instructed Bright that a mortgage securing 118's entitlement to the finder's fee would have to be prepared. The circumstances surrounding the conception, preparation and execution of that mortgage are discussed in the next section of these reasons.

[77] Prior to the April 30, 2008 closing, Bright, Embury and Paprotka had exchanged drafts of the closing documents. Among these were two different forms of the assignment of 118's interest. One of these forms stated that the consideration for the assignment was "payment of the sum of $10.00, the receipt and sufficiency of which is hereby acknowledged"; in the other form, the figure used was $2,000,000. The plaintiffs attempted to make much of this discrepancy in their argument. I therefore review what transpired in some detail.

[78] On the evening of April 29, Bright emailed revised documents to Paprotka for his signature, cc'd to Embury. There were a number of matters dealt with in the back-and-forth that then took place, and the following description is only with respect to what transpired regarding the assignment:

1. At 5:32 pm, Paprotka emailed Bright, noting that the assignment and the corporate resolution authorizing both stated that the consideration was $10.00, and that instead it should be stated as $2 million plus GST.

2. At 8:29 pm, Bright replied:

> is there any reason why we might not want to let the vendor know the amount? (we could destroy the $10 one post close)

2. Paprotka wrote back at 8:53 pm:

> The vendor does not need to know … do you have to show him the resolutions and the assignment ag … if you do then why not prepare the post closing resolutions and assignment for signing at the same time we sign the pre-closing resolution and assignment.

3. At 9:36 pm, Bright replied:

> they need to see the assignment agreement - the resolutions don't mention the amount

4. At 9:44 pm, Paprotka instructed Bright:

> Then do the pre and post closing assignments/resolutions for signing now.

5. One minute later, at 9:45 pm, Bright wrote back:

> attached the revised docs for you to sign, with the assignment listing $2M - you could sign it or the $10 one - I think at this stage you probably have

> comfort that we can amend that after closing if you don't want the vendor to know the amount.

6. At 1:15 am on April 30, Paprotka forward the signed $2 million assignment, confirming that the Vendor was not to see it. He asked if it was necessary to sign the $2 million assignment.

7. At 8:46 am on April 30, Bright advised that the Vendor would have to see an assignment.

8. Paprotka forwarded a signed pre-closing assignment (the $10 assignment), at 9:44 am, confirming that it would be replaced by the post-closing assignment he had emailed the previous night.

[79] The $10.00 assignment was used in closing with the Vendors.

[80] The third difference between the original conception of the closing, and its final form, was that the seventh step of SOC selling the land to SPC did not take place. Instead, to avoid payment of property transfer tax, SOC continued to hold title to the property in trust for SPC.

Registration of the 118 Mortgage

[81] Although no claim is being made in misrepresentation, the plaintiffs say that the circumstances under which 118 obtained its mortgage over the property are germane to an understanding of how Paprotka breached his fiduciary obligation. I will therefore set those circumstances out in some detail.

[82] Paprotka had been aware from the early stages of his dealings with Embury that Embury intended to attract investors to project through indicating that there was security provided by way of a first mortgage. In an email to Embury dated January 15, 2008, Paprotka acknowledged that upon Embury fulfilling his obligation to raise $8.5 million from investors, the investors would be granted a first mortgage, which would in due course be postponed to construction financing, at an interest rate to be agreed upon by Paprotka and Embury. There was a further exchange of emails between them on January 30, concerning Embury's deadlines for raising funds ($6.5

million plus closing costs by April 30, and $12 million by August 30); Paprotka expressed his preference not to go down the road of borrowing money to make up any shortfall, if possible, as it could complicate the security position to be offered to the investors.

[83] Paprotka again confirmed the investors' security interest in an email sent to Embury and Bright on February 17, two days before the meeting held at Gowlings' offices at which Burke was in attendance. Paprotka wrote:

> 6. [T]he LP's must be passive investors with no guarantee of repayment of original capital and/or unit yields…my understanding is their security will be by way of a first charge on the lands subject to any financing we require to assist in purchasing the lands and/or redeveloping any part of same …

[84] Paprotka wrote to Embury on March 3, 2008, suggesting the framework for a "hard deal" between them. He noted that $2.8 million was being held in trust unconditionally, which was to be applied towards purchase of the property. Strategic West would be responsible for obtaining the balance of the funds necessary to close; if they were unable to raise the requisite funds, the property could be offered as security, with Strategic West being responsible for obtaining and servicing the mortgage loan. Paprotka specified that 118 was to be granted security for $2 million, "*behind* the investors principal and interest payments and any bank financing that is used to assist in acquiring the property" [emphasis added].

[85] Embury and Paprotka then entered into a formal "Confirmation Agreement", in the form of a letter dated March 6, 2008. They agreed that the Commitment Terms of February 15, 2008 were legally binding. The Confirmation Agreement stated:

> 7. 1186342 Alberta Ltd. will be granted security against the property for $2M, ranking behind the limited partners and any bank financing that is used to assist in acquiring the property.

[86] Paprotka referred to this clause of the Confirmation Agreement in an email he sent to Bright on the morning of April 27, 2008, which set out a few preliminary comments regarding the closing agenda. Paprotka wrote:

> 4. What about the Mortgage to be registered against the lands and GSA in favor Deanco subject to Reliant Capital and the LP in the amount of 2M pursuant to our letter agreement dated March 6/08?

[87] In one of Paprotka's covering emails to Bright sent on the evening of April 29, 2008, transmitting the signed closing documents, he made several queries, including the following (referring to 118 as "Deanco"):

> Corp resolution regarding 2M mortgage granted in favor of Deanco as per our agreement…mortgage also need to be signed and registered concurrently with the transfer docs and other securities as per our agreement.

Beyond asserting that the mortgage was to be registered "concurrently", Paprotka said nothing else at that time about priorities.

[88] In early May, following the closing, Embury and Paprotka had discussions regarding the timing of payment to Citrine and Strategic West's sales staff of commissions owed to them, and of payment to 118 of its $2 million. Paprotka sent a proposal to Embury on May 12 in which he stated:

> Gowlings was to have registered the 2M owing to Deanco as a second mortgage only behind Reliant. Deanco to receive 10% simple interest per year on outstanding monies owed from monies raised by SW. [A]n amending agreement will have to be registered at land titles to reflect the interest and the term. [W]e can put a 6mth term on payment of the balance of the monies owing to Deanco. Gowlings has to be told about this to ensure mortgage registered properly.

[89] Embury's reply of the same date did not take exception to this suggestion.

[90] This is the first reference in the documents to the 118 Mortgage being registered in second place, immediately behind the Reliant Mortgage.

[91] Notwithstanding Paprotka's assertion of what Gowlings was to have done, there is no evidence that Gowlings had previously been given any specific instructions as to the ordering of the mortgage priorities. Furthermore, the terms of 118's mortgage had not yet been agreed upon between Embury and Paprotka, prior to closing, so no registration would have been possible.

[92] The two of them discussed matters again the morning of May 13, and Paprotka summarized their conversation in an email sent to Embury that afternoon. He confirmed that going forward, 118 would be paid 70% of all monies raised by Strategic West and its affiliates, until it had been paid $2 million plus GST (the "Sum"). He stated:

> Deanco is to be paid 10% simple interest per annum on any of the Sum that it has not received, which monies are to be secured by way of a second mortgage, subject only to the mortgage granted in favour of Reliant Capital, on Skyevue Property Corp's lands in Kelowna, BC upon which the Travelodge Kelowna is operating and ranking ahead of all the limited partners and the general partner of Skyevue Limited partnership and all related, associated and affiliated companies. This interest is to accrue and it along with the outstanding principal sum is to be paid to Deanco on or before November 30, 2008.

[93] The following day, May 14, 2008, Paprotka instructed Gowlings to register the 118 Mortgage, to be a second financial charge, subject only to Reliant's first registered mortgage, and in priority to all of the limited partners and the general partner of SDLP.

[94] Accordingly, Gowlings prepared a corporate resolution authorizing SOC to grant a $2 million mortgage to 118 (the "118 Mortgage"), as security for SPC's indebtedness to 118, and a direction from SPC to SOC authorizing the grant. The documents were executed, and the 118 Mortgage was registered on May 29, 2008.

[95] SOC then granted a mortgage to SDC in the amount of $8.5 million, in respect of the loan agreement of April 30, 2008.

[96] As of June 16, 2008, the titles to each of the five lots showed a first mortgage and related security registered in favour of Reliant, as of May 1, 2008; a second mortgage registered in favour of 118, as of May 29, 2008; and a third mortgage registered in favour of SDC, as of May 29, 2008.

Post-Closing Events

[97] A detailed account of the events which transpired following the closing, and the registration of the mortgages, is not germane to the plaintiffs' cause of action. The relevant points may be summarized quickly.

[98] On May 22, 2008, SDC paid 118 $233,000 towards the $2.1 million owed. At the same time, $233,000 was paid to Strategic West, to go towards commissions owed to its sales staff and to Citrine.

[99] Many of the investors had been provided with a schedule specifying the dates on which quarterly income payments would be made. The first payment date was to have been June 4, 2008, but with a mortgage payment having to be made to Reliant there was no net income available for distribution when that date arrived. Several of the plaintiffs then corresponded with Strategic West or Citrine as to their concerns, but they were reassured that efforts to secure further capital were ongoing.

[100] With the exception of $70,000 invested by Mr. Gosyatnikov in July 2008, no further monies were raised from sale of partnership units.

[101] On July 31, 2008 SDC paid 118 a further $100,000, the GST component of the debt, reducing the total indebtedness to $1,767,000.

[102] With the real estate investment market beginning to undergo considerable upheaval in the summer of 2008, SOC retained an appraiser, Mr. Hoffmann, to re-value the subject properties for the purpose of potential refinancing. His report, which is discussed in further detail below, gave a value of $7.05 million, effective September 17, 2008.

[103] In October 2008, Citrine submitted to Strategic West two invoices for payment of commissions earned through sale of the limited partnership units. The total amount billed was $311,772.00. Burke testified that Citrine was paid $25,000 towards one of the two invoices. No other payment was received.

[104] In the fall of 2008, Burke sent a letter to the RCMP detailing her concerns with improper accounting and her suspicions of criminal conduct in respect of the Skyevue, Skyreach and Golden Vine projects. In that letter, Burke asserted:

> For all projects, individual investors were told there would be quarterly payments and the money would be set aside in escrow to guarantee those payments. Money was never put into escrow for any of the projects. Within the last few months, quarterly payment for all 3 projects have ceased with the Skyevue project never even making the first payment.

There is no record in the documents of anyone ever having advised Burke that there would be an escrow fund constituted to guarantee the quarterly payments to investors in Skyeue. As noted, Embury did not testify, so Burke's assertion is not corroborated from any source.

[105] In January 2009 Paprotka investigated refinancing. He succeeded in obtaining a term sheet from the Business Development Bank of Canada ("BDC"), offering funding of $3.5 million, which would go to pay out the Reliant Mortgage and reduce the indebtedness to 118 by $700,000. The offered interest rate was 6%, half the rate being charged by Reliant. Paprotka was unable to follow through on this refinancing because of a Certificate of Pending Litigation filed by the plaintiffs.

[106] Effective February 11th, 2009, Embury resigned as a director of SOC, SPC, and SDC, and Paprotka was appointed as the President and Secretary of SDC.

[107] The City of Kelowna did not proceed with rezoning of the property. The necessary by-law amendments passed through three readings of the City council and there was then a delay while the amendments were referred to the Ministry of Transportation for approval. Before a final vote could be taken, a municipal election was held and new members came onto the council. The amendments were then defeated.

[108] As of October 28, 2009, SDC resigned as the general partner of SDLP, and Paprotka resigned as sole director and officer of both SOC and SPC. 1449855 Alberta Ltd., a company whose sole director and President is Burke, was appointed

as the new general partner; Burke was appointed as president and sole director of SOC and SPC, and has been managing the property since then.

[109] The partnership has not pursued any refinancing. Burke was aware of Paprotka's attempts to refinance, but made no effort to do so herself. She admitted on cross-examination that although she noticed the rate proposed by BDC was lower than what was being charged by Reliant, she did not calculate what the payments to BDC would be, nor determine if the payments would be lower.

[110] No steps have been taken to develop the property under the current zoning.

Discussion

[111] The plaintiffs' claim is premised entirely on the proposition that Paprotka's profit of $2 million, which the 118 Mortgage secures, was far in excess of what could have been fairly earned as a finder's fee correlated to the equity in the property. The plaintiffs say that Paprotka, as a director of the general partner, was under a fiduciary obligation to ensure that the partnership paid no more than market value for the property. They contend that the notional acquisition cost of $8.5 million – $6.5 million paid to the Vendors for the share purchase, and $2 million owed to Paprotka – far exceeded the property's actual value.

[112] In support of this contention, the plaintiffs rely upon the aforementioned evidence of the appraiser, Mr. Lionel Hoffmann.

[113] In July 2008, after the closing, SOC had retained Hoffmann's firm to conduct an appraisal of the five lots (the four contiguous lots on Abbott Street, and "Lot 9" on Leon Avenue). Hoffmann provided a draft appraisal opinion report to SOC in September 2008. In the draft, he appraised the market value at $6.59 million. His opinion was based on the Income Approach to valuation, as opposed to the Direct Comparison Approach utilized by Payne.

[114] Following discussions with Paprotka, Hoffmann modified the capitalization rate he had used under the Income Approach, and arrived at a final opinion valuing

the property at $7.05 million as of September 17, 2008 – $6.03 million for the four Abbott Street lots, and $1.02 million for Lot 9.

[115] In the course of this litigation, on October 22, 2010 counsel for the plaintiffs asked Hoffmann to provide a further letter report, to be read in conjunction with his September 2008 appraisal, as to the fair market value as of April 30, 2008. Hoffmann sent a one-page email reply on November 2, 2010. In that email, he provided some data regarding the residential real estate market in the spring and summer of 2008, and commented in general terms on commercial activity, stating that there was a lack of empirical data, and that his recollection was that downward adjustment of commercial values had not yet started during those months. He stated that he could not conclude that the market value would have changed between April 30 and valuation date of September 17, 2008.

[116] The plaintiffs rely on this statement as opinion evidence that the fair market value of the acquisition as of April 30, 2008 was no more than $7.05 million, and, by implication, that the $2 million finder's fee exceeded any profit which could be justified in relation to the equity in the property, by more than $1.5 million.

[117] To put my findings regarding Hoffman's opinion in context, it will be necessary to review the methodology utilized in his September 2008 appraisal, in some detail. Before doing so, however, I make two observations regarding his opinion.

[118] First, it is essentially negative in form. Hoffman does not positively state, as a matter of his professional opinion, that the market value did not change between April and September; he simply says that he cannot reach the conclusion that it did change.

[119] Second, Hoffmann did not undertake a fresh analysis of the data that would have been available to an appraiser conducting a valuation in early 2008, when Paprotka and Embury arrived at their agreement, for a proposed transaction to be closing in April 2008.

[120] Also, before turning to the technical aspects of Hoffmann's appraisal, I will address at the outset an argument advanced by Paprotka, and by Bright and Gowlings, as to certain evidence given by Hoffmann in cross-examination. They assert that Hoffmann conceded, while under cross-examination by Mr. Ferris, that the time-adjusted appraised value in April 2008 of a right to purchase the property from the Vendors was $8.4 million – so close to the $8.5 million figure that the difference is inconsequential. Both Paprotka, and Bright and Gowlings, rely on this supposed concession as evidence that the plaintiffs essentially got what they bargained for.

[121] The evidence in question was adduced when Hoffmann was being cross-examined as to the timing of the comparator sales used in his Direct Comparison Analysis. The ten comparators had sold between April 2006 and January 2008. Market values were increasing over that time period, and he therefore had to adjust the contract sales prices for each comparator to reflect the escalation in value over time, up to the effective date of his appraisal. Analysis of sales figures led him to believe that prices had been increasing at the non-compounded rate of 2% per month in 2006 and 2007. In hindsight, he could not say that there was a supportable rate of change during 2008. This meant, for example, that for comparison purposes, the $2 million sales price of his "Index 1" comparator – the same property with Payne had used as his "Index 10" – with a contract date of May 2007, had to be increased by 14% to reflect its value as of January 2008 (2% per month for the final seven months of 2007).

[122] Hoffmann had been made aware by Paprotka that the sales price of the subject lots was $6.5 million. This was a price that had been negotiated at arm's length, between a willing buyer and a willing seller. However, Hoffmann was not made aware that the date of that contract was also May 2007.

[123] Cross-examined on the need to adjust the value of subject contract as well for comparison purposes, Hoffmann said the following:

> Q Now, if you, if you took the Travelodge property contract date and you adjusted it for the seven months at fourteen percent, do you know what just the value of the Travelodge property would then be?
>
> A Not off the top of my head.
>
> Q Can you, can you calculate that on the calculator, please?
>
> [pause]
>
> A Seven point four million.
>
> Q And if you add the Leon Avenue property to that, what would the, what would the time adjusted valuation of that six point five million dollar contract as of May 7th be, of May '07 be? The parking lot wasn't adjusted in the value.
>
> A So, it would be up to eight point 4.

[124] Hoffmann was not re-examined on these calculations.

[125] On close examination of his figures, it is readily apparent that in answering the questions put to him, Hoffmann effectively double-counted the value of the Leon Avenue lot. Hoffmann said that the adjusted value of the "Travelodge property" was $7.4 million; that figure divided by 114% yields a value of $6.5 million, which was the cost of acquiring all five lots. I infer that when asked in cross-examination to adjust the value of the "Travelodge property", Hoffmann started with the $6.5 million acquisition cost, rather than the value of the four Abbott Street lots alone. When he was then asked by counsel to "add the Leon Avenue property to that", he was being invited to duplicate a value he had already taken into account.

[126] If Hoffmann's Income Approach valuation of the Abbott Street lots alone – $6 million – had been increased by 14%, their value would have been $6.84 million, not $7.4 million. Adding $1.02 million for Lot 9 would have yielded a total price of $7.86 million – more than the appraised value stated in Hoffmann's report, but still less than $8.5 million.

[127] Aside from that point, however, the cross-examination of Hoffmann did reveal significant problems with his analysis.

[128] Hoffmann had approached the appraisal he performed in September 2008 in the following manner. The first step had been to determine the "highest and best

use" of the subject property. Mr. Hoffman's list of considerations making this determination included the following:

> The Central Okanagan Division MLS statistics for the 8 month period ending August 31, 2008 reveal total sales dollars of $1.34 billion, a 28% decline over the same period last year. The active inventory of listings is up 88% over last year and total sold units have declined 33%. The active inventory of apartment condominiums, 1305 units, is up 149% over last year (525 units) although average unit prices are up 9.4 [%] over last year. A number of planned multiple family residential developments for 2008 have been shelved due to the uncertain real estate market conditions as the apartment condominium sector is shifting from a seller's to a buyer's market.
>
> [Emphasis added]

[129] Hoffmann had concluded that the highest and the best use was:

> … the continued motel use pending redevelopment when improved real estate market conditions exists [sic] for multiple family residential development under the current C7 zone …

[130] Next, Hoffmann had undertaken what he called a "broad brush" valuation of the motel to determine if it added value to the property, above and beyond the underlying land value. This "broad brush" approach did not include any analysis of current room rates and occupancy rates for hotels in the area.

[131] As the motel was a going concern, Hoffmann believed purchasers would largely be motivated to view the property's value in the manner reflected in the Income Approach technique. Since it would best reflect the typical market behaviour of purchasers, it was the best method of valuing the property for appraisal purposes. This approach entailed determining the motel's projected net rental income, and then discounting it by an appropriate capitalization rate, or "cap rate"; the cap rate is derived from reviewing current sales prices of other similar income-producing properties. Utilizing the Income Approach method, Mr. Hoffman had used the motel's records to arrive at projected net annual operating revenue of $362,000. He then had to decide what the market would view to be the appropriate cap rate. Because he was looking at the motel as an operating concern, his starting point was the cap rates for all motel operations in the Thompson-Okanagan region; these ranged from 8.5% to 9.5%.

[132] Considering the property's downtown Kelowna location and the scope of the motel's improvements, Hoffmann had started with the premise that an appropriate cap rate, assuming the property's land-to-building value ratio to be typical, would be 8.75%. However, he then adjusted the cap rate to reflect the fact that the motel was uniquely situated within the downtown, giving it a higher than average underlying land value, in relation to the property value as a whole. Overall cap rates for income-producing commercial properties in Kelowna are typically in the range of 7.0% to 8.0%. He also looked specifically at data for four commercial properties located in proximity to the motel, which were being held for redevelopment but offered cash flow opportunities in the interim; they showed a cap rate of 4.5% to 4.8%. Hoffmann was of the view that this lower range, in comparison to the overall rates for Kelowna commercial properties, reflected the premium attached to those properties being downtown. This was something he had felt needed to be adjusted for. He stated:

> Considering the underlying land value for the [motel] is significant offering redevelopment opportunities in the short to mid-term and further considering the substantial net operating revenue, a prospective purchaser would acquire the property at a significantly lower overall capitalization rate than 8.75%.

[133] Exercising his professional judgment, Hoffmann had therefore applied a 2.25% reduction to the 8.75% cap rate that had been his starting point, resulting in an overall capitalization rate for the subject property of 6.5%. Dividing that into the net revenue of $362,000, gave a value, for the four lots on which the motel is situated, of approximately $5.57 million.

[134] Adding the market value of Lot 9 on Leon Avenue, $1.02 million, gave a total value of $6.59 million.

[135] As a check on the result of his Income Approach analysis, Hoffmann had also estimated the market value of the lots if sold as bare land. Given the quantity of available sales data for properties with comparable zoning, he chose the Direct Comparison method for this purpose. He considered sales data relating to ten other comparable "index" commercial properties in Kelowna. The most appropriate two comparators – including one parcel immediately adjacent to the subject property,

"Index 1" [Payne's "Index 10"] – which had values per square foot of $200, and $316. In Hoffmann's judgment, the appropriate square footage value to be applied to the subject motel lots was $220. At 24,000 sq. ft., this would give a value of $5,280,000; adding in the fifth lot, at a value of $170, yielded a total value of the bare land, under the Direct Comparison approach, of $6.3 million.

[136] Since the motel would continue to contribute to market value of the motel lots in excess of their underlying land value, he had believed that the Income Approach was more appropriate than Direct Comparison, for the property as a whole, and therefore concluded that $6.59 million was the market value.

[137] As noted above, this was a draft report. After discussions with Paprotka, Hoffmann re-evaluated the cap rate and decided to lower it from 6.5% to 6.0%. His final opinion was that the four motel lots had a value of $6,030,000 using the Income Approach. For the Direct Comparison, he increased the square footage value from $220 to $250, giving a value of $6 million.

[138] For all five lots, the Income Approach and Direct Comparison Approach figures in his final report were, respectively, $7,050,000 and $7,020,000. His conclusion that the Income Approach was preferable did not change, and he therefore settled on a final opinion as to the market value of the subject property in the amount of $7,050,000 as of September 17, 2008.

[139] The plaintiffs called Hoffmann to give evidence as to the property's value as of April 2008. On October 27, 2010, the plaintiffs' counsel had written to Hoffman, asking for his assistance in determining the fair market value as of the date of acquisition. He remarked:

> It may be that the fair market value was in your opinion approximately the same as it was on Sept. 17, 2008, or it might have varied somewhat.
>
> We don't need a full-blown appraisal, but rather a letter report, giving us your opinion as to value as of April 30, 2008, intending to be read in conjunction with the Sept. 17, 2008 appraisal.

[140] Six days later, on November 2, 2010, Hoffmann provided his reply in the form of a short email message. In it, he noted statistics for the residential real estate market that showed declines in the dollar sales volume and number of units sold commencing in May 2008. He then stated:

> With respect to the commercial market, activity was robust in 2007, but was also showing signs of a slow down in 2008 in regard to sales volumes and number of sales. However, it is difficult to conclusively state that commercial values were also declining, if at all, between May 2008 and august 2008 given the dearth of empirical data. To my recollection, we had not yet started to downward adjust commercial values during this period.
>
> As you recall, the global financial crisis had begun in September 2008. At the date of the appraisal, September 17, 2008, it was still too early to fully comprehend the scope of the financial and economic crisis and its measurable impact on the real estate market and economy.
>
> In conclusion, I cannot conclude as of September 17, 2008 that the market value would have changed, if at all, between April 30, 2008 and the valuation date, September 17, 2008.

[141] To bring the form of his opinion into compliance with the requirements of the Rules of Court, Hoffmann provided a follow-up letter dated December 22, 2010, in which he stated his qualifications and confirmed his understanding of his duty to assist the Court. With respect to his factual assumptions and research, he stated that most of the factual assumptions, research, and documents relied on by him were set out in the appraisal, and that in addition he had reviewed "various media articles" to assist him in rendering his further opinion. He referred to this in cross-examination as "research"; it was not described in any detail. It is apparent from the content of the November 2 email that he also reviewed MLS data as to residential sales.

[142] The cross-examination of Hoffmann revealed significant weaknesses in Hoffmann's application of his September 2008 cap rate analysis to the question of the property's value early in that year.

[143] As noted above, Hoffmann's September 2008 opinion as to the highest and best use of the property had been based, in part, on his knowledge of the real estate market having showed signs of slowing in the spring and summer of 2008. He had information available to him in September 2008 indicating that the market for

condominiums was already oversupplied. Because of economic conditions, a developer purchasing the property at that time might hold on to the land and operate the motel for a period of up to 3 to 5 years. On this basis he believed, as a matter of professional judgment, that employing a cap rate of 6.0% – a "hybrid" of the range of cap rates for downtown commercial properties being held for redevelopment – 4.5% to 4.8% – and the range for motels in the Thompson-Okanagan region – 8.5% to 9.5% – was justifiable. However, he conceded that an appraiser conducting a valuation in early 2008 [i.e. for an intended sale in April 2008] would not have had access to the same market data, and may have reached a different conclusion.

[144] The sales prices for the four downtown properties Hoffmann had used as comparators to derive the cap rate, for his Income Approach analysis, reflected cap rates in the range of 4.5% to 4.8%. If a developer intending to purchase the subject property in the spring of 2008 had not anticipated a lengthy period of holding the land and continuing to operate the motel – as was the case with this project – there was nothing in Hoffmann's evidence that persuaded me it would have been unreasonable to utilize a cap rate as low as 4.8%. Given the motel's net revenue of $362,000, the value of the four motel lots at that cap rate would have been $7.54 million; adding in the value of the fifth lot ($1,020,000) would give a total of $8.56 million, i.e. slightly more than the limited partnership paid for this property, including the finder's fee. Utilizing a cap rate of 4.5%, the total value would have been more than $9 million. In either case, the $8.5 million valuation of the property, on which Paprotka's $2 million profit was based, would be justified.

[145] With respect to the Direct Comparison approach, Hoffmann agreed that the value per square foot he assigned to the subject property was a judgment call. He conceded that the subject property is unique, and that it had been difficult to find appropriate comparable sales. He had arbitrarily decided on a square footage value of $250 – between the $200 value of the "Index 5" property, and the $316.67 value of "Index 1". He agreed that the fewer direct comparables one has to work with, the less precise one can be. The "Index 1" site was adjacent, and was the more comparable property with respect to location. Some downward adjustment from

$316.67 was necessary, he testified, because the Index 1 location is a smaller, single lot, and the market tends to value smaller lots more highly, per unit. He chose a midpoint, less than half-way between those two Index locations' values. Nothing in Hoffmann's evidence persuaded me that a valuation based on a higher square footage value, between $250 and $316 – the approach taken by Payne – would have been unrealistic. A square footage value of $285 for the four motel lots alone, for example, would have yielded a Direct Comparison value for the five lots of the property as a whole, of $7.86 million, considerably more than the $7.02 million figure he had arrived at.

[146] Further, Hoffmann's approach of applying a lower square footage value to the parking lot, "Lot 9", meant that the lots were being treated by him as non-contiguous. Nothing in Hoffmann's analysis persuades me that it would have been improper for an analysis to be conducted in January 2008 on the assumption that the lots would be assembled contiguously.

[147] In one sense, Hoffmann was asked the wrong question. The opinion which plaintiffs' counsel sought from him was the fair market value of the property as of April 30, 2008. That was the opinion he produced, and it was very much based on a retrospective analysis.

[148] A more relevant question, with respect, would have been to ask what an appraiser would have valued the land at in January 2008, in respect of a transaction planned to close on April 30, 2008. But even that question would miss the point that Embury and Paprotka were not under any legal obligation to negotiate a purchase price equivalent to an appraised value. They negotiated the price of $8.5 million at arm's length, presumably drawing on their own expertise, impressions, and expectations. The inherently conservative approaches to valuation utilized by an appraiser may very well be significant considerations when any sophisticated investor considers the price at which they are willing to buy or sell land. In the present case, Embury did have an appraisal conducted, and retained Payne for that

purpose. But other considerations, including an investor's tolerance for risk, might also play a role.

[149] A more pertinent question to ask of Hoffmann, in my view, would have been whether he was able to say as a matter of professional opinion that a purchase price of $8.5 million, based in part on Payne's appraisal of $8.25 million, was so clearly excessive that no reasonable developer would have agreed to it.

[150] Hoffmann's report does not answer that question, and provides me with no basis for drawing any adverse conclusions as to the reasonableness of the price negotiated by Embury and Paprotka in January 2008. His evidence, I find, does not assist the plaintiffs in establishing that the $8.5 million paid by the limited partnership for the property in April 2008 (inclusive of the $2 million finder's fee) was more than market value.

[151] The plaintiffs submit that no credit should be given to Paprotka or Embury for having relied upon the Payne appraisal, which had given an estimated value of $8.25 million as of January 28, 2008. Throughout their argument, the plaintiffs continually referred to the Payne appraisal as having generated a "hypothetical" value, based on assumptions that Payne was told to make: an assumption as to the lots being assembled contiguously, including the back lane, and an assumption as to the rezoning. They say this "hypothetical" value is to be distinguished from the "real" value given by Hoffmann.

[152] But this characterization of Payne's valuation ignores the question of what probability the market attached to the assumptions made by Payne. If those assumptions were assigned a very high probability by knowledgeable real estate investors at the time – if the "hypotheticals" were effectively treated as certainties, or near-certainties – then Payne's "hypothetical" value would correspond with, or come very close to corresponding to, the market value.

[153] This was the rationale for the assumptions that Payne laid out in his report. Payne believed the market viewed rezoning as likely, and was of the opinion that if

rezoning occurred the city would likely sell the back lane to further its plan for higher density. Those facts have not been proven and Payne's appraisal is not in evidence for the truth of its opinion. But it is not enough for the plaintiffs to simply label Payne's assumptions as hypotheticals. The burden of proving converse assumptions lies with the plaintiffs. Hoffmann's report falls far short of persuading me that a valuation based on those assumptions was unreasonable.

[154] In short, I find nothing untoward in the Share Purchase Transaction having completed at a price to the partnership of $8.5 million. The plaintiffs got what they bargained for.

[155] Having made this finding, the plaintiffs' other arguments objecting to Paprotka's conduct can be quickly disposed of.

[156] I find that no fiduciary duty was owed by Paprotka to the plaintiffs when the $8.5 million figure was negotiated, nor when the Term Sheet was being drafted, nor when the limited partnership units were being sold. Promoters of investments do not owe a fiduciary duty to potential investors: *Sharbern Holdings Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23 at paras. 144 to 146. If the plaintiffs have any claim respecting the adequacy of disclosure at the time they decided to invest, it lies not in breach of fiduciary duty, but in misrepresentation, and misrepresentation is not pleaded.

[157] Further, in my view no issue can properly be taken with the disclosure of the finder's fee in the Term Sheet in any event. The figure of $2 million was not stated, and the phrase "finder's fee" arguably brings to mind smaller percentages, such as one might find being charged as a commission or service fee. But I find the disclosure to have been appropriate for a transaction that was supposed to involve only sophisticated investors. Many of the plaintiffs expressed, in their testimony, dissatisfaction with the size of the finder's fee. Their views, of course, have been coloured by subsequent events. The essential point which any reasonable investor would have wanted to be assured of was that the property was worth its price. So long as the finder's fee, in the words of the Term Sheet, reflected the equity in the

land, a sophisticated investor, acting reasonably, would have been indifferent as to whether $2 million of the purchase price was to go to the developer and $6.5 million to the vendor, as opposed to the whole $8.5 million going to the vendor.

[158] With respect to the $10.00 assignment used during the course of the Share Purchase Transaction, the plaintiffs say that this is evidence of a pattern of deceitful behaviour on the part of Paprotka, aimed at hiding the reality of his $2 million profit from any interested party. I do not draw any such inference from the circumstances, as detailed above. Paprotka was initially anxious that the documents record the true value of the consideration paid for the assignment. The suggestion that different pre- and post-closing assignments could be prepared originated with Bright. Whatever the propriety of the disclosure to the Vendors, I find it has no bearing on the plaintiffs' claim.

[159] With respect to the 118 Mortgage, the plaintiffs argue that the main remedy sought by them is "to make Paprotka stick to the terms of" his March 6, 2008 email to Embury, in which he stated that the 118 Mortgage would be registered behind the interests of the limited partners and any required bank financing. I note that by the time this statement was made, approximately $2.6 million had already been raised. No legal theory is advanced as to how this statement, made in an email to Embury, could bind Paprotka or give rise to a cause of action on the part of the investors. This statement was made in the course of discussions within the general partner as to how to handle the consequences of a shortfall in capital at the time of closing. Even if the statement had contractual force – which I do not accept was the case here – it would have been open to Paprotka and Embury to renegotiate that agreement.

[160] Paprotka testified that his March 6 email was a mistake, and that what he intended was only that the 118 Mortgage be subsidiary to the investors' entitlement to cash flow, i.e. to their share of net income. I do not accept that explanation. Paprotka's email to Embury of March 3 spoke specifically of the investor's principal and "interest" having priority. His subsequent emails to Bright of April 27 and 29

made no reference to investor income having the only priority. I find that these messages and instructions from Paprotka were simply made without him contemplating the possibility of no further investment monies being raised to pay out 118. I find that the probable explanation for his decision to instruct Gowlings on May 14 to register the 118 Mortgage as a second charge, behind only Reliant, was his growing sense of unease as to Strategic West's ability to deliver on its promises. His apprehension is understandable, and he was, I find, entitled to act to protect his interests.

[161] The plaintiffs complain that at that point, prior to closing:

> There is no consideration by 118 of a reduction of the finder's fee. There is no thought of the impact of registering two mortgages on the expectation of the investors of receiving distributions. Every concern is linked to closing the transaction.

[162] The investors had agreed to participate as limited partners, (i.e. with no managerial control being exercised by them in return for obtaining limited liability), in a project in which the general partner was granted wide authority to do what was necessary to achieve the purposes of the business - under s.2.2 of the LPA, to "own, operate, develop, sell, subdivide or lease portions of the development". The general partner was granted broad powers under Section 6.1 and 6.2 of the LPA. The list of powers set out in the subsections to Section 6.2 are descriptive only, and do not derogate from the general partner's wide authority.

[163] Paprotka was under no obligation to renegotiate the finder's fee; it had been agreed to in arm's-length negotiations with Embury. $8.5 million had been agreed as the purchase price, and the plaintiffs have not persuaded me that this was not fair market value. The limited partnership was formed for the purpose of acquiring an assignment of the Share Purchase Agreement at a price of $2 million, and then completing the Share Purchase for $6.5 million. If $8.5 million was a fair price for the property, $2 million was a fair fee, and there is no evidence that Paprotka was ever willing to accept less than $2 million for the assignment of 118's right to purchase.

[164] The acquisition of the property – the first, fundamental step in the development the investors all wished to participate in – would not have gone ahead without the finder's fee being paid, or being acknowledged as payable. The general partner's first obligation was to ensure that the project did complete as planned. I cannot understand how a focus on closing the transaction could be viewed as objectionable.

[165] Nothing, in my view, turns on the fact that Paprotka was both principal of 118, and a director of the general partner. Even if a person in that position would have owed fiduciary duties to limited partners at common law, in this case the fiduciary duties were circumscribed by Sections 6.5, 6.11 and 6.12 of the LPA. Section 6.5 specifically contemplates transactions between the general partner and affiliates, and provides that such transactions are not affected by such relationships.

[166] I accept the argument advanced by Paprotka, that the present case is different than a situation in which an affiliate of a general partner is formed for the purpose of locating a property, and a property is then located for the limited partnership. In that situation, a general partner would be obligated to obtain the lowest possible price, in order to benefit the partnership. And any profit to be earned by the general partner or its affiliates, to the detriment of the partnership, would have to be disclosed. But that is not what happened here. And 118's profit was not earned at the detriment of the partnership; it reflected fair value.

[167] As for the plaintiffs' complaint that registering the mortgages defeated their expectation of receiving distributions, this overlooks the essential point that the investors' only entitlement was to receive a share of net income – that is, income after the payment of debts. SDC was indebted to 118. The debt was legitimate. Paprotka did not agree, and was not obliged to agree, to exchange the debt for equity in the project, nor to postpone payment indefinitely. The investors could have had no expectation of payment of net income until the debt owed 118 was satisfied. The property was purchased for $8.5 million, the plaintiffs have not persuaded me that it was worth any less than $8.5 million, and the partnership, acting through its

subsidiaries, was therefore obliged to ensure that the debt was paid, before they could have any expectation of earning a return on the $8.5 million asset.

[168] With the partnership being indebted to 118, it would have been open to SPC on the closing date, if required by Paprotka, to borrow enough money from a third-party financer to pay the finder's fee. If Reliant had been willing to lend as much, SPC could have borrowed $4.7 million from Reliant, and used $2 million to pay 118. Whether any lender would have engaged in such a transaction is beside the point. In that hypothetical situation, the borrowing would have been necessary to complete the property acquisition, and would have clearly been within the "construction or bank financing" that the Term Sheet provided would take priority to any mortgage granted in favour of the limited partnership. 118's priority cannot be impaired by the fact that it took its own mortgage, rather than accepting payment out of funds generated by mortgage-secured bank financing.

[169] To the extent that the SPC Mortgage might have been viewed by investors as providing them with security, I do not agree that registration of the 118 Mortgage ahead of it represented an illegitimate interference with their security. I agree with the argument advanced on behalf of Paprotka and Bright, that s 62 of the Alberta *Partnership Act* applies:

> 62 (1) A limited partner is not entitled to receive from a general partner or out of the limited partnership property any part of the limited partner's contribution until
>
> > (a) all liabilities of the limited partnership, except liabilities to general partners and to limited partners on account of their contributions, have been paid or there remains sufficient limited partnership property to pay them …

The investors had no legal right to have their investment secured in priority to the payment of the partnership's liabilities. The general partner was entitled to offer security to its creditor, 118, and Paprotka, as 118's principal, was entitled to accept that security.

[170] Furthermore, the SDC Mortgage secured a loan of $8.5 million; it contemplated a loan to SOC of sufficient monies for SOC to pay for 118's

assignment. It contemplated SOC's indebtedness to 118. That SDC Mortgage cannot therefore take priority to the 118 Mortgage, which is founded on that indebtedness.

[171] The plaintiffs submit that it would have been more reasonable for the venture to have provided for a payment of a finder's fee to Paprotka:

> … after distributions are paid, as the entitlement to a finder's fee would be based on having created value, as opposed to simply a risky plan for a development that amounted to nothing. A high fee should be linked to something of value. The ownership of the Property provided nothing of value to the investors.

[172] Aside from failing to account for why no steps have been taken to proceed with development, and aside from judging the merits of the investment in hindsight – as if Paprotka and Embury could have foreseen the collapse of capital markets in 2008 – this submission misses the point that the deal described is not the deal the plaintiffs signed on for. The project was undeniably risky. I repeat the disclosure of the risk found in the Term Sheet:

> This Offering is suitable only to those investors who are willing to rely solely on the management of the Partnership and the General Partner and to risk a total loss of their entire investment. The Partnership does not currently have any assets, the investment in the units is speculative and involves a high degree of risk and there are certain risks inherent in any real estate based investment. This is a risk investment - there are no guarantees that the investment amounts will be repaid, or that the investment will yield any return. The reward for accepting these potential risks is the potential for the rate of return described.

[173] The manifestation of those risks is not due to any breach of duty on the part of Paprotka.

[174] The plaintiffs' claim is dismissed.

"A. Saunders J."

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Voegtlin v. Paprotka,*
2014 BCCA 323

Date: 20140815
Docket: CA041218

Between:

Marilee A. Voegtlin, Yuet-Ngor Loke, 525675 Alberta Ltd., Anna Cobbledick, Arlene G. McDonald, Erdon Investments Inc., G.J.S.J. Investments Inc., 555636 Alberta Ltd., Kelterra Investments Ltd., Kristen Frischbutter, Martin E. Hurrell, Thomas F. Moslow, Vince Yip, Bruce J. Nicol, Thracian Horse Ltd., Debbie Hanson, Jeannine Chanel Champagne Saliken, John G. Owen, WRW Enterprises Ltd., Robert Lederman, Jan Przysowa, Danny Debolt, James G. McLachlan, Erika Field, Victor Gosyatnikov, Donald Butcher, David Bruneau, Mari Narayan and Roshni Narayan

Appellants
(Plaintiffs)

And

Dean Paprotka, 1186342 Alberta Ltd., Skyevue Development Corporation

Respondents
(Defendants)

And

Gowling Lafleur Henderson LLP and Jeffrey W. Bright

Respondents
(Third Parties)

Before: The Honourable Mr. Justice Chiasson
The Honourable Madam Justice Stromberg-Stein
The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia, dated September 3, 2013 (*Voegtlin v. Paprotka*, 2013 BCSC 1613, Kamloops Registry 42276).

Counsel for the Appellants:	S.T. MacIsaac, Q.C. T. Eaves
Counsel for the Respondents D. Paprotka, 1186342 Alberta Ltd., Skyevue Development Corporation:	M. Kirwin, Q.C.
Counsel for the Respondents Gowling Lafleur Henderson LLP and J.W. Bright:	C. Ferris G. Brandt
Place and Date of Hearing:	Vancouver, British Columbia May 27, 2014
Place and Date of Judgment:	Vancouver, British Columbia August 15, 2014

Written Reasons by:
The Honourable Mr. Justice Chiasson

Concurred in by:
The Honourable Madam Justice Stromberg-Stein
The Honourable Mr. Justice Goepel

Summary:

The appellants invested in a project to develop a mixed-use commercial and residential high-rise tower in Kelowna, British Columbia, by purchasing units in a limited partnership. The project was not completed, causing the appellants to lose all or most of their investments. Prior to the formation of the partnership, the developer and the promoter of the project agreed that the developer would receive a "finder's fee" of $2 million. The investors were not told the amount of the fee, but did know that a "significant finder's fee" was payable to a related party. In due course, this was secured by a mortgage granted by the general partner. The investors advanced a number of claims against the developer, his company and the general partner which were dismissed at trial. On appeal, they pursued only breach of fiduciary duty based on a failure properly to disclose the quantum of the finder's fee and granting the mortgage, which was not in the best interests of the partnership. Held: appeal dismissed. The disclosure was adequate and appropriate. The finder's fee was an obligation of the partnership. There was no violation of any duty by securing its payment.

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

Introduction

[1] This appeal considers allegations of breach of fiduciary duty.

Background

[2] The appellants invested in a project to develop a mixed-use commercial and residential high-rise tower in Kelowna, British Columbia by purchasing units in a limited partnership. The project was not completed, causing the appellants to lose all or most of their investments. I summarize the background facts, in part, from the reasons for judgment of the trial judge.

[3] The respondent third party, Jeffrey Bright, was an associate lawyer in the respondent third party Gowling Lafleur Henderson LLP. He acted to put the project together legally.

[4] The limited partnership was called Skyevue Development Limited Partnership. The general partner, the respondent Skyevue Development Corporation, was controlled by the project developer, the respondent Dean Paprotka and the project promoter, Bob Embury. Mr. Embury was a defendant and third party at trial, but is not a party to the appeal.

[5] In May 2007, prior to the incorporation of the general partner, the respondent 1186342 Alberta Ltd. ("118"), a company owned by Mr. Paprotka, acquired the right to purchase the shares of the company that owned the subject property at a price of $6.5 million.

[6] In early 2008, Messrs. Paprotka and Embury agreed to finance the acquisition and development of the property through a limited partnership. The general partner was incorporated on February 19, 2008. Messrs. Paprotka and Embury were the directors of the general partner. Its shares were issued equally to 118 and a company controlled by Mr. Embury. They agreed that 118 would assign its interest in the purchase agreement to a subsidiary of the limited partnership for $2 million

plus GST, which they called a finder's fee. A Limited Partnership Agreement was made effective February 19, 2008.

[7] Mr. Embury was able to raise only $4.5 million as a result of which the limited partner's subsidiary was obliged to borrow $2.8 million in April 2008 in order to complete the transaction with the vendor. A first mortgage was placed against the property to secure the loan.

[8] On May 29, 2008, Mr. Paprotka caused a $2.1 million second mortgage to be registered against the property to secure the payment to 118. The appellants contend that this was a breach of fiduciary duty by Mr. Paprotka, the general partner and 118.

[9] A number of provisions of the Limited Partnership Agreement are relevant:

> 6.1 **Management of the Partnership**: The General Partner shall, subject to this Agreement, and in a reasonable and prudent manner, acting in the best interests of the Partnership, have exclusive authority to manage, control, administer and operate the business and affairs of the Partnership and, subject to Section 6.8, to make all decisions regarding the business of the Partnership. Pursuant to the foregoing, the General Partner shall have all of the rights and powers of a general partner as provided in the Partnership Act and as otherwise provided by law, and any action taken by the General Partner shall constitute the act of, and serve to bind, the Partnership. …
>
> 6.2 **Authority of General Partner**: In addition to the powers and authorities possessed by the General Partner pursuant to the Partnership Act, the General Partner is hereby granted the right, power and authority to do or to cause to be done on behalf of the Partnership all things which, in its sole judgment, are necessary, proper or desirable to carry on the business and purposes of the Partnership referred to in Section 2.2, including without limitation:
>
> …
>
> (g) to incur all reasonable expenditures, subject to this agreement;
>
> …
>
> 6.5 **Transactions Involving Affiliates**: The validity of any transaction, agreement or payment involving the Partnership and any Affiliate otherwise permitted by the terms of this Agreement shall not be affected by reason of the relationship between the General Partner and such Affiliate or the approval of the said transaction, agreement or payment by directors of the General Partner all or some of whom are officers or directors of or are otherwise interested in or related to such Affiliate.

> 6.6 **Safekeeping of Assets**: The General Partner shall have a fiduciary responsibility for the safekeeping and use of all funds and assets of the Partnership, whether or not in its immediate possession or control, and the General Partner shall not employ or permit another to employ such funds or assets in any manner except for the exclusive benefit of the Partnership.
>
> …
>
> 6.11 **Conflict of Interest**: The Limited Partners acknowledge that the General Partner's associates, affiliates and their respective directors and officers may be and are permitted to be engaged in and continue in other businesses in which the Partnership will not have an interest and which may be competitive with the activities of the Partnership and, without limitation, the General Partner's associates, affiliates and their respective directors and officers may be and are permitted to act as a partner, shareholder, director, officer, joint venturer, advisor or in any other capacity or role whatsoever of, with or to other entities, including limited partnerships, which may be engaged in all or some of the aspects of the business of the Partnership and may be in competition with the Partnership.
>
> 6.12 **Consent to Conflict**: Subject to the General Partner's express obligations hereunder, the Limited Partners agree that the activities and facts as set forth in Section 6.11, shall not constitute a conflict of interest or breach of fiduciary duty to the Partnership or the Limited Partners, the Limited Partners hereby consent to such activities and the Limited Partners waive, relinquish and renounce any right to participate in, and any other claim whatsoever with respect to, any such activities. The Limited Partners further agree that neither the General Partner nor any other party referred to in Section 6.11 will be required to account to the Partnership or any Limited Partner for any benefit or profit derived from any such activities or from such similar or competing activity or any transactions relating thereto by reason of any conflict of interest or the fiduciary relationship created by virtue of the position of the General Partner hereunder unless such activity is contrary to the express terms of this Agreement.

[10] Prior to investing in the project, many of the appellants were given a Term Sheet of relevant provisions, which include:

> Use of Investor Funds:
>
> Limited Partners' capital investment will be used at the discretion of the General Partner acting in the best interests of the partnership, according to law and pursuant to the terms of the partnership agreement.
>
> …
>
> Offering Size:
>
> Total $12,000,000 (CAD)
>
> Phase 1: $8,500,000 (CAD), Phase 2: $3,500,000 (CAD)
>
> Minimum Investment $100,000 (CAD)
>
> …

> Related Party:
>
> Part of the acquisition cost of the property involves a significant finder's fee payment to a party which is now a related party pursuant to its involvement in the partnership as a co-owner of the General Partner. This payment reflects the equity present in the land as of date of purchase.
>
> …
>
> This Offering is suitable only to those investors who are willing to rely solely on the management of the Partnership and the General Partner and to risk a total loss of their entire investment. The Partnership does not currently have any assets, the investment in the units is speculative and involves a high degree of risk and there are certain risks inherent in any real estate based investment. This is a risk investment - there are no guarantees that the investment amounts will be repaid, or that the investment will yield any return. The reward for accepting these potential risks is the potential for the rate of return described.

[11] The appellants also signed a Subscription Agreement. The trial judge referred to it at para. 51:

> [51] The Subscription Agreement also set out a number of detailed representations and warranties made by the subscriber to the limited partnership … and to the general partner, … including that apart from the Term Sheet, the Limited Partnership Agreement, and certain financial documents, the subscriber was not relying on verbal or written representations; that the subscriber had such knowledge, or had received independent advice, in financial, business and legal affairs as to be capable of evaluating the merits and risks of the investment, and was able to bear the risk of loss of the entire investment; and that the subscriber was purchasing the units pursuant to an exemption from the governing prospectus requirement.

[12] Mr. Paprotka made unsuccessful efforts to refinance the project. The property could not be developed unless it was rezoned by the City of Kelowna, which ultimately did not happen. The judge discussed this at para. 107:

> [107] The City of Kelowna did not proceed with rezoning of the property. The necessary by-law amendments passed through three readings of the City council and there was then a delay while the amendments were referred to the Ministry of Transportation for approval. Before a final vote could be taken, a municipal election was held and new members came onto the council. The amendments were then defeated.

[13] Mr. Embury resigned from the project in February 2009 and is an undischarged bankrupt. Mr. Paprotka resigned in October 2009.

[14] The judge dismissed the appellants' case after analyzing a number of positions they advanced. The only issue in this appeal is whether the respondents breached a fiduciary duty owed to the appellants.

Trial Judgment

[15] At trial, the appellants challenged the validity of the finder's fee as being improvident. The judge stated at para. 111:

> [111] The [appellants'] claim is premised entirely on the proposition that Paprotka's profit of $2 million, which the 118 Mortgage secures, was far in excess of what could have been fairly earned as a finder's fee correlated to the equity in the property. The [appellants] say that Paprotka, as a director of the general partner, was under a fiduciary obligation to ensure that the partnership paid no more than market value for the property. They contend that the notional acquisition cost of $8.5 million – $6.5 million paid to the Vendors for the share purchase, and $2 million owed to Paprotka – far exceeded the property's actual value.

[16] After reviewing appraisal and other evidence, the judge concluded at para. 144 that "the $8.5 million valuation of the property, on which Paprotka's $2 million profit was based, [is] justified". After further analysis, the judge stated at para. 154:

> [154] In short, I find nothing untoward in the Share Purchase Transaction having completed at a price to the partnership of $8.5 million. The [appellants] got what they bargained for.

He continued at para. 156:

> [156] I find that no fiduciary duty was owed by Paprotka to the [appellants] when the $8.5 million figure was negotiated, nor when the Term Sheet was being drafted, nor when the limited partnership units were being sold. Promoters of investments do not owe a fiduciary duty to potential investors: *Sharbern Holdings Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23 at paras. 144 to 146. If the [appellants] have any claim respecting the adequacy of disclosure at the time they decided to invest, it lies not in breach of fiduciary duty, but in misrepresentation, and misrepresentation is not pleaded.

On appeal, the appellants do not take issue with this conclusion.

[17] The judge then turned to the issue of disclosure. He stated at para. 157:

> [157] Further, in my view no issue can properly be taken with the disclosure of the finder's fee in the Term Sheet in any event. The figure of $2 million was not stated, and the phrase "finder's fee" arguably brings to mind smaller percentages, such as one might find being charged as a commission or service fee. But I find the disclosure to have been appropriate for a transaction that was supposed to involve only sophisticated investors. Many of the [appellants] expressed, in their testimony, dissatisfaction with the size of the finder's fee. Their views, of course, have been coloured by subsequent events. The essential point which any reasonable investor would have wanted to be assured of was that the property was worth its price. So long as the finder's fee, in the words of the Term Sheet, reflected the equity in the land, a sophisticated investor, acting reasonably, would have been indifferent as to whether $2 million of the purchase price was to go to the developer and $6.5 million to the vendor, as opposed to the whole $8.5 million going to the vendor.

[18] The judge noted that the funds raised were not sufficient to pay the finder's fee and that Mr. Paprotka was "entitled to act to protect his interests" (at para. 160). The judge addressed the appellants' assertion that securing the finder's fee with a mortgage was a breach of fiduciary duty at paras. 162-165:

> [162] The investors had agreed to participate as limited partners, (i.e. with no managerial control being exercised by them in return for obtaining limited liability), in a project in which the general partner was granted wide authority to do what was necessary to achieve the purposes of the business - under s.2.2 of the LPA, to "own, operate, develop, sell, subdivide or lease portions of the development". The general partner was granted broad powers under Section[s] 6.1 and 6.2 of the LPA. The list of powers set out in the subsections to Section 6.2 are descriptive only, and do not derogate from the general partner's wide authority.
>
> [163] Paprotka was under no obligation to renegotiate the finder's fee; it had been agreed to in arm's-length negotiations with Embury. $8.5 million had been agreed as the purchase price, and the [appellants] have not persuaded me that this was not fair market value. The limited partnership was formed for the purpose of acquiring an assignment of the Share Purchase Agreement at a price of $2 million, and then completing the Share Purchase for $6.5 million. If $8.5 million was a fair price for the property, $2 million was a fair fee, and there is no evidence that Paprotka was ever willing to accept less than $2 million for the assignment of 118's right to purchase.
>
> [164] The acquisition of the property – the first, fundamental step in the development the investors all wished to participate in – would not have gone ahead without the finder's fee being paid, or being acknowledged as payable. The general partner's first obligation was to ensure that the project did complete as planned. I cannot understand how a focus on closing the transaction could be viewed as objectionable.

> [165] Nothing, in my view, turns on the fact that Paprotka was both principal of 118, and a director of the general partner. Even if a person in that position would have owed fiduciary duties to limited partners at common law, in this case the fiduciary duties were circumscribed by Sections 6.5, 6.11 and 6.12 of the LPA. Section 6.5 specifically contemplates transactions between the general partner and affiliates, and provides that such transactions are not affected by such relationships.

[19] The appellants contended that registering the 118 mortgage "defeated their expectation of receiving distributions". The judge rejected this contention at paras. 167-169:

> [167] As for the [appellants'] complaint that registering the mortgages defeated their expectation of receiving distributions, this overlooks the essential point that the investors' only entitlement was to receive a share of net income – that is, income after the payment of debts. [The general partner] was indebted to 118. The debt was legitimate. Paprotka did not agree, and was not obliged to agree, to exchange the debt for equity in the project, nor to postpone payment indefinitely. The investors could have had no expectation of payment of net income until the debt owed 118 was satisfied. The property was purchased for $8.5 million, the [appellants] have not persuaded me that it was worth any less than $8.5 million, and the partnership, acting through its subsidiaries, was therefore obliged to ensure that the debt was paid, before they could have any expectation of earning a return on the $8.5 million asset.
>
> [168] With the partnership being indebted to 118, it would have been open to SPC [a wholly-owned subsidiary of the limited partnership] on the closing date, if required by Paprotka, to borrow enough money from a third-party financer to pay the finder's fee. If Reliant had been willing to lend as much, SPC could have borrowed $4.7 million from Reliant, and used $2 million to pay 118. Whether any lender would have engaged in such a transaction is beside the point. In that hypothetical situation, the borrowing would have been necessary to complete the property acquisition, and would have clearly been within the "construction or bank financing" that the Term Sheet provided would take priority to any mortgage granted in favour of the limited partnership. 118's priority cannot be impaired by the fact that it took its own mortgage, rather than accepting payment out of funds generated by mortgage-secured bank financing.
>
> [169] To the extent that the SPC Mortgage might have been viewed by investors as providing them with security, I do not agree that registration of the 118 Mortgage ahead of it represented an illegitimate interference with their security. I agree with the argument advanced on behalf of Paprotka and Bright, that s. 62 of the Alberta *Partnership Act* applies:
>
> > 62 (1) A limited partner is not entitled to receive from a general partner or out of the limited partnership property any part of the limited partner's contribution until
> >
> > > (a) all liabilities of the limited partnership, except liabilities to general partners and to limited partners on account of their

> contributions, have been paid or there remains sufficient limited partnership property to pay them …
>
> The investors had no legal right to have their investment secured in priority to the payment of the partnership's liabilities. The general partner was entitled to offer security to its creditor, 118, and Paprotka, as 118's principal, was entitled to accept that security.

[20] Finally, at paras. 171-173, the judge rejected the appellants' assertion that the finder's fee should have been paid after distributions to them:

> [171] The [appellants] submit that it would have been more reasonable for the venture to have provided for a payment of a finder's fee to Paprotka:
>
> > … after distributions are paid, as the entitlement to a finder's fee would be based on having created value, as opposed to simply a risky plan for a development that amounted to nothing. A high fee should be linked to something of value. The ownership of the Property provided nothing of value to the investors.
>
> [172] Aside from failing to account for why no steps have been taken to proceed with development, and aside from judging the merits of the investment in hindsight – as if Paprotka and Embury could have foreseen the collapse of capital markets in 2008 – this submission misses the point that the deal described is not the deal the [appellants] signed on for. The project was undeniably risky. I repeat the disclosure of the risk found in the Term Sheet:
>
> > This Offering is suitable only to those investors who are willing to rely solely on the management of the Partnership and the General Partner and to risk a total loss of their entire investment. The Partnership does not currently have any assets, the investment in the units is speculative and involves a high degree of risk and there are certain risks inherent in any real estate based investment. This is a risk investment - there are no guarantees that the investment amounts will be repaid, or that the investment will yield any return. The reward for accepting these potential risks is the potential for the rate of return described.
>
> [173] The manifestation of those risks is not due to any breach of duty on the part of Paprotka.

[21] The judge dismissed the appellants' claim.

Position of the appellants

[22] As is apparent, the judge addressed a number of issues including whether the property was worth $8.5 million, but on appeal the appellants restrict their contention of breach of fiduciary duty to the failure of the respondents to disclose the specific

amount of the finder's fee to be paid for the acquisition of the land and in securing the fee by granting a mortgage. The latter position is grounded on article 6.6 of the Limited Partnership Agreement.

[23] The appellants concede that at the time Messrs. Paprotka and Embury agreed to the $2 million finder's fee, no fiduciary duty was owed to them.

Discussion

[24] The first ground of appeal is a lack of adequate disclosure. It is instructive to put this issue into context. The $8.5 million cost to acquire the property was known to the appellants. The general partner was obliged to pay that sum. The appellants stated at the hearing of the appeal that, although there was much evidence at trial that challenged the value of the property at the time of acquisition, they do not rely on it. That is, they do not challenge the quantum of the cost of acquisition. It is the appellants' position that the success or failure of the project is not relevant; the indebtedness for the finder's fee must be cancelled because there was inadequate disclosure.

[25] The trial judge noted that there was a bit of hindsight reasoning in the appellants' complaint. I repeat his comments at para. 157:

> … Many of the [appellants] expressed, in their testimony, dissatisfaction with the size of the finder's fee. Their views, of course, have been coloured by subsequent events.

He added:

> The essential point which any reasonable investor would have wanted to be assured of was that the property was worth its price. So long as the finder's fee, in the words of the Term Sheet, reflected the equity in the land, a sophisticated investor, acting reasonably, would have been indifferent as to whether $2 million of the purchase price was to go to the developer and $6.5 million to the vendor, as opposed to the whole $8.5 million going to the vendor.

I agree with both observations. From a practical perspective, neither the size of the finder's fee nor the fact that one was to be paid was of significance to the appellants.

[26] In addition, the Term Sheet stated that a "significant finder's fee" was payable to a related party as part of the cost of acquiring the property. No one inquired about this fee.

[27] The appellants state that they would not object to a fee of $333,000, the amount that the general partner paid to 118 as part payment of the fee in May and July 2008, before the mortgage was granted. Presumably, this might mean that the statement "a significant finder's fee is payable" would have been acceptable if the fee were set at that amount, but it would not be acceptable if it were higher. This would invite this Court to speculate on what constitutes a "significant" fee, a concept I consider to be highly subjective and not an exercise to be undertaken by this Court.

[28] I would not accede to the appellants' first ground of appeal.

[29] The essential position of the appellants with respect to granting a mortgage to 118 is stated in their factum:

> 100. The trial judge should have limited the meaning of clauses 6.5, 6.11, and 6.12 of the LPA to their context and usage. Clause 6.5 of the LPA allows a transaction between the partnership and an affiliate. This should only apply to a transaction that does not offend clause 6.6 of the LPA such as the payment of market value for a service. Clause 6.11 of the LPA allows the [respondents] to engage in a competitive business. One would think that this relates to them being involved in a different development. Clause 6.12 of the LPA states that a competitive business shall not constitute a conflict of interest. None of these clauses are at issue in this case. The trial judge should have instead asked "was the payment of funds and mortgaging of the partnership assets to 1186342 done for the exclusive benefit of the partnership?"
>
> 101. When reading the LPA as a whole, the fiduciary duty that appears in clause 6.6 applies notwithstanding any of the other clauses. The common law principles relating to partners are thus not limited in any way by the terms of the LPA.

[30] They also contend in their factum that "the purpose of the mortgage was to pay a fee to 1186342, which is not a partnership purpose". I repeat the comments of the judge at para. 164, with which I agree:

> [164] The acquisition of the property – the first, fundamental step in the development the investors all wished to participate in – would not have gone ahead without the finder's fee being paid, or being acknowledged as payable.

> The general partner's first obligation was to ensure that the project did complete as planned. I cannot understand how a focus on closing the transaction could be viewed as objectionable.

[31] The finder's fee was an obligation of the partnership. In my view, securing that indebtedness was fully consistent with the obligations of the general partner as expressed in article 6.6 of the Limited Partnership Agreement.

[32] I would not accede to the appellants' second ground of appeal.

[33] Much was said about whether Mr. Paprotka had a fiduciary obligation to the appellants. Other issues concerning the scope of a fiduciary duty when it exists were discussed. Because, in my view, the disclosure was adequate and appropriate and there was no violation of any duty by securing payment of the finder's fee, I do not consider it necessary to comment on these issues.

Conclusion

[34] I would dismiss this appeal.

"The Honourable Mr. Justice Chiasson"

I agree:

"The Honourable Madam Justice Stromberg-Stein"

I agree:

"The Honourable Mr. Justice Goepel"

13

COURT OF APPEAL FOR ONTARIO

CITATION: Extreme Venture Partners Fund I LP v. Varma, 2021 ONCA 853
DATE: 20211201
DOCKET: C67057, C67062, C67364 & C67376

Hourigan, Huscroft and Coroza JJ.A.

BETWEEN

DOCKET: C67057

Extreme Venture Partners Fund I LP, EVP GP Inc.,
Ravinder Kumar Sharma, Imran Bashir, and Kenneth Teslia

Plaintiffs/Defendants by Counterclaim
(Respondents)

and

Amar Varma, Sundeep Madra, Varma Holdco Inc.,
Madra Holdco Inc., Chamath Palihapitiya, El Investco I Inc.,
Extreme Venture Partners Annex Fund I LP, and EVP GP Annex Fund I Inc.

Defendants/Plaintiffs by Counterclaim
(Appellants/Respondents)

AND BETWEEN

DOCKET: C67062

Extreme Venture Partners Fund I LP, EVP GP Inc.,
Ravinder Kumar Sharma, Imran Bashir, and Kenneth Teslia

Plaintiffs/Defendants by Counterclaim
(Respondents/Appellants by Cross-Appeal)

and

Amar Varma, Sundeep Madra, Varma Holdco Inc.,
Madra Holdco Inc., Chamath Palihapitiya, El Investco I Inc.,

Extreme Venture Partners Annex Fund I LP,
EVP GP Annex Fund I Inc., Cassels Brock & Blackwell LLP, and
Seven Hills Group LLC

Defendants/Plaintiffs by Counterclaim
(Appellants/Respondents by Cross-Appeal)

AND BETWEEN

DOCKET: C67364

Extreme Venture Partners Fund I LP, EVP GP Inc.,
Ravinder Kumar Sharma, Imran Bashir, and Kenneth Teslia

Plaintiffs/Defendants by Counterclaim
(Respondents)

and

Amar Varma, Sundeep Madra, Varma Holdco Inc.,
Madra Holdco Inc., Chamath Palihapitiya, El Investco I Inc.,
Extreme Venture Partners Annex Fund I LP,
EVP GP Annex Fund I Inc., Cassels Brock & Blackwell LLP, and
Seven Hills Group LLC

Defendants/Plaintiffs by Counterclaim
(Appellants)

AND BETWEEN

DOCKET: C67376

Extreme Venture Partners Fund I LP, EVP GP Inc.,
Ravinder Kumar Sharma, Imran Bashir And Kenneth Teslia

Plaintiffs (Respondents)

and

Amar Varma, Sundeep Madra, Varma Holdco Inc.,
Madra Holdco Inc., Chamath Palihapitiya, El Investco I Inc.,
Extreme Venture Partners Annex Fund I LP,
EVP GP Annex Fund I Inc., Cassels Brock & Blackwell LLP, and
Seven Hills Group LLC

Defendants (Appellants)

Jonathan Lisus, Crawford Smith, Nadia Campion, Vlad Calina and John Carlo Mastrangelo, for the appellants Amar Varma, Sundeep Mandra, Varma Holdco Inc. and Madra Holdco Inc.

Andrew Brodkin, David E. Lederman and Daniel Cappe, for the appellants Chamath Palihapitiya and El Investco 1 Inc.

Won J. Kim, Megan B. McPhee, Aris Gyamfi and Rachael Sider, for the respondents

Heard: October 4-5, 2021 by video conference

On appeal from the orders of Justice Barbara A. Conway of the Superior Court of Justice, dated May 14, 2019, July 24, 2019, and February 4, 2020, and the judgment of Justice Barbara A. Conway of the Superior Court of Justice, dated May 14, 2019.

Hourigan J.A.:

Part I - Introduction

[1] After a five-week trial, the trial judge released thorough and compelling reasons that weaved a narrative of corporate malfeasance, avarice, and deceit in the technology sector. The appeals before this court raise important issues about remedies and, more fundamentally, acceptable standards of conduct in corporate Canada.

[2] I begin with an introduction of the key players. Amar Varma and Sundeep Madra, along with their respective holding companies, Varma Holdco Inc. (“Varma Holdco”) and Madra Holdco Inc. (“Madra Holdco”), are the "Varma/Madra Appellants." Chamath Palihapitiya and his holding company, El Investco 1 Inc. (“Investco”), are the “Palihapitiya Appellants”. They are collectively referred to as the "Appellants". Extreme Venture Partners Fund I LP, EVP GP Inc., Ravinder Kumar Sharma, Imran Bashir and Kenneth Teslia are the "Respondents".

[3] At trial, the Respondents asserted two central claims: (1) the “Annex Fund Claim”, alleging that the Varma/Madra Appellants were liable for breach of fiduciary duty and breach of contract regarding the establishment of a competing business, and (2) the “Xtreme Labs Claim”, alleging that the Varma/Madra Appellants were liable for breach of fiduciary duty, breach of contract, and conspiracy and that the Palihapitiya Appellants were liable in tort for knowing assistance in breach of fiduciary duty, inducing breach of contract, and conspiracy, all concerning the sale of Xtreme Labs Inc. (“Xtreme Labs”).

[4] The trial judge found in favour of the Respondents and ordered that: (1) on the Annex Fund Claim, Varma and Madra are liable for $250,000 in punitive damages, and (2) on the Xtreme Labs Claim, the Palihapitiya Appellants and the Varma/Madra Appellants are jointly and severally liable for $3.36 million (U.S.) in damages and $12.33 million (U.S.) in disgorgement of profits. She also made additional orders regarding the applicable exchange rate and prejudgment interest.

[5] The two groups of appellants take different approaches to this appeal. The Varma/Madra Appellants do not challenge the factual findings made by the trial judge. Instead, in their written materials, these appellants raise several alleged legal errors, which were narrowed in their oral submissions to two issues: (i) the calculation of damages on the sale of Xtreme Labs, and (ii) the validity of an amendment to the statement of claim to seek disgorgement regarding the sale of Hatch Labs Inc. ("Hatch Labs") and the disgorgement order ultimately made by the trial judge.

[6] In these reasons, I will explain why I am not persuaded by either of these arguments or the other grounds of appeal that were not addressed in oral argument. In summary, the trial judge made a sensible damages calculation, grounded in the evidence, which does not require appellate intervention. She also reasonably exercised her discretion in permitting the amendment of the claim and making the disgorgement order. There is also no basis to interfere with the trial judge's conclusions on the issues raised by the Appellants in their written material but not addressed in their oral submissions.

[7] The Palihapitiya Appellants adopt the legal arguments advanced by the Varma/Madra Appellants. They further submit that the trial judge erred in imposing joint and several liability for her disgorgement order. Relying on English authority, they say that a knowing assistant should not face the same liability as a faithless fiduciary. While that position is contrary to some Canadian jurisprudence, I am

prepared to accept that there might be circumstances where a knowing assistant should have their liability limited. However, this is not such a case. Here, the Palihapitiya Appellants were active participants in the core wrongful conduct as well as its primary beneficiaries. There is no equitable reason why their liability should be limited.

[8] The Palihapitiya Appellants also offer a double-barrelled attack on the trial judge's factual findings as part of their submission that she erred in finding that Palihapitiya had knowingly assisted in the breaches of fiduciary duty. First, they argue that she made a series of palpable and overriding errors of fact. Second, they submit that their conduct was well within the boundaries of ethical and legal corporate behaviour and that the trial judge's findings of misconduct are based on her own “idiosyncratic moral values.” These appellants argue that permitting the trial judge's findings to stand would result in confusion in the Canadian corporate world as business people would be held to unknowable standards of conduct that conflict with their legitimate business interests.

[9] The principal problem with the first part of the Palihapitiya Appellants' position is that it is dependent upon the Appellants' credibility. The trial judge rightly found the Appellants to be incredible witnesses whose sworn testimony was routinely contradicted by the written record. Moreover, Palihapitiya had an unusual habit in his public and private communications of bragging about significant

aspects of his alleged misbehaviour but then inexplicably denying any misconduct on the witness stand.

[10] The second part of the submission is a straw man argument. The trial judge's conclusions were not grounded in her idiosyncratic moral values, nor did she require Palihapitiya to compromise his legitimate business interests. Instead, she applied well-established tort and corporate law principles to his conduct and made findings of illegality supported by the record. Counsel's submission that the Appellants' unethical and illegal behaviour should be excused as standard examples of corporate conduct is meritless. The trial judge, an experienced commercial judge, saw through this argument and reached the correct conclusion. In my view, if the Appellants' conduct was not the subject of adverse findings by her, the court would have communicated a message that there are few, if any, limits to corporate malfeasance. Such a message would have caused significant uncertainty in the Canadian business world.

[11] The final legal issue is the cross-appeal. Ms. McPhee, on behalf of the Respondents, submits that the trial judge was correct in making an order for disgorgement. Further, she argues that the trial judge was right in finding that the order should act as a deterrent to similar behaviour in keeping with the prophylactic purpose of disgorgement. However, Ms. McPhee submits that the order made will have no deterrent effect because the Appellants are obliged to disgorge to the Respondents only what they would otherwise be entitled to receive had they not

breached their fiduciary duty. I am persuaded by that argument and agree that the disgorgement order should be increased to achieve its deterrent purpose.

[12] The question raised by the panel in oral argument was whether a prophylactic disgorgement order necessarily requires the disgorgement of all ill-gotten gains. The Respondents argue that it should. However, counsel for the Appellants chose to make no submissions on the point. My view is that courts should have flexibility in making a prophylactic disgorgement order, and thus there should not be an automatic rule for the disgorgement of all profits in all circumstances. However, on the facts of this case, where the Appellants have engaged in a litany of brazenly illegal acts and where their counsel elected not to offer any submissions on the point, I would order disgorgement of the total amount of the profits.

Part II – Background Facts

[13] The following high-level factual overview will provide the necessary context to consider the issues in these appeals.

(a) Fund I

[14] Extreme Venture Partners Fund I LP (“Fund I”) is a venture capital fund that provides seed capital to start-up technology companies. It was established in November 2007 by the following parties in this litigation: Sharma, Bashir, Teslia, Varma and Madra.

[15] Fund I was registered as a limited partnership, and its general partner, EVP GP Inc. ("EVP GP"), was incorporated. The shares of EVP GP were owned personally by Sharma, Bashir and Teslia, as well by Varma Holdco and Madra Holdco.

[16] EVP GP managed the business of Fund I. The board of directors of EVP GP consisted of Sharma, Bashir, Teslia, Varma and Madra. In addition, Varma and Madra served as managing directors of EVP GP, were responsible for all aspects of the day-to-day operations of Fund I, and recommended companies for investment to the Investment Committee.

[17] Fund I grew rapidly, but by late 2010, tensions had started to develop in the relationship between Sharma, Bashir and Teslia on the one hand and Varma and Madra on the other. Varma and Madra testified at trial that they were doing all the work to grow the businesses and were not being adequately recognized or compensated for their efforts.

(b) Annex Fund

[18] In November 2010, Madra was on a plane to California and ran into the managing director of Northleaf Capital Partners (“Northleaf”). They began talking about establishing a fund together, with Northleaf as the primary limited partner. Varma, who had been looking into pitching Northleaf for Fund I with Sharma, joined

these conversations at a later meeting. Madra and Varma did not tell Sharma, Bashir or Teslia about the meetings.

[19] In December 2011, Madra and Varma established a second fund named the Annex Fund. Madra and Varma did not tell Sharma, Bashir or Teslia about the establishment of the Annex Fund. Instead, Madra and Varma surreptitiously obtained $5 million in financing from Northleaf. After the Annex Fund was established, Madra and Varma provided Northleaf with confidential information about Fund I's portfolio and investment strategy. As a result, the Annex Fund invested in six of Fund I's most successful portfolio companies and operated for two years until it closed in 2013. The foregoing facts were the basis of the Annex Fund Claim.

(c) Xtreme Labs

[20] One of Fund I's investments was Xtreme Labs, a mobile software development lab business co-founded by Madra and Varma. The original equity of Extreme Labs, less 5% held by Go Pivotal Inc. ("Pivotal"), was split equally among Sharma, Bashir, Teslia, Varma Holdco and Madra Holdco. Fund I later acquired an interest in the company. Madra and Varma were also the managing directors and co-CEOs of Xtreme Labs and were responsible for its day-to-day operations.

[21] By 2011, the parties had started to explore options to sell Xtreme Labs. Despite the prior years' rapid growth, Madra and Varma presented projections that

estimated the company's growth would slow, which surprised and disappointed the Xtreme Labs board. They advised the board, which included Sharma, Bashir and Teslia, that the projected revenues for the current fiscal year would be $12 million (U.S.).The initial efforts to sell Xtreme Labs were unsuccessful, and the board members had different opinions about the company's value.

[22] On February 1, 2012, Palihapitiya contacted Madra to talk about buying Xtreme Labs. Palihapitiya is a prominent Silicon Valley entrepreneur, a founding senior executive at Facebook, and a good friend of Varma and Madra. On March 20, Palihapitiya, Varma and Madra had dinner together in Toronto and then went to Varma's apartment afterward. Together, they prepared an offer by Palihapitiya to purchase the company that would allow Varma and Madra to stay on with the company after the sale. The offer was forwarded to the rest of the board the next day, but Varma and Madra did not tell the board that they had been with Palihapitiya the previous evening, working on the offer.

[23] After the offer and a counteroffer, as well as an independent valuation by Seven Hills Group LLC ("Seven Hills") that Varma and Madra oversaw, the Respondents agreed to sell their shares in Xtreme Labs to Palihapitiya's holding company, Investco. The purchase price was based on an enterprise value for Xtreme Labs of $18 million (U.S.). The selling shareholders received $12 million (U.S.) for their shares of Xtreme Labs. Varma and Madra and the Xtreme Labs employees received $6 million (U.S.) in the ongoing equity of the company.

[24] In October 2013, Palihapitiya negotiated the sale of shares of Xtreme Labs to Pivotal for $60 million (U.S.). Prior to the sale, Palihapitiya, Varma and Madra carved certain assets out of Xtreme Labs and transferred them to a holding company of which they were the sole shareholders, 2390184 Ontario Inc. (“239 Ontario”). One of those assets was a 13% equity interest in Hatch Labs, which had developed the mobile dating app Tinder. In March 2014, 239 Ontario sold its stake in Hatch Labs to a large American corporation, InterActive Corp. (“IAC”), for $30 million (U.S.).

Part III – Proceedings Below

[25] The Respondents sued the Appellants, asserting various causes of action, including breach of fiduciary duty, breach of contract, inducing breach of fiduciary duty and inducing breach of contract.

(a) Standing

[26] At trial, the Appellants noted that Varma and Madra were managing directors of EVP GP and not Fund I. Therefore, they submitted, Fund I had no standing to claim a breach of fiduciary duty. Further, they argued that EVP GP had no standing to assert such a claim because it had not suffered harm. In addition, the Appellants’ position was that in the Xtreme Labs sale, Varma and Madra were acting exclusively in their role as Xtreme Labs directors, not EVP GP directors. Thus, they argued that they owed no duty to any of the Respondents.

[27] The trial judge rejected these submissions. She observed that "[i]n this case, Fund I is alleging that it suffered harm *as a result of* the breach of fiduciary duty owed by Amar and Sunny to its general partner, EVP GP, which was responsible for managing the business of Fund I." The trial judge also noted that EVP GP holds all the property of the limited partnership. Therefore, to the extent that EVP GP received any damages, those damages would be the property of Fund I. Under either rationale, the damages would be receivable by Fund I, the party that alleged the loss. Additionally, she found that Varma and Madra were directors of both EVP GP and Xtreme Labs, and "as directors of EVP GP, owed fiduciary duties to that company in connection with the sale of Xtreme Labs."

(b) Annex Fund Claim

[28] Sharma, Bashir and Teslia testified that they trusted Varma and Madra as managing directors of Fund I. Their evidence was that the plan from the outset was to operate a series of funds under the Extreme Venture Partners brand, with Varma and Madra taking a lead role. If Varma and Madra started a new fund independently, the expectation was they would do so transparently and properly by buying out the Respondents' interests in EVP GP under the EVP GP Shareholders' Agreement. Varma and Madra, on the other hand, testified they were entitled to pursue the second fund on their own, without the Respondents' involvement.

[29] The trial judge accepted the Respondents' account and found that Varma and Madra had breached their duties of honesty, loyalty, and confidentiality owed by virtue of being directors of EVP GP. However, the trial judge dismissed the Respondents' passing off claim.

[30] While the Respondents alleged reputational damages as part of the Annex Fund Claim, the trial judge ruled such damages were not made out. In addition, Fund I sought compensatory damages for lost opportunities, but the trial judge rejected that claim. However, the trial judge found that punitive damages were appropriate on the basis that Varma and Madra's conduct was "most deserving" of sanction and required denunciation. Accordingly, she awarded $250,000 punitive damages against each of Varma and Madra, payable to Fund I.

(c) Xtreme Labs Claim

(i) General Findings

[31] Palihapitiya, Varma, and Madra denied that they conspired on the Xtreme Labs acquisition. However, the trial judge rejected their evidence as incredible, in part because it was contradicted by the written record. Instead, she found that they worked together and coordinated their efforts to present Palihapitiya's offer to buy the company at the board meeting in March 2012. Further, Varma and Madra hid this coordination and pressured the board to accept the offer. They acted out of

self-interest as Palihapitiya's offer to buy the company was their opportunity to increase their compensation and equity in the business.

[32] The trial judge also found that Varma and Madra worked with Palihapitiya to facilitate his acquisition of Xtreme Labs at a discounted purchase price by: (a) understating the company's revenue projections, (b) advancing a low earnings multiple, and (c) concealing the company's equity interest in Hatch Labs.

(ii) Causes of Action

[33] The trial judge carefully considered each of the constituent elements of the causes of action asserted.

[34] Regarding the claim of breach of fiduciary duty, Fund I alleged at trial that Varma and Madra breached their fiduciary duties as directors of Fund I's general partner, EVP GP, in connection with the Xtreme Labs sale transaction. The trial judge agreed. She found that they were in a conflict of interest and were not transparent with the EVP GP board. The board was entitled from the outset to know the role Varma and Madra were playing with respect to Palihapitiya's offer. In addition, Varma and Madra breached their duty of loyalty in various ways, such as by providing confidential information to Palihapitiya before the sale had closed.

[35] On the claim of breach of contract/breach of warranty, the trial judge found that Varma and Madra breached their warranties in the Xtreme Labs sale contract.

In addition, their conduct constituted a breach of contract by Varma Holdco and Madra Holdco of their confidentiality obligations.

[36] Palihapitiya testified that he did not know what information was exchanged and what communications Varma and Madra had with other board members. Accordingly, he denied that he provided knowing assistance to any breach of fiduciary duty. His evidence was found to be contradicted by his email to Madra on March 16, instructing Madra what to tell the board about the multiplier on a recent sale regarding Pivotal. It was also contradicted by the ongoing communications between the co-conspirators as to what was transpiring among board members. The trial judge found that Palihapitiya worked together with Varma and Madra on an offer that included a Pivotal multiplier figure that they knew was understated. Palihapitiya sent this offer to Varma and Madra to present to the board and, by extension, knowingly participated in their advancing an understated multiplier figure to the board. Palihapitiya therefore assisted Varma and Madra in breaching their duty of honesty.

[37] The trial judge also concluded that Palihapitiya knowingly assisted Varma and Madra in breaching their duty of honesty concerning Hatch Labs/Tinder. Varma and Madra did not disclose the existence of the equity interest in Hatch Labs or the launch of Tinder to Fund I before closing. Palihapitiya was found to have known about Hatch Labs/Tinder and, along with Varma and Madra, to have closed the transaction based on this concealed information. In so doing,

Palihapitiya knowingly assisted Varma and Madra in the breach of their fiduciary duty.

[38] The elements of the tort of inducing breach of contract were met as Palihapitiya induced Varma Holdco and Madra Holdco to breach their contractual obligations under the Xtreme Labs Shareholders' Agreement. Palihapitiya intended to and did procure the breach of the Xtreme Labs Shareholders' Agreement when he asked Varma and Madra to provide him with confidential information from Xtreme Labs before signing the letter of intent in May 2012.

[39] Concerning the conspiracy claim, the trial judge relied on, among other things, Palihapitiya's talk at a Town Hall held with the employees of Xtreme Labs shortly after the sale and his speech at the Collision Conference in 2014 to find that Palihapitiya, Varma and Madra were acting in concert. The requisite unlawful conduct included the breaches of fiduciary duty, contract and warranty, as well as Palihapitiya's knowing assistance in the breach of fiduciary duties and his inducement of the breach of the Xtreme Labs Shareholders' Agreement. This misconduct was directed towards the Respondents and caused damages.

(iii) Remedies

[40] The trial judge found that Fund I, Sharma and Bashir sold their shares of Xtreme Labs based on the wrongful conduct of Palihapitiya, Varma and Madra. Had Fund I, Sharma and Bashir been given accurate information about the

financial position and prospects of Xtreme Labs, they would have had the opportunity to negotiate a sale to Palihapitiya or another buyer based on this accurate information or to continue to hold their shares.

[41] Using actual revenues of $17.2 million (U.S.) for FY 2012, the trial judge multiplied that figure by 1.5, resulting in a revised purchase price of $25.8 million (U.S.). Since Fund I, Sharma and Bashir owned 64.56% of the shares of Xtreme Labs, the trial judge concluded that they would receive 64.56% of $17.20 million (U.S.), the latter figure referring to the cash amount they would have received on the new purchase price. In other words, they would have received $3.36 million (U.S.) more than what they did receive on the sale of the company. Further, because Palihapitiya, Varma, Madra, Investco, Varma Holdco and Madra Holdco were all participants in the acquisition of Xtreme Labs that was based on the breaches of fiduciary and contractual duties and all played a role in the conspiracy, she concluded that they should be jointly and severally responsible for the $3.36 (U.S.) million in losses.

[42] Regarding Hatch Labs, while the Respondents initially claimed damages for the undervalued share price and lost opportunity, during their closing submissions they sought to amend their claim to elect disgorgement. After considering the Appellants' submissions on prejudice, the trial judge granted leave to amend the claim. She found no non-compensable prejudice in granting the amendment, as it

was simply another remedy being asserted and would not take the Appellants by surprise.

[43] At the time of the sale to Palihapitiya (through Investco), Fund I owned 41.82% of the shares of Xtreme Labs and therefore had a 41.82% indirect interest in the Hatch Labs equity. One year later, Palihapitiya, Varma and Madra transferred the Hatch Labs equity to their holding company, 239 Ontario. The shareholders of 239 Ontario were Investco (50%), Varma and Madra (25% each). Six months later, 239 Ontario sold the Hatch Labs equity to IAC for $30 million (U.S.).

[44] According to the trial judge, by concealing the existence of the Hatch Labs equity, Varma and Madra, working with Palihapitiya/Investco, deprived Fund I of the opportunity to take it into account on the sale of its shares of Xtreme Labs, to renegotiate the terms of sale, or to decide not to sell its shares of Xtreme Labs at that time. Further, as a direct result of this concealment, Varma, Madra and Palihapitiya /Investco were able to profit from Fund I's interest in the Hatch Labs equity. Accordingly, the trial judge found that they should not be entitled to retain the profits attributable to their wrongdoing. A disgorgement order was required to serve a deterrent purpose. However, she found that the order should only apply to the profits that corresponded to Fund I's 41.82% interest in the Hatch Labs equity.

(iv) Exchange Rate and Prejudgment Interest

[45] The trial judge issued supplementary reasons for judgment regarding the exchange rate and prejudgment interest applicable to the awards she made in her primary reasons for judgment.

[46] Orders payable in a foreign currency are subject to s. 121(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"). The default rule is that the applicable exchange rate to be used is the rate on the day before payment is received by the judgment creditor. However, s. 121(3) of the *CJA* gives the court the discretion to apply a different exchange rate date if it considers using the rate on the day before payment to be inequitable.

[47] The Appellants submitted that the trial judge should exercise her discretion to use the exchange rate that existed on the date of the transactions in question because the current exchange rate reflected a significantly weakened Canadian dollar. Further, the Appellants argued that because the Respondents' expert used the date of the transactions in his report for currency conversion, the Respondents were estopped from asserting a right to the current exchange rate.

[48] The trial judge found that the Appellants had not met their onus of establishing why she should depart from the usual rule regarding the exchange rate. She observed that the s. 121(3) discretion is often exercised with a view to preventing inequity and making plaintiffs whole. Here, however, choosing the

transaction dates with a more favourable exchange rate in favour of the Appellants would allow them to benefit from their wrongful conduct at the expense of the Respondents. Further, she found that the Respondents did not rely on their expert report in closing submissions.

[49] Regarding prejudgment interest on the Xtreme Labs Claim, the parties used the same formula and the same rate of 1.3%. The only issue was the starting date. The Respondents claimed prejudgment interest on the full amount from August 15, 2012. This was the date the Xtreme Labs sale closed and, they submitted, the date the cause of action arose. The Appellants agreed that August 15, 2012 was the date for the Xtreme Labs sale damages but submitted that the loss arising from the Hatch Labs sale only occurred on April 3, 2014, the date when they first received profits from the sale that closed on March 11, 2014.

[50] The trial judge ruled in favour of the Respondents, finding that the Appellants were improperly equating the remedy of disgorgement with the date that the cause of action arose. Disgorgement of profits was the remedy for Varma and Madra’s breach of fiduciary duty and Palihapitiya/Investco's knowing assistance concerning the concealment of Xtreme Labs' equity interest in Hatch Labs. The cause of action arose with the concealment of this asset when the Appellants purchased the shares of Xtreme Labs on August 15, 2012. Therefore, the trial judge concluded that this was the date the cause of action arose and the date from which prejudgment interest should be calculated.

Part IV – Analysis

(a) Damages on Sale of Xtreme Labs (Excluding Hatch Labs)

[51] The Appellants make three submissions regarding the award of damages on the sale of Xtreme Labs. I am not persuaded by any of these arguments.

[52] First, they submit that the damages award lacked an evidentiary foundation. In setting a revised purchase price of $25.8 million (U.S.) and then calculating damages on that basis, they say that the trial judge took an "extraordinary step in crafting her own damages theory." According to the Appellants, the "trial judge erred in failing to accept the experts' evidence, absent any cogent reason, given that both parties' experts agreed there were no damages."

[53] The jurisprudence recognizes that trial judges are not held to a standard of perfection in making damages awards. Appellate courts will not interfere with reasonable damages awards where they have an evidentiary basis, as damages cannot always be calculated with mathematical precision. Sometimes the trial judge must do the best they can in the circumstances: *Penvidic v. International Nickel*, [1976] 1 S.C.R. 267, at 280. An appellate court should interfere with a trial judge's damages assessment only if it is "tainted by an error in principle, or is unreasonably high or low": *Whitefish Lake Band of Indians v. Canada (Attorney General)*, 2007 ONCA 744, 87 O.R. (3d) 321, at para. 28. See also

1758704 Ontario Inc. v. Priest, 2021 ONCA 588, at para. 70; *Southwind v. Canada*, 2021 SCC 28, 459 D.L.R. (4th) 1, at paras. 153-60.

[54] I am satisfied that there is no basis for interference with the trial judge's damages calculation. She was not obliged to accept the evidence of the expert witnesses on damages. The trial judge reasonably calculated the damages, basing her calculations on the actual revenues for FY 2012 and the fact that the Respondents were amenable to selling at a 1.5 multiplier. This award aimed to put the Respondents in the position they would have been in had they been given correct information regarding the revenues of Xtreme Labs.

[55] Second, the Appellants submit that the trial judge erred in ignoring the lack of evidence of a buyer at a higher price. Their position is that there was no evidence that a $25.8 million purchase price could have been achieved but for their alleged misconduct. They note as well that there was no suggestion that Palihapitiya, others in his group of buyers or anyone else, would have paid that price.

[56] This submission ignores the critical fact that the misconduct of the Appellants prevented the company from being properly marketed, as the correct underlying revenue and other information was concealed by the Appellants and thus could not be presented to potential buyers. Moreover, the trial judge found that the Respondents were deprived of the opportunity to sell the company or

retain their shares and sell at a higher value later. It should be remembered that Xtreme Labs was sold at a much higher value just over one year later.

[57] Finally, the Appellants argue that the Respondents were awarded loss of chance damages that were not claimed or argued at trial. I disagree. While the Respondents changed the methodology of their damages calculation during the course of the trial, they consistently sought damages on the sale of Xtreme Labs. They argued that as a result of the Appellants' misconduct, they did not obtain a fair price on the sale of the company. The trial judge's damages calculation is responsive to that claim.

(b) Amendment to the Statement of Claim

[58] The Appellants submit that the trial judge erred in allowing the Respondents to amend their statement of claim after trial to include a claim for disgorgement. They argue that the presumptive prejudice of late-stage amendments means the party seeking the amendment bears the burden of establishing the absence of irremediable prejudice. According to the Appellants, the trial judge reversed this burden, requiring the Appellants to show prejudice. Further, they note that the Respondents never ended up amending their claim formally, so the trial judge made a finding of liability and awarded substantial damages on a theory that was not pleaded. Counsel for the Varma/Madra Appellants submitted in oral argument that the correct course is to order a new trial on the issue of disgorgement so that

his clients may adduce further evidence to respond to this claim. I would not give effect to this argument.

[59] Initially, the Respondents claimed damages for the losses they suffered in selling their shares of Xtreme Labs to Palihapitiya at an undervalued price. They also claimed damages for lost opportunity regarding Hatch Labs due to the concealment of Xtreme Labs' 13% equity interest in that company. However, due to errors in their expert's report, they were forced to abandon the latter claim. The Respondents raised disgorgement of the profits from the Hatch Labs sale during closing submissions, and the trial judge commented that they appeared to be trying to amend their claim to seek new relief.

[60] The Appellants opposed the amendment, arguing that it would cause non-compensable prejudice because they would have conducted the trial differently if they had known about a claim for disgorgement of profits. After considering the Respondents' submissions, the trial judge gave reasons granting leave to amend the claim to seek disgorgement of profits for Hatch Labs. She concluded that there was no non-compensable prejudice, that disgorgement was simply another remedy being sought, and that the Appellants would not be taken by surprise in any of the substantive allegations or amounts claimed. Further, the trial judge also found that most of the evidence concerning profits was in the Appellants' possession or control.

[61] The Appellants were then given an opportunity to request an adjournment and/or present further evidence and make additional submissions. On their return to court ten days later, the Appellants advised that they maintained their position that they had suffered non-compensable prejudice and that leave to amend should not have been granted. They advised the court that they would not be seeking an adjournment and would not be tendering additional evidence or making further submissions on the Hatch Labs issue.

[62] The trial judge was correct in finding that there was no prejudice to the Appellants. They have not articulated for this court what substantial new evidence they might call at the new trial they are requesting. My view is that they have not done so because there is no new evidence. They knew at trial that there was an allegation that Varma and Madra had hidden Xtreme Labs' equity interest in Hatch Labs. The defence proffered was twofold: (i) they did not know about the interest in Tinder, and (ii) the gains made on the investment were based entirely on a fortuitous series of events that occurred after the closing of the sale. Evidence was tendered in support of these positions. It is reasonable to infer that the same evidence would be presented in a new trial on disgorgement. In any event, the Appellants were given an opportunity to either lead further evidence or seek an adjournment. They declined both options. That was a strategic choice, and the Appellants must live with the consequences of their choice.

[63] The fact that the pleading was not amended is of no moment. Rule 26.06 provides that “[w]here a pleading is amended at the trial, and the amendment is made on the face of the record, an order need not be taken out and the pleading as amended need not be filed or served unless the court orders otherwise”: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. In the present case, the pleading was effectively amended at trial through the motion judge's order. I am satisfied that the Appellants understood the amended claim against them. Thus, no formal amendment of the statement of claim was necessary.

[64] Finally, the trial judge did not reverse the onus. Here, it was clear to the trial judge that an amendment would cause no irreparable prejudice to the Appellants. The Appellants were given an opportunity to dissuade the trial judge of that view and failed to do so.

(c) Disgorgement Award

[65] The Appellants submit that the trial judge made four errors in making her order for disgorgement independent of her alleged error in permitting the statement of claim to be amended.

[66] First, they submit that the trial judge erred in not requiring a causal relationship between the wrongdoing and the profits to be disgorged. Here, the profits held to have been received from the sale of the Hatch Labs equity were not causally connected to the wrongful conduct. The Hatch Labs equity was only worth

at most $500,000 (U.S.) when the Xtreme Labs sale closed – its increase in value thereafter was due to Tinder's success at the 2014 Sochi Olympics and “a lot of luck." It is argued that the trial judge allowed the Respondents to take the benefit of a significant increase in value that resulted from external independent events unrelated to the appellants’ conduct.

[67] I am not persuaded that the trial judge erred in this regard. I concur with her statement in paragraph 173 of her reasons where she rejected this same argument:

> The defendants argue that no one could have predicted in August 2012 that Tinder would become a great success. There are two problems with this submission. First, it is not consistent with the position advanced by the defendants in their testimony. The defendants did not testify that they were aware of Tinder but failed to disclose it to the board because they thought it had no value at the time. Rather, they testified that they never heard of Tinder until well after the sale transaction. I have rejected their evidence and found that they did know about Tinder at the time of the sale and failed to tell the plaintiffs about it. Second, as fiduciaries, Amar and Sunny had a duty to disclose to the board all of the information with respect to the company’s assets, regardless of whether or not they thought it had the potential for future success at the time. They did not do so.

[68] The trial judge's second point is worth emphasizing. What the fiduciaries did in this case was hide the investment in Hatch Labs/Tinder. As a consequence of their actions, Fund I lost the opportunity to participate in the upside of the investment. It is no defence to such actions to say that no one knew that Hatch

Labs would be profitable. A fiduciary has a duty of utmost good faith and an obligation to disclose so that the beneficiary has an opportunity to make an informed decision about the best course of action: see *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at paras. 93-94. By breaching their duty in this case, the appellants denied the respondents the opportunity to make that decision.

[69] Second, the Appellants submit that the trial judge erred in ordering disgorgement from 239 Ontario, Varma and Madra when there was no evidence that they had personally profited from Hatch Labs' sale to IAC. Thus, they say that the trial judge pierced the corporate veil of 239 Ontario, a non-party.

[70] I reject this argument. The trial judge found that the Appellants or their holding companies “wholly owned” 239 Ontario and that a sizable portion of the profits "were distributed" to the Appellants. This was an available inference on the facts as one of the purposes of the conspiracy was to conceal an asset of Xtreme Labs – namely Hatch Labs – from the selling shareholders for the benefit of the co-conspirators. There was no order that 239 Ontario itself make any disgorgement and therefore no veil piercing or disregard of any corporate form.

[71] Third, the Appellants contend that the trial judge’s disgorgement award focused exclusively on the sale price and did not account for deductions/expenses in completing the sale. In effect, the Appellants argue, she made her order in an evidentiary vacuum. But if there was indeed an evidentiary vacuum, it was created

by the Appellants. The trial judge recognized that they held the evidence regarding the precise details of the sale. Nevertheless, they elected not to call that evidence and cannot now complain about its absence from the record.

[72] Fourth, the Appellants argue that the trial judge's damages calculation includes an element of double counting. Their position is as follows. The trial judge's calculation is based on an enterprise value of $25.8 million (U.S.), representing a 1.5 multiple applied to the actual FY 2012 revenues of $17.2 million (U.S.). The enterprise value, the Appellants claim, included the price of Hatch Labs Equity. Thus, the trial judge erred by ordering both damages that included this value as well as disgorgement of proceeds from the sale of Hatch Labs. Damages and disgorgement are alternative remedies; a plaintiff cannot obtain a judgment for both.

[73] This argument is flawed in its central contention that the value of Hatch Labs was reflected in the damages awarded. That award was made to compensate for the depressed sale price received by the Respondents for Xtreme Labs and was based on the trial judge's assessment of the extent to which the actual FY 2012 figures for the revenues of Xtreme Labs exceeded the depressed figures put forth by Varma and Madra. The trial judge based the damages calculation on a multiple of actual earnings. However, the Hatch Labs equity interest did not contribute to the Xtreme Labs revenue stream during that fiscal year and was therefore not included in the damages calculation. Thus, there was no double counting.

(d) Knowing Assistance in Breach of Fiduciary Duty

[74] The constituent elements of the tort of knowing assistance in the breach of a fiduciary duty are that: (i) there must be a fiduciary duty; (ii) the fiduciary must have breached that duty fraudulently and dishonestly; (iii) the stranger to the fiduciary relationship must have had actual knowledge of both the fiduciary relationship and the fiduciary's fraudulent and dishonest conduct; and (iv) the stranger must have participated in or assisted the fiduciary's fraudulent and dishonest conduct: *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787, at pp. 811-13.

[75] The Palihapitiya Appellants submit that the trial judge erred in her application of the knowing assistance test because there was no intentional wrongful act in this case. They argue that the trial judge erred in reaching her factual conclusions. They allege, for example, that the trial judge incorrectly concluded that Palihapitiya knew of the Hatch Labs equity and Tinder at the time of closing. In addition, these appellants submit that Palihapitiya's conduct was legal and entirely consistent with Canadian business conduct standards. To properly analyze this submission, it is necessary to consider its two underlying themes: (i) the trial judge made palpable and overriding errors of fact, and (ii) the trial judge erred in imposing her idiosyncratic moral code upon what was otherwise standard business conduct.

(i) Factual Findings

[76] It should be remembered that the Varma/Madra Appellants accept the factual findings of the trial judge. The Palihapitiya Appellants do not. It is helpful to review some of the significant findings of fact made by the trial judge in her comprehensive reasons for judgment, including the following:

- Varma, Madra and Palihapitiya were incredible witnesses. They were not forthright in their testimony. Their testimony constituted an attempt to get around the contemporaneous emails and documents that contradict their version of events.
- Teslia, Bashir and Sharma were straightforward in their testimony, which was consistent with the documentary evidence.
- Varma, Madra and Palihapitiya worked together and coordinated their efforts to present Palihapitiya's offer to buy Xtreme Labs at the board meeting on March 21. They undertook this coordinated campaign in the weeks leading up to the meeting as proven by their emails, which showed that they were working together on the offer to purchase, had brought "key folks" on board and were planning the "hammer drop" for the board meeting.
- When Varma and Madra presented the offer to the board, they pretended that they were not involved in its creation and acted as though they had just received an unsolicited offer from Palihapitiya. They immediately sent a slide deck recommending the offer and pressured the Respondents intensely to

accept the offer over the next few days. They tried to resist a valuation of the company and voted against giving the board an M&A mandate.

- Varma and Madra were motivated by their self-interest because they wanted to increase their compensation and equity interests in Xtreme Labs.
- Varma and Madra downplayed Xtreme Labs' financial prospects to facilitate Palihapitiya's acquisition of the company at a discounted price. The trial judge rejected Varma and Madra's testimony that they thought their $12 million projection was reasonable as of April 2012. Their testimony was contradicted by the much higher figures they were providing around the same time to others such as Samsung and Palihapitiya.
- Varma and Madra provided Seven Hills with understated revenue projections.
- Contrary to what they were telling the Respondents, Varma and Madra were actually optimistic about the business and its potential for continued growth and knew that upcoming projects would generate significant additional revenues for FY 2012.
- Varma, Madra and Palihapitiya all knew the Pivotal multiple was higher than the 0.75x number contained in Palihapitiya’s March 20 offer. Varma and Madra nonetheless conveyed the offer to the board, even though the offer was based upon a number they knew to be understated.

- When told by Sharma that a 3x multiple would be appropriate, Varma and Madra tried to persuade him that the appropriate multiple was a lower number.
- Varma and Madra never disclosed to the board the fact that Xtreme Labs had a 13% equity interest in Hatch Labs, which was significant, given management's view that the way for a fee for service business to evolve was by developing proprietary technology, which is what Hatch Labs was doing.
- Palihapitiya's testimony wherein he denied knowing anything about Hatch Labs at the time of the sale transaction and said that he only learned of the investment shortly after closing was false.
- Varma knew about the development of the Tinder app and its launch in the Apple Store at the time of closing. Further, given how closely Varma, Madra and Palihapitiya were working together on the Xtreme Labs transaction, they clearly all knew about Tinder.

[77] The Palihapitiya Appellants challenge these findings, but they fail to specify, either in their factum or oral submissions, how the trial judge went wrong in her factual analysis or how she made any palpable and overriding errors of fact. They point out, for example, that the initial offer to purchase Xtreme Labs was rejected by the board and thus argue that the offer had no impact. However, this submission ignores the trial judge's finding that the offer was only one instance of the illegal

activity employed as part of the ongoing conspiracy to purchase Xtreme Labs at a discounted purchase price.

[78] Another example of an objection to the findings is the specious argument that the board could have discovered the actual revenue numbers if they had undertaken more due diligence. That is not the way corporate law works. A board of directors has a right to believe what its officers and directors are telling it. Where that information is deliberately falsified, as in this case, it is no defence to say that the board should have known better: *Business Corporations Act*, R.S.O. 1990, c. B. 16, s 135(4).

[79] The Palihapitiya Appellants also submit that the trial judge ought to have accepted Palihapitiya's evidence over the testimony of the Respondents. The difficulty with this argument is that Palihapitiya's testimony was contradicted time and again by the written record. Indeed, Palihapitiya's private and public statements are inconsistent with his sworn evidence. I offer the following examples:

- On September 27, 2012 – just seven weeks after closing – Palihapitiya wrote an email to a friend regarding the acquisition of Xtreme Labs, boasting: “25% net cash margins, 100% YoY revenue growth – should do $35 – 40M next year. We bought it for $16M. Yum, yum!!!!”

- Palihapitiya spoke at a Town Hall for the Xtreme Labs employees shortly after closing. In his remarks, he talked about how the previous owners of the company were "douchebags," "fuckfaces" and "idiots that were counterproductive." He described how at the 11th hour, the company's ownership structure got "convoluted," and in his opinion, Varma and Madra "got taken advantage of." He said that "over the course of this last year, sort of instigating and pushing and prodding, we finally found the path to basically buy Xtreme and recapitalize it."
- Palihapitiya's denials about knowing about Hatch Labs and Tinder before closing, as well as his testimony that he found out about Hatch Labs shortly after closing and considered it worthless, were contradicted by a speech he gave at a Collision Conference in 2014. In his speech, Palihapitiya described his strategy in acquiring Xtreme Labs, selling it to Pivotal, carving out the Hatch Labs equity and selling it to IAC four months later. Palihapitiya said he knew that his friend had been developing apps and receiving equity in lieu of payment.

[80] In his testimony, Palihapitiya tried in vain to distance himself from his previous statements. The trial judge saw through that effort. It is difficult to imagine any judge believing his denials and prevarications in spite of the record, and I am satisfied that the trial judge made no factual errors in finding that he was not only an active participant in the core wrongful activity, but also its primary beneficiary. I

am fortified in that conclusion by the fact that the Varma/Madra Appellants are not challenging the trial judge's factual findings on these appeals. On the contrary, they sensibly concluded that those findings were unassailable.

(ii) Standard of Business Conduct

[81] I come now to the second theme. As noted earlier, the Palihapitiya Appellants assert that Palihapitiya's conduct was in keeping with how business is conducted in Canada, and the trial judge inappropriately applied her idiosyncratic moral values and thereby found wrongdoing where there was none. The policy issue said to underlie this submission is that allowing trial judges to impose their own moral codes will lead to uncertainty in the corporate world. The crux of the argument is that business people are supposed to maximize profit and look after their own interests; it will lead to uncertainty if they are held to a different standard whereby they are obliged to look out for the best interests of their competition.

[82] This is a straw man argument. Counsel for these appellants queries whether business people should be forced to assume broad and unknowable duties of fairness to their counterparts in transactions. The obvious answer to that question is no. But, of course, that was not the question before the court below or this court. What was in issue was whether the Appellants had breached their duties and/or engaged in tortious conduct by organizing the sale of Xtreme Labs. This was not a case of the trial judge imposing some new morality-based constraints on the way

business operates; it was the court applying the settled law of corporations, fiduciary duty, contract, and tort to the conduct of the Appellants. The trial judge correctly rejected the Appellants' submission, finding in her reasons that:

> This is not a case of tough business tactics and clever negotiating strategy. Nor is it a case of sellers' remorse. This is a case of a purchaser conspiring with fiduciaries of a company to acquire a business and doing so based on breaches of fiduciary and contractual duties.

[83] Another argument under this theme is that Palihapitiya's real interest was in protecting young tech entrepreneurs and that this motivation somehow rendered his illegal conduct justifiable in the circumstances. The following excerpt from his cross-examination regarding his initial offer to purchase Xtreme Labs is particularly revealing on this point:

> Q. Sir, you are a founder of Social Capital, and you talk about having Social Capital values and Chamath values-the highest ethics. Did you find it weird that the potential sellers are helping you with an offer that tightens the screws on them?
>
> A. If you're asking for my opinion, this, Your Honour, it's quite common place. It tends to be the case in Silicon Valley that young founders are so in need of money that many of them do really bad deals at the beginning and then they do find themselves in a situation where their boards really take advantage of them and I do think that this type of stuff is quite common place there amongst these kind of deals because you're not talking about 35, 40, 50-year-old with years of experience, you're talking about folks that are starting their new venture a few years in. They're quite naïve and they often do get taken advantage of and they do react this way.

[84] Remarkably, Palihapitiya does not challenge the premise of the question that Varma and Madra were assisting him in breach of their duties. Instead, he justifies his participation in this conduct on the basis that they had been taken advantage of by the board. It is hard to believe that a business person of Palihapitiya's experience and sophistication believed that his conduct was legal and justified by reason of his co-conspirators' dissatisfaction with their compensation. It is tempting to conclude that Palihapitiya used Varma and Madra for his own purposes and, in the process, reaped a multi-million dollar windfall. However, I need not determine this matter, because even if I believed Palihapitiya's dubious justification, it offers no defence in law.

(e) Joint and Several Liability

[85] The Palihapitiya Appellants submit that the trial judge erred in law by holding them jointly and severally liable with the Varma/Madra Appellants. They argue, relying on an English trial court decision, *Ultraframe (UK) Ltd. v. Fielding,* [2005] EWHC 1638 (Ch.), that a knowing assistant’s liability ought not to be synonymous with a fiduciary’s because the knowing assistant, who has not given an undertaking of loyalty, is not in the same position as the fiduciary. The court ruled in that case, at para. 1600:

> I can see that it makes sense for a dishonest assistant to be jointly and severally liable for any *loss* which the beneficiary suffers as a result of a breach of trust. I can see also that it makes sense for a dishonest assistant to

> be liable to disgorge any profit which he *himself* has made as a result of assisting in the breach. However, I cannot take the next step to the conclusion that a dishonest assistant is also liable to pay to the beneficiary an amount equal to a profit which he did not make and which has produced no corresponding loss to the beneficiary. As James LJ pointed out in *Vyse v. Foster* (1872) LR 8 Ch App 309:
>
> > "This Court is not a Court of penal jurisdiction. It compels restitution of property unconscientiously withheld; it gives full compensation for any loss or damage through failure of some equitable duty; but it has no power of punishing any one. In fact, it is not by way of punishment that the Court ever charges a trustee with more than he actually received, or ought to have received, and the appropriate interest thereon. It is simply on the ground that the Court finds that he actually made more, constituting moneys in his hands "had and received to the use" of the *cestui que trust*."

[86] There is Canadian jurisprudence where our courts have found a knowing assistant to be jointly and severally liable: see, for example, the decision of this court in *Enbridge Gas Distribution Inc. v. Marinaccio*, 2012 ONCA 650. Contrary to the assertion of the Palihapitiya Appellants, the Canadian cases do not all involve situations where the knowing assistant was found to be a constructive trustee: see, for example, *Imperial Parking Canada Corporation v. Anderson*, 2015 BCSC 2221. Counsel for the Palihapitiya Appellants was unable to point to any Canadian authority that supports his position.

[87] There is also academic commentary that supports a finding of joint and several liability for the knowing assistant (also referred to by some as the dishonest assistant). Steven Elliott and Professor Charles Mitchell, in their article "Remedies for Dishonest Assistance", (2004) 67 Mod L Rev 16, write at p. 40 that:

> [A] well established line of Canadian authority flowing from Canada Safeway Ltd v Thompson tells us that a dishonest assistant is jointly and severally liable for whatever unauthorised profit the wrongdoing fiduciary has made….This is consistent with and finds support in the secondary nature of liability for dishonest assistance. [Footnotes omitted.]

[88] *Ultraframe* is the leading case in England on the issue of a knowing assistant's joint and several liability: see Geoffrey Morse, ed, *Palmer's Company Law* (London, UK: Sweet & Maxwell, 2021), at vol. 2, ch. 8.3614. Based on a legal article filed with this court, however, it appears that the English approach towards knowing assistance is not followed in Australia: see Madison Robins, "Accessory Liability in Canadian Law" (2020) Annual Rev Civ Litigation 1, at p. 9. In any event, there is little reason to hew closely to the *Ultraframe* approach; the reasoning in that case is in my view inconsistent with the policy goals underlying equitable remedies. A court exercising its equitable jurisdiction seeks to fashion remedies that are fair in the circumstances of the case before it. While I agree that a knowing assistant should not be penalized, experience tells us that a judgment against a faithless fiduciary is often uncollectable. Indeed, that is one of the reasons why plaintiffs normally seek an order for joint and several liability. As between the

wronged beneficiary and the knowing assistant, in most circumstances, the loss more equitably falls on the shoulders of the knowing assistant who has deliberately taken steps to procure a breach of fiduciary duty.

[89] I do not purport to establish a rule that liability should always be joint and several between the faithless fiduciary and the knowing assistant. There may be circumstances where a different order should be made. Courts should be given sufficient flexibility to fashion a fair remedy in the circumstances of the particular case. In this case, where Palihapitiya was intimately involved in the breach of the fiduciary duty as part of a conspiracy where he received most of the profits, there is no equitable reason why the liability should not be joint and several.

(f) Other Grounds of Appeal

[90] The parties were allocated two full days of court time to argue the appeals and cross-appeal. However, counsel for the Appellants chose to restrict their oral submissions to the issues discussed above. Therefore, the remaining grounds of appeal from their factums, which were not pressed in oral argument, may be dealt with summarily as follows.

(i) Punitive Damages

[91] The trial judge did not err in awarding punitive damages on the Annex Fund Claim. Varma and Madra engaged in outrageous and illegal conduct that was worthy of sanction by the court. The damages awarded were appropriate to

accomplish the objectives of denunciation and deterrence of others from acting similarly. Indeed, they could well have been higher in the circumstances.

(ii) Exchange Rate and Prejudgment Interest

[92] The trial judge did not err in exercising her discretion not to deviate from the default rules for prejudgment interest and the exchange rate. In both instances, she correctly applied the law and ruled that the Appellants had not met their onus to establish that a variation of the standard rule was appropriate.

(iii) Group Enterprise Theory

[93] The trial judge did not use the group enterprise theory to affix liability for any breach of fiduciary duty. The Appellants' argument that any breach of duty was owed exclusively to Xtreme Labs does not withstand scrutiny. I agree with the trial judge that Varma and Madra owed fiduciary duties to EVP GP to maximize the value realized by the sellers as part of the sale of Xtreme Labs and that they breached those duties.

(iv) Directors' Liability

[94] The Appellants argue in their factums that they cannot be held liable for any breach because the party to whom they owed the duty, EVP GP, is different than the party that suffered the loss, Fund I. In rejecting this argument, I reach the same conclusion as the trial judge but for different reasons.

[95] I note that the position taken by the Appellants that no duty was owed directly to the Limited Partnership is inconsistent with the text of the Limited Partnership Agreement. Article 6.5 of that document states that the General Partner and its "officers, directors, shareholders or agents" can be liable to the Limited Partnership or a Limited Partner for acts or omissions "performed or omitted fraudulently or in bad faith" or that "constituted willful misfeasance or negligence in the performance of their obligations or as a result of the reckless disregard of such obligations."

[96] Moreover, it would be an anomalous result if the law offered no remedy for the breach of a director's fiduciary duty in circumstances where the limited partnership suffered the resulting loss. If that were the case, directors could act with impunity to damage the interests of the limited partnership, including by engaging in self-dealing, and there would be no remedy for such a breach of fiduciary duty. The law of fiduciary duties, which is based in equity, should not brook such a lacuna in its remedies.

[97] To analyze this issue it is helpful to turn to first principles. Before doing so, I note that the trial judge relied on *McGrail v. Phillips*, 2018 ONSC 3571, 83 B.L.R. (5th) 271 (Div. Ct.), at para. 33, for the proposition that the directors owe a duty only to the corporate general partner, not to the limited partnership itself. The Divisional Court in that case in turn cited to *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.* (1995), 26 O.R. (3d) 481 (C.A.). *McGrail* is not binding on this court. Moreover, the problem with relying on *ScotiaMcLeod*, and by extension *McGrail*, is that

ScotiaMcLeod did not feature a fiduciary duty claim. The court's comments regarding the personal liability of directors were in the context of claims in tort and are of limited assistance in analyzing a claim for breach of fiduciary duty.

[98] In the present case, we are dealing with a limited partnership, which is a hybrid organization that combines elements of partnership law and the law of corporations. A limited partnership consists of a general partner, who manages the affairs of the limited partnership and has liability for all its debts and obligations and at least one limited partner, whose liability is restricted to the amount they contributed or agreed to contribute to the limited partnership. The general partner owes a fiduciary duty to the limited partners. Limited partnerships are not a distinct legal entity. Despite this, the law permits a limited partnership to act as a distinct legal entity for certain limited purposes. A limited partnership can, for example, bring and defend actions: Neil Guthrie, “Some Lacunae in the Law of Limited Partnerships” (2009) 88 Can Bar Rev 147 at 148-49.

[99] The question is whether Varma and Madra's fiduciary duty should expand to include a duty to the limited partnership. In my view, it should. Varma and Madra conducted themselves in a manner that clearly breached their duties to EVP GP. This is not a situation where they were balancing the corporation's interests against those of the limited partnership. Instead, they acted solely in their self-interest and contrary to the interests of both the general partner and the limited partnership. For that reason, they are being sued by both Fund I and EVP GP.

[100] Where, as here, the directors ignore the interests of the general partners and the limited partnership and act solely in their self-interest, the concept of a director's fiduciary duty should be flexible enough to include duties to both the general partner and the limited partnership. Further, it should come as no surprise to the corporate directors that the limited partnership, which stands in a fiduciary relationship to the general partner and whose interests are supposed to be safeguarded, should have a right to claim against them personally.

[101] In a limited partnership the *raison d' être* of the general partner is to manage the business operations of the limited partnership and shield the limited partners from the unlimited liability they would face in a partnership. The use of the corporate form by the general partner is in turn designed to limit its liability exposure. It would be inequitable if the corporate form could be used to insulate directors who are in breach of their duties to the general partner and who have caused damages to the limited partnership. Given the unique structure of limited partnerships, the common law should impose a fiduciary duty on corporate directors of the general partner towards the limited partnership.

[102] It is well established that the "categories of fiduciary relationship are never closed": *Frame v. Smith*, [1987] 2 S.C.R. 99, at para. 36; see also *Guerin v. R.*, [1984] 2 S.C.R. 335 at 384. Certain status relationships—solicitor-client or doctor-patient, for example—give rise to a *per se* fiduciary relationship. In other circumstances, courts can find an *ad hoc* fiduciary duty. Such a duty arises where:

(1) the fiduciary has the discretionary power to affect the vulnerable party's legal or practical interests and (2) the fiduciary has made an express or implied undertaking that it will exercise the discretionary power in the vulnerable party's best interests: *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at paras. 66, 83.

[103] Varma and Madra owed the limited partnership an *ad hoc* fiduciary duty. Both the limited partners and the limited partnership constituted a class of vulnerable and defined beneficiaries, whose legal and substantial practical interests stood to be and in fact were adversely affected by Varma and Madra's exercise of discretion. Varma and Madra's undertaking arose from the nature of the business relationship itself—a general partner operates on behalf of the limited partnership—as well as from the Limited Partnership Agreement, which recognized the duty of the general partners towards the limited partners and the limited partnership.

[104] Further, I note that certain jurisdictions in the United States have similarly determined that the liability owed by a general partner to the limited partnership should be expanded: see Colin P. Marks, "Piercing the Corporate Veil" (2015) 19 Lewis & Clark L Rev 73 at 83; J. William Callison & Maureen A. Sullivan, *Partnership Law & Practice* (St. Paul, MN: Thomson Reuters, 2021) at § 22:18; *In re Harwood*, 637 F (3d) 615 at 622 (5th Cir 2011); One seminal American case is *In re USACafes, L.P. Litig.*, 600 A (2d) 43 (Del Ch 1991). Delaware courts have

consistently upheld and in certain cases expanded the reach of that decision: Marks, at 83, 85. In *USACafes*, Chancellor Allen drew an analogy to corporate trustees:

> While the parties cite no case treating the specific question whether directors of a corporate general partner are fiduciaries for the limited partnership, a large number of trust cases do stand for a principle that would extend a fiduciary duty to such persons in certain circumstances. The problem comes up in trust law because modernly corporations may serve as trustees of express trusts. Thus, the question has arisen whether directors of a corporate trustee may personally owe duties of loyalty to cestui que trusts of the corporation. A leading authority states the accepted answer:
>
> The directors and officers of [a corporate trustee] are certainly under a duty to the beneficiaries not to convert to their own use property of the trust administered by the corporation. . . . Furthermore, the directors and officers are under a duty to the beneficiaries of trusts administered by the corporation not to cause the corporation to misappropriate the property. . . . The breach of trust need not, however, be a misappropriation. . . . Any officer [director cases are cited in support here] who knowingly causes the corporation to commit a breach of trust causing loss . . . is personally liable to the beneficiary of the trust. . . .
>
> Moreover, a director or officer of a trust institution who improperly acquires an interest in the property of a trust administered by the institution is subject to personal liability. He is accountable for any profit. . . . Even where the trustee [itself] is not liable, however, because it had no knowledge that the director was making the purchase . . ., the director . . . is liable to the beneficiaries. . . . The directors and officers are in a fiduciary relation not merely to the [corporation] . . . but to the beneficiaries of the trust administered by the [corporation].

[105] Chancellor Allen also made the following comments that are particularly pertinent to the circumstances of the case at bar:

> The theory underlying fiduciary duties is consistent with recognition that a director of a corporate general partner bears such a duty towards the limited partnership. That duty, of course, extends only to dealings with the partnership's property or affecting its business, but, so limited, its existence seems apparent in any number of circumstances. Consider, for example, a classic self-dealing transaction: assume that a majority of the board of the corporate general partner formed a new entity and then caused the general partner to sell partnership assets to the new entity at an unfairly small price, injuring the partnership and its limited partners. Can it be imagined that such persons have not breached a duty to the partnership itself? And does it not make perfect sense to say that the gist of the offense is a breach of the equitable duty of loyalty that is placed upon a fiduciary?[1]

[106] I agree with and adopt Chancellor Allen's analysis. In my view, for the reasons discussed above, the law of fiduciary duty must hold Madra and Varma to account. Accordingly, I would find that they are both liable to Fund I for their fiduciary breaches as directors of EVP GP.

[1] See also Ben Barnes, *Do Fiduciaries of Fiduciaries Owe Duties?* (2019), online: American Bar Association <https://www.americanbar.org/groups/litigation/committees/business-torts-unfair-competition/practice/2019/imposition-fiduciary-duties-departing-llc-members1/>

(g) Cross-Appeal

[107] The trial judge based the amount of the disgorgement award on the proportion of shares of Xtreme Labs that Fund I held at the time of the transaction. Her reasoning is summarized at paragraphs 297 to 298 of her reasons:

> [297] By concealing the existence of the Hatch Labs Equity, Amar and Sunny (working with Chamath/El Investco) deprived Fund I of the opportunity to take it into account on the sale of its shares of Xtreme Labs, to renegotiate any terms of sale or to decide not to sell its shares of Xtreme Labs at that time. Further, as a direct result of this concealment, Amar, Sunny, and Chamath/El Investco were able to profit from Fund I's interest in the Hatch Labs Equity. In my view, they should not be entitled to retain the profits attributable to their wrongdoing. A disgorgement order is required to serve a deterrent purpose in this case.
>
> [298] In determining the extent of this equitable relief, however, I agree that the disgorgement order should only apply to the profits that correspond to Fund I's 41.82% interest in the Hatch Labs Equity. Those are the only profits that flow from the breach of fiduciary duty. Concealment of the Hatch Labs Equity deprived Fund I from realizing 41.82% of the profits from the sale of the Hatch Labs Equity. Any disgorgement order beyond that would result in Fund I receiving profits to which it was not otherwise entitled. [33]

[108] The cases cited in footnote 33, *Olson v. Gullo*, (1994), 17 O.R. (3d) 790 (C.A.) and *Rochwerg v. Truster* (2002), 58 O.R. (3d) 687 (C.A.), are relied upon by the Appellants on the cross-appeal.

[109] The Respondents submit that the trial judge committed an error in principle because prophylactic disgorgement is aimed not at what the beneficiaries lost but

rather at what the wrongdoers gained. They say that the apportioned disgorgement award issued by the trial judge represents an outcome where the wrongdoers are no worse off than if they had never breached fiduciary duties in the first place – meaning no deterrence has been achieved. Thus, they argue that disgorgement should be ordered for all profits made from the Hatch Labs Equity sale, which is $29.5 million (U.S.).

[110] The Appellants submit that the trial judge followed the law correctly and that there is no causal connection between the additional profits sought and any wrongdoing found to have been committed against Fund I. There is, in their submission, no right to profits unrelated to the breach. They note that Fund I has no claim to the remaining 58.18% of the profits, and no other shareholders of Xtreme Labs sought or established a fiduciary breach against the Appellants that could ground disgorgement of this portion of the profits.

[111] The leading case on disgorgement of profits is *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177, where the Supreme Court stated:

> 74. This Court has repeatedly stated that "[e]quitable remedies are always subject to the discretion of the court". (internal citations omitted) In *Neil*, the Court stated emphatically: "It is one thing to demonstrate a breach of loyalty. It is quite another to arrive at an appropriate remedy" (para. 36).
>
> 75. Monarch seeks "disgorgement" of profit earned by Strother and Davis. Such a remedy may be directed to either or both of two equitable purposes. Firstly, is a *prophylactic* purpose, aptly described as appropriating

> for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict: the objective is to preclude the fiduciary from being swayed by considerations of personal interest.
>
> (*Chan v. Zacharia* (1984), 154 C.L.R. 178, *per* Deane J., at p. 198)
>
> 76. The second potential purpose is *restitutionary*, i.e. to restore to the beneficiary profit which properly belongs to the beneficiary, but which has been wrongly appropriated by the fiduciary in breach of its duty. …
>
> 77. The concept of the *prophylactic* purpose is well summarized in the Davis factum as follows:
>
> > [W]here a conflict or significant possibility of conflict existed between the fiduciary's duty and his or her personal interest in the pursuit or receipt of such profits . . . equity requires disgorgement of any profits received even where the beneficiary has suffered no loss because of the need to deter fiduciary faithlessness and preserve the integrity of the fiduciary relationship. [Emphasis omitted; para. 152.]
>
> Where, as here, disgorgement is imposed to serve a *prophylactic* purpose, the relevant causation is the breach of a fiduciary duty and the defendant's gain (not the plaintiff's loss). Denying Strother profit generated by the financial interest that constituted his conflict teaches faithless fiduciaries that conflicts of interest do not pay. The prophylactic purpose thereby advances the policy of equity, even at the expense of a windfall to the wronged beneficiary.

[112] In my view, it is evident that the disgorgement order was imposed to serve a prophylactic purpose. Indeed, the trial judge stated explicitly that a

"disgorgement order is required to serve a deterrent purpose in this case." Further, there is a clear nexus between the breach of the fiduciary duties and the gains as the profits were secured as a direct result of the breach. Thus, the necessary causal connection has been established.

[113] In the circumstances, the trial judge was obliged to fashion a remedy that would have a deterrent impact. I agree with counsel for the Respondents that simply ordering the Appellants to pay the Respondents what they would otherwise have been entitled to receive serves as no disincentive. A party considering breaching a fiduciary duty could reasonably look at the trial judge's decision and conclude that in a worst-case scenario, they would only be forced to pay over to the aggrieved beneficiary what the beneficiary was always owed, thereby profiting from the breach of their fiduciary duties.

[114] The Appellants' reliance on *Olson* and *Rochwerg* is also misplaced. In those cases, which were decided under the *Partnership Act*, R.S.O. 1990, c. P.5, the courts did not impose disgorgement orders for a prophylactic purpose; they were made for restitutionary purposes. Thus, these authorities are of no assistance to the court in this case where the trial judge chose to make the order for a prophylactic purpose. Similarly, the Appellants' argument about the Respondents receiving a windfall fails because, in the case of a prophylactic disgorgement order, the focus of the inquiry is not the beneficiary's loss but the gain of the faithless

fiduciary. This is so even if there is a potential windfall to the beneficiary: *Strother*, at para. 77.

[115] The question that remains is whether, in fashioning a prophylactic disgorgement order, the court is required to order disgorgement of all ill-gotten gains or whether it can make an order that achieves its deterrent purposes but does not require full disgorgement. When this issue was put to counsel for the Respondents, she took the position that the jurisprudence appears to call for full disgorgement. On the other hand, counsel for the Appellants took no position on this issue. In other words, they offered no assistance to the court regarding a sum short of full disgorgement that would meet the deterrent purpose.

[116] There may well be circumstances where it would be inequitable to order a faithless fiduciary to disgorge all profits. Equity seeks what is fair and what is fair should be determined with flexibility, not by means of hard and fast rules. For that reason, I would not endorse an inflexible rule that full disgorgement of all profits must be ordered in all cases, but nor would I speculate on the sorts of reasons that may justify something less than full disgorgement. I note that Australian courts have grappled with the circumstances in which full disgorgement ought to be made and whether there should be a rebuttable presumption that full disgorgement is appropriate: see e.g. *Warman International Ltd v. Dwyer,* [1995] HCA 18, at paras. 33-35. I decline to decide these questions today, as counsel for the Appellants failed to address either point.

[117] There is nothing to suggest that a partial disgorgement order should be made in the case at bar. Certainly, counsel for the Appellants did not argue for such an order nor did he offer any suggested amount for such an award in response to questions from the court. In these circumstances, an order of disgorgement of all profits – $29.5 million (U.S.) – is in my view appropriate.

Part V – Disposition

[118] I would dismiss the appeals of the Palihapitiya Appellants and the Varma/Madra Appellants. I would allow the cross-appeal.

[119] Regarding costs of the appeals and cross-appeal, the parties may make written submissions. The Respondents' submissions are due within two weeks of the release of these reasons. They shall be no more than five pages in length plus a costs outline. The Palihapitiya Appellants and the Varma/Madra Appellants' submissions are also limited to five pages each, and they are both required to file a costs outline. Those submissions are due one week after receiving the Respondents' cost submissions. The Respondents may file reply submissions of no more than three pages within a week of receiving the Appellants' costs submissions.

Released: December 1, 2021 "CWH"

"C.W. Hourigan J.A."
"I agree. Grant Huscroft J.A."
"I agree. S. Coroza J.A."

14

1993 CarswellOnt 801
Supreme Court of Canada

Queen v. Cognos Inc.

1993 CarswellOnt 972, 1993 CarswellOnt 801, [1993] 1 S.C.R. 87, [1993] S.C.J. No. 3,
147 N.R. 169, 14 C.C.L.T. (2d) 113, 37 A.C.W.S. (3d) 1304, 45 C.C.E.L. 153, 60 O.A.C.
1, 93 C.L.L.C. 14,019, 99 D.L.R. (4th) 626, J.E. 93-270, D.T.E. 93T-198, EYB 1993-67486

DOUGLAS J. QUEEN v. COGNOS INCORPORATED

La Forest, L'Heureux-Dubé, Sopinka, Gonthier, McLachlin, Stevenson * and Iacobucci JJ.

Heard: January 29, 1992
Judgment: January 21, 1993
Docket: Doc. n[o] 22004

Counsel: *Peter J. Bishop* and *Tom Brooker* , for appellant
Charles T. Hackland and *Mark Josselyn* , for respondent

Subject: Torts; Employment; Civil Practice and Procedure; Contracts; Corporate and Commercial

Appeal from judgment reported at (1990), 30 C.C.E.L. 1, 38 O.A.C. 180, 69 D.L.R. (4th) 288, 74 O.R. (2d) 176, 90 C.L.L.C. 14,024 (C.A.) , setting aside judgment reported at (1987), 18 C.C.E.L. 146, 63 O.R. (2d) 389 (H.C.) , awarding damages in claim for negligent misrepresentation.

***La Forest J.* (*L'Heureux-Dubé* and *Gonthier JJ.* concurring):**

1 Subject to what I have had to say in *BG Checo International Ltd. v. British Columbia Hydro & Power Authority* , S.C.C., Nos. 21939 and 21955, issued concurrently [reported 75 B.C.L.R. (2d) 145], I agree with Justices Iacobucci and McLachlin, and would dispose of the appeal in the manner proposed by them. Though Iacobucci J. repeats the essence of his analysis in *Checo* , the present case is not one of concurrency at all. It is sufficient for me to say that the tort here was independent of the contract and the liability was not limited by an exclusion clause in the contract.

***Iacobucci J.* (*Sopinka J.* concurring):**

2 This appeal involves the application of the tort of negligent misrepresentation to a pre-employment representation made by an employer to a prospective employee in the course of a hiring interview. Specifically, this court is being asked to determine in what circumstances a representation made during a hiring interview becomes, in law, a "negligent misrepresentation". A subsidiary question deals with the effect of a subsequent employment agreement signed by the plaintiff, and its provisions allowing termination "without cause" and reassignment, on a claim for damages for negligent misrepresentation.

I. Facts

3 The trial judge conducted an extensive and thorough review of the facts in the course of his reasons for judgment. None of his findings of fact has been challenged in a direct manner by the respondent or altered by the Court of Appeal. As the facts are particularly important in the case at bar, I will review in some detail the trial judge's most relevant findings.

4 The respondent, Cognos Incorporated (previously named Quasar Corporation and hereinafter referred to as "Cognos" or "respondent"), is an Ottawa-based company which carries on the business of designing, developing and marketing computer programmes and software. In December of 1982, the respondent's president (Mr. Mike Potter) instructed Mr. Sean Johnston, the recently appointed manager of product development for a product line of accounting software known as "Multiview", that

Cognos intended to develop Multiview to an equal standing with its main product line called "Power House". Mr. Johnston had also received instructions from the vice-president of research and development of Cognos (Mr. Bob Minns), at the time of accepting the position of manager of product development, that the respondent wished to see Multiview expand beyond the general ledger module (the software involved consists of various "modules") then developed and in circulation, and the accounts payable module then under development. In particular, he was told that the respondent wished to see the development of three additional modules, namely, accounts receivable, cash flow, and fixed assets. Mr. Johnston was instructed by Cognos's senior management to take charge and to do whatever was necessary to make Multiview a marketable and profitable product.

5 A meeting was held on December 21, 1982, during which Mr. Johnston and several senior executives of Cognos reviewed plans for the development of the Multiview line of products according to the mandate that had just been given. Criticisms were voiced by Mr. Johnston about the development of Multiview currently under way. He filed a project schedule covering a period of time up to 1985 and contemplating the development of modules such as accounts payable, accounts receivable, and cash flow.

6 Mr. Johnston indicated that there was a need on the research and development team of Multiview for an accountant to assist in the writing and maintenance of the software. Mr. Johnston proceeded, with the full knowledge of the respondent's senior management, to advertise for (and later hire) an accountant to help with the development of Multiview. An advertisement was placed in *The Globe and Mail* in mid-January, 1983, and many responses were received. In February of that year, a short list of six chartered accountants were interviewed by Mr. Johnston and two other executives of Cognos. The appellant, Douglas J. Queen, was one of the persons interviewed.

7 At the time of his interview, the appellant had been qualified as a chartered accountant for some eight and a half years. Since May of 1975, he had been living in Calgary with his wife and children and had occupied positions with three different employers, whereby he gained experience in working with computer accounting systems. For the three and a half years prior to the interview, the appellant had been the regional controller for a Calgary-based corporation named Genstar Development Corporation, occupying a relatively well paying and secure managerial position. In the fall of 1982, the appellant was actively seeking employment outside Calgary and was interested in the high-tech industry in the Ottawa area. In the words of the trial judge, the appellant wanted more challenging opportunities than were available for him in Calgary; he wanted a senior financial position that would make use of his expertise in management information computer systems.

8 On February 14, 1983, the appellant was interviewed for approximately an hour and a half. During this interview, Mr. Johnston made a number of representations (as he had to the other five candidates) about the Multiview project and about the successful candidate's role in its development. These representations are fully canvassed at pp. 396-98 of the reported reasons of the trial judge: (1987), 63 O.R. (2d) 389 .

9 In sum, Mr. Johnston told the appellant that Multiview was a major project which would be developed over a period of two years (the "primary development period") with enhancements and maintenance thereafter, and that the position being interviewed for would be needed throughout this period. It was made clear that Cognos was committed to the development of additional modules of Multiview beyond general ledger (then developed), accounts payable (development under way), and accounts receivable (planned, but not yet under development). Those additional modules were cash flow, fixed assets, inventory, and order entry. Moreover, it was represented that the staff required to develop the Multiview modules would double, from 16 to 32, by August, 1983 (the appellant's evidence), or by the end of the two year primary development period (Mr. Johnston's evidence). Throughout the interview, it was understood that the successful candidate would play an important role as a chartered accountant in the Multiview project, advising on accounting standards throughout the life of the project. In addition, the trial judge found, based on his assessment of all the evidence, that it was implicitly represented that there was a reasonable plan in existence for the additional modules and that Cognos had made a financial commitment for such development in the way of budgetary provisions.

10 At the time of this interview, Mr. Johnston's knowledge as to the respondent's commitment to the development of Multiview was based on conversations and meetings with senior executives of Cognos. He was aware, however, that the funding needed for the full development of Multiview in accordance with his mandate had not yet been approved by the respondent's corporate management team. While this body had met in early February to discuss and formulate strategies and plans for the development

of Multiview, it had not yet given any financial commitment commensurate with the mandate given to Mr. Johnston. Mr. Johnston was also aware that this body had the ultimate responsibility of deciding whether to allocate corporate funds for the research and development of Multiview. At no point during the interview was the appellant made aware of the fact that there was no guaranteed funding for the Multiview project as described to him, or that the position being applied for was subject, in any respect, to budgetary approval.

11 The appellant was offered the job of manager, financial standards, by telephone early in the month of March, 1983. He accepted immediately and Mr. Johnston mailed to him a written contract of employment. It is undisputed that, prior to signing, the appellant read and understood the employment agreement. He knew that its purpose was to define the rights and obligations of the parties. One clause in the contract (clause 14) permitted the respondent to terminate at any time the appellant's employment "without cause" upon one month's notice, or payment of one month's salary in lieu of notice. Another clause (clause 13) enabled the respondent to reassign the appellant to another position within Cognos without reduction in salary and upon one month's notice. Much importance was given to these provisions by the Court of Appeal as well as by the respondent in argument before this court.

12 For convenience, I shall reproduce clauses 13 and 14 of the employment agreement:

Transfer

> 13. Quasar Systems reserves the right to reassign you to another position with the Company without reduction of your salary or benefits and upon one month's notice to you. Should such reassignment require your permanent relocation to another city, the Company will reimburse you for your expenses in accordance with the then current relocation policy.

Termination Notice — One Month

> 14. This Agreement may be terminated at any time and without cause by Quasar Systems Ltd. or by you. In the event of termination, Quasar Systems Ltd. will give you one month's notice of termination plus any additional notice that may be required by any applicable legislation. Similarly, you shall give Quasar Systems Ltd. one month's notice if you voluntarily terminate this Agreement. Quasar Systems Ltd. may pay you one month's salary in lieu of the aforesaid notice in which event this Agreement and your employment will be terminated on the date such payment in lieu of notice is made.

13 The trial judge specifically accepted the appellant's evidence that he signed the contract of employment based on the representations made to him during the interview, and that were it not for those representations he would not have signed it. In order to accept employment with Cognos, the appellant was required to give up a relatively well paying and secure, albeit not as challenging, position in Calgary and to move himself and his family more than half-way across the country.

14 The appellant commenced employment with Cognos on April 11, 1983. Two weeks later, on April 25, 1983, the corporate management team of the respondent considered for the very first time the project cost estimates for the Multiview project. This body rejected Mr. Johnston's funding proposal which was in excess of $1,000,000. It decided to commit research and development funds to the Power House project in priority to Multiview. This decision was based on a number of market considerations, including the continuing low sales of the then developed Multiview module (general ledger) and the continuing high sales of the various Power House modules. The corporate management team allotted a budget of only $200,000 to Multiview, thus making the development of additional modules beyond accounts receivable quite unrealistic. Further meetings of the management team took place in the following months at which time additional funding curtailment of the Multiview project occurred. On September 9, 1983, barely five months after his arrival in Ottawa, the appellant and others were advised that there would be a reassignment of personnel involved with Multiview owing to diminished research and development funding. The appellant was informed that, unless a position was available for him in the finance and administration department of the respondent, he would most likely be laid off.

15 On October 28, 1983, the appellant was given his first written notice of termination of employment effective March 21, 1984. The appellant negotiated an amendment to his employment agreement in order to eliminate his obligation to repay $7,500

of moving expenses, otherwise repayable in the event that his position was terminated within the first year of employment. This notice was rescinded in November, 1983, and the appellant was assigned to quality control of one of the aspects of the Power House project. On May 1, 1984, after having been informed earlier in March that he would no longer be needed with quality control, the appellant secured the position of manager of finance in the finance department of the respondent. He performed various tasks while in this function. On July 31, 1984, he received his second written notice of termination effective October 25, 1984. He worked until that day and was paid until November 15, 1984. The trial judge found that the appellant was not dismissed as a result of an unsatisfactory assessment of his job performance.

16 On March 25, 1985, the appellant commenced an action against the respondent seeking damages for negligent and fraudulent misrepresentation. He apparently discontinued his claim for fraudulent misrepresentation at some point after filing the statement of claim, and proceeded only in negligence. From the beginning, the appellant's cause of action has been founded wholly and solely in tort. At no time did he argue breach of contract, breach of collateral warranty or any other contractual cause of action against the respondent. He did not dispute the fact that some of the terms of his employment contract ap peared to be inconsistent with the representations made by Mr. Johnston. However, it was his understanding from the interview that the Multiview project was a reality and that its existence was not contingent on the happening of some future event. He testified that were it not for the representations made during the interview as to the nature and existence of the employment opportunity, he would not have left his secure position in Calgary.

17 In a judgment rendered on December 31, 1987, White J. of the Ontario High Court of Justice upheld the appellant's claim and awarded him $67,224 in damages: (1987), 18 C.C.E.L. 146 , 63 O.R (2d) 389. On May 1, 1990, an appeal by the respondent to the Court of Appeal for Ontario was allowed; the trial judgment was set aside and replaced by a judgment dismissing the action with costs: (1990), 30 C.C.E.L. 1, 38 O.A.C. 180, 69 D.L.R. (4th) 288, 74 O.R. (2d) 176, 90 C.L.L.C. 14,024 . The appellant was granted leave to appeal to this court on January 17, 1991, [1991] 1 S.C.R. xii.

II. Judgments in the Courts Below

A. Ontario High Court of Justice (1987), 63 O.R. (2d) 389

18 The trial judge found, in all the circumstances, that there existed a "special relationship" between the respondent (via Mr. Johnston) and the appellant, within the meaning of *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.) , so as to give rise to a duty of care with respect to the representations made during the hiring interview. The fact that this case involved pre-contractual or pre-employment negotiations did not alter this conclusion. Based on his assessment of all the evidence adduced at trial, White J. also found that certain representations made to the appellant during the interview were inaccurate or misleading (i.e., they were misrepresentations), and that these misrepresentations were made in a negligent manner (i.e., they were *negligent* misrepresentations). Some of his comments in this respect warrant repeating (at pp. 415-16):

> I find that misrepresentations were made to the [appellant] by Sean Johnston in the hiring interview. The effect of these misrepresentations was that the [appellant] would have a position in the research and development of the product "Multiview"; that that position would be a significant one and would involve his expertise as an accountant; that he would perform the responsible role of seeing to proper accounting standards being implemented into the product; that beyond the three modules immediately in contemplation were a minimum of four other modules; and that the project of "Multiview", in connection with which [the appellant] would be hired would last a minimum of two years. I find further that Mr. Johnston implicitly represented that management had made a firm budgetary commit ment to the development of four other modules in addition to those then presently under development.
>
> I find further, in all the circumstances, that Sean Johnston made those misrepresentations negligently. Based upon his expertise in the field of computer development, he was aware, according to his evidence, that until there is a feasibility study in which cost estimates have been submitted to and have been considered and approved by senior management, one could not say that the [respondent] had made a firm commitment to the project as Mr. Johnston envisaged it and as he described it to [the appellant] in the interview.

19 Other circumstances which the trial judge took into consideration in concluding that the misrepresentations were negligently made include the following: (1) Mr. Johnston knew, or ought to have known, that the truth of his representations depended on the approval by the corporate management team of the cost estimates he had prepared for the research and development of the Multiview project; (2) it is reasonable to infer that Mr. Johnston, at the time of the interview, contemplated that the budgetary needs for the Multiview project would be substantial and that approval was at best speculative; (3) Mr. Johnston must have been aware of the continued poor sales performance of the Multiview product line; (4) Mr. Johnston did not disclose to the appellant that senior management had not yet given the financial commitment required to make the plans for the Multiview project a probable reality; (5) Mr. Johnston's expertise in the computer development field should have made him aware that, notwithstanding his conversations with senior management and the meeting of December 21, 1982, there was still a considerable risk that senior management would not give budgetary approval to his plans; (6) Mr. Johnston knew that the appellant was relying on the information he was providing during the interview; (7) Mr. Johnston knew that the appellant had a secure, responsible, and well-paying employment as a chartered accountant in Calgary and that coming to Ottawa would involve moving himself and his family across the country; and (8) Mr. Johnston was aware that the appellant was relying on the position with Cognos to enhance his career significantly as an accountant.

20 The trial judge also found that, even if Mr. Johnston felt justified in making the representations that he did (based on his conversations with senior management and the meeting of December 21, 1982), and assuming that this deprived his misrepresentations of their negligent quality, then such misrepresentations, while not negligently made by Mr. Johnston, were negligently made by the senior management of the respondent "through Mr. Johnston as an innocent instrument of the [respondent] company" (p.418).

21 White J. further found that the appellant had relied upon the negligent misrepresentations, to his detriment, and that he had sus tained substantial damages (at p. 419):

> The misrepresentations induced [the appellant] to quit his job as controller of the Calgary Division of Genstar Development Corporation and to accept employment with the [respondent]. Those representations induced him to sign the contract of employment. But for those representations he would have remained working for the Genstar Development Corporation for some further period of time and would not have become an employee of the [respondent].

22 Finally, the trial judge addressed a number of arguments raised by the respondent in defence. First, he rejected the proposition that the representations were truthful and that Mr. Johnston was simply giving an opinion as to future events. In his view, the representations were untruthful: "What was untruthful in the representations was the implied assurance in those representations that Mr. Johnston had made a sufficient study of the relevant facts including the decision of senior management to make a financial commitment to the development of 'Multiview' beyond the accounts receivable module, to be able to make the unqualified representations that he made" (pp. 417-18). All Mr. Johnston had to say, in the trial judge's opinion, was that the feasibility study of the project had not yet been completed. Second, senior management of the respondent made no attempt to disclaim expressly any representations made to the appellant during the interview. Third, the trial judge rejected the defence put forward that the appellant, by his conduct subsequent to learning the situation of Multiview, had affirmed his contract of employment. In this respect, White J. distinguished the decision relied on by the respondent (*Burrows v. Burke* (1984), 49 O.R. (2d) 76 (C.A.)), and held that the appellant's conduct was not one of affirming the contract of employment but of a person in a difficult situation attempting to "minimize his damages" (p. 420). In any event, his conduct "did not amount to an explicit waiver of his right to claim damages in tort arising out of negligent misrepresentations made to him inducing the contract" (p. 421). In his view, whether the contract is affirmed or not, the cause of action in tort is preserved as it is external to the contract. And fourth, the trial judge rejected the respondent's defence of business necessity on the basis that there was no evidence of any such necessity which would exonerate the respondent from the negligent misrepresentations in issue.

23 Thus, White J. allowed the appellant's claim for negligent misrepresentation. He assessed the damages payable to the appellant at $67,224. This amount represented what was necessary, according to White J., "to put the [appellant] in the same position as he would have been if the negligent misrepresentation had not been made" (p.414). It consists of $50,000 for loss

of income, $252 for costs of obtaining a new employment, $11,972 for the loss on the purchase and sale of his home in the Ottawa area, and $5,000 in general damages for emotional stress.

B. Ontario Court of Appeal (1990), 74 O.R. (2d) 176

24 Finlayson J.A. (Griffiths and Arbour JJ.A. concurring) held that the trial judge made two errors in allowing the appellant's claim to succeed. Finlayson J.A. accepted that there was a "special relationship" between the appellant and the respondent so as to give rise to a duty of care of the sort described in *Hedley Byrne* , supra, and subsequent cases. However, he was of the view that, in the circumstances of the present case, White J. had erred in the manner in which he dealt with the issues of contractual disclaimer and of negligence.

25 With respect to disclaimer, Finlayson J.A. felt the trial judge had erred in requiring an express disavowal of any representations that may have been made during the pre-contractual negotiations in order for a disclaimer argument to succeed, as it had in *Hedley Byrne* , supra, and in *Carman Construction Ltd. v. Canadian Pacific Railway*, [1982] 1 S.C.R. 958 . In Finlayson J.A.'s opinion, something less than an express disclaimer could suffice (at p. 183): "it is a sufficient disclaimer if the contract contains terms which contradict or are inconsistent with the representations relied upon." He noted that the contract of employment, which the appellant read and understood, contained provisions relating to the possibility of reassignment and, more importantly, to the termination of employment on one month's notice. He found that such provisions were sufficient to constitute a valid disclaimer (at pp. 183 and 185):

> In the case on appeal, the [appellant] stated that he would not have given up his secure position in Calgary for a move to Ottawa that was without permanence, and yet he signed a contract which provided him with no assurances respecting his place of employment or its tenure. To rely on *Hedley Byrne* , the negligent misrepresentation must have amounted to a warranty of job security and yet the contract of employment was surely a disclaimer of just that. No representations as to job security, whether based on performance or on job availability, could have survived the one-month termination notice "without cause" contained in the contract.
>
> . . . . .
>
> The pre-employment discussions in this case merged in the contract of employment. There is no separate tort, even accepting the trial judge's findings of innocent misrepresentation, because the terms of the contract amounted to a disclaimer within the meaning of *Hedley Byrne* . The references to the Multiview project did not amount to warranties or representations that were independent of the contract of employment and they cannot survive the written agreement.

According to Finlayson J.A., this disclaimer was fatal to the appellant's claim as it had the effect of negating any assumption of duty of care on the part of the respondent; a conclusion similar to the one reached in *Hedley Byrne* and *Carman Construction* , supra.

26 In any event, Finlayson J.A. was of the view that the trial judge had erred in his finding of *negligent* misrepresentation because he imposed a "higher duty of care" on the respondent than was required in the circumstances. According to Finlayson J.A., the duty in the case at bar is no more than a duty to take care that the representations made were "responsible and accurate to the knowledge of Johnston and of his principal, Cognos" (p. 186). He observed that the same representations were made to all the six candidates, that the purpose of the interview was to make the position sound attractive enough that the successful candidate would accept it, and that Mr. Johnston believed in the veracity of what he was saying during the interview. Moreover, he noted that the trial judge criticized more what was not said by Mr. Johnston, than what was actually said by him. In his view, any duty of care had been fully discharged in the circumstances of this case — there had been no *negligent* misrepresentation (at pp. 187-88):

> Johnston was hired to oversee the Multiview project. Counsel for [the appellant] conceded that Johnston was as surprised as anyone at the corporate decision not to concentrate on it. Johnston believed in what he said to the job applicants about Multiview. The trial judge found that he had a duty to go further and to point out the details of the internal decision-making process at Cognos and stress that that process had not been completed. In other words, his own *bona fide* belief as a knowledgeable executive that the program was going forward was not sufficient. He had to divulge to all of the applicants

> that he interviewed the precise status of the corporate commitment to the development of the new product so that they could make their own assessment of the viability of the project.
>
> In my opinion, this casts the duty too high. It suggests that at least a quasi-fiduciary relationship existed between corporation and job applicant, giving rise to a duty to make full disclosure. Such a duty can exist in a given "special relationship" required by *Hedley Byrne* ...but it does not exist in this one. The trial judge was in error in extending to this situation the narrow class of contract cases where *uberrima fides* is the standard.
>
> . . . . .
>
> In my opinion, while a "special relationship" existed between [the respondent] and the six applicants, any duty of care that arose from it was discharged. I say this without reference to the disclaimer in [the appellant's] contract. Johnston was not obliged to go father than he did in describing the job prospects. What he said was truthful, he believed in it, that was enough.

27 There was an appeal and cross-appeal as to damages. Finlayson J.A. held that if, contrary to his view, the appellant's action was successful, he would not have interfered with the assessment of damages made by the trial judge.

III. Issues

28 I would characterize the issues raised by this appeal as follows:

> (1) Disregarding for now the employment agreement signed by the appellant in March of 1983, did the respondent or its representative Mr. Johnston owe a duty of care to the appellant during the pre-employment interview of February 14, 1983, with respect to the representations made to the appellant about the respondent and the nature and existence of the employment opportunity being offered?
>
> (2) If so, again disregarding for now the contract between the parties, did the respondent or its representative Mr. Johnston breach this duty of care in all the circumstances of this case?
>
> (3) If so, should the answers given to questions 1 and 2, or the result that would normally follow from such conclusions (i.e. liability of the respondent for the damages caused to the appellant, fixed by the trial judge at $67,224, upheld by the Court of Appeal, and unchallenged before this court), be different in any way in view of the fact that the appellant signed an employment agreement after the negligent misrepresentations containing, inter alia, a termination "without cause" provision (clause 14) as well as a reassignment provision (clause 13)?

29 For reasons that follow, I am of the opinion that questions 1 and 2 should be answered in the affirmative and that question 3 should be answered in the negative. The appeal should therefore be allowed and the judgment of White J. in favour of the appellant and granting him damages in the amount of $67,224 should be restored.

IV. Analysis

30

A. Introduction

31 This appeal involves an action in tort to recover damages caused by alleged negligent misrepresentations made in the course of a hiring interview by an employer (the respondent), through its representative, to a prospective employee (the appellant) with respect to the employer and the nature and existence of the employment opportunity. Though a relatively recent feature of the common law, the tort of negligent misrepresentation relied on by the appellant and first recognized by the House of Lords in *Hedley Byrne* , supra, is now an established principle of Canadian tort law. This court has confirmed on many occasions, sometimes tacitly, that an action in tort may lie, in appropriate circumstances, for damages caused by a misrepresentation made in a negligent manner: see *Welbridge Holdings Ltd. v. Winnipeg (City)*, [1971] S.C.R. 957 ; *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co.*, [1972] S.C.R. 769 ; *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189 ; *Hodgins v. Nepean Hydro-Electric Commission*, [1976] 2 S.C.R. 501 ; *The Pas (Town) v. Porky Packers Ltd.*, [1977] 1 S.C.R. 51 ; *Haig v.*

Bamford, [1977] 1 S.C.R. 466 ; *Carman Construction* , supra; *V.K. Mason Construction Ltd. v. Bank of Nova Scotia*, [1985] 1 S.C.R. 271 ; and *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [1991] 3 S.C.R. 3 .

32 While the doctrine of *Hedley Byrne* , supra, is well established in Canada, the exact breadth of its applicability is, like any common law principle, subject to debate and to continuous development. At the time this appeal was heard, there have only been a handful of cases where the tort of negligent misrepresentation was used in a pre-employment context such as the one involved here: see *Steer v. Aerovox Inc.* (1984), 65 N.S.R. (2d) 91 (S.C.T.D.) ; *Wooldridge v. H.B. Nickerson & Sons Ltd.* (1980), 115 D.L.R. (3d) 97 (N.S.S.C.A.D.) ; *Williams v. Saanich School District No. 63* (1986), 11 C.C.E.L. 233 (B.C.S.C.) , affirmed on other grounds (1987), 17 C.C.E.L. 257 (B.C.C.A.) ; *Grenier v. Timmins Board of Education* , Ont. H.C., No. 1250/82, May 31, 1984, 26 A.C.W.S. (2d) 285 ; *Pettit v. Prince George & District Credit Union* (1991), 35 C.C.E.L. 140 (B.C.S.C.) ; and *Roy v. B.N.P.P. Regional Police Commission* (1986), 15 C.C.E.L. 167 (N.B.Q.B.) . Without question, the present factual situation is a novel one for this court.

33 Some have suggested that it is inappropriate to extend the application of *Hedley Byrne* , supra, to representations made by an employer to a prospective employee in the course of an interview because it places a heavy burden on employers. As will be apparent from my reasons herein, I disagree in principle with this view. However, I find it unnecessary for the purposes of this appeal to engage in a general and abstract discussion on the applicability of the tort of negligent misrepresentation to pre-employment representations. The thrust of the respondent's argument before this court is not that the appellant's action is unfounded in law. Rather, the respondent argues that the appellant has not made out a case for compensation based on negligent misrepresentation. Accordingly, this appeal may be disposed of simply by considering whether or not the required elements under the *Hedley Byrne* , supra, doctrine are established in the facts of this case. In my view, they are.

34 The required elements for a successful *Hedley Byrne* , supra, claim have been stated in many authorities, sometimes in varying forms. The decisions of this court cited above suggest five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted. In the case at bar, the trial judge found that all elements were present and allowed the appellant's claim.

35 In particular, White J. found, as a fact, that the respondent's representative, Mr. Johnston, had misrepresented the nature and existence of the employment opportunity for which the appellant had applied, and that the appellant had relied to his detriment on those misrepresentations. These findings of fact were undisturbed by the Court of Appeal and, except for a few passing remarks, the respondent does not challenge them before this court. Thus, the second, fourth, and fifth requirements are not in question here.

36 The only issues before this court deal with the duty of care owed to the appellant in the circumstances of this case and the alleged breach of this duty (i.e., the alleged negligence). The respondent concedes that a "special relationship" existed between itself (through its representative) and the appellant so as to give rise to a duty of care. However, it argues that this duty is negated by a disclaimer contained in the employment contract signed by the appellant more than two weeks after the interview. Furthermore, the respondent argues that any misrepresentations made during the hiring interview were not made in a negligent manner. For reasons that follow, it is my view that both submissions fail.

37 However, before turning to these issues, I intend to deal with a preliminary matter not directly raised in argument. This appeal was argued before this court in close proximity to the case *BG Checo International Ltd. v. British Columbia Hydro & Power Authority* , S.C.C., Nos. 21939 and 21955, January 21, 1993 [reported 75 B.C.L.R. (2d) 145]. That case involved circumstances somewhat similar to those in the present appeal in that it also dealt with a claim for damages based on an alleged negligent misrepresentation stem ming from pre-contractual negotiations. Generally speaking, in *BG Checo* as in the case at bar, it was argued that certain representations made in a pre-contractual setting did not correspond with the post-agreement reality and were made in a negligent manner. In both cases, the defendants relied on the contract signed by the parties subsequent to the alleged negligent misrepresentation in order to bar the plaintiffs' claim in tort. As my conclusion in *BG Checo* is opposite

from the one I take herein, I believe it is useful at the outset to explain why this case is clearly distinguishable from *BG Checo* . In doing so, my hope is to clarify some of the confusion which currently exists with respect to pre-contractual negligent misrepresentations.

B. Preliminary Observations on the Effect of the Employment Agreement on this Appeal

38 As I stated in *BG Checo* , it is now clear that an action in tort for negligent misrepresentation may lie even though the relevant parties to the action (i.e., the representee/plaintiff and the representor/defendant) are in a contractual relationship: see *Esso Petroleum Co. v. Mardon*, [1976] 2 All E.R. 5 (C.A.) ; *Sodd Corp. v. Tessis* (1977), 17 O.R. (2d) 158 (C.A.) ; *Kingu v. Walmar Ventures Ltd.* (1986), 38 C.C.L.T. 51 (B.C.C.A.) ; *Carman Construction* , supra; *V.K. Mason Construction* , supra; *Rainbow Industrial Caterers* , supra; and L.N. Klar, *Tort Law* (1991), at p. 162, n. 89. More particularly, the fact that the alleged negligent misrepresentations are made in a pre-contractual setting, such as during negotiations or in the course of an employment hiring interview, and the fact that a contract is subsequently entered into by the parties do not, in themselves, bar an action in tort for damages caused by said misrepresentations: see, for example, *Esso Petroleum* , supra, and the cases cited above dealing specifically with pre-employment misrepresentation.

39 This is not to say that the contract in such a case is irrelevant and that a court should dispose of the plaintiff's tort claim independently of the contractual arrangement. On the contrary, depending on the circumstances, the subsequent contract may play a very important role in determining whether or not, and to what extent, a claim for negligent misrepresentation shall succeed. Indeed, as evidenced by my conclusion in *BG Checo* , such a contract can have the effect of negating the action in tort and of confining the plaintiff to whatever remedies are available under the law of contract. On the other hand, even if the tort claim is not barred altogether by the contract, the duty or liability of the defendant with respect to negligent misrepresentations may be limited or excluded by a term of the subsequent contract so as to diminish or extinguish the plaintiff's remedy in tort: see, for example, *Hedley Byrne* (although this case did not involve a con tract) and *Carman Construction* (although this case involved mostly post-contractual representations), supra. Equally true, however, is that there are cases where the subsequent contract will have no effect whatsoever on the plaintiff's claim for damages in tort. As will be apparent from these reasons, it is my view that the employment agreement signed by the appellant in March of 1983 is governed by this last proposition.

40 When considering the effect of the subsequent contract on the representee's tort action, everything revolves around the nature of the contractual obligations assumed by the parties and the nature of the alleged negligent misrepresentation. The first and foremost question should be whether there is a specific contractual duty created by an express term of the contract which is co-extensive with the common law duty of care which the representee alleges the representor has breached. Put another way, did the pre-contractual representation relied on by the plaintiff become an express term of the subsequent contract? If so, absent any overriding considerations arising from the context in which the transaction occurred, the plaintiff cannot bring a concurrent action in tort for negligent misrepresentation and is confined to whatever remedies are available under the law of contract. The authorities supporting this proposition, including the decision of this court in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 , are fully canvassed in my reasons in *BG Checo* . As alluded to in *BG Checo* , this principle is an exception to the general rule of concurrency espoused by this court in *Central Trust v. Rafuse* , supra.

41 There lies, in my view, the fundamental difference between the present appeal and *BG Checo* , supra. In the latter case, the alleged pre-contractual misrepresentation had been incorporated verbatim as an express term of the subsequent contract. As such, the common law duty of care relied on by the plaintiff in its tort action was co-extensive with a duty imposed on the defendant in contract by an express term of their agreement. Thus, it was my view that the plaintiff was barred from exercising a concurrent action in tort for the alleged breach of said duty, and this view was reinforced by the commercial context in which the transaction occurred. In the case at bar, however, there is no such concurrency. The employment agreement signed by the appellant in March of 1983 does not contain any express contractual obligation co-extensive with the duty of care the respondent is alleged to have breached. The provisions most relevant to this appeal (clauses 13 and 14) contain contractual duties clearly different from, not co-extensive with, the common law duty invoked by the appellant in his tort action.

42 Had the appellant's action been based on pre-contractual representations concerning the length of his involvement on the Multiview project or his "job security", as characterized by the Court of Appeal, the concurrency question might be resolved

differently in light of the termination and reassignment provisions of the contract. However, it is clear that the appellant's claim was *not* that Mr. Johnston negligently misrepresented the amount of time he would be working on Multiview or the conditions under which his employment could be terminated. In other words, he did not argue that the respondent, through its representative, breached a common law duty of care by negligently misrepresenting his security of employment with Cognos. Rather, the appellant argued that Mr. Johnston negligently misrepresented the nature and existence of the employment opportunity being offered. It is the existence, or reality, of the job being interviewed for, not the extent of the appellant's involvement therein, which is at the heart of this tort action. A close reading of the employment agreement reveals that it contains no express provisions dealing with the respondent's obligations with respect to the nature and existence of the Multiview project. Accordingly, the ratio decidendi of my reasons in *BG Checo* is inapplicable to the present appeal. While both cases involve pre-contractual negligent misrepresentations, only *BG Checo* involved an impermissible concurrent liability in tort and contract; an exception to the general rule of concurrency set out in *Central Trust v. Rafuse* , supra. The case at bar does not involve concurrency at all, let alone an exception thereto.

43 Having said this, it does not follow that the employment agreement is irrelevant to the disposition of this appeal. As I mentioned earlier, even if the tort claim is not barred altogether by the contract as in *BG Checo* , the duty or liability of the representor in tort may be limited or excluded by a term of the subsequent contract. In this respect, the respondent submits that the Court of Appeal was correct in finding that clauses 13 and 14 of the employment agreement represent a valid disclaimer for the misrepresentations allegedly made during the hiring interview, thereby negating any duty of care. I shall return to this issue in the last part of my reasons. I prefer to deal next with the questions of whether the respondent or its representative owed a duty of care to the appellant during the pre-employment interview and, if so, whether there was a breach of this duty in all the circumstances of this case.

C. The Duty of Care Owed to the Appellant

44 The respondent concedes that it itself and its representative, Mr. Johnston, owed a duty of care towards the six job applicants being interviewed, including the appellant, not to make negligent misrepresentations as to Cognos and the nature and permanence of the job being offered. In so doing, it accepts as correct the findings of both the trial judge and the Court of Appeal that there existed between the parties a "special relationship" within the meaning of *Hedley Byrne* , supra.

45 In my view, this concession is a sensible one. Without a doubt, when all the circumstances of this case are taken into account, the respondent and Mr. Johnston were under an obligation to exercise due diligence throughout the hiring interview with respect to the representations made to the appellant about Cognos and the nature and existence of the employment opportunity.

46 There is some debate in academic circles, fuelled by various judicial pronouncements, about the proper test that should be applied to determine when a "special relationship" exists between the representor and the representee which will give rise to a duty of care. Some have suggested that "foreseeable and reasonable reliance" on the representations is the key element to the analysis, while others speak of "voluntary assumption of responsibility" on the part of the representor. Recently, in *Caparo Industries plc v. Dickman*, [1990] 1 All E.R. 568 (H.L.) , a case unlike the present one in that there the whole issue revolved around the existence of a duty of care, the House of Lords suggested that three criteria determine the imposition of a duty of care: foreseeability of damage; proximity of relationship; and the reasonableness or otherwise of imposing a duty.

47 For my part, I find it unnecessary — and unwise in view of the respondent's concession — to take part in this debate. Regardless of the test applied, the result which the circumstances of this case dictate would be the same. It was foreseeable that the appellant would be relying on the information given during the hiring interview in order to make his career decision. It was reasonable for the appellant to rely on said representations. There is nothing before this court that suggests that the respondent was not, at the time of the interview or shortly thereafter, assuming responsibility for what was being represented to the appellant by Mr. Johnston. As noted by the trial judge, Mr. Johnston discussed the Multiview project in an unqualified manner, without making any relevant caveats. The alleged disclaimers of responsibility are provisions of a contract signed more than two weeks after the interview. For reasons that I give in the last part of this analysis, these provisions are not valid disclaimers. They do not negate the duty of care owed to the appellant or prevent it from arising as in *Hedley Byrne* and *Carman Construction* , supra. It was foreseeable to the respondent and its representative that the appellant would sustain damages should the representations

relied on prove to be false and negligently made. There was, undoubtedly, a relationship of proximity between the parties at all material times. Finally, it is not unreasonable to impose a duty of care in all the circumstances of this case; quite the contrary, it would be unreasonable *not* to impose such a duty. In short, therefore, there existed between the parties a "special relationship" at the time of the interview. The respondent and its representative Mr. Johnston were under a duty of care during the pre-employment interview to exercise reasonable care and diligence in making representations as to the employer and the employment opportunity being offered.

48 Although it was not argued before this court, I wish to add what is implicit in my acceptance of the respondent's concession, namely, that I reject the so-called restrictive approach as to who can owe a *Hedley Byrne* , supra, duty of care, often associated with the majority judgment in *Mutual Life & Citizens' Assurance Co. v. Evatt*, [1971] A.C. 793 (P.C.) . In my opinion, confining this duty of care to "professionals" who are in the business of providing information and advice such as doctors, lawyers, bankers, architects, and engineers, reflects an overly simplistic view of the analysis required in cases such as the present one. The question of whether a duty of care with respect to representations exists depends on a number of considerations including, but not limited to, the representor's profession. While this factor may provide a good indication as to whether a "special relationship" exists between the parties, it should not be treated in all cases as a threshold requirement. There may be situations where the surrounding circumstances provide sufficient indicia of a duty of care, notwithstanding the representor's profession. Indeed, the case at bar is a good example. I find support for a more flexible approach on this question in a number of authorities: see, for example, the dissenting reasons of Lord Reid and Lord Morris in *Mutual Life* , supra; *Esso Petroleum* , supra; *Howard Marine & Dredging Co. v. A. Ogden & Sons (Excavations) Ltd.*, [1978] Q.B. 574 (C.A.) ; *L. Shaddock & Associates Pty. Ltd. v. Parramatta City Council* (1981), 150 C.L.R. 225 (Aust. H.C.) ; *Blair v. Canada Trust Co.* (1986), 38 C.C.L.T. 300 (B.C.S.C.) ; *Nelson Lumber Co. v. Koch* (1980), 13 C.C.L.T. 201 (Sask. C.A.) ; and A.M. Linden, *Canadian Tort Law* (4th ed., 1988), at pp. 400-404.

D. The Breach of the Duty of Care

(1) Introduction

49 The next issue deals with whether the above duty of care was breached during the course of the pre-employment interview of February 14, 1983. The main question to be addressed here is whether the misrepresentations of Mr. Johnston during the interview were negligently made, as found by the trial judge.

50 In order to answer this question, it will be necessary to determine the nature and extent of the duty of care owed to the appellant in the circumstances of this case or, as I prefer to characterize it, the standard of care imposed by law on the respondent and its representative. Specifically, we must ask ourselves whether it is sufficient, in law, that Mr. Johnston was truthful during the interview and that he believed in what he was representing, as found by the Court of Appeal, or whether something more was required of him?

51 I will also deal under this heading with a sub-issue raised by the respondent, namely, the nature of the misrepresentations made in the case at bar. As previously noted, the trial judge found as a fact that some of the representations made to the appellant in the course of the pre-employment interview were misrepresentations in the sense that they were inaccurate or misleading. This finding, made on the basis of White J.'s assessment of all the evidence, was not disturbed in any way by the Court of Appeal. The respondent is not challenging — at least not directly — this finding of fact before this court. However, it is arguing that regardless of any negligence these misrepresentations are not actionable at law under the *Hedley Byrne* , supra, principle because they depend on inferences or implications rather than on direct and express statements, and because they relate to a future expectation. I shall address this submission following my review of the relevant standard of care and of its application to the facts of this case.

(2) The Standard of Care Imposed on the Respondent

52 According to Finlayson J.A., the duty imposed on the respondent and its representative is "no more than a duty to take care that the representations made were responsible and accurate to the knowledge of Johnston and of his principal, Cognos" (p.

186). In his view, Mr. Johnston was not obliged to go further than he did in describing the employment opportunity to the appellant: "What he said was truthful, he believed in it, that was enough" (p. 188).

53 Before this court, the respondent adopts the position of Finlayson J.A. with respect to the applicable standard of care. It also adopts his finding that the trial judge erred in imposing a higher standard than was required in the circumstances, namely, a standard of disclosure to the appellant concerning the extent of the respondent's financial commitment to the Multiview project. It is submitted that the trial judge's approach is an unwarranted extension to the law of master/servant of a quasi-fiduciary duty of uberrima fides. Finally, the respondent adopts the finding of Finlayson J.A. that the duty of care imposed on the respondent and its representative was fully discharged. In this respect, the respondent emphasizes the fact that the recruitment process for the position in question had been commenced by Mr. Johnston with full knowledge and support of a number of senior executives of the respondent, and that there was in fact a "commitment" of the respondent to develop Multiview in the way out lined by Mr. Johnston during the interview.

54 The appellant characterizes the applicable standard of care in a somewhat different manner. He submits that the respondent's duty of care required that both it itself and Mr. Johnston take reasonable steps to avoid conveying information to the appellant about his prospective employment that was materially inaccurate or misleading. According to him, this duty also required them to put themselves "in the appellant's shoes" in assessing the possible impact of their representations on his career choices. In particular, it is argued that they had a duty to consider what inferences the appellant would probably make from the pre-employment statements. The appellant concedes that this standard appears to be high; however, he submits that it is justified in a pre-employment situation based on a number of "policy considerations". Finally, the appellant argues that the applicable standard requires not only that an employer provide accurate information regarding the employment opportunity, but it also requires that he or she provide complete information; viz., full disclosure. In the case at bar, the appellant submits that the duty of care was not discharged since the information provided by Mr. Johnston was incomplete; there was no mention of the absence of a financial commitment. In any event, it is submitted that there was negligence even under a lower standard of care because the respondent and its representative did not ensure that the information provided, both expressly and impliedly, was accurate.

55 In my view, the relevant standard of care is neither the one advanced by the respondent and the Court of Appeal nor the one proposed by the appellant. The former is too low as it equates, in essence, a duty of care with a duty of common honesty. On the other hand, the standard of care proposed by the appellant is too onerous as it is tantamount to requiring full disclosure from employers during pre-employment interviews. This court has been presented with no compelling reasons to treat representations made in an employment context differently from representations made in any other context. It is unfortunate that the appellant has spent considerable time in his argument trying to convince this court to recognize a fundamentally new standard of care, specific to the employment context. Clearly, the standard of care normally required by law is sufficient to dispose of this appeal in the appellant's favour. Upholding the trial judge's finding of negligence does not require an expansion of tort law into previously uncharted and hence unknown waters. Rather, it simply requires an application of well established principles of the law of negligence.

56 The applicable standard of care should be the one used in every negligence case namely the universally accepted, albeit hypothetical, "reasonable person". The standard of care required by a person making representations is an objective one. It is a duty to exercise such reasonable care as the circumstances require to ensure that representations made are accurate and not misleading: see *Hedley Byrne* , supra, at p. 486, per Lord Reid; *Hodgins v. Nepean Hydro-Electric Commission* , supra, at pp. 506-9, per Ritchie J. for the majority of this court; *Wooldridge v. H.B. Nickerson & Sons* , supra, at pp. 135-36; J.G. Fleming, *The Law of Torts* (7th ed., 1987), at pp. 96-104 and 614; Linden, supra, at pp. 105-19; and Klar, supra, at pp. 159-60. Professor Klar provides some useful insight on this issue (at p. 160):

> An advisor does not guarantee the accuracy of the statement made, but is only required to exercise reasonable care with respect to it. As with the issue of standard of care in negligence in general, this is a question of fact which must be determined according to the circumstances of the case. Taking into account the nature of the occasion, the purpose for which the statement was made, the foreseeable use of the statement, the probable damage which will result from an inaccurate statement, the status of the advisor and the level of competence generally observed by others similarly placed, the trier of fact will determine whether the advisor was negligent.

57 In my opinion, the trial judge did not depart from the applicable standard of care in rendering his decision. He found that, "in all the circumstances", the misrepresentations made by the respondent's representative were negligently made. Unlike the Court of Appeal, I find no reason to interfere with his careful and considered finding on this point.

58 As I see it, the Court of Appeal erred in two important respecta when it interfered with White J.'s finding of negligence. First, it mischaracterized his reasons on the negligence issue. Finlayson J.A. said the following (at p. 187):

> The trial judge found that [Mr. Johnston] had a duty to go further and to point out the details of the internal decision-making process at Cognos and stress that the process had not been completed. In other words, his own *bona fide* belief as a knowledgeable executive that the program was going forward was not sufficient. He had to divulge to all of the applicants that he interviewed the precise status of the corporate commitment to the development of the new product so that they could make their own assessment of the viability of the project.
>
> In my opinion, this casts the duty too high. It suggests that at least a quasi-fiduciary relationship existed between corporation and job applicant, giving rise to a duty to make full disclosure.

59 Unlike Finlayson J.A., I do not read the trial judge's reasons as suggesting that the respondent and its representative had a *duty to make "full disclosure"* in the sense described above, and that the respondent was liable for a failure to meet this duty. Rather, I read his reasons as suggesting that, in all the circumstances of this case, Mr. Johnston breached a *duty to exercise reasonable care* by, inter alia, representing the employment opportunity in the way he did without, at the same time, informing the appellant about the precarious nature of the respondent's financial commitment to the development of Multiview. In reality, the trial judge did not impose a duty to make full disclosure on the respondent and its representative. He simply imposed a duty of care, the respect of which required, among other things and in the circumstances of this case, that the appellant be given highly relevant information about the nature and existence of the employment opportunity for which he had applied.

60 There are many reported cases in which a failure to divulge highly relevant information is a pertinent consideration in determining whether a misrepresentation was negligently made: see, for example, *Fine's Flowers Ltd. v. General Accident Assurance Co.* (1974), 5 O.R. (2d) 137 (H.C.) , at p. 147, affirmed (1977), 17 O.R. (2d) 529 (C.A.) ; *Grenier v. Timmins Board of Education* , supra; *Wooldridge v. H.B. Nickerson & Sons* , supra; *Hendrick v. De Marsh* (1984), 45 O.R. (2d) 463 (H.C.) , affirmed on other grounds (1986), 54 O.R. (2d) 185 (C.A.) ; *Steer v. Aerovox* , supra; *W.B. Anderson & Sons Ltd. v. Rhodes (Liverpool) Ltd.*, [1967] 2 All E.R. 850 (Liverpool Assizes) ; and *V.K. Mason Construction* , supra. In the last case, Wilson J. said the following speaking for this court (at p. 284):

> The statement was negligent because it was made without revealing that the Bank was giving an assurance based solely on a loan arrangement which Mason had already said was insufficient assurance to it of the existence of adequate financing.

In so doing, these cases and the trial judgment in the case at bar are not applying a standard of uberrima fides to the transactions involved therein. Quite frankly, this notion is irrelevant to a determination of whether the representor has breached a common law duty of care in tort. These decisions simply reflect the applicable law by taking into account all relevant circumstances in deciding whether the representor's conduct was negligent. In some cases, this includes the failure to divulge highly pertinent information.

61 The second error made by the Court of Appeal is that it substituted for the "higher" standard of care allegedly imposed by the trial judge, a standard well below the one required by law. Once again, it is worth repeating the final words of Finlayson J.A. on the negligence issue: "Johnston was not obliged to go farther than he did in describing the job prospects. What he said was truthful, he believed in it, that was enough" (p. 188). In essence, the Court of Appeal reduced a common law duty of care to a duty of common honesty. Undoubtedly, the latter duty existed in the case at bar, as it exists during any pre-contractual negotiations.

62 However, the duty of care owed by a representor to a representee, *when there exists a "special relationship" within the meaning of Hedley Byrne, supra* , is distinct in nature and scope from a duty to be honest and truthful. As was stated in *Hedley Byrne* , supra, by Lord Morris (at pp. 502-3):

> Independently of contract, there may be circumstances where information is given or where advice is given which establishes a relationship which creates a duty not only to be honest but also to be careful.
>
> . . . . .
>
> In these circumstances, I think some duty towards the unnamed person, whoever it was, was owed by the bank. There was a duty of honesty. The great question, however, is whether there was a duty of care.

and by Lord Pearce (at p. 539):

> There is also, in my opinion, a duty of care created by special relationships which, though not fiduciary, give rise to an assumption that care as well as honesty is demanded.

See also *Hayward v. Mellick* (1984), 45 O.R. (2d) 110 (C.A.) , and *Carman Construction* , supra, at p. 973.

63 A duty of care with respect to representations made during pre-contractual negotiations is over and above a duty to be honest in making those representations. It requires not just that the representor be truthful and honest in his or her representations. It also requires that the representor exercise such reasonable care as the circumstances require to ensure that the representations made are accurate and not misleading.

64 Although the representor's subjective belief in the accuracy of the representations and his moral blameworthiness, or lack thereof, is highly relevant when considering whether or not a misrepresentation was fraudulently made, it serves little, if any, purpose in an inquiry into negligence. As noted above, the applicable standard of care is that of the objective reasonable person. The representor's belief in the truth of his or her representations is irrelevant to that standard of care. The position adopted by the Court of Appeal seems to absolve those who make negligent misrepresentations from liability if they believe that their representations are true. Such a position would virtually eliminate liability for negligent misrepresentation as liability would result only where there is actual knowledge that the representation made is not true; the basis of *fraudulent* misrepresentation. In essence, the Court of Appeal has returned to the pre-*Hedley Byrne* , supra, state of law where a misrepresentation had to be accompanied by moral blameworthiness in order to support an action in tort for damages: see, in this respect, my discussion in *BG Checo* , supra, of the context in which *Hedley Byrne* was decided. The question facing the trial judge on the negligence issue was not whether Mr. Johnston was truthful or believed in what he was representing to the appellant. The question was whether he exercised such reasonable care as the circumstances required so as to ensure the accuracy of his representations.

65 The trial judge found that the respondent's representative had acted negligently in making the misrepresentations to the appellant about the nature and existence of the employment opportunity and, in particular, the extent of the respondent's commitment to the Multiview project. He found that Mr. Johnston was aware, based upon his expertise in the field of computer development, that until there was a feasibility study in which cost estimates had been submitted, considered, and approved by senior management, one could not say that the respondent had made a firm commitment to the project as Mr. Johnston envisaged it and as he described it to the appellant in the interview.

66 As noted above, the trial judge also made the following important findings: Mr. Johnston knew, or ought to have known, that the truth of his representations depended on the approval by the corporate management team of the cost estimates he had prepared for the research and development of the Multiview project; it is reasonable to infer that Mr. Johnston, at the time of the interview, contemplated that the budgetary needs for the Multiview project would be substantial and that approval was at best speculative; Mr. Johnston must have been aware of the continued poor sales performance of the Multiview product line; Mr. Johnston did not disclose to the appellant that senior management had not yet given the financial commitment required to make the plans for the Multiview project a probable reality; Mr. Johnston's expertise in the computer development field should have made him aware that, notwithstanding his conversations with senior management and the meeting of December 21, 1982, there was still a considerable risk that senior management would not give budgetary approval to his plans; Mr. Johnston knew that the appellant was relying on the information he was providing during the interview; Mr. Johnston knew that the appellant had a secure, responsible, and well-paying position as a chartered accountant in Calgary and that coming to Ottawa would involve

moving himself and his family across the country; and Mr. Johnston was aware that the appellant was relying on the position with Cognos to enhance his career significantly as an accountant.

67 These findings are fully supported by the evidence adduced at trial. I see no reason to interfere with the trial judge's conclusion that the misrepresentations made to the appellant were, in all the circumstances, "negligent misrepresentations". Under the standard of care described above, Mr. Johnston failed to exercise such reasonable care as the circumstances required him to in making the representations he did during the interview. Particularly, he should not have led the appellant to believe that the Multiview project as described during the interview was a reality when, in fact, he knew very well that the most important factor to the existence of the project, as he was describing it, was financial support by the respondent.

68 Before this court, the respondent made extensive reference to the evidence adduced at trial to indicate that it did, in reality, plan to develop Multiview and to make it a profitable project. While it seems to be true that Cognos was "committed" to the project at the end of 1982 and early 1983, it was not committed in the most crucial respect, namely funding. As found by the trial judge, the impression given during the interview was not consistent with the fundamental reality that funding for the project was not yet approved.

69 In the end, I am unable to find any ground for interfering with White J.'s finding of negligence. There was, in the circumstances of this case, a breach of the duty of care owed to the appellant. In light of this conclusion, it is unnecessary to determine whether, as argued by the appellant, other members of the respondent such as senior management were negligent on the facts of this case. Mr. Johnston's conduct during the interview is sufficient to support a finding of liability against the respondent.

(3) The Nature of the Misrepresentations

70 The respondent takes the alternate position that, even accepting the trial judge's findings of misrepresentations and of negligence, the appellant's action must fail because the representations relied on are not actionable under the *Hedley Byrne* , supra, doctrine. In this respect, the respondent argues that the representations depend on inferences or implications, rather than on direct statements, and also relate to a future expectation. The appellant makes no submissions on this point. It is unclear whether this submission of the respondent was advanced prior to the appeal to this court. If so, it has received very little attention by the courts below. There is only a brief discussion, and rejection, of the "future expectation" aspect of the argument in the trial judge's reasons and the Court of Appeal makes no reference whatsoever to this submission.

71 In my view, the respondent's alternate position cannot succeed in the circumstances of this case. First of all, I reject as incorrect the suggestion that the representations in question relate solely to future events or expectations. I reproduce again, for convenience, a passage from White J.'s judgment in which he finds, as a fact, that misrepresentations were made to the appellant in the hiring interview (at pp. 415-16):

> The effect of these misrepresentations was that the [appellant] would have a position in the research and development of the product "Multiview"; that that position would be a significant one and would involve his expertise as an accountant; that he would perform the responsible role of seeing to proper accounting standards being implemented into the product; that beyond the three modules immediately in contemplation were a minimum of four other modules; and that the project of "Multiview", in connection with which [the appellant] would be hired would last a minimum of two years. I find further that Mr. Johnston implicitly represented that management had made a firm budgetary commitment to the development of four other modules in addition to those then presently under development.

72 Obviously, some aspects of the misrepresentations made to the appellant about the employment opportunity were, by their very nature, matters in futuro. Statements about the appellant's involvement with the respondent and his responsibilities should he be offered a position are representations that relate to future conduct and events. There are authorities supporting the view that only representations of existing facts, and not those relating to future occurrences, can give rise to actionable negligence: see, for example, *Williams v. Saanich School District No. 63* (B.C.S.C.), supra; *Datile Financial Corp. v. Royal Trust Corp. of*

Canada (1991), 5 O.R. (3d) 358 (Gen. Div.) ; *Foster Advertising Ltd. v. Keenberg* (1987), 38 C.C.L.T. 309 (Man. C.A.) ; and *Andronyk v. Williams* (1985), 35 C.C.L.T. 38 (Man. C.A.) .

73 However, assuming without deciding that this view of the law is correct, the representations most relevant to the appellant's action are *not* those relating to his future involvement and responsibilities with Cognos, but those relating to the very existence of the job for which he had applied. That is a matter of existing fact. It was implicitly represented that the job applied for did in fact, *at the time of the interview* , exist in the manner described by Mr. Johnston. As found by the trial judge, however, such was not the case. The employment opportunity described to the appellant was not, at the time of the interview, a fait accompli for the respondent. Clearly, this misrepresentation relates to facts presumed to have existed at the time of the interview: the respondent's financial commitment to the development of Multiview and the existence of the employment opportunity offered. It is *not* a "remark by a defendant concerning the outcome of a future event" (*Williams v. Saanich School District No. 63* (B.C.S.C.), supra, at p. 240), a "representation as to future occurrences" (*Datile Financial Corp. v. Royal Trust* , supra, at p. 379), a "statement of intention or forecast of the future" (*Foster Advertising Ltd. v. Keenberg* , supra, at p. 325), or "forecasting" (*Andronyk v. Williams* , supra, at p. 57).

74 The other aspect of the respondent's argument is that representations which depend on implications or inferences cannot give rise to actionable negligence under the *Hedley Byrne* , supra, doctrine. Again, I reject this submission. However, on this issue, I prefer, for obvious reasons, to challenge the principle advanced by the respondent rather than simply reject its application to the facts of this case.

75 In my view, there is no compelling reason in principle, authority, or policy for the proposition that, as a general rule, an implied representation cannot under any circumstance give rise to actionable negligence. The only authority offered by the respondent is the decision of the New South Wales Court of Appeal in *Minister Administering the Environmental Planning and Assessment Act, 1979 v. San Sebastian Pty. Ltd.*, [1983] 2 N.S.W.L.R. 268 , affirmed on other grounds (1986), 68 A.L.R. 161 (H.C.), applied by Southin J.A. of the British Columbia Court of Appeal, in dissent, in *BG Checo International Ltd. v. British Columbia Hydro & Power Authority* (1990), 44 B.C.L.R. (2d) 145 . The reasons of Mahoney and Hutley JJ.A. in the former case appear indeed to support the proposition that nothing less than an express, or tantamount to an express, representation can suffice under the *Hedley Byrne* , supra, doctrine. It is not without significance, however, that the High Court of Australia in dismissing a subsequent appeal on different grounds expressly refrained from making any comments on this issue. Rather, the majority of the court preferred to base its judgment, inter alia, on the fact that no misrepresentations, whether "express or implied", had been made. In other words, the High Court found nothing misleading or inaccurate in what was represented, regardless of how the representation was characterized.

76 On the other hand, there is considerable authority for the more flexible view that, *in appropriate circumstances* , implied misrepresentations can, and often do, give rise to actionable negligence: see, for example, *Banque Financière de la Cité SA v. Westgate Insurance Co.*, [1989] 2 All E.R. 952 (C.A.) , at p. 1000, affirmed on other grounds [1990] 2 All E.R. 947 (H.L.) ; *Datile Financial Corp. v. Royal Trust* , supra, at p. 379; *Hendrick v. De Marsh* (Ont. H.C.), supra; *Steer v. Aerovox* , supra; and *Doherty v. Allen* (1988), 55 D.L.R. (4th) 746 (N.B.C.A.) .

77 In my opinion, a flexible approach to this issue is preferable. It is arbitrary and premature to declare as a general rule that nothing less than express or direct representations can succeed under the *Hedley Byrne* , supra, doctrine. Undoubtedly, there will be cases such as the present one where the surrounding circumstances are such that it makes little difference, if any, how one characterizes the manner in which the representation is made, and where it would be unjust to deny recovery simply because the representation relied on is said to be implied rather than express. It is unnecessary for me to set out in detail the circumstances in which so-called implied representations can be enough to sustain an action in tort for negligent misrepresentation. I prefer leaving this task to trial judges dealing with specific factual situations. Suffice it to say that the case at bar falls well within this category.

78 There was a considerable number of express representations made by Mr. Johnston during the interview which point directly towards the existence of the Multiview project and the nature of the respondent's commitment thereto. The implied misrepresentation found by the trial judge is not only reasonable in the surrounding circumstances, but it is also perhaps the

only inference that could be drawn from the direct representations made to the appellant during the interview. A reasonable person placed in the appellant's position would, without a doubt, have drawn the same inference from what was being said that the appellant and trial judge did.

79 This is not a situation where many different and conflicting interpretations may reasonably be drawn from a series of direct representations and where the representee advances the implied meaning most favourable to recovery. This is a case where everything said and represented during the interview points to the same conclusion: the Multiview project as described by Mr. Johnston was a reality in that the respondent had given its financial support to its development. The appellant had a relatively secure and well paying job in Calgary and, as found by the trial judge, he would not have chosen to move across the country if he thought there was a substantial risk that the employment opportunity described to him would no longer exist, after his arrival in Ottawa. To a large extent, this risk was alleviated by the representations made during the interview. For these reasons, the fact that the representation in question falls short of being express should not, in the circumstances of this case, preclude the appellant from relying on the *Hedley Byrne* , supra, doctrine and from obtaining a remedy for the damages he suffered.

E. The Employment Agreement Signed Subsequent to the Negligent Misrepresentations

80 Thus far, I have stated that the courts below were correct in finding a "special relationship" between the parties as to give rise to a duty of care during the interview, and that the misrepresentations found by the trial judge were indeed made in a negligent manner in all the circumstances of the case. Again, there is no question in this appeal that the appellant reasonably relied, to his detriment, on these negligent misrepresentations. The only remaining issue is whether the employment agreement signed by the appellant more than two weeks after the interview affects, in any way, the above findings or the consequence that would normally follow therefrom, namely, liability of the respondent for the damages caused to the appellant.

81 Finlayson J.A. found that clauses 13 and 14 of the employment agreement constituted an adequate, albeit not express, "disclaimer of responsibility" for the representations made during the interview because these clauses contradicted or were inconsistent with those representations. The respondent adopts this conclusion, submitting that there is a clear inconsistency between the contract and the alleged misrepresentations and that this inconsistency is sufficient to constitute a disclaimer within the meaning of *Hedley Byrne* , supra. The respondent argues that the representation relied on by the appellant goes to the issue of job security and that the contract of employment specifically addresses, and contradicts, this issue in its provisions dealing with reassignment and termination of employment, "without cause", on one month's notice. Furthermore, the respondent relies on the decision of this court in *J. Nunes Diamonds* , supra, for the proposition that the doctrine of *Hedley Byrne* , supra, "is inapplicable to any case where the relationship between the parties is governed by a contract, unless the negligence relied on can properly be considered as 'an independent tort' unconnected with the performance of that contract". It is argued that the tort in question is not "independent" from the contract. Moreover, the respondent submits that the one month termination clause in the contract amounts to a "limitation of liability clause" and that the appellant is attempting to circumvent this clause by its present action in tort, contrary to the decision of this court in *Central Trust v. Rafuse* , supra. Finally, the respondent argues that the appellant's conduct after his arrival at the company and his learning of the developments regarding the Multiview project amounts to an affirmation of his contract of employment.

82 For his part, the appellant submits that the tort at issue is "independent" of the employment agreement within the meaning of *J. Nunes Diamonds* , supra, and is not affected in any way by its provisions. In particular, it is submitted that clauses 13 and 14 of the employment contract do not amount to a valid disclaimer and have no bearing whatsoever on the respondent's liability in tort. In this respect, he argues that express contractual terms are required in order to negate an otherwise "independent" duty of care. Furthermore, the appellant claims he was simply attempting to mitigate his damages by staying with the respondent after the reassignments. According to him, any "affirmation" of the contract is irrelevant since the tort in issue is "independent" from the contract and because the damages crystallized at the moment he became aware of the misrepresentations.

83 As I see the matter, the specific employment agreement signed by the appellant is, in the circumstances of this case, irrelevant to his action for negligent misrepresentation. This contract falls within the third proposition suggested earlier in which a representee's claim for damages for a negligent pre-contractual misrepresentation is not affected, in any way, by the subsequent contract. I observed at p. 25 [paras. 38-40] of these reasons that this appeal is clearly distinguishable from *BG Checo* , supra,

in that the common law duty of care relied on by the appellant is *not* , unlike in *BG Checo* , co-extensive with a duty imposed on the respondent by an express term of the employment agreement. This conclusion, in effect, disposes of the respondent's argument based on *J. Nunes Diamonds* , supra.

84 Indeed, as I alluded to in *BG Checo* , the aspect of the judgment of the majority in *J. Nunes Diamonds* , supra, upon which the respondent relies (the passage found at pp. 777-78) was qualified by the unanimousjudgment of this court in *Central Trust v. Rafuse* , supra, recognizing concurrency between contract and tort as a general rule subject to certain "exceptions", including (at p. 205):

> 2. What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract. *It is in that sense that the common law duty of care must be independent of the contract* . The distinction, in so far as the terms of the contract are concerned, is, broadly speaking, between what is to be done and how it is to be done. A claim cannot be said to be in tort if it depends for the nature and scope of the asserted duty of care on the manner in which an obligation or duty has been expressly and specifically defined by a contract. [Emphasis added.]

Unlike in *BG Checo* , the common law duty of care invoked by the appellant *is* , for reasons already given, "independent" of the employment agreement. I would therefore reject this part of the respondent's argument which attempts to disallow the appellant's action in tort and to confine him to whatever remedies are available under the law of contract.

85 This leaves the question of whether the duty or liability of the respondent in tort is limited or excluded by a term of the employment agreement. As I see the matter, neither the respondent's duty of care nor its liability is affected by the terms of the employment agreement. For convenience, I reproduce again the provisions of this contract which play a determining role according to the Court of Appeal and the respondent:

> **Transfer**
>
> 13. Quasar Systems reserves the right to reassign you to another position with the Company without reduction of your salary or benefits and upon one month's notice to you. Should such reassignment require your permanent relocation to another city, the Company will reimburse you for your expenses in accordance with the then current relocation policy.
>
> **Termination Notice — One Month**
>
> 14. This Agreement may be terminated at any time and without cause by Quasar Systems Ltd. or by you. In the event of termination, Quasar Systems Ltd. will give you one month's notice of termination plus any additional notice that may be required by any applicable legislation. Similarly, you shall give Quasar Systems Ltd. one month's notice if you voluntarily terminate this Agreement. Quasar Systems Ltd. may pay you one month's salary in lieu of the aforesaid notice in which event this Agreement and your employment will be terminated on the date such payment in lieu of notice is made.

In my view, the Court of Appeal erred in giving to clauses 13 and 14 the effect of a "disclaimer of responsibility" within the meaning of *Hedley Byrne* and *Carman Construction* , supra. These provisions are clearly distinguishable from the disclaimers at issue in both *Hedley Byrne* and *Carman Construction* .

86 In *Hedley Byrne* , supra, the representee's bank requested certain financial information from the representors, merchant bankers for a potential client of the representee, "in confidence and without responsibility" on the part of the representors. The latter replied to the inquiry, in part, as follows: "Confidential. For your private use and without responsibility on the part of the bank or its officials." Unlike the present appeal, there was never any contractual relationship between the representee and the representor in *Hedley Byrne* . The House of Lords unanimously held that even though a duty of care with respect to representations could, in appropriate circumstances, exist, such a duty could not arise in *Hedley Byrne* since the representors

had manifestly expressed, prior to the representations and to the knowledge of the representee, that they did not assume or accept responsibility for any of the information given.

87 *Carman Construction* , supra, on the other hand, concerned a misrepresentation made in a contractual setting. The corresponding clause in that case (cl.3.1) expressly provided that the plaintiff was not relying on the representations of the defendant: "the Contractor does not rely upon any information given or statement made to him in relation to the work by the Company" (p.961). The pertinent com ments of Martland J., writing for a unanimous court, are worth quoting (at pp. 972-73):

> In the *Hedley Byrne* case the decision was that the disclaimer of responsibility for the persons alleged to be liable for negligent misrepresentation, communicated to the other party, excluded the assumption of a duty of care. I regard the wording of clause 3.1 of the agreement as having the like effect. The judgment at trial dealt with the situation on the basis that negligent misrepresentation had been established, but that clause 3.1 was an exemption clause which exempted C.P.R. from liability. In the circumstances of this case, I would prefer to regard the clause as establishing that C.P.R. did not assume any duty of care, and a claim in negligence will not arise in the absence of a duty of care.
>
> I reach this conclusion in the light of the facts to which I have already referred in dealing with the issue of collateral warranty. *Carman was made aware, when Fielding received the tender documents, and read and understood clause 3.1, that if it entered into an agreement with C.P.R. it was doing so on its own knowledge as to the quantities of material to be removed and that it would not rely upon any information or statement made to it by C.P.R. in relation to the work. Fielding was aware of this when he sought information from a C.P.R. employee. He knew that if information was obtained, Carman would be relying upon it at its own risk. In my opinion, on the facts of this case, a duty of care on the part of C.P.R. in respect of information provided by its employee never arose provided the information was given honestly* . The trial judge has found that the misrepresentation made to Carman was made innocently without intent to defraud. [Emphasis added.]

88 Also instructive is the following excerpt from the reasons of Wilson J.A. (as she then was), writing for the majority of the Court of Appeal, in *Carman Construction* ((1981), 33 O.R. (2d) 472 , at p. 473):

> This is not, in the view of the majority, a case in which, after making a negligent misrepresentation to the plaintiff in order to induce it to enter into a contract, the terms of which were at the time of the misrepresentation unknown, the defendant thereafter inserts into the contract an exculpatory clause in order to insulate itself against antecedent tort liability. This is a case in which the plaintiff tendered knowing that in the very contract on which it was tendering it had agreed to assume the risk of using any information obtained by it from the defendant's employees.

89 Contrary to *Hedley Byrne* and *Carman Construction* , supra, there is no contemporaneity in this case between the alleged disclaimers of responsibility and the negligent misrepresentations. More important than their timing, however, clauses 13 and 14 of the employment agreement are far from being statements, express or implied, that the respondent and its representative are not assuming responsibility for the representations made to the appellant during the hiring interview about the nature and existence of the Multiview project. Although I am not prepared to hold that nothing less than the clearest and most express disclaimer will suffice to negate a duty of care, something more than clauses 13 and 14 is definitely required. These provisions relate to the right and obligations of the parties in the event of the appellant's termination or transfer. They have nothing to do with representations made during pre- or post-contractual negotiations, let alone disclaimers for said representations.

90 Assuming, for the sake of argument, that the principle set out in the judgment of the Court of Appeal is correct in law (i.e., "it is a sufficient disclaimer if the contract contains terms which contradict or are inconsistent with the representations relied upon" (p.183)), there are *no* inconsistencies in the case at bar between clauses 13 and 14 of the contract and the representations *relied on* by the appellant. The only way to find such an inconsistency is to agree with Finlayson J.A. and the respondent that the representations relied on by the appellant amount to a warranty of job security. However, as noted above, the representations in question are *not* of this nature. Rather, they are representations that a particular job would exist and that it would have certain features. As the trial judge found, the representations made during the job interview were firm representations "that the [respondent] company was committed to the development of additional modules of 'Multiview'" (p.397), and there were implicit representations "that there was a reasonable plan in existence for the additional modules and that the company had made

a financial commitment in the way of budgetary provisions for such development" (p.398). Characterizing the representations in question as a warranty of job security seems particularly strained because Mr. Johnston actually indicated that the project would last only two years. Thus, Mr. Johnston did not represent that the position would last forever, although he certainly did represent that it would exist.

91 Again, the appellant's claim is not that Mr. Johnston negligently misrepresented the length of time he would be working on Multiview or the conditions under which his employment could be terminated. He does not argue that Cognos, through its representative, breached a duty of care by negligently misrepresenting his security of employment with the respondent company. Rather, the appellant argues that Mr. Johnston misrepresented the nature *and existence* of the employment opportunity being offered. It is on these latter representations that the appellant relied in leaving his relatively secure and well paying job in Calgary. The employment agreement neither expressly nor impliedly states that there may be no job of the sort described during the interview after the appellant's arrival in Ottawa. Stipulations that an employee can be dismissed without cause upon proper notice or reassigned to another position are not incompatible with a pre-contractual representation that a particular job would exist, as described, should the employee accept employment.

92 As for the respondent's liability, clauses 13 and 14 of the employment agreement are clearly not, on their face, general limitation or exclusion of liability clauses as these expressions are commonly used. The language adopted by the parties is unambiguous. By stretching the common definition of "limitation of liability clause", one could interpret clauses 13 and 14 as "limiting" the respondent's "liability" in the event of a transfer or termination to what is specifically provided therein. However, even if this interpretation were adopted, the respondent's liability *for pre-contractual negligent misrepresentations* is clearly beyond the scope of these provisions. It is trite law that, in determining whether or not a limitation (or exclusion) of liability clause protects a defendant in a particular situation, the first step is to interpret the clause to see if it applies to the tort or breach of contract complained of. If the clause is wide enough to cover, for example, the defendant's negligence, then it may operate to limit effectively the defendant's liability for the breach of a common law duty of care, subject to any overriding considerations. This is not, however, the situation facing this court.

93 Clauses 13 and 14 of the employment agreement, even if characterized as "limitation of liability" clauses, cannot support an interpretation which would enable them to protect the respondent from the breach of a common law duty of care, let alone the breach of the particular duty invoked by the appellant in his action for negligent misrepresentation. These provisions are no more relevant to the outcome of this case than is clause 15 of the contract, permitting Cognos to terminate the appellant's employment for cause. Thus, contrary to the respondent's submission, the third proposition set out in *Central Trust v. Rafuse* , supra, at p. 206, is of no assistance to this appeal, that is, the appellant is not attempting by his tort claim to "circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort". Simply put, there is nothing in the employment agreement for the appellant to circumvent or to escape.

94 Finally, with respect to the respondent's argument that the appellant "affirmed" his contract by his conduct subsequent to his arrival in Ottawa, I would make two brief comments. First, the whole concept of "affirming" a contract is irrelevant in the case at bar as the appellant is seeking to rely on a tort remedy rather than a contractual one. Second, it seems somewhat harsh to characterize the appellant as having affirmed his contract of employment. The appellant found himself in a very difficult job situation, with increasing marital and health problems to exacerbate the situation. In my view, he acted quite reasonably in attempting to mitigate his losses before finally endinghis employment relationship with Cognos.

F. Conclusion

95 In my view, the appellant has established all the required elements to succeed in his action. The respondent and its representative, Mr. Johnston, owed a duty of care to the appellant during the course of the hiring interview to exercise such reasonable care as the circumstances required to ensure that the representations made were accurate and not misleading. This duty of care is distinct from, and additional to, the duty of common honesty existing between negotiating parties. The trial judge found, as a fact, that misrepresentations — both express and implied — were made to the appellant and that he relied upon them, reasonably I might add, to his eventual detriment. In all the circumstances of this case, I agree with the trial judge that these misrepresentations were made by Mr. Johnston in a negligent manner. While a subsequent contract may, in appropriate

cases, affect a *Hedley Byrne* , supra, claim relying on pre-contractual representations, the employment agreement signed by the appellant is irrelevant to this action. In particular, clauses 13 and 14 of the contract are not valid disclaimers of responsibility for the representations made during the interview.

V. Disposition

96 For the foregoing reasons, I would allow the appeal, set aside the judgment of the Ontario Court of Appeal, and restore the judgment of White J., finding the respondent liable and granting the appellant damages in the amount of $67,224. The appellant should have his costs here and in the courts below.

McLachlin J. **(concurring):**

97 I agree with my colleague Iacobucci J. that this appeal should be allowed, although for reasons which are obvious from my reasons in *BG Checo International Ltd. v. British Columbia Hydro & Power Authority* , S.C.C., Nos. 21939 and 21955 (released concurrently) [reported 75 B.C.L.R. (2d) 145], I do not concur in all aspects of his reasons.

98 The first issue raised by this appeal is the effect of the fact that the parties in this case entered into a contract which contained a specific term governing termination. The Court of Appeal (1990), 74 O.R. (2d) 176 concluded that this precluded the plaintiff's action in tort for negligent misrepresentation as to the employment. Finlayson J.A., for the court, stated (at p. 183):

> the respondent Queen stated that he would not have given up his secure position in Calgary for a move to Ottawa that was without permanence, and yet he signed a contract which provided him with no assurances respecting his place of employment or its tenure. To rely on *Hedley Byrne, the negligent misrepresentation must have amounted to a warranty of job security and yet the contract of employment was surely a disclaimer of just that* . No representations as to job security, whether based on performance or on job availability, could have survived the one-month termination notice "without cause" contained in the contract. [Emphasis added.]

99 My colleague rejects this conclusion on the ground that the contractual duties were different from the common law duty associated with the tort of negligent misrepresentation. The misrepresentation concerned "the nature and existence of the employment opportunity being offered." The contract clauses, by contrast, were concerned with the rights and remedies of the parties relating to termination (p. 29) [para. 44].

100 I agree that the pre-contractual representation was different in scope and effect from the contractual obligation. The matter is not merely one of semantics. It turns on the plaintiff's assessment of the risk involved in leaving his employment and joining Cognos. When a person is deciding to enter a contract with terms governing termination, he or she makes an assessment as to the risk of such termination occurring. A stringent term as to termination may not deter the person from entering into the contract if he or she is satisfied that the risk of termination materializing is low. The representation at issue in this case concerned the risk of termination coming about. The representation was not that Cognos would not have the discretion to terminate or transfer the plaintiff on one month's notice. Rather, by implying that the Multiview project was a reality, that it had the financial support of Cognos, and that it has passed through the feasibility and costing stage, Johnston on behalf of Cognos caused the plaintiff to be misled as to the level of the risk to the plaintiff that Cognos might at some point choose to exercise its termination power under the employment contract. The plaintiff, believing Johnston, concluded that the risk of being transferred or terminated was low.

101 To elaborate, a number of situations can be envisaged in which Cognos might have decided to terminate the plaintiff's employment:

> (i) his employment not working out in the Multiview project, for reasons that did not amount to just cause for dismissal (e.g., say his work was mediocre, but not incompetent);
>
> (ii) unanticipated serious financial difficulties being encountered by Cognos, such that a decision might be made to lay off staff;

(iii) the situation that actually developed, of Cognos' Corporate Management Team deciding, when the Multiview project reached the end of the feasibility and costing stage, not to make a financial commitment to proceeding with the full development of the Multiview line of products;

(iv) Cognos' Corporate Management Team deciding *after* a financial commitment had been made to scale back or terminate the development of the Multiview line of products.

102 The representation excluded the third reason for dismissal, thereby reducing the risk of termination. As found by the trial judge, the plaintiff relied on that representation in deciding to enter into the contract. It turned out to have been negligently made and false. It follows that the plaintiff is entitled to damages for the loss suffered as a result of that representation.

103 The second issue on the appeal is whether the Court of Appeal was correct in concluding that the trial judge imposed too high a duty of care. Finlayson J.A. correctly stated that the duty on Cognos was "no more than a duty to take care that the representations made were responsible and accurate to the knowledge of Johnston and of his principal, Cognos" (p. 186). However, he went on to conclude "What [Johnston] said was truthful, he believed in it, that was enough" (p. 188). With respect, the second statement cannot be supported. It is not enough that the defendant believed what he said; he must have been non-negligent in having formed and expressed that belief. At the same time, Finlayson J.A. exaggerated the duty of care which the trial judge applied, in stating the trial judge held that Johnston "had to divulge to all of the applicants that he interviewed the precise status of the corporate commitment to the development of the new product so that they could make their own assessment" (p. 187). In fact, the trial judge held only that the defendant had a duty not to hold out to applicants that the project was secure when it knew that funding was not approved and knew or should have known that the final approval was not a rubber stamp process and the secure funding was not a foregone conclusion. I agree with my colleague that this is the appropriate standard and that the duty of care with respect to representations made in a pre-employment situation is the same as that which applies generally. I also agree with my colleague that the argument that the representations are non-actionable by their nature must be rejected.

104 I would allow the appeal on the terms proposed by Iacobucci J.

. . . . .

Appeal allowed.

Footnotes

* Stevenson J. took no part in the judgment.

15

COURT OF APPEAL FOR ONTARIO

CITATION: Mahendran v. 9660143 Canada Inc., 2022 ONCA 676
DATE: 20221012
DOCKET: C70384

Zarnett, Coroza and Favreau JJ.A.

BETWEEN

Kirubakaran Mahendran

Plaintiff
Defendant by Counterclaim

and

9660143 Canada Inc., Sandeep Singh, 1713691 Ontario Inc., and Karl Nodel

Defendants
Plaintiffs by Counterclaim (Appellants)

and

The Nationwide Groups Ltd.

Third Party
(Respondent)

Sandeep Singh, acting in person and for the appellant 9660143 Canada Inc.

Hilary Book and William McLennan, for the respondent

Heard: September 23, 2022

On appeal from the order of Justice R. Cary Boswell of the Superior Court of Justice, dated January 20, 2022.

REASONS FOR DECISION

[1] The appellants, Sandeep Singh and 9660143 Canada Inc. (“966”), appeal an order dismissing their third-party claim on the basis that it does not disclose a cause of action.

[2] In the main action, the plaintiff, Kirubakaran Mahendran, sues a number of defendants, including the appellants, under the *Construction Act*, R.S.O. 1990, c. C.30, in relation to services and materials he allegedly provided for a property at 252 Church Street, Markham, Ontario. 966 is the owner of the property and Mr. Singh is a shareholder and director of 966.

[3] Mr. Singh and 966 have defended the main action and brought a counterclaim against Mr. Mahendran. They claim that Mr. Singh and Mr. Mahendran were business partners working together to renovate the property at 252 Church Street and a number of other properties.

[4] As part of the counterclaim, the appellants allege that Mr. Singh and Mr. Mahendran had agreed to develop a property at 7450 9th Line, Markham. They allege that the property was owned by 938359 Canada Ltd. (“938”), another company of which Mr. Singh is a director and shareholder. The appellants allege that 938 had agreed to sell the 9th Line property to Mr. Mahendran’s sister-in-law, Yasotha Surendran, for $2,050,000, which was reduced from the listed price of $2,599,000. The reduction in price of approximately $550,000 was meant to reflect

938's investment in the development of the property. However, Ms. Surendran refused to close the deal and the appellants allege that the Mr. Mahendran is responsible for this loss.

[5] The appellants' third-party claim, which is the focus of this appeal, is against The Nationwide Groups Ltd. ("Nationwide"). Nationwide obtained an appraisal for the 9th Line property for Ms. Surendran's lender, the Royal Bank of Canada ("RBC"). In the third-party claim, the appellants allege that Nationwide's appraisal undervalued the 9th Line property, which led Ms. Surendran to refuse to close the transaction.

[6] Nationwide brought a motion to strike the third-party claim on the basis that it does not disclose a cause of action. The motion judge granted the motion and dismissed the third-party claim. The motion judge noted that the were "numerous obvious problems" with the third-party claim, including the fact that 938, and not Mr. Singh or 966, was the owner of the property. However, the motion judge ultimately focused his analysis on a finding that the claim does not disclose a cause of action because Nationwide does not owe the appellants a duty of care and the appellants do not plead that they relied on Nationwide's appraisal.

[7] We see no error in the motion judge's decision. The issue of whether a duty of care is owed is a question of law that can, in appropriate circumstances, be resolved on a pleadings motion: *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*,

2020 SCC 35, 450 D.L.R. (4th) 181, at paras. 24-25; *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42, [2011] 3 S.C.R. 45. Here, we agree with the motion judge that, on the facts pleaded in this case, it is plain and obvious that Nationwide does not owe the appellants a duty of care.

[8] As correctly stated by the motion judge, on a motion to strike a claim under r. 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the court should only strike the claim if it is plain and obvious that there is no reasonable chance of success: *Hunt v. Carey Canada Inc.,* [1990] 2 S.C.R. 959, at para. 36. The court is to read the claim generously and to assume that the allegations in the claim are true, unless they are patently ridiculous or incapable of proof: *Imperial*, at para. 22; *McCreight v. Canada (Attorney General)*, 2013 ONCA 483, 116 O.R. (3d) 429, at para. 29.

[9] The motion judge also identified the correct legal test for negligent misrepresentation, which requires a plaintiff to show that (1) there is a "special relationship" between the person making the statement and the person hearing it; (2) it is reasonable for the person hearing the statement to rely on it; (3) the statement is untrue; (4) the person was careless in making the statement; and (5) the person who reasonably relied on the statement suffered damages: *Queen v Cognos Inc*., [1993] 1 S.C.R. 87, at para. 34.

[10] The issue of whether Nationwide owes the appellants a duty of care turns on whether they are in a special relationship of proximity. In *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, at para. 30, the Supreme Court confirmed that in cases of pure economic loss arising from negligent misrepresentation or performance of a service, the two determinative factors for establishing a special relationship are:

> the defendant's undertaking and the plaintiff's reliance. Where the defendant undertakes to provide a representation or service in circumstances that invite the plaintiff's reasonable reliance, the defendant becomes obligated to take reasonable care. And, the plaintiff has a right to rely on the defendant's undertaking to do so. [Emphasis added.]

[11] Here, as found by the motion judge, even on a generous reading of the pleadings, the appellants and Nationwide were not in the type of special relationship described in *Livent*. Nationwide was retained by RBC, which was Ms. Surendran's lender. The appraisal documents, which are incorporated into the third-party claim by reference, specify that they were only prepared for the benefit of RBC. Nationwide did not undertake to appraise the property for the appellants' benefit nor did Nationwide invite the appellants to rely on the appraisal. In addition, as found by the motion judge, the appellants did not allege that they relied on Nationwide's appraisal; on the contrary, the third-party claim alleges that the appellants provided RBC with an alternative appraisal they had obtained independently which they claimed provided an accurate valuation of the property.

[12] As noted by the motion judge, the finding that Nationwide does not owe the appellants a duty of care when retained to appraise the property by the buyer's lender is consistent with the decision in *Barkley v. Tier 1 Capital Management Inc*., 2018 ONSC 1956, aff'd 2019 ONCA 54.

[13] Mr. Singh argues that Nationwide owed a duty of care to all people to whom the appraisal may be shown and who may be expected to rely on it. However, this is contrary to the requirement that a special relationship be founded on an undertaking by the person making the representation and reliance by the person receiving the representation. Specifically, here, as reviewed above, the third-party claim and the incorporated appraisal documents do not assert that Nationwide undertook the appraisal for Mr. Singh. Further, as noted by the motion judge, the appellants do not plead that they relied on the appraisal.

[14] Mr. Singh also argues that the motion judge misunderstood the third-party claim, and that the claim discloses a cause of action because Nationwide used improper comparator properties in conducting its appraisal. Had it used appropriate comparators, the sale of the 9th Line Property to Ms. Surendran would have closed. However, the issue of whether Nationwide fell below the standard of care is irrelevant to the issue of whether Nationwide owed the appellants a duty of care. Only if Nationwide owed the appellants a duty of care would the standard of care become relevant.

[15] The appeal is dismissed. Nationwide is entitled to its costs in the amount of $6,780.00, inclusive of disbursements and HST.

"B. Zarnett J.A."
"S. Coroza J.A."
"L. Favreau J.A."

16

Fiduciary Duties in Canada § 1:32

Fiduciary Duties in Canada
Mark Vincent Ellis

Part I. Fiduciary Concept

Chapter 1. The Fiduciary Concept

V. The Scope of the Concept: To Whom the Fiduciary Concept Applies

§ 1:32. Analysis

Given that it attracts the "highest duty known to law", the fiduciary relationship is intended to be rarified and found only where the appropriate situation and circumstances exist. It is fitting that the law is jealous to restrict its invocation to the exclusive realm where an aura of trust and confidence is established.

Historically there is in effect a dichotomy between those easily recognized as fiduciaries with those less-recognizable obligants who are found to owe the duty on an *ad hoc* basis. Given that wherever the situation and circumstances compel a finding that trust and confidence has been reposed by one party on another, a fiduciary relationship is established independent of title or role.

Respecting whether a stockbroker is a fiduciary, in Hodgkinson v. Simms, 1994 CarswellBC 438, 1994 CarswellBC 1245, EYB 1994-67089, [1994] 3 S.C.R. 377, 97 B.C.L.R. (2d) 1, 16 B.L.R. (2d) 1, 22 C.C.L.T. (2d) 1, 57 C.P.R. (3d) 1, 117 D.L.R. (4th) 161, 5 E.T.R. (2d) 1, [1994] 9 W.W.R. 609, 49 B.C.A.C. 1, 6 C.C.L.S. 1, 95 D.T.C. 5135, 171 N.R. 245, 80 W.A.C. 1, [1994] S.C.J. No. 84 (S.C.C.) the Supreme Court of Canada sought to define the incidence of a fiduciary finding broadly:

> … who is fiduciary? It is evident that a principle which applies to anyone who undertakes a task on behalf of another is applicable to a wide and varied range of persons, and so it has been proved in the courts over two hundred years and more. However, Equity first conceived of the rule in relation to trustees, and it was from this starting point that it spread to cover the activities of any person who is involved with a position of trust or to whom a task is confided … Basically the simple question remains: did the individual undertake a task which involved the placing of trust and confidence in him, and if so, was he acting within the scope of that task or those duties when he acted to benefit himself? (*Law of Trusts in Canada*, 2nd ed. (1984), at pp. 712-714, quoted in *Baskerville v. Thurgood*, [1992] 5 W.W.R. 193, 46 E.T.R. 28, 100 Sask. R. 214, 18 W.A.C. 214, (sub nom. *582872 Saskatchewan Ltd. v. Thurgood*), 93 D.L.R. (4th) 694 (Sask. C.A.)).
>
> Everything depends on the particular facts, and such a relationship has been held to exist in unusual circumstances as between purchaser and vendor, as between great uncle and adult nephew, and in widely other different sets of circumstances. Moreover, it is neither feasible nor desirable to attempt to closely define the relationship, or its characteristics, or the demarcation line showing the exact transition point where a relationship that does not entail that duty passes into one that does. … (*Lloyds Bank Ltd. v. Bundy*, [1975] Q.B. 326 at 341.)
>
> … [T]he classes of relationships which have been recognized by the court to be fiduciary in nature have been extended. They now include trustees, executors, administrators, assignees in bankruptcy, solicitors, accountants, banks, directors, agents, partners, senior management and persons holding public office. … (*International Corona Resources Ltd. v. Lac Minerals Ltd.* (1987), 62 O.R. (2d) 1, 1987 CarswellOnt 655, 46 R.P.R. 109, 28 E.T.R. 245, 18 C.P.R. (3d) 263, 44 D.L.R. (4th) 592,

> 23 O.A.C. 263 ((Ont. C.A.) at p. 5); affirmed, (sub nom. *Minerals Ltd. v. International Corona Resources Ltd.*), [1989] 2 S.C.R. 574, 1989 CarswellOnt 965, 1989 CarswellOnt 126, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*), 26 C.P.R. (3d) 97, 6 R.P.R. (2d) 1, EYB 1989-67469, [1989] S.C.J. No. 83, 36 O.A.C. 57, 101 N.R. 239, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*), 61 D.L.R. (4th) 14, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*), 69 O.R. (2d) 287, 35 E.T.R. 1, 44 B.L.R. 1 (S.C.C.)] above, p. 45.)
>
> It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence [are open-ended]. (*Guerin v. R.* (1984), 1984 CarswellNat 813, 1984 CarswellNat 693, 36 R.P.R. 1, 20 E.T.R. 6, [1985] 1 C.N.L.R. 120, (sub nom. *Guerin v. Canada*), 55 N.R. 161, 13 D.L.R. (4th) 321, (sub nom. *Guerin v. Canada*), [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481, [1984] S.C.J. No. 45, 59 B.C.L.R. 301 (S.C.C.), at para. 99.)
>
> … [I]n *Frame v. Smith*, [1987] 2 S.C.R. 99 at p. 136, [in her dissenting reasons, Wilson J.] proposed a three-step analysis to guide the courts in identifying new fiduciary relationships. She stated that relationships in which a fiduciary obligation has been imposed are marked by the following three characteristics: (1) scope for the exercise of some discretion or power; (2) that power or discretion can be exercised unilaterally so as to effect the beneficiary's legal or practical interests; and, (3) a peculiar vulnerability to the exercise of that discretion or power. Although the majority held on the facts that there was no fiduciary obligation, Wilson J.'s mode of analysis has been followed as a "rough and ready guide" in identifying new categories of fiduciary relationships; … [p. 48]

As with negligence, purposefully it is unavailable and undesirable to create an exhaustive list of fiduciary categories; rather, the appropriate incidence of application of the fiduciary guise is "never closed".

Illustrative of and seminal to the resilient nature of category is the Supreme Court of Canada judgment in *Lac Minerals Ltd. v. International Corona Resources Ltd.* [see previous cite above] involving a proposed mining joint venture. In *Lac*, the plaintiff (Corona) was a junior mining company which had mineral discoveries on a particular property. Prior to purchasing the mining rights to the property, the plaintiff had concrete discussions with defendant (Lac), a much larger company, about co-developing the property. During these discussions, the plaintiff shared confidential information with the defendant. Prior to formal agreement and while "negotiating parties", Lac outbid Corona for rights, staking out favourable claims adjacent to the property. The trial judge found no binding contract, but found that Lac in breach of the tort doctrine of confidence, and in breach of its fiduciary duty to Corona. On appeal it was affirmed that the property was held by Lac in trust for Corona. On final appeal to the Supreme Court of Canada, the ruling was confirmed despite the fact that only the minority found that a fiduciary relationship *per se* existed.

While his position might be predicated upon his conservative views, Sopinka J. for the majority baulked at extending to the parties a fiduciary aspect to their commercial negotiation:

> The consequences attendant on a finding of a fiduciary relationship and its breach have resulted in judicial reluctance to do so except where the application of this "blunt tool of equity" is really necessary. It is rare that it is required in the context of an arm's length commercial transaction. … It was submitted that the departure of the courts below from this salutary rule has resulted in a plethora of claims that would impose fiduciary relationships in a commercial-type setting.

…

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Federal Court of Appeal | Cour d'appel fédérale

Date: 20160531

Docket: A-422-14

Citation: 2016 FCA 161

CORAM: **STRATAS J.A.**
RYER J.A.
GLEASON J.A.

BETWEEN:

PFIZER CANADA INC.

Appellant

and

TEVA CANADA LIMITED

Respondent

Heard at Toronto, Ontario, on December 1, 2015.

Judgment delivered at Ottawa, Ontario, May 31, 2016.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: RYER J.A.
GLEASON J.A.

Federal Court of Appeal | Cour d'appel fédérale

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Appellant

and

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Respondent

REASONS FOR JUDGMENT

STRATAS J.A.

A. Introduction

[1] Pfizer appeals from the judgment dated June 30, 2014 of the Federal Court (*per* Zinn J.). The judgment is based on reasons dated April 3, 2014 (2014 FC 248) and subsequent reasons dated June 30, 2014 (2014 FC 634).

[2] Following fifteen days of trial, the Federal Court found Pfizer liable for damages under section 8 of the *Patented Medicines (Notice of Compliance) Regulations*, S.O.R. 93-133 in the amount of $92,228,000.00, pre-judgment interest in the amount of $32,539,550.36, post-judgment interest at the rate of 3.0% on $124,766,550.36 (the sum of the damages and prejudgment interest) from the date of judgment until payment, and costs.

[3] Pfizer appeals. It alleges that the Federal Court committed reversible error in a number of ways.

[4] I agree with Pfizer on one of the issues it raises, namely the Federal Court's admission of and reliance upon hearsay evidence in the trial. While this Court has the power to consider the matter without the hearsay evidence and make the judgment the Federal Court should have made, I would not exercise that power in this factually-complex circumstance where the result is unclear. Rather, I would remit the matter to the Federal Court for redetermination.

[5] Therefore, for the reasons that follow, I would allow the appeal, set aside the judgment of the Federal Court, and remit the matter to the Federal Court for redetermination on this record, excluding the hearsay evidence. I would grant Pfizer its costs of the appeal.

B. Background facts

[6] In the Federal Court, Teva sued Pfizer for damages arising from Pfizer's conduct under the *PMNOC Regulations* that improperly kept one of its corporate predecessors from selling its

drug on the market. This suit was founded upon the legislative cause of action in section 8 of the *PMNOC Regulations*.

[7] In this summary of background facts, I shall describe the relevant drugs and the relevant parties and then review the portions of the *PMNOC Regulations* that relate to this appeal. Then I shall review what the parties did under those portions of the *PMNOC Regulations* that gave rise to Teva's action for damages under section 8 of the *PMNOC Regulations*. Finally, I shall review the Federal Court's reasons.

[8] Throughout these reasons, when I refer to a paragraph number in the Federal Court's reasons, the relevant reasons are the first set of reasons dated April 3, 2014 (2014 FC 248).

(1) The relevant drug and the relevant parties

[9] The innovative drug at issue in this matter is venlafaxine hydrochloride ("venlafaxine") marketed under the name Effexor XR.

[10] The appellant, Pfizer, is the corporate successor to Wyeth and Wyeth Canada. Wyeth was the innovative manufacturer of venlafaxine. In these reasons, for the purposes of describing Wyeth's conduct before it became part of Pfizer, I shall refer to Wyeth as "Wyeth (Pfizer)."

[11] The respondent, Teva, is the corporate successor to ratiopharm inc. During many of the events giving rise to its claim for damages under section 8 of the *PMNOC Regulations*,

Ratiopharm sought to be a generic manufacturer of venlafaxine. In these reasons, for the purposes of describing Ratiopharm's conduct before it became part of Teva, I shall refer to Ratiopharm as "Ratiopharm (Teva)."

[12] As the Federal Court noted in its reasons, Novopharm Limited and Pharmascience Inc. played a role as generic entrants into the market for venlafaxine. I shall refer to them as Novopharm and Pharmascience. Novopharm is now part of Teva. But in the interests of clarity and due to their less significant role in these reasons, it is not necessary to acknowledge their current status, as I have for Ratiopharm (Teva) and Wyeth (Pfizer).

(2) The *PMNOC Regulations* as they relate to this appeal

[13] In order to market a new drug in Canada, an innovative drug manufacturer must, among other things, file a new drug submission and receive approval in the form of a notice of compliance from the Minister of Health. As part of that process, the *PMNOC Regulations* permit the manufacturer to list in a patent register all of the relevant patents pertaining to the submission.

[14] Later, a generic drug manufacturer wishing to make and market a generic version of the innovator's drug may submit an abbreviated new drug submission demonstrating, among other things, that the generic formulation is bioequivalent to the innovator's drug by cross-referencing clinical trials regarding safety and effectiveness undertaken by the innovator. This dispenses with the need for the generic manufacturer to undertake its own clinical trials.

[15] The generic drug manufacturer must address any patent listed in the patent register concerning the innovator drug: *PMNOC Regulations*, s. 5. It does so either by stating that it is not seeking the issuance of a notice of compliance until the patent expires or by alleging that the patent is not valid or will not be infringed by the making, using or selling of the generic drug. In furtherance of the allegation, it must serve a notice of allegation which contains a detailed statement of the factual and legal bases for the allegation.

[16] An innovator who wishes to challenge the allegation of invalidity or non-infringement in the notice of allegation must apply to the Federal Court within 45 days for an order prohibiting the Minister of Health from issuing a notice of compliance for the generic product before the expiry of the patent(s) that are the subject of the notice of allegation. If the innovator does that, the Minister of Health is precluded from issuing a notice of compliance to the generic manufacturer in most cases for twenty-four months or until the prohibition application has been dismissed: *PMNOC Regulations*, s. 7(1).

[17] A generic manufacturer may seek an order dismissing all or part of the prohibition application concerning patents it says are not eligible for inclusion on the patent register: *PMNOC Regulations*, para. 6(5)(*a*). If the motion is successful, the prohibition application is dismissed as against any improperly listed patents.

[18] If a prohibition application is ultimately unsuccessful either at first instance or on appeal, or if it is discontinued or withdrawn, the innovator may be liable for damages for "any loss

suffered during the period": *PMNOC Regulations*, s. 8(1). In assessing damages, a court is to take into account "all matters that it considers relevant": *PMNOC Regulations*, s. 8(5).

(3) What happened under the *PMNOC Regulations* in this case

[19] In this case, Wyeth (Pfizer) marketed an extended release version of venlafaxine hydrochloride under the name Effexor XR. Related to it is Canadian Patent 1,248,540, a patent that was to expire on January 10, 2006. It was listed on the Patent Register against Effexor XR.

[20] In 2005, Ratiopharm (Teva) wanted to market its generic version of venlafaxine hydrochloride and filed an abbreviated new drug submission on February 24, 2005. On December 9, 2005, Health Canada informed Ratiopharm (Teva) that it had completed its review of its abbreviated new drug submission but that it would not issue a notice of compliance until the requirements under the *PMNOC Regulations* were met.

[21] On December 20, 2005, on the eve of the expiry of the '540 Patent, Canadian Patent 2,199,778, covering the extended release formulation of venlafaxine was issued. On December 23, 2005, Wyeth (Pfizer) listed it on the Patent Register against Effexor XR.

[22] In response, on the same day, Ratiopharm (Teva) served a notice of allegation. In its notice of allegation, Ratiopharm (Teva) accepted that its notice of compliance for its version of venlafaxine would not issue until the expiry of the '540 Patent, namely January 10, 2006. Ratiopharm (Teva) also alleged that the newly-listed '778 Patent was invalid or would not be

infringed by its version of venlafaxine. On February 10, 2006, Wyeth (Pfizer) applied for prohibition preventing the Minister from issuing a notice of compliance to Ratiopharm (Teva). This triggered the automatic twenty-four month stay of the Minister's ability to grant a notice of compliance to Ratiopharm (Teva) for its version of venlafaxine.

[23] Some time passed. Then, on December 18, 2006, Ratiopharm (Teva) filed a motion to dismiss Pfizer's prohibition application. It submitted that the '778 Patent was not eligible for listing on the Patent Register for Effexor XR.

[24] Following litigation of the motion in the Federal Court, the matter arrived in this Court. This Court agreed that the '778 Patent was not eligible for listing on the patent register for Effexor XR. So it granted Ratiopharm (Teva)'s motion and dismissed Wyeth (Pfizer)'s prohibition application: *Ratiopharm Inc. v. Wyeth*, 2007 FCA 264, [2008] 1 F.C.R. 447, rev'g 2007 FC 340, 58 C.P.R. (4th) 154. This Court released its judgment on August 1, 2007.

[25] This removed the obstacles that stood in the way of Ratiopharm (Teva) receiving a notice of compliance to launch its version of venlafaxine. On August 2, 2007, the Minister granted Ratiopharm (Teva) its notice of compliance for its version of venlafaxine. Ratiopharm (Teva) launched its product into the Canadian market on September 18, 2007.

[26] Looking at this history with the benefit of hindsight, it can be said Wyeth (Pfizer) should not have listed its '778 Patent on the patent register for Effexor XR and should not have brought a prohibition application. Put another way, Wyeth (Pfizer) improperly kept Ratiopharm (Teva)'s

version of venlafaxine off the market. Under section 8 of the *PMNOC Regulations*, Ratiopharm (Teva) could seek damages for that.

[27] So Ratiopharm (Teva) did just that and started an action for damages in the Federal Court. Wyeth (Pfizer) counterclaimed on the ground that Ratiopharm (Teva)'s venlafaxine product infringed the '778 Patent. Later, it discontinued that counterclaim.

(4) The Federal Court's consideration of the damages claim

[28] The Federal Court first considered the period of loss suffered that is compensable under section 8 of the *PMNOC Regulations*.

[29] The parties did not dispute the end date of that period of loss. Both agreed that under paragraph 8(1)(*b*) of the *PMNOC Regulations*, the end date is the date the prohibition application is withdrawn, discontinued, dismissed or reversed. Here, that date was August 1, 2007, the date this Court dismissed Wyeth (Pfizer)'s prohibition application.

[30] However, the parties disputed the start date of the period of loss. Teva submitted that the start date was January 10, 2006, the date the '540 Patent expired. Pfizer, on the other hand, submitted that the start date could not be earlier than February 13, 2006, the date the Minister would have issued a notice of compliance to Ratiopharm (Teva) if it had served Pfizer with a notice of allegation relating to the '778 Patent and Pfizer had not started a prohibition application.

[31] The Federal Court rejected Pfizer's submission based on the wording of paragraph 8(1)(*a*) of the *PMNOC Regulations*. In its view, that paragraph governed the start date. Paragraph 8(1)(*a*) provides that the period starts "on the date, as certified by the Minister, on which a notice of compliance would have been issued in the absence of these Regulations, unless the court concludes that…a date other than the certified date is more appropriate." The Minister certified the date as December 7, 2005. That date, in *PMNOC Regulations* parlance, is the patent hold date.

[32] Paragraph 8(1)(*a*), quoted above, by default sets the start date as the date the Minister certifies a notice of compliance would have been issued in the absence of the Regulations "unless the court concludes that…a date other than the certified date is more appropriate." Here, the Federal Court found that there was a more appropriate date, namely the date of expiry of the '540 Patent, January 10, 2006. It will be recalled that in its notice of allegation, Ratiopharm (Teva) accepted that its notice of compliance for its version of venlafaxine would not issue until the expiry of the '540 Patent.

[33] On this point, the Federal Court concluded as follows (at paras. 64-65):

> [64] In short, based on the evidence, [Wyeth (Pfizer)] knew that [Ratiopharm (Teva)] or another generic would be entering the market in January 2006 or very shortly thereafter and it chose to list the '778 Patent in an attempt to evergreen its drug and prevent generic competition. It knew or ought to have known that a generic ready to enter the market in January 2006 would very likely serve it with a [notice of allegation], rather than wait many more years to gain entry into the venlafaxine market.
>
> [65] In this case, but for the improper listing of the '778 Patent on the Patent Register, all things being equal, [Ratiopharm (Teva)] would have received its [notice of compliance] and been in a position to launch its product on January 10, 2006. The earlier Patent Hold date [December 7, 2005] is an appropriate date to

> commence the [period of loss]; however, because no loss is claimed by [Ratiopharm (Teva)] prior to January 10, 2006, I accept [Ratiopharm (Teva)'s] submission that January 10, 2006, is a more appropriate commencement for the [period of loss] than the Patent Hold Date [December 7, 2005].

[34] Having determined the start date and the end date for the period of loss, the Federal Court then determined a number of issues: the size of the overall market for venlafaxine, the size of the generic venlafaxine market and Ratiopharm (Teva)'s market share, the time when Ratiopharm (Teva) and its competitors' generic products would have been listed on the provincial formularies and the entry of competitors into the generic market, the overall value of Ratiopharm (Teva)'s lost sales in the relevant period, and whether any deductions should be made under subsection 8(5) of the *PMNOC Regulations*. Below, in the context of submissions made by Pfizer in this Court, I shall review in more detail the Federal Court's reasons on the entry of Ratiopharm (Teva)'s competitors into the generic market.

[35] The Federal Court then considered the central issues in this appeal: the time when Ratiopharm (Teva) would have launched its venlafaxine product and the existence of any impediments to Ratiopharm (Teva) being able to supply the market. Teva submitted that it would have launched its product as soon as it could, on January 10, 2006, and there were no impediments to it obtaining the necessary product and supplying the full generic market. Pfizer disagreed.

[36] At the outset of its reasons on this point, the Federal Court held (at para. 148) that on the authorities Teva had to show "on a balance of probabilities that [Ratiopharm (Teva)] was able to supply the market." In this case, that meant that Teva had to identify a supplier of the active

pharmaceutical ingredient and show that that supplier had the capacity to supply the market over the relevant period. It noted (at paras. 149-152) that the only evidence offered on this point was that of Mr. Major, a witness called by Teva. Mr. Major was a former executive of Ratiopharm (Teva) and acted in that position at all material times.

[37] Mr. Major testified that Ratiopharm (Teva) relied upon a separate company, Alembic Pharmaceuticals, to manufacture its venlafaxine product. He testified that on a site visit over two weeks in 2004, he thoroughly inspected Alembic's facility. From that, he formed the view that Alembic had sufficient capacity to produce Ratiopharm (Teva)'s venlafaxine product in the necessary quantities. Ratiopharm (Teva) had worked with Alembic before and Alembic was an eager and enthusiastic business partner of Ratiopharm (Teva) in such matters.

[38] In support of his testimony that Alembic had sufficient capacity to produce Ratiopharm (Teva)'s venlafaxine product in sufficient quantities at the relevant time, Mr. Major also relied on emails between Ratiopharm (Teva) personnel and Alembic personnel, most of which he was not copied upon. He also relied on what some colleagues at Ratiopharm (Teva) told him about Alembic's ability to supply and on documents prepared by others. During my analysis, below, I shall review Mr. Major's testimony in more detail.

[39] During Mr. Major's testimony, Pfizer repeatedly objected on the ground that some of the evidence offered was inadmissible hearsay. In response to the objections, the Federal Court ruled that it would consider what weight to give to the evidence.

[40] Ultimately, the Federal Court released two reasons for judgment. In the first, on April 3, 2014 (reported at 2014 FC 248), the Federal Court found Pfizer liable and set out certain principles for the calculation of damages. In the second, on June 30, 2014 (reported at 2014 FC 634), the Federal Court quantified the damages award and calculated pre-judgment and post-judgment interest and costs. It then released its formal judgment.

[41] Overall, in its first set of reasons (2014 FC 248), the Federal Court found that Alembic would have been able to supply adequate quantities of Ratiopharm (Teva)'s venlafaxine product at the relevant time. It took into account all of the evidence offered by Mr. Major, holding (at para. 153) that "[a]lthough Mr. Major speaks as an observer rather than as an employee of Alembic, I find that his evidence is reliable." It found that Teva had established loss under section 8 of the *PMNOC Regulations* and, thus, was entitled to damages.

[42] In its second set of reasons (2014 FC 634), the Federal Court quantified Teva's damages and awarded pre-judgment and post-judgment interest and costs.

C. Issues on appeal

[43] Pfizer appeals to this Court. In light of the submissions the parties have advanced, these reasons address six issues:

(1) *Some basic issues concerning section 8 damages claims.* Before us, the parties disagree on what must be proven and who bears the burden of proof in a claim under section 8 of the *PMNOC Regulations*.

(2) *The hearsay issue.* Pfizer submits that the Federal Court wrongly admitted and relied upon hearsay evidence in determining whether Ratiopharm (Teva) could have supplied the market with its venlafaxine product at the relevant time in sufficient quantities.

(3) *The issue whether there was palpable and overriding error on a factual finding.* Pfizer attacks one of the key factual findings the Federal Court made in support of its conclusion that Ratiopharm (Teva) could have supplied the market with its venlafaxine product at the relevant time in sufficient quantities.

(4) *Other section 8 damages issues.* Here Pfizer raises a number of issues. It submits that the Federal Court chose the wrong starting date for the period of Ratiopharm (Teva)'s loss and another generic drug manufacturer, Pharmascience, would have entered the hypothetical market and competed with Ratiopharm (Teva). Also it says that the Federal Court failed to attribute Novopharm's rebates to Ratiopharm (Teva).

(5) *Pre-judgment interest*. Pfizer submits that the Federal Court calculated pre-judgment interest improperly.

(6) *The disposition of this appeal: what should happen now?* Pfizer primarily submits that if the Federal Court wrongly admitted and relied upon hearsay evidence, the remaining admissible evidence is insufficient to support a finding that Ratiopharm (Teva) could have supplied the market with venlafaxine. Thus, Ratiopharm (Teva) suffered no loss and so this Court, making the judgment the Federal Court should have made, should now allow the appeal and dismiss Teva's action. Teva primarily submits that Pfizer is just asking for a reweighing of the factually-suffused findings of the Federal Court and so its appeal should be dismissed.

D. Analysis

(1) Some basic issues concerning section 8 damages claims

(a) General principles

[44] A plaintiff suing for damages under section 8 of the *PMNOC Regulations* must show that it did in fact suffer a loss caused by the failed proceedings under the *PMNOC Regulations*. Section 8 provides that compensation is available for "any loss suffered" during the relevant period—usually starting from the date on which a notice of compliance would have been issued in the absence of the Regulations as certified by the Minister of Health and ending on the date of the termination of the prohibition application.

[45] If a plaintiff cannot prove a loss caused by the failed proceedings under the *PMNOC Regulations* during that period, it cannot recover section 8 damages. Typically most of the plaintiff's loss will be its inability to sell its version of a drug during that period, in other words, the financial impact of lost sales. To assess that, the court must examine what would have happened had the defendant's triggering conduct for section 8 damages not taken place.

[46] In effect, the court is examining a hypothetical world. What would have happened in that hypothetical world must be proven by admissible evidence and any permissible inferences from that evidence.

(b) Determining lost sales in the hypothetical world

[47] This Court offered much guidance on how to go about assessing the hypothetical world in *Apotex Inc. v. Merck & Co., Inc.*, 2015 FCA 171, 387 D.L.R. (4th) 552 (*Lovastatin*). I acknowledge that *Lovastatin* concerned a claim for compensatory damages for patent infringement, not a claim for damages under section 8 of the *PMNOC Regulations*. But in both types of claims the court's task is the same: to assess a hypothetical world where the defendant's impugned conduct did not take place. And in both the overriding principle is the same: a plaintiff is to be compensated, no more, no less: *AstraZeneca Canada Inc. v. Apotex Inc.*, 2013 FCA 77, 444 N.R. 254 at para. 7.

[48] In *Lovastatin*, the plaintiff claimed that the defendant, by making and selling infringing product, caused it to lose sales it could have made. The defendant submitted, among other things,

that in the hypothetical world it would have been able to make the product in a non-infringing way. The sales would still have happened, cutting into the defendant's sales just as actually happened.

[49] This Court held that to make out that argument, the defendant would have had to show, on the evidence, that in the hypothetical world it would have and could have had access to sufficient quantities of non-infringing product and would have and could have used it: *Lovastatin*, at paras. 32, 53, 55, 70, 77 and 78.

[50] Both "would have" and "could have" are key. Compensatory damages are to place plaintiffs in the position they would have been in had a wrong not been committed. Proof of that first requires demonstration that nothing made it impossible for them to be in that position—*i.e.*, they *could* have been in that position. And proof that plaintiffs would have been in a particular position also requires demonstration that events would transpire in such a way as to put them in that position—*i.e.*, they *would* have been in that position.

[51] Both elements have to be present. "Could have" does not prove "would have"; "would have" does not prove "could have":

- Evidence that a party would have done something does not prove that it could have done something. I might swear up and down that I would have run in a marathon in Toronto on April 1 aiming to complete it, but that says nothing about whether I could have completed it. Maybe I am not fit enough to complete it.

- Evidence that a party could have done something does not prove that it would have done something. A trainer might testify that I was fit enough to complete a marathon race in Toronto on April 1, but that says nothing about whether I would have completed it. Perhaps on April 1 I would have skipped the marathon and gone to a baseball game instead.

[52] There must be evidence that the parties "would have" and "could have" ordered and supplied material at the relevant time. Evidence that a manufacturing plant had capacity at some time other than the relevant time for the assessment of loss under section 8 does not necessarily mean that the plant could have and would have had capacity in the hypothetical world at the relevant time. In the words of *Lovastatin*, without more it is an error to "[jump] from a statement as to manufacturing capacity to conclusions as to what [a generic] could and would do in the 'but for' [hypothetical] world" (at para. 77).

(c) The burden of proof concerning the hypothetical world

[53] In the case at bar, Teva submits that it did not bear the burden of proof concerning what would and could have happened in the hypothetical world had its venlafaxine product not been kept off the market. It submits that Pfizer bore this burden of proof. It says that if evidence of what Alembic would have and could have done in the hypothetical world were needed from Alembic, Pfizer had to call that evidence.

[54] I disagree. Here too, *Lovastatin*, above, is instructive. In that case, this Court held that the plaintiffs bear the burden of proving the hypothetical world on the balance of probabilities as part of their damages claim (at para. 45).

[55] This is no surprise: in suits for breach of contract or for damages caused by a wrong, such as tort cases, the plaintiff usually bears the burden to prove what would have transpired had the breach or wrong not been committed, *i.e.*, the persuasive burden to show what would have transpired in the hypothetical world: *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324 at p. 330, 57 D.L.R. (3d) 386; *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, 16 D.L.R. (4th) 1 at para. 32. The task of constructing the hypothetical world for the purposes of assessing compensatory damages is a factual inquiry using "robust common sense": *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at paras. 8 and 9.

[56] The analytical exercise of constructing a hypothetical world exists elsewhere in our law and the burden of proof remains upon the plaintiff/complainant. For example, in some competition cases, the decision-maker must examine the state of competition in a hypothetical world. There, the party alleging anti-competitive conduct bears the burden of proving on the basis of admissible evidence what would have transpired in the hypothetical world on the balance of probabilities. Mere possibilities short of probabilities do not suffice. See generally *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161 at paras. 49-51 and 66, citing *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 at paras. 40 and 49.

[57] There is nothing in section 8 of the *PMNOC Regulations* that would suggest a different conclusion on the burden of proof.

[58] Teva also offers the Supreme Court's decision in *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [1991] 3 S.C.R. 3, 84 D.L.R. (4th) 291 in support of its submission on the burden of proof. *Rainbow Industrial Caterers* does not assist Teva.

[59] The plaintiff, Rainbow, was a caterer bidding on a catering contract for CN. The defendant, CN, advised Rainbow of the number of meals it would have to prepare. Rainbow set its bid based on that estimate. CN awarded Rainbow the contract. But CN's estimate was way too high and Rainbow lost money on the contract.

[60] Rainbow sued for damages caused by the estimate. Rainbow bore the burden of proving on the balance of probabilities what would have and could have happened in the hypothetical world where CN gave a proper estimate. See *Rainbow Industrial Caterers* at p. 14, citing D.W. McLauchlan, "Assessment of Damages for Misrepresentations Inducing Contracts" (1987), 6 Otago L.R. 370 at p. 388. In discharge of that burden, among other things, Rainbow presented evidence concerning what bid it would have made had the estimate not been faulty.

[61] In response, CN could have worked within the hypothetical world proposed by Rainbow and defended on the basis that Rainbow did not prove that certain events in that hypothetical world could have and would have happened. For example, CN could have argued that Rainbow

did not adduce sufficient evidence of what would have transpired in the hypothetical world to meet the balance of probabilities standard or to prove its quantum of damages.

[62] But CN did not do that. Rather, CN offered a different hypothetical world, one where Rainbow still would have made a low bid to win the contract and still would have lost money. In effect, CN's submission was that the real cause of Rainbow's loss was not its faulty estimate but Rainbow's strong desire to get the contract, even if it meant proposing terms favourable to CN.

[63] The Supreme Court held that Rainbow had proven what would have happened in the hypothetical world and its quantum of loss in that world. That discharged its burden. CN, by suggesting a different hypothetical world—in effect a different view of who caused the loss—set up, in the words of the Supreme Court, a "new issue" or what others might perhaps call a positive defence. In the Supreme Court's view, a defendant that sets up a new issue bears the burden of proving it. The plaintiff, having proved its version of the hypothetical world, does not have to disprove other speculative hypotheses. The key passage in the Supreme Court's decision in *Rainbow Industrial Caterers* is at p. 15:

> Once the loss occasioned by the transaction is established, the plaintiff has discharged the burden of proof with respect to damages. A defendant who alleges that a plaintiff would have entered into a transaction on different terms sets up a new issue. It is an issue that requires the court to speculate as to what would have happened in a hypothetical situation. It is an area in which it is usually impossible to adduce concrete evidence. In the absence of evidence to support a finding on this issue, should the plaintiff or defendant bear the risk of non-persuasion? Must the plaintiff negative all speculative hypotheses about his position if the defendant had not committed a tort or must the tortfeasor who sets up this hypothetical situation establish it?
>
> …

> … In my opinion, [the answer to these questions is no]. [T]here is good reason for such reversal [of burden] in this kind of case. The plaintiff is the innocent victim of a misrepresentation which has induced a change of position. It is just that the plaintiff should be entitled to say "but for the tortious conduct of the defendant, I would not have changed my position". A tortfeasor who says "Yes, but you would have assumed a position other than the *status quo ante*", and thereby asks a court to find a transaction whose terms are hypothetical and speculative, should bear the burden of displacing the plaintiff's assertion of the *status quo ante*.

[64] In the case at bar, Teva's position was that in the hypothetical world, Ratiopharm (Teva) could have and would have obtained venlafaxine in sufficient quantities from Alembic. As *Rainbow Industrial Caterers* tells us, Teva bore the burden of proving that as part of its general burden to prove its loss.

[65] Suppose Pfizer took the position that Ratiopharm (Teva) would not have tried to obtain venlafaxine from Alembic but instead would have given up and pursued another business objective, such as getting another generic drug to market. *Rainbow Industrial Caterers* instructs us that Pfizer, setting up a different hypothetical, would have borne the burden of proof on that point. Put a different way, Teva would not have borne the burden of proving that it would not have pursued a different business objective.

[66] But Pfizer did not do that. Rather, it contested the very hypothetical that Teva relied upon in support of its damages claim—that Ratiopharm (Teva) would have and could have obtained venlafaxine in sufficient quantities from Alembic—and it submitted that Teva failed to prove that on the balance of probabilities. It is as if, in *Rainbow Industrial Caterers*, CN took the position that Rainbow had failed to adduce enough evidence to prove its version of what could

have and would have happened in the hypothetical world. Under the reasoning in *Rainbow Industrial Caterers*, the burden of proof would have remained on the plaintiff, Rainbow.

(d) Did the Federal Court err on these matters of principle?

[67] Pfizer submits that the Federal Court was not mindful of the foregoing principles. It suggests that the Federal Court only had regard to Alembic's willingness and potential capacity—not actual capacity—to manufacture Ratiopharm (Teva)'s venlafaxine product at the relevant time. I disagree.

[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.

[70] It is true that the Federal Court did not offer a great deal on the proper principles to be applied concerning the availability of s. 8 damages. However, it was mindful of these principles.

[71] It proceeded on the basis that the hypothetical world that Teva had to prove was one where Wyeth (Pfizer) did not improperly list its '778 Patent and Ratiopharm (Teva) received its notice of compliance on December 7, 2005. In part for reasons set out later, the Federal Court committed neither legal error nor palpable and overriding error in proceeding on that basis.

[72] With that hypothetical world in mind, the Federal Court held that Teva had to "show on the balance of probabilities that [Ratiopharm (Teva)] was able to supply the market" (at para. 148). This is the "could have" portion of the analysis. And at a number of portions in its reasons, it showed it was alive to the issue whether Ratiopharm (Teva) wanted to supply the market and whether Alembic was willing to produce venlafaxine. This is the "would have" portion of the analysis.

[73] Overall, the Federal Court was very much alive to the need for a firm causal link between failed proceedings under the *PMNOC Regulations* and the claimed loss. At paragraph 57, it identified the damages as "those that the plaintiff generic suffered 'by reason of the delayed market entry of its drug' as stated in the Regulatory Impact Analysis Statement" for the *PMNOC Regulations*. And at paragraph 61, it identified "[t]he question for the Court" as "whether there is

a causal connection between the failed PMNOC proceedings and the loss claimed as damages," stressing again that the damages claimed must be "causally connected."

[74] Even if I am wrong in my conclusion that the Federal Court was mindful of proper principles, this is of no consequence. The redetermination I propose will take place upon the proper principles set out in these reasons.

(2) The hearsay issue

[75] Pfizer submits that even if the Federal Court appreciated that Teva had to prove it could have supplied its version of venlafaxine in the hypothetical world, it wrongly admitted hearsay evidence on this point.

[76] Pfizer submitted that the Federal Court wrongly adopted hearsay evidence from Mr. Major. Putting aside the first-hand evidence Mr. Major offered from his two week visit to Alembic's manufacturing facility, some of the rest of his evidence consisted of things told to him by Alembic's personnel or information from other Ratiopharm (Teva) employees who got that information from Alembic's personnel. The former is hearsay, the latter is double hearsay. Pfizer says that the Federal Court erred in not excluding this evidence. Teva maintained that none of this evidence was hearsay and so the Federal Court properly admitted all of the evidence.

[77] I agree with Pfizer. The Federal Court improperly admitted hearsay evidence.

(a) General evidentiary principles

[78] In considering evidentiary issues in complicated, high-stakes cases such as this, certain high-level principles are best kept front of mind.

[79] We start with a fundamental general principle: facts must be proven by admissible evidence: see *R. v. Schwartz*, [1988] 2 S.C.R. 443 at pp. 476-77, 55 D.L.R. (4th) 1; *Canadian Copyright Licensing Agency (Access Copyright) v. Alberta*, 2015 FCA 268, 392 D.L.R. (4th) 563 at para. 20; *Canada v. Kabul Farms Inc.*, 2016 FCA 143 at para. 38. Put another way, a court can act only on the basis of facts proven by admissible evidence or evidence whose admissibility has not been contested: *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548 at paras. 26-27.

[80] There are rarely-occurring exceptions to this. These include circumstances where facts are subject to judicial notice (see, *e.g.*, *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458), facts are deemed or presumed by legislation to exist, facts have been found in previous proceedings in circumstances where they bind the court (see, *e.g.*, *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460), and facts have been stipulated or agreed to.

[81] In a civil case, absent one of those exceptions, admissibility must be the court's first inquiry where an objection has been made. If the evidence is not admissible, it is not before the court in any way and, thus, the court cannot deal with it in any way.

[82] Appellate courts may interfere with admissibility decisions vitiated by errors of law: *R. v. Fanjoy*, [1985] 2 S.C.R. 233 at p. 238, 21 D.L.R. (4th) 321; *R. v. Evans*, [1993] 3 S.C.R. 653 at p. 664, 108 D.L.R. (4th) 32; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; and in the case of hearsay evidence, see *R. v. Saddleback*, 2014 ABCA 166, 575 A.R. 203 at para. 8. Any factual findings that affect the application of a law of evidence are entitled to deference: *R. v. Youvarajah*, 2013 SCC 41, [2013] 2 S.C.R. 720 at para. 31.

[83] Recently, some rules of evidence have been liberalized, allowing for more flexibility. Seduced by this trend towards flexibility, some judges in various jurisdictions have been tempted to rule all relevant evidence as admissible, subject to their later assessment of weight. But according to our Supreme Court, this is heresy. The trend towards flexibility has not undermined the need for judges to take a rigorous approach to admissibility, separating that analytical step from others, such as determining the weight to be given to evidence: *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787 at para. 59.

[84] Sometimes courts—aiming to prevent trials from bogging down—provisionally receive evidence whose admissibility is challenged, reserving their rulings on admissibility until later. In some circumstances, there may be much to commend that approach; in other circumstances, the trial may be more orderly and fair if rulings are made immediately so the parties know where they stand. It is a matter of discretion. But, in the end, before a court can rely on the evidence and ascribe it any weight or draw any inferences from it, it first must determine its admissibility.

[85] Now to the task of determining admissibility. The starting point is that evidence logically tending to prove a point is admissible: *The Queen v. Wray*, [1971] S.C.R. 272 at p. 297, 11 D.L.R. (3d) 673. If evidence does not logically tend to prove a point, it is irrelevant and inadmissible at the outset.

[86] But there are exceptions to that general principle, stated in the form of exclusionary rules. One such rule is that hearsay evidence shall not be admitted.

[87] In courts—civil, criminal or military—the hearsay rule remains in full force. Indeed, recently the Supreme Court has emphasized that hearsay evidence is presumptively inadmissible in court proceedings: *Khelawon*, above at paras. 3, 34, 42 and 59; *Youvarajah*, above at para. 18.

[88] It is true that some administrative decision-makers can ignore the hearsay rule: see, *e.g.*, the Supreme Court's discussion in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789 at para. 68. But that is only because legislative provisions have explicitly or implicitly given them the power to do that. Absent a specific legislative provision speaking to the matter, all courts must apply the rules of evidence, including the hearsay rule.

[89] The status of a particular piece of evidence as hearsay depends on its use. Hearsay is an oral or written statement that was made by someone other than the person testifying at the proceeding, out of court, that the witness repeats or produces in court in an effort to prove that what was said or written is true: see, *e.g.*, *Khelawon*, above at paras. 35-36; *R. v. Smith*, [1992] 2

S.C.R. 915 at pp. 924-925, 94 D.L.R. (4th) 590; *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144 at para. 162.

[90] This is to be distinguished from a non-hearsay use, where a witness repeats or produces a statement to prove merely that it was made. The classic expression of this distinction is as follows:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement but the fact that it was made.

(*Subramanian v. Public Prosecutor*, [1956] 1 W.L.R. 965 at p. 969 (P.C.).)

[91] So if a witness says that a supplier told her that it would be able to deliver supplies on date X, and if the witness' evidence is offered to prove that the supplier would be able to deliver supplies at that time, the evidence is hearsay and falls within the rule against admission of hearsay evidence.

[92] In some cases, the fact that the supplier told the witness it would supply by date X, regardless of whether or not the supplier's statement is true, might be relevant to an issue in the proceeding and be admissible for that purpose. For example, suppose that the witness, in reliance on what the supplier told her, set aside time to work with the promised supplies. The witness may use the supplier's statement to explain why she set aside the time she did. In that case, the statement is not being used to prove that the supplier would supply by date X—a hearsay

purpose—but is being used for a non-hearsay purpose—it was the triggering event that caused the witness to do something.

[93] The same is true for documents, with an additional wrinkle, the requirement of authentication. Suppose a witness produces a printout of an email from the supplier to her stating that the supplier would supply. Absent the parties' agreement or a specific legislative provision speaking to the matter, the document must by authenticated by the witness or someone else: *Schwartz*, above at p. 476; *Evans*, above at pp. 664-65; *R. v. Schertzer*, 2011 ONSC 579 at para. 7; David M. Paciocco and Lee Stuesser, *The Law of Evidence*, 4th ed. (Toronto: Irwin Law, 2005) at p. 419; and in the case of electronic documents, see Graham Underwood and Jonathan Penner, *Electronic Evidence in Canada*, loose-leaf (Toronto: Carswell, July 2015) at 13-18.2 to 13-18.4 and the *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 31.1. For example, to authenticate the document, the witness could testify that she received the email and the printout is an exact copy of what she received. But after the document is authenticated, the communication is still hearsay if it is tendered to show that the supplier would supply.

[94] There can be multiple layers of hearsay. If a witness has a printout of an email on which she was not copied sent by the supplier to one of her colleagues assuring that colleague that supplies would be delivered by date X, the document is double hearsay if tendered to prove that the supplier would supply by date X. Someone other than the witness is reporting to the witness that the supplier told him that it would deliver by date X.

[95] When faced with hearsay objections, courts must not only appreciate the terms of the hearsay rule but should keep in mind the rationales underlying it: the need for trials to be effective in discovering the truth while ensuring procedural fairness to all parties.

[96] On this, the right of parties in a civil action to confront evidence presented against their positions is paramount. Their main instrument is cross-examination—what Wigmore has called "beyond any doubt the greatest legal engine ever invented for the discovery of truth" and what the Supreme Court has called "a vital element of the adversarial system applied and followed in our legal system…since the earliest times," of "essential importance in determining whether a witness is credible": *Wigmore on Evidence* (Chadbourne rev. 1974) vol. 5, p. 32, para. 1367; *Innisfil Township v. Vespra Township*, [1981] 2 S.C.R. 145 at p. 167, 123 D.L.R. (3d) 530; *R. v. Osolin*, [1993] 4 S.C.R. 595 at p. 663, 109 D.L.R. (4th) 478. For this reason, counsel are given the greatest latitude in cross-examination and restrictions are rare: see, *e.g.*, *C.H.D v. C.R.H.*, 2007 NSCA 1, 250 N.S.R. (2d) 138 at para. 41.

[97] To be effective, cross-examination must be able to test many aspects of witnesses' testimony—their observation, perception, memory and narration of events or facts, their accuracy in recounting or perceiving them, and their sincerity and honesty as witnesses.

[98] All of these vital objectives are lost when witnesses testify second-hand about an event. When that happens, only their sincerity and honesty about what they were told can be tested. The person who actually knows first-hand about the event or fact is out of court, shielded from any testing of their observation, memory, accuracy, sincerity or honesty.

[99] The Supreme Court recently expressed this idea as follows:

> Our adversary system puts a premium on the calling of witnesses, who testify under oath or solemn affirmation, whose demeanour can be observed by the trier of fact, and whose testimony can be tested by cross-examination. We regard this process as the optimal way of testing testimonial evidence. Because hearsay evidence comes in a different form, it raises particular concerns. The general exclusionary rule is a recognition of the difficulty for a trier of fact to assess what weight, if any, is to be given to a statement made by a person who has not been seen or heard, and who has not been subject to the test of cross-examination. The fear is that untested hearsay evidence may be afforded more weight than it deserves.

(*Khelawon*, above, at para. 35.)

[100] Even more recently, the Supreme Court confirmed that those who try to test hearsay evidence face "difficulties inherent in testing the reliability of the declarant's assertion": *R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520 at para. 31. An out of court declarant may have supplied inaccurate information but, unless in court as a witness, that possibility can never be tested:

> First, the declarant may have *misperceived* the facts to which the hearsay statement relates; second, even if correctly perceived, the relevant facts may have been *wrongly remembered*; third, the declarant may have narrated the relevant facts in an *unintentionally misleading manner*; and finally, the declarant may have *knowingly made a false assertion*. The opportunity to fully probe these potential sources of error arises only if the declarant is present in court and subject to cross-examination.

(*Baldree*, above at para. 32. [emphasis in original])

[101] The exclusionary rule against the admission of hearsay, however, does not stand alone.

[102] Over time, the law has recognized that, in certain circumstances, it is safe for courts to rely on out-of-court statements for the truth of their contents even though a party is unable to test the evidence by way of cross-examination. So certain exceptions to the hearsay rule have developed. For example, a witness could report another person's statement made against interest because of the unlikelihood of that person falsely saying something against interest.

[103] Aside from those exceptions, the Supreme Court has recently developed a more general, principled exception to the exclusionary hearsay rule. Under that broader exception, courts can admit hearsay evidence if it is necessary and reliable. See, *e.g.*, *R. v. Khan*, [1990] 2 S.C.R. 531, 59 C.C.C. (3d) 92; *Smith*, above; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, 79 C.C.C. (3d) 257; *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764, 128 D.L.R. (4th) 121; *R. v. Blackman*, 2008 SCC 37, [2008] 2 S.C.R. 298.

(b) Applying the evidentiary principles to this case

[104] No current or former Alembic employees testified at trial. Teva did not adduce any direct evidence from Alembic. Instead, Teva relied upon the testimony of Mr. Major.

[105] At all material times, Mr. Major was the vice-president for development management and regulatory affairs and a member of the executive management committee with Ratiopharm (Teva). A fair reading of the Federal Court's reasons is that the Federal Court was satisfied that Mr. Major, acting in that capacity, would have had first-hand knowledge of the corporate wishes and objectives of Ratiopharm (Teva), the steps it took to achieve those objectives, commercial

arrangements Ratiopharm (Teva) had made, and the state of the market (*i.e.*, evidence of the sort described in the transcript at pages 475-478 of the Appeal Book). As part of this, a venlafaxine supply agreement between Ratiopharm (Teva) and Alembic and another related agreement were placed before the Court: see Appeal Book at pp. 462-463. No objection was taken to this.

[106] The Federal Court took some of Mr. Major's testimony as showing that Ratiopharm (Teva) had the corporate objective of securing adequate supply of venlafaxine from Alembic, manifested that objective by making inquiries and sending documents to Alembic regarding the supply of venlafaxine should the need arise, and assured Alembic that it would redirect equipment to Alembic should the need arise at a particular time. The Federal Court considered that sort of evidence admissible on the issue of Ratiopharm (Teva)'s general intentions in the hypothetical world and evidence of the general steps it took to prepare itself for entry into the market. In this respect, the Federal Court did not err. In the words of the Federal Court during the hearing, "He does have the expertise having been employed there for a number of years to say, this is what we [Ratiopharm (Teva)] would have done [in the hypothetical world] or this is what I believe we would have done": see Appeal Book, p. 487.

[107] Similarly, by virtue of his position, Mr. Major had first-hand knowledge of the general relationship between Ratiopharm (Teva) and Alembic. He testified that the relationship was a warm, long-trusted one: see Appeal Book, p. 479.

[108] The Federal Court also properly admitted another category of evidence from Mr. Major. In 2004, over a year before the relevant supply times in the hypothetical world, Mr. Major visited

Alembic's manufacturing facility in Gujarat, India for two weeks. From this visit, he developed the view that Alembic was eager to please Ratiopharm (Teva) and was keen to do what it could to satisfy Ratiopharm (Teva)'s need for venlafaxine as it arose. Based on his visit, Mr. Major testified at trial about the capacity of Alembic's manufacturing facility and Alembic's desire to supply venlafaxine to Canada. It was open to the Federal Court judge on this record to admit the evidence of what Mr. Major saw and the conclusions he drew from his observations; however, any reports made to Mr. Major by Alembic personnel during his visit could not be used as evidence of the truth of those reports, as that would be a hearsay use.

[109] In his testimony, Mr. Major could not supply evidence based on direct, first-hand knowledge or observation of at least the following: the operating capacity of Alembic's facility during the relevant time, Alembic's actual ability and willingness to redirect or add equipment at the relevant time, and how long production at Alembic would have taken at the relevant time. Yet there is admissible evidence or evidence that was not objected to in the record that might conceivably bear on these matters, such as the venlafaxine supply agreement, Alembic's production of venlafaxine at other times, and Mr. Major's impressions, observations and conclusions he drew from his visit to Alembic's manufacturing facility. The inferences that could permissibly be drawn from the admissible evidence, in conjunction with other admissible evidence about Alembic's ability to supply venlafaxine at the relevant time, is a question I shall return to later in these reasons.

[110] During the course of his testimony, Mr. Major was presented with emails and documents, such as a spreadsheet setting out Teva's marketing forecast and associated documents, and was

asked to comment on them: see Appeal Book, pp. 466-467. Many spoke to Alembic's capacity to produce in the abstract. He neither authored nor received many of the emails and documents. In fact, out of all of the emails, he authored only one—a meeting request—that the Federal Court did not cite in its reasons. The other emails contained particular statements made by various employees of Alembic and Ratiopharm (Teva) and the documents were prepared by others or by persons unknown. Mr. Major was not in a position to authenticate emails or documents that he neither received nor sent.

[111] At the outset, counsel for Pfizer raised an objection stating that "[w]e haven't admitted these documents" and added, in the case of the first document, that "I haven't heard my friend properly identify it through this witness, other than through hearsay." He warned that he would be "standing up for a few of these documents." See Appeal Book, p. 465. I construe the objection as a warning that if Teva sought to have the documents admitted as evidence, it would have to authenticate them.

[112] Teva submits that Mr. Major could use the emails and documents to refresh his memory. I accept that if Mr. Major had some first-hand memory of matters responsive to questions posed to him, he could use unauthenticated emails and documents to refresh his memory, even if those emails and documents were themselves inadmissible: *R. v. Fliss*, 2002 SCC 16, [2002] 1 S.C.R. 535 at paras. 60-68. For example, the spreadsheet setting out Teva's marketing forecast, prepared by persons other than Mr. Major and an unauthenticated document, is not admissible through Mr. Major. But Mr. Major's knowledge of Ratiopharm (Teva)'s marketing expectations, if first-hand, is something to which Mr. Major can testify given his role (see paras. 105-108, above) and he

was free to refresh his memory using this spreadsheet. But on the issue of Alembic's production capacity, his first-hand knowledge was limited to what he saw on his visit to Alembic's manufacturing facility in 2004.

[113] At one point, Mr. Major was asked whether Mr. Woloschuk, Ratiopharm (Teva)'s Vice-President for Business Development, reported to him about Alembic's capacity to supply venlafaxine: see Appeal Book, p. 495. Pfizer objected to the question on the basis Teva was seeking to elicit hearsay evidence. If the evidence were offered as truth of Alembic's actual capacity to supply, it was. Pfizer registered similarly meritorious hearsay objections to Tabs 12-15 and 21 in the book of documents put before Mr. Major, some of which the Federal Court relied upon: Appeal Book, p. 496.

[114] Teva submits that it was not using some of the emails for the truth of their contents. It said that at best they were just corroboration of Mr. Major's testimony as to his personal knowledge of the production capacity of Alembic. But hearsay they were: whether being used as primary evidence or corroborative evidence, these emails recounting the statements of others—sometimes recounting the recounting of statements of others—were tendered for the purpose of proving what Alembic would and could have done in the hypothetical world, not just to prove the fact that they were made. And corroborative evidence must itself be evidence that is admissible: *Khelawon*, above at para. 100. There is no "corroborative evidence" exception to hearsay.

[115] Teva also suggests that statements in emails written to and from personnel in Mr. Major's department or area could be admitted as truth of their contents through Mr. Major. As discussed above, Mr. Major, by virtue of his position, could be found—as the Federal Court found— to have first-hand knowledge of the corporate wishes and objectives of Ratiopharm (Teva), how it went about achieving those objectives, and Ratiopharm (Teva)'s willingness to redirect equipment to Alembic. But he does not have first-hand knowledge of the truth of particular statements made by employees in emails they write to each other. Tendering particular statements in emails between employees in Ratiopharm (Teva) through a separate witness, such as Mr. Major, to prove the truth of the statements is a hearsay use. There is no "department head" exception to hearsay whereby specific statements in emails passing between underlings in the department can be admitted through the department head for the truth of their contents.

[116] In this case, the Federal Court explicitly relied upon some of these inadmissible emails to support its conclusions about what would have transpired in the hypothetical world: an email from Kavit Tyagi of Alembic, to Jim Mihail, a product manager with Ratiopharm (Teva)'s marketing group (at para. 154), an email exchange between Alembic and Bob Woloschuk, Ratiopharm (Teva)'s Vice-President for Business Development that reported that Alembic was only operating at 40 per cent capacity and that it was planning to expand its manufacturing plant to "double its capacity to handle at least 2 billion capsules" (at para. 156), and an email exchange between Ratiopharm (Teva) representatives and Alembic that said that had Ratiopharm (Teva) not called off production in October 2005, Alembic would have produced 6.6 million capsules by December 2005 (at para. 157). In each case, the emails are unauthenticated and are statements of others, not Mr. Major, reporting on statements made by others at Alembic. They are at least

double hearsay on the issue of what Alembic could have or would have done. And depending on whether the people at Alembic had first-hand knowledge of the matters they were describing, they might be triple hearsay or even more.

[117] Teva also invokes the state of mind exception to hearsay in support of the admissibility of emails where Alembic employees expressed a willingness or optimism about the supply of venlafaxine in the required quantities when required. It is true that an out-of-court declarant's statement tendered to show the declarant's state of mind or intention is admissible: *Brisco Estate v. Canadian Premier Life Insurance Company*, 2012 ONCA 854, 113 OR (3d) 161, citing *Smith* and *Starr*, both above. However, the emails Mr. Major referred to in his testimony—communications from colleagues about what Alembic employees said—are double hearsay: even if the state of mind exception applies, the emails remain a hearsay report by an out-of-court declarant and the emails remain unauthenticated. A further problem is that the state of mind of an Alembic employee is not necessarily the state of mind of Alembic, the corporate entity: *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662, 19 D.L.R. (4th) 314; *Rhône (The) v. Peter A.B. Widener (The)*, [1993] 1 S.C.R. 497, 101 D.L.R. (4th) 188. So proof of the employee's state of mind may be irrelevant to the issue of Alembic's state of mind and inadmissible on that basis. Finally, as *Brisco Estate* shows, the evidence goes no higher than what the employee believed or wished at that time: an inference must be drawn to extend that belief into a different time and that may not be possible. On this, again, the issue of when inferences are permissible from evidence is discussed below.

[118] In both this Court and the Federal Court, Teva did not provide evidence or submissions to the effect that the hearsay evidence nevertheless was admissible because it was reliable or necessary. Nor could it:

- *Necessity*. Many of the emails Mr. Major testified about disclose the names of many Alembic employees who might have been able to give direct testimony on Alembic's ability to supply during the relevant time. Those emails also disclose the names of personnel at Ratiopharm (Teva) who also could have been called. Teva offered no evidence or submissions as to why these individuals or others could not be called to testify. Instead, Teva called Mr. Major, who had no direct, first-hand knowledge of Alembic or its operations at the relevant time.

- *Reliability*. The hearsay evidence tendered by Mr. Major did not possess circumstantial guarantees of trustworthiness. Quite the contrary. Ratiopharm (Teva) was Alembic's client and one may presume that Alembic had an incentive to say whatever needed to be said to keep its customer pleased and give it the impression that it could satisfy its customer's needs at any time it asked.

[119] All of the mischief associated with admitting hearsay evidence is present in this case. Confronted with the hearsay evidence, all that Pfizer could do was test Mr. Major's sincerity and honesty about what he was reading from documents he did not author, what he had heard from Alembic personnel, and what colleagues were saying Alembic personnel were saying. In a high-stakes case such as this, that was hardly any sort of meaningful or fair test.

[120] Those who actually knew first-hand about whether Alembic could supply the desired quantities of venlafaxine at the relevant times in the hypothetical world—personnel at Alembic—were out of court, shielded from any testing of their observation, memory, accuracy, sincerity or honesty, but their say-so on that issue—recounted or recorded by others—was admitted into these proceedings. This worked great unfairness to Pfizer.

[121] Pfizer frequently objected to the admissibility of hearsay evidence. It was largely right to do so: in my view, every hearsay objection it made during Mr. Major's testimony was correct, except on the subject-matters discussed at paras. 105-108 and 112, above. But on a number of occasions, the Federal Court said that it would consider the weight of the evidence or it said that Pfizer's objection was one of weight, not admissibility. On one occasion, it said that because Mr. Major's name did not appear on a document, the document would "probably just go to weight." The Federal Court admitted this evidence when it should have been excluded. This was an error that might have affected the outcome of the case. Therefore, the Federal Court's judgment must be set aside.

(3) The issue whether there was palpable and overriding error on a factual finding

[122] Pfizer attacks one of the bases upon which the Federal Court found that Ratiopharm (Teva) could have supplied its product in the hypothetical world.

[123] At one point in its reasons, the Federal Court considered (at para. 152) whether any "bottleneck" in Alembic's manufacture of Ratiopharm (Teva)'s venlafaxine product in the

hypothetical world would have come at the stage of encapsulation. In finding that no bottleneck would have taken place at that stage, the Federal Court relied in part on the fact that Alembic had many fluid bed processors. But, as Pfizer notes, fluid bed processors are not used for encapsulation. Teva does not disagree.

[124] However, Teva suggests that any error by the Federal Court here was inconsequential, not overriding, and so it does not vitiate the Federal Court's judgment. Based on this Court's decision in *South Yukon*, above at paragraph 46, I agree:

> "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

[125] In the course of its reasons on this point (at para. 152), the Federal Court also accepted and relied upon Mr. Major's non-hearsay testimony that if necessary, his then-employer, Ratiopharm (Teva), would have "bought equipment, put equipment in place" to avoid any bottleneck. Thus, to the extent the Federal Court misunderstood the use of fluid bed processors, I am not persuaded that its overall finding was vitiated by palpable and overriding error.

(4) Other section 8 damages issues

[126] Pfizer submits that the Federal Court erred in selecting January 10, 2006 as the start of the period of loss, or, in other words, the time when Ratiopharm (Teva) would have been legally able to start selling its venlafaxine product in the market.

[127] It submits that in the hypothetical world, Ratiopharm (Teva) would not have received a notice of compliance allowing it to sell its venlafaxine product before February 13, 2006. It says that when the '778 Patent was listed on the patent register, Ratiopharm (Teva) would have had to serve a notice of allegation addressing it and the Minister would then be prohibited from issuing a notice of compliance until 45 days had passed: see *PMNOC Regulations*, para. 7(1)(*d*).

[128] The Federal Court selected January 10, 2006, the expiry of the '540 Patent as the start date. This was the soonest Ratiopharm (Teva) could have marketed its venlafaxine product given that the Minister had certified that, but for the *PMNOC Regulations*, it would have given Ratiopharm (Teva) its notice of compliance on December 7, 2005.

[129] In my view, the Federal Court committed no error in principle in setting January 10, 2006 as the start date.

[130] In essence, Pfizer's submission is that in the hypothetical world the *PMNOC Regulations* should not be disregarded for the purpose of determining the start of Ratiopharm (Teva)'s period of loss.

[131] This submission runs counter to the express wording of paragraph 8(1)(*a*) of the *PMNOC Regulations*. That paragraph provides that the section 8 liability period begins "on the date, as certified by the Minister, on which a notice of compliance would have been issued in the absence of these Regulations unless the court concludes [under subparagraph 8(1)(*a*)(ii)] that … a date other than the certified date is more appropriate" [my emphasis]. Thus, it is only in circumstances

where, under subparagraph 8(1)(*a*)(ii), the Court deems that another date is more appropriate that this default date can be set aside.

[132] Pfizer's submission is also precisely the opposite of what a majority of this Court held in *Apotex Inc. v. Sanofi-Aventis*, 2014 FCA 68, 125 C.P.R. (4th) 403 at paragraph 170 (*Apotex Ramipril s. 8 FCA*): "the [*PMNOC Regulations*] are to be disregarded in determining the beginning of the section 8 liability period." On appeal, the Supreme Court of Canada affirmed those reasons: *Sanofi-Aventis v. Apotex Inc.*, 2015 SCC 20, [2015] 2 S.C.R. 136.

[133] Pfizer's submission is also contrary to the holding of a majority of this Court in *Teva Canada Limited v. Sanofi-Aventis Canada Inc.*, 2014 FCA 67, 126 C.P.R. (4th) 1 at paragraph 145 (*Teva Ramipril s. 8 FCA*):

> [145] My view, in summary, is that in the hypothetical world constructed for the purposes of determining section 8 damages, the *NOC Regulations* should not be assumed away except to the extent required by paragraph 8(1)(*a*), that is, for the purpose of determining the beginning of the section 8 liability period. For all other purposes, the *NOC Regulations* should be assumed to exist in the hypothetical world, and all steps that were actually taken under the *NOC Regulations* should be assumed to have been taken in the hypothetical world unless there is evidence upon which the trier of fact may reasonably conclude that different steps would have been taken. [my emphasis]

[134] Pfizer also takes issue with the Federal Court's conclusions concerning the entry and participation of Ratiopharm (Teva)'s generic competitors in the venlafaxine market in the hypothetical world.

[135] In the Federal Court, Pfizer submitted that Teva's damages claim would be reduced because in the hypothetical world Novopharm and Pharmascience would have entered into the market, cutting down Ratiopharm (Teva)'s market share.

[136] In dealing with this submission, the Federal Court did not have the benefit of *Apotex Ramipril s. 8 FCA*. In that case, this Court held that the regulatory barriers to entry, including the *PMNOC Regulations*, which all generic manufacturers face in the real world, also affect all generic manufacturers in the hypothetical world. Thus, in order to assess whether and when other generic manufacturers could have and would have entered the market in the hypothetical world, the Federal Court had to assess, among other things, whether regulatory barriers stood in their way.

[137] Although the Federal Court did not have the benefit of *Apotex Ramipril s. 8 FCA*, it applied principles consistent with it and committed no error in principle. It proceeded on the basis that other generic manufacturers entering the market would have had to follow the *PMNOC Regulations*. It considered all of the evidence, in part guided by real world events and based on the evidence before it, to determine whether "any other generics would have entered the market during the Relevant Period" and, if so, when (at para. 89).

[138] This was precisely in accordance with *Apotex Ramipril s. 8 FCA*. At paragraph 159 of *Apotex Ramipril s. 8 FCA*, the majority of this Court (whose reasons were adopted on appeal by the Supreme Court) agreed with the methodology the Federal Court adopted in that case. It described the methodology as follows (at para. 158):

> [I]n the hypothetical world, the competitors of a section 8 damages claimant are bound by the [*PMNOC*] *Regulations*, and…[they must be taken to] act as they did in the real world in relation to the [*PMNOC*] *Regulations* except to the extent that there is evidence upon which the trier of fact can reasonably conclude that they would have acted differently.

And a few paragraphs later, the majority confirmed the state of the law on this point (at para. 162):

> It follows that in the hypothetical market, the behaviour of competing generic drug manufacturers must be determined on the basis that the [*PMNOC*] *Regulations* exist, and each generic drug manufacturer will conduct itself accordingly.

[139] On the evidence, the Federal Court found (at para. 94) that in the hypothetical world Novopharm would have received a notice of compliance shortly after Ratiopharm (Teva). Novopharm had entered into an agreement with Wyeth (Pfizer). Under this agreement, Novopharm could obtain a notice of compliance and take steps to obtain listing on formularies soon after Ratiopharm (Teva) could. But it noted (at para. 111) that Novopharm faced problems in manufacturing venlafaxine. Considering the evidence before it, it found (at para. 129) that "Novopharm would have entered the market with Novo-Venlafaxine on December 1, 2006 in the [hypothetical] world, as it did in the real world."

[140] In the case of Pharmascience, the main question for the Federal Court was whether it would have served a notice of allegation in the hypothetical world. The Federal Court answered this in the negative (at para. 132). Pharmascience intended to time the launch of its product to coincide with a decision on the '778 Patent in favour of Ratiopharm (Teva). It was adverse to

litigation and would not act sooner (at para. 141). Therefore, the Federal Court concluded that Pharmascience would not have been ready to launch earlier than it did in the real world.

[141] Pfizer submits that in assessing what Pharmascience would have done in the hypothetical world, the Federal Court failed to sufficiently take into account real world events. In my view, this is a complaint about how the Federal Court weighed the evidence. But appellate courts are not entitled to interfere based on their own weighing of the evidence short of palpable and overriding error: *Housen*, above. In my view, the record shows real world evidence of an intention on the part of Pharmascience to delay or avoid litigation concerning the '778 Patent.

[142] Overall, in its analysis on this point, the Federal Court did not err in principle. And, in applying the principles to the evidence before it, it did not commit any palpable and overriding error.

[143] Pfizer also says that the Federal Court erred during its calculation of damages by attributing Novopharm's market share to Ratiopharm (Teva) without also attributing Novopharm's rebates to Ratiopharm (Teva). Pfizer also advanced this submission below. The Federal Court dealt with it (at various places in paras. 209-227) by considering and weighing the evidence of a number of witnesses and considering what weight should be given to Novopharm's sole-source and multi-source trade spend rates in determining Ratiopharm (Teva)'s sole-source and multi-source trade spend rates in the hypothetical world. On this issue it also preferred the testimony of Teva's expert and made an adverse credibility finding against Pfizer's expert (at

para. 38). Pfizer has not persuaded me that there is any palpable and overriding error in the Federal Court's analysis on this point.

(5) Pre-judgment interest

[144] On the issue of pre-judgment interest, the parties dispute the date the cause of action arose. Pfizer submits that the cause of action arose on August 1, 2007 when this Court dismissed Wyeth (Pfizer)'s prohibition application. At that point, the requirements for a claim under section 8 of the *PMNOC Regulations* were met.

[145] The Federal Court disagreed with Pfizer. In its view, the cause of action arises on the date that the damages that are the basis for the claim actually begin to be suffered. Here that was January 10, 2006. It rejected Pfizer's submission that the dismissal of the prohibition application is the relevant start date. It offered the following basis (at para. 258), with which I agree:

> The disposition of a Prohibition Application does not ground liability, it simply confirms that liability exists. The cause of action arises on the date that damages that are the basis for the claim begin to be suffered. Typically, this will coincide with when the Relevant Period begins, as it did in *Pantoprazole FC 2012* [*Apotex Inc v. Takeda Canada Inc.*, 2013 FC 1237, 123 C.P.R. (4th) 261] and as it does in this case. However, because the Relevant Period may begin before damage is actually suffered, this need not always be the case. For that reason, prejudgment interest must be tied to when the loss actually begins to be suffered irrespective of whether that date is the same as the start of the Relevant Period.

[146] On two occasions, the Federal Court has found that the cause of action under section 8 arises on the patent hold date because that is when the period of liability commences: *Apotex Inc.*

v. Takeda Canada Inc., 2013 FC 1237, 123 C.P.R. (4th) 261 at paras. 173-174; *Sanofi-Aventis Canada v. Teva Canada*, 2012 FC 552, 410 F.T.R. 1 at paras. 297-299.

[147] Section 8 damages—damages suffered during the period when a notice of compliance could have been issued but was not by reason of the automatic stay—are analogous to an undertaking to the court to pay damages in the event a successful applicant for an interlocutory injunction should ultimately fail at trial: *Apotex Inc. v. AstraZeneca Canada Inc.*, 2012 FC 559, 410 F.T.R. 168 at para. 58, aff'd 2013 FCA 77, 444 N.R. 254; *Apotex Inc. v. Merck & Co. Inc.*, 2009 FCA 187, [2010] 2 F.C.R. 389 at para. 48. This Court has held that pre-judgment interest on an undertaking in damages runs from the date an interlocutory injunction is granted, not from the day it is set aside, because that is when the damages start to arise: *Algonquin Mercantile Corp. v. Dart Industries Canada Ltd.*, [1988] 2 F.C. 305, 16 C.P.R. (3d) 193 at para. 27 (C.A.).

[148] Pfizer also challenges the Federal Court's decision to calculate pre-judgment interest from the beginning of each month on the entire amount of Teva's lost profits in that month, rather than at the end of each month.

[149] In this case, the Federal Court followed the calculation of pre-judgment interest in subsection 128(3) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 as it was bound to do: *Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 36(1). It applied the principles set out by the Court of Appeal for Ontario in *Celanese Canada Inc. v. Canadian National Railway Co.* (2005), 196 O.A.C. 60, 138 A.C.W.S. (3d) 23 at para. 17:

> The purpose of s. 128(3) is to achieve fairness in the payment of the prejudgment interest on pecuniary damages by ensuring that a plaintiff will not recover a windfall that would otherwise result were s. 128(1) to be applied. It does so by providing a formula for the accrual of interest on pecuniary damages as they are incurred, in lieu of requiring the court to conduct a series of individual calculations. Section 128(3) accords with the underlying compensatory principle for awarding prejudgment interest, which is to compensate a party for the loss of the use of its money.

[150] The Federal Court also noted that an award of interest is meant to compensate rather than punish: *Bank of America Canada v. Mutual Trust Co*, 2002 SCC 43, [2002] 2 S.C.R. 601.

[151] It also adopted the statement in *Chandran v. National Bank*, 2011 ONSC 4369, 95 C.C.E.L. (3d) 322 at para. 8, aff'd 2012 ONCA 205, 99 C.C.E.L. (3d) 277 on a different point, that "[i]nterest is due for a month as soon as the payment is owed, not after the payment has been outstanding for a month": see also *Lowndes v. Summit Ford Sales Ltd.* (2006), 206 O.A.C. 55, 47 C.C.E.L. (3d) 198.

[152] In the circumstances of this case, I see no legal error in the Federal Court's approach, nor any palpable and overriding error that would vitiate its decision. The award of interest is a discretionary matter: *Courts of Justice Act*, above, s. 130. There is no principle of law requiring that pre-judgment interest be calculated at some other date in the month.

(6) The disposition of this appeal: what should happen now?

[153] After this Court finds that a trial court erred in admitting evidence, this Court may make the judgment the trial court should have made on the basis of the remaining admissible evidence

in the record: *Federal Courts Act*, above, para. 52(b)(*i*). In other words, this Court itself can redetermine the matter.

[154] Both parties made submissions, albeit rather brief, on the redetermination. Pfizer has asked this Court to exercise its power under paragraph 52(b)(*i*) of the *Federal Courts Act* and decide that the section 8 damages claim must fail on the basis of the evidentiary record left after the hearsay evidence has been excluded. It says the remaining evidence is insufficient to support a claim for damages under section 8 of the *PMNOC Regulations*. Teva disagrees.

[155] Complicating matters is the presence in the record of some conflicting evidence that may not have been adjudicated upon before but, if admissible in accordance with the principles set out in these reasons, now may have to be adjudicated upon: see, *e.g.*, the evidence cited at Pfizer's memorandum of fact and law at para. 90.

[156] I note that on occasion this Court has declined to conduct the redetermination itself and instead has remitted it to the Federal Court: see, *e.g.*, *Kelly v. Canada*, 2013 FCA 171, 446 N.R. 339 at paras. 66-72; *Janssen-Ortho Inc. v. Apotex Inc.*, 2009 FCA 212, 75 C.P.R. (4th) 411 at para. 80; *Zero Spill Systems (Int'l) Inc. v. 614248 Alberta Ltd.*, 2015 FCA 115, 130 C.P.R. (4th) 291 at para. 107. Redetermination by the Federal Court is a further "process" that this Court may "award" within the meaning of paragraph 52(b)(*i*) of the *Federal Courts Act*.

[157] The Federal Court is more experienced and adept in fact-finding than is this Court. Allowing it to redetermine the matter makes sense where the case is factually complex and

factually voluminous, the Federal Court has seen the witnesses and has developed views on their credibility, and the result is uncertain and factually suffused: *Turberfield v. Canada*, 2012 FCA 170, 433 N.R. 236; *Canada v. Brokenhead First Nation*, 2011 FCA 148, 419 N.R. 289; *Kelly*, above. This is often true for damages issues: *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, 177 D.L.R. (4th) 73 at para. 67. As *Kelly* shows, this option has even more merit where the parties have not offered substantial or meaningful submissions to the appellate court on the redetermination.

[158] In the case at bar, all of these factors are present. In particular, to conduct the redetermination ourselves and to make the judgment the Federal Court should have made, the parties would have had to provide far more detailed submissions to us concerning the specific admissible evidence remaining in the record after the hearsay evidence is disregarded, the inferences we can permissibly draw from that evidence, and the facts that we should find based on that evidence. Even then, we might still have deferred to the Federal Court's role as a fact-finder.

[159] Thus, as a matter of discretion, in this case I would remit the redetermination to the Federal Court.

[160] Neither party has asked for the opportunity to adduce further evidence in that redetermination, *i.e.*, something akin to a retrial under paragraph 52(b)(*ii*) of the *Federal Courts Act*. The parties were right not to ask. As paragraph 52(b)(*ii*) suggests, that remedy is granted as a matter of discretion only when required by the interests of justice. One possible circumstance is

where the trial court's error has undercut the integrity, viability or fairness of much if not all of the trial. Another possible circumstance is where a legal test has been materially changed since the trial, with the result that the parties did not have a chance at trial to adduce evidence responsive to it: see, *e.g.*, *Kelly*, above.

[161] Neither circumstance is here. In particular, the issue whether Ratiopharm (Teva) could have had and would have had sufficient quantities of its version of venlafaxine to supply the market at the relevant time was a live issue in the Federal Court; indeed, as I have held, the Federal Court understood that was the operative principle. The parties made legal, practical and tactical choices regarding the evidence they should adduce or not adduce concerning that point. The interests of justice do not support relieving them of the choices they made. This Court has never done so in circumstances like this.

[162] Of course, before redetermining the matter, the Federal Court will need to receive submissions from the parties.

[163] I wish to offer some further comments to guide the Federal Court in its redetermination.

[164] The redetermination is to decide upon whether and to what extent Ratiopharm (Teva) is entitled to section 8 damages and is to be conducted by applying proper legal principles to the admissible evidence in the record. Without limiting the foregoing, the key issue for redetermination is whether in the hypothetical world Ratiopharm (Teva) would have had and could have had access to sufficient quantities of venlafaxine at the relevant time.

[165] In my view, it is not enough to establish this on the balance of probabilities by pointing *only* to sufficient manufacturing capacity a long time (here over a year) before the relevant time and Alembic's general willingness to keep its customer, Ratiopharm (Teva), happy. Perhaps as part of the totality of the admissible evidence and permissible inferences therefrom, Teva can establish its case on the balance of probabilities. That will be for the Federal Court to determine.

[166] The inadmissible hearsay evidence, identified above, of course is to be excluded. These reasons have dealt with specific pieces of evidence used by the trial judge. But it has described some other evidence generically because, for the most part, the parties spoke of the evidence in that way. As a result, disputes might arise during the redetermination concerning the admissibility of specific pieces of evidence. The Federal Court may rule on those disputes using the principles set out in these reasons.

[167] Further, viewing the remaining evidentiary record, I note that there does not appear to be direct evidence from Alembic on a number of matters, including whether it had other commitments that would have restricted or prevented its ability to supply product, whether it could have acquired sufficient quantities of raw material to manufacture the product, and whether the length of the manufacturing process would have affected Alembic's ability to supply product at the relevant time. Despite these gaps, the redetermination should examine whether other evidence in the record, taken together, along with any permissible inferences, proves that in the hypothetical world Ratiopharm (Teva) would have and could have had access to sufficient quantities of venlafaxine at the relevant time. As mentioned above, Teva bears the persuasive burden on this. And also as mentioned above, the standard of proof on this is the balance of

probabilities, not just mere possibilities: *Tervita*, above at paras. 49-51 and 66; *F.H. v. McDougall*, above at paras. 40 and 49.

[168] Excluding the inadmissible hearsay evidence from the evidentiary record leaves a smaller body of admissible evidence for the Federal Court to bring to bear in its redetermination. The Federal Court will want to identify the admissible evidence that forms that body, and then assess it in accordance with the principles set out in these reasons. In assessing it, the Federal Court may consider, with the benefit of submissions, whether it can and should draw any positive or negative inferences about what Alembic could have and would have done at the relevant time. In doing so, it should ensure that any inferences it draws are legally permissible, and offer clear reasons for why it did or did not draw a positive or negative inference.

[169] To assist the redetermination, by way of non-exhaustive guidance concerning legal limits on what inferences can be drawn from evidence, the parties and the Federal Court might wish to consider *R. v. Munoz* (2006), 86 O.R. (3d) 134, 38 C.R. (6th) 376 at paragraphs 23-31 (and authorities cited therein)—an authority now applied approvingly by several appellate courts (*District of West Vancouver (Corporation of) v. Liu*, 2016 BCCA 96, 47 M.P.L.R. (5th) 1; *United States v. Viscomi*, 2015 ONCA 484, 126 O.R. (3d) 427; *R. v. G.S.*, 2013 NUCA 5, 100 C.R. (6th) 397), the Federal Court (*K.K. v. Canada (Citizenship and Immigration)*, 2014 FC 78, 446 F.T.R. 209), and virtually every other Canadian trial court.

[170] And by way of non-exhaustive guidance on when the Court might draw adverse inferences, the parties might have regard to *Lévesque v. Comeau*, [1970] S.C.R. 1010, 16 D.L.R.

(3d) 425; *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751 at paragraphs 22-30; and, in this Court, authorities that apply *Lévesque* and *Jolivet* such as *Merck & Co., Inc. v. Apotex Inc.*, 2003 FCA 488, [2004] 2 F.C.R. 45.

E. Proposed judgment

[171] For the foregoing reasons, I would set aside the judgment of the Federal Court and remit to the Federal Court for redetermination the issue whether Teva is entitled to damages and, if so, to what extent.

[172] Pfizer has been substantially successful on appeal. I would grant it its costs of the appeal.

[173] As I propose to set aside the Federal Court's judgment, the Federal Court's award of trial costs in favour of Teva would also fall away. But I would decline to make any award of trial costs in its place. Rather, at the end of its redetermination, after it has decided who has prevailed on the merits, the Federal Court should make that award.

[174] Therefore, I would allow the appeal, set aside the judgment of the Federal Court, and remit the matter to the Federal Court for redetermination in accordance with these reasons. I would grant Pfizer its costs of the appeal.

"David Stratas"

J.A.

"I agree
C. Michael Ryer J.A."

"I agree
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-422-14
APPEAL FROM THE JUDGMENT OF THE HONOURABLE MR. JUSTICE ZINN DATED JUNE 30, 2014, NO. T-1844-07	
STYLE OF CAUSE:	PFIZER CANADA INC. v. TEVA CANADA LIMITED
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 1, 2015
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	RYER J.A. GLEASON J.A.
DATED:	MAY 31, 2016

APPEARANCES:

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David W. Aitken Marcus Klee Sean Jackson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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Aitken Klee LLP Ottawa, Ontario	FOR THE RESPONDENT

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NOVA SCOTIA COURT OF APPEAL
Citation: ***2703203 Manitoba Inc. v. Parks***, 2007 NSCA 36

Date: 20070403
Docket: CA 263242
Registry: Halifax

Between:

Ross Parks, Parrcom Atlantic Concepts Incorporated and Lloyd Smith

Appellants

v.

2703203 Manitoba Inc.

Respondent

Judges: Cromwell, Saunders & Oland, JJ.A.

Appeal Heard: November 21, 2006, in Halifax, Nova Scotia

Held: Appeal allowed in part and damages at trial varied, as per reasons for judgment of Saunders, J.A. (dissenting only on the extent to which general damages ought to be reduced, as reflected in [72] - [101] of his reasons); Cromwell & Oland, JJ.A. concurring

Counsel: John P. Merrick, Q.C. & William J. Mahody, for the appellants, Ross Parks and Parrcom Atlantic Concepts Incorporated
Lloyd E. Smith, representing himself
William L. Ryan, Q.C., & Sarah Dykema, for the respondent, 2703203 Manitoba Inc.

Reasons for judgment: Saunders, J.A. (dissenting only on the extent to which general damages ought to be reduced, as reflected in [72] - [101] *infra*)

[1] After a trial before Nova Scotia Supreme Court Justice K. Peter Richard, the appellants were found jointly and severally liable for copyright infringement, passing-off, and interference with contractual relations, resulting in general and punitive damages totalling $239,000. The trial judge also granted injunctive relief restraining the appellants from carrying on various activities upon strict terms while at the same time making it clear that nothing in his order would restrict the appellants from continuing to publish their work as long as it complied with the order and was readily distinguishable from the respondent's.

[2] For the reasons that follow I would allow the appeal in part, thus reducing the damages payable by the appellants to $117,600.

[3] The host of grounds, issues and submissions put forward by the appellants may be unbundled and recast as two principal inquiries. Did the trial judge err:

(i) in his findings of fact, or in his application of the law to those facts, in arriving at his conclusions that the appellants were liable to the respondent for any or all of: copyright infringement; passing-off; and interference with contractual relations; and

(ii) in his findings of fact, or in his application of the law to those facts, in concluding that the respondent was entitled to general damages, and to punitive damages.

Background

[4] I will start by giving a brief introduction to the facts of this case. Necessary detail will be added later when I address the particular issues requiring our consideration.

[5] The appellant, Parrcom Atlantic Concepts Incorporated ("Parrcom") was incorporated in Nova Scotia on January 3, 1997. Its sole director and agent is the appellant, Mr. Ross Parks.

[6] The respondent, 27032303 Manitoba Inc. ("the respondent" or "Manitoba Inc." or "the company") was incorporated in Manitoba on March 1, 1991 and registered in Nova Scotia on November 15, 2002. Ms. Jean Daum is the president, chief operating officer and sole director of Manitoba Inc.

[7] The respondent's principal business is the franchising of a publication called *Coffee News*, which is trademarked in both Canada and the United States. *Coffee News* is published in 50 countries and according to the evidence presented at trial, has acquired a reputation as a highly rated, award winning, trade publication.

[8] Ms. Daum spent 10 years developing the *Coffee News* concept and organization. All publications have the exact same format, colour and style, comprising a border of advertising which surrounds a text of written content in the centre. Each franchisee is provided the content for that particular issue through a coded entry into the respondent's website. Material is then downloaded and incorporated into the body of the *Coffee News* which is then distributed by the individual franchisee, free of charge, to restaurants, coffee shops, convenience stores, etc.

[9] The franchise contract sets out the geographical area in which a franchisee will distribute *Coffee News*. The terms of the contract require that the franchisee sell advertising and arrange for the printing and distribution of the sheet(s) in the designated geographical region.

[10] The respondent first encountered the appellant, Mr. Ross Parks ("Mr. Parks") in September 1998 concerning a *Coffee News* franchise negotiated with John Schimmel ("Mr. Schimmel") in North Vancouver, British Columbia.

[11] It was around this same time that David Lane, a Winnipeg franchisee, expressed an interest in selling his franchise. Mr. Lane had been diagnosed with a terminal illness. Mr. Parks learned of this and entered into negotiations with Mr. Lane.

[12] Ms. Daum testified that Mr. Parks played upon Mr. Lane's deteriorating health so as to bring the purchase price down to unconscionable levels, before

deciding to terminate their negotiations altogether. Based on this event, and the fact that no franchise fees had been paid for the North Vancouver franchise, Ms. Daum vowed that she would never have any further dealings with Parks.

[13] In February 2000 the appellant, Lloyd Smith ("Mr. Smith") joined the respondent's team. As far as the respondent knew, Smith had acted independently in negotiating his purchase of a *Coffee News* franchise in the Annapolis Valley. An agreement was entered into between the respondent and Smith on February 28, 2000 to formalize their relationship.

[14] In June 2000, Ms. Daum discovered that Parks had participated in some way in Smith's franchise arrangement. She immediately confronted Smith who assured her that Parks' only involvement was to have advanced Smith a loan, and that Parks' company, Parrcom, had been engaged to do some administrative work for the franchise. Ms. Daum also learned that John Schimmel had become involved, but once again Smith assured her that Schimmel's interest was limited to some graphic design work from his Vancouver residence. With these assurances, Ms. Daum sent an email to Smith stating in part:

> I must tell you - I WOULDN'T have allowed you to licence of Coffee News if I'd known either Ross or John Schimmel was in any way involved with it.

[15] Unknown to Ms. Daum, Parks then negotiated for several other *Coffee News* franchises, supposedly on behalf of Smith. The appellants Smith and Parks kept the respondent completely in the dark as to the true extent of Parks' involvement in the business. Parks either directly or through his company Parrcom, held control and stood as the guiding force behind their *Coffee News* franchise in the Annapolis Valley. Revenues from the franchise operation were intermingled with other monies coming to Parks or Parrcom. Smith had neither signing nor administrative authority and was found by the trial judge to be nothing more than a "front man" for the operation.

[16] From 2000-2002 Smith acquired franchises under his name in other parts of Nova Scotia. The evidence disclosed that Parks was the true owner and manager of these franchises with all revenues directed through Parrcom. The trial judge found that Parks and Smith went to great lengths to deceive the respondent.

[17] In June 2002 Parrcom entered into an agreement with two other individuals to supply editorial material for a new publication, *Flying Cow*. Witnesses at trial testified that the first several issues of *Flying Cow* were published by the same printer as *Coffee News*, and were identical to the *Coffee News* in every respect including design, format, and the quality and colour of the paper. Only the editorial content and the mast-head were different. Smith was shown to be intimately involved in all of Parrcom/Parks' development of *Flying Cow*.

[18] In the summer of 2002 Mr. Cohen McInnes responded to an ad in the local edition of *Coffee News* for a sales agent position. Mr. McInnes was directed to Parks, who then arranged for Mr. McInnes to meet with his brother, David Parks. At the meeting David Parks showed up with a complete binder respecting *Coffee News*, as well as a copy of the Halifax edition of *Flying Cow*. Mr. McInnes was hired as a *Coffee News* sales agent but was told by David Parks that there would be an opportunity to "grow with *Flying Cow*."

[19] Then a fortuitous thing happened. Shortly after his initial meeting with David Parks, Mr. McInnes called the telephone number he had been given for the *Coffee News*. The answering machine message declared "home of *Coffee News* and *The Flying Cow*." Concerned about the obvious confusion with the two names, Mr. McInnes called the head office of the respondent and spoke with Ms. Daum. Only then did Ms. Daum discover the extent of Parks' involvement. She terminated Smith's franchise. The franchise was then passed on to Mr. McInnes. Following the transfer, Mr. McInnes testified that Parks was in his area soliciting advertising, and that many of Mr. McInnes' clients concluded that *Coffee News* and *Flying Cow* were one and the same.

[20] Mr. McInnes testified that while he had the *Coffee News* franchise in the Antigonish-Port Hawkesbury area, *Flying Cow* was almost identical to the *Coffee News* and used the same format and paper colour. The evidence revealed that *Coffee News* was often removed from its display stands in stores and replaced with copies of *Flying Cow*. Witnesses said that stacks of *Coffee News* disappeared from their locations or were destroyed at the hands of Parks.

[21] The statement of claim filed by the respondent in October, 2002 claimed both injunctive relief and damages for a variety of alleged misconduct including: breach of contract; breach of fiduciary obligations; "breach of copyright"; passing-

off; infringement of copyright; conspiracy; interference with the contracts and business of the respondent, trademark violations; violation of the **Competition Act**; unlawful use of confidential and strategic business information; and violation of non-competition agreements.

[22] The appellants were represented by legal counsel in preparing and filing their pleadings. However, they chose to defend themselves at trial.

[23] After a five day trial Richard, J. found Parks, Parrcom and Smith jointly and severally liable for infringement of copyright, the tort of passing-off, and interference with contractual relations, and awarded the respondent general damages of $139,000, punitive damages of $100,000, and costs of $10,000.

[24] I will now address the standard of review that applies to our consideration of the various issues in this case.

Standard of Review

[25] Deciding the appropriate standard of review depends on how one characterizes the particular question that is under scrutiny.

[26] In **Secunda Marine Services Ltd. v. Liberty Mutual Insurance Company**, 2006 NSCA 82 this Court said at ¶ 25:

> As this Court observed in **McPhee v. Gwynne-Timothy**, (2005), 232 N.S.R. (2d) 175; 737 A.P.R. 175; 2005 NSCA 80, at ¶ 31 - 33:
>
> > [31] A trial judge's findings of fact are not to be disturbed unless it can be shown that they are the result of some palpable and overriding error. The standard of review applicable to inferences drawn from fact is no less and no different than the standard applied to the trial judge's findings of fact. Again, such inferences are immutable unless shown to be the result of palpable and overriding error. If there is no such error in establishing the facts upon which the trial judge relies in drawing the inference, then it is only when palpable and overriding error can be shown in the inference drawing process itself that an appellate court is entitled to intervene. Thus, we are to apply the same standard of review in assessing Justice Richard's findings of fact, and the inferences he

> drew from those facts. **H. L. v. Canada (Attorney General)**, [2005] S.C.J. No. 24; **Housen v. Nikolaisen,** [2002] 2 S.C.R. 235; **Campbell MacIsaac v. Deveaux & Lombard**, 2004 NSCA 87.
>
> [32] An error is said to be palpable if it is clear or obvious. An error is overriding if, in the context of the whole case, it is so serious as to be determinative when assessing the balance of probabilities with respect to that particular factual issue. Thus, invoking the "palpable and overriding error" standard recognizes that a high degree of deference is paid on appeal to findings of fact at trial. See, for example, **Housen**, supra, at ¶ 1-5 and **Delgamuukw v. British Columbia**, [1997] 3 S.C.R. 1010, at ¶ 78 and 80. Not every misapprehension of the evidence or every error of fact by the trial judge will justify appellate intervention. The error must not only be plainly seen, but 'overriding and determinative.'
>
> [33] On questions of law the trial judge must be right. The standard of review is one of correctness. There may be questions of mixed fact and law. Matters of mixed fact and law are said to fall along a 'spectrum of particularity.' Such matters typically involve applying a legal standard to a set of facts. Mixed questions of fact and law should be reviewed according to the palpable and overriding error standard unless the alleged error can be traced to an error of law which may be isolated from the mixed question of law and fact. Where that result obtains, the extricated legal principle will attract a correctness standard. Where, on the other hand, the legal principle in issue is not readily extricable, then the issue of mixed law and fact is reviewable on the standard of palpable and overriding error. See **Housen,** supra, generally at ¶ 19-28; **Campbell MacIsaac**, supra, at ¶ 40; **Davison v. Nova Scotia Government Employees Union**, 2005 NSCA 51.

[27] To summarize then, on questions of law the judge must be right. Such questions are tested on a standard of correctness. Matters of fact, or inferences drawn from facts are owed a high degree of deference and will not be disturbed unless they resulted from palpable and overriding error. Matters said to be mixed questions of fact and law are also tested using the palpable and overriding error standard, unless the mistake can be easily linked to a particular and extricable legal principle, which will then attract a correctness standard. Where, however,

the legal principle is not readily extricable, the question of mixed law and fact will be reviewable on the standard of palpable and overriding error.

[28] The findings, inferences and conclusions drawn by the trial judge in this case cover the spectrum between questions of fact, law, or mixed law and fact. Accordingly each will draw its own standard of review.

Credibility

[29] Before dealing specifically with each of the causes of action for which the trial judge ultimately awarded damages, it is necessary to emphasize at the outset the many strong and sharp findings of credibility which Justice Richard made against the appellants.

[30] A judge's advantage in seeing and hearing the witnesses who testify at a trial is not to be taken lightly. Absent palpable and overriding error, findings of fact and in particular, findings of credibility are not to be disturbed. See for example **Toneguzzo-Norvell et al v. Savein and Burnaby Hospital**,[1994] 1 S.C.R. 114 at 121. It is not every error that leads to appellate intervention. As Chief Justice Lamer said in **Delgamuukw et al v. British Columbia et al**, [1997] 3 S.C.R. 1010 at ¶ 88:

> The error must be sufficiently serious that it was overriding and determinative in the assessment of the balance of probabilities with respect to that factual issue.

Finally, in **R. v. W.(R.)** (1992), C.C.C. (3d) 134 (S.C.C.) the Supreme Court of Canada cautioned appellate courts with respect to the requisite deference that is owed to findings of credibility made at trial, at p. 142:

> This Court has repeatedly affirmed the importance of taking into account the special position of the trier of fact on matters of credibility . . . The trial judge has the advantage, denied to the appellate court, of seeing and hearing the evidence of witnesses.

While the court's admonition was given in the context of a criminal case, it applies equally in the context of civil litigation.

[31] There is no doubt that in this case the trial judge was unimpressed with the evidence presented by the appellants. Early in his decision Richard, J. states:

> [9] During the four and one-half days of trial there was much contradiction between the evidence of the Plaintiff and the evidence of the several defendants. At the outset I express the conclusion that where there is conflict between the evidence of the Plaintiff and the Defendant I accept that of the Plaintiff.

[32] The strong language used by the trial judge in this case provide many illustrations that he rejected, unreservedly, any evidence offered by the appellants which purported to deny wrongdoing on their part. For example, at ¶ 13, Richard, J. said:

> . . . The communications . . . between the Plaintiff and Smith and between Smith and Ross Parks . . . disclose a strategy of lies and deceit on the part of Smith and Ross Parks to keep the Plaintiff completely in the dark as to the true extent of the involvement of Ross Parks in the Valley Coffee News franchise . . .

This is reinforced in subsequent paragraphs including:

> [18] The evidence in general is somewhat confusing but I conclude that this result was not entirely unintentional on the part of the defendants, especially Ross Parks - it is merely a further manifestation of the efforts to conceal and obfuscate the realities of the situation. For this reason, the following review of the evidence may appear somewhat anecdotal and disjointed.

[33] Informed by these strong and very disparaging factual findings of the trial judge - which are not in themselves challenged by the appellants on appeal - I will turn to a consideration of the judge's treatment of the various causes of action for which the respondent claimed damages. But before doing so I wish to dispose of a new argument raised by the appellants for the first time in this court.

Assignment

[34] Here I will briefly consider a ground of appeal advanced by the appellants for the first time at the hearing. Messrs. Merrick and Mahody on behalf of the appellants Parks and Parrcom say that the trial judge's decision cannot stand because if any copyright exists (which they deny) it does not belong to the numbered company, but rather only to Ms. Jean Daum personally. They say that s.

13(4) of the **Copyright Act** requires that any assignment of copyright be in writing and signed by the owner of the right. There was no such written assignment here, at least at the material times when the impugned conduct and damages were said to have arisen. This they say is fatal to the respondent's claim. They say that both of the appellants were self-represented at trial and some allowance or accommodation ought to be given to the fact that this issue was not raised before the trial judge. The appellant Lloyd Smith supports the argument.

[35] I am not persuaded by the appellants' submissions. The trial judge repeatedly urged Messrs. Parks and Smith to get a lawyer, and explained to them the risks they ran if they were not legally represented in such a serious case. They chose not to have counsel. I am not prepared to extend to them the accommodation now urged by their appellate counsel. Further, and more importantly, it is too late for the appellants to raise this issue. I accept the respondent's argument that it would have presented evidence and been prepared to face the issue had it been raised at trial. This omission on the part of the appellants explains why the respondent and the trial judge did not feel obliged to deal with the issue when the case was argued. I agree that to introduce this issue for the first time on appeal would be prejudicial to the respondent and it is far too late for this court to consider the matter in the absence of an adequate evidentiary record.

Copyright Infringement

[36] The correct legal test to be applied in Canada with respect to the existence of copyright was described by the Supreme Court of Canada in **CCH Canadian Ltd. v. Law Society of Upper Canada**, [2004] 1 S.C.R. 339 where at ¶ 14 McLachlin, C.J.C. stated:

> Section 5 of the *Copyright Act* states that, in Canada, copyright shall subsist "in every original literary, dramatic, musical and artistic work" (emphasis added). Although originality sets the boundaries of copyright law, it is not defined in the *Copyright Act*. Section 2 of the *Copyright Act* defines "every original literary . . . work" as including "every original production in the literary . . . domain, whatever may be the mode or form of its expression". Since copyright protects only the expression or form of ideas, "the originality requirement must apply to the expressive element of the work and not the idea": S. Handa, *Copyright Law in Canada* (2002), at p. 209.

> There are competing views on the meaning of "original" in copyright law. Some courts have found that a work that originates from an author and is more than a mere copy of a work is sufficient to ground copyright. . . . This approach is consistent with the "sweat of the brow" or "industriousness" standard of originality, which is premised on a natural rights or Lockean theory of "just desserts", namely that an author deserves to have his or her efforts in producing a work rewarded. Other courts have required that a work must be creative to be "original" and thus protected by copyright. . . . This approach is also consistent with a natural rights theory of property law; however it is less absolute in that only those works that are the product of creativity will be rewarded with copyright protection. It has been suggested that the "creativity" approach to originality helps ensure that copyright protection only extends to the expression of ideas as opposed to the underlying ideas or facts. . . .
>
> I conclude that the correct position falls between these extremes. For a work to be "original" within the meaning of the *Copyright Act*, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. For example, any skill and judgment that might be involved in simply changing the font of a work to produce "another" work would be too trivial to merit copyright protection as an "original" work.

(Cases omitted) (Underlining mine)

[37] Under the **Copyright Act**, R.S. 1985, c. C-42 (Parts I, II and III) copyright in a work means the rights described as follows:

> 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
>
> (a) to produce, reproduce, perform or publish any translation of the work,

[38] The *Coffee News* can be considered a compilation under s. 2 of the **Copyright Act**, which is defined as:

> "compilation" means
>
> > (a) a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof, or
> >
> > (b) a work resulting from the selection or arrangement of data;

[39] Infringement of copyright is defined under s. 27 of the **Copyright Act**:

> 27. (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

[40] After referring to the decision of the British Columbia Court of Appeal in **British Columbia Jockey Club v. Standen (Windbar Publications)** [1983] B.C.J. No. 1769, and satisfying himself that *Coffee News* qualified as a compilation under the **Copyright Act**, Richard, J. held:

> [31] In the present case it is clear that the defendants availed themselves "of the previous labours of another for the purpose of conveying to the public the same information" and by so doing did "take away the result of another man's labour". The defendant's, in producing and distributing the Flying Cow in the form which they did, infringed the copyright of the Plaintiff.

[41] The appellants say that Richard, J. erred by simply referring to the decision of the British Columbia Court of Appeal in **Jockey Club**, supra, and its reliance upon the English text, *The Modern Law of Copyright* (London: Butterworths, 1980), thereby failing to accurately identify and apply the modern legal test for copyright matters in Canada which Chief Justice McLachlin had articulated in **CCH**, supra.

[42] I respectfully disagree. Having reviewed the trial judge's reasons it is apparent to me that he considered both the "sweat of the brow" and the "skill and judgment" elements of the originality test as directed by the Supreme Court of Canada. Although Richard, J. did not refer specifically to the Court's decision in

CCH, supra, I think it can be said with some confidence that his specific reference to the "skill, judgment and knowledge" excerpt from the English text cited in **Jockey Club**, supra, together with his clear finding in [31] of his decision that the appellants had deprived the respondent of her "labour," show that the trial judge correctly applied the law.

[43] The trial judge's finding as a fact that the appellants had infringed copyright in the *Coffee News* by "producing and distributing the Flying Cow in the form in which they did" was certainly available from the evidence presented at trial. It cannot be said that the judge's conclusion was the result of any palpable and overriding error.

[44] Finally, the evaluation of that finding in light of relevant legal principles in order to decide whether the respondent had proved a copyright infringement was a question of mixed fact and law. I am satisfied the trial judge made no reversible error of fact. The relevant principles of law are readily extricable and in my opinion their application here meets a standard of correctness.

[45] For these reasons I see no error in the trial judge's conclusion that the appellants infringed the respondent's copyright.

Passing-off

[46] Manitoba Inc. also claimed that the appellants caused it damages by passing-off the *Flying Cow* as and for the *Coffee News*. The trial judge agreed.

[47] Section 7 of the **Trade-marks Act**, R.S. 1985, c. T-13 provides:

> Prohibitions
>
> 7. No person shall
>
> . . .
>
> (b) direct public attention to his wares, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his wares, services or business and the wares, services or business of another;

> (c) pass off other wares or services as and for those ordered or requested;
>
> . . .

[48] To establish a claim of passing-off the claimant must show three things. First, the plaintiff must establish a goodwill or reputation attached to the goods or services by virtue of its "get-up," whereby the public has come to identify such an appearance with the wares or services of that individual, thus creating a proprietary right in that appearance. Second, the plaintiff must establish a misrepresentation by the defendant to the public (whether intentional or not) leading or likely to lead one to believe that the goods or services offered by the defendant are the goods or services of the claimant. Third, the plaintiff must demonstrate that he has or likely will suffer damages by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the claimant. See, for example, **Reckitt and Colman Products Ltd. v. Borden Inc.**, [1990] 1 All E.R. 873, cited with approval by the Supreme Court of Canada in **Ciba-Geigy Canada Ltd. v. Apotex Inc.**, [1992] 3 S.C.R. 120. There, Gonthier, J., writing for the Court declared at p. 132:

> The three necessary components of a passing-off action are thus: the existence of goodwill, deception of the public due to a misrepresentation and actual or potential damage to the plaintiff.

[49] Richard, J. recognized and applied these principles to the evidence before him and made very clear findings which are borne out from the record. With respect to the first component, he specifically accepted Ms. Daum's assertion that the appellants had traded on her company's "good will . . . using blatant misrepresentations in order to capitalize on the marketplace for their own financial gain."

[50] With regard to identifying the "get-up" of her publication by which she acquired a proprietary right in its appearance, and the damages caused by the appellants' misrepresentation, the trial judge found:

> [28] In my view the Plaintiff endeavoured over a long period of time to establish a particular "get-up" by which the Coffee News could be readily

> identified, and by so doing did establish a good will or reputation in the product. This is shown by the number of awards and other accolades received by the Coffee News over the preceding years. It is clear that the Defendants, by their actions, did misrepresent the Flying Cow as either the successor to or sister publication of the Coffee News and did thereby deceive members of the public. Such misrepresentation did actually or potentially cause damage to the Plaintiff.

[51] While proof of an intention to deceive is no longer required, the plaintiff must at least demonstrate that confusion in the minds of the public has occurred or will likely arise on account of the defendant's making the product available under the guise or implication that it was the plaintiff's. Thus as Justice Gonthier made clear in **Ciba-Geigy**, supra, at p. 140, confusion on the part of consumers lies at the heart of passing-off:

> There is no question that confusion, which is the essence of the tort of passing-off, must be avoided in the minds of all customers, whether direct . . . or indirect . . .

[52] Both Ms. Daum and Mr. Cohen McInnes described how their customers were confused and what remedial actions they were forced to take to manage the situation. McInnes said he felt as if he had been "raped" by the actions of the appellants.

[53] In his decision the trial judge referred specifically to the testimony of several witnesses before concluding that the appellants had devised "a strategy of lies and deceit" in producing *Flying Cow* as practically identical to *Coffee News*, with the objective being "to cause confusion in the several marketing areas so that advertisers, distributors and readers may be persuaded that the two publications were 'sister' editions rather than competitors."

[54] The appellants cannot seriously suggest that the respondent failed to prove confusion. The appellants' records, including Smith's own computerized daily call logs are replete with examples of their attempts to contain, explain and salvage the situation that arose amidst this confusion. It is obvious the trial judge accepted the evidence of witnesses who described not only the appellants' deceit but overt acts of sabotage which led to "definite confusion between the distributors and advertisers about the relationship existing between *Coffee News* and *Flying Cow*."

[55] There was ample evidence to support the trial judge's conclusion that the appellants' nefarious conduct affected the public at large and not only Ms. Jean Daum. The judge was satisfied that the appellants' conduct was planned, systematic and deliberate, was designed to deceive Ms. Daum and her company, and do them harm. Recognizing his distinct advantage in seeing and hearing the witnesses, the judge's findings are owed considerable deference.

[56] It was not incumbent upon the respondent to prove that the appellants were passing-off *Flying Cow* as and for *Coffee News* everywhere in Nova Scotia. All they had to do was show that it was happening in some locations. It was certainly open to the trial judge to find - as he did - that the appellants' deliberate actions adversely affected the goodwill Ms. Daum had established in Manitoba Inc., overall.

[57] As Richard, J. pointedly observed, a review of the extensive emails introduced at trial gave the reader a sense of "the extent to which Ross Parks et al went in order to keep the plaintiff in the dark as to the true ownership and management of the *Coffee News* franchises in the Valley and elsewhere in Nova Scotia." Lloyd Smith admitted on cross-examination that as he continued to apply for new franchises in Nova Scotia he would pass on to Ross Parks his email correspondence with Jean Daum, and that he "never told Ms. Daum he was part and parcel of this three way communication."

[58] Deciding whether the respondent had proved the tort of passing-off was a question of mixed fact and law. It required a careful assessment of the facts, and their subsequent consideration in light of proper legal principles. The trial judge's findings are amply borne out in the record and are not the result of any palpable and overriding error. The judge's application of the law when disposing of this question was correct.

[59] For these reasons the trial judge's conclusion that the respondent was entitled to damages from the appellants for passing-off, should not be disturbed.

Interference with contractual relations

[60] Richard, J. expressly found that the appellants committed the tort of direct interference with the contractual relations of the respondent. He said:

> [25] . . . I am satisfied on a balance of probabilities that the defendants acted in concert, or implicitly as partners, to interfere with the contractual relations of the Plaintiff in violating the franchise agreements by attempting to pass off the Flying Cow as the Coffee News.

[61] The particular complaint alleging the tort of intentional interference with the respondent's contractual relations is not outlined with great specificity. The extracts from the statement of claim to which this particular allegation refers are found in paragraph 9 which provides:

> 9. . . . The Plaintiff states that the Defendants then took steps to contact Coffee News advertisers and distributors, known to the Defendants to have contracts with the Plaintiff or its franchisees, and intentionally interfered with these contracts by conduct, including but not limited to:
>
> (i) suggesting that the Coffee News would no longer be published and would be replaced by the Flying Cow;
>
> (ii) suggesting that the Flying Cow was the legitimate successor to the Coffee News;
>
> (iii) suggesting that the Flying Cow was under common ownership with the Coffee News; and
>
> (iv) soliciting clients of the Coffee News to abandon contracts with the Coffee News and to place contracts for advertising space with the Flying Cow.

and further at:

> 22. The Plaintiff repeats the foregoing and claims against the Defendants jointly and severally:
>
> (i) injunctive relief restraining . . . the defendant from further interfering with the contracts and business of the Plaintiff . . .

[62] As appears from the respondent's own pleadings, Manitoba Inc. did not allege that the appellants were liable in tort for inducing the respondent to breach its own contracts. Rather, the alleged tort was narrowed to a complaint that the appellants were liable for direct interference with the respondent's contractual relations.

[63] For the reasons that follow I would agree with the appellants that the respondent's offer of proof was insufficient to establish this segment of its claim for damages (excepting the loss arising in New Brunswick which I dispose of in [109] *infra)*. However, I do not think it matters in the end. In my opinion the general damages awarded by the trial judge (and which I have gone on to reduce) were intended to incorporate collectively, compensation for losses suffered by the respondent on account of copyright infringement, and passing-off, and interference with the respondent's own contractual relations. Since the general damages for infringement, and passing-off, are in my opinion quantifiable, and legitimately tied to the appellants' tortious conduct, it does not matter to the outcome that the respondent's attempt to support a claim for additional damages for interference in its contractual relations, was found wanting.

[64] The identities of the "advertisers and distributors" whom the appellants are said to have contacted, are not provided. While the pleadings do provide particulars in (i) through (iv) as to the means whereby such interference was attempted, one cannot state with precision what "contracts" or "business" were adversely affected.

[65] This lack of precision was amplified at trial by the way in which Manitoba Inc. presented its evidence. Justice Richard would not have derived much help from the evidence in attempting to quantify these alleged losses or link them to the appellants' conduct. Having reviewed the testimony of the various witnesses and considered the documentary evidence I am of the opinion that it would be impossible to assign a fair and accurate figure to this segment of the claim for damages said to have resulted from the appellants' intentional interference with the respondent's contractual relations.

[66] It will not be necessary for me to list and define the specific elements of the tort of inducing breach of contract, or the tort of intentional interference with

contractual relations, or to embark upon an analysis as to whether each action is the same in all cases. Suffice it to say that the law in this area continues to evolve. See for example **Allister Harlow Construction Ltd. v. Shelburne Shopping Centre Ltd.** (1981), 45 N.S.R. (2d) 27; **Matsushita Electric of Canada Ltd. v. Central Trust Co.** (1986), 73 N.S.R. (2d) 250; **M. A. Hanna Co. v. Nova Scotia (Premier)** (1990), 97 N.S.R. (2d) 281; **Industrial Union of Marine & Shipbuilding Workers of Canada Local 1 v. I.B.E.W., Local 625** (2001), 198 N.S.R. (2d) 60 (N.S.S.C.); and [2002] N.S.J. No. 188 (C.A.); **Daishowa Inc. v. Friends of the Lubicon et al** (1996), 27 O.R. (3d) 215; **Waxman v. Waxman**, [2004] O.J. No. 1765 (C.A.), [2004] S.C.C.A. No. 291; **Verchere v. Greenpeace Canada**, 2004 BCCA 24; **Super-Save Enterprises Ltd. v. 249513 B.C. Ltd.**, 2004 BCCA 183; **39413 Alberta Ltd. v. Pocklington**, 2000 ABCA 307; and **Pepsi-Cola Canada Beverages (West) Ltd. v. Retail, Wholesale and Department Store Union, Local 558** (1998), 172 Sask. R. 40 (C.A.), 1 S.C.R. 156.

[67] Because of the way in which I have disposed of this segment of the claim it will not be necessary for me to address the appellants' complaint that the respondent failed to plead the appropriate tort or effectively confused and co-mingled allegations of breach of contract by "direct" or "indirect" interference with contractual relations, or interference with economic relations.

[68] This will avoid having to plumb the depths of the inadequate record in this case so as to explore what my colleague Justice Cromwell has succinctly described as the "highly controversial issues regarding the elements of the economic torts." **(IBEW, Local 625**, supra, at ¶ 42.)

[69] For whatever the elements, the plaintiff must prove that the defendants caused a loss, and then offer proof from which such damages might be fairly assessed. In this the respondent fell short.

[70] Here the trial judge failed to identify which franchise agreements had been violated. Neither did he describe how they had been violated, or if so, what monetary loss was suffered by the respondent as a consequence.

[71] In my opinion, Manitoba Inc. failed in its burden of showing the extent to which it suffered monetary loss for the appellants' deliberate interference in the business relationships it had with others.

General Damages

[72] The trial judge awarded general damages totalling $139,000. This award was broken down into three parts. First, the trial judge awarded $117,000 which was said to represent franchise fees the respondent was unable to collect on account of the appellants' actions, and in particular the losses attributed to the "flipping" of the franchises from *Coffee News* to *Flying Cow*.

[73] Additionally, the respondent was awarded $12,000 said to represent her payment of debts "as a direct result of advertising fees which were wrongfully appropriated and applied to *Flying Cow* publications in the Antigonish area."

[74] A further $10,000 was awarded as "a result of a direct intervention by Ross Parks into the Fredericton area."

[75] While noting Ms. Daum's testimony that she had spent about 2,000 hours of her own time in protecting her corporate interests, the judge declined to award any damages on account of those efforts noting:

> . . . There is nothing in evidence to suggest a dollar amount which this cost the Plaintiff directly.

[76] We will not disturb a trial judge's award of damages unless it can be demonstrated that the judge applied a wrong principle of law or has set an amount so inordinately high or low as to be a wholly erroneous estimate. See, for example, **Toneguzzo-Norvell et al v. Savein et al** (1994), 110 D.L.R. (4th) 289 (S.C.C.); **Campbell-MacIsaac v. Deveaux & Lombard**, 2004 NSCA 87; **McPhee v. Gwynne-Timothy**, 2005 NSCA 80; and **Ken Murphy Enterprises Ltd. v. Commercial Union Assurance Company of Canada**, 2005 NSCA 53.

[77] The trial judge's calculation of general damages is sparse, taking up only fourteen lines of the decision:

> [34] General Damages - Ms. Daum said that the Plaintiff could not collect franchise fees of about $117,000. This amount appears to be based on an estimate of the fees lost by the Plaintiff as a result of various defaults by the defendants and the losses attributed to the "flipping" of the franchises from Coffee News to Flying Cow. Additionally, the Plaintiff paid debts of $12,000 as a direct result of advertising fees which were wrongfully appropriated and applied to Flying Cow publications in the Antigonish area. As a result of a direct intervention by Ross Parks into the Fredericton area the Plaintiff claims losses of about $10,000.
>
> [35] Ms. Daum said that she spent about 2000 hours of her time in protecting the Plaintiff's interests which were being threatened by the unlawful actions of the defendants. There is nothing in evidence to suggest a dollar amount which this cost the Plaintiff directly.
>
> [36] In the result, I award general damages to the Plaintiff in the sum of $139,000.00.

[78] The only explanation for the largest portion of general damages, that being the $117,000 is found in these few lines which I will repeat for emphasis:

> Ms. Daum said that the Plaintiff could not collect franchise fees of about $117,000. This amount appears to be based on an estimate of the fees lost by the Plaintiff as a result of various defaults by the defendants and the losses attributed to the "flipping" of the franchises from Coffee News to Flying Cow.

[79] The only explanation for the additional $12,000 award is the judge's statement that:

> . . . the Plaintiff paid debts of $12,000. as a direct result of advertising fees . . . wrongfully appropriated and applied to Flying Cow publications in the Antigonish area.

[80] Finally, the only explanation given by the trial judge for the remaining $10,000 award is that this sum represents losses caused as:

> . . . a result of a direct intervention by Ross Parks into the Fredericton area . . .

[81] The appellants attack this award of general damages on three principal bases. First, the appellants say there was no evidence to support any or all of these awards. Second, the appellants say the respondent at trial did nothing more than

"throw numbers at the head of the court" without making any attempt to either prove the extent of the loss or then link the loss to the appellants' actions. Third, the appellants complain of duplication or double recovery in certain respects.

[82] In this I agree with some of the appellants' submissions. For the reasons that follow I would allow the appeal in part.

[83] In challenging the respondent's proof especially in terms of dollar damages, the appellants rely upon Lord Goddard's wise admonition in **Bonham-Carter v. Hyde Park Hotel** (1948), 64 T.L.R. 176, at 179:

> Plaintiffs must understand that if they bring actions for damages, it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the court, saying: "This is what I have lost, I ask you to give me these damages."

[84] This statement of the law by Lord Goddard, C.J. was cited with approval by this court in **Capital Placement of Canada (C.P.C.) Ltd. v. Wilson** (1988), 83 N.S.R. (2d). There, Clarke, C.J.N.S. noted:

> [40] . . . The normal rules apply and the respondent is put to its proof.
>
> [41] In **Municipal Spraying & Contracting Limited v. J. Harris & Sons Limited et al.** (1980), 35 N.S.R. (2d) 235; 62 A.P.R. 235, Hallett, J., wrote at page 244,
>
> > In **McGregor on Damages** (13th Ed.), at p. 935, appears the following quotation dealing with the burden of proof of damages:
> >
> > > The plaintiff has the burden of proving both the fact and the amount of damage before he can recover substantial damages.
> >
> > In a footnote, Lord Goddard, C.J., in **Bonham-Carter v. Hyde Park Hotel** (1948), 64 T.L.R. 177, is quoted as follows:
> >
> > > Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the court,

> saying: "This is what I have lost, I ask you to give me these damages." They have to prove it.

[85] In his text entitled *The Law of Damages*, looseleaf (Toronto: Canada Law Book, 2006), Waddams says the following about the proof of loss:

> The general burden of proof lies upon the plaintiff to establish the case and to prove the loss for which compensation is claimed.

[86] For this proposition, he quotes **Bonham-Carter, Municipal Spraying & Contracting Limited v. J. Harris & Sons Limited et al** as well as **British Columbia v. Canadian Forest Products Ltd.**, [2004] 2 S.C.R. 74; **Reliable Leather Sportswear Ltd.**, [1955] 2 D.L.R. 284 (S.C.C.); and **Cotter v. General Petroleums Ltd.**, [1951] S.C.R. 154.

[87] In **British Columbia v. Canadian Forest Products Ltd.**, supra, the Supreme Court of Canada was asked to consider the question of compensation for environmental damage. Binnie, J., speaking for the majority, said this about the Crown's failure to lead the proper evidence in support of its damage claim:

> 12 A claim for environmental loss, as in the case of any loss, must be put forward based on a coherent theory of damages, a methodology suitable for their assessment, and supporting evidence. No one doubts the need for environmental protection but, in this case, apart from the cost of reforestation, which was agreed to, the Crown claims only stumpage and "diminution of the value of the timber" within the burned-over area. The environment includes more than timber, but no allegations of loss were made in that regard. The pleadings, in other words, suggested a fairly narrow commercial focus and that is how the claim was defended.
>
> 13 The evidentiary record is also singularly thin on what precise environmental loss occurred, apart from damage to trees, and what value should be placed on it. The evidence of the Crown's own valuation experts, Deloitte & Touche, offered no support for the Crown's present expanded posture on environmental loss.
>
> 14 We cannot treat the Crown's argument as evidence; nor can we read into the record a theory of valuation that, rightly or wrongly, was supported by none of the experts. The Crown may have a more substantial environmental claim than is before us but she didn't prove it. Thus, while I would not interfere with the Court of Appeal's disposition of the claim in respect of the harvestable timber, in my

> opinion, with respect, the Crown did not establish its claim for compensation for environmental damage. I would therefore allow Canfor's appeal in that respect. The Crown's cross-appeal should be dismissed.

[88] Finally, in **Cotter v. General Petroleums Ltd.**, [1951] S.C.R. 154, Cartwright, J., in concurring reasons, said at p. 175:

> . . . It is well settled that the mere fact that damages are difficult to estimate and cannot be assessed with certainty does not relieve the party in default of the necessity of paying damages and is no ground for awarding only nominal damages, but the onus of proving his damages still rests upon the plaintiff.

[89] The onus was on Manitoba Inc. to provide cogent evidence of the losses claimed and show that those losses were caused by the wrongful actions of the appellants. It was for the respondent to produce sufficient evidence to permit the court to make a reasoned award. In my respectful opinion it failed to do so and the judge erred in fixing the awards described above.

[90] From the spotty evidence that does appear in the record, I will attempt to reconstruct what I consider to be an appropriate measure of damages.

[91] I will begin with the amount of $117,000. The only evidence put before the trial judge to support that amount was the testimony of Ms. Daum. However, when one carefully examines her evidence we see that this amount was in relation to franchise fees she chose not to collect in order to support her franchisees during the bitter dispute with *Flying Cow*.

> A. They were franchise fees that I couldn't collect because of the amount of interference from Flying Cow and to support my franchisees I couldn't take money from them and put them in jeopardy and then...and...danger of going bankrupt themselves so I choose to support my franchisees during the time we had to wage war with Flying Cow.
>
> Q. And what...what is the sum of that?
>
> A. In total I (sic) would be about $117,000.

[92] Ms. Daum did not present any backup or support for this "loss" nor offer any evidence as to how it was calculated. We know that the amount did include franchise fees from her Halifax franchisee, Mr. Cameron Thompson, from the time *Flying Cow* came into existence up until the date of trial. However, there was no evidence as to whether, and if so which, of her other franchisees were involved. There was no evidence any of the franchisees requested or needed such assistance, or if they did, whether their difficult circumstances were solely the result of competition from *Flying Cow*. Perhaps most telling was the evidence of Mr. Thompson on cross-examination when he acknowledged that he was able to pay the franchise fees if he chose to do so.

> Q. You're currently paying franchise fees to Ms. Daum?
>
> A. No, I'm not.
>
> Q. You would agree with me that since the Flying Cow started publication in Halifax you have been able to continue and you are able to pay license fees if you wanted to Ms. Daum?
>
> A. Yes." (Transcript p. 419)

[93] I will now address the evidence that would support some measure of damage.

[94] Documentary evidence established that unknown to her, Smith and Parks had set up ten publishing zones, when Ms. Daum only knew of the four that had actually been licensed. Her testimony and other documentation suggested that this deception resulted in lost franchise fees from Lloyd Smith worth $8,000.

[95] It would have been open to the trial judge to conclude from the evidence that Mr. Cohen McInnes' unsuccessful franchise was directly due to the actions of the appellants. Ms. Daum testified that when Mr. McInnes was forced to shut down his operations she gave him $500 towards his phone bill and suffered further losses of approximately $12,000 as a result.

[96] Ms. Daum estimated she was owed a further $40,000 from Messrs. Parks and Smith for the revenue lost in the several publication zones which they

deliberately concealed from her. Evidently this $40,000 sum includes the $8,000 mentioned earlier.

[97] While Ms. Daum spoke of two or three other lost opportunities to sign franchisees there was no evidence with which to quantify the extent of the claim.

[98] These are the only figures I can track with any degree of confidence as constituting legitimate "losses" directly related to the appellants' conduct. With respect, it was not enough for Ms. Daum to simply "throw out" a figure of $117,000 as representing the equivalent of her inability to collect franchise fees, without that figure linked to specific franchisees as well as showing a probable connection between those losses and the appellants' conduct. With respect, it was not enough for the trial judge to have accepted the respondent's figure based on an appearance, or an estimate, of lost fees through some vague, unspecified "various defaults" or "flipping" of unidentified franchises.

[99] While the deceitful, manipulative, tortious conduct of the appellants is in no way excused, nonetheless it was for the respondent to present sufficiently reliable evidence to support her losses and not simply throw figures in the air for the judge's consideration. For the reasons stated I find that she failed to prove certain aspects of her case.

[100] In the result, based on the foregoing analysis, I would reduce this segment of general damages from $117,000 to $52,500 as follows:

	$8,000	(lost fees from Lloyd Smith)
	500	(telephone charges)
	12,000	(Colin McInnes' losses)
	32,000	($40,000 - $8,000 double recovery)
TOTAL:	$52,500	

[101] In my opinion, an award for losses totalling $52,500 represents those damages that can be directly linked to the appellants' actions.

[102] The next challenged figure is $12,000 which the judge said arose from advertising fees "wrongfully appropriated" by the appellants in the Antigonish area.

[103] The appellants challenge this part of the award on account of duplicity, saying it is already compensated for in the judge's initial award of $117,000. The appellants put it this way in their factum:

> The only conclusion that can be reached on the evidence is that the losses of $12,000 that were in addition to the phone bill were franchise fees that she chose not to collect. But if that is correct then that amount was already included in the $117,000.

[104] I disagree with the appellants' submission. A fair reading of Ms. Daum's testimony is that in her "calculation" of $117,000 for uncollected franchise fees, she specifically excluded the fees she paid on behalf of Mr. Cohen McInnes. For example, McInnes testified that Daum paid $10,000 to cover his franchise fees and printing costs due to the failure of the Antigonish/Port Hawkesbury *Coffee News* (Appeal Book, page 133). Daum testified that she paid $500 for his telephone bill and a further $12,000 out of her own pocket due to McInnes being forced to shut down his operation. Then after specifying further losses, Ms. Daum was asked by her solicitor under direct examination whether she had suffered any losses "in addition" to those mentioned. Finally, in the respondent's counsel's post-trial submissions he once again used the words "in addition to that" when referring to alleged losses quite distinct from what the respondent said she lost in Antigonish.

[105] Accordingly, by the respondent's own evidence and theory of the case, there was no duplicity. Although the $12,000 was franchise fees which the respondent chose not to collect, she identified this amount as separate from the sum of $117,000 which she urged be awarded to her.

[106] I do not accept the appellants' submission that this sum is not a "loss" to the respondent for which they should be liable, because she "chose" not to collect it from her franchisees. In the circumstances of this case I consider it fanciful to suggest that the respondent had any choice in the matter. Rather, the appellants' tortious conduct which caused such disruption to the respondent's business operations forced her to accept losses or adopt other creative but benevolent means to save the operation and reduce her own damages. The evidence discloses a probable link between these particular losses and the appellants' conduct in the Antigonish/Port Hawkesbury area. I would not disturb the award.

[107] I turn now to the final amount of $10,000 which the trial judge awarded "as a result of a direct intervention by Ross Parks into the Fredericton (sic) area..." I think the trial judge made an obvious slip when he spoke of Fredericton rather than Moncton. Ms. Daum had testified about the difficulty she had encountered with her Moncton franchise. We see this exchange:

> A. The Moncton franchise...it was owned...it was bought by Stephan Diotte in March of 2002 and immediately...there was no...I sent out the agreements for him to send back and send in his post dated cheques because he was buying an existing franchise and the fees were due immediately. And this franchise, I talked later with Stephan Diotte to find out, you know, like what happened and it was Ross' involvement to tell him not to send in his franchise fees, not to send in the agreement, that I couldn't do anything about it, and...
>
> Q. What did you eventually do with Mr. Diotte?
>
> A. I took him to small claims court and I won the case.
>
> Q. In New Brunswick? And you got a judgement against him?
>
> A. Yes.
>
> Q. And the amount of the judgement?
>
> A. It was the full judgement. I think it was the maximum of $6,000 but we...we...we accepted $4,000 from Stephan Diotte because he was not...not very...he was not very well off financially. And he was trying.
>
> Q. Well, what did it cost you to bring that action in to get your $4,000?
>
> A. Probably about...well, including Steve Watton's trip out there to investigate and bring pictures back of the Coffee News in Moncton with Stephan's phone number on it and to find out where Stephan had moved to, what his new...
>
> Q. What was the bottom line of the cost?
>
> A. About $10,000.

[108] It must be remembered that the appellants chose to represent their own interests at trial. Their efforts in effectively cross-examining the respondent were

largely unsuccessful. While one would reasonably expect that any weakness or uncertainty surrounding this segment of the respondent's claim for damages would have been explored by experienced counsel on cross-examination, the fact remains that by the respondent's own evidence the sum of $10,000 is suspect.

[109] Ms. Daum's evidence was that she had to chase the Moncton franchisee to recover franchise fees. She eventually sued him, recovered judgment and ultimately settled for $4,000. She said she spent $10,000 which included hiring someone to track down the franchisee. There was no evidence as to whether the $10,000 was net of the settlement recovery. Leaving it so vague is a responsibility that should rest with the respondent. I would therefore reduce this segment of the trial judge's award by $4,000 representing settlement monies recovered from the defaulting franchisee. This would leave a balance of $6,000 as a net loss directly linked to the actions of the appellants and for which they ought to be held accountable.

[110] In summary I would award the respondent general damages of:

	$52,500
	$12,000
	$ 6,000
Total:	$70,500

Punitive Damages

[111] As I have already emphasized, the trial judge made very strong findings against the appellants. He obviously accepted Ms. Daum's evidence before concluding that she had been badly treated and victimized through the appellants' deliberate scheme of deception. His characterization of the appellants' actions was both sharp and disparaging.

[112] The appellants do not challenge those findings. However, they say that those conclusions hindered the trial judge's analysis and impartial application of the law. In this they say he erred, prompting him to impose liability where it did not lie, or award damages that cannot be supported on the evidence.

[113] I agree with the appellants' submissions to a certain extent. For the reasons that follow I would allow the appeal in part by reducing the trial judge's award for punitive damages.

[114] After awarding the respondent general damages the trial judge went on to cite the Supreme Court's decision in **Whiten v. Pilot Insurance Co.**, [2002] 1 S.C.R. 595 and then conclude:

> [37] Punitive Damages - The conduct of the several defendants in this matter was of such a cavalier and egregious nature as to demand consideration of some sort of retribution or penalty. . . .
>
> [38] The present case seems particularly appropriate for consideration of the award of punitive damages. . . .
>
> [39] The defendants (sic) conduct in the present case was clearly planned and deliberate; their intent and motive was to deprive the Plaintiff of its business opportunity in the franchise areas; the evidence suggests that the Defendants are persisting in their outrageous conduct; the Defendants certainly concealed or attempted to cover up their misconduct; only the wilfully blind could be unaware that such conduct was wrong; and finally, one can only conclude, since the Flying cow (sic) is still being circulated in the franchise areas, that the Defendants profited from their misconduct. Therefore, a clear case has been made out for the award of punitive damages.
>
> [40] The conduct of the Defendants in this case was highly reprehensible. As stated at paragraph 112 of **Whiten** "The more reprehensible the conduct, the higher the **rational** limits to the potential award." Bearing all of this in mind I fix punitive damages of $100,000.00.

[115] As noted, these findings of fact are <u>not</u> challenged by the appellants. However, they say that the trial judge's characterization of their actions blurred his analysis of the law. They say that he failed to apply the proper legal standard to a given set of facts.

[116] For reasons I will now develop, I find the judge erred in law by failing to address the relevant considerations set out in **Whiten**, which must be taken into account, first when deciding whether to award punitive damages, and second in establishing their quantum if they are to be awarded. It therefore falls to this Court to conduct the requisite analysis and determine the appropriate figure, if any, for

punitive damages while paying appropriate deference to the trial judge's findings of fact relevant to this exercise.

[117] A preliminary question must first be addressed, that being whether punitive damages are available in intellectual property cases. I am satisfied that they are.

[118] The analysis invokes the application of sections 34 and 35 of the **Copyright Act.** Section 34(1) describes the remedies that are available for copyright infringement:

> 34. (1) Where copyright has been infringed, the owner of the copyright is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.

[119] In *Fox Canadian Law of Copyright and Industrial Designs*, 4th ed. (Toronto: Carswell, 2003), at p. 24-74, ¶ 24:15(d), John S. McKeown describes the operation of s. 35 in relation to punitive damages, citing **Vorvis v. Insurance Corp. of British Columbia** (1989), 58 D.L.R. (4th) 193 (S.C.C.):

> Although punitive or exemplary damages are not specifically mentioned in section 35, it is well established that they may be awarded in appropriate circumstances. Punitive damages are designed to punish. . . . They may only be employed in circumstances where the conduct giving the cause for complaint is of such a nature that it merits punishment.

[120] Awarding punitive damages in copyright or patent infringement cases was approved by the Federal Court of Appeal in **Lubrizol Corp. v. Imperial Oil Ltd.**, (1996) 197 N.R. 241, p. 255, where Stone and Linden, JJ.A., relied on the principles in **Vorvis** and stated on behalf of the Court:

> [33] In recent years, there have been many awards of punitive or exemplary damages made by Canadian courts. They have not been limited to defamation and intentional tort situations, where they are most prevalent, but they may be awarded in contract cases, in certain negligence cases, fiduciary relationship cases, and other situations where the court, in a civil case, feels that it is necessary to condemn the outrageous conduct of a defendant. We can see no reason why, in appropriate circumstances, punitive or exemplary damages could not be available in a copyright, or patent infringement case, a type of statutory tort claim, and counsel have not even suggested that they should not be permissible.

[121] In *Computer Law,* 2nd ed. (Toronto: Irwin Law, 2003), George S. Takach, citing **Whiten**, observes at p. 122-123:

> Damages based on a wide variety of measures can be awarded when infringement of an intellectual property right is proven. . . . A court may award damages for copyright infringement even where the infringer made no profits. The Copyright Act also contains a statutory damages provision that permits a court to award monetary damages between $500 and $20,000. Punitive or exemplary damages for copyright infringement or trade secret misappropriation can also be awarded where the defendant's conduct is egregious and shows virtual contempt for the intellectual property rights of the plaintiff. An infringer of another person's patent is liable for all damages sustained by the patent holder, and such damages may be expressed as a payment of reasonable or generous royalties in such a manner as is considered to be fair in all of the circumstances of the case. A court may also award punitive damages in a patent infringement suit. . . .

[122] In **Apotex Inc. v. Merck & Co.** (2003), 26 C.P.R. (4th) 278, the Federal Court of Appeal applied the principles from **Whiten**, supra, in a patent infringement case. Sharlow, J.A., speaking for the Court first explained the principles of punitive damages and then left it open for the trial judge to determine whether they ought to be awarded because of the finding at ¶ 35 that "the motions judge erred in deciding punitive damages were owed before other remedies are determined."

[123] Thus, while punitive damages are available in intellectual property cases, it must be remembered that such an award is only justified in exceptional cases when the defendant's conduct is such as to require punishment.

[124] The dimensions for an award of punitive damages were described by Justice Binnie in **Whiten**, supra. However, before referring to those parameters here, it would do well to repeat the circumstances which led to an award of punitive damages in that case. The appellant, her husband and their daughter were forced to flee their house in frigid temperatures after midnight upon discovering a fire. They were clad in skimpy nightclothes. The husband gave his slippers to his daughter so that she could run for help. He suffered serious frostbite to his feet. The fire totally destroyed the home and contents including their three cats. The appellant was able to rent a small, winterized cottage nearby. The respondent insurer made a single $5,000 payment for living expenses. It covered the rent for a

couple of months but then cut off payments without notice, thereafter adopting a confrontational stance, leaving the appellant's family in precarious financial circumstances. The matter eventually proceeded to trial based on the insurer's allegation that the family had torched their own home, even though the local fire chief, the insurer's own investigator, and its initial expert all said there was no evidence of arson whatsoever. The insurer's position was wholly discredited at trial and its lawyer on appeal conceded that there was no air of reality to the allegation of arson. The civil jury awarded compensatory damages, plus $1 million in punitive damages. A majority of the Court of Appeal allowed the appeal in part and reduced the punitive damages award to $100,000.

[125] In a 6:1 decision (LeBel, J. dissenting) the Court allowed the appeal and restored the jury award of $1 million in punitive damages. The respondent insurer's cross-appeal against the award of any punitive damages was dismissed. In writing for the majority, Justice Binnie observed that while the jury's award of punitive damages was high, it was within rational limits. The respondent's conduct towards the appellant was exceptionally reprehensible. In rejecting her claim, the insurer hoped to force her to settle for less than she deserved. The respondent's conduct was described as planned and deliberate. It continued for over two years. Evidently the jury wished to send a powerful message of denunciation, retribution and deterrence.

[126] In considering the merits of the appeal Justice Binnie conducted a detailed comparative analysis of the experience in other common law jurisdictions. He then developed what he described as ten "general principles" which I will précis and list as follows:

1. Limiting punitive damages to a particular category of case should be abandoned in favour of an approach that rationally considers whether the circumstances warrant the addition of punitive damages to punish conduct, quite apart from compensatory damages in a civil action.

2. The general objectives of punitive damages are punishment (in the sense of retribution), deterrence of the wrongdoer and others, and denunciation (as an expression of outrage at the impugned egregious conduct).

3. Punitive damages should be resorted to only in exceptional cases and with restraint.

4. Pejorative descriptions like “highhanded,” “oppressive,” “vindictive,” etc. offer little guidance to a judge or jury when setting an amount for punitive damages. A more principled and less exhortatory approach is desirable.

5. Rationality must be achieved. The court should relate the facts to the underlying objectives of punitive damages and ask itself two questions: how, in particular, an award would further one of those purposes, and what is the lowest award that would serve that purpose, because any higher award would be irrational.

6. It will be rational to use punitive damages to relieve a wrongdoer of its profits in a situation where compensatory damages would amount to nothing more than a licence fee to earn greater profits through continuing outrageous disregard of the legal or equitable rights of others.

7. Since the proper focus is not the plaintiff’s loss but rather the defendant’s misconduct, a formulaic approach such as one with a fixed cap or a fixed ratio between compensatory and punitive damages is to be rejected. Such a mechanical approach would not allow for the many variables that arise in any given case.

8. In fixing an amount for punitive damages the governing rule is proportionality, such that the overall award should be rationally related to the objectives for which punitive damages are awarded. In stating this principle the Court reiterated its endorsement of the “if, but only if” test which states that punitive damages should only be awarded where compensatory damages are inadequate to punish the defendant. In other words they are intended as a “topping up” award and a remedy of last resort. Relevant factors will include the reprehensibility of the defendants’ conduct; whether the defendant has already been punished (for example under the criminal law which may be an absolute bar), and the parties’ respective means.

9. Trial judges are obliged to offer more guidance to civil juries (with suggestions in this respect offered by Binnie, J. at ¶ 94 of his decision), and

10. Punitive damages are not "at large" and "an appellate court is entitled to intervene if the award exceeds the outer boundaries of a rational and measured response to the facts of the case."

[127] As the Court made clear in **Whiten**, supra, one of the requirements to be considered in fixing punitive damages is that it be the minimum necessary to achieve the objectives such an award is intended to serve. As Binnie, J. noted at ¶ 94:

> . . . they are given in an amount that is no greater than necessary to rationally accomplish their purpose.

and further, at ¶ 101:

> The "rationality" test applies both to the question of whether an award of punitive damages should be made at all, as well as to the question of its quantum.

[128] Although in the case before us the trial judge cited **Whiten**, supra, I have respectfully come to the conclusion that he erred by restricting his analysis to a discussion of the appellants' "level of blameworthiness" while neglecting to consider the other fundamental principles which justify its application. More particularly the trial judge failed to give any consideration to proportionality, something Justice Binnie described as "the key to the permissible quantum of punitive damages." While observing that retribution, denunciation and deterrence are the recognized objectives for an award of punitive damages, "the means must be rationally proportionate to the end sought to be achieved." Binnie, J. then went on to explain how proportionality must be considered in several dimensions and not simply restricted to a consideration of proportionality relative to the blameworthiness of the defendant's conduct. Other factors will include proportionality with respect to: the degree of vulnerability of the plaintiff; the harm or potential harm directed specifically at the plaintiff; the need for

deterrence; a consideration of other penalties; and the advantage gained by the defendant from the impugned misconduct.

[129] At all events, as Justice Binnie pointed out at ¶ 123, the trier must not forget that:

> Compensatory damages also punish. In many cases they will be all the "punishment" required. . . . The key point is that punitive damages are awarded "if, but only if" *all* other penalties have been taken into account and found to be inadequate to accomplish the objectives of retribution, deterrence, and denunciation. . . .

[130] For these reasons I say that the trial judge erred in law, first by failing to complete the necessary analysis in order to decide whether punitive damages were in fact justified, and second, by setting quantum at $100,000 without addressing the "several dimensions" from which proportionality ought to be assessed.

[131] In the circumstances of this case I do not think it would be appropriate to remit this single issue to the trial judge for a proper consideration. Such a direction would be especially problematic as the judge has recently retired from the bench. Based on the record before us I think we are equipped to decide the issue.

[132] First, in relating proportionality to the blameworthiness of the appellants' actions I would agree with the trial judge's characterization of their conduct, its duration, its intended purpose and the fact that the appellants profited from their misconduct.

[133] Next, in relating proportionality to the degree of the respondent's own vulnerability I do not discern from the evidence any real imbalance between the respondent and the appellants during the course of their extended transactions. Ms. Daum was hardly a neophyte in business. The evidence confirms that she is a very smart, successful, aggressive and savvy entrepreneur. Rather than succumb to the appellants' pernicious behaviour she outfoxed them at practically every turn once she discovered what they were doing behind her back.

[134] Next, with respect to proportionality to the harm or potential harm directed at the respondent, I see no error in the judge's conclusion that the appellants'

actions were designed to seriously disrupt or destroy the respondent's business operations in the region.

[135] In relating proportionality to the need for deterrence there was certainly evidence to support the trial judge's conclusion that the appellants deliberately set out to deprive Manitoba Inc. of its business opportunities in the franchise areas and that at the time of trial they were "persisting in their outrageous conduct." Thus, in my opinion both specific and general deterrence are factors which can be weighted heavily in favour of the respondent.

[136] Next, in relating proportionality to other penalties imposed upon the appellants it is clear that the trial judge gave no consideration to the "if, but only if" approach. However, having conducted that analysis myself and taking into account the reduction I have made to compensatory damages, I conclude that compensation without more, would be inadequate to meet the objectives of retribution, deterrence and denunciation. In my opinion, this is a case where punitive damages are required to top-up the award and punish the appellants' egregious conduct.

[137] Finally, in assessing proportionality in relation to the advantage wrongfully gained by the appellants from their misconduct, it is impossible to quantify the appellants' "gain" at the expense of the respondent, other than to observe that they are still in business and in competition with the respondent for the same advertising market. Such scanty evidence is not enough for me to calculate the extent to which the appellants profited from their misconduct.

[138] Having conducted the necessary analysis I cannot say that the trial judge's award of $100,000 in punitive damages was within rational limits. With respect, the award does "overshoot its purpose." It is so disproportionate as to exceed the bounds of rationality. I would reduce the award for punitive damages to $40,000.

Lloyd Smith, appearing on his own behalf as appellant

[139] The written and oral submissions advanced by the appellant Lloyd Smith are essentially an attempt to distance himself from the judge's findings concerning the other appellants, or to challenge certain conclusions reached by the judge concerning Smith's own actions.

[140] Smith's particular complaints challenge findings made by the trial judge on matters of credibility for which any trial judge has a recognized advantage. His other arguments refer to matters which are largely immaterial and hardly determinative. In any event, they are not shown to be the result of palpable and overriding error. **Housen**.

[141] I see no merit to Smith's submissions. At the hearing he insisted that he was not in any way involved in the design, creation or operation of *Flying Cow*; that it was never his intention to deceive Ms. Daum; that he was not aware of any *animus* between Ross Parks and Ms. Daum; and that the trial judge erred in linking him to either Ross Parks or Parrcom. In effect the appellant Smith is asking us to re-try the case. That is not our function. The trial judge made very clear and strong findings of fact and credibility in favour of the respondent. There was certainly evidence to permit the trial judge to find - as he did - that Smith was intimately involved with *Flying Cow* at all material times and was a full participant with Parks and Parrcom in their tortious conduct towards the respondent.

[142] In finding that the appellant Smith was jointly and severally liable with the other appellants, I am not at all persuaded that the trial judge's conclusion was the result of an error in law, or a palpable and overriding error of fact.

Costs

[143] Success has been divided. I would order each side to bear their own costs on appeal. I would not make any adjustment to the trial judge's award of $10,000 costs to the plaintiff at trial.

Conclusion

[144] The trial judge's order filed May 16, 2006 is varied in part as follows:

(i) General damages are reduced and clause no. 3 of the order is revised to read:

3. The Plaintiff is entitled against the defendants Ross Parks, Lloyd Smith and Parrcom Atlantic Concepts Incorporated, on a joint and several basis, to general damages in the amount of $70,500.

(ii) Punitive damages are reduced and clause no. 4 of the order is revised to read:

4. The Plaintiff is entitled against the defendants Ross Parks, Lloyd Smith and Parrcom Atlantic Concepts Incorporated, on a joint and several basis, to punitive damages in the amount of $40,000.

[145] In all other respects the order stands.

Saunders, J.A.

Reasons for Judgment: Cromwell, J.A. (Oland, J.A. concurring, not agreeing to the reduction in the general damage award as proposed by Saunders, J.A. in [72] - [101] *supra.*)

[146] I have had the advantage of reading the reasons prepared by my colleague, Saunders, J.A. I agree with him, for the reasons which he gives, on all issues but one. Except in one minor respect, I would not disturb the judge's assessment of general damages. I will briefly set out my reasons for reaching this conclusion.

[147] It is often extremely difficult for a victim of copyright infringement or passing off to prove damages with precision. The law has long recognized this. So, for example, with respect to damages for copyright infringement, the following principle is stated in John S. McKeown, **Fox on Canadian Law of Copyright and Industrial Designs**, 4th ed., (Toronto: 2003 Thomson Canada Ltd.) at para. 24:15(b):

> It is not appropriate that an infringer avoid liability merely because it is difficult or impossible to prove actual damages. In such a case, the tribunal must do the best it can, although it may be that the amount awarded will really be a matter of guesswork. In assessing damages the objective is a broadly equitable result. Mathematical exactitude is neither required nor attainable.

[148] The same principle has been recognized in assessing damages for passing off. The authors of **Remedies in Tort**, vol. 3, looseleaf (updated to 2006, Rel. 5) (Toronto: Carswell, 1987) at para. 61,state the principle this way:

> A successful plaintiff may, at his option, take an inquiry as to damages or an account of profits. Where passing off is established, some damages must be awarded even if an actual monetary loss is not proven.
>
> The defendant is liable for all loss actually sustained by the plaintiff that is the natural and direct consequence of the unlawful acts of the defendant, including any injury to the plaintiff's reputation, business, goodwill or trade. Difficulty in assessing damages does not relieve the court from the duty of assessing them as best it can.

[149] The decision of the English Court of Appeal in **Draper v. Trist and Others**, [1939] 3 All E.R. 513, is perhaps the leading authority on this subject. Often referred to are the words of Goddard, L.J. at p. 527:

> ... once one has established passing off, there is injury to goodwill, and this court or the jury must assess, by the best means they can, what is a fair and temperate sum to give to the plaintiff for that injury.

[150] Ms. Daum gave evidence, which Saunders, J.A. has referred to, stating her losses as she understood them. She testified that she had foregone collection of franchise fees in order to protect the franchise. She was not cross-examined on this evidence. As Saunders, J.A. has correctly pointed out, the trial judge made strong findings of credibility in favour of Ms. Daum. Mr. Thompson's evidence that he could have afforded to pay franchise fees does not negate the business judgment which Ms. Daum exercised in response to the defendant's wrongdoing. Having not attacked the plaintiff's evidence in this regard at trial, it is not fair for the appellants to attempt to undermine it on appeal.

[151] Moreover, the judge did not make any allowance for damages under other heads which he might have decided to compensate on the record before him. I refer specifically to the $40,000 figure discussed by Saunders, J.A. and the judge's failure to award anything to Ms. Daum for her extensive efforts in investigating the wrongdoing which was perpetrated by the defendants.

[152] While the evidence of damage was admittedly extremely thin, the evidence on which the judge acted was virtually unchallenged at trial and was accepted as factual by him. Moreover, he moderated his award in an apparent effort to do precisely what the authorities required of him, namely, to achieve a broadly equitable result.

[153] For the reasons given by Saunders, J.A., I reject the appellant's attack on the judge's award of the $12,000 as referred to in para. 34 of the trial judge's reasons. As for the $10,000 referred to in the same paragraph, I agree with Saunders, J.A. that this figure should be reduced to $6,000 for the reasons he gives.

[154] Except for that reduction, I would sustain the trial judge's award of general damages.

[155] In all other respects I agree with Saunders, J.A.

Cromwell, J.A.

Concurred in:

Oland, J.A.

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

COA File No. COA-24-CV-0550
Court File No. BK-21-02734090-0031

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

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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